IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO.:

In the matter between:

Applicant

and

COMMISSION CONCILIATION MEDIATION AND ARBITRATION

MANFRED B ZUNGU

Case No.:D1140/99

: 20 March, 2000

: 31 January, 2001

JUDGMENT:

Poswa,A.J.

1.This is a matter in which the Second Respondent and another, V Dhlamini, both of whom were employees of the Applicant, were each found with a blood alcohol content in excess of the First Respondent's official limit of 0,08% which had been agreed between the Applicant and the National Union of Mineworkers, of which the Second Respondent was, at all relevant times, a member. It is common course that both Dhlamini and the Second Respondent committed the offence whilst employed in a "high-risk" area of the Applicant's mine premises. At the time of the commission of the offence, the Applicant was engaged in an acting capacity in the place of Dhlamini, who, having committed his part of the offence on a date prior to the Second Respondent's date of commission of the offence, had been suspended from duty.

2.It is common course that the area where the Second Respondent and Dhlamini were stationed was a "high-risk" area, at a mine owned by the Applicant. Although Dhlamini has a previous conviction in respect of the same offence, his alcohol content was only 0,009%. On the other hand, whilst the Second Respondent's alcohol content was 0,24%, three times in excess of the limit, he was a first offender. According to a security officer

employed by the Applicant, one Sithole, being the person who apprehended both Dhlamini and the Second Respondent and later tested their blood alcohol content, the Second Respondent exhibited signs of being under the influence of liquor at the time that he was apprehended by Sithole. That is what the latter said to the Commissioner during arbitration proceedings.

3.Both employees were suspended in consequence of their respective alcohol blood content being above the official limit. Both employees were charged and subsequently appeared in respective disciplinary enquiries on dates that I have not been able to determine from the papers. Each of them was dismissed for the offence that he had committed. They both applied for leave to appeal against their respective dismissals, Dhlamini's application was successful. Although a "Memorandum" from the Applicant, in which the "APPLICATION FOR APPEAL" (sic) with regard to the Second Respondent is contained, does not say so in so many words, it is common cause that the Second Respondent's application for leave was refused, thus confirming his dismissal from duty.

4.The Second Respondent took the matter to the Commission for Conciliation Mediation and Arbitration (CCMA), the First Respondent herein, challenging his (the Second Respondent's)dismissal on the basis of the Applicant's inconsistency in its application of discipline for the offence of being found with a blood alcohol content in excess of the permissible limit, whilst on duty. This complaint was based on the fact that the Second Respondent was dismissed, whilst Dhlamini was given a written final notice and permitted to continue with his employment. The Second Respondent's complaint ended up being dealt with within the arbitration process.

5.The section of the Act in terms whereof the matter was referred to arbitration does not appear in the papers and it was, by oversight, not mentioned during argument. I assumed, at the time, that it was an ordinary 134 referral. It occurs now, however, that it ought to have been a referral in terms of sec 140. Sec 140 (1) reads:

*"(1) If the **dispute** being arbitrated is about the fairness of a **dismissal** and a party has alleged that the reason for the **dismissal** relates to the employee's conduct or capacity, the parties ,despite sec 138(4), are not entitled to be represented by a legal practitioner in the arbitration proceedings unless-*

(a)the Commissioner and all the other parties consent; or

(b)the Commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation..."

6.There is no doubt that the essence of the Second Respondent's grievance is that he was unfairly dismissed and that he should have been given a written final warning, as was done in Dhlamini's case. That, therefore, placed the dispute between himself and the Applicant within the provisions of sec 140(1), which, in turn, means that the parties ought not to have been represented before the Commissioner without either the consent envisaged in sub-paragraph (a) or the Commissioner's decision in sub-paragraph (b). In my view, where there has been such consent or decision, that fact ought to be recorded and the Court's attention ought to be drawn thereto when the matter comes it.

7.In view of the circumstances of this case, I think it is only appropriate for me to assume that the dispute was dealt with in terms of either sub-paragraph (a) or (b) of sec 140(1). I do not think it is appropriate to re-open that enquiry at this stage. I must stress, however, that I am of the view that, in a case where the facts of the dispute bring it within the provisions of sec 140(1) and where the parties are, nonetheless, legally represented before the Commissioner, it is obligatory for the parties to explain how that came about, i.e. whether it was in terms of sub-paragraph (a) or sub-paragraph (b) of section 140(1) that that was done. In either event, if and when the matter does proceed to the Labour Court, that aspect will already be on record. To do otherwise would be to render sec 140, as a whole, obsolete. It should be borne in mind that sub sec 2 makes provision for the Commissioner who "finds that the dismissal is procedurally unfair" to "charge the employer an arbitration fee". I would think that sub-sec (1) is designed to avoid an employer unwittingly paying unjustified costs of legal practitioners, in the event of the Commissioner thus charging the employer.

OUTCOME OF REVIEW PROCEEDINGS

8.In a 6-page judgment, in which he dealt fully with the facts and the argument by the parties, the Commissioner who arbitrated the dispute found in favour of the then Applicant, the Second Respondent in the current proceedings. I am not, at this stage, concerned with the question as to whether the Commissioner dealt with such facts and argument correctly or otherwise. The relevant portion of his finding reads;

"In the light of the surrounding circumstances, dismissal was not an appropriate sanction to impose. Especially if one considers that there was the precedent of V Dhlamini, who had not been dismissed for a similar offence."

The award itself reads:

"I, therefore, reinstate the applicant to his former position with three months back-pay (R6985-00x3)=R20,955-00. This will convert the applicant's sanction of dismissal of a two month

suspension without pay."(sic)

APPLICATION IN TERMS OF SEC 145,ALTERNATIVELY, 158(1)(g)

9.In a Notice of Motion dated 14 October, 1999, the Applicant sought to have the arbitration "decision or proceedings" before the Commissioner "reviewed and corrected or set aside", in terms of sec 145, alternatively sec 158 (1)(g) of the Act.

10.Although the arbitration award was made on 2 September, 1999, it is common cause amongst the parties that it was faxed to the Applicant on 3 September, 1999.

11.Sec 145 is divided into four sub-sections. At this stage, only the first two are relevant and they read as follows;

"(1) 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

(2)A defect referred to in sub-section (1), means-

(a) that the commissioner -

(i)committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii)committed a gross irregularity in the conduct of the arbitration; or

(iii)exceeded the commissioner's powers; or

(b)that an award has been improperly obtained."

12. Although the absence of the word "or" at the end of sub-paragraph (i) suggests that both sub-

paragraph (i) and sub-paragraph (ii) must be present for one type of misconduct to exist, it appears that the omission of "or" is an error. In the case of *Reunert Industries (Pty) Ltd t/a Reutech Defence Industries v Naicker and Others 1997 181 ILJ*, the three subsections were treated as three separate, independent and alternative requirements.

13.Sec 158(1)(g) reads:

"(1) The Labour Court may -

g)despite sec 145, review the performance or purported performance of any function provided for in this Act or any act or omission of any person or body in terms of this Act on any grounds that are permissible in law."

14.A lot of time was spent, almost exclusively, on whether or not the application was timeously made in terms of sub-sec 145(1), i.e. whether it was brought within six weeks, as well as on whether or not the Applicant's application for condonation of the late filing of its Heads of Argument was timeously made. The Notice of Motion does not deal with sub-sec(2) of sec 145,i.e. whether the alleged defect in the Commissioner's award relates to conduct that falls under sub-paragraph (2)(a)(i) or (ii) or (iii); or whether it falls under sub-paragraph (2)(b). It is, in my view, important to make that distinction because there mut be different considerations, and therefore different kinds of conduct to be considered, in arriving at a decision as to whether a defect in arbitration proceedings exists or not.

15.Neither counsel addressed me on the circumstances in which I may resort to sec 158(1)(g), in the alternative. Neither was I addressed as to what aspects of "the performance or purported performance" of the Commissioner qualify for review under this section, nor was I addressed on "any grounds... permissible in law" that I am required to take into account in reviewing the performance or purported performance of the Commissioner, under this section.

16.In my view, not only does the Applicant have to name the grounds in terms whereof the performance or purported performance has to be reviewed, but he or she also must establish that any such grounds are "permissible in law." It should not, in my view, be left to the Court to work out what grounds are being relied upon and/or whether "any grounds(relied upon) are permissible." An applicant must, in my view, properly define the case in respect whereof it requires the Court to find in its favour in terms of sec 158(1)(g). This is apart from the vexed question whether or not sec 158(1)(g) gives this Court jurisdiction to review commissioner's arbitration awards , in much the same way as does sec 145, an aspect I shall deal with later in this judgment.

17.It is appropriate, at this stage, to set out what, precisely, is stated by the Applicant in both the Notice of Motion and its Founding Affidavit. The relevant portion of the Notice of Motion reads:

"1. Application is being made to the above Honourable Court in terms of Sec 145, alternatively 158(1)(g) to review or set aside the arbitration award of the arbitrator Seloacwe Setiloane, obtained (sic) under the 1st respondents case number KN27679."

The relevant portion of the (Founding)Affidavit of Mr Josef Hubert Rose Boom reads:

" 10. The Applicant is unaware of whether the second Respondent logged/ sent his heads of argument to the arbitrator. Applicant has however been prejudiced by the fact that it did not have the opportunity to respond to the second Respondents arguments, if any and the arbitrator erred in this regard.

11. The arbitrators award makes no mention of the heads of argument and until full reasons are received, as called for, applicant is unable to deal more fully therewith.

12. The arbitrators finding (sic) that the mitigating circumstances of second respondent were not considered (sic) is cortrary (sic) to the applicants evidence led by a witness for the applicant.

13. I submit that the arbitrator has further failed to recognise and apply the principle that when the provisions of item 3(5) of schedule 8 of the Labour Relations Act 66 of 1995 are applied the decision to dismiss may differ in each case.

The circumstance (sic) of second Respondent and that of V Dhlamini were different and the fair application of the code of conduct item 3(5) of schedule 8 led to the distinction of the two cases.

14. The arbitrators finding that the dismissal was inconsistent with previous action by Applicant is contrary to the intention of the legislator as envisaged by the code of good practice in schedule 8 and cannot be upheld.

15. It is therefore submitted that the dismissal was fair and the arbitration award should be set aside."

18.As can be seen from the above, no attempt is made to categorise the Commissioner's conduct in accordance with the various sub-sections of sec 145, as discussed above. Neither is there reference to sec 158(1)(g), directly or indirectly, in the affidavit, or an indication as to why resort should be had to the latter sub-section.

19.An illustration of the point that it is necessary for an applicant to itemise a commissioner's alleged defective conduct is the case of *Reunert Industries (Pty) Ltd t/a Reutech Defence Industries v Naicker and Others (1997) 18ILJ 1393 (LC),* the judgment of Landman,J. In that case the Labour Court was called upon to review an award to the employee by a commissioner of the CCMA on the grounds that the award was defective, in the sense that it did not comply with the requirements of sec 145 of the Labour Relations Act (the LRA), alternatively, with the provisions of sec 158(1)(g) of the same Act. A summary of the facts appears on the head note as follows:

"The parties limited the dispute to the question whether the employer has dismissed the employee on suspicion (as submitted by the employee) or whether it had proved his intoxication on a balance of probabilities (as submitted by the employer). The employee did not make the adequacy of dismissal an issue. The Commissioner found that the employee had been unfairly dismissed and reinstated him." (My underlining).

20.After a detailed and careful discussion of what alleged defective conduct fell under paragraph (i) or (ii) or (iii) of sub-section (2)(a) of sec 145, the Court found that the commissioner had exceeded his powers, as contemplated in paragraph (iii). The applicant before the Labour Court, the employer, had specifically alluded to the fact that the Commissioner had improperly dealt with the question of the adequacy or otherwise of the applicant's (the employer's) sanction, after the employer had found the employee to have been intoxicated whilst on duty. That was an issue that had not been raised by the parties. In that regard the judgment reads, on page 1398;

"The Commissioner exceeded her powers by entering into the question of adequacy of the sanction and, in so doing, committed a gross irregularity by failing to hear the parties on the issue. Admittedly, certain background facts had been turned out but the parties were unaware that the Commissioner intended considering the adequacy of dismissal as a proper and appropriate sanction."

21.The point I am making here is that the Court was specifically directed to the alleged defective conduct on the part of the Commissioner, which is not the case here. In my view, I would be entitled to dismiss this application merely on the basis that the Commissioner's conduct in respect whereof there is a complaint has not been appropriately categorised or categorised at all - in terms of the relevant paragraph of sec 145(2) or shown to fall within the provisions of sec 158(1)(g).

22.Seeing, however, that this aspect was not argued before me, I think that it would be inappropriate of me to decide this matter on that basis. Similarly, it would, in my view, be inappropriate to call upon the parties to address me thereon, at this late stage. After all, the Second Respondent was legally represented during the application before me and he failed to raise that point, deliberately or unwittingly.

APPLICANT'S FAILURE TO TIMEOUSLY APPLY FOR CONDONATION CF LATE FILING OF ITS HEADS OF ARGUMENT

23.I find it appropriate to first deal with the Applicant's failure to file its Heads of Argument and its application for condonation of such failure, before dealing with the Applicant's alleged failure to timeously apply for the review of the Commissioner's award. For reasons I shall explain, I condone the Applicants's late filing of its Heads of Argument. I do so because it would be judicial fiction of the highest order for me to claim that I have not benefited from the Second Respondent's detailed Heads of Argument, on the basis whereof the Second Respondent's counsel addressed me during argument. As already pointed out, the Second Respondent failed to file its Heads of Argument timeously, just as much as the Applicant did. Consequently, if I place reliance on the former's Heads of Argument, as I have done, it would, in my view, be extremely unfair, not to similarly rely on the latter's Heads of Argument, to the extent that any reliance can be placed thereon. It is for this reason and because the Second Respondent himself relied extensively on his own late Heads of Argument, during argument on 20 March,2000 that I condone the Applicant's late filing of its Heads of Argument.

24.On Thursday 17 February, 2000, the Registrar telefaxed the Notice of Set Down to both the Applicant, and the Second Respondent. The Notice advised that the Application was set down for 13 March, 2000. Heads of Argument were to be filed as follows:

a)not less than ten court days before the hearing, in the Applicant's case; and

b)not less than five court days before the hearing, in the Second Respondent's case.

25.Counting backwards, from 12 March, inclusive of that date, the 10th day, by which the Applicant should have filed its Head of Argument, is Monday 28 February, 2000, whilst the last day for the Second Respondent is Monday 6 March, 2000.

26.The Applicant's Heads of Argument were, according to the Court's date- stamp, only filed on 8 March, 2000, seven days later than they should have been delivered. In paragraph 12 of Struwig's Affidavit, in support of an application for condonation for the late filing of the Applicant's Heads of Argument, it is stated that the Heads of Argument "were ultimately delivered on 7 March, 2000, six days late." If by "delivered" the Applicant meant "filed", then that is clearly incorrect, in view of the Registrar's date-stamp. In passing, I should also point out that, in the Second Respondent's Heads of Argument, dated 10 March, 2000, it is contended that the Second Respondent had had no sight of the Applicant's Heads of Argument as at that date. As there is no replying affidavit contesting this allegation. I am, therefore, obliged to accept that the Second Respondent had not received the Applicant's Heads of Argument as at 10 March, 2000. (*Plascon Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd 1984 (3) SA 623 (A))*

27.The Second Respondent's Heads of Argument were, as already stated, only signed on Friday 10 March, 2000, the court-day preceding the date on which the Application was set down for hearing, i.e. Monday, 13 March, 2000. They were, thus, handed up in Court on 13 March, 2000. In short, both parties failed to timeously deliver their respective Heads of Argument. Although, on behalf of the Second Respondent, it is stated that he "has been unable to file his Heads of Argument without sight of the Applicant's Heads of Argument", I find that explanation unsatisfactory. Nothing prevented the Second Respondent from filing his own Heads of Argument without sight of the Applicant's Heads of Argument. That, after all, is exactly what he ended up doing and there is no reason why he could not have done so earlier. There was no application by the Second Respondent for condonation of the late filing of his Heads of Argument - an untenable situation.

28.I now proceed to point out why the Applicant is not, otherwise entitled to indulgence regarding the late filing of its Heads of Argument and to demonstrate why I could appropriately have refused to condone the late filing of such heads. According to Struwig, who made the main affidavit in support of the Application for Condonation of the late filing of the Heads of Argument, the position is as follows:

(a)He says that he has been involved with the matter from the outset, having given evidence at the arbitration hearing before the Commissioner.

(b)On 20 January, 2000, he went on leave, at a stage when, according to him, "all other requirements for the prosecution of the review had been attended to".

(c)At the time of his departure, on leave, Struwig left the matter in the custody of Boom, an accredited

representative of the Federated Employers Organisation of South Africa, of which the Applicant is a member, for his attention " to the extent that any further action was required from the Applicant in prosecuting the Review Application." He also instructed his assistant, one Cummins, "to keep a look out for any matters that may require attention." Although a supplementary affidavit was prepared for Cummins to consider and to have it attested, he was not found and that document was, consequently, not attested.

(d)Struwig returned to work on 24 February, 2000 " to find (that) the Notice of Set Down in this matter had been telefaxed to the Applicant on 17 February, 2000."

(e)Because the Notice of Motion was addressed to the employers organisation, " Cummins assumed that any aspect that required attention would be dealt with by them", the employers organisation, notwithstanding that he had been instructed by Struwig to keep a look out for any matters that might require attention.

(f)Struwig immediately contacted Boom, who informed him that "he had already left the employ of the Employers Organisation at the end of January, 2000 to take up employment with SASOL, and that he had neither received nor attended to the Notice of Set Down on behalf of the Applicant."

(g)In the circumstances, Struwig "decided to instruct new representatives on behalf of the Applicant and approached one Warren Beech, of the firm of Lepan Beech who, with local correspondence , have taken over the matter".

(h)Struwig " only managed to instruct Lepan Beech properly on 29 February, 2000. Boom had taken the papers in this matter from the Employers Organisation and, fortuitously Boom, Beech and (Struwig) met on 29 February, 2000 at the Volkswagen Conference Centre in Midrand and Boom gave the papers to Beech. It has taken from then until the filing of the heads of argument on 6 March, 2000 for Lepan Beech to properly consider the matter, brief counsel to draft the heads of argument, and for counsel to draft the heads of argument."(My underlining). " The matter having been set down for 13 March, 2000, the heads of argument were to have been delivered by 28 February, 2000, ten days before, as required in terms of the Notice of Set Down. Given that I only returned to work at the applicant on 24 February, 2000 and still had to obtain the papers from Boom, instruct new representatives, and they then had to familiarise themselves with the matter and instruct counsel, who then had to draft the heads, it was not possible to deliver the heads of argument timeously," so says Struwig.

(i)"The Heads of Argument were ultimately delivered on 7 March, 2000, six days late. It will be submitted on behalf of the applicant that this delay is explicable as set out above, and also, under the circumstances, not a

very long delay." I have already pointed out that, Applicant's Heads of Argument, whilst appearing to have been signed on 6 March, 2000, were only filed on 8 March, 2000 and not on 7 March, as alleged by Struwig.

(j)"There is little if any prejudice to the Respondents as they will have had a week to consider the applicant's heads of argument and, if necessary, in the light of such heads of argument, modify their own heads of argument. The issues are notoriously well-known to the parties and a full set of papers has been exchanged. Accordingly, the Respondent would not have been prejudiced in its preparation for the hearing in any way, and the papers being in order, and heads having been delivered, it will be submitted on behalf of the applicant that there is no reason that the matter should not proceed." In passing, I should state that the heads of argument are 17 pages long, with reference made to 23 cases, many of which are unreported. Neither the Second Respondent's counsel nor the Court was furnished with copies of the unreported decisions and it took me quite some time to read through and consider those cases and I expect the Second Respondent's counsel to have spent about the same amount of time on the Applicant's authorities. Consequently, I find it strange, to say the least, of the Applicant to say that the delay was not very long and extremely arrogant to suggest that the Second Respondent "would not have been prejudiced in its preparation for the hearing in any way."

(k)Struwig then deals with prospects of success on the merits of the application for review, stating reasons why that application should be successful. It is not, in my view, necessary for the Court to consider prospects or otherwise of success of an application for review when considering the question whether or not there is justification for the late filing of heads of argument. Ordinarily, argument on prospects of success is set out in the heads of argument themselves. Consequently, by the time I decide on prospects of success I shall, for all practical purposes, have permitted the use of the heads of argument.

29.In an affidavit which, on the face thereof, was signed and attested on 8 March, 2000, Boom supports Struwig's allegations in so far as they refer to Boom's own conduct.

30.Whereas Boom's Supporting Affidavit is dated 8 March, 2000, Struwig's Affidavit, which Boom's affidavit purports to support, is dated 9 March, 2000. The Second Respondent understandably contends that Boom's Affidavit is, consequently, irregular. In his explanation of the discrepancy, Struwig points out that he forwarded his own affidavit, (at a stage when he considered it to be a draft and had not yet signed it), to Boom, for the latter's consideration. Simultaneously with forwarding his own draft affidavit, Struwig also sent Boom's draft affidavit for the latter to consider and, it would seem, to comment thereon. Boom, who

must have been in agreement with the draft forwarded to him by Struwig, signed his own draft and had it attested as an affidavit on 8 March, 2000. Struwig was unable to sign and attest his own affidavit on that day and, consequently, only signed on 9 March, 2000. Whilst this is unacceptable conduct on the Applicant's part and one which should not be encouraged, I find that the explanation given by Struwig does, as a matter of fact, clearly indicate that when Boom attested his affidavit on 8 March, 2000, he had already read Struwig's own draft, the same document that Struwig ultimately signed on 9 March, 2000. Consequently, I, with reservations, accept, as a matter of fact, that Boom was in a position, when he signed his own affidavit on 8 March, 2000, to do so in support of what he had already read in Struwig's draft affidavit.

31.Tardiness on the Applicant's part does not, however, end there. It later transpired that Boom's and Struwig's affidavits, respectively, were signed before a security officer employed by the Applicant and not before a Commissioner of Oaths. Consequently. Struwig's Affidavit was only properly signed and attested on 16 March, 2000.

32.Struwig's re-attested affidavit was not objected to by the Second Respondent. The fact, however, that Boom did not re-attest his affidavit was relied on for arguing that Boom had not confirmed Struwig's allegation with regard to Boom's conduct, which I find a valid observation. In other words, there is no explanation as to what Boom did or did not do with regard to the Applicant's case during Struwig's absence on leave.

33.In his affidavit of 9 March, 2000, as re-attested on 16 March, 2000, Struwig does not explain Boom's tardiness and indifference towards his obligations with regard to the Applicant's Application for Review. Boom was, for all practical purposes, acting as the Applicant's attorney in respect of the review application at that stage and until he left the Applicant's employ. His conduct, therefore, is not different from that of a legal representative who fails to properly attend to his/her client's affairs.

34.Struwig does not explain why, having discovered on 24 February, 2000 that Boom had abandoned his obligations in respect of the Application for Review, he only instructed attorneys on this aspect on 29 February, 2000, after "fortuitously" meeting Boom and the attorney that was later to be instructed on the matter, at a conference in Midrand. Having stated that he "immediately contacted Boom" on discovering, on 24 February, 2000, that the latter had not taken appropriate steps, Struwig does not explain what happened from the time of his contacting Boom to the date when he instructed his attorneys, i.e. on 29 February, 2000. After taking over from Boom, Struwig acted in a capacity similar to Boom's and my remarks with regard to Boom apply equally to him.

35.There is also no explanation from the Applicant's attorneys as to why, having been instructed on 29 February, 2000, the Applicant's Heads of Argument were only signed on Monday 6 March, 2000, and only filed two

days thereafter, on Wednesday 8 March, 2000. It should be borne in mind that when the attorneys accepted instructions on this matter they were aware that the Heads of Argument were already out of time and that they needed to act expeditiously in explaining such lateness and assuring that there was no further delay.

36.It is evident that, in this regard, the Applicant was represented at the relevant times, by Boom, Struwig and its attorneys. The apparent tardiness I have referred to is, therefore, that of Boom, Struwig and the attorneys, respectively, at the relevant stages.

37.The Applicant, in its attempt to have the late filing of its Heads of Argument condoned, was under an obligation to fully and sufficiently explain the apparent tardiness in the handing of the Applicant's Head of Argument. *(Cf Ferreira v Ntsingila 1990 (4) SA 271, at 281G-H)*

38.It is well-established that there has, historically, been reluctance to penalise a litigant on account of the conduct of its legal representatives. *R v Chetty 1943 AD 321; Regal v African Superslate (Pty) Ltd 1962 (2) SA 18 (A), at 23; Saloojee and Another, NNO v Minister of Community Development 1965 (2) SA 135(A), at 140-1.*

39.In *Regal v African Superslate (supra)*, the applicant applied for condonation of the late filing of the record in an appeal from a judgment of absolution from the instance which had been given against the Applicant, in the lower court. The Appellate Division (as it then was) found that the delay in filing the application for condonation was attributable, entirely, to the conduct of the applicant's attorneys. Dealing with that aspect, on pages 23-24, Botha,J.A., stated as follows;

"It seems to me that the delay in the present case was due entirely to the neglect of applicant's attorney, which neglect should not, in my view, in the circumstances of this case, debar the applicant, who himself was in no way to blame, from relief. *(Cf. Rose and Another v Alpha Secretaries Ltd,1947(4) SA 511(AD))****. The applicant's attorney should clearly have realised that, in view of the fact that the trial itself had lasted four and a half days, and that a very large number of photographs, plans and diagrams were handed in as exhibits by both parties at the trial, the preparation of the appeal record would take considerably longer than the time he had allowed for it. On the other hand, when the attorney finally realised that the record could not be prepared in time, he did everything he could, and with reasonable expedition, to remedy the results of his own neglect. His request to the respondent's attorneys for an extension of time was made soon after the realisation that the record could not be prepared in time and prior to the expiration of the prescribed period of three months, and the petition to this Court was prepared and signed within three days of the respondent's refusal to agree to an extension of time, and before the three***

months has expired. The essence of the attorney's neglect seems to me therefore to have been a failure to realise, as he should in the circumstances have done, that the preparation of the appeal record would take considerably longer than the time he had allowed for it, and that he allowed himself to be kept fully engaged on other duties until it was too late to ensure compliance with the Rules relating to the appeal to this Court. Under these circumstances, it seems to me that I ought not to attribute the neglect of his attorney to the applicant and thereby debar him from the relief sought. It was suggested during argument that the applicant himself was not entirely blameless, as he himself did nothing during the relevant period to ensure compliance with the Rules relating to the prosecution of his appeal. It is difficult to know what he should have done beyond directing a reminder or an enquiry to his attorney. He had left the matter in the hands of his attorney, who had been his legal adviser for many years, and whom he had fully instructed about the appeal. It is said that a close business and professional relationship apparently existed between the applicant and his attorney. Although the applicant may have been, and probably was, anxious to know the result of counsel's opinion and regard to the appeal, and yet took no effective steps to ascertain whether the opinion had been obtained or not, and what the advice was, he was nevertheless entitled to assume that his attorney would do everything that was necessary in connection with the prosecution of the appeal. It is unlikely that a reminder or enquiry directed to his attorney would, in the circumstances, have ensured a timely completion of the record."

40.In an often-quoted passage, in *Saloojee and Another,NNO v Minister of Community Development 1965(2) SA 135(A), at 141C-E,* Steyn,C.J, states the following, on the question of penalising a litigant, on account of blameworthy conduct of its legal representative, or otherwise;

41.

"In ***Regal v African Superslate (Pty) Ltd 1962 (3) SA 18(AD), at p.23****, also, this Court came to the conclusion that the delay was due entirely to the neglect of the applicant's attorney and held that the attorney's neglect should not, in the circumstances of the case, debar the applicant, who was himself in no way to blame, from relief. I should point out,however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of the this Court. Considerations* ***ad misericordiam*** *should not be allowed to become an invitation to laxity. In fact, this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with the Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of*

the failure are ***(Cf Hepworths Ltd v Thornloe and Clarkson Ltd, 1922 TPD 336; Kingsborough Town Council v Thirlwell and Another, 1957 (4) SA 533 (N))****. A litigant, moreover, who knows, as the applicants did, that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands off it. If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney* ***(cf .Regal v African Superslate (Pty) Ltd. supra at p.23 i.f.)*** *and expect to be exonerated of all blame; and if, as here, the explanation offered to this Court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself. That has not been done in this case. In the circumstances, I would find it difficult to justify condonation unless there are strong prospects of success* ***(Melane v Santam Insurance Co. Ltd., 1962(4) SA 531 (AD) at p.532)".****. (My underlining.)****(Cf. PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 (AD); Theron v AA Life Assurance Association Ltd. 1995 (4) SA 361 (AD), at 365)***

42.It seems evident, from the above two Appellate Division cases, that a litigant will not be penalised in circumstances where it is clear that it is not, itself, responsible for the failure to comply with the Rules of Court.

43.After the warning given in *Saloojee(supra)*, there has developed a practice which, in my view, gradually emphasises less and less the aforementioned reluctance to penalise a litigant on account of the conduct of its legal representative, a practice I find regrettable. This is more so in a society where the large majority of litigants are entirely ignorant when it comes to legal aspects and requirements and who tend to, justifiably, rely entirely on their legal representatives to do, on their behalf, that which is required by the law.

44.In *PE Bosman (supra)* counsel for the applicants contended that the applicants, themselves, were not responsible for the late noting of their appeal and the late filing of the record of appeal with the Registrar of the Appellate Division. Without making a finding on that aspect, however, Muller, J.A.,went on to say the following, on page 799, after quoting from the above passage in *Saloojee (supra),* at 141C-E;

"In the present case the breaches of the Rules were of such a nature, and the explanation offered in many respects so unacceptable or wanting that, even if virtually all the blame can be attributed to the applicant's attorneys, condonation ought not, in my view to be granted." (My underlining).

In my view, this went further than *Saloojee (supra)*, in stating that a litigant can be penalised for its legal representative's negligence.

45.Although condonation was granted for delays in complying with the Rules, in *Theron (supra)*, it does not appear that that was on the basis of the applicant not having been found to be, personally, to blame for such delays. The Court repeated the warning that a litigant cannot always escape the results of his/her attorneys negligence. In granting condonation, Vivier, J.A., stated the following;

"This Court has often warned that there is a limit beyond which a litigant cannot escape the results of his attorney's remissness and ineptitude or the insufficiency of the explanation tendered and that condonation may be refused whatever the merits of the appeal. ***(See Fibro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein, and Others 1985 (4) SA 773 (A) at 787G-H; Ferreira v Ntshingila 1990 (4) SA 271 (A) at 281D-H; Tshivhase Royal Council and Another v Tshivhase and Another 1992 (4) SA 852 (A) at 859E-F.)*** *The question is whether the present is such a case. In favour of the application it can be said that the delays in complying with the Rules were not excessive; the application for condonation was made as soon as the appellant's attorney realised that the Rules had not been complied with; and that the administration of justice had not been delayed.* ***(Cf. Federated Employers Fire and General Insurance Co. Ltd and Another v McKenzie 1969 (3) SA 360 (A) at 362F-G.)*** *In all the circumstances, it cannot be said, in my view, that this is a case in which the Court should refuse the application irrespective of the prospects of success* ***(see Blumenthal and Another v Thompson NO and Another 1994 (2) SA 118 (A) at 121I-122B)****." (My underlining)*

46.The question whether or not a litigant can be penalised on account of conduct by its legal representative has, on numerous occasions, been dealt with in this Court, in its predecessor, the Industrial Court and in the Labour Appeal Court. In *National Union of Metal Workers of South Africa on behalf of Mabunda v Manganese Metal Co. (Pty) Ltd (1995) 16 ILJ 219 (IC),* the following was stated by De Kock ,SM, on page 219;

"A failure on the part of the party's representative may constitute good cause, although it is not in all the circumstances good cause. It will amount to good cause if the ineptitude or remissness is not imputed to the applicant." (My underlining)

47.Whilst I think that the legal position ought to be as stated in the underlined portion of this excerpt, I do not share the learned Judge's optimism that that will always be the case, in the light of the cases I have cited above, more especially *Bosman(supra)*. Neither am I certain that that will always be the case in the Labour Appeal Court. In *National Construction Building and Allied Workers Union and Another v MF Woodcraft (Pty) Ltd*

(1997) 18 ILJ 165 (LAC), Cameron,J., in delivering the unanimous decision of the Court, stated, on page 167;

"The mere fact that a legal representative has failed to attend properly to his or her client's affairs will not always furnish 'a reasonable and acceptable explanation' for a default in relation to a time-limit. A lawyer's neglect of his or her client's affairs cannot be relied upon by the client without more to procure an indulgence in relation to time limits. Whether an indulgence will be granted depends ***inter alia*** *on the period of the delay; on the lawyer's explanation for it; and on whether the delay was such as might suggest that the client was itself lax in insisting on due service from the lawyer." (My underlining)*

48.On my reading of the Labour Appeal Court's decision in the matters of *Glansbeek v JDG Trading (Pty) Ltd, an unreported judgment given on 13 February, 1998, in Case No. JA76/97, and Allround Tooling (Pty) Ltd v NUMSA, an unreported judgment given on 15 June, 1998, in Case No. DA2//97,* however, the absence of fault on the Applicant's part did not persuade the Court to grant condonation. I propose to refer in detail to the reasoning in both cases, in order to demonstrate why I am of the view that it does not appear that the delay, in each case, was due to the conduct of the applicant(s).

49.In *Glansbeek (supra),* the following was stated, in respect of the conduct of the applicant's attorney;

"[6] The same cannot be said for her explanation why she did not realise the appellant heads had to be served and filed by 1 December, 1997. She admits that she received the notice of the Registrar to that effect timeously, but entered the date on her diary as 15 December, 1997. She candidly says that she cannot give a reason for this, except that she must have 'misread' the telefax. She only realised her mistake when telephoned by the respondent's attorney on 8 December, 1997. She does not say that on becoming aware of this she informed counsel of the fact that the heads were late. Counsel indicated from the bar that he was told, which makes his failure to complete the heads expeditiously even less acceptable."

With reference to counsel's conduct the following is stated;

"[7] Counsel's further explanation for delivering the heads on 15 December, 1997, is equally unsatisfactory. He said he planned to work on them between 8 and 13 December, 1997, but was precluded from doing so because he accepted a later brief to draw a petition for leave to appeal which had to be delivered by courier to Bloemfontein on 13December, 1997. He says he could not refuse this brief because of his earlier involvement in that matter in the labour appeal court. Apparently he anticipated that one day would be sufficient time to complete the appellant's heads. On 14 December, 1997, however, because his computer malfunctioned, he was unable to do so. He had that particular problem seen to on 15 December, 1997, but

then a difficulty with the Tab key of the computer caused further delays. One must assume that these problems persisted for another two days, because he only completed his heads on 18 December, 1997. Why he could not take other steps to have the heads typed by his attorney or some else is not explained at all."

The Court goes on to state;

"[9] The conduct of the appellant's attorney and counsel fell short of what I consider to be reasonable standards for their respective professions." (My underlining)

The Court then concludes as follows;

"[11] It is trite law that a requirement for any condonation for non-compliance of the rules in an explanation for that non-compliance. I do not consider that there is any explanation for the non-compliance in respect of the late noting of an appeal and the defective notice of appeal itself. I would, therefore, dismiss the application for condonation of the late noting of the appeal, the application for leave to amend, notice of appeal and the application for the reinstatement of the appeal for this reason alone. In that event there is no appeal before us and the necessity for dealing in detail with other applications falls away. In consequence they should also be dismissed."

Seeing that there were explanations by both the attorney and counsel, I take it that the Court meant, in the expression "I do not consider that there is any explanation...", to say that the explanations were inadequate. It is clear that the explanations were unsatisfactory. They do, however, clearly indicate that the delays were due to the remissness of both the attorney and counsel and certainly not to the applicant's conduct. If my interpretation is correct, then the litigant was penalised for its legal representatives' ineptitude.

50.In *Allround Tooling (supra)*, after the attorney, one Tanner, had given a lengthy explanation for the delays, in filing the application for condonation and the late filing of the respondent's heads of argument, the application for condonation was refused. The following is some of what was stated by Myburgh,J.P, in his judgment, with which Froneman,D.J.P and Nicholson, A.J, concurred;

"[8] Tanner was obliged to apply for condonation, without delay, as soon as he realised that the respondent's heads of argument were late; ***cf. Croeser v Standard Bank 1934 AD 77 at 79; R v Mkize 1940 AD 211 at 213;Reeders v Jacobsz 1942 AD 395 at 397; Commissioner of Inland Revenue v Burger 1956 (4) SA 446 (A) at 449G; Meintjies v HD Combrinck (Edms) Bpk 1961 (1) SA 662 (A) at 264B; Rennie v Kamby Farms (Pty) Ltd 1989 (2) SA 124 (A) at 129G; Napier v Tsaperas 1995 (2) SA 665 (A) at 671B-D****. Tanner knew by no later than 21 April that the respondent's heads of arguments were three weeks late.*

He should have filed the application for condonation no later than on that day. Instead the application was filed six weeks later on the day of the appeal. The only explanation for his failure to make timeous application for condonation is that he forgot to do so. It goes without saying that that is not a reasonable nor acceptable explanation. It is an explanation which borders on contempt for the Court and is manifest of an unprofessional and irresponsible attitude towards the interests of the respondent, of which more later.

[9] It is accepted that Turner was able to commence working on the heads of argument only after disposal of the industrial court case on 10 February, 1998. He then had six weeks in which to prepare the heads of argument. He said he took nine weeks to do so.

[10] What Tanner failed to do was to allocate time to the preparation of the heads of argument. Instead work on the heads of argument competed - unsuccessfully - with the other demands of his practice. The respondents' interests were ranked below those of other clients. It is not an acceptable explanation for delay that a practitioner is too busy. If the nature or size of a practitioner's practice renders it impossible for him to render a professional service and to comply with the provisions of the Labour Appeal Court Rules, he must not take on the work; ***Sennet v Wessels (Pietersburg); BK v Prins, LAC Judgment JA 72/97 para 18.*** *In the absence of an acceptable explanation for non-compliance with the Rules of Court, condonation will not be granted;* ***Classiclean (Pty) Ltd v CWIU a.o., LAC Judgment JA 60/97 para 5; Joerning and Sons (Pty) Ltd t/a Joernings Pharmacy a.o. v Coetzee, LAC Judgment CA14/94 para 22.*** *Tanner did not provide an acceptable explanation for not timeously filing heads of argument. In the result the application for condonation is refused." (My underlining)*

Apart from my interpretation of the judgment being that it nowhere shows any fault on the respondents' part, this is a case which practitioners would do well to read, appreciate and heed. Although the Court clearly stated that the respondents suffered from the omissions by their legal representatives, that did not spare the respondents from the penalty of having their application for condonation refused.

51.I am of the view that the approach adopted by the Labour Appeal Court in *Glansbeek and Allround Tooling* is different from that which that Court adopted in *National Construction Building and Allied Workers Union* and that the LAC should clear that position. In my view, *Allround Tooling,* to the extent that the Court penalised the applicants without any fault on their part, is without precedent. In spite of the warning in *Saloojee (supra)* and many other cases that have reiterated that warning, none of the cases that I have come across has actually penalised an innocent applicant for condonation. I have already underlined the aspects in the quotation from Steyn,C.J's judgment in *Saloojee* that indicate that the Court, on the facts of that case,

found that the applicants themselves were not without blemish. On page 139, for instance, the Court found that the Applicants had been untruthful in their explanations for the delays, in a number of instances.

- For instance, whereas there was an explanation that the delay was due to lack of funds, the Court found that

"the reason given to the State Attorney when his consent to a late filing of the record was sought, was not any lack of funds but that the record was voluminous. In these circumstances any suggestion that the delay, after 8th October, in making the application, was due to financial consideration, cannot carry any conviction, and, if anything discloses a lack of candour."

- Another instance is the fact that, despite the fact that it had been alleged that "the petition was to be lodged together with the record", when the petition was actually lodged, it was not accompanied by such record.

- Thirdly, the Court found, on ultimately seeing the record, that it comprised a mere 120 pages and the Court "would not describe it as voluminous."

The Court also found that a number of aspects, with regard to the delays, had either not been explained or sufficiently explained.(Pages 139-140). The Chief Justice, stating the unanimous view of the Court, concluded thus;

"In the result, I find it impossible to hold that the delay in preparing the record and in bringing this application has been explained in a manner which is even remotely satisfactory. page 140.

The matter did not end there, in that the Court went to deal with prospects of success on appeal after a very thorough analysis of the likely scenario in the event of the applicants being granted leave to appeal. Steyn C.J, stated, in that regard;

"While, therefore, I would not hold that applicants have no prospects of success on this issue, I cannot regard it otherwise than doubtful and uncertain." Pages 142-143.

Finally, the following passage makes it quite evident, in my view, that the refusal of the Court to

grant condonation in that case is not an instance of an innocent applicant being penalised for the ineptitude of its legal representatives;

"But, having regard to the uncertainty of the prospect that the issue of delay and prejudice raised in the respondent's petition in the Court below will be resolved in favour of the applicants, and the wholly unsatisfactory features of the delay in preparing the record and in bringing this application, and of the explanation thereof to which I have referred, I am not disposed to grant the indulgence sought." page 143

51.I have already stated that in *Bosman (supra)* no finding was made as to whether or not the applicants, themselves, were in any way at fault. The reasons given for the dismissal of the applicants' application for condonation are related to failure to explain the delay. Muller,J.A., stated the following in that regard;

"From what has been stated above, especially with regard to the late filing of the record with the Registrar,the following seems to be clear:

(a) *There is no explanation why instructions to prepare a record were only given by the applicants' Johannesburg attorneys in November 1978, after more than three months had expired from the date of judgment.*

(b) *...*

(c) *There is indeed no explanation why, after the record was completed in May 1979, the requisite number of copies were not, as soon as possible, lodged with the Registrar of this Court, but were only lodged on 23 July, 1979." Page 798 cf page 799 (My underlining)*

52.Despite repeating the warning that "there is a limit beyond which a litigant cannot escape the results of his attorney's remissness and ineptitude or the insufficiency of the explanation tendered and that condonation will be refused whatever the merits of the appeal", the Court, in *Theron (supra),* granted the application for condonation and proceeded to deal with prospects of success. (365A.)

53.In reiterating the warning stated above, Vivier, J.A., cited, as authority for that proposition, the cases of *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein, and Others 1985 (4) SA 773 (A), at 787G-H; Ferreira v Ntshingila 1990 (4) SA 271 (A) at 281D-H; Tshivhase Royal Council and Another v Tshivhase and Another 1992 (4) SA 852 (A) at 859E-F.* I have read all three decisions.

54.In *Finbro Furnishers (supra)* the Court found, as a fact, that the applicant had not established that it was its attorneys' fault that was responsible for the delay. Quoting, with approval, from the remarks of the learned Judge in the *court a quo,* Vivier, J.A. proceeded to say;

"'The question arises who caused the delay? On the papers it is suggested that Messrs Goodricks and Franklin caused the delay. If so, why was the Court left in the dark about the identity of the attorney responsible for the delay and why was no affidavit filed by the attorney concerned, offering an acceptable explanation for his suggested inordinate delay to notify the applicant of the judgment? Counsel for the applicant, however, contended in this Court during argument that Dale was the person who caused the delay, although Dale in his supporting affidavit does not admit such a fact..." 787E-F

The Court then referred to a hypothetical situation dealt with by the learned Judge in the *court a quo*, viz. what would have happened "had Finger sought to fasten the blame for late notification of the result of the main application on a particular attorney", and enquiring whether "such a direct accusation would have improved the appellant's chances of gaining condonation". It was with regard to that hypothetical situation that Hoexter,J.A, stated;

"The answer to this question against the appellant the learned Judge found in the oft-repeated judicial warning that there is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered ***(See Saloojee and Another NNO v Minister of Community Development 1955 (2) SA 135 (A) at 141C-E; Immelman v Loubser en Ander 1974(2) SA 816 (A) at 823 G-824B;PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 (A) at 799E-H).*** *" 795G-H*

55.In *Ferreira (supra)*, Friedman,A.J.A stated;

"The explanation given in the present case was neither full nor satisfactory. I might add that, although there was gross negligence on the part of the Defendant's attorney, the Defendant himself was not entirely blameless." p281 H

56.In *Tshivhase (supra)*, Nestadt,J.A. referring to the applicants, stated;

"Neither Kennedy nor Ligege can, in any way, be blamed for what has happened. Mr Coetzee, on their behalf, rightly emphasised that they have at all stages demonstrated a firm intention to appeal. Their disquiet at the way their case has been dealt with is a factor to be taken into account and is shown by their terminating the mandate of Mr Gous and De Vander Attorney and appointing new attorneys in their stead." 860D

57.In *Webster and Another v Santam Insurance Co. Ltd 1977 (2) SA 874 (A)* the question arose as to whether the

appellants' legal representatives' failure to comply with a provision of the compulsory Motor Vehicle Insurance Act, 56 of 1972, could be relied upon by the applicants, as constituting "unusual or unexpected circumstances, as envisaged in the Act." In his judgment, to which Trollip, J.A, Corbett, J.A, Hofmeyer, J.A and Miller, J.A. concurred, Kotze, J.A. stated;

"I consider the answer to this question to be in the affirmative for the reasons that follow. A lay client, like each of the appellants, is ordinarily entitled to regard an attorney duly admitted to the practice of the law as a skilled professional practitioner. Ordinarily he places considerable reliance upon the competence, skill and knowledge of an attorney and he trusts that he will fulfil his professional responsibility. It is, of course, not unknown for an attorney or his firm to be negligent in carrying out professional duties, but that is not usual, and ***a fortiori*** *to the lay client it would be a most unusual and unexpected occurrence. Consequently, in considering whether the neglect of an attorney constitutes a special circumstance within the meaning of that phrase in sec. 24(2)(a) of the Act, the correct approach should always be to regard it as a relevant factor and to recognise that such neglect by an attorney may frequently be a special circumstances on its own* ***vis-a-vis*** *his client. To hold, without qualification... that a client is bound by the negligence of his legal adviser is, in my respectful view, wrong... It may be that to attribute to a client the negligence of his attorney would be justifiable in cases he "the client" is partly to blame through his supineness or otherwise for his attorney's dilatoriness. There is, however, no need to express an opinion with regard to this question in the present case as the appellants cannot be identified with the negligence of the firm and its servants." 883G-884A*

58.The above passage in *Webster and Another (supra)* was referred to with approval, by the same Judge of Appeal, in *Bezuidenhout v AA Mutual Insurance Association 1978(1) SA at 712 D-E*, in a judgment with which Wessels,J.A., Rabbie, J.A., Diemont,J.A., and Joubert, J.A concurred.

59.Tebbutt,J., in *General Accident Insurance Co. South Africa Ltd v Zampelli 1988 (4) SA 407 (C),* a case in which the respondent applied for dismissal of the appeal by reason of the appellant's failure to comply with Rule 49(15) of the Uniform Rules of Court, in that his heads of argument were delivered late, stated;

"It was also contended that appellant cannot be relieved of his legal representatives' neglect. I do not know that it can be said, firstly, that Mr Hazell was negligent. But if he was, in ***R v Chetty 1943 AD 321 and Regal v African Superslate (Pty) Ltd 1962(3) SA 18(A) at 23****, both referred to in* ***Saloojee's case at 141A-B,*** *the Appellate Division concluded that neglect by an attorney should not necessarily debar an applicant, who was himself in no way to blame, from relief* ***(see also Louw v Louw [1965(3) SA 852 (E)], (...854B))****. It is true that in* ***Saloojee's case*** *Steyn,C.J said that there was a limit beyond which a litigant*

*cannot escape the results of his attorney's lack of diligence or the insufficiency of an explanation offered. The learned Chief Justice, however, made it clear that this was where the applicant could not show that the ineptitude or remissness of the attorney could not be imputed to himself (**see at 141G-H).** In the present case there is no question of Mr Hazell's delay being imputed to the appellant who has always,it would seem, sought to prosecute his appeal. Mr Du Toit also sought to compare Mr Hazell's delay with the failure to prosecute timeously a claim under the compulsory Motor Vehicle Insurance Act 56 of 1972. Under sec 24(2) of that Act where a claim has become prescribed by reason of a failure to prosecute it within the period laid down by the Act, application can be made to the Court to grant leave to bring the claim if it can be shown that 'special circumstances' existed as to why it was not brought timeously. In terms of a definition of 'special circumstances' introduced into the Act by an amendment in 1978, they are defined as not to include 'any neglect, omission ignorance.' There is no such limitation of 'special circumstances' under the Court Notice, if that be held applicable, nor would such a limitation apply to the words 'good cause shown.' Moreover, before the 1978 amendment it was held that the neglect of a third party's attorney had to be regarded 'as a relevant factor' and that it may frequently of itself be a special circumstance **(see Webster and Another v Santam Insurance Co. Ltd 1977(2) SA 874 (A) at 883H**. In Webster's case previous decisions that an attorney's neglect could not be a special circumstance 'eg **Mapela v Marine and Trade Insurance Co. Ltd and Another 1977 (1) SA 568 (E); Synman v Santam Versekeringsmaatskappy 1976 (4) SA 145 (T))** were dissented from. Those cases are, therefore, in my view, not authoritative support for Mr Du Toit's argument nor can the Act be called in aid for his submission. They have, in my view, no bearing on the test of ' good cause' required under Rule 27(15)." 412E-413B.*

60.To the extent, therefore, that *Allround Tooling (supra)* seems to have penalised an innocent litigant for his legal representative's negligent conduct, it is, in my respectful view, without precedent. All the cases that I have referred to above, in which applications for condonation were refused or a warning in line with the *Saloojee* decision was given, were, in my view, *obiter*. Some of them were given before *Webster and Another(supra)*, whilst in those that were given after *Webster,* there is no reference to that case. It would seem that the Court, in *Allround Tooling*, was not aware of the latter decision.

61.It remains, however, a matter that, in my view, which calls for clarification by the Labour Appeal Court. On the facts of the case before me, however, I am not called upon to decide which of the conflicting views of the Labour Appeal Court I should follow.

62.Coming back to the facts of the present case, I am of the view that I am entitled to refuse condonation of the late filing of the Applicant's Heads of Argument in that the Applicant itself was at fault, in my judgment. It

should be borne in mind that, unlike Boom and the Applicant's attorneys, Struwig was an employee of the Applicant. His omissions were the omissions of the Applicant itself and his failure to explain tardiness in the respects I have already alluded to, is the Applicant's own failure.

63.As already stated herein, I am, however of the view that it would be inappropriate, in the exercise of my discretion, for me to refuse condonation of the late filing of the Applicant's Heads of Argument. I have given my reasons for that decision. The Second Respondent himself, has not taken the trouble to apply for condonation for the late filing of his Heads of Argument. It may even be that I have erred in permitting his Heads of Argument to remain as though they were appropriately filed in terms of the Rules of Court. I did not deem it appropriate to take the easy option of dismissing both Heads of Argument - which I could have done. Although the Applicant's Heads of Argument are silent on the question of the alleged late filing of the Application for Review, Mr Snider, the Applicant's Counsel, like Mr Dutton, the Second Respondent's Counsel, addressed me at length on the question of condonation of the late filing of the Applicant's Heads of Argument and the alleged late filing of the Application for Review. What I am trying to explain is that it would be too artificial of me to ignore what Mr Snider had spent so much time putting across to me during argument. He, in a sense, supplemented the Respondent's Heads of Argument. It so happens that that argument does not make out a case for condonation of the delay in filing the Heads. I have, however, condoned the late filing, for reasons I have stated.

CONDONATION OF THE LATE FILING OF THE APPLICATION FOR REVIEW IN TERMS OF SECTION 145 OF THE ACT

64.In the light of the Applicant's attitude that the Application for Review was timeously filed, in spite of the postponement of the application of 13 March, 2000 as well as its purported Application for Review, the only issue to determine here is whether, indeed, the Application for Review was timeously filed.

65.Although the Notice of Motion refers to the Application for Review being, alternatively, in terms of sec 158(1)(g), Mr Snider did not, at any stage, in the course of his detailed address during argument, deal with sec 158(1)(g). Neither did Mr Dutton do so. In paragraph 10 of Boom's affidavit of 16 March, 2000, in support of the Applicant's Application for Condonation, it is stated;

"It is ,therefore, the submission of the Applicant that the application for review has in fact been brought within the time period contemplated in section 145 of the LRA..." (My underlining)

That is a further indication that sec 158(1)(g) is furtherance from the Applicant's mind, right now. I

am, therefore, spared the arduous task of dealing with an aspect that the Labour Appeal Court is still to deal with, i.e. just precisely what is intended in sec 158(1)(g) and whether it can, in fact, be relied on as a basis for an application for review of an arbitration award, independently of sec 145.

APPLICATION FOR CONDONATION OF THE LATE NOTING OF THE APPLICATION FOR REVIEW.

66.The only delay alluded to in sub-paragraph 5.6.4 of Myeni's affidavit, in support of the Second Respondent's opposition to the application for the late filing of its Heads of Argument timeously. It is apparent from the Order made on 13 March, 2000 that the parties discussed the alleged late filing of the Review Application and that they must have been in agreement thereon, because that Order reads as follows:

"IT IS ORDERED THAT:-

1.By agreement this matter is adjourned to the 20th March 2000.

2.The Applicant is to file an application for condonation for late filing of review application.

3.The Applicant tenders the Respondent's costs."

That is how I became seized with the application on 20 March, 2000.

56.In apparent compliance with the Order of 13 March, 2000, the Applicant made the following application, by way of Notice of Motion dated 16 March, 2000 and entitled;

"APPLICATION FOR CONDONATION IN TERMS OF RULE 7, READ TOGETHER WITH RULE 12(3) OF THE RULES OF THE LABOUR COURT."

The first paragraph of that Notice of Application reads;

*"**KINDLY TAKE NOTICE** that the Applicant intends applying to the above Honourable Court at a date and time fixed by the Registrar for an Order in respect of the filing of a (sic) Application for Review of an award of (sic) the Second Respondent dated 2 September, 1999."*

57.It will be realised that the Applicant does not, in the above paragraph, refer to an application for condonation of the late filing of its application.

58.In an affidavit by Boom, on 16 March, 2000, that document is described as follows:

"***AFFIDAVIT IN SUPPORT OF AN APPLICATION FOR CONDONATION IN TERMS OF RULE 7, READ WITH RULE 12 OF THE RULES OF THE LABOUR COURT."***

59.In a curiously worded paragraph 6 of Boom's Affidavit, the following is stated;

"6. I take this opportunity to place before the above Honourable Court the reasons why the above Honourable Court should entertain the Applicant's Review in terms of Sec 145 of the Labour Relations Act 1995 ("the LRA"). I submit that the Application for Review is in fact ***not late*** *due to the following reasons. (The emphasis is mine).*

60.Paragraphs 7,8,9 and 10 of Boom's Affidavit read as follows;

"7. The award made by the Second Respondent was served on the Applicant on 3 September, 1999 (a Friday), per telefax.

8.The six weeks time period contemplated in clause 145 of the LRA, calculated from 4 September in which an Application for Review is to be brought therefore starts on 4 September 1999.

9.The date six weeks from 3 September 1999 as counted from 4 September 1999 is 16 October 1999 ,which was a Saturday. The Application for Review was brought on 18 October 1999 the Monday following the Saturday of the 16th of October 1999 as applications for Review cannot be brought on a Saturday.

10.It is therefore the submission of the Applicant that the application for review has in fact been brought within the time period contemplated in section 145 of the LRA and the above Honourable Court is requested to entertain the Application for Review of the arbitration award dated 2 September 1999."(*My underlining).*

72.It was in response to Boom's aforementioned allegations that, for the first time, the Second Respondent alluded to the alleged late filing of the Application for Review, in an affidavit made by one Myeni on 16 March, 2000. Paragraph 7.1 of Myeni's affidavit reads;

"7.1 I confirm that the arbitration award was sent to the parties on 3 September 1999. I confirm that the Second Respondent's (sic) persists in his view that as applications for review are to be made within six weeks of the date that the award was served on the Applicant, the Application for Review should have been filed on or before 14 October 1999. In the premises the Application for Review is out time. Legal argument will (be) advanced in support of this contention at the hearing of the matter."

73.From all the aforegoing, it is evident that the Applicant is not, in fact, making an application for condonation of the alleged late noting of an application for review of the Commissioner's award. This is so, notwithstanding the fact that the application was postponed, on 13 March, 2000, specifically to enable the Applicant to make an application for condonation of the late filing of its Application for Review of the Commissioner's arbitration award. Surprisingly, the Second Respondent's counsel did not make much of this point during argument.

74.From the above excerpts from Boom's affidavit, on the one hand, and Myeni's affidavit, on the other hand, it is very clear that there is difference of interpretation between the two parties as to how the six- weeks period from 3 September should be calculated.

75.During argument, on 20 March, 2000, Mr Snider, Counsel for the Applicant, and Mr Dutton, Second Respondent's Counsel, were in agreement that the Applicant received the award on 3 September, 1999 and that the Application for Review was filed later than 14 October,1999. There was no disagreement as to the exact date on which it was filed. That dispute, regarding the Application for Review, in terms of sec 145, can be summed up as follows :-

- The award was received by the Applicant on 3 September, 1999;
- The Applicant's Notice of Motion is dated 14 October, 1999;
- Boom's Affidavit accompanying the Notice of Motion is dated 18 October, 1999;
- According to the Applicant, the Application for Review was issued and filed on 16 October, 1999;
- According to the Second Respondent, the Application for Review was issued and filed on 18 October, 1999;
- The date stamp on the Notice of Motion reflects that it was issued and filed on 19 October, 1999.

76.The next thing to determine is by when, in terms of the law, the Application for Review should have been made. For reasons that will be apparent later, I shall not deal, at this stage, with the alternative application in terms of sec 158(1)(g). The present enquiry is confined to sec 145. It is, of course, common course that the latter application ought to have been made **within** six weeks.

77.I have already stated that there is no reference in the Applicant's Heads of Argument to the question of when the Application for Review ought to have been made. It is apparent that the Applicant did not, before 13 March, entertain this question, whatsoever.

78.The Second Respondent, on the other hand, deals extensively, in his Heads of Argument dated 10 March, 2000, with the question whether the Application for Review was made timeously or otherwise. He even, subsequently, filed Supplementary Heads of Argument, dated 20 March, 2000,dealing primarily with the question of the alleged non-compliance with sec 145. The latter heads were forwarded after 20 March,2000, at a time when the Court had adjourned to consider its decision on that issue.

79.Arguing before me and being in agreement that the Commissioner's award was received by the Applicant on 3 September 1999, the Applicant's and the Second Respondent's counsel were in disagreement as to when the computation of the period of six weeks commenced. Mr Snider, for the Applicant, contended that it did so only on 4 September, whilst Mr Dutton, for the Second Respondent, was adamant that it commenced on the very day on which it was received, i.e. 3 September. There was also a dispute as to whether the computation of the six weeks period should be from the given day of the week (whether it was Friday 3 September or Saturday 4 September) to the corresponding day of the week (Friday or Saturday) of the sixth week. According to Mr Snider the computation should be from Saturday 4 September to Saturday 16 October, whereas Mr Dutton contended that it should be from Friday 3 September to Thursday 14 October.

80.In determining whether an application for review in terms of sec 145 has been timeously made or otherwise, the following considerations should be taken into account;

(a) According to Rule 1 of this Court "'court day' shall mean any day other than a Saturday, Sunday or Public Holiday, and only court days shall be included in the computation of any time expressed in days, prescribed by these rules or fixed by any order of court."

b)the *dies induciae*, by which is meant the period by which something that has to be done, in terms of the Rules of Court or any other law must be done, or governed by the Interpretation Act, 33 of 1957. Sec 4 of that Act

provides that the first day should be excluded and the last day included in computing such period, unless the last day falls on a Sunday or on a public holiday, in which case "the time shall be reckoned exclusively of the first day and exclusively also of such Sunday or Public holiday."

c)If a period of time is expressed in terms of weeks or months or years, the common law applies and weekends and public holidays falling within that period will be included in the computation. (*Lammas v Nicholls and Anderson 1911 TPD 968,at 977-8; Somdaka v Northern Insurance Co. Ltd 1961 (4) SA 764 (D) at 769,* where the common law rule is also referred to as "the ordinary civil rule" of computation; *Du Plessis v United Furnishing Co. 1921 OPD 156, at 159-60,* where the decision in *Lammas (supra)* was quoted with approval and applied; *Nair v Naicker 1942 NPD 3 at 3,* where it is stated thus :;" A period of two weeks from a Sunday will expire at the close of a Saturday, a period of two months from the 1st March at the close of 30 April, and a period of one year from the 1st January to the close of 31 December.")

d)At common law and in accordance with what is sometimes referred to as the *civiliter* or civil mode of computation, "the first day is to be included in, and the last day is to the excluded from, the computation." (*Joubert v Enslin 1910 AD 6, at 48).* I find it a frustrating exercise to try to determine the logic behind the decision that the first day should be included rather than excluded. On reading the reasoning of each of the three judges involved in a unanimous decision in that case, I could not help concluding that it was an "either or" situation and that the decision was arrived at, as it were, on a flip of the coin, based more on the principle of *stare decisis*. Moreover, as appears from the judgments of Innes,J. and Solomon,J, respectively, it is not as though the mode opted for works less hardship to the party which is adversely affected by the inclusion of the first day and the exclusion of the last day, which is the Applicant in the present case. In delivering the main judgment, with which Innes,J. and Solomon,J concurred, Lord De Villiers,C.J., after tracing the conflicting views in Roman law and Roman Dutch law on the question of the preferable interpretation ,and after citing decisions in which different views were expressed, states the following:

"I do not, however, purport to attempt to reconcile the different Dutch authorities with each other, because the question at issue appears to me to be settled by a carefully considered judgment of the Cape Supreme Court in the case of ***Cock vs. Cape of Good Hope Marine Assurance Company (3 Searle, S114).*** *It was an action on a policy of insurance dated January 22, 1857, on a schooner, for the period of twelve months from January 14, 1857, to January 14, 1858. The vessel was lost at 10pm on January, 14,1858. The Court held that the plaintiff could not recover on the policy inasmuch as the risk ceased at midnight on January 13. It was laid down that under general rule time must be computed civilly,* ***de diem****, and not* ***de momentom*** *and that in such civil computations fractions of a day are not admitted, but the term expires at the commencement of the last day. The judgment of the Court, which consisted of Hodges,C.J., Bell,*

Cloete, and Watermeyer, J.J., was delivered by Watermeyer, J, after taking nearly three months to consider. There appears to have been no appeal to the Privy Counsel, although the amount disputed was far above the appealable amount and the decision must, therefore, be regarded as one of unquestionable authority. If that decision is right, it is clear that, in the present case, the time allowed the Plaintiff for the exercise of his option expired at midnight, on Monday, October 4." (p25-26)

Innes,J, on his part, stated the following;

"Turning now to Roman-Dutch Law, which also recognised the distinction between the natural and the civil method of calculation, we find the authorities not entirely harmonious" (p35).

He goes on, after discussing other Roman law authorities, to state the following;

"In the case of ***Cock vs. Cape of Good Hope Assurance Co.(3 Searle P.114)****,it was held that the general rule of Roman-Dutch law was that time should be computed* ***civiliter****, and that in such computation the last day of the term should be excluded:but that in special cases the Court was allowed to the natural method of calculation. The application of the above principles in that instance caused great hardship, and the amount at stake was considerable, yet the Court did not feel justified in applying one of the Roman methods of civil computation, and allowing the last day of the period to run on until midnight. Now that was the considered decision of a strong Court; it is supported by considerable Roman-Dutch authority, and it was approved by the Court of the Southern African Republic in the case quoted to us at the Bar. I know of no South African decision to the contrary; certainly none was referred to during this argument. I think, under these circumstances, we should abide by the rule laid down nearly 50 years ago, and should hold that ... the computation should, as a general rule, be made by including the first day and excluding the last day..." (p36-7)*.

Innes J, goes on further and states the following;

"It would no doubt be more convenient to adopt the rule laid in Act 5 of 1883 for the interpretation of statutes and bye-laws, under which the first day is excluded and the last day included, more especially as the same method of calculation has been applied by a statute in regard to bills of exchange; but for reasons already stated.I do not think we are able to take that course."

Solomon ,J, like the other two learned Judges, went into the history of the subject and similarly found that there were contrary views thereon. He then deals with the phrase "within fourteen days

from date" and states the following;

"The words are 'within fourteen days from date' and it is at once apparent that the important word is the preposition 'from'.Does it include or exclude the day when the document was signed? Now ,as was pointed out by Lord Mansfield in the case of ***Pugh vs. The Duke of Leeds****, 'from' is a word of equivocal meaning, and may mean either inclusive or exclusive of the day on which the document was signed....The word 'from' being capable of bearing either or other of two meanings, which meaning is to be adopted in the present case? (The Learned Judge then discusses various cases in which the subject was dealt with and then concludes:) And in this mode of computation, as is pointed out in the judgment in the case of* ***Cock vs. The Cape of Good Hope Assurance Society****, the general rule was... that the first day is to be included in, and the last day is to be excluded from, the computation... In the case of* ***Cock,*** *already referred to, the application of the rule worked very great hardship, but the rule was nevertheless applied after full consideration by a strong Court, and that decision was not appealed from, nor has it been questioned so far as I know by any South African Court. On the contrary, the decision was approved of in* ***Cregoe vs. Bezuidenhout (4 O.R. 1995).****.. Moreover, there is abundant authority in the Roman-Dutch law for the rule, and consequently without discussing in detail the authorities, I come to the conclusion that we should now follow the law as laid down in* ***Cock's case****, and that consequently in computing the period of fourteen days we must hold that the time expired at the close of the 4th of October." (p47-9)*

Clarity as to the effect of the finding that the period expired at midnight on 4 October appears more clearly in the judgment of Innes, J, which, in that regard, reads;

"The time, therefore should be computed in the ordinary way with the result that the option period expired at midnight on Monday, 4th October. So that the notification sent to the Midland Company on the Tuesday morning was too late, and could create no contractual relationship between the parties."p38

81. *Joubert v Enslin (supra)* has been followed in numerous cases and there will be no point in trying to debate, at this late stage, how correct it was to conclude as was done therein. It is now law. Cf *Craig v Park 1914 TPD 96,* where the following is stated;

"The question is when the period of six weeks elapsed. In the case of ***Lammas v Nicholls Anderson (1911) TPD 968*** *it was laid down that (except in a case where days are prescribed, which falls under the statute) the common law obtains, and the rule of the common law, as laid down by the Appellate Division in* ***Joubert v Enslin,*** *which was followed in Lammas' case, was that the first day should be included... It seems a fine distinction to draw between days, and weeks or months. But the distinction has been drawn*

*in **Lammas' case**, and I do not think the Court ought to disturb it. Moreover, it is a sound rule to adopt, that where the statute law does not specifically provide, the common law obtains. It has already been laid down that, in the case of months, the common law should be adopted, and I see no difference in this respect between months and weeks."* (P97–8)

82.In *Black v Jacksons (SA) Enterprises 1952 (2) SA (N) 184*, Caney,A.J, stated the following;

*"In the computation of clear days it is commonly said that the first day and the last day are excluded, as also are Sundays and holidays. Three clear or whole business days must elapse after the first day. If, for instance, three clear days' notice of an application is being given, the day on which the notice is given must be followed by three business days, and the day for hearing of the application is the next day thereafter, at the earliest. **Bashford v Moolla 1932 NPD 673**. The present, however, is not a case of something to be done after three clear days, but something to be done within three clear days and in that respect it is distinguishable from **Bashford v Moolla, supra**. A plea or exception accordingly had to be filed before the expiry of three days, excluding Sundays and holidays, after the 21st December, and consequently before the expiry of 24th December."*

(Insofar as the Learned Judge omitted Saturdays, I can only think that the decision was given at a time when Saturdays were considered court days. I have no explanation otherwise and that discrepancy is of no consequence in the light of it being clearly stated in Rule 1 that Saturdays are also excluded when considering court days.)

These principles are also discussed in Superior Court Practice, by Erasmus, B1-9 to 10 and the Civil Practice of the Superior Court of South Africa by Herbstein and Van Winsen,4th edition,pages 281-2.

83.I find that submission without merit. I am in no doubt that sec 145 explicitly talks of six weeks and any calculation in respect thereof does not, in my view, entail the formula used when computing a period based on days. On the basis of the formula, as correctly summarised in Cameron's passage, quoted above, the computation of the six weeks period, in this case, commenced on Friday 3 September and ended on Thursday 14 October.

84.If the computation should be as contended by the Applicant, i.e. it should commence on Saturday 4 September and end on Saturday 16 October, the Applicant would not have been able to file the Application for Review

because Saturday is not a court day. The earliest that the Applicant could have filed the Application for Review, on that basis, was Monday 18 October, on which date Mr Snider contends the Notice of Motion, was, indeed, filed.

85.If, as contended by the Second Respondent, however, the computation should have commenced on Friday 3 September and ended on Thursday 14 October, the Applicant should have filed its Application for Review on Friday 15 October.

86.Both parties relied on an article by Cameron in Volume 27 LAWSA, page 212, para 235. That paragraph reads;

"A week beginning in any one day expires at the end of the day preceding the corresponding calender day in the week thereafter. Successive periods of weeks are, likewise, calculated to end at the end of the expiry of the day preceding the calender day corresponding to that on which the counting started."

I find the above a correct interpretation of the law, when computation is according to common law and not based on days and not on weeks, months or years- as I shall elaborate hereafter.

87.Whilst accepting Cameron's interpretation of the law on this aspect, Mr Snider argues that calculation in respect of sec 145 should not be in weeks but in days. His basis for that submission is that sec 145 (1)(a) says the application may be brought "within six weeks of the <u>date</u> that the award was served on the applicant..." (My underlining) He argues that, because there is reference to the "date", the computation has to be in accordance with the formula that applies on a calculation based on days.

88.I was referred to a decision of this Court in *Rustenburg Transitional Local Council v Siele NO and Others, 1999 12 BLLR 793 (LC)* - also reported as *(1999) 20 ILJ 2935 (J1401/98))*. It is the judgment of my brother Stelzner,A.J. In that matter, the applicant received the award on 4 February, 1998. On 18 March, 1998, the applicant wrote a letter to the CCMA, indicating its intention to apply for review in terms of sec 145, unaware that it had to direct its application to this Court. There is no indication, in the judgment, that Stelzner,A.J's attention was drawn to the applicable law in computing the period of six weeks prescribed in sec 145. Similarly, there is no indication that his attention was drawn to Cameron's article. It is quite clear in my mind that Stelzner,A.J was talking loosely when he mentioned the period of six weeks, in the following except;

"[3] The award was made by the commissioner on 28 January, 1998 and the applicant received the award on 4 February, 1998.

[4] On 18 March, 1998 (six weeks later) applicant wrote a letter to the CCMA in which it indicated that it wished to review the award." (My underling)

I have established that 4 February, 1998 was a Wednesday and that 18 March, 1998 was, similarly, a Wednesday. If Stelzner, A.J did, in fact, apply his mind and , the expression "six weeks later" meant that the six weeks period terminated on 18 March, 1998, then, in my view, he is, with respect, clearly wrong.

89.Mr Snider urged me to follow Stelzner,A.J's alleged decision that, in calculating a period of one week, for the purposes of arriving at the six weeks period mentioned in sec 145, one should exclude the given day of the week on which the incident occurred to a corresponding day in the following week corresponding to the one on which the counting started and go on in that fashion until the end of the sixth week. Mr Snider submitted that, on the basis of *stare decisis*, I am bound to follow *Rustenburg Transitional Local (supra).* As I have already stated, to the extent that that decision may be said to create a precedent for me, I find myself obliged to disagree with it. It is trite law that I am not bound to follow that decision if I find it clearly incorrect. (*Gemi v Minister of Justice, Transkei 1993 (2) SA 276 Tk. GD, at 286F; Faithfull and Gray 1907 TS 1081; R v Nxumalo 1939 AD 580; Harris v Minister of Interior 1952 (2) SA 471 (A)*) Cameron's statement is in agreement with authority, as already cited herein.

90.Even if I am wrong in adopting the calculation set out in Cameron's passage, in which event the period should have been calculated from Saturday 16 October, the Application for Review would still have been filed out of time. It was not, in fact, filed on 18 October, as Mr Snider suggests. The date stamp on the Notice of Motion is clearly 19 October, 1999, which still makes it one day out on that computation.

91.Whether the application should have been filed by Thursday 14 October or Friday 15 October or even Monday 18 October, it would not have been, in my view, extremely out of time. I would certainly have been inclined to grant an application for condonation of its late filing, had there been such an application .The Applicant has, however, resolved not to make such application and it must stand or fall by its decision.

92.In his Heads of Argument, the Second Respondent submits, further, that the Applicant has not complied with the provisions of Rule 7A, more specifically in the following respects;

a)Within ten days of the Registrar making the record available to an applicant, the applicant should furnish the Registrar and each of the parties with a copy of such record and the CCMA's reasons for the award (Rule 7A(6),7A(8) and 7A (9));

b)According to the Second Respondent, the record was made available on 28 October, 1999 and the Applicant should, therefore, have furnished the Second Respondent with the a copy thereof on or before 12 November, 1999, which it did not do;

c)Compliance with the above provisions of Rule 7A is peremptory.

93.My response to this argument is that it was not dealt with, by both counsel, during argument before me. Consequently, although a copy of the Second Respondent's Heads of Argument containing this point was furnished to the Applicant before both counsel addressed me, it is evident that both counsel expected me to deal, primarily, with the question whether or not the Application for Review was timeously brought and the question of the condonation of the late filing of the Applicant's Heads of Argument. It would, once more, be inappropriate and unfair, in my view, for me to base my judgment on the alleged failure by the Applicant to comply with the provisions of Rule 7A. I should, however, point out that Rule 7A was inserted by Government Gazette Notice R1100, on 4 September, 1998, which is clearly an indication that the legislature, on appropriate advice, felt that it was necessary to make such provisions. The Applicant was obliged to comply with those provisions. It is possible, however, that, if the matter had been argued before me, the Applicant would have demonstrated that it did comply. Of course, the Applicant would not have been able to explain its failure to comply with the provisions of Rule 7A, if it conceded that, in that it did not make an application for condonation of its alleged non-compliance with Rule 7A.

94.I would like, however, to stress the significance of compliance with the Rules of Court and the danger accompanying non-compliance therewith. It is common experience that litigants' legal representatives frequently fail to comply with requirements prescribed in the Rules, resulting in courts being inundated with applications for condonation. In this very instance, the Applicant's path to the ultimate application for condonation of its late filing of its Application for Review, is riddled with many instances of non-compliance or inadequate compliance with the Rules or other procedural requirements. I have no intention of listing such instances. One such example is having Struwig's affidavit in support of the Application for Condonation of the late filing of Heads of Argument "attested" by a senior security officer who was an employee of the Applicant's. That affidavit was signed and "attested" on 9 March, 2000 and had to be re-attested on 16 March, 2000. The Supreme Court, the High Court, the Labour Court and the Labour Appeal Court have frequently expressed themselves on the importance of complying with the Rules. *Cf. Donkor v Palmer, an unreported decision of the High Court, Transkei ,Case No.172/94,delivered on 16 November, 1998 and authorities cited therein; Kgobane and Another v Minister of Justice and Another 1969 (3) SA 365 (a), at 369.*

95.In *Classiclean (Pty) Ltd v Cwiu and Others,* an unreported decision of the Labour Appeal Court, case no.JA60/97, given on 10 June, 1998, Froneman,J.P. dealt with a situation where an employer which sought to overturn a reinstatement order in favour of its employees had failed to comply with some procedural requirements. It, for instance, failed to file a power of attorney within ten days of its filing the notice of appeal and it failed to file the record appeal within sixty days of the date of filing of the notice of appeal .It was only at the hearing of the appeal that senior counsel handed up an application for condonation "which was apparently signed by an official of the employer. The statement was not on oath, neither was it accompanied by a Notice of Motion for condonation of that error. Counsel could not suggest any legal basis for (the Court) having any regard to (that) statement..." In that regard, in giving judgment with which Myburgh,J.P. and Nicholson,J.A. concurred, stated the following;

"[6] In the recent past this Court has had to deal with a depressing monotonous number of matter where the failure of the practitioners and the practice to adhere to the rules has come to the fore. This is another one of them. In my view the rules are drafted in simple, understandable language. They provide procedures ... to deal simply and inexpensively with problems such as those that arose in this matter. Failure to adhere to them will be viewed with any increasingly jaundiced eye in future."

97.In *Blumenthal and Another v Thompson and Another 1994 (2) SA 118 (A)* Joubert,J.A. dealt with Appellate Division Rules which are akin to the aforementioned sub-sections of Rule 7A in this matter, in respect whereof there had been non-compliance by the appellants. Rule 5(1)(a) requires a Notice of Appeal to be filed with Registrar of the Appellate Division (now Supreme Court) within twenty days after an order for the notice appeal had been granted; Rule 5(3)(b) requires that a power of attorney authorising an appellant's attorney to prosecute the appeal be lodged with the Registrar within twenty days of the notice of appeal; Rule 5(4)(c) and(d) requires an appellant to lodge copies of record of the proceedings with the Registrar within three months of the date of the judgment or order appealed against; whilst Rule 6(2) provides that, before lodging the record with the Registrar, security for the respondent's costs be lodged by the appellants. After pointing out that it was the duty of legal practitioners to acquaint themselves with the relevant rules of the Court, Joubert, J.A., in giving the unanimous decision of the Court, dismissed the Application for Condonation. Of course, Joubert, J.A, pointed out that:"Even the appellants are not free to blame", and proceeded to point out why and how that was the case.121G-H. Consequently, the remarks at 121I-J are, in my respectful view, *obiter*. There too, no reference was made to *Webster and Another (supra).*

98.In conclusion, I should reiterate that the basis on which I dismissed the Application for Condonation of the late filing of the review is that it ought to have been filed on Thursday 14 October, 1999 and not, as contended

by Mr Snider, on the Applicant's behalf, on Monday 18 October,1999; that, in any event, even if the Applicant's contention that the application should have been filed by Monday 18 October, 1999, it is correct, it was, in fact, only filed on Tuesday 19 October, 1999, certainly out of time even by the Applicant's own contention; and that the Applicant has not applied for condonation for the late filing of the Application for Review.

99. Mr Dutton asked me, in the event of the application being dismissed, to make the Commissioner's award an order of this Court, which I do. The applicant is ordered to pay costs of the application, including costs occasioned by the Applicant's application for Condonation of the late-filing of its Heads of Argument.

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POSWA, AJ

LABOUR COURT OF SOUTH AFRICA