IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J123/99

In the matter between :-

P S KRUGER First Applicant

J J PRETORIUS Second Applicant

and

R I MACGREGOR N.O. First Respondent

SALOMON SENEKAL BELEGGINGS (EDMS) BPK Second Respondent

JUDGMENT

MARCUS AJ:

INTRODUCTION

1 The applicants apply in terms of section 145 of the Labour Relations Act 66 of 1995 ("the Act") to review an arbitration award delivered on 21 September 1998 by the first respondent, to whom I shall refer as the arbitrator. The facts giving rise to the dispute between the parties are not presently germane. It suffices to state that the applicants alleged that they had been unfairly dismissed by the second respondent. The arbitrator found that in terms of an agreement between the parties, all claims arising from the termination of the applicants' employment with the second respondent had been settled. The arbitrator further found that the applicants were independent contractors and hence the dispute fell outside the jurisdiction of the CCMA.

2 It is common cause that the application for review was instituted outside the six week period stipulated in section 145 of the Act. The application was some 10 weeks out of time and was not accompanied by any application for condonation. I accordingly invited counsel to address me on whether it was competent for the review to be entertained at all. The applicants were represented by Adv J G Blignaut and the second respondent by Advocate SJ Coetzee. I am grateful to both counsel for their assistance and the sensible manner in which they approached the issues.

3 I should point out that although the issue presently under consideration

initially arose at the stage of conciliation, the decision in question was properly characterised as an arbitration award. Counsel were in agreement that the first respondent was exercising his powers as an arbitrator and the matter was argued on this basis.

THE RELEVANT PROVISIONS OF THE ACT

4 Section 145 of the Act provides:

> "**145 Review of arbitration awards**
>
> **(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award -**
>
> **(a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves corruption; or**
>
> **(b) if the alleged defect involves corruption, within six weeks of the date that the applicant discovers the corruption.**
>
> **(2) A defect referred to in sub-section (1), means -**
>
> **(a) that the Commissioner -**
>
> **(i) committed misconduct in relation to the duties of the Commissioner as an arbitrator;**
>
> **(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or**
>
> **(iii) exceeded the Commissioner's**

powers; or

(b) that an award has been improperly obtained.

(3) The Labour Court may stay the enforcement of the award pending its decision.

(4) If the award is set aside, the Labour Court may -

(a) determine the dispute in the manner it considers appropriate; or

(b) make any order it considers appropriate about the procedures to be followed to determine the dispute."

5 The issue which arises for my consideration is whether non-compliance with the time limits prescribed by section 145 of the Act is fatal to any application for review. The Act contains a general power of condonation. Section 158(1)(f) 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**". The phrase "**subject to**" in such a context "**is to establish what is dominant and what subordinate or subservient**" - per Miller JA in **S v Marwane 1982 (3) SA 716 (A) at 747 H**. At issue, therefore, is whether section 145 ousts this general power of condonation.

THE CASE LAW

6 The issue before me has been the subject of competing decisions of the Labour Court. In **Queenstown Fuel Distributors CC v Labuschagne N.O. & Others (1999) 3 BLLR 268 (LC)** Landman J concluded that the six week period referred to in section 145 of the Act had to be complied with and that the Court enjoyed no power of condonation. This conclusion was followed by Jajbhay AJ in **National Union of Mineworkers v Commission for Conciliation, Mediation and Arbitration & Others (Labour Court, Case No. J1918/98, 7 May 1999, unreported)**. A contrary conclusion was reached by Gon AJ in **Dimbaza Founderies Ltd v Commission for Conciliation, Mediation and Arbitration and Others (Labour Court, Case No. P216/98, 14 May 1999, unreported)**.

7 In **Queenstown Fuel Distributors CC v Labuschagne N.O. (supra)** Landman J reasoned thus at paras 7 - 8:

> "**7 Litigation is invariably subject to time constraints. For a discussion on the aims and objects of prescription clauses, see Saner *Prescription in South Africa* at para 1.2. Common law reviews are subject to a time limitation. They must be brought within a reasonable time. See *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A)*. A statutory review, such as the present application, must be brought within the time permitted by the relevant Act. Where it is brought out of time the question of condonation arises. Whether condonation may be granted or not depends upon the interpretation of the statute in question. Generally,**

there appears to be no inherent power residing in a court to condone a failure to comply with the time limits laid down by statute. See the remarks of Didcott J in *Mohlomi v Minister of Defence 1996 (12) BCLR 1559 (CC) at 1568 D - E*.

8 The legislature was aware in enacting the Labour Relations Act 66 of 1995 that circumstances might arise where the time limits it sets might not be met by parties subject to the Act and has, for the most part, provided for the appropriate authority to condone a failure to comply with them - usually on good cause being shown. See for example ss 111(4) and 191(2) of the Act.

9 The inevitable conclusion to be drawn from the omission of the legislature to do so in relation to section 145(1) must be that it intended the six week period to be complied with, and that the Court should not have the power to condone a failure to comply with the time periods specified in that section."

Landman J envisaged the possibility that the six week limitation period might infringe section 35 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) ("the Constitution"). Nevertheless, he held that the Labour Court was not empowered to adjudicate on the constitutionality of the laws it applies.

8 In **National Union of Mineworkers v Commission for Conciliation, Mediation and Arbitration (supra)** Jajbhay AJ endorsed the approach of Landman J. He elaborated on his reasons for reaching the same conclusion at paras 22 - 23 of the judgment in the following terms:

"**22 Unresolved disputes fester and spread infection of**

discontent. They cry out for resolution. Disputes in the field of labour relations are particularly sensitive. Work is an essential ingredient in the lives of most South Africans. Labour disputes deal with a wide variety of work related problems. They pertain to wages and benefits, working conditions, hours of work, job classification and seniority. Many of these issues are emotional and volatile. If these disputes are not resolved quickly and finally they can lead to frustration, hostility and even violence. Both the members of the workforce and management have every right to expect that the differences will be, as they should be, settled expeditiously. Further the provision of goods and services in our complex society can be seriously disrupted if there were no time constraints to expeditiously finalise a review application in terms of section 145 of the LRA. Thus society as a whole as well as the parties has an interest in their prompt resolution.

23 In my judgment the drafters have recognised the importance of a speedy determination of labour disputes. By the enactment of the LRA they have sought to provide a mechanism for a fair, just and speedy conclusion of the issues. In this particular instance, they have gone further and allowed a maximum time period of six weeks to institute proceedings in terms of section 145 of the LRA."

9 Gon AJ in **Dimbaza Foundaries Ltd v Commission for Conciliation, Mediation and Arbitration (supra)** came to the opposite conclusion. She concluded at para 55:

"**... [i]t cannot have been the intention of the legislature, in the circumstances, that the limited right to review CCMA arbitration awards had to be confined to a six week period, without the possibility of condonation for good cause shown, in the event that the referral was late. It is my view, that by making it a matter that, if not brought within a six week period could not be condoned, this would not lead to effective dispute resolution. Awards that are justifiably reviewable but cannot**

> **be reviewed by virtue of being rigidly confined by a time limit, would lead to the primary purpose of arbitration under the Act, namely fairness, being thwarted with severe consequences for the affected party and thereby bring the adjudicative functions of the CCMA into disrepute.**"

In reaching this conclusion Gon AJ was strongly influenced by a comparison between section 145 of the Act and the provisions of the Arbitration Act 42 of 1965. She was of the view that "**it is most likely that the drafters took their cue from the Arbitration Act, being the longstanding piece of legislation governing private arbitration which became a significant form of alternative dispute resolution after the Wiehahn era commenced in labour relations**" (at para 48). The grounds of review of arbitration awards under the Labour Relations Act and the Arbitration Act are similar, although not identical. Under both statutes reviews must be instituted within six weeks. The Arbitration Act, however, vests a court with a general discretion to extend any time period on good cause shown. Gon AJ concluded that the failure to incorporate a similar provision in the Labour Relations Act "**was an omission and not a deliberate act**" (at para 46).

10 Finally, I should mention the decision of the Labour Appeal Court in **Librapac CC v Fedcraw & Others (Labour Appeal Court, Case No. JA49/98, 11 March 1999, unreported)**. In that case, the Labour

Appeal Court, although alive to the issues, found it unnecessary to decide whether the failure to institute review proceedings in terms of section 145 of the Act within the six week limit could be condoned.

11 Apart from the cases referred to above in which the interpretation of section 145 has been considered, there are many judgments of the Labour Court in which it has been assumed that non-compliance with the six week period is not fatal. As a result of the competing decisions on this issue, however, a situation of undesirable uncertainty has arisen. Much of the work of the Labour Court is taken up with reviews of arbitration awards. The issue of whether non-compliance with the time period stipulated is fatal, faces Labour Court judges on a weekly basis. In my respectful view a decision on this issue by the Labour Appeal Court is required as a matter of urgency. This judgment will merely add to the growing number of competing decisions. It is unavoidable, however, not simply to resolve the dispute presently before me, but also because the approach which I adopt differs from that reflected in the decided cases.

THE INTERPRETATION OF SECTION 145

12 In attempting to resolve this issue, it may be helpful to identify and analyse the applicable interpretative injunctions. In my view these fall into three categories: The common law, the Act and the Constitution.

The Common Law

13 Landman J and Gon AJ drew inferences of legislative intent but came to different conclusions. Landman J was primarily influenced by the absence of a specific power of condonation in section 145 and the presence of such power in section 111(4) and 191(2). While a consideration of other provisions of the Act is permissible, I am not convinced that this comparison is helpful in the present case. Section 111(4) deals with appeals from decisions of the Registrar. Section 191(2) deals with the power of a Bargaining Council or the CCMA to extend the period for the referral of disputes. The subject matter of these sections is different from section 145 as is their language, structure and purpose. Gon AJ inferred that by reason of the similarity between section 145 of the Act and the relevant provisions of the Arbitration Act, the absence in section 145 of an express power of condonation was an omission and not deliberate. In my respectful view, this line of reasoning is also compatible with the very opposite conclusion. In my view, the enquiry ought to focus, in the first instance, on the wording of section 145 itself.

14 Regard must be had to the long established principles of statutory interpretation. At common law, there is a vast body of case law which deals with the distinction between statutory requirements that are

peremptory or directory and, if peremptory, the consequences of non-compliance. The starting point, in my view, is the decision in **Sutter v Scheepers 1932 AD 165**. Wessels JA laid down certain guidelines at 173 - 174:

> **"A long series of cases both here and in England have evolved certain guiding principles. Without pretending to make an exhaustive list I would suggest the following tests, not as comprehensive but as useful guides. The word 'shall' when used in a statute is rather to be construed as peremptory than as directory unless there are other circumstances which negative this construction -** ***Standard Bank Ltd v Van Rhyn (1925 AD 266*****).**
>
> **(1) If a provision is couched in a negative form it is to be regarded as peremptory rather than as a directory mandate. To say that no power of attorney shall be accepted by the Deeds Office unless it complies with certain conditions rather discloses an intention to make the conditions peremptory than directory: though even such language is not conclusive.**
>
> **(2) If a provision is couched in positive language and there is no sanction added in case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directory. Thus in** ***Cole v Greene (L.J.C.P., vol 13 at p 32)*** **Tindall, CJ approving of a decision of Lord Tenterden and dealing with this same question as to when 'shall' is to be interpreted as peremptory and when as directory, says: 'It may be observed here as it was by Lord Tenterden ... in the case of** ***The King v Justices of Leicester*** **that the words are in the affirmative only and that there are no negative words; nor are the words so stringent as in those of the Marriage Act 4 Geo. IV c.76, s 16 whereby it was enacted 'that the father, if living, of any party under twenty one years of age (such party not being a widower or widow), or if the father shall be dead, the guardian or guardians, etc, shall have authority to give consent to the marriage of such parties; and such consent is hereby required for the marriage of such**

parties so under age, unless there shall be no person authorised to give such consent:' and yet, in *The King v Birmingham* it was held that those words are directory only. Lord Tenterden, in giving judgment, says 'the language of this section is merely to require consent; it does not proceed to make the marriage void if solemnised without consent'. So here, the Act says, the contract shall be signed by the commissioner, or three of them, or by their clerk; it does not say it shall be void unless so signed.'

(3) If, when we consider the scope and objects of a provision, we find that its terms would, if strictly carried out, lead to injustice and even fraud, and if there is no explicit statement that the act is to be void if the conditions are not complied with, or if no sanction is added, then the presumption is rather in favour of the provision being directory.

(4) The history of the legislation will also afford a clue in some cases."

15 In applying these guidelines to section 145 of the Act, two observations are apposite. First, section 145 is silent on the effect of non-compliance with the six week time period. No sanction is prescribed if the requisites are not met. Second, there is manifestly scope for injustice if the six week period were to be strictly enforced.

16 The more recent authorities focus not so much on whether a particular provision is peremptory or directory, but on whether or not the failure to comply strictly with a peremptory provision is fatal. This was the approach adopted by the Appellate Division in **Maharaj & Others v Rampersad 1964 (4) SA 638 (A)**. Van Winsen AJA, having concluded that the provision under consideration was imperative, went on to consider

whether the absence of strict compliance therewith was fatal. He formulated the appropriate test at 646 C in the following terms:

> "**The enquiry, I suggest, is not so much whether there has been 'exact', 'adequate' or 'substantial' compliance with this injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a Court might hold that, even though the position as it is is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved are of importance.**"

(See also: **Shalala v Klerksdorp Town Council & Ano 1969 (1) SA 582 (T) and Mathope & Others v Soweto Council 1983 (4) SA 287 (W)**)

17 As Wiechers *Administrative Law* (1985) points out, the fundamental question is whether non-compliance with a formal or procedural rule will result in nullity. At 198 - 199 he states:

> "**In the question whether non-compliance with a statutory provisions results in nullity it is usually asked whether the rule in question is 'peremptory' or merely 'directory'. If it is peremptory, failure to comply with it results in nullity; but if the rule is merely directory, non-compliance is not visited with nullity. Although this construction is easy to understand, it is not sound.** ***All statutory rules are peremptory*****. If this were not so, it would have to be accepted that some statutory provisions**

are not really binding legal rules but merely non-obligatory suggestions for desirable conduct. ....

In practice, however, it often happens that formal and procedural rules are not complied with, either by the administrative organ itself or by the subject who, by his action, enters into an administrative-law relationship or exercises his rights and privileges within an existing relationship. The question that now arises is not whether the formal or procedural provision in question is peremptory or directory - because it must simply be accepted that the rule, being a rule of positive law, is indeed peremptory - but whether the administrative organ that failed to comply with the rule was authorised not to comply with it or to condone the subject's non-compliance with it. The question is simply whether the organ has the power to dispense with the rule in question. In order to answer the question of the possible existence of a dispensing power, the rule itself must be examined. If the rule is peremptory, that is, if absolute compliance is required, there can be no dispensing power, but if the rule is directory, there will be such a power. Now the objection may be raised that one eventually returns to the same point after all - whether the rule is peremptory or directory. In truth, however, there are two altogether different approaches involved: The view that the enquiry is aimed purely at the question whether the rule is directory or peremptory, is based on the false premise that some statutory rules are binding while others are merely indications. As explained above, such a view is in conflict with the elementary principle that a statute contains generally binding rules. The view that one is dealing with a power to permit that the rules of a binding legal provision be dispensed with, depending on the peremptory or directory nature of the statutory provision, places the entire problem in the correct perspective: First, that all statutory rules are binding or peremptory, but that some rules leave room for a dispensing power because of their directory nature; secondly, that the power to dispense with a requirement is a legal power which vests in the administrative organ by virtue of the statute itself.

The authority to permit dispensation with a formal or procedural statutory rule in a particular case is an implied discretionary power conferred on the administrative organ by

the statute." (emphasis in the original)

18 There is another relevant common law principle of interpretation. The curtailment of the powers of a Court of law will not be presumed in the absence of an express provision or a necessary implication to the contrary. See, **De Wet v Deetlefs 1928 AD 286 at 290; Lenz Township Co. (Pty) Ltd v Lorentz NO en Andere 1961 (2) SA 450 (A) at 455 A - D; Minister of Law & Order and Others v Hurley & Ano 1986 (3) SA 568 (A) at 584 A - C; Administrator, Transvaal & Others v Traub & Others**

1989 (4) SA 731 (A) at 764 E - F

The Act

19 Section 3 of the Act provides:

"**3 Interpretation of this Act**

Any person applying this Act must interpret its provisions -

(a) to give effect to its primary objects;

(b) in compliance with the Constitution; and

(c) in compliance with the public international obligations of the Republic."

20 With regard to the requirements of section 3 of the Act, if there is any conflict between the objects of the Act and the requirements of the Constitution, the latter must prevail. This is because the Constitution is the highest law. The supremacy clause in the Constitution is contained in section 2 which provides:

> "**This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the duties imposed by it must be performed.**"

21 Section 1 of the Act states that its purpose is, among other things, to advance "**social justice**" and "**labour peace**". Included in the primary objects of the Act are "**the effective resolution of labour disputes**".

22 In my view there is no conflict between the primary objects of the Act and the Constitution. While it is correct, as Jajbhay AJ has pointed out, that there is a need for the expeditious resolution of labour disputes, this does not mean that fairness in decision making must be sacrificed. The learned Judge rightly states that disputes in the field of labour relations are particularly sensitive and that many of the issues are emotional and volatile. These are factors which ought to militate in favour of judicial supervision of arbitration awards for otherwise, there exists the possibility

that palpably wrong decisions would be allowed to stand unchallenged. This holds the very danger of aggravating labour relations rather than resolving issues.

The Constitution

23 Turning to the Constitution itself, there are at least three relevant constitutional rights.

First, section 23(1) of the Constitution provides :

> "**Everyone has the right to fair labour practices**".

Second, section 34 of the Constitution provides :

> "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."

Finally, Section 33 of the Constitution provides:

> "**33 (1) Everyone has the right to administrative action that it lawful, reasonable and procedurally fair.**
>
> **(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.**

> **(3) National legislation must be enacted to give effect to these rights and must -**
>
> > **(a) provide for the review of administrative action by a Court or, where appropriate, an independent and impartial tribunal;**
> >
> > **(b) impose a duty on the State to give effect to the rights in sub-sections (1) and (2); and**
> >
> > **(c) promote an efficient administration.**"

By reason of section 241 read with Item 23 of Schedule 6, until the legislation envisaged in section 33(3) has been enacted, the guarantee of administrative justice is in the following terms:

> "**Every person has the right to :**
>
> **(a) lawful administrative action where any of their rights or interests is affected or threatened;**
>
> **(b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;**
>
> **(c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and**
>
> **(d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.**"

24 The centrality of the Bill of Rights and its foundational values to the newly created democracy is expressed in section 7 of the Constitution which

provides:

> “**Rights**
>
> **7 (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.**
>
> **(2) The State must respect, protect, promote and fulfil the rights in the Bill of Rights.**
>
> **(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.**”

25 Section 7(2) is couched in imperative terms. It imposes a positive obligation upon the State to “**respect, protect, promote and fulfil the rights in the Bill of Rights.**”

26 The Constitution creates an ethos of accountability. The State and its officials, where appropriate, must be called to answer for their actions and must be subject to critical scrutiny (**S v Makwanyane 1995 (3) SA 391 (CC) at 431 para 88** and **Carephone (Pty) Ltd v Marcus N.O. & Others (1998) 19 ILJ 1425 (LAC) at 1434 H**).

27 The Constitutional Court has repeatedly emphasised that constitutional rights must be generously and purposively interpreted. See: **S v Zuma &**

Others

1995 (2) SA 642 (CC) at 650 H - 651 I; S v Makwanyane 1995 (6) BCLR 665 (CC) at 676-677, paras 9-10; S v Williams & Others 1995 (3) SA 632 (CC) 648-649 paras 51-54.

A "purposive" interpretation will not always correspond with a generous interpretation. Sometimes, a purposive interpretation of rights will require a restrictive rather than a generous interpretation of the rights (see **S v Makwanyane & Ano 1995 (3) SA 391 (CC) at para 325; Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC) at para 17**).

28 The Constitution itself lays down certain principles of interpretation.

> "**Interpretation of Bill of Rights**
>
> **39 (1) When interpreting the Bill of Rights, a court, tribunal or forum -**
>
> **(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;**
>
> **(b) must consider international law; and**
>
> **(c) may consider foreign law.**

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

The role of section 39(2) of the Constitution in the interpretation of legislation is particularly important. In **S v Letaoana 1997 (11) BCLR 1581 (W)** I stated at 1591 A - B:

"Section 39(2) of the present Constitution reflects an important change in wording from its forerunner in section 35(3) of the interim Constitution. The latter required a court, when interpreting a statute to have "due regard" to the spirit, purport and objects of the chapter on Fundamental Rights. Section 39(2), by contrast, provides that a court "must promote" the spirit, purport and objects of the Bill of Rights. To "promote" in this context, means to further or advance. It means more than taking into proper account.

29 Section 35(2) of the interim Constitution contained what may be described as a presumption of constitutionality. It stated:

"**No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, provided such a law is reasonably**

> **capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation.**"

A similar provision was contained in section 232(3) of the interim Constitution which dealt with laws which were *prima facie* inconsistent with provisions of the Constitution other than the Chapter on Fundamental Rights.

30 Under the final Constitution, these provisions have not been repeated. In my view, however, this in no way detracts from the obligation of a Court of law to interpret a statutory provision in a manner that preserves its constitutional validity if this is linguistically possible. This is the approach that has been followed by other courts (see **Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd 1984 (2) SA 778 (ZSC) at 783 A - D**). It is also consistent with the approach adopted by the Labour Appeal Court in **Carephone (Pty) Ltd v Marcus N.O. & Others (supra) at 1433 G, para 28**.

31 In my view, an interpretation of section 145 of the Act which excludes any power of condonation would result in a *prima facie* violation of the right of access to Court embraced by section 34 of the Constitution and the right to lawful administrative action embraced by section 33 of the Constitution

(read with section 241 and Item 23 of Schedule 6).

32 The common law presumption against ousting the jurisdiction of the Court has been reinforced by secton 34 of the Constitution referred to above. In **Mohlomi v Minister of Defence 1997 (1) SA 124 (CC)**, the Constitutional Court, dealing with section 22 of the interim Constitution (which guaranteed access to courts in terms similar to the present guarantee in section 34), observed at para 16:

> "**The nature and importance of the right proclaimed by section 22 speak for themselves and call for no elaboration.**"

See also, **Concorde Plastics (Pty) Ltd v NUMSA & Others 1997 (11) BCLR 1624 (LAC) at 1644 D - 1645 H**.

33 I should add that the provisions under consideration in **Mohlomi's** case differ from the matter presently before this Court. At issue was section 113(1) of the Defence Act 44 of 1957 which provided that "**no civil action shall be capable of being instituted against the State ... if a period of six months ... has elapsed since the date on which the cause of action arose, and notice in writing of any such civil action and of the cause thereof shall be given to the defendant one month at least before the commencement thereof.**" That section, unlike section 145 of the Act, contained the sanction of invalidity.

34 The question of the constitutional validity of section 113(1) of the Defence Act arose in **Mohlomi's case (supra)** precisely because the section had been held by the Appelate Division to be incapable of an interpretation which conferred any power of condonation (leaving aside cases of impossibility of compliance). It is precisely that kind of interpretation which flows from the approach of Landman J and Jajbhay AJ. Obviously if the language of section 145 of the Act, taken in the context of the Act as a whole and in the light of the relevant principles of interpretation, permits no other result, then all that would be left would be a possible challenge to the constitutional validity of section 145 of the Act. In approaching the proper interpretation of section 145 in the light of the relevant principles, it is appropriate to confront the consequences of the approach of Landman J and Jajbhay AJ squarely. In this regard, the observations of Didcott J in **Mohlomi's case (supra)** in relation to section 113(1) of the Defence Act are apposite. After noting the disparity between the time periods stipulated by the Prescription Act and those contained in the Defence Act, the learned Judge observed at para 14:

> "**That disparity must be viewed against the background depicted by the state of affairs prevailing in South Africa, a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and**

what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons. The severity of section 113(1) which then becomes conspicuous has the effect, in my opinion, that many of the claimants whom it hits are not afforded an adequate and fair opportunity to seek judicial redress for wrongs allegedly done to them. They are left with too short a time within which to give the requisite notices in the first place and to sue in the second. Their rights in terms of section 22 are thus, I believe, infringed."

The same consequences flow from an interpretation of section 145 which precludes any power of condonation.

OVERVIEW

35 In my view, the weight of considerations points strongly against construing non-compliance with the six week period as being fatal. Firstly, the section contains no sanction for non-compliance. Seconly, there is undoubtedly the possibility of great hardship where, for example, the delay is insignificant and could not result in any material prejudice to other affected parties. Thirdly, there is a well recognised and strong presumption against ousting the jurisdiction of the superior courts. In this case, the interpretation adopted by Landman J and Jajbhay AJ precludes the Court from exercising its historical and traditional powers of review which are designed to prevent the abuse of power. Fourthly, such an interpretation entails a *prima facie* violation of constitutionally protected

rights.

36 It remains only to consider whether there are factors which point to a different conclusion. The most cogent factor is that advanced by Jajbhay AJ, namely, the need for expeditious resolution of labour disputes. This in turn leads to certainty and finality in the employment relationship. These are undoubtedly important factors. In my view, however, they should not be exaggerated. There are important countervailing factors, not the least of which is the need to ensure that labour disputes are fairly resolved.

37 Jajbhay AJ also points out that disputes in the field of labour relations are emotional and volatile. I have already suggested that the absence of judicial review may serve to aggravate existing tensions rather than resolve them. In this regard, I am of the view that the learned Judge does not give sufficient weight to the role of courts in dispute resolution. This issue is discussed in greater detail in **Concorde Plastics (Pty) Ltd v NUMSA & Others 1997 (11) BCLR 1624 (LAC)**. In that case, I drew attention to the importance of access to justice as a safeguard against self-help and violence. I pointed out that although the Constitution of the United States does not expressly embody a right of access to court, the "**due process**" clauses of the Fifth and Fourteenth Amendments have been interpreted as

guaranteeing such a right. The purpose underlying the guarantee was described by Justice Harlan in **Boddie v Connecticut 401 US 371; 28 L Ed 2d 113 at 117:**

> "**At its core, the right to due process reflects a fundamental value in our American constitutional system. ... Perhaps no characteristic of an organised and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a `legal system', social organisation and cohesion are virtually impossible; with the ability to seek regularised resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganised society. Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political**

theorists call the `state of nature'. ...

It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularised, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment and later those who drafted the Fourteenth Amendment, recognised the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within those bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this court has through years of adjudication put flesh upon the due process principle."

38 This does not mean, of course, that periods of prescription do not play a vital role in any legal system. Here, however, we are dealing with a very short period of time within which to institute proceedings for review. Moreover, we are doing so in a context in which those affected, as pointed out by Didcott J in **Mohlomi's case (supra)**, will frequently be poor people lacking in legal knowledge and without access to the kinds of resources necessary to protect their rights.

39 I accordingly conclude that non-compliance with the six week period mentioned in section 145 of the Act is not fatal to the institution of review proceedings. It remains to consider whether the delay in the present matter ought to be condoned. There is no formal application for condonation before me. However, I have been furnished with an affidavit by the applicants' attorney dealing with aspects of the delay in the present proceedings. Mr. Blignaut, on behalf of the applicants, accepts that this affidavit on its own does not constitute an application for condonation. However, he has argued that in the event of it being held that the failure to institute review proceedings within six weeks is capable of being condoned, he would seek leave to move a formal application for condonation in due course. Although there is no formal application for condonation before me, I consider it appropriate to say something about condonation, particularly in the light of certain submissions made by Mr Coetzee on behalf of the second respondent.

CONDONATION FOR DELAY

40 In **Dimbaza's case (supra)** Gon AJ applied the test for condonation laid down in **Melane v Santam Insurance Co. Ltd 1962 (4) SA 531 (A)**. In that case, the appellant was described as "**a bantu mine worker in the Transvaal with rural ties in the Transkei**". He sought leave to appeal *in forma pauperis*" against a judgment of Snyman J delivered in the

Witwatersrand Local Division of the Supreme Court. His petition for leave to appeal was out of time by several weeks. Holmes JA observed at 532 C - F:

> "**In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked.**"

In that case, the report of the decision does not reflect the discussion of the prospects of success on appeal. Ultimately, these prospects were considered to be "**so remote as to be unappreciable**" (at 533 A). This was considered to be decisive, notwithstanding the appellant's attempts to raise funds for the appeal which prompted the observation that "**in this country one has a human, and I trust judicial, measure of sympathy for a humble Bantu struggling to reconcile an alien concept of urgency with the unplentiful subject of cash**" (at 532 H).

41 While I am in agreement that the test in **Melane v Santam Insurance Co. Ltd (supra)** is appropriate for applications for condonation for the late noting of review proceedings in terms of section 145 of the Act, Mr Coetzee placed great stress on the need for finality in labour disputes. Where, for example, the question of reinstatement arises, it would be manifestly unfair if such an order were made long after the events in question. This is a problem which is by no means new to labour law. In my view, however, it is important to keep the question of condonation separate and distinct from the question of an appropriate remedy.

42 It may be of some assistance to consider the approach of our courts to the question of delay in instituting proceedings for review at common law. The procedure for review is governed by Rule 53 of the Rules of the High Court. No time limits are prescribed for instituting review proceedings. The courts have held that such proceedings must be instituted within a reasonable time and the failure to do so may in itself be grounds for dismissing the review.

43 At common law, the test to determine whether review proceedings are to be dismissed on the grounds of delay is twofold:

(a) Were the proceedings brought within a reasonable time; and

(b) If not, should the Court nonetheless condone the failure to bring the proceedings within a reasonable time.

(See, **Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) at 41 H - 42 D** and **Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie en 'n Ander 1986 (2) SA 57 (A) at 86 A - G**).

44 Prejudice is usually an important factor in the second stage of the test (**Wolgroeiers Afslaers (supra) at 42 A - D**).

45 In **Mkhwanazi v Minister of Agriculture & Forestry, KwaZulu 1990 (4) SA 763 (D)** it was suggested, obiter, that a court could *mero motu* take the point of an unreasonable delay in <u>enrolling</u> an application for review. The applicant in **Mkhwanazi's case** was employed by the Kwa-Zulu government as a driver. He allegedly absented himself from work without permission and was therefore deemed to have been discharged from his employment. He instituted proceedings for his reinstatement and the payment to him of his full salary for the period of his unemployment (at 765 C). There was a substantial delay in enrolling the matter for hearing. The presiding Judge personally contacted the attorneys for the parties and indicated that he required argument as to

whether the delays in bringing the matter to Court were not such as to render the application unfit for hearing. Affidavits were filed in response to this invitation (at 765 E - F).

46 The Court considered that the delay in enrolling the application was fatal. (However, in any event, it was held that the matter failed on its merits). The Court reasoned thus

(a) The principle requiring the launching of review proceedings within a reasonable time applies also to enrolling such matters. "**In cases such as this, the applicant could notionally be better off than in the others because here there is no real likelihood of evidence being lost. In all other respects the reasoning underlying the principle that delays may be fatal to an application must apply equally to both classes of case.**" - at 766 G - H. The Court relied, in this regard on **Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) at 41**.

(b) The Court held that:

> "**The rule against undue delay is a procedural rule (Wolgroeiers case at 41 G - H) and can therefore be enforced by the Court's *mero motu*.**" - at 767 E

(c) The Court finally held that the nature of the relief sought "**is however conclusive in the present case**" - at 767 F.

(d) In dealing with the question of reinstatement, the Court held that after a lapse of three years it was not even known whether the employment was still available. - at 767 G. Moreover, the Court held that "**the longer the delay the longer the applicant seeks payment for in fact not working**" - at 768 A.

47 In my respectful view, the learned Judge in **Mkhwanazi's case** erred in his observations concerning the power of a court to raise the question of undue delay in enrolling a matter. The judgment proceeds from an erroneous understanding of the **Wolgroeiers case (supra)**. The **Wolgroeiers case** concerned the time within which review proceedings must be instituted. The question arose solely by reason of the fact that the Rules of Court, while granting the right to institute review proceedings, were silent on the time within which this must be done. This basic principle was apparently overlooked by the court in **Mkhwanazi's case**. The statement referred to above that "**the rule against undue delay is a procedural rule (Wolgroeiers case at 41 G - H) and can therefore be enforced by the Court's *mero motu***" misinterprets the central issue in that case. As is made clear in the **Wolgroeiers case** at 41 H - 42 A, the

Court's powers of intervention, by reason of their inherent jurisdiction, are limited to cases <u>not</u> governed by the Rules of Court or other statutory provision:

> "**<u>By gebrek aan statutêre of ander wettige voorskrifte rakende die prosedure wat gevolg moet word, word die prosedure, wat tydsbeperking insluit, deur die Howe self voorgeskryf</u>. Wat wel deur ons Howe voorgeskryf is, is dat verrigtinge binne redelike tyd ingestel moet word en, soos ek reeds genoem het, staan dit die Hof vry om, na gelang van omstandighede, en by die uitoefening van sy diskresie, onredelike vertraging oor die hoof te sien in geskikte gevalle.**" (emphasis added)

48 Apart from the aforegoing, it should be pointed out that it always lies within the power of a respondent to set down on application where there has been a failure by the applicant to enroll the matter and once the time period for the filing of a replying affidavit has lapsed.

49 While I am of the view that **Mkhwanazi's case** was wrongly decided on this issue, the result in that case may nevertheless be sustainable, but for different reasons. In considering delays in the institution of review proceedings, the enquiry into prejudice will frequently necessitate an investigation of the consequences which will flow from allowing a review out of time. Where there are questions of reinstatement, then the impact of the relief ultimately sought must be weighed together with the other relevant factors. It may well be that the remedy of reinstatement may not

be appropriate in particular circumstances by reason of undue delay. That, however, is a separate question from whether or not condonation for the delay ought to be granted. Each case, however, would require consideration on its own facts.

50 As indicated, there is presently before me no application for condonation. Given the uncertainty surrounding the time period within which review proceedings must be instituted, I am of the view that it would be appropriate to afford the applicants the opportunity to file a substantive application for condonation. Mr Coetzee argued that if I were to hold that the failure to institute proceedings within the six week period is condonable, the applicants should nevertheless pay the costs of the present proceedings because it was within the applicants' power to bring a proper application for condonation. This is particularly so since the parties were advised in advance of the hearing that I would require argument on the issue. Had the applicants brought an application for condonation timeously, the respondents would have been able to file answering affidavits and the question of condonation could have been decided. I agree with Mr Coetzee's contentions in this regard.

51 I accordingly make the following order:

(a) The applicants are given leave to file a substantive application for condonation;

(b) The matter is postponed to a date to be arranged by the Registrar;

(c) The applicants are to pay the respondents' wasted costs.

G J MARCUS

Acting Judge of the Labour Court

Date of Hearing: **10 June 1999**
Date of Judgment: **18 June 1999**

For the applicants: **Adv J G Blignaut**
Instructed by Philip Du Toit Inc

For the respondents: **Adv S J Coetzee**
Instructed by : **Geyser and Coetzee**