CASE NO. SA 25/2002

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

TELECOM NAMIBIA LIMITED	**APPELLANT**

And

LOUIS TOBIAS DEYZEL	**FIRST RESPONDENT**
DAVID JOHN BRUNI	**SECOND RESPONDENT**

CORAM: Teek, J.A, O'Linn, A.J.A. *et* Gibson, A.J.A.

HEARD ON: 2004/07/02

DELIVERED ON: 2004/10/29

APPEAL JUDGMENT

O'LINN, A.J.A.:

I: INTRODUCTION: The appeal is against a judgment of the Labour Court handed down on 1 October 2001. Leave to appeal to this Court had been granted by the Court *a quo* on 3 December 2002.

Mr Smuts, assisted by Mr Dicks, appeared before us for the appellant and Mr Strydom for first and second respondents.

Mr Strydom, instructed by Erasmus and Associates appeared for Deysel as from and including the proceedings before the District Labour Court whereas Mr Hamman appeared for Telecom before the District Labour Court. Mr Dicks instructed by Lorentz and Bone appeared for Telecom in the Court *a quo*, and Mr Smuts and Mr Dicks for Telecom before us, as instructed by Lorentz and Bone. Mr David Bruni, cited as the second respondent before us, is the Trustee in the insolvent estate of Deysel and was the second applicant in the Court *a quo*. Second respondent was not separately represented in the appeal before us.

In view of multiple legal proceedings preceding this appeal, I will hereinafter refer to the appellant and first respondent respectively as Telecom and Deysel.

II: THE HISTORY OF THE PROCEEDING PRIOR TO THIS APPEAL

1. Deysel was appointed by the Telecom as its Regional Manager: Commercial – Central Region on 1 May 1995.

2. On 16 October 1996 Deysel was suspended pending the investigation of serious allegations against him.

3. On or about 24 October 1996 Deysel was given notice that he faced a disciplinary hearing on 30 October 1996 on the following charges:

> "1. Gross failure to adhere to work regulations in that you knowingly contravened the company's suspension policy on your telephone account by instructing the connection of a new line to your residence whilst an overdue, unpaid, suspended account remain in force at the same resident as per Par.3.1.2 (Clause ix) of the Disciplinary Code.
>
> 2. Serious breach of trust in that you used your position as Area Manager to contravene company policy for personal benefit by instructing the opening of new service as well as to effect the issuing of the cellphone to secretary without authority while an outstanding account remains unsettled as per Par 3.1.2 (Clause (xii) of the Disciplinary Code.
>
> 3. Misuse of company property for private purposes in that you used a Telecom account at a hotel in contravention with company stipulations as per Par 3.1.2 (Clause iii) of the Disciplinary Code."

4. Deysel did not object to the charges at any stage during the disciplinary hearing or in the internal appeal procedure.

5. The disciplinary hearing was duly held on 30 October 1996. Deysel was found guilty of charges 1 and 3 and the first part of charge 2. The outcome of the disciplinary hearing was that Deysel was dismissed with immediate effect and informed of his right to appeal.

6. On 31 October 1996 Deysel gave notice of his intention to appeal. His reasons/grounds for appeal were the following:

> "REASONS FOR APPEAL:
> 1. The penalty is too severe in the light of all the circumstances.
> 2. First offence.
> 3. No mitigating factors considered.
> 4. The chairman was influenced by the acessor."

The appeal was clearly only against sentence.

7. Telecom gave the Deysel notice of the date of the appeal hearing, namely 14 November 1996.

8. The appeal was duly considered by the chairperson of the appeal hearing and was upheld. The outcome of the appeal was the following:

> "DECISION FOLLOWING APPEAL
> Reverse earlier decision of appeal due to extenuating circumstances accepted and offering Mr Deyzel a demotion with two grades down. This however will have to be accepted by him. Two days granted for consideration.
>
> CLOSURE OF MEETING – FINAL REMARKS (if any)
> The verdict of guilt as passed at the first hearing is not reversed as Mr Deyzel's actions around the settlement of the outstanding telephone account did not inspire confidence and

> trust considering the level of responsibility he carries at the Central Coastal Region."

It is clear from the above that the appeal against sentence was upheld and the conviction remained intact.

9. Deysel was granted two days to consider the appeal verdict and to indicate his acceptance thereof. He however failed to respond within the two day period.

10. On 14 November 1996 and by facsimile Deysel requested the terms of his demotion, which were duly forwarded to him on the same date.

He was specifically requested to revert back to the appellant regarding his acceptance of the demotion by Monday, 18 November 1996.

11. On 15 November 1996 Mr Pierre Erasmus requested a copy of "**the decision taken at the appeal on Monday the 9th of November 1996**".

Deysel failed to inform Telecom by 18th November 1996 whether or not he accepted his demotion. On 20 November 1996 Telecom referred the matter to its attorneys and informed Deysel accordingly.

On 22 November 1996 Deyzel was informed by Telecom's attorneys, Lorenz and Bone, that, due to his failure to revert to the appellant by Monday, 18 November 1996, his services had been terminated.

12. The proceedings in the District Labour Court.

On 30 June 1997 the respondent lodged a complaint under the provisions of section 45 of the Labour Act, Act 6 of 1992 ("the Act") alleging that he had been unfairly dismissed on 16 October 1996, without a fair and proper procedure.

The appellant opposed the complaint and filed a reply.

12.2 Due to the fact that Deyzel was an unrehabilitated insolvent in terms of Rule 62(1)(b) of the rules of the Magistrate's Court pursuant to being sequestrated by his own attorney Mr Pierre Erasmus, during February 1997, (before the dispute with Telecom arose) appellant sought security for costs as it was entitled to in terms of the Magistrate's Court Rule.

The respondent provided the required security on 1 July 1999.

12.3 The aforementioned complaint served before the District Labour Court, Walvis Bay, on 26 July 1999.

12.4 At the outset of the complaint hearing the respondent elected to proceed by taking a point *in limine* in terms of Rule 29(6) of the rules of the Magistrate's Court, which counsel argued is applicable to proceedings before the District Labour Court.

The points *in limine* were articulated by Deysel's counsel as follows:

(i) The first charge namely that of gross failure to adhere to work regulations, was a nullity on the ground that the instructions to connect a new telephone line to a private residence cannot amount to gross negligence or incompetence within the meaning of the appellant's Disciplinary Code.

(ii) An employee can only be charged with either a common law offence or a statutory offence. Since charge 2 leveled against the respondent did not fall within one of these categories, the respondent could not be charged with a breach of trust.

(iii) The third charge, namely that of misuse of company property for private purposes, was a nullity because the property allegedly misused, namely a Telecom account, cannot constitute "**property**".

Furthermore, he argued that insofar as the appellant wanted to rely on a statutory offence, it should have referred to the statute and section allegedly transgressed.

12.5 At the conclusion of arguing his points *in limine*, Deysel's counsel urged the Court to quash the three charges. The Court was not requested to make

a ruling in terms of section 46(1) that he had been dismissed unfairly or that the disciplinary action was taken unfairly.

12.6 Following argument upon the point *in limine*, the Learned Chairperson of the DLC, Mr Amutse made the following ruling on 27 July 1999:

> “Having heard the application *in limine* by the legal representatives of the complainant in this matter and the submissions by the legal representatives of the respondent and having perused the three charges on the basis of which a point *in limine* were raised, this Court makes the following orders:
>
> a. That the application *in limine* is upheld.
> b. That the charges in question are quashed.
> c. That this matter is referred back to the respondent to institute charges and disciplinary hearing against the complainant *de novo*.
> d. That both parties are warned to ensure strict compliance with the District Labour Court rules including Rule 6.
> Respondent ordered to ensure that this is done within three (3) months from today. Mean while, matter postponed sine die pending the outcome of the disciplinary hearing.”

13. On the same day, 27 July 1999, the Deysel’s legal representatives requested written reasons from the DLC Chairperson and more particularly regarding:

> “1. For what reason was the matter postponed *sine die* as the application was intended to dispose of the matter finally;

> 2. The effect of the order on the employment of the complainant as he was suspended with full pay prior to the hearing which led to this action;
>
> 3. The effect of the order should respondent (the appellant) not comply therewith."

13.1 On 28 July 1999 the Chairperson supplied written reasons, which included the following:

> "The order is clear. It is not meant or intended to change or affect anything, right, obligation or cause that existed before 27/7/1999."

13.2 Following the ruling of the District Labour Court, Walvis Bay and the further reasons supplied by the Chairperson, Deysel on 27 July 1999 by letter of his attorneys, claimed that he must first be reinstated by the appellant and receive payment of the amount of N$513,631.04 (apparently representing the aggregate of his salary and benefits from the time of dismissal, including a period during which the respondent had already obtained other employment) before complying with the order of the DLC.

This claim was repeated on 22 October 1999, again in a letter by Mr Erasmus on the Deysel's behalf, in the following terms:

> "We believe that the effect of the court order granted on 27 July 1999 is that our client must be paid his salary from date of "termination" of his employment until date hereof. In this regard we attach a copy of our letter addressed to Kinghorn Associates dated 27 July 1999. Kindly forward payment to our offices prior to the disciplinary hearing commencing."

This claim was reiterated yet again on 11 November 1999 by Mr Erasmus in these terms:

> "If our client is to be regarded as an employee, your client is obliged to pay our client to date, including all perks."

14. When the aforesaid letters were written by Deysel's attorney, the respondent had already obtained new employment with effect from 1 July

1999 at Internam Shipping and received a salary including perks, of N$12 680.80, since at least October 1999.

15. Telecom reconvened disciplinary proceedings after no appeal was noted within the required time period. Telecom complied and gave effect to the court order (of the DLC) and duly held the required disciplinary hearing on 11 November 1999. It was not held strictly within the three-month period as a postponement of the hearing was expressly requested by the respondent, which request the appellant acceded to.

15.1 In compliance with the order of the District Labour Court delivered on 27 July 1999 and the subsequent postponement of the District Labour Court matter, Telecom:

redrafted the charges against the respondent as follows:

> "CHARGE 1
>
> That you are guilty of fraudulent conduct in that you on the 14th of June 1996 applied for a subscriber service agreement with MTC, for an official Telecom cell phone with number 081 127 5949, in which agreement you brought MTC and TELECOM NAMIBIA under the mistaken belief that:

(a) the said cell phone would be for the official use of the "private secretary" at the Walvis Bay office of TELECOM NAMIBIA; and/or

(b) the mentioned "private secretary" would be entitled to the use of an official Telecom cell phone while knowing that the cell phone would be used by one M J Feris, who is barred from holding a cell phone account with MTC due to previous non-payments of her cell phone account and/or while knowing that the said cell phone would be used by the said Mrs Feris for her own private use and/or while knowing that the said Mrs Feris nor the "private secretary" at Walvis Bay office are mandated by Telecom Namibia to use official cell phones and that the aforesaid fraudulent conduct induced MTC to provide the said phone and/or services applied for and further induced Telecom Namibia to pay the account of MTC for the service rendered to the aforementioned cell phone, thereby causing MTC a potential loss and Telecom Namibia to suffer a loss of N$1 467.78.

CHARGE 2

That you are guilty of misappropriation of Telecom Funds in that you allowed your secretary Mrs Feris to sign an official

order for N$140.00 to pay for alcoholic beverages, that you enjoyed at the Kalahari Sands Hotel in Windhoek, while knowing that it was against Official Telecom Policies for employees of Telecom to use Telecom Funds to pay for alcoholic beverages.

CHARGE 3

That you knowingly contravened and or attempted to circumvent the official Telecom suspension policy by applying for a second line to your house in Walvis Bay while the first line to your house was suspended due to non-payment of your telephone account.

CHARGE 4

That you abused your powers as Areas Manager Coastal Region of Telecom by allowing your private telephone account to run in arrears for a period of 10 months (from December 1995 – September 1996) to the amount of N$3096.75, without suspending the same.

CHARGE 5

That you are guilty of unseemly conduct in that you entered into a romantic relationship with your secretary Mrs M J Feris and that you allowed the said Mrs Feris, while having this relationship with her, to conduct certain official duties, which she was not mandated for and/or allowing her to enjoy certain official Telecom privileges, which she would not have been entitled to had she not entered into the mentioned relationship with you."

15.2 On 15 October 1999 Telecom gave notice to Deysel of the disciplinary hearing to be held on 25 and 26 October 1999 at the Telecom Head Quarters, Windhoek, at 09:00 and informed Deysel of his rights.

15.3 On 22 October 1999 Deysel's legal representative, Mr Pierre Erasmus of the firm Erasmus and Associates, requested a postponement of the disciplinary hearing for a period of 2 weeks "to prepare and consult with witnesses and arrange the necessary." Furthermore, Mr Pierre Erasmus stated that "the venue is not suitable nor in terms of the labour practice or company policy. Our client is entitled to be heard at his place of employment i.e. Walvis Bay." Mr Erasmus also confirmed that his firm had been acting for Deysel since the termination of his services.

Telecom acceded to Deysel's request for a postponement as well as a change of the venue of the disciplinary hearing.

15.4 On 1 November 1999 Telecom's legal representatives informed Deysel's legal representatives as follows:

> "We refer to the above matter and our fax of the 22nd of October 1999 and advise that the hearing shall take place on the 11th and 12th of November 1999 at 09:00 at the offices of Telecom Namibia in Walvis Bay."

15.5 Only on 10 November 1999 and after all arrangements had been made for the disciplinary hearing to be held in Walvis Bay on 11 and 12 November 1999 and furthermore after Telecom's witnesses and officials of the liquidator had already travelled to Walvis Bay, Deysel's attorneys informed Telecom that he will not be present at the hearing in view of the fact that Deysel and his attorneys intended to institute review proceedings against the ruling of the District Labour Court.

15.6 In compliance with the court order Telecom proceeded with the disciplinary hearing in Deysel's absence and found him guilty on four of the five charges leveled against him and dismissed him.

16. **<u>The proceedings in the Court below</u>**

16.1 On 6 April 2000 Deysel however instituted review proceedings, seeking only to set aside paragraphs (c) and (d) of the order made on 27th July 1999. This was more than eight months after the date upon which the order was granted and nearly five months after that portion of the order sought to be reviewed had already been given effect to and complied with by Telecom. The application for review was also lodged 3½ years after the decision in the first disciplinary hearing.

16.2 Given the fact that the review application was brought out of time, Deysel applied for condonation in the Court *a quo* for the late bringing of the review application.

16.3 Telecom opposed the review application on several grounds.

16.4 The Court *a quo*, although expressing reservations in respect of shortcomings in the respondent's explanation in support of the condonation application nevertheless found that respondent acted upon advice and decided not to penalise him for the conduct of his legal representatives and granted condonation. The Court *a quo* further held that the chairperson of

the DLC did not have the power to make the order sought to be reviewed – by reason of the fact that section 46 of the Act requires the DLC to be satisfied that an employee has been dismissed unfairly or that disciplinary action has been taken unfairly before making an order pursuant to section 46(1)(c). The Court *a quo* as a consequence set aside portions (c) and (d) of the ruling of the DLC and the postponement of the complaint *sine die* referred to in paragraph 12.6 supra.

III. THE APPEAL TO THIS COURT

Telecom applied to the Court *a quo* and was granted leave to appeal to this Court. The notice of appeal set out the following grounds of appeal:

> "1. That the Honourable President erred in setting aside portions of the ruling of the Chairperson of the District Labour Court which are not capable of standing on their own and which were an integral part and consequential upon the other parts

of the ruling which remained and which had been expressly sought by the first respondent.

2. The Honourable President erred in setting aside the portions of the order which essentially constituted the implementation of the orders embodied in (a) and (b) and which portions had already been given effect to.

3. That the Honourable President erred in setting aside portions of an order which were integral parts of and consequential upon incompetent rulings embodied in (a) and (b) of the orders of the District Labour Court.

4. That the Honourable President erred in finding that the Chairperson of the District Labour Court did not have the power to make order (c) by reason of the Chairperson's incorrect reference to a section in the Labour Act upon which he relied.

5. That the Honourable President erred in failing to take into account that the first respondent should have appealed against the District Labour Court's ruling instead of reviewing same.

6. That the Honourable President erred in finding that the first respondent had in the circumstances shown good cause for the non-compliance with the provisions of Rule 15(2) of the Labour Court Rules.

7. That the Honourable President erred in finding that Rule 16 of the Labour Court Rules allowed a more liberal interpretation in exercise of the Court's discretion and less rigid adherence to the prescriptive time limits in Rule 15(2) of the Labour Court Rules by failing to take into account that Rule 15(2) requires a review being instituted promptly and in any event within 3 months and that such time limit is superimposed upon the common law requirement of bringing a review within a reasonable time.

8. That the Honourable President, in granting condonation, erred by taking into account the alternative argument of the applicant that the entire order should have been set aside."

(IV) DOES THE GROUNDS OF APPEAL CONTAINED IN PARAGRAPHS 6 AND 8 CONSTITUTE QUESTIONS OF LAW AND AS SUCH APPEALABLE

Mr Strydom contended that the points raised in paragraph 6, 8, 9, 10, 11 of the notice of application for leave to appeal "are either questions of fact and/or questions of judicial discretion" and thus do not qualify as questions of law and

consequently not appealable. In the notice of appeal filed subsequent to the granting of leave to appeal, grounds 9-12 were omitted and it is consequently not necessary to deal with all those grounds when answering the question on whether or not some of those grounds did not amount to questions of law. Only grounds 6 and 8, which were repeated in the notice of appeal, are therefore relevant to this question.

To decide whether or not "good cause" in terms of section 15(2) has been shown, several rules of Court have to be considered, interpreted and applied. Such interpretation and application amount to questions of law. Furthermore many principles enunciated in our common law and case law, need to be applied when a Court must consider whether or not condonation for the late bringing of an application for review is considered. This is not a case of an unfettered discretion

vested in the Court. The discretion, to the extent that a discretion must be exercised, cannot be divorced from the pure questions of law which arise in interpreting the statutory provisions applicable and applying such provisions and the relevant legal principles, in deciding whether or not condonation should be granted.

Mr Strydom referred to the decision by myself in the case of *Minister of Health and Social Welfare Services v Vlasiu*[1] wherein I referred with approval to Salmond and said:

> "Salmond at 70-71 of his work sets out three classes of questions that come before a Court of Justice. These are:
>
> (i) Matters and questions of law – that is to say, all that are determined by authoritative legal principles;
>
> (ii) Matters and questions of judicial discretion – that is to say, all matters and questions as to what is right, just equitable, or reasonable, except in so far as determined by law.

[1] NLLP 1998(1) 35 NLC

> In the matters of the first kind, the duty of the Court is to ascertain the rule of law and to decide in accordance with it.
>
> In matters of the second kind, its duty, is to exercise its moral judgment in order to ascertain the right and justice of the case.
>
> In matters of <u>the third kind</u>, its duty is to exercise its intellectual judgment on evidence submitted to it in order to ascertain the truth."
> (My emphasis added)

The issues raised in the aforesaid paragraph 6 and 8 of the notice of appeal comply with the first category of Salmond's definition as well as the exception stated in the second category dealing with discretion and which reads – "except in so far as determined by law."[2]

V. <u>SHOULD CONDONATION HAVE BEEN GRANTED</u>

1. The applicable provisions of the Labour Court Rules.

1.1 Rule 15(2) provides:

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[2] See also Section v. infra

> "An application to which this rule applies shall be made promptly and in any event, within three months from the date when grounds for the application first arose."

The requirements set out in this rule relating to time, standing alone, are clearly imperative and mandatory, so that on application for review which is not brought promptly and which in any event is not brought within a period of three months from the date when the grounds for the application first arose, cannot be permitted or entertained by Labour Court.

This rule is much stricter than the requirement of the common law which is applicable to reviews brought before the High Court where no time is stipulated and which requires a review to be brought within a reasonable time.

1.2 However, the clear and specific words of Rule 15(2) specially enacted and applicable only to reviews, must be read in conjunction with the following Rule 16 which is a general rule dealing with any non-compliance of the Rules. Rule 16 reads:

> "The Court may, upon application and an good cause shown, at any time –
>
> (a) condone any non-compliance with these rules;
> (b) extend or abridge any period prescribed by these rules, whether before or after the expiry of such period."

1.3 The Court *a quo* also referred to and apparently relied on Rule 23 of the Labour Court Rules which the Court stated "puts the matter beyond doubt".

The matter referred to as being placed beyond doubt by Rule 23 is apparently that Rule 16 of the Labour Court Rules "can and must be interpreted in the same way as Rule 27(1) and (3) of the High Court Rules," which, similar to Rule 16 of the Labour Court Rules, deal with extension of time, removal of bar and condonation in general.

In my respectful view the Court *a quo* misdirected itself in this regard, notwithstanding that counsel at the time allegedly being *ad idem* on the correctness of the proposition. I say this because Rule 23 of the Labour Court rules introduces Rule 23 by stating the precondition that –

> "Subject to the Act and these Rules", – "where these Rules do not make provision for the procedure to be followed in any matter before the Court, the rules applicable to civil proceedings in the High Court ….shall apply to proceedings before the Court with such

qualifications, modifications and adaptions as the Court may deem necessary in the interest of all parties to such proceedings."

Rule 15(2) of the Labour Court and Rule 16 do provide the procedure to be followed in respect of the time within which applications for condonation must be brought and Rule 23 is therefore not applicable at all. It follows from this that Rules 27(1) and 27(3) of the High Court are not applicable to this issue. Rules 27(1) and (3) however are similar to Rule 16 of the Labour Court Rules and decisions on its interpretation and application are therefore useful in interpreting

Rule 16 of the Labour Court Rules, provided such interpretation gives due weight to the mandatory and imperative wording of Rule 15(2), laying down specific time limits for review applications.

Rule 53 of the Rules of the High Court deals with reviews brought to the High Court. Rule 53 does not lay down any principle of promptness or any limitation of the time within which a review may be brought in the High Court. Consequently the common law rule as recognized in the case law applies, namely that such applications must be brought within a reasonable time.

It must be noted that the Rules of the High Court referred to were promulgated on 10th October 1990, those of the Supreme Court on 8th October 1990 and those of the Labour Court subsequently on 22nd April 1994.

Rule 27 of the High Court reads as follows:

> "27(1) In the absence of agreement between the parties, the Court may on application and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of Court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet…….
>
> (3) The Court may on good cause shown, condone any non-compliance with these rules."

The relevant rule of the Supreme Court is Rule 18 which reads as follows:

> "18. The Supreme Court may, for sufficient cause shown, excuse the parties from compliance with any of the aforegoing rules and may give such directions in matters of practice and procedure as it may consider just and expedient under the circumstances."

Rule 15(2) of the Labour Court Rules enacted in April 1994 thus was a radical innovation of Rules of Court compared to those of the High Court and Supreme Court of Namibia and Courts of law preceding those of the Namibian High Court and Supreme Court, dealing with the requirements for the condonation of a failure to comply with Rules in review applications. It is obvious that Rule 15(2) was intended to deal with the special case of reviews in Labour Courts and the need to bring Labour disputes to an expeditious end and so promote stability and diminish labour unrest.

1.4 It follows that decisions such as *Cairn Executors v Gairn* 1912 A 181 at 186 and even *Smith NO v Brunmer NO and Another*, quoted in the Civil Practice of the Supreme Court of South Africa, 4th ed at p555 and relied on by the Court *a quo* and counsel, do not afford a complete answer and formula when the Rules 15.2 and 16 of the Labour Court Rules of Namibia must be interpreted and applied.

1.5 I agree with counsel for Telecom, Mr Smuts that where express statutory limits are laid down, ….more compelling reasons are required in order to obtain condonation than where the requirement would be of mere reasonableness. This is because the Rule-maker had set a principle of promptness and set an express limit beyond which an application would not be regarded as prompt."

1.6 I also agree with that part of the judgment in Cairn Executors v Gairn, [3] referred to supra, where Innes J as he then was said: "Cases might conceivably arise so special in their circumstances that, in spite of abnormal delay, the Court would feel bound to assist the applicant. But on the other hand the length of the delay and its cause must always be important (in many cases the most important) element to consider in arriving at a conclusion."

1.7 It seems to me that although the power of the Labour Court to condone set out in Rule 16 is indeed wide, it should take cognizance of Rule 15.2 and regard the requirements therein set out as a standard to which it must adhere, unless there are exceptional circumstances constituting "good cause" to allow condonation.

1.8 For the rest I adhere to the guidelines (a) –(e) set out in *Smit NO v Brummer NO and Another* [4] which read as follows:

> "(a) A reasonable explanation for the delay is forthcoming.
> (b) the application is bona fide and not made with intent to delay the other party's claim;
> (c) it appears that there has not been a reckless or intentional disregard of the rules of court;
> (d) the applicants case is not obviously without foundation; and
> (e) the other party is not prejudiced to an extent which cannot be rectified by a suitable order as to costs."

[3] 1912 AD 181 at 186
[4] 1954 (3) SA 352

As far as some of the general principles applied in the Supreme Court in condonation applications for the failure to comply with requirements of the Rules of Supreme Court are concerned, I need not go further than the recent decision of the Supreme Court in *Chairperson of the Immigration Selection Board v Frank and Another* [5] where Strydom, CJ *inter alia* said:

"In considering petitions for condonation under Rule 18, the factors usually weighed by the Court include: the degree of non-compliance; the explanation therefore; the importance of the case; the prospects of success; the respondents interest in the finality of the judgment; the convenience of the Court and the avoidance of unnecessary delay in the administration of justice….."

The Chief Justice further said:

> "A reading of the cases of the Supreme Court of Appeal (in South Africa) shows in my opinion more than a tendency to follow a hard line. These cases show that a flagrant non-observance of the Rules of Court coupled with an unsatisfactory explanation for the non-observance of the Rules and delays, more often than not ended in a

[5] Unreported judgment

refusal of condonation. In certain cases the Court declined to consider the merits of a particular case even though it was of the opinion that there was substance in the appeal……. A reading of the cases of the High Court of Namibia shows that the situation is not different from that in South Africa and the Court has referred condonation or relief in similar circumstances……"

As to cases where blame is placed on the legal practitioners of a litigant, the Chief Justice stated:

"Many of the above cases also show that 'there is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this Court………

A legal practitioner who fails to comply with the Rules of Court must give full and satisfactory explanation for the non-observance of the Rules and any delays that might have occurred. Furthermore a legal practitioner should also as soon as he or she realizes that a

> breach of the Rules has occurred prepare and file an application for condonation. This presupposes that the legal practitioner knows the rules and would know when non-observance thereof occurred. Lack of knowledge due to ignorance of the Rules and failure to inform him or herself of the provisions of the Rules can hardly serve as an explanation for failure to apply timeously." (My emphasis)

Although I wrote the majority judgment in which Teek, AJA concurred, we agreed in substance with the approach articulated by Strydom CJ regarding condonation. Condonation was however granted because the matter was one of substantial public interest and the prospects of success were very good.

The Learned President of the Court *a quo* commented on the argument of counsel for Telecom that in view of Rule 15(2), review proceedings should strictly adhere to such limits as follows:

> "I think Rule 16 of the Labour Court Rules allows a more liberal interpretation and exercise of the Courts discretion and a less than rigid adherence to the time limit prescribed by Rule 15(2)."

The Court however failed to give the necessary weight to the fact that the Labour Court Rules have provided for strict limitations as to the time allowed, for the launching of reviews, whereas the Rules of the High Court and Supreme Court and

similar legislation preceding its rules, did not contain such restriction for review applications.

This fact necessitates, a much more rigid and less "liberal" approach in Labour Court reviews than in other legislation dealing with condonation applications.

2. The Court a quo's finding in regard to Deysel's alleged reliance on advice from his attorney.

2.1 "The Court *a quo* found:

> "Whatever shortcoming there may be in the applicant's explanation of his delay one thing, however, is clear and that is that he, rightly or wrongly, acted on advice and the advice, rightly or wrongly, was given in the course of both parties attempting, rightly or wrongly, to comply with the Court a quo's ruling." (My emphasis added)

(i) This dictum is confusing. However if I understand this dictum correctly, it makes no distinction between the case where the litigant "rightly acts on advice and where he "wrongly" acts on advice as long as he acts on advice; similarly it makes no difference whether the advice was given "rightly" in the course of both parties attempting – "rightly or wrongly", to comply with the court a quo's ruling or "wrongly" attempting to comply with the Courts ruling. Surely it is important

in a condonation matter whether a litigant has acted rightly or wrongly. The following observations need be made.

(ii) This approach is inconsistent with the approach laid down in decisions of Namibian and South African Courts as reiterated in the recent Supreme Court decision of <u>Frank and Another v Minister of the Interior</u>, referred to supra.

2.2 The Court continued:

"Paragraph 37 of Deysel's affidavit states:

'37. I am advised and respectfully submit that review proceedings must be brought within a reasonable time. However, I am also advised and respectfully submit that a further consideration of this

Court pertains to the issue of prejudice'. And in paragraph 34.5 of Telecom's answering affidavit is stated:

"34.5 Quite evidently, at the time when the letters of the 10th and 11th of November were written, Mr Erasmus was blissfully unaware that the time for filing of the review application has already lapsed two weeks prior to that on the 28th October 1999. I submit that it is clear from this letter that Mr Erasmus laboured from the impression that the review can be filed within a reasonable time as is the case with normal civil reviews. This is corroborated by the fact that the first applicant received precisely such legal advice as clearly stated in paragraph 37 of his founding affidavit. I submit that this is the true cause of the delay, and not the variety of excuses that that the first applicant now puts forward."

It is apparent that the Court misdirected itself in relying on paragraph 37 of Deysel's founding affidavit and failing to take cognisance of the preceding paragraph 34 wherein Deysel stated:

> "I am advised and respectfully submit that in any application for a review such an application need to be instituted within three months as contemplated in Rule 15(2) of the Rules of the Labour Court. I am also advised and respectfully submit that the Court by virtue of the provisions of Rule 16 has powers to, upon application and on good cause shown, condone any non-compliance with the rules and may extend or abridge any period prescribed by the rules whether before or after such period."

The Court compounded the misdirection by relying on paragraph 34.5 of Telecom's answering affidavit where an argument was put forward based on paragraph 37 of applicant's affidavit, to the effect that Erasmus was ignorant of Rule 15.2 and that that was the real reason for the delay. Obviously Telecom's legal advisors and representatives, also failed to take cognisance of paragraph 34 of Deysel's founding affidavit and as a result their argument in this regard is also fatally flawed.

It must be accepted in the light of the foregoing that both Deysel and his attorney knew quite well what the Rules of the Labour Court require. There is no basis for the excuse of ignorance by either and none of them actually put that excuse forward in their affidavits before Court.

2.3 The Court continued:

> "The applicant has not been shown to have recklessly disregarded his obligation ……… generally in cases where condonation of non-compliance with the Rules of Court is sought, the Court will not highly penalize the litigant on account of the conduct of his attorney."

The principles applicable where a legal representative is the cause of the delay, has been set out authoritatively in the Frank decision of the Supreme Court. Although I am not certain whether the word "highly" was intended in the above dictum of the Court *a quo*, it is in my respectful view clear that the principles set out in the Frank case in this regard are correct and binding and in so far as the Court *a quo* obviously did not apply those principles, it had misdirected itself.

The question is then to what extent, if any, was the legal representative of Deysel, Mr Erasmus to blame for failure to comply with Rule 15(2). It seems to me that no case was made out by or on behalf of Deysel of alleged negligence and/or incompetence of his legal representatives, as the sole or contributory cause of Deysel's failure to comply with the Rules. The only possible blame alleged by either Deysel or Erasmus relates to Deysel's financial position.

2.4 The Court formulated the alleged financial predicament as follows:

> "The other consideration to take account of in this regard is that applicant had prior to the hearing before the District Labour Court, <u>been declared insolvent at the instance of the same legal practitioner</u>
>
> <u>who continued to</u> represent him in proceedings in the Lower Court and thereafter. As a result the proceedings in the Lower Court, were held up for more than a year until security for costs in the sum of N$15.000 was given. This has a direct bearing on the question of prejudice that respondent complains it had suffered or will suffer should the application for condonation be granted."

I deem the following comments necessary:

(i) Although Deysel admitted that he had been reemployed already before July 1999 and permanently appointed by his new employer since October 1999 at a salary of at least N$10.000 per month, neither he nor his attorney gave an account at any stage of his income and expenditure since being discharged by Telecom. It was later established that in addition to the N$10.000 he was entitled to perks amounting to N$2 680.80, totaling N$12 680.80. This gravely reflects on his openness, credibility and *bona-fides*, particularly when financial problems are advanced for not complying with Rules 15(2) of the Rules of the Labour Court.

(ii) The fact that Deysel had been "declared insolvent at the instance of the same legal practitioner who continued to represent him in the Lower Court and thereafter" is an anomaly of their own choosing, for which Telecom could not take responsibility. Nevertheless it is claimed "that as a result, the proceedings in the lower Court were held up for more than a year until security for costs in the sum of N$15 000 was given."

(iii) It was not explained why his legal representative Erasmus and Company had applied for his sequestration, why he was sequestrated, why the same legal practitioner continued to act for him; whether or not he continued to pay that representative; whether that representative refused to draw the review documents unless he was paid; why he did not obtain the services of another legal representative or even represented himself.

(iv) Telecom had the right to obtain security for costs and it was prudent for Telecom, being a parastatal, to apply for security for costs, also considering the long delays.

(v) Security for costs would indeed have a bearing on prejudice that Telecom claimed it would suffer if condonation was granted, but surely that is not the only

prejudice that Telecom could suffer. Aspects of prejudice which are not taken care of by payment of security for costs, are for instance the following:

(a) It was necessary in the interest industrial stability and peace, that litigation and other action between employers and employees are brought to a conclusion expeditiously and not be dragged out indefinitely. That is also why a rule such as Rule 15.2 has been enacted to lay down a specific time frame within which review applications had to be brought.

(b) Should applicant Deysel succeed, the possible financial compensation to which he would be entitled, would increase with the time which had elapsed in the meantime.

(c) Telecom had the right and the need to fill the vacancy left by Deysel's dismissal and to reshuffle personnel. Undue delays in bringing the dispute with Deysel to finality, hampers Telecom's ability to do this. When the application for review was launched on 6th April 2000, 3½ years had already passed since the first disciplinary hearing when Deysel was dismissed.

2.5 The Courts' statement: "The applicant has not been shown to have recklessly disregarded his obligation."

The onus was on the applicant Deysel to satisfy the Court on a balance of probabilities that the requirements for condonation as herein set out, have been met.[6] It appears that the Court placed an onus on Telecom, to satisfy these requirements. If that is so, the Court has misdirected itself.

2.6 The last reason put forward by the Court *a quo* for having granted condonation, is stated as follows:

> "In determining this part of the application, I have also had regard, as Mr Strydom suggested in his heads of argument on behalf of applicant, to the alternative relief prayed for by respondent in his answering affidavit, namely that the entire order of the Chairperson of the District Labour Court be set aside and the matter be referred back for a full hearing on the merits. In these circumstances I am prepared to condone the non-compliance with the rules by applicant, and I so order."

Mr Smuts submitted that this reason by the Court *a quo* amounts to a misdirection.

[6] Smit NO v Brumner NO and Another referred to supra under footnote 3, a case relied on by the Court *a quo* and sets out the nature of the onus resting on the applicant.

I agree with Mr Smuts counsel for Telecom in this regard. I could understand the Court's argument if used to satisfy the requirements of reasonable substance in the appeal on the merits, but I fail to see the logic or reason for using the fact of a submission made by counsel in the alternative relating to the merits, to overcome the obstacle created by Rule 15(2) of the Rules.

3. When considering the guidelines stated in *Cairn Executors v Gairn*, supra, the delay in the instant case can indeed be described as abnormal, being at least 5 months later than the three months which is the outer limit laid down by Rule 15(2) from the time when the grounds for the review first arose. Furthermore the

launching of the application was a gross failure to make the application promptly." It is certainly also not a case "so special in its circumstances, that in spite of abnormal delay, the Court will feel bound to assist the applicant."

When the guidelines laid down in the *Smith NO v Brumner NO and Another* are considered, the application should have failed because the applicant has not shown that –

(a) A reasonable explanation for the applicants delay is forthcoming;

(b) the application is bona fide and not made with intent to delay the other party's claim;

(c) it appears that there has not been a reckless or intentional disregard of the Rules of Court;

(d) the other party is not prejudiced to an extent which cannot be rectified by a suitable order as to costs.

In my respectful view, the applicant Deysel failed to meet any of these requirements.

There are also no exceptional circumstances justifying such an abnormal delay measured by the requirements of Rule 15(2).

In the instant case there certainly was a flagrant non-observance of the Rules of Court coupled with an unsatisfactory explanation for the non-observance of the Rules, which, more often then not, ends in a refusal of condonation", as formulated in the decision by this Court in the Frank matter referred to supra. Condonation is therefore likely to be refused.

The final decision on whether or not condonation should have been granted will be made after considering the merits of the review case.

(IV) THE MERITS OF THE REVIEW

1. The review application was preceded by:

(i) A disciplinary hearing wherein Deysel was charged, convicted and sentenced on three charges. This was followed by an appeal, only against the sentence of dismissal. The appeal was partially successful as to sentence only. Deysel was represented at these proceedings. At no stage was any objection made against the charges.

(ii) A complaint by Deysel to the District Labour Court dated 30.6.1994 in which the following particulars were given.

Particulars of complaint:

Unlawful dismissal on 16th October 1996 without a fair and proper procedure, without fair reason and without proper cause.

Statement of relief claimed:

Reinstatement, with salaries and benefits paid retrospectively from 1st December 1996.

Amount of money claimed N$14 500 per month from 1st December 1996 plus additional benefits (only where appropriate and if known to complainant."

(iii) On the same date notice of hearing was already given for 28th August 1997.

(iv) On the same date that the complaint was received by the Clerk of the Court, the said clerk referred the complaint to the Labour Inspector in terms of Rule 6(1).

(v) Telecom did file a reply opposing the complaint in terms of Rule 7 on 11.7.1997, wherein the Telecom insisted that both the initial disciplinary hearing as well as the appeal proceedings was done by a fair procedure and for a valid and fair reason and found guilty and sentenced of a fair hearing.

(vi) There is no record of any steps taken by the Labour Inspector or any conference or other effort to settle the issues and also no notification by the Labour Inspector to the District Labour Court that the matter could not be settled and also no record of the facts and records that were admitted or not admitted. It is therefore obvious that an essential part of Rule 6 was not complied with prior to the hearing.

(vii) At the hearing in the District Labour Court Telecom was suddenly confronted by counsel for Deysel with certain points *in limine*

amounting to an application that the charges levelled at the first disciplinary hearing and again considered in the appeal on sentence, be quashed.

The points *in limine* have been set out in paragraph 12.4 of Section II supra and need not be repeated. It amounted however to an alleged conflict between the facts alleged at the disciplinary hearing held by Telecom and sections of an alleged disciplinary code referred to in the charges. There were three such charges against Deysel.

2. The relevant part of Deysel's application for review read:

"Reviewing and setting aside part of the ruling……

(c) That this matter is referred back to the Respondent to institute charges and disciplinary hearing against complainant *de novo* -

(d) That both parties are warned to ensure strict compliance with the District Labour Court Rules including Rule 6.

Respondent is ordered to ensure that this is done within three (3) months as from today. Meanwhile matter postponed sine die pending the outcome of the disciplinary hearing (The application

stated that this part was irregular and also in contravention with the Constitutional rights of the applicant).

Costs of the application (only in the event of the matter being opposed."

Deysel did not complain about the part contained in paragraph (a) and (b) of the order. These two paragraphs read:

"(a) that the application *in limine* is upheld;

(b) that the charges in question are quashed."

3. None of the parties, nor their counsel or the Court *a quo*, referred at all to an important part of the Learned Magistrate's ruling that "both parties are warned to ensure strict compliance with the District Labour Court Rules including Rule 6. Rule 6, read with Rule 7 is an integral and mandatory procedure provided for in the Rules to encourage, through the mediation rôle of the Labour inspector, an expeditious, inexpensive and conciliatory solution to any labour dispute.

Rule 6 reads as follows:

"6(1) Upon the filing of a complaint, the clerk of the court shall, unless good grounds exist not to do so, refer the complaint for settlement or further investigation to a labour inspector (form 4).

(2) The complainant and respondent shall be informed (form 5) of the date and place of any conference for the purposes of subrule (1), by the labour inspector.

(3) The parties shall co-operate with the labour inspector and attempt to settle their dispute.

(4) In the event of a settlement, the terms thereof shall be reduced to writing by the labour inspector, signed by the parties and filed with the clerk of the court not later than three days prior to the date of the hearing.

(5) Upon agreement of the parties, the terms of the settlement may be made an order of court.

(6) In the event that a settlement cannot be reached, the parties shall co-operate with the labour inspector to identify such facts and documents relevant to the complaint or to the defence thereto which are not in dispute and a list of facts and documents so agreed upon, if any, shall be prepared by the labour inspector, signed by the parties

> and filed by the labour inspector with the clerk of the court not later than three days prior to the date of the hearing, or if no such facts or documents can be agreed upon, a notice to the court to that effect by the labour inspector shall be so filed with the clerk of the court."

The rule provides not only for a settlement procedure and the making of any settlement an order of Court, but a procedure in the form of a pre-trial conference, in the case where a settlement of the dispute is not reached, to enable agreement on the facts and documents not in issue. The rule further provides for a notice by the labour inspector to the Court if no agreement could be reached on such facts and documents.

It is obvious that no legal representatives need be involved in complying with Rule 6, since the labour inspector is entrusted with a central and impartial role, but legal representatives are not excluded. In this regard Rule 10(3) provides for free representation of the complainant by a person designated by the Permanent Secretary: Labour and Human Resources Development.

It seems to me to follow that a dispute is not ready for hearing before the District Labour Court if Rule 6 has not been complied with. That probably is the reason why the Learned Chairman of the District Labour Court decided to include the

order in his ruling that both parties must strictly comply with this Rule within the period of three months from the date of his order, and by implication, before the matter is again set down for hearing if the disciplinary hearing does not conclude the matter to the satisfaction of the parties.

4. The Code of conduct and the points *in limine*

Mr Strydom built his whole argument contained in his "points *in limine*" on the alleged Code of Conduct and persisted with that approach in the appeal before us.

The Code was represented by him as a codification by the employer of all the disciplinary offences with which an employee could be charged by the employer and any alleged offence not numbered and worded in accordance with this code is a nullity. Unfortunately the full alleged code was never produced in Court by any of the parties to enable the various tribunals to understand and interpret the nature

of the Code. The small part which was produced and which became part of the record on appeal was illegible in part.

The problem had its origin in the Telecom Disciplinary Tribunal where Deysel first appeared on three charges which were obviously drafted by a person without professional skills in matters of law and who misunderstood the nature and purpose of the code. The charges as formulated read as follows:

“Charge 1: Gross failure to adhere to work regulations in that you knowingly contravened company’s policy on your telephone amount by instructing the connection of a new line to your residence whilst on overdue, unpaid, suspended amount remain in force at the same residence as per paragraph 3.1.2 (Clause1x) of the Disciplinary Code.

Charge 2: Serious breach of trust in that you used your position as Area Manager to contravene company policy for personal benefit by instructing the opening a new service as well as to effect the issuing of cellphone to secretary without authority while an outstanding amount account remains unsettled as per paragraph 3.1.2 Clause (xii) of the Disciplinary Code)

Charge 3: Misuse of company property for private purposes in that you used a Telecom account at any hotel in contravention with company stipulations as paragraph 3.1.2 (Clause iii) of the Disciplinary Code.” (My emphasis added)

Telecom's legal representatives argued in everyone of the legal proceedings that the reference to the wrong code number was a technical error and not a matter of substance; that the existence of a code, was a mere guide and did not prevent the

employer from charging the employee for breaches of discipline not contained in the said code.

The part of the so-called code relied on by Deysel and his legal representatives appear in Volume 4, paragraph 368-370. The headings and specific paragraphs of the "Code" relevant to the original three charges before the two aforesaid disciplinary hearings, are as follows:

<table>
<tr><td colspan="2">Nature of Offence
consideration,</td><td colspan="5">PROPOSED ACTION
The proposed action should not automatically be imposed. The nature and circumstances of each individual case should be taken into prior to making a decision. Therefore, the proposed code serves only as a guideline.</td></tr>
<tr><td></td><td>First Offence</td><td>Second Offence</td><td>Third Offence</td><td>Fourth Offence</td><td colspan="2">Comments and/or policy guidelines</td></tr>
<tr><td>(iii) Misuse of company property for private purposes (which is theft)

(ix) Gross negligence or incompetence, which shall mean failure to adhere to or execute work according to work standards and/or regulations or any such action or failure to act, contrary to</td><td>Dismissal of final written warning

Dismissal or final written warning</td><td>Dismissal if a final written warning was issued

Dismissal if a final written warning was issued</td><td></td><td></td><td colspan="2">With regard to the second offence, the comments under “proposed action” should be taken into account</td></tr>
</table>

that of the reasonable employee with serious or potentially serious consequences for the company (xii) Should any employee commit a law offence whilst on and/or duty, the company shall be entitled to take disciplinary action against such employee, for such an offence and on such grounds	The disciplinary action will depend nature and circumstances of the case	See comments	See comme nts		Disciplinary action will depend on the nature and circumstances of the case, well as on the previous record

The following features of the Code must be noted:

(i) Under the heading "PROPOSED ACTION" it is stated: "Therefore, the proposed code serves only as a guideline."

(ii) The first heading in the first block – “nature of offence”, is a broad indication of the “nature” of the offence, not an attempt at precise

definition and is borne out by the loose and somewhat confusing descriptions which follow in that column.

(iii) The breaches of discipline is not restricted to, law offences or contraventions of the criminal law and/or of statutes and the common law. (All the contraventions in the “Code” which appear over three A4-size pages on p368-370 of Vol. 4 are not reproduced herein in order to save space.)

(iv) The argument by the legal representatives of Telecom from the very beginning of proceedings in the District Labour Court and continued in this Court, is in my respectful view correct, but it can be taken much further. In my respectful view, the indications above stated are that the “Code” referred to was never intended as a list of contraventions, and certainly not as an exhaustive list, but rather as a set of guidelines for the sanction to be imposed in case of conviction for a broad category of disciplinary infractions.

(v) If the references to Clause (ix) of the Code in charge 1, Clause (xii) of the Code in charge 2, and Clause (iii) of the Code in 3 are left out, the remaining part of each charge where the alleged facts are set out, make

complete sense and suffice to show what the Deysel had allegedly done wrong.

No wonder that Deysel and his representatives raised no objection to the charges at the two disciplinary hearings and took issue with Telecom's representatives on the facts, as set out in those charges.

It will be noted that that is precisely what was done at the disciplinary rehearing by Telecom ordered by the District Labour Court where the charges were redrawn and the reference to the Code left out. There again the charges made sufficient sense in a disciplinary tribunal, where the employer is requested by section 45(1) not to dismiss an employee without a valid and fair reason and not in compliance with a fair procedure.

A disciplinary hearing in the form such as conducted by Telecom in the instant case, is not even strictly necessary, as long as the dismissal is not without a valid and fair reason and is in compliance with a fair procedure.

Section 46 of the Labour Act defining the task of the District Labour Court when a complaint is lodged with it by an employee that such employee has been dismissed unfairly or that disciplinary action has been taken unfairly, provides that the said

Court may make certain orders, only if such court "is satisfied that such employee has been dismissed unfairly or that such disciplinary action has been so taken unfairly".

Points *in limine* to a charge sheet of the nature taken in the instant case on behalf of Deysel, appears to be foreign to the Labour Act and the principles and procedures therein contained for the settlement of Labour Disputes, more so where there was no dispute about the formulation of the charges at the Disciplinary tribunals where the Deysel was confronted with the charges.

Mr Strydom also relied throughout on what he called trite law namely that where the Rules of the District Labour does not provide a procedure, the Rules of the Magistrate's Courts will apply. The appropriate Rule of the Magistrate Court Rules on which he relies for his action is subrule (6) of Rule 29.

Now Rule 26 of the Rules of the District Labour Court reads as follows:

"26. Subject to the Act and these rules, where these rules do not make provision for the procedure to be followed in any matter before the court, the rules applicable to civil proceedings in magistrates' courts made in terms of section 25 of the Magistrates' Courts Act, 1944 (Act 32 of 1944), shall apply to proceedings before the court with such qualifications, modifications and adaptions as the chairperson may deem necessary in the interest of all the parties to such proceedings." (My emphasis added)

Rule 29(6) of the Rules of the Magistrate Court reads as follows:

"When questions of law and issues of fact arise in the same case and the Court is of the opinion that the case may be disposed of upon the questions of law only, the Court may require the parties to argue upon these questions only and may give final judgment without dealing with the issues of fact."

The fundamental requirements in Rule 26 of the Rules of the District Labour Court for Rules of the Magistrate Court to become applicable, are thus:

(i) "Subject to the Act and these Rules, where these rules do not make provision in any matter before Court,"

(ii) The rules applicable to civil proceedings in Magistrate Courts shall apply;

(iii) with such qualifications, modifications and as the Chairperson deem necessary in the interest of the parties in such proceedings.

The following observations apply:

Ad (i)

The rules of District Labour Court are always subject to the Labour Act which provides in Part (IV) for the establishment of the Labour Court and District labour Court and in section 22 for the making of the Rules of the District Labour Court.

Section 19 of the Labour Act 6 of 1992 provides, *inter alia*, for the jurisdiction and powers of District Labour Courts. Subsection 1(a) of section 19 provides that the District Labour Court shall have jurisdiction to make an order against, or in respect of, the respondent or the complainant as the case may be, which it is empowered to make under any such provision of this Act. The only order it can make however when a complaint is lodged that an employee was unfairly dismissed or that disciplinary has been taken unfairly, are those contained in subsection (1) of section 46 and then only when the District Labour Court is satisfied that the employee/complainant was dismissed unfairly or that such

disciplinary action was taken unfairly, the proof of which lies on the employee/complainant.

These provisions appear to leave no scope for points *in limine* taken before the District Labour Court to quash charges laid and decided upon in the proceedings before tribunals created by employers to adjudicate on those charges.

In my respectful view the aforesaid provisions of the Labour Act itself, does not allow an application for quashing of charges in the form of points *in limine* through the back door of Rule 26 of the District Labour Court read with Rule 29(6) of the Rules of the Magistrates Court as was attempted in the instant case.

Ad ii

An application *in limine* to quash charges, is part of criminal procedure, not part of "civil proceedings" in Magistrate's Courts.

This point in itself is a conclusive reason for not allowing applications to quash charges in the form of points *in limine*.

That the points *in limine* to quash was completely misconceived is further borne out by a comparison with the provisions in the Criminal Procedure Act for points *in limine* to quash charges.

Section 85 of Act 51 of 1977 provides:

> "85. Objection to the charge –
>
> (1) An accused may, before pleading to the charge under section 106, object to the charge on the ground -
>
> (a) that the charge does not comply with the provisions of this Act relating to the essentials of a charge;
>
> (b) that the charge does not set out an essential element of the relevant offence;
>
> (c) that the charge does not disclose an offence;
>
> (d) that the charge does not contain sufficient particulars of any matter alleged in the charge; or
>
> (e) that the accused is not correctly named or described in the charge:
>
> Provided that the accused shall give reasonable notice to the prosecution of his intention to object to the charge and shall state the ground upon which he bases his objection: Provided further that the requirement of such notice may be waived by the attorney-general or the prosecutor, as the case may be, and the court may, on good cause shown, dispense with such notice or adjourn the trial to enable such notice to be given.

(2)(a) If the court decides that an objection under subsection

(1) is well-founded, the court shall make such order relating to the amendment of the charge or the delivery of particulars as it may deem fit.

(b) Where the prosecution fails to comply with an order under paragraph (a), the court may quash the charge."

Section 86 provides that the charge may be amended and reads as follows:

"86. Court may order that charge be amended.

(1) Where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between any averment in a charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it

discloses an offence or not, be amended, so far as it is necessary, both in that part thereof where the defect, variance, omission, insertion or error occurs and in any other part thereof which it may become necessary to amend.

(2) The amendment may be made on such terms as to an adjournment of the proceedings as the court may deem fit.

(3) Upon the amendment of the charge in accordance with the order of the court, the trial shall proceed at the appointed time upon the amended charge in the same manner and with the same consequences as if it had been originally in its amended form.

(4) The fact that a charge is not amended as provided in this section, shall not, unless the court refuses to allow the amendment, affect the validity of the proceedings thereunder."

It is clear from the above provisions that:

(i) There is no provision in the District Labour Court Rules to incorporate proceedings as provided for in Sections 85 and 86 into District Labour Court procedures and obviously the disciplinary tribunals and procedures for disciplinary action taken by employers are not required to follow these procedures.

(ii) It is also obvious that in the instant case before the District Labour Court, no advance notice as provided in the proviso to section 85 was given by or on behalf of Deysel prior to raising the points *in limine*.

(iii) Even if an objection to a charge is found by the Court to be well founded, the Court may order amendment or the provision of particulars. When the prosecution fails to comply with such order, the Court may quash the charges.

The Court could even order such amendment and adjournment until amendment is made and allowed, in the case where the charge "is defective for the want of any essential averment" or even in the cases where the charge as formulated does not disclose an offence. Another remedy where a charge lacks sufficient particulars is for the Court to order further particulars.

The main thrust of these provisions is for charges to be rectified if defective and the case to continue on the merits, rather than allow technical objections to thwart

the course of justice. The argument by counsel for a final decision in the case on the grounds of their objections, find no support even in the more stringent provisions of the Criminal Procedure Act.

The Rules of the District Labour Court does not allow the incorporation of the criminal law procedures into the procedures of the District Labour Court. What Deysel and his legal representatives contended for, was an even stricter and harsher regime for District Labour Courts than that applicable in Criminal courts.

To take the points before the District Labour Court and not before the employers disciplinary tribunals, is a further absurdity with no basis in Labour law. The District Labour Court was thus used as a sort of Court of Review or appeal, but with the distinction that the defects in the charges was never an issue before the tribunals from which the appeal and/or review is lodged. Logic and plain common sense also demands that alleged defects in the charges before the Disciplinary Tribunals cannot be raised for the first time as a complaint in the said “appeal” or “review”.

5. The points *in limine* as articulated by Deysel’s counsel, even if taken before an appropriate tribunal, was furthermore defective in the following respects:

(a) Ad <u>Chapter II</u>, paragraph 12.4, <u>point (i)</u> referring to <u>the first charge</u>:

The charge of “gross failure to adhere to work regulations” and the facts given in support of the charge, could not become a nullity merely because there was no label for it in the Disciplinary Code or if the label given was not accurate.

(b) The attack on charge 2, alleging a breach of trust, that it was a nullity because it was “neither a common law offence nor a statutory offence” and as such, not expressly provided for in the Code, is again without substance.

The “Code”, properly interpreted, does not restrict disciplinary infractions to only those which constitute common law offences or statutory offences. A breach of trust is in any event a well-known ground in the common law for an employer to take disciplinary action against an employee.

(c) The attack on the third charge, namely that the charge was a nullity because it was based on the code providing for the “misuse of the employers property”, and because “a Telecom account” at an hotel cannot be regarded as “property”, is again without substance *inter alia* because:

(i) The socalled "Telecom account" was apparently an arrangement whereunder Telecom could buy or acquire certain goods or services at such hotel <u>on credit</u>, and as such the <u>facility</u> could be described as property, even though in the form of an incorporeal right of Telecom.

In my view, an employee who then makes use, without authority, of such credit facility to pay for the accommodation and drinks of him and his girlfriend, probably amounts to an abuse of the employers property.

(ii) The objection is further based on the alleged fact that the label of "misuse of the employers property" referred to in the "Code" does not apply to the alleged conduct of Deysel.

Again the conduct alleged was clearly set out and even if the label was not correct, it was not a fatal defect in Disciplinary proceedings.

6. Apart from the points *in limine*, there were no other complaints about the procedure applied by Telecom, no case was made out at all that the procedure was

otherwise unfair. The penalty imposed in the first disciplinary proceeding was not fair and this was acknowledged by the employer's appeal tribunal. When the

sanction was changed on appeal, there was no further ground, apart from the points *in limine*, relied on by Deysel and his legal representatives.

If Deysel and his legal representatives dealt with the merits before the District Labour Court, or the subsequent rehearing before the Telecom's Disciplinary Tribunal, the outcome may have been different. But it would be wrong for me to speculate on such prospects.

7. The procedure followed by the legal representatives of Deysel, prevented them from disputing the facts as laid before the two hearings of Telecom's Disciplinary Tribunals. These facts and the findings thereon by the Disciplinary Tribunals, are the facts and findings on which the District Labour Court had to decide, once the dispute was ripe for hearing, whether it was satisfied in terms of section 45(1) read with section 46 of the Act whether or not the employee/complainant was dismissed unfairly or that the disciplinary action taken was taken unfairly.

Section 46(1)(b)(iii) provides that where the District Labour Court finds that disciplinary action was in fact taken unfairly, it could issue an order in terms of which,

"…the matter is referred back to the employer to reconsider any disciplinary action or disciplinary penalty to be taken or imposed upon such employee in accordance with any guideline, if any, laid down by the Court and specified in such order;" (My emphasis added).

Section 46(1)(c) further provides that the District Labour Court, once it had found that it was satisfied that the complainant/employee was dismissed unfairly or the disciplinary action was taken unfairly, "make such other order as the circumstances may require."

Rules 29(4), (5) and (6) relied on by the Chairperson of the District Labour Court confirms his wide discretion, and supplements Section 46(1) of the Labour Act in this regard.

However, where he referred to Section 44(i) and 53(e) of the Labour Act in his reasons supplied on request by Deysel's legal representatives, he clearly misdirected himself because those sections are clearly not relevant to the dispute in this case.

The Learned Chairperson also erred in not making a specific and express finding on the issue of whether or not the complainant was unfairly dismissed or whether or not an unfair procedure was followed.

If one however infers that the Chairman was satisfied, in view of the application made in the course of the application for quashing, that the complainant was dismissed in the course of an unfair procedure, then he would have been entitled to make the order which he in fact made in terms of section 46(1)(b)(ii) and/or 46(1)(c), read with Rule 6 of the Rules of the District Labour Court.

(VII) THE LABOUR COURT'S REASONS FOR UPHOLDING DEYSEL'S REVIEW ON THE MERITS

The Learned President of the Court motivated his judgment on the merits as follows:

> "Neither in his order nor in his reasons subsequently furnished did the District Labour Court make such a finding, i.e. that the applicant had been so dismissed unfairly, or that the disciplinary action taken against him had been so taken unfairly. In that regard the Chairperson of the District Labour Court exercised a power he did not have in regard to paragraph (c) and (d) of his ruling and,

consequently, that part of the ruling falls to be set aside. (Section 20(1)(a) of the High Court Act, 16 of 1990; Section 18(c) Labour Court Act of 1992.

In his heads of argument Mr Dicks for respondents supports the Court *a quo's* ruling as far as paragraph (c) and (d) thereof and says that the Chairperson was entitled to make the order in terms of Section 45 and 46(1)(c) of the Act. My finding above that without the condition precedent in Section 46(1) being fulfilled, the Court *a quo* had no power to make the order in terms of section 41(1)(c) disposes of this contention. Nothing more need be said of the argument."

The only reason why the Court *a quo* dismissed Mr Dick's argument about paragraph (c) and (d), was that the precondition for jurisdiction was not fulfilled in that a finding in terms of section 46(1) was not made.

I prefer to say, that no express finding was made in terms of section 46(1) but that such finding may be inferred from the fact that the Chairperson upheld the points *in limine*, which he could only do if he was satisfied that the disciplinary action was taken unfairly. I do not however wish to express a final view in this regard.

Suffice to say, that if the failure to make an express finding in terms of section 46(1), removed the District Labour Court's jurisdiction to have made the orders in paragraph (c) and (d) (i.e. the referring back for a rehearing and the postponement *sine die*) then it also removed its jurisdiction to have made the order (a) and (b), upholding the point *in limine* as to the quashing of the charges. What is good for the gander is good for the goose. The Court *a quo* however justified this part as follows:

> "The further attack on the Court *a quo's* ruling in paragraph (a) and (b) thereof is based on the contention that the Court was wrong to rule that the charges brought against applicant in the disciplinary proceedings conducted by respondent was bad; that the chairperson was wrong to uphold the point *in limine* taken by Mr Strydom in that Court. Again this is a matter on which respondent was entitled to appeal on the basis either that the point was not a point of law in terms of Rule 29(6) of the Magistrate Court's Rules (as Mr Dicks says in paragraph 42 of his heads of argument) or that charges for the disciplinary hearing need not be drawn with the formality or "precision of an indictment in a criminal trial" (as Mr Dicks labours to demonstrate in paragraph 34-42 of his heads of argument).

> In the result all that this Court can do is to grant the relief as prayed in applicant's Notice of Motion. It is accordingly ordered that the part (c) and (d) of the Ruling by the Chairperson of the District Labour Court made on 27th July 1999 are hereby set aside."

If I understand the learned President of the Labour Court correctly, the only reason why he did not order that the whole order of the District Labour Court, including paragraph (a) and (b), be set aside, is because Telecom did not appeal to the Labour Court. This was also in response to the argument by Mr Dicks before the Labour Court, that if applicant Deysel followed the correct procedure, namely the appeal proceedings, Telecom could have cross appealed. Because Deysel resorted to review procedure, Telecom was constrained to raise this question in their opposing affidavits. It must also be remembered that even Mr Strydom, counsel for Deysel, argued in the alternative, that the whole order be set aside.

I do not find it necessary to decide in this appeal whether or not the applicant Deysel should have appealed to the Labour Court, instead of instituting review

proceedings, as argued by counsel for Telecom. However the point is certainly not without substance.

Here again, the principle that should have been applied was, that if an appeal was necessary for Telecom to raise its point, then the same principle must have applied to applicant Deysel. The Labour Court, once it allowed Deysel's review procedure, had the duty to give the order which is correct in law and in accordance with justice. In my respectful view, the Court *a quo* could not allow only the part favouring Deysel to stand and the part favouring Telecom to be struck down as null and void, once it found that the Court had no jurisdiction to make the ruling because it had not first made a finding in accordance with section 46 of the Labour Act.

When considering the inordinate delay in bringing the review, the failure to provide reasonable or good cause and the failure to make out a case of substance on the merits, condonation should not have been granted by the Court *a quo*.

If I considered the granting of condonation justified, I would have set aside the whole of the order of the District Labour Court and not only paragraph (c) and (d).

Before a rehearing in terms of sections 46(1) could begin, Rule 6 would first have to be complied with. The dispute which began with disciplinary proceedings on

24th October 1996, would then probably have to be continued for several more years and that, after Deysel had an opportunity to put his case in three disciplinary hearings and one hearing before the District Labour Court, one before the Labour Court and one before this Court.

I am convinced that it would not be in the interest of justice and labour stability to prolong the agony.

In my respectful view, the following order should be made by this Court:

1. The appeal succeeds.
2. The order of the Labour Court is set aside and the following order substituted for that of the Labour Court:

2.1 Condonation for the late launching of the review proceeding is refused.

2.2 The review application is struck off the roll.

2.3 No order is made as to costs.

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O'LINN, A.J.A.

I agree

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TEEK, J.A.

I agree

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GIBSON, A.J.A.

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