NO ORDINARY HEARSAY!

A Discussion of *Minister of Police v RM M, Safety and Security Sectoral Bargaining Council and M Smith NO* (2017) 38 ILJ 402 (LC)

1 Introduction

One is constantly reminded not to emulate the criminal courts when conducting disciplinary enquiries, nor, for that matter, labour dispute resolution arbitrations.

The *locus classicus* dealing with the appropriate manner to conduct disciplinary enquiries is the *Avril Elizabeth Home for the Mentally Handicapped v CCMA* ([2006] 9 BLLR 833 (LC)) case. It was in this case, which has been quoted and followed innumerable times (a significant recent case being that of *BEMAWU v SABC* [2016] ZALCJHB 74 (2 March 2016)), that the court emphasised item 4(1) of the Code of Good Practice: Dismissal (Schedule 8, Labour Relations Act 66 of 1995) which provides that there does not have to be a formal disciplinary enquiry. The court indicated that the approach outlined in the code was a "significant and fundamental" departure from the criminal justice model, which "likened a workplace disciplinary enquiry to a criminal trial" (*Avril Elizabeth Home for the Mentally Handicapped v CCMA supra* par 10).

It is also, however well-established that arbitrators, and disciplinary chairpersons, must follow basic rules of fair procedure and evidence.

This tension between avoiding over-formality while remaining true to basic rules of evidence and procedure is again evident in a recent case (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council* (2017) 38 ILJ 402 (LC)), which deals with the proper manner to treat hearsay evidence in a labour dispute resolution arbitration.

The case sends the message that if the proceedings of a disciplinary enquiry are conducted with a relatively high degree of formality, and fairly scrupulous adherence to what might be described as the criminal justice model – then one might be able to create a *prima facie* case against the dismissed employee at the *de novo* arbitration hearing while avoiding the re-calling of the witnesses – and instead by simply tendering the (hearsay) record of the disciplinary proceedings. The case also contributes to the jurisprudence seeking to protect vulnerable classes of witness (such as children, *in casu*) by canvassing means by which such witnesses may be spared having to repeatedly testify to traumatic events.

2 Background

The law governing hearsay evidence in civil and criminal courts (but not Admiralty Courts in terms of the Admiralty Jurisdiction Regulation Act 105 of 1983, which admits hearsay evidence subject to such directions and conditions as the court sees fit) is section 3 of the Law of Evidence Amendment Act (45 of 1988). According to section 3(4), hearsay evidence is evidence where the credibility depends on a person who is not giving evidence before the court. Thus, the reliability of the evidence does not depend on the truthfulness of the witness before the court. It depends instead on the accuracy of the information provided to the witness by the third party, who is not before the presiding officer, and whose credibility cannot be assessed through the usual method of cross-examination. This is the main objection to the admission of hearsay evidence.

Hearsay evidence can be oral or it can be documentary. A common example of documentary hearsay in the context of labour arbitrations is a written transcript of disciplinary proceedings. Such documentary evidence is hearsay evidence, because its probative value depends on the credibility of the person who signed the affidavit, or transcribed the proceedings of the disciplinary enquiry. That is, the reliability of the transcript depends on whether the decision-maker believes that it is, in fact, a full and accurate record of the proceedings – and that depends on whether the transcriber (or anyone else present at the enquiry) can testify that it is.

The current position in terms of section 3 is that hearsay evidence will be admissible in three circumstances:

Firstly, the parties may consent to its admission (s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988).

Secondly, if the person on whose credibility the probative value of the hearsay depends is going to testify at a later stage in the proceedings, the hearsay will be provisionally admitted, and the witness must then confirm the contents of the previous hearsay evidence on oath (s 3(1)(b) of Act 45 of 1988).

Thirdly, the court must admit hearsay evidence where the interests of justice require this. Whether this is so must be determined with reference to the list of factors set out in section 3(1)(c)(i)–(vii) of the Law of Evidence Amendment Act. There are seven (7) factors, which are listed as follows:

(i) the nature of the proceedings;

Arbitrations in terms of the Labour Relations Act (66 of 1995) should not be conducted as formally as criminal or civil trials – as discussed in paragraph three (3) below. Consequently, the arbitrator has a wide discretion to admit hearsay evidence where the interests of justice require.

(ii) the nature of the evidence;

This factor is primarily concerned with the characterisation of the hearsay evidence under consideration (*POPCRU obo Maseko v Department of Correctional Services* [2011] 2 BLLR 450 (LC) par 69).

Relevant considerations would include, for example, whether the evidence was direct or circumstantial evidence and whether the hearsay was first- or second-hand hearsay. Generally, first-hand hearsay is more reliable than second- or third-hand hearsay.

(iii) the purpose for which the evidence is tendered;

This requires considering whether the evidence is being introduced to play a central, decisive role in the proceedings or whether it is to play a lesser role. In the case of *S v Ramavhale* ((1996) 1 SACR 639 (A)) the Appellate Division held that "a judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there are compelling justifications for doing so." (*S v Ramavhale supra* 649 a−e).

Compelling justifications would include "pointers to its truthfulness", "objective guarantees of its reliability", "high probative value", "strong corroboration" of the hearsay and a "powerful interlinking" of all the evidence (*S v Ndhlovu* (2002) 2 SACR 325 (SCA) par 44−47).

(iv) the probative value of the evidence;

This consideration entails assessing whether the hearsay will prove relevant evidence in a reliable manner (*POPCRU obo Maseko v Department of Correctional Services supra* par 76).

(v) the reason the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

Common sense dictates that where the original declarant is easily available, and there is no rational explanation for not calling him as a witness, one would be entitled to be suspicious of reliance on the hearsay evidence in lieu of calling the declarant to testify.

(vi) any prejudice to a party, which the admission of such evidence might entail;

"Prejudice" in this context means procedural prejudice, in the sense that the party against whom the hearsay is tendered cannot cross-examine the original declarant. Prejudice will always be present when hearsay is admitted, but "it must be weighed against the reliability of the hearsay in deciding whether, despite the inevitable prejudice, the interests of justice require its admission" (*S v Ndhlovu supra* 342).

In the case of *POPCRU obo Maseko v Department of Correctional Services* (*supra* par 69), the learned judge explained further that:

> "The suggestion that the prejudice in question might include the disadvantage ensuing from the hearsay being accorded its just evidential weight once admitted must be discountenanced… A just verdict, based on evidence admitted because the interests of justice require it, cannot constitute 'prejudice'… Where the interests of justice require the admission of hearsay, the resultant strengthening of the opposing case cannot count as prejudice for statutory purposes since in weighing the interests of justice the court must already have concluded that the reliability of the evidence is such that its admission is necessary and justified. If these requisites are fulfilled, the very fact that the hearsay justifiably strengthens the proponent's case warrants its admission, since its omission would run counter to the interests of justice." (*POPCRU obo Maseko v Department of Correctional Services supra* par 50).

(vii) any other relevant factor.

In exercising discretion in terms of section 3 of the Law of Evidence Amendment Act, the old common-law exceptions to the exclusion of hearsay evidence are relevant in that it has been decided that a court should not lightly decide to exclude evidence, which has traditionally been admissible in terms of the common-law (*Mnyama v Gxalaba* (1990) 1 SA 650 (C)). One of the common-law exceptions to the exclusion of hearsay evidence is that the evidence of a witness in former proceedings is admissible in subsequent civil proceedings between the same parties that involve substantially the same issues, provided the witness is unavailable to testify and the opposition has had an opportunity to cross-examine the witness (Schmidt and Zeffertt "Evidence" updated by DP Van der Merwe 2005 2 *LAWSA* IX par 521).

In *Maseko*'s case, the witnesses who provided the hearsay affidavits had testified in person at the disciplinary enquiry of the applicant and had been cross-examined by him. The issues were exactly the same as in the arbitration, and there was an adequate explanation for not calling the original sources of the evidence at the later proceedings. These were regarded as strong reasons for admitting the evidence (*POPCRU obo Maseko v Department of Correctional Services supra* par 65).

3 Applicability to Labour Dispute Resolution

Arbitration proceedings, in terms of the Labour Relations Act (66 of 1995), are not equivalent to cases decided in the civil and criminal courts. Rather, they are characterised by the fact that disputes are intended to be resolved quickly and through relatively simple and non-technical procedures (*Edcon Ltd v Pillemer NO* (2008) 29 ILJ 614 (LAC) 15; *PPWAWU v Commissioner: CCMA (Port Elizabeth)* [1998] 5 BLLR 499 (LC)). This is one of the chief objectives of the Labour Relations Act and this approach is reflected in section 138 of the Act, which requires an arbitrator to conduct the proceedings with a minimum of legal formalities. In the case of *Pep Stores Pty Ltd v Laka NO* ([1998] 9 BLLR 952 (LC)) the court explained that section 138 of the Labour Relations Act advocates an arbitration process that is simple, less formalistic and less legalistic with curtailed legal representation. In the case of *Afrox Ltd v Laka* ([1999] 5 BLLR 467 (LC)) the court held that there may be circumstances in which the ordinary rules relating to the admissibility of evidence might be relaxed. In the case of *Naraindath D v Commission for Conciliation, Mediation and Arbitration* ((2000) 21 ILJ 1151 (LC)) the court went so far as to hold that an excessive concern with legalistic formalities could constitute a reviewable irregularity.

On the other hand, however, arbitration awards are regularly set aside on the basis that the arbitrator failed to follow the rules of evidence and procedure. See, for example, the case of *Karan Beef (Pty) Ltd v Mbovane NO* ((2008) 29 ILJ 2959 (LC)) where an arbitrator's award was successfully reviewed on the basis that the arbitrator had not complied with the rules of

evidence. She had based her decision on a transcript of the disciplinary enquiry in the absence of consent of the parties. Likewise, in the case of *Char Technology (Pty) v Mnisi* ([2000] ZALC 13 (16 March 2000)) where the Labour Court took the view that documentary evidence that is not proved (not authenticated) at the arbitration, nor submitted in terms of an agreement with the other side, would be inadmissible and could not be taken into account in the proceedings. The arbitrator's award was successfully reviewed on this basis.

It has been recently stated by the Labour Appeal Court that this also applies in labour proceedings. The Labour Appeal Court has accepted that section 3 of the Law of Evidence Amendment Act should be applied in determining whether to admit hearsay evidence in statutory arbitration proceedings in at least two cases (*Southern Sun Hotels (Pty) Ltd v South African Commercial Catering and Allied Workers Union* (2000) 21 ILJ 1315 (LAC); *Edcon Ltd v Pillermer NO supra*). This is undoubtedly correct. This position is supported by the fact that section 3(1)(c) of the Law of Evidence Amendment Act requires the decision-maker to have regard to the nature of the proceedings in determining whether the admission of the evidence is in the interests of justice. It is, however, important to note that in applying the section, arbitrators are bound not to "slavishly" follow precedent established in the criminal and civil courts, as this would "stultify" the efficient resolution of disputes (*Naraindath D v Commission for Conciliation, Mediation and Arbitration supra* par 26; *Le Monde Luggage cc t/a Pakwells Petje v Dunn NO* (2007) 28 ILJ 2238 (LAC) par 18). An arbitrator may not, however, simply ignore accepted principles. Any deviation from the rules of evidence must be justified in the light of the circumstances of the arbitration and cogent reasons for doing so must be given (*Chemical Workers Union v Ebony SA* (2000) 21 ILJ 2640 (LC); *Edcon Ltd v Pillemer NO* (2008) 29 ILJ 614 (LAC)).

The general trend in labour arbitrations is for arbitrators to be quite willing to find that the interests of justice require that the hearsay evidence be admitted – however, they then attach minimal weight to it because of its supposed unreliability.

The case under discussion has now identified that hearsay evidence, which is of a certain type, is in fact not unreliable and can safely be relied upon and given significant (even decisive) weight.

4 Facts

In the recent matter of *Minister of Police v RM M Safety and Security Sectoral Bargaining Council* ((2017) 38 ILJ 402 (LC)), the employee was a warrant officer in the South African Police Services (SAPS), who was accused of sexually violating his minor child (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 1). The SAPS considered that if this was true, he was no longer suitable to hold office in the SAPS. He was charged with prejudicing the administration, discipline and efficiency of the SAPS and of contravening the SAPS code of conduct (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council*

supra par 2). The internal disciplinary process ran concurrently with the criminal proceedings. At the disciplinary enquiry, direct evidence regarding the sexual crimes was led by a number of witnesses, including the victim, K, and two other occupants of the house where the sexual assaults occurred (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 3). The employee had a fair chance to state his defence and to question the witnesses and was represented by a union official (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 3). The proceedings were conducted entirely fairly and everything was electronically recorded (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 4). The employee was found guilty and consequently dismissed after a proper consideration of mitigating and aggravating factors (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 4).

The fairness of the dismissal was challenged in an internal appeal, which was unsuccessful; and then at arbitration at the Safety and Security Sectoral Bargaining Council (SSSBC) (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 5).

At this point, the witnesses stopped cooperating with the SAPS. The SAPS requested subpoenas for K and the two other witnesses to attend the arbitration but they could not be located for the subpoenas to be served (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 5). At one point, the SAPS made telephonic contact with K who refused to divulge her contact details and said she would not testify in further proceedings. The employee attempted to argue that this refusal to cooperate must have been an indication that she was fabricating her version and did not want to be caught out. However, the judge noted that in fact, K gave two good reasons for her stance. She said she "is nie meer bereid om deur hierdie trauma deur te gaan nie" and that she was currently undergoing therapy, which "would be upset if she opens old wounds again" (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 48).

The employer was therefore only able to produce the hearsay evidence in the form of the transcript of the evidence at the disciplinary enquiry to prove the fairness of the dismissal. It applied to have the transcripts admitted as hearsay evidence in terms of section 3 of the Law of Evidence Amendment Act, in the interests of justice (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 6).

The commissioner admitted the transcripts as hearsay evidence in the interests of justice but then afforded the evidence minimal value since the witnesses were not present and could therefore not be cross-examined by the employee and the arbitration was supposed to be a hearing *de novo*. The commissioner also noted that the evidence at the internal enquiry was not taken on oath. The dismissal was found to be unfair for a lack of reliable evidence and the employee was reinstated (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 7, 28−30).

The employer was dissatisfied with the outcome and referred the matter to the Labour Court.

5 Judgment

The court analysed the evidence of the misconduct – the rapes of K (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 8−23); and then turned to examine the manner in which the internal enquiry had been conducted. The Labour Court noted that the transcripts revealed that the presiding officer had conducted the hearing in a "tight, fair and professional manner". It noted that the employee's representative had been given ample time to prepare and a fair opportunity to cross-examine the employee's accusers. She observed that "the representative had asked relevant and probing questions" of the witnesses, as had the chairperson of the enquiry. She concluded that "by the time each witness was excused, their version was clear, thoroughly ventilated and tested" (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 24). When the employee testified he was given generous leeway in attempting to flesh out a conspiracy theory against him. He did not challenge the procedural fairness of the disciplinary enquiry at the SSSBC arbitration (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 25).

As regards the fact that the witnesses at the disciplinary enquiry were not sworn in, the judge held that not much turns on this in labour law and that they were clearly aware "that they were expected to truthfully narrate their experiences" (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 26). The proceedings were professionally recorded and transcribed (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 27).

The court held that "since the transcripts were plainly relevant to the issue in dispute and the employer had a good reason for the absence of its original main witnesses" the commissioner was correct in admitting the transcripts as hearsay evidence (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 34).

However, the important question was whether the commissioner had afforded the hearsay evidence enough weight. The commissioner had ruled that the weight was "minimal because there was no other evidence before the SSSBC to substantiate the claims made in the transcript" (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 35). The judge said that she had some sympathy for the approach taken by the commissioner since she had "trod a well-established labour law path in readily admitting the hearsay but not being prepared to ascribe significant weight to it unless the transcripts were corroborated by other pieces of hard evidence making up the factual jigsaw" (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 35).

The court held that just as an error or irregularity in which hearsay evidence is given too much weight, so too may giving hearsay evidence insufficient weight constitute a reviewable irregularity that may render the award reviewable if it has a distorting effect on the award (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 36).

The court held that the commissioner erred in not appreciating that the hearsay evidence before her was no ordinary hearsay evidence (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 37). The record comprised a bi-lateral and comprehensive record of earlier proceedings where the other two witnesses by way of cross-examination corroborated the victim's evidence against the employee; and where the accused's defence was also exposed as implausible (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 37).

The transcripts constituted a comprehensive and reliable record of a prior quasi-judicial encounter between the parties. On top of this, the internal hearing was properly conducted at the time. The transcript did not contain mere allegations but tested allegations and a tested denial. It was exceptionally "strong" hearsay evidence (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 40). The transcripts revealed that at a prior telling the allegations against the employee were reliable and internally consistent and corroborated by two other witnesses (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 38).

The court acknowledged the concern at the unreliability of hearsay evidence because the source of the evidence is not present to be cross-examined but she remarks that "this begs the question: What if the content of the hearsay is a record of the *source* actually being cross-examined on in earlier quasi-judicial proceedings?" (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 41) The judge comments "that the prejudice that the employee is subjected to is limited to being deprived of a second and perhaps different kind of cross-examination of K than earlier performed" (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 42).

The court made it clear that it was not suggesting that transcripts take the place of *viva voce* evidence or that arbitrations should not function as hearings *de novo*. The ratio of the judgment is simply that "in appropriate factual circumstances, a single piece of hearsay, such as the transcript of a properly run disciplinary enquiry, may carry sufficient weight to trigger the duty in the accused employee to rebut the allegations contained in the hearsay" (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 43).

In the court's opinion the transcripts constituted *prima facie* evidence of the employee's wrong-doing, which he chose not to even attempt to rebut at the arbitration (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 43) and which he had not been able to rebut at the internal disciplinary enquiry. The evidentiary burden rested on him. The commissioner's reviewable irregularity was the "failure to appreciate that the transcripts alone established a case of sufficient strength against the employee that his failure to give evidence in rebuttal should have exposed him to a finding of guilt" (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 44).

The Labour Court, therefore, set aside the arbitrator's finding on the basis that the hearsay was sufficiently reliable to warrant a finding that his

dismissal was fair (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 51−52). It found that the arbitration should have unfolded differently – namely that the employee "ought to have been invited to take the stand in rebuttal of the *prima facie* case against him; a case created by the transcripts considered as a whole" (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 51). Therefore, the judge ordered that the arbitration be set down *de novo* by the SSSBC before a different commissioner *Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 52).

The Labour Court provided clear guidelines to assist in determining when a single piece of hearsay, such as the transcript in this situation, may constitute *prima facie* proof of an allegation, saying that it was aware that this was a departure from the way, hearsay evidence was usually weighed (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 45). The court held that the hearsay should:

1. Be contained in a record, which is reliably accurate and complete;
2. Be tendered on the same factual dispute;
3. Be bi-lateral in nature, meaning the hearsay should be a record of all evidence directly tendered by all contending parties;
4. In respect of the allegations, demonstrate internal consistency and some corroboration at the time the hearsay was recorded;
5. Show that various allegations were tested in cross-examination. This did occur in the disciplinary hearing where the alleged victim gave evidence and the accused attempted to discredit same;
6. Must have been generated in procedurally fair and proper circumstances.

6 Conclusion

The judge *in casu* quite correctly observed that the situation the SAPS faced in this case is not unique. The labour dispute resolution system is such, with the arbitration hearing a *viva voce, de novo* hearing, that vulnerable witnesses will usually be required to testify at least twice before an employee's dismissal is confirmed. Once at the internal disciplinary enquiry and then again at the arbitration hearing (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 49). In this case, unusually the vulnerable witness was a child and someone who was not an employee of the employer. Still, one can easily imagine other vulnerable classes of witnesses who one would not want to have to subject to re-opening their old wounds by testifying twice – sexual harassment and discrimination cases spring to mind but so too do cases involving bullying and assault.

She suggested two ways in which the secondary trauma of vulnerable witnesses could be avoided. The first would be where employers made use of the procedure provided for by s 188A of the Labour Relations Act. In effect, the intention of section 188A is that the disciplinary enquiry and the arbitration will be conducted as one process. A neutral person, appointed for

a fee by the CCMA or a bargaining council, will listen to the evidence and will decide what action, if any, may be taken against the employee. The arbitrator must conduct an inquiry and in the light of the evidence presented and by reference to the criteria of fairness in the Labour Relations Act rule as to what action, if any, may be taken against the employee. That ruling may be reviewed as if it was an arbitration award. The employee must consent to the section 188A procedure, and may only do so after having been advised of the allegations against him (unless s/he earns more than the amount prescribed in which case she can consent to the procedure in advance in the contract of employment). The obvious problems with this are that it comes at a price and that the employee must consent to it.

The second way to avoid "trundling reluctant and vulnerable victims out to give evidence all over again" suggested by the judge was

> "for all parties to an internal hearing to ensure that a good record … of a procedurally fair enquiry is created. Should the main original witness not be in a position to testify again at arbitration, the accused employee would, in appropriate factual circumstances, still be under a duty to take the stand to rebut the *prima facie* case against him constituted by the transcript of the internal hearing" (*Minister of Police v RM M Safety and Security Sectoral Bargaining Council supra* par 50).

This judgment is a valuable addition to the jurisprudence regarding hearsay evidence in labour dispute resolution tribunals and also to the body of case law seeking to protect vulnerable witnesses from secondary trauma arising from a legal dispute resolution.

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