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THE ADMISSIBILITY OF HEARSAY EVIDENCE DURING HEARINGS AND ARBITRATION PROCEEDINGS



By general definition, ‘hearsay’ is understood as being information that cannot really be proven. It is often heard by someone else and so can easily amount to nothing more than rumours.

For the purpose of this blog we define hearsay evidence during hearing proceedings in the workplace.

What is the general rule of hearsay and exceptions?

As a general rule of the Law of Evidence of South Africa, hearsay evidence is not admitted.

Hearsay evidence is defined in section 3(4) of the Law of Evidence Amendment Act, No. 45 of 1988 (LEAA) 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”.

The exception to this rule is regulated by section 3 of the Law of Evidence Amendment Act 45 of 1988:

“(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless–

1. each party against whom the evidence is to be adduced agrees to the admission of the evidence at such proceedings; or
2. the person upon whose credibility the probative value of such evidence depends, himself testifies at the proceedings; or
3. the Court, having regard to–

(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

(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 interest of justice.”

Examples of Case Law in the workplace where the above-mentioned rules were applied:

- **Matsekoleng v Shoprite Checkers [2013] 2 BLLR 130 (LAC)** - the Commissioner's decision not to admit an affidavit where the deponent could not be cross-examined was a material mistake in law. This aspect was only relevant as to the weight of the evidence
- **Southern Sun Hotels (Pty) Ltd v SA Commercial Catering & Allied Works Union and Another [2000] 21 ILJ 1315 (LAC)** - the test with regard to the admissibility of hearsay evidence was whether it was in the interest of justice to admit such hearsay.
- **Swiss South Africa (Pty) Ltd v Louw NO and Others [2006] 27 ILJ 395 (LC)** - Depending on the circumstances of each particular case, hearsay evidence may accordingly be admitted to the proceedings before the CCMA. Commissioners were required to deal with their disputes with the least legal formalities and with some flexibility as provided in section 138 of the Labour Relations Act.
- **Sisonke Partnership t/a International Healthcare Distributors v National Bargaining Council for Chemical Industry & Others (JA51/10)[2013] ZALAC 16** - Hearsay evidence is allowed if it is in the interest of justice and such evidence is confirmed by other evidence.
- **NUMSA obo ADAM v Volkswagen South Africa (Pty) Ltd [2002] 9 BALR 967 (CCMA)** - Written statements by a victim of sexual harassment are allowed as hearsay in light of the fact that a qualified psychologist testified to the psychological impact of acts of sexual harassment and rape. It was more in the interest of justice to admit the hearsay evidence than it would have been to exclude it.
- **Numsa obo Mnisi v First National Battery [2007] 10 BALR907 (NBCCI)** - A tape recording was admitted as evidence where the employee admitted to theft and also implicated the applicants. There was no convincing explanation as to why the informer could not be called to testify. The dismissal was unfair, as the decision by the presiding officer was based solely on the tape recording.
- **Sangweni Matshaka NO [2019] ZALCJHB 173** - The failure to assess the weight to be attached to hearsay evidence was held to amount to a reviewable irregularity.
- **Minister of Police v M and Others (JR56/14) [2016] ZALCJHB 314** - According to the judge, the **transcript** was prima facie evidence in support of the allegations against RM, and the judge gave the following six guidelines to follow when deciding whether hearsay evidence is prima facie proof of an allegation.

The hearsay evidence should-

- be contained in a record which is reliably accurate and complete;
- be tendered on the same factual dispute and be bilateral in nature (i.e. it should constitute a record of all evidence directly tendered by all contending parties);
- in respect of allegations, demonstrate internal consistency and some corroboration at the time the hearsay record was created;
- show that the various allegations were adequately tested in cross-examination; and
- have been generated in procedurally proper and fair circumstances.

In conclusion

With reference to the above, it is advisable for presiding officers to thoroughly weigh the different factors mentioned above when deciding on whether or not to allow hearsay evidence. Furthermore, it is imperative to attach weight to the hearsay evidence allowed. Lastly, hearsay evidence should be corroborated by other evidence before a decision is made. However, a transcript of disciplinary procedures is regarded as prima facie evidence if it meets the criteria in the Minister of Police v M and Others case.

SERR Synergy assists employers to follow the correct and fair procedure in disciplinary cases by presiding at internal disciplinary hearings.

About our Author: Jaco Conradie joined SERR Synergy in 2017 as Project Manager. He completed his LLB at the University of Stellenbosch in 2004 and received the SASLAW prize in Advanced Labour Law (2002). He has practised in Industrial Relations since 2005.

Other sources:

CCMA : Case law summary

SA Labour Guide: Clear-cut evidence in a not-so-clear-cut situation: when usually inadmissible, hearsay evidence should be weighed prima facie admissible evidence (by Fiona Leppan (Director), Michael Yeates (Director), Reabetswe Mampane and Cliffe Dekker Hofmeyr)

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