Not Reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case No: C836/2019

In the matter between:

MOGAMAT ISMAIL Applicant

and

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL First Respondent

MELWYN NASH *N.O.* Second Respondent

CITY OF CAPE TOWN MUNICIPALITY Third Respondent

Date of Hearing: 30 June 2021

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 13 December 2021

Summary: Review application, alleged failure by commissioner to appreciate and apply law, helping hand principle and commissioner required to guide parties, alleged misconduct by commissioner allowing party to informally refer to other investigations, alleged bias, commissioner allegedly did not properly consider evidence, review application late, insufficient explanation for long delay, poor prospects of success, commissioner appreciated nature of enquiry and commissioner's findings supported by evidence properly before arbitration proceedings, no factual basis for alleged bias

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JUDGMENT

VAN VOORE AJ

Introduction

1. Mr Mogamat Ismail, the applicant, was employed by the City of Cape Town Municipality (the City) as a Facility Officer. He worked in this capacity at the Silverstream Resort (the resort). The resort is one of a number of resorts owned and managed by the City. The applicant commenced employment as the Facility Officer on 1 October 2010. On 1 June 2017 the applicant was promoted to Principal Facility Officer.
2. The applicant was dismissed on 11 July 2018. Following his dismissal, the applicant referred an alleged unfair dismissal dispute to the South African Local Government Bargaining Council (the bargaining council). Following lengthy arbitration proceedings over some nine (9) days, Mr Melwyn Nash (the commissioner) issued an arbitration award under case number WCM091808. The award was issued on 14 August 2019. In the arbitration award the commissioner determined that the applicant's dismissal was substantively fair.
3. The applicant launched an application to, *inter alia*, review and set aside the award. The relief sought by the applicant includes that this court determines

that the commissioner should have found that his dismissal was procedurally and substantively unfair.

4. The review application was served by telefax on 20 December 2019 and filed with the Labour Court on 7 January 2020. In terms of section 145 of the Labour Relations Act, 1995 (the LRA) the applicant had 6 weeks from 14 August 2019 to launch an application to review and set aside the award. The applicant's review application is some eighty-six (86) days out of time. The delay is indeed excessive. Compliance with the six (6) week time period required that the applicant launches the review application by no later than 25 September 2019. The applicant has applied for condonation for the delay.

5. The applicant delivered a supplementary affidavit on 8 September 2020. The City delivered an answering affidavit on 8 June 2021. An answering affidavit was due on 22 September 2020. The answering affidavit was filed more than 8 months late. At no stage prior to delivering the answering affidavit did the City request or seek the Applicant's agreement in relation to the late filing of the answering affidavit.

6. The City has not applied for condonation for the late filing of the answering affidavit. In the answering affidavit the issue of the delay is addressed in a few short paragraphs. The substance of the explanation for the delay appears to be that substantial parts of the transcript of the arbitration proceedings is in Afrikaans, that the City's attorneys are English speaking and that they appointed a services provider to translate those portions of the transcript. Other than those averments, there is no further explanation for the delay. No detail is provided fleshing out those averments. It is unclear when the City's attorneys engaged the services provider to translate the portions of the record that it sought to be translated. This explanation is insufficient. In any event, there is no condonation application before this court. In the circumstances, this application must be determined on the basis that it is not opposed. Notwithstanding this, the applicant bears the onus in relation to the condonation application and of establishing that the arbitration award and its attendant proceedings are susceptible to review.

7. The applicant has applied for condonation for the delay in launching the review application. The relevant legal principles in assessing an application for condonation are well established. These principles were dealt with in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532 B-E. Relevant to an application for condonation is the degree of lateness, the reasons for the lateness, the prospects of success in the main matter and prejudice to the parties. These factors are not exhaustive and are interrelated. The factors are not individually decisive except that if there are no prospects of success, then condonation should not be granted. A slight delay and a good explanation may help to compensate for prospects which are not strong. The importance of the issues in dispute together with strong prospects of success may tend to compensate for a long delay.

8. In *Grootboom v National Prosecuting Authority* (2014) 35 ILJ 121 (CC) the Constitutional Court in dealing with a condonation application held that in deciding such an application one has to look at the "interests of justice". The court acknowledged that the "interests of justice" has no definitive definition. The court did however set out non-exhaustive factors relevant to an enquiry for determining whether it would be in the interests of justice to grant condonation. Those factors include the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success. The ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors.

9. In *Matlama v Transnet Bargaining Council and Others* (JR 1386 / 17) [2019] ZALCJHB 182 (31 July 2019) the court held that when a delay is '*significant'*, there is a greater burden on the applicant to set out all the facts and circumstances relating to the delay, and most importantly, to provide a satisfactory explanation for each period of the delay. Any period of delay unaccounted for would ordinarily have the result that condonation is refused.

10. Of further relevance is the fact that this matter concerns an individual employee applying for condonation for non-compliance with a statutorily prescribed time

limit. In *Queenstown Fuel Distributors CC v Labuschagne N.O. and Others* (2000) 21 ILJ 166 (LAC), the court held that

> *"[24] … in principle, therefore, it is possible to condone non-compliance with the time limit. It follows however from what I have said above, that condonation in the case of disputes over individual dismissals will not readily be granted. The excuse for non-compliance would have to be compelling, the case for attacking a defect in the proceedings would have to be cogent and the defect would have to be of a kind which would result in a miscarriage of justice if it were allowed to stand.*
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> *[25] by adopting a policy of strict scrutiny of condonation applications in individual dismissal cases I think that the Labour Court would give effect to the intention of the legislation to swiftly resolve individual dismissal disputes by means of a restricted procedure, and to the desirable goal of making a successful contender, after the lapse of 6 weeks, feel secure in his award."*

Reason for lateness

11. The applicant approached his trade union, the Independent Municipal and Allied Trade Union (IMATU). On 10 September 2019 IMATU informed the applicant that it was closing his file and further informed him that should he wish to challenge the arbitration award by way of a review application, he would have to do so without IMATU's assistance. IMATU also informed the applicant of the 6 week time period.

12. The applicant then approached the South African Society for Labour Law (SASLAW). The applicant approached SASLAW on 13 September 2019 to ask for assistance to pursue a review application. The applicant was apparently informed to return to SASLAW's offices the following week as it was apparently dealing with a large number of '*advice seekers'*. It is the Applicant's case that he returned to SASLAW on further occasions including on 20 September 2018 when he was informed that the SASLAW offices would be closed for 2 weeks.

The applicant then returned to SASLAW's offices on 14 October 2018 and was apparently informed that the volume of cases it was dealing with was of such a magnitude that it could not assist him. The applicant returned to SASLAW's offices and on 11 and 18 October 2018 was informed that "*there was no attorney to assist [him] as all the attorneys present [represent the City]*."

13. The applicant was subsequently contacted by SASLAW, apparently sometime before 24 October 2019, and informed that it had found an attorney willing to assist him and that the attorney would contact him on 25 October 2019. The applicant claims that he was never contacted by the attorney. The applicant then apparently returned to SASLAW's office on 1 November 2018 when he met with an attorney who informed him that she was willing to represent him. However, the applicant states that on 8 November 2018 he was contacted by the attorney and informed that she was relocating to Johannesburg and could no longer assist him. After borrowing money, the applicant instructed his current attorneys of record.

14. The applicant visited the SASLAW office on a number of occasions. By 10 September 2018 the applicant knew that he was under some time pressure. The applicant states that IMATU advised him that he had limited time (6 weeks) to launch a review application. Given this knowledge it was incumbent on the applicant to take effective steps to timeously launch a review application. However, the steps taken by the applicant were not effective and display a lack of urgency and proper endeavour to meet the 6 week time period. The steps allegedly taken by the applicant after 25 September 2018, being the last day of the 6 week period, are similarly ineffective and lacking in endeavour. The steps taken by the applicant from 10 September 2018 to 8 November 2018 amount to one thing, visiting the SASLAW office on a number of occasions and waiting for assistance. It is not the applicant's case that during the visits to the SASLAW office he impressed upon the persons with whom he met that he was under pressure of time to launch a review application. After 8 November 2018 it took the applicant some 5 more weeks to launch the application.

15. The applicant's explanation does not demonstrate that the Applicant was genuinely concerned with complying with the 6 week time period. On balance

the applicant's explanation for the long delay is not compelling in its nature. Rather, the explanation evidences a lack of energy and endeavor on the part of the applicant. The applicant took insufficient steps to timeously launch a review application. The apparent lack of funds is not a sufficient explanation for a long delay. The applicant's explanation for the long delay is unsatisfactory.

Prospects of success

16. It is important to consider the applicant's prospects of success the review application. Should it be the case that the applicant enjoys good prospects of success then this may compensate for an unsatisfactory explanation for the long delay.

17. The Applicant's review grounds may be summarised as follows:

    17.1 The commissioner failed to appreciate the law applicable to the dispute. The '*helping hand'* principal applied in this matter and the commissioner was obliged to guide the parties to ensure that all the evidence was before him and the commissioner's failure to do so resulted in the merits not being fully dealt with.

    17.2 The commissioner relied on hearsay evidence to arrive at his factual findings.

    17.3 The commissioner made a number of credibility findings based on the version of a person who was not called as a witness. The credibility findings were contradictory in themselves, and the commissioner failed to provide reasons for those findings.

    17.4 The commissioner failed to deal with many contradictions which arose from cross-examination of the City's witnesses, and this resulted in a lack of a rational and causal connection between the evidence and the findings.

    17.5 The commissioner committed a gross irregularity in the conduct of the arbitration proceedings in that he:

17.5.1 Failed to apply his mind to all the evidence before him in a reasonable manner;

17.5.2 the commissioner committed misconduct in relation to his duties as an arbitrator in that he was obviously biased in favour of the legal representative for the City;

17.5.3 the commissioner spent time with a representative for the City alone whilst the arbitration proceedings were being conducted and this raised a suspicion of bias;

17.5.4 the commissioner allowed the representative for the City to informally refer to other investigations which were planned against the Applicant and that if the Applicant was not dismissed now he would be dismissed on one of these other investigations; and

17.5.5 the commissioner issued an award which is not justifiable in relation to the reasons given by him for the award and not one that a reasonable decision maker would have arrived at.

Relevant legal principles

18. The relevant legal principles are well known. Those principles were restated in *Herholdt v Nedbank Ltd and Congress of South Africa Trade Union* 2013(6) SA 224 (SCA) [2013 (11) BLLR 1074 (SCA)]. In that matter the court held:

> *"In summary, the position regarding the review of CCMA awards is this: a review of a CCMA award is permissible if the defect in the proceedings falls in one of the grounds in S145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to gross irregularity as contemplated by s145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry 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 particulars facts, are not in and of themselves sufficient for an aware to be set aside, but are only of any consequence if the effect is to render the outcome unreasonable. (paragraph 25)."

19. In the matter of *Nyathikazi v Public Health and Social Development Bargaining Council and others (2021) 42 ILJ 1686* and at paragraph 21 the court held:

> *"[21] After the decision on Sidumo and another vs Rustenburg Platinum Mines Ltd and another 2008 (2) SA 24 CC and the further explication in Heroldt vs Nedbank Limited 2013 (6) SA 224 (SCA), it is clear that our law dictates that an award delivered by and Arbitrator will only be considered to be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before him or her. A material error of fact and the particular weight to be attached to a particular fact may in and of itself not be sufficient to set aside the award but will only be done if the consequence thereof is to render the ultimate outcome unreasonable".*

20. In the matter of *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mining) v CCMA and Others* [2014] 1 BLLR 20 (LAC) and at paragraph 21 the court held:

> *"Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see Minister of Health and Another vs New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piece meal analysis. As soon as it is done*

in a piece meal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad-based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts may potentially result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable – there is no room for conjecture and guess work."

21. In *Stellenbosch Farmers Winery v Martell* 2003 (1) SA 11 (SCA) and at paragraph 5 the court held:

"On the central issue as to what the parties actually decided there are 2 irreconcilable versions so too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by the courts in resolving factual disputes of this nature may conveniently be summarized as follows: To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's findings on credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend upon a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candor and demeanor in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra-curial statements or actions, (v) the probability or improbability of particular aspects

of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c) this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus with proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

22. Under s138 of the LRA commissioners of a bargaining council are enjoined to conduct arbitration proceedings in a manner they deem appropriate so as to determine the dispute fairly and quickly. Commissioners are to deal with the substantial merits of the dispute with the minimum of legal formalities. In *CUSA v Tao Yang Metal Industries and Others* [2009] 1 BLLR 1 (CC) the court held:

> *"64. Consistent with the objectives of the LRA, commissioners are required to "deal with the substantial merits of the dispute with the minimum of legal formalities. This requires commissioners to deal with the substance of a dispute between the parties. They must cut through all the claims and counterclaims 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. Thus the LRA permits commissioners to "conduct the arbitration in a manner that the commissioner considers appropriate. But in doing so, commissioners must be guided by at least 3 considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do".*

23. It is in light of these principles that the commissioner's award and the arbitration proceedings ought to be assessed.

24. The City convened a disciplinary hearing into allegations of serious misconduct against the applicant. The notice of the disciplinary hearing is dated 9 February 2018. The allegations of misconduct, referred to by the City as '*charges'* are as follows:

> *"Charge 1:*
>
> *Fraud and / or corruption in that you issued a document to Mr Blanchard to specify the cleaning services to be provided by you and / or employees of the City and / or private contractors, during 10 – 12 February 2017 at the Silwerstroom Resort to the value of R17 000 and / or you received cash to an approximate value of R17 000 on or about 12 February 2017.*
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> *Alternative to charge 1:*
>
> *Gross dishonesty in that you received about R17 000 from Mr Blanchard on or about 12 February 2017, for services rendered with Municipal staff at the Silwerstroom resort, during the Clubbers Campout event, during the period 10 – 12 February 2017.*
>
> *Charge 2:*

Gross dishonesty in that you allowed the Clubbers Campout event to take place at Silwerstrand resort during 8 – 12 February 2017, without the required booking and / or permit/s and / or proof of payment to the City of Cape Town for which you personally received R17 000 from Mr Blanchard.

Alternative to charge 2:

Gross negligence in the execution of your duties in that you allowed an event to take place at the Silwerstroom Resort during 8 – 12 February 2017, without the required booking and / or permits and / or proof of payment to the City, and / or allowed Municipal staff to work overtime, to perform private cleaning duties at the event for which you received R17 000, and / or failed to report such incident to your Line manager/s timeously.

Charge 3:

Fruitless and / or wasteful expenditure in that you have allowed a booking for the Clubbers Campout event at the Silwerstroom resort, without payment as from about 8 – 12 February 2017 which has caused a loss of income to the City. The amount being + - R43 908."

25. Following the disciplinary hearing the applicant was found guilty of serious misconduct. The decision of the internal disciplinary hearing is dated 11 July 2018. The applicant was summarily dismissed on 11 July 2018. Subsequent to the summary dismissal the applicant pursued an internal appeal. That was unsuccessful and the applicant then referred an alleged unfair dismissal dispute to the bargaining council.

26. In the award the commissioner records the following:

"6. Ismail was dismissed for:

6.1. Gross dishonesty in that he allegedly received about R17 000.00 from a Mr Blanchard on or about 12

February 2017, for services rendered with Municipal staff at the Silverstream resort, during the Clubbers camp out event during the period of 10 to 12 February 2017.

6.2. Gross negligence in the execution of his duties in that he allowed an event to take place at the Silverstream resort during 8 to 12 February 2017, without the required booking and / or permits and / or proof of payment to the City, and / or allowed Municipal staff to work overtime, to perform private cleaning duties at the event for which he received R17 000.00, and / or failed to report such incident to his Line manager timeously.

7. The employer argues that Ismail benefitted financially from cleaning services rendered at the Clubbers Campout event and that he failed to act responsibly by allowing Blanchard to enter the resort without a valid permit or proof of payment.

8. The employee denies that he benefitted as alleged and that he was not involved in the cleaning services and that he merely assisted one Betru Stevens to start a business venture. The money she received for rendering this service is accounted for and shows there was no benefit for him. As regards the negligence charge, he argues that it was not his responsibility to do access control and the responsible parties are trying to deflect blame to him."

27. At the heart of the alleged unfair dismissal dispute was whether the City's procedures were complied with in relation to the Clubbers Campout event which took place during the period 10 – 12 February 2017 and the use of its staff and resources for a private function. At the arbitration proceedings the City informed

the parties that it was no longer pursuing 'charge' 3 which relates to alleged fruitless and wasteful expenditure.

28. On review the applicant contends that the City's procedures were in fact complied with. The applicant's allegations include the following:

> *"4. Whilst still employed as the Facility Officer at Silwerstroom I received an enquiry from Clinton Blanchard for a weekend booking of the entire facility. I referred him to the booking office, as I was supposed to do and he secured a booking in the correct manner.*
>
> *5. There were delays in the booking office providing Blanchard with an invoice. He asked me to assist him, and I was in contact with the booking office until they confirmed shortly before the event that everything had been resolved.*
>
> *6. Blanchard also asked me to assist him in obtaining a cleaning service for the facility for the event, as there is a duty on an occupant to ensure that the facility is cleaned. He also wanted me to manage the cleaning service, but I declined and told him that I would rather just him in touch with someone. Two weeks prior to the event, I introduced him to a local contractor, one Betru Stevens (Beatie), who agreed to provide a cleaning service for the weekend. As she does not have access to email, I assisted the parties to make arrangements.*
>
> *7. During the event Beatie provided the cleaning service and at the conclusion of the event, Blanchard paid her for the service in cash. She paid all her cleaning staff, with the exception of 1 or 2 who were not present, and she asked me to hand the cash to them, as I was going to see them the following day."* (applicant's founding affidavit, pages 6-7)

29. Several witnesses gave evidence during the arbitration proceedings. The witnesses numbered 16 in total. The evidence that served before the commissioner does not support the applicant's contentions as to compliance with the City's booking procedures nor his role during the Clubbers event of 10 to 12 February 2017.

The allegation of gross negligence

30. In relation to the booking procedures the evidence included that of Anne Kotzee (Kotzee). Kotzee is employed at the City's Table View office. In the arbitration award the commissioner summarises part of Kozee's evidence as follows:

> *"25. As for booking procedures for Silverstream resort, a client will enquire about availability, relevant documents will be requested inclusive of identity document, proof of address and bank details. As a booking clerk, it is important to check if the client is in arrears. If the client is clear, then an invoice is generated for payment. If it is not a walk-in client, then the invoice is emailed to them. In the past, an invoice would be generated, and a spool number is created. The spool number is used in the system and the email is automatically sent to the client's email and the system generates confirmation that it was sent, alternatively the booking clerk would save it to her desktop, and it is then sent to the client. The only difference currently is that the invoice is saved and sent to the client hence there is no more automatic sending of the invoice via the system.*
>
> *26. She became aware of the event in July 2017. Her department Head asked assistance given that the booking clerk (Pretorius) was going on maternity leave end of June. She started assisting in July 2017 when a C3 complaint was sent to her to attend to. The complaint was from Blanchard stating that he had a*

successful event in February 2017 and wanted to book for 2018. Upon hearing that he had a previous event, he was asked for his business partner number as this would take her to all the relevant details about this client and would assist her in making the booking for 2018. She searched on his name and came to the contract number linked to Blanchard. There was an outstanding amount of over R40 000. He was told a reservation cannot be done unless he settled the arrears. Blanchard was very arrogant in his communication and when she picked up the arrears, she contacted Ismail and told him of Blanchard's arrogance but that he failed to pay for the previous event. Ismail asked her not to copy in everyone when she corresponds with Blanchard as they would know that he allowed Blanchard there without any proof of payment. Blanchard sent her an email of 24 July 2017 attaching an invoice he purportedly received for the event in February 2017 and which he confirmed he paid in cash on 12 February 2017. The attachment to the email was however not a City invoice. She replied to the email stating that his concerns would be addressed with management and that she provisionally booked the dates he requested for March 2018. She requested that he send her signed proof of receipt of R12 000 as she would need to investigate and will provide feedback. Her understanding from Blanchard was that he wanted the R12 000 paid to be deducted from what they said was still outstanding for the 2017 event.

27. She added that the invoices were attached to an email Lizahn sent to him on 3 February 2017 and she confirmed the email address it was sent to. All invoices must be paid beforehand to occupy facilities on the site.

According to the invoices supplied to Blanchard for the 2017 event the amounts had to be paid no later than 8 February 2017. The outstanding amounts were eventually paid in December 2017 and January 2018.

28. She added that there were invoices where the system generated date was 3 February 2017 for the 2017 Clubbers event, and this would be the date that the invoice was either generated or sent to the client. The system generated date cannot be manipulated by anyone on the system.

29. She stated that around 2015 she was the booking clerk at the resort and at that stage the official responsible for access control at the resort was Ismail and he was very persistent that he receives the arrival list as he wanted to see who would be visiting the resort. She would normally email it to him as there was nobody else with email access at the resort. There were no access controllers at that stage. The booking list gave an indication where a proof of payment was still required."

31. It is clear from the evidence of Kotzee that a client wishing to host an event at the resort needed to, *inter alia,* make a booking, the City would then generate an invoice in respect of that booking, the client is then required to make payment by stipulated date prior to the event to be hosted and once the payment is received the City would acknowledge receipt. This did not happen in relation to the event during the period 10 – 12 February 2017.

32. The evidence of Kotzee is supplemented and supported by other evidence which served before the commissioner. Such evidence included the evidence of Lizahn Pretorius (Pretorius). Pretorius is a senior clerk employed by the City in its Parks and Recreational department. In the arbitration award the commissioner summarises parts of the evidence of Pretorius as follows:

"32.… She is based in Atlantis and is familiar with the Silverstream Resort as she is responsible for its booking process. She knew Ismail as an official at the resort and his immediate manager was Brian Vaughn, the Principal facilities officer.

33. She described the resort booking process as follows: A request is received as to the availability of the resort, she checks if a date is available and if so, a provisional booking is made. Specific documentation is required including identity document, bank statements and proof of address. When these documents are received, an invoice is generated and sent to the client. Payment is then expected at a specific date. If proof of payment is received, the client receives a permit. If no payment is made by the due date then the resort people, which includes the access controllers and Ismail, must check for proof of payment as the payment process allows for third party payments and she would not always be aware if late payments are made. Under normal circumstances when a payment is not made on a due date the booking can be cancelled.

34. She referred to an invoice generated for Blanchard for the Clubbers event. The invoice was generated on 3 February 2017. Once an invoice is generated a spool number is created and this spool number is registered to the client's business partner number which contains Blanchard's Gmail account details and the system automatically sent the invoice to this email address. The payment due date for the invoice was 8 February 2017 and if not paid the event cannot take place and the client cannot enter the facility. Blanchard never paid on the due dates for all the invoices generated for the event. She did a follow up to Blanchard stating that she

still awaited proof of payment, but she cannot recall whether he responded.

35. On 5 February 2017 Blanchard sent an email, copying Ismail, stating that he was waiting for the invoice for the venue to process payment. Ismail emailed her asking to make the issue a priority. She replied the next day stating that the invoice had already been done and they were awaiting proof of payment. She sent all the invoices to Blanchard again on 8 February 2017 requesting payment. Blanchard could have made a third-party payment at various City payment partners.

36. Her expectation is that if she had not received proof of payment, Ismail would send it to her via email. She could not remember whether she followed up with Ismail whether they received payment on the day of the event. She was unable to send the same emails to the access controllers because they do not have access to a computer at the resort. The access controllers would get the information from Ismail. She never received communication from Ismail confirming whether payment had been made. She only became aware that Blanchard did not pay on 8 June 2017 when he attempted to make a booking for his next event. She could not recall whether Blanchard responded. She went on maternity leave on 26 June 2017 and returned end October 2017."

33. The commissioner's summary of the evidence of Kozee and Pretotius is consistent with the transcript of their evidence. The evidence of Kotzee and Pretorius establishes that the City had not received payment from Clinton Blanchard (Blanchard) by 8 February 2017 or at any time prior to the event during the period 10 – 12 February 2017. The bundles of documents that served

before the commissioner during the arbitration proceedings include an electronic mail exchange between the applicant and Pretorius in relation to the invoices sent to Blanchard. In an electronic mail dated 7 February 2017 Pretorius informs the applicant that that *"invoicing is done awaiting on proof of payments"*. (bundle B, page 367). This evidence was not in any dispute and certainly not in any serious dispute.

34. The commissioner had no reason to conclude that the evidence of Kotzee and Pretorius was not credible and reliable. The evidence of Kotzee and Pretorius was not the subject of any serious challenge during the arbitration proceedings. This evidence does not support the applicant's contention that Blanchard "*secured a booking in the correct manner*" (paragraph 4 of the founding affidavit). The applicant also contends that Blanchard asked him to assist as there were delays in the booking office, that the applicant was in contact with the booking office and that shortly before the event the booking office confirmed that everything had been resolved (paragraph 5 of the founding affidavit). The applicant's contention that the booking office informed him that everything had been resolved is not supported by the evidence properly before the commissioner. In fact the evidence before the commissioner establishes the opposite: Blanchard had not made payment as required.

35. The evidence before the commissioner as to what happened shortly before the event of 10 – 12 February 2017 included that of Candice Swartz (Swartz). In the arbitration award the commissioner summarises parts of Swartz's evidence as follows:

> *"49. …she is an Access controller at Silverstream resort working as a permanent employee for the City in the Recreation and Parks department. She had been employed since 2015. She knows Ismail as her manager at the resort and described their working relationship as a good manager / employee relationship.*
>
> *50. She has knowledge of the Clubbers event. She knows that Blanchard is the organiser and it was in*

February 2017. She could not recall the date but, prior to the event Blanchard arrived at the resort and confirmed he was the organiser and that he was there to collect the chalet keys. She asked him for his permit but then Ismail came and said he would check with Lizahn. Ismail returned saying that everything was in order and told them to give Blanchard the key. She could not recall whether Blanchard responded to her request for the permit. She assumed Ismail's reference to it being sorted was to confirm that payment was made.

51. If clients arrive without a permit, they would normally go to Ismail who would check with Pretorius as to whether payment was made. She was unaware that Blanchard did not pay. Normally they would give chalet users the rules around its use and then do a check in at the chalet to ensure what is required in there. They did not do this for Blanchard because there was no paperwork."

36. The applicant himself gave evidence during the arbitration proceedings. In the arbitration award the commissioner summarises part of the applicant's evidence as follows:

"108. In cross-examination, he confirmed that he was the most senior person at the resort and that he assumed the responsibilities of PFO and SFO. He denies that his managers motivated for regrading of his post and he had to beg them to assist. He cannot recall on which basis it was denied. He is aware that advanced payment is required before entering the resort and that decisions regarding resort conditions rests with resort management. He confirmed that the current access controllers reported to him at least since

2014. He confirmed that he was on duty on 8 February 2017 and that he clocked in at 6h33. He knows Blanchard was not in the office because he (Ismail) would have been in his office at that time. He never told Candice that everything was sorted. He was confronted with the transcript of the disciplinary enquiry where he is alleged to have said that he told Swartz everything was sorted but he could not recall whether he said this at the hearing. In response that there were issues with the generation of an invoice and payment and whether that did not place a responsibility on him to deal with the problem, he said that he assumed the issue was resolved because the last communication from Pretorius was that invoicing was done and she awaited proof of payment. He concedes there was an overall responsibility, but he assumed they did their work. He confirmed that they had, in the past, alerted him when there were issues around entry to the resort. He responded to a contention where an event was stopped, by saying that he recalls it perhaps related to a film shoot. The job description relied on by the employer for an FO is vague and relates more to the FO's stationed at halls. He agrees he never received an email stating payment was made. He concedes that his job description does not contain anything regarding waste management plans. He agrees that Blanchard in his interview with Richards did not mention Stevens. Blanchard did not want to acknowledge Stevens as the person in charge. When confronted with statements Blanchard would have made when questioned as to the incident he stated that some statements Blanchard made was opportunistic and aimed at getting a discount for his next booking…"

37. In analysing the evidence the commissioner states the following:

> *"157. The employer's witnesses (Ahrends and Swartz) testified that Blanchard arrived at the venue, they asked for his permit, Ismail intervened saying he would check with Pretorius, came back and said everything was sorted. Fourie testified that Ismail has overall responsibility for the management of the resort, and this would include overseeing access control functions.*
>
> *158. The employee's witnesses (Ismail and Arendse) testified that access controllers take overall responsibility as to who enters the resort and their immediate manager at the time was the Area manager and not him as the FO.*
>
> *159. The account presented by Fourie that Ismail assumes overall responsibility for the resort is rational. It is inconceivable, as suggested by Ismail, that Ahrends and Swartz would have unfettered discretion as to who enters the resort or not and how they do it. Ismail attempts to shield himself with the job description of a Facilities officer in that it does not include access control functions. He however made concessions that he was the most senior person at the resort and that he gradually assumed the responsibilities of SFO and PFO. He conceded that the access controllers in practice reported to him. No basis was created as to why Ahrends and Swartz would not have requested a permit from Blanchard when he checked in. Given the email communication from Pretorius that at least as at 6 February 2017 there was evidence that payment was still outstanding, it should have been a red flag to Ismail to verify whether Blanchard had in fact paid. More so because he had concluded long before that Blanchard*

> *is a sly character. Evidence of this was presented on Ismail's account that Blanchard was not dealing in good faith with De Vries around the removal and replacement of the posts and rails. The most probable version is that Blanchard arrived at the resort, was asked for his permits and could not produce it and the matter was referred to Ismail for a final decision, which decision was that Blanchard could enter the resort.*
>
> *160. Thus, I conclude that the employer discharged the onus of proving on a balance of probabilities that [Ismail] was negligent."*

38. The approach adopted by the commissioner in relation to the evidence before him was correct. The commissioner did not have any reason or proper basis to find that the evidence given by the employer witnesses in relation to the booking process and specifically the fact that the applicant ultimately gave Blanchard access to the premises without the booking process having been complied with, and specifically without payment having been made. The evidence that served before the commissioner established that the application of the City's ordinary processes should have yielded the outcome that the booking could not be confirmed given the absence of payment and that the event planned for 10 – 12 February 2017 could not proceed. There is simply no factual basis for the applicant's allegations that the commissioner failed to apply his mind to all of the evidence before him in a reasonable manner.

39. The applicant makes a very serious allegation that the arbitrator "*was obviously biased and / or intimidated by the legal representative for the third respondent [the City]*" (founding affidavit, para 15.5). The applicant goes further and alleges that the commissioner spent some time with the City's representatives alone whilst the arbitration was being conducted (founding affidavit, para 15.6) Yet further the applicant alleges that the commissioner allowed the City's representatives to refer informally to other investigations planned against him and "*that if [the applicant] was not dismissed now, [he] would be dismissed on one of these other investigations*" (founding affidavit, para 15.7). The applicant

contends that he believes that this '*influenced*' the commissioner and that the commissioner acted improperly.

40. The allegation of bias is in the ordinary course a very serious one. This allegation was not made during the course of the arbitration proceedings. Ordinarily if such an allegation is made during the course of arbitration proceedings, then it may be the basis of an application for the recusal of the arbitrator. This is not an aspect of this matter. All that is said by the applicant is that the commissioner *"spent time with the representatives for the Third Respondent alone whilst the arbitration was being conducted"*. (founding affidavit, paragraph 15.6). In the supplementary affidavit and in relation to alleged bias, the applicant states the following:

> *"42.5. The Second Respondent spent time with the representative for the Third Respondent alone whilst the arbitration was being conducted. This raises suspicion, and in light of the findings of the second Respondent which seem arbitrary, I can only deduce he was improperly influenced by the third Respondent's representative. He specifically placed on record that he had a private conversation with the Third Respondent's representative regarding Blanchard, the crucial witness who was never called".*

41. It is correct that the arbitrator informed the parties that he *'indicated'* to the City's representative that Blanchard had sent him, the commissioner, an electronic mail. There can be no suggestion that the commissioner was hiding the fact that Blanchard had sent him an electronic mail. In that electronic mail Blanchard informed the commissioner that he was prepared to come to the arbitration proceedings to testify for the applicant. There can be no serious suggestion that there was anything untoward about this and the commissioner informed the parties of the electronic mail that he received from Blanchard. At that stage in the arbitration proceedings the applicant does not take the view that there was anything improper in the commissioner having informed the City's representative that he had received an electronic mail from Blanchard. In any

event, the commissioner also shared this information with the applicant and his representative. If that is the basis upon which the allegation of bias is made then there is simply no merit in this claim.

42. If the allegation of bias is not related to the commissioner having informed the City's representative that he received an electronic mail from Blanchard, which information he also shared with the applicant and his representative, then the claim as to bias is little more than generalised. An allegation as to bias requires more. It requires factual support and proper context. Mere suspicion cannot properly support an allegation of bias. The applicant sets out no factual basis for the allegation of bias. The test for bias is stated in *BTR Industries SA (Pty) Ltd & Others v Metal and Allied Workers Union and Another* (1992) 13 ILJ 803 (a) 817 F – I and 822 A - B. In that matter the court reasoned as follows:

> *"For present purposes there may be adopted the definition of 'bias' stated in the House of Lords by Lord Thankerton in Franklin vs Minister of Town & Country Planning 1948 AC 87 (HL) 103. It was there said that the proper significance of the word – is to denote a departure from the standard of evenhanded justice which the law requires from those who occupy judicial office or those who are commonly regarded as holding a quasi-judicial office.*
>
> *…*
>
> *Provided the suspicion of partiality is one which might reasonably be entertained by lay litigant a reviewing court cannot, so I consider, be called upon to measure in a nice balance the precise extent of the apparent risk. If a suspicion is reasonably apprehended, then that is the end of the matter."*

43. In the matter of *SA Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* (2001) 22 ILJ 1311 (SCA) para 10 and para 14 – 16 the court stated the following:

> *"The Court in Sarfu further alluded to the apparently double requirement of reasonableness that the application of the test imports. Not only must the person apprehend in bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable. This 2-fold aspect finds reflection also in S vs Roberts, decided shortly Sarfu, where the Supreme Court of Appeal required both that the apprehension be that of a reasonable person in the position of the litigant and that it be based on reasonable grounds.*
>
> *It is no doubt possible to compact the "double" aspect of reasonableness in as much as the reasonable person should not be supposed to entertain unreasonable or ill-informed apprehensions. But the two-fold emphasis does serve to underscore the weight of the burden resting upon a person alleging to be showed bias or its appearance.*
>
> *The "double" unreasonableness requirement also highlights the fact that mere apprehensiveness on the part of a litigant that a Judge will be biased – even a strongly and honestly felt anxiety – is not enough. The court must carefully scrutinize the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigant's apprehension a legal value and thereby decides whether it is such that it should be countenanced in law."*

44. Bargaining council proceedings are by their nature informal proceedings. A bargaining council commissioner is enjoined to determine the dispute with a minimum of legal formalities. The fact that a commissioner has some form of interaction with a representative during the hearing of a matter but outside of

the parties being on record is not unusual. That fact alone cannot reasonably be the basis of a reasonable apprehension of bias.

45. In the matter of *Nel vs Ndaba and Others* (1999) 20 ILJ 2666 (LC) and at paragraph 12 the court, in a matter where private discussion between a presiding officer and a party was at issue stated the following:

> *"…it is contended that at the arbitration Smith could not deny the employee's version that she was with 2 witnesses for the company for at least 20 minutes before the commencement of the enquiry. This contention is simply not born out by the transcript of the arbitration proceedings. The transcript reflects that Smith admitted to being in the presence of Green, prior to the commencement of the enquiry, "for a minute or two". Putting the matter at its highest for the employee, the evidence goes no further than establishing peripheral contact between the chairperson of the enquiry and a witness for an insubstantial period of time. Whilst it is undesirable for those charged with adjudicatory functions to conduct themselves in any manner which might create a reasonable apprehension of bias… the facts of the present case are not such as to create an apprehension which is reasonable."*

46. In this matter there is no allegation that the commissioner spent time privately with witnesses. The allegation is that the commissioner spent time alone with the City's representative. The applicant sets out no proper factual basis for the allegation of bias. In effect the allegation amounts to no more than an unfounded suspicion. In the absence of a proper factual basis and context, the applicant's perception does not meet the standard of a reasonable apprehension of bias. Further, the applicant's claim that the commissioner was intimidated by the City's representative has no factual basis.

47. The evidence that served before the commissioner establishes that the City booking procedures were not complied, that Blanchard did not make payment

of the invoices sent to him by electronic mail on 3 and 6 February 2017, that Blanchard should have been denied access to and use of the resort and that the applicant intervened so as to grant Blanchard access to and use of the resort. No amount of baseless claims as to bias, intimidation and improper influence, can displace that evidence which served before the commissioner.

48. The applicant's allegations as to improper influence of the commissioner and alleged resultant misconduct, have no proper basis in the facts. These are merely the subject of conjecture at best and amount to little more than contentions in the air. The commissioner, as evidenced by the arbitration award, on the basis of the evidence that properly served before him determined that the applicant was guilty of serious misconduct. There is no factual or other proper basis for the applicant's allegation that the commissioner was improperly influenced by alleged informal references to investigations and indeed other investigations against the applicant. The fact that the applicant allegedly believes that that the commissioner was improperly influenced takes the matter no further.

49. Blanchard used the resort without having paid for it. Blanchard should have made payment of the invoices sent to him prior to 10 February 2017 and on or about 8 February 2017. On 8 February 2017 the applicant was made aware of the fact that when Blanchard arrived at the premises on 8 February 2017, he was not in possession of a permit. The day before and on 7 February 2017 Pretorius sent the applicant an electronic mail informing him that the City was awaiting payment from Blanchard. A few straightforward factual enquiries of the relevant persons in the City would have led to the applicant learning that Blanchard had not made payment and in the circumstances the applicant should have denied Blanchard access to the premises. Regrettably, this did not happen. The applicant as the most senior person must ultimately take responsibility for this. Rather than doing so, the applicant sought to avoid responsibility. He did so by, *inter alia*, referring to his employment contract, claiming that he was not an access controller and that those reporting to him, the access controllers, were ultimately responsible. The commissioner, correctly so, was not persuaded. There can be no suggestion as to bias as alleged.

50. As part of his application, the applicant contends that the commissioner did not properly assess the evidence before him. On this score the applicant points to various parts of the evidence of various witnesses and suggests contradictions, inconsistencies and a selective approach by the commissioner. This attempt is misguided. On the whole, the commissioner understood the substance of the allegations against the applicant, heard the evidence of the various witnesses and determined that in his assessment the City had discharged the onus of proving serious misconduct on the part of the applicant.

51. In effect, the applicant seeks to disturb the arbitration award by way of an appeal. That is impermissible. As set out above, the straightforward facts are that Blanchard had the use of the entire resort for the period 10 – 12 February 2017 and did not pay for it. That is a matter which properly concerned the City. It is a result which came about through a failure to properly apply the City's policies including its booking procedures. The evidence before the commissioner established that Pretorius did indeed send Blanchard the invoices by electronic mail and that she did so timeously. By 8 February 2017 no payment had been made and in the result the booking of the planned event should have been cancelled. However, when Blanchard arrived at the resort and the access controllers asked him for his permit he applicant intervened and as a result of the applicant's intervention Blanchard was allowed the use of the entire resort without the City receiving payment by 8 February 2017 or indeed at any time before 10 February 2017. It was only during July 2017 when Blanchard sought to book the resort, or part of it, for another event to take place during 2018 that it was discovered that payment was still outstanding for the event during the period 10 – 12 February 2017. These facts were established at the arbitration proceedings and the commissioner correctly found that the applicant was indeed guilty of gross negligence. This determination or finding by the commissioner is not open to review whether on the grounds contended for by the Applicant or any other grounds.

The allegation of dishonesty

52. The commissioner does deal with the evidence of the relevant witnesses including Candice Swartz, Betru Stevens, Neville Van Greunen, Hadley Sambaba, Denver De Vries and the applicant.

53. The commissioner summarises parts of the evidence of Swartz as follows:

> *"52. She confirmed she worked that weekend for the City and at that Clubbers event. On 11 February 2017 she clocked in a 7h22 and worked for the City cleaning toilets until 12h38. After their City work, they started at the resort and went to the staff room to get ready for their shifts for the event. She started that shit after 16h00 and went to the campsite toilets where she had to clean.*
>
> *53. Ismail asked them in the week leading up to the event whether they wanted to work. They said yes and he said they would be cleaning toilets. He told them they would receive R250 per shift and a shift was approximately 10 hours. When her shifts were done, she went to the staff room and rested there a bit until she started her next shift. Ismail said they could stay over in the staff quarters. They used mattresses that were brought down by Neville van Greunen. She started her last shift working for the City on 12 February 2017 and clocked in at 7h18 until 12h51 and thereafter she left with the City transport. She worked 2 shifts for the Clubbers event.*
>
> *54. Ismail was in charge as he told them where to work. The cleaning stuff was collected from the hall the Friday from the Clubbers people. Ismail was doing patrols during the time of the event.*

55. She was paid the Monday, 13 February 2017. She received R500 from Ismail in cash. She could not recall whether she signed anything to acknowledge receipt.

56. With regards to a list of names presented to her of people who purportedly received payment, she stated that she knew some of the names on the list. She did not see Hadley working at the event. As for Betru Stevens, she confirmed that she worked that weekend, but she never gave her any instructions as to what to do. She does not know whether Betru did supervisory functions that weekend."

54. Neville Van Greunen (Van Greunen) is an employee of the City. In the arbitration award the commissioner summarises parts of Van Greunen's evidence as follows:

"59. He had a role to play at the Clubbers event. Firstly, the contractor that was supposed to remove the post and rails for the stage set up did not pitch and Ismail approached him, and he then offered to do it. This was not a normal function he performed as he would normally attend to the maintenance of it. Ismail told him Blanchard told him which posts and rails had to be removed. He did it either the Tuesday or Wednesday before the event. He put it in storage for the original contractor to replace it about 2 days after the event, but Ismail approached him again saying that the contractor did not pitch leading him supervising the replacing of the post and rails. Ismail was aware that he had replanted it as he came around when they were busy, and he informed Ismail when they were finished. He met the contractor for the first time at Ismail's hearing…. When presented with a document purportedly showing that payment was received for the

replacement of the post and rails on 18 February 2017, he said he was at work that day and nobody came to him for the alleged replacement of the post and rails and nobody could have come at any stage because he (Van Greunen) removed and replaced it.

60. He was approached by Ismail prior to the event asking if he wanted to work because the Clubbers cleaners did not pitch. On 11 February 2017 he worked for the City clocking in at 06h56 until 1707. Thereafter he worked at the Clubbers event. His functions at the event was to remove the dirty bags. He used the City vehicle for this as it was authorized by Ismail. Nobody gave instructions and everyone knew what they had to do. He worked until 21h00 and then left in his own transport.

61. He was paid on 13 February 2017 after work. He was paid in cash and received R250. He never signed for the money. They were all outside Ismail's office and he called them in individually to pay them. At the arbitration he was presented with a document with a record of payments made to staff for the event reflecting that he worked two shifts however he only worked one shift on the Sunday. He indicated that he knew some of the people appearing on the list. He knows a Pieter Hendriks but could not recall seeing him on his shift. He knows Hadley but Hadley did not work at Clubbers because he was only recently appointed permanently. He does not recall that Betru Stevens was a supervisor at the event. Ismail presented a roster, people were given the option to work where they wanted, and everyone knew what they had to do.

62. As for transport, he knows some of them stayed over the Friday evening because Ismail asked him to drop mattresses off at the staff quarters. He does not know if they stayed over the Saturday as he left at 21h00.

63. He added that on the day they were all waiting to be interviewed by Richards, Ismail came to the van and told them "you know what happens to witnesses, do you watch CSI". He replied that he did watch it and Ismail said witnesses can disappear. He did not like the comment at all and brushed it off at the time but still told his family about it and said that if anything happened to him, they should mention it. When Ismail made this statement, he was stunned and just walked away. The work relationship continued as normal thereafter and he continued to follow Ismail's work-related instructions.

64. In cross-examination he denied that he made the proposal to remove the posts and rails to Blanchard and he worked directly under instructions from Ismail. He confirmed it was in official working time, but he simply followed instructions. He confirmed that he removed the posts and rails at a recent event (Endless Days) and acted on the instruction of his superior, Mr Vaughan. He added that Ismail was getting false information from Nolene who was Ismail's girlfriend. He maintained that his evidence at the hearing was incorrectly captured and he did not tell Richards he was not there when the posts and rails were replaced. He assed that Ismail in fact came to him prior to the hearing and asked if he would be prepared to testify that whilst he was replacing the posts and rails that the contractor arrived and continued replacing, but he

refused to do that. He conceded that he and Ismail got the working relationship off on a bad footing because Ismail wanted Mr Goliath to be appointed to his position as the latter was interviewed for the same post. He did not regard Ismail's threat as a joke. He further denies that Ismail would have reprimanded him for smoking in the staff room and vehicles and for swearing at colleagues or any other issues."

55. In the arbitration award the commissioner also summarises what he regarded as pertinent parts of the applicant's evidence in relation to the removal of the posts and rails. The relevant paragraphs of the arbitration award include the following:

"101. As for the removal of the posts and rails, he stated that Blanchard wanted fencing to be removed to erect a stage and that rendered him responsible to restore the site to its original condition after the event. Blanchard asked him and he said that he could put him in touch with a reliable guy that previously did fencing work at the resort. Blanchard contacted the guy and they agreed a price based on certain measurements given by Blanchard. This guy was going to come through prior to the event to remove the posts and rails however a few days prior to the event Van Greunen took it upon himself to remove it. He then phoned the guy and told him it was not necessary to come through and remove it and he then asked the guy which dimensions Blanchard gave him. It turns out that the dimensions provided was for a smaller area, but the guy then said that he is no longer removing it and since the area to cover was bigger, he would just stick to the original price. The guy came the weekend after the event and did the replacement and he paid him on that day. He arrived late afternoon and he (Ismail) still

asked him if he would be able to complete the job and he said he brought experienced guys with him.

102. He disputes the version by Van Greunen that he replaced the posts and rails as it contradicts his testimony at the disciplinary hearing where he said that when he returned the posts and rails were already replaced. Further he disputes that the posts and rails were stored and that he (Van Greunen) had the keys as he specifically instructed staff to get it where it was stored at the ablution blocks because the contractor, de Vries said he was going to replace it latest over the weekend. He and van Greunen had a very good working relationship and they often had discussions about world politics however there were times when they bumped heads regarding work related matters like him smoking in vehicles and in the staff room. There was an occasion where the bakkie was broken and Van Greunen loaded bins into the combi instead of hooking up the trailer and putting it in there. there were also staff complaints about Van Greunen swearing. He further disputes Van Greunen's testimony that he gave permission to staff to sleep at the resort. He became aware of it over the weekend but turned a blind eye to it however the people did not really sleep as they were excited about the event."

56. Witnesses also gave evidence to the effect that as employees of the City they worked at the Clubbers event over the period 10 – 12 February 2017, that they were contacted by the applicant and asked whether they were willing to work at the Clubbers event, that they had minimal contact with Betru Stevens during the Clubbers event, that the applicant was present during the Clubbers event and had from time to time issued them with instructions as they were working during the Clubbers event. Those instructions were relevant to their work during the Clubbers event. From this evidence that served before the commissioner it

is apparent that the applicant was indeed intimately involved in procuring City employees to work during the Clubbers event, that he was present for at least material parts of the time during the Clubbers event and that he issued them with instructions. There is no proper basis for the commissioner to have doubted this evidence. The commissioner's summary of the evidence of the witnesses is consistent with the transcript of their evidence.

57. In relation to the allegation of gross dishonesty, the commissioner makes the following findings:

> *"161. In dealing with the gross dishonesty charge, I am required to determine whether Ismail had any financial benefit from the money paid in respect of cleaning services rendered at the event and / or the removal and replacement of the posts and rails and / or the transport of the people working at the event.*
>
> *162. For me to make a finding on the above it is critical to determine whether Stevens genuinely operated independently from Ismail. The employer's evidence is essentially that Ismail was running the show and that Stevens is used as a front when he is fact pulled the strings. It is common cause that there was extensive negotiation taking place between Ismail and Blanchard. Ismail testified that he did so on instruction and on behalf of Stevens. It is however also common cause that nowhere in the email communication between them is reference made to Stevens. I also considered that staff could sleep over and use the company vehicles which further supports that Ismail was the person in charge as he would have permitted this. His contention that he was unaware is unfounded. It is unlikely that staff would risk the chance to stay over without his permission and to use the vehicle when Ismail stays on the resort and there is a great chance*

that he would see this happening as some testified that he was seen at the event. The more probable account is that it was done with his blessing and he did not turn a blind eye as suggested but rather it was factored in the bigger picture. Ismail testified that his involvement on the day they were supposed to be paid was unplanned and that he was irritated by the fact that they involved him, and he had guests at the time. If anything, that was the time, if he really was not the key instigator, for him to distance himself from the matter. Even on his own account after the money was secured from Blanchard, he could have returned to his guests and his involvement would have ceased but instead they end up in his office where the money is counted and the payments are made. He then proceeds to draw up the documents which were not necessary because on his own account he was not running the show. Thus I agree with the employer's argument that there is little support for the argument that Stevens in fact was running the show. The contents of the email's communications suggests that Ismail was making the decisions and had the final say and that Stevens was just a normal worker at the event like any of the other workers.

163.Having come to the above conclusion, I need to consider is whether the payments as alleged to the workers were made. As regards Sambaba, he testified that he did not work at the event. Witnesses for the employer corroborated this account. The contention on Ismail's part is that Sambaba was manipulated into saying that he did not work however this was never tested with him. There were bold statements that Sambaba would follow Van Greunen blindly and that

there were meetings between them where Van Greunen would have told Sambaba what he had to say at the arbitration but Sambaba was not confronted with this. Marthinus attempted to argue that Sambaba was working but ended up conceding could not say with certainty whether Sambaba in fact worked. It was also testified that Sambaba only started as a permanent worked on 1 February 2017 thus making it likely that he would not have been approached to work at the event. Considering these factors, I conclude that the probabilities show that Sambaba did not work at the event and Ismail, having the money in his possession, probably pocketed that money. In relation to the payments to Alcia and Deego, it is common cause that they only received R250 each. It was testified that the money for their other shifts went to one Sharief however Sharief never testified as a witness. There was also reference made to a Hoppie who should have reflected on the payment list instead of Pieter Hendricks. Given the detail as to these 2 individuals, namely that there was drinking and accused of theft and one had an entertaining wife with tattoos, one would think that there was firstly no reason to mistake Pieter Hendricks with Hoppie on the list and no reason to omit Sharief from the list. The logical conclusion is their alleged workers status was fabricated and that they were never paid as alleged. The payment allegedly made to De Vries also is doubtful. In respect of the dealings between De Vries and Blanchard regarding the posts and rails, Ismail plays a pivotal role. On De Vries' own account, he only had one telephone discussion with Blanchard and that was it, despite there being material changes to the agreement of the posts and rails like the removal thereof by Van Greunen and

the incorrect measurements apparently given by Blanchard which should have altered the course of the agreement. I do not find De Vries' testimony credible at all. He gave conflicting accounts as to phone calls and his version as to when he became aware of incorrect measurements and Ismail's version do not correspond. He stated that he became aware of the incorrect measurements the day after his call with Blanchard whilst Ismail testified that he informed him when Van Greunen removed the posts and rails. His driving time from Delft to the resort seems inconsistent as he said it took him 45 minutes to drive the 79 kilometer distance. I also find the contention that Van Greunen having removed the posts and rails of his own accord unlikely as there was no reason for him to do this. The argument was raised that Blanchard was perhaps there and urged him to do so is opportunistic and given how Blanchard's been described, it is unlikely that he would have then, after getting Van Greunen to remove it, not re-negotiate the price with De Vries. Marthinus' testimony that Van Greunen could not have replaced it is also unlikely as he got tongue tied when dealing with the quantity of poles involved. He also testified that it was done during the week but then attempted to rectify this later in his testimony. Thus, his evidence is also unreliable, and I conclude that the probabilities show that Van Greunen indeed replaced the posts and rails. If this finding is reached then it implies that De Vries had nothing to do with the removal or replacement of it and as such would not have received payment for it and in all likelihood the money was pocketed by Ismail and the purported receipt of payment is a fabrication. I draw the same conclusion as to the receipt for payment of the transport. Denzil Brandt was not called as a witness

that he in fact transported workers and received payment for it. Ismail's account was that he was there on the day of payments why would he then not sign it on the same day? This also contradicts Stevens' account that Brandt signed it in her presence in Ismail's office. I thus conclude that the transport money also found its way into Ismail's pocket.

164. Thus, based on my assessment of the evidence I conclude that the employer discharged the onus of proving that Ismail is guilty of the charges against him.

165. The remaining issue is to determine whether the sanction imposed was appropriate. I doubt whether on the negligence charge there would have been justification for dismissal. In the end Blanchard paid what was due and there was no loss suffered by the City and at best this would have attracted a sanction of written warning or a final written warning. On the dishonesty charge however the sanction of dismissal is justified. The misconduct relates to an issue of honesty and trust. Ismail oversaw a major asset of the City and he misused this asset for his own gain and the employer is justified [in] saying they cannot trust him again. The employer cannot be blamed for losing trust in him and the abuse of the trust they placed in him to run the resort does not warrant a second chance. The applicant's conduct cannot be condoned, and the seriousness of the charges warrants a sanction of dismissal.

166. Based on the evidence placed before me, I find that the applicant dismissal was substantively fair."

58. The commissioner in reaching his conclusion that the City has established that the applicant was guilty of gross dishonesty refers to various elements of the

evidence before him. In analysing the evidence the commissioner explains why he prefers one version over another. The commissioner on a number of occasions states that in his assessment the probabilities are with the employer's version rather than that of the applicant. The commissioner's award includes that the City's resources and staff were used during a private function. The commissioner's award shows how he concludes that the probabilities are that the applicant pocketed some of the money received from Blanchard. The approach of the commissioner does not disclose any bias or undue influence. The commissioner explains his approach and states the basis upon which he preferred one version over another. The commissioner goes further and concludes that on a balance of probabilities it is his finding that the applicant pocketed monies. This approach by the commissioner to the evidence is rational and reasonable. The commissioner gives clear reasons for preferring the employer's version over that of the applicant and provides reasons for his conclusion as to dishonesty.

59. The same is true as to the role of Stevens. The commissioner having heard the evidence concludes that the applicant played a key role during the Clubbers event and the period preceding it. That role included procuring employees of the City to work at the event during the period 10 – 12 February 2017. Once again the commissioner determines that on a balance of probabilities, Stevens did not act independently of the applicant as a small businessperson and that the applicant was indeed a key role player.

60. The applicant's attempt to disturb the commissioner's approach, his reasoning and his finding in relation to gross dishonesty are ill-informed and misguided. The applicant's approach has about it the hallmarks of an appeal. The fact that the commissioner preferred one version over another and then determines that it has been established that the applicant was guilty of serious misconduct as alleged, gross dishonesty, necessarily means that the commissioner rejected material portions of the version of the applicant and some of the applicant's witnesses. No doubt the applicant was displeased with this, but this does not mean that the commissioner's award is reviewable whether on the grounds alleged by the applicant or at all. On the contrary the commissioner adopted a permissible approach in his analysis of the evidence and ultimately in his

determination that it was established that the applicant had committed acts of serious misconduct.

Blanchard an essential witness?

61. The applicant contends that Blanchard was an essential witness. The applicant contends that in the absence of Blanchard being called, the commissioner could not properly determine the issues in dispute. The applicant goes further and contends that the commissioner ought to have called Blanchard as a witness. In summary, the applicant alleges that in the absence of Blanchard being called as a witness the commissioner failed to ensure that the issues were properly tried and that this was a reviewable irregularity on the part of the commissioner.

62. However, the applicant had every reasonable opportunity to call Blanchard as a witness and for the purpose of ensuring his attendance as a witness had every reasonable opportunity to request that a subpoena be issued. The applicant did not take steps to call Blanchard as a witness. The bundles of documents that served before the arbitration proceedings also reveal that the applicant indicated that he would be calling Blanchard as a witness. In this regard the applicant's representative in an electronic mail dated 4 February 2018 records, *inter alia*, the following: *"We confirm that we will be calling / subpoenaing – Mr Ismail, Beatru Stevens, Mr Blanchard…"*. (bundle B, page 128). The applicant had taken view that he would be calling Blanchard and informed the relevant parties of this. There can be no suggestion that the applicant was prevented from calling Blanchard as a witness.

63. The applicant contends that the merits of the dispute were not fully ventilated. The basis of this contention appears to be that an essential witness did not give evidence in the arbitration proceedings. That alleged essential witness was Blanchard. The applicant in attempting to advance this contention alleges that the commissioner allowed '*hearsay evidence'* to be presented and that the applicant's representatives did not object to this on the basis that the alleged material witness, Blanchard, would be called to give evidence.

64. The applicant further contends that in circumstances where it is clear that all the evidence is not being placed before the commissioner, the commissioner is

under a duty to guide the parties. The applicant contends that the '*helping hand'* principle found application in the proceedings before the commissioner and that the outcome of the application of this principle ought to have been that the commissioner calls Blanchard as a witness.

65. In the matter of *Leboho v Commission for Conciliation, Mediation and Arbitration & Others (2005) 26 ILJ 883 (LC)* the court held:

> *"[6] The position in civil proceedings is different, a presiding officer has no power mero motu to call witnesses. He can only do so with the consent of the litigants. However, a civil court has the power to recall witnesses that have already testified before it for purposes of further examination or cross-examination. It can do this at any stage of the proceedings before judgment. However, this is not done by the court mero motu but upon application by one of the parties. If there is inconclusive evidence on the issues involved the court merely asks itself whether the party on whom the onus rests has discharged it, it is not for the court to go out of its way to establish the truth, it only decides the truth on the basis of the evidence before it.*
>
> *…*
>
> *[11] The rationale for forbidding a court hearing a civil case from mero motu calling witnesses is, in my view, equally valid in respect of arbitration proceedings."*

66. In relation to the allegation of gross negligence, the essential facts are that Blanchard enjoyed the use of the entire resort without the City's booking procedures having been complied with and specifically that Blanchard did not make payment for use of the resort prior to the event and that it was the applicant's intervention that secured the use of the resort for Blanchard. The material facts were not much in dispute. The relevant and material facts on this score served before the commissioner. Those facts include that an enquiry was

made in relation to an event to be hosted over the period 10 – 12 February 2017, the enquiry was processed in the ordinary way, an invoice was generated and sent to Blanchard's electronic mail address, no payment was received by 8 February 2017 or indeed at any time before 10 February 2017, Blanchard arrived at the resort and Swartz, an access controller, asked him for his permit, that the applicant then intervened saying he would check with Pretorius, the applicant returned saying that everything was in order and that the applicant said that Blanchard should be given the keys. These material facts are largely undisputed. In relation to those material facts, Blanchard is not an essential witness. Those facts are known by persons who gave evidence at the arbitration proceedings.

67. It can hardly be said to be the case that Blanchard as a witness would say that he was indeed in possession of a permit, that he had in fact made payment on 8 February 2017 or on some other occasion before 10 February 2017 and that he was in possession of proof of such payment. Of no small importance here is that the fact of non-payment for use of the resort in February 2017 was discovered during July 2017. In the circumstances the applicant's contentions as to Blanchard being a material witness in relation to the allegations of gross negligence are misguided and ill-informed. The '*helping hand'* principle finds no application in the arbitration proceedings before the commissioner as they relate to the allegation of gross negligence. Accordingly, there can be no basis for the applicant's further contentions as to the arbitration award and its attendant proceedings in relation to the finding of gross negligence being susceptible to review on the basis that Blanchard was not called as a witness.

68. The commissioner's credibility findings in relation to the allegation of gross negligence do not rely on 'Blanchard's version' or information placed before the arbitration proceedings by way of informally referencing investigations conducted by the City and the role that Blanchard played.

69. Similarly, Blanchard was not an essential witness in relation to the allegation of dishonesty. At the heart of this allegation is the use of City's resources including its staff during the Clubbers event over the period 10 – 12 February 2017, the role played by the applicant during the Clubbers event over the period 10 – 12

February 2017 and whether the applicant had received monies. The material and relevant facts include that the Clubbers event did indeed take place over the period 10 – 12 February 2017, posts and rails were moved, the applicant approached some City employees to work during the Clubbers event, City employees worked at the event, some City employees stayed over at the resort during the event, City resources including a motor vehicles were used during the event, the applicant was an active presence during the event and that this presence included giving instructions to various City employees, the applicant received some R17 000 from Blanchard, the applicant made payment to City employees who worked during the period 10 – 12 February 2017, the applicant prepared a schedule of payments listing names of various persons.

70. The persons who did give evidence at the arbitration proceedings before the commissioner gave evidence as to these facts and circumstances. It is from that evidence that the commissioner draws the conclusions that he did. That evidence does not constitute hearsay evidence or indeed inadmissible hearsay evidence. In those circumstances it can hardly be said that the facts that the commissioner needed to enquire into and establish needed the evidence of an essential witness who was not called. The *'helping hand'* principle finds no application in the proceedings before the commissioner as the relate to the allegation of dishonesty.

71. To the extent that the commissioner prefers the evidence of some witnesses over others in relation to the allegation of dishonesty and makes credibility findings in relation to some witnesses, he does so with reference to and on the basis of evidence that was properly before him. In this regard, the commissioner's reasoning is not speculative.

72. The applicant contends that in the absence of the City calling Blanchard to give evidence as a witness, the commissioner should have disregarded the evidence presented by the City regarding '*Blanchard's version*' as this could not be tested by the applicant and the evidence had no value. This contention is misguided and ill-informed. The commissioner did not rely on a version presented by Blanchard. Rather the commissioner had regard to evidence properly before him as to the conduct of the applicant and Blanchard. That

evidence was given by persons who had dealings with the applicant and Blanchard.

73. In relation to the allegation of gross negligence and dishonesty the commissioner heard the evidence of several witnesses, including the applicant and had regard to documentary evidence that served before him. On the basis of that evidence which properly served before him the commissioner determined that the applicant was indeed guilty of the allegations of serious misconduct against him. That determination by the commissioner is properly supported by the evidence which served before him. There can be no serious suggestion that the factual evidence as to the applicant's conduct including his dealings with Blanchard would be displaced on the basis of further evidence to have been given by Blanchard as an alleged '*essential witness*'.

74. The commissioner appears to have been alive to the relevance of Blanchard as a witness. In this regard the transcript records the following:

> "*COMMISSIONER: Alright. Maybe also not now, just to bring to the parties' attention, just to give clarity in terms of whose witness Mr Blanchard would be as I've indicated to Mr Stopka he sent me an email and he said he's prepared to come, he's going to be here to testify for Mr Ismail. I said in the end, or just a comment I made, it's about (indistinct) information if that witness will be able to assist me in the decision I have to make, it's very welcome testimony. Maybe just from the perspective of the… who cross-examines or who starts in Chief, that also I made a comment in passing to Mr Stopka that a question is a question but whatever… I don't want to make a call on it now, it's… I don't want to have a discussion on that particular witness and we're not sure if he is going to be here yet."* (transcript page 156 lines 4 – 17)
>
> …

"COMMISSIONER: Look, I am hesitant to say who's got the obligation. I am not the one leading anyone's case so I am just going to repeat what I said in the past, but the meaning and evidence of the testimony's given, I keep on asking myself, how relevant is Mr Blanchard? I am not saying he isn't, but how relevant is he now, because it seems to be that its common course that Mr Blanchard had given… You received the R17 000, you've got your accounting as to how it was disbursed, I think the issue for the City is… let me not, I am just using very broad strokes.

MS GELDENHUYS: Gross dishonesty is the issue.

COMMISSIONER: Yes, but up to this point, perhaps with the other issues in terms of what came out in the witnesses testimonies (intervention).

MS GELDENHUYS: Sorry commissioner but if we could just excuse this witness now.

COMMISSIONER: Ya I think (intervention).

MS GELDENHUYS: Ya, you're not part of this.

MS KOTZEE: OK

COMMISSIONER: So.

MR STOPKA: You can I be excused.

COMMISSIONER: because if one looks at the charges (intervention).

MS GELDENHUYS: then he is actually meant to win the charge?

COMMISSIONER: Mmm

MS GELDENHUYS: R17 000 from Blanchard (intervention)

COMMISSIONER: Yes but that's not (intervention)

MS GELDENHUYS: … for services rendered with municipal staff.

COMMISSIONER: Yes okay, Ya. But I mean that, just looking at the Charge, there doesn't seem to be as much in dispute there, that's the point I am trying to get across, because there is not dispute about Mr Ismail receiving the R17 000 from Mr Blanchard.

MS GELDENHUYS: Yes

COMMISSIONER: On the 12th of February

MS GELDENHUYS: Yes.

COMMISSIONER: So for services rendered, that is the other issue, because the witness raised the issue of disclosure, and I don't know if Mr Stopka can perhaps (intervention).

MS GELDENHUYS: that's not what (intervention).

COMMISSIONER: … assist. So that's not the dispute at issue Mr Stopka? So in other words, the way I am seeing it now is what the City is saying that the dishonesty lays in terms of Mr Ismail sharing in the R17 000, or…?

MS GELDENHUYS: Receiving the R17 000, well receiving the R17 000 and using Municipal staff to render the service commissioner

COMMISSIONER: Mmm

MS GELDENHUYS: That's the … you received R17 000 for services rendered using Municipal staff

COMMISSIONER: Mmm

MS GELDENHUYS: and you allowed Municipal staff to work overtime to perform private cleaning duties at the event, for which you received R17 000. So I think its at this point the thought process was that they were doing this in Municipal time, and he was getting paid for it.

COMMISSIONER: Mmm. Is that the employer's case Mr Stopka?

MS GELDENHUYS: That is certainly what the evidence was that the (intervention).

MR STOPKA: It isn't our evidence because we (intervention).

COMMISSIONER: Mmm

MR STOPKA: There were problems with the R17 000 that whatever he is putting down as the money that he received and the accounting to Mr Blanchard.

COMMISSIONER: Mmm

MS GELDENHUYS: We say there was not all the R17 000 he paid to whoever he paid.

MR STOPKA: Was not paid to those people

COMMISSIONER: That's why I am saying, that he shared (intervention).

MR STOPKA: At least a portion of that was shared (intervention).

> *COMMISSIONER: And that is the issue for the employer?*
>
> *MR STOPKA: That is the issue*
>
> *COMMISSIONER: Because the way I understand the argument on the employee's side, on the Applicant's side is that, the accept that Municipal staff were used, they accept that R17 000 was paid toward but they are saying that Mr Ismail did not, he had no benefit of that money, so the issue of whether Municipal staff were used is of no consequence to the employer. That was my understanding because you say you used Municipal staff, it actually boils down to whether or not he had a share in or benefitted from the funds. Okay. So in that context, is it, how relevant would Mr Blanchard's testimony be? It could be we don't know what he is going to come here and testify but (intervention)."* (transcript pages 315 – 318, lines 1-14)

75. The commissioner did not preclude the applicant or indeed the City from calling Blanchard. The applicant has not set out any proper basis for his contention that the commissioner was under a duty to call Blanchard as a witness. It is so that during the arbitration proceedings and before closing its case the City informed the arbitrator that Blanchard was a potential witness, that the City sent him a subpoena but that he "*remains an evading person*". (transcript, page 687, lines2-7). However, this too takes the issue no further. The facts that properly served before the commissioner properly support his determination that the applicant was guilty of the serios allegation of misconduct against him.

76. In this matter the commissioner had to determine, *inter alia,* whether the applicant was indeed guilty of the allegations of serious misconduct against him, gross negligence and dishonesty. In the arbitration award the commissioner specifically records the allegations of serious misconduct. Further, in the arbitration award the commissioner, at some length, records and summarises what he considers to be the relevant and material evidence that

served before him. The commissioner in the award demonstrates that he properly appreciated the nature of the enquiry before him. In relation to gross negligence, the commissioner's assessment is that Blanchard was given access to and enjoyed the full use of the City's Silverstream resort for the period 10 – 12 February without having complied with the City's booking procedures. It is the commissioner's assessment that the applicant had intervened so as to allow or permit Blanchard access to and use of the resort without proper compliance with the City's booking procedures, including payment. In doing so, the commissioner considered the relevant and material evidence before him and provides reasons for preferring the version of the City over that of the applicant. This approach by the commissioner is reasonable. The commissioner's decision that the applicant was guilty of gross negligence is indeed one that a reasonable commissioner could reach on the basis of the evidentiary material before him.

77. Similarly, in relation to the allegation of dishonesty, the commissioner in the arbitration award records and reflects upon what he considers to be the relevant and material evidence that served before him. The commissioner does so at some length. The award demonstrates that the commissioner grappled with tensions and contradictions as between the various versions put before him on the material issues. In the arbitration award the commissioner provides an explanation for preferring one version over another. This approach as adopted by the commissioner is permissible and rational.

78. In the result, the applicant's prospects of success on the merits, the review application, are poor. This matter concerns an 'individual dismissal'. The applicant's explanation for the long delay is unsatisfactory. The case as to alleged defects, irregularities ad misconduct by the commissioner is not cogent and has no proper factual basis. Accordingly, the applicant has not made out a proper case for condonation.

79. In the circumstances I make the following order:

    1. The application for condonation is refused.

    2. There is no order as to costs

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VAN VOORE AJ
ACTING JUDGE OF THE LABOUR COURT

Appearances:

For the Applicant: L Myburgh, instructed by Bagraims Attorneys

For the Third Respondent:

S Mbobo, instructed by Maguga Attorneys