

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)

CASE NO:C814/2005

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In the matter between:

SIKHULA SONKE obo WILLEM PEDRO

Applicant

10 and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER GAIL McEWAN

Second Respondent

15 FAIRFIELD BOERDERY

Third Respondent

J U D G M E N T

NEL AJ:

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[1] This is an application to review and set aside an award of the second respondent ("the Commissioner") which was handed down by the Commissioner on 8 October 2005 under case number WE9968/05.

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[2] The circumstances giving rise to this application are that the employee, Mr Willem Pedro ("Pedro") and two other employees of the third respondent ("the farm" or "the employer") on 21 July 2005 took three tractors during their lunch break in order to collect wood. This was done whilst

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they were under the control of a Mr Scholtz, the foreman of the farm. The three employees it would appear had just set off on their way with the tractors when they were stopped by Mr Malherbe, the owner of the farm, and asked who had given them permission to use the tractors. It is around these events that some controversy exists, which I will deal with in more detail later herein. Suffice it to state that Malherbe instructed the employees to immediately return the tractors, which they did. Disciplinary action was instituted, initially only against Pedro and one of the other two employees. The one against whom disciplinary action was initially not instituted is the son of Scholtz, the foreman. The employer contended that there was a workplace rule in existence that employees could only use the tractors for personal use with the permission of Mr Malherbe, the owner, or Mr Snyman, the manager of the farm.

[3] It would appear that only after allegations of inconsistent application of discipline arose, was Scholtz Jnr disciplined and dismissed. He was subsequently reinstated at a CCMA conciliation. It is to be noted that the allegations that Scholtz Jnr was initially not disciplined, but only after claims of inconsistency, and that he had been subsequently reinstated at a CCMA conciliation, were not made, so it would appear, before the Commissioner. The allegations are contained in the applicant's founding affidavit and they stand uncontested.

[4] When Pedro was dismissed, he referred a dismissal dispute to the CCMA. It is this arbitration award of the Commissioner in which she found that Pedro's dismissal was substantively fair that is under review.

[5] The application is unopposed. During argument before me I asked Ms de Wet, who appeared on behalf of the applicants, to explain to me why the record of the arbitration proceedings reflected that an interpreter interpreted from Afrikaans to English under circumstances where the representatives of all the parties, as well as the witnesses who testified on behalf of the parties, were Afrikaans. I was advised that the Commissioner required the assistance of an interpreter from Afrikaans to English.

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[6] As the record reflected that not everything that was testified to in Afrikaans was translated into English, I wanted to be advised, if the Commissioner required interpretation services from Afrikaans to English, why everything was then not interpreted. This concern was raised, as I then wanted to know whether the Commissioner possibly did not follow all the evidence, as it was not in its totality translated from Afrikaans to English. I accordingly, at the conclusion of argument, directed that the applicant should depose to an affidavit dealing with the use of the interpreter and issues related thereto and that this affidavit should be served on the Commissioner. I directed the Commissioner to reply to the affidavit, if she so wished. She was, however, directed to provide the Court with an explanation for the use of an interpreter.

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[7] An affidavit was, in terms of my directive, then filed on behalf of the applicant in which it was confirmed that the interpretation was only for the benefit of the Commissioner in respect of the evidence of the parties and in order to translate

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to the parties in Afrikaans what the Commissioner had to say in English. The affidavit further confirmed that, but for the fact that the Commissioner was English speaking, the parties would not have required the services of an interpreter at all.

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[8] Perhaps of more relevance is that it was then confirmed in this affidavit that in many instances no interpretation had taken place of the Afrikaans evidence. Only in respect of one aspect is it alleged on behalf of the applicant that there is a part of the record which reflects no interpretation and that the Commissioner summarised the evidence incorrectly. The affidavit does clearly set out that extensive parts of the evidence were not translated from Afrikaans to English. I will revert to this aspect in a moment.

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[9] This affidavit was served on the Commissioner and she provided the Court with what she called an "Explanatory affidavit on the use of an interpreter...as ordered by the Labour Court " in the case under consideration. She indicated that she does speak Afrikaans but not at a level at which she would be comfortable arbitrating a matter without the assistance of an interpreter. She further stated that her Afrikaans was at a level where she could understand most of what had been said, therefore the interpreter did not translate every word said. If she did not understand what was being said, she would signal to the interpreter to translate for her. The only comment made by the Commissioner, in respect of the allegations on behalf of the applicant that she overlooked certain evidence, is that she said:

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"Whether or not certain points have been taken into account, as raised by the applicant can be discerned from the award itself".

5 [10] Having perused particularly these parts of the record which were not translated, and to which my attention was drawn, and having regard to the Commissioner's award, I have reason to be driven to one or two possible conclusions. One is that the Commissioner, having understood the evidence
10 adduced before her, did not apply her mind properly thereto. Another possible conclusion is that because the evidence was not translated, the Commissioner did not fully understand it, and this led to her not properly considering a number of aspects, which I will refer to in a moment.

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[11] I turn to deal with the specific allegations made in the supplementary affidavit on behalf of the applicant that the Commissioner made incorrect comments regarding the evidence of Mr Witbooi in her award as a result of the fact
20 that there was no interpretation of a particular portion of his evidence.

[12] The Commissioner, in summarising Witbooi's evidence, recorded that:

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"Under cross-examination Witbooi conceded that he had to ask Malherbe to use the tractor".

I believe that this is clearly not what the record reflects
30 Witbooi as having conceded. It is patently clear from the

record that Witbooi testified to the effect that only after the so-called "tractor case" did he hear that the rule was that Malherbe had to be asked if they wanted to use a tractor. This is a particularly important aspect as the evidence adduced on behalf of Pedro was to the effect that at the time of the incident the foreman, Scholtz, could be asked for permission.

[13] Another aspect which gives rise to a concern is that it is apparent from the record that Mr Visser, who appeared on behalf of the employer, interrupted Witbooi whilst he was in the process of explaining how the alleged rule was working. I believe this was an improper interruption. Unfortunately I am now unable to discern whether the Commissioner perhaps did not properly understand what was happening, because it was not translated for her, or whether she did understand, but simply allowed Visser to so improperly interrupt the witness. At this particular page, being page 37 of the record, another aspect of Witbooi's evidence, which is not translated, is that he expressly testified that Malherbe had first stopped the foreman, Scholtz. Yet again what exactly had happened at this very point in time was relevant because a perusal of the record reflects that there are clear contradictions between the evidence of Malherbe and that of Scholtz with Malherbe having testified that he had first stopped at Scholtz and thereafter proceeded to the three employees on the tractors whereas Scholtz testified that it had happened the other way round. Yet again, I am unfortunately confronted with the predicament that I am not certain whether the Commissioner failed to apply her mind to this aspect or whether she did not understand it properly, as it was also not translated for her.

Whatever the reason therefor is, I do believe that these contradictions ought to have been dealt with by the Commissioner in her award. But she did not, and as I said, I do not know whether it is because of a failure to apply her mind or possibly because of the fact that she perhaps did not fully understand the untranslated evidence before her.

[14] A further highly relevant aspect is that Witbooi testified that he was present when the employees asked for permission to use the tractors. The permission he referred to was that of Scholtz. One sees that the Commissioner, in her summation of the evidence adduced by Pedro and his father, did record that their evidence was, *inter alia*, to the effect that the employees had received permission from the foreman, Scholtz. Yet again I do not know whether the Commissioner's failure to record this very important aspect of Witbooi's evidence is as a result of it not having been translated for her, or as a result of her failure to apply her mind properly to all the evidence adduced.

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[15] The fact of the matter is that it was a very relevant aspect of the case before the Commissioner that on the one hand, the applicant's case was that he, and the other two employees, had received permission from the foreman, Scholtz, to use the tractors. On the other hand, the evidence adduced on behalf of the employer was to the effect that the foreman had advised the owner, Malherbe, that the employees had told him that the owner, Malherbe, had given them permission to use the tractors and that was the reason why he did not intervene.

These contradictory versions had to be considered and the

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Commissioner was required to reason her way through a process to arrive at a conclusion which version she would accept and why. I will revert to this aspect later on herein.

5 [16] Still dealing with the evidence of Witbooi, appearing on page
7 of the record, and which was not translated for the
Commissioner's benefit, it is also clear from the record that
Witbooi testified that he heard when Malherbe stopped
Scholtz, the foreman. Witbooi's evidence was to the effect
10 that Scholtz only said that the employees had not asked him
for permission. Yet again this aspect is of great relevance in
the assessment of the two versions presented. This is so
because Malherbe had testified that on him confronting
Scholtz, the foreman had advised him that the employees had
15 told him that they had obtained the owner, Malherbe's,
permission. If one has regard to the evidence of Scholtz, his
evidence in this regard was very unsatisfactory. The record
reflects that he was asked by Visser whether the employees
asked permission to use the tractors to which he responded
20 that they had not. After a number of indistinct exchanges
between the Commissioner and Visser, the record reflects the
following:

25 "MNR VISSER: Het hulle vir u iets anders gesê? Het
hulle enige iets vir u gesê oor die
trekker? --- Hulle het net gesê hulle ry
die trekkers.

Hulle sê hulle ry die trekkers? --- Ja,
want hulle ry die trekkers.

30 INTERPRETER: They did not tell me anything, because

they drive the tractors.

MNR VISSER: Het hulle iets gesê van toestemming
wat hulle by mnr Malherbe gekry het?
--- (Onduidelik) ek weet nie daarvan
nie.

ARBITRATOR: Sorry, do not ask him such leading
questions. (indistinct)".

It is patently clear from the aforementioned that only after
prodding and leading questions from Visser did Scholtz
eventually testify that the employees had said that they had
permission from Mr Malherbe. One does not see from the
Commissioner's reasoning that she considered these aspects,
in weighing up the two contradictory versions.

[17] The uncertainties arising as a result of the fact that a lot of
the Afrikaans evidence was not translated, unfortunately
continue. When Malherbe testified, he stated that the new rule
relating to the use of the company's tractors was to the effect
that he or the manager, Mr Snyman, could exclusively give
permission. During his evidence, Malherbe changed the rule
to being that only he could give permission for the use of
tractors. Yet again one does not see this aspect of
Malherbe's evidence being considered by the Commissioner.
Was it because this particular part of Malherbe's evidence
was not translated for the benefit of the Commissioner, or was
it because of the fact that she did hear or understand his
evidence, but did not regard it necessary to consider the
change in Malherbe's evidence? One sees that in Scholtz's
evidence he was asked whether anyone else could give

permission for the use of tractors and his evidence was expressly to the effect that only Malherbe, the owner, could give such permission. Yet again this is an extremely relevant aspect of the evidence because it was contended on behalf of Pedro that the rule at the time of the incident was that they could obtain permission from the foreman and that this rule only changed after the tractor incident.

[18] After Malherbe had testified in Afrikaans, the record reflects no translation for the benefit of the Commissioner. The record reflects the following evidence by Malherbe:

"(MNR VISSER): Op hierdie dag wat die insident gebeur het, het u na die boorde toe gery en u het gesien die persone ry met die trekkers. En u het blykbaar mnr Josef Scholtz eerste gekonfronteer. Wat het u vir hom gevra? --- (MALHERBE): Ek het vir hom gesê, Josef, wat gaan hier aan? Jy weet wat is die reëls is (sic) op die plaas. Hoekom ry die mense met die trekker? Toe het hy vir my gesê, meneer, hulle het - hulle het vir my gesê hulle het vir u gevra om toestemming om the trekker te ry en u het gesê hulle kan maar die trekkers vat. Dis hoekom hy sê hy het basies gesien dat hulle ry. Hulle het vir hom gesê hulle ry. Hulle het vir my gevra en ek het vir hom gesê, maar Josef, dis absurd. Jy weet ek sal nie so iets

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This very aspect, why Scholtz did not question the employees

when they allegedly had told him that Malherbe had given permission, against the background that Malherbe had testified that he had told the foreman that under no circumstances would tractors be given for private use, were all relevant issues which ought to have been considered by the Commissioner. Did she, because it was not properly translated, not understand it, or did she understand it, but not regard it as sufficiently relevant to consider?

[19] Another aspect of the interpretation is that it translates Malherbe's evidence as that:

"He asked Mr Scholtz if he gave permission".

This is not what his evidence was. His evidence was:

"Ek het vir hom gesê, Josef, wat gaan hier aan?"

Yet again, what on the surface may appear as trivial or perhaps irrelevant, is in fact not. This very aspect of what exactly happened between Malherbe and Scholtz was of the utmost importance in order to arrive at a proper determination of whose evidence to believe. When one has regard to Scholtz's evidence, one sees that this aspect relating, firstly, to what his response to Malherbe was when Malherbe confronted him, and secondly, to the issue, at what point in time the employees had allegedly told him that Malherbe had given them permission, were extremely relevant parts of the evidence. I am of the view that the evidence adduced on behalf of the employer on these issues was anything but

satisfactory. The Commissioner does not at all deal with these aspects of the evidence. Did she not do so because she did not regard it as relevant or did she fail to do so because she did not properly understand the evidence, either because it was wrongly translated, or not translated at all in other instances? She certainly appears not to have applied her mind to these aspects at all.

[20] In conclusion, on this particular aspect of the wrong translation, Malherbe said that he had told Scholtz:

"...maar Josef, dis absurd. Jy weet ek sal nie so iets toelaat nie..."

The translation of this part by the interpreter is:

"I said that that is absurd. We cannot allow that".

Patently this is not what Malherbe said. He said that: "...but Josef, that is absurd. You (Scholtz) know that I (Malherbe) will not allow such a thing..." (with reference to permitting the private use of the tractors). Yet again, superficially this may appear trivial or irrelevant but this goes to the heart of the question why Scholtz did not check with Malherbe whether he had given permission if it was so absurd for Malherbe to have given the permission and that Scholtz knew that Malherbe would not have given the permission. Again, as I said, this must be viewed against the background of Malherbe's own evidence that only under exceptional circumstances would permission be given for tractors to be used by employees for

private purposes.

[21] On page 50 of the record, a substantial part of Malherbe's evidence under cross-examination is not translated. He repeatedly said, and from his evidence it is clear, that he first confronted Scholtz and thereafter had gone to the employees. This is in direct contradiction of how Scholtz testified events had unfolded. Yet again, superficially it appears to be a minor matter. However, against the background of how Scholtz dealt with the question, when exactly the employees had allegedly told him that they had obtained Malherbe's permission, that this becomes a very relevant aspect. Yet again, one sees that the Commissioner did not deal with it. Is it because she missed it in the absence of translation or because she did not regard it as relevant?

[22] On page 52 of the record appears the part, which I had earlier referred to, when Malherbe in his evidence in chief said:

"Ek het eintlik vir die voorman gesê, onder geen omstandighede loop daar weer 'n trekker nie. Met ander woorde, die trekker is heeltemal gestop. Toe het ek vir hom gesê, Josef, in uitsluitlike gevalle as iemand vir my vra of hy 'n trekker kan gebruik, daardie besluit berus net by my. Jy het geen sê daarin nie. Ek sal die toestemming gee of 'n trekker gebruik word al dan nie".

[23] This part of Malherbe's evidence was not translated. Apart from the fact that it does, in my view, clearly state that only in exceptional circumstances would permission be given for the

use of the tractors for private purposes, it also contains the contradiction of Malherbe's earlier evidence. Earlier he had testified that he and the manager of the farm, Mr Snyman, could give such permission. As I have said, this tends to explain why Malherbe said to Scholtz that it was absurd that the employees were using the tractor and that he, Malherbe, would not have given permission for it. This tends to suggest that only in very exceptional circumstances, and then only by Malherbe, would permission be given for the private use of tractors. Why then did Scholtz not query it with Malherbe, if they had truly told him that Malherbe had given permission? It must be remembered that the version of Pedro and his witnesses was that permission had been sought from, and given by, Scholtz, the foreman. If it was so exceptional that permission would be given for the private use of the tractors, the probabilities favour it that Scholtz would have checked with Malherbe whether he had in fact given the alleged permission.

[24] On page 58 of the record, right at the commencement of the evidence of Scholtz, he gives two patently contradictory answers when he is asked literally the same question, namely whether he had permission from his employer to approve the use by employees of the tractors. The record reads as follows:

"(Visser) Het u al ooit toestemming gehad by die werkgewer of die bestuurder om vir die mense toestemming te gee om trekkers to gebruik? --- (Scholtz) Ja.

(Visser) Het u toestemming gehad om vir ander mense toestemming te gee om trekkers te gebruik? --- (Scholtz) Nee".

5 Then the question is asked for the third time and Scholtz then repeated his answer that he did not have the permission.

[25] This part of the record was again not translated. This is the most patent contradiction on an issue, which went to the heart of the whole matter. Why did the Commissioner not deal with it at all? Unfortunately this question comes up again and again. Is it because she did not pick it up in Afrikaans, it not having been translated, or did she hear and understand this patent contradiction, but simply did not regard it as being of sufficient relevance to deal with it in her award?

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[26] In conclusion on this topic, the cross-examination of Scholtz commences at page 61 of the record. More than two pages of evidence were not translated at all for the Commissioner. These two pages contain matter going to the heart of the very issue of when the employees allegedly had advised Scholtz, as he contended, that they had obtained permission from Malherbe. This evidence, properly considered, reflects anything but that the evidence of Scholtz on this aspect was satisfactory. I believe the Commissioner ought to have dealt with this aspect of the evidence of Scholtz as it most certainly cannot be regarded as satisfactory. It was not translated. The same question posed again is, did the Commissioner not understand it or did she disregard it?

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[27] I also believe the Commissioner summarised the evidence of Witbooi incorrectly. I have every reason to believe that she did so as a result of either not having had the evidence of Witbooi translated, and therefor not having fully appreciated or understood it, or because she failed to apply her mind thereto properly, or at all. There are numerous other aspects of the evidence, which I have referred to earlier, which required the Commissioner's consideration. As I have repeatedly said, her not having dealt with it in her award may either be because she did not understand it, as the evidence was not translated, or if she did understand it, or it had been translated, she ought to have dealt with it in her award, but she failed to properly apply her mind thereto. There are sufficient contradictions and discrepancies contained in the evidence adduced on behalf of the employer, which the Commissioner ought to have provided reasons for why she nevertheless accepted the version adduced on behalf of the employer in favour of that adduced on behalf of the dismissed employee. I believe that from what I have dealt with, a number of reviewable irregularities have come forward. I am accordingly driven to the conclusion that the Commissioner has failed to apply her mind properly to the material before her, or alternatively that she, in the process, unfortunately in the absence of translation, did not understand it fully. Whatever the reasons may be, I do not believe that the Commissioner's conclusions, particularly in regard to her evaluation of the evidence before her, and the reasons given why she accepted the evidence of the employer, and rejected that on behalf of the employee, are justifiable, having regard to the evidence presented to her. The Commissioner's award

accordingly for these reasons stands to be reviewed and set aside.

[28] There is a further aspect to which my attention was drawn and that is that the Commissioner, at the commencement of the cross-examination of Malherbe, told Pedro's representative that she must not ask leading questions and she directed her to ask direct questions. This, it must be remembered, is right at the outset of the cross-examiner starting to question Malherbe. A cross-examiner is entitled to put leading questions to a witness being cross-examined. I believe that the instruction from the Commissioner not to put leading questions during cross-examination was irregular and may very well have inhibited the cross-examiner from properly cross-examining, not only the witness under cross-examination, but also the later witness, Scholtz, called by the employer. This is in and by itself a serious misdirection on the part of the Commissioner, sufficiently so that it also warrants the intervention by this Court.

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[29] It was also argued on behalf of the applicant by Ms de Wet that the Commissioner acted improperly in having allowed Visser, the representative who appeared before the Commissioner on behalf of the employer, to ask leading questions to an extent that bordered on him giving evidence. There is some justification in this complaint. I have referred earlier herein to the fact that the Commissioner also allowed Visser to improperly interrupt a witness, when the witness clearly wanted to deal with an important aspect of the case. Having regard to these aspects of the conduct of Visser, I

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have unfortunately been driven to the conclusion that an overall consideration of the record leaves one with the distinct impression, and I in fact conclude, that the Commissioner did not properly regulate the proceedings before her. It has the
5 result that I do not believe the employee, Pedro, had a fair hearing.

[30] I have also agonised over the aspect relating to the fact that the Commissioner required translation of the evidence before
10 her from Afrikaans to English and that she was the only one for whose benefit the interpretation had to be done. A Commissioner may call on the assistance of an interpreter when the language in which evidence is adduced before him/her is not fully understood by the Commissioner. When a
15 Commissioner contends that he or she understands some, but not necessarily all of the evidence, and that he or she would call on the interpreter to interpret only those portions not understood by the Commissioner, it may create problems. I believe that it opens up a situation, as happened herein, where, if the Commissioner failed to deal with a particular
20 aspect, that the review Court may be troubled by the question whether the Commissioner's failure was due to the Commissioner not having fully understood the evidence. Or was it a situation that the Commissioner understood the
25 evidence, but failed to apply his/her mind properly, or at all, thereto.

[31] In our country with its many official languages it is of course a common occurrence that interpreters need to be used in our courts or in tribunals such as the CCMA. The practice, as far as I am aware, is that when interpretation is necessary, everything is interpreted to the language that all the parties understand. Only the interpretation is recorded in the record, and not that which was being interpreted. Records are not produced with the questions and evidence in one of the official languages first being transcribed, and then the translation thereof. I do believe that when an interpreter is used, whether it is for the sake of the Commissioner, the witness or the representatives of any of the parties, that only the interpreted questions and answers should be reflected in the record. All the evidence must then be interpreted. I believe the practice, as was embarked on by the Commissioner herein, namely that an interpreter is called in to only interpret in the event of the Commissioner not understanding parts of the evidence, and apparently then so signals to the interpreter, is to be avoided. This will inevitably lead to the situation where, if the Commissioner either does not deal with evidence, or in the recordal of evidence make mistakes, that it is suggested that it happened as a result of the Commissioner not having fully understood the evidence, as it was not translated. A situation should accordingly be avoided, firstly where the record contains the question together with a translation and then the answer together with a translation. Secondly, I believe the moment an interpreter is required, then only the interpreted evidence, namely both the questions and the answers, as translated, should be reflected in the record. If any party indicates that he/she

needs translation from one language to another, then translation should at all times take place – not on and off. Particularly if the Commissioner requires translation must it be avoided that translation takes place on and off, at the
5 behest of the Commissioner.

[32] I am unfortunately of the view herein that I am not in a position to substitute the award with that of this Court. This is partly so because of the fact that I am driven to the
10 conclusion that the applicant herein, Mr Pedro, did not have a fair hearing. Secondly the record is also unfortunately so replete with "inaudible" or "indistinct" parts, in respect of what I believe were very relevant parts thereof, that this matter will, in my view, have to be referred back to the first
15 respondent to be arbitrated by a Commissioner other than the second respondent. I also wish to comment that it will obviously be prudent, as I am sure the applicant and his representatives will do, to place before the Commissioner when the matter is heard again, all the circumstances relating
20 to the fact that disciplinary action was initially not instituted against one of the employees who was involved in the alleged unauthorised use of the tractors, namely the son of Scholtz, the foreman. The son's reinstatement as a result of conciliation should perhaps also be looked into. On the face
25 of it, it does tend to give an impression of favouritism, if not nepotism, and I can only express the hope that this aspect of the matter is fully aired, and properly dealt with, at the re-hearing of the applicant's dismissal dispute.

30 [32] The order that I make herein is accordingly the following:

1. The second respondent's award dated 8 October 2005 with case number WE9968/05 is reviewed and set aside.
2. The dispute is referred back to the first respondent to be arbitrated on by a Commissioner other than the second respondent.
3. No order is made as to costs.

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Deon Nel

Acting Judge of the Labour Court.

DATE OF HEARING: 21 NOVEMBER 2006.

DATE OF JUDGMENT: _____

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Appearances:

For the applicants: Advocate A de Wet

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Instructed by Marieke van Rooyen Attorneys.