

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Case no : JA 33/99

In the matter between

**SOUTHERN SUN HOTELS (PTY)LTD
Appellant**

and

**SOUTH AFRICAN COMMERCIAL CATERING 1st
Respondent
& ALLIED WORKERS UNION**

**DAVID APHANE
Respondent**

2nd

JUDGEMENT

Zondo AJP:

Introduction

[1] This is an appeal against a determination made by the industrial court in terms of sec 46(9) of the Labour Relations Act, 1956 (Act no 28 of 1956)(**“the old Act”**) in a dispute between the appellant and the second respondent. The dispute was whether the dismissal of the

second respondent constituted an unfair labour practice and what relief the second respondent should be granted if his dismissal did constitute an unfair labour practice. The determination of the industrial court was to the effect that the dismissal did constitute an unfair labour practice and that the appellant should reinstate the second respondent. It is against this determination and order that the appellant now appeals to this Court.

The background facts

[2] It is necessary to give a summary of the facts relating to the dispute in respect of which the industrial court gave the determination appealed against. The appellant owns an hotel in Sandton, Johannesburg. Until the 6th September 1996 the second respondent was employed as a waiter in the room service department of the hotel. The appellant also employed at all times material to this matter one Mr Phillip Moremi, one Mr T.Goebel and one Mr Lawrence Phakathi. Mr Phillip Moremi was a supervisor in the room service department. Mr Goebel was a senior assistant

manager. Mr Lawrence Phakathi was the room service manager.

[3] At a certain point on the 29th June 1996 Mr Goebel noticed that the second respondent was not in the room service department which was his workstation. He set out to look for him and found him in the staff canteen. He instructed him to return to the room service department. The second respondent then left the canteen and returned to the room service department. It would appear that there was some delay on Mr Goebel's part in returning to the room service department. According to Mr Goebel's evidence, which was not challenged, when he arrived back in the room service department, he found Mr Moremi **"shaken up"** or **"nervous"**. Mr Goebel then asked Mr Moremi what had happened. The latter reported to him that, on returning to the room service department, the second respondent was very upset. Mr Moremi told Mr Goebel that the second respondent accused him (i.e. Mr Moremi) of reporting to Mr Goebel that he (i.e. is the

second respondent) had gone to the staff canteen. Mr Moremi then told Mr Goebel that the second respondent had then threatened him.

[4] Mr Goebel had later on gone to a restaurant with Mr Phakathi. Mr Moremi had joined them. Mr Moremi had then relayed to them what had occurred. There had been no eye-witnesses to what Mr Moremi alleged the second respondent had said to him. Subsequently a disciplinary inquiry was convened against the second respondent. The second respondent was charged with two acts of misconduct. These were deserting his workstation and threatening Mr Moremi. He pleaded not guilty.

[5] Mr Moremi testified in the inquiry in the presence of the second respondent. His evidence was to the effect that the second respondent had threatened him. The second respondent did not give evidence in the inquiry. Accordingly he failed to deny Mr Moremi's evidence that he had threatened him. The second respondent was found guilty and dismissed. The second respondent noted an internal appeal but the appeal failed. A dismissal dispute arose between the appellant and the second respondent. The latter referred it to the industrial court which gave the determination and order I have referred to above.

[6] During the trial in the industrial court the appellant led the evidence of Mr Goebel which was to the effect I have outlined above. This included Mr Goebel's evidence that when he returned from looking for the second respondent in the staff canteen, he had found Mr Moremi in the room

service **“shaken up”** and nervous. Mr Goebel’s evidence had included that, when he had asked Mr Moremi what was wrong, Mr Moremi had told him that he had been threatened by the second respondent for allegedly reporting to Mr Goebel that he (i.e. second respondent) had gone to the staff canteen. Obviously this part of Mr Goebel’s was hearsay evidence in so far as it related to what Mr Moremi had told him the second respondent had said to him.

[7] An affidavit which was signed by Mr Moremi was handed up in court. In that affidavit Mr Moremi stated that the second respondent had threatened him on the 29th June 1996. He said he feared for his life if he were to come to court and testify against the second respondent. For that reason he said he was not prepared to go to the industrial court and testify. He said the second respondent had threatened him again into not going to court to testify. Whether the second respondent had or had not threatened

Mr Moremi on the 29th June 1996 depended on whether or not the industrial court would admit the hearsay evidence given by Mr Goebel about what Mr Moremi told him on the day of the alleged incident and/or the contents of the affidavit by Mr Moremi which was submitted to the industrial court. The industrial court had to decide whether the hearsay evidence was admissible. If it admitted the hearsay evidence, there would be a sufficient basis for a finding that the second respondent did threaten Mr Moremi. If the hearsay evidence was not admitted, there would be little to support such a finding.

[8] The industrial court came to the conclusion that the hearsay evidence should not be admitted and found that the dismissal constituted an unfair labour practice and ordered the reinstatement of the second respondent. The reason given by the industrial court for refusing to admit the hearsay evidence even on the basis of sec 3 of the Law of Evidence Amendment Act, 1988 (**“the Evidence Act”**) was that it related to too fundamental an issue of the

case for such evidence to be admitted. During the proceedings in the industrial court the minutes of the disciplinary inquiry had been admitted as accurately reflecting what had transpired in the inquiry. This had included Mr Moremi's evidence which the second respondent had failed to contradict. The second respondent who was subjected to cross-examination gave evidence in the court a quo and denied having threatened Mr Moremi.

[9] Before us two grounds were advanced in argument on why we should uphold the appeal and set aside the determination of the industrial court. The one, which was the main ground, was that the court a quo had erred in refusing to admit the hearsay evidence. The second was that there had been sufficient circumstantial evidence before the court a quo in any event to justify a finding that the second respondent had threatened Mr Moremi. I propose dealing with the main point first. Depending on my finding on that point, it may not be necessary to deal with the second point.

**Should the court a quo have admitted the
hearsay evidence?**

[10] The appeal was argued on the basis that, if the court a quo was wrong not to admit the hearsay evidence, then its

determination cannot stand and will fall to be set aside.

The only basis on which the appellant urged us to come to that conclusion is the power which the provisions of sec 3 of the Evidence Act, confer on a court to admit hearsay evidence in certain circumstances. In this regard Mr Franklin, who appeared for the appellant, drew our attention to certain aspects of this case in support of his submission that the court a quo erred in not admitting the hearsay evidence. On behalf of the second respondent the argument presented was that the aspect of the case in respect of which the appellants wanted the court a quo to admit the hearsay evidence was so fundamental that it would be extremely unfair to the second respondent to admit it.

[11] Sec 3 of the Evidence Act provides as follows:

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

(a) each party against whom the evidence is to be adduced agrees to the admission

thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.

(2) Hearsay evidence may be provisionally admitted in terms of subsection(1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

(4) For the purposes of this section-

“Hearsay evidence” means 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;

“party” means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.”

[12] In argument, Mr Franklin referred us to **Hlongwane v Rector, St Francis College 1989 (3) SA 318 (D)**, in particular at 326 D-F; **S v Mpofu 1993 (2) SACR 109 (N)**, **Metedad v National Employers General Insurance Company Ltd 1992 (1) SA 494 (W)**, in particular, at 498I-500A and **Hewan v Kourie N.O. & Another 1993 (3) SA 233 (T)** in particular at 238G - 241E and an unreported judgement of the industrial court. I do not consider it necessary to discuss those cases in any specific manner but will refer to any one of them in the course of this judgement where to do so appears to be warranted.

[13] The provisions of sec 3 of the Evidence Act which are relevant to this appeal are those of sec 3(1)(c). It seems clear to me that the legislature enacted the provisions of sec 3 in order to create a better and more acceptable dispensation in our law relating to the reception of hearsay evidence. The wording of sec 3 makes it clear that the point of departure is that hearsay evidence is not admissible in civil and criminal proceedings. However, because the legislature was conscious of various difficulties associated with the reception of hearsay evidence in our law up to that stage and wanted to bring about a better

dispensation, it created a mechanism to determine circumstances when it would be acceptable to admit hearsay evidence.

[14] The legislature also decided that the test whether or not hearsay evidence should be admitted would be whether or not in a particular case the court thought it would be in the interests of justice that such evidence be admitted. It also decided on what factors a court should take into account in determining whether or not in a particular case it would be in the interests of justice to admit a particular piece of hearsay evidence. The factors which a court must take into account in order to determine this are those which are set out in sec 3 (1)(c)(i)-(vii) which includes any other factor which, in the opinion of the court, should be taken into account. Accordingly, in a criminal case, for example, it is neither the interests of the State nor those of an accused person nor is it, in a civil case, those of the plaintiff, nor, those of the defendant which are decisive. This is not to say that a court will disregard those interests. Indeed, it will consider them but in doing so it must not lose sight of the fact that it is the interests of justice which are decisive.

[15] At this stage it is necessary to consider the factors mentioned in sec 3(1)(c) in the context of this appeal. However, before I can do so I wish to point out that the industrial court was not a court of law.

[16] For the reason stated above, it is possible that the unfair labour practice proceedings which were conducted before it in terms of sec 46(9) of the old Act could not be described as civil proceedings as contemplated in sec 3(1) of the Evidence Act. The sec 46(9) proceedings in the industrial court could, obviously, not be described as criminal proceedings. However, in some way, they could also be seen as an inquiry. Although in practice legal representation was normally allowed, the proceedings were characterised by a certain degree of informality. Indeed, it had even been said that the statement of case which an

applicant had to file, and, the statement of defence, which a respondent had to file, in those proceedings were not pleadings as we know them in courts of law. However, the presiding officers were required to be appointed on the basis of their knowledge of law. I think the nature of the proceedings in the industrial court would support the admission of the hearsay evidence under consideration.

(b) The nature of the evidence

[17] The hearsay evidence was that of Mr Goebel who testified that Mr Moremi had told him that the second respondent had threatened him. Mr Goebel's hearsay evidence was corroborated by Mr Moremi's evidence on affidavit which was also to the effect that the second respondent had threatened him. This was not evidence on some secondary issue in the proceedings but evidence that was central to the fairness or otherwise of the dismissal of the second respondent because, to a very large extent, the substantive fairness or otherwise of the dismissal of the second respondent depended on it.

[18] My initial view was that the nature of the hearsay evidence was such as to support the exclusion of the non-hearsay evidence. However, on reflection I think this need not be so. I say this because it seems that there can't be, or, ought not to be, any basis for any suggestion that in the

light of the nature of the hearsay evidence it would be more in the interests of justice to admit the hearsay evidence than it would be to exclude it.

[19] If one admits the hearsay evidence, then the prejudice to the second respondent is very serious because the evidence goes to the heart of his defence, and, yet, he may well be innocent. However, also, if the evidence is excluded, then the appellant and Mr Moremi would suffer serious prejudice because (a) the appellant has no way of proving the guilt of the second respondent on what is clearly a very serious offence in circumstances where the second respondent may well be guilty and (b) to exclude the hearsay evidence may well play into the hands of bad elements in the workplace or in society in that it may mean in effect that people can indulge in all kinds of acts of misconduct or criminal conduct with impunity if they ensure that complainants and witnesses to their deeds are either killed or intimidated into not coming to court to testify against them. That is totally unacceptable and is an evil because, if it becomes part of our life, it will destroy the very foundations on which our society is built. That

does not mean that, just because of those considerations, hearsay evidence must be admitted without due regard being had to the rights and interests of those alleged or accused of offences or acts of misconduct. If that were to be allowed to be part of our life, more often than not many persons will be condemned as guilty and punished or dismissed from their jobs for deeds of which they may well be innocent simply because evidence is admitted which they cannot challenge in any effective manner. Accordingly by making the interests of justice to be the decisive factor, the legislature has sought to ensure a balancing act will have to take place before the court can finally say what is in the interests of Justice.

(c) The purpose for which the evidence is tendered.

[20] The purpose of the hearsay evidence was to establish that the second respondent was guilty of threatening Mr Moremi. Whether the evidence is admitted or excluded,

one of the parties would be seriously prejudiced. This was not a case of the appellant trying to shield Mr Moremi from cross-examination for fear that he might not survive the cross-examination. Indeed the bona fides of the appellant in this whole exercise have never been challenged. It also has not been suggested that the appellant did not try its best to secure Mr Moremi's attendance in the industrial court to testify.

(c) The probative value of the evidence

[21] On the whole I think that the hearsay evidence in question in this matter is reasonably good. I say this because:-

- (a) it was presented in simple and straight forward manner;
- (b) the second respondent only offers a bare denial of the allegation that he threatened Mr Moremi;
- (c) the second respondent did not challenge or deny the evidence of Mr Goebel that, when, on the day of the alleged incident, he returned from the staff canteen, he found Mr Moremi **“shaken up”** and nervous, also the second respondent offers no reason why Mr Moremi, who

obviously was not **“shaken up”** and nervous when Mr Goebel left the room service department to look for him, would have suddenly become **“shaken up”** and nervous; the second respondent also did not challenge the veracity of Mr Goebel’s evidence that the explanation which Mr Moremi gave him for his condition was that he (i.e the second respondent) had threatened him.

[22] Although Mr Moremi did not testify in the industrial court, he had testified in the disciplinary inquiry. In his evidence there, Mr Moremi had stated that the second respondent had threatened him. He gave this evidence in the presence of the second respondent and yet the second respondent did not cross-examine him. In fact the second respondent elected not to give evidence in the enquiry to rebut Mr Moremi’s evidence.

[23] When the second respondent was asked under cross-examination in the industrial court why he had not given evidence in the inquiry to challenge Mr Moremi’s evidence, the explanation he gave was highly unsatisfactory. His explanation was that the allegation that he had threatened Mr Moremi was **“very much scary things to me, it was a shock to me and so I became humbled: I did not know actually what to ask him.”** Accordingly, in so far

as the basis for objecting to the hearsay evidence of Mr Moremi may be that the second respondent would not have an opportunity to challenge and to cross-examine Mr Moremi, the answer is that is not very bad because it is not as if the second respondent had never had an opportunity to cross examine Mr Moremi. He had such an opportunity in the inquiry but had chosen not to use it.

[24] The second respondent's representative in the disciplinary inquiry was asked by the chairman of the inquiry what the second respondent had to say about the version that he **"came up, went to Philemon [Moremi] and told him you would kill him. In response to this, the second respondent's representative proffered a version of what had happened. He said that the second respondent had gone up, "showed Tobi the docket and asked Mr Moremi why he said he was gone for so long if it was only 15 minutes and he just ignored him."** When the second respondent was asked under cross-examination about this version, he

denied that that is what he had done but could not explain where his representative could have got that version from if he had not got it from him. In all of those circumstances it appears to me that the hearsay evidence had good probative value.

(d) The reason why the evidence is not given by the _____ person upon whose credibility the probative value of _____ such evidence depends.

[25] In this case the evidence by Mr Goebel that the second respondent had threatened to kill Mr Moremi could not be given by Mr Moremi because Mr Moremi feared for his life if he came to the industrial court and testified against the second respondent. He feared because the second respondent had threatened him that, if he testified against him, he would kill him. This was a second threat. Since Mr Moremi was prepared to state in an affidavit that the second respondent had threatened him, I have difficulty in accepting that Mr Moremi was scared to testify against the second respondent as such.

[26] I think, strictly speaking, what the second respondent may have been scared of was to go to court where he knew the second respondent would be present. Maybe what Mr Moremi feared was that, if he went to the industrial court, the second respondent could either follow him or arrange for someone to follow him and harm him. I say this because if he was prepared, as he was, to put his evidence on affidavit and say what he would have said in the witness

box? why could he not have said the same thing in the witness box. Maybe if he was given an opportunity to testify in a place where the second respondent would not be present and would not know such place, he may well have been prepared to give oral evidence. But that would be an extra-ordinary measure and the parties do not appear to have thought of it. Not that necessarily I think such a measure would have been consistent with the constitution or would have been appropriate. I say this simply on the assumption that it would be constitutional to resort to such a measure.

(e) Any prejudice to a party which the admission of such evidence might entail.

[27] I have already dealt with this factor when I was dealing with the nature of the evidence.

(f) Any other factor which should, in the opinion of the court, be taken into account.

[28] Another factor which I think needs to be taken into account is that the appellant had made serious attempts to secure Mr Moremi's attendance in Court to testify but Mr Moremi was not prepared to risk his life. No one could blame him for that. Furthermore it must also be taken into account that, since the legislature intended hearsay evidence to be admitted in courts of law if to do so would

be in the interests of justice, it is highly unlikely that the legislature would demand a higher test before hearsay evidence can be admitted by an administrative tribunal like the industrial court than the test to be applied by courts of law in the admission of hearsay evidence.

Conclusion

[29] In the light of all the above I have no hesitation in coming to the conclusion that the industrial court ought to have admitted the hearsay evidence. Once the hearsay evidence was admitted, there can be no doubt that there would have been more than sufficient evidence to find that the second respondent had threatened Mr Moremi and that, for that reason, his dismissal was substantively fair. The contrary was not argued by the respondents in this appeal. Accordingly the finding of the industrial court that the dismissal of the second respondent constituted an unfair labour practice cannot stand and falls to be set aside. Accordingly I make the following order:-

- (1) The appeal succeeds with costs;

(2) The determination of the industrial court is set aside and is replaced with one in the following terms:-

“(a) The dismissal of the applicant did not constitute an unfair labour practice and the application is dismissed.

(b) there is to be no order as to costs.”

RMM Zondo
Acting Judge President

I concur

J.H Conradie
Judge of Appeal
Appeal

I concur

M.T.R. Mogoeng
Acting Judge of

Appearances:

For the appellant : Adv. A. Franklin

Instructed by : Deneys Reitz, Sandton
For the respondent: Mr Zibi (A union official)
Date of hearing : 1 December 1999
Date of Judgement : 7 March 2000

