

Evidential crossroads: Navigating hearsay evidence in CCMA proceedings

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Introduction

There is some debate surrounding the extent to which Commissioners are required to apply the general rule against the admission of hearsay evidence in matters before the Commission for Conciliation, Mediation and Arbitration (“**CCMA**”). The role and treatment of hearsay evidence and its admissibility in CCMA proceedings was considered by the Labour Appeal Court (“**LAC**”) in the recent case of *NUMSA obo Mokase v Nissan and Others* (JA46/2023) discussed herein.

Facts

Mr. Lungile Mokase (“**the Employee**”), previously employed by Nissan South Africa Limited (“**the Company**”) had been involved in a series of confrontations with his supervisor. These incidents notably included a verbal altercation where the Employee accused his supervisor of undermining him while pointing at him, and another instance where the Employee was found in possession of scissors during a meeting and refused to surrender them for safekeeping until much later on the same day. Months after these confrontations, a complaint of poor workmanship led to disciplinary steps being taken against the Employee. Following a disciplinary hearing, the Employee’s supervisor and another colleague received anonymous threatening calls prompting them to obtain protection orders. In order for the Company to establish whether the Employee was behind the threats made, the Company requested that the Employee and his supervisor undergo polygraph tests. The polygraph tests were conducted on both parties, indicating deception on the Employee’s part regarding the threats made and no deception on the part of the Employee’s supervisor. The Employee was subsequently dismissed for gross misconduct in that he had intimidated or threatened his colleagues.

The Employee referred the matter to the CCMA. No ruling was made on the admissibility of the hearsay evidence tendered during the proceedings before the CCMA. However, the Commissioner rejected the hearsay evidence presented and concluded there was no reasonable suspicion of the Employee’s involvement in alleged threats or intimidation.

The Company took the CCMA’s decision on review, arguing that the Commissioner disregarded crucial evidence, including polygraph tests results showing deception by the Employee. The Labour Court agreed with the Company, setting aside the arbitration award, and ruling that the dismissal was fair. The Labour Court found that the CCMA award was unreasonable in that the Commissioner had disregarded the results of the polygraph tests and that on a balance of probabilities, the evidence had shown that the Employee had threatened and intimidated his colleagues.

Findings

The matter was referred to the LAC which had to consider whether the Labour Court correctly overturned the arbitration award which found that the Employee’s dismissal was unfair. In summary, the LAC first considered the CCMA Commissioner’s treatment of the evidence before him in light of the general rule that hearsay evidence not admitted in accordance with the provisions of section 3 of the Law of Evidence Amendment Act 66 of 1995 (“**LEAA**”) is not evidence at all. In this regard, the LAC considered section 138 of the Labour Relations Act 66 of 1995 (“**LRA**”). Section 138 of the LRA affords a Commissioner with the discretion to determine the manner and form of the proceedings in an unfair dismissal dispute. In terms of section 138(2), subject to the discretion of the Commissioner, a party to a dispute may give evidence, call and question witnesses and address concluding arguments to the Commissioner. The LAC found that while notionally a Commissioner is not obliged to apply section 3 of the LEAA because of the discretion bestowed by section 138 of the LRA, it is prudent that section 3 of the LEAA be applied to ensure both a fair process and outcome at arbitration proceedings before the CCMA.

The LAC found that the decision to exclude hearsay evidence, without having regard to the provisions of section 3 of the LEAA or making a timeous ruling on its admissibility, constituted a material misdirection on the part of the Commissioner and led to a gross irregularity in the conduct of the arbitration proceedings.

Second, the LAC considered why setting aside the CCMA award and referring it back to the CCMA for a new hearing was not necessary in the circumstances. The LAC considered that no direct evidence had been tendered before the CCMA to prove that the Employee caused his colleagues to be threatened or intimidated. Accordingly, what was in issue before the Commissioner was whether the inference that the Employee committed the misconduct by causing someone to do so on his behalf could be drawn from all of the proven facts. In this regard, the LAC found that without regard to the hearsay and polygraph evidence tendered, the undisputed facts before the Commissioner were that the Employee felt aggrieved with how he was treated at work and the proven facts before the Commissioner were that the Employee had previously engaged in aggressive and intimidatory behaviour at work when he took scissors to work and initially refused to hand these over. The inference was capable of being drawn that it was the Employee to whom the anonymous caller referred given that it was consistent with all the proven facts. From the totality of the evidence before the Commissioner the LAC found that the Company proved that the Employee committed the misconduct alleged and that his dismissal for such misconduct was substantively fair.

Importance of the case

Ultimately, the admissibility of hearsay evidence will depend on the circumstances of each case. Particularly, if the parties to a dispute fail to agree on the admissibility of hearsay evidence, the commissioner presiding over the matter should make a ruling on this point having due regard to the rules of evidence and the LEAA.



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