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

CASE NO. C249/09

In the matter between:

THE TRUSTEES FOR THE TIME BEING OF THE NATIONAL BIOINFORMATICS NETWORK TRUST	**Applicant**
And	
MR DANIEL ALLAN JACOBSON	**First Respondent**
NR MAZWI N.O.	**Second Respondent**
THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Third Respondent**

JUDGMENT

VAN NIEKERK J

[1] This is an urgent application in which the applicant seeks an order restraining the second respondent (the commissioner) from continuing with arbitration proceedings conducted under the auspices of the third respondent (the CCMA) pending the outcome of an application for review that the applicant undertakes to file. The application for review relates to certain preliminary rulings made by the commissioner. The application was heard over the telephone at noon on 8 April 2009. After considering the submissions made by Adv Rautenbach (who appeared for the applicant) and the first respondent (who elected to oppose the application without legal representation and without filing an answering affidavit), I ruled that the application should be dismissed, with costs. These are my brief reasons for that ruling.

[2] The applicant dismissed the first respondent (Jacobson) after a protracted disciplinary enquiry into allegations of misconduct. The enquiry was the antithesis of what is contemplated by the Code of Good Practice: Dismissal, Schedule 8 to the Labour Relations Act. The enquiry was chaired by a senior counsel, and both the applicant and Jacobson were represented by legal practitioners. The enquiry was conducted over a period of months, resulting in a transcript (excluding documentary evidence) exceeding 5 000 pages, and a finding comprising some 450 pages. The applicant referred an unfair dismissal dispute to the CCMA on date. After an unsuccessful conciliation, the dispute was referred to arbitration. On 25 March 2009, the applicant's attorneys wrote a letter to the CCMA, requesting the right to legal representation at the arbitration proceedings. On 31 March 2009, the CCMA responded, noting that the application failed to comply with rule 30 of the CCMA rules, and advising the applicant that it would be entitled to present argument on legal representation when the arbitration proceedings commenced. The letter also stated "You must be prepared for the hearing as it will proceed after the commissioner has made his ruling on legal representation." The applicant avers that it then found itself in a dilemma – it was uncertain whether to instruct an attorney (which would have involved a perusal and consideration of the voluminous documentation) and expend the necessary funds before knowing whether the right to legal representation would be granted. On 6 April 2009, an employee of the applicant, a Dr Msomi, applied for the right to legal representation. He placed emphasis on the public importance of the matter, the importance of the trustees' fiduciary duties, and the factual and legal complexity of the matter. After hearing argument presented by the applicant as to why it should be granted the right to legal representation, the commissioner refused the application. The applicant then brought an application for the recusal of the commissioner, on the basis it would appear that the commissioner lacked an appreciation of the importance of the management of public funds. The commissioner refused this application. These are the rulings that the applicant intends to review. On 7 April 2009, the

applicant instructed its attorneys of record in these proceedings to have the arbitration proceedings stand down to enable the applicant to bring an application for the urgent review of the commissioner's rulings. The commissioner also refused this application, hence the initiation of this application.

[3] This court has jurisdiction in terms of s 158 (1) (g) to review interlocutory rulings made by commissioners, and is empowered generally by s158 (1) (a) (i) to grant urgent interim relief. In criminal and civil proceedings, intervention by way of interdict in uncompleted proceedings is exceptional – the exercise of this power has been held to be confined to those rare cases where a grave injustice might otherwise result or where justice might not by other means be attained. In general the court will hesitate to intervene, having regard to the effect on the continuity of the proceedings in the court below and to the fact that redress review or appeal will ordinarily be available. (See *Wahlhaus & others v Additional Magistrate, Wynberg & another* 1959 (3) SA 113 (A), and *Ismail & others v Additional Magistrate Wynberg & another* 1963 (1) SA 1 (A). Mr Rautenbach implied that the court ought to adopt a broad view on what constitutes a grave injustice, and referred to *Olivier v Universiteit van Stellenbosch* [2006] JOL 18108 (C), a case in which the High Court intervened in the conduct of a disciplinary hearing, setting aside a decision not to postpone the hearing. However, as Cheadle AJ observed in *Booysen v SAPS & another* [2008] 10 BLLR 928 (LC), that decision was partly based on an alleged violation of constitutional rights to fair administrative action and access to information, a matter since addressed and an avenue now closed by *Chirwa v Transnet Ltd & others* [2008] 2 BLLR 97 (CC).

[4] There are at least two reasons why the limited basis for intervention in criminal and civil proceedings ought to extend to uncompleted arbitration proceedings conducted under the auspices of the CCMA, and why this court ought to be slow to intervene in those proceedings. The first is a policy-related reason – for this court to routinely intervene

in uncompleted arbitration proceedings would undermine the informal nature of the system of dispute resolution established by Act. The second (related) reason is that to permit applications for review on a piecemeal basis would frustrate the expeditious resolution of labour disputes. In other words, in general terms, justice would be advanced rather than frustrated by permitting CCMA arbitration proceedings to run their course without intervention by this court. This conclusion was recently underscored by the Constitutional Court. *In Commercial Workers Union of SA v Tao Ying Metal Industries & others* (2008) 29 *ILJ* 2461 (CC), Ngcobo J stated:

> "The role of commissioners in resolving labour disputes is set out in s 138(1) of the LRA which provides:
>
> > 'The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.'
>
> The LRA introduces a simple, quick, cheap and informal approach to the adjudication of labour disputes. This alternative process is intended to bring about the expeditious resolution of labour disputes. These disputes, by their very nature, require speedy resolution. This requires commissioners to deal with the substance of a dispute between the parties. They must cut through all the claims and counter-claims and reach for the real dispute between the parties. In order to perform this task effectively, commissioners must be allowed a significant measure of latitude in the performance of their functions" (at paragraphs 62, 63 and 65).

[5] The limitation on the right to legal representation is an integral element of a system of expeditious and informal dispute resolution. The default position established by rule 25 of the CCMA rules is that in cases of dismissal for misconduct and incapacity, a party to arbitration proceeding is not entitled to be represented by a legal practitioner

unless the commissioner and the parties consent, or the commissioner concludes, after considering specified factors, that it is unreasonable to expect a party to deal with the dispute without legal representation.

[6] Reverting to the facts of the present case, the effect of the commissioner's ruling is that the arbitration continues with both parties not represented by legal practitioners. Mr Rautenbach submitted that in these circumstances, the conduct of the applicant's case might be prejudiced, unattuned to the niceties of legal procedure as those currently representing the applicant are, for example, by making admissions they need not make or more generally by failing to cross-examine witnesses with the skill of a seasoned legal practitioner. This submission overlooks the fact that any disadvantage consequent on a lack of legal representation is equally borne by the applicant and Jacobson, and that the commissioner's primary obligation is to conduct the proceedings with the minimum of legal formality, providing guidance on the conduct of the proceedings to the parties and their representatives where this is appropriate. In so far as the factual and legal complexity of the dispute is concerned, there is nothing in the papers before me to sustain the argument that this matter is so complex that a failure to intervene at this point by interdicting the proceedings will result in a grave injustice. The applicant chose to ignore the informal workplace procedures prescribed by the Code of Good Practice and to conduct a disciplinary enquiry, at great expense to the taxpayer no doubt, in a form that would make any criminal court proud. I have previously had occasion to comment on the profitable cottage industry[1] that has developed from the application of unnecessarily complex workplace disciplinary procedures, and how inimical the actions of some practitioners, consultants, so-called trade unions and employer organisations and the various other carpetbaggers who populate this industry are in relation to the

[1] The term is borrowed from the judgment by Wallis J in *Cele v South African Social Security Agency and 22 related cases* 2008 (7) BCLR 734 (D)

objectives underlying the LRA.[2] The fact that the arbitration proceedings may raise, as the applicant submits, intricate legal questions concerning the law of trusts and Jacobson's fiduciary duties and that there is a broader public interest in the matter, are all issues that the applicant will in due course be entitled to address should it seek later to review the commissioner's award and to subject the commissioner's decisions and the reasons underlying them, to scrutiny by this court. In short, the applicant failed to establish a prima facie right, even subject to some doubt.

[7] For these reasons, I dismissed the application, with costs.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of hearing and order: 8 April 2009
Reasons furnished on: 14 April 2009

Appearances:

For the applicant: Adv Rautenbach

Instructed by: Deneys Reitz Attorneys

For the respondent: In person

[2] *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others* [2006] 9 BLLR 833 (LC). Section 188A of the Act is particularly suited to the expeditious determination of allegations of misconduct.