THE APPLICATION OF THE HEARSAY RULE IN LABOUR LAW PROCEEDINGS

by

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SUMMARY

To know your law and not to understand it is like a legal barbarian lost in the battlefield of legal theory. A proper and thorough understanding of the law of evidence and hearsay evidence in particular, is of paramount importance not only for lawyers but also for persons who regard themselves as labour law experts. It takes a great deal of experience before a lawyer truly becomes confident with the law of evidence and its application. The only way one becomes good at it is firstly to know the law. (Where does it come from and why is it there?) Then one must get to understand it by looking at examples and apply it in practice. Only then will a person gain practical experience.

The aim of this treatise is not to try and educate experienced lawyers. This article is aimed at those that need some motivation to pursue their journey in the labour law process. Remember we all assume that lawyers know and understand their subject until they proof the contrary. In this work I shall try to highlight the importance of the law of evidence in labour law proceedings. Firstly the meaning of the law of evidence and hearsay evidence is considered. Further emphasisis will be on the approach and application of the law of evidence, and in particular the hearsay rule, in labour law proceedings.
KEYWORDS

“Law of Evidence”
“Common Law”
“Current position”
“New meaning”
“Application and approach”
“Documentary evidence”
“Review”
1. THE LAW OF EVIDENCE

The law of evidence is part of adjective law as opposed to the substantive law. In *Tregea v Godart* Stratford C J stated that “substantive law lays down what has to be proved in any given issue and by whom, and the rules of evidence relate to the manner of its proof”.¹ In any given issue we have *facta probanda* (facts in dispute) and *facta probantia* (proving facts). The last mentioned facts are demonstrated by the adjective law and in particular the law of evidence. The law of evidence according to Stratford C J provides “the manner of its proof”.² Hoffman and Zeffert criticised Stratford’s statement.³ According to them not all the rules relating to the manner of proving the facts in issue can be described as rules of evidence. Schmidt⁴ classifies the law of evidence as the whole of legal rules that are applicable to prove facts in a court of law. The importance of a distinction between substantive law and adjective law is not only for theoretical purpose, but also for practical purpose. Our common law stems from the Roman Dutch Law and English Law.⁵ The Roman Dutch Law is the source of our substantive law. The English Law is the source of our adjective law. Therefore we have to look at the English common law for the rules of evidence.⁶

2. COMMON LAW

Statutory law now replaces the common law in relation to hearsay evidence, - see

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¹ 1939 AD 16 31.
² *Tregea v Godart* supra 31.
⁵ The common law is our unwritten customary law, the law common to us which we inherited; as well as case law in this regard.
the Law of Evidence Amendment Act. The common law is however still part of our law of which cognizance must be taken. The reason is that the common law rule can assist the arbitrator when using his discretion to allow hearsay or not. We can therefore not ignore or forget our common law. It gives us guidance as to what approach to follow. In *Mnyama v Gxalaba* there was a dispute as to who would decide where to bury the deceased. The question arose as to whether the deceased statements as to where he wants to be buried, could be admitted as hearsay. Conradie J had the following to say about the common: “The Law of Evidence Amendment Act has made all of this obsolete but not irrelevant”. Conradie J was of the view that the mere fact that the evidence was admissible under the common law rule is a strong factor in favour of its admissibility in terms of the new Act. The evidence was eventually admitted in this case, but its probative value made it not worthwhile to take into account.

The classical common law definition of hearsay was provided in *Estate De Wet v De Wet* “… evidence of statements made by persons not called as witnesses which are tendered for the purpose of proving the truth of what is contained in the statement”. The focus here is on statements of non-witnesses for the sole purpose of proving the truth. It will hereby be noted that a statement of a non-witness will only be hearsay if it is tendered to be the truth. If the dispute is about whether or not certain rumours were spread in the workplace then evidence of the rumours to be true will be considered as hearsay, because the evidence is tendered to prove that the rumours are true.

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7 45 of 1988.
8 1990 (1) SA 650 (C).
9 *Mnyama v Gxalaba* supra 652J.
If the dispute is about whether or not such rumours exist then evidence tendered to prove that the rumours were spread, will not be classified as hearsay. The purpose for which the evidence was tendered is not to prove that the rumours are true, but merely that they exist.\textsuperscript{11}

Hearsay evidence is generally inadmissible not because of relevance, but because of its unreliability. There are exceptions however. The exceptions to the hearsay rule originated through case law in England. The courts refrained from creating new exceptions.\textsuperscript{12} The existing common law exceptions are a \textit{numerus clausus}. In \textit{Vulcan Rubber Works (Pty) Ltd v SAR & H}\textsuperscript{3} the Appellate Division of the Supreme Court confirmed that our courts have no discretion to expand the \textit{numerus clausus} of exceptions. The common law exceptions on the hearsay rule have their origin due to the fact that it was sometimes difficult to obtain direct evidence about a certain fact and because there is some “guarantee of truth” present in the hearsay.

A few important exceptions are the following: \textit{Res gestae} is one exception and it means “what happened” or “what was done”. This means that the term is used to indicate that the words a non-witness uttered should be allowed because the words is part of a transaction or occurrence. Typical examples of this term are the instant response of an employee at a workplace accident or the complaint by a woman immediately after a rape. The term however can incorporate several different

\textsuperscript{10} 1924 CPD 341.
\textsuperscript{11} For an example of a civil case where the dispute involved rumours that certain cigarettes causes cancer - see \textit{International Tobacco Co (SA) Ltd v United Tobacco Cos (South) Ltd} 1953 (3) SA 343 (A).
\textsuperscript{12} \textit{iudicis est ius dicere non dare} (it is the province of a judge to expound or interpret the law not to make it).
grounds of admissibility and a loose usage of the term is open to criticism.

It is not relevant to elaborate on this point any further for the purpose of this treatise. It also is more of academic nature. “Instant response” can also be an exception apart from res gestae.\(^1\)

Secondly, statements made by a person who dies after the statement was made is an exception to the hearsay rule. For example, statements made against once own interest (pecuniary or property) contains some guarantee of truth. A further example is statements made by someone during the dying-hour. We expect some guarantee of truth from a person in a hour of death.\(^2\) There are also other examples in this regard which deals with public rights, contents of wills and descent which is not necessary to elaborate on.

4. **THE CURRENT POSITION**

Hearsay evidence is dealt with in section 3 of the Law of Evidence Amendment Act.\(^3\)

This section 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

\(^3\) _Flange Engineering Co (Pty) Ltd v Elands Steel Mills (Pty) Ltd_ 1963(2) SA 303 (W).
\(^4\) 45 of 1988.
(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 interest of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence that is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) 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 admitted by the court in terms of paragraph (c) of that subsection.

(4) For the purpose 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”.

5. THE NEW MEANING OF HEARSAY

It is significant to note that the purpose of submitting hearsay is now irrelevant. In common law, hearsay could only be allowed for the sole purpose of proving the truth. Now there is room to allow additional evidence.

Of further significance is the fact that our courts now have discretion to allow hearsay
evidence under section 3(1)(c) of the Law of Evidence Amendment Act. In addition, parties can consent to the admission of hearsay evidence.

Finally, hearsay evidence may provisionally be allowed, on condition that the person upon whose credibility the probative value of such evidence depends, later came to testify at the proceedings. Presiding officers sometimes provisionally allow hearsay evidence if they are uncertain about its admissibility. Then only at the end of the case do they decide over the admissibility of the hearsay. That, to me, is not advisable because section 3(3) of the Law of Evidence Amendment Act sets the conditions under which hearsay could be provisionally allowed. Further the evidence before the presiding officer might be tainted by inadmissible hearsay, which should not have, be there in the first place.

6. THE APPLICATION OF AND APPROACH TO THE HEARSAY RULE IN LABOUR LAW PROCEEDINGS

In section 3(1) Law of Evidence Amendments Act reference is made to “criminal and civil proceedings”. The question is whether arbitration proceedings can be considered as civil proceedings. As far as the Labour Court is concerned there is no doubt that it is a court of law and equity equal to the status of the High Court as such in relation to matters under its jurisdiction - see Labour Relations Act. The Labour Court has inter alia review powers concerning arbitration awards. The Labour Appeal Court is also a court of law and equity. It is a final Court of appeal in respect

\[\text{66 of 1995 s151 reads: "(1) The Labour Court is hereby established as a court of law and equity. (2) The Labour Court is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of provincial}\]
of Labour Court judgments and orders within its exclusive jurisdiction. It is also clothed with the status equal to that of the Supreme Court of Appeal in relation to matters under its jurisdiction.  

Criminal and civil proceedings deal with law of procedure (adjective law). “Criminal proceedings” are described in section 1 of the Criminal Procedure Act. When section 196 of the said Act as well as section 5 of the Magistrates’ Court Act is read it becomes evident that “criminal proceedings” are court proceedings. The same applies to “civil proceedings”. Although the Magistrates’ Court Act does not give a definition of “civil proceedings”, section 5(3) of the Act does refer to “civil proceedings in any court”.

Arbitration proceedings are not proceedings in a court of law. Section 138(1) of the Labour Relations Act is indicative thereof.

Section 138(1) reads: “The commissioner may conduct the arbitration in a manner that the commissioner considers 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.” They are not “civil proceedings” in the strict sense of the word. Section 3(1)(c) of Act the Magistrates’ Court Act specifically uses the words “the court”.

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21 See s 167 and 173 of the LRA.
22 51 of 1977
23 51 of 1977; 32 of 1944.
24 32 of 1944.
25 See Naraindath v CCMA & Others 2000 6 BLLR 716 (LC) 724H.
27 32 of 1944.
It is submitted that, despite arbitration proceedings being less formalistic to court proceedings, arbitrators still should not open the floodgates for the admission of hearsay. The arbitration awards will form part of our case law. Lawyers and Labour Court judges will consider the decisions. It will make a mockery of our legal system if the case law is flooded with controversial decisions. Justice must be done. Accordingly arbitrators should treat hearsay with circumspection and should take cognizance of the court decisions on Labour Law. In *Pick ‘n Pay Stores (Ltd) (Krugersdorp) and Commercial Catering and Allied Workers Union of South Africa*\(^{28}\) the arbitrator appropriately decided that “(he) should certainly not rely on hearsay evidence in circumstances where a court of law would not rely upon it”.

Further hearsay evidence was allowed in *SA Commercial Catering and Allied Workers Union v OK Bazaars Ltd*\(^{29}\) Arbitrator Cameron decided that if evidence is not normally allowed in a court of law, there can be no doubt as to its admissibility. Cameron further allowed hearsay evidence based on other considerations, namely:

1. that arbitration proceedings are less formal than judicial proceedings: therefore technical and formalistic objections should accordingly not be encouraged or emphasized;

2. Hearsay evidence could be a means by which a proper exploration of potential sources of industrial conflict could be achieved; and

\(^{29}\) (1992) 13 *ILJ* 436 (ARB).
(3) Consideration of fear could require hearsay evidence to be admissible, for example in a case of intimidation.

It is submitted that the standard of fairness considered should not be lowered in arbitration proceedings as opposed to court proceedings. This could lead to double standards. In *S v Ramavhale*\(^{30}\) the Appellate Division of the Supreme Court\(^{31}\) considered the admissibility and probative value of hearsay evidence in terms of section 3(1)(c) of the Law of Evidence Amendment Act.\(^{32}\) The court held that for many years our law knew a rigid exclusionary rule where specific expectations were allowed with no relaxation. Hearsay evidence can now be accepted subject to the board almost limitless criteria set out in section 3(1) of the Law of Evidence Amendment Act.\(^{33}\) The court also pointed out that hearsay evidence has long been recognised to be unreliable and this seems to be the continuous trend. The court further declared that a judge should hesitate before allowing hearsay evidence which plays a decisive or significant part in deciding, whether a accused is guilty or not. Only compelling justification should convince a judge to allow such hearsay evidence. The same can be said about labour disputes as well. In *AIR Products CWIU*\(^{34}\) arbitrator Damant correctly indicates the inherent danger that hearsay evidence contains. He stated: “I am of the view that where a company has a unilaterally imposed disciplinary procedure it must ensure that the procedure is fair even where the employee declines to participate”.

\(^{30}\) 1996(1) SACR 639 (A).
\(^{31}\) Now known as the Supreme Court of Appeal.
\(^{32}\) 45 of 1988.
\(^{33}\) 45 of 1988.
\(^{34}\) (1993) 2 ARB 2.2.1.
The question then arises as to whether the disciplinary procedure was fair or not.

In an article in “Labour Law Briefs Vol 1 No 12” the author states that a disciplinary tribunal is not a court of law and is entitled to admit hearsay evidence at hearings. He states that although it is permissible there is a danger that hearsay evidence may be unreliable. It must therefore be treated with caution. Having admitted the evidence the tribunal must consider what weight, if any, should be given.

If, for example, an employee was dismissed for theft, and the only evidence against him, is hearsay evidence of a witness who heard from an eyewitness that the employee had stole some goods from the workplace. The eyewitness is not prepared to testify because of possible fear. If the employee is also charged in a criminal court it is doubtful whether the presiding officer would allow the hearsay.\(^{35}\) If we look at section 3(1)(c) the Law of Evidence Amendment Act\(^{36}\) the nature of the proceedings (criminal trail), the nature of the evidence (single eyewitness with no other circumstantial evidence to corroborate), the purpose for which he evidence is tendered (to be a decisive answer to the guilt of the accused), probative value of the evidence (the non-witness cannot be cross-examined to see what he saw was correct and reliable), any prejudice to a party (the evidence will establish a crime and

\(^{35}\) In *Elandsrand Gold Mining Co Ltd v NUM* (1998) 7 ARB 2.2.1 Arbitrator Adv Munnik ordered reinstatement. He stated: “The company’s case, as I have already stated, is not supported by any direct evidence whatsoever of the transgressions alleged to have been committed by Mr Silemala. Mr Santos’s testimony regarding the evidence presented at the disciplinary inquiry is, in its entirety, pure hearsay and, in the context that it cannot, in the absence of the witnesses Ndlovu and Chivete, be questioned or challenged, is of no probative value to me whatsoever in my assessment of the true facts of the matter.”

\(^{36}\) 45 of 1988.
the accused will be convicted and dismissed) all counts against admissibility. The only factor in favour of admissibility is the reason why the hearsay is tendered (the non-witness is afraid to testify because of possible intimidation or revenge). When the same scenario is taken to arbitration, why must the employee be treated differently?

Why must he lose his job after several years of service, only because the hearsay evidence was allowed? The answer might be that we are not dealing with a court of law and in terms of section 138 (1) of the Labour Relations Act the arbitration proceedings are less formal. It is submitted that section 138 does not mean that commissioners can apply a lower standard of adjective law when it comes to evidence and especially when dealing with the hearsay rule.

Firstly, it must be stressed that presiding officers are expected to know their law and in particular the law of evidence. A well-known author in the law of delict and law of succession had the following to say about the law. You must first be a trier of fact and only then after all be a trier of law to suit your facts. You have to be good at both otherwise you suffer the embarrassment that all your mistakes will be highlighted on review.

In the case of Scholtz v Maseko NO the arbitrator failed to inform the applicant of her right to legal representation. Further the arbitrator’s failure to inform the applicant

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38 Dr N J Van der Merwe inter alia co-author of Van der Merwe en Olivier Die Onregmatige Daad in die Suid-Afrikaanse Reg (1989); “the law is very grim, it is like a jealous mistress, it wants all its time and attention”.

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of the rules of evidence also constituted a reviewable gross irregularity. What does it mean to say that arbitrations should be less technical and formalistic in their approach? It cannot be stated that the meaning of section 138 of the Labour Relations Act implies that commissioners need not to be so strict on the law.\textsuperscript{40} It is submitted what section 138 actually implies is that rigid legal formalities must not apply. Legal formalities mean strict custom in a court of law. As far as arbitrations are concerned the approach will be different. In other words it is not the way you do it as long as you do it.

The arbitration process can therefore not be challenged if the arbitrator conducted the hearing in a relaxed and less formal manner. As long as he applies his or her mind to the merits of the facts and give the parties the opportunities mentioned in section 138(2) of the Labour Relations Act.\textsuperscript{41} Section 138 can never implies that commissioners can ignore the law and or create their own law. The law is the law and legal formalities are rules of custom or practice.\textsuperscript{42} Legal technicalities is different from legal formalities. To be technical is to be strict in the application of rules or strict in the interpretation of words.\textsuperscript{43} Section 138 does not make mention of the word “technical”. It is submitted that “technical” connotes intricate while “formalities” connotes simple custom or etiquette. Accordingly, it is submitted that section 138 only implies that the strict legal formalities should be done away with. Section 3 of

\textsuperscript{39}[2000] 9 BLLR 1111 (LC).
\textsuperscript{40}66 of 1995.
\textsuperscript{41}66 of 1995. The opportunities to parties are to give evidence; call witnesses; question witnesses; and address concluding arguments.
\textsuperscript{42}The following may be seen as examples: What is the dress code at the hearing?; How do you address the commissioner?; Does the witness have to stand when he testifies?; How does the cross-examiner address the witness? See also MC LEOD The New Collins Dictionary and Thesaurus (1990) 394.
\textsuperscript{43}See MC LEOD Collins Dictionary 1030 - 1031.
the Law of Evidence Amendment Act\textsuperscript{44} made the hearsay rule already less technical. It is not for arbitrators to make the law of evidence less technical and hereby create their own law.

To give the parties their opportunities cognisance of the law is required. How can the parties give evidence if the principles of evidence are ignored? In the case of \textit{SA Cleaning Services Ltd v Steel Mining and Commercial Workers Union & Others} the commissioner allowed the employee's representative to testify on her behalf.\textsuperscript{45} The award was set aside on review. Surely section 138 (2)\textsuperscript{46} permits the commissioner to use his discretion as to the format of the hearing.

But a commissioner cannot hereby deviate from the standards of the law of evidence. The importance for arbitrators to know their law of evidence must be reiterated. Deviations from the principles of evidence will only lead to awards being set aside on review.

The hearsay rule is part of the law of evidence and has to be adhered to. Presiding officers in labour proceedings must take cognizance of the fact that for a award to be justifiable case the applicant must have had a fair hearing.\textsuperscript{47} A fair hearing can only be conducted by way of evidence. When hearsay evidence is to be considered it can only be admitted if it is “in the interest of justice”. In \textit{Rainbow Farms (Pty) Ltd v

\textsuperscript{44} 45 of 1988.
\textsuperscript{45} [2000] 9 BLLR 1106 (LC).
\textsuperscript{46} S 138(2) of the LRA reads: “Subject to the discretion of the commissioner as to the appropriate form of the proceedings, a party to the \textit{dispute} may give evidence, call witnesses, question the witnesses of any other party, and address concluding arguments to the commissioner”.
\textsuperscript{47} See the test for review in \textit{Carephone (Pty) Ltd v Marcus No} [1998] 19 ILJ 1425 (LAC).
FAWU\textsuperscript{48} arbitrator Pretorius rejected hearsay evidence on identification for there was no reliable corroboration of the hearsay evidence. Pretorius stated “Now the law in regard to hearsay evidence is quite clear: if it is in the interests of justice then I should have regard to such evidence. However even if such evidence is admitted it should be approached with a great deal of caution, because it is untested and therefore inherently unreliable.” From the instant case it is clear that the arbitrator cannot make the law of evidence less technical and apply a lesser test. The arbitrator has to apply the hearsay rule. The employee will not have a fair hearing if he is to be dismissed on identification, which he could not contest, or challenge. In the case of \textit{S v Dyimbane}\textsuperscript{49} the court declared that “the Court must bear in mind all the factors set out in the section and take an overall view at the end thereof”. In other words the court will make a finding on the admissibility of hearsay in the interest of justice, after all the factors (factors in favour and against) have been considered. It is submitted that hearsay should not be more readily allowed merely because the nature of the proceedings is arbitration proceedings.

The nature of the proceedings is but one factor to consider. In \textit{Hlongwane v Rector, SA Francis College}\textsuperscript{50} the court considered the factors in section 3(1)(c) of the Law of Evidence Ammendment Act.\textsuperscript{51} The applicants were matriculants suspended for political related reasons. They made a motion application to lift their suspension. The rector in his supporting affidavit made use of hearsay evidence. The reasons being that the sources of information were too scared to be identified because of fear for revenge. The court found that the nature of the process and evidence, as well as

\begin{thebibliography}{99}
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\bibitem{} (1996) 5 ARB 2.2.3.
\bibitem{} 1990(2) SACR 502 (SE) 505.
\bibitem{} 1989(3) SA 318 (N).
\bibitem{} 45 of 1988.
\end{thebibliography}
the purpose thereof counted against admissibility. The court also found that the
probative value and reason for submittal of the evidence counted in favour of
admissibility. Finally under “any other factor” the court took into consideration the
serious consequences for the school and scholars and the remaining teachers.

Galgut J summarises his finding as follows: “Weighing up all the relevant features
referred to in section 3(1)(c) of the Act, I have no difficulty in coming to the conclusion
that in my opinion all of the hearsay evidence should be admitted in the interest of
justice.” The court was initially reluctant to allow the hearsay when it considered the
nature of the process. The court reckoned that because it is motion proceedings the
rector would not face cross-examination and his evidence could not be tested. In the
light of the instant case it is submitted that the nature of arbitration proceedings may
on occasion count against the admissibility of hearsay evidence. Instead of saying
that hearsay will be more easily allowed during arbitration proceedings, the contrary
seems also true.

Hence if an arbitrator allows other evidence more easily because of a less formal
approach, the pressure is on him to look with more caution to hearsay evidence.
There’s no sole factor for the admissibility of hearsay evidence. If the evidence is
admitted or provisionally admitted it may be worthless because of another factor, for

52 The probative value being that there are certain limited independent or undisputed facts which
are not hearsay and which tend to show that what is contained in the hearsay evidence may
well be true. The reason being that the history of assault is indicative of possible revenge.
54 Hlongwane v Rector SA Francis College 327 A.
55 Because the arbitrations are of less legal formalism, the temptation arises to create a carte
blanche for the admission of hearsay evidence. It is submitted that the need therefore arises to
view hearsay evidence with more circumspection. This will afford the parties a fear hearing.
56 For instance where an arbitrator allowed documentary evidence not in accordance with the
rules of evidence, he is faced with an even bigger problem when he has to look at corroboration
of or the reliability of the hearsay evidence in order to admit it.
example the probative value.\textsuperscript{57} The facts of each case will influence the approach to evidence and to hearsay evidence.\textsuperscript{58}

With reference to subsection (v) of section 3(1)(c) of the Law of Evidence Amendment Act\textsuperscript{59} the court in \textit{Secunda Supermarket CC t/a Secunda Spar & another v Dreyer NO} decided that hearsay evidence was not acceptable in the absence of clear or cogent reasons why direct evidence cannot be presented.\textsuperscript{60} In \textit{Checkers SA (Ltd) v SACCAWU}\textsuperscript{61} the Company led evidence that the test shopper was no longer employed by the company and was unwilling to testify. An adverse inference for the witness failure to testify could not be drawn. In the instant case arbitrator De Villiers held: “I do not believe the union’s case was materially prejudiced simply because it could not cross-examine the test shopper. Not only was what the test shopper said corroborated, in all material aspects ... but there is sufficient circumstantial evidence for me to find, on a balance of probabilities, that what the test shopper said happened had happened.”

In \textit{Mnyama v Gxalaba} Conradie J stated: “Section 3(1)(c) empowers the Court to admit hearsay evidence in the interests of justice. In deciding what is in the interests of justice the Court may have regard, not only to certain specified matters, such as the purpose for which the evidence is tendered and its probative value, but to any

\textsuperscript{57} See \textit{Mnyama v Gxalaba} supra 653 F-I.
\textsuperscript{58} See the DB Thermal case \textit{infra}. (The contents of the disciplinary record was in dispute and it was never formally handed in as evidence.); see also the Naraindath case \textit{supra}. (The contents of the disciplinary record was never in dispute. The employee never contested the witnesses’ versions during the disciplinary hearing. The employee also had a different version during arbitration).
\textsuperscript{59} 45 of 1988.
\textsuperscript{60} 1998 10 BLLR 1062 (LC).
\textsuperscript{61} (1991) 1 ARB 2.2.7.
other factor which in the opinion of the Court should be take into account”. 62

In Metedad v National Employers’ General Insurance63 Van Schalkwyk J stated: “It means only that evidence tendered for a compelling reason would stand a better chance of admission than evidence tendered for a doubtful or illegitimate purpose.”

“This section [3(1)(c)] invest in the court with a discretion, to be judicially exercised in the interests of justice. It seems to me that the purpose of the amendment was to permit hearsay evidence in certain circumstances where the application of rigid and somewhat archaic principles might frustrate the interests of justice. The exclusion of the hearsay statement of an otherwise reliable person whose testimony cannot be obtained might be a far greater injustice than any uncertainty, which may result from its admission. Moreover, the fact that the statement is untested by cross-examination is a factor to be taken into account in assessing its probative value.”64

In S v Cekiso65 Zietsman J stated: “The effect of this section of the Act is that hearsay evidence will not be admitted without agreement between the parties unless the person upon whose credibility the probative value of such evidence depends himself testifies. In other words, the opportunity of properly testing the evidence must still be present. Section 3(1)(c) provides an exception to this requirement.

In terms of that subsection the Court has a discretion to admit hearsay evidence even though the probative value of such evidence cannot be tested in the normal

62 Mnyama v Gxalaba 652 I.
63 1992(1) SA 494 (W) 498 E.
64 Metedad v National Employers’ General Insurance 498H - 499A.
65 1990 (4) SA 20 (E) 21C-E.
way. In my opinion this section should not be lightly applied. The section provides specifically that any prejudice which might be caused to a party if the evidence is admitted is one of the factors to be considered."

“In my opinion the discretion given to the Court by s 3(1)(c) of Act 45 of 1988 should not be exercised in favour of allowing hearsay evidence on controversial issues upon which conflicting evidence has already been given. To do so could result in severe prejudice to the person against whom the evidence is given, and it would not be in the interests of justice to allow such evidence which cannot be tested in the normal way.” 66

Our current labour case law includes arbitration awards and Labour Court judgments reported. Our court decisions on hearsay are ultimately the example to follow. It is apparent that the rigid application of hearsay evidence has now given way to a versatile application. The courts have now discretion as to the admissibility of hearsay evidence. Arbitrators have to look at the courts for guidance.

The mere fact that arbitration proceedings are less formalistic does not mean that arbitrators can open the floodgates for hearsay evidence. The courts tell us to handle hearsay with caution and to admit it in the interest of justice when compelling circumstance requires it. Justice must be done. For arbitrators to reach decisions on the basis of fairness and equity in an open and democratic society, it does not mean personal considerations of fairness. Justice must be done, based on decisions of objective considerations of fairness in line with our law on hearsay evidence. We

66 S v Cekiso 22 A - B.
must be careful not to make a fallacy of the word “fairness”.

Our decisions on the admissibility of hearsay must be calculated on objective fairness according to sound application of the rules of law. If a decision is done in this manner and one of the parties has to forfeit, justice is done. Fairness in this sense does not mean that both parties should be satisfied and that a compromise should be reach. Accordingly arbitrators should realize the important task upon them and school themselves in labour law to make proper decisions. The only manner in which their decisions will be scrutinised is on review, which needs some thought.

7. DOCUMENTARY HEARSAY EVIDENCE

It is worthwhile to make mention of documentary hearsay evidence, a subject frequently dealt with by arbitrators. In this day and time arbitrators will be faced more and more with this kind of evidence. Therefore an overview thereof is necessary.

Documentary evidence is evidence in the form of a document. For admissibility under the common law of such evidence certain requirements have to be met whereby certain issues are taken into account, for instance:

1. originality of the document;
2. proof of authenticity;
3. nature of the document;
4. all other relevant issues.\(^{67}\)

\(^{67}\) See Hoffman & Zeffert Law of Evidence 389 - 404; see Schmidt Bewysreg 315 - 337.
It is apparent that the test for admissibility of documentary evidence is more stringent than the test for real evidence.

Real evidence consists of things or objects submitted as evidence for the court to observe. Under the common law a party who wants to make use of real evidence only has to indicate its relevance, submit it and supplement it with other evidence to prove its relevance.\(^{68}\)

As far as civil proceedings is concerned section 33 of the Civil Proceedings Evidence Act is applicable and describes a document.\(^{69}\) The definition of “document” in section 33 reads “includes any book, map, plan, drawing or photograph”. This is apart from the ordinary meaning of a document and if the context otherwise indicates in section 33. Section 222 of the Criminal Procedure Act \(^{70}\) made section 33 *mutatis mutandis* applicable to criminal proceedings. In criminal proceedings section 221 of the Criminal Procedure Act\(^{71}\) is applicable.

Before the enactment of the Law of Evidence Amendment Act,\(^{72}\) there were one common law and few statutory exceptions applicable to documentary hearsay evidence. The common law exceptions are public documents.\(^{73}\) A public document proves itself. That is the reason why it is an exception. Private documents have to

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\(^{68}\) Hoffman & Zeffert *Law of Evidence* 404 - 405.

\(^{69}\) 25 of 1965.

\(^{70}\) 51 of 1977; s 222 reads “The provisions of sections 33 to 38 inclusive, of the Civil Proceedings Evidence Act, 1965 (Act 25 of 1965), shall *mutatis mutandis* apply with reference to criminal proceedings.”

\(^{71}\) 51 of 1977; s 221 declares that a document includes “any device by means of which information is recorded or stored.”

\(^{72}\) 45 of 1988.

\(^{73}\) See Hoffman & Zeffert *Law of Evidence* 397; Schmidt *Bewysreg* 333, 461.
adhere to the hearsay rule. The statutory exceptions relevant here are Part VI of the Civil Proceedings Evidence Act (section 222 of the Criminal Procedure Act already mentioned. Part VI of the Civil Proceedings Evidence Act came as an important relaxation of the hearsay rule.

It is therefore important to note a few aspects. Section 221 of the Criminal Procedure Act is an important exception as far as certain trade and business record are concerned. Du Toit et al give a general discussions of section 221.

Hearsay evidence is now dealt with in terms of section 3(1)(c) of the Law of Evidence Amendment Act. The same applies for documentary hearsay evidence. The statutory exceptions will remain intact. Du Toit et al states “but it is clear that future reliance on these exceptions will be infrequent in light of the liberal approach engendered by s 3(1)(c)”.

“It is submitted that they constitute alternative routes to admissibility in that, if an item of evidence fails - albeit narrowly - to satisfy the conditions of the statutory exception, the courts are still at liberty to consider its admissibility under s 3(1).”

It is submitted that there is a vast difference between common law positions and the current position. Reliable hearsay was excluded. Hoffman & Zeffert had the following to say about the common law hearsay rule. “This rule is calculated to

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74 Schmidt Bewysreg 333 n 1.
75 25 of 1965.
76 51 of 1977.
77 51 of 1977.
78 25 of 1965.
79 See Schmidt Bewysreg 462 - 470.
80 51 of 1977.
81 Du Toit, De Jager, Paizes, Skeen & Van der Merwe Commentary on the Criminal Procedure Act 24 - 83.
83 Du Toit et al Commentary of the Criminal Procedure Act 24 - 83.
cause good deal of judicial frustration. As Lord Reid observed in Myers v DPP: ‘the law regarding hearsay evidence is technical, and I want to say absurdly technical’.”

The position has changed. The new approach to hearsay evidence is less technical and easier to grasp. The new hearsay rule makes provision of any kind of hearsay evidence made by a person other than a person upon whose credibility the probative value of such evidence depends.

Documentary hearsay evidence is one form of hearsay evidence. The nature of the evidence will determine what form of evidence you deal with.

Video evidence, for instance, can either be documentary hearsay evidence or real evidence as were decided by case law.85

It is submitted that it is really not that crucial, to identify the form of hearsay evidence under the new hearsay rule. It is but one factor for the court to consider. What is important is to meet the requirements of section 3(1)(c) of the Law of Evidence Amendment Act.86 The common law rules can be of guidance to a court. The hearsay rule is now more relaxed. It is for this reason and not for the nature of the proceedings that hearsay evidence is more easily admitted. The approach submitted by Schmidt87 must be approved. He submitted that uncertainties or defects in evidence should rather affect probative value than admissibility. Arbitrators will have to make a value judgment after all factors, are considered, even if the hearsay evidence was easily admitted.

84 Hoffman & Zeffert Law of Evidence 625.
87 Schmidt Bewysreg 344 - 346.
In *NUMSA v Baldwin Steel*\(^8\) the important part of the employers evidence was based on a video recording. The employee was dismissed for misconduct. The important question for the commissioner to decide was whether the video tape as hearsay evidence should be admitted. Commissioner Vermaak, it is submitted took the correct approach. He considered various factors and finally decided on the probative value of the hearsay evidence. He stated “I ruled that the video tape and transcript be admitted as evidence with the proviso that the weight afforded to this evidence be determined in light of all the other evidence lead by the parties”. Commissioner Vermaak gave due regard to the following factors:

1. that Mr Breda, the witness could not be traced and sufficient effort was made to trace him;

2. the authenticity of the video was not attacked by the employee;

3. Mr Warren is experienced in video recording, testified and made the video recording himself;

4. the video tape lend further weight to Mr Breda’s written statement;

5. the relevance of the evidence;

6. the nature of the proceedings;

\(^8\) (1999) 8 CCMA 2.2.1.
7. stock losses indicated was not challenged;

8. numerous contradiction by the employee;

9. employee was an unsatisfactory witness;

10. statement on video was corroborated though not materially;

11. employee is guilty without relying on the video.

This case is indicative of the fact that the commissioner was cautious about the hearsay evidence. He looked for circumstantial evidence and corroboration. Though he admitted the hearsay evidence, shortcomings affected the weight attached to the evidence.

8. REVIEW OF AWARDS

It is useful to look at review of awards because the incorrect application of and approach to the hearsay rule can form part of a ground of review and may influence a reviewing judge's decision.

Arbitrations under the Arbitration Act⁸⁹ are reviewed in terms of section 33(1) of the said Act.

⁸⁹ 42 of 1965.
The test on review is whether the arbitrator was biased, corrupt or committed a gross irregularity. A narrower test applies than in other arbitrations. An interesting judgment on the said Act is *Eskom v Hiemstra NO*.\(^{90}\) Judgment was given by Landman J who stated “An error in law however, when used in the context of private arbitration, is something of a misnomer for, save in a few instances, none of which are relevant here, the arbitrator is the judge of the law for purposes of the arbitration and *a fortiori* the arbitrator cannot be wrong. Similarly, if the arbitrator made a leap in logic, the parties have selected him as their judge and cannot complain about his process of reasoning save in those instances such as *mala fides*, which is not alleged here”.\(^{91}\)

Landman J further declared:

> “An arbitration conducted on a voluntary basis in terms of the Arbitration Act of 1965 need not, and is usually not, conducted by an organ of state. In this case the parties’ arbitrator is a private citizen and not an organ of state. Section 33 and the test of justifiability is not applicable to this situation. Policy considerations do not enter into picture for our law has always recognised that by choosing one’s forum one may be choosing a different standard of justice”\(^{92}\)

Only if a arbitrator’s decision was biased or based on corruption or to admit hearsay evidence that for instance amounts to a gross irregularity will the Labour Court intervene on review. This means that the arbitrator did not apply his mind to the facts maybe because of bias and not in the interest of justice to allow the hearsay evidence, avoiding the applicant a fair hearing as mention in section 34 of the

\(^{90}\) [1999] 10 BLLR 1041 (LC).

\(^{91}\) *Eskom v Hiemstra* 1047 D - E.

\(^{92}\) *Eskom v Heimstra* 1045 H - I.
Constitution. 93  Section 34 reads as follows:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”.

Judge Landman stated that section 34 remains applicable in private arbitrations. However a mere error of law or fact will not constitute gross irregularity only material irregularities will suffice.

Reviews in terms of section 145 of The Labour Relations Act will be dealt with differently and with more scrutiny according to the *Eskom* case 94 and the *Carephone* case. 95 Commissioners are organs of state therefore section 33 of the Constitution and the justifiability test do apply. 96 This was confirmed in *Glaxo Welcome SA(Pty) Ltd v Mashaba*. 97

The criticism however in *Toyota South Africa Motors (Pty) Ltd v Radebe*, 98 is seen to be *obiter*. 99 The importance of evidence and its kind as well as the admissability

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93 108 of 1996.
94 *Supra.*
95 *Supra.* Read the case of *Reunert Industries (Pty) Ltd t/a Reutech Defence Industries v Naiker and Others* (1997) 18 ILJ 1393 (LC). The Court found that a gross irregularity had been committed, as the commissioner did not allow the parties address on the issue of penalty. The Court did however made the comment that misconduct under section 145 of the LRA might be more widely construed as its counterpart under the Arbitration Act. The Court raised the importance of every citizen’s constitutional right to a decision in line with the law 1396 G “Where they are summonsed to appear before an administrative body exercising judicial powers they may expect that the tribunal will know and apply the law correctly”.
96 The test means whether or not a decision is justifiable in terms of s 33 of the Constitution of 1996. Section 33 deals with the responsibility of public bodies as far as administration is concerned. It was decided in the *Carephone* case *supra* that the CCMA is a public body which have to adhere to the requirements of s 33.
97 [2000] 8 BLLR 923 (LC) 924 I - 926 E.
99 The criticism was based on the fact that s 145 of Labour Relations Act 66 of 1995 sets clear grounds for review and that justifiability is not a separate ground of review; See *Toyota South Africa Motors (Pty) Ltd v Radebe* 254 E - G.
thereof is well illustrated in *DB Thermal (Pty) Ltd v CCMA*.\(^{100}\) In the instant case grounds for review were based on gross irregularity.

Gamble J gave judgment and stated “In terms of section 136 and 138 of the Labour Relations Act, an arbitrator is obliged to determine the dispute before him expeditiously and with the minimum of legal formalities. The latter section is, however, not a *carte blanche* to an arbitrator to ignore the rules of evidence”.\(^{101}\) It appears from the facts that the commissioner based his award solely on the record of the disciplinary hearing, which was not admitted as evidence. The judge decided that there was no material properly placed before the arbitrator. The arbitrator had a duty to point out to the parties how evidence should be produced. This constitutes gross irregularities, which renders the award reviewable. It is submitted that the arbitrator should have admitted the disciplinary record as hearsay evidence with the consent of both parties. Otherwise the disciplinary record could have been admitted as documentary evidence. The truth of the contents can be proved if both parties consent to the fact that the contents are true. If not, the party who wants to submit it must call witnesses to proof the contents thereof. If for argument’s sake substantive fairness of a dismissal is in dispute (misconduct is denied), it would be futile to submit the disciplinary record. Rather call the witnesses in the form of *viva voce* evidence to proof that the employee committed misconduct.

In *Naraindath* case the Labour Court took the approach that the disciplinary record was hearsay evidence.\(^{102}\) The court decided that under the circumstances the hearsay evidence was correctly admitted as evidence. The *ratio* being that section

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\(^{100}\) [2000] 10 BLLR 1163 (LC).

\(^{101}\) *DB Thermal (Pty) Ltd v CCMA* 1167 E.
138(1) of The Labour Relations Act\textsuperscript{103} promotes a process “with the minimum of legal formalities”. Given the circumstances the reliance on hearsay was to his satisfaction on proper grounds. In this instant case a lot of emphasis was placed on the nature of the proceeding to approve the admissibility of the hearsay.

Wallis AJ went into detail as to what the legislature’s intention was with section 138 of The Labour Relations Act.\textsuperscript{104} The draft bill was discussed to substantiate his reasoning. The sole question, it is submitted, to be asked is whether or not the commissioner committed on reviewable irregularity or misconduct which prevented a fair hearing. When an incorrect application of the hearsay rule is alleged to form part of gross irregularity, the sole question will be whether or not the presiding officer conducted the proceedings in a fair manner and gave the applicant a fair hearing. The question is not whether or not the arbitrator conducted the process in a different way. This is precisely the inference I gather for the view of Wallis AJ:

“In my view it is perfectly clear in these circumstances that a complaint that a commissioner has conducted proceedings in a way which differs from the way in which the same dispute would be dealt with before a court of law cannot as such succeed. It is only where the person seeking to challenge the commissioner’s award can point to specific unfairness arising from that action by the commissioner that a proper ground for review is established. A failure to conduct arbitration proceedings in a fair manner, where that has the effect that one of the parties does not receive a fair hearing of their case, will almost inevitably mean either that the commissioner has committed misconduct in relation to his or her duties as an arbitrator or that the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.”\textsuperscript{105}

Accordingly it is submitted that it doesn’t matter what process an arbitrator follows as long as he applies the law of evidence. In other words an arbitrator can never be

\textsuperscript{102} Supra n 23.
\textsuperscript{103} 66 of 1995.
\textsuperscript{104} 66 of 1995.
obliged to conduct proceedings in a strict manner as long as the proceedings was conducted in a fair manner.

The Court referred to the role of the arbitrator in proceedings: “I also agree with the warning which Jali AJ (as he then was) sounded in Mutual & Federal Insurance Company Ltd v CCMA & others [1997] 12 BLLR 1610 (LC) about the need for an arbitrator, who adopts a more inquisitorial and participative role in the proceedings than is customarily the case in an adversarial hearing, to be vigilant to ensure not only that the proceedings are fair to both parties but that the appearance of fairness is always maintained. However, with respect, insofar as certain passages in his judgment might be taken to indicate that it is only a traditional adversarial process as we know it from our courts that conforms to the well established rules of natural justice so that the commissioner’s role is to mimic that of a trial judge and be a ‘silent umpire’ I, with respect, cannot agree with him.”

The need is there to concur and disagrees with both Jali AJ and Wallis AJ. Not to say that a strict adversarial role is required from arbitrators. What is submitted that it is a good guideline for arbitrators to follow. The rules of natural justice of the English Common Law, which have to be applied in arbitrations are indicative of the adversarial system. Wiechers has the

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105 Naraindath case 725 A - C of the judgment.
106 Naraindath case 726 B - E.
107 Brandt, Lötter, Mischke & Steadman Labour Dispute Resolution (1997) 183 “It is widely accepted that the procedure for the adjudication of disputes is based on the ‘rules of natural justice’. These principles are usually expressed in the form of two Latin maxims: audi alteram partem (‘hear the other side’) and nemo iudex in propria causa (‘no one may judge his own cause’) (see Baxter Administrative Law at 536). The Industrial Court applied these rules and so will any arbitrator. This is understandable because, as Baxter points out (at 538), the principles of natural justice serve three purposes:
- they facilitate accurate and informed decision-making
- they ensure that decisions are made in the public interest and
- they cater for (certain) important process values.

The Industrial Court (per fabricius) AM in Twala v ABC Shoe Store (1987) 8 ILJ 714 rules that those involved in industrial relations should have strict regard to the rules of natural justice. This applies to disciplinary hearings, private arbitration and statutory arbitration”.
following to say about the rule of natural justice:

“The rules of natural justice are common-law rules which are applicable to administrative enquiries and hearings. The objection may immediately be raised that these rules are far more than mere rules of procedure and that they really ensure that a kind of fundamental or primeval justice materializes. It can immediately be conceded that these rules are, by their very nature, much more than a formal code of administrative conduct. As will become apparent from the discussion of the nature of the rules of natural justice, the application of the rules does indeed ensure simple justice between legal subjects. And yet it is the ideal objective of all legal rules to ensure that justice is done.”

The adversarial system is in line with the rules of natural justice. There is a very good reason for that. Firstly *audi alteram partem*\(^{109}\) requires that the other party be given an opportunity to state his case.\(^{110}\) Silent umpires are intellectuals and therefore good listeners. Secondly *nemo iudex in propia causa* requires the presiding officer to be impartial and non-biased.\(^{111}\) Why the adversarial approach? Judges generally listen with dedication, question with confidence and judge without emotion. The biggest trap of the inquisitorial approach is that you become involved in the case. The more you form part of the commotion the less you see the wood from the trees. Where do you draw the line? Coming from a legal background the adversarial approach is favoured. A strict adversarial approach is not suggested. What is required from this approach is to remain professional, objective and uninvolved. If you need to ascertain the facts inquisitorially from the parties, do it within certain parameters. Facts in labour law proceedings or court proceedings can only be proved by way of evidence and nothing else. The *DB Thermal* case\(^{112}\) and *Pick ‘n Pay Stores* case\(^{113}\) as conformation. *Cape Town City Council v SAMWU*.\(^{114}\) Prove the importance of the law of evidence, and the manner of its proof.

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\(^{109}\) Hear the other side.

\(^{110}\) Wiechers *Administrative Law* 210 - 215

\(^{111}\) No one may judge his own cause.

\(^{112}\) *Supra.*
Emphasis is not on the nature of proceedings, but on the “manner of its proof”. Commissioners or arbitrators who think that they can conduct a case without evidence at all, are grossly mistaken. It is a bizarre world filled with ridicule. Brand\textsuperscript{115} cited the case of \textit{BAWU & Others v Edward Hotel}\textsuperscript{116} where De Kock AM remarked as follows: “It is not appropriate to lay down rules for how ... facts are to be placed before the court but that need not necessarily be done by way of evidence. How it can best be done should be determined by the circumstances ... The court has wide powers of enquiry. The court will in each case have to determine, whether and how \textit{the facts are to be verified or amplified by evidence, viva voce or by affidavit}. This is incorrect. How on earth can there be evidence of facts without evidence. The same “bizarre” situation played off in \textit{DB Thermal case}\textsuperscript{117}. In the instant case the Court decided that evidence of entrapment is permissible in employment context provided that entrapment must be conducted fairly and in accordance with the requirements of section 252A of the Criminal Procedure Act\textsuperscript{118}. In other words to avoid grounds for review, arbitrators must be alert as to “the manner of its proof”. A more perfect example than this case cannot be found to explain my whole argument. It doesn’t matter how informal and less technical you want to make the proceedings, you cannot get away from the rules of evidence including the hearsay rule, unless you exclude some of them by agreement. You cannot exclude all, because if you don’t have evidence at all on what basis are you going to make your judgment!

\textsuperscript{113} Supra.
\textsuperscript{114} [2000] 11 BLLR 1239 (LC).
\textsuperscript{115} Brandt \textit{et al Labour Dispute Resolutions} 183.
\textsuperscript{116} [1989] 10 ILJ 537 376 D-F.
\textsuperscript{117} Supra 1165 - 1166 of the judgment.
\textsuperscript{118} 51 of 1977.
9. CONCLUSION

Every game has its rules. The same applies to the game of labour law proceedings. Surely private arbitration agreements can exclude some rules of evidence. Be it as it may the law of evidence cannot totally be ignored no matter what legal process. The hearsay rule is part of the law of evidence and arbitrator have to take cognisance thereof.

The manner in which arbitration proceedings are dealt with depends on the terms of reference. Private arbitrations are ruled by arbitration agreements. Statutory arbitrations are dealt with in terms of the Labour Relations Act.\textsuperscript{119} Although section 138(1) of the Labour Relations Act\textsuperscript{120} allows commissioners a discretion as to the manner of the process with the minimum of legal formalities, the commissioner must still deal with the “substantial merits”.\textsuperscript{121} This discretion, it is submitted, is qualified by section 138(2) of the Labour Relations Act.\textsuperscript{122} A party to the process or dispute may give evidence, call witnesses, question the witnesses and address concluding arguments. Hereby the importance of the law of evidence is mentioned. To call, to question and to give evidence is nothing other than the law of evidence. Therefore the importance of the law of evidence and in particular our topic the hearsay rule cannot be over emphasised.

Some of the labour law cases cited may create the inference that the hearsay rule can be watered down in arbitration proceedings because of section 138 of the Labour Relations Act.\textsuperscript{66 of 1995. Supra. This means the merits of the case, which can only be facta probanda (facts in dispute) and facta probantia (the proving facts) - see also 3 supra of the dispute.}
It was argued that not too much emphasis must be placed on the nature of the proceedings in this regard. Section 138 of the Labour Relations Act does not say it either. The only implied inference comes from section 3(1)(c)(i) of the Law of Evidence Amendment Act where the nature of the proceedings is taken into account. It was argued that the nature of proceedings is but one factor for the presiding officer to consider. There are several other factors too. The presiding officer has to apply his mind to the facts (consider the substantial merits). Further he has to look at all the factor in section 3(1) before he makes final judgement. The true test in section 3(1) is whether or not the hearsay evidence should be admitted in the interest of justice. The new hearsay rule is relaxed and less technical. Arbitrators need not relax it even further.

The incorrect application of the hearsay rule can sometimes lead to reviewable grounds of an award. Section 33 of the Arbitration Act set out the clear grounds for review as far as private arbitrations is concerned. It is not necessary to repeat the grounds or the discussion thereof. It is important to note that a narrower test for review applies during private arbitrations than in the case of arbitrations under the Labour Relations Act. An error in law in the last mentioned case can amount to misconduct in terms of section 145 of the Labour Relations Act. To incorrectly construe the hearsay rule can amount to reviewable misconduct by the arbitrator. Yet again arbitrators knowledge of the law of evidence is of paramount importance.

122 Supra.
123 Supra.
124 Supra.
125 45 of 1988.
126 *Iudicis est ius dicere non dare* (it is the province of a judge to expound or interpret the law not to make it).
127 42 of 1965.
129 Supra.
As for arbitrations in terms of the Labour Relations Act, section 145 sets out clear grounds for review. What is more of importance and what have been discussed are “misconduct or gross irregularity” as a grounds for review. For an arbitrator to commit a gross irregularity as far as the hearsay rule is concerned, it must be shown that his decision to admit hearsay was not justifiable under the circumstances in the sense that the applicant did not have a fair hearing. Consequently gross irregularity lies in the fact that the arbitrator prevented the applicant a fair hearing under the circumstances. Only then will the hearsay rule form part of “gross irregularity” as a ground of review. A mere error of fact or law would not necessarily lead to a ground of review, unless the arbitrator misconduct himself or committed a gross irregularity. Misconduct can sometimes also amount to gross irregularity. In other words the arbitrator misconduct himself and by doing that also committed a gross irregularity.

Finally the importance of arbitrators to know their law and understand the basics of the law of evidence as a whole must be emphasised. Once conversant with instances like the hearsay rule, arbitrators can be far better triers of fact and the law.
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