IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C952/2002

In the matter between:

LESLIE SIEGELAAR Applicant

And

MINISTER OF SAFETY AND SECURITY Respondent

JUDGEMENT

MURPHY, AJ

1. On 26 July 2004 I upheld a point in limine made by the respondent and dismissed the applicant's action in terms of section 6 the Employment Equity Act, 56 of 1998 ("the EEA") alleging unfair discrimination. At the time I reserved the reasons for my decision. These are my reasons.

2. On 13 September 2002 the applicant filed suit in the Labour Court alleging that he had been unfairly discriminated against by his employer, the respondent, on the basis of race and/or colour as contemplated in section 6 of the EEA.

3. The respondent delivered a response to the applicant's statement of claim on 3 October 2002 in which it disputes many of the facts and conclusions of law in the applicant's statement of claim and further avers that the applicant has delayed unreasonably in referring the matter to court in terms of section 10 of the EEA.

4. The applicant is an employee of the respondent within the meaning of EEA, the respondent similarly is an employer and the application is brought in terms of section 6(1) of the EEA. Section 6 of the EEA provides as follows:

1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, agenda, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

2) It is not unfair discrimination to –

(a). take affirmative action measures consistent with the purpose of this Act; or
(b). distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

5. In the pre-trial minute filed in accordance with rule 6 of the Labour Court rules, the parties were able to record many facts that are common cause. The applicant was appointed by the respondent as a constable on 29 March 1982 and was promoted to the rank of sergeant during 1993. Thereafter the applicant rose quickly through the ranks and by 1995 had been promoted to Captain and in 2001 was further promoted to Superintendent. During the period 1986 to February 2002 the applicant held several senior positions in the police force. He has been Station Commander at different police stations in the Western Cape and has served also as Detective Commander and ultimately Detective Branch Commander in Kraaifontein. Throughout his period of employment he has acquired an impressive range of academic qualifications, including a national diploma in police administration, an advanced diploma in public administration and management, and a Master's degree in public administration from the University of Stellenbosch. He has also completed a number of in-service training courses and certificates.

6. In July 2000 the respondent advertised various vacant posts on the level of Senior Superintendent. During or about August 2000 the applicant applied for one of these posts, namely, Commander Detective Services: Cape Town Central: Western Cape.

7. In terms of the respondent's advertisements applicants for the post were required to meet the following criteria:

- Proven managerial experience in the field of the post;
- Fluency in at least two of the official languages of which one must be English;

- A recognized degree or equivalent qualification applicable to the post would be a recommendation.

8. In addition, applicants were required to display competency in the core functions of the job which were:

    - Direct responsibility for the effective management of the detective service capacity at the station in accordance with the relevant policies, standards and directives;
    - Develop and maintain investigative priorities and objectives of the station in accordance with policing priorities and objectives as well as the crime combating strategy; and
    - Effective management and co-ordination of the functions and resources allocated to this component.

9. The applicant went through the interview process and on or about 23 October 2000 the promotion selection committee of the Western Cape office of the respondent placed the applicant as number 2 on its recommendation priority list. The process of recommendation was the culmination of an interview process directed by the provisions of the respondent's National Instruction 3/2000 dealing with appointments to posts on salary levels 11 to 15.

10. The selection committee was comprised of Commissioners Du Toit, Strydom and Holtzman. The committee was unable to reach consensus on a recommendation for the post in question. Its comments were as follows:

> The selection committee could not find consensus, whilst Commissioners Du Toit and Strydom are of the opinion that the candidate who scored the most marks during the adjudication…Superintendent De Beer should be considered for appointment…Commissioner Holtzman is of the opinion that the difference in marks between the first and the second candidate is marginal and given the fact that the second candidate (the applicant) is from the designated group [the applicant] should be considered for the post. The interview manager refers to section 18(4) of National Instruction 3/2000 and informs the selection panel that he will ask the Provincial Commissioner for a ruling on this matter. Both Commissioners Du Toit and Strydom reply that [the applicant] is equally qualified to take up the position, and [they] will accept the Provincial Commissioner's ruling…It is also the unanimous recommendation of the selection committee that either Superintendent De Beer or [the applicant] should be the second candidate in line, depending on the Provincial Commissioner's ruling.

11. On or about 23 October 2000 the Provincial Commissioner recommended Superintendent De Beer, a white male as number 1, and the applicant, a coloured male, as number 2. Superintendent De Beer scored 74% on the interview and the applicant scored 71.32%.

12. On or about 1 December 2000 the National Commissioner of Police appointed a third party, an African male, into the post. The third party had also been one of the candidates short-listed on the committee's priority list, but as he had attained a lesser score he was ranked lower than Superintendent de Beer and the applicant. The third party took up the position with effect from 1 December 2000.

13. Almost five months later, on 25 April 2001, the applicant lodged a grievance in relation to the appointment inter alia on the grounds that he had been unfairly discriminated against on the basis of race and/or colour.

14. According to the applicant, he thereafter attempted to exhaust the respondent's internal dispute resolution and grievance procedures from 25 April 2001 until 31 July 2001. When it became clear to him that he could not resolve the matter internally, he referred a dispute to the CCMA, with the assistance of SAPU, his trade union, in terms of section 10(2) of the EEA on 1 August 2001. A conciliation hearing was convened at the CCMA on 12 December 2001, which was postponed to a later date, and when the matter was eventually not resolved, the CCMA issued a certificate of outcome on 21 February 2002.

15. On 11 April 2002 Mr A G Miller of SAPU, ostensibly acting in terms of an agreement between the union and the respondent, the terms of which remain unclear and in respect of which no evidence has been adduced, referred the dispute between the parties to the CCMA for arbitration, purportedly in terms of section 10(6)(b) of the EEA (set out fully later in this judgment). The matter was then set down by the CCMA for arbitration on 15 August 2002. In an undated arbitration award the appointed commissioner ruled that the lack of clarity concerning the terms of the agreement to refer the matter to arbitration, occasioned by the failure of the parties to reduce the agreement to writing, had resulted in his lacking jurisdiction to determine the dispute, which ought properly in his opinion to have been referred to the Labour Court in terms of section 10(6)(a)) of the EEA.

16. The applicant then filed a statement of claim with the Labour Court on 13 September 2002.

17. As mentioned earlier, the respondent has taken issue with many of the factual and legal allegations made by the applicant. In particular, it avers that the appointment of the third party to the post by the National Commissioner, first having satisfied himself that the appointee was indeed qualified in all respects for the post, gave effect to the provisions of the National Instruction which form part of the collective agreement concluded with the South African Police Union (SAPU) and the respondent. It further maintains that the appointment was effected in terms of the respondent's employment equity plan and was aimed at the promotion of representivity at salary level 11 to 12.

18. The applicant's filing of his statement of claim with the Labour Court almost 22 months after the appointment prompted the respondent to raise a point *in limine* on the issue of delay. Anticipating the point, the applicant in paragraph 4 of his statement of claim sets out the facts upon which he relies to justify the delay in bringing the application. Paragraph 4 of the statement of claim reads as follows:

> Delay in bringing this Application
>
> 4.1 The Applicant attempted to exhaust the Respondent's internal dispute resolution and grievance procedures in order to resolve this matter from 25 April 2001 until 31 July 2001.
> 4.2 When it became clear that the internal procedures were exhausted, Applicant via his Trade union, referred the dispute to the CCMA on 1 August 2001.
> 4.3 On 12 December 2001 the CCMA issued a Certificate of Non-Resolution and on 11 April 2002 the dispute was referred to the CCMA for arbitration by agreement between the parties.
> 4.4 On 15 August 2002 and at the arbitration hearing, a dispute arose regarding the agreement to arbitrate at the CCMA. The CCMA held that it did not have jurisdiction and that the matter should be referred to the above Honorable Court.

19. The respondent in his response disputes these facts and contends with reference to the history of the dispute that the applicant delayed unreasonably in bringing the application to the Labour Court.

20. In the pre-trial minute dated 3 December 2002 the parties agreed that the issue of delay should be determined *in limine.*

21. Disputes in relation to the prohibition of unfair discrimination as contemplated in Chapter II of the EEA are to the processed in terms of section 10 of the EEA. The section reads as follows:

> 1) In this section the word *dispute* excludes a dispute about an unfair dismissal, which must be referred to the appropriate body for arbitration or adjudication in terms of Chapter VIII of the Labour Relations Act.
> 2) Any party to a dispute concerning this Chapter may refer the dispute in writing to the CCMA within 6 months after the act or omission that allegedly constitutes unfair discrimination.
> 3) The CCMA may at any time permit a party that shows good cause to refer the dispute after the relevant time limit set out in sub-section (2).
> 4) The party that refers a dispute must satisfy the CCMA that –
>
> (a). a copy of the referral has been served on every other party in the dispute; and
>
> (b). the referring party has made a reasonable attempt to resolve the dispute.
>
> 5) The CCMA must attempt to resolve the dispute through conciliation.
> 6) If the dispute remains unresolved after conciliation –
>
> (a) any party to the dispute may refer it to the Labour Court for adjudication; or
>
> (b). all the parties to the dispute may consent to arbitration of the dispute.
>
> 7) The relevant provisions of parts C and D of Chapter VII of the Labour Relations Act, with the changes required by context, apply in respect of a dispute in terms of this Chapter.

22. Although section 10 lays down a 6-month time limit within which an applicant is required to refer a matter to conciliation, it fails to specify a time limit for the referral of a dispute either to the Labour Court for adjudication or to voluntary arbitration.

23. Mr. Sutherland, on behalf of the respondent, with reference to section 10(7) of the EEA, which incorporates part C and D of Chapter VII of the Labour Relations Act into the EEA, submitted that section 136 of part C of Chapter VII of the Labour Relations Act could be relied on to support the contention that the applicant was obliged to make a valid referral to the Labour Court for adjudication, or to the CCMA for voluntary arbitration, within 90 days of the commissioner issuing the certificate of outcome on 21 February 2002, i.e. on or before 21 May 2002. Section 136 of the LRA deals with the appointment of a commissioner to resolve a dispute through arbitration and the relevant part of it reads:

> 1) If this Act requires a dispute to be resolved through arbitration, the commission must appoint a

commissioner to arbitrate the dispute, if –

(a) a commissioner has issued a certificate stating that the dispute remains unresolved; and

(b). within 90 days after the date on which the certificate was issued, any party to the dispute has requested that the dispute be resolved through arbitration. However, the commission, on good cause shown, may condone a party's non-observance of that time frame and allow a request for arbitration to be filed by the party after the expiry of the 90 day period.

24. I am persuaded that section 136(1) might be of application to referrals made under section 10(6)(b) of the EEA, meaning that referrals to consensual arbitration at the instance of the CCMA would have to be done within 90 days of the commissioner issuing a certificate, failing which an application for condonation would be necessary and would succeed only in the event of good cause shown. However, I doubt the subsection can apply in respect of referrals to the Labour Court in terms of section 10(6)(a). Section 136 deals with the appointment of a commissioner as an arbitrator and does not deal with adjudication of disputes by the Labour Court. Besides, there is no other provision in part C or D of Chapter VII of the Labour Relations Act which imposes any time limit within which disputes must be referred for adjudication to the Labour Court once conciliation has failed and the commissioner has issued a certificate of outcome in terms of section 135(5)(a). It would seem naturally to follow in accordance with common law principles that if the dispute remains unresolved after conciliation any party wishing to refer the dispute to the Labour Court should do so within a reasonable time. This then raises the question of what amounts to a reasonable time within the context of the EEA.

25. Before turning to this, it needs saying that the applicant has dealt with the *in limine* point in a less than satisfactory manner. As indicated earlier, the applicant was aware that there was a time frame problem at the time he delivered his statement of claim. And the respondent in his response put the question of unreasonable delay in referring the matter to adjudication squarely in issue. Thereafter it was agreed in the pre-trial minute that the issue would be dealt with on an *in limine* basis. Since the applicant is essentially seeking condonation for the delay, given the terms of the pre-trial minute he should have dealt with the matter by way of an interlocutory application delivered in accordance with rule 11 of the rules of the Labour Court. The rule provides as follows:

1) The following applications must be brought on notice, supported by affidavit:

(a). interlocutory applications;

(b). other applications incidental to, or pending, proceedings referred to in these rules that are not specifically provided for

in these rules; and

(c). any other applications for direction which may be sought from the court.

2) The requirement in sub-rule (1) that affidavits be filed does not apply to applications that deal only with procedural aspects.

26. Seeing that the point *in limine* goes beyond a mere procedural issue, Mr. Sutherland submitted, correctly in my view, that the applicant needed to bring an application on notice and supported by an affidavit. This the applicant has failed to do and has offered no reason at all for his non-compliance. Hence, at the commencement of the trial the court was without evidence in relation to the nature, extent and reasons for the delay of sufficient order to enable me to exercise a discretion to condone or not to condone it. However, by agreement between the parties, the applicant was sworn in and gave brief testimony upon which his counsel then relied to make an application for condonation. The applicant also called Mr Lennit Max, a member of Parliament, and previously Commissioner of Police for the Western Cape who also gave limited testimony of a general nature concerning the practice in respect of grievances within the police force to the effect that members are expected first to exhaust their internal remedies, with each step being clearly spelt out in the governing code and procedure, and that the department was obliged to process grievances expeditiously. As will become apparent presently, the testimony of both witnesses offered little in the way of explanation for the delays at the different stages of processing this matter.

27. Although the period in contention strictly speaking relates to the time taken between 21 February 2002, when the commissioner issued the certificate of outcome in respect of the failed conciliation, and the eventual referral of the dispute to the Labour Court on 13 September 2002, it is both appropriate and necessary to have regard to the overall time frame in which the dispute was processed in order to arrive at a conclusion as to whether the referral to the Labour Court was made within a reasonable time and whether condonation should be granted.

28. The appointment into the vacant post was made with effect from 1 December 2000. There is some uncertainty about when the applicant first acquired knowledge of the appointment. In his oral testimony he claimed to have become aware of the appointment in April 2001. Although Mr. Sutherland mounted no serious challenge to this in cross-examination, I doubt its correctness. In his internal grievance filed on 25 April 2001 the applicant states: “Gedeurende Januarie 2001 is bekend gemaak dat die pos aan

'n ander offiseer toegeken is". It is not clear whether he or his representative is stating that he became aware of the appointment in January 2001 or whether that is when it became a matter of general knowledge. Moreover, it seems improbable that as a senior officer he would not have become aware of the appointment sooner. Had he been aware in January it would mean that he waited for four months before filing his internal grievance on 25 April 2001. At the very least therefore the applicant was obliged to furnish a fuller explanation of this 4-month period. A bald statement that he first became aware of the appointment in April 2001 is not enough, especially in the face of a contradictory and ambiguous statement in his grievance form.

29. After filing his grievance the applicant waited a further four months before referring the dispute to the CCMA for conciliation on 1 August 2001. Mr. Max's evidence that the processing of grievances within the SAPS take time, hints at some general justification. Still, again, there is no evidence before me outlining what in fact transpired in relation to the applicant's grievance, and what steps, if any, were taken to move the process along and where responsibility lay for the delay in processing the grievance through the internal procedures.

30. Section 10(2) of the EEA requires a dispute alleging unfair discrimination to be referred in writing to the CCMA "within 6 months after the act or omission that allegedly constitutes unfair discrimination". The "act or omission" complained of by the applicant presumably would be the appointment of the successful candidate and the failure to appoint the applicant during December 2000, which would then have required a referral to the CCMA by the end of June 2001 at the latest. It is common cause that the referral was made on 1 August 2001. As the referral to the CCMA for conciliation was more than six months after the act or omission allegedly constituting unfair discrimination, one assumes that in order to found its jurisdiction the CCMA, on the basis of good cause shown, must have condoned the late referral in terms of section 10(3) of the EEA. Alternatively, it may have held that condonation was unnecessary because it considered some other later act or omission as the conduct constituting the discriminatory conduct. Again, though, there is no evidence on record dealing with these aspects, making difficult any assessment of the nature, extent and reasons for the delay, to say the least.

31. Almost four and a half months after the dispute was referred to the CCMA, a hearing was convened at the CCMA on 12 December 2001. A certificate of outcome was issued two and a half months later on

21 February 2002. In his oral testimony the applicant stated somewhat cryptically, without elucidation, that the conciliation hearing of December 2001 was postponed to February 2002 because the employer apparently had claimed it lacked a mandate. What that signifies is unclear. Moreover, the applicant has tendered no evidence by way of affidavit or in his oral testimony explaining why he did not expedite the matter, as he was entitled to do in terms of section 135 of the Labour Relations Act, applicable in EEA disputes by virtue of section 10(7) of the EEA. Section 135 provides that when a dispute has been referred to the CCMA, the CCMA must appoint a commissioner to attempt to resolve it through conciliation. The appointed commissioner is obliged to attempt to resolve the dispute through conciliation "within 30 days of the date the commission received the referral" – section 135(2). Section 135(5) provides that when conciliation has failed, or at the end of the 30-day period, or any further period agreed between the parties, the commissioner must issue a certificate stating whether or not the dispute has been resolved. No account has been offered for why the applicant did not avail himself of his right to obtain a certificate of outcome at the expiry of the 30-day period, nor has he made any clear assertion that the parties decided, in the interests of seeking a settlement, to extend the conciliation process by way of agreement. Accordingly, the explanation for why the conciliation process (normally expected to endure on average for no more than 30 days) was allowed to extend over a 7-month period, from 1 August 2001 until 21 February, is once more, at best, incomplete.

32. About 2 months after the issue of the certificate of outcome, the applicant's trade union referred the dispute to the CCMA for arbitration. The certificate of outcome reflects that the dispute could be referred to arbitration "by consent". As set out above, section 10(6) of the EEA allows for adjudication of unfair discrimination disputes by the Labour Court, with referrals to arbitration being permitted only by agreement between the parties. No evidence has been placed before the court setting out the terms of the agreement to refer the matter to arbitration. When the matter eventually came before the CCMA on 15 August 2002, the commissioner held that he did not have jurisdiction to determine the dispute on the grounds that there was not a valid agreement in terms of section 10(6)(b) of the EEA. The matter was then referred to this court a month later on 13 September 2002, 204 days after the certificate of outcome was issued.

33. In his oral testimony the applicant alleged that the professed agreement to refer the matter to arbitration unraveled because of a dispute concerning legal representation. The commissioner's ruling

on the other hand goes further, finding in effect that the terms of referral were never properly concluded. There is no affidavit or other evidence before me contesting the correctness of the commissioner's decision or offering any explanation or justification for the applicant labouring under a mistaken supposition of one kind or another. Accordingly, it is not easy to conclude that the defective referral to arbitration, leading to a six and a half month delay in referring the matter to the Labour Court after the issue of the certificate of outcome, was reasonable in the circumstances. The applicant's explanation is plainly insufficient.

34. As I have already discussed, I am not persuaded that section 136(1) of the Labour Relations Act is of any direct application to the determination of the time frame in which the referral to adjudication should have been made. Nevertheless, I do take the view that the review of the decision of the National Commissioner of Police, as with all review applications, should have been brought within a reasonable time. The legal principles applicable to determining the question of unreasonable delay in this regard are well established. In *Wolgroeiersafslaers v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 39A-C, Miller JA stated the principles as follows:

> In gevalle waar 'n bepaalde tydperk vir instelling van sodanige verrigtinge deur wetgewing of regulasies voorgeskryf is en die aansoekdoener nie aan die voorskrif voldoen nie, is die Hof by magte om te weier om die saak in hersiening te neem – of kan hy die versuim kondoneer. In sulke gevalle oefen die Hof 'n regterlike diskresie uit, met inagneming van alle tersaaklike omstandighede. In die afwesigheid van enige spesifieke tydsbepalings het ons Howe gedurende die afgelope sowat 70 jaar herhaaldelik daarop gewys dat die verrigtinge binne redelike tyd ingestel moet word……..Word beweer dat die aansoekdoener nie binne redelike tyd die saak by die Hof aanhangig gemaak het nie moet die Hof beslis (a) of die verrigtinge wel na verloop van 'n redelike tydperk eers ingestel is en (b) indien wel, of die onredelike vertraging oor die hoof gesien behoort te word. Weereens, soos dit my voorkom, met betrekking tot (b), oefen die Hof 'n regterlike diskresie uit, met inagneming van al die relevante omstandighede.

35. In other words, in determining whether the delay in bringing the proceedings is unreasonable the court is obliged to exercise a judicial discretion taking into account all the relevant circumstances. Guidance can also be sought from cases dealing with applications for condonation for special leave to appeal. In *Brummer v Gorfil Brothers Investments (Pty) Ltd & Others* 2000 (2) SA 837 (CC) the Constitutional Court stated:

> This court has held that an application for leave to appeal will be granted if it is in the interests of justice to do so and that

the existence of prospects of success, though an important consideration in deciding whether to grant leave to appeal, is not the only factor in the determination of the interests of justice. It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if that is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect.

36. In other words, the interests of justice are a central consideration in deciding whether to grant condonation for an unexplained delay. So too is the observance of appropriate standards in the administration of justice. Applications for condonation must be properly made in the appropriate manner in order to ensure they can be effectively adjudicated.

37. The question then is whether the interests of justice in this instance demand that I should condone a referral made to the Labour Court in terms of section 10(6)(a) of the EEA 204 days after the certificate of outcome was issued by the CCMA. At first glance, 204 days may not seem to be an inordinate lag in making the referral. Yet in *Lionmatch Co Ltd v Paper Printing Wood and Allied Workers Union and Others* 2001 (4) SA 149 (SCA) the court held that a period of five months was a delay of such a magnitude that it called for an explanation from the appellant in anticipation of the delay being raised as a bar to his claim. Moreover, in the context of employment relations, it is trite that the dispute resolution scheme enacted by different statutes aims at expedited dispute resolution. By analogy, referrals of unfair dismissal disputes to adjudication by the Labour Court as a rule must be made within 90 days after the CCMA has certified that the dispute has remained unresolved – section 191(11)(a). Similarly, disputes concerning alleged unfair labour practices related to protected disclosures must be referred for adjudication within 90 days. Hence, although section 136(1) of the Labour Relations Act has no direct application, the 90-day period is certainly a contextual yardstick against which to measure the issue of delay when no time limit has been specifically enacted.

38. Furthermore, section 7 of the Promotion of Administrative Justice Act 3 of 2000 offers a helpful indication of the norm. It goes some way towards codifying the common law principle for determining questions of unreasonable delay by establishing as a general principle that proceedings for judicial review should be instituted without unreasonable delay and not later than 180 days after the

exhaustion of internal remedies, where they exist.

39. Accordingly, when measured against these benchmarks, it would seem fair to conclude that the filing of the referral to adjudication 204 days after the exhaustion of the conciliation process is indeed an unreasonable delay. The only question therefore is whether is should be condoned in the light of the less than adequate application for condonation which has been made from the bar.

40. Taking into account all the relevant factors, I am of the opinion that the application for condonation should not be granted. The extent of the largely unexplained delay in referring the matter to adjudication is compounded by the delays throughout the other processes for which the applicant has advanced no adequate explanation on the papers or in his oral testimony. There is simply no satisfactory account for the delays in finalizing the internal processes, the conciliation process and the mistaken routing of the matter to arbitration before the CCMA. Added to that is the fact that the successful applicant was appointed to the post on 1 December 2000, and given that instatement is the normal remedy in matters such as this, it would not, in my view, be in the interests of justice after such an inordinate delay to reopen the dispute and to place the successful appointee in jeopardy of losing his position so long after his appointment - (see in this regard the unreported decision of the Constitutional Court in the *Head of Department, Department of Education, Limpopo Province v Settlers Agricultural High School and others* dated 2 October 2003). Any attempt to reopen the dispute will subject the operation of the post to an undesirable uncertainty and dislocation. Likewise, the prejudice facing the respondent is significant by virtue of the intervening period in all probability having induced the reasonable belief in the minds of the successful candidate's subordinates that the appointment has become unassailable.

41. Moreover, besides a bald allegation on the pleadings and in the applicant's oral testimony to the effect that his prospects of success are reasonable, there is no compelling evidence to suggest that the balance favours him on the merits or that he is deserving of protective promotion.

42. For the above reasons, I handed down the following order on 26 July 2004:

    42.1. The respondent's point in limine is upheld and the applicant's application for

condonation is refused.

42.2. The applicant's referral in terms of section 10(6) of the Employment Equity Act 65 of 1998 is dismissed.

42.3. There is no order as to costs.

MURPHY AJ

DATE OF HEARING: 26 July 2004

DATE OF JUDGEMENT: 26 July 2004

DATE OF REASONS: 12 August 2004

APPERANCES FOR THE APPLICANT:

Adv February instructed by Garon Nortje & Associates

APPEARANCES FOR THE RESPONDENT:

Adv R Sutherland SC instructed by the State Attorney