IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR288/18

In the matter between:

LYTTLETON DOLOMITE (PTY) LTD	**First Applicant**
and	
NUM obo AMOS LEKGAU	**First Respondent**
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**Second Respondent**
KUVONAKALA PRETTY CHAVALALA N. O	**Third Respondent**

Heard: **22 July 2020**

Delivered: **11 August 2020**

Summary: **Application to review and set aside arbitration award – exclusion of hearsay evidence- late ruling on admissibility unfair- duty to warn or advise the Applicant of the negative inferences from hearsay evidence-review upheld-case remitted back to CCMA for hearing *de novo***

JUDGMENT

DEANE AJ

Introduction

[1] This is an opposed application brought in terms of section 145 of the Labour Relations Act 66 of 1995 (LRA) for the review, correcting and setting aside of a decision and award made on 2 February 2018, by the Third Respondent (the Commissioner) under case number GATW 5234-17, wherein it was found that the dismissal of the First Respondent was procedurally fair but substantively unfair. The Applicant was ordered to re-instate the First Respondent together with an order for retrospective backpay.

[2] The issue in this matter concerns the so-called helping hand principle and the nature and extent of the duties of a commissioner of the CCMA to assist parties to conduct their cases in arbitration.

[3] The relief sought by the Applicant is for this court to remit the matter back for arbitration to the Second Respondent to be heard *de novo*.

Material Background Facts

[4] The First Respondent was a NUM shop steward and branch chairperson at the Applicant. At a disciplinary hearing he was found guilty of misconduct and dismissed in relation to a charge the essence of which relates to misleading employees relating to inaccurate information around the payment of incentive bonuses for the 2016/2017 financial year.

[5] At the disciplinary hearing the First Respondent was represented by Mr Sephoti and two witnesses gave evidence in support of the First Respondent, a one Abraham Lepelle and Japhter Nhobeni. None of these witnesses testified in the subsequent arbitration hearing.

[6] During arbitration proceedings the First Respondent was the sole witness for his own case whilst the Applicant called three witnesses in support of their case, Gerhardus Pick (Pick), a manager of the Applicant's mining operations, Ms Pilislwa Magagula (Magagula), the chairperson of the disciplinary hearing

against the First Respondent and Joanne Elizabeth Giles (Giles), the initiator at the disciplinary hearing.

[7] In her award, the Commissioner stated that the evidence produced at the arbitration by the Applicant to prove charges of misconduct against the First Respondent, was essentially hearsay.[1] The Commissioner effectively found that the hearsay evidence was to be excluded. She stated that "*basically all that was before me was 'so and so said', was merely hearsay. In terms of the Law of Evidence Amendment, hearsay evidence is generally not acceptable unless there exists one or more of the exceptions as laid down in section 4 thereof. None of those exceptions exists*".[2]

[8] In reaching her decision, the Commissioner therefore excluded or disregarded the witnesses' evidence on the basis that it constituted hearsay evidence and she drew a negative inference from the failure of the Applicant to call Japhter as a witness to the arbitration proceedings.

[9] The Applicant contend that the failure of the Commissioner to warn the Applicant's representative prior to deciding to draw a negative inference constitutes a gross irregularity.[3] They furthermore contend that Mr Bebe (Bebe), the Applicant's Regional Human Resources Manager, who appeared on behalf of the Applicant at the CCMA, and who from a reading of the transcripts; was not well versed with the conduct of arbitrations.[4] It was submitted that Bebe did not appreciate that the evidence of the Applicant's witnesses was hearsay and that he needed to call witnesses to corroborate it.[5] Based on these factors, the Commissioner therefore had a duty to warn or advise the Applicant of the inferences, albeit negative, that she would draw and that the evidence constituted hearsay evidence.

[10] The First Respondent argues that had the Commissioner advised the Applicant that it needed to call another witness it would have amounted to unduly assisting a party to the detriment of the other, and that the

[1] See Transcript of Proceedings Volumes 1-3 and Arbitration Award.
[2] Arbitration Award at para 63.
[3] Amended Notice of Motion dated 1 February 2019 at para 40.
[4] Applicant's Heads of Argument (HoA) dated 7 June 2019 at para 10.
[5] Applicants HoA at para 3.

Commissioner has a duty to guard against such instances and against being biased,[6] or creating a perception of bias in favour of one party over the other.[7]

Grounds of review

[11] This review application arises out of the issue relating to the duties of a Commissioner during the conduct of arbitration proceedings and the "helping hand principle"; in that since the "*Commissioner was aware that the witnesses' evidence constituted hearsay*"[8] she therefore had a duty to advise or warn the Applicant that the evidence would be considered to be hearsay and of the inferences that she would draw from such evidence. The Applicant further states that the "*transcript evidences that the Applicant's representative did not appreciate that the evidence of the Applicant's witnesses was hearsay and that the Applicant needed to call other witnesses to corroborate it*".[9]

[12] The Applicant therefore submits that the Commissioner committed a gross irregularity, failed to properly apply her mind to the whole of the evidence placed before her; committed a material error on the process, the law and the facts and that her decision is not one that a reasonable decision-maker would make.

Test for Review

[13] The test for review does not require repetition at every turn. It is trite that only decisions that a reasonable commissioner cannot make are reviewable. In terms of the well-known authority of *Sidumo & another v Rustenburg Platinum Mines Ltd & others*,[10] an irregularity prevents a fair trial of issues. So, for the review court to assess the ground that the Commissioner ought to have assisted the Applicant regard must be had to what happened during the arbitration hearing and assess the conduct of the Commissioner at that time to determine the alleged irregularity.

[6] First Respondent's Answering Affidavit 24 February 2019 at para 69.
[7] First Respondents Answering Affidavit 24 February 2019 at para 73.
[8] Applicants HoA dated 12 June 2019 at para 3.
[9] Applicants HoA dated 12 June 2019 at para 2.
[10] [2007] BLLR 1097 (CC).

[14] As it was stated in *Ekurhuleni Metropolitan Municipality v SA Municipal Workers Union & others*;[11]

> *'…The test is concerned with outcomes, not the process by which the outcomes are achieved. Only when the outcome is one which no reasonable arbitrator, with the material that was to hand, could produce, is an award liable to be set aside. The frailties of an arbitrator's reasoning, or inattention to mentioning every facet of relevance, or clumsiness in articulation are unimportant, unless they are causally connected to an unfair outcome.*'[12]

[15] This court is entitled to interfere with an award made by an arbitrator if and only if the arbitrator misconceived the nature of the enquiry (and thus denied the parties a fair hearing) or committed a reviewable irregularity which had the consequence of an unreasonable result.

Legal Principles and Analysis

[16] Clauses 20 and 21 of the CCMA Guidelines are the source of the so-called "helping hand" principle. The provisions require an arbitrator at the commencement of arbitration proceedings to inform the parties (*inter alia*) of: i) the fact that the proceedings will be recorded; ii) any potential conflicts of interest; iii) the rules of proceedings; iv) the role and powers of the arbitrator; iv) the procedure in terms of which documents are introduced into proceedings; and v) the requirement that if evidence of a witness is disputed, the other party should, at the appropriate stage, question the witness in that regard and put its version to the witness so that the witness has an opportunity to respond.[13]

[17] Clause 21 of the CCMA Guidelines is of particular relevance. It reads:

> *The extent to which the arbitrator deals with any of these issues should be determined by the experience of the parties, or their representatives, and their knowledge of CCMA procedures. If it is evident at a subsequent stage that a party or its representative does not understand the nature of*

[11] [2018] 3 BLLR 246 (LAC); (2018) 39 ILJ 546 (LAC).
[12] *Ekurhuleni Metropolitan Municipality* at para 18.
[13] Clause 20 of the CCMA Guideline.

proceedings and that this is prejudicing the presentation of its case, the arbitrator should draw this to the attention of the party. Circumstances in which it may be appropriate for the arbitrator to do this include if a party:

21.1 fails to lead evidence of its version under oath or affirmation;

21.2 fails to cross-examine the witnesses of the other party or fails to put its version to those witnesses during cross-examination; and

21.3 changes its version of events or puts a new version during proceedings.

[18] In the case of *Nkomati Joint Venture v Commissioner for Conciliation, Mediation and Arbitration & others* the Judge wrote that:

> '*An arbitrator may commit a gross irregularity, fail to fairly try the issues or render an unreasonable award where under a duty to lend a helping hand and then fails to do so. Where the circumstances and procedural fairness so require, a commissioner must intervene in accordance with the precepts set out in the CCMA Guidelines. Not to do so will invariably result in an unreasonable award. The purpose of the helping hand principle is to prevent a procedural defect by ensuring that there is a full ventilation of the dispute and a fair trial of the issues. A commissioner commits a reviewable irregularity not only when the outcome of an award is unreasonable but also where the nature of the enquiry has been misconceived, which may happen when the issues are not ventilated by proper lines of enquiry.*'[14]

[19] *In casu* the Commissioner found that since the evidence of the Applicant's witnesses constituted hearsay, the hearsay evidence was to be excluded because none of the grounds as provided for in section 4 of the *Law of Evidence Amendment Act* (the LEAA)[15] existed. Thus, the issue concerns the regularity of the commissioner's ruling on the admissibility of the hearsay evidence.

[14] *Nkomati Joint Venture v Commissioner for Conciliation, Mediation and Arbitration & others* (JA 155/2017) [2018] ZALAC 53; (2019) 40 ILJ 819 (LAC) (12 December 2018) at para 18.
[15] Act 45 of 1988.

[20] As was mentioned in the *Exxaro Coal (Pty) Ltd & another v Chipana & others*[16] (*Exxaro*) "*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, 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.*"

[21] Hearsay evidence is defined in section 3(4) of the *LEAA* as evidence, whether oral or in writing, the probative value of which depends on the credibility of any person other than the person giving such evidence.[17]

[22] In terms of section 3(1) of the *LEAA,* hearsay evidence shall not be admitted as evidence unless the parties agreed to the admission thereof as evidence, or the person upon whose credibility the probative value of such evidence depends, testifies at the proceedings or where the evidence is admitted in the interest of justice, having regard to seven specified factors.

(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; and

(vii) any other factor which should in the opinion of the court be considered,

[16] *Exxaro Coal (Pty) Ltd & another v Chipana & others* (JA161/17) [2019] ZALAC 52; [2019] 10 BLLR 991 (LAC); (2019) 40 ILJ 2485 (LAC) (27 June 2019) at para 3.
[17] Section 3(4) of the Law of Evidence Amendment Act 45 of 1988.

And if it believes such evidence should be admitted in the interests of justice.

[23] 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.

[24] This court has ruled that "*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*".[18]

[25] It was also stated that this section 3(1) of the *LEAA* still retains the "caution" concerning the receiving of hearsay evidence, but it has changed the rules about when it is to be received and when it is not to be received or accepted.[19]

[26] The provisions of section 138 of the *Labour Relations Act, 1995* (LRA) give a Commissioner a discretion to conduct an arbitration in a manner that he or she considers appropriate to determine a dispute fairly and quickly, and to do so with a minimum of legal formalities. However, I am mindful once again of the dicta in the *Exxaro* case[20] where the court said that this discretion "*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, 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*

[18] Musi AJA in *Public Servant's Association of South Africa v Minister: Department of Home Affairs and Others* [2013] 3 BLLR 237 (LAC) at para 19.
[19] *S v Ndhlovu and Others* (above) para 15, quoting from *Makhatini v Road Accident Fund* 2002 (1) SA 511 (SCA) at para 51.
[20] *Exxaro Coal* at para 21.

hearsay evidence appears not to be the answer, because those rules have already rightly been jettisoned for their "rigidity, inflexibility – and occasional absurdity".[21] Those "epithets" are not consonant with fairness and reasonableness.[22]

[27] The Court further stated that 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*.[23]

[28] For the purpose of this case before me the court in the *Exxaro* case went on to say that "*adapted they would include the following:*

> *(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*
>
> *(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. The same ought to be true for an arbitration*

[21] *S v Ndhlovu and others* at para 15.
[22] *Exxaro Coal* at para 21.
[23] *Exxaro Coal* at para 24.

conducted in an adversarial fashion because fairness to both parties is paramount.

[29] Turning to the facts of this case, the Commissioner was evidently aware of her duties to assist the parties and appropriately attempted to do so at times. For example, at the commencement of the arbitration proceedings, she narrowed the issues in dispute.[24]

[30] After the representatives confirmed that these were the issues in dispute, Pick then proceeded to give evidence on behalf of the Applicant.

[31] During his evidence it became very clear that Bebe was not versed in the questioning of his witness. The Commissioner had to intervene on numerous occasions and warned him of leading evidence-in-chief.[25] The Commissioner, on a few occassions even proceeded to give him a lesson on how to go about questioning the witness during examination-in-chief without necessarily leading the witness.[26]

[32] She recognised at the very outset of the arbitration proceedings that the evidence of Pick was hearsay evidence when she interjects during examination- in-chief and corrects Bebe when Bebe states to the witness, Pick: "*You just testified to this Commission that the Applicant spread misleading information to the employees. Is that correct?*", and the Commissioner questions; "*He just testified?*" to which Bebe states the following; "*That the Applicant spread misinformation, misleading information to the employees.*" When Pick answers "*Yes*" the Commissioner states "*He testified that he was informed that the Applicant……yes"*.[27]

[33] Regarding the evidence of Magagula, from the transcript it becomes clear that the Commissioner was once again aware in what capacity Magagula was testifying, i.e., as chair of the disciplinary hearing of the First Respondent, and by her stating to this witness "*What inference did you draw*" in relation to

[24] Index to Record of Proceedings Volume 1 of 4 at pgs 4-5.
[25] For example, see pgs 8, 23, 24, 25, 28 of the Index to Record of Proceedings Volume 1 of 4 as well as Volume 2. She also assisted with questioning and understanding of examination in chief etc in Volume 2 of the Index.
[26] See pg 29 of the Index to Record of Proceedings Volume 1 of 4.
[27] Index to Record of Proceedings Volume 1 of 4 at pg 19.

Japhter's evidence during the disciplinary[28] it indicates that the Commissioner was once again alive to the type of evidence she is faced with determining the value of.

[34] Furthermore, during the evidence of Giles, the Commissioner asked her questions like "*sorry is it something you observed or is it something that someone told you they observed…...then let's leave it at that. If it is something you did not observe someone told you their [inaudible]*"; and "*did you observe any moral on part of the*".[29] From a holistic reading of the Transcript, I am satisfied that the Commissioner was alive to the fact that not only was Giles' evidence hearsay evidence but all three witnesses' evidence called in support of the Applicant, constituted hearsay evidence.[30] At the end of the Applicant's case at the arbitration, the Commissioner asked of the Applicant's representative "*Are you closing your case*"[31] to which Bebe responded "*yes*", and the Commissioner accepted this without any further consideration or explanation.[32] She then proceeded to hear evidence relating to the First Respondent's case.

[35] It is apparent from the record of the arbitration proceedings that the commissioner was acutely aware that she was faced with an inexperienced representative together with hearsay evidence being adduced; she therefore had a duty in terms of the CCMA Guidelines, to lend a helping hand but fails to do so and appeared to adopt a passive attitude in this regard.

[36] No objection was raised to this evidence being adduced, either by the First Respondent or by the Commissioner. In fact, Sephoti himself did not raise any objection to the hearsay evidence and appeared after each witness had given evidence-in-chief and proceeded to cross-examine, in-depth, the witnesses, with the consent of all parties including the Commissioner. At the closure of the Applicant's case the Commissioner once again had an opportunity to proclaim on the hearsay evidence as well as what her

[28] Index to Record of Proceedings Volume 2 of 4 at pg 34/141.
[29] Index to Record of Proceedings Volume 3 of 4 at pg 242.
[30] Index to Record of Proceedings Volume 2 and 3 of 4.
[31] Index to Record of Proceedings Volume 3 of 4 at pg 139.
[32] Index to Record of Proceedings Volume 3 of 4 at pg 139/246.

inference would be if Bebe does not call further witnesses, but she failed to do so.

[37] From the First Respondent's Heads of Argument[33] they argue that should the Commissioner have brought to the attention of the Applicant the need to call other witnesses to corroborate evidence it would have created a perception of bias in favour of the Applicant. I beg to differ. The issue that arises here is not whether the Commissioner should have informed the Applicant of the need to call a witness to corroborate hearsay evidence, but what weight she would be attributing to the hearsay evidence and the inference, albeit a negative one, that she would draw from such evidence. It would then have been up to the Applicant to call other witnesses or not. This would give proper effect to the duties of a Commissioner in terms of clause 21 of the CCMA Guidelines.

[38] It is my opinion that in this matter the timing of the Commissioner's ruling on the admissibility of the hearsay evidence is of vital importance. If one has regard to the LAC decision in *Exxaro* and looking at the principle of fairness, the fact that the Commissioner failed to comment on or proceed to explain the weight attributed to hearsay evidence in terms of the *LEAA* at the time when she became aware of the fact that the evidence was hearsay evidence is crucial and has a direct impact on her duty to ensure fairness in the proceedings.

[39] Furthermore and as reflected in the CCMA Guidelines the purpose of the helping hand principle is to prevent a procedural defect by ensuring that there is a full ventilation of the dispute and a fair trial of the issues. The Commissioner had a duty firstly to explain to the parties the significance of the provisions of section 3 of the *LEAA*, or of the alternative, fair standard and procedure that was going to be adopted by the Commissioner to consider the admission of the evidence and secondly, to timeously rule on the admission of the hearsay evidence. As stated by the Court in *Exxaro* to only make a ruling on admissibility of such evidence only at the award stage speaks to the crucial aspect of fairness. The fact that the decision of the hearsay evidence

[33] Dated 29 October 2019.

occurred only at decision-making time, is significant as this prevented there being a full ventilation of the dispute and a fair trial of the issues.[34]

[40] A Commissioner has a duty to determine a dispute between parties fairly and quickly. The issue of the Commissioner's relative passivity when the hearsay evidence was being adduced at the arbitration is not compatible with this duty. Furthermore, the timing of the ruling was not fair to the parties because if the issue of admissibility of the hearsay evidence had been addressed promptly when it was being adduced or had adduced a ruling in respect thereof would have assisted both sides to know what the ambit of the cases were that they had to meet respectively.[35]

[41] I am of the view that the Commissioner's passivity herein led to the prejudice of the Applicant's case as Bebe was clearly ill-equipped to deal with these types of proceedings and he proceeded not fully understanding and appreciating the type of evidence that was being presented. Whilst it may be that parties are legally trained to participate in arbitration proceedings, it was clear herein that Bebe was not. It was therefore ultimately for the Commissioner to ensure that the hearing was fair for both sides. In essence both parties were essentially deprived of the opportunity of knowing exactly what more was required of them to properly 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 act on such a ruling and this resulted in unfairness.

[42] 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 but would have been alert to the introduction of the hearsay evidence and would have addressed its admissibility promptly to ensure fairness and expediency.

[43] The Commissioner's ruling on admissibility was material in that it clearly impacted the outcome of the arbitration. The First Respondent's dismissal

[34] *Nkomati Joint Venture*.
[35] *Exxaro Coal* at para 29.

was held to be substantively unfair because the commissioner found that all the evidence before him was “merely hearsay”.

[44] 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.

[45] Considering the law and fairness, no costs order will be made herein.

Order

In the premise, I make the following order:

1. The arbitration award issued under case number GATW 5234-17 dated 02 February 2018 is reviewed and set aside.

2. The matter is referred to the Second Respondent (CCMA) for an arbitration hearing *de novo*.

3. No order is made as to costs.

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T Deane

Acting Judge of the Labour Court

Appearances:

For the Applicant:	Tebogo Manchu Instructed by Hogan Lovells Attorneys
For the First Respondent:	Thuso Modisane Instructed Finger Phukubje Attorneys