

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD IN JOHANNESBURG)**

CASE NO. JA10/04

In the matter between:

**KUNGWINI RESIDENTIAL ESTATE &
ADVENTURE SPORT CENTRE LIMITED**

APPELLANT

and

**MR LUCKY MHLONGO N.O.
THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

FIRST RESPONDENT

SECOND RESPONDENT

CARON DUTTON

THIRD RESPONDENT

J U D G M E N T

Mc CALL AJA

[1] The following facts are either common cause, not in dispute, or appear from the documents in the appeal:-

- a) The third respondent referred a dispute to the second respondent, the Commission for Conciliation, Mediation and Arbitration (“**the CCMA**”) in which she claimed that she was constructively dismissed by the appellant on 10 March 2002.

- b) The dispute was referred to the CCMA on 25 November 2002 on the prescribed form, and, at the foot of the second page, there was written, in manuscript, **“Application for condonation to be served upon Respondent party and CCMA shortly!”**.
- c) The referral form was served on the appellant by fax on 27 November 2002.
- d) An application for condonation of the late filing of the referral (**“the CONDONATION APPLICATION”**), dated 28 November 2002, was served on the appellant by fax on 3 December 2002.
- e) On 4 December 2002 the appellant’s attorneys wrote a letter to the third respondent’s legal representative, Advocate M.A. Hawyes (**“Hawyes”**), which is Annexure “A” to the founding affidavit in the review application (**“Annexure ‘A’”**) and sent a copy by fax to **“CASE MANAGEMENT CCMA”**. The letter states:-

**“RE : APPLICATION FOR CONDONATION –
CAROL DUTTON”**

Further to the above the following:

- 1. As the Commission in terms of Rule 31(3) has assigned no case number the Respondent is prevented from opposing your client’s application.**
- 2. Paragraph 3 of the application for condonation is in contravention with Rule 31(3)(e) of the Rules for the**

conduct of proceedings before the CCMA.

3. Take further notice that this office will be closed between the periods 5 December 2002 to 5 January 2003.

4. Client's right remain strictly reserved at all times."

- (f) On 16 January 2003 Hawyes, who represented the third respondent throughout these proceedings and appeared on her behalf in this appeal, replied to Annexure "A" as follows:-

"CAROL DUTTON / KUNGWINI RESIDENTIAL ESTATE AND ADVENTURE SPORTS CENTRE

Your letter dated the 04 December 2003 refers.

Case Number GA39954-02 has now been allocated to this matter by the CCMA.

You have fourteen (14) calendar days in which to lodge a notice of opposition and supporting affidavit.

Your reply by return is awaited." ("Annexure 'B'" to the founding affidavit) ("Annexure 'B'")

- (g) On 10 January 2003 Commissioner S. ALLI DADABHAI ("Commissioner Dadabhai") signed a document headed "CONDONATION RULING" which will hereinafter be referred to as such, in which, without notice to the appellant and the third respondent, he granted condonation for the late filing of the referral.

- h) The appellant received notice of the CONDONATION RULING on 22 January 2003.

- i) On 23 January 2003 the appellant filed an application with the CCMA for the rescission of the CONDONATION RULING. (**“the RESCISSION APPLICATION”**.)
- j) On 24 January 2003 the appellant also filed a notice of intention to oppose the CONDONATION APPLICATION and an answering affidavit by the sole director of the appellant, one JOHANN WALTERS (**“WALTERS”**).
- k) The third respondent filed a notice of her intention to oppose the RESCISSION APPLICATION and her answering affidavit, on 30 January 2003.
- l) On 4 February 2003 the appellant filed its replying affidavit.
- m) Before the RESCISSION APPLICATION had been set down for hearing the CCMA set the dispute regarding the third respondent’s alleged constructive dismissal down for hearing on 24 February 2003.
- n) Notwithstanding the fact that the RESCISSION APPLICATION was not before him on 24 February 2003, the first respondent, apparently at the request of the third respondent’s legal representative, proceeded to hear argument on the RESCISSION APPLICATION. He thereafter, in a written ruling (**“the RESCISSION RULING”**) which is dated 25 March 2003 on the first page and 3 March 2003 before the signature on the third page, ruled that the condonation ruling dated 10 January 2003 stands, refused the application for rescission of that ruling, and

directed the CCMA to “**reschedule the matter for conciliation**”.

o) The RESCISSION RULING was taken on review by the appellant.
 (“**the REVIEW APPLICATION**”).)

p) In paragraphs 1 and 2 of the order prayed in the REVIEW APPLICATION the appellant sought the following relief:-

- “1. That the Rescission Ruling dated 3 March 2003 and issued by Commissioner, Lucky Mhlongo of the CCMA, Gauteng under Case Number GA39954-02 be reviewed and/or set aside, in accordance with the provisions of section 158(1)(g) of the Act.**
- 2. That the Honourable Court determines this dispute in an appropriate manner alternatively make an appropriate order about the procedures to be followed to determine the dispute.”**

However, in the last paragraph (22) of the founding affidavit in the REVIEW APPLICATION Walters says:-

“Based on the aforesaid it is respectfully submitted that the Condonation Ruling as well as the Rescission Ruling be found to be fatally defective and for this reason the Applicant will respectfully pray the above Honourable Court to have the Condonation Ruling as well as the Rescission Ruling reviewed and set aside.”

- q) The REVIEW APPLICATION was opposed by the third respondent. It was heard by Francis J who delivered a written judgement on 2 December 2003 in which he dismissed the REVIEW APPLICATION with costs and ordered the CCMA to enrol the dispute for conciliation.
- r) An application to Francis J for leave to appeal was dismissed with costs.
- s) Thereafter this Court granted leave to appeal.

- [2] This matter has been beset with confusion and misconceptions and before considering the judgement in the Court a quo, it is necessary to identify the areas in which things went wrong.
- [3] In both his answering affidavit in opposition to the CONDONATION APPLICATION and in his founding affidavit in support of the REVIEW APPLICATION, Walters referred to a number of respects in which he contended that the CONDONATION APPLICATION did not comply with the Rules for Conduct of Proceedings before the CCMA ("the Rules"). One of them is the point also raised in paragraph 1 of annexure "A", namely that in terms of Rule 31(3)(b) the party bringing an application must state "**the case number assigned to the matter by the Commission**". The appellant also contends that the CONDONATION APPLICATION did not comply with Rules 31(3)(e) and (g) and Rules 31(4)(a) (c) and (d). A further contention was that there was non-compliance with Rules 9(2) and 10(2)(c) in that the CONDONATION APPLICATION did not accompany the referral document when the latter

was delivered to the Commission and the appellant. It is not necessary to determine all of these issues at this stage but they are matters which may have to be considered if and when the third respondent's CONDONATION APPLICATION is reconsidered.

- [4] It is the appellant's contention that irrespective of whether the objections referred to in paragraph (3) hereof are good in law, the fact of the matter was that the third respondent had agreed that the appellant would be allowed an opportunity to oppose the third respondent's application and to file an opposing affidavit within 14 calendar days of 15 January 2003. In this regard the appellant relied on Annexures "A" and "B".
- [5] In her answering affidavit opposing the REVIEW APPLICATION, the third respondent endeavoured to avoid the contention that the exchange of the letters Annexures "A" and "B" constituted an agreement by pointing out that at the time Annexure "B" was written, her representative had not received notification of the CONDONATION RULING. She says that the case number was afforded to the appellant **"as a matter of courtesy"** and that **"The letter has no power to bind a Commissioner in terms of the Rules"**. Also **"My representative's letter was not designed to afford the Applicant rights that he was not entitled to in terms of the Rules or otherwise"**.
- [6] In his Heads of Argument on appeal, Hawyees, referring to Annexure "B" says **"this was never intended as an agreement to the late filing of the Notice of Opposition and opposing affidavit. Further elaboration will follow"**. That elaboration appears to be the following paragraphs in

Hawyes' Heads of Argument:-

“20.5 It is not common cause that the Third Respondent agreed on 16 January 2003 to the Appellant filing its notice of opposition and supporting affidavits. At the time the letter was sent out the Third Respondent had not yet received notification of Commissioner Dadabhai's condonation ruling and was unsure of the status of the case with the CCMA. Almost six (6) weeks had passed since the lodgment of the dispute with the CCMA and Third Respondent was anxious to know what was going on. Third Respondents legal representative phoned the CCMA and was advised of the allocation of a case number but was not advised on the outcome of any condonation ruling.

Having noted the clear discrepancy in the CCMA Rules the Third Respondents legal representative was uncertain of his next move and decided to send a letter to the Appellants representative advising him of the case number and calling for a response within 14 days. The letter may have been construed as an agreement to permit the Appellant to file an opposing affidavit had the Third Respondents legal representative been aware of Commissioner Dadabhai's condonation ruling at the time the letter dated 16 January 2003 was sent out. As it turns out Commissioner Dadabhai only dispatched his condonation ruling to the parties on or about 22 January 2003.

20.6 An important further point to remember is that the condonation ruling had already been made (10 January 2003) prior to the dispatch of the “consent:” letter (16 January 2003). CCMA Rules and/or practice do not permit the parties to set aside a condonation ruling or any ruling for that matter made by the Commission by agreement. The aforementioned letter was thus inconsequential in granting the Appellant additional rights that they were not afforded by the CCMA Rules or general accepted practice.”

- [7] In my opinion, Annexure “**B**”, could only be interpreted to mean that Hawyes, having furnished the appellant’s attorney with the case number, intended to afford the appellant 14 calendar days from the date of his letter in which to lodge notice of opposition and a supporting affidavit.
- [8] The fact that Hawyes was, at the time of writing Annexure “**B**” unaware of the CONDONATION RULING is not relevant to the determination of his intention in writing of Annexure “**B**”. Of course, the fact that Annexure “**B**” was written could not, in itself, alter or undo the CONDONATION RULING. However, the existence of Annexures “**A**” and “**B**” calls into question the third respondent’s decision to oppose the rescission application and was an important factor which should have been taken into account in deciding the rescission application. I say this because Annexure “**A**” clearly constitutes an intimation that the appellant intended to oppose the application for condonation and Annexure “**B**” shows, at the very least, that Hawyes understood that the appellant intended to oppose that application.

- [9] Bearing in mind that Hawyes was the author of Annexure “B” and almost certainly the drafter of the third respondent’s affidavits opposing the RESCISSION APPLICATION and the REVIEW APPLICATION, I question the propriety of the conduct of Hawyes in appearing on behalf of the third respondent in this appeal. His position was not unlike that of an attorney who acts as the attorney of record in a matter in which he is an important witness. Indeed, some of Hawyes’ submissions in his Heads of Argument were tantamount to the giving of evidence regarding his purpose and intention in writing Annexure “B”. The undesirability of an attorney acting as an attorney of record in a matter in which he is to be an important witness and in which his credibility may be in issue was dealt with by Wessels J in the case of *Elgin Engineering Co. (Pty) Ltd v Hillview Motor Transport 1961 (4) SA 450 (D) at 454D-H*. The result of Hawyes appearing as counsel for the third respondent in this appeal was that he had to suffer the embarrassment of answering the Court’s questions regarding the meaning and interpretation of the letter of which he was the author and of his attempts to justify his client’s conduct in opposing the RESCISSION APPLICATION.
- [10] I must assume that Commissioner Dadabhai was unaware of the existence of Annexure “A” when he delivered his CONDONATION RULING, although it is not disputed that a copy of Annexure “A” was sent to the CCMA. I doubt whether Commissioner Dadabhai would have made the CONDONATION RULING, without any notice to the appellant, had he been aware of the indication that the appellant intended to oppose the CONDONATION APPLICATION. Annexure “A” would have drawn his attention to the fact that the notice of application did not comply with

Rule 31(3)(e) in that, in paragraph 3, on the first page of the notice of application, the respondent was afforded only 5 days from the date of service of the application in which to deliver a notice of opposition and an answering affidavit, instead of the 14 days provided for in Rule 31(3)(e).

- [11] Whether or not Commissioner Dadabhai was aware of the existence of Annexure “A”, he ought, in any event, to have noticed that the third respondent had given the appellant less time to file a notice of opposition and answering affidavit than she was required to give in terms of Rule 31(3)(e). The giving of such short notice is sometimes referred to as short service. The effect of short service of a summons is discussed in *Herbstein and Van Winsen, The Civil Practice of the Superior Courts in South Africa*, 4th Ed. at page 283.
- [12] The cases are not altogether consistent but in some it has been held that, if insufficient time has been given, the service will be bad and fresh service will have to be made whilst others have held that short service is a fatal irregularity. See also *Collier v Algoa Township Ltd 1947 (2) SA 559 (E)* at 560; *Shield Insurance Co. Ltd v van Wyk 1976 (1) SA 770 (NCD)*; *Staatsdiensliga van Suid-Afrika en Andere v Minister van Waterwese 1990 (2) SA 440 (N)* at 460E-F; *Turquoise River Inc. v McMnamin and Others 1992 (3) SA 653 at 656F-657D*. It is arguable, therefore, that the CONDONATION APPLICATION was fatally defective, but this is a matter which will have to be decided should that application be reconsidered.

- [13] Another point is that in terms of Rule 31(9)(a), the Commission must allocate a date for the hearing of an application, including an application for condonation, and in terms of Rule 31(9)(b) the Commission must notify the parties of the date, time and place of the hearing of the application.

Rule 31(10) provides that:-

“Despite this rule, the Commission or a commissioner may determine an application in any manner it deems fit.”

However, I do not think that this provision can possibly be relied upon to dispense with the giving of notice to the parties, or at least to the applicant if the respondent is in default, of the commissioner’s intention to hear a matter. For a commissioner to hear and determine an application for condonation without notice to the parties would be to ignore the *audi alterem partem* rule. There is no indication in the papers that any such notice was given to either the third respondent, who had applied for condonation, or the appellant. Although it may be argued that it was not necessary to give notice to the appellant, since, although it was a party as contemplated by Rule 31, it had not given notice of intention to oppose the application (leaving aside Annexure “A”), the same cannot be said about notice to the third respondent. Had notice of the intention to hear the condonation application been given to the third respondent’s legal representative, Hawyes, he would surely have had an obligation to call Annexure “A” to the attention of the CCMA or at least to advise the appellant’s attorneys of the set down of the application. Had that occurred it is unlikely that the CONDONATION RULING would have

been made in the absence of both parties and the huge wastage of time and effort which has occurred in this matter would have been avoided.

- [14] As it happens, the appellant did not, at the time, seek to have the CONDONATION RULING set aside on review and did not appeal against it. Instead it sought to rescind the CONDONATION RULING.
- [15] Section 144 of the Labour Relations Act, No. 66 of 1995 (“**the Act**”) provides, *inter alia*, that any commissioner who has issued an arbitration award or ruling, or any other commissioner appointed by the director for that purpose, may on that commissioner’s own accord, or, on the application of any affected party, vary or rescind an arbitration award or ruling “(a) erroneously sought or erroneously made in the absence of any party affected by that award”. It seems that the omission of the words “or ruling” at the end of paragraph (a) is a *causus omissus* and that this is a case in which this can be remedied by reading the provision as if those words were there. Cf. *Vaughan-Heapy v Natal Performing Arts Council 1991 (1) SA 191 (D) at 195I-196B*.
- [16] In my view a ruling on an application for condonation of the failure to refer a dispute within the 30 days provided for in section 191(1)(b)(i) of the Act is a ruling contemplated by section 144 of the Act which may be rescinded. No one has contended to the contrary in this case.
- [17] The words “**erroneously sought or erroneously granted in the absence of a party affected thereby**” have been considered in a number of cases in the High Court. In the case of *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) at 9I-10B* the Supreme

Court of Appeal referred to, but did not, resolve the conflicting approaches of the courts to the question as to whether or not the “**error**” must be patent from the record or whether reference may be had to external evidence of the “**error**”.

- [18] In my view, however, it does not matter, in the present case, which approach is adopted. It was apparent from the record that Rule 31(3)(e) had not been complied with and it must have appeared from the record that notice of set down of the CONDONATION APPLICATION had not been given to either of the parties. In the circumstances Commissioner Dadabhai ought not to have considered and determined the CONDONATION APPLICATION, at least not without addressing the question of the short service and the absence of notice to the parties. Cf. *Nyingwa v Moolman NO 1993 (2) SA 508 (Tk) at 510D-G*.
- [19] I have already referred to Rule 31(9) which requires the Commission to allocate a date for the hearing of an application and to notify the parties of that date. It was common cause that that was not done in the case of the RESCISSION APPLICATION in this matter. Instead the Commissioner, in the face of an objection by the applicant, and apparently at the instance of Hawyes, took it upon himself to use the occasion for which the conciliation proceedings had been set down (incorrectly, in the light of the RESCISSION APPLICATION), in order to hear and determine the RESCISSION APPLICATION. In my view, the fact that the Commissioner proceeded to hear the rescission application, in the face of the objection by the appellant and without allowing his legal representative time to prepare, this was an irregularity which, in itself, warranted the review and setting aside of the RESCISSION RULING.

Even if I am wrong, however, and Rule 31(10) empowered the commissioner to hear and determine the application which had not been set down, I am of the view that the Commissioner, in deciding the RESCISSION APPLICATION against the appellant, misdirected himself in certain material respects and that his reasons did not justify his decision.

[20] This matter has been bedevilled by the issue as to whether or not a person bringing an application is obliged to state on it the case number assigned by the Commission at the time when the application is served on the respondent and whether, in this regard, there is a conflict between Rule 31(3)(b) and Rule 10(2)(b). The use of the word “must” in Rule 31(3)(b) in regard to what the party bringing the application is required to state makes those requirements peremptory. Rule 10(2)(b), which is also peremptory, requires the referring party to attach to the referral document written proof that the referring document was served on the parties to the dispute. The first respondent in his RESCISSION RULING said that “it is impractical to have a case number assigned without having served the other party to the dispute” and expressed the view that Rule 10 may be in conflict with Rule 31(3)(b).

[21] In my view there is no conflict between the two provisions. There is no reason why an applicant should not obtain a case number from the commission and insert it in the notice of application before serving the application on the other party or parties. Moreover, for practical reasons, this is what should be done. The alternative would mean that the respondent will either have to endeavour to obtain the case number from the office of the Commission, after the application has been delivered to

the Commission, or that the respondent will deliver a notice of opposition without a case number on it. The first possibility could present difficulties, bearing in mind that documents may, in terms of Rule 7 be filed with the Commission by sending a copy by registered post or by faxing it. Without a case number as a reference the office of the Commission may have difficulty in tracing a case in order to furnish the respondent with the case number. The second possibility could result in the opposing documents, without a case number, being mislaid. I do not understand the first respondent's reasons for criticising what the appellant's representative did and why he considers that what he did was unfair. Be that as it may, he found that the appellant's representative used the absence of a case number "as an excuse not to oppose the application in order to proceed with holidays which was done after receipt of the application (sic)". He said that:-

"In light of Rule 10, I find that the applicant had no *bona fide* defence to oppose the application for condonation."

These findings by the first respondent were, in my view, a gross misdirection. Firstly, the respondent was perfectly entitled to refer to Rule 31(3) and to rely upon the absence of a case number as a reason for not filing a notice of opposition. Secondly, to say that the appellant's representative used this as an excuse to enable him to go on holiday appears to be mere conjecture not supported by any evidence. Thirdly, the finding ignores the fact that Annexure "A" also drew attention to the non-compliance with Rule 31(3)(e). Fourthly, even assuming that the appellant's representative was not justified in not filing a notice of opposition and opposing affidavit within 14 days, as required by Rule

31(5)(a), the first respondent gives no reason as to why, in the circumstances of the case, that neglect on the part of the appellant's representative should be visited upon the appellant by depriving it of the opportunity to oppose the **CONDONATION APPLICATION**.

[22] I am not sure what the first respondent meant by “**no *bona fide* defence to oppose the application for condonation**”. If by that he meant that the appellant had no *bona fide* reason for not filing notice of opposition timeously, that finding is not supported by the evidence. As I have said, Annexure “A” does convey an intention to oppose the application. If the first respondent meant that the appellant had no *bona fide* grounds for opposing the **CONDONATION APPLICATION**, that was certainly a misdirection as that was not in issue between the parties in the **RESCISSION APPLICATION**.

[23] The first respondent further found that it was not for the appellant to determine whether or not the **CONDONATION APPLICATION** was defective and that he should have filed a notice of opposition in terms of Rule 31(5)(a) contending that the referral be dismissed “**on technical basis (sic)**”. Whilst there may appear to be some merit in this argument, it ignores the fact that it was the appellant's legal representative, not Walters, who wrote Annexure “A”. Although Walters did say in his affidavit in support of the RESCISSION APPLICATION, that he instructed his attorney to draft a letter and direct it to the representative of the third respondent as well as to the Case Management Officer of the CCMA, he was referring to drafting a letter dealing with the fact that the **CONDONATION APPLICATION** was in contravention of Rule 31(3)(e) relating to the short time given for the appellant to oppose the application.

That contravention of the rules appears *ex facie* the third respondent's notice of application for condonation and there was, therefore, no question of the appellant or, for that matter, its legal representative, determining whether or not the application was defective – it was defective, if not fatally defective.

[24] The first respondent also found that **“the reasons for not opposing the respondent’s application for condonation was due to the fact that the applicant’s representative’s office was closed”**. There is nothing to support that finding. There is no evidence that Walters actually saw Annexure “A” before it was sent off or that he knew that his attorney’s office was to close the following day until 5 January 2003. As I have already said, Annexure “A” indicates that the appellant did, indeed, intend to oppose the CONDONATION APPLICATION and that is how Hawyes understood it. In the circumstances there is no justification for finding that the appellant’s reason for not opposing the CONDONATION APPLICATION was because its attorney’s office was closed.

[25] Finally, there is no basis upon which it can be said, as found by the first respondent, that the failure to file a notice of opposition and answering affidavits constituted a waiver of the appellant’s rights. As appears from *Road Accident Fund v Mothupi 2000 (4) SA 38 (SCA)*:-

“Waiver is first and foremost a matter of intention.” (49E-F)

and

“the knowledge and appreciation of the party alleged to have

waived is furthermore an *axiomatic* aspect of waiver” (50B-C)

Furthermore, the *onus* of proving waiver is on the party alleging it (50G). I do not know if the third respondent has ever alleged that the appellant waived the right to oppose the CONDONATION APPLICATION. There is no such allegation in her answering affidavit in the RESCISSION APPLICATION. Furthermore there is no evidence to support the proposition that the appellant intended to waive its right to oppose the condonation application or that it knew and appreciated that that was, or may be, a consequence of the writing of Annexure “A” without filing a notice of opposition and opposing affidavit.

[26] It follows, in my view, that there are serious errors in the first respondent’s reasoning in refusing the RESCISSION APPLICATION. On the assumption that the first respondent was entitled to hear and determine the RESCISSION APPLICATION, he should have granted it on the grounds that the CONDONATION RULING was made by Commissioner Dadabhai in the absence of the appellant and was made erroneously, because:-

- a) it was made in the absence of notice to the parties, or, at the very least, to the third respondent;
- (b) apparently unbeknown to the commissioner, the appellant had indicated in Annexure “A” that it intended to oppose the application but did not find it necessary to give notice of its intention to do so because of the short service and the absence of a case number; and

c) the Commissioner failed to appreciate that the application was defective, at least because of the failure to comply with the mandatory requirement of Rule 31(3)(e) and possibly in other respects.

[27] The grounds of appeal raised in the appellant's notice of appeal include the ground that the learned Judge in the Court a quo erred in finding that the appellant did not object to the conversion of the conciliation hearing into an application for the rescission of the CONDONATION RULING. This ground of appeal is valid. In his affidavit in support of the RESCISSION APPLICATION, Walters makes it clear, in paragraph 13, that the objection was raised at the hearing on 24 February 2002 that the first respondent was not permitted to address the RESCISSION APPLICATION, which was not before him. In reply to this paragraph the third respondent says that "**the third respondent at the request of my legal representative, proceeded to convert the proceedings into rescission proceedings**" (my emphasis). The appellant did object to the hearing of the RESCISSION APPLICATION and the misdirection of fact by the Court a quo in this regard is, in my view, sufficient reason for upholding the appeal.

[28] In his judgement in the Court a quo the learned Judge found that no irregularity was committed by the first respondent. He adopted the first respondent's reasoning that the appellant could not, on its own, decide that there was non-compliance with Rule 31 and decide not to oppose the application when nothing prevented the appellant from opposing the late referral. He said:-

“It (the appellant), was the author of its own misfortune.”

The learned Judge overlooked, as did the first respondent, that the contravention of Rule 31(3)(e) appears *ex facie* the third respondent’s notice of application for condonation so that there was no question of the appellant, on its own, deciding that there was non-compliance with Rule 31. The learned Judge also appears to have overlooked the fact that Walters does not say that he approved the draft of his attorney’s letter, Annexure “A”, or that he instructed his attorney not to file a notice of opposition. The learned Judge also does not deal with the first respondent’s finding that the failure to file notice of opposition and answering affidavits constituted a waiver of the appellant’s rights. For these reasons, also, the appeal must succeed.

[29] The learned Judge also found that the appellant’s application to review the CONDONATION RULING should fail. In this regard he was presumably referring to the last paragraph of the founding affidavit deposed to by Walters, in the REVIEW APPLICATION, to which I have referred. Counsel for the appellant accepts, in his Heads of Argument, that the REVIEW APPLICATION was an application to review the first respondent’s RESCISSION RULING dated 3 March 2003 and that the proper order would be one setting aside that ruling and referring the matter back to the second respondent, the CCMA, for the hearing of the RESCISSION APPLICATION. In my view that is the correct approach in the light of the relief sought in the order prayed in the REVIEW APPLICATION.

[30] As to costs the requirements of law and fairness dictate that the cost

should follow the result.

[31] In the result I make the following order:-

- 1. The appeal is upheld, with costs.**
- 2. The judgement of the Labour Court delivered on 2 December 2003 is set aside.**
- 3. The RESCISSION RULING of the first respondent dated 3 (or 25th) March 2003 is reviewed and set aside.**
- 4. The appellant's application for rescission of the CONDONATION RULING by Commissioner Dadabhai on 10 January 2003 is referred back to the second respondent, the CCMA, to be heard before a Commissioner other than the first respondent or Commissioner Dadabhai, on due notice to the parties.**
- 5. The third respondent is ordered to pay the costs of:-**
 - (a) the hearing on 24 February 2003 which gave rise to the first respondent's RESCISSION RULING;**
 - (b) the application by the appellant for the review and**

setting aside of the said RESCISSION RULING.

MC CALL AJA

I agree.

ZONDO JP

I agree.

NICHOLSON JA

Appearances

For the appellant :	L.P. Holgryn Instructed by De Villiers-Möhr Attorneys
For the third respondent :	M.A. Hawyes Instructed by Barry Kotze Incorporated
Date of Argument :	17 August 2005
Date of Judgement :	9 December 2005