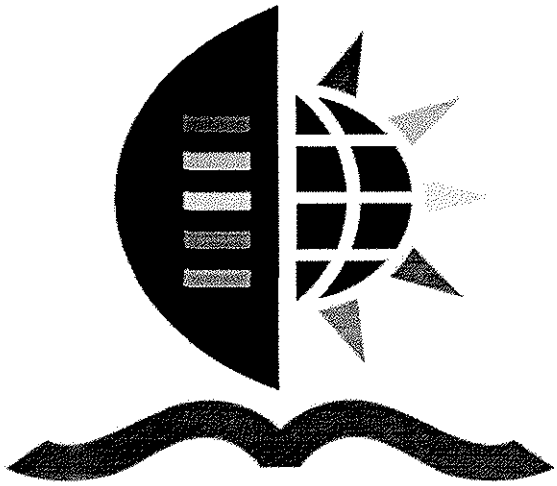
UNIVERSITY OF KWAZULU-NATAL

AN ANALYSIS OF THE PRESENTATION AND ADMISSIBILITY OF EVIDENCE AT CCMA ARBITRATIONS



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DECLARATION

I, Shamon Gounden, hereby declare that this dissertation is a product of my own work except where otherwise stated and expressly acknowledged, and that it has not been previously presented either in part or in its entirety at any other university for the award of a degree.

Signature 

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"Though the fig tree does not bud and there are no grapes on the vines, though the olive crop fails and the fields produce no food, though there are no sheep in the pen and no cattle in the stalls, yet I will rejoice in the LORD, I will be joyful in God my Savior. The Sovereign LORD is my strength; he makes my feet like the feet of a deer, he enables me to tread on the heights."

Habakkuk 3:19

(NIV)

First and foremost, I thank God for granting me the wisdom and strength to have accomplished this feat.

This paper could not have been completed without the efficiency and guidance of my supervisor, Ms Benita Whitcher. Thank you for your time and positive criticism. I have learned a great deal from you.

To my parents, Veni and Preggie Gounden: Thank you for the sacrifices you made to afford me this opportunity to better myself. I am forever indebted to you.

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ABSTRACT

Historically, labour dispute resolution in South Africa has been synonymous with being expensive, unnecessarily lengthy and ineffective. The Labour Relations Act (LRA) 66 of 1995 set out to change this through the creation of the Commission for Conciliation, Mediation and Arbitration (CCMA). The design of the CCMA is centred on a dispute resolution institution that adopts a quick, cheap and non-legalistic approach to dispute resolution. Through the introduction of compulsory arbitration for specified dismissal and unfair labour practice disputes, the LRA granted the CCMA the mandate of upholding the objectives of industrial peace and reducing exorbitant legal costs. The outcome of arbitration proceedings conducted under the auspices of the CCMA are final and binding. Accordingly, this *sui generis* type of proceedings aimed at being cheap and informal has several implications. The adherence to traditional legal principles, in particular the rules relating to the presentation and admissibility of evidence cannot be adhered to rigorously in a forum where parties are unrepresented and that has informality as a defining feature. This paper set out to examine the proposition that based on various statutory powers; arbitrations are to be conducted informally and free from legalism- which necessarily entails a relaxation if not elimination of the traditional exclusionary rules pertaining to the presentation and admission of evidence.

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CHAPTER 1

INTRODUCTION

1.1 Background

Labour disputes arise from the relationship between employers and employees, or the termination thereof. South African labour law provides an extensive range of statutory employment rights and thus an extensive range of rights disputes. The Basic Conditions of Employment Act[1] sets minimum conditions of employment, the Employment Equity Act[2] prohibits discrimination against employees on certain grounds, except on certain specified grounds, and obliges the employer to implement affirmative action measures to achieve equitable demographic representation in the workplace, the Labour Relations Act[3] confers, *inter alia,* the right against unfair dismissal and unfair labour practices and the right to collectively bargain. The contract of employment between an employer and employee still remains a fundamental source of rights and thus labour disputes include breaches of contract claims.[4]

The advent of the 1995 Labour Relations Act[5] ('the LRA') brought about significant change to dispute resolution in South Africa. A specialist high court, namely the Labour Court and a Labour Appeal Court was created. Most significantly a primary objective of the LRA is to provide an inexpensive, non-legalistic and quick method of resolving specified employment disputes through conciliation and arbitration.

The preamble to the Act reads as follows:

> "To provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration is established), and through independent alternative dispute resolution services accredited for that purpose."

[1] Act 75 of 1997. Hereinafter referred to as the BCEA.
[2] Act 55 of 1998. Hereinafter referred to as the EEA.
[3] Act 66 of 1995.
[4] Section 74 of the BCEA.
[5] Act 66 of 1995.

In accordance with the stated objective, the Commission for the Conciliation, Mediation and Arbitration ('the CCMA') was created in terms of section 112 of the LRA. It occupies offices, and has jurisdiction, in all nine provinces.[6]

Section 115 of the LRA prescribes the functions of the CCMA. The CCMA must attempt to resolve, through conciliation, any dispute referred to it in terms of the LRA or other legislation.[7] If a dispute that has been referred to it remains unresolved after conciliation, the commission must arbitrate the dispute if the LRA or other legislation requires arbitration under the LRA and any party to the dispute has requested that the dispute be resolved through arbitration, or all the parties to a dispute in respect of which the Labour Court has jurisdiction consent to arbitration under the auspices of the Commission.[8]

Accredited Bargaining Councils are accredited to perform the same dispute resolution functions of the CCMA in certain disputes. Where disputes are referred for conciliation and arbitration in terms of the LRA to these accredited Bargaining Councils, the Bargaining Council arbitrators have the same functions, powers, duties and review evaluation that CCMA commissioners have when conciliating and arbitrating disputes.[9] Accordingly, all references to statutory arbitrations are equally applicable to Bargain Council arbitrations as well.

1.2 Purpose of the Study

The aim of this research paper is to examine arbitrations conducted in terms of the LRA by the CCMA and relevant Bargaining Councils. The proposition is that, based on the specific statutory powers, particularly section 138, the test for review of arbitration awards, the objects of the LRA and intention of the Legislature when they created statutory arbitration, arbitrations should be conducted in a simple informal non-legalistic manner without adherence to strict rules of evidence relevant to traditional court proceedings.

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[6] Section 114(1) LRA
[7] Section 115(1)(a).
[8] Section 115(1)(b)(i) and (ii).
[9] See section 51, 127 and 128 of the LRA.

The resolution of disputes inevitably involves the presentation of evidence by the parties to the arbitrator, especially where there are disputes of fact. In labour law, how evidence is presented and its admissibility depends on the nature of the proceedings, namely whether they are internal disciplinary proceedings, statutory arbitrations, private arbitrations or Labour Court proceedings.

The primary aim is to examine the presentation and admissibility of evidence in statutory arbitration hearings, that is arbitrations conducted in terms of the LRA. The proposition is that based on section 138 of the LRA, disputes are to be determined informally, quickly and with the minimum of legal formalities.

CHAPTER 2

STATUTORY ARBITRATIONS

2.1 Introduction

Generally, arbitration is a process where a neutral third-party makes a decision on a specified range of disputed issues and at the end of the case issues a written arbitration award (like a written judgment).[10] Statutory arbitrations are arbitrations conducted under the auspices of the CCMA or relevant Bargaining Councils. Importantly they are conducted in terms of the LRA which, through various provisions of the Act and Rules of Proceedings of the CCMA drafted in terms of the Act, regulate the conduct of these proceedings. Private arbitrations, on the other hand, are conducted in terms of the Arbitration Act 42 of 1965. This paper is concerned with statutory arbitrations conducted in terms of the LRA.

2.2 Jurisdiction of the CCMA and Bargaining Councils

The matters that the CCMA and Bargaining Councils must arbitrate are set out in the LRA and related legislation. The CCMA and bargaining councils have jurisdiction to arbitrate, *inter alia*, disputes concerning dismissal for misconduct and incapacity, [11] constructive dismissals, a retrenchment dispute where the process involved only one employee, [12] severance pay,[13] unfair labour practices,[14] organizational rights[15] and the interpretation and application of settlement and collective agreements. [16] Parties may also consent to the jurisdiction of the CCMA in respect of certain disputes ordinarily adjudicated by the Labour Court.

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[10] Arbitration has characteristics resembling adjudication but is more accurately classified as a quasi-judicial process. *Carephone (Pty) Ltd v Marcus NO* (1998) 19 *ILJ* 1425 (LAC)

[11] Section 191 of the LRA.
[12] Section 191 of the LRA.
[13] Section 41 of the BCEA.
[14] Section 191 of the LRA.
[15] Section 22 of the LRA.
[16] Section 24 of the LRA.

2.3 Representation in the CCMA and Bargaining Councils

Parties to a dispute in an arbitration have a right to representation. To this effect section 138(4) of the LRA provides that a party may be represented by a legal practitioner, a director or employee of the party or any member, office-bearer or official of the party's registered trade union or registered employers' organisation.[17]

Generally lawyers are not allowed to represent parties where the dispute concerns a dismissal. This is probably due to the fact that lawyers will make the process legalistic and expensive which would undermine the object of expeditious arbitration. It is further added that the use of lawyers in arbitrations would 'tilt the balance unfairly in favour of employers' as employers are in a better position to absorb the associated legal costs.[18] Legal representation is only permissible in these circumstances where consent of all parties as well as leave of the commissioner is obtained. Even if a party objects to the other being represented by a legal practitioner, commissioners are empowered to permit such representation if he feels the situation warrants such representation. This is permissible in terms of CCMA Rule 25(1)(c) where a commissioner concludes it would be unreasonable for a party to deal with the dispute without legal representation following a consideration of the legal nature of the dispute, its complexity, the public interest and the comparative ability of the opposing parties to deal with the dispute.

Where parties fail to agree on representation, it is expected that commissioners will apply their minds before denying or permitting legal representation.[19] It has been held by the labour court that the pivotal question to be determined by commissioners is if it would be unreasonable to allow a party to continue without legal representation.[20]

In the recent judgment of *Commission for Conciliation, Mediation and Arbitration and Others v Law Society of the Northern Provinces*[21] the constitutionality of Rule 25(1)(c) of the CCMA was in dispute. The High Court per Tuchten J declared the rule to be unconstitutional on the basis that it was irrational as it limited a litigant's right to legal representation.[22] The

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[17]Rule 25. Rules for the Conduct of Proceedings Before the CCMA. Published under GN R1448 in *GG* 25515 of 10 October 2003

[18]D Collier "The Right to Legal Representation Under the LRA" (2003) 24 *ILJ* 753. 753.

[19]J Grogan *Workplace Law* 10th Ed (2009) 429.

[20]*Afrox Ltd v Laka & others* (1999) 20 *ILJ* 1732 (LC) 1737.

[21](005/13) [2013] ZASCA 118

[22]*Law Society of the Northern Provinces v Minister of Labour and Others* (2013) 1 BLLR 105 (GNP) 45.

Supreme Court of Appeal per Malan J, in variance with the learned judge came to the conclusion that the rule served a legitimate governmental purpose and held that with regard to binding established authority- there was no general right to legal representation in administrative tribunals.[23] The full bench concurred on this position and accordingly the SCA has provided some clarity on the right to representation in the CCMA.

[23] *Commission for Conciliation, Mediation and Arbitration and Others v Law Society of the Northern Provinces* (note 21 above) 26. The full bench concurring.

CHAPTER 3

THE CONDUCT OF ARBITRATION PROCEEDINGS IN TERMS OF THE LABOUR RELATIONS ACT 66 OF 1995

3.1 Introduction

An arbitrator as the presiding officer fulfils a role similar to that of a judge or magistrate. He or she will hear the oral evidence and argument, assess real and documentary evidence and make a decision in the form of an arbitration award.[24]The issue that is examined in this chapter is how arbitrators are permitted and required by the LRA to conduct arbitrations. The proposition that is explored is that, while the process of arbitration is similar to litigation, the intention of the legislature was to provide an alternative to seeking redress through traditional court structures and that statutory arbitrators are not expected to act in the same manner as if it were legal proceedings in a court.[25] The role and powers awarded to arbitrators by the LRA indicate that they are permitted, and in certain situations actually enjoined, to conduct arbitrations in a more inquisitorial, investigative and robust manner in order to resolve the dispute in a manner that is simple and quick, but fair. They are also enjoined to apply rules of evidence that are not as technical or strict as those used in courts.

3.2 The Format of Arbitration Proceedings

This subject necessarily involves an examination of the traditional and inquisitorial approaches to fact-finding hearings.

3.2.1 The Traditional or Adversarial Trial Process

The basic system of adjudicating legal disputes through our courts in South Africa is called the adversarial system. In broad terms an adversarial system has the following features: The parties or their representatives define and control the issues to be determined and the flow of evidence.[26] They are responsible for selecting and leading witnesses and other evidence which advance their case. The right to cross-examine is seen as a fundamental procedural

[24]Bellengere A. ...et al *The Law of Evidence in South Africa: Basic Principles: Procedural Law* (2013) 424
[25]*Naraindath v CCMA & others* (2000) 21 *ILJ* 1151 (LC) 26-27.
[26] Bellengere ...et al (note 24 above) 424.

right. The role of the presiding officer is limited; he or she may not inquire beyond the evidence and issues put forward by the parties, may not cross examine witnesses and may only intervene to apply rules of evidence.[27] These rules mostly operate to exclude certain types of evidence on the basis that they are irrelevant, inherently unreliable, prejudicial, obtained unlawfully or contrary to public policy. The assumption is that the most effective way of determining a dispute fairly is to allow the parties to put their respective cases in their own way and control the evidence. [28]The court will thus only hear evidence that the parties have presented and not any other, possibly valuable and useful, evidence.[29]

3.2.2 The Inquisitorial Approach

Broadly speaking, in an inquisitorial or investigative system the presiding officer takes a more interventionist position. He or she plays an active role in determining and testing the issues and facts of the dispute during the hearing through personal questioning of the disputants and witnesses. He or she may thus inquire and go beyond the issues and evidence offered by the parties. The questioning and cross examination of witnesses is at the discretion of the presiding officer and the rules regarding admissibility of evidence are less strict.[30]

An inquisitorial approach permits the presiding officer to determine the flow of evidence by playing an active, investigative role through questioning parties and eliciting evidence.[31] It is essentially an inquiry to establish the material truth, with the inquirer using evidence as an aid to achieve this end.[32]

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[27]PJ Schwikkard, *Principles of Evidence*, 3rd Ed (2009) 9.
[28] B Whitcher "Speedy and effective arbitration in the CCMA: a case for an inquisitorial approach" Research Paper (2013).
[29] Bellengere …et al (note 24 above) 424.
[30] B Whitcher (note 28 above)
[31]Bellengere …et al (note 24 above) 424.
[32]PJ Schwikkard (note 27 above) 10.

3.2.3 Inquisitorial Systems in the South African Legal System

Inquisitorial features have long since been introduced into our legal system in important areas outside of labour law.[33] They were intended to meet the challenge posed by a variety of disputes that require simple, quick and cheaper processes.[34] Examples include the Small Claims Court, the Land Claims Court, the Admiralty Court and the Competition Tribunal.[35]

The proceedings before the Small Claims Court are informal in nature and conducted in a manner determined by the commissioner subject to the overriding need to comply with the principles of natural justice.[36] In terms of the Small Claims Court Act[37] the presiding commissioner shall proceed inquisitorially to ascertain the relevant facts. Parties have the responsibility for indicating what witnesses they wish to give evidence in support of their claim but the responsibility for questioning witnesses lay with the presiding commissioner. Parties may only question witnesses with the consent of the presiding commissioner. Evidence to prove or disprove any fact in issue may be submitted in writing or orally. The rules of evidence do not apply and the presiding officer may ascertain any relevant fact in such manner as it may deem fit. The Competition Tribunal, which enjoys considerable powers of remedy, including the prohibition of mergers, the imposition of injunctive relief, the levying of administrative penalties and the ordering of divestiture, also has similar inquisitorial powers and procedures.[38]

3.2.4 Inquisitorial Systems in other Labour Jurisdictions

In Australia and the United Kingdom, which have labour adjudication systems similar to ours, inquisitorial style approaches are common in administrative and labour tribunals. In the UK, arbitration under the auspices of ACAS is a *voluntary* alternative to proceedings in the Employment Tribunal. In terms of the rules arbitrations are informal with the arbitrator deciding all procedural and evidential matters during the hearing. The rules of evidence which apply in the courts will not apply in the arbitration hearing. Both parties are given a

[33] B Whitcher (note 28 above)
[34] Ibid.
[35] Ibid.
[36] *Naraindath v CCMA & others* (note 25 above) 32.
[37] Act 61 of 1984.
[38] B Whitcher (note 28 above)

full opportunity to outline their arguments, to refer to any relevant documents submitted by themselves or the other party, and to call those they wish to speak on their behalf.

Usually one person presents each party's case, but other members of each party's team may be asked to give supporting statements and be questioned by the arbitrator. The arbitrator will adopt a questioning approach to the hearing and, although there will be no direct cross-examination, a party may suggest questions which the arbitrator might put to the other party. The arbitrator will also be able to assist any party who is having difficulties in fully explaining their case. Each party will be allowed to summarize the main points of their case they wish to be considered by the arbitrator in coming to a decision.[39]

3.3 Determining the Format of Arbitrations Conducted Under the LRA

3.3.1 Introduction

An arbitrator's general powers and the general procedures regarding the conduct of arbitration proceedings under the LRA are set out in section 138 of the Act which reads as follows:

(1) The commissioner **may** conduct an arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly and **must** deal with the substantial merits of the dispute with the minimum of legal formalities.

(2) Subject to the commissioner's **discretion** as to the appropriate form of the proceedings, a party to a dispute is entitled to give evidence, call witnesses, question the witnesses of any other party, and address concluding arguments to the commissioner.

The interpretation of s 138 and thus how an arbitrator may conduct the proceedings must be seen in light of the Legislature's knowledge of the flaws synonymous with the adversarial system[40] and the overall purpose of the 1995 LRA in providing for arbitration by the CCMA

[39]P Benjamin 'Friend or Foe? The impact of Judicial Decisions on the Operation of the CCMA' (2007) 28 *ILJ* 20; B Whitcher (note 28 above).
[40]*Pep Stores (Pty) Ltd v Laka* (1999) BLLR 952 (LC) 19.

and the establishment of the CCMA. When the draft of the 1995 LRA was published it was accompanied by an explanatory memorandum.[41] The following extracts are pertinent:

> "Our system of adjudicating unfair dismissal disputes is, contrary to original intentions, highly legalistic and expensive. The Industrial Court conducts its proceedings in a formal manner, along the lines of a court of law, and adopts a strictly **adversarial** approach to the hearing of cases. Judgments are lengthy, fairness is determined by reference to established legal principles and, within an essentially **adversarial** system, the lawyer's presentation of a case has inevitably emphasized legal precedent. Legalism undermines the goals of the system, namely cheapness, speed, accessibility and informality. Common law perceptions of natural justice, rather than industrial relations-based equity, have become the standard by which fairness is assessed."[42]

The next portion of the memorandum[43] deals with the draft bill's solution to this problem. The old system is starkly contrasted with the new system in the following passage:[44]

> "In cases concerning the alleged misconduct of workers, the courts have generally required an employer to follow an elaborate pre-dismissal procedure and have thereafter conducted a fresh, full hearing into the merits of the case. Apart from its duplication and lengthiness, this approach has obvious cost implications for the parties and the State. The draft bill requires a fair, but brief, pre-dismissal procedure, and quick arbitration on the merits of the case."

The memorandum goes on[45] to say the following:

> "By providing for the determination of dismissal disputes by final and binding arbitration, the draft Bill adopts a simple, quick, cheap and non-legalistic approach to adjudication of unfair dismissal... In order for this alternative process to be credible and legitimate and to achieve the purposes of the legislation, it must be cheap, accessible, quick and informal. These are the characteristics of arbitration, whose benefits over court adjudication have been shown in a number of international studies."

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[41] Labour Relations Act 66 of 1995, Explanatory Memorandum (1995) 16 *ILJ* 268-336; *Naraindath v CCMA & others* (note 25 above) 22.
[42] LRA Explanatory Memorandum (note 41 above) 316.
[43] LRA Explanatory Memorandum (note 41 above) 317.
[44] *Naraindath v CCMA & others* (note 25 above) 23.
[45] LRA Explanatory Memorandum (note 41 above) 318.

The underlying policy considerations should remain the yard-stick in analysing the consequences of s 138 of the LRA. The CCMA and ultimately s 138 symbolise the need for a dispute resolution mechanism that is efficient and responsive in nature. The discretion incumbent in s 138 allowing commissioner's autonomy in the choice of format of proceedings must be seen as a retort to the former Industrial Court trials, which were essentially adversarial and lengthy.

3.3.2 The General Conduct of Arbitration Proceedings

The rules of natural justice and fairness should always serve as a guide to arbitrators in the conduct of proceedings. Arbitrators may not allow the ignorance of a lay litigant to favour the other party unfairly. They are required to take charge of the proceedings when parties are unrepresented and do not realise what is expected of them. When appropriate, arbitrators should in an even-handed manner assist lay representatives to present and put their version to opposing witnesses. They should also warn them of the consequences of not leading evidence on particular issues or of not putting their version to the other parties' witness where the evidence of the witness contradicts, modifies or otherwise has an impact on their version.[46]

The inquisitorial power of the arbitrator is further established by the following comments of the Constitutional Court in *CUSA v Tao Ying Metal Industries & others*:[47]

> "The LRA introduces a simple, quick, cheap and informal approach to the adjudication of disputes" [48]
>
> "...commissioners are required to deal with the substantial merits of the dispute with the minimum of legal formalities. This requires commissioners to deal with the substance of a dispute between the parties. They must cut through all the claims and counter-claims and reach for the real dispute between the parties. In order to perform this task effectively, arbitrators must be allowed a significant measure of latitude in the performance of their functions. Thus the LRA permits commissioners to 'conduct the arbitration in a manner that the commissioner considers appropriate. But in doing so, commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, the must do so expeditiously. And, in resolving the dispute, they must act fairly to all the parties"[49]
>
> Commissioners should not lightly tell parties what they should complain about. However the commissioner *must* raise material *issues* and points of law which were not raised by the

[46] Bellengere et al (note 24 above) 425.
[47] (2009) 1 BLLR 1 (CC).
[48] (Ibid) 63.
[49] *CUSA v Tao Ying Metal Industries* (note 47 above) 64-65.

parties, but which are *apparent* in the dispute and necessary to the proper determination of the dispute"[50]

Section 138 thus establishes a broad mandate as to how commissioners are to conduct proceedings. The wide discretion conferred on commissioners can be said to encompass the LRA's objectives of a system of dispute resolution aimed at being 'simple, quick, cheap and non-legalistic'.[51]

The case of *Deutsch v Pinto & another*[52] quite accurately sums up the nature of CCMA arbitrations as follows:

> *"The CCMA is not established as a court of law. When arbitrating it follows the rules of natural justice as embodied in the LRA. It arrives at its decisions and makes its awards in a judicial manner."*[53]

It is apparent that arbitrators are not required to act in the same manner as a presiding officer would in a court.[54]The Labour Appeal Court has held that an arbitrator may ascertain any relevant fact in any manner it deems fit on condition that it is fair to the parties.[55] The rules of natural justice as expressed by the Latin maxims: *audi alteram partem* (both sides must be heard) and *nemo iudex in propria causa* (no one may judge his own cause) must be observed.[56] Arbitrators are expected to conduct arbitration proceedings in a fair, impartial manner that is free of any conduct that may cause a party to form a reasonable apprehension of bias.

A general duty incumbent on arbitrators in line with the principle of fairness is to ensure that parties are aware of their rights and the powers of the arbitrator as well as the procedure to be followed. This responsibility is pertinent where the parties to dispute are unrepresented.

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[50] *CUSA v Tao Ying Metal Industries* (note 47 above) 68.
[51] P Benjamin. (note 39 above) 2.
[52] (1997) 18 *ILJ* 1008 LC
[53] Ibid. 1012.
[54] D Du Toit ...et al. *The Labour Relations Act: A Comprehensive Guide* 5th Ed (2006).
[55] *Le Monde Luggage CC v Commissioner Dunn & others* (2007) 10 BLLR 909 (LAC) 17-19.
[56] J Brand *Labour Dispute Resolution* 2 Ed (2008) 204.

The LC in *Bafokeng Rasimone Platinum Mine v CCMA & Others*[57] succinctly states that the duty to assist litigants is ultimately dependent on compliance with s 138:

> *'At the end of the day, the cardinal question is whether the merits of the dispute have been adequately dealt with and fairly so in compliance with the provisions of s 138 of the Labour Relations Act.* '[58]

The nature of s 138 establishes a positive obligation on arbitrators to intervene actively in proceedings if it is required to deal with the substantial merits of the dispute. This obligation must be observed irrespective of the procedure used in proceedings.

Commissioners are effectively mandated under s 138 to adopt any method they see fit, on condition it is fair. Where the circumstances so require, commissioners should adopt methods beyond traditional inquisitorial and adversarial approaches in order to effectively carry out this mandate.

3.3.3 The Rules of Evidence

The CCMA Guidelines state that parties are entitled to exercise the rights to present different types of evidence, call and question witnesses and address arguments to a commissioner regardless of the form of proceedings.[59] It follows that the decided format of proceedings will influence the manner in which parties exercise these rights.

Wallis AJ in *Naraindath v CCMA and Others*[60] suggested that arbitrators should only adopt the traditional adversarial approach where the true issue depends on the resolution of a clear dispute of fact which can only be determined by listening to evidence and determining the credibility of witnesses.

In its most recent judgment on the scope of review of arbitration proceedings in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA & others*[61] the LAC emphasized that the test is whether the process that the arbitrator employed gave the parties a full opportunity to have

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[57] (2006) 27 *ILJ* 1499 (LC)
[58] Ibid. 17.
[59] CCMA Guidelines: Misconduct Arbitrations 2011. 15.
[60] (note 25 above)
[61] Unreported, 5 November 2013.

their say in respect of the dispute; not whether they were given full adversarial procedures, such as the right to cross examine and control the flow of evidence.

Magistrates and judges have to comply with peremptory rules and principles of evidence in civil and criminal courts.[62] In contrast to this, section 138 denotes the great discretion arbitrators have in applying the rules of evidence.

While it is not possible to lay down specific guidelines for commissioners as to the exact manner in which they are to conduct proceedings, the CCMA Practice and Procedure Manual 2011 (hereinafter referred to as the Manual) offers some assistance. The Manual suggests several factors to be considered when deciding on the form of the arbitration.[63] These include:

- the complexity of the factual and legal matters involved;
- the attitude of the parties to the form of the proceedings;
- whether the parties are represented;
- whether legal representation has been permitted and
- the experience of the parties or their representatives in appearing at arbitrations.

Each case will be judged on its own merits and the circumstances will dictate the manner in which evidence is adduced. With fairness as the superseding principle, an arbitrator has to determine a dispute quickly and with the minimum of legal formalities whilst ensuring parties rights are upheld. The duties encompass cautioning parties of the consequences of: changing their version of events; putting forward new versions; failing to lead evidence on a particular issue or of not putting their version to the opposition's witness where the evidence of the witness contradicts or otherwise impacts their version.[64]

It is obvious that the primary reason for arbitrator's to assume an active role in proceedings is to ensure fairness through the assistance of lay litigants. Deciding when and how often to intervene presents a challenge. This is a delicate procedure as an arbitrator has a continuing duty to guide and assist parties, whilst trying to elicit relevant information in order to deal

[62] J Brand (note 56 above) 205.
[63] CCMA Practice and Procedure Manual 6th Ed. November 2011. 12.4.
[64] *Klaasen v CCMA and others* (2005) 26 *ILJ* 1447 (LC); *Dimbaza Foundries v CCMA and others* (1999) 20 *ILJ* 1763 (LC); *Consolidated Wire Industries (Pty) Ltd v CCMA and others* (1999) 20 *ILJ* 2602 (LC); *Sikula Sonke v CCMA and others* (2007) 28 *ILJ* 1322 (LC)

with the substantial merits of the dispute. Where it is apparent that unrepresented litigants are tentative to proceedings, arbitrators are expected to actively direct proceedings thereby preventing the ignorance of a lay litigant favouring the other party unfairly.[65]

Active intervention on the part of a commissioner in guiding or assisting a party has the potential to create an apprehension of bias.[66]Arbitrators should not intervene in proceedings at liberty. Rather, it can be inferred from the salient points in s 138 that an arbitrator should only intervene to the extent that the dictates of fairness warrant such intervention or where it is necessary to ascertain and deal with the substantial merits of the dispute.[67]

3.4 Conclusion

Arbitrators are therefore required to conduct an arbitration in a manner he or she deems appropriate to the particular case and disputants, including in an inquisitorial style, especially where parties are unrepresented or do not have skills to properly lead evidence and question witnesses. The duties entail narrowing the dispute and determining relevant issues and disputes of fact. Parties to the dispute are to be guided by the arbitrator as to what evidence to lead even if these facts are beyond what the parties have decided to present. The rules of evidence that are to be applied must not be as technical or strict as that used in courts.[68]

Benjamin quite accurately locates the role of the arbitrator as that of a 'helping hand' discharging the obligation to reach the substantial merits of the dispute.[69] Having regard to the objectives of the CCMA, it is submitted that an arbitrator's obligation under s 138 cannot effectively be carried out through restrictions inherent in the law of evidence as applied in courts. There must inevitably be a relaxation of the rules of evidence in arbitrations paired with the discretion to conduct proceedings as an arbitrator deems fit. It is also important to bear in mind that the strict system of evidence as incorporated in courts is a 'concomitant of the adversarial model of fact-finding'.[70]

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[65] Ibid.
[66]*Mutual and Federal Insurance Co Ltd v CCMA & Others* (1997) 12 BLLR 1610 (LC)
[67]Du Toit ...et al. (note 54 above) 127
[68]*Le Monde Luggage CC v Commissioner Dunn & others* (note 55 above).
[69]P Benjamin P (note 39 above) 15.
[70]PJ Schwikkard (note 27 above) 9.

An arbitrator must embark on a nuanced weighing of several factors so as to ensure the result is fair, quick and parties are able to exercise their rights whilst avoiding strict legalism in the process. The arbitrator must not be perceived to be advancing one parties at the expense of the other and should be cautious to explain the procedures where a course of action may be open to suspicion.

It is submitted that an arbitrator cannot successfully achieve the mandate enumerated by s 138 of the LRA whilst circumventing strict legalism, without having formidable experience and knowledge of the legal procedures to start with. Of import is the fact that there exists no burden on an arbitrator to conduct proceedings in a manner resembling that of a court of law. However, in order to depart from established legal procedures and still aim to achieve a result free of irregularities requires the making of coherent and informed decisions. This can only be achieved through a sound understanding of the law of procedure, and in particular the workings of the law of evidence in this unique niche of labour disputes conducted at arbitration in terms of the Labour Relations Act 66 of 1995.

CHAPTER 4

WHAT IS EVIDENCE

This analysis that follows evaluates what evidence is in terms of South African Law. The key focus here will be on established principles relating to evidence in terms of civil law.

4.1 Background and Purpose of the Law of Evidence

Parties to a dispute must present material called evidence in order to prove or disprove a case. However, evidence is more than simply the material provided to establish a fact. The law of evidence also regulates the process of proving facts. It serves to govern on a factual basis what rights, duties and liabilities exist.[71]

Evidence is defined as:

> *"Any thing or statement that might prove the truth of the fact at issue. Evidence is that which demonstrates, makes clear, or proves the truth of the fact at issue."*[72]

The case of *Tregea v Godart*[73]held that the law of evidence is that portion of the law by means of which facts are proven.

What becomes clear from the concept of evidence is that it is used as a tool to achieve a certain purpose. It in essence is an instrument that is used to prove or disprove some factual assertion that is in dispute. It is by adducing evidence that a party is able to prove an asserted fact or disprove a fact asserted by another party. The law of evidence therefore serves the purpose of proving or disproving an issue in dispute by prescribing what material may be adduced as evidence as well as the manner in which it is to be presented and by whom. The role played by evidence in the process of any dispute is accordingly of paramount importance.

The law of evidence forms part of that of branch of law called adjective law and is the procedural mechanism that allows for substantive rights and duties to be exercised. Adjective law does not only provide for substantive rights and duties, it gives rise to its own rights and duties which include for example the right of a party to cross-examine a witness.[74]The South

[71]PJ Schwikkard (note 27 above) 1.
[72]MS Sheppard *The Wolters Kluwer Bouvier Law Dictionary* Compact Ed (2011) 396.
[73] 1939 AD 16
[74]PJ Schwikkard (note 27 above) 32.

African Law of evidence belongs to the Anglo-American system of evidence which is based upon adversarial principles and a strict system of evidence.[75]

It was held in *Tregea v Godart*[76] that substantive law prescribes what has to be proved and by whom, while the rules of evidence relate to the manner of its proof.

The law of evidence is integral as it comprises the procedural machinery that enforces and gives effect to substantive law. The objective of the system of evidence is an attempt to uncover and protect the truth.

It is easier to understand the concept of evidence in terms of the function which it plays. The primary function of the law of evidence is to provide for the determination of facts admissible to proving facts in issue, it further determines the method of adducing evidence, the rules for weighing the cogency of the evidence and the burden of proof to be discharged before a party to litigation can succeed.[77] It significantly also lays down the rules applicable to the presentation of different types of evidence.

Evidence determines the facts admissible for proving facts in issue. Facts that are in issue are those facts which need to be proven to establish a case, these are known as *facta probanda.* Facts which are relevant to the facts in issue are facts which prove or counter those which are in issue and are known as *facta probantia.* A golden rule of evidence is that a fact cannot be relied on unless it has been proved through a witness or document or it has been agreed to by the other side.[78]

Facts in dispute will be determined according to substantive law and those that are relevant to the facts in issue will be determined by the procedural law of evidence.

Generally speaking, evidence consists of oral statements made during proceedings under oath, affirmation or warning. Evidence also includes documentary evidence and objects produced and received during proceedings through witnesses. All evidence is presented through a relevant witness as objects and documents do not speak and cannot be cross-examined to test the authenticity and veracity thereof.[79]

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[75]DT Zeffert *The South African Law of Evidence* (2003) 35.
[76] 1939 AD 16
[77]CRM Dlamini *Proof Beyond a Reasonable Doubt* (LLD thesis, University of Zululand, 1998) 423- 424.
[78] J Brand (note 56 above) 206.
[79]PJ Schwikkard (note 27 above) 18.

One of the major functions of the law of evidence is to ascertain what facts will be legally acceptable in order to prove or disprove a disputed point of fact. The role played by the law of evidence is pivotal as it provides a guideline for presiding officers in assessing what evidence is admissible, the cogency thereof and what weight to ascribe to items of evidence in terms of the overall jigsaw of evidence. It further assists in the determination of which party bears the onus of proof and on what standard this burden is to be discharged. The concepts of proof, relevance, admissibility and weight will be discussed in the chapters that follow.

Closely linked to evidence is the concept of probative material. The notion of probative material embraces more than simply evidence produced and received in court.[80] Probative material is material that will help determine the facts of the case. It includes facts that do not have to be proved and those that have to be proved by means of evidence. Schwikkard and Van der Merwe[81] submit that the term "probative material" is a convenient term to include not only oral, documentary and real evidence but also formal admissions, judicial notice and presumptions. The concept of probative material therefore encompasses more than just oral, documentary and real evidence.

4.2 Evidence and Proof

Proof has been defined as:

> *"The evidence that demonstrates the truth or falsity of a claim. Proof is a demonstration of the truth or falsity of some argument or claim, based upon evidence and argument. Proof is the test of an asserted fact or legal claim that leads an observer, such as a judge, to believe the assertion or claim is true or false, or at least believe that the assertion of claim is true or false to some level of confidence in that belief."*[82]

Evidence is not automatically deemed as proof. Evidence of a fact is only proof of that fact once a court has accepted it as such. This can only be done after evaluation by the court and

[80] In the case of *S v Mjoli* 1981 3 SA 1233 (A) it was stated that admissions made by an accused in terms of section 115 of the Criminal Procedure Act 51 of 1977 though not strictly evidence, can be regarded by the presiding officer as probative material in the fact-finding process.
[81] PJ Schwikkard (note 27 above) 19.
[82] MS Sheppard (note 72 above) 875.

after it is satisfied that such fact has been proved.[83] There are various factors which have a bearing on the proof of a fact. These include which party bears the burden of proof and on what standard that party is to discharge that burden of proof.

A common term that one may encounter when discussing proof is that of *prima facie* proof which implies that proof to the contrary is still a possibility.[84] With conclusive proof however, the proof is deemed to be final and no rebuttal can be proffered. Schwikkard asserts that the term *prima facie* proof is often used incorrectly as a synonym for *prima facie* evidence.[85]

Emphasis must be placed on the fact that proof must be based on evidence. Where a party does not adduce sufficient evidence to prove an issue in dispute, it is likely that a presiding officer will find that they have failed to convincingly discharge the burden of proof incumbent upon them.

4.3 Evidence in Labour Law

Labour law falls under that branch of law known as private law which is part of civil law. As discussed earlier, labour disputes also have to be settled by a process of proving certain disputed facts. In order to prove a case in a court trial, arbitration case or a disciplinary inquiry, a party relies on various forms of evidence. This evidence may take the form of real evidence (eg. physical objects), documentary evidence (eg. affidavits) and oral evidence (eg. witness testimony).

The learned Pillay J in the case of *Public Servants Association obo Haschke v MEC for Agriculture & others*[86] commented on the nature of labour law:

> *"Labour law is not administrative law. They may share many common characteristics. However, administrative law falls exclusively in the category of public law, whereas labour law has elements of administrative law, procedural law, private law and commercial law."*[87]

It is necessary to consider the rules and laws applicable to labour disputes in order to establish their bearing on evidence in labour disputes. Labour law and employment law in

[83]PJ Schwikkard (note 27 above) 19.
[84]Ibid. 20.
[85]Ibid.
[86] 2004 (8) BLLR (LC)
[87]Ibid. 11.

South Africa comprises a complex set of rules which originate from the common law and statute.[88]Further, the Minister of Labour is empowered in terms of various labour statutes to issue 'codes of good practice'. These codes provide guidelines but in effect have quasi-statutory force as the CCMA and courts are to have regard to them in the process of resolving disputes.[89]

In the case of *Rustenburg Platinum Mines Ltd v Commission for Conciliation, Mediation and Arbitration*[90] it was held that decisions made by commissioners in the CCMA constitute administrative action in terms of the Promotion of Administrative Justice Act[91] and are reviewable as such. This necessarily demands that decisions by Commissioners are to be procedurally fair, reasonable and lawful.

In accordance with the above, labour proceedings can be deemed *sui generis* proceedings in the sense that it does not fall squarely into a particular niche or branch of law. The legal proceedings of labour law are largely governed by statute. The normal rules of evidence as applicable in criminal and civil proceedings will be shown to not be strictly applicable in the proceedings of labour matters and in particular statutory arbitrations.

The manner in which evidence is presented and admitted is largely influenced by the respective area of law and the nature of the forum, namely whether it is an arbitration or a court hearing. This is significant as it impacts on the onus of proof, standard of proof as well as the strictness of the rules of evidence applied. This process of proof of facts in labour law is also regulated by the law of evidence, albeit with certain qualifications as will be shown in this paper.

[88]J Grogan (note 19 above) 1.
[89]Ibid. 11.
[90] 2007 (1) SA 576 (SCA)
[91] Act 3 of 2000 (PAJA)

CHAPTER 5

FORMS OF EVIDENCE AND THE PRESENTATION THEREOF

5.1 Introduction

One of the fundamental rules of evidence is that a party will not be able to rely on a fact unless there is consensus between the parties on that fact or if it has been proved through a witness or document.[92] S 138 of the LRA provides that parties to the dispute may give evidence, call witnesses, question the witnesses of the other party and may further address concluding arguments to the commissioner. This evidence may be in the form of oral evidence, real evidence and documentary evidence. Each form will be discussed in turn with their necessary requirements for presentation.

5.2 Oral Evidence

Oral evidence generally comprises oral statements proffered by witnesses in the presence of the parties about the facts of the case. The rationale behind the practice of oral evidence is to present the parties with an opportunity to confront witnesses who are testifying against them. It further provides an opportunity to challenge the evidence led by the witness, allowing the arbitrator to observe the candour of witnesses.[93] The demeanour and responses of witnesses assist the arbitrator in making an assessment of the credibility of the witness.

Witnesses in arbitration hearings should be sworn in, or make an affirmation that they will tell the truth before they testify. The affirmation will generally be used where the witness either has an objection to taking the oath or does not find it binding on their conscience.

The CCMA Practice and Procedure Manual states verbatim how arbitrators should administer both the oath and affirmation. The oath should be administered as follows: "Do you have any objection to taking the oath?" If the witness answers in the negative, the arbitrator should ask: "Do you consider the oath to be binding on your conscience?" If the response is in the affirmative, the oath should be administered as follows: "Do you swear that the evidence you

[92] J Brand (note 56 above) 206.
[93] PJ Schwikkard (note 27 above) 362.

will give shall be the truth, the whole truth and nothing but the truth? Please say, so help me God".[94]

The affirmation should be administered in the following manner: "Do you affirm that the evidence you will give shall be the truth, the whole truth and nothing but the truth? Please say, I do so affirm".[95]

The process that follows begins with the witness making a statement, thereafter the opposing party will cross-examine the witness and then the party who called the witness may re-examine the witness. The witness will then make a statement which is called the evidence-in chief. Once this is completed, the opposing party has the right to cross-examine the witness again and the party who called the witness may re-examine the witness to clarify any points raised during cross-examination.

Parties are generally prohibited from asking leading questions. Leading questions are couched in such a manner as to suggest the answer to the witness, or assume the existence of certain facts in dispute.[96] In the case of *Modikwa Mining Personnel Services v Commission for Conciliation, Mediation & Arbitration & others* the Labour Court found that the commissioner had committed a reviewable irregularity in terms of s 145 of the LRA through 'almost entirely' leading the witness.[97] The learned judge was patently clear that such conduct was 'inappropriate and reprehensible' and that a reasonable person in the position of the applicant had a factual basis for drawing the inference that there was a reasonable apprehension of bias.[98]

[94] CCMA Practice and Procedure Manual (note 63 above) 13.5.3.
[95] Ibid. 13.5.4.
[96] DT Zeffert (note 75 above) 738.
[97] *Modikwa Mining Personnel Services v Commission for Conciliation, Mediation &Arbitration & others* (2013) 34 *ILJ* 373 (LC) 17.
[98] Ibid. 41.

5.3 Real Evidence

Real evidence is an object which, through proper identification intrinsically becomes evidence.[99] It is in essence, evidence that is presented at the arbitration hearing as a means of proof. Real evidence includes material and physical objects and in order to be admissible it needs to be introduced through a witness who can identify and explain it. The rule regarding the relevance of evidence still applies to real evidence and though the tendered evidence is meant to be proof a fact within itself, it must be introduced through a witness testimony and has to be relevant to the issues in order to be admissible.

The efficacy and relevance of real evidence is established through a witness who explains, for instance, the nature of the exhibit and its properties.[100] Real evidence is not conclusive in proving any disputed issue and may still be rebutted by the other party. One of the purposes served by real evidence is to enable the arbitrator to come to conclusions on the evidence presented using his own senses and perception of the object.

5.3.1 Computer Generated Material

Information that has been created by a computer or other device without human intervention may be treated as real evidence.[101] To this extent the Electronic Communications and Transactions Act 25 of 2002 provides for the admissibility of computer printouts of business records made in the ordinary course of business against any person in civil, criminal and disciplinary inquiry proceedings under any law and administrative proceedings without the testimony of the person who made the entry.[102] Further, it adds that such records will constitute rebuttable proof of the facts contained therein where accompanied by a certificate from a manager stating that the contents therein are accurate and correct.[103]

[99] *S v M* 2002 2 SACR 411 (SCA) 31.
[100] PJ Schwikkard (note 27 above) 362.
[101] A Bellengere ...et al (note 24 above) 427.
[102] Section 15 Electronic Communications and Transactions Act 25 of 2002.
[103] Ibid.

5.4 Documentary Evidence

Documentary evidence typically comprises an important component in terms of the evidence adduced at arbitration hearings. Documentary evidence includes affidavits, written statements, employment policies, minutes and transcripts of meetings and disciplinary hearings, medical certificates, letters, computer printouts of emails, photographs, videos and camera surveillance footage.[104]

The arbitrator should enquire into the evidentiary status of documents which are submitted and ascertain whether the parties have agreed to the contents of the documents and are satisfied that they are what they purport to be. Documents may be wholly agreed to, partially agreed to or totally in dispute. Wholly agreed documents indicate that parties are in consensus as to the form and content of the documents. Partially agreed documents include documents where only some elements of the document are challenged, for instance where an item of the contents is in issue.[105]

Where the form and contents of documents are in dispute evidence must be led through a person who was the author, signatory, producer or had some or other connection to the documents sufficient to authenticate them and their contents as being accurate. Oral evidence is led by a witness on the relevant documentary evidence to establish the authenticity and veracity of the document.

In accordance with the best evidence rule, where a party seeks to rely on a document, the original document should be tendered.[106] In terms of s 34(1) of the Civil Proceedings Evidence Act 25 of 1965, it is mandatory in civil proceedings to produce the original of a document. However, this rule cannot be strictly applied in arbitration proceedings and where it can be shown that the original is unobtainable or obtaining the original would cause undue expense and delay, a copy will be allowed.

[104]T Cohen ...et al *Trade Unions and the Law in South Africa* (2009) 105.
[105]Ibid. 105.
[106]J Brand (note 56 above) 211.

5.4.1 Photographs, Videos and Surveillance Camera Footage

Photographic and video footage evidence are deemed to be documents for the purposes of evidence. Therefore the rules relating to the relevance and admissibility of documentary evidence apply untainted. Accordingly, a photograph or video footage cannot be introduced into evidence unless a witness testifies as to its authenticity or if the parties consent to its admission beforehand.

The witness who testifies to such evidence should be the person who recorded or produced the item. The witness should establish through the testimony that the evidence portrays true representations of the objects or persons they purport to represent and that there have been no alterations to the photograph or video footage.[107]

The case of *Moloko v Commissioner Diale & Others*[108]held that it is imperative that before video footage can be relied upon it must be authenticated, the court found that the arbitrator had committed an irregularity by failing to reject such video footage as it was a copy, had not been authenticated and was of such poor quality that it failed to establish the alleged assault. While there can be no hard and fast rule relating to the admission of such footage, the admissibility of such evidence is generally dependent on the circumstances of each case.[109] Relevance is the primary test for the admissibility thereof and it such footage should be authenticated. Arbitrators must exercise caution when relying on both video footage and photographs as a result of the inherent risks which may arise.

[107]T Cohen ...et al (note 104 above) 105.
[108] (2004) 25 *ILJ* 1067 (LC)
[109]*Afrox Ltd v Laka & Others* (1999) 20 *ILJ* 1732 (LC). *S v Ramgobin & Others* 1986 (4) SA 117 (N).

CHAPTER 6

ONUS OF PROOF

6.1 Introduction

The terms 'burden of proof' and 'onus of proof' are used interchangeably and refer to the same concept, namely the legal burden that a party has of finally satisfying the presiding officer that they are entitled to the relief sought.[110] This is done by proving the issues in dispute and the factual allegations upon which these are based.[111] The onus allows us to determine which party bears this duty of satisfying the court.

In South African law the issue of onus and its meaning has been dealt with in the case of *Pillay v Krishna*[112] where Davis AJA stated:

> *"The only correct use of the word 'onus' is that which I believe to be its true and original sense, namely, the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim, or defence, as the case may be..."*

The burden of proof determines which party to a dispute must fail, if the facts necessary to establish a claim have not been proved.[113] A party who wishes to prove an issue in proceedings will bear the burden of proof. Adding impetus to the above is the fact that the burden of proof is often referred to as the "risk of non-persuasion" as it determines who bears the risk of failure if evidence on a point is lacking.[114]

The general rule is that he who alleges must prove.[115] It is likely that there may be several issues in a case and each party may bear a burden of proof with regard to each issue, these will arise in sequence once the previous one has been discharged.[116]

In civil law the burden of proof is generally apparent from the statement of claim. This is in line with the principle of 'he who asserts must prove'. If a party raises a special defence, this too will affect which party has to discharge the burden of proof.

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[110]PJ Schwikkard (note 27 above) 571.
[111]T Cohen ...et al. (note 104 above) 115.
[112]1946 AD 946. 952-3.
[113]PJ Schwikkard (note 27 above) 571.
[114]Ibid. 572.
[115]*Pillay v Krishna* (note 112 above) 951-2.
[116]Ibid. 953.

The case of *Mabaso v Felix*[117] in comparing the criminal and civil onuses stated that in terms of the approach followed in the criminal law, the State bears the onus of proving unlawfulness and that an accused can only be punished for a crime once his guilt has been proven. An important factor with respect to criminal matters is the constitutionally enshrined right to the presumption of innocence. As a consequence of the presumption of innocence as well as the right to silence, the State through the prosecution has a duty to discharge the burden of proof. In civil law however, there are elements of policy, practice and fairness which require a defendant to bear the onus of providing some justification for his wrongful conduct.[118]

A presiding officer ultimately has to make a decision as to which party is successful in the dispute; this is largely dependent upon whether a party has sufficiently discharged the relevant burden of proof. That is whether, after adducing evidence one party's version is more probable than the other.

6.2 Onus of Proof in Labour Law

The rules relating to evidence in labour law differ to that of criminal and civil law. In labour law, the onus of proof is primarily prescribed by statute. In arbitration proceedings, the party bearing the onus has a duty to satisfy the arbitrator that they are entitled to the relief sought. Accordingly, an arbitrator has to make a decision based on the evidence tendered by the party bearing the onus of proof, and if the arbitrator is unable to make a decision based on the evidence presented then that party must fail.[119]

Over and above proving the facts in dispute, the question of onus is significant for instance in misconduct dismissals where it is necessary to determine which party has the burden of proving whether the employee committed the alleged misconduct, whether the dismissal of the employee was fair and whether the procedure used to dismiss the employee was fair. This encompasses which party has the duty to prove that the dismissal was substantively and procedurally fair.

[117] 1981 (3) SA 865 (A)
[118] Ibid. 872 G-H.
[119] J Brand (note 56 above) 218.

The onus is also significant when the evidence on a particular point is indecisive. In this instancean arbitrator will have to make a finding against the party who bears the onus.

6.2.1 Onus of proof per the Labour Relations Act 66 of 1995

In the years preceding the 1995 Labour Relations Act there was some uncertainty as to which party had to bear the onus. In terms of unfair labour proceedings the former stance was that there was no onus on a particular party and that both parties would adduce evidence after which the court would reach a conclusion following a conspectus of the evidence as a whole.[120]The current LRA has brought about some clarity on the issue of onus through specifically prescribing which party bears the onus of proof depending on the nature of the dispute.

6.2.1.1 Section 192: Onus in Dismissal Disputes

Section 192 stipulates that the onus is on the employee to establish the existence of a dismissal.[121] Once this a dismissal has been established, the employer has to prove that the dismissal was fair.[122]

In the case of *Janda v First National Bank*[123]the court had to consider the nature of the onus of proof before making a finding on the application for absolution from the instance. One of the key points noted by the court relating to the incidence of onus is that the common-law position that he who asserts must prove has now been overridden by section 192 of the LRA.[124]

It has been stated that in terms of section 192 it is only once the employee is successful in establishing the existence of a dismissal, that the employer is required to justify its actions by showing that there was a fair reason and furthermore that a fair procedure was followed.

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[120]*AECI Paints (Pty) Ltd v South African Chemical Workers Union* (1989) Arb 1.2.3.
[121]Section 192(1) LRA.
[122]Section 192(2) LRA. *NUSOG (Western Cape) v CCMA & another* (1998) 10 BLLR 1047 (LC) 8.
[123] (2006) 27 *ILJ* 2627 (LC)
[124] T Cohen 'Onus of Proof in Automatically Unfair Dismissals- Janda v First National Bank (2006) 27 ILJ 2627 (LC)' (2007) 28 *ILJ* 1465

6.2.1.2 Section 187: Onus in Automatically Unfair Dismissals

Section 187 deals with automatically unfair dismissals and provides that if a dismissal falls within one of the listed categories found in section 187(1) and a causal link is established between the reason for dismissal and the circumstances of the dismissal then there is a rebuttable presumption of unfairness.[125] This means that if an employee is able to establish an automatically unfair dismissal in terms of section 187 then no justification can be put forward by the employer.[126] The implications of this are that the employee qualifies for certain privileges including the above mentioned presumption and an entitlement to double the ordinary compensation awarded.[127] The significance of precisely determining the onus in such a scenario is paramount as the implications are far reaching.

With automatically unfair dismissals as provided for in section 187, an employee has an evidentiary burden to prove that the reason for the dismissal fell within one of the listed grounds provided for in s 187. Once this is established, the onus is on the employer to prove that the dismissal was fair. The employee bears no onus, but rather an *evidentiary burden.*[128] Once an employee proves a connection between his dismissal and a listed ground, then the onus rests on the employer to show that there was no unfairness in the dismissal.[129]

6.2.2 Onus of Proof per the Employment Equity Act 55 of 1998

In terms of the equality provision in the Bill of Rights found in the Constitution of the Republic of South Africa discrimination on any of the grounds listed therein is presumed to be unfair unless it is established to be fair. With respect to labour law and in terms of the test laid down in *Harksen v Lane*[130]once an employee is able to prove discrimination by drawing a link between the differentiation complained of and one of the listed grounds then the initial onus is said to be discharged. The Employment Equity Act gives effect to this constitutional provision and provides almost identically in terms of section 11 that whenever unfair

[125] Automatically unfair dismissals may be adjudicated in the Labour Court in terms of section 191(5)(b), however the relationship between section 187 and 192 are relevant for purposes of discussing the onus of proof in terms of the LRA.
[126] T Cohen (note 124 above)
[127] Section 194(3) provides for compensation of up to 24 months' remuneration in automatically unfair dismissals compared to that of up to 12 months' for an ordinary dismissal.
[128]The concept of evidentiary burden will be discussed in the following chapter.
[129]*Kroukam v SA Airlink (Pty) Ltd* (2005) 26 *ILJ* 2153 (LAC); *Janda v First National Bank* (2006) 27 *ILJ* 2627 (note 123 above); *Thomas v Mincom (Pty) Ltd* (2007) 10 BLLR 9993 (LC).
[130]1998 (1) 300 (CC).

discrimination is alleged by an employee against an employer, the employer has the duty of establishing that it was fair. A bald averment of discrimination will not suffice, the employee must provide *prima facie* proof of the alleged discrimination.[131] *Chizunza v MTN (Pty) Ltd*[132] held that pleading mere arbitrary treatment is not sufficient to constitute unfair discrimination in terms of the EEA. Citing the test in *Harksen v Lane NO* [1998 (1) SA 300 (CC), the court said there must be a link between the alleged differentiating conduct and a listed ground and, where the discrimination on an unlisted ground is alleged, the applicant employee must prove the differentiation amounted to 'discrimination'. *Zabala v Gold Reef City Casino*[133] held that the applicant must first prove that she had been treated differently from other employees and explain the basis of the comparison.

6.3 Duty to Begin

The party bearing the onus of proof will generally be the party who has the duty to begin. This simply entails that the relevant party will have the responsibility to commence the leading of evidence. In terms of the High Court Rules 39(5) and (9) read together it is stipulated that the party bearing the burden of proof has the right to adduce evidence first. The Magistrates' Court Rule 29 provides that the duty to adduce evidence first is married to the incidence of the burden of proof in the circumstances.

While the party who bears the onus of proof should commence the leading of evidence, an arbitrator may rule either *mero motu* or on application that the other commence proceedings.[134]

In the case of *Sajid v The Juma Masjid Trust*[135]the arbitrator was of the view that the duty to begin was placed on the employer so as to enable the employee to deal fully with the fairness of his suspension and the reason there for. It is expected that arbitrators will follow the same principles as enunciated above with the primary focus being the hearing of evidence in a logical manner.

[131]*TGWU & another v Bayete Security Holdings* (1999) 20 *ILJ* 1117 (LC) and *Abbott v Bargaining Council for the Motor Industry* (1999) 20 *ILJ* 330 (LC).
[132][2008] 10 BLLR 940 (LC).
[133][2009] 1 BLLR 94 (LC).
[134]A Bellengere ...et al (note 24 above) at 426.
[135](1999) 20 *ILJ* 1975 (CCMA) 1979.

CHAPTER 7

THE EVIDENTIARY BURDEN

7.1 Introduction

It is necessary to draw the distinction between the concepts of 'burden of proof' and that of the 'evidentiary burden'. The onus never shifts between parties but during the course of proceedings there may arise the need for a party to present evidence to counter certain allegations of fact. The case of *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*[136] in drawing the distinction between the two aforementioned concepts, stated that while the onus can never shift from the party upon whom it initially rested the evidentiary burden can shift or be transferred depending on the measure of proof furnished by parties during the course of a case.[137]

In the case of *Woolworths (Pty) Ltd v CCMA & Others*[138] the employer based misconduct charges on DVD footage captured on surveillance cameras. With regard to the nature of the evidentiary burden in dismissal proceedings the LAC per Ndlovu JA stated as follows:

> *"...the DVD footage evidence created a prima facie case against the employee which shifted the evidentiary burden to her to demonstrate her lawful or innocent possession or handling of the two items in question."*[139]

In *Hermans and Hitachi Construction Machinery Southern Africa,*[140] in which the employee simply denied the employer's evidence at arbitration and deliberately left it unchallenged in cross-examination, the arbitrator accepted the employer's version of events and found that it had discharged the onus of proving the employee guilty of misconduct.

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[136]1977 3 SA 534 (A) 548.
[137]Ibid. This position was endorsed by the Constitutional Court in the case of *Mohunram v National Director of Public Prosecution* (*Law Review Project as* Amicus Curiae) 2007 2 SACR 145 (CC) 75.
[138] (2011) 32 *ILJ* 2455 (LAC)
[139]Ibid. 44.
[140](2013) *ILJ* 738.

It is only once a party has discharged the onus of proof that the opposing party can be expected to adduce evidence to discharge an evidentiary burden that is upon it.[141]

7.2 Evidentiary Burdens: Employment Equity Act 55 of 1998

In terms of s 11 of the EEA whenever unfair discrimination is alleged, the onus is on the employer against whom the allegation is made to prove it is not unfair. The employee has an evidentiary burden to prove the existence of discrimination. Once this burden is discharged, the onus is on the employer to adduce evidence; that is, in disputing the allegation provide some justification to establish that the discrimination was fair.

7.3 Evidentiary Burdens: Labour Relations Act 66 of 1995

Another example of the shifting evidentiary burden can be found in Section 187 of the LRA. The court in *Janda v First National Bank*[142]in commenting on the distinction between the evidentiary burden and onus of proof in terms of section 187 of the LRA, stated as follows:

> *"The overall onus to prove that the dismissal is not automatically unfair and is for a fair reason lies with the employer at all times, once the employee has established that the dismissal has occurred. However, the evidentiary burden shifts between the employer and the employee, and the employee bears the evidentiary burden at the outset to provide prima facie evidence of the automatically unfair reason."*[143]

It has been stated that section 187 of the LRA imposes an evidentiary burden on an employee to adduce evidence sufficient to create a credible possibility that an automatically unfair dismissal occurred.[144] Following this an employer has to counter this by producing evidence to prove that the reason for the dismissal does not constitute an unfair dismissal as envisaged by the circumstances found in section 187.

In light of this provision the evidentiary burden finally shifts back to the employee whereby the employee is to adduce evidence to counter those reasons proffered by the employer and accordingly show the employers reasons to be less than probable. There is in effect a

[141]J Brand (note 56 above) 219.
[142] (note 123 above)
[143]Ibid. 21.
[144]Per Davis AJA *Kroukam v SA Airlink (Pty) Ltd* 2005 12 BLLR (LAC) 28.

rebuttable presumption that once discrimination is shown to be present by the employee it is assumed to be unfair and the employer has a duty to rebut, asserting that the discrimination was fair.

The shift in the evidentiary burden warrants the party upon whom the evidentiary burden lies to adduce some evidence as rebuttal. A failure to rebut will lead to the prima facie evidence being taken as conclusive.[145]

[145] *National Union of Metalworkers of SA on behalf of Mthambo and Pro Roof Steel Merchant* (2012) 33 *ILJ* 2742 (BCA)

CHAPTER 8

THE STANDARD OF PROOF

8.1 Introduction

After having established which of the parties to a dispute bears the burden of adducing evidence, it is necessary to know of what degree or standard this proof should be. If a party is to successfully convince a presiding officer that their version is more probable than the opposition, in discharging the onus of proof the said party should put forward evidence of a certain prescribed standard. The standard of proof provides for how much proof is required of the party bearing the onus of proof.

8.2 Criminal vs Civil Standard of Proof

In criminal matters the standard of proof is that of 'beyond a reasonable doubt' whereby the State is required to prove the guilt of the accused beyond a reasonable doubt. The standard of proof in criminal matters is much stricter so as to ensure that only the truly guilty are convicted. Accordingly, proof beyond a reasonable doubt should convince a presiding officer, after a conspectus of all evidence that the accused is guilty of the offence as charged.

In civil cases the 'burden of proof is discharged as a matter of probability'.[146] The said standard requires proof on a balance of probabilities. This is lower than the stricter standard applicable in criminal law. This standard presupposes that on a preponderance of probabilities one party's version is more likely than the other.

It is important to note that there are instances where the inferences that can be drawn from both parties evidence are quite evenly balanced. It is in these situations where a set of facts suggest several inferences that a presiding officer is to select the most probable inference and if that favours the party bearing the onus of proof then he should be entitled to judgment.[147]

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[146] PJ Schwikkard (note 27 above) 580.

[147] *Cooper & another NNO v Merchant Trade Finance Ltd* 2000 3 SA 1009 (SCA)

8.3 The Standard of Proof at Arbitrations

In labour law and CCMA arbitrations the standard is also that of proof on a balance of probabilities. The Labour Court in the case of *Avril Elizabeth Home for the Mentally Handicapped v CCMA & Others*[148] stated that it is trite law that the test to be utilised in determining whether an employee is guilty of the misconduct charges is on a '*balance of probability*' on the evidence presented at arbitration'.

The case of *Fourie's Poultry Farm t/a Chubby Chicks v CCMA & Others*[149] quite succinctly states the test to be used in arbitrations as follows:

> *"The proper test in arbitration proceedings is the civil one and if an arbitrator imports to the evidence before him the test applicable to criminal proceedings, namely that the discharge of the onus borne by employers must be determined beyond a reasonable doubt rather than on a balance of probabilities, a gross irregularity in the proceedings will have been perpetrated."*[150]

It is imperative that the correct standard of proof be applied in arbitration proceedings. As can be seen above, a failure on the part of a commissioner to apply the correct standard of proof will result in the arbitration award being set aside.

Proof on a balance of probabilities in essence means that the more probable version presented to an arbitrator supported by evidence will succeed in the dispute. Accordingly an employer, in misconduct proceedings will be required to prove that an employee committed the misconduct on a balance of probabilities. It is accepted that the standard of proof encompassed by civil law and necessarily arbitrations are of a lower threshold than that encompassed by criminal law. The test used in criminal law requires there to be no reasonable doubt based on evidence before a court. This implies that if proved that there is a possibility of doubt then the accused cannot be found guilty. In arbitrations however, the standard is lower and in order to prove something, what needs to be asserted in terms of the evidence is that the fact is more likely than not. It can therefore be inferred then that in order

[148](2006) 27 *ILJ* 1644 (LC) 1650. Emphasis added.
[149](2001) 10 BLLR 125 (LC)
[150] Ibid. 6.

to prove something at arbitration, it is only necessary to adduce evidence to the extent that a commissioner is able to arrive at the conclusion that the said version is of a reasonable likelihood. The situation should be such that 'on preponderance, it is probable that a particular state of affairs existed'.[151]

The case of *Early Bird Farms (Pty) Ltd v Mlambo*[152]is extremely useful in illustrating the implications of the two standards of proof in practice. The respondent employee was found on the company premises without reason or permission and in possession of company goods. The employee was dismissed at internal disciplinary proceedings and on appeal, the LAC quite correctly stated the following:

> *"The industrial court misdirected itself in imposing an onus of "absolute certainty". All the appellant was required to do was to prove on a balance of probabilities that the respondent had committed the misconduct complained about."*[153]

The LAC found that on a balance of probabilities the employer had sufficiently proved the two charges and the dismissal was fair. This case illustrates that the less onerous standard of proof in civil law and arbitrations could have a very different result if tried in a criminal court.

8.4 Conclusion

To encapsulate the standard of proof as utilised in arbitrations, a chain of events as proved by evidence should enable an arbitrator to draw a plausible inference that the alleged state of affairs existed.

If an arbitrator is unable to infer, on a balance of probabilities that the state of affairs existed then the party bearing the onus of proof must fail. Each case must be treated on its own merits and an arbitrator will require sufficient evidence to be adduced before a finding can be reached on a balance of probabilities.

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[151]PJ Schwikkard (note 27 above) 580.
[152](1997) 5 BLLR 541 (LAC)

[153]Ibid. 544.

CHAPTER 9

ADMISSIBILITY OF EVIDENCE IN ARBITRATIONS

9.1 Introduction

While each party to a dispute adduces evidence to prove an allegation of fact, this serves only as a means of attempted proof and not all evidence adduced will achieve their object. Accordingly evidence once submitted, is subject to judicial scrutiny. A commissioner must still determine whether the evidence as presented is relevant, if it should be admitted, and if admissible, what weight to ascribe to it. Only once all evidence is presented at an arbitration hearing is a commissioner is in a position to determine whether, on conspectus of the evidence cumulatively, that a party has established their case on a balance of probabilities.

9.2 The concept of Admissibility

Some of the core responsibilities of an arbitrator are to identify the material issues in dispute, to advise parties where the onus of proof lies and to clarify the legal framework.[154] A concomitant responsibility of dealing with the substantial merits of a dispute includes the duty to admit relevant evidence and exclude irrelevant evidence.

Parties are required to present evidence and other probative material in order to prove or disprove the issues in dispute. The evidence, when tendered is merely an attempt to prove or disprove a fact in dispute. It is for the arbitrator to decide whether such means of proof should be included as evidence and thus be admitted.

Admissibility refers to whether a particular item of evidence may be introduced at a hearing and taken into consideration by the arbitrator.[155] In essence it provides for what items may be accepted as evidence in a particular case and type of proceedings, in relation to the issues in dispute. This stage deals exclusively with whether the evidence may be admitted. If an item of evidence is admitted it does not mean that it is automatically true or is of any persuasive

[154]D Du Toit ...et al. (note 54 above) 128.
[155]T Cohen ...et al (note 104 above) 105.

value. The subsequent stage deals with the evaluation of evidence and whether the evidence is credible, reliable or probable; failing which it stands to be rejected.

Arbitrators are required to observe various principles of evidence including the onus of proof, standard of proof and the principle of relevance. However, the impact of s 138 of the LRA is to lessen the strictness of the application of the law of evidence in arbitrations. To this effect, s 138 denotes that an arbitrator is to deal with evidence with the minimum of legal formalities. It is important to remember that arbitrations are not legal proceedings as in a court, neither is an arbitrator expected to conduct proceedings in a manner that mimics civil trial proceedings. Therefore, in order to observe the obligations in s 138 of the LRA, the traditional exclusionary rules relating to evidence must be relaxed in arbitrations so as to allow for flexibility in admitting evidence.

9.3 Relevance

The admissibility of evidence is based upon the fundamental criterion of relevance. The general rule is that evidence will be admissible where it is relevant to the issues in dispute. Arbitrators are duty bound to draw the attention of parties as to the evidence they should lead in relation to the issues in dispute. These issues are generally narrowed at the commencement of proceedings. If the evidence is legally and logically relevant to the disputed issues, it serves as a good indication that an arbitrator should admit it. Facts will generally be relevant if through their existence proper inferences can be drawn to the existence of facts in issue.[156] The courts have defined the term "relevant" in the context of evidence as being any two facts which are so related to each other, that if one is isolated the existence of the other is rendered improbable.[157]

The criterion of relevance can be applied to evidence in both a positive and negative manner. Therefore it is generally true that relevant evidence is admissible and irrelevant evidence will be inadmissible.[158] The rule regarding relevance found its way into South African law through the case of *R v Trupedo*[159] where Innes CJ stated the following:

[156] *R v Mpanza* 1915 AD 348. 352-353.
[157] *R v Katz* 1946 AD 71. 78.
[158] DT Zeffert (note 75 above) 237.
[159] 1920 AD 58.

'The general rule is that all facts relevant to the issue in legal proceedings may be proved. Much of the law of evidence is concerned with exceptions... But where its operation is not so excluded it must remain as the fundamental test of admissibility.'[160]

The rule formulated in *R v Trupedo*[161] is clearly couched in a positive manner, applying an inclusionary aspect whereby all relevant evidence is admissible. In contrast, support for the negative application of the "relevance rule" can be found in section 2 of the Civil Proceedings Evidence Act 25 of 1965 which reads as follows:

> **'2 Evidence as to irrelevant matters**
> No evidence as to any fact, matter or thing which is irrelevant or immaterial and cannot conduce to prove or disprove any point or fact in issue shall be admissible.'

It is apparent from the above that irrelevant evidence or rather, evidence that is not relevant to facts in issue shall not be admissible. However, the circumstances of the dispute may warrant that evidence be admitted even though it is not relevant to the facts in issue. Such a scenario would arise where the evidence should be admitted as it affects the cogency of other evidence, for instance where the evidence has an impact on the credibility of a witness.[162] This formulation of relevance must therefore be interpreted widely so as to include facts which have bearing not only on the admissibility of evidence, but also the cogency of other evidence.

Of import to the concept of relevance is the notion of probative value. Evidence is said to have probative value where it is reliable and there is some indication that the evidence will assist the arbitrator in deciding the case.[163] Furthermore, the evidence should have the potential to provide some clarity on what actually happened where there is a dispute of fact without the need to embark on protracted investigations into collateral issues.[164] The reason for the rule is to limit evidence to that which is strictly necessary in resolving the issues in dispute, so as to save time and resources. The need for efficiency in the resolution of labour disputes in arbitrations is particularly pertinent and any consideration of irrelevant evidence would be contradictory to the purpose of s 138 of the LRA.

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[160]Ibid. 62.
[161]Ibid.
[162]DT Zeffert (note 75 above) 243.
[163]T Cohen ...et al (note 104 above) 105.
[164] A Bellengere ...et al (note 24 above) 426.

The admissibility of evidence must be determined through the exercise of a certain measure of flexibility on the part of the arbitrator. There may be circumstances where a deviation from the rule may be warranted, for instance where a fair resolution cannot be reached without the consideration of evidence that is not strictly relevant to the issues.[165]

9.4 Excluding Relevant Evidence

It is trite that only relevant evidence that is shown to rationally and logically assist the arbitrator will be admitted. However, where the evidence will unduly waste the arbitration's time for a dubious purpose or where its relevance is insignificant it must be excluded. The case of *R v Trupedo*[166] also provides that there will be instances where evidence may still be excluded notwithstanding its relevance to the issues. Certain relevant evidence may be inadmissible as it is privileged, was obtained in an improper manner or is likely to detrimentally affect the fair and speedy resolution of the dispute.[167] The instances where evidence will be inadmissible despite its relevance as alluded to in *R v Trupedo*[168] above are encompassed by evidential exclusionary rules. Explanations about different forms of evidence and specific admissibility issues will be fully discussed in the chapters that follow.

Arbitrators must be mindful that the context in which admissibility issues are assessed are arbitrations and not court proceedings.[169] An excessively legalistic and technical approach to the admission of evidence would not be conducive to dealing with a dispute with minimal legal formalities as outlined by s 138. The apparent practice amongst arbitrators has been to admit certain irrelevant evidence and leave it to the parties to argue what weight should be ascribed thereto.[170]

[165] J Brand (note 56 above) 206.
[166] (note 159 above)
[167] T Cohen ...et al (note 104 above) 105.
[168] (note 159 above)
[169] T Cohen ...et al (note 104 above) 106.
[170] J Brand (note 56 above) 206.

CHAPTER 10

THE EVALUATION OF EVIDENCE

10.1 Introduction

Whilst evidence has been admitted, it does not equate to the evidence constituting proof of any disputed fact or even that it is persuasive. The arbitrator may still find that certain admitted evidence may be untrue, unreliable or improbable. An arbitrator may also make findings that the admitted evidence is of little weight.

Once all admissible evidence has been tendered by the parties, and the closing arguments have been delivered, the arbitrator has the task of assessing the impact of the evidence cumulatively in order to determine whether the adduced evidence sufficiently establishes or refutes the issues in dispute on a balance of probabilities. This entails evaluating which relevant facts have been proved, what inferences can be drawn from these facts and if the party bearing the onus has sufficiently proved all elements of its case and ultimately established a more probable version than the other party.[175]

10.2 How is Evidence Evaluated?

The evaluation of evidence involves making findings of fact in relation to substantial and procedural issues following an assessment of the probabilities, credibility and reliability of witnesses and any applicable evidentiary rules. A proper conclusion can only be reached following a thorough analysis of the impact of the evidence cumulatively in relation to the issues in dispute.

In the case of *Sasol Mining v Commissioner Ngqeleni NO and others*[176] the Labour Court provides that the proper approach when resolving disputes of fact is to make findings based on: the credibility of witnesses; the inherent probability or improbability of the version that is proffered by the witnesses; the reliability of their evidence; and lastly an assessment of the probabilities of the irreconcilable versions before the arbitrator. The Court denoted the aforementioned factors as 'essential ingredients' in the evaluation of evidence, and further

[175] A Bellengere ...et al (note 24 above) 435.
[176] (2011) 32 *ILJ* 723 (LC)

noted that it is only after the said assessment of evidence that a finding can be made as to whether a party has successfully discharged the burden of proof. Where an arbitrator fails to evaluate the evidence accordingly, he in essence fails to resolve the dispute and effectively denies the parties their right to a fair hearing. In this case the Court found that the arbitrator had made no proper attempt to analyse the oral evidence before him and had disregarded other material evidence.[177]

In the case of *Network Field Marketing (Pty) Ltd v Mngezana NO and others*[178] the Labour Court found that the arbitrator had barely evaluated the evidence and did not provide reasons as to why he relied solely on credibility findings when the balance of probabilities clearly favoured the employer. The arbitrator arrived at the conclusion that the employer's witnesses were unreliable on the basis of a minor contradiction between the witnesses which was insufficient to taint their evidence in entirety.

With specific regard to the situation where evidence is led by a single witness, the general rule in terms of civil and criminal law has been to treat such evidence with caution. This is known as the cautionary rule. While courts have not rejected the applicability of this rule in terms of its application to arbitrations, parties may still rely on the evidence of a single witness to establish their case.[179]

Possible examples of failing to properly evaluate evidence include: drawing adverse inferences against the employer for reasons not put to its witnesses in cross-examination; failing to take into account; that a party, for no good reason, an available material supporting witness; failing to rely on or properly evaluate circumstantial evidence; and incorrectly taking into account alleged inconsistencies between the evidence given by certain witnesses at the disciplinary hearing and that given at the arbitration, in the absence of the inconsistencies being put to the witnesses.[180]

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[177] Ibid.
[178] (2011) 32 *ILJ* 1705 (LC)
[179] *Northam Platinum Mines v Shai NO & Others* (2012) 33 *ILJ* 942 (LC).
[180] A Bellengere ...et al (note 24 above) 436.

10.3 Probabilities, Credibility and Reliability

The Labour Court has confirmed that the approach to be followed in evaluating evidence is to make findings of fact based on the factors of probabilities, reliability and credibility in relation to disputes of fact.[181] To this extent, the CCMA has attempted to codify this by incorporating it into the CCMA Practice and Procedure Manual as factors which an arbitrator must take into account in weighing up the evidence as a whole.[182]

In making a determination of the probabilities, the arbitrator should ascertain the most probable version in relation to the disputed facts by considering both the probabilities and improbabilities of each version. An arbitrator must have regard to the type of evidence before him in weighing the probabilities. This relates to whether the evidence is hearsay or opinion evidence for example as this will have a significant impact on the weight of the evidence.

In assessing the credibility of a witness, an arbitrator must assess the candour and demeanour of the witness when testifying. Relevant considerations include: whether the version averred by the witness is inherently probable; consistency with previous witness' versions; corroboration with other evidence and the manner in which the witness answered questions amongst other considerations.[183]

The credibility and reliability of a witness will also relate to any necessary motive to lie; the probabilities of aspects of the version as testified and that witnesses ability to accurately recall such occurrences. In determining the probability, reliability and credibility of evidence an arbitrator must not arrive at conclusions through considering each factor in isolation of each other. When evaluating evidence an arbitrator cannot make piecemeal evaluations or make determinations in a vacuum. An arbitrator must be aware of the cumulative effect of the factors in relation to the overall weight of evidence.[184]

[181] *Sasol Mining v Commissioner Ngqeleni NO and others* (note 176 above).
[182] (note 63 above) 13.14.
[183] T Cohen ...et al (note 104 above) 112.
[184] *Masilela v Leonard Dingler (Pty) Ltd* (2004) 25 *ILJ* 544 (LC) 29

CHAPTER 11

THE ARBITRATION AWARD

11.1 Introduction

At the end of the arbitration the arbitrator must issue an award. This entails identifying the relevant legal issues and substantive law relevant to the dispute and evaluating the evidence to determine whether a factual basis has been established in respect of the relevant legal and substantive law issues and resolving disputes of fact.

11.2 The Substantive Law

Section 138(6) of the LRA provides that 'a commissioner must take into account any code of good practice issued by NEDLAC or guidelines published by the Commission in accordance with the provisions of the Act...'

The CCMA Guidelines on Misconduct Arbitrations provides assistance as to how arbitrators are to interpret and apply the law. An arbitrator is obliged to follow the guidelines to the extent that it advances an interpretation of the law, failing which good reasons must be proffered for the deviation. The Guidelines are aimed at promoting consistent decision making, but also assist parties in preparing their cases, and assessing whether arbitrators are thorough and rational in reaching the final decision. A further pivotal aspect of the Guidelines are to give effect to s 33(1) of the Constitution inter alia providing for the enshrined right to lawful, reasonable and procedurally fair administrative action.

Commissioners are further obliged to interpret and apply the Labour Relations Act and other legislation. Judicial decisions of the Constitutional Court, the Supreme Court of Appeal, Labour Appeal Court, High Court and the Labour Court are binding on the CCMA. The most recent decision on the interpretation of a provision handed down by the highest court is the interpretation to be followed by commissioners. Where there are inconsistencies an arbitrator is to consider these inconsistencies and provide reasons for the approach followed.

Every decision made by an arbitrator must comply with the Constitutional imperative of section 33(1) of the Constitution which provides for the right to administrative action that is lawful, reasonable and procedurally fair. In *Sidumo & Another v Rustenburg Platinum Mines*

Ltd & Others[185] the Constitutional Court stated that the CCMA is an organ of state in terms of the Constitution and is subject to section 33 of the Constitution which requires the right to fair administrative action.

11.3 Nature and effect of an Arbitration Award

In order to pass muster the award must reflect that all issues in dispute have been resolved as well as provide a reply to the claim. The award should also outline findings on material facts and provide justifiable reasons correlating to the final decision.[186] The purpose of this is to formally denote that the commissioner in exercising his discretion, rationally and coherently reached a decision following a scrupulous consideration of all relevant material before him.

The effect of an arbitration award issued by a commissioner is final and binding and is enforced in the same manner as if it were an order of the Labour Court.[187] Certification of the award by the relevant director of the CCMA is probably the most efficient manner of enforcing a CCMA award. A failure to comply with a CCMA arbitration award will constitute contempt and can be enforced by way of contempt proceedings instituted in the Labour Court.[188] The award is subject to review but parties cannot appeal the matter on its merits.

11.4 Grounds for Review

In accordance with their aim of speedy and cheap dispute resolution, the drafters of the LRA excluded the right of appeal from proceedings of the CCMA and bargaining councils and confined parties to the right to review. Section 145(1) of the LRA allows for any party alleging a defect in arbitration proceedings to make an application to the Labour Court for an order to set aside the award. The grounds for review are provided for in s 145(2) of the LRA as follows:

> 'A defect referred to in subsection (1), means-

[185] 2008 (2) SA 24 (CC).
[186] *Carephone (Pty) Ltd v Marcus NO* (1998) 11 BLLR 1093 (LAC); *County Fair Foods (Pty) Ltd v CCMA & Others* (1999) 11 BLLR 1117 (LAC) and *Shoprite Checkers (Pty) Ltd v Ramdaw NO* (2001) 9 BLLR 268 (LC).
[187] Section 143 (1) LRA
[188] Section 143(4) LRA

(a) that the commissioner-

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner's powers; or

(b) that an award has been improperly obtained.'

Contrary to the intention of the drafters of the LRA, the interpretation of section 145 and the test for review has led to considerable judicial debate for many years, resulting in numerous conflicting judgments. Although this debate falls outside of the purview of this paper, it is necessary to peruse it because the issue of admissibility and the task of evaluation of evidence constitute a large part the arbitration process and thus potential ground for reviews.

In a recent decision, the Supreme Court of Appeal in *Herholdt v Nedbank and others*[189] applied its mind to the aforementioned debate and found the following:

1. The SCA in *Rustenburg Platinum Mines v CCMA & others* (2006) 27 *ILJ* 2076 (SCA) held that a reviewing court could, in addition to the requirements under section 145, review the award for reasonableness by examining the 'substantive merits' of the award to determine whether the award was rationally connected to the reasons given by the arbitrator. Once it was found that the award was appreciably or significantly infected with bad reasons it fell to be set aside irrespective of whether it could otherwise be sustained on the material in the record.
2. The Constitutional Court in *Sidumo & another v Rustenburg Platinum Mines Ltd & another* (2007) 28 *ILJ* 2405 (CC)], however enunciated a different unreasonableness test, namely, whether the award was one that a reasonable decision-maker could not reach ('the *Sidumo* test').[190]
3. On the *Sidumo* approach the reasoning of the arbitrator assumes less importance than it does on the SCA test, where a flaw in the reasoning/reasons results in the award being set aside.[191]
4. In the *Sidumo* test, the reasons are still considered to see whether the result can reasonably be reached by that route. If not, the court must still consider whether, apart from those reasons, the result is one a reasonable decision-maker could reach in light of the issues and the evidence.[192] The evidence must be scrutinised to determine whether the outcome was reasonable.[193]
5. The *Sidumo* test will, however, justify setting aside an award if the decision is 'entirely disconnected with the evidence' or is 'unsupported by any evidence' and involves speculation by the commissioner.[194]

[189] [2013] 11 BLLR 1074 (SCA).
[190] Ibid. 12.
[191] Ibid.
[192] Ibid.
[193] Ibid. 13.
[194] Ibid.

The SCA then examined the 'latent irregularity' ground of review developed by the Labour Appeal Court in *Herholdt*.[195]

A latent irregularity, sometimes referred to as a process-related unreasonableness, is one arising from the failure by the arbitrator to take into account a material fact. It includes the converse situation of taking into account a materially irrelevant fact.

According to the LAC, it is immaterial whether the result reached by the arbitrator is one that could reasonably be reached on the material before the arbitrator. The mere possibility of prejudice will suffice to warrant interference.

The SCA in *Herholdt* rejected this test of the LAC and held that the test incorrectly lowers the threshold for review set out by the majority judgment in *Sidumo*. The SCA, however, stated that this does not mean that a latent irregularity, as Schreiner J originally used that term in the *Goldfields Investments* case, is not a gross irregularity within the meaning of s145(2)(a)(ii). It is, but only in the limited sense where the decision-maker has undertaken the wrong enquiry or undertaken the enquiry in the wrong manner.[196]

The SCA then examined the LAC's 'dialectical unreasonableness' ground for review.

According to the LAC this review ground refers to the unreasonableness flowing from the process of reasoning adopted by the arbitrator, ie whether the decision 'is supported by argument and considerations recognised as valid, even if not conclusive'.

The LAC held that proper consideration of all the relevant and material facts and issues is indispensable to a reasonable decision and if a decision-maker fails to take account of a relevant factor which he or she is bound to consider, the resulting decision will not be reasonable in a dialectical sense. It further held that there is no requirement that the commissioner must have deprived the aggrieved party of a fair trial by misconceiving the whole nature of [the] enquiry. The threshold for interference is lower than that: it being sufficient that the commissioner has failed to apply his mind to certain of the material facts or issues before him, with such having potential for prejudice and the possibility that the result may have been different.

The SCA, however, held that these propositions were not a permissible development of the law and contrary to the *Sidumo* test.

In summary, according to the SCA in *Herholdt* the proper test for review or the grounds for review of arbitration awards are as follows:

1. The drafters of the LRA intended an extremely high standard for setting aside an award to support the overall aim of a speedy and inexpensive resolution of disputes arbitrated by the CCMA.[197]

[195] *Herholdt v Nedbank* Ltd (2012) 23 *ILJ* 1789 (LAC)
[196] Ibid. 21.
[197] Ibid. 9.

2. A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a). For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result.
3. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator.
4. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.

Following the SCA decision in *Herholdt,* the LAC in *Goldfields Mining South Africa (Pty) Ltd v CCMA & others*[198] held that where the arbitrator fails to have regard to material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome. But, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis.[199] The issue is whether the final decision of the arbitrator [the outcome] is in any event reasonable based on the totality of the material placed before the arbitrator.[200]

11.5 Conclusion

The arbitration award is fundamental as it formally denotes that the manner in which the arbitrator reasoned and how he arrived at the ultimate finding. In essence the questions to ask are these: (i) in terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) did the arbitrator identity the dispute he was required to arbitrate? (iii) did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) did he or she deal with the substantial merits of the dispute? and, in the final analysis, (v) based on the evidence, did the arbitrator arrive at a reasonable decision?

[198]Unreported, 4 November 2013.
[199]Ibid. 21.
[200]Ibid. 10.

CHAPTER 12

SPECIFIC ADMISSIBILITY ISSUES IN RELATION TO CERTAIN TYPES OF EVIDENCE

12.1 Introduction

There are certain rules applicable to different types of evidence which serve to exclude the evidence for various reasons. In terms of relevance being a fundamental factor in determining admissibility it stands to reason that irrelevant evidence must be excluded. Examples of irrelevant evidence include: character evidence, similar fact evidence and opinion evidence. Evidence that is accepted as being unreliable also stands to be excluded. Examples are hearsay evidence and evidence that is obtained under duress. Evidence also stands to be excluded where policy reasons dictate such exclusion, for instance where the evidence is privileged information or where it is obtained illegally or through some or other improper manner.

There are exceptions to these exclusionary rules as applicable to the various forms of evidence as will be shown. Further, the CCMA is required in terms of s 138 of the LRA to deal with disputes with the minimal legal formalities; this necessarily means that the aforementioned exclusionary rules cannot be applied strictly, if applied at all.

12.2 Privileged Information

Confidential communications between a party and their legal representative fall under the category of legal professional privileged information. All communications subject to legal privilege need not be disclosed at arbitration proceedings unless agreed to by the relevant party. For the purposes of labour law, a legal representative includes a union representative and communications made in the context of seeking legal advice or in preparation for litigation need not be disclosed. In *Lewis and Baltimore Aircoil Co SA (Pty) Ltd*[201] the arbitrator ruled that the employer could not at arbitration call as a witness the employee who had represented the applicant employee at his disciplinary hearing. He found that attorney-client privilege extended also to shop stewards and representatives at disciplinary hearings.

[201](2013) *ILJ* 751.

12.3 Parol Evidence Rule

In terms of this rule, parties to a written agreement, for example a collective agreement, are bound by what is written in the agreement. The document should speak for itself in terms of determining the intention of the parties. The parties may not seek to prove, contradict or change the written terms of the agreement through oral evidence unless the agreement itself is unclear and ambiguous on the matter. However, where an employment relationship is disputed, arbitrators may permit extrinsic evidence and look behind an otherwise clear agreement to determine whether there is an employment relationship between the parties. The arbitrator may presume such a relationship exists where the employee proves certain facts listed in section 200A of the LRA unless the contrary is proved by the employer. *Mpungose v Ridge Laundries CC* [202] was one of the first test cases that looked beyond the written signed 'independent contractor' agreements to determine real relationship. Cases like these lead to the enactment of section 200A in the LRA.

Witnesses may not be asked to interpret a contract or be asked about the meaning of certain words in a contract unless certain words have a peculiar institutional or industry meaning. Interpretation is a matter of law and not fact. Accordingly, the arbitrator must decide a matter after listening to argument from both representatives.[203]

12.4 Admissions and Confessions

Generally admissions may be formal or informal. Formal admissions amount to an admission of adverse facts formally agreed to before the hearing. Such formal admissions become 'common cause' and no evidence may be required to prove such facts as evidence.

Informal admissions are admissions that have not been agreed to and are subject to scrutiny at hearings to ascertain whether they constitute proof of a disputed fact. Confessions are a form of informal admission where the maker admits to all the elements of, for example the misconduct charged.[204] The stricter rules relating to admissions as applicable in criminal and civil law cannot be applied as strictly in arbitration hearings.

[202](1999) 20 *ILJ* 704 (CCMA).
[203]*KPMG Chartered Accountants (SA) v Securefin Ltd & Another* 2009 (4) SA 399 (SCA).
[204]T Cohen ...et al (note 104 above) 110.

The Labour Court in *OK Bazaars (a division of Shoprite Checkers) v CCMA and Others*[205] held that admissions and confessions in labour law need not be subject to the same stringent rules as those in criminal law. Where an employee voluntarily and in the absence of undue influence confesses to misconduct, the confession may be admitted and the employee may be found guilty of the misconduct if he or she has admitted all the elements of it. The employer does not have to confirm the confession in a material respect or adduce evidence other than the confession to prove the misconduct.

12.5 Direct and Circumstantial Evidence

Direct evidence proves a fact in issue directly and where relevant will be admissible. In contrast, circumstantial evidence proves a fact in issue indirectly. Circumstantial evidence is evidence of relevant facts which allow for disputed facts to be presumed through inferences which can be drawn from surrounding proved facts.[206]

Circumstantial evidence relates to a combination of circumstances, which taken cumulatively allow for the formulation of a strong inference or conclusion relating to a dispute in issue. Circumstantial evidence will be admissible in arbitration hearings provided that the inference drawn from the evidence is consistent with proved facts and that the inference drawn is the most plausible inference.[207]

All that is required in arbitration hearings is that the arbitrator is able to draw an inference from the circumstantial evidence and that that inference is the most plausible inference that can be drawn.

In *Standard Bank Of SA v Mosime NO & another*[208] the employer's case was based on circumstantial evidence. The reviewing court found that the arbitrator should have found that the bank had made out a prima facie case which the employee was obliged to rebut. The circumstances led to the unavoidable inference that the employee was involved in the fraudulent transaction. By declining to draw that inference, the arbitrator had failed to

[205](2000) 21 *ILJ* 1188 (LC).
[206]T Cohen ...et al (note 104 above) 112.
[207]*AA Onderlinge Assurasie Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A).
[208](2008) 10 BLLR 1010 (LC).

discharge his duty to accept circumstantial evidence and had failed to draw obvious inferences from circumstantial evidence.

CHAPTER 13

HEARSAY EVIDENCE

13.1 Introduction

Hearsay evidence is defined by the Law of Evidence Amendment Act 45 of 1988 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". This in essence means that the witness giving such evidence did not personally experience or observe such events. The basis of the evidence being led by the witness was received in some way from another person.

Hearsay is inherently weak because the reliability of the evidence depends on the credibility of the source who is not present to be cross-examined regarding same.[209] Its reliability is also open to question as it is dependent on the ability of the narrator to recollect the reported statements. Therefore, the general rule is that hearsay evidence is inadmissible.

13.2 Admissibility of Hearsay Evidence

The rule regarding the inadmissibility of hearsay evidence cannot be applied strictly in arbitration hearings as a result of s 138 of the LRA. Hearsay evidence will be admissible where the parties agree to its admission or where it would be in the interests of justice for the arbitrator to admit such evidence. The nature of arbitration hearings are not as formalistic and technical as traditional judicial proceedings and in accordance with s138 of the LRA, arbitrators should more readily exercise a discretion in favour of admitting hearsay evidence.

Various factors will influence the admission of hearsay evidence including the reason why the originator of the evidence cannot be brought, the nature and purpose of the evidence being brought and the value of the evidence in relation to the overall jigsaw of evidence. The hearsay evidence should relate to the issues in dispute and should have the ability to corroborate other evidence. Arbitrators should be conscious of the possibility that hearsay evidence may be confirmed or corroborated through evidence that may be presented later on in the hearing.

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[209] PJ Schwikkard (note 27 above) 270.

The case of *Naraindath v CCMA and Others*[210] noted that reliance by an arbitrator on hearsay evidence where the arbitrator is satisfied that such reliance is properly grounded and procedurally logical, then it will not constitute a reviewable irregularity.

Medical reports and certificates are commonly used by employees as evidence in disputes. Such reports will generally be admissible as the employee as the patient can attest to the authenticity and correctness of the certificate or report. Where the technical contents of such report, namely those relating to medical issues outside the knowledge of the employee patient, become the subject of a dispute, the contents will amount to hearsay evidence in the absence of a doctor's testimony. However, arbitrators are not bound by the strict rules of evidence and the Labour Appeal Court has held that medical certificates can be taken into account without being accompanied by a doctor's testimony where it is corroborated by other reliable evidence.[211]

13.3 Conclusion

The discretion to exclude hearsay evidence at arbitration hearings should be exercised with caution by arbitrators. What is warranted is an assessment of the reliability of the hearsay evidence and its relevance to the overall mosaic of evidence, following which a determination can be made as to the weight to give to the evidence. An arbitrator should ascertain objective aspects of hearsay evidence that do not require direct testimony. Such hearsay evidence can be given significant weight. Hearsay evidence that is dependent on the corroboration of other evidence or that can only be tested through cross-examination must be given diminished weight, or excluded altogether.

[210] (note 25 above).
[211] *Le Monde Luggage CC v Commissioner Dunn and Others* (note 55 above).

CHAPTER 14

SIMILAR FACT EVIDENCE

14.1 Introduction

Similar fact evidence is evidence that attempts to show a likelihood of guilt of a party by virtue of past misconduct of a similar nature. Such evidence is led with the view that an inference should be drawn that by virtue of former related misconduct, the party accused of misconduct has committed the same misconduct again. Similar fact evidence is generally irrelevant and is therefore inadmissible. Further reason for the exclusion of similar fact evidence is that a person should be held liable for misconduct based on reasons directly related to the matter in dispute. The inclusion of any other past misconduct will be regarded as unfairly prejudicial.

14.2 Admissibility of Similar Fact Evidence

There is however an exception to the exclusionary rule against similar fact evidence. Similar fact evidence may be relevant and admissible where it used to identify a culprit and establishes a pattern of behaviour (*modus operandi*) in strikingly similar previous offences to that alleged in the present matter.[212]

Some of the problems associated with similar fact evidence is that the accused party has to now defend previous acts as well as the current allegation. Another significant problem is that the introduction of similar fact evidence raises collateral issues which have the impact of being time consuming. Similar fact evidence should only be admitted by arbitrators where the probative value of the evidence in relation to material facts in issue are of greater value than the potential prejudice it could cause.

In *Gaga v Anglo Platinum Ltd*[213] the employer sought to use similar fact evidence of the employee's earlier conduct to prove that the employee had in fact sexually harassed the latest complainant. While, the commissioner at the arbitration hearing failed to admit such evidence, the Labour Appeal Court held that the commissioner's exclusion of the similar fact evidence constituted a reviewable irregularity. The LAC further found that the similar fact

[212] CCMA Practice and Procedure Manual (note 63 above) 13.11.2
[213] (2012) 33 *ILJ* 329 (LAC)

evidence would not constitute a time wasting inquiry where it is led to show a *modus operandi*, which in the circumstances was a pattern of sexual harassment.

The LAC decision in *Gaga*[214] in dealing with similar fact evidence has effectively lowered the threshold for the admission of unfairly prejudicial material at arbitration hearings.[215] While s 138 of the LRA provides for commissioners to conduct proceedings with the minimal of legal formalities it does not mean that evidential safeguards relating to the exclusion of similar fact evidence can be disregarded.

14.3 Conclusion

The introduction of similar fact evidence into arbitration hearings brings with it complexities which will inevitably hamper the speed and cost efficiency of arbitrations conducted under the auspices of the CCMA. Allowing similar fact evidence that is still to be proved will complicate arbitration hearings and will further give rise to reviewable irregularities; nullifying the object efficient dispute resolution. Therefore, save for similar fact evidence that is directly relevant to factual issues in dispute- the many policy reasons warrant the exclusion of vague similar fact evidence.

[214] Ibid.
[215] B Whitcher 'Similar Fact Evidence' Research Paper. October 2013.

CHAPTER 15

OPINION EVIDENCE

15.1 Introduction

Generally, a witness may only depose to the facts that he or she directly observed through the use of the five senses. Where a witness makes assertions over and above his or her observations, the result is that the witness is drawing inferences or conclusions based on these observations and inevitably giving an opinion. It is not for a witness to formulate opinions and draw inferences. Generally a witness is not qualified to make such inferences and is inadmissible as it constitutes irrelevant testimony.

It is the function of the arbitrator to draw inferences and arrive at conclusions from proved facts presented by witnesses. A witness will essentially usurp the function of an arbitrator where he or she expresses an opinion based on observations.

15.2 Admissibility of Opinion Evidence

As noted earlier, it is the duty of the arbitrator to draw inferences from the facts laid before him. However, in certain instances an arbitrator may permit the opinion evidence of both an expert and/or lay person. Sometimes an arbitrator is not qualified to form an opinion or draw inferences and he or she may choose to rely on the opinion of an *expert witness* who is better suited to drawing such inferences. It is necessary to first establish that a witness is in fact an expert.[216] An expert witness should be qualified or possess expertise in the form of skill, knowledge and experience and is accordingly able to draw better inferences than an arbitrator on certain facts. In particular when it comes to the medical evaluation of a person's health, our courts have noted that a doctor's expert opinion should be admissible.[217]

A non-expert witness will be permitted to give opinion evidence where he is only able to express himself meaningfully through the making of an inference, or where he is in a better position than the arbitrator to make an inference. A lay witness in these circumstances will

[216] CCMA Practice and Procedure Manual (note 63 above) 13.5.8
[217] *Sipho Emmanuel Mgobhozi v Rajah Naidoo* (2006) 27 *ILJ* 786 (LAC).

express an opinion based on general human experience and knowledge.[218] Examples of such opinion evidence include evidence based on speed, age, value and intoxication.[219]

In cases of intoxication, evidence need not be of a technical or medical nature in order to be admissible.[220] The testimony of a lay witness as to the intoxication of an accused employee in the absence of a satisfactory explanation by that employee will constitute a more probable version on the part of the employer.[221]

Arbitrations do not constitute civil proceedings in terms of s42 of the Civil Proceedings Evidence Act 25 of 1965. Accordingly, the Hollington Rule does not apply to arbitrations and as a result an arbitrator may take into account the findings and observations of a court of law as rebuttable, *prima facie* evidence.[222]

15.2.1 Polygraph Evidence

Polygraph evidence as a lie detector test amounts to opinion evidence which attempts to indicate the guilt or otherwise of an accused employee. Once again, it is the duty of the arbitrator to determine through the facts whether a party has been evasive on certain points.

This form of opinion evidence is particularly controversial as the scientific validity and reliability of lie detector tests have not been accepted by our courts or the Health Professionals Council of South Africa.[223] At best it provides an indication that one has a strong emotional response to a question, and by no means constitutes proof that the employee lied. Therefore even if admitted, polygraph evidence can generally only serve as corroboratory of other evidence against an employee.[224] The Labour Courts, however, have held that the results of a polygraph test may be taken into account in assessing the credibility of a witness and in assessing the probabilities.[225]

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[218] A Bellengere ...et al (note 24 above) 429.
[219] J Brand (note 56 above) 216.
[220] *S v Edley* 1970 (2) SA 223 (N) notes that the more manifest the physical manifestations of intoxication are as averred by a reliable and credible lay witness then the more readily medical and technical evidence can be dispensed with.
[221] *Exactics- Pet (Pty) Ltd v Patelia NO and others* (2006) 6 BLLR 551 (LC).
[222] *Nel v Law Society; Cape of Good Hope* 2010 (6) SA 263 (ECG).
[223] T Cohen ...et al (note 104 above) 105.
[224] *Mzimela and United National Breweries (SA) Pty Ltd* (2005) 14 CCMA 8.23.11
[225] *Truworths Ltd v CCMA & Others* (2009) 30 *ILJ* 677 (LC).

CHAPTER 16

IMPROPERLY OBTAINED EVIDENCE

16.1 Introduction

The notion of improperly obtained evidence encompasses evidence that was obtained illegally, unlawfully, contrary to any workplace policy regulating such gathering of evidence and evidence that constitutes an improper infringement of a person's right to privacy and dignity. Evidence must not be obtained under duress and an accused person cannot be obliged to give evidence that is self-incriminating.[226]

16.2 Admissibility of Improperly Obtained Evidence

Tribunals in civil matters have a discretion to exclude evidence that has been obtained in an improper manner.[227] In exercising this discretion, the following considerations must be taken into account:

- If there were any lawful means of obtaining the evidence;
- If justice could be achieved through the use of ordinary measures;
- If there was a deliberate violation of the constitutional rights of an employee.[228]

It is important to note that arbitrations do not constitute civil proceedings and arbitrators are not expected to conduct arbitration hearings as such. In this regard section 138 of the Labour Relations Act provides for the relaxation of the strict admissibility rules relating to evidence as applicable in courts. Improperly obtained evidence may have a significant impact on an employee's rights to privacy and dignity. An arbitrator is accordingly expected to balance the rights of an employer to protect its business interests and an employee's rights to privacy and dignity.

16.2.1 Interception of Communications

The Regulation of Interception of Communications and Provisions of Communications Related Information Act 70 of 2002 (RICA) subject to certain exceptions, prohibits the intentional interception and monitoring of communications. The Act primarily prohibits a

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[226] *Goosen v Caroline's Frozen Yoghurt Parlour (Pty) Ltd & Another* (1) (1995) 16 *ILJ* 396 (IC).
[227] *Lotter v Arlow and another* 2002 (6) SA 60 (T)
[228] Ibid.

third party intercepting or monitoring communications and does not apply where one is a participant to communications and records or divulges such information.[229] Interception by a third party is permitted with the consent of a party to such communications or where the communications are in a public domain, including unrestricted access to social networks.[230]

Section 6 of RICA deals specifically with the interception and monitoring of an employee's communications made at the workplace using an employer's telecommunication systems. An employer will be permitted to intercept the communications of employees' provided:

- the communications were made using the employers' telecommunication systems which were provided for use wholly or partly in connection with the business of the employer;
- employees were made aware in advance that their communications made through the use of the employer's telecommunication systems may be intercepted and monitored;
- interception is not done at random and without proper reason;
- the systems controller consents to such interception each time;[231]
- the purpose for such interception must be to establish the existence of facts relevant to the business.[232]

In addition to the above, evidence obtained through the interception of an employee's communications will be admissible where it can be shown that there were no less drastic means of detection available.

In *Moonsamy v The Mailhouse*[233]the arbitrator stated that telephone conversations are a 'very private affair'. The employer must show that there are compelling reasons within the context of business that necessitate that the contents of those conversations are disclosed. He drew the line at continual tapping of an employee's business telephone and found that the employer could have and had, in fact, acquired evidence against Moonsamy by less intrusive means.

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[229]*Dauth/ Brown and Weirs Cash and Carry* (2002) 8 BALR 837 (CCMA).
[230]*Sedick & Another and Krisray (Pty) Ltd* (2011) 32 *ILJ* 752 (CCMA). In considering the application of RICA, the commissioner in this case found that the Internet and therefore Facebook was in the public domain. Where a party fails to use their privacy options, the right to privacy and protections of RICA fall away.
[231] Systems controller is defined as a natural person in the case of private bodies; a partner in a partnership and a chief executive officer (or persons duly authorized thereby) in the case of juristic persons.
[232] Section 6 RICA. Confirmed in *Sugreen v Standard Bank of South Africa* (2002) 23 *ILJ* 1319 (CCMA).
[233](1999) 20 *ILJ* 464 (CCMA).

In *Sugreen v Standard Bank of SA*[234] the employer had obtained a tape recording of a conversation between one of its managers and a service provider, which revealed a bribe. The service provider made the tape recording and gave it to the employer. The arbitrator differentiated this case from *Moonsamy v The Mailhouse* on the basis that there were few other methods by which the evidence could have been acquired, that the recording was made during business hours and using the employer's telephone. In any event, it was a case of 'participant monitoring', which is permitted by RICA.

In *Bamford and Others v Energiser (SA) Limited*,[235] the arbitrator sanctioned the collection and storage of email messages from employees' private mailboxes on the basis that the content of the messages (crude jokes and pornographic material) could not be construed as private. Moreover, when the company conducted an audit of its system when technical problems arose through overloading, it was seeking to establish the existence of facts indicating the root of the technical problem. It needed to secure the system's effective operation and, in the process, discovered improper use of the system, which amounted to misconduct.

16.2.2 Monitoring and Searches

Save for change-rooms and toilets an employer is permitted to monitor its premises and operational areas through camera surveillance. An employer is entitled to protect its property and business through the use of video and camera surveillance. There can be no expectation of absolute privacy in the workplace and evidence obtained in this manner is admissible.

Where evidence is obtained following a search it will be admissible where an employee has contractually agreed to undergo searches. Evidence obtained as a result of a search is admissible where an employer has reasonable grounds to conduct the search of an employee's person or workstation. It is also important in the context of body searches that such search was conducted in a decent manner and that there were no less drastic means of detection.

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[234] (2002) 23 *ILJ* 1349 (CCMA).
[235] [2001] 12 BALR 1251 (P)

16.2.3 Entrapment

Entrapment occurs where an agent or employee of the employer cooperates with an employee in the commission of an offence. Evidence obtained as a result of entrapment will be admissible where the employer reasonably suspected the employee of misconduct. Evidence that is obtained in this manner will be inadmissible where it provides more than an opportunity for an employee to commit an offence. Anything beyond providing an opportunity would amount to enticement, and it would be contrary to public policy to permit such evidence.

In *Cape Town City Council v SAMWU and Others,*[236] the Court found that the evidence obtained in the trap *in casu* (what the employees did and said during the trap and the information uncovered by the agent) was inadmissible because there was no proper pre-existing suspicion about the employees. In addition, the agent had exceeded the bounds set by section 252A of the Criminal Procedure Act by actively encouraging and unduly inducing the employees to commit the offence. The onus rests on the employer to show that the trapping was fairly conducted.[237]

16.3 Conclusion

The rules regulating the admissibility of improperly obtained evidence in courts cannot be adhered to strictly in arbitrations by virtue of s 138 of the LRA. Arbitrators must be conscious of employees' rights to fair labour practices in exercising the discretion to exclude illegally and improperly obtained evidence.

Section 6 of RICA only permits the interception and monitoring of an employee's communications under certain circumstances, affording some protection to the rights of both the employee and employer. It is therefore necessary for arbitrator's to balance the rights and interests of the employee as well as that of the employer in deciding to admit or exclude evidence that was obtained in an improper manner.

[236] (2000) 21 *ILJ* 2409 (LC).
[237] Ibid.

CHAPTER 17

CONCLUSION

The purpose of this research paper was to examine arbitrations conducted in terms of the Labour Relations Act 66 of 1995, under the auspices of the CCMA and bargaining councils. In particular, the specific statutory powers including the test for review and chiefly the impact of section 138 of the LRA on the conduct of proceedings.

The concept of 'evidence' in civil law and labour law was discussed along with the different types of evidence and the presentation thereof in arbitrations. Related evidential concepts of the onus of proof, the evidentiary burden and the standard of proof were discussed in detail comparing the criminal, civil and labour law positions.

The central focus of this paper was on the actual process of adducing evidence in arbitrations, the powers and duties of arbitrators in conducting these proceedings and how the evidence was ultimately evaluated. The statutory provisions of the LRA, particularly s 138 was shown to have a significant impact on the manner in which arbitrator's exercised their powers in the conduct of proceedings. Having regard to the Legislature's purpose in creating the CCMA and necessarily arbitrations, the object of quick, efficient dispute resolution becomes obvious.

While s 138 grants arbitrators the discretion to conduct proceedings in a manner they deem fit, this does not mean arbitrators have *carte blanche* as to the manner in which proceedings are conducted. The ensuing award following an arbitration must reflect that all relevant issues were taken into account; that the arbitrator applied his mind to the evidence before him and ultimately that the outcome is fair.

What came to the fore through this research was the constant reminder that arbitration proceedings are not the same as proceedings conducted in a court. While there are certain formalities and facets of the conduct of arbitration proceedings that resemble court proceedings, arbitrators are not expected to mimic legal proceedings as if they were in a court. The cumulative effect of this principle together with the objectives of the LRA and the provisions of s 138 warrant a relaxation of the strict rules of evidence as applicable in a court.

To this effect, the latter chapters of this paper focused on specific critical types of evidence. It was shown through the analysis of case law and academic commentary that the strict exclusionary rules of evidence cannot be applied in arbitration hearings. For arbitrators to

conduct hearings efficiently, it would be beneficial for them to possess some form of procedural understanding of the law of evidence so as to determine when items of evidence should be admitted despite not being strictly relevant, and if so what weight to ascribe to it. A sound understanding of the law of evidence and its associated procedures would go a long way in adhering to the objects of arbitration- circumventing the strict rules of evidence, whilst ensuring efficiency and a fair outcome.

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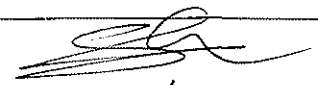
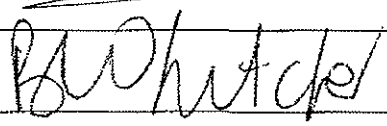
HUMANITIES AND SOCIAL SCIENCES RESEARCH ETHICS COMMITTEE ETHICAL CLEARANCE CHANGE OF DISSERTATION TITLE FORM	
School	Law
Student Name	S GOUNDEN
Student Number	207508149
Supervisor	Ms Benita Whitcher
Co-supervisor	
Old Title	An analysis of the Presentation and Admissibility of Evidence at CCMA Arbitrations
New Title	The Presentation and Admissibility of Evidence at CCMA Arbitrations
Reason for Change	Changed before submitting for examination to more accurately reflect the focus of the dissertation. The change has no ethical implications.

Signatures	
Student:	
Supervisor:	
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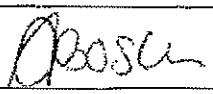
ALR:	
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