IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR56/14

In the matter between:

MINISTER OF POLICE	**Applicant**
and	
RM M	**First Respondent**
SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL	**Second Respondent**
M SMITH N.O.	**Third Respondent**

Heard: 24 May 2016

Delivered: 19 August 2016

Summary: Review of arbitration proceedings – s 145 of the LRA – transcript of internal hearing admitted as hearsay evidence - admissibility and weight of hearsay evidence in arbitration proceedings-– vulnerable victim witnesses

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JUDGMENT

WHITCHER J

[1] The First Respondent ("RM")[1] was employed in the VIP protection unit of the South African Police Services ("SAPS") at the rank of warrant officer. In 2009 he was arrested on charges of raping his own daughter over a period of four years, starting when she was 14 years old.

[2] Parallel to the criminal case, SAPS also convened a disciplinary hearing. SAPS alleged that when RM 'violated his minor child without her consent', he prejudiced the administration, discipline and efficiency of SAPS and further contravened the SAPS code of conduct.

[3] The alleged victim, K, testified against her father at the internal disciplinary hearing. Two other occupants of the house in which some of the sexual assaults allegedly occurred also testified: RM's new wife, D, and his son, K's biological brother.[2] In the disciplinary hearing, RM was represented by a union representative. The representative cross-examined his member's accusers at length. RM also testified in his own defense and was cross-examined. Closing arguments by both parties were addressed to the presiding officer.

[4] In May 2010, after hearing all the evidence, the presiding officer of the disciplinary hearing found RM guilty on the charges. Mitigating and aggravating factors were then presented and the presiding officer decided that RM should be dismissed. The entire disciplinary hearing was electronically recorded.

[5] RM exercised his right to an internal appeal in terms of the SAPS disciplinary regulations but this was unsuccessful. He then referred an unfair dismissal dispute to the SSSBC and the matter was set down for arbitration. At this point K ceased cooperating with SAPS. Despite the employer requesting subpoenas for K and the other two witnesses to attend the arbitration, these subpoenas could not be served owing to insufficient information concerning their whereabouts. The employer representative however did manage to speak to K

[1] The First Respondent is properly identified in the court papers and all other relevant documents.
[2] The full names were disclosed and recorded in the internal hearing.

over the telephone but she refused to divulge her new address or to agree to testify at the hearing.

[6] Consequently, the employer found itself in a situation where the only material it had to place before the SSSBC to prove the substantive fairness of RM's dismissal were the transcripts of the internal disciplinary hearing. It applied to have these transcripts admitted as hearsay in terms of the Law of Evidence Amendment Act of 1988, in the interests of justice.

[7] The third respondent ("the commissioner") granted the application. However, the commissioner went on to find that the *weight* of the evidence derived from the transcripts was minimal without "additional testimony or documents substantiating the allegations." Consequently, as the arbitration was a hearing *de novo*, the commissioner found that RM's dismissal was substantively unfair and reinstated him. The Applicant seeks to review and set aside this award.

The evidence in the internal hearing

[8] In the internal hearing K testified that up until the age of 14 she had very little contact with her father, RM. Her mother had died when she was 12 and she and her elder brother, S, had gone to stay with her maternal grandparents. In 2004, her father required both K and S to come stay with him and his new wife, D.

[9] K stated that her father was an authoritarian figure and would frequently beat her and her brother, S, with his police-issue belt. She was very afraid of him.

[10] One night in 2004, when she was 14 years old, RM entered her room, started to touch her and took off her panties. He then proceeded to have sex with her. This was against her will. She testified that she did not shout as she was very afraid of her father. She did sob though as it was painful. When her father finished, she went to the toilet where she cried. This was her first sexual encounter with any person.

[11] Her father continued to sexually abuse her approximately twice a month for the next four years. The abuse either took place in the house where they stayed or in a white car that he would sometimes arrive at her school with to pick her

up. As her father worked shifts, it was thus frequently the case that they would be at home alone together.

[12] Later in 2004, K became pregnant by RM. She informed her father who insisted she have an abortion. This abortion was administered at Garankuwa Hospital, with D accompanying her.

[13] K also wrote in her diary that her father had impregnated her. Her brother, S, later came across this diary and read it. He asked K whether what she had written was true and she confirmed it. S suggested that K tell their father that he, S, had seen the diary entry. K did so. RM instructed K to bring the diary to him and he destroyed it.

[14] S, who also testified at the internal hearing, was embarrassed and avoided contact with his father after that. He was also scared of RM, confirming K's evidence that their father often severely assaulted them.

[15] One day K came across a letter addressed to her father marked confidential. She opened it to discover that it was his HIV test results. According to the results he was HIV positive. She then decided to get tested herself and found that she too was HIV positive, an infection she could only but trace back to her father as she had not had sex with any other person at that time.

[16] K testified that her father used to sometimes write notes to her. In one message he complained that it was as if K expected material things from him in exchange for sexual favours. This was the wrong attitude because, he stated, what was happening between the two of them was a natural part of the father daughter relationship. S confirmed having seen this note too and recognised his father's handwriting.

[17] In 2008, K, now 18 years old, started dating a boy at school. She told him what had been happening to her. He advised her to report the matter to social workers, which she did. This set in motion a course of events which resulted in her and S leaving their father's house and RM being arrested.

[18] Under cross-examination, K explained the lay-out of the house and how it was thus possible for a sleeping D not to have been woken by her first rape. She

denied being persuaded by her mother's family to manufacture these allegations against her father. She explained that she felt she had no-one to report her situation to. Her father was a respected person in the community and she was scared of him. He regularly beat his children and she was also aware that he had a gun with him. She kept hoping that his conduct would just stop.

[19] K also stated that she was presently undergoing psychological counselling and that this allowed her not to hate her father. She missed her family life. She admitted sending three text messages to her father after his arrest. In one she told him she was getting sick all the time. The second and third messages expressed a general sadness at having seen him passing by and on her birthday.

[20] D confirmed that K had had an abortion at the insistence of RM. She stated that, in retrospect, it now seemed significant that RM had shown no interest at all in finding out who had impregnated his daughter. D confirmed that the lay-out of the house could have allowed K to be raped while she slept in another room. She also stated that she believed K's allegation because many little things that struck her as odd at the time about the father-daughter relationship now made sense, for example RM giving K money to buy G-strings and K's transformation into a precocious and brattish girl.

[21] S also remembered an incident where he came back home to find K leaving their father's room half-dressed. Under cross-examination he stated that he was afraid of RM and decided not report what he knew or suspected because he thought he should follow K's lead. If she reported the abuse, he would support her.

[22] In his evidence, RM confirmed aspects of K's allegations such as that he used a white car to pick up K from school on some days; that he offered only K a lift and not S; that she had an abortion in 2004; and that both he and her were HIV positive.

[23] RM however denied raping K, stating that she was put up to say this by his former in-laws. This was because his first wife's family blamed him for not making them aware of his first wife's illness back in 2002. He also suggested

that K was promiscuous at school and that she had told him she had become pregnant after sleeping with a boy. RM did not think to ask for the name of this boy.

The conduct of the internal hearing

[24] The transcripts of the internal hearing reveal a presiding officer, Senior Superintendent Matabane, who ran the hearing in a tight, fair and professional manner. He gave RM's representative, in particular, more than sufficient time to prepare for the case[3] and to cross-examine the employer's witnesses. The representative asked relevant and probing questions of these witnesses. The chairperson also asked relevant and probing questions of these witnesses. The result is that this is not the sort of transcript where one notices glaring and possibly exculpatory omissions in the questions asked of witnesses. By the time each witness was excused, their version was clear, thoroughly ventilated and tested.

[25] When the time came for RM to testify, the presiding officer permitted a long monologue from the accused employee as he tried to flesh out the conspiracy against him. Quite correctly, RM had no quibbles at the SSSBC about the procedural fairness of his dismissal.

[26] None of the witnesses were sworn in but not much turns on this in labour law. They were quite clearly aware that they were expected to truthfully narrate their experiences. The transcripts thus represent a record of various witnesses giving evidence that they know should be true and correct.

[27] The record of the internal hearing was transcribed by a professional transcription service and accompanied by a transcriber certificate, signed by a Ms. Lindeque on 3 November 2016.

The SSSBC award

[3] The hearing was postponed for this purpose.

[28] As noted above, the key decision the commissioner made in handling the evidence before him was to *admit* the transcripts as hearsay but then to find that they carried insufficient *weight* for the employer to have discharged the onus of proof it bore. Specifically, the commissioner found:

> *"[SAPS'] inability to provide this forum with any additional evidence to substantiate the charge proffered against [RM] cannot be condoned. In not submitting additional testimony, [RM] was deprived of the opportunity to cross-examine these witnesses."*

[29] The commissioner went on to note that there was no evidence extraneous to the transcripts that showed the hearsay evidence to be "clear and consistent." The Commissioner repeated this line or reasoning:

> *".. [I]t is my view that although hearsay evidence was allowed herein, that the weight it carried in these proceedings were very little. [RM] in my view will be severely prejudiced if only the hearsay evidence is used herein with no additional or corroborating evidence. With no substantial evidence before me, it is my view that [SAPS] failed to prove its case on a balance of probabilities."*

[30] In giving reasons for the transcripts insufficiency, the commissioner further noted that the evidence tendered in the internal hearing was not taken under oath.

Review Test

[31] A most useful exposition of the review test is found in *Mofokeng*,[4]

> "[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry,

[4] *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC).

> the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination."

[32] In short, where a commissioner ignores materially relevant facts, issues and/or considerations (with this being *prima facie* unreasonable), the award will be reviewable if the distorting effect of this misdirection was to render the result of the award unreasonable. And the reviewing court must have regard to the nature of the competing interests impacted upon by the decision.

Grounds of Review

[33] The Applicant submits that the commissioner committed a reviewable irregularity in failing to apply her mind to the evidence. This happened when, in weighing the evidence, she found that there was no corroborating evidence for the hearsay transcripts in the form of additional witnesses or documents against RM. The commissioner concluded that without such corroborative evidence the weight of the transcripts was minimal. She also found that in not submitting additional testimony RM was deprived of the opportunity to cross-exam these witnesses to his prejudice. As a result, the Applicant submitted, the commissioner came to the unreasonable conclusion that SAPS failed to prove its case on a balance of probabilities.

Analysis

[34] SAPS arrived at the hearing *de novo* only with transcripts of the internal hearing with an explanation that SAPS' main original witness, K, could not be traced to serve a subpoena. In deciding the ensuing application to have the transcripts admitted as hearsay, the commissioner kept in mind prior admonishments by this court that section 138 of the LRA frees arbitrators from having to slavishly imitate the procedures adopted in a court of law[5]. Since the transcripts were plainly relevant to the issue in dispute and the employer had a good reason for the absence of its main original witness, the commissioner correctly admitted the transcripts as hearsay evidence.

[35] However, the remaining question was what *weight* this hearsay should be afforded. The commissioner ruled that the transcript's weight was "minimal" because there was no other evidence before the SSSBC to substantiate the claims made in the transcripts. I have some sympathy for the approach adopted by the commissioner. She trod a well-established labour law path in readily admitting the hearsay but not being prepared to ascribe significant weight to it unless the transcripts were corroborated by other pieces of hard evidence making up the rest of the factual jigsaw.

[36] Just as an error or irregularity in which a commissioner gives hearsay evidence too much weight may be unreasonable, the opposite is also true. Not giving hearsay evidence sufficient weight may also constitute a material error or irregularity. If this error has a distorting effect on the end result, the award is then reviewable.

[37] In my view, the commissioner did not seem to realise that the transcripts before her were no ordinary hearsay. The transcripts were hearsay of a special type. Considered in full, they comprised a bi-lateral and comprehensive record of earlier proceedings in which K's evidence against RM *was* indeed corroborated by S and D; in which this substantiation survived competent testing by way of cross-examination; and in which RM's own defense was ventilated and exposed as being implausible.

[5] *Naraindath v CCMA and Others (*2000) 21 ILJ 1151 (LC); [2000] 6 BLLR 716 (LC).

[38] In referring to the transcripts, I am not referring to the ruling on guilt or sanction made by the internal chairperson, which is irrelevant and detachable. I refer solely to the evidence of witnesses in the internal hearing which, once admitted, should have been considered holistically to ascertain what weight it had. In my view, reading the transcripts would convey to a reasonable commissioner that K's testimony was credible and persuasive. This impression is conveyed not simply by K's rendition of events in evidence-in-chief but by the way her version withstood competent cross-examination by the employee's representative and questions by the presiding officer. Seen properly, the transcripts constituted a different order of hearsay in comparison, for example, to a witness statement handed up to an arbitrator during the course of a hearing. The transcripts set out not only the allegations against RM but, crucially revealed that these allegations were, at a previous telling, reliable and internally consistent. The transcripts, moreover, also constitute a record that other people, namely S and D, had corroborated key aspects of K's evidence.

[39] On the other hand, the transcripts showed that RM had given a particularly poor account of himself in his internal hearing. His denials were weak and the conspiracy theory he advanced was vague and unpersuasive. The employer may not have led any other pieces of evidence substantiating K's allegations at the SSSBC but the transcript does show that the last time RM put forward a defense to the charges, it was implausible and contradictory.

[40] It seems to me that transcripts such as the ones in this case must be afforded greater intrinsic weight than simple hearsay (such as witness statements) because they constitute a comprehensive and reliable record of a prior quasi-judicial encounter between the parties. Put differently, it seems perfectly fair that a party such as RM, who the transcript shows faced devastating evidence at an internal hearing which he tried and failed to discredit through cross-examination, should be in a poorer evidential position at a hearing *de novo* than if he were confronted by these accusations for the first time by way of an *untested* hearsay witness statement.

[41] The main argument against affording weight to hearsay is that it cannot be subjected to cross-examination and is thus prejudicial to the party against

whom the hearsay would be tendered. Counsel for RM puts it thus: “Hearsay is inherently weak because the reliability of the evidence depends on the credibility of the *source* that is not present to be cross-examined regarding same”. However, this begs the question: what if the content of the hearsay is a record of the *source* actually being cross-examined on in earlier quasi-judicial proceedings?

[42] Naturally, a witness statement simply handed up in an arbitration leaves an accused employee at a distinct advantage. Absent other hard evidence to back it up, it should assume very little weight. However, this is not the essence of the prejudice caused to RM when the transcript of his *properly conducted* internal disciplinary hearing is admitted in a subsequent arbitration. His prejudice is reduced to that he is deprived of a *second* and perhaps different kind of cross-examination of K than was earlier performed.

[43] I do not mean to suggest that transcripts take the place of live witnesses or that arbitrations should not function as hearings *de novo*. The issue is that *in appropriate factual circumstances*, a single piece of hearsay, such as a transcript of a properly run internal hearing, may carry sufficient weight to trigger the duty in the accused employee to rebut the allegations contained in the hearsay. In this regard, it is worth noting that RM also did not give oral evidence denying the charges and undergoing any cross-examination. The substance of his own denial is also only recorded in the transcripts. It may be argued that since the transcripts were assigned minimal weight, he had no case to answer. This is precisely where the commissioner’s error in evaluating the evidence lay. A reasonable decision-maker, to my mind, would have appreciated that the transcript did not contain mere allegations but rather tested allegations and a tested denial.

[44] Given that the transcript evidence before the commissioner would have disclosed that K’s version at the internal hearing was far more probable and credible than RM’s, the transcripts constituted *prima facie* evidence of his wrong-doing. This then shifted the evidentiary burden onto RM to rebut this impression lest it be taken as proven. The commissioner’s reviewable failure was to fail to appreciate that the transcripts alone established a case of

sufficient strength against RM such that his failure to give evidence in rebuttal should have exposed him to a finding of guilt.

[45] Since this may be a departure from the norm in how hearsay is weighed, I take this opportunity to set out a few guidelines on when, in arbitration proceedings conducted in terms of the LRA, a single piece of hearsay, such as a transcript, might constitute *prima facie* proof of an allegation. The hearsay should:

(1) be contained in a record which is reliably accurate and complete;
(2) be tendered on the same factual dispute;
(3) be bi-lateral in nature. In other words, the hearsay should constitute a record of all evidence directly tendered by all contending parties;
(4) in respect of the allegations, demonstrate internal consistency and some corroboration at the time the hearsay record was created. For example, the transcripts read as a whole provide corroboration via D and RM, for K's evidence that she became pregnant at age 14 while living under her father's roof. RM's letter to K about expecting favours in exchange for sex was further corroborated by S;
(5) show that the various allegations were adequately tested in cross-examination. For example, the transcripts record not only K's allegations but also RM's attempts to discredit them;
(6) have been generated in procedurally proper and fair circumstances. For example, the internal hearing that generated the hearsay records was run in a scrupulously fair manner by Snr Supt Matabane, with RM free to conduct his defence as he wished.

[46] In light of what I have stated above, I therefore find that the commissioner erred in unreasonably assigning minimal value to the transcripts. This mishandling of the evidence would have distorted the outcome of the matter, particularly considering that RM himself did not testify. For this reason alone the award must be set aside.

[47] For completeness sake, RM's complaint that witnesses in the internal hearing were not sworn in is also without merit and was wrongly accepted by the commissioner as being meaningful. To the extent that this may have played a

role in the commissioner's decision to afford the transcripts only minimal weight, this is also a decision no reasonable decision maker would have made.

[48] I wish to make a final comment about K's unavailability as a witness. In closing argument at the arbitration, the employee representative stated that one could only assume that K's unwillingness to testify was due to the fact that she fabricated the allegations. This particular submission did not find itself into the reasoning in the arbitration award. To the extent that it may have influenced the commissioner's decision, I note that a perusal of the record shows that K did not simply refuse to testify. She gave two cogent reasons. She told the employer representative that she, "is nie meer bereid om deur hierdie trauma te gaan nie"[6] and that she is currently undergoing therapy which would be upset if she opens old wounds again.

[49] It strikes me that the situation SAPS found itself in may not be unique. Our labour relations system is designed to give dismissed employees a fresh opportunity to fight their case at the CCMA or Bargaining Council. However, this system from time to time envisages that vulnerable classes of victims, such as children, must testify at least twice before an offending employee can finally be removed from service with an employer. The labour law consequence of victims like K feeling that they could not, *de novo*, reopen old wounds is that employees who committed very serious misconduct escape accountability and are reinstated to the very positions of trust they earlier abused.

[50] I would imagine that, in light of this judgment and to avoid trundling reluctant and vulnerable victims out to give evidence all over again, parties would have recourse to section 188A of the LRA. Another way of minimizing the secondary traumatization of vulnerable witnesses is for all parties to an internal hearing ensure that a good record is created of a procedurally fair enquiry is created. Should the main original witness not be in a position to testify again at arbitration, the accused employee would, *in appropriate factual circumstances*, still be under a duty to take the stand to rebut the prima facie case against him constituted by the transcript of the internal hearing. In the present matter, especially if he stuck to his conspiracy defence, it is not difficult to imaging the

[6] "not prepared to go through this trauma any longer"

employee's oral evidence at the SSSBC still not lifting the evidentiary burden lying against him.

Relief

[51] I have found the hearing should have unfolded differently to what it did. That is, RM ought to have been invited to take the stand in rebuttal of the *prima facie* case against him; a case created by the transcripts considered as a whole. Consequently, I cannot dispose of the matter based on the evidence before me.

Order

[52] In the premises, I make the following order:

1. The arbitration award issued by the third respondent under case number PSSS 759.11/12 on 18 October 2013 is reviewed and set aside.
2. The SSSBC set the matter down to be heard *de novo* before a new commissioner.
3. There is no order as to costs.

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Benita Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Adv S Tilly
Instructed by:	*State Attorney, Pretoria*
For the First Respondent:	Adv I D Masako
Instructed by:	*J Gouws Attorneys*