IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C73/98

In the matter between :

SOBANTU XAYIYA **Applicant**

And

AFRICAN NATIONAL CONGRESS **First Respondent**

CCMA

Second Respondent

JUDGMENT

APPEARANCES:

On behalf of Applicant: **Adv Bryan Hack instructed by Bonisile Fonk & Associates**

On behalf of Respondent: **Mr B Conradie of Cheadle Thompson & Haysom**

Hearing: **17 September 1999**

CORAM : MacROBERT AJ

1. This opposed application concerns the review of second respondent's decision (i.e. that of the

CCMA) made on 9 January 1998 by its then Senior Convening Commissioner Ms Sarah Christie, to refuse to condone the applicant's late referral of a dispute pertaining to his dismissal by first respondent. The application also includes a request for condonation, alternatively purports to tender and exculpatory explanation in respect of the bringing of the review and the non-compliance in various instances of the rules and time periods contained therein in regard to the bringing of the review itself and in regard to the subsequent track of the matter, the details of which appear more fully below.

It is common cause that the review itself has been brought in terms of s158(1)(g) of the Labour Relations Act 66/1995 (LRA) although it is complicated by the contention that it was brought late (i.e. not within a reasonable time) and that further deficiencies in bringing the case require condonation, condonation being opposed by first respondent.

2. It is useful to set out a chronology of the important events relating to this matter as follows:

2.1 The Applicant was employed by the ANC as a media officer.

2.2 On 21 June 1996 a letter was sent to applicant by first respondent informing him that he had to attend a disciplinary hearing on 28 June. On 27 June a letter was received from applicant indicating he would not be able to attend a disciplinary inquiry as his motor vehicle was in a poor condition and he would not be able to make the trip from Cape Town to Johannesburg. He also indicated in his letter that the matter was being dealt with by the National Working Committee (NWC) of the African National Congress.

2.3 Mr Mamoepa of first respondent wrote to applicant on 28 June advising him that the disciplinary inquiry had been postponed to 1 July and that he could contact the Administrator for first respondent with regard to his travel arrangements. A further charge of absenteeism was added to the list of charges.

2.4 Applicant failed to attend the disciplinary inquiry scheduled for 1 July 1996 and it

was postponed and rescheduled for Tuesday 8 October after the NWC had confirmed that applicant's disciplinary inquiry should be handled by members of the Secretariate at National Headquarters. On 3 October 1996 Mr Mamoepa received a letter from applicant indicating that he needed more time to prepare and requesting a copy of the full charges. Mr Mamoepa wrote back on the same day 3 October 1996 indicating that in terms of the disciplinary code 24 hours was regarded as reasonable notice and that there would be no postponement and also advising that the charges had been communicated in previous correspondence and that further particulars would be presented at the inquiry.

2.5 The inquiry did not in fact take place on 8 October and Mr Mamoepa wrote to applicant on 9 October informing that the disciplinary inquiry would take place on 21 October and informed him that an additional charge had been levelled (i.e. that of absenteeism as indicated above).

2.6 On 10 October Mr Mamoepa received a letter from applicant requesting a complete list of all the charges levelled. Mr Mamoepa wrote back on 18 October advising that the inquiry was to be postponed to 31 October due to the unavailability of witnesses and reiterating that the charges had been communicated in previous correspondence. On the same day he received a letter from applicant, again requesting a copy of the chargesheet which was duly sent to him on 24 October.

2.7 On 29 October 1996 applicant requested more information in respect of the charges which was communicated to him on 14 November as well as a new date of the inquiry scheduled for 26 November. Mr Mamoepa received a letter from applicant "minutes before the inquiry" (see below) on 26 November 1996 wherein he stated that he would not attend the hearing until he had received further information whereafter he would prepare his defence with his legal advisors and inform headquarters to set a possible date for the inquiry. The chair of the disciplinary inquiry then ruled in the circumstances that the disciplinary hearing should proceed in the absence of applicant.

2.8 The charges included a refusal to perform legitimately an assigned task and/or obey instructions given by a supervisor without just or reasonable cause; insubordination; giving an unauthorised media briefing without the consent of his supervisor and/or head of department and unauthorised and/or uncommunicated absenteeism.

2.9 After evidence had been led in the absence of the applicant, he was found guilty on all four charges and in respect of charges 1, 2 and 4 the sanction of dismissal was imposed due to the perceived severity thereof.

2.10 The applicant's employment with first respondent was terminated on 14 December and first respondent informed applicant of his dismissal per letter dated 10 December 1996 which applicant contends he only received in February 1997 without any explanation as to why this was the case. No explanation for this gap was given in his affidavit – an explanation was tentatively ventured from the Bar that the delay may have been occasioned because Parliament was in recess.

2.11 Applicant then sought to appeal against the finding and sanction of the disciplinary inquiry. An appeal was lodged to the National Executive Committee (NEC) disciplinary chair on 18 February 1997, although applicant alleges he submitted a prior appeal to the National Secretariate of first respondent, although no details of this were given and no record of same is annexed to his papers (and as will be seen, first respondent denies ever receiving this).

2.12 On 30 October 1997 applicant referred the decision of the disciplinary committee to the CCMA and in his referral sought condonation for the late filing of the referral.

2.13 The application for condonation was considered on 9 January 1998 and was refused. This was conveyed to applicant via letter dated 14 January 1998.

2.14 It appears from the record that applicant then lodged Form 1, namely the notice of

commencement of proceedings contemplated by the rules of the Labour Court on 27 February 1997, but there is no stamp of the Registrar on the form. No notice of motion or supporting affidavits were filed at the time.

2.15 On 30 April 1998 a notice of motion was filed but without any supporting affidavits as is indicated by a letter from the registrar to applicant's attorneys dated 24 June 1998.

2.16 Only on 29 September 1998 were supporting affidavits filed by a candidate attorney of applicant's attorneys (the attorney who had previously dealt with matter having moved on). No explanation was given as to why the affidavits had not been filed in the first instance.

It is to be noted that the original notice of motion filed on 30 April was in the form of an urgent application which, in all the circumstances, was a somewhat extraordinary step.

There is no affidavit of service or indication of service of the notice of motion on first respondent. Only first respondent was cited as a respondent.

2.17 Applicant filed an amended notice of motion on 17 February 1999 and applied to join the CCMA as second respondent at the same time.

2.18 The record was filed on 18 March 1999 together with an application for condonation but this was accompanied by no affidavit or explanation as to why it was filed so late.

2.19 The CCMA's reasons were filed on 9 April 1999. First respondent's notice of intention to oppose, together with answering affidavit and annexures were filed on 5 May 1999 (a few days late, but condonation therefor was granted by Stelzner AJ on 18 August 1999, after consideration of an unopposed application for condonation).

2.20 The affidavit of the senior convening commissioner of the CCMA, Ms Sarah Christie, was filed on 20 May 1999.

2.21 On 22 June 1999, the Registrar wrote to applicant's attorneys advising that his direction of 5 May 1999 had not been complied with and informing the attorneys that the file would be stored in the archives. (The direction mentioned is not on file but apparently related to the transcript of the CCMA condonation application). This elicited an excited response from applicant's attorneys indicating that they had sought the transcript but the condonation application had not been mechanically recorded. The matter then proceeded.

2.22 Respondent does not oppose the amended notice of motion filed on 17 February 1999, nor the application to join the CCMA as second respondent.

2.23 No replying affidavit was filed by applicant.

2.24 Applicant's heads of argument were filed on 4 August 1999 but were not served on first respondent – the litany of breach of the rules and directions continued right up to hearing of the matter, leading to an appropriate apology being given from the Bar by applicant's counsel.

2.25 I now turn to deal with the substance of the application made by applicant, the relief sought and the grounds upon which respondent opposes.

3. The original application contained an order seeking to review the decision to dismiss the applicant and to reinstate him into his former position.

4. The amended application (dated 17 February 1999) which is the one serving before court, seeks the following orders:

a) To condone applicant's non-compliance with the rules of court in regard to service, forms and periods (precisely what is sought to be condoned is not specified in the application);

b) Reviewing and setting aside the order and decision of the CCMA of 9 January 1998 to refuse the application for condonation dated 30 October 1997;

c) Directing the CCMA to hear and determine applicant's unfair dismissal claim;

d) Costs.

5. Applicant's original affidavit dated 3 April 1998 contains an allegation that he was never informed of the appropriate date of the disciplinary hearing. This is gainsayed in the typed transcript of the minutes of the disciplinary hearing, whose contents are confirmed in first respondent's answering affidavit. Where disputes of fact occur in an opposed application of this nature, the rule in the decision of Plascon-Evans Paints v Van Riebeek Paints 1984 (3) SA 623 (A) holds sway namely that the matter must be dealt with on the basis of respondent's papers.

6. It is to be noted that applicant does not contend in his application that he did not know the date of the disciplinary inquiry and in this regard as mentioned in the chronology given above, on first respondent's version, applicant was aware of the date of inquiry. The relevant portion of the minute reads as follows: "*CDE (*acronym for comrade*) Mamoepa said that on 29 October 1996 CDE Xayiya requested more information in respect of the charges which was duly communicated to him on 14 November 1996 as well as the new date of the disciplinary inquiry that is 26 November 1996.*

He said that he received a letter from CDE Xayiya minutes before the inquiry on 26 November 1996, wherein he stated that he would not attend the disciplinary hearing until he had received further information, whereafter he would prepare his defence with his legal advisors and inform headquarters to set a possible date for the inquiry.

The chairperson then asked CDE Cowan whether adequate time had been given to CDE Xayiya in order for him to prepare his defence.

CDE M Cowan replied that CDE Xayiya had been given adequate time to prepare for the disciplinary hearing and that CDE Mamoepa had communicated all the relevant information as requested by CDE Xayiya in writing.

He said further that according to paragraph 6.1.2 of the disciplinary code and procedures for fulltime staff members, CDE Xayiya had been given more than 24 hours notice of the disciplinary hearing which is viewed as adequate time.

CDE Baker, the chairperson, then ruled that the disciplinary hearing should proceed in absentia." (As recorded above, applicant was thereafter dismissed after having been found guilty of the charges).

7. Applicant states in his founding papers that he only received the letter of dismissal in February 1997 but does not state precisely when this was received or why it was received so late having been despatched by first respondent to him on 10 December 1996 (this never having been made an issue).

8. Applicant testifies in his founding affidavit that he then appealed to the National Secretariate of first respondent, yet no copy of this appeal is annexed to his papers, nor does he state precisely when this was done. Receipt of such appeal is denied by first respondent and first respondent also contends that applicant did not follow the dictates in regard to any appeal as set out in first respondent's letter of 10 December 1996, namely that any such appeal should be written in one week to the first respondent's secretariate.

9. It is common cause that the applicant then "appealed" to the National Executive Committee (NEC) disciplinary committee chairperson, Mr Kadar Asmal on 18 February 1997 which elicited no response. First respondent admits that this letter was received but contended that it

was way out of time and in any event was directed to the wrong body.

10. On 30 October 1997 applicant referred a dispute pertaining to his dismissal to the CCMA without giving any explanation for the delay other than that he had been refused an internal appeal and in which he said further: "*I have been writing to them since January inquiring about my appeal"*. The referral ought to have been made at earliest within 30 days of 10 December 1996 (i.e. the date of first respondent's letter confirming the dismissal) although this letter indicated that applicant would be paid up to 31 January 1997. At latest it ought to have been referred within 30 days of 31 January 1997. There is no indication on the papers as to when applicant's last working day was. The date of dismissal is expressed in terms of s190 of the LRA to be the earlier of the date on which the contract of employment terminated or the date on which the employee left the service of the employer.

11. The CCMA, under the guise of Ms Sarah Christie, refused to grant condonation and her reasons for her decision are set out in the record.

12. Respondent's grounds of opposition to applicant's application are four-fold:

    12.1 Firstly, that the review application was not brought within a reasonable time and that applicant failed to follow the Labour Court rules in regard to service and time periods. In this regard respondent contends as follows:

        12.1.1 The decision of the CCMA to refuse to condone was made on 9 January 1998;

        12.1.2 Applicant then, at best for him, completed Form 1 in terms of the Labour Court rules on 27 February 1998;

        12.1.3 Thereafter the original "urgent application", without any supporting affidavits, was filed on 30 April 1998. There is no evidence of any service on first respondent and no affidavit of service was filed. In any

event the original application was wholly misconceived both in regard to its supposed "urgency" and in regard to the relief it sought, it being noted that second respondent was not joined at that time.

12.1.4 The Registrar of the Labour Court advised applicant's attorneys in writing on 24 June 1998 that no supporting affidavits had been filed.

12.1.5 Applicant's attorneys then sent copies of the affidavits to first respondent under cover of a letter dated 16 October 1998 (5 ½ months late), these having been filed, as indicated above, on 29 September 1998, with no explanation for the delay. No attempt had been made to track down the previous attorney who had handled the matter, (it being noted that the same firm of attorneys was involved throughout), whereafter first respondent's attorneys requested, on 8 December 1998, copies of the papers, proof of service of the notice of motion etc. This received no reply and a further letter from first respondent on 11 January 1999 following up its previous request received an acknowledgement on 12 January 1999 from applicant's attorneys and thereafter a letter of 20 January 1999 arrived advising that the matter was being removed from the roll and promising delivery of documents "in due course".

12.1.6 On 22 February 1999 applicant's attorneys furnished to first respondent's attorneys an amended notice of motion together with an application to join second respondent, which was filed on 27 February 1999.

In effect therefore, the application to review was only launched some 13 months after the decision of the CMMA was made with no, or at best, an inadequate explanation for this delay having been given.

12.1.7 Respondent contends that there would be prejudice to it inter alia as a result of the reorganisation of its operations (including numerous retrenchments) and that there were no longer any sub-headquarters in Cape Town.

12.2 Second, first respondent contends that the legal grounds for reviewing a decision of the CCMA declining to grant a condonation application include:

- the absence of jurisdiction;
- admission of inadmissible or incompetent evidence;
- rejection of competent or admissible evidence;
- bias, malice or corruption, interest in the cause;
- the failure to apply ones mind to the matter;
- gross irregularity

In the present matter, it is contended that applicant has not specified in his application on which ground this application is being brought and is accordingly defective. (The absence of specificity of any grounds being admitted by applicant in argument).

12.3 Thirdly, that the application is an appeal disguised as a review in the sense that applicant's real (but unarticulated) contention is that the application for condonation was premised on the dispute having been referred late because first respondent declined an appeal. In the premises first respondent contends that applicant's attack relates to the result of proceedings and not the method or process of proceedings.

12.4 Fourthly, that no good cause for condonation (i.e. with regard to the merits of the substantive dispute relating to the failure to condone the late referral) exists in that:

- no good reasons were given for the delay in referring the dispute, bearing in mind that the dispute was referred some 11 months after his dismissal and some 7 months after applicant's "appeal" letter.

- In this regard, in his application for condonation applicant gives the reason for the delay as being that: *"The ANC …..refuses to grant me an appeal. I have been writing to them since January about my appeal."*

However, there is no record of any letter or letters in January 1997. The only record of correspondence is applicant's letter to Mr Kadar Asmal of the NEC of first respondent in February 1997 and there is no trace of, or reference to, any further letters thereafter. Certainly none were appended to the application.

- Moreover, it may be noted that in applicant's application for condonation no case was made out as to the merits of the dismissal itself to give the Convening Commissioner any intimation that there may be some *prima facie* prospects of success in regard to the ultimate dispute, namely the dismissal itself.

There are therefore four separate but inter-related merits involved, namely:

- The merits of the dismissal itself;
- The merits of the lateness of the referral to conciliation of the dismissal;
- The merits of the delay in reviewing the decision of the CCMA to decline condonation; and
- The merits of any subsequent failures/lack of compliance with the rules in respect of which condonation is sought.

13. Against the background given above, I now turn to deal with the submissions of the parties.

14. It was contended on behalf of applicant that these proceedings were initiated approximately six weeks after the date of the letter informing him of the Commissioner's decision to refuse to condone and that that constitutes a reasonable time. It is however conceded that thereafter

the proceedings were delayed by non-compliance with the rules and forms of the Labour Court. It is also conceded that the applicant does not set out the exact grounds upon which he seeks to review the decision of second respondent. However, in the same breath it is contended that it is clear from the facts alleged by the applicant that the ground of review is the failure of the Senior Convening Commissioner properly to apply her mind to the application for condonation. It is contended that applicant's explanation for failing to comply with the 30 day period provided in s191(1) of the LRA is good inasmuch as he explained that he had received no response to his internal appeal against the decision of the first respondent.

In applicant's supplementary heads of argument it is contended that the second respondent had a legal duty to applicant to inform and advise him in regard to his lodgement of his application for condonation and that second respondent failed to carry out this legal duty.

I deal with these contentions below.

15. The thrust of respondent's legal contentions has been set out above. It is useful to set out some authorities. It was common cause between the parties that the application for review must be launched within a reasonable time. In this regard and by analogy, the decision of Kennedy AJ in Mothibeli v Western Vaal Metropolitan Sub-structure (J1/97) decided on 6 October 1999 may be helpful. This involved a late referral of a dispute concerning an unfair labour practice to the Labour Court. Conciliation of the dispute took place in December 1996 and the matter was referred to the Labour Court in July 1998 and an amended claim submitted in October 1998. A point was raised by the Respondent that there had been an unreasonable delay in referring the dispute to the Labour Court. At that stage neither the LRA nor the rules prescribed a time period (as is the case in respect of s158(1)(g) reviews), however, it was also common cause in that matter that it should have been referred within a reasonable time.

The court noted one of the objects of the LRA was to deal with disputes expeditiously and held that a claimant must show proper grounds as to why condonation should be granted before the matter may proceed on its merits. It held further that in that matter the delay was "manifestly unreasonable". It was held further that the explanation for the delay offered was unsatisfactory and further that the

prospects of success were not so great as to excuse the excessive delay and the application was dismissed with costs.

16. The Labour Appeal Court had occasion to deal with the late prosecution of a case in NUMSA & Others v AS Transmissions and Steerings (Pty) Ltd (JA91/98 decided on 29 September 1999). This was an appeal from the Industrial Court involving the referral in November 1989 of a dispute to the Industrial Court under the old LRA dealing with the dismissal of a number of employees. Leave had been given to the union to amend its application but nothing transpired until March 1993 when the union re-enrolled its application. However, no proof of authority was filed and the union was ordered to file this within 21 days. The union did nothing until June 1995 when the amended application was filed but was served on respondent only in November 1996. The matter was enrolled in November 1997 and heard in November 1998 when it was struck off the roll. The union appealed.

The court noted that s46(9) of the old Act required disputes to be resolved as soon as possible. The court held that even without such provision: *"the delay was so outrageously long that it has undermined all prospect of a fair determination of the issues".* It held further that a party faced with the delay is not obliged to use the rules of court to hurry its opponent's case along. In the result the court refused an application by the union for the late filing of proof of authority and the appeal was struck off the roll with costs.

17. In the matter of Achilles v HE Otto Import & Export (Pty) Ltd (C51/98), a decision of the Labour Court, respondent applied for condonation for the late filing of a response to the applicant's statement of case which had been filed in January 1999. By August 1999 no statement in response had been filed despite an agreement made in May that respondent would file its statement of defence within 10 days. The respondent employer then applied for condonation but still failed to file its statement in response.

It was held that the long period that had elapsed since May, coupled with a very weak and unacceptable explanation together with weak prospects of success on the merits led to condonation being refused. The delay was alleged to have been the fault of the respondent employer's attorneys.

The court reaffirmed the principle in Salojee & Another v Minister of Community Development 1965 (2) SA135 (A): *"There is a limit within which a litigant can explain non-compliance with the rules by referring to the negligence of the attorneys involved"*. The application for condonation was dismissed with costs.

18. In the matter of Rustenberg Transitional Local Council v Suli & Others (J1401/98 decided by Stelzner AJ on 18 August 1999) it was held that the delay in that matter was substantial and the explanation for it that was offered "*falls well short of what could be considered a reasonable and acceptable explanation, and, in any event, failed to cover considerable portions of the period of delay."* As there was no reasonable explanation for the delay there was therefore no need to consider the prospects of success, but in any event it was held on that matter that those prospects were "*slim"* . The court had reference to the decisions of Mkhize v First National Bank & Another (1998) 11 BLLR 1141 (LC) and Waverly Blankets v Nzimane & Others PA10/1998. Application for condonation was refused with costs.

19. In the matter of Bambi Hotel (Pty) Ltd v De Koker & Another, decided by the Labour Appeal Court on 10 August 1999, the court considered the late filing of the record. The employers had been dismissed in August 1994 and the Industrial Court had found the dismissals to be unfair and awarded compensation. The employer appealed. It made an effort to obtain a transcript of the record only two days after the record was due. No explanation for the delay was tendered other than that instructions had been received late. The court held: *"As a minimum requirement for condonation, there should have been an explanation of why (the employer) undertook nothing timeously ……and why ……a proper notice of appeal was only filed almost three weeks late….."* The court held further that the case on the merits and on the delay was too rickety to justify condonation and that even if the merits had not been as poor as they were, the court would have been reluctant to allow the appeal.

20. In SACCA (Pty) Ltd v Thipe & Another, another decision of the Labour Appeal Court handed down on 12 August 1999 (JA65/98) the court considered an appeal from the Industrial Court. The employee had referred a dispute and applied for a case number to the Industrial Court in June 1993. In February 1997 the applicant employee served the statement of case in terms of

rule 29(1) of the Industrial Court rules. The employer had warned the employee it would object and advised the employee to apply for condonation. The employee refused and a point in limine was raised. The Industrial Court held that the proper procedure was for the employee to be barred in terms of Rule 29(4) and the employer having failed to do this, was estopped from objecting to the delay.

The LAC noted that although Rule 29 contained no express time limit, a statement of case had to be filed within a reasonable time. A purposive approach should be adopted to the rule and it held that the Industrial Court had misunderstood the nature of Rule 29(4) which was not intended to penalise the respondent who chose not to utilise it. It was held that the point in limine should be upheld. Conradie JA held that the litigant may, by reason of a procedural transgression, lose the right to have the substance of his dispute determined. An applicant may not need formally to apply for condonation where no time limit was involved, but must put before the court an explanation as to why the delay should not deprive him of his right to proceed. This should be an exculpatory explanation coupled with proof that the employee had not "*overstepped the threshold of legitimacy"*.

21. In this section I note finally that a useful summary of the Labour Court's approach to applications for condonation, together with the relevant principles and some useful citations of authority may be found in the judgment of Stelzner AJ in the matter of R Brassey v Helderberg Maintenance Services CC (Case No C555/98).

22. Against the background of the authorities set out above and the authorities put up by respondent's counsel in argument, including the important decisions in All Round Tooling (Pty) Ltd v NUMSA (1998) 8BLLR 847 (LAC), Regal v African Superslate (Pty) Ltd 1962 (3) SA 18 (A), NUM v Council for Mineral Technology (1999) 3 BLLR 209 (LAC) and Melane v Santam Insurance Company Ltd 1962 (4) SA @532 (AD) it is useful to assess firstly the delay in bringing this application for review, the reasons for that delay and also the subsequent want of compliance with the rules of court.

23. As mentioned above, the applicant received the decision of the second respondent per the latter's letter of 14 January 1998, and the only item the applicant attended to expeditiously

thereafter was the lodgement of Form 1 on 27 February 1998. On 30 April 1998 a notice of motion was filed but without any supporting affidavits, these only being filed some five months later on 29 September. In other words the very earliest that it could be said that an application for review (inherently defective as the first application was – see above) was brought, was some 8 months after the second respondent's decision. The amended notice of motion and application to join second respondent was only filed on 17 February 1999 – some thirteen months after the decision.

24. These delays (which in my view are unreasonable bearing in mind one of the objects of the Labour Relations Act is the effective resolution of labour disputes, and also bearing in mind the principles contained in the cases referred to above) have not been explained either at all and if it can be regarded that there is any explanation (e.g. the want of efficiency of applicant's attorneys) the explanation is unacceptable. No effort was made by applicant or his attorneys to track down the previous attorney who had handled the matter to extract from him why these delays were occasioned. The cases cited above make it quite clear that there is a limit beyond which a Court will tolerate the tardiness of an attorney, and in my view those limits have been well exceeded in this matter. Having found this, it is not necessary for me to go further and consider the merits of applicant's case itself or indeed the further delays and want of compliance with the rules of this court that took place, for example in regard to the furnishing of the record of the CCMA, the lodging of the reasons of the CCMA etc..

25. In other words I am satisfied on all the facts and with reference to the authorities given above, that in the first instance the review was not brought within a reasonable time or timeously and no or no adequate explanation has been given in this respect. Furthermore, insofar as the want of compliance with the rules of court in regard to the lodgement of affidavits etc is concerned, once again these have not been adequately or at all explained and from start to finish the conduct of this matter has been unacceptable. Moreover the chronology and facts detailed above indicate that there are lengthy periods of delay in respect of which absolutely no explanation has been tendered at all.

26. If one were to turn to the merits of the review itself, once again the papers do not show a

cause of action or the ground(s) upon which the decision of second respondent is sought to be reviewed and even if the court was to accept that the ground was the failure of the Senior Convening Commissioner to apply her mind to the matter, this is not borne out by the facts or her reasons. Moreover, the explanation tendered by applicant as to why he referred the dispute so late is also flimsy and on the facts before court, it appears that he has not taken the court into its full confidence. He makes mention of bringing an appeal to the correct body in respect of which no trace can be found and certainly there is no trace of this annexed to his papers and such lodgement of an appeal is denied by first respondent.

Then, in the absence of any positive response from first respondent, the applicant sat on his hands from 18 February 1997 until 30 October 1997 when he referred the dispute to the CCMA – in other words some 8 ½ months elapsed before he took this step and no or inadequate explanation, and certainly not an acceptable one, was furnished by him to the CCMA in regard to his dilatoriness. The contention made by applicant's counsel that the CCMA was duty bound in terms of the Constitution and/or the LRA to actively assist in preparing his application for condonation has no merit. Even if there was such a positive duty, it would not have helped him in any event as he did not have good and acceptable grounds for condonation in the first place.

Moreover, the only section of the LRA which comes close to supporting this contention may be found in s148 under the heading: *"Commission may provide advice"* and which provides:

1. *<u>If asked</u> (my emphasis), the Commission may advise any party to a dispute in terms of this Act about the <u>procedure</u> (my emphasis) to be followed for the resolution of that dispute.*
2. *In response to a request for advice, the Commission may provide the advice that it considers appropriate."*

It is to be noted that there is no record that the applicant asked the Commission for any advice - this does not appear from his founding papers. Secondly it will be noted that the nature of any advice

given is about the procedure to be followed and not the substantive merits of any case. However, and importantly, the application for condonation was made by applicant on a pro-forma standard form prepared by the Commission itself as an aid to a party and which provides the relevant headings under which the information in support of an application for condonation may be brought. The applicant duly filled in this form and in my view the Commission more than acquitted whatever obligations may have been cast upon it. For the Commission to be duty bound to assist every applicant in an application for condonation or indeed any other matter on the basis as contended for by applicant, would put the Commission out of business in a very short time.

There is also no constitutional basis for upholding the contentions made by applicant's counsel in this regard.

27. In the premises and for the reasons given above, I am satisfied that the application for review was not brought within a reasonable time by applicant. Insofar as condonation is sought or alternatively an exculpatory explanation is offered in regard to the want of compliance by the applicant as to the forms, procedures and rules of this court, such condonation is refused and in any event I am of the view that there are little or no prospects on the substantive merits.

28. Accordingly the following order is made:

    28.1 The application is refused;

    28.2 The applicant is ordered to pay the first respondent's costs of suit on the High Court scale.

DATED AT CAPE TOWN ON THIS THE DAY OF OCTOBER 1999.

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MacROBERT A.J.