

EMPLOYMENT

The importance of witness testimony when seeking to rely on electronic evidence

8 November 2022 9 min read

by Jacques van Wyk, Director, Andre van Heerden, Senior Associate and Danelle Plaatjies, Candidate Attorney

Issue

Whether the reliance on a data message, in the form of a telematics report, in the absence of a suitable witness being called to attest to its contents, meaning and reliability was irregular and therefore rendered the award handed down by the [CCMA](#) Commissioner irregular and therefore, reviewable by the [Labour Court](#) ("LC").

Summary

The CCMA's reliance, in deciding between two competing version of events, on a telematics report in circumstances where no witness was called testify to its contents, meaning and reliability resulted in the Labour Court finding that the Commissioner's ruling was grossly irregular and subject to review by the Labour Court.

Facts

This was the issue considered by the Labour Court in the case of *Eskom Holdings SOC Limited v Ravichandran Reddy* (2022) D368/2021. In this matter, an employee was a participant in a managerial car scheme, regulated by the employer's Car Schemes Procedure ("CSP"). The CSP allowed the employee to utilise his own vehicle for the purposes of work trips and to claim a contingency allowance (which was, in effect, a reimbursement allowance paid per kilometre travelled by the employee in his personal vehicle, together with any other costs associated with travel, for business purposes).

It was the Employer's case that the Employee was precluded from travelling in the employer-owned "pool vehicles". The employee could, however, claim a contingency allowance after making use of his personal vehicle for work trips.

After an investigation, it was found that the employee had contravened the CSP by travelling in a pool vehicle and submitting six fraudulent contingency claims which had been paid by the employer (amounting to R8,315.70). The employee was ultimately dismissed for such conduct. The employee, thereafter, referred the matter to the CCMA, claiming that his dismissal was substantively unfair.

The CCMA initially made an award, in default, against the employer. This award was ultimately rescinded and the matter was sent back to the CCMA. It is the award, from this second occasion, which is detailed below.

CCMA's findings

During the arbitration proceedings before the CCMA, the employer alleged, in part, that the employee had been guilty of the misconduct in that he had claimed the contingency fees for trips he had made while travelling in the pool vehicle (and not his own vehicle, as required).

The employee denied that he had done so. While he admitted he had travelled in the pool vehicle from time to time, he denied that he had done so on the day he lodged claims for a contingency allowance.

Witnesses for the employer testified that the employee had travelled in the pool vehicles on the days in question and had then submitted claims for payment of the contingency fees for the use of his personal vehicle, on the same days.

The Commissioner rejected the employer's version on the basis of a telematics report, submitted by the employee. It was argued that the report showed that on the days in question the pool vehicle had not stopped at the employee's location. In other words, the telematics report indicated that the employee had not travelled in the pool vehicle on the relevant dates. The employee's dismissal was found to be unfair.

The employer, thereafter, referred the award for review to the Labour Court.

Labour Court findings

The employer contended that the Commissioner had committed various irregularities in making the award that she did. In this regard, it submitted, she reached a decision no reasonable decision maker would reach. It was argued that the decision was incorrect.

The basis for the employer's submission, and seeking to review the award, was, amongst others, that the Commissioner had failed to consider its witness' testimony, had given preference to the telematic reports over and above its witness' testimony and accepted the employee's testimony that he had not travelled in the pool vehicle on the days in question. More simply put, the employer disagreed with the Commissioner's election to prefer the employee's version over its version.

The Labour Court found that the Commissioner had correctly identified the issues in this matter, namely –

"...whether the Applicant is entitled to travel in the pool vehicle and secondly, if he was entitled to do so, whether he committed misconduct when he submitted claims for use of his private vehicle for six days on which it is alleged that he travelled in the Eskom pool motor vehicle. It is common cause that the Applicant submitted contingency claims for his private vehicle for the six days in question but he disputes that he travelled in the pool vehicle on those six days."

The Labour Court found that the CCMA was correct in finding that the employee was entitled to travel in the pool vehicle. Of primary importance for the purposes of this article, was the second element to the query namely, whether the employee had submitted contingency claims for days on which he travelled in the pool vehicle.

In assessing whether the employee committed misconduct when he submitted claims for use of his private vehicle for days on which he travelled with the employer's motor vehicle, the Labour Court found that the CCMA had to consider "two mutually irreconcilable and contradictory versions".

The employer contended that the employee travelled with a group of employees in the pool vehicle on the days on which he had claimed contingency allowances. The employee admitted that he had travelled in a pool vehicle on some eighty other occasions but denied that he had done so on the specific dates in respect of which the employer alleged that he had also claimed contingency allowances.

The telematics report was relied on by the employee to support his version of events. The telematics report contained data represented in a data message. Section 1 of the [Electronic Communications and Transactions Act of 2022 \("ECTA"\)](#), defines both "data" and "data message" as follows –

"data" means electronic representations of information in any form

"data message" means data generated, sent, received or stored by electronic means and includes –

(a) voice, where the voice is used in an automated transaction,' and

(b) a stored record."

The treatment of data contained in data messages is governed by section 15 of ECTA, which provides as follows –

"(1) In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence –

(a) on the mere grounds that it is constituted by a data message; or

*(b) if it is the best evidence that **the person adducing it** could reasonably be expected to obtain, on the grounds that it is not in its original form."*

[emphasis added]

Section 15(1) of ECTA provides that the data message as contained in the telematics report, was admissible subject to proof thereof. While section 15(4) of ECTA makes provision for data messages created in the ordinary course of business which has been certified as correct by an appropriate officer to constitute rebuttable proof there is no equivalent provision for data messages made otherwise than in the ordinary course of business (i.e.; such as the telematics report). The Labour Court stated that the words "the person adducing it" in section 15(1)(b) of ECTA, affirms that all other types of data messages are required to be proven in the same way as any other type of evidence: by way of agreement between the parties failing which, the oral evidence of a witness.

The Labour Court affirmed that the telematics report could not simply have proved itself. The Labour Court explained that in either scenario more was required, **specifically, a witness who was able to testify as to "the meaning of the data contained in the data message, that the data contained in the data message had been reliably generated, stored, communicated and maintained was required to have given evidence before the data contained in the data message could have been regarded as having constituted proof of the truth of its contents"**.

No such witness was called to testify. It should be noted that while other witnesses attempted to testify as to the content of the telematics report, they were not well placed to deal with the above issues (for instance, they had no knowledge whatsoever concerning the systems which generated the data message, let alone what reliance, if any, could be placed on the data contained therein).

Therefore, in arriving at the determination of the two mutually exclusive versions presented, the Commissioner failed to apply the correct manner of assessment (as determined by case law, in particular the case of Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others 2003 (1) SA 11 (SCA)).

The Supreme Court of Appeal, in Herholdt v Nedbank Limited (701/2012) [2013] ZASCA 97, has confirmed that a failure on the part of a commissioner to have undertaken the correct enquiry constitutes a gross irregularity in the conduct of proceedings, as envisaged in the Labour Relations Act 66 of 1995 ("LRA").

The Labour Court confirmed that in relying on the telematics report (and not applying the test set out in the Stellenbosch Farmers' case), the Commissioner "undertook the enquiry regarding the parties' mutually incompatible versions in a manner which was misconceived". The Labour Court determined that the conduct of the Commissioner amounted to a gross irregularity which resulted in the award being reviewable.

The Labour Court set aside the award and ordered that the dispute pertaining to the fairness of the dismissal be remitted to the CCMA for determination by another Commissioner.

Importance of this Case

Employers are reminded that it is often insufficient to simply introduce evidence in a bundle and seek to rely on it (especially where there is no agreement between the parties that this can be done). Rather, a witness, suitable to the task, may have to provide evidence as to, at minimum, the meaning of the data contained in the document or data message and that the data contained in the document or data message had been reliably generated, stored, communicated and maintained, before the data contained in the data message could be regarded as proof of the truth of its contents.



Andre van Heerden

Director

[View Profile](#)



Jacques van Wyk

Director

[View Profile](#)