IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

CASE NO.: PA 3/99

In the matter between

QUEENSTOWN FUEL DISTRIBUTORS CC	Applicant
and	
J LABUSCHAGNE N.O.	1st Respondent
THE CCMA	2nd Respondent
FAWU & OTHERS	3rd Respondent

JUDGMENT

CONRADIE JA

[1] The point before us is a crisp one. It is whether the labour court is empowered to hear an application for the review of a decision of a commissioner of the Commission for Conciliation Mediation and Arbitration ('the CCMA') where there has been non-compliance with the provisions of section 145 of the Labour Relations Act 66 of 1995 ('the Act'). Landman J in the court *a quo* found that the court had no jurisdiction to condone the late delivery of an application for review in terms of s 145. The decision has been reported as *Queenstown Fuel Distributors CC v Labuschagne NO & others* [1999] 3 BLLR 268 (LC).

The relevant part of s 145 reads 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 –

within six weeks of the date that the award was served on the applicant, unless the alleged defect involves corruption; or
if the alleged defect involves corruption, within six weeks of the date that the applicant discovers the corruption.

(2) A defect referred to in subsection (1), means –

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 proceedings; or
exceeded the commissioner's powers; or

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

[3] On 24 August 1998 the appellant by telefax sent a copy of its application in terms of rule 7 of the rules of the labour court to the respondents. It is not clear when the application was filed with the registrar. I shall assume that it was filed on the same day. I should say something about the terminology. Rule 7(2) requires delivery of an application. The word 'delivery' is not defined. In the high court rules 'delivery' in this context means service on the parties and filing with the registrar. It seems sensible to suppose that 'delivery' in rule 7 means the same. On this assumption, and provided that delivery of the application is to be equated with 'apply to the labour court' (which is the expression used in section 145(1)),the application was one week late. I agree with Landman J that 'apply' in section 145 of the Act is meant to refer to the delivery of an application. It cannot reasonably be interpreted to mean that the application must within six weeks be brought before the court for a

hearing. For that there are too many logistical hurdles.

[4] There are cases in the labour court in which it was accepted, without debate, that the court had power to condone non-compliance with the provisions of s 145(1)(a) of the Act – *Mthembu & Mahomed Attorneys v CCMA & others* [1998] 2 BLLR 150 (LC); *Mlaba v Masonite (Africa) Ltd & others* [1998] 3 BLLR 291 (LC); *Metcash Trading Ltd t/a Metro Cash & Carry v Fobb & others* [1998] 11 BLLR 1136 (LC); *Keerom Casa Hotel v Heinrich & another* [1999] 1 BLLR 27 (LC). Shortly afterwards the labour appeal court in *Librapac CC v Fedcraw & others* (1999) 20 ILJ 1510 (LAC) declined to express a view on whether condonation of a failure to adhere to the time period laid down in s 145 was competent. Mlambo J had earlier stressed the important legislative objective of finality in dispute resolution (*Pep Stores (Pty) Ltd v Laka & others* (1998) 19 ILJ 1532 (LC) at 1450 F) the point was then dealt with in quick succession by Jajbhay AJ and Gon AJ. The former decided that non-compliance with s 145 could not be condoned. The latter decided that it could be. Both these judgments were delivered in May 1999 (see: *National Union of Mineworkers v CCMA & others* case no.: J 1918/98 delivered 7.5.99 unreported and *Dimbaza Foundries Ltd v CCMA & Others* [1999] 8 BLLR 779 (LC)). During the next month Marcus AJ contributed to the debate a judgment in which he found that condonation was competent. (*Kruger & Another v Macgregor NO & Another* case no.: J123/99 judgment delivered on 18 June 1999 – unreported.)

[5] Without having expressly or implicitly been given the power to do so, a

court cannot forgive non-compliance with a statutory enactment. There has been a suggestion in some of the reported decisions *(Mabombo v Shoprite Checkers Holdings (Pty) Ltd & others* [1998] 12 BLLR 1307 (LC) and *Mkhize v First National Bank & another* [1998] 11 BLLR 1141 (LC)) that an express power to condone non- compliance with s 145 of the Act is conferred on the labour court by s 158(1)(f). This paragraph provides that the labour court may 'subject to the provisions of this Act, condone the late filing of any document with, or the late referral of any dispute to, the court.' I am inclined to think that this provision is meant to accomplish no more than give the labour court (statutory) authority for what its rules require it to do.

[6] Anyway, I do not consider that I could, without doing violence to the language, interpret the phrase 'the late filing of a document' to mean the late delivery of an application commencing litigation. For although an application would have to be in documentary form I doubt whether it would, in the context, have been described by the legislature simply as a 'document'. It seems to me, also, that the legislature would not have characterised a disagreement about an award simply as a 'dispute'. The topic of a review is not the underlying dispute but the quality of a commissioner's decision. The challenge to an award by way of review is thus not a 'dispute' as contemplated. The way in which the word 'dispute' is used in the Act leaves no room for thinking that it is in section 158(1)(f) intended to mean anything other than a disagreement which comes from the shop floor. The use of the term throughout the Act confirms this. It is a term of art defined in s 212 of the Act to include an 'alleged dispute'. It

means a dispute about a matter of mutual interest (s 134). I should also not overlook the import of the phrase 'subject to the provisions of this Act.' If the legislature had intended to grant a blanket power to condone, it would not have made the power subject to other provisions of the Act. I accordingly do not consider that the Act confers express authority on the labour court to forgive non-compliance with the provisions of s 145.

[7] It was suggested in *Kruger & Another v Macgregor & Another (supra)* that the Constitution of the Republic of South Africa 108 of 1996 ('the Constitution') requires a court to interpret section 145 in a way which would make the time limit subject to discretionary enforcement by the court. One of the difficulties which I experience with this approach is that the decision of the constitutional court in *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) makes it clear that barring provisions are not necessarily constitutionally objectionable. At paragraphs [11] and [12] of the report (pp. 129 – 130) Didcott J remarks –

'[11] Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules

prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.

[12] It does not follow, however, that all limitations which achieve a result so laudable are constitutionally sound for that reason. Each must nevertheless be scrutinised to see whether its own particular range and terms are compatible with the right which s 22 bestows on everyone to have his or her justiciable disputes settled by a court of law. The right is denied altogether, of course, whenever an action gets barred eventually because it was not instituted within the time allowed. But the prospect of such an outcome is inherent in every case, no matter how generous or meagre the allowance may have been there, and it does not *per se* dispose of the point, as I view that at any rate. What counts rather, I believe, is the sufficiency or insufficiency, the adequacy or inadequacy, of the room which the limitation leaves open in the beginning of the exercise of the right.'

[8] It was not suggested by the appellant that the period of six weeks was so short that it infringed his constitutional right to a fair hearing. It does not, to me, seem to be so short. One must remember that the appellant has already had one hearing. The review application was not an entirely new step. It followed directly on the earlier litigation. For this reason it is not comparable to the six months' period for instituting action for the first time which was found to be too short in *Mohlomi*'s case (supra).

[9] If, then, an absolute time bar is not objectionable the next enquiry is

whether anything in the Constitution suggests that, in the case of s 145 of the Act, the legislature did not, despite what it may have said or omitted to say, intend the time bar to be immune from adjustment by the court. There is, in s 3 of the Act, the injunction that it must be interpreted in compliance with the Constitution. That, and an interpretation to give effect to its primary objects as well as to this country's international law obligations would have been required as a matter of course even if nothing had been said about it.

[10] Section 23(1) of the Constitution provides that 'everyone has the right to fair labour practices.' But the right to review an arbitration award, and the obligation to do so within a fixed time, cannot aptly be described as a 'labour practice'. Section 34 of the Constitution provides that 'everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.' It is a valuable provision, principally because it enshrines the right to a fair hearing as a fundamental value. But for guidance on what a fair hearing in a particular case might be, I think that it is necessary to embark upon an investigation of the common law. It is only in those rare cases where the common law is silent or where its provisions conflict with the 'spirit, purport and object of the Bill of Rights' that it would be necessary to place reliance on constitutional principles. In the present enquiry I think that the common law guidelines for compliance with time limits which have been developed and refined by jurists over many generations offer a surer passage to a correct answer.

[11] There are cases, many of which are collected in *Moluele v Deschatelets* 1950 (2) SA 670 (T), dealing with the power of a court, in the case of an appeal to it, to grant relief from a time constraint even though not expressly authorised to do so by the empowering statute. In the Transvaal, where the leading case is *Jackson v Smith* 1928 TPD 580, the court refused to condone non-compliance with the statutorily laid down time for noting an appeal. In the Cape, where an identical statutory provision was in force, the courts granted relief. In *South African Shipping Co Ltd v Liquidators Promoters Ltd* 1918 CPD 606, Searle J considered himself (at 614) 'bound to follow our decisions given over a long period of years… that the court has still an inherent power, though it be a matter of grace to suffer an appeal to proceed if it come to the conclusion that such should be done in the interests of justice.' Van Zyl J echoed these sentiments in *Bredell v Pienaar & Others* 1922 CPD 42 at 426 – 427 in saying that 'there may be cases of very great hardship in such matters if it were held that this court could in no circumstances give leave to note an appeal… and the view that I take is that, unless it is quite clear that this should not be done, the court should not give a decision which would deprive it of that power.'

[12] In *R v Whittle* 1914 CPD 774 the court held that it had the power to condone non-compliance with a statutorily determined period for noting a criminal appeal, Hopley J saying: 'The legislature must have had knowledge of the circumstances of the country and the course and methods by which its courts do their work; and it is not to be supposed

that they meant in certain circumstances to make it impossible for a convicted person to be heard in appeals. So that, however strongly they have worded the Act in question it would be wronging them to say that they meant to take away the inherent right in the courts of law to look into the special circumstances of such cases and to proceed in such manner as is best conducive to the interests of justice'

[13] In a case of condonation of non-compliance with the rules of court, the power, if not expressly given, may derive from the court's inherent reservoir of powers to regulate its own procedures in the interests of justice. (*Universal City Studios v Network Video* 1986 2 SA 734 (A) at 754 G – I) In *Leibowits & Others v Swartz & Others* 1974 2 SA 661 (T) it was said that a court has the inherent power to relax its own rules where substantial injustice would otherwise result. A court's own rules are, as it were, an internal affair. It does not follow that a court also has the power to excuse non-compliance with an Act of parliament. It will, however, as the cases quoted above show, be reluctant to conclude that parliament intended depriving it of its power to regulate the manner in which a litigant gains access to the court. It is in this spirit that I think I should approach the question of the interpretation of s 145. I find succour in the general precept of our common law that provisions hampering access to the courts are to be strictly construed (See: *Avex Air (Pty) Ltd v Borough of Vryheid* 1973 1 SA 617 (AD) at 622 A.)

[14] It is quite common for courts to interpret a statute in such a way as to conclude that they have impliedly been given the power to excuse non-

compliance with its terms. They express this conclusion by saying that the rule under consideration is directory and not peremptory. Whether a rule is in a given case directory or peremptory is determined by having regard to the language, scope and object of an enactment. (*Charlestown Town Board & Another v Vilakazi* 1951 3 SA 361 (A))

[15] In the case of peremptory prescriptions a mild form of relaxation is sometimes permissible. The courts have said that there are degrees of compliance with statutory precepts. Compliance with the letter is sometimes not required, so that even peremptory provisions need only be 'substantially' complied with. The difference is that with directory provisions non-compliance may be excused whereas with peremptory provisions only less than perfect compliance may be overlooked. The most celebrated case on this topic is *Maharaj & others v Rampersad* 1964 (4) SA 638 (A) at 646 C – E. I do not for a moment believe that I am here dealing with substantial compliance of a time barring provision. Being late by a week is not substantial compliance with section 145(1).

[16] As I see it, the only route for arriving at a conclusion that non-compliance with the time provision of section 145(1)(a) may be condoned, is to regard it as directory. A rule which is directory is not meant to be rigidly applied. A court which characterises a rule as directory is, in effect, saying that it has discretionary power to condone non-compliance with it.

[17] With regard specifically to time provisions, Schreiner JA had this to say in *Charlestown Town Board & Another v Vilakazi* (supra at 370 C – E):

‘ Although provisions as to time are sometimes dealt with as if they formed a special category in this connection, it seems clear that such enactments too must be dealt with in the light of its own language, scope and object and the consequences in relation to justice and convenience of adopting one view rather than the other.’

The question, then, I should ask myself is this: what are the consequences in relation to justice and convenience of deciding that the time provision in section 145(1)(a) is directory rather than peremptory? For that I need to analyse the general scheme of the Act.

[18] The Act was introduced to, *inter alia*, fundamentally reform earlier dispute resolution procedures. These were cumbersome and expensive. In theory an individual dismissal could go through a disciplinary enquiry, an internal appeal hearing, a full rehearing before the industrial court, an appeal to the labour appeal court and, finally, an appeal to the appellate division of the supreme court. The idea of the labour law reforms was to take most of the (less important) individual dismissals out of the courts altogether and to entrust their resolution to quasi-judicial bodies which could deal with them swiftly and relatively informally. The more socially disruptive – and potentially explosive – dismissals, such as dismissals arising from strike action or for operational reasons, were left to the labour court to resolve. So were individual dismissals considered to be automatically unfair (s 187). They involve sensitive issues like discrimination and victimization. Not only were the less contentious dismissals relegated to less important *fora* but the right to have the decisions of those *fora* adjusted by a superior tribunal was severely curtailed. Testing could now only be done on review

and then only on certain fairly narrow grounds.

[19] In contrast, the right to have a decision of the labour court tested by a higher tribunal was in section 174 and 175 of the Act made much wider. A traditional right of appeal was vouchsafed, circumscribed only by the requirement of leave to appeal, which might be obtained either from the court *a quo* or from the court of appeal. The notice of appeal has, of course, to be delivered within ten days of the granting of leave to appeal but a failure to adhere to the time period may be condoned. Express provision has been made therefor. But even here the earlier right to ascend to a further appeal tier – the supreme court of appeal - has been abolished.

[20] The pattern is that of greater indulgence in regard to matters of greater social and economic importance, and lesser indulgence where the aim of the dispute resolution procedures is to ensure that matters are dealt with swiftly and determined once and for all, subject to a review procedure designed to ensure an acceptable level of administrative justice. If the full amplitude of justice had been the quest, parties to any dismissal dispute before a commissioner of the CCMA would, as a matter of course, have been entitled to legal representation. As it is, parties may only be legally represented in dismissals for misconduct or incapacity in exceptional cases and with leave of the commissioner (s 140). What is envisaged, in short, is quite a summary procedure with no right of appeal. The legislature evidently considered that our country lacked the resources to permit individual dismissal disputes to go on endlessly. This is an

argument favouring a premptory intention

[21] There is another argument for peremptoriness. Section 145 of the Act is plainly modeled on s 33 of the Arbitration Act 42 of 1965. The wording of s 33 is different but in conception it is the same as s 145 of the Act. The ordinary time limit for bringing a review in each case is six weeks unless there is corruption in which case a review may, under each of the Acts, be brought within six weeks of the discovery of the corruption. The major difference between the procedures envisaged by the two Acts is that s 38 of the Arbitration Act confers a general power on the court to 'on good cause shown, extend any period of time fixed by or under this Act, whether such period has expired or not.' S 146 of the Act provides that the Arbitration Act is not to apply to any arbitration conducted by a commissioner. It is surprising that the power in s 38 of the Arbitration Act was not conferred on the labour court, particularly since arbitrations in terms of the Act are not voluntary.

[22] On the other hand it is not as though the six week period is inviolable. Where something as offensive as corruption has occurred, the permissible review period can be much longer. If the alleged defect in the proceedings involves corruption, an aggrieved disputant has six weeks from the discovery of the corruption to bring review proceedings. This means that a corrupt award may remain reviewable for many years. The legislature is plainly prepared to tolerate a long delay in the final adjudication of a labour dispute where public policy justifies it.

[23] There is another side to the coin. Although by far the greater part of the CCMA's time is taken up by individual dismissal disputes it is empowered to, and does, deal with other disputes as well. It is not necessary to recount them all. They encompass disputes about matters of mutual interest to employers and employees. They may be disputes of the utmost gravity, the correct resolution of which has profound socio-economic implications. In the case of such disputes, at any rate, it would seem reasonable to assume that the legislature did not wish any non-compliance with the time limit in s 145(1)(a), no matter how trivial and no matter how free from blame (and no matter how gross the defect in the arbitration proceedings) to be fatal to an application for review.

[24] I have not found the balancing of all these interests and conflicting *indiciae* an easy task. However, ultimately, the consideration that a court should endeavour to interpret legislation in such a way as to avoid relinquishing all control over the manner and timing of access to it weighs heavily with me. I would, respectfully adopting the words of Schreiner JA in *Charlestown Town Board Another v Vilakazi* (supra at 370 C – E), venture to conclude that considerations of justice and convenience dictate the acceptance of the proposition that the legislature intended the time limit for bringing review proceedings in s 145(1)(a) to be directory. In principle, therefore, it is possible to condone non-compliance with the time limit. It follows, however, from what I have said above, that condonation in the case of disputes over individual dismissals will not readily be granted. The excuse for non-compliance would have to be compelling, the case for attacking a defect in the proceedings would have to be cogent and the

defect would have to be of a kind which would result in a miscarriage of justice if it were allowed to stand.

[25] By adopting a policy of strict scrutiny of condonation applications in individual dismissal cases I think that the labour court would give effect to the intention of the legislature to swiftly resolve individual dismissal disputes by means of a restricted procedure, and to the desirable goal of making a successful contender, after the lapse of six weeks, feel secure in his award.

[26] Since the respondents were unrepresented at the appeal hearing, no question of costs arises. The following order issues:

The appeal succeeds. The judgment of the court *a quo* is set aside.

The matter is remitted to the court *a quo* to decide whether or not the appellant's failure to bring its application for review within six weeks should be condoned.

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CONRADIE JA

I agree

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NICHOLSON JA

I agree

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MOGOENG AJA

Date of Hearing:	21 September 1999
Date of Judgment:	3 November 1999
Attorney for the Appellant:	Wheeldon Pushmore & Cole
Counsel for the Appellant:	Adv. J G Grogan