

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

REPORTABLE

CASE NO **D252/03**

DATE HEARD 2004/05/10

DATE DELIVERED 2004/05/14

In the matter between:

PSA ON BEHALF OF S W HASCHKE Applicant

and

MEC FOR AGRICULTURE AND OTHERS Respondents

JUDGMENT DELIVERED BY
THE HONOURABLE MADAM JUSTICE PILLAY

ON BEHALF OF APPLICANT:

ADV. I VAN DER MERWE

INSTRUCTED BY:

DENEYS REITZ

ON BEHALF OF 1ST & 2ND RESPONDENTS:

ADV. S M GOVENDER

INSTRUCTED BY:

STATES ATTORNEY

JUDGMENT 14 MAY 2004

PILLAY J

The applicant seeks to review and set aside the award of the fourth respondent commissioner, refusing condonation of the late referral of its dispute for conciliation to the third respondent, the Commission for Conciliation, Mediation and Arbitration ("the CCMA").

In limine the first and second respondents submitted that the application was not competent and was premature. The applicant contended that the Commissioner had not provided any reasons for her decision. However, the Commissioner was not obliged by the Labour Relations Act No 66 of 1995 ("the LRA") its Rules or Guidelines or the Employment Equity Act of No 55 of 1998 ("the EEA") to furnish reasons. But, as an administrative organ, the CCMA was bound by the Promotion of Administrative Justice Act No 3 of 2000 ("PAJA"), read with section 33(2) of the Constitution. PAJA is an option that an employee or employer may exercise to request reasons from a Commissioner. A suitably-worded letter to the fourth respondent, compelling her in terms of PAJA to furnish reasons for her decision could have obviated this litigation, so it was submitted.

Neither Mr *Govender* for the first and second respondents, nor Mr *van der Merwe* for the applicant had prepared sufficient heads on the applicability of PAJA to the dispute. The matter was stood down until the next morning to enable them to do so.

Shortly into his argument, Mr *Govender* found that he was arguing against

himself. Consequently he withdrew the point *in limine*. However, the issues raised are sufficiently important to warrant comment by the Court.

The relevance of PAJA to labour disputes is controversial. The controversy has its roots in *Carephone (Pty) Limited v Marcus N.O.* 1999 (3) SA 304 (LAC). There FRONEMAN DJP's finding that the CCMA is an organ of State led to the conclusion that arbitration awards issued by the CCMA have to be tested for justifiability against the constitutional right to just administrative action. *Carephone* was decided under the Interim Constitution, Act No 200 of 1993, which gave direct access to the right to just administrative action. It was not regulated by national legislation as it is now under the Final Constitution, Act No 108 of 1996.

Inspired by an *obiter* remark by NICHOLSON JA in *Toyota SA Motors (Pty) Ltd v Radebe and Others* (2000) 21 ILJ 340 (LAC), WALLIS AJ in *Shoprite Checkers (Pty) Limited v Ramdow NO and 15 Others* (2000) 7 BLLR 835 and LANDMAN J, who agreed with him in *Volkswagen (SA) (Pty) Limited v Brand NO and Others* (2001) 22 ILJ 993 (LC), (2001) 5 BLLR 558 (LC) and *Netherburn CC trading as Netherburn Ceramics v Mudau and Others* (2003) 10 BLLR 1034 (LC) took the view that CCMA arbitration is not administrative action, PAJA does not apply and that section 145 of the LRA narrowed the grounds of review.

ZONDO JP in the Labour Appeal Court decision of *Shoprite* (2001) 9 BLLR 1011 (LAC) doubted the correctness of the finding in *Carephone* that an arbitration award constituted administrative action, but, he remarked *obiter* that PAJA and its definition of administrative action may well apply to CCMA awards. Applying the Constitutional Court's decision in *Pharmaceutical Manufacturers Association of South Africa in re EP President of the RSA* 2002 SA 674 (CC) he held that irrationality is a ground of review of the exercise of public power and the issuing of a CCMA award is an exercise of public power.

Since then the Constitutional Court has held in *Bato Star v Minister of Environmental Affairs and Tourism, the Chief Director Marine and Coastal Management Department of Environmental Affairs and Tourism Certain Rights Holders*, case No CCT 27/03 at paragraph 22 (unreported) per O'Regan that:

"Courts power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself. The grundnorm of administrative law is now to be found, in the first place, not in the doctrine of *ultra vires* nor in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution. The common law informs the provisions of PAJA and the Constitution, and derives its force from the latter. The extent to which the common law remains relevant to administrative review will have to be developed on a case by case basis as the Courts interpret and apply the provisions of PAJA and the Constitution."

Bato Star confirms that there is no direct access to section 33 of the Final Constitution other than through PAJA. (J R de Ville *Judicial Review of Administrative Action in South Africa* 2003 at 5, *Bato Star* at para 25.) It follows from that judgment that the constitutional right to just administrative action may be invoked only if PAJA applies to decisions in labour disputes.

It is now an open question whether CCMA awards and rulings and decisions of a public employer are administrative actions under PAJA.

Labour law is not administrative law. They may share many common characteristics. However, administrative law falls exclusively in the category of public law, whereas labour law has elements of administrative law, procedural law, private law and commercial law. Historically, recourse has been had to administrative law to advance labour rights where labour laws were inadequate. (*Administrator of the Transvaal and Others v Traub and Others* 1989 (4) SA 731 (A), (1989) 10 ILJ 823 (A); *Administrator, Transvaal, and Others v Zenzile* 1991 (1) SA 21 (A), (1991) 12 ILJ 259 (A); *Administrator, Natal, v Sibiyi* (1992) 4 532

(AD))

However, pursuant to the affirmation in the Interim Constitution and the Final Constitution that everyone has a right to fair labour practices, the LRA, the EEA and the Basic Conditions of Employment Act No 75 of 1997 ("the BCEA") codified labour and employment rights. Adjustments were also made to other national laws, such as the Public Service of Act, Proclamation 103 of 1994, the Police Services Act 68 of 1995 and the Employment of Educators Act 76 of 1998, to bring them in line with the Constitution.

The purpose of the LRA and the BCEA is to give effect to and regulate the fundamental rights to fair labour practices conferred by section 27 of the Interim Constitution or section 23 of the Final Constitution. (section 1(a) of the LRA and section 2(a) of the BCEA) The EEA does not have a similar section. Labour rights such as the right to due process, to substantively fair reasons and the remedies for non-compliance are codified in the LRA. Similarly, the EEA and BCEA were also promulgated prior to PAJA with a view to codifying the right to equality in the context of employment and labour standards respectively.

At the same time, as with any legislation, the LRA, the EEA and BCEA ("the labour laws") must be interpreted in compliance with the Constitution. Therefore, although there is no explicit statutory injunction in the labour laws to give effect to the right to just administrative action, there is an obligation to comply with it as one of the rights in the Bill of Rights. However, if the right to just administrative action competes or is in conflict with the right to fair labour practices then the LRA and the BCEA, read with the constitutional right to fair labour practices, must prevail over the right to administrative justice.

This view is reinforced if regard is had to sections 210 and 63 of the LRA and the EEA, respectively. These sections, which are similarly worded, state that if any conflict arises between these Acts and the provisions of any other law, save the

Constitution or any Act expressly amending these Acts, the provisions of these Acts will prevail.

The right to fair labour practices may be accessed from the Constitution direct. Everyone has this right. (*NUMSA v Baderbop* (2003) ILJ 305 (CC) at para 62 and 67; *Netherburn CC* @ 1726; *SA National Defence Union v Minister of Defence & Another* (1999) 20 ILJ 2265 (CC); *SA National Defence Union & Another v Minister of Defence & Others*; *SA National Defence Union v Minister of Defence & Others* (2003) 24 ILJ 2101 (T) (per Smit J) and *NAPTOSA & Others v Minister of Education, Western Cape & others* (2001) 22 ILJ 889 (C) per Conradie J) Consequently, insofar as labour laws are deficient, the fair labour practice clause in the Constitution can be invoked. There is no need to have recourse to administrative law.

Do Commissioner's rulings amount to administrative action?

[18] The LRA and the CCMA Rules and Guidelines distinguish between rulings and awards of Commissioners. Awards are reviewed on the narrow grounds of section 145 of the LRA. Rulings are reviewed under section 158(1)(g) of the LRA. The latter section provides for the review of the performance of any function provided for in the LRA. The standard of review of rulings, however, is "subject to section 145", but it may also be "on any grounds that are reasonable in law". It is wider than the standard set for the review of awards.

[19] It seems to me that rulings are reviewed under section 158(1)(a) only because they are not awards. Yet both awards and rulings are outcomes of adjudicative processes.

Conceptually, arbitration is distinct from an administrative process. (*Shoprite Labour Court* at paragraph 89.) It is adjudication that is alternative to litigation. Arbitration may have many features common with adjudicative

administrative acts. However, merely because an official is conducting it under the auspices of an administrative organ does not alter its essential character.

The nature and the essential content of the process of issuing rulings are similar to arbitration. As such, they too do not amount to administrative action. If this were not so, then the anomaly that arises is that a ruling made in the course of an arbitration and which finds itself as one of the grounds of review of an award is tested against section 145, whereas other rulings that are made outside of arbitration are tested against section 158(1)(g). I cannot see any reason why a different test should apply to awards and rulings.

Rulings are distinguishable from the performance of other acts in terms of the LRA. For instance, a Commissioner who issues a certificate of non-resolution of a dispute performs a ministerial or purely administrative act. Such acts are distinguishable from adjudicated decisions, which require the exercise of a judicious, instead of a formal discretion.

As discussed below, the Labour Court and the Labour Appeal Court may not hear matters under PAJA until its rules have been implemented. If PAJA applies to ministerial administrative acts of the CCMA then reviews of such acts lie to the High Court. What then should be the standard of review? That raises the spectre of another unintended consequence of PAJA, namely that of splitting jurisdiction over labour laws between the High Court and the Labour Court.

I turn to consider whether PAJA contains any provisions that might apply to CCMA awards and rulings. PAJA defines administrative action to include any decision or failure to take a decision by an organ of State when exercising public power in terms of any legislation. As an institution that exercises public power and performs a public function in terms of the LRA, the CCMA is an organ of State. (Section 239 of the Final Constitution, *Carephone*, *Netherburn* above).

Furthermore, the CCMA is funded principally by the State. (section 122 of the LRA) It therefore meets the government-function and the government entity tests devised for identifying an organ of state. The control test developed by Van Dijkhorst J in *Directory Advertising Cost Cutters v Minister of Posts, Telecommunications & Broadcasting & Others* 1996 C (3) SA 800 (T) at 810F-G, for determining whether an entity is an organ of state does not apply to the CCMA. (JR de Ville above at 41-43)

CCMA arbitration awards and rulings and decisions by other organs of state affecting employment are not in the list of exclusions that make up the definition of administrative action. The definition of administrative action tempts one to accept that PAJA applies to labour and employment decisions. (*Shoprite (LAC), Basson v Provincial Commissioner, Eastern Cape, Department of Correctional Services* (2003) 24 ILJ 803 (LC) and *National Employers Forum v Minister of Labour and Others* (2003) 24 ILJ 954 (LC).)

However, from a survey of other provisions of PAJA a different picture emerges. If PAJA applies to CCMA awards and rulings then the standard of review will be codified in terms of section 6(2) of PAJA. The rigidity of section 6(2) of PAJA will compete with the relative flexibility of section 145 of the LRA.

[28] The grounds of review under section 145 are misconduct by the arbitrator, commission of a gross irregularity, acting *ultra vires* and improperly obtaining an award. The PAJA grounds of review are a complete codification of the common law grounds of review. Any ground not specifically mentioned has been captured in the catch-all clause that empowers a court to review action that is otherwise unconstitutional or unlawful. Such a comprehensive codification can encourage a mechanical checklist mentality when reviewing awards.

Professor Cora Hoexter observes that codification of the grounds of review might inspire not only a greater incidence of review but also a greater degree of

interference with the merits of the decision. (Hoexter, Cora "Future of Judicial Review in South African Administrative Law", South African Law Journal 500.)

PAJA permits delving into the merits, given the constitutional injunction that administrative action must be lawful and reasonable. (Section 33 of the Final Constitution read with section 6(2)(e) of PAJA.) Or, as it was put in *Pharmaceutical*, the exercise of any public power must be rational.

However, the difference with the application of the rationality test in administrative law and labour law is that under labour law it is in the context of meeting labour law objectives. Rationality under PAJA must be assessed in the context of meeting administrative law objectives.

[32] How deep does a review court delve into the merits of an award, a ruling or public employer's decision? The following extract from *Bato Star* provides some guidance:

What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.

[33] It remains to be seen how helpful these general guidelines are to labour law reviews. Whether it would return the standard of review of awards and

rulings to that which was originally intended i.e. a standard akin to that which prevailed under section 33 of the Arbitration Act No 42 of 1965 for private labour arbitration, depends on how the jurisprudence unfolds henceforth.

If PAJA applies to labour law decisions it could widen the door that *Carephone* opened to the risk of judges substituting their decisions for those with which they simply do not agree. If that happens then the objective of speed and finality of dispute resolution will be thwarted.

[35] Some of the PAJA grounds of judicial review overlap with the section 145 grounds. It has been an abiding concern in the labour law community that section 145 is interpreted too widely and that the distinction between appeal and review is being blurred. To subject CCMA adjudication to a constitutional test for just administrative action could not only broaden the grounds of review and blur the distinction between appeal and review even further but also cause parallel streams of jurisprudence to develop : one for private and bargaining council adjudication and another for CCMA adjudication; one for High Court decisions, another for Labour Court decisions, one for administrative law decisions, another for labour law decisions.

Mr *Govender* conceded that the PAJA procedure for judicial review (section 7 of PAJA) clashes with the labour law procedures. The PAJA procedures are substantially more protracted because the time limits for filing are longer and could be extended further. (Section 9 of PAJA.) Section 5 of PAJA allows 90 days within which to request reasons for administrative action from an administrator who, in turn, has a further 90 days to furnish reasons. On the other hand, CCMA awards must be issued within 14 days after a hearing. The practice is also to issue rulings quickly. PAJA requires all internal remedies to be exhausted first. Under the LRA, an internal appeal against dismissal may be bypassed.

[37] A typical example of ministerial administrative act is the deregistration of

trade unions. The LRA directs the registrar to furnish reasons for his decision within 30 days of receiving a request. An appeal against his decision may be launched within 60 days to the Labour Court. Judicial review under PAJA must be launched within 180 days. It seems to me that section 210 will oust the application of PAJA because of the conflict. But, if I am wrong then any ambiguity in the statutes is for the attention of the Legislature.

The PAJA remedies prescribed are all quite at odds with the labour laws. The LRA conceives reinstatement as a primary remedy and pegs the amount of compensation for unfair dismissal. PAJA empowers the Court to direct the administrator to act in any manner that it requires.

[39] Public employees have relied on rights to administrative justice and fair labour practices. (*Semela and Others v MEC for Education, Eastern Cape, and Another* (2001) 22 ILJ 1688 (LC), (2001) 9 BLLR 1085 (LC) per FRANCIS AJ, as he then was.) Section 158(1)(h) has been used to invoke the application of PAJA. (*Basson* above.) The section empowers the Labour Court to review any decision taken or any act performed by the State in its capacity as employer on such grounds as are permissible in law. Section 158(1)(h) does not prescribe the grounds of such review. However, *Bato Star* spawns a debate on the efficacy of judicial review of decisions affecting employment in terms of administrative law as regulated by PAJA.

[40] For example, a public employer decides not to appoint an employee in deference to a collectively endorsed affirmative action plan. The employee wants to review the employer's decision as being irrational because it is discriminatory. In another case a public employee is suspended without a prior hearing. It is arguable that PAJA gives the employee as *dominus litus* a choice: She may base her claim on either the LRA and other labour laws or PAJA.

However, exercising a choice between PAJA and labour law is linear.

Labour law is polycentric. Affirmative action is collectively bargained as a planned progression towards employment equity. Disputes arising from it must be channeled through the carefully constructed procedure of conciliation followed, if necessary, by adjudication. Conciliation seeks to address all interests as opposed to determining rights. Insofar as rights have to be determined by adjudication, this is accomplished by specialists who must give effect to the primary objectives of the labour laws. If the claim succeeds should, as a matter of policy, such individual action be allowed to trump collectively bargained decisions? The objectives of the LRA compel one to answer this question in the negative. Suspension of employment too has a domino effect on other interests which have to be mediated. If the decision is reviewable under PAJA, the implications for collective bargaining and effective dispute resolution could be catastrophic.

Then there are decisions of a public employer concerning employment that are ministerial administrative actions. Such would be the case when the decision is a mere formality. Whether a decision is purely ministerial depends on the circumstances and reasons for each decision. Thus a public employer may refuse to authorise an employee's application for leave. If the reason for his refusal is the non-compliance with prescribed requirements his decision would be a formality. However, if the refusal is underpinned by ulterior motives, then it could arguably be an unfair labour practice under section 186(2) of the LRA .

[43] It is arguable that such decisions and others which are not caught in the net of the labour laws should fall into the trough of PAJA so that an aggrieved party has an avenue for relief. In my view, however, the distinction between ministerial and other decisions are irrelevant in employment disputes. All decisions affecting employment should be processed in terms of the labour laws and the Constitution. I say so because an employer and other employees affected by its decision are entitled to the resolution of disputes in accordance with the objectives of the labour laws. Thus an employer may organise its affairs

on the basis that a dispute is not likely to be referred for conciliation after 90 days of a decision, unless, exceptionally condonation is granted. Therefore, although an aggrieved employee may appear as *dominus litus* to have a choice of *fora* and causes of action, such choices are limited by the countervailing rights of the employer and other affected employees. If the labour laws provide no remedy then the probabilities are that neither the Legislature nor the social partners who participated in the drafting of the labour laws intended to provide a remedy in those circumstances.

Mr Govender submitted that PAJA excludes the Labour Court and the Labour Appeal Court from its definition of "court". Consequently, the Labour Court and the Labour Appeal Court may not adjudicate any matter arising from PAJA.

If this were so it could, in my view, be decisive of the question whether PAJA applies to Commissioner's awards and rulings. However, the Labour Court is a "court of similar status" to the High Court. (section 151 of LRA) The Labour Appeal Court is a court equal in status to the Supreme Court of Appeal. (Section 167 of LRA) As appeals from the Labour Court are to the Labour Appeal Court, the latter will have jurisdiction to hear employment disputes in which PAJA is raised, assuming that PAJA otherwise applies to such disputes. If the intention of the Legislature was to exclude the application of PAJA to labour disputes then the definition of "court" also calls for legislative amendment.

For the time being, however, the provisions of PAJA are inoperable because the rules of procedure contemplated in section 7(4) of PAJA have not been implemented. Until they are implemented proceedings in terms of PAJA must be instituted only in a High Court or the Constitutional Court. (*Transwerk v Independent Medical Services of SA and Others* (2002) 23 ILJ 2313 (LC) at 50; *Volkswagen* per Landman J.)

In the circumstances the *point in limine* was correctly withdrawn.

This application for a review of the refusal of condonation is prefaced by an application for condonation. I directed that the merits of the review be canvassed first. If the applicant succeeds, then the other criteria for condonation of the review will be considered.

On the merits of his complaint of discrimination, the applicant submitted to the arbitrator that the Department did not have a proper affirmative action policy or plan when Moodley was appointed. Alternatively, the plan had not been carefully constructed, nor did it evolve in a transparent and inclusive manner. He denied that the PSA had been involved or consulted about the contents of such a plan or policy. Further alternatively, he contended that the Department did not follow its own plan. Furthermore, the Department employed affirmative action in an over-broad manner, as white managers for the period 1996 to 2002 were less representative than the Department's target of 2005, whilst Indian managers were over-represented.

All this was denied by the Department. It relied, in the first instance, on the Final Constitution, in particular section 195 thereof, the EEA and various white papers pertaining to transformation of the public service. Secondly, it relied on its affirmative action policy which it alleged was in place at the time. Thirdly, it relied on the EEA for the definition of "black", which included Indians.

In these proceedings the first and second respondents elaborate on the employment equity plan and the process followed in securing its registration in October 2000. This information does not appear to have been as fully canvassed at the arbitration. That the respondents might have implemented a plan that had not been formally registered is not significant. (*Department of Correctional Services v Van Vuuren* (1999) 20 ILJ (LAC))

I have held that the Constitution provides an independent ground for implementing affirmative action in an unreported decision. (*Martin Gordon v Department of Health, KwaZulu Natal Provincial Administration Case No D398/1998*) However, if there is a plan then it must be followed.

[53] In this case there was a dispute of fact as to whether there was a properly processed plan. If the dispute has to be resolved on the papers it must be in favour of the first and second respondents. (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)*).

On the plan that was before the Commissioner, at middle management level whites numbered 50 and Indians 5. The target was to reduce the number of whites to 30 and to increase Indians to 9 by 2010. On the face of it, it would appear that the applicant's allegations about under representation by whites were unsubstantiated.

As the applicant has no prospects of success on the merits whatsoever, the application for condonation must fail. Accordingly, the review must also fail. I nevertheless turn to consider the other criteria relevant to condonation.

On 8 September 2000 the applicant learnt that his application for promotion was unsuccessful. He requested the results of his interview from the Department on 26 September and 18 December 2000. Having received no response, he lodged a grievance. By letter dated 11 January 2001 he was given the minutes of his interview. It recorded that the applicant was found suitable for the post of Director, South-West. He relodged his grievance on 6 March 2001. The settlement he desired was disclosure of his position on the merit list as per the ranking of the interview panel and for implementation of the panel's recommendation.

It would seem that the applicant might have had some insight as to what the panel's recommendation was, otherwise he would not have had an interest in its

implementation. As it turns out, he was ranked first for the post. This was disclosed to him by letter dated 22 June 2001.

The 14 August 2001 was the first time the applicant, represented by his trade union, the Public Servants Association ("the PSA"), asked the Department how it came about that the first respondent, in conjunction with the Department, appointed somebody else, despite the applicant being found to be the most suitable. The Department did not respond.

The applicant referred a dispute pertaining to the disclosure of information. It was scheduled for conciliation on 15 November 2001. The Department furnished the applicant with further information, including a memorandum signed by the first respondent, confirming the appointment of one Moodley, and his reasons therefor. The memorandum reads as follows:

"All comments have been noted and considered. I agree that scoring alone cannot be the sole criterion in the appointment of a 'manager'. I believe that Mr Moodley has proven himself in the held and as he has also been found capable of doing the job and in keeping with representativity in Government service, which is a constitutional imperative, I after discussions with the head of department, Mr H B Strauss, hereby confirm that Mr Moodley be appointed as Director, South-West Region, with effect from 1 September 2000."

The applicant could have been left in no doubt that the appointment was based on racial representativity. It was potentially a claim based on unfair discrimination. Instead, the applicant and his trade union elected to refer the dispute as an unfair labour practice pertaining to his non-promotion to the Public Service Co-ordinating Bargaining Council.

The applicant alleges that it was only on 20 March 2002 that the Department made it clear to him and his trade union that its decision was based on affirmative action. Realising that his case was based on discrimination, he also

became aware that the CCMA should have conciliated the dispute and not the Bargaining Council.

He then sought counsel's advice and further information pertaining to the existence of employment equity plans and policies in the Department. This information was supplied to the applicant on 11 July 2002. Counsel gave his opinion on 22 August. After certain internal processes, Counsel was briefed in September 2002. The geographical distance between the trade union, the applicant and his counsel contributed to the delay.

An incomplete application for conciliation was made on 24 October 2002. Form 7.11 was eventually submitted on 10 December 2002 - more than two years after the applicant became aware of his non-appointment.

The applicant's reaction on hearing that he was not appointed, should have been to ask for reasons therefor. Neither the minutes of his interview nor his ranking on the merit list would have informed him why the first respondent did not appoint him. The interview panel merely made a recommendation to the first respondent who decided on the appointment. It is his decision that the applicant should have interrogated from the outset.

At no time in the two years and three months that it took for the condonation application to be filed did the applicant demonstrate any sense of urgency. The misconception by him and the PSA of the nature of the dispute is also not reasonable. The PSA is a long-established and experienced trade union.

I accordingly find that the period of delay is substantial and the explanation therefor unacceptable.

With regard to the Commissioner's reasons, I take note that Commissioners are not obliged to furnish reasons in terms of the LRA. However, it is an elementary principle of the rule of law which has been adopted by the CCMA in practice that

parties have a right to know the reasons for the outcome of their dispute. The reasons supplied by the Commissioner do not adequately inform the parties to the dispute. To that extent, it must be criticised. However, her conclusions must stand in the light of my finding on the merits.

The application is dismissed.

The applicant is ordered to pay the costs.

Judge Pillay, D

10 June 2004