IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C246/2005

In the matter between:

ANDRAG MACHINERY (PTY) LIMITED	Applicant
and	
METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL	1st Respondent
S HARVEY	2nd Respondent
J CARELSE	3rd Respondent

JUDGMENT

NEL, AJ

[1] This is an application in which the applicant, the employer party, seeks to have reviewed and set aside an award by the second respondent ("the Commissioner") handed down on 20 April 2005 under case number NEWC1010 under the auspices of the first respondent.

[2] In very brief, the circumstances which gave rise to the dispute, which in turn led to the arbitration, which is the

subject of this review, are that the third respondent ("Carelse" or "the employee") needed to warm medication on the day in question. He needed to do so urgently as he was already two hours late in the taking of this medication. Carelse had testified that his kidney condition was life threatening. He also testified as to what the symptoms were if he did not take his medicine at the prescribed time. Whilst he would normally heat the medication by boiling it in water, on the day in question that would have taken too long and he therefore approached a Mr Arthur Kempen, one of the applicant's senior employees, and obtained leave to heat the medication in a microwave belonging to the applicant. He had already begun experiencing the symptoms as a result of him not having taken his medication on time. Carelse had assured Arthur Kempen that it would be safe to heat the medication in the microwave. Arthur Kempen accompanied Carelse to the office kitchen. Mr Andrag, the Managing Director of the applicant, approached them and enquired as to what was going on. Arthur Kempen explained the situation to Andrag. Andrag was apparently concerned that the whole procedure may have been unhealthy for people who used the kitchen. Andrag accordingly indicated that he did not believe it was safe for Carelse to do the heating of his medication in an area where food was prepared and indicated that this would be last time Carelse would be allowed to use the kitchen microwave.

Carelse was not pleased with Andrag's comments and told him that it would be Andrag's fault if, through his lack of compassion, he became sick. Carelse also told Andrag that things were bad in the factory because of Andrag's reluctance to help people.

[3] On the employer's version, Carelse had said to Andrag "Jy is 'n dier" or words to that effect. Andrag also alleged that Carelse was physically threatening in that he loomed over him in his face. These allegations were denied by Carelse who in turn had alleged that Andrag had said to him "Gaan weg van my tafel af want ek wil vreet" or words to that effect. This in turn was denied by Andrag.

[4] Carelse was walking away from Andrag's desk when Andrag ordered him to come back. Carelse however disobeyed this instruction and left the room. This led to Carelse being charged and found guilty of insubordination and him being dismissed. He declared a dispute which in turn led to the arbitration under consideration. The Commissioner found the dismissal of the applicant to have been substantively unfair. She reinstated Carelse retrospectively to the date of his dismissal, which was 29 July 2004, on the same terms and conditions as those which prevailed immediately prior to his dismissal and with no loss of accrued service or benefits.

She also ordered the applicant to pay Carelse an amount of R11 952, less statutory deductions.

[5] The applicant in its founding affidavit criticises the Commissioner in respect of a number of specific findings and then, so it would appear, summarises its grounds of review as being that the Commissioner:

- Failed to give proper effect to her powers and duties in terms of the Labour Relations Act; and/or
- Reached conclusions unjustified on the facts and inconsistent with the law; and/or
- Did not apply her mind properly or fairly or at all to the issues before her, as she was obliged to do; and/or
- Took into account irrelevant matters and failed to take into account relevant matters; and /or
- Committed a gross irregularity in the proceedings; and/or
- Acted unreasonably.

[6] It was further contended by the applicant that the Commissioner's award was not based on proper legal principles and that it constituted an excess of the Commissioner's powers as the award was not justified on the evidence placed before the Commissioner at the arbitration proceedings. In argument before Mr Jacobs, who appeared

on behalf of the applicant, very clearly condensed all of these attacks by arguing that the review was based on two grounds, both of which, according to him, warranted the review and setting aside of the award. The first ground of review was contended to be that the Commissioner had failed to apply her mind to the facts and the evidence before her and that she accordingly erred in her finding and award. The second ground of review was that the Commissioner's conduct towards the applicant's representatives was such that it either constituted gross misconduct or that it displayed a clear bias and prejudicial position against the applicant and thus that it denied the applicant the opportunity for a fair trial.

[7] I turn to consider first whether there is merit in the applicant's contention that the Commissioner failed to apply her mind to the facts and evidence before her as a result of which she erred in her finding and award.

[8] It is quite apparent from the Commissioner's award that she was fully alive to the issues she had to determine. It is apparent that in the first instance the Commissioner agreed with the argument presented to her on behalf of the employer that employees had a duty to be respectful and subordinate towards their employer and that rudeness, cheekiness and insubordination could all be valid grounds for dismissal.

From this premise it is apparent that the Commissioner then considered the fact that the employer alleged that Carelse was cheeky, rude and insubordinate. In addition the employer had alleged Carelse was rude and disrespectful by having adopted a threatening stance towards Andrag, and calling him an animal. In addition, the employer had relied on the fact that Carelse had refused to return to Andrag's desk when Andrag had called him back.

[8] The Commissioner accordingly clearly indicated what the facts were on which the employer relied in order to persuade her that she should confirm the employer's finding at the disciplinary enquiry that Carelse was guilty of insubordination. The Commissioner, in what I believe to be a reasoned manner, then set out the facts which she found and why she made particular findings.

[9] In the first instance, the Commissioner indicated what the facts were which were not in dispute. In respect of some of these facts, which the Commissioner found not to have been in dispute, she is also criticised by the applicant. For example, issue is taken with the Commissioner's finding that it was established that the applicant was in a state of medical crisis. It was argued on behalf of the applicant that this conclusion of the Commissioner was not justified in the

absence of expert medical evidence. A perusal of the evidence adduced discloses that Carelse had testified what the symptoms would be that would manifest itself in the event of him not taking his medicine timeously. I certainly could not find any evidence adduced on behalf of the employer contradicting Carelse's evidence as to what these symptoms were. He had testified, and again I do not believe this was gainsaid, that his kidney condition was life threatening. On the evidence adduced before the Commissioner I believe she was perfectly justified in finding that it was established that the applicant was in a state of medical crisis and that he needed the dialysis badly. I certainly do not believe that Carelse needed to call an expert medical witness to confirm his evidence, particularly in the absence of any serious challenge being made of his evidence.

[10] But for the attack on this part of the Commissioner's reasoning in respect of what she recorded were the common cause facts, the applicant does not appear to have taken issue with the rest of the facts the Commissioner had recorded as being common cause. The applicant also does not appear to have taken issue with the recorded facts, which the Commissioner found were matters in dispute.

[11] It is quite apparent that the employer in essence relied on the fact that it alleged that Carelse had called the employer's chief executive officer an animal, (that is "Jy is 'n dier"). It further relied on his physical demeanour as having been threatening by reason of Carelse having loomed over Andrag and having been in his face. The third element on which the employer relied was that Carelse had walked away from Andrag's desk and had ignored Andrag's instruction that he must stay and advise Andrag what he had said. The Commissioner was satisfied that the actual walking away by Carelse from Andrag's desk was common cause. It is apparent that the Commissioner, however, accepted the explanation tendered by Carelse for having walked away.

[12] The fact of the matter is that in respect of two of the three crucial factual elements, on which the employer relied for its allegation that Carelse was insubordinate, the Commissioner reasoned herself through to a particular conclusion. This in effect was that she rejected the version put forward on behalf of the employer and found that the employee's version was more believable.

[13] In this regard, as I said, the applicant launched a number of specific attacks on the Commissioner's reasoning. In finding that there were some discrepancies between Kempen junior

and Andrag's evidence in respect of the physical position Carelse had adopted when confronting Andrag in his office, it was suggested on behalf of the applicant that the Commissioner had failed to consider the fact that Andrag was facing Carelse head on and that Kempton junior had witnessed the incident from a very different angle and from a distance. In this regard it must be remembered that, in her award, the Commissioner indicated that Kempen junior's physical demonstration did not corroborate Andrag's version that Carelse had leant over his desk in a threatening manner. She indicated what Kempen junior's demonstration had indicated and concluded that his evidence did not corroborate that of Andrag. I certainly do not believe that the angle at which Kempen junior viewed the incident could justify the differences in specific respects between his and Andrag's evidence and which he apparently had demonstrated to the Commissioner.

[14] A further attack launched on the Commissioner's award was in respect of her findings that Kempen and Andrag had contradicted one another on where the conversation between Carelse and Andrag had taken place. I do not believe that the Commissioner as a matter of fact was wrong and inaccurate in how she assessed Kempen junior and Andrag in respect of where the conversation had taken place. It must

be remembered that two witnesses with the surname Kempen testified before the Commissioner. The one was Arthur Kempen. The other Kempen was identified by the Commissioner, to distinguish him from Arthur Kempen, as Kempen junior. It is apparent that the Commissioner was at all times alive to the fact that Arthur Kempen's evidence really only dealt with what happened in the kitchen between Carelse and Andrag. When she, in her award, says that Arthur Kempen's evidence corroborated that of Carelse on most aspects, that obviously is with reference to what had happened in the kitchen.

[15] The point was made by the applicant that the Commissioner erred in concluding that Andrag's evidence indicated that the entire conversation between himself and the applicant took place at his desk. Having regard to the Commissioner's summation of the evidence, it is quite clear that she was alive to the fact that Andrag had testified that he had gone to the kitchen to wash an apple he intended eating. Having regard to Andrag's evidence it is, however, apparent that Andrag did contend that the entire conversation, as well as the events on which the employer relied for its accusation of insubordination, took place at his desk in his office. If one has regard to the evidence of Arthur Kempen, one sees that his evidence was in the first instance that he only observed

the conversation between Andrag and Carelse, which took place in the kitchen. Arthur Kempen testified that Andrag said in the kitchen that the microwave oven is only there to heat food and that Andrag did not know whether medicine could be heated in it, as it could be dangerous. According to Arthur Kempen, Andrag also said to Carelse that it was the first and the last time that Carelse may heat his medicine in the microwave. Arthur Kempen further testified that Carelse had told Andrag about the hot water he would heat his medicine in and that he had explained about his kidney situation. Arthur Kempen also testified that Carelse had told Andrag that he, Carelse, was already two hours late with the taking of his medication as well as that Carelse had said that they were busy at another place and that he was not able to heat his medication there. Carelse had also, according to Arthur Kempen, told Andrag of the different processes, which Carelse had used to heat the medicine on a little stove.

[16] If one assesses what Andrag's evidence in chief was in respect of what occurred in the kitchen between him, Carelse and Arthur Kempen, one sees that, according to Andrag, he went to the kitchen to wash his apple. Arthur Kempen and Carelse were busy at the microwave. Andrag saw the bag being placed into the microwave and he enquired about what it was. Arthur Kempen answered that it was Carelse's

medicine. This was the first Andrag had heard about he medication that Carelse would need. According to Andrag he had a question in his mind about the hygiene and that he had remarked that he did not know about the safety issues, whether it was safe to heat medicine in the microwave. Then he passed Arthur Kempen and Carelse and went back to his desk. From his desk he could hear Carelse telling Arthur Kempen that the substance needed to be heated up for ten minutes at full heat. He heard Arthur Kempen asking whether it would be safe and whether it could not explode and that he was assured by Carelse that it was safe and that he had done this in the same way at his home. On realising that it might be unhealthy to heat the medicine in the kitchen, Andrag said that he then from his desk said that he was not sure that it was safe to have the medication heated in an area where food was prepared and that he had then had said to Carelse that it would be better if he did it in another way. It was then, according to Andrag, that Arthur Kempen had asked Carelse after a while whether he had heard Andrag's statement that heating of the medicine should be done in a different way.

[17] The record accordingly clearly reflects differences between the evidence of Arthur Kempen and Andrag as to what was said in the kitchen. And this is so particularly in respect of where what was said. I am accordingly of the view that the

Commissioner was perfectly justified in concluding that Andrag and Arthur Kempen contradicted one another as to where what part of the conversation had taken place.

[18] The Commissioner went to the length of indicating in her award that she made a note of Andrag's demeanour whilst he was testifying. It is trite that an appeal or review court will not easily interfere with a Court *a quo's* assessment on credibility, particularly insofar as it relates to demeanour.

[19] Andrag's demeanour is however not the only aspect on which the Commissioner relied for her eventual conclusion. I have already referred to the fact that the Commissioner also concluded that there were contradictions between Arthur Kempen and Andrag as to where conversation had taken place.

[20] The reasoning of the Commissioner, relating to Andrag having testified that the conversation at his desk was quiet and the fact that Kempen junior said that he heard nothing save for the fact that Andrag said that he did not want to argue any more and that Carelse had called Andrag an animal, appears to me to be a perfectly rational reasoning process, which the Commissioner embarked on, in order to assess the evidence adduced before her.

[21] Lastly, the Commissioner also, as I said, relied on Kempen junior's evidence about Carelse's physical stance and the fact that it differed from that of Andrag.

[22] Having reasoned herself through, with reference to these particular aspects of the evidence adduced before her, the Commissioner came to a conclusion that she was satisfied, on a balance of probabilities, that the employer had not established that the animal comment had been made by Carelse, or that Carelse was aggressive or threatening in his physical stance. In respect of the Commissioner's reasoning, I find her conclusion perfectly justifiable having regard to the evidence adduced before her.

[23] Having arrived at the aforementioned conclusion, the Commissioner then embarked on a comprehensive assessment of the circumstances and the situation, which prevailed at the time. In this regard the Commissioner considered the evidence before her that Andrag had a dislike for NUMSA and its members. She also considered the fact that Andrag was disdainful about the "dirty" medication bag and the fact that he had regarded the heating of Carelse's medication as potentially dangerous and the Commissioner regarded Andrag's approach as inappropriate and poorly

judged. The Commissioner concluded that Andrag was seemingly unaware that he was witnessing a serious health crisis in another person who deserved his support and not his contempt. I am unable to find any of the extensive reasoning of the Commissioner in this regard capable of attack in the sense that she perpetrated a reviewable irregularity, misconducted herself or exceeded her powers. Likewise, her conclusion that Carelse's failure to return, when called back by Andrag, did not amount to insubordination, is in my view wholly justifiable, having regard to the reasons the Commissioner provided therefore and the evidence on which she had relied for this conclusion.

[24] I lastly turn to deal with the second ground of review, and that is with reference to the fact that, towards the end of the arbitration proceedings, the Commissioner excluded Mr Jordaan, the applicant's representative at the arbitration, from the arbitration proceedings as he was held by the Commissioner to have disrupted such proceedings.

[25] Mr White, who appeared before me on behalf of the third respondent, in argument before me drew my attention to the fact that the applicant elected not to file any replication to the third respondent's opposing answering affidavit. In respect of this particular ground of review, Mr Whyte drew my attention

to the following allegations made by the third respondent, which stands uncontested by the applicant. Carelse's replying affidavit refers to specific pages of the transcript of the arbitration proceedings. He then alleges that it would be readily apparent from the specific extract in the record that once the Commissioner had overruled Mr Jordaan's objection, Jordaan continued to argue with her in an aggressive manner. Carelse further pointed out that Jordaan's demeanour towards the Commissioner was extremely aggressive and inappropriate, considering the nature of the proceedings.

[26] Apart from the fact, as I said, that these allegations stand undenied, I for myself perused the specific parts of the record to which Carelse referred me. The record itself reflects Jordaan's aggressive and inappropriate manners. Carelse further contended that, in respect of Jordaan's approach towards the Commissioner, it warranted her finding that he was disrupting proceedings. Apart from this allegation not having been contested by the applicant, I agree therewith.

[27] Carelse then referred me to the specific part of the record, which contains the whole incident, which led to the Commissioner excluding Jordaan from the proceedings. Carelse submitted that the exchange that occurred was wholly inappropriate and that Jordaan had gone so far as to harass

and intimidate the Commissioner. Yet again this allegation stands uncontested and having perused the record, Carelse is in my view wholly justified in making these allegations of his.

[28] Carelse's opposing answering affidavit further pointed out that Jordaan's intimidatory tactics were not limited to the verbal exchanges recorded but that he had adopted a physically threatening manner towards the Commissioner and Carelse himself. This is not gainsaid by the applicant in any replying affidavit.

[29] The applicant alleges in his founding affidavit that, during the hearing, Jordaan raised objections to leading questions that were being asked by Carelse's representative. It is alleged that when Jordaan specifically objected to a question in which something which was never testified to was put to the witness Williams as being part of his evidence, the Commissioner refused to hear Jordaan's objection. It is alleged that she even verbally attacked Jordaan. It is said that the Commissioner then switched off the recording, I assume verbally attacking Jordaan off record, and that she allegedly proceeded off record to verbally attack Jordaan in a hysterical state. The submission was made that the Commissioner was completely out of control. Although the Commissioner did not depose to any answering affidavit in respect of these

allegations, Carelse, who was present, denied that the Commissioner was hysterical or out of control and he contended that she had handled the situation to the best of her ability.

[30] I believe that the fact that the Commissioner was fully justified in finally deciding to exclude Mr Jordaan from the proceedings is perhaps best illustrated by extracts from the record of the arbitration proceedings itself. The first incident to which Carelse referred the Court is recorded as follows:

"Arbitrator: I must ask you please to just relax and behave properly ... (talking simultaneously).

Mr Jordaan: I hear what you are saying ... can I just ask you but how many times do we need to listen to this. That is what I am asking you. That is your responsibility.

Arbitrator: Mr Jordaan, that is my responsibility and if I find that the questioning is going on too long I will stop the questioning. I have noted your objection, I have overruled it and I will allow Mr Piedt to continue to question the witness and I would appreciate it if you would stop sighing and ... (intervention).

Mr Jordaan: Does that disallow me from having any feelings about this?

Arbitrator: You may have feelings, Mr Jordaan, but please refrain from sighing and disrupting the proceedings ... (intervention).

Mr Jordaan: I am not disrupting ...(intervention).

Arbitrator: Please behave ...(intervention).

Mr Jordaan: If I am sighing I am not disrupting him.

Arbitrator: Please behave in a manner fitting your status as a representative.

Mr Jordaan: Are we now getting personal (indistinct)?"

[31] Later on in the proceedings, the following incident occurred:

"Mr Jordaan: Objection Commissioner. That is not what was said.

Mr Piedt: It is a statement.

Mr Jordaan: No, it is not a statement. Keep to the facts. It is not what was said ...

Arbitrator: I am not going to entertain argument.

Mr Jordaan: I am not arguing, Commissioner but surely ... (intervention).

Arbitrator: Mr Jordaan, I am going to warn you now especially on record ... (intervention).

Mr Jordaan: Okay, can I just ask you what ...(intervention).

Arbitrator: No, you may not, Mr Jordaan. Do you want me to (indistinct) contempt, because I am tired of you interrupting me every time I say something (indistinct) ...(intervention).

Mr Jordaan: Commissioner, can I just ask you, ...(intervention).

Arbitrator: No ...

Mr Jordaan: .... Do I have the right to object?

Arbitrator: I will give you one minute and I will eject you from these proceedings if you don't allow me to finish my sentences.

Mr Jordaan: Okay, then can I ask you ....(intervention).

Arbitrator: I have never refused you an opportunity to speak when it is your turn to speak, Mr Jordaan. So I will not continually be intimidated and interrupted by you in these proceedings, and at the moment I am speaking and what I am trying to say at the moment is that I will allow that question and I will not accept the disrespectful attitude that you display towards this forum, and I am putting it on record that I object to the disrespectful attitude that you have for this forum, I object to your constant interruptions, I object to your constant argumentation with the rulings that I make and if it happens again you will be found in contempt of

(indistinct) proceedings and I will eject you from this hearing.

Mr Jordaan: I hear that.

Arbitrator: Thank you, Mr Jordaan.

Mr Jordaan: Can I answer to that Commissioner?

Arbitrator: No, you cannot answer, (indistinct)... (intervention).

Mr Jordaan: You put it on record – can I just ask you, Commissioner, can I object when I believe that Mr ... (intervention).

Arbitrator: Mr Jordaan, we had this discussion last time you were here. I made it very clear ...(intervention).

Mr Jordaan: Commissioner, just answer, say no.

Arbitrator: Don't interrupt me.

Mr Jordaan: Commissioner, just say no then. Say no (indistinct) object.

Arbitrator: We will stand down for five minutes.

Machine switched off – on resumption

Arbitrator: Okay, we have taken a five minute break. Hopefully Mr Jordaan has thought about his conduct (indistinct) these proceedings. Mr Jordaan, my final warning to you.

Mr Jordaan: (indistinct).

Arbitrator: If this carries on, if you interrupt these proceedings again in disrespectful manner and if

you continue to interrupt me and do not give me the respect which I am due you will be ejected from these proceedings and your client will conduct – or finish the cross-examination and his argument on his own.

Mr Jordaan: Can I ask you permission, can I answer to that?

Arbitrator: No, you can't.

Mr Jordaan: Can I get my client to just ask you Commissioner ...(intervention).

Arbitrator: (indistinct). You cannot.

Mr Jordaan: I insist to answer to that because I don't agree ...(intervention).

Arbitrator: (indistinct) you are excused.

Mr Jordaan: Can I ask you Commissioner ...(intervention).

Arbitrator: (indistinct).

Mr Jordaan: ... Would you consider recusing you from the case?

Arbitrator: Mr Jordaan, I am telling you again on record that you are now excused from these proceedings. I am asking you to leave the room.

Mr Jordaan: Commissioner, I have asked you to answer to your allegations because I don't believe that I was disrespectful to you.

Arbitrator: No, (indistinct).

Mr Jordaan: I don't believe that I – kom ek spel dit vir u in Afrikaans. Ek dink u het geen reg ... (tussenbeide).

Arbitrator: I would like the record to show that I have asked Mr Jordaan to leave the room.

Mnr Jordaan: Ek dink ons het kennis geneem – Kommissaris ek wil hê u moet weet ...(tussenbeide).

Arbitrator: Mr Jordaan is ignoring my instructions and he is not accepting my ruling in this matter (indistinct) ...(intervention).

Mnr Jordaan: Ek aanvaar u ruling. Kommissaris, ek aanvaar die ruling. Wat ek u vra, repliseer (rekuseer?) uself ... (tussenbeide).

Arbitrator: I am going off the record. I am going to wait for Mr Jordaan ...

Machine switched off – on resumption:

Mr Jordaan: It is highly irregular what you are doing.

Arbitrator: I have asked you to leave the room, Mr Jordaan. If you have any problem with the irregularity I am sure you know the correct forum to deal with those allegations.

Mr Jordaan: Yes. You can bargain on that. You can bargain on that. You've displayed this attitude from the start.

Arbitrator: Thank you, Mr Jordaan, you are excused from these proceedings.

Mr Jordaan leaves the room."

[32] The above, and particularly the allegation that Jordaan adopted a physically threatening manner towards the Commissioner, in my view serves as justification for the Commissioner's conclusion that Jordaan was disrupting the arbitration proceedings. Mr White contended before me that under these circumstances, the Commissioner acted appropriately and within her statutory powers in excluding Jordaan from the proceedings. Mr White continued to argue that it was apparent from the transcript of the proceedings that the Commissioner went out of her way to ensure that the applicant nonetheless received a fair hearing.

[33] Mr White on the one hand did not refer me to any particular section of any statute on which he relied for his proposition that the Commissioner was statutorily empowered to exclude Mr Jordaan from the hearing by reason of his disruptive conduct. The Commissioner derives her powers from the Labour Relations Act ("the LRA"). It is trite that Section 138 of the LRA gives a Commissioner the power to conduct the arbitration in a manner that she considers appropriate in order to determine the dispute fairly and quickly but that she

must deal with the substantial merits of the dispute with the minimum of legal formalities. I do not believe that this wide discretion to conduct the arbitration in a manner the Commissioner considers appropriate includes the power to exclude a representative of a particular party if he in the view of the Commissioner is obstructing the process. I have considered whether the Commissioner, in terms of Section 142(8) of the LRA, may have the right to exclude a representative of a party from the arbitration proceedings. One sees that if a person insults, disparages or belittles a Commissioner, or pre-prejudices or improperly influences the proceedings, or improperly anticipates the Commissioner's award, or wilfully interrupts the conciliation or arbitration proceedings, or misbehaves in any manner during those proceedings, a Commissioner may make a finding that a party is in contempt of the Commission. However, such a finding may be referred, together with the record of the proceedings, to the Labour Court for its decision, who may then affirm, vary or set aside the finding of contempt of the Commissioner. It is apparent that only once the Labour Court has confirmed a finding by a Commissioner that a party is in contempt, then it is the Labour Court who may make any order that it deems appropriate which may include suspending a person's right to represent a party in the Commission and the Labour Court,

but only in the case of a person who is not a legal practitioner.

[34] I do not believe that any of these sections of the LRA to which I have referred, or for that matter any other section of the LRA, does give a Commissioner the power to exclude a representative of a party from the proceedings by reason of the representative's misconduct or because of the representative disrupting the arbitration proceedings. Accordingly, I am of the view that in excluding Jordaan from the arbitration proceedings, as unacceptable as his conduct was, which I certainly find as a fact his conduct was, the Commissioner nevertheless in my view exceeded her powers in excluding Jordaan from the rest of the arbitration proceedings. I believe that what the Commissioner was empowered to do was to make a finding that Jordaan was in contempt of the Commission. The Commissioner should then have postponed the arbitration indefinitely and referred her finding, together with the record of the proceedings, to the Labour Court for its decision, who may then have affirmed, varied or set aside the finding of contempt of the Commissioner. Only the Labour Court had the power to make any order that it deemed appropriate, which may have included suspending Jordaan's right to represent a party in

the Commission, but only in the case of Jordaan not having been a legal practitioner.

[35] Although I am of the view that the Commissioner accordingly exceeded her powers by excluding Jordaan from the arbitration proceedings, I do however agree with Mr White's contention that the Commissioner went out of her way to ensure that the applicant nonetheless received a fair hearing. In this regard she allowed Jordaan, at the request of Mr Andrag, to remain present although she continued to refuse to allow Jordaan the right to further participate in the proceedings. The Commissioner further allowed the parties to present their legal argument in writing.

[36] The incident of the Commissioner excluding Jordaan from the proceedings further occurred at a stage when only one witness still had to be cross-examined by the applicant. This witness of the employee Carelse, Mr Elias Williams, presented a lot of evidence, which was never put to the employer's witnesses. The Commissioner recorded that she did not take such evidence of Williams into account. The purpose of his evidence was further, so it would appear, to persuade the Commissioner that the applicant had acted inconsistently in respect of the sanction it imposed on Carelse with reference to two other employees who,

according to Williams, had been found guilty of the same offence, but were both given final written warnings. I do not believe that any of the evidence adduced by Williams affected the Commissioner either in her reasoning or the conclusion she arrived at.

[37] Although I am accordingly of the view that the Commissioner exceeded her powers when she excluded Jordaan from the arbitration proceedings, I am satisfied that, by reason of the late point in time during the arbitration proceedings that Jordaan was excluded; the fact that Jordaan was allowed to assist Andrag the remaining part of the proceedings; the fact that the witness who then had to be cross-examined by the applicant's representative who could only be assisted by Jordaan gave evidence which was either ignored by the Commissioner or did not influence her conclusions; and lastly, the fact that the Commissioner allowed written argument to be presented, all drives me to the conclusion that the Commissioner having exceeded her powers by excluding the applicant's representative nevertheless did not lead to the applicant having suffered any prejudice or it not having had a fair hearing.

[38] Under all these circumstances, I am satisfied that the applicant has not succeeded in showing that the

Commissioner has perpetrated any irregularity or misconduct which justifies the review and setting aside of her award herein. As I have said a moment ago, in respect of the conclusion that the Commissioner exceeded her powers when she excluded Jordaan from the arbitration proceedings, I am nevertheless not persuaded, for the reasons I stated, that this in and by itself justifies the reviewing and setting aside of the award herein.

[39] Under all these circumstances, the application falls to be dismissed. No special circumstances have been placed before me for consideration in support of a conclusion that the costs should not follow the result herein. Accordingly the order that I make herein is the following:

(1) The application is dismissed.

(2) The applicant is ordered to pay the third respondent's cost of suit.

DEON NEL

ACTING JUDGE OF THE LABOUR COURT

Date of hearing: 24 April 2007

Date of Judgment: 19 November 2007

Appearances:

For the applicant: Mr Willem Jacobs of Willem Jacobs and Associates.

For the third respondent: Mr Jason White of Cheadle Thompson and Haysom Inc.