REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

REPORTABLE

CASE NO: C144/2009

In the matter of:

SIMANI: ZWELANDILE PATRICK	Applicant
and	
MOSSELBAY MUNICIPALITY	1st Respondent
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	2nd Respondent
CARLTON JOHNSON, N.O	3rd Respondent

Heard: 30 July 2013

Delivered: 3 December 2013

Summary: Section 138 (1) of LRA requiring arbitrating commissioner to determine substantive merits of dispute and section 138(7) requiring commissioner to provide brief reasons for award. These provisions requiring commissioner to resolve disputes (subs. (1)) and to provide an explanation on how disputes resolved (subs. (7)). Failure to resolve dispute or failure to provide explanation on how dispute resolved constituting a failure to discharge obligation under the empowering statute and therefore an gross irregularity in terms of section 145(2)(a)(ii) of LRA.

JUDGMENT

HULLEY, AJ

Introduction

[1] The applicant seeks an order reviewing and setting aside an arbitration award issued by the third respondent on 3 December 2008 and for the referral of the matter back to the second respondent for allocation to an arbitrator other than the third respondent. In addition, he seeks condonation for the late filing of his review application.

[2] Before considering either application, I propose sketching the factual background to this matter.

Factual background

[3] The first respondent is a municipality. As such, it is responsible for the provision and maintenance of electrical reticulation systems within its area of jurisdiction. For this purpose it has large stocks of electrical cabling.

[4] The charges against the applicant related to the theft of electrical cabling from the first respondent's stocks and his fraudulent attempt to avoid detection.

[5] The allegation was that on 4 October 2006 the applicant had entered the first respondent's premises, rolled out and cut off electric cabling with the intention of stealing it and, when confronted by a security officer, falsely alleged that his name was Koni and that he had been

instructed by his supervisor to remove and cut off the cable.

[6] A disciplinary enquiry which had been convened to consider the allegations against the applicant found him guilty. He was dismissed. The applicant referred an unfair dismissal dispute to the SA Local Government Bargaining Council. The third respondent was appointed to determine the dispute.

[7] The essence of the applicant's case at the arbitration hearing was that he was ill at the time when the alleged misconduct was perpetrated and that he was not capable of having committed the misconduct. In support of his defence he produced a medical certificate.

[8] The first respondent, called three witnesses. The evidence of only two of those witnesses, Mr Nicolaus Gerhardus Cornelius Van der Colff and Mr Laurens Jakobus De Lange, was relevant to the substantive issues before the arbitrator.

[9] Mr Van Der Colff was a security officer. He testified that he assumed duty on 3 October 2006 at 19h00. His shift was to conclude at 07h00 on 4 October 2006. At approximately 06h20, shortly before the conclusion of his shift, a person, who he identified as the applicant, reported for duty. Mr Van der Colff testified that he knew the applicant by sight but was, at that stage, not aware of his name.

[10] Shortly thereafter Mr Van der Colff heard a whistling sound and upon investigation found the applicant unrolling electrical cable from a large wooden reel. The applicant explained to Mr Van der Colff that he was acting upon instructions from his supervisor, Mr Rooiland. When asked, the applicant identified himself to Mr Van der Colff as Mr Simani. Mr Van der Colff returned to his security station.

[11] Upon reflection Mr Van der Colff realised that the applicant's version was suspicious. He returned to pursue the matter with the applicant, but was unable to locate him in the area where he had previously seen the applicant. Mr Van der Colff proceeded to the change rooms where he again encountered the applicant, this time at the stairs to the change rooms.

[12] Mr Van der Colff asked the applicant what his name was. This time the applicant stated that he was "Conie" (Koni). Mr Van der Colff asked the applicant why he had two names, to which the applicant responded by saying that they called him by the other name (presumably a sobriquet). Mr Van der Colff requested the applicant to produce his ID book, but the applicant claimed that he did not have it with him.

[13] According to Mr Van der Colff, he then left the applicant at the steps and proceeded to the fire department where he spoke to a Mr Marius Barnard. He explained the story to Mr Barnard and together they returned in search of the applicant. The applicant was nowhere to be seen. Mr Barnard then telephoned Mr Louw de Lange.

[14] When Mr de Lange arrived the three proceeded to the point where the daily roll call was conducted. The applicant was not at the roll call.

[15] Mr Van der Colff testified that two days later he noticed the applicant when the latter reported for duty. Mr Van der Colff then contacted Mr de Lange to inform him that he had identified the applicant.

[16] Mr de Lange was also called as a witness. In broad outline (and I do not intend to traverse his evidence in great detail), Mr de Lange confirmed what Mr Van der Colff had testified to.

[17] The applicant testified on his own behalf and called two other witnesses.

[18] As previously indicated, the applicant denied that he had been on duty at the relevant time, produced a medical certificate to support what he was saying and testified that he had telephoned a colleague, a Mr Mawethu Popo, and requested him to inform his supervisor that he was ill and would not be attending at work on that day.

[19] Mr Popo was called as a witness and confirmed the applicant's version.

[20] The other witness called on behalf of the applicant, Mr Marius Bower, testified that he had worked with the applicant for some time and could confirm that the latter was hardworking and disciplined.

[21] According to Mr Bower, Mr Van der Colff had initially identified the applicant as the person he had seen on the morning of 4 October 2006, but subsequently, some four to five months later, recanted, indicating that he was uncertain. This version had not been put to Mr Van der Colff during cross-examination.

The arbitration award

[22] The third respondent correctly noted that the crucial question was whether the applicant was present at work on the day and if so, whether he had cut off a portion of the cable. In dealing with this issue, he said:

> "23. The respondent contended that the applicant was identified by Van der Colff, as the person he found with the cable outside the cable yard. Having regards to the evidence, it is evident that Van der Colff was in no doubt as to the identity

of the person. Van der Colff came across as a credible witness and I have no reason to question the veracity of his evidence. Many allegations were made against Van der Colff but the difficulty is that none of this evidence was put to him when he testified. In my view, this strategy was designed to deny Van der Colff a proper opportunity to answer the allegations. It further allowed the applicant an opportunity to adjust his version at a later stage.

24. I am simply not convinced that Van der Colff had fabricated the allegations against the applicant. I find that the balance of probabilities favour the version of the respondent. In arriving at this conclusion, I took into consideration the fact that the evidence of De Lange is consistent with that of Van der Colff. For the applicant's version to be true, it would imply that Van der Colff and De Lange was (*sic*) part of a conspiracy against him. Such conclusion is simply not consistent with the evidence. In the circumstances I find that the respondent has proved on a balance of probabilities that the applicant gained unauthorised access to the premises and proceeded to cut off the copper cable with the intention of removing it. The applicant is therefore found guilty of dishonest conduct."

Grounds of review

[23] The applicant has raised a number of grounds of review. I do not intend dealing with each and every ground. One of the grounds is compelling. In this regard the applicant points out that the arbitrator simply ignored his alibi defence, holding that if his defence were true, the first respondent's witnesses would have to be part of a conspiracy.

[24] The applicant complained that the arbitrator did not even test the

veracity of his evidence. In the end, says the applicant, the arbitrator's finding amounts to "*nothing but a simple rejection, without any basis whatsoever, of the evidence before him*".

The condonation application

[25] The arbitration award is dated 3 December 2008, but according to the applicant, he only received it on 15 December 2008.

[26] The applicant served the review application on the respondents on 31 March 2009. Given that the review application should have been instituted within 6 weeks of the date on which the applicant became aware of the award, i.e. by 26 January 2009, the delay is a little over two months.

[27] The applicant explained that he approached the union representative who assisted him at the arbitration proceedings during the first week of January 2009. The union representative undertook to refer the matter to the union's lawyers, but when the applicant realised, in mid-February, that no action was being taken by the union or its lawyers, he decided to approach a private attorney for assistance.

[28] The applicant stated that he obtained the details of his (now) erstwhile attorney, Mr Voyi, from a Mr Seriti. He averred that he contacted Mr Voyi on 27 February 2009, but it is clear that this date is incorrect because attached to the applicant's affidavit was a copy of an application for a case number which was signed by Mr Voyi of Ndumiso P. Voyi Attorneys on 16 February 2009 and faxed to the court on 24 February 2009. It thus appears that Mr Voyi had become involved in the matter as early as 16 February 2009.

[29] The applicant states that Mr Voyi advised him of the procedure to be followed and the costs involved. He was unable at that stage to

meet the costs associated with prosecuting the matter, but managed to secure sufficient funds from friends and family by 20 March 2009.

[30] The founding affidavit was deposed to by the applicant on 25 March 2009 and the notice of motion was signed by his attorney on 30 March 2009. As explained previously, the application was then served on the respective respondents on 31 March 2009.

[31] The time-honoured approach to condonation is this:

> 'In deciding whether sufficient cause [for condonation to be granted] has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked.'[1]

[32] When preparing a condonation application legal representatives must be careful to ensure that the applicant explains every single day during the entire period of the delay. Where possible the use of vague dates, such as "mid-February", or imprecise time periods, such as "approximately two weeks", should be avoided. Where such imprecision is unavoidable, the deponent must explain why this is so.

[33] Where the delay is alleged to be attributable to a particular person

[1] *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C – F

(whether a former or an extant legal representative or any other person), an attempt must be made to obtain an affidavit from that person. If the applicant for condonation is unable to secure an affidavit from such person, he or she should provide an explanation for such inability.

[34] The delay of two months in the present case is not insignificant, particularly having regard to the express goal of the LRA which is to expedite the resolution of disputes, but by the same token, it is not excessive.

[35] The two-month period consists of four distinct delays:

35.1 The period from 26 January to mid-February 2009 (the first delay), a period of approximately nineteen days.

35.2 The period from mid-February to 20 March 2009 (the second delay), a period of approximately 34 days.

35.3 The period from 20 March to 25 March 2009 (the third delay), a period of five days.

35.4 The period from 25 March to 31 March 2009 (the fourth delay), a period of six days.

[36] According to the applicant the first delay was due to the failure of the union representative to take any measures to assist the applicant; the second delay was due to the applicant's impecunious circumstances; the third delay, though not explained, was probably due to the time required to prepare the review and condonation applications; the fourth delay occurred after the review and condonation applications had already been prepared. The fourth delay is relatively short (and occurred after the affidavit seeking

condonation had already been deposed to).

[37] The applicant ought to have secured an affidavit from the union representative to explain his role in the first delay or to have provided an explanation as to why no affidavit was obtained from the union representative.

[38] However, none of the criticisms outlined above were raised by the first respondent. Instead, the first respondent opposed the condonation application largely because of the substantial delays in bringing this matter to finality *after* the review application had been launched. I will accordingly consider the application for condonation on that basis.

[39] Assuming that such delays were at all relevant to the condonation application, there is little evidence that the applicant was to blame for those delays.

[40] There may, of course, be circumstances in which delays not directly related to those in respect of which condonation is sought may be relevant. For instance, if the unrelated delays demonstrate a general tardiness on the part of an applicant, a court would be entitled to have regard to such delays in bolstering its conclusion that condonation should be refused.

[41] The applicant seeks condonation for the delay in launching the review application; and in respect of such delay the first respondent has been unable to demonstrate any prejudice.

[42] Since the prospects of success are a crucial aspect of the condonation application, I turn now to the merits of the review application.

Legal principles applicable to the present review

[43] Section 136(1) of the Labour Relations Act, 66 of 1995 (the LRA) requires that a commissioner be appointed "to arbitrate that dispute" which is required to be arbitrated in terms of the Act. In terms of section 138(1) the commissioner so appointed must conduct the arbitration in a manner that he or she 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". Section 138(7) requires the commissioner to provide an award which must contain "brief reasons" within 14 days

[44] A commissioner is thus under an obligation to "deal with" the substantial merits of the dispute and to provide reasons, albeit brief, in support of his or her award.

[45] Thus, in order to discharge his or her duties a commissioner must, as it were, grapple with the merits of the dispute before arriving at a conclusion. An award is not to reflect a perfunctory approach to the disputes of fact, with the commissioner merely recording the evidence of both parties and then, without further ado, selecting one or the other version.[2]

[46] Commenting upon the common law approach in private arbitrations Ramsden[3] notes that –

> "It is a basic rule of justice that those charged with making a binding decision affecting the rights and obligations of others should explain the reasons for making that decision …"

[47] This applies *a fortiori* to compulsory arbitrations under the LRA.

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[2] *Abdull & Another v Cloete NO & Others* (1998) 19 *ILJ* 799 (LC), at 805B – C
[3] Peter Ramsden, *The Law of Arbitration: South African & International Arbitration* (Juta, 2009), p. 159

[48] Two aspects of Ramsden's exposition are relevant. First, the award must contain an explanation and, secondly, the explanation must set out reasons for the decision. The decision represents the conclusion arrived at by the commissioner and the reasons given will consist of the factual and legal premises relied upon by the commissioner to support that conclusion.

[49] In short, where the evidence presented for the employer and employee reveal disputes of fact, the award must contain an explanation, with reasons, as to how the commissioner resolved those disputes.

[50] I dare say, not every dispute needs to be resolved; to require the commissioner to do so would be too onerous, particularly where commissioners have only 14 days within which to deliver an award. The question is always whether the commissioner can be said to have dealt with the substantial merits of the dispute. This can only be determined on a case by case basis with reference to the particular facts of the case and the award.

[51] In *Lukhanji Municipality v Nonxuba NO & others*[4] Cele AJ (as he then was) noted that 'the technique' in resolving disputes (i.e. the method referred to in *Stellenbosch Farmers' Winery Group Ltd & another v Martell Et Cie & others*[5]) was equally applicable to a commissioner resolving disputes of fact in arbitration proceedings under the LRA. Similarly, in *Northam Platinum Mines v Shai NO & others*[6] Lagrange J held that a commissioner considering disputes between the employer's and the employee's witnesses 'ought to have weighed the probabilities of the respective versions and, if

[4] (2007) 28 *ILJ* 886 (LC), at 896A – F
[5] 2003 (1) SA 11 (SCA)
[6] (2012) 33 *ILJ* 942 (LC), at 949B

necessary, made credibility findings to arrive at an outcome'.

[52] At the same time, it should be emphasised that it is for the commissioner to determine the dispute and in so doing to determine what weight to attach to the relevant considerations. Provided he or she exercises the powers given to him or her in good faith and in a rational and reasonable manner, there is little scope for a review court to interfere. Thus, in a recent judgment of the Supreme Court of Appeal, it was held that

> '[18] … It bears repeating that a review is not concerned with the correctness of a decision made by a functionary, but with whether he performed the function with which he was entrusted. When the law entrusts a functionary with a discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a court to second-guess his evaluation. The role of a court is no more than to ensure that the decision-maker has performed the function with which he was entrusted.
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> [22] … The law remains, as we see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide, and as [long as] he acts in good faith (and reasonably and rationally) a court of law cannot interfere.'[7]

[53] In *Pepcor Retirement Fund & Another v Financial Services Board & Another*[8] Cloete JA observed that

> '… where both the power to determine what facts are relevant to the making of a decision, and the power to determine whether or not they exist, has been entrusted to a particular functionary (be it a person or a body of persons), it would not be possible to review and set aside its decision merely because the reviewing Court considers that the functionary was mistaken either in its assessment of what

[7] *MEC for Environmental Affairs and Development Planning v. Clairison's CC* 2013 (6) SA 235 (SCA), at 240H – 241A
[8] 2003 (6) SA 38 (SCA)

> facts were relevant, or in concluding that the facts exist. If it were, there would be no point in preserving the time-honoured and socially necessary separate and distinct forms of relief which the remedies of appeal and review provide.'[9]

[54] Commenting upon material mistakes of fact as a ground of review, the same Judge noted, in *Dumani v. Nair*, that such ground of review 'must be confined to … a fact that is established in the sense that it is uncontentious and objectively verifiable'.[10]

[55] Those comments which were made in the context of a review under the Promotion of Administrative Justice Act,[11] apply equally to the review of awards under the LRA, where commissioners perform administrative functions of a quasi-judicial nature.[12]

[56] Thus, when reviewing an arbitration award under the LRA there can be little purpose served in extracting copious passages from the transcript of the arbitration hearing to highlight why the version advanced on behalf of one party was improbable and should have been rejected. Instead, the correct approach is this:

> 'For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)*(a)*(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'[13]

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[9] At 59D – E
[10] *Dumani v Nair and Another* 2013 (2) SA 274 (SCA), at 285D – E
[11] Act 3 of 2000
[12] *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* 2008 (2) SA 24 (CC), at 55A – B
[13] *Herholdt v. Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA), at 2806B – C

[57] Thus, where a commissioner has before him or her two mutually destructive versions and accepts one version in preference to the other, there is very little scope for interference in the award.

[58] That having been said, if a commissioner comes to a conclusion and the reasons provided by him or her for such conclusion objectively speaking do not constitute *any* support for the conclusion, the reviewing court *may* be entitled to intervene. Whether the Court *will* be entitled to intervene is dependent upon the nature and scope of the commissioner's erroneous reasoning in relation to the final conclusion. If, for instance, *none* of the reasons provided by the commissioner in fact support the ultimate conclusion, it appears obvious that he or she cannot be said to have determined the substantive merits of the dispute and the award will be set aside.

[59] In such circumstances, the basis upon which the award is set aside is the failure of the commissioner to perform the function entrusted to him or her by the empowering statute. He or she thus commits a gross irregularity as contemplated in s. 145(2)(a)(ii) of the LRA.

[60] It should be emphasised that where the commissioner's award stands to be set aside in the circumstances described above, it matters not that the ultimate conclusion which he or she came to may be one which a reasonable commissioner could have come to. In other words, there may be various facts which, having regard to the transcript, could support the conclusion arrived at by the commissioner, but if, on a proper interpretation of the award, it is clear that the commissioner did not rely upon *those* facts but others (which do not support his or her conclusion), the award stands to be reviewed and set aside. The basis on which it is set aside is the failure of the commissioner to discharge his or her obligation to determine the substantive merits of the case.

[61] Of course, where there are ample reasons to support the conclusion arrived at by the commissioner, the existence of those reasons may become relevant when determining what relief to grant. In that context, a court may well decide that although the award stands to be reviewed and set aside, there is ample evidence on the record for it (the Court) to substitute the decision of the commissioner with the same award as that granted by the commissioner, now based upon the valid grounds which appear from the record.

Consideration of the award in the present case

[62] Against the aforesaid background I turn now to consider the award *in casu*.

[63] I have serious difficulties with the arbitration award.

[64] The third respondent did not deal with the applicant's version *at all* except to the limited extent explained below. I do not doubt that there were various grounds upon which the third respondent may have been entitled to reject the applicant's version, but to do so he had to consider that version and deal with it. This was an unavoidable consequence of his duties as the commissioner appointed to determine the substantive merits of the dispute.

[65] The second respondent was satisfied that the first respondent had proved its case on a balance of probabilities. This conclusion was based in essence upon three preceding and interlinked findings:

65.1 Mr Van der Colff was a credible witness and there was no reason to doubt the correctness of his evidence.

65.2 The evidence of Mr de Lange corroborated that of Mr Van der Colff.

65.3 To reject the evidence of Messrs de Lange and Van der Colff, it would have to be shown that they were part of a conspiracy against the applicant.

[66] I will consider the second of these findings first. The notion that the evidence of Mr de Lange corroborated that of Mr Van Der Colff was, with respect, exaggerated. As set out above, Mr de Lange only arrived on the scene after the perpetrator had already departed; he was accordingly not in a position to corroborate Mr Van der Colff on the most crucial aspect of his evidence, his identification of the applicant. The only aspects on which Mr de Lange supported Mr Van der Colff, related to what Mr Van der Colff had conveyed to him.

[67] I turn now to the third of the findings made by the third respondent. The suggestion that the applicant's version could not be true because that would imply that Messrs Van der Colff and de Lange were part of a conspiracy against him suffers from two serious defects in reasoning. The first, relates to the notion that de Lange had in fact corroborated Van der Colff. As explained above, he had not. The second begs the very question it is designed to answer.[14]

[68] As noted by Dowling, J. in *R v Mtembu*[15]:

> 'The magistrate in his reasons for judgment obviously takes the view that if the evidence of the traffic inspector is accepted then the accused was guilty of driving to the danger of the public. In coming to the conclusion that that evidence is to be accepted he said that the inspector either saw the accused drive as he says or he has come to court to commit perjury. That is not the correct approach. The remarks of the late MILLIN, J., in *Schulles v Pretoria City Council*, a judgment delivered on the 8th June, 1950, but not reported, are very pertinent to this point; he says:

[14] R. J. Aldisert, *Logic For Lawyers: A Guide To Clear Legal Thinking*, 3rd ed., pp. 208 – 213; R. H. Thouless & C. R. Thouless, *Straight and Crooked Thinking*, 5th ed., pp. 82 – 84
[15] 1956 (4) SA 334 (T)

> "It is a wrong approach in a criminal case to say 'Why should a witness for the prosecution come here to commit perjury?' It might equally be asked: 'Why does the accused come here to commit perjury?' True, an accused is interested in not being convicted, but it may be that an inspector has an interest in securing a conviction. It is, therefore, quite a wrong approach to say 'I ask myself whether this man has come here to commit perjury, and I can see no reason why he should have done that; therefore his evidence must be true and the accused must be convicted.' The question is whether the accused's evidence raises a doubt."'

[69] The passage quoted is taken from a criminal trial where the standard of proof required for a conviction is different to that in a civil trial, but the force of the logic is in no way diminished.

[70] In arriving at the conclusion which he did, the third respondent in the first of his findings outlined above cannot be said to have discharged his obligation of deciding the substantive merits of the dispute by accepting that the applicant's version was false *because* that of the employer's witnesses were considered to be true. That begs the question of whether the version of the first respondent's witnesses was in fact true *and* whether the version of the applicant and his witnesses was in fact false. Even if the third respondent was satisfied that the evidence of the first respondent's witnesses was true, logically that does not exclude the possibility that he may be unable to say that the evidence of the applicant's witnesses was not true.

[71] Of course, where there are two mutually destructive versions, before the onus is discharged the commissioner must be satisfied that the version of the party upon whom the onus rests is true and the other false.[16] If the two versions are equally probable, the party bearing the onus cannot succeed.[17]

[72] To be fair, the third respondent did not confine himself to a finding

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[16] *National Employers Mutual General Insurance Association v Gany* 1931 AD 187 at 199
[17] *African Eagle Life Assurance Co Ltd v Cainer* 1980 (2) SA 234 (W) at 237F-H at 237F-H

that the evidence of the applicant was false *merely* because that of Mr Van der Colff was true. He in fact found that Mr Van der Colff came across as a credible witness and that he had no reason to question the veracity of his evidence. But that still begs the question. It was his duty in deciding the substantial merits of the case to assess the probabilities by weighing up the evidence for both sides having regard to the probabilities.[18] To say that a witness "came across" as a credible witness without providing any explanation for such finding or the reasons supporting it was meaningless:

> 'There can be little profit in comparing the demeanour only of one witness with that of another in seeking the truth.'[19]

[73] In any event, credibility is not a substitute for a determination of the probabilities.

[74] I do not consider that the detail involved in the aforesaid analysis or the requirement that the second respondent should have been alive to such considerations, offends against the requirement that the dispute be resolved with the minimum of legal formalities. The resolution of disputes of fact is not a legal formality; it is prerequisite for the assessment of the probabilities.

[75] In the circumstances, I am satisfied that the second respondent has committed a gross irregularity.

[76] It follows that, for the purpose of condonation, the applicant has good prospects of success; I would accordingly grant condonation.

[77] The appropriate relief to be granted is more difficult. Given the substantial delay in finalising this matter, my inclination would be to

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[18] *Stellenbosch Farmers' Winery*, *supra*
[19] *S v Kelly* 1980 (3) SA 301 (A), at 308B

determine the matter myself. Although such relief was not sought in the notice of motion, it was asked for at the hearing. From what I could gather all witnesses are still available to testify should the matter be referred back.

[78] The difficulty I have with determining the matter myself is that there are a number of unexplained issues; the outcome cannot be said to be a foregone conclusion.

[79] There were various grounds upon which the evidence of the applicant could have been rejected and, equally, there are various grounds upon which the evidence of Mr Van der Colff could have been rejected. One reason to consider the evidence of Mr Van der Colff with circumspection was that his actions were not consistent with his alleged suspicions. After returning to his security office and reflecting upon the matter Mr Van der Colff testified that he came to the conclusion that the perpetrator was lying to him. He thereupon returned to confront the perpetrator who, far from dispelling Mr Van der Colff's initial suspicions, provided him with a different name thus heightening those suspicions. In such circumstances, one would have expected Mr Van der Colff to either take the perpetrator into custody or ask the perpetrator to accompany him (Mr Van der Colff) to the security office. Instead of doing that, Mr Van der Colff departed.

[80] Mr Van der Colff's explanation as to why he did not take the aforesaid measures is, with respect, quite unconvincing. He was after all the security officer. It must surely have been his obligation to investigate and detect breaches of the municipality's security and, upon detection, to take measures to bring the perpetrator to book.

[81] Then there is the evidence of Bower. The second respondent was

correct in finding that Van der Colff had not been confronted with the allegations made against him by Bower. But if Bower's allegations were true, the cogency of Van der Colff's evidence would be substantially diminished.

[82] In light of these factors it would in my opinion be in the interests of justice if the matter is considered afresh before a different commissioner.

[83] In all the circumstances, I make an order in the following terms:

83.1 The late filing of the review application is hereby condoned.

83.2 The award of the third respondent is hereby reviewed and set aside.

83.3 The matter is remitted to the second respondent for determination by a Commissioner other than the third respondent.

83.4 There is no order as to costs.

[84] I would be failing in my duties if I did not make special mention of the efforts of Mr Abrahams, an attorney with one of the larger law firms in Cape Town, who was in court for a different matter when the present case was called. Mr Abrahams, in the finest traditions of the profession and at substantial inconvenience to himself (the matter was argued into the early evening), graciously assisted the applicant, who had lost the services of his attorney and was unrepresented at the hearing. His efforts, which despite the short period of preparation time, were insightful and useful and were highly appreciated.

G. I. HULLEY

Acting Judge

APPEARANCES:

FOR APPLICANT:	Mr Abrahams of Bowman Gilfillan Inc on request by the Court.
FOR RESPONDENT:	Ms D Barnard (Attorney) of Desiré Barnard Attorneys.