(1) Reportable Yes/No
(2) Of interest to other Judges: Yes/No
(3) Revised

_____ _____
Signature Date

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case No. JA02/25
JA09/25

In the matter between:

Goldplat Recovery (Pty) Ltd **Appellant**

And

AMCU obo Maluleke and 4 others **Respondent**

Heard: **17 March 2026**

Delivered: **29 April 2026**

Coram: Tokota AJA; Djaje AJA and Moshoana AJA

JUDGMENT

TOKOTA AJA

LABOUR APPEAL COURT

Introduction:

[1] This matter concerns two separate appeals which have been consolidated to be heard together by this Court. The *fons et origo* of the two appeals emanates from the disputes of the alleged automatically unfair dismissals of five employees of the appellant. The first appeal relates to a judgment of the Labour Court (per Nkutha-Nkontwana J, as she then was) which granted condonation for the late filing of a statement of claim by the respondent. An application for leave to appeal the judgment and order was refused but leave subsequently granted by this court.

[2] The second appeal concerns an admission of hearsay evidence during the trial where the appellant sought leave to adduce hearsay evidence in terms of s.3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 (Hearsay Act). At the commencement of the proceedings in the Labour Court, Counsel for the appellant indicated in chambers that the appellant would seek leave to lead hearsay evidence in terms of s.3(1)(c) of the Hearsay Act. Indeed, in court Counsel for the appellant made submissions from the bar seeking leave to lead hearsay evidence. The respondent objected to such an application which objection was sustained by the Labour Court (per Daniels J). The trial continued and at the conclusion thereof the Labour Court declared that the dismissals were automatically unfair and ordered the appellant to reinstate the dismissed employees. The appellant applied for leave to appeal against the refusal of admission of hearsay evidence. The application was dismissed but leave to appeal was subsequently granted by this court.

Factual Background:

[3] Although the issues on appeal are limited in nature, for a proper conspectus of the matter, it is necessary to set out the factual background. Needless to say it will be necessary only for purposes of the determination of the appeals.

[4] Before 2016 the appellant operated its business without its employees being represented by a trade union. Its employees were represented by worker's committees elected by the appellant's employees to engage with management

LABOUR APPEAL COURT

on matters concerning workers' interests. For some time, the workers' committees were considered as ineffective by the employees as they were perceived to be instruments of the management.

[5] By 2015 and 2016 a union called Association of Mineworkers and Construction Union (AMCU) started recruiting members from amongst the appellant's employees. During 2016 AMCU had made significant inroads and it requested organisational rights from the appellant. The request was refused and AMCU referred a dispute relating to organisational rights to the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of s. 21 of the Labour Relations Act 66 of 1995 (the LRA)[1]. The dispute was settled on the basis that a collective agreement was concluded to the effect that the threshold for granting such rights would be 30%.

[6] Pursuant to the agreement concluded at the CCMA, and, at the instance of the appellant, an independent institution called TOKISO was appointed to conduct a verification process of the union membership to determine the actual level of membership of AMCU. On 25 August 2016 the verification process found that AMCU had achieved 23,3% of the employees' membership.

[7] After the verification process conducted by Tokiso, AMCU continued to recruit more members. The recruitment did not go without events. The management was apprehensive of the drive for unionisation of its employees. There were certain employees who were satisfied with the work committees. Management was approached by some employees, namely, Messrs Vasco Nkuna, Zamile Manyike and Ms Zanele Nkoane and was advised that employees were being intimidated and threatened to join AMCU. I will refer to the three employees mentioned above as complainants. The names of Messrs Simbala, Maluleke, Hlekiso, Gwantshu and Ms Majola were mentioned as being responsible for the intimidation of employees. I will refer to these as five employees.

1.S.21(1)(2) and (4) provides: 'Any registered trade union may notify an employer in writing that it seeks to exercise one or more of the rights conferred by this Part in a workplace.
(2) The notice referred to in subsection (1) must be accompanied by a certified copy of the trade unions certificate of registration and must specify-
(4) If a collective agreement is not concluded, either the registered trade union or the employer may refer the dispute in writing to the Commission.

LABOUR APPEAL COURT

[8] On 31 August 2016 the five employees were summoned to the boardroom by Mr Nkuna and were informed that there were allegations against them that they were intimidating fellow employees to join AMCU. They were handed letters of dismissals with immediate effect. The letters were from Management. The dismissals were not preceded by any disciplinary hearing.

[9] Subsequent to the dismissals of the five employees, on 7 September 2016, AMCU, on behalf of the five employees, referred disputes of unfair dismissals to the CCMA. At the CCMA Mr Soldatos, a Non-Executive Director of the appellant represented the appellant and was the only witness who gave evidence on behalf of the appellant. He was, however, not part of management and was not involved in the dismissals of the five employees. He gave hearsay evidence about the activities of the five employees regarding the intimidation and threats as reported to him by the complainants. The Commissioner admitted his hearsay evidence stating that CCMA is not a Court of law and arbitration proceedings are to be conducted within the minimum of legal formalities formal than judicial proceedings.

[10] Mr Soldatos mentioned the names of the complainants and advanced reasons as to why they were unwilling to testify. He testified that they feared for their lives because of the threats received and Mr Nkuna's car was burnt. At the tail end of the proceedings it was argued on behalf of the appellant that the CCMA, in light of the evidence led by the respondent, lacked jurisdiction to entertain the disputes and that the matter should have been referred to Labour Court for adjudication. On 14 June 2017 the Commissioner issued an award without reference to the jurisdiction point and found that the dismissals were both substantively and procedurally fair.

[11] On 29 August 2017 AMCU instituted review proceedings in the Labour Court seeking an order to review and set aside the award on the basis that the Commissioner lacked jurisdiction to adjudicate on the dispute by reason of the fact that the dismissals were automatically unfair as envisaged in s.187(1) and

LABOUR APPEAL COURT

187(1) (d) of the LRA[2]. The appellant opposed the review application. The application was argued on 9 January 2020 and judgment was reserved.

[12] Regrettably, the delivery of the judgment was delayed for a little over a year and only delivered on 8 February 2021. The Labour Court, per Molotsi AJ, reviewed and set aside the award on the grounds thereof that the Commissioner lacked jurisdiction to adjudicate on the matter.

[13] On 3 March 2021 AMCU filed a statement of claim in the Labour Court claiming that the dismissals were automatically unfair. The referral to the Labour Court was four years late inclusive of the period spent on CCMA proceedings and the review in the Labour Court.

[14] Subsequent to the filing of the statement of claim AMCU applied for condonation for the late filing thereof. The application was heard on 6 August 2021. The Labour Court, per Nkutha-Nkontwana J, as she then was, granted condonation.

[15] The main matter was set down for trial and heard on 13 to 17 May 2024 before Daniels J. On the first day of the hearing an application from the bar was made by Counsel for the appellant for leave of the Court to allow hearsay evidence in terms of s. 3(1)(c) of the Hearsay Act. The application was opposed by the respondent. The Labour Court ruled that it was not reasonably necessary to admit such evidence and furthermore it was not in the interests of justice to do so.

[16] After the ruling that hearsay evidence would not be allowed the trial proceeded to its logical conclusion. The Labour Court found that the dismissals were automatically unfair in accordance with s.187(1) of the LRA and ordered reinstatement of the five employees.

Discussion:

[2] S.187(1) provides:' 1) 'A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5' Section 5 confers protections relating to the right to freedom of association and on members of workplace forums.

LABOUR APPEAL COURT

Condonation appeal:

[17] I consider it expedient to begin with condonation appeal. If a commissioner has certified that the dispute relating to automatically unfair dismissal remains unresolved, such dispute may be referred to the Labour Court, within 90 days after the certification, for adjudication. The Labour Court may condone non-observance of the time period on good cause shown.[3] I may mention that there was an argument about the peremption of the appeal. In light of the view I take it will not be necessary to deal with the merits of that argument save to say that I have reservations about the merits thereof.

[18] The referral of the dispute to the Labour Court was excessively delayed. It is clear from section 191(11) that the Labour Court has a discretion to condone the late referral of the dispute on good cause shown. In exercising its discretion, the Labour Court must have regard, inter alia, to the leading cases in this regard. More than five decades ago the then Appellate Division in *Melane v Santam Insurance Co Ltd*[4] said:

> 'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation thereof, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation'.

[19] Cases which consider the delay in isolation and decide the case of the application for condonation without regard to the prospects of success[5] must be

[3] See. S. 191(5)(b) and 191(11) of the LRA.
[4] 1962 (4) SA 531 (A) 532C-E.
[5] *NUMSA* and *another v Hillside Aluminium* [2005] 6 BLLR 601 (LC).

LABOUR APPEAL COURT

regarded as having been overruled by the Constitutional Court.[6] The overriding factor now is whether it is in the interests of justice to overlook the delay.

[20] In *Turnbull-Jackson v Hibiscus Coast Municipality*[7], The Constitutional Court had this to say in this regard:

> 'In this Court the test for determining whether condonation should be granted or refused is the interests of justice. Factors that the Court weighs in that enquiry include: the length of the delay; the explanation for, or cause of, the delay; the prospects of success for the party seeking condonation; the importance of the issues that the matter raises; the prejudice to the other party or parties; and the effect of the delay on the administration of justice. It should be noted that although the existence of prospects of success in favour of the party seeking condonation is not decisive, it is a weighty factor in favour of granting condonation.' [Footnotes omitted]

[21] As I understood the appellant's argument in this case it is not contended that the Learned Judge failed to exercise her discretion judiciously or that she exercised it capriciously upon a wrong principle when she granted condonation. The main contention is that after the judgment was granted and four years down the line new evidence emerged which the Labour Court, had it been aware thereof, would not have granted condonation. Consequently, as the judgment stands the correctness thereof is not in issue. The question now is, if the judgment is not assailed on what basis must this Court interfere.

[22] The order of the Labour Court was made on 8 September 2021. It is contended by the appellant that it only became aware of crucial facts, which had been concealed from the Court at the time the condonation was argued, in May 2024. The condonation application was argued in August 2021. Counsel submitted therefore that the facts grounding the appeal were accordingly not

---

[6] See: *Department of Transport and Others v Tasima (Pty) Limited; Tasima (Pty) Limited and Others v Road Traffic Management Corporation and Others* 2018 (9) BCLR 1067 (CC); *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* 2019 (6) BCLR 661 (CC) at paras 39 and 40. (*Buffalo City)*

[7] 2014(6) SA 592 (CC) para.23

LABOUR APPEAL COURT

known to the appellant at the time the matter was argued in August 2021 and could not therefore be relied upon in opposing the condonation application.

[23] The facts which, it is alleged were concealed, are that the respondent referred disputes of automatically unfair dismissals to the CCMA having characterised such disputes as unfair dismissals. One of the witnesses of the respondent, Mr Simbala, testified during the trial that the respondent's representative, one Mr Nkalitshana, advised them not to disclose that the dismissals were automatically unfair dismissals because that would take a lengthy period before the matter could be finalised.

[24] When the condonation application was made the five employees testified that they were not aware at the time of referral to CCMA that the disputes related to automatically unfair dismissals as they were lay persons. Mr Simbala conceded, however, that they were advised by Mr Nkalitshana that if they were to characterise the disputes as automatically unfair dismissals it would have to be referred to the Labour Court for adjudication and that would be time consuming.

[25] In my view the argument is unhelpful. It is clear from the record of the arbitration and the arbitration award that the five employees never concealed the true facts leading to their dismissals. They testified to the effect that they were dismissed because of their involvement in the recruitment of AMCU members hence it was alleged by the complainants that they were responsible for the threats and intimidations made. That is why Mr Soldatos for the appellant argued vehemently at the CCMA that the CCMA had no jurisdiction. It would seem to me that the mere characterisation of the disputes by their representative cannot be attributed to them. They were honest in their testimony and no fraud was committed.

[26] In this regard I can do no better than quote verbatim what Ngcobo J, as he then was, said in *CUSA v Tao Ying Metal Industries and Others*[8] 'A commissioner

[8] **2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) ; [2009] 1 BLLR 1 (CC) ; (2008) 29 ILJ2461(CC)** para 66

LABOUR APPEAL COURT

must, as the LRA requires, "deal with the substantial merits of the dispute". This can only be done by ascertaining the real dispute between the parties.[9] In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed, the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature of the dispute and the desired outcome. The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in.'

[27] Consequently, the advice that was given to the employees was not only technical in nature, the arbitrator still had a duty to identify what the real dispute was between the parties. Furthermore, courts are reluctant to punish litigants for the faults of their legal representatives subject to certain limitations[10]. What is more, notwithstanding the characterisation of the disputes, the arbitrator was alerted to the true nature thereof based on the facts before him which he chose to ignore.

[28] In the circumstances and in light of the fact that the judgment, as it stands, is unassailable in that there is no attack on the exercise of its discretion, I do not see the reason why this Court should interfere therewith. Furthermore, a Court of appeal will not lightly interfere with the discretion of the lower Court where it has been exercised judiciously having taken into account all the relevant facts. The Labour Court considered the merits of the case carefully and all the relevant factors for the exercise of its discretion. It found that the respondent

[9] *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd & Another* [2002] ZACC 30; 2003 (3) SA 513 (CC); 2003 (2) BCLR 182 (CC); (2003) 24 *ILJ* 305 (CC) at para 52.
[10] Turnbull-Jackson note 7 para.26

LABOUR APPEAL COURT

was strong on the merits and the interests of justice dictated that condonation be granted. It even remarked, correctly so in my view, that the delay was not only attributable to the respondent but the appellant was also responsible for that. The appellant was aware, and in fact argued the point of jurisdiction at the CCMA but still went ahead and opposed the review application. Accordingly, the appeal cannot succeed.

Hearsay Appeal:

[29] The second appeal turns on whether the Labour Court was correct in disallowing leading of hearsay evidence in terms s.3(1) (c) of the Hearsay Act. Counsel for the appellant submitted that the Labour Court erred by not hearing the evidence of Mr Soldatos (the only witness for the appellant) in order to allow him to lay the basis for receiving such hearsay evidence. The Labour Court based its decision on the air, prematurely before hearing Mr Soldatos, so the argument ran. Counsel submitted that the failure to hear the evidence of Mr Soldatos first before deciding on the admissibility of the hearsay evidence constituted a fundamental procedural error which was fatal to the ruling. In this regard it was submitted that the Labour Court did not exercise its discretion properly.

[30] In its ruling the Labour Court found that when Mr Soldatos interviewed the complainants he took notes but made no voice recordings of the interviews and took no sworn statements. It had some reservations of the accuracy of the notes in view thereof that there was no interpreter and it is unclear whether the complainants were conversant with English. It expressed the view that it would be undesirable to force the respondent to accept the accuracy thereof. The Court held that the hearsay evidence carried low index of reliability.

[31] In terms of section 3 of the Hearsay Act, hearsay evidence may be admissible under three conditions: firstly, through consent of parties to the lawsuit; secondly, where the witness on whose credibility the truth and the extent of reliability of the evidence depend would come and testify before court and undergo the court's scrutiny, and, thirdly, where the court is of the opinion that

LABOUR APPEAL COURT

the interest of justice demands the admissibility of hearsay evidence. The application of these provisions is not cumulative, implying that each of them is independently applied. This results in the possibility of uneven processes by courts in testing the admissibility of hearsay evidence.

[32] It can hardly be gainsaid that the admission of hearsay evidence causes prejudice to the person against whom it is admitted because he is deprived of the opportunity to cross-examine the deponent. But that is not the only consideration – the Court must still consider reasons for non-availability of the witness to give evidence and whether he is still alive or deceased. The overriding consideration is the interests of justice. Ultimately, the question is whether there are adequate pointers of truthfulness, reliability, and probative value for the statement to be admitted as evidence.[11]

[33] There is a plethora of leading cases on the subject in criminal matters and of course there are some Labour Court matters. The criminal matters include *Savoi and Others v National Director of Public Prosecutions and Another*[12]; *S v Ndhlovu and Others*[13] and *Kapa v S*[14] and many others.

[34] In the context of Labour law the principles relating to admission of hearsay evidence in terms of the Hearsay Act are the same as those applied in civil matters. However, the arbitrators seem to see things differently. They seem to think that the principles at arbitration stage are not stringent. This perception is based on the premise that at the CCMA the Commissioners may conduct the arbitration proceedings in a manner that they consider appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.[15]

[35] In my view s.138 of the LRA does not give the arbitrator a licence to admit hearsay evidence willy-nilly and arbitrarily without regard to the interests of justice. The main purpose is to resolve the dispute quickly, fairly to all the

[11] *Kapa v S* 2023 (4) BCLR 370 (CC); 2023 (1) SACR 583 (CC) para.104
[12] 2014 (5) SA 317 (CC)
[13] 2002 (6) SA 305 (SCA)
[14] 2023 (4) BCLR 370 (CC).
[15] See s.138(1)

LABOUR APPEAL COURT

parties taking into account the interests of justice. Minimum application of formalities does not mean that legal principles must be ignored. This Court in *Exxaro Coal (Pty) Ltd v Chipana and Others*[16] per Coppin JA said: 'Those safeguards and precautions, duly adapted, also apply to the application of section 3 of the LEAA in civil proceedings. Because of the similarities between civil proceedings and arbitration proceedings, the, overwhelmingly, adversarial nature of arbitration proceedings under the LRA, and the overarching requirement that such proceedings be fair, those safeguards and precautions, duly adapted, apply equally to arbitration proceedings to ensure fairness and serve as an invaluable guide for commissioners and arbitrators when confronted with hearsay evidence, and, particularly, when applying section 3 of the LEAA. Adapted they would include the following: (1) Section 3(1)(c) of the LEAA is not a licence for the wholesale admission of hearsay evidence in the proceedings; (2) in applying the section the commissioner must be careful to ensure that fairness is not compromised; (3) a commissioner is to be alert to the introduction of hearsay evidence and ought not to remain passive in that regard; (4) a party must as early as possible in the proceedings make known its intention to rely on hearsay evidence so that the other party is able to reasonably appreciate the evidentiary ambit, or challenge, that he/she or it is facing. To ensure compliance, a commissioner should at the outset require parties to indicate such an intention; (5) the commissioner must explain to the parties the significance of the provisions of section 3 of the LEAA, or of the alternative, fair standard and procedure adopted by the commissioner to consider the admission of the evidence[17]; (6) the commissioner must timeously rule on the admission of the hearsay evidence and the ruling on admissibility should not be made for the first time at the end of the arbitration, or in the closing argument, or in the award. The point at which a ruling on the admissibility of evidence is made is crucial to ensure fairness in a criminal

[16] [2019] 10 BLLR 991 (LAC); (2019) 40 ILJ 2485 (LAC) para.24

[17] Compare: *Le Monde Luggage CC t/a Pakwells Petje v Commissioner Dunn and Others* [2007] 10 BLLR 909 (LAC) paras 17-20; *Foschini Group v Maidi and Others* [2010] 7 BLLR 689 (LAC) para 38. However, the Labour and Labour Appeal Court have sometimes invoked section 3 of the LEEA to determine whether hearsay evidence was correctly admitted or excluded by a commissioner or arbitrator. See eg.: *Swiss South Africa Pty) Ltd v Louw NO and Others* [2006] 4 BLLR 373 (LC) and *Edcon Ltd v Pillemer NO and Others* [2008] 5 BLLR 391 (LAC) para 15.

LABOUR APPEAL COURT

trial[18]. The same ought to be true for an arbitration conducted in an adversarial fashion because fairness to both parties is paramount.'

[36] I respectfully agree with the learned Judge's remarks above. They are in line with what was said in *Cusa*[19]. The principles set out in the Hearsay Act are not mere formalities as envisaged in s.138 of the LRA. These are procedural legal principles. The evidential evaluation as applied in Courts should be applied in CCMA as well.

[37] Coming to the appeal at hand one must first analyse the requirements of s.3(1)(c). It 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—
>
> . . .
>
> (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." In what follows is an analysis of these requirements.

A: The nature of the proceedings:

[18] See: *S v Ndhlovu and Others* (above) para 18 and *S v Molimi* 2008 (3) SA 608 (CC) paras 38-42.
[19] Note 8

LABOUR APPEAL COURT

[38] The nature of the proceedings in this matter, militates against admission of the hearsay evidence for the following reasons:

(a) the witnesses whose hearsay evidence is sought to be led in their absence were available but unwilling to come and testify;

(b) these witnesses are known to the five employees who are alleged to be the perpetrators of the alleged intimidation and threats;

(c) due to the understanding that the proceedings are to be conducted with less formalities the CCMA allowed such evidence to be led in their absence;

(d) the evidence is denied by the respondents and the need to test its veracity under cross-examination is desirable;

(e) There are instances, such as where the witness is deceased, where challenging evidence through cross-examination is impossible this is not the case here.

B: The nature of the evidence:

[39] In this regard as alluded to above, Counsel for the appellant on the first day of the hearing addressed the Labour court from the bar seeking leave to lead hearsay evidence through Mr Soldatos. It was alleged that Mr Soldatos, the non-Executive Director of the company, interviewed the complainants who alleged that they were intimidated. The identity of the intimidators was not revealed. In his address to Court Counsel submitted that *"Mr Soldatos who is the company's own witness in this particular point of time, his involvement in the matter was that at the time the events proceeded he was employed as a non-executive director of the company. And his evidence will be to the extent that* [he interviewed] *certain* [employees] *of the company who had raised concerns regarding intimidation."*

[40] Although this does not appear in the address of Counsel for the appellant, Counsel for the respondent pointed out that Mr Soldatos took manuscript

LABOUR APPEAL COURT

[contemporaneous] notes. From those notes no names appear, no dates no time, it is just recorded that *"these guys threatened to burn down the house, they said if we do not join AMCU you are rat."* It follows then that the nature of the hearsay evidence is neither sworn statements nor audio recordings but simply anonymous notes recorded by Mr Soldatos. An invitation by the Court to lead the evidence in camera was not heeded. From these notes it appears that the evidence was likely to play a decisive role of the appellant's case.

[41] Section 3(4) of the Hearsay Act defines hearsay 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". There was neither reliable oral in the form of audio recordings nor evidence in writing in the form of affidavits to be presented by Mr Soldatos.

C: The purpose for which the evidence was to be tendered

[42] The appellant had only one witness to call, Mr Soldatos. The purpose of the hearsay evidence was to prove that the five employees were intimidating and threatening other employees to join AMCU hence they were dismissed. The purpose was therefore to bolster the case of the appellant.

D: The probative value of the evidence

[43] I can do no better than to refer to the Supreme Court of Appeal in *Ndhlovu*[20] where probative value was defined in the following terms:

> "Probative value' means value for purposes of proof. This means not only, 'what will the hearsay evidence prove if admitted?', but 'will it do so reliably?'
>
> There are many factors relevant to the reliability question, namely: (a) any interest in the outcome of the proceedings by the witness; (b) the degree to which it is corroborated or contradicted by other evidence; (c)

[20] Note 11 para.

LABOUR APPEAL COURT

the contemporaneity and spontaneity of the hearsay statement; and (d) the degree of hearsay.[21]

In *Savoi*, the Constitutional Court explained that courts' aversion to hearsay evidence stems from its *general* unreliability as it is not subject to the reliability checks applicable to other evidence – such as cross-examination – and as its nature makes it difficult for a party to effectively counter inferences drawn from it.[22] Factors mentioned in *Ndlovu's* case were present in this matter. Evidence of Mr Soldatos was contradicted, he had an interest in the outcome of the matter, he was a witness, Non-Executive Director and an attorney of the appellant at the same. There were no sworn statements taken from the complainants.

E: The reason why the evidence was not given by the person upon whose credibility the probative value of such evidence depends;

[44] The reason why the evidence could not be given by the persons upon whose credibility the probative value of such evidence depended was the alleged fear for reprisals. The complainants were available and known by everybody but they were unwilling to give evidence in any forum alleging fear that their properties could be burnt.

F: Prejudice to the respondent.

[45] In light of the denial of the alleged threats and intimidation and absence of corroborative evidence, the respondent stood to be prejudiced by admission of such evidence. The Court in *Ndhlovu* emphasised that—

[21] Schwikkard and van der Merwe *Principles of Evidence* 4 ed (Juta & Co Ltd, Cape Town 2016) at 298.
[22] *Savoi v National Director of Public Prosecutions* [2014] ZACC 5; 2014 (5) SA 317 (CC); 2014 (5) BCLR 606 (CC) at para 38, .

LABOUR APPEAL COURT

> 'prejudice is always present when hearsay is admitted. It must be weighed against the reliability of the hearsay in deciding whether, despite the inevitable prejudice, the interests of justice require its admission.'[23]

The prejudice which would be occasioned to the respondent by the admission of the hearsay evidence is significant – it played a decisive role in the appellant's case.

G: Any other factor.

[46] The fact that the contemporaneous notes were written in English and no sworn statements confirmed by the complainants raises eyebrows in light of the fact that Mr Soldatos had an interest in the outcome of the case.

H: The interests of justice:

[47] A court must be of the opinion that it is in the interests of justice for the hearsay evidence to be admitted. The provisions of section 3(1)(c) each require consideration in order to limit prejudice to the party against whom such evidence is admitted, and all the factors must be considered cumulatively.

The submission that the Labour Court erred by not hearing the evidence of Mr Soldatos (the only witness for the appellant) in order to allow him to lay the basis for receiving such hearsay evidence cannot be sustained. The appellant cannot approbate and reprobate. It was content with making submissions from the bar instead of calling the evidence of Mr Soldatos in this regard. The suggestion by the Labour Court to lead evidence in camera was not even considered. It does not lie in its mouth to now argue that the Labour Court erred in not hearing the evidence of Mr Soldatos before making its ruling. The appellant made its bed with its eyes open, it is not unfair that it must lie on it.

<u>Conclusion:</u>

[48] Regard being had to the above there is no merit in the appeal and it must fail.

---

[23] Id para.49

LABOUR APPEAL COURT

Costs:

[49] The general rule is that in labour matters costs do not follow the results but law and fairness play an important consideration. There is no reason to deviate from the general rule.

Order:

[50] In the result, the following order will issue.

1. The appeal is dismissed in both matters.

2. There is no order as to costs.

_____

B R Tokota

Acting Judge of the Labour Appeal Court

Djaje AJA and Moshoana AJA concur

Appearances:

For the Appellant:	Adv A Snider SC; Adv D Whittington
Instructed by:	SCI Attorneys
For the respondent:	Adv A Cook
Instructed by:	LDA Attorneys

LABOUR APPEAL COURT

LABOUR APPEAL COURT