

**IN THE HIGH COURT OF SOUTH AFRICA
(Cape of Good Hope Provincial Division)**

Case No. 9764/2001

In the matter between:

CLIVE ERIC COETZEE

Applicant

and

PALTEX 1995 (PTY) LIMITED

Respondent

JUDGMENT DELIVERED : 8 MAY 2002

DAVIS J

INTRODUCTION:

On 14 November 2001 applicant instituted proceedings to have two arbitration awards made orders of court. The background to these arbitration awards are to be found in a sale agreement entered into between applicant and respondent in terms of which the former sold his business Ex Modatex to respondent for R1 m. in December 1998. In February 1999 respondent repudiated the agreement. Applicant then placed his business on the market and eventually sold it to one Gavern Kay for R300 000, which was the highest price applicant could then obtain.

Applicant subsequently sued respondent for R700 000, being the difference between the contract price and the price which Kay had paid. The matter was eventually referred to arbitration in terms of a written arbitration agreement which made provision for an

appeal. This arbitration was held in Cape Town during January 2001 before the Honourable Ms Justice van den Heever ('the arbitrator'). In March 2001 the arbitrator made an award in favour of applicant and directed respondents to pay damages to applicant in the amount of R700 000. Respondent exercised his right of appeal in terms of the arbitration agreement. This appeal was duly heard before the Honourable Messrs Justice Corbett and Grosskopf ('the appeal arbitrators') in Cape Town in October 2001. On 2 November 2001 the appeal arbitrators upheld the award of the arbitrator in the first instance and dismissed the appeal with costs.

When applicant applied to have the arbitration awards made orders of court on 14 November 2001, respondent gave notice on 28 November 2001 that, it was intent on opposing the application. Respondent did not file its answering affidavits timeously and applicant therefore set the matter down for hearing on 8 January 2002. On that day respondent handed up from the bar a preliminary answering statement which was unsworn in which its attorney stated that the application has been opposed because certain weighty new evidence had become available to it, which would corroborate the testimony which respondent had placed before the arbitrators.

On 10 January 2002 the affidavits were filed by respondent including an affidavit deposed to by Mr Dean Mackness.

The matter was then postponed by order of court for hearing to 11 April 2002, in terms of

which order, the further conduct of the matter was regulated. On 11 February 2002 respondent filed further answering papers in the application and also brought a counter application.

In its counter application of 11 February 2002 respondent applied for an order in terms of which the arbitration awards be set aside and the dispute between the parties be submitted in terms of section 33(4) of the Arbitration Act 42 of 1965 ('the Act') to a new arbitration tribunal constituted in a manner directed by the Court or alternatively to the arbitrator for a re-hearing.

On 5 April 2002 respondent sought to amend its notice of motion in respect of the counter application. Apart from seeking to set aside the arbitration award of the arbitrator of 9 March 2001 and the arbitration of 31 October 2001, respondent sought an order in terms of which the dispute between the parties be submitted 'to Madam Justice L van den Heever, the Arbitrator who presided at the initial arbitration, alternatively that the dispute be submitted to a new Arbitration Tribunalfor the necessary re-hearing in respect of the evidence of Dean Mackness contained in his Affidavits 11 February 2002 at pages 125 to 133 of the Record and of 11 March 2002 at pages 232 and 233 of the Record, relating to an alleged agreement between the applicant and van Der Poel that the former pay a secret profit to the latter should the latter influence Mr Brin, a director of the Respondent, to be in favour of a purchase of certain machinery from the Applicant, which purchase by the Respondent did materialise; the Arbitrator to make an appropriate award

arising thereout’.

Furthermore in terms of the amended notice of motion, respondent sought ‘an extension of time in terms of section 38 of the Act so, that Respondent’s counter application (served on 7 and 11 February 2001 and lodged with the Registrar of the above Honourable Court on 12 February 2002) is deemed to have been brought timeously for purposes of compliance with the period prescribed by section 33(2) of the Act, alternatively section 32(2) of the Act.’

Applicant has opposed this counter application, essentially on the basis that the arbitration awards cannot be set aside in terms the common law but only in terms of the Act and further that the counter application has become time barred. Applicant also avers that the affidavits filed in support of the calling of fresh evidence are devoid of allegations necessary to sustain a finding that

- a) the arbitrators were guilty of
 - i) misconduct in relation to her/their duties
 - ii) ‘any irregularity not to mention a gross irregularity’, and
 - iii) either award was improperly obtained.

The Question of the Application being Time-barred.

Mr Tredoux, who appeared on behalf of applicant, submitted that respondents had not complied with the prescribed time limits in terms of section 32 and 33 of the Act. In

terms of section 32 the parties to a reference may, within six weeks after the publication of the award to them, by writing signed by them, revert any matter which was referred to arbitration to the arbitration tribunal for reconsideration and for the making of a further award or a fresh award or for such other purpose as the parties may specify in the said writing.

In terms of section 32(2) the court may, on application of any party to the reference and after due notice to the other party or parties made within six weeks after the publication of the award to the parties, on good cause shown, remit any matter which is referred to arbitration, to the arbitration tribunal for reconsideration and for the making of a further award or a fresh award or such other purpose as the court may direct.

In terms of section 33 (1), where

- a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
- b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its power; or
- c) an award has been improperly obtained,

the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.

Section 33(2) provides that an application pursuant to this section shall be made within six weeks after the publication of the award to the parties: provided that when the setting aside of the award is requested on the grounds of corruption, such application should be made within six weeks after discovery of the corruption and in any case not later than three years after the date on which the award was so published.

Mr Tredoux submitted that, although the time periods may be extended in terms of section 38 of the Act, such extension must be brought by way of a formal application and on the basis of good cause shown. The publication of the award to the parties occurred on Friday 2 November 2001. Mr Tredoux submitted that the six week period expired on Friday 14 December 2001, if calculated from the date of the award. On respondent's

latest version, the new evidence came to the attention of its directors on 21 November 2001. The six week period thus expired on Wednesday 2 January 2002 if calculated from the date on which the new evidence was allegedly discovered. It followed that, on any interpretation, respondent should have sought an extension of time in terms of section 38 of the Act, which it only did by way of its amended notice of motion of 5 April 2002.

Mr Tredoux contended that respondent could not invoke section 33(2) of the Act, namely the setting aside of the award was based on the ground of corruption. He submitted that the impropriety which would justify the setting an award aside in terms of s33(1)(c) of the Act read with s33(2) related to improper conduct on the part of the arbitrator. There was nothing untoward nor improper in the manner in which the award was obtained from the arbitrator. He submitted further that there was no evidence on the papers which revealed that applicants' conduct in the context employed in these sections was improper. Accordingly it could not be contended that the arbitration award was improperly obtained so as to justify a three year time bar from the publication of the award; being 2 November 2001. The three year period would end on 1 November 2004.

Mr Wulfsohn, who appeared on behalf of respondent, submitted that section 33(2) was applicable to the present case. The 'corruption' had been discovered on 21 November 2001. In respect of the application of this section to the present dispute, Mr Wulfsohn submitted that the falsification of evidence by a party or a witness without the arbitrator being aware thereof could amount to the award having been improperly obtained. In other words, the concept of corruption did not relate exclusively to the conduct of the arbitrator but extended to the conduct of a party such as applicant so that in terms of 33(1)(c) the award had been improperly obtained. Support for the submission that the award of an arbitrator can be set aside on the ground that false evidence had been given to the arbitrator, where that evidence was material so that it influenced the arbitrator in his decision, can be found in **Van Schalkwyk v Vlok** 1914 CPD 999 and **Butler and Finsen Arbitration in South Africa. Law and Practice** at 294 – 295.

On the basis of this authority, it was contended that, were respondent to show that the award was based on false evidence given by applicant, that such evidence was material and that such evidence influenced the arbitrator in his or her decision, respondent's case would not amount to misconduct by the arbitrator but the award would still have been improperly obtained in terms of section 33(1)(c).

Mackness' evidence was directed towards the contention that van der Poel had been bribed in order to influence the conclusion of the contract. If admitted such evidence would fall within section 33(1)(c) and accordingly the six week time bar would not apply.

In the alternative Mr Wulfsohn contended that, in terms of section 38 of the Act, good cause had been shown by respondent as to why the application had been launched after the prescribed period of six weeks from publication of the award had lapsed. He

submitted that the material facts relating to the fresh evidence were not known to respondent until after the arbitration appeal had been completed. The issues in the arbitration, the evidence led and the award did not cover the new issue involved in the affidavit of Mackness which evidence was with relevant and 'weighty'. No criticism could fairly be levelled at respondent for not having produced an affidavit from van der Poel in support of Mackness' affidavit. No 'reasonable diligence' could have unearthed the facts set out in Mackness' affidavit during the course of the arbitration hearing. Furthermore Mr Wulfsohn submitted that applicant should not be permitted to retain the benefit of the award if fresh evidence could show that a secret profit had been made in fraudulent circumstances, a result which was clearly contrary to public policy and morality.

To return to the chronology, on 10 January 2002 respondent filed an affidavit in which the 'new testimony' was canvassed in some detail and to which an affidavit deposed to by Mackness was included. In his affidavit of 10 January 2002 Mackness stated '[t]here may have been a wilful misrepresentation to Mr Moti Brin of his (Van der Poel's) state of mind and intention amounting possibly to fraud and/or a collusion on his part and/or that of the Applicant, ultimately to the detriment of Respondent'.

There is no reason proffered in the affidavit of Mr Swart filed on behalf of respondent on 5 April 2002 as to why two affidavits were filed by respondent on 10 January 2002 including an initial affidavit of Mackness, but the substantive application by respondent was still delayed to 11 February 2002. There is, however, a considerable explanation provided for the further delay until 5 April 2002 when the amended counter application was brought.

Given that the very nature of arbitration is designed to be expeditious and final, the time limits prescribed by the Act are of importance for they guarantee a major advantage of arbitration, namely that an arbitrator's award (in this case after the appeal arbitrators had decided) is final. See Butler and Finsen at 22. In order to apply successfully for condonation when a party is out of time by some six weeks (as at 11 February 2002) a rather more comprehensive explanation is required, particularly of the delay between 10 January 2002 and 11 February 2002 than that which was set out in respondent's papers.

The question of a time bar depends on whether good cause has been shown (s38) or whether the evidence relates to corruption.

Thus the question as to whether the counter application is time-barred depends upon an analysis of the evidence of Mr Mackness and in particular the weight and materiality thereof. Further, the analysis will reveal whether the evidence relates to corruption and accordingly whether the three year expiry rule applies.

Remittal for Hearing of further evidence.

In order to succeed in an application for the remittal for the hearing of further evidence

respondent will be required to persuade the court to exercise its discretion in the latter's favour by showing –

- 1) that it could not by the exercise of reasonable diligence have adduced the evidence in time;
- 2) the evidence must be material weighty and practically conclusive;
- 3) the prejudice to the other party must be considered. As **Wessels CJ** said in **Colman v Dunbar** 1933 AD 141 at 162 'If the conditions have so changed that the fresh evidence will prejudice the opposite party, the Court will not grant the application....Thus if the witnesses of the opposite party have been scattered and cannot be brought back to refute the fresh evidence, or to explain their own evidence in the light of the fresh evidence, the Court will not grant the application'.

In considering such an application, the Court will take account of the principle of finality **Wessels CJ** said in **Colman v Dunbar**, supra at 161 set it out thus: 'It is essential that there should be finality to a trial and therefore if the suitor elects to stand by the evidence which he adduces, he should not be allowed to adduce further evidence except in exceptional circumstances. To allow fresh evidence on the point which calls in question evidence already led would necessitate a re-hearing of the witnesses whose evidence is questioned, so as to give them an opportunity of answering the fresh evidence. This means that the case will be largely re-opened which militates against finality'. See also *Butler and Finsen* 287-289.

In order to apply these tests to the present dispute it is necessary to examine, albeit

briefly, the essential features of the dispute as they were decided by the arbitrator. Applicant's case essential turned on the contention that a valid and binding agreement of sale had been entered into by the parties in terms of which, respondent had agreed to buy applicant's business. It appears that applicant had acquired a business which had been owned by a company named Modatex (Pty) Ltd which was liquidated in September 1998. In October 1998 applicant bought the plant and equipment from the liquidator and resuscitated the business, which he called Ex Modatex.

Fundamental to the applicant's cause of action was that on 7 December 1998 respondent made a written offer to buy the business (Ex Modatex) from applicant. The offer stipulated that applicant had to accept the offer in writing which he duly did on 9 December 1998. At all times during the negotiations applicant acted personally whereas respondent was represented by one Moti Brin. Brin in turn was represented by Terry van der Poel. Van der Poel, assisted by his wife, operated a business under the name Palcape, being a sales agent for more than one concern involved in the textile industry. The material term of the contract was that respondent would purchase the business for R1 m. The payment of the price and transfer of the business would be effected on 1 February 1999. Respondent failed to pay or take delivery of the business by 1 February. On 10 February 1999 Brin informed applicant that respondent would only pay R500 000 for the business. Applicant alleged that respondent had repudiated or breached the terms of the agreement, which repudiation or breach he accepted. Thus, applicant elected to cancel the contract. When applicant finally sold the business to Mr Kay for R300 000 he sought to recover damages in the amount of R700 000 from respondent.

One of the key issues which vexed the arbitrator concerned the question as to whether a valid and binding agreement of sale had been entered into upon the terms alleged by applicant. In the hearing the role of van der Poel, who acted on behalf of respondent, was of great importance. A reading of the arbitration proceedings reveals that respondent's defence changed from its initial stance. The differences in the stance of respondent notwithstanding it is common cause that Brin conversed on the telephone with van der Poel on 26 November 1996 during which conversation the issue of a purchase price of R1 m (as opposed to the opening figure of R1.6 m) was discussed. An offer of R1 m was made by van der Poel to Coetzee which the latter accepted. This formed the basis of the contract. According to Brin his instruction to van der Poel was that this offer would represent no more than "the intention to do business."

The role of van der Poel was important to the finding of the arbitrator and the appeal arbitrators.. In the appeal arbitration, the issue of what occurred on 26 November 1998 is discussed thus: 'If Brin's version on what happened on 26 November 1998 were to be accepted as being correct, it would necessarily mean that van der Poel, and probably also Coetzee, perpetrated a blatant fraud on Brin and Paltex. There is really no room for an honest misunderstanding. Indeed in evidence Brin suggested that Coetzee and van der Poel had tried to 'set him up'. There is no basis for such a finding. Apart from the consideration that the court does not easily conclude that a party or person has been

guilty of fraud, it seems so unlikely that van der Poel or Coetzee could have thought that in all the circumstances they could get away with such a fraud. It is true that Coetzee and van der Poel were long standing friends and that they both stood to gain from a deal being struck from the sale of Modatex, but van der Poel could only benefit if the sale of Modatex was a genuine one. He could hardly expect Brin to honour a so-called deal which was conceived in order to defraud him (Brin). Moreover van der Poel was an agent for Paltex and, as the letter of 17 November 1998 indicates, harboured a sense of allegiance towards Paltex.'

Mackness' affidavits must now be read within this context. In his first affidavit on 10 January 2002 he states as follows:

- '4. Given what was related to me by van der Poel from time to time, it was clear to me that what he conveyed to me as being the nature and substance of his negotiations with the Applicant did not accord with his actions and with what had actually transpired nor for that matter with the factual findings of the arbitration of which I am aware.
- 5 In this regard and more particularly, I point out firstly the submission of the alleged written offer by Van der Poel to the Applicant on Respondent's alleged behalf, and secondly without any reference to an inspection of the relevant plan and machinery, infers in the light of what he had told me earlier that there may have been a willful misrepresentation to Mr Moti Brin of his state of mind and intention amounting possibly to fraud and/or a collusion on his part and/or that of the Applicant, ultimately to the detriment of the Respondent.
- 6 Such inference is furthermore possible when one considers that, having regard to what Van der Poel had told me, on the Applicant's version that Van der Poel had at all material times acted as the Respondent's agent as aforesaid, Van der Poel's conduct may well have amounted to both the making of a secret profit by him and he and the Applicant profiting financially from the purported conclusion of an

agreement between Applicant and Respondent’.

On 11 February 2002 Mackness deposed to a further affidavit in which he stated that he had joined respondent in July 1998 as the marketing manager with responsibility for the overseeing of the marketing and sales of the company. He first met Van der Poel in August 1998 at which time Van der Poel was a sales agent and representative of respondent in Cape Town. They struck up a friendship.

Mackness then describes the following series of conversations which he had with Van der Poel:

- ‘5. In the latter part of 1998 Van der Poel told me that he had spoken to Moti Brinregarding the possibility of looking at a joint venture in a printing business.

He said that Moti Brin had expressed an interest in doing so because it would enable Paltex to have the option of selling printed fabric to the market place albeit a separate entity entirely and with Van der Poel’s knowledge and experience of commission printing to the local market sounded quite interesting.
6. Van der Poel previously told me that he was concerned that Ital Print would not survive due to being under-financed and management problems and that he needed to secure his future with something more stable....
- 7,2 In about November 1998 Van der Poel told me that his friend Clive Coetzee had recently purchased a printing company and that he may be open to offers as printing was not his expertise. He said that Coetzee had approached him to see if he was interested in running the sales side for him, but he said that Coetzee was a close friend of his for over 20 years and it wasn’t the right thing to do.....
8. A few days later Van der Poel told me that he had spoken to Coetzee and that he was open to offers. Van der Poel gave me an indication that a possible price would be around R1,800,000...He said that he had spoken to Moti Brin about the two

possibilities and Moti Brin had asked van der Poel to produce some information.....

9. He told me later that he had submitted the information to Moti Brin that had been requested and Van der Poel said that Moti Brin was very keen....
11. At the time he told me in confidence “as a friend” that he was going to make a substantial sum of money out of the sale of Modatex. He explained that Coetzee had purchased the plant and business and bought a stenter and the whole deal stood him at around R300 000. He added that he agreed with Coetzee that they would split any profit over and above the initial purchase price 50/50. Therefore if they agreed a final purchase price with Moti Brin of a R1,000,000 or R1,200,000 van der Poel stood to profit out of the deal in the region of R350,000 or R450,000. In effect his 20% stake in the new venture will be for free and it would leave him with additional cash in the region of R150,000 or R210,000.
12. I spoke to van der Poel again in early December 1998 and he said that he was going to push Moti Brin to make a decision otherwise he would miss out on the opportunity. He later confirmed to me that he spoken to Moti Brin telephonically in the presence of Coetzee and negotiated an offer over the phone and agreed to pay a purchase price of R1,000,000 I asked van der Poel how he could get Moti Brin to make an offer at a figure of R1,000,000 for a plant in a business which he had never seen. Van der Poel said that the offer was subject to a plant and machinery inspection by Moti Brin’s engineer that would take place in January 1999. Van der Poel was delighted that he had concluded the deal.....
15. At a later stage van der Poel told me that he had received feed-back from Moti Brin

and that the engineer's report was not good and that he stated that there would be a large amount of money to be spent to bring the plant and machinery up to scratch."

Mackness then explained why it took him so long to come forward with this information:

18 'I was aware of legal proceedings that were taking place in Coetzee's case. I was not involved in the case at any time. I was not a witness in the case, nor was I expected to be but with the information that van der Poel had given me, I was sure that van der Poel's case was no good. I do not know if my friendship with van der Poel was known to the Respondent.

19 At about the beginning of December 2001 during his visit to Cape Town Moti Brin happened to mention to me that Coetzee had won the case. I expressed surprise and during the ensuing discussion told him of my conversations with van der Poel. In the course thereof I told him that according to van der Poel he had stood to obtain from Coetzee 50% of the latter profit on the sale, by agreement between them. Moti Brin expressed shock to me in his discovery that van der Poel had stood to make a profit at the expense of the respondent and that van der Poel had a profit sharing agreement with Coetzee. Moti Brin then requested me to convey this information to respondent's legal representatives which I subsequently did do.

20 At the time of my discussion with van der Poel I did not reflect upon the propriety of any of his conduct as he described to me and it did not occur to me that I ought

to convey any of this information to Moti Brin or the respondent. I assumed that it was known to them and it did not occur to me that van der Poel and/or the applicant would not reveal this to them or in the proceedings.

- 22 It was only when Moti Brin had been told of the loss of the case that I realised the necessity for me to reveal what van der Poel had communicated to me, as set out above in this affidavit of mine.’

Mr Wulfsohn submitted that this evidence, if properly proved, would be practically conclusive of the case. The promise by applicant to van der Poel, as agent of respondent, and the applicant’s non disclosure thereof to respondent as well as the intention of van der Poel to ‘push’ Brin into negotiation would constitute material facts pertaining to the dispute. On this version, the purpose of the bribe would have been to influence the agent van der Poel who would in turn have influenced his principal, being respondent. The result would then be that respondent would have been entitled to cancel the contract.

In **Extel Industrial (Pty) Ltd and Another v Crown Mills (Pty) Ltd** 1999 (2) SA 719 (SCA) at 729 – 730, the court distinguished between three contractual situations with regard to bribery, namely

- i) the agreement of bribery itself which is void, ab initio
- ii) the particular transaction contemplated by the bribery agreement and which is concluded as a direct and immediate result thereof, and
- iii) the contractual relationship which is established as a direct result of the bribery and which engenders further agreements, one or more of which become the subject matter of the suit.’

Were Mackness’ evidence to be proved correct, the transaction in the present dispute would fall into the third category. Respondent as the innocent principal would have an election on the basis of the contract, if it tenders ‘to restore which he has received under the contract or, if it is unable to do so through no fault of its own, if it tenders

compensation in lieu thereof'. **Extel** , supra at 730 I – 731 A.

Mr Wulfsohn then proceeded to deal with the problem that Mr Mackness' evidence was hearsay evidence which, as a general rule, would not be admissible. He sought to argue that such evidence fell under the exception in terms of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1998 which provides that, subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at a criminal or civil proceedings, unless the court having regard to –

- i) the nature of the proceedings;
- ii) the nature of the evidence;
- iii) the purpose for which the evidence is tendered;
- iv) the probative value of the evidence;
- v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
- vi) any prejudice to a party which the admission of such evidence might entail;
- vii) any other factor which should, in the opinion of the court be taken into account

is of the opinion that such evidence should be admitted in the interest of justice.

Mr Wulfsohn submitted that the reason why no evidence had been given by van der Poel was that the latter would be unlikely to wish to incriminate himself. He contended that Mackness' evidence would have considerable probative value in that decisions made by Brin were adopted on the strength of van der Poel's 'information'. Thus the context in which the contracts were entered into read together with Mackness' evidence would provide a clear background as to the way in which van der Poel improperly and illegally used his influence to persuade Brin to contract with applicant.

Mr Wulfsohn submitted that respondent had made a *prima facie* case entitling it to the benefit of an oral hearing on the admissibility of such hearsay evidence which, if admitted, would be weighty because it would enable respondent to cancel the whole of the sale agreement, in which case respondent would not be obliged to pay any damages to applicant.

Regarding the question of reasonable diligence on the part of respondent, Mr Wulfsohn submitted that it would have been unreasonable to expect respondent to have searched for unknown facts of an unknown issue from an unknown witness at an unknown place or time. Respondent could not reasonably have thought of looking for possible evidence of an agreement of a bribe when, the very purpose of the bribe was to ensure that the person purporting to act on behalf of the respondent, had effectively acted as 'a double agent'. Relying on *dicta* in **Oosthuizen v Stanley** 1938 AD 332 at 333 and **Colman v Dunbar**, supra at 162 Mr Wulfsohn submitted that the evidence sought to be admitted must be 'weighty in the sense that if the evidence is tendered and presumably was believed, it would be practically conclusive of the case. Mackness' evidence would reveal in particular that van der Poel and applicant had entered into a contract of bribery' in order to ensure that the contract of sale between applicant and respondent was concluded.

Mr Tredoux submitted that there was no display of reasonable diligence on the part of respondent. In analysing the two Mackness affidavits he submitted that it was highly unlikely that the issues raised by Mackness had not been canvassed earlier with Brin and other members of respondent. Mackness occupied a senior managerial position with respondent in Cape Town. The arbitration had run for a week. It required the presence of two directors of respondent and even the technician Mr Pandelli had attended. Hence had Mackness followed the matter he would know something about the case. Indeed, on his own version, he was aware of these legal proceedings. He had ventured the opinion that 'I was sure that van der Poel's case was no good'. Notwithstanding Mackness' position in plaintiff's organisation and his knowledge of the arbitration proceedings, he had not mentioned anything of his conversations with van der Poel to any member of respondent until well after the appeal arbitration had been decided against respondent. Mr Tredoux submitted that on the basis of this evidence, the fact that Mackness did not at an earlier date take his employers into his confidence was support for the argument that the entire affidavit was no more than a fabrication.

Mr Tredoux submitted that this evidence was neither weighty nor material. He attacked the two versions of events which had been set out by Mackness in his two affidavits of 10 January and 11 February. On 10 January Mackness contented himself with the allegation that 'van der Poel's conduct may well have amounted to both the making of a secret profit by him and he and the applicant profited financially from the purported inclusion of an agreement between applicant and respondent'. Less than three months later Mackness was more confident and alleged now that a secret profit had been made by van der Poel which amounted to 50% of the entire profit enjoyed by applicant from the content with respondent. Respondent also raised questions about why van der Poel, were he to have entered into these nefarious activities with applicant, would have wanted to confide in someone who was a senior employee in the very organisation which van der Poel had sought to defraud.

In examining the evidence of Mackness, Mr Tredoux raised a number of troubling

aspects with regard to this testimony. According to the affidavit of 11 February, Mackness alleges that 'I spoke to van der Poel again in early December 1998 and he said that he was going to push Moti Brin to make a decision otherwise he would miss out on the opportunity. He later confirmed to me that he had spoken to Moti Brin telephonically in the presence of Coetzee and negotiated an offer over the phone and agreed to pay a purchase price of R1,000,000'. On evidence which remained uncontested during the arbitration proceedings, Moti Brin's last day at respondent's offices was 26 November 1998 before he flew to Tel Aviv and thereafter to the United States of America. According to Mackness' version further conversations took place between van der Poel and Brin with regard to concluding the transaction in early December 1998. In his evidence before the arbitration tribunal Brin testified to the effect that an oral agreement had been concluded on 26 November 1998 in which van der Poel had played a role.

According to Mr Tredoux the dates employed by Mackness were contradicted by the objective facts placed before the arbitrator. Mr Tredoux sought to explain this discrepancy by referring to annexures PC 1 and PC 2 to the particulars of claim. PC 1 constituted a letter written by van der Poel to applicant confirming the offer to purchase. This letter was written on 7 December 1998. PC 2 consisted of a letter written by applicant to van der Poel accepting the offer as at 9 December 1998. In short, the conversations which Mackness alleged to have conducted with van der Poel concerning the latter 'pushing' Moti Brin to make a decision and then finally negotiating a R1,000,000 offer with Brin subject to an inspection accorded with the written correspondence. The evidence which was accepted in the Tribunal was that an agreement had been concluded on 26 November 1998, albeit in an oral form. The dates mentioned in Mackness' affidavit appeared to overlook the fact that the agreement had been concluded before the dates reflected upon the correspondence in PC 1 and PC 2. This raised further doubts as to the veracity of the account set out by Mackness in his affidavits.

Mr Wulfsohn sought to explain Mackness' inadequate recollection of dates by suggesting that when the conversations took place between van der Poel and himself, the latter could not have been expected to have recalled the exact date of each of the meetings. Mackness had not expected litigation to arise at that stage. Hence he would have no particular reason to recollect the specific dates of each of the conversations between himself and van der Poel. When Mackness refers to 'early December 1998', he did not base this date on a diarised note. He simply relied on memory when he set out these dates in his affidavit. Accordingly, the conversations mentioned by Mackness could have taken place in November 1998 which is close enough to fall within the objective evidence placed before the arbitrator.

In assessing whether the evidence sought to be placed before an arbitrator in terms of such an application should be heard, the test cannot simply be reduced to a conclusion that the evidence is material, weighty and practically conclusive by a cursory examination of the supporting affidavits. The court is required to examine the content of the evidence which respondent seeks to have heard by the arbitrator. In balancing the

need for finality against fairness to the losing litigant who wishes to appeal, the court is entitled to examine the content of such evidence as described in the affidavits placed before it to see whether such evidence presumably could be believed. In other words, as **Holmes JA** held in **S v De Jager** 1965(2) SA 612(A) at 613 D ‘There should be a **prima facie** likelihood of the truth of the evidence’. In the assessment of evidence upon affidavit, **Colman J** said in **Metallurgical & Commercial Consultants (Pty) Ltd v Metal Sales (Pty) Ltd** 1971(2) SA 388(W) at 390 F-G ‘[a]n assertion or a denial which seems very probable or improbable on a reading of a set of affidavits often takes on a different colour when the veracity of the person who has made it is tested by cross-examination’.

In this case, the assessment does not concern a denial or an assertion but a detailed account of conduct. Were the only difficulty in Mr Mackness’ accounts to be that of alleged mistakes regarding the dates of conversations which he conducted with Mr van der Poel, then respondents may well have been justified in their contention that not too much weight must be given to an inability to specifically recall an event which occurred over three years ago. However there are significant additional difficulties with regard to the version placed before this Court in the two affidavits to which Mr Mackness deposed.

The first affidavit deposed to by Mackness contains a tentative suggestion that van der Poel’s conduct may have amounted to the making of a secret profit by him, notwithstanding that, at this stage Mackness must have known of the entire sequence of events surrounding van der Poel. However without any subsequent explanation, he then provided but a skeletal account of his knowledge of van der Poel’s conduct. Mr Tredoux observed that on the basis of this affidavit alone, respondents could never have succeeded in an application for remittal of evidence. Only in his affidavit of 11 February does Mr Mackness set out an account which, were it proved to be correct, could constitute the kind of material and weighty evidence which could be practically conclusive of the case. Mr Wulfsohn attempted to explain Mackness’ first affidavit by suggesting that both he and respondent’s attorney Mr Karp were extremely cautious at this point in the formulation of these allegations that van der Poel or applicant had committed any crime. No explanation is given as to how this hesitant conduct transmogrified into the confidence of the version as set out in the affidavit of 11 February.

Mackness was a senior employee of respondent. If his evidence as contained in his second affidavit is to be believed, it meant that he would have said nothing of his conversations with van der Poel, notwithstanding that he had known of the importance of the arbitration and that he held firm views as to the nature of the case. On his version he said nothing about these conversations, even after his employer lost the arbitration hearing. He said nothing after respondent lost its appeal in before the appeal arbitrators. His evidence that van der Poel was his friend and was prepared to tell him ‘in confidence’ that he was engaged in criminal activity to the detriment of Mackness’ employer stretches credibility. On this version Mr van der Poel must have had immense confidence in Mackness to reveal such a damning secret to a senior employee of the very entity

which had suffered the consequences of van der Poel's nefarious act.

Mr Wulfsohn urged that these difficulties could be dealt with under cross examination before the arbitrator. Were that to be a complete answer to the problem, a court would have to accept affidavit evidence on face value, grant each application for a hearing for further evidence where the applicant was sufficiently astute to construct an affidavit to fall within the scope of being material, weighty and practically conclusive. By contrast, it is incumbent on the court to examine the affidavits which support such an application in order to satisfy itself that there was a **prima facie** likelihood of the truth of such evidence.

The difficulties inherent in the evidence proffered by Mackness are compounded by the arbitrator's negative credibility findings of all the respondent's witnesses. For example, Mr Brin was described by the arbitrators in the following devastating terms: 'Cross examination was hardly necessary to discredit Brin'. In the case of Mr Pandelli she said 'I have no doubt that he lied in claiming to have inspected the under blanket of the Zimmer'.

In summary, I find that the requirements to justify an exercise of a discretion to order that the award be remitted so that additional evidence should be heard have not been met. When the affidavits of Mackness are examined within the context of the evidence placed before the arbitrators as well as the history and nature of the production of these affidavits, respondent has not shown that they contain evidence, which is material, weighty and practically conclusive. To allow such evidence would cause prejudice to an applicant who has been forced to an arbitration hearing and an appeal hearing and notwithstanding two victories, still face considerable delay in attempting to obtain its just deserts, namely that the award be executed.

In the context of the analysis undertaken of Mackness' evidence, it is now possible to return to the question of the time barring of respondent's application. In my view Mackness' evidence does not support a case on the basis of corruption. Corruption is defined in the **Shorter Oxford English Dictionary, inter alia**, as 'perversion of integrity by bribery or favour'. In the context of s33(2) of the Act the word 'corruption' must be taken to refer to the manner in which the award was obtained; that is by 'perversion of integrity and by bribery or favour' of the person giving the award. Were the concept to extend to evidence given by a witness which proved to be false, a vast range of challenges would fall within the three year period where manifestly the extended period was intended for a restrictive class of cases. In my view that class of behaviour relates to the manner in which the award was procured rather than to evidence given to an arbitrator who has acted with the highest standard of integrity.

The question therefore arises to whether an application of s38 of the Act is appropriate to extend the six week time period. The exercise of this power depends upon good cause being shown by respondent. Even if the evidence is weighty and material, respondent has

not provided a complete account as to the delays; for much of the delay there is, as I noted above, simply no explanation. Thus even if I am wrong on the principle finding, an extension should not be granted and the counter-application is thus time barred.

For these reasons the following order is made:

1. The counter application of respondent is dismissed.
2. The award handed down by the Hon. Ms Justice Van den Heever on 9 March 2001 and the award made on the arbitration appeal by the Hon. Messrs Justice Corbett and Grosskopf on 31 October 2001 are made orders of this Court.
3. Respondent is ordered to pay the costs of the application as well as the costs incurred by applicant in respect of his opposition to the counter-application.

DAVIS J