IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

CASE NO. P216/98

In the matter between:

DIMBAZA FOUNDARIES LIMITED	Applicant
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	First Respondent
GROGAN, J, N.O.	Second Respondent
NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA	Third Respondent
STUURMAN, M	Fourth Respondent
VUSO, P	Fifth Respondent

JUDGMENT

GON A J

1. The application in this matter is to review and set aside or correct the arbitration award given by the second respondent dated 28 May 1998.

2. Prior to consideration of that application it is necessary to consider the application for condonation for late filing of the application in terms of section 145(1)(a) of the Labour Relations Act of 1995 ("the Act").

3. The award was served on the applicant on 2 June 1998 and the application was delivered on 16 July 1998. The applicant argues that it was only one day late. In my view, it was two days late as the applicant appears to have excluded from its calculation of "6 weeks", a public holiday. When one is required to calculate a time period in weeks, unlike days, a public holiday is not accounted for. However, the applicant's attorneys' affidavit in support of the application for condonation indicated a genuine belief that they were only one day late and I do not believe any error in this regard is either wilful or material.

4. The third to fifth respondents, whom I shall refer to either as the respondents or the individual respondents where appropriate, contend that the applicant was debarred from bringing

the application because the Labour Court has no power to condone applications in terms of section 145. In support the respondents referred to the decision of Landman J in *Queenstown Fuel Distributors CC v J Labuschagne N.O & Others* unreported case no. P270/98 2 December 1998.

5. Landman J said that the Act, for the most part, provided for the appropriate authority to condone a failure to comply with time limits set by the Act, usually on good cause shown. The learned judge refers to sections 111(4) and 191(2). He goes on to say that the inevitable conclusion to be drawn from the omission to do so in relation to Section 145(i) must be that the Act intended the six week period to be complied with, and that the court should not have the power to condone the failure to comply with the time periods specified in that section.

6. Landman J referred to *Pep Stores (Pty) Limited v Laka & Others* (1998) 19 ILJ 1532 (LC) at 1540F where Mlambo J stated:

"The provision for a time frame on s145 is an important confirmation of the legislative objective of finality in dispute resolution. Any legal challenge by way of rescission (s144) or review (s145) must be brought within this period. If there is no such challenge the award remains final and binding in terms of s143."

7. Landman J finally states that it may be argued that the six week period infringes on the right of access to the courts and refers to section 35 of the Constitution of the Republic of South Africa, 1996. He then holds that the issue cannot be resolved by this court, for this court is not empowered to adjudicate on the constitutionality of the laws which it applies.

8. Landman J then dismissed the application for condonation.

9. The applicant argued that the *Queenstown Fuel Distributor's* decision is wrong, that there is no direct support for it in labour law, and that it stands in conflict with, inter alia, seven other Labour Court decisions which expressly or impliedly condone late application in terms of section 145.

See : *Mthembu v Mahomed Attorneys v CCMA & others* [1998] 2 BLLR 150 (LC) at 152H-I

Mlaba v Masonite (Africa) Limited & others [1998] 3 BLLR 291 (LC) at 295C-H;J

PTWU v Putco Limited [1998] 5 BLLR 503 (LC) at 503G;

Metcash Trading Limited t/a Metro Cash & Carry v Fobb & others [1998] 11 BLLR 1136 (LC) at 1143D;

Mkhize v First National Bank & another [1998] 11 BLLR 1141 (LC) at 1142H-1143D;

Ross and Son Motor Engineering v CCMA & others [1998] 11 BLLR 1168 (LC) at 1170J-1172A; and

Mabombo v Shoprite Checkers Holdings (Pty) Ltd & others [1998] 12 BLLR 1307 (LC) at 1308G-J, a judgment of Mlambo J which found support for condonation in terms of section 158(1)(f).

10. To this list can be added the recent judgment of *M Nonukela v the CCMA & Others,* D127/98, 19 February 1999, unreported, a judgment of Basson J who accepted that the principles applicable in *Melane v Santam Insurance Company Limited* 1962 (4) SA 531(AD) at 532C-F apply.

11. The applicant further argued that Landman J did not deal with the issue of substantial compliance in the *Queenstown* judgment. In any event even if I do not find substantial compliance then the applicant submits that the *Queenstown* decision is wrong.

12. The applicant referred to four judgments by Landman J himself pertaining to substantial compliance. The first one, *Ceramics Industries Ltd t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union & others* (1997) 18 ILJ 716(LC) at 727H, concerned the giving of notice in terms of section 64(1)(b) of the Act that said a strike will commence "any time after the 48 hours elapsed." The second case, *Automobile Manufacturers Employers' Organisation v NUMSA* [1998] 11 BLLR 1116(LC) at 1118I-J was concerned with the provision that where a union gave 10 days of an intended strike, it is entitled to five days notice of any application to interdict the strike. Interestingly, Landman J stated that in this latter case that it is provided for in the statute and therefore its breach cannot be condoned.

13. I was referred to Du Toit *et al; The Labour Relations Act of 1995*, 2nd edition Butterworths, which notes that there is no provision for an abridgement of the 5 day period, even on the grounds of urgency. However, this issue is not directly in point.

14. Landman J recognised the possibility of substantial compliance in stating that as three days notice had been given and not five, and that two days were over the weekend it cannot be said to be substantial compliance. I was also referred to *Chetty v Scotts Select a Shoe* (1998) 19 ILJ 1465 (LC) at 1471E – 1472B which dealt with compliance in terms of section 189 in which it was held that there can be substantial compliance. This case also referred to the decision of the Labour Appeal Court in *BSA v COSATU & another* [1997] 5 BLLR 511 (LAC) at 5241 I-J and 5250 and to the dissenting judgment of Nicholson JA of which are discussed below.

15. The fourth case to which I was referred was *Free State Buying Association Ltd t/a Alpha Pharm v SA Commercial Catering and Allied Workers Union & another* (1998) 19 ILJ 1481 (LC) at

1484A which was concerned with section 138 of the Act which requires a commissioner to issue an arbitration award within 14 days of the hearing. The judge found that this provision was not peremptory.

16. *BSA v COSATU* (supra) concerned section 77(1) of the LRA which states:

(1) "Every employee who is not engaged in an essential service or a maintenance service has the right to take part in protest action if –

(a) ….

(b) the registered union or federation of trade unions has served a notice on NEDLAC stating –

i) the reasons for the protest action; and

ii) the nature of the protest action;

(c)…

d) at least 14 days before the commencement of the protest action, the registered trade union or federation of trade unions has served a notice on NEDLAC of its intention to proceed with protest action."

17. The court held that there was substantial compliance with section 77(1)(b) and (d). Nicholson JA in a dissenting judgment at [1997] 6 BLLR 681(LAC) at 690 A-I held that there cannot be substantial compliance and referred to E*x parte Mothuloe (Law Society Transvaal Intervening)* 1996 (4) SA 1131 (T) at page 1137H-1138D in which Van Dijkhorst J said:

"It is clear that the provisions of s14(1) are peremptory. In using this term as a convenient label I mean that the Legislature intended that the prerequisites laid down by that section be fulfilled. In the absence with the compliance therewith the Court is not empowered to admit the applicant. Non-compliance cannot be condoned. This is not the end of the matter, however. *Maharaj and others v Rampersad* 1964 (4) SA 638 (A) at 646C Van Winsen AJA, after having concluded that the legislative provision he was concerned with was peremptory, went on to enquire whether it was fatal that it had not been strictly complied with. The learned Judge laid down the following test:

"The enquiry, I suggest, is not so much whether there has been "exact" "adequate" or "substantial"

compliance with this injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a court might hold that, even though the position as it is is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved are of importance.""

…. Once it has been established that a legislative provision is peremptory and the question arises whether exact compliance therewith is required, the answer is to be sought in the purpose of the statutory requirement which is to be ascertained from its language read in the context of the statute as a whole."

18. Nicholson J A found that the respondents had complied in the real sense with section 77(1)(b) and (d) and therefor had complied with the Act.

19. Further reference was made to *AA Ball (Pty) Limited v Kolisi & another* [1998] 6 BLLR 560 (LC) at 563D-F which concerned section 138(7) regarding the peremptory late issuing of an arbitration award. Section 138(8) provides that the director of the CCMA may extend the serving and filing on good cause shown. The court held that the rendering of an award only a few days late could amount to substantial compliance of section 138(7) and that it could never be intended by the legislature that the award should be set aside on this basis.

20. I agree with Nicholson J A. However, even if the concept of substantial compliance is appropriate, substantial compliance can only be established in the circumstances of provisions such as section 77 and 189 which require that certain acts be done and, although not worded in the exact terms of the section, compliance can be ascertained from an interpretation of the action actually taken.

21. It is extremely difficult to find substantial compliance with a rigid provision such as a time limit. One either complies with the time limit or one does not. The failure to comply with a time limit, in my view, can only be overcome if determined by way of an application for condonation.

Condonation of section 145(1)(a)

22. The respondents argued that the Labour Court is a creature of statute and that it is in terms of section 151(2) of the Act a "superior court" on which is conferred "the authority, inherent powers and standing, in relation to matters under its jurisdiction equal to that which a court of the Provincial Division of the High Court has under its jurisdiction". The respondents argue, however,

that it does not follow that the Labour Court has inherent jurisdiction to condone applications brought outside the time limits prescribed by section 145.

23. The respondent referred to *Mhohlomi v Minister of Defence* (1996) (12) 1559 (CC) at 1568D-E to the effect that courts have no inherent powers to condone a failure to comply with the time limits laid down.

24. The respondents argued that if a provision of the Act does not specifically give the Labour Court the power to condone the late filing of any document, then it does not have the power under section 158(1)(f) to grant condonation. The power only arises when a provision of the Act specifically provides for the granting also of condonation of the late filing of any document or the late referral.

25. In this respect the court was referred to the judgments of *Queenstown Fuel Distributors (supra)* and of *Pep Stores (supra).*

26. By way of illustration the respondents referred to a number of provisions of the Act:

26.1 section 68(2) which empowers the Labour Court to interdict unprotected strikes or lockouts only on 48 hours notice, but may permit less than 48 hours if certain conditions are met including good cause shown for a shorter period;

26.2 section 111(2) empowers the Labour Court to extend the time period within which appeals may be lodged against the Registrar of trade unions beyond the prescribed 60 days;

26.3 section 191(2) empowers bargaining councils or the CCMA to extend, on good cause shown, the 30 day time period for the referral of dismissal disputes.

27. Interestingly, the respondents also referred to section 38 of the Arbitration Act, 42 of 1965 which provides specifically that the High Court may, on good cause shown, extend any period of time fixed by or under that Act, whether such a period has expired or not. I will return to consideration of this section in my conclusion on the issue.

28. The respondent concluded, therefore, that since the Act does not contain a similar provision to the above section in the Arbitration Act, the Labour Court may not condone late reviews of arbitrations convened by the commission under the Act.

29. As I have already stated, the applicant argued that the *Queenstown Fuel Distributors* case is the only case which holds the view against condonation, that it is wrong and ought not to be followed. Further, that it stands in conflict, *inter alia*, with the reported decisions of this court referred to above.

30. The applicant's primary contentions are as follows:

30.1 In terms of section 158(1)(f) of the Act, the Labour Court may

"subject to the provisions of this Act, condone the late filing of any document with, or the late referral of any dispute to the court."

The applicant argues that although section 158 falls under the heading of the Labour Court's powers this section also deals with items of substantive jurisdiction and referred to *SAAPAWU v the Premier (Eastern Cape) & Others [1997] 9 BLLR 1226 (LC)* at 1228H-J, and Landman and Van Niekerk : *Practice in the Labour Courts* (original service 1998) at A-16 which states that jurisdiction is contained in section 157 read with section 158.

30.2 Properly construed the phrase "subject to the provisions of this Act" in section 158(1)(f) stands to be interpreted as meaning that the Labour Court has the jurisdiction to grant condonation unless otherwise provided in the Act. There is nothing in the Act that specifically prohibits the court from granting condonation for a failure to comply with the provisions of section 145(1)(a).

30.3 In the event of there being any uncertainty as to the meaning to be attributed to the aforesaid phrase, section 3 of the Act provides that it ought to be interpreted so as to give effect to the primary objects of the Act and in compliance with the Constitution. That being so, it is permissible in cases of a contextual ambiguity, to interpret the provisions of section 158(1)(f) read with section 145(1)(a) with reference to the provisions of the Constitution and particular to the applicant's right of access to the court under section 34 of the Constitution.

See : *Queenstown Fuel Distributors (Supra)* at page 6 paragraph 10; and *Carephone (Pty) Limited v Marcus N O & Others* (1998) 11 BLLR 1093 (LAC) at 1101D-F.

30.4 As the Act stands to be interpreted so as to give effect to its primary objects, this court is enjoined to adopt a purposive of approach to interpretation. In terms of that approach, the applicant argues, compliance is a question of effect rather than degree. If the conduct in question (in this case the applicant's marginal failure to comply with the provisions of section 145(1)(a)) has the effect that the object is achieved it may suffice, regardless of the extent to which it complies with the letter of the Act.

See : *Landman & Van Niekerk (supra)* at C-5 to C-8

31. Although as worded, section 158(1)(f) can be interpreted either in support of granting condonation in terms of section 145 or against it, it is my view that it stands in support of granting condonation for the reasons I set out below.

32. I agree that a purposive approach to interpretation of section 158 is necessary for a variety of reasons. Firstly, to comply with the purpose of the Act, section 3 requires:

"Any person applying this Act must interpret its provisions –

a) to give effect to its primary objects;

b) in compliance with the Constitution;

c) in compliance with the public international law obligations of the Republic."

33. Section 1 states that the purpose of the Act is to advance economic development, social justice, labour peace and democratisation of a workplace by fulfilling the primary objects of this Act, which are:

" (a)

(b)

(c)

(d) to promote -

i) …..

ii) ……

iii) …….

iv) the effective resolution of labour disputes."

See: *Ceramic Industries* (supra) at 700I – 701J

34. Paul Jammy: *Interpreting the New Act- Getting down to Business with the Labour Appeal Court*, ILJ (1997) volume 18 page 906, states that the Act contains its own directive in favour of a purposive interpretation by requiring the Act to be interpreted so as to comply with the Constitution and the requirement in section 3 so as to give effect to the Act's primary objects set out in section 1.

35. He refers to recognition of the approach by the Appellate Division (now the Supreme Court of Appeals) in *Public Carriers Association & Others v Toll Road Concessionaires (Pty) Ltd & others 1990 (1) SA 925 (A at 943 B- C.* He also notes that although this decision reflects a

recognition that courts may have regard to the legislature's intention, there remains a general reluctance to embark upon speculation as to what the legislature's intention may have been.

36. I agree with him when he says that because the Act enjoins interpretation that gives effect to its objects, in cases of textual ambiguity, purposive interpretation should be a first, rather than a last resort.

37. *In BSA v COSATU (supra) and Ceramic Industries Limited v NACBAWU & others (1997) 8 ILJ 671 (LAC*), the Labour Appeal Court referred to a purposive approach. In *BSA v COSATU* the majority decision remarked that "depending on the proper purpose of the Act, a particular section may have to be interpreted restrictively rather than extensively." Jammy raises this in response to the concern that "purposive" implies that interpretation must also be "generous"

38. Section 33(1) of the Constitution 1996 states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Subsection (c) provides that n national legislation must be enacted to give effect to these rights and must –

"(a) provide for the review of administrative action by a court or, where appropriate, an independent or impartial tribunal;

a) impose a duty on the State to give effect to the right in sub-sections (1) and (2); and

b) promote an efficient administration."

39. Section 34 provides that everyone has a right to have any dispute that can be resolved by the adjudication of law decided in a fair public hearing before a court or where appropriate another independent and impartial tribunal or forum.

40. In *Queenstown Fuel Distributors CC (supra)* Landman J held that the legislature must have intended that the powers of the court to condone late filing or referral of dispute would not apply in respect of reviews of arbitration awards. I do not agree that the legislature had this intention. In regard to section 145 I believe the purposive approach should result in a generous interpretation for the reasons set out below.

41. The learned Judge appears to apply the interpretation maxim, *expressio unius est exclusio alteris,* (expression of one thing is exclusion of the other). In reaching the decision that the legislature must have intended to limit the power of the court to condone review application, he then refers to the expressed provision for condonation in sections 111 and 191 of the Act.

42. In my view the omission from section 145 of the Labour Court's power to condone late

review applications and the inclusion, for example, of that power in sections 111 and 191, does not necessarily mean that the legislature intended to exclude the power of the Labour Court to condone late review applications.

43. I submit that section 158(1)(f) is a residual provision and as such it applies unless it is specifically or explicitly excluded. Section 145 does not purport to exclude the power by the court to grant condonation . It merely does not make reference to it. I submit that the power conferred on the court to condone late referrals of any disputes, also applies to late applications for review of arbitration awards. There are, as far as I am concerned, strong policy reasons for this interpretation.

44. Section 33(1) of the Arbitration Act provides that where an arbitrator has misconducted himself, committed any gross irregularity in the conduct of the proceedings, exceeded his powers, or an award has improperly obtained, the court may make an order setting the award aside.

45. Section 33(2) which provides for reviews against private arbitration awards states:

"An application pursuant to this section shall be made within 6 weeks after the publication of the award to the parties: Provided that when the setting aside of the award is requested on the grounds of corruption, such application shall be made within 6 weeks after the discovery of the corruption and in any case not later than 3 years after the date on which the award was so published."

46. Section 38 of the Arbitration Act then provides:

"The court may, on good cause shown, extend any period of time fixed by or under this Act, whether such period has expired or not."

47. Section 145(1) of the Labour Relations Act provides:

"Any party to a *dispute* who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-

a) within six weeks of the date that the award was *served* on the applicant, unless the alleged defect involves corruption; or

b) if the alleged defect involves corruption, within six weeks of the date that the applicant discovers the corruption."

48. Although the two review sections are not identically worded they are much the same.

There is no particular reason why arbitration awards under the Act should be reviewed within six weeks and no other period. It could be a shorter period or it could be a longer period. It is most likely that the drafters took their cue from the Arbitration Act, being the longstanding piece of legislation governing private arbitration which became a significant form of alternative dispute resolution after the Wiehahn era commenced in labour relations, largely pioneered and refined by the Independent Mediation Service of South Africa. Many of the disputes which are now disposed of by way of CCMA arbitration have for the last 15 odd years been dealt with through voluntary private arbitration.

49. There is, however, no equivalent provision in the Act to that of section 38 of the Arbitration Act. In my view, this was an omission and not a deliberate act. The policy for reasons for this view, I believe, are as follows.

50. Firstly, the Arbitration Act governs arbitrations conducted by agreement where the parties to those agreements voluntarily choose to divest themselves of the authority of a court, which court would otherwise entitle the parties both to appeal and review such court judgments. In addition, the parties, by agreement, choose the arbitrator, decide whether to provide for some form of appeal failing which the arbitration award is then final and binding, determine the power of the arbitrator and decide whether to be legally represented or not. In other words, the parties to the dispute are entirely in control of the arbitration process, subject to the control that they and the Arbitration Act vest in the arbitrator. They elect to oust the jurisdiction of the courts in order to benefit from the arbitrator and process of their choice.

51. Even in these voluntary and empowered circumstances the Arbitration Act still provides for the review of arbitration awards. Further still, the Arbitration Act also empowers any court to which the application is made, to condone the late filing of an application for review on good cause shown.

52. In the case of arbitrations before the CCMA, however, almost none of these benefits apply. The vast majority of arbitrations conducted by the CCMA are not voluntarily. If an aggrieved party chooses to pursue a matter to arbitration, the respondent has to follow unless it wants an award made in its absence. The parties have no election to go to court rather than arbitration. In fact the right to go to court or otherwise is specifically circumscribed by the Act.

53. There is relatively little scope for choosing the arbitrator and none for providing for the powers of the arbitrator, nor for dictating the manner in which the arbitrator conducts the proceedings. There is no provision for obliging the parties to submit pleadings. The vast majority of disputes arbitrated by the CCMA concern dismissals for misconduct or incapacity, in which the entitlement to legal representation is prohibited.

54. Finally, however, is the fact that despite these very limited circumstances, there is no provision for an appeal against an award of a CCMA arbitration award. It has to be noted, from my experience that a not inconsiderable number of CCMA arbitrators do not appear to have the necessary legal understanding both of the substantive issues and of the arbitration process.

55. Therefore in my view, it cannot have been the intention of the legislature, in the circumstances, that the limited right to review CCMA arbitration awards had to be confined to a 6 week period, without the possibility of condonation for good cause shown, in the event that the referral was late. It is my view, that by making it a matter that, if not brought within a 6 week period could not be condoned, this would not lead to effective dispute resolution. Awards that are justifiably reviewable but cannot be reviewed by virtue of being rigidly confined by a time limit, would lead to the primary purpose of arbitration under the Act, namely fairness, being thwarted with severe consequences for the affected party and thereby bring the adjudicative functions of the CCMA into disrepute.

56. Froneman JA in *Carephone* at page 1 099 paragraph 20 states:-

"*The constitutional imperatives for compulsory arbitration under the LRA are thus that the process must be fair and equitable, that the arbitrator must be impartial and unbiased, that the proceedings must be lawful and procedurally fair, that the reasons for the award must be given publicly and in writing, that the award must be justifiable in terms of those reasons and that it must be consistent with the fundamental right to fair labour practices.*"

57. There appears to be a tendency to view the arbitration, particularly of dismissal disputes for misconduct and incapacity, as simple issues and to relegate them legally to something requiring less than the proper application of legal principles for the sake of expeditious dispute resolution: that the sooner a dispute is resolved, the more quickly a harmonious relationship will re-establish itself at a workplace irrespective of the finding in the award.

58. In my view this has been an inclination to show contempt for the often complex issues and consequences that labour disputes expose.

59. However understandable the desire for expeditious and uncomplicated proceedings may be, there is a risk that, in the sacrifice of some formality in proceedings, for the sake of a speedy result, irrespective of the quality of that result, the result will be unfair and inequitable.

60. Private labour arbitration in this country has obtained a well deserved reputation for informality and speed without sacrificing the basic formalities required in legal proceedings. This has been achieved largely through a process of an initial inquisitorial approach to narrow the

issues which allows the arbitrator substantial opportunity to equate himself or herself with the issues. This is followed by the more formal adversarial process which follows the basic tenets of court procedure and the rules of evidence without becoming unduly bogged down by unnecessary technicalities.

61. At the CCMA, where the restrictions already mentioned apply, at the same time arbitrators are given sweeping powers with the only obligations as contained in s138 as follows:-:

"(1) The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with a minimum of legal formalities;

2) Subject to the discretion of the commissioner as to the appropriate form of the proceedings, a party to the dispute may given evidence, call witnesses, question the witnesses of any other party, and address concluding arguments to the commissioner.

3) ……." (my underlining)

62. The informality can sacrifice the basic requirements in which case arbitrations are not always properly conducted and injustice is done, even if the arbitrator does not act improperly.

63. For the above reasons, I submit in terms of the purposive approach to interpretation of section 158(1)(f), that must be interpreted to allow condonation for late application for review in terms of section 145(1)(a).

Grounds for Condonation

64. Having found I have jurisdiction to entertain an application for condonation, I then intend to consider the grounds for condonation as enunciated in *Melane v Santam (supra)*. The court has a discretion, which is to be exercised judicially upon consideration of all the facts, and in essence it is a matter of fairness to both sides. Amongst the facts that are usually relevant are:

64.1 the degree of lateness;

64.2 the explanation therefore;

64.3 the prospects of success; and

64.4 the importance of the matter to the party.

65. It is emphasised (per *Melane*) that these facts are inter-related and are not individually

decisive. They need to be viewed from an objective conspectus.

66. In regard to the matter in hand with regard to degree of lateness, the award was served on the applicant on 2 January 1998 and application was made for the review on 16 July 1998. The applicant argued that the application was served one day late and this calculation is arrived at by excluding a holiday from the calculation of the 6 weeks. The view of the respondent (which I share) was that the application was 2 days late because in the calculation of "weeks" the exclusion of a public holiday does not apply and therefore the application was 2 days late. This does not in my view make a material difference. The degree of lateness is very short.

67. This is also explained by the applicant by its impression that an application for review could also be brought in terms of section 158(1)(g) and it took the view that ideally the application should be brought within 6 weeks, but that if not, at least within a reasonable time. One can accept or criticise this approach but I think credence has to be given to the fact that many applications for review were made in terms of terms section 158(1)(g) which resulted in conflicting judgments on the validity of section 158(1)(g). This issue was finally settled by the Labour Appeal court in *Carephone* (supra). This casual reasoning will not be applied from now on.

68. The applicant stated that the intention was to serve the review application on 15 July 1998 (even though it would still have been 1 day late), if I accept that the applicant's attorney believed it was still in time. The attorney failed to do so because he noticed that one of the confirmatory affidavits had not been properly commissioned. He then ordered that the affidavit be returned to Dimbaza which is 100 kilometres from East London and it was only returned properly commissioned too late for service on 15 July. In light of the fact that the application was 112 pages long, the attorney thought it inappropriate to serve by way of fax and together with his view that section also 158(1)(g) applied, decided to serve it the following day.

69. I have no problem with the decision not to fax the document, although I think it is somewhat unnecessary to have gone to the trouble of sending back a confirmatory affidavit for proper commissioning if the founding affidavit had been properly signed and commissioned. I do not see any court rejecting a confirmatory affidavit that is submitted after service for the reasons that the applicant's attorney points out. However, this reason weighs against the relatively small degree of lateness.

70. With respect to the prospects of success, the issue will be canvassed in my judgment in the merits.

71. With respect to the importance of the matter to the applicant, it was echoed by the arbitrator (the 2nd respondent), who found that he had no doubt about the importance of a rule

which is to the effect that it is imperative to dismiss anyone who breaches clocking in procedures. This supports the applicant's argument that it is important for dismissals for such breaches to be properly attended to as it could have been an enormous impact on its ability to uphold strict clocking in procedures for the efficient and correct running of the applicant's business

The merits

72. The application is to review the 2nd respondent's award that the dismissal of the individual respondents was substantively unfair and set aside the order of retrospective re-instatement.

73. The grounds for the application were:

73.1 the 2nd respondent failed to apply his mind, and/or

73.2 he committed a gross irregularity; and/or

73.3 he acted unreasonably and/or exceeded his powers to the extent that there is no rational objective basis justifying the connection made by the 2nd respondent between the material available to him and the conclusion arrived at.

74. The applicant's case is as follows:

74.1 the individual respondents were found guilty at a disciplinary hearing. They were charged with dishonesty in respect of "suspected clocking of each others clock cards". The offence with which they were charged was alleged to have occurred on 12 November 1997. They were found guilty at the disciplinary hearing and dismissed. The two individual respondents appealed against the finding;

74.2 the basis of the appeal, as stated by the respondent's shop steward, Mr Peter Martins ("Martins") was "not against verdict but against sanction" and on the basis that mitigating factors were not fully taken into account. Save to state that the minutes of the appeal were not a verbatim record, the respondents admitted this. Martins also stated that the applicant suffered no loss as a result of their action;

74.3 the individual respondents included amongst their mitigating factors a submission that it was not their intention to defraud the company. Martins stated that it was a matter of convenience, for example, if both individual respondents arrived together and the applicant had visitors one had to make tea or coffee for the visitors while the other would clock in for both of them.

75. At the appeal hearing the individual respondents stated that they knew of the clocking procedures. They also acknowledge that it was a dismissable offence to clock in for another person. Both expressed their contrition and said they were sorry and ensured that it would not happen again.

76. For the applicant, the aggravating factor was the dishonesty of the action and when confronted both denied it, and the fact that it was apparent that they had done it on previous occasions. The appeal was upheld.

77. The respondents referred the matter to the CCMA and the referral stated under "SPECIAL FEATURES" as follows:

"The two employees do not deny the fact that they do clock for each other when need arise: work related. No intention to steal Co. time. Penalty to severe in the circumstances. Employees have long service 12/16 years aged."

78. The referral to arbitration stated that the issue was whether or not the dismissal of Vuso (4th respondent) and Stuurman (5th respondent) was fair or not.

79. In reply the respondents stated that their appeal against the sanction only, was not an admission of guilt of the events of 12 November 1997 nor was the fact that there had been previous occasions prior to 12 November 1997 when the individual respondents contravened the clocking in requirements. The individual respondents' case is that any admissions were made in regard to previous occasions on which they had contravened the clocking in rule and not in relation to the incident of 12 November 1997.

80. According to the respondents, form LRA 7.11 is ambiguous: they disputed their dismissal for the specific alleged clocking in incident, but what they did not deny was that they had done it when the need arose.

81. The individual respondents admitted that Martins, stated at the appeal that the applicant had suffered no loss and based this on the fact that even when the individual respondents were late they were never more than ten minutes late and thus would have been paid in full anyway. The respondents submitted that it is evident that Martins was referring to occasions other than that of 12 November 1997.

82. The respondents submitted that it is a matter of convenience that if both individual respondents arrived together and there were visitors, then tea and coffee had to be made. One would then make the tea and coffee while the other clocked in for both of them. They submitted that this was clearly in reference to incidents which occurred before 12 November 1997.

83. With respect to the allegation that they acknowledged that it was a dismissable offence to clock in for one another, the individual respondents admitted this but stated that what they meant was that dismissal only applied where an employee failed to report for work at all. It must be pointed out that this was only raised in explanation at the arbitration.

84. With respect to the referral to the CCMA, the individual respondents admitted the contents of the referral as set out elsewhere in this judgment but once again submitted that it was clearly in reference to incidents prior to 12 November 1997.

85. My view , on the merits thus far is as follows:

85.1 it is improbable, though not impossible, that employees who have been found guilty of an offence that they genuinely did not commit would not, particularly if represented by an experienced shop steward at the appeal, have challenged the sanction only and not the finding of guilt;

85.2 my reading of form LRA 7.11 is not one of ambiguity. It is clear from the form that the individual respondents were challenging the severity of the sanction and the most probable reason is because they had been found guiltily of misconduct which they had committed on 12 November 1997. The fact that the misconduct had occurred previously "when the need arose" merely reinforces that it is more likely that they committed the misconduct on 12 November 1997 than that they did not. It appears to admit by implication that they committed the misconduct;

85.3 it is improbable that all the alleged admissions of guilt were for previous occasions for which they had never been charged, particularly, in the absence of a denial in any form that they had committed their specific misconduct alleged on 12 November 1997;

85.4 the explanation that the misconduct had occurred before as a matter of convenience and that their admissions were clearly in reference to incidents that occurred before 12 November 1997, is improbable. All that this appears to be illustrative of, is the fact that the misconduct had occurred before and it explained why they believed they were justified in doing it. It does not amount to a clear denial that the misconduct occurred on 12 November 1997.

86. I acknowledge that the respondents' submission that the reference to arbitration was broad in that in simply stated whether or not the dismissal of the individual respondent's was fair or not. In light of what preceeded the arbitration, it was not at all unreasonable for the applicant to have assumed that fairness need only relate to the sanction and not the reason for the dismissal or the procedure that it had followed.

87. At arbitration the case for the applicant was presented by Mr Neil Pieter Le Roux ("Le Roux"), the HR Manager of applicant. It was not contested that he had never presented a case at

arbitration before and that he had no legal training. He stated that the only issue to be canvassed at the arbitration in the circumstance was the severity of the sanction.

88. The individual respondents were represented by the 3rd respondent's legal officer in East London, and an admitted attorney, Mr Nathan Rhode ("Rhode"). In his founding affidavit Le Roux states that Rhode is known as having a vast amount of experience in the field of labour law litigation, which submission the respondents admitted in reply.

89. At the arbitration the respondents, in Rhode's opening statement, stated that the individual respondents' case was that they were not guilty of the conduct for which they had been dismissed. The applicant sets out in its papers in some detail Le Roux's surprise at the change in the case that he was expected to meet. He submitted that the employees had effectively on three occasions admitted they were guilty. Firstly, at the appeal hearing where they admitted they were sorry and would not do it again; secondly through Martins, the shop steward, who appealed not against the verdict but the severity of the sanction; and thirdly, through the referral to the CCMA which have been referred to above. Le Roux said that the applicant arrived at the arbitration hearing to address the issue of sanction and was not prepared with evidence to try the entire issue of innocence or guilt which the applicant believed had been established beyond all doubt through the admissions.

90. The respondents did not deny the applicant's version of events up to this point.

91. Le Roux stated that he thought the arbitrator was alive to his predicament and his unpreparedness, but conceded that he did not ask for a postponement. The 2nd respondent chose to deal with the problem by asking the respondents to present their case first. This did not solve Le Roux's problem with regard to his inexperience with respect to cross-examination and he repeatedly expressed his concerns about his lack of preparedness.

92. The 2nd respondent's award states that he is satisfied, having inspected the applicant's documentation that the way the individual respondents had described their case, and the earlier statements and internal hearings, were sufficiently misleading to have caught the employer off guard. This view (which he specifically notes) Rhode agreed with and therefore he granted the adjournment at the end of the individual respondent's case.

93. In his sworn further reasons, the 2nd respondent states that he was aware that the change in case was sufficient to have caught the applicant off-guard. He further acknowledged that he was faced with a choice of postponing proceedings *sine die* or continuing to hear the individual respondents' evidence and postponing the matter thereafter to enable the applicant to produce

witnesses.

94. He then went on to say, "Since a postponement was inevitable, it is accordingly denied that I "sought somehow to avoid the necessity for a postponement". My sole intention was to avoid wasting the time that had been set aside for the hearing." (my underlining)

95. At paragraph 6.1.3 of his further reasons, the 2nd respondent notes that the applicant confirmed that no formal application for postponement was made by Le Roux. The 2nd respondent goes on to state that had Le Roux expressly done so, and indicated that he did not wish to proceed, "I would undoubtedly have granted such an application."

96. Further on, at paragraph 6.1.6 in reference to the applicant's surprise that the respondents were asked to adduce evidence first, the 2nd respondent says:

"……apart from the reservations expressed by the Applicant's representative about his ability to cross-examine effectively, which I admit, he did not lodge any objection to my suggestion that the employees should begin".

97. At paragraph 6.3 of his further reasons he reiterated he would have postponed the proceedings at the outset or after the employees had given their evidence-in-chief had the applicant (Le Roux) requested him to do so.

98. Le Roux stated that he had no direct personal knowledge of the event in question, had not consulted with the applicant's witnesses in order to be able to put a version to the individual respondents in cross- examination and that all his preparation was over the appropriateness of the sanction. All he could do was to challenge the change in plea.

99. The applicant submitted that before and during examination Le Roux told the 2nd respondent, on more than one occasion, that he was unable to attend effectively to the task of challenging the individual respondents' plea of innocence because of the lack of preparation. At no time did the 2nd respondent assist Le Roux with cross-examination or pose questions of his own.

100. The 2nd respondent does not deal with the above allegations by the applicant at all in his further reasons which are in reply to the applicant's founding affidavit.

101. The applicant states that in paragraph 1 of the 2nd respondent's award, the 2nd respondent incorrectly records that the applicant "applied for an adjournment" at the close of the individual respondent's case. At the conclusion of the individual respondent's case, the 2nd

respondent enquired as to whether or not Le Roux who was in the position to proceed with the applicant's case, which the applicant found strange as Le Roux had made his position clear. The applicant was faced with a repetition of the objection that Le Roux had raised less in an hour before, when the 2nd respondent suggested the parties explore settlement, which Le Roux considered a further attempt to avoid the necessity for a postponement. When settlement discussions failed then the 2nd respondent postponed the matter. The 2nd respondent's response to the above was only that the suggestion that the parties explore settlement was made by the respondents' representative, Rhode, and was agreed to by the applicant. The 2nd respondent did not deal with the other allegation.

102. I have made it clear elsewhere in this judgment that I have no doubt that the documentation indicates that the individual respondents had admitted their guilt in a variety of ways from the lodging appeal onwards both in relation to 12 November 1997 and previous occasions. The 2nd respondent was under the same impression.

103. In the circumstances and particularly as the 2nd respondent admits that a postponement was inevitable and all the applicant has to do was ask for it, the failure for the 2nd respondent to postpone the matter at the outset *mero motu* was unacceptable . The fact that he then allowed cross-examination to take place by Le Roux, an unprepared layman who admitted that he made his difficulties known to the 2nd respondent, becomes particularly problematic.

104. The respondents state that the applicant's concern about not being able to address the issue of innocence or guilt was adequately addressed by having the matter postponed after the respondents had closed their case. There is a supporting affidavit by Rhode, who it must be remembered it was admitted was an experienced labour law litigator and admitted attorney. He further goes on to say that there was no basis in law or fact that the matter ought not to have continued. I do not accept this argument for reasons set out below.

105. In the circumstances where the applicant was represented by a layman, it is careless to assume that a postponement is going to be requested at an "appropriate" time. In my view it is the arbitrator's function to be sensitive and alert to the fact that he is there to guide the process particularly as section 138 of the Act provides, and I repeat this:

" (1) The Commissioner may conduct the arbitration in the manner that the Commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formality.

(2) Subject to the discretion of the Commissioner as to the appropriate form of the proceedings, a party to the dispute may give evidence, call witnesses, question the witnesses of any other party, and address concluding arguments to the Commissioner.

(3) ……."

106. More specifically the 2nd respondent should not have allowed cross-examination by a layman, who had not done what he (the 2nd respondent) thought was logical, namely, to ask for a postponement. Such logic he cannot simply impute to someone not legally trained. The power of the process is in the arbitrator's hands. One cannot assume that a layman would instinctively make the correct legal assumptions that the 2nd respondent (or Rhode) would make.

107. Section 138 specifically provides that the arbitrator alone shall determine procedure. An inexperienced layman may well feel constrained not to challenge the arbitrator's way of proceeding nor be aware of his entitlement to do so nor be aware of what it is he should do.

108. This is one of the problems with the informality assumed under the Act, namely, that one can more or less do away with any form of process or ignore the processes that would normally be used by legal practitioners in a litigation context.

109. The discipline of the presenting and arguing evidence is not to be lightly imputed to laymen.

110. It is one of the fundamental explanations for the distinction between bar and the side bar. Those who choose to go to the bar largely do so because they wish to pursue a career which revolves around a development and honing of the skills of analysing, representing and challenging evidence in adjudication. While many attorneys have good advocacy skills, many attorneys choose not to pursue a career with an emphasis on advocacy because they do not feel comfortable with the skills of advocacy. The range of concepts and the jurisprudence and authorities which have developed over the law of evidence and the attendant complexity are a challenge for every lawyer in authority. Certainly layman cannot be assumed to know the issues he is faced with at arbitration nor how to deal with them.

111. In the context of the CCMA where laymen are required to represent themselves, in circumstances where legal representation is specifically excluded, as in this case, the failure of a layman representing a party to take the logical step in the evidentiary process cannot be ignored on the basis that the party should have taken that step as if he were a trained legal practitioner.

112. In my view the 2nd respondent is duty bound, as is the person in control of the process, to have *mero motu* granted a postponement immediately after the closing statements. Once the

opening statements were made by the parties and it become patently obvious, also to the 2nd respondent, that the individual respondents' version had changed and that the applicant was unprepared. This would only have been fair. The 2nd respondent should not have made assumptions and waited for a postponement to be requested.

113. It does not make sense, in terms of fairness, to realise that a postponement was inevitable and then to avoid the moment of the postponement for the "sole intention being "to avoid wasting time that was set aside for the hearing".

114. This consideration, namely of speed, has to be subordinated in the interests of fairness. Even if one accepts that the individual respondents' change in version was genuine, I cannot accept that the fairness dictated by completing the arbitration quickly, overrode the right to administer fairness to the applicant in the circumstances.

115. It is a fundamental tenet of the law of evidence that in order to be fairly adjudicated, parties must know the case they are required to meet and the version they will be entitled to challenge. By allowing the individual respondents to present their case first the applicant is put at a singular disadvantage of trying to cross-examine, a difficult skill in the absence of any preparation or knowledge of what his own case would be in the circumstances. The applicant was unable to put a version to the individual respondent. Once the respondents' case was closed it was in effect too late.

116. Assumptions cannot thereafter be made that the applicant would have known exactly what was required of him when the 2nd respondent instructed him to bring evidence forward on the second day of the arbitration to prove that the individual respondents committed the misconduct.

117. The applicant did not necessarily realise the full extent of the strategy that would be needed to counter the individual respondents' version. It also cannot be assumed, as the respondents do, that the applicant could have consulted their attorney. It is not necessarily a given that the applicant's representative would have realised the need to have consulted an attorney. In any event, consulting an attorney in those circumstances would not cure the following potential unfairness:

117.1 The respondent could neither properly cross-examine the individual respondents nor put the applicant's version to them; and

117.2 The individual respondents would not be afforded the opportunity to answer to the applicant's case which could only be made out at the conclusion of their evidence-in-chief.

118. As a consequence of the 2nd respondent's failure to guide due process to the equal fairness of both parties for the sake of expedition, his consequent findings on the evidence tendered become problematic.

119. At the outset of the award the 2nd respondent states :

"I return below to the question of what weight should be attached to the apparent admissions of the employees during the earlier proceedings."

He never does, however.

120. The applicant's evidence before the arbitration on the 2nd day of the hearing with regard to the previous admissions of guilt, is that of Mr Jeremy Riekert ("Riekert") who chaired the disciplinary enquiry. Riekert's evidence is that Martins had informed him after the conclusion of the disciplinary enquiry that the employees did not intent to challenge their guilt on appeal but only the sanction of dismissal. No challenge was raised to Riekert's evidence in cross-examination.

121. Further, the applicant's evidence was that the minutes of the appeal enquiry were not challenged with regard to the accuracy by Rhode or placed in dispute by the individual respondents during cross-examination. Such minutes reflect that the employees admitted guilt, admitted that they were aware of the rule and they admitted that contravention of the rule was a dismissable offence.

122. Significantly in his further reasons, the 2nd respondent admitted at paragraph 7.2 that the evidence regarding the alleged previous admissions of guilt was not stated above. He finds that having only appealed against the sanction, indicated that they intended only to raise this aspect in conciliation and to place it in the issue in arbitration did not amount to an admission of guilt. More importantly, however, he notes that it appeared to him that the employees had admitted to clocking in for each other on some occasions prior to 12 November 1997 but denied that they did so on that day.

123. In response to the applicant's submission that he never assessed the probabilities on the evidence before him despite intending to apply his mind to the change in plea, the 2nd respondent denied that he failed to apply his mind and stated that:

"The alleged admissions of guilt were apparently confined to the earlier incidents."

124. The problem, however, is that there is nothing in the evidence and nothing in the appeal minute to come to this conclusion. The only place that the previous admissions were "apparently

confined to the earlier incidents" is in Rhode's opening statement. It is not in evidence.

125. The respondents submitted that the appeal against sanction only and not verdict ("the first admission") and the LRA 7.11. ("the second admission") are not unequivocal acknowledgements of guilt. Unequivocal they may not be, but implied acknowledgements of guilt they are.

126. The gist of the applicant's evidence regarding the incident of 12 November 1997 was that the individual respondents were seen outside the applicant's premises 5 minutes apart, the 4th respondent was seen on the premises between 07h55 and 08h00 and their respective clock cards recorded that they had both clocked in at 07h58. The 2nd respondent records that the evidence of the applicant's witness is that the times were approximate and he then goes on to analyse the movements of each employee and comes to the conclusion that the respondents could conceivably have clocked in at the same time.

127. His award reflects that the 4th respondent was in the kitchen at about 07h55 according to the applicant's evidence and conclude that this would have made it impossible for her to clock in at 07h58. It is interesting that the 2nd respondent made much of the previous evidence that the times observed by the applicant's witness, Mrs Meyer ("Meyer") the supervisor, were approximate in regard to individual respondents being seen approaching the company, but he then places exactitude on her evidence with regard to the time that the 4th respondent was seen in the kitchen and the extent to which it would have made possible for her to clock in at the time that she was recorded to have done, namely, 07h58. He therefore concludes that Meyer was wrong and that her estimates of the times must be treated with circumspection.

128. The 2nd respondent, however, does not treat the individual respondent's emphatic claims that they clocked in independently on 12 November 1997 with any circumspection or query their credibility in this regard in light of the controversial previous admissions. This is most likely a result of the permission to postpone the arbitration more timeously and the consequent failure to deal with this issue concretely.

129. The 2nd respondent held, therefore, that whether on the proven facts it is more plausible that the 4th respondent clocked in for the 5th respondent than she did not, he finds that the recording of identical times on their respective clock cards is impossible and speculated that they could have clocked in simultaneously on two machines or one after the other on one machine which records time in minutes. The 2nd respondent does refer to the security guard's evidence that they entered the gates at different times but holds that her testimony does not rule out the possibility that they were at the clocking station together at 07h58.

130. The consequence of having failed to allow the applicant the possibility of dealing with the previous admissions properly, in my view, resulted in 2nd respondent rejecting a probable version (the applicant's), in light of strenuous denials by the individual respondents and prior admissions which he found were apparently related to earlier occasions, although this is not apparent from the evidence.

131. The 2nd respondent gave no weight to the evidence of Mrs Meyer that the individual respondents' clock cards registered many simultaneous clocking times during the previous six weeks. He records that the claim was undisputed, but then states that he had nothing before him to support the allegation that the employees clocked in for each other prior to 12 November 1997. He states that the alleged clocking offences prior to that date were not put to the employees at the disciplinary hearing, which is correct. He further says that they were not dealt with in evidence in these proceedings. However, it was the evidence of the 4th respondent in cross-examination at the arbitration that there were times that they had clocked in for each other. The 2nd respondent records this earlier on the award in reference to the 5th respondent's evidence.

132. In regard to the sanction, 2nd respondent found that the fact of the 5th respondent's frank admission that she and the 4th respondent did clock in for each other on occasion and their admission at the disciplinary hearing and after, seems to have indicated a degree of confusion on their part. This confusion he attributes to their confusion of the understanding of the disciplinary rule.

133. The 2nd respondent did not doubt the importance of the rule, but found that the applicant's approach that dismissal must be the inevitable consequence of the breach of it in any circumstances seemed unnecessarily inflexible. This is not an unreasonable view.

134. However, a further indication of the 2nd respondent's failure to apply his mind properly is that he found that the 5th respondent's frank admission that they did on occasion clock in for one another together with their admission at the disciplinary hearing (there was no such admission) seemed to indicate a degree of confusion on their part which should have been taken into account in mitigation of sentence but was not.

135. The problem is, and the 2nd respondent appears to forget this, there was no admission made at the disciplinary hearing at all to indicate that there was confusion over the understanding of the rule. Both individual respondents admitted at the appeal that they were aware of the rule and that the sanction for such misconduct was dismissal.

136. The appeal dealt with an implied admission since only severity of the sanction was challenged and the individual respondents admitted their knowledge of the rule and the resultant likely dismissals. Although confusion may have been the view of the 2nd respondent in the arbitration, it was not evident at the internal proceedings that there was confusion regarding the rule. The confusion that the 2nd respondent found was not evident by the appeal chairman and therefore could not have been taken into account by him.

137. There is a further indication that, although it is not material, the 2nd respondent did not apply his mind to the issue properly. He finds that the 6 February notice about the clocking in rule warns only against "the failure to clock in or out in the prescribed manner". This is not correct. The above notice says "with immediate effect, therefore, an employee failing to clock in or out will be liable to disciplinary measures in terms of the company's disciplinary procedure." This was admitted by the 5th respondent in cross-examination.

138. The respondents submitted that the contradictory admissions, besides being equivocal, really constitute inconsistent prior statements in relation to the denial at the arbitration. The respondents argued that they may be used to draw the inference of recent fabrication against the individual applicants which could result in their credibility being rejected and applicant's version being accepted. The respondents then submit that this inference could not logically be drawn because of the denial of guilt at the disciplinary hearing. I do not agree that the denial of guilt at the disciplinary hearing automatically annihilates the inference. It is most common sensical that employees faced with the charge first off will deny it, but may change their view thereafter in the light of evidence that has been proven against them.

139. Although there is merit in the respondents argument that the arbitrator would be entitled to find against the applicant if the applicant failed to discharge its statutory onus on the probabilities, before finding against the employees because of their lack of credibility in the event of a mutually destructive versions, in my view for reasons stated elsewhere, the arbitrator's finding on the improbability of the applicant's version was unjustifiable and the issues of credibility should have been raised over the individual respondents' version.

140. I find, with reference to *Carephone* (see paragraph 56 above), that the process was not fair and equitable or procedurally fair which led to an unjustifiable conclusion by the 2nd respondent In the absence of fairness, the 2nd respondent exceeded his powers in terms of section 145(2)(a)(iii).

141. For the above reasons I find that the 2nd respondent exceeded his powers requiring him to

determine the dispute fairly.

142. In light of my findings on the merits, the importance of a case to the applicant, the minor degree of lateness of application for review, the applicant is granted condonation and as a result of its success on the merits I make the following order:

142.1 The application succeeds;

142.2 The matter is remitted back to the 1st respondent for hearing by commissioner other than 2nd respondent;

142.3 The 3rd to 5th respondents are ordered to pay the costs of the application, jointly and severally.

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S GON
Acting Judge of the Labour Court

Date of hearing : 11 March 1999

Date of judgment : 14 May 1999

: Advocate A Myburgh instructed by Linde Dorrington & Kirchmann

: Advocate T Bruinders instructed by Pretorius, Herbert & Banes