IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA161/17

In the matter between:

EXXARO COAL (PTY) LTD **Appellant**

And

GABRIEL CHIPANA **First Respondent**

DONALD NKADIMENG N.O **Second Respondent**

COMMSION FOR CONCILIATION MEDIATION AND ARBITRATION **Third Respondent**

Heard: **23 May 2019**

Delivered: 27 June 2019

Summary: Review of arbitration award made in terms of the Labour relations Act -exclusion of hearsay evidence-ruling made in arbitration award-hearsay evidence not objected to or disallowed when first produced-dealt with as if it was admitted evidence-timing of ruling crucial-to be made when evidence first produced- hearsay inadmissible unless admission consented to or it is in the interest of justice-latter involves the exercise of a discretion-invoking the law requires reasonable accuracy-Misstating the law in those circumstances is a reviewable irregularity-late ruling on admissibility unfair-purported exercise of the discretion by a reviewing or appeal court incapable of curing the fundamental unfairness that occurred in the arbitration proceedings when the evidence been ruled upon was let in unchecked-arbitrator or commissioner not to remain passive when hearsay evidence produced by a party.

Appeal succeeded, matter remitted to the CCMA for a fresh hearing before a different commissioner.

CORAM: Coppin JA, Murphy *et* Savage AJJA

JUDGMENT

COPPIN JA

[1] This is an appeal against the judgment of the Labour Court (Baloyi AJ) in which an application to review and set aside an award of the second respondent ("the commissioner"), declaring the dismissal of the first respondent ("Mr Chipana") by the appellant ("Exxaro") as substantively unfair and reinstating him, was dismissed. Leave to appeal to this Court was granted on petition.

[2] A substantial portion of the evidence produced by Exxaro to prove charges of misconduct against Mr Chipana, at both the disciplinary hearing and subsequent arbitration at the Commission for Conciliation, Mediation and Arbitration ("CCMA"), was essentially hearsay. The commissioner effectively found that the hearsay evidence was to be excluded because it had not been introduced with the consent of Mr Chipana. The Labour Court agreed with the commissioner.

[3] Thus, the main issue raised on appeal concerns the regularity of the commissioner's ruling on the admissibility of the hearsay evidence. This pertains not only to the commissioner's failure to consider whether the evidence was admissible in the interests of justice as contemplated in section 3 of the Law of Evidence Amendment Act [1]("the LEAA"), but also the timing of the commissioner's ruling on the admissibility of the evidence; and the correctness or efficacy of ruling on such admissibility by invoking the provisions of the said section, either at the stage of review, or on appeal. The appeal also concerns the consistency between section 138 of the Labour Relations Act ("the LRA") and rulings by commissioners on admissibility of evidence relying on the rules of evidence applicable in courts of law.

Factual Matrix

[4] Until his dismissal on 14 May 2014 for misconduct, Mr Chipana, a shop steward for the National Union of Mineworkers of South Africa ("NUMSA"), was employed by Exxaro in its human resources department. The misconduct he was charged with related to him, allegedly, selling jobs to members of the public in breach of the disciplinary code that was binding on him.

The charges

[5] The first charge of misconduct was for dishonesty. It was alleged that he was dishonest in that during 2012 he had indicated to a Ms Mange that he was working in human resources at Exarro; and/or that he would assist her to obtain employment for her niece, Ms Thobane at Exxaro; and/or by

[1] Act 45 of 1988.

demanding or soliciting payment of R 3000 and R 2000, respectively, from Ms Mange and/or Ms Thobane; by accepting such payment and then submitting Mr Thobane's curriculum vitae (CV) to his colleague Mr Jiyane for the payment received. As an alternative to the first charge, it was alleged that Mr Chipana misused his position in soliciting or requesting the R 5000 from Ms Mange and/or MsThobane when such payment was not due and payable.

[6] In the second charge, the employer alleged that Mr Chipana was guilty of dishonesty in that he had indicated to a Mr Nong that he would obtain employment for him at Exxaro; in demanding and/or soliciting payment of an amount of R 6000 from Mr Nong; and/or accepting such payment. In the alternative, it was alleged that Mr Chipana had misused his position by soliciting and requesting the payment of R 6000 from Mr Nong when it was not due and payable. In respect of both the charges and the alternatives the charge sheet stated that if any of the charges were proven it would "effectively destroy the trust relationship between the employee and the employer".

The Disciplinary hearing

[7] At the disciplinary hearing, which commenced on 17 April 2014, Exxaro called three witnesses to prove the charges, a Mr Pieter Steyn, senior manager of a forensics auditing team employed by Ernest and Young; Mr Paul Claasen, a colleague of Mr Steyn who assisted in the investigation; and one of the complainants, Ms.Thobane. Ms Mange and Mr Nong were not called as witnesses. Mr Chipana gave evidence in his defence. The evidence of Messrs Steyn and Claasen was essentially hearsay in that they had no first-hand knowledge of Mr Chipana's alleged wrongdoing. In essence, they merely related what they had been told, or what they had heard from others. They also relied on affidavits allegedly made by the complainants. The reason given for the failure to call the two complainants was that they had been intimidated by Mr Chipana. He was found guilty of the main and alternative counts of misconduct and his dismissal was recommended. As already mentioned, Mr Chipana was dismissed by Exxaro on 14 May 2014.

The Arbitration

[8] He referred an unfair dismissal dispute to the CCMA, and after a failed conciliation the matter went to arbitration. There Exxaro relied on a bundle of documents, including the affidavits allegedly made by the complainants, Mr Chipana's official telephone records, and the like. It also called Messrs Steyn and Claasen, to prove that the dismissal was fair, and called a Mr Nyaka to prove that the trust relationship between Mr Chipana and Exxaro had been broken.

[9] Mr Chipana, who was legally represented for a substantial portion of the hearing, gave evidence in his defence and called no other witnesses. The commissioner concluded as follows in his award:

> "6.3 In their closing arguments, both parties admitted that the evidence sought to be relied upon by the respondent was hearsay. While the respondent argued that such evidence was admissible under the Law of Evidence Amendment Act, and in terms of certain Labour Court decisions, the applicant argued for an opposite finding.
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> 6.4 The applicant was accused of bribery, which is a crime in our law. The person giving the bribe and the one receiving it, are co-conspirators in an unlawful act. It would be extremely prejudicial to the person against whom the evidence on affidavit is given, to accept it without testing such evidence through cross-examination.
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> 6.5 The applicant denied any wrongdoing, and there was nothing during his cross-examination that showed that his version was not probably true.
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> 6.6 Hearsay evidence cannot be admitted against a person without his consent, especially where it is not corroborated by independent evidence. This is the law of the land, and disciplinary enquiries are not exempted from the application of the law of evidence. The standard of proof in disciplinary proceedings is the same as that in civil matters, and not something lower than that. The standard must also be observed in arbitration proceedings in the CCMA.
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> 6.7 Once the hearsay evidence against the applicant is excluded, which I hereby do, there remains no shred of evidence in support of the respondent's allegations against him.

> 6.8 This dismissal of the applicant was, accordingly, not for a fair reason within the purview of section 188 of the Act." (Emphasis added).

[10] The commissioner went on to order Mr Chipana's full reinstatement retrospective to the date of his dismissal, with backpay in the amount of R 95,000-00, which was to be paid by Exxaro on or before 31 October 2014.

The Review in the Labour Court

[11] In October 2014 Exxaro brought an application in the Labour Court to review and set aside the commissioner's award and to replace it with an order upholding Mr Chipana's dismissal. Mr Chipana opposed the application and filed an answering affidavit to which Exxaro replied by affidavit. The matter was eventually heard on 4 May 2017 and the Labour Court handed down its judgement on 6 September 2017.

[12] One of the primary challenges raised by Exxaro in respect of the award was the fact that the commissioner had not accepted the hearsay evidence and it argued, in particular, that the commissioner had failed to apply his mind to the provisions of section 3 of the LEAA. It submitted further that the arbitrator had also ignored other evidence, including the affidavits of the 'complainants', the oral evidence given by Messrs Steyn and Claasen, text messages, voice recordings of an alleged conversation between Mr Chipana and Ms Mange, evidence confirming Mr Nong's visit to Mr Chipana's workplace, and a transcript of the disciplinary hearing.

[13] The Labour Court found that the issue before the commissioner was not whether Mr Chipana consented to the admission of the hearsay evidence, but concerned the reasons for Exxaro's failure to call particular witnesses to testify. It held that the commissioner's failure to determine whether there was a good reason for those witnesses' failure to testify did not "ordinarily render the award unreasonable" and that what had to be considered was whether in light of all the material placed before the commissioner, his decision could be said to be one which a reasonable decision-maker could not make[2]. The

[2] See: *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC); (2007) 28 ILJ 2405 (CC) paras 78 and 79.

Labour Court reasoned that the next test to be applied, alongside the "*Sidumo* test"[3], was to ask "whether the irregularity is so gross to such an extent that it was calculated to prejudice the aggrieved party, if so proved the decision is then liable to be set aside". As authority for this additional test the Labour Court referred to a statement in "*Erasmus Superior Court Practice*"[4]. The Labour Court went on to explain that in dealing with this question it also sought guidance from this Court's decision in *Fidelity Cash Management Service v CCMA and Others*[5], where it is pointed out that a reviewing court must bear in mind that interference with the decisions or findings of a commissioner is not justified merely because the reviewing court would come to a different decision, or finding.

[14] The Labour Court then went on to itself determine whether any good reason for the failure of the witnesses to testify was evident from the record. Having referred to, inter alia, the evidence of Messrs Steyn and Claasen and the affidavit of Ms Thobane the Labour Court concluded that there was nothing to indicate that the "alleged intimidation was ongoing" and found that there was "no credible evidence" that the "alleged threat was imminent". The Labour Court further noted that Mr Nong's affidavit contained no allegation of intimidation and finally concluded that "the cumulative effect of all that", irrespective of whether the commissioner's reason for excluding the hearsay evidence was satisfactory, was that Exxaro had "failed to genuinely establish a compelling case for the admission of such evidence".

[15] On the assumption that it may have been wrong in that finding, the Labour Court went on to consider another question, namely, "whether the evidence sought to be admitted was of value toward proving fairness of the dismissal". In answering that question, the Labour Court considered the following – that the content of the affidavits of the complainant was disputed; and if those contents were weighed against Mr Chipana's denial of misconduct and his undisputed version that he had a love relationship with Ms Mange, who did not want to testify – Exxaro's case "was about to crumble for lack of evidence

[3] Ibid.
[4] PE Van Loggerenberg's "*Erasmus Superior Court Practice*" (2nd edition) A2-134.
[5] [2008] 3 BLLR 197 (LAC) para 98.

in rebuttal of his version". The Labour Court also considered that the evidence tendered by Messrs Steyn and Claasen "was based on untested allegations received from the complainants". Referring to the decision in *Herholdt v Nedbank*[6] the Labour Court, in effect, found that the irregularities in the arbitration were not "susceptible to the court's interference", and held that in those circumstances it was "constrained" to dismiss Exxaro's review application. The Labour Court subsequently dismissed Exxaro's application for leave to appeal to this Court.

The Appeal

[16] It was submitted in heads of argument filed on behalf of Exxaro that the Labour Court had erred in its approach, conclusion and order. Exxaro persisted with its argument that the arbitrator failed to have proper regard for section 3 of the LEAA; had ignored the totality of the evidence and had merely excluded the hearsay evidence on the ground that Mr Chipana had not consented to its admission, but had ignored the reasons given for the complainants not testifying. It was further submitted that the commissioner's award was one which a reasonable decision-maker would not have made taking into account all of the evidence.

[17] It was submitted on behalf of Mr Chipana that neither the commissioner, nor the Labour Court could be faulted for finding that if the hearsay evidence was excluded there was not a "shred of evidence" on which Exxaro could rely to prove that Mr Chipana's dismissal was fair. It was further submitted that even if the commissioner had erred in failing to take into account certain electronic messages (SMS's) and recordings as corroboration for the content of the affidavits of the complainants, it was an error of law that did not constitute a gross irregularity, because it did not cause the commissioner to misconceive the nature of the enquiry, or his duties in relation thereto. It was further argued that the voice recording and SMS's were uncorroborated and constituted hearsay and that since Mr Chipana denied their veracity they do not have any probative value. A number of court decisions were relied on in support of the argument that it was not in the interest of justice to receive the hearsay

[6] [2013] 11 BLLR 1074 (SCA).

evidence, including *Makhatini v Road Accident Fund*[7]*; S v Shaik and others*[8]*; S v Molumi*[9]. Reference was also made to a passage in *S v Ndhlovu and Others*[10] where trial courts in criminal matters are cautioned to be scrupulous when applying the hearsay provisions in the LEAA, so as to ensure respect for an accused's fundamental right to a fair trial.

Discussion

[18] The Labour Court erred in a number of respects and I shall address those in due course. With reference to the award itself, if a commissioner purports to apply the law then it is incumbent upon the commissioner to at least make an effort to ascertain what the law is. In this matter the commissioner avowed in his award that it was the law of the land that uncorroborated hearsay evidence could not be admitted without Mr Chipana's consent. Perhaps the commissioner had in mind an oversimplified view of the law as it stood before the enactment of section 3 of the LEAA, because the position described by the commissioner is and was at the time of the award certainly not the law of the land. Because of that fundamental error the commissioner also misconceived the enquiry into the admissibility of the hearsay evidence. Section 3 provides:

> '3 **Hearsay evidence**
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> (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –
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> (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
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> (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
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> (c) the court, having regard to –
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> (i) the nature of the proceedings;

[7] 2002 (1) SA 511 (SCA).
[8] 2007 (1) SA 240 (SCA) para 170.
[9] 2008 (3) SA 608 (CC).
[10] 2002 (6) SA 305 (SCA) para 17.

(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; and

(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 interests of justice.

(2) the provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1) (b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

(4) For the purposes of this section –

"hearsay evidence" means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;

"party" means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.'

[19] It is accepted that this section essentially means that if there is no agreement to receive hearsay evidence it is to be excluded unless the interests of justice

requires its admission[11]. Hearsay evidence that is not admitted in accordance with the provisions of this section is not evidence at all.[12] This Court[13] held: "Section 3(1) of the Act has ushered our approach to the admissibility of hearsay evidence into a refreshing and practical era. We have broken away from the assertion–orientated and rigid rule–and–exception approach of the past. Courts may receive hearsay evidence if the interests of justice require it to be admitted". This section still retains the "caution" concerning the receiving of hearsay evidence, but changed the rules about when it is to be received and when not.[14]

[20] Hearsay evidence is a common form of evidence encountered in disciplinary proceedings. In many cases, it might be the only evidence available to supplement other direct evidence in making out a case of misconduct or to sustain a defence to a charge of misconduct. It is therefore not unreasonable to expect commissioners to be familiar with it and to be in a position to identify it readily. That the provisions of the section are not a novelty or mystery to commissioners or arbitrators, is evident from reported decisions[15].

[21] The provisions of section 138 of the LRA that give a commissioner a discretion to conduct an arbitration in a manner that she, or he, considers appropriate to determine a dispute fairly and quickly, and to do so with a minimum of legal formalities, does not imply that the commissioner may arbitrarily receive or exclude hearsay evidence, or for that matter any other kind of evidence. In the case of hearsay evidence, even though section 3 of the LEAA, by providing a set of rules or principles for the admission or exclusion of hearsay evidence, assumes some legal formality, it is invaluable. While a commissioner is notionally not obliged to apply it because of the discretion bestowed on him or her by section 138 of the LRA, the prudent commissioner does not err by applying it when dealing with hearsay evidence,

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[11] See: *S v Ndhlovu and Others* (above) para 12.
[12] See: *S v Ndhlovu and Others* (above) para 14.
[13] See: per Musi AJA in *Public Servant's Association of South Africa v Minister: Department of Home Affairs and Others* [2013] 3 BLLR 237 (LAC) para 19.
[14] See: *S v Ndhlovu and Others* (above) para 15, quoting from *Makhatini v Road Accident Fund* 2002 (1) SA 511 (SCA) para 51.
[15] See eg. *NUM and Others v CCMA and Others* [2010] 6 BLLR 681 (LC) paras 22-25*; Rand Water v Legodi NO and Others* (2006) 27 ILJ 1933 (LC) paras22-23.

rather than conceive of an alternative norm that will ensure not only fairness in the process, but also in the outcome of the arbitration. Applying the common law rules for the reception, or exclusion, of hearsay evidence appears not to be the answer, because those rules have already rightly been jettisoned for their "rigidity, inflexibility – and occasional absurdity"[16]. Those epithets in are not consonant with fairness and reasonableness.

[22] The provisions of section 3 of the LEAA are readily straightforward and the factors to be considered under subsection 3 (1) (c) are not a closed list. The provisions of the section may be adapted specifically for arbitration proceedings. For example, in applying the section "court" may be the readily taken to refer to the commissioner or arbitrator; "criminal or civil proceedings" could be taken to refer to the arbitration proceedings.

[23] In addition to referring to precautions to be taken by criminal trial courts in applying the hearsay provisions of LEAA, the Supreme Court of Appeal in *S v Ndhlovu and Others*[17] referred to safeguards to ensure respect for an accused's fundamental right to a fair trial. Cameron JA pointed out that safeguards, including the following, were important: "First, a presiding judicial officer is generally under a duty to prevent a witness heedlessly giving vent to hearsay evidence. More specifically under the Act, 'it is the duty of a trial judge to keep inadmissible evidence out, [and] not to listen passively as the record is turned into a papery sump of "evidence".' Second, the Act cannot be applied against an unrepresented accused to whom the significance of its provisions have not been explained… Third, an accused cannot be ambushed by the late or unheralded admission of hearsay evidence. The trial court must be asked clearly and timeously to consider and rule on its admissibility. This cannot be done for the first time at the end of the trial, nor in argument, still less in the court's judgement, nor on appeal. The prosecution must before closing its case clearly signal its intention to invoke the provisions of the Act, and the trial judge must before the State closes its case rule on admissibility, so that the accused can appreciate the full evidentiary ambit he or she faces."

[16] *S v Ndhlovu and Others* (above) para 15.
[17] *S v Ndhlovu and Others* (above) paras 17-18.

[24] Those safeguards and precautions, duly adapted, also apply to the application of section 3 of the LEAA in civil proceedings. Because of the similarities between civil proceedings and arbitration proceedings, the, overwhelmingly, adversarial nature of arbitration proceedings under the LRA, and the overarching requirement that such proceedings be fair, those safeguards and precautions, duly adapted, apply equally to arbitration proceedings to ensure fairness and serve as an invaluable guide for commissioners and arbitrators when confronted with hearsay evidence, and, particularly, when applying section 3 of the LEAA. Adapted they would include the following: (1) Section 3(1)(c) of the LEAA is not a licence for the wholesale admission of hearsay evidence in the proceedings; (2) in applying the section the commissioner must be careful to ensure that fairness is not compromised; (3) a commissioner is to be alert to the introduction of hearsay evidence and ought not to remain passive in that regard; (4) a party must as early as possible in the proceedings make known its intention to rely on hearsay evidence so that the other party is able to reasonably appreciate the evidentiary ambit, or challenge, that he/she or it is facing. To ensure compliance, a commissioner should at the outset require parties to indicate such an intention; (5) the commissioner must explain to the parties the significance of the provisions of section 3 of the LEAA, or of the alternative, fair standard and procedure adopted by the commissioner to consider the admission of the evidence[18]; (6) the commissioner must timeously rule on the admission of the hearsay evidence and the ruling on admissibility should not be made for the first time at the end of the arbitration, or in the closing argument, or in the award. The point at which a ruling on the admissibility of evidence is made is crucial to ensure fairness in a criminal trial[19]. The same ought to be true for an arbitration conducted in an adversarial fashion because fairness to both parties is paramount.

[18] Compare: *Le Monde Luggage CC t/a Pakwells Petje v Commissioner Dunn and Others* [2007] 10 BLLR 909 (LAC) paras 17-20; *Foschini Group v Maidi and Others* [2010] 7 BLLR 689 (LAC) para 38. However, the Labour and Labour Appeal Court have sometimes invoked section 3 of the LEEA to determine whether hearsay evidence was correctly admitted or excluded by a commissioner or arbitrator. See eg.: *Swiss South Africa Pty) Ltd v Louw NO and Others* [2006] 4 BLLR 373 (LC) and *Edcon Ltd v Pillemer NO and Others* [2008] 5 BLLR 391 (LAC) para 15.

[19] See: *S v Ndhlovu and Others* (above) para 18 and *S v Molimi* 2008 (3) SA 608 (CC) paras 38-42.

[25] In this matter the timing of the commissioner's ruling on the admissibility of the hearsay evidence occurred so late, that it was undoubtedly unfair to both, the employer and the employee. It is apparent from the record of the arbitration proceedings that the commissioner was acutely aware from the outset that the main issue in dispute related to the admission of hearsay evidence at the disciplinary enquiry. Exxaro's representative, in her opening statement, conceded that Exxaro had relied on hearsay evidence at the disciplinary enquiry. Exxaro's representative proceeded to adduce hearsay evidence, through Messrs Steyn and Claasen to prove the charges of misconduct. No objection was raised to this evidence being adduced, neither by Mr Chipana, who was forced to represent himself for the early stages of the arbitration, nor by the commissioner. Significantly, the commissioner appeared to adopt a passive attitude in that regard. Mr Chipana's legal representative appeared after Mr Steyn had given evidence-in-chief and he cross-examined Mr Steyn after consulting Mr Chipana, but he too did not raise any objection to the hearsay evidence.

[26] After Exxaro's third and last witness gave evidence, Mr Chipana gave evidence in his defence. He essentially tried to answer what was, mainly, hearsay evidence adduced against him by Exxaro. For example, he denied asking Ms Mange or Ms Thobane for payment for getting Ms Thobane a job at Exxaro and testified, in essence, that he had been giving money to Ms Mange in return for sexual favours; that their story was a fabrication and that they concocted it out of spite after he ended the adulterous love- relationship he had with Ms Mange. Mr Chipana also denied ever promising a job to Mr Nong, or taking money from him in return. Mr Chipana was briefly cross-examined by Exxarro's representative and his case was closed.

[27] It is only in the closing argument that Exxaro's representative again raised the issue of the admission of the hearsay evidence. She conceded that Exxaro's case was based largely on hearsay evidence and contended for its admission in terms of section 3 (3) of the LEAA. The record shows that in support of that contention she referred to case authority, although the record does not clearly and adequately reflect which cases she actually referred to. However, she

went on to submit that taking into account the totality of the evidence the charges of misconduct against Mr Chipana had been proved and his dismissal was thus procedurally and substantively fair.

[28] The record is not clear regarding the closing submissions made by Mr Chipana's representative (too many 'inaudibles'), but there are indications that the admissibility of the hearsay evidence was addressed. Of significance is the fact that it is only in his award that the commissioner makes a ruling on the admissibility of the hearsay; ruling, essentially, that it was inadmissible because Mr Chipana did not consent to its admission.

[29] The timing of the ruling and the Commissioner's relative passivity during the arbitration when the hearsay evidence was being adduced is not consonant with a commissioner's duty to determine a dispute between parties fairly, or quickly. If the issue of admissibility of the evidence been addressed promptly when it was sought to be adduced or adduced, the ruling in respect thereof would not only have assisted both sides to know what the ambit of the cases were that they had to meet respectively, but could possibly have led to a quicker and cheaper resolution of the dispute.

[30] Mr Chipana was clearly prejudiced by the commissioner's passivity regarding the admissibility of the evidence, in that, he proceeded headlong to deal with the hearsay evidence risking the finding that he had thereby consented (albeit tacitly) to its admission. The employer also proceeded not knowing whether the evidence was to be admitted; and both parties were essentially deprived of the opportunity of knowing exactly what more was required, respectively, to make out a case, and what case had to be met, timeously, so that alternatives could be considered. By the time the ruling on admissibility was made it was too late for either party to do anything to save their (respective) situations.

[31] While both sides may be criticised for not raising the issue of admissibility early in the proceedings, i.e. at least as or when the hearsay evidence was adduced, the criticism is tempered particularly because these are not court proceedings and the representatives of the parties are not necessarily legally trained. Notwithstanding, ultimately it was for the commissioner to ensure that

the hearing was fair for both sides. A reasonable commissioner in the position of the arbitrator in this matter would not only have known what the law on the admission of hearsay was, if he sought to invoke the law (i.e., the formal rules for the admission of evidence), but would have been alert to the introduction of the hearsay evidence and would have addressed its admissibility promptly so as to ensure fairness and expediency.

[32] The Labour Court did not deal pointedly with the commissioner's erroneous view of the law and, instead, found that there was no basis for interfering with the commissioner's award. The Labour Court seems to have overlooked the fact that the commissioner had erred grossly concerning the law on the admission of hearsay evidence and that his consequent, erroneous ruling had a direct impact on the outcome of the arbitration proceedings. Instead, the Labour Court, seemingly, sought to find justification for the erroneous ruling in the supposed informality of the proceedings and sought, belatedly, and for the first time, in effect, to embark on the discretionary exercise necessitated by section 3 (1) (c) of the LEAA, oblivious to the fact that such exercise could not cure the unfairness that had already been wrought in the arbitration hearing by the timing of the ruling.[20]

[33] On appeal both sides, effectively, also required of us to engage in the exercise which the commissioner ought to have timeously performed in the arbitration, namely, to consider the admissibility of the hearsay evidence in light of section 3 (1) (c) of the LEAA. This Court is in no better position than the Labour Court in trying to cure the unfairness that had occurred in the arbitration hearing. In *S v Ndlovhu and Others*[21] the Supreme Court of Appeal (per Cameron JA) expressed itself as follows in respect of the timing of the ruling on the admission of hearsay evidence: "… The trial court must be asked timeously to consider and rule on its admissibility. This cannot be done for the first time at the end of the trial, nor in argument, still less in the court's judgement, nor on appeal. The prosecution must before closing its case clearly signal its intention to invoke the provisions of the act, and the trial

[20] Compare: *S v Ndhlovu and Others* (above) para 18.
[21] See (above) para 18.

judge must before the state closes its case rule on the admissibility, so that the accused can appreciate the full evidentiary ambit he or she faces".

[34] Even though this is not a criminal matter, the principles to be derived from that decision are salient and consonant with fairness in arbitration proceedings where section 3 of the LEAA is invoked. Both, the employer and the employee, ought to be able to appreciate the evidentiary ambit they (respectively) face, so that they are able conduct their cases accordingly. Late rulings on admissibility of evidence are of no assistance to the parties, and result in unfairness that cannot be undone on review, or on appeal.

[35] While this approach appears to introduce some measure of formality one would rather have that, than unfairness. Some formality is not anathema to arbitration proceedings in the CCMA. Section 138 does not ban all formality – it merely requires "minimal formality". In deciding on how much formality is permissible one must be careful not to sacrifice fairness on the altar of informality. Section 138 not only requires minimal formality, but also requires fairness and speed. An equitable balance must be struck so that none of these pre-eminent values are sacrificed.[22]

[36] The Labour Court clearly erred in finding that there was no basis for interfering with the commissioner's award. The commissioner's ruling on admissibility, which was wrong in law, was material in that it clearly impacted the outcome of the arbitration. Mr Chipana's dismissal was held to be substantively unfair because the commissioner found that there was "no shred of evidence" to prove that it was fair. The Labour Court's belated attempt to exercise the discretion which the commissioner ought to have exercised promptly in terms of section 3 (3) of the LEAA, could not cure the unfairness that had been caused by the gross irregularity in the conduct of the arbitration proceedings. And even in that attempt the Labour Court erred by only considering one factor, namely, the reason for the failure of the 'complainants' to testify- whereas, in a proper case, where there is no issue of timing, all other relevant factors (i.e., at least those identified in section 3 (1) (c) of the

[22] See: *CUSA v Tao Ying Metal Industries and Others* [2009] 4 BLLR 381 (LC) para 22. Compare: *Naraindath v CCMA and Others* [2000] 6 BLLR 716 (LC) para 26.

LEEA) ought to have been taken into account, cumulatively, in considering whether the interests of justice (and of fairness) required the admission of the hearsay evidence[23].

[37] The appropriate relief is to set aside the award and to refer the matter back to the CCMA for a hearing de novo before a different commissioner. I am of the view, taking into account the law and fairness, no costs orders ought to be made in respect of the application in the Labour Court, or in this appeal.

[38] In the result, the following is ordered:

1. The appeal is upheld.

2. The order of the Labour Court dismissing the review is set aside, and is replaced with the following order:

   '1. The award is reviewed and set aside;

   2. The matter is referred back to the third respondent (the CCMA) for a hearing *de novo* before a different commissioner;

   3. There is no costs order.'

3. No order is made in respect of the costs of the appeal.

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P Coppin

Judge of the Labour Appeal Court

Murphy and Savage AJJA concur in the judgment of Coppin JA.

[23] See: *inter alia*, *S v Shaik and Others* 2007 (1) SA 240 (SCA) para 170.

APPEARANCES:

FOR THE APPELLANT:	L Hollander
	Instructed by Shepstone & Wylie
FOR THE RESPONDENT:	ME Phooko
	Instructed by Mohale Incorporated