IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Case no: DA04/2024

In the matter between:

CTP GRAVURE (PTY) A DIVISION OF CTP LIMITED	**Appellant**
and	
THE STATUTORY COUNCIL FOR THE PRINTING, NEWSPAPER AND PACKAGING INDUSTRY	**First Respondent**
RAJENDRA SHANKER *N.O*	**Second Respondent**
THE CHEMICAL, ENERGY, PAPER, PRINTING, WOOD AND ALLIED WORKERS' UNION OBO SIZWE HLONGWANE	**Third Respondent**

Heard: **11 March 2025**
Delivered: **20 March 2025**
Coram: **Van Niekerk JA, Waglay and Mooki AJJA**

JUDGMENT

WAGLAY, AJA

Introduction

[1] This appeal, with leave of the court *a quo*, concerns the treatment of hearsay evidence in an arbitration proceeding and whether the failure to rule on the admission of such evidence at the outset of the arbitration proceedings constitutes gross irregularity sufficient for the review of the arbitration award. Further, the appellant impugns the arbitrator's refusal to allow it legal representation during the arbitration proceedings, which refusal, as the argument goes, impacted its case before the bargaining council and the eventual refusal to admit the hearsay evidence presented.

[2] The record of appeal is filed one day late, and the appellant has sought condonation. The delay is minimal and explained, and in that respect, condonation is granted.

Background

[3] The appellant, CTP Gravure, operates as a printing company engaged in the printing of magazines and brochures. The union, CEPPWAWU, enjoys representivity within the appellant's workplace.

[4] The employee, Sizwe Hlongwane, commenced employment with the appellant in 2005, and at the time of his dismissal, he was employed as an RECMI operator. The employee further served as a shop steward of the union.

[5] On 17 September 2018, the employee, as shop steward, together with senior employees of the appellant, being the Production Manager, Johnathan Lawrence

(Lawrence) and the Divisional Managing Director, Jan Marius Logtenberg (Logtenberg), attended a section 189A facilitation meeting. At the facilitation meeting, the employee alleged that the appellant had engaged the employment services of nine casual workers, which the appellant disputed. Given the claim, it became necessary for the appellant to inspect its workplace to confirm the number of casual workers employed.

[6] On their return to the workplace, Lawrence and Logtenberg conducted an inspection to confirm the veracity of the employee's claims, and it was during this inspection when a heated discussion or confrontation, regarding the claims made by the employee during the facilitation meeting, ensued between the employee and Logtenberg.

[7] Three days after the inspection, on 20 September 2018, the employee lodged an internal grievance against Logtenberg, alleging that during their discussion, Logtenberg had used abusive language towards him, more specifically, as it was later established during the grievance meeting, that Logtenberg had referred to him as a 'stupid black'.

[8] In the days following the altercation between Logtenberg and the employee, Lawrence had come to learn, from numerous employees, that the employee was alleging that Logtenberg had called him a "kaffir" during their confrontation. He was first alerted to this allegation by another shop steward, a Mr Thiyane, during a telephone call on 20 September 2018, who had indicated that he had heard directly from the employee that Logtenberg had used the slur during their confrontation. Upon investigation by Lawrence, the same rumour was confirmed by several other employees.

[9] On 17 October 2018, Lawrence received an email from another employee who confirmed that he had heard the same rumour.

[10] Pertinently, although several employees had confirmed hearing the rumour, it was only Mr Thiyane who had allegedly got this information directly from the employee.

[11] On 24 October 2018, the appellant issued the employee with a notice of suspension, a notice to attend a disciplinary hearing and a letter to the union informing it of its intention to take disciplinary action against its shop steward, the employee. The employee, per the notice to attend the disciplinary hearing, was called to answer the following charge:

> 'you made false, malicious and damning allegations against [Logtenberg] in that you misrepresented the fact that, in an interaction between yourself and [Logtenberg] on 17 September 2018 [Logtenberg] had utilised offensive and derogatory terminology, namely that he had referred to you by utilising the "k" word.'

[12] On the same date, the employee filed a criminal complaint against Logtenberg for the use of abusive language. Similar to his grievance, there is no mention in the criminal complaint that Logtenberg had called him a "kaffir".

[13] On 26 October 2018, the disciplinary hearing proceeded in the employee's absence, and he was found guilty of the misconduct alleged. The employee was subsequently dismissed, and an internal appeal was sought but refused.

[14] Aggrieved, the employee, assisted by the union, referred an unfair dismissal dispute to the bargaining council, impugning the substantive and procedural fairness of his dismissal.

Arbitration

[15] At arbitration, the appellant applied for legal representation on the basis that the dispute was fairly complex, particularly as it intended to rely on hearsay evidence to make its case against the employee. The appellant further argued that due to the comparative ability of the parties and that the dispute concerned an issue of public interest, it was necessary for it to be represented by an attorney. The application for legal representation was opposed by the employee.

[16] The arbitrator refused the application for legal representation. He further ruled that the parties would be allowed to submit hearsay evidence provisionally; thereafter, they could argue whether the evidence should be admitted, and that the parties were allowed to submit written arguments at the end of the proceedings in respect thereof. Neither party objected to this.

[17] In the arbitration award, the arbitrator refused to admit the hearsay evidence led by the appellant, and as no other evidence was presented to sustain its case that the employee had committed the misconduct alleged, it was determined that the appellant failed to establish any wrongful conduct on the part of the employee and the dismissal was found to be unfair.

In the Labour Court

[18] On review, the appellant submitted that the application for legal representation was inextricably connected to its request for the admission of hearsay evidence and that the arbitrator failed to comply with the principles expounded in the judgment of this Court, *Exxaro Coal (Pty) Ltd v Chipana and others*[1] (*Exxaro*), in belatedly rejecting the admission of the evidence. The appellant further submitted that the bargaining council did not have jurisdiction to hear the dispute as, throughout the arbitration proceedings, the "*underlying theme and tone and the fundamental complaint*" raised by the employee was that he was victimised for his trade union activities and in effect, the misconduct charge was merely a sham intended to disguise the true reason for his dismissal. Thus, so the argument went, the employee's case before the bargaining council was actually one of an automatically unfair dismissal on the grounds of discrimination or victimisation, depriving the bargaining council of jurisdiction to hear the dispute.

[19] Finally, the appellant submitted that the arbitrator had committed a material contradiction by first finding that the evidence of its key witness, Lawrence, was credible

[1] [2019] ZALAC 52; (2019) 40 ILJ 2485 (LAC).

and probably true and then later finding that the hearsay evidence led by Lawrence could not be admitted.

[20] On the finding of procedural unfairness, the appellant impugned the finding that it had failed, prior to the institution of disciplinary action against the employee, to consult effectively with the union in terms of the provisions of the Code of Good Practice: Dismissal[2].

[21] The court *a quo* found that the arbitration award did not contain any reviewable irregularities or defects, and the review application was dismissed.

In this Court

[22] On appeal, and in its heads of argument, the appellant persisted with the contention that the failure to timeously decide on the admission of hearsay evidence and the refusal to allow legal representation during the arbitration proceedings, was unreasonable and prejudicial to the parties.

[23] The grounds of appeal can be summarised as follows:

1. The court *a quo* erred in its treatment of *Exxaro* and, in particular, the failure by the arbitrator to decide the admissibility of the hearsay evidence timeously;
2. The court erred in failing to appreciate the unfairness occasioned in the provisional admittance of the evidence, only for the same evidence to be later rejected;
3. The court *a quo* erred in its reliance on the employee's answering affidavit as a starting point in considering the arbitration award;
4. The court erred in finding that the introduction of hearsay evidence was objected to by the employee when it was first introduced;
5. The court erred in finding that the arbitrator gave appropriate reasons for his decision to refuse legal representation; and

[2] Schedule 8 of the LRA.

6. The court erred in its criticism of the appellant's inability to secure the attendance at arbitration of witnesses to corroborate the hearsay evidence led.

[24] The appellant did not continue with its jurisdictional challenge in this appeal, nor did it dispute the court a *quo*'s findings on procedural fairness. The Appellant also abandoned its appeal on the arbitrator's findings in relation to legal representation. The only challenge related to the admission of hearsay evidence.

Admission of hearsay evidence

[25] Hearsay evidence is defined in section 3(4) of the Law of Evidence Amendment Act as "*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*" and in terms of section 3(1) of the Act, such evidence shall not be admitted as evidence in criminal or civil proceedings unless:

> '(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;
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> (ii) the nature of the evidence;
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> (iii) the purpose for which the evidence is tendered;
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> (iv) the probative value of the evidence;
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> (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
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> (vi) any prejudice to a party which the admission of such evidence might entail; and
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> (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.'

[26] There are three circumstances wherein hearsay evidence may be admitted: on consent between the parties; on provisional admittance with an understanding that the person upon whose credibility the probative value of the evidence depends is to testify at some future point in the proceedings; or by the court if the court, on consideration of relevant factors, is of the opinion that it would be in the interests of justice to admit the evidence.

[27] The employee had not consented to the admission of the hearsay evidence, nor, as incorrectly stated by the court *a quo* and argued by the union, was the provisional admission given on condition that the witnesses who could corroborate the appellant's case that the employee had committed the misconduct as alleged would later give evidence. On a reading of the transcript, together with the arbitration award, the arbitrator was aware at the time that the application for the admittance of hearsay evidence was made that the appellant was unable to secure the attendance of key witnesses who could give evidence based on their first-hand knowledge of the rumour. Instead, the arbitrator made a finding of provisional admittance where the parties would, at the close of the proceedings, make argument and written submissions on whether the evidence led should be finally admitted or not. As the arbitrator said:

> 'The parties will be allowed to submit hearsay evidence provisionally and argue at the end of the hearing as to why it should or should not be taken into consideration and the weight to be attached to it and I will allow the parties to submit written arguments at the end of the proceedings.'

[28] This position, that the provisional admittance of the evidence was made without the condition that the hearsay evidence would be later corroborated, is further emphasised by the arbitrator in the arbitration award where he stated:
'the [employee] did not consent to the admission of the hearsay evidence and had in fact strongly objected to it. It was clear from the outset that none of the staff that gave Lawrence the information were going to give evidence at this arbitration. In determining

whether to admit the hearsay evidence, I have therefore taken into account the provisions of subsection 3(1)(c) of the Evidence Amendment Act.'

[29] Accordingly, the final decision on the hearsay evidence was premised on the arbitrator's discretion following a section 3(1)(c) assessment of the circumstances of the disputes.

Timeous rulings on hearsay evidence

[30] In applying the hearsay provisions of the Act, the Supreme Court of Appeal in *S v Ndhlovu and Others*[3] (*Ndhlovu*) set out three safeguards to be applied:

> '[17] …
>
> - First, a presiding judicial official 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. …
>
> [18] 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 judgment, nor on appeal. The prosecution, before closing its case, must clearly signal its intention to invoke the provisions of the Act, and, before the State closes its case, the trial Judge must rule on admissibility, so that the accused can appreciate the full evidentiary ambit he or she faces.'

[31] This Court in *Exxaro* confirmed the applicability of the safeguards set out in *Ndhlovu* within the context of arbitration proceedings and held that:

[3] 2002 (6) SA 305 (SCA).

'Those safeguards and precautions, duly adapted, also apply to the application of s 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 s 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 s 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 conducted in an adversarial fashion because fairness to both parties is paramount.'[4] (emphasis added)

[4] *Exxaro* at para 24.

[32] In *National Union of Metalworkers of South Africa obo Mokase v Nissan South Africa (Pty) Ltd and others*[5] (*Nissan*), this Court expanded on the importance of timeous rulings on the admission of the hearsay evidence:

> 'The importance of a timeous ruling on the admissibility of the hearsay evidence is that it provides parties with the opportunity to make submissions on the issue and, if informed that such evidence is to be excluded, to consider whether it is possible to rely on other evidence or not. Given the nature of the evidence and the reliance placed on it in the proceedings before the commissioner, the failure to determine the issue and the decision later simply to exclude such evidence, without having regard to the provisions of section 3 or make 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 proceedings.'

[33] Although section 138 of the Labour Relations Act[6] gives an arbitrator discretion to conduct the arbitration proceedings in a manner that they consider appropriate to determine the dispute fairly and quickly, this does not mean that an arbitrator may treat evidence in a manner which is unfair to the parties.[7]

[34] The arbitrator had regard to the provisions of section 3(1)(c) in assessing the hearsay evidence led, undertaking a fairly extensive consideration of the factors set out in the Act against the facts of the dispute. However, and contrary to the above dictums in *Ndhlovu* and *Exxaro*, the arbitrator had only made his ruling on the admissibility of the hearsay evidence in his arbitration award.

[35] The prejudice to the parties, particularly the party leading the hearsay evidence, in receiving a belated section 3(1)(c) ruling on the admissibility of its evidence at judgment or award stage is obvious: such party leading the hearsay evidence is unable to decide whether to lead further evidence in light of the ruling. Here, the arbitrator provisionally admitted the hearsay evidence and advised the parties to make written

[5] [2024] ZALAC 16; [2024] 9 BLLR 967 (LAC).
[6] Act 66 of 1995, as amended.
[7] See: *Exxaro* at para 21; and *Nissan* supra at 14.

submissions at the tail end of the arbitration proceedings on whether he should accept such evidence. This decision, according to the appellant, had the effect of prejudicing its case by delaying the timing of the ruling to after its case had closed and as such, as stated in *Exxaro*, "*it was too late for either party to do anything to save their (respective) situations*"[8].

[36] However, a late ruling on the admissibility of hearsay evidence may not necessarily warrant the setting aside of the award and for the matter to be remitted back to CCMA or the bargaining council for a hearing *de novo.*

[37] This Court in *Nissan* stated:

> '[18] A material misdirection and gross irregularity caused by the commissioner's failure to have regard to the admissibility of the hearsay evidence in the manner required may warrant a decision to set aside the award with the matter referred back to the CCMA for a new hearing. …
>
> [19] This is so in that the result reached by the commissioner was also unreasonable given the failure to have regard to the circumstantial evidence adduced at arbitration. Despite the recognition that legal formalities may be kept to a minimum during the course of arbitration proceedings, evidence adduced must be appropriately considered by a commissioner and cannot simply be ignored. …'[9]

[38] That being said, this dispute is not like *Exxaro,* where the commissioner had belatedly *and* incorrectly decided on the issue of the admissibility of the hearsay evidence. As set out above, the arbitrator had assessed the section 3(1)(c) factors in his consideration of whether it would be in the interests of justice to admit the evidence.

[39] What is relevant here is that, not only did the arbitrator find that the hearsay evidence was oral in nature, he also found that the evidence presented by Lawrence , in

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[8] *Exxaro* at para 34.
[9] *Nissan ibid* at paras 18 – 19.

respect of specific employees, constituted third or even fourth-hand hearsay evidence where the employees who had reported to Lawrence had heard the rumour from their fellow co-workers or the 'shop floor'. Only one employee, Thiyane, had heard the alleged claim of the use of the 'k word' directly from the employee himself, and Thiyane was not called to testify during the arbitration proceedings.

[40] Although reasons were given as to why the employees did not appear at the disciplinary hearing to testify as to their knowledge of the rumour, no reasons were proffered as to why they could not testify at the arbitration hearing. Nor did the appellant give reasons why the employees were not subpoenaed to present their evidence in a case where they were unwilling to appear voluntarily before the proceedings. Arbitration proceedings are conducted *de novo*, and as such, the appellant needed to present new evidence to explain why the employees, and more specifically Thiyane, were not called to give evidence and why, despite the step being available to it, did the appellant not subpoena him to appear at the arbitration hearing.

[41] Importantly, it was the evidence of the appellant that it had no intention to call the employees to give evidence against the 'errant' employee.

[42] The lack of first-hand evidence, coupled with the lack of an acceptable explanation for failing to call its employee, Thiyane, to testify at the arbitration, was, in the arbitrator's view, fatal to the appellant's case for the admission of the hearsay evidence. This, in my view, was not open for the labour Court to interfere with the arbitrator's decision, nor is it open for this Court to do so.

[43] In any event, the appellant was aware from the commencement of the leading of its evidence that the arbitrator had only intended to make a determination on the admissibility of the hearsay evidence as part of his award on the merits of the dismissal. It should, therefore, have realised the risk associated with such a decision and should have presented argument as to why that route would severely prejudice it. It should have at that time or at least before deciding to close its case, argue that the absence of

the decision on the admissibility of the hearsay evidence would prejudice it in the further conduct of its case.

[44] In the circumstances of this case, I do not believe that there are sufficient grounds to set aside a (on the whole) reasonable arbitration award in a case where the appellant's case was solely based on a workplace rumour.

[45] Finally, I must add that while affidavits normally constitute evidence in application proceedings, in an application to review an award or any other decision, the evidence is the record that served before the commission or the decision maker, not the affidavits in support or in opposition to the review application. The affidavits may provide submissions and averments as to why the award or decision should be reviewed or not, but the grant or refusal of the review is based on the four corners of the record. The court *a quo* thus erred in relying on the employee's answering affidavit to form the view that the arbitrator had in fact handed down a 'decision' in respect of the admission of the hearsay evidence when the record clearly demonstrated that this was not the case, and both parties where satisfied that the record filed was sufficient to deal with the review application that was before the court *a quo* and this Court.

[46] In the circumstances, the appeal must fail. I also see no reason to award costs.

[47] In the result, the following order is made:

Order

1. Condonation for the late filing of the record of appeal is granted.
2. The appeal is dismissed with no order as to costs.

WAGLAY AJA

Van Niekerk JA and Mooki AJA concur.

APPEARANCES:

FOR THE APPELLANT: Mr. A Soldatos of Soldatos Cooper Inc.

FOR THE 3rd RESPONDENT: Mr. J Phillips of Cheadle Thompson &Haysom Inc