

SOUTH AFRICA / JUDGMENT

Academic And Professional Staff Association v Pretorius NO and Others (JR1552/06) [2007] ZALCJHB 4 (30 August 2007) [2007] ZALCJHB 4

COURT

Labour Court Johannesburg

BEFORE

Molahlehi AJ

CASE / FILE NUMBER

JR1552/06

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IN

THE LABOUR COURT OF SOUTH AFRICA

(HELD

IN JOHANNESBURG)

CASE

NO: JR 1552/06

IN

THE MATTER BETWEEN:

THE
ACADEMIC AND PROFESSIONAL
STAFF
ASSOCIATION
APPLICANT
AND
ADVOCATE
PAUL PRETORIUS SC NO FIRST
RESPONDENT
UNIVERSITY
OF SOUTH AFRICA
SECOND
RESPONDENT
NATIONAL
EDUCATION, HEALTH AND
ALLIED
WORKERS UNION
THIRD
RESPONDENT
NATIONAL
UNION OF TERTIARY EMPLOYEES

OF
SOUTH AFRICA
FOURTH
RESPONDENT
SOUTH
AFRICAN PARASTATAL AND
TERTIARY
INSTITUTIONS FIFTH
RESPONDENT
SOLIDARITY
SIXTH
RESPONDENT
COMMISSION
FOR MEDIATION, CONCILIATION,
ARBITRATION
AND MEDIATION SEVENTH
RESPONDENT

JUDGEMENT

MOLAHLEHI AJ

Introduction

- [1] This is an application in terms of which the applicant, the Academic and Professional Staff Association (“APSA”) sought an order to review and set aside the private arbitration award issued by the first respondent (“the arbitrator”) on 24 April 2006.
- [2] The arbitration award was consequent to the agreement between the parties to submit to arbitration a dispute concerning the decision by the second respondent (“UNISA”) to cancel the Recognition and Procedural Agreement (“the collective agreement”) concluded by the parties on 18 October 1995. The terms of reference for the arbitrator were contained in clause 15 of the collective agreement.
- [3] The applicant also applied for the condonation of the late filing of the review application in terms of Section 28 of the Arbitration Act, 42 of 1965 (“the Act”) as read with Section 33(2) of the Act.
- [4] The interim interdict which was issued by Revelas J on the 4 July 2006, requiring UNISA to comply with the terms of the collective agreement was extended pending the outcome of this review application.

Background

facts

- [5] The formal relationship between the parties date back to 18 October 1995, when they concluded the collective agreement in terms of which UNISA recognised the applicant as the sole collective bargaining representative of its members. The applicant represented those of its members who fell within the bargaining unit which was defined in terms of clause 2 (two) of the collective agreement as:

“All permanent and temporary staff members of the teaching staff, including staff and research officers attached to teaching departments, research institutions as well as professional staff of the university who are members of APSA (UNISA).”

- [6] The collective agreement created two separate collective bargaining units at UNISA. The National Health and Allied Workers Union

(“NEHAWU”) and the South African Parastatal and Tertiary Institutions Union (“SAPTU”) were recognised as

representatives of the administrative staff and professional staff. As stated earlier, the applicant represented academic and research

staff on the academic and research staff bargaining unit.

- [7] The relationship between the two parties was terminated on 24 April 2006, following the issuing of the arbitration award by the arbitrator. The applicant challenged the termination and on 4 July 2006, obtained an interim interdict from the Labour Court,

reinstating the provisions of the agreement.

- [8] The issue that led to the termination of the relationship relates largely to the refusal by the applicant to agree to the proposal by UNISA to do away with the two-tier bargaining system and the creation of a single bargaining unit.

- [9] It is apparent that UNISA’s view and attitude towards the two-tier bargaining system changed after the merger with both

Technikon SA and Vista University. The merger which occurred in terms of the Higher Education Act, 101 of 1997, took effect as from 1st January 2004. After this date a single entity from the three entities was created. The new institution, which kept the name UNISA, became by virtue of the Higher Education Act the employer of all employees of the three institutions, and all contractual commitments, including the collective agreement with labour unions, were transferred to it.

- [10] Following the merger, UNISA embarked on a process of restructuring, and included in it the evaluation of the appropriateness of its collective bargaining structures and standard conditions of employment. The outcome of the evaluation was that the UNISA resolved that the two-tier collective bargaining arrangement was no longer appropriate and needed to be done away with.
- [11] After a lengthy negotiations process which commenced during August 2004, all other unions, except for the applicant, signed an agreement whose main purpose was to establish a single bargaining forum. The constitution establishing a single bargaining forum for UNISA was signed by the other unions except the applicant on 18 January 2006.
- [12] However, clause 11.3 of the constitution of the bargaining forum provided for a measure of recognition of the distinctive position of academics at UNISA's workplace. In terms of this provision, a separate forum was contemplated within which the views of academics and researchers could be solicited. This forum was to serve as an advisory group that would be brought into being as and when the need arose.
- [13] The applicant rejected this arrangement for mainly three reasons. The first reason being that the role of the interest group would be limited to that of an advisory forum. The second reason being that it was not clear whether it (the applicant) would have the right to refer matters to this bargaining forum. And thirdly because it was not clear how this advisory group would operate and what its jurisdiction would be.
- [14] On 26 October 2005, the Principal and Vice Chancellor of UNISA issued the applicant with a notice of termination of the collective

agreement. The applicant objected to the proposed termination and on 3rd November 2005, declared a dispute as envisaged by clause 15.4 of the collective agreement. Following the declaration of the dispute the parties agreed to refer the matter to arbitration in terms of the provisions of the collective agreement.

Condonation Application

- [15] It is common cause that the arbitration award was issued on the on 24 April 2006 and in terms of Section 33(2) of the Arbitration Act 42 of 1965, an application for review should be brought within six weeks of the date of receipt of the award. On the facts of this case the

review application should have been filed by the 5th June 2006. The review application was filed on 28th June 2006 which is more than 3 (three) weeks outside the prescribe six weeks period.

- [16] The reasons for the late filing of the review application is set out at paragraph 3(three) of the applicant's papers as follows:

"31.1 on receipt of the award, APSA was told by its lawyers on 9 May 2006 that a review would be costly, and they recommended that APSA seek other ways of securing its objectives;

31.2 the delays attendant upon and resulting from the difficulty in communicating with and obtaining mandates from its dispersed membership at the Florida Campus and the Muckleneuk Campus on 9 and 17 May 2006 and from the union council;

31.3 the delays occasioned in seeking and obtaining proper advice to the effect that the matter was reviewable, which advice was only finally obtained on 8 June 2006;

31.4 the delays occasioned by attempts to achieve, by consultation and, negotiation, a satisfactory outcome designed to make litigation

unnecessary.”

The applicable legal principle

[17] The factors which the court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non compliance with the prescribed time frame, (b) the explanation for the lateness or the failure to comply with time frames, (c) prospects of success or bona fide defense in the main case; (d) the importance of the case, (e) the respondent's interest in the finality of the judgment, (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice. See *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC).

[18] It is trite that these factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and the long delay.

[19] An applicant in an application for condonation has to show good cause by providing an explanation that shows how and why the default occurred. There is authority that the court could decline the granting of condonation if it appears that the default was willful or was due to gross negligence on the part of the applicant. In fact the court could on this ground alone decline to grant an indulgence to the applicant.

[20] The prospects of success or bona fide defense on the other hand mean that all what needs to be determined is the likelihood or chance of success when the main case is heard. See *Saraiva Construction (PTY) Ltd v Zulu Electrical and Engineering Wholesalers (Pty) Ltd* 1975 (1) SA 612 (D) and *Chetty v Law Society* 1985 (2) SA at 765A-C.

[21] In *Melane v Santam Insurance Co Ltd*, 1962 (4) SA 531 (A) at 532C-F, the Court held that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused. It has also been held by the courts that the applicant should bring the application for condonation as soon as it becomes aware of the lateness of its case.

[22] In the labour law context the above approach was endorsed in the National Union of Mineworkers v Council for Mineral Technology

(1999) 3 BLLR 209 (LAC), where the court said:

"The approach is that the court has discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degrees of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated, they are not individually decisive. What is needed is an objective conspectus of all facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue of the delay, the prospects of success no matter how good the explanation for the delay, an application for condonation should be dismissed."

[23] Turning to the facts of this matter, I am of the view that whilst the delay of 3 (three) weeks was not necessarily a short period, especially taking into account the fact that the applicant was aware much earlier of the need to file an application for condonation the period cannot be said to be exercised.

[24] The explanation that the delay was caused by looking for an alternative solution to the dispute following the advice from counsel

that the review proceedings would be too costly, is unreasonable and unacceptable. It seems fair to infer that the attorney who advised the applicant about the cost implications of the review would have advised it also of the need to keep in mind the time frame within which review was to be filed, if the alternatives which it was considering were to yield no results. This advice was obtained on their version, on the 09 May 2006, well within the prescribed period of six weeks. It is not the applicant's case that the period of six weeks provided for in section 33 (2) of the Act was insufficient to have afforded it the opportunity to assess the prospects of resolving the matter with UNISA through alternative means.

[25] The two other reasons advanced by the applicant are also unreasonable and unacceptable. The two workplaces at which the applicant needed to consult with its members are within the Gauteng Province. The one is in Pretoria and the other in

Johannesburg. Again even though the consultation with members is pleaded as a cause for the delay, the consultation occurred prior to the expiry of the prescribed period on the 9 and 17 May 2006.

[26] The explanation that the applicant were delayed by the fact that it had to wait for its counsel to complete his acting period as a Judge of the High Court is just but difficult to comprehend. There is no explanation as to why the applicant had to wait for Mr Brassey when there are other counsels who could have assisted in drafting the application.

[27] The prospects of success for the applicant are also very poor. They have not been complimented by the explanation provided by the applicant. There are also no other factors from the papers before the court that could be said to assist the case of the applicant in as far as the late filing of the review is concerned.

[28] In the circumstances, I find that the applicant has not made out in case for the condonation of the late filing of its review

application. The condonation application is accordingly dismissed.

[29] I know proceed to deal with the merits of the review in the event my view about the condonation application incorrect.

The issues arising from the arbitration award

[30] In its application to review and set aside the arbitration award the applicant raised two issues for consideration. The first issue concerns in the main, the approach which the arbitrator adopted in carrying out his mandate as set out in the terms of reference agreed to by both parties. This issue concerns the question of whether the arbitrator was faced with having to determine the dispute as a dispute of interest or of right. The applicant contended that while the arbitrator correctly recognised that the dispute he was faced with, concerned issues of interest, he however approached it as a dispute of right.

[31] The second issue relates to the criticism by the applicant that the arbitrator failed to apply his mind to or overlooked the important issue of Academic Freedom and Freedom of Research as enshrined in the South African Constitution and incorporated in the collective agreement.

[32] Before dealing with the two issues referred to above, I need to deal firstly with the issue concerning the regime which should govern this review.

[33] In its supplementary heads of argument the applicant contended that this review was in terms of its founding papers firmly placed within the purview of the provisions of s158 of the Labour Relation Act 66 of 1995 ("the LRA"). This arbitration was according to the applicant within the contemplation of s24 (1) read with ss23 and 213 of the LRA. The essence of this contention was that this review should be considered under the test applicable in the compulsory and statutory arbitration. In other words the contention of the applicant was that the rationality and justifiability test should be used to determine whether or not this award was reviewable.

[34] Section 23 of the LRA deals with the legal effect of a collective agreement. Section 24(1) requires that every collective agreement

must provide for a procedure to resolve any disputes about the interpretation or application of the collective agreement. In addition the section requires that provision be made for compulsory conciliation in the dispute procedure.

[35] In its founding affidavit the applicant indicates that the purpose of the application was to review and set aside the “the private arbitration award of the arbitrator dated the 18 April 2006.” Reference is also made to the arbitration being private in the amended notice of motion in the urgent application which the

applicant brought, interdicting the UNISA from failing to act in accordance with the provisions of the collective agreement.

[36] In dealing with the jurisdiction of the court to hear the urgent application which it had filed with this court, the applicant refers to S158 (1) (a) as the section giving the court the jurisdiction to hear the urgent application it had brought against UNISA and at paragraph 14.2 of the founding affidavit the applicant states that the court was empowered by s157 (3) of the LRA “to review a private arbitration award.”

[37] The same understanding of the applicant that this was a private arbitration appears in its notice of motion in terms of rule 7A(8) (where it is stated as follows :

“1. Extending the period for filing the present Review Application from the 5 June 2006 in terms of Section 38 of the Arbitration Act 42 of 1965(“the Act) as read with section 33(2) of the Act.”

[38] In support of its argument that the arbitration was contemplated in s24(1) the applicant relied on the decision of NUM v Brand NO & Another (1999) 8 BLLR 849 (at paras 28-29) wherein Gon AJ said:

“[28] The CCMA does exercise compulsory functions in terms of its dismissal jurisdiction and if employers and employees agree to go to private arbitration instead, they choose to avoid the CCMA’s jurisdiction and the bases of review provided in section 145. How ever, there is something of a difference in terms of section 24 in that, in my view, parties are obliged to go to private arbitration. They do not do so as an alternative to CCMA arbitration.

[29] Although it may be argued that the section does not specifically say one cannot go to the CCMA, as I have stated, the implication of the provision is that the CCMA may only be resorted to in the event that any of the circumstances envisaged in section 24 (2) (a) –(c) occur. It is not a voluntary reference to private arbitration and in that respect it is distinguishable from the second respondent’s contention that it is voluntary arbitration as normally understood.”

The learned Judge went further to say:

“In my view section 24 delegates the CCMA’s function to private arbitration to and to this extent it could be argued that the arbitration in the context is performed as a delegated administrative function.”

[39] Section 24 requires parties to a collective agreement to determine on their own the procedure to follow in the event a dispute of interpretation and or application of the agreement arises. The underlying purpose of section 24 is to provide to a framework for self regulation between the parties. There is no penalty on the parties who fail to provide a

dispute resolution procedure in their collective agreement. They would still be entitled to refer their disputes to the CCMA even if their agreement does not comply with the requirements of section 24 as is the case in the present matter in that the dispute resolution clause does not make conciliation compulsory.

- [40] The central question in determining whether the private or public review regime applies revolves around the powers and functions of the arbitrator. In the case of public arbitration in which the arbitrator performs an administrative function, the arbitrator derives his or her powers, as stated else where in this judgment, from the statute. In the case of a private arbitration the arbitrator derives his powers from the terms of reference as agreed upon by the parties. Thus in this case the question is whether the arbitrator exercised his powers within the purview of the LRA or the Arbitration Act.

“It is only administrative action which is subject to the administrative justice right in s33 (1). Generally speaking, administrative action is conduct of an administrative nature performed by a functionary in the exercise of a public power or the performance of a public function.”

- [42] In drawing the distinction between private and public arbitration the court held:

“First, arbitration proceeds from an agreement between parties who consent to a process by which a decision is taken by the arbitrator that is binding on the parties. Secondly, the arbitration agreement provides a process by which the substantive rights of the parties to the arbitration are determined. Third, the arbitrator is chosen either by the parties, or by a process to which they have consented to. Fourth, arbitration is a process by which the rights of the parties are determined in an impartial manner in respect of the dispute between the parties which is formulated at the time the arbitrator is appointed.”

- [43] And, more importantly the court held that, consensual arbitration is not a species of administrative action and therefore section 33(1) of the Constitution does not apply to private arbitration.
- [44] There is no doubt, turning to the facts of the current case, that the arbitration was the result of an agreement between the parties and the understanding including that of the applicant was that the arbitrator was appointed to conduct a private arbitration whose review would fall under the provisions of the Act.
- [45] It is also important to note as already indicated, that the dispute resolution clause in the collective agreement does not comply with the provisions of s24, in that it does not make conciliation compulsory.
- [46] Accordingly the review application in this matter will be considered in terms of s33 (1) of the Act.

Issues

in the arbitration

[47] The terms of reference required the arbitrator to determine:

“3.1 whether or not the employer’s cancellation of the collective agreement is valid as being in accordance with the provisions of clause 15.2 thereof;

3.2 whether the provisions of clause 15.5 of the collective agreement are applicable to a cancellation effected pursuant to clause 15.2 and if so;

3.3 whether the cancellation of the collective bargaining agreement by the employer complies with the provisions of clause 15.5.”

[48] Clause 15.5 of the collective agreement provides:

“whether in all the circumstances then prevailing a party ... may, having due regard to the requirements of fairness and reasonableness, terminate this Recognition Agreement...”

[49] The arbitrator found in favour of UNISA and ruled that its cancellation of the collective agreement was in accordance with the provisions of clause 15 of the collective agreement.

[50] As concerning the issue that gave rise to this review, the arbitrator found that UNISA had the right to terminate the collective agreement between it and the applicant.

Grounds for review

[51] The applicant did not in the review application pursue the other two issues, which were placed before the arbitrator. The two other issues related to the question of whether UNISA's cancellation of the collective agreement complies with the provisions of clause 15.2; and secondly, whether the provisions of clause 15.5 are in fact applicable to the cancellation effected pursuant to clause 15.2.

[52] The applicant contended that the arbitrator committed a gross irregularity in the conduct of the arbitration proceedings, exceeded

his powers and committed misconduct in relation to his duties as an arbitrator.

[53] The applicant adopted a two-pronged approach in its first ground of review. It submitted that in the first instance, the arbitrator

misconceived the test he should have applied in determining the question before him and, secondly as a result of this he fundamentally misdirected himself on the approach he should have taken in resolving the dispute.

[54] The applicant argued that the arbitrator was required to decide, on a proper conspectus of all the circumstances, whether the relationship between applicant and the second respondent should terminate and not whether the decision to terminate the relationship was unreasonable.

[55] The applicant further argued that the test, which the arbitrator applied, would have been correct but for the fact that he approached the matter as a matter as right based rather than interest based. This case the, applicant argued, concern an interest dispute and therefore the arbitrator was called upon to determine the appropriate solution to the dispute for the parties.

[56] The second ground of review concerns the alleged failure by the arbitrator to take into account:

“A factor of fundamental importance in the determination of the issues before him, that is, the constitutional right to academic freedom that academic personnel champion and defend.”

[57] I will now proceed to deal with the legal principles to apply when considering a review of a private arbitration award.

[58] Section 33 (1) of the Act provides :

“[1] Where –

- (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or as an umpire; or
- (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
- (c) an award has been improperly obtained, the Court may, on the application of any of party to the reference after due notice, to the

other party or parties, make an order setting the award aside.”

[59] The courts have, in dealing with reviews of private arbitration, adopted a narrow approach. This approach confines itself to mainly issues related to procedural aspects of the arbitration. This approach is mainly informed by the fact that private arbitrations

flow from the consent of the parties who through an agreement determines the powers of the arbitrator.

[60] In dealing with the issue of “gross irregularity and exceeding powers” by private arbitrators, Harms JA in *Telcordia Technologies v Telkom SA Ltd* (2006) SCA 139, quotes with approval from the judgement of Lord Steyn in the *Lesotho Highlands Development Authority v Impregelio SPA* (2005) UKHL 43 para 24 wherein it was said:

“But the issue was whether the tribunal “exceed its powers” within the meaning of s68 (2) (b) (of the English Act). This required the court below to address the question whether the tribunal purported to exercise a power which it did not have or whether

erroneously exercised a power that it have. It is merely a case of erroneous exercise of power vesting in the tribunal no excess of power under s 68(2) (b) is involved. Once the matter is approached correctly, it is clear that at the highest in the present case, on the current point, there was no more than an erroneous exercise of the power available under s48(4). The jurisdictional challenge must therefore fail.”

[61] In essence the attack on the arbitrator’s award in the present case is based on the perspective that, while he correctly classified the dispute as an interest dispute his reasoning is based on a different consideration.

[62] It is evidently clear to me that the applicant misread or misunderstood the arbitrator in the first instance when he stated

that the issue of a single bargaining forum was essentially an interest and not a rights issue. It is evidently clear from the

proper and objective reading of the arbitrator’s award that he made reference to the issue of interest during his reasoning when he was assessing the existence of circumstances that would have entitled UNISA to cancel the agreement. The issue of interest is used in the context of analysing the stance that each party took in the negotiations process for a single collective bargaining forum. He specifically deals with this issue in relation to the positions taken by the parties, arising from UNISA’s proposal for the establishment of a single bargaining forum. In this regard the arbitrator reasoned as follows:

“78 'Whatever criticisms may be levelled at UNISA's negotiation strategy and its argument in rejecting APSA's proposals it cannot be said that the stance taken by UNISA was, in the ultimate analysis, unfair or unreasonable. It is a fair and reasonable demand that negotiations be conducted in a single bargaining forum while some provision, however limited, is made for the for the addressing of interested special groups. It is essentially an interest issue and not a rights issue.'”

[63] The concept of misconduct as envisaged in the Act has been held by the Courts, not to extend to bona fide mistakes that may be made of law or fact by the arbitrator. The Court may however interfere where the mistake is so gross that it manifests evidence of misconduct or partiality on the part of the arbitrator. In this regard see *Amalgamated Clothing and Textile Workers Union of SA v Veldspan (Pty) Ltd* [1993] ZASCA 158; 1994 (1) SA 162 at 169.

[64] In *Telcordia* (supra) the Supreme Court Appeal held that the Courts in reviewing private arbitration awards should give due difference to the award, having regard to the autonomy of the parties. By agreeing to refer their dispute to private arbitration by implication the parties limit the common law ground of review and the power of interference by the court is thus limited to instances of procedural irregularities.

[65] In this regard the Court in *Telcordia* (supra), held at para 51 that:

“Last, by agreeing to arbitration the parties limit interference by courts to the ground of procedural irregularities set out in s33 (1) of the Act. By necessary implication they waive the right to rely on any further ground of review, ‘common law’ or otherwise. If they wish to extend the grounds, they may do so by agreement impose jurisdiction on the court. However as will become apparent, the common law ground of review on which Telkom relies is contained- by virtue of judicial interpretation- in the Act, and it is strictly unnecessary to deal with the common law in this regard. But, by virtue of the structure of the judgment below and the argument presented to us, it is incumbent on me to take the tortuous route”

[66] In terms of his or her powers the arbitrator is confined to the power as spelt out by the parties in the terms of reference or their agreement to refer the dispute to arbitration. The test for determining whether an arbitrator exceeded his or her powers is whether the arbitrator purported to exercise power which he or she did not have or whether he or she erroneously exercise power he or she had.

[67] The second ground of review which the applicant sought to rely on in challenging the arbitration award concerns the allegation that the arbitrator failed to consider the issue Academic Freedom.

[68] The applicant’s contention before the arbitrator was that its members as academics have at all times constituted a discrete group of employees within UNISA and that it is as such proper and appropriate that UNISA should bargain with it separately as opposed

to all other employees. This ground like the other grounds relied upon by the applicant cannot be sustained for the simple reason that the arbitrator was not required by his terms of reference to determine the appropriate model for bargaining for the parties. The arbitrator would in my view, have travelled outside his terms of reference, had considered and pronounced on this issue.

[69] I finally need to point out that I agree with Mr Maserumule, the attorney for UNISA that the award would still be sustainable

even if the justifiability and rationality test as set out in the *Carephone (Pty) Ltd v Marcus* NO 1999(3) SA 304 (LAC) was to be applied to this review. The award is well reasoned and there is logical connectivity between the reasons for the decision and the outcome. The arbitrator considered and applied his mind to all the evidential material which was placed before him.

Conclusion

[70] In my view the applicant has not been able to make out a case establishing that the arbitrator committed a misconduct or gross

irregularity as envisaged in s33 (1) of the Act. The arbitrator determined the dispute within the confines of his terms of reference

and in doing so did not exceed his powers. The terms of reference were very clear and confined the arbitrator to determining the

dispute for the parties within the confines of their collective agreement and the terms of reference as agreed to by them.

[71] As concerning the issue of Academic Freedom, as stated earlier, in my view this was not an issue that the arbitrator was called upon to determine. The issue in my view relates largely to the question of the model for collective bargaining for the parties which was not including the terms of reference.

[72] In the premises:

- (a) The condonation application is dismissed
- (b) The review application is dismissed.
- (c) The costs to follow the result.

MOLAHLEHI AJ

Date of Hearing : 06 February 2007

Date of Judgment : 30 August 2007

Appearances

For the Applicant : Advocate(s) M S M Brassey SC with P A Buirski

Instructed by : Hlatshwayo Du Plessis Van Der Merwe Nkaiseng Attorneys

For the Respondent : Mr P Maserumule of Maserumule Incorporated

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