



# **DETERMINING THE ADMISSIBILITY OF HEARSAY EVIDENCE IN DISMISSAL PROCEEDINGS**

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**TABLE OF CONTENTS**

**LIST OF ABBREVIATIONS ..... iv**

**ABSTRACT ..... v**

**Chapter 1 ..... 1**

**1 Introduction ..... 1**

**1.1 Problem statement ..... 1**

**1.1.1 Background to study..... 1**

**1.2 Literature review ..... 4**

**1.3 Scope and limitations of the study ..... 7**

**1.4 Rational and justification..... 8**

**1.5 Framework (structure) of the study..... 8**

**1.6 Research methods ..... 9**

**1.7 Statement regarding ethics ..... 9**

**1.8 Conclusion..... 9**

**Chapter 2 ..... 11**

**2 Arbitration proceedings and the admissibility of hearsay evidence ..... 11**

**2.1 Introduction..... 11**

**2.2 The meaning of dismissal and dismissal proceedings..... 13**

**2.3 The law of evidence, the specific meaning of hearsay evidence and expectations towards commissioners ..... 15**

<b>2.4</b>	<b><i>Determining factors of the admissibility of hearsay evidence</i></b> .....	<b>19</b>
<b>2.5</b>	<b><i>Conclusion</i></b> .....	<b>24</b>
<b>Chapter 3</b>	.....	<b>26</b>
<b>3</b>	<b>Admissibility of hearsay evidence during dismissal proceedings</b> .....	<b>26</b>
<b>3.1</b>	<b><i>Introduction</i></b> .....	<b>26</b>
<b>3.2</b>	<b><i>Commissioners discretion, fairness of proceedings and the application of the LEAA</i></b> .....	<b>29</b>
<b>3.3</b>	<b><i>Admissibility of hearsay evidence being in the interest of justice</i></b> .....	<b>32</b>
<b>3.3.1</b>	<b><i>Safety measures when determining admissibility of hearsay evidence</i></b> .....	<b>34</b>
<b>3.4</b>	<b><i>Conclusion</i></b> .....	<b>39</b>
<b>Chapter 4</b>	.....	<b>42</b>
<b>4</b>	<b>Recommendations and conclusion</b> .....	<b>42</b>
<b>4.1</b>	<b><i>Introduction</i></b> .....	<b>42</b>
<b>4.2</b>	<b><i>Recommendations based on the findings of the study</i></b> ....	<b>44</b>
<b>4.3</b>	<b><i>Conclusion</i></b> .....	<b>47</b>
<b>BIBLIOGRAPHY</b>	.....	<b>50</b>

## LIST OF ABBREVIATIONS

BLLR	Butterworths Labour Law Reports
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
CUSA	Council of Unions of South Africa
FAWU	Food and Allied Workers Union
GG	Government Gazette
GN	General Notice
ILJ	Industrial Law Journal
LAC	Labour Appeal Court
LC	Labour Court
<i>LEAA</i>	Law of Evidence Amendment Act
LLM	Magister <i>Legum</i> (Masters of Law)
<i>LRA</i>	Labour Relations Act
NBCCI	National Bargaining Council for the Chemical Industry
NUM	National Union of Mineworkers
NWU	North West University
PER	Potchefstroom Electronic Law Journal
REG	Regulation
SACJ	South African Journal of Criminal Justice
SALJ	South African Law Journal
SAPS	South African Police Service
SCA	Supreme Court of Appeal
STELL LR	Stellenbosch Law Review

## **ABSTRACT**

**TITLE:** Determining the admissibility of hearsay evidence in dismissal proceedings

The general aim of this study is to determine and evaluate the current developments of the labour law regarding the determination of the admissibility of hearsay evidence in dismissal proceedings. The practical implementation of the labour law profession is regulated by the *Labour Relations Act 66 of 1995* and when dealing with dismissal proceedings, numerous guidelines and codes of conduct provide further guidance. Labour law practitioners are confronted with practical labour issues on a daily basis and have to take note of all judicial decisions binding on them, creating an ever-changing labour market.

The most recent jurisprudence to be taken into consideration by labour law practitioners regarding the determination of the admissibility of hearsay evidence in the interest of justice, is *Exxaro Coal (Pty) Ltd v Gabriel Chipana* 2019 10 BLLR 991 (LAC). There is a need for all parties to a dismissal proceeding, representatives of parties as well as commissioners, to be aware of the new safeguards, introduced into labour law by the *Exxaro Coal* matter. These safeguards attempt to ensure the fairness of all parties, fairness regarding the entire dismissal proceeding, with specific reference to the determination of admissibility of hearsay evidence being in the interest of justice. The researcher submits that these six safeguards introduced into the labour law by the *Exxaro Coal* matter is not farfetched and that these safeguards forms part of the jurisprudence. The researcher recommends that these safeguards be adhered to by commissioners, even though there is a bit of legal formality attached to the safeguards. The fairness towards all parties and the fairness of the proceedings are of the utmost importance.

**KEYWORDS:** Admissibility, hearsay evidence, dismissal proceedings, commissioners, commissioners' discretion, hearsay evidence in the interest of justice.

# Chapter 1

## 1 Introduction

### 1.1 Problem statement

#### 1.1.1 Background to study

This research investigates how the admissibility of hearsay evidence is determined during dismissal disputes. The *Labour Relations Act*<sup>1</sup> provides three forums to employees to challenge their dismissals. These forums include the: Commission for Conciliation, Mediation and Arbitration (CCMA); bargaining councils with the necessary authority from the CCMA; and the Labour Court (LC).<sup>2</sup> Van Niekerk<sup>3</sup> emphasises the imperativeness of the labour dispute resolution systems to operate in a manner that is effective, expeditious, and inexpensive.<sup>4</sup>

Section 1 of the *LRA* indicates the primary objective(s) of the *LRA*, specifically the promotion of effective resolutions of labour disputes.<sup>5</sup> There is not a decisive definition of a labour dispute in the *LRA*.<sup>6</sup> In *Health and Other Services Personnel Trade Union of SA obo Tshambi v Department of Health, KwaZulu-Natal*<sup>7</sup> the Labour Appeal Court (LAC) noted that a dispute, at least, requires a difference in opinion with regards to a question.<sup>8</sup> Section 138(1) of the *LRA* provides commissioners, conducting arbitrations, with a discretion to conduct the arbitration in a manner that they consider appropriate, leading to a quick and fair determination of the dispute, however, the substantial merits of the dispute is to be addressed in a manner with minimum legal formalities.<sup>9</sup>

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<sup>1</sup> 66 of 1995 (hereinafter the *LRA*).

<sup>2</sup> Grogan *Dismissal* 676; Basson *et al The New Essential Labour Law Handbook* 380.

<sup>3</sup> Van Niekerk, Smit and Christianson *Law@work* 472.

<sup>4</sup> Van Niekerk, Smit and Christianson *Law@work* 472; Basson *et al The New Essential Labour Law Handbook* 380.

<sup>5</sup> Section 1(d)(iv) of the *LRA*.

<sup>6</sup> Van Niekerk, Smit and Christianson *Law@work* 472.

<sup>7</sup> 2016 37 ILJ 1839 (LAC) (hereinafter the *Tshambi* case).

<sup>8</sup> *Tshambi* para 17.

<sup>9</sup> See also Van Niekerk, Smit and Christianson *Law@work* 472; *Sidumo v Rustenburg Platinum Mines Ltd* 2007 12 BLLR 1097 (CC) para 266 (hereinafter the *Sidumo* case); *CUSA v Tao Ying Metal Industries* 2009 1 BLLR 1 (CC) para 65 (hereinafter the *Tao* case).

Section 3 of the *Law of Evidence Amendment Act*<sup>10</sup> defines hearsay evidence as oral or written evidence of which the probative value depends more on another person's credibility, than the person providing the evidence.<sup>11</sup> Section 3(1)(a) of the *LEAA* also makes provision for the admissibility of hearsay evidence in civil, or criminal, proceedings and the court is guided by the principles of natural justice in order to determine the admissibility of the hearsay evidence. The hearsay evidence may be admissible if the court is of the view that admission of that evidence would be in the interest of justice.<sup>12</sup> This section of the *LEAA* therefore creates a certain measure of legal formality, which formality is vital, and commissioners must adequately comply with the legal rules. The South African law is wider than the mere exercise of discretion when determining the admissibility of hearsay evidence, as the courts or commissioners simultaneously apply the legal rules and their discretion in order to determine the admissibility of hearsay evidence.<sup>13</sup> Commissioners have an obligation to consider hearsay evidence if it is in the interest of justice.<sup>14</sup> Commissioner may not simply ignore the rules of evidence and accepted principles, nor may commissioners simply deviate from the rule of law. If commissioners deviate from the legal rules of evidence, an explanation has to be provided.<sup>15</sup> Schwikkard<sup>16</sup> aluminates the fact that the admissibility of hearsay evidence inevitably includes a deliberation regarding the reliability of the evidence.<sup>17</sup> In *Southern Sun Hotels (Pty) Limited v SA Commercial Catering and Allied Workers Union*<sup>18</sup> the Labour Appeal Court<sup>19</sup> held that the factors to determine whether certain hearsay evidence should be admissible, in the interest of justice, should be based on the factors as set out in sections 3(1)(c)(i)-(vii) of the *LEAA*.<sup>20</sup> However, a careful consideration on the commissioner's part has to take place when determining the admissibility of hearsay evidence, as presented during dismissal

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<sup>10</sup> 45 of 1988 (hereinafter the *LEAA*).

<sup>11</sup> Section 3(4) of the *LEAA*; *Swiss South Africa (Pty) Limited v Louw* 2006 4 BLLR 373 (LC) para 14.

<sup>12</sup> Section 3(1)(c) of the *LEAA*.

<sup>13</sup> Zeffert and Paizes *The South African Law of Evidence* 410.

<sup>14</sup> Section 3(1)(c) of the *LEAA*.

<sup>15</sup> *Edcon Ltd v Pillmer* 2008 29 ILJ 614 (LAC) para 15 (hereinafter the *Edcon* case); *Exxaro Coal (Pty) Ltd v Gabriel Chipana* 2019 10 BLLR 991 (LAC) para 26 (hereinafter the *Exxaro Coal* matter /case).

<sup>16</sup> Schwikkard 2003 *SALJ* 66.

<sup>17</sup> Schwikkard 2003 *SALJ* 66-67.

<sup>18</sup> 2000 21 *ILJ* 1315 (LAC) (hereinafter the *Southern Sun Hotels* case).

<sup>19</sup> Labour Appeal Court. Hereinafter the LAC.

<sup>20</sup> *Southern Sun Hotels* para 14.

proceedings. A balancing act takes place between the commissioner's consideration of the rule of law and the simultaneous exercising of his discretion. In *Sisonke Partnership t/a International Healthcare Distributors v National Bargaining Council for Chemical Industry*<sup>21</sup> the LAC once again confirmed that it will not be irregular for a commissioner to rely on hearsay evidence, if the hearsay evidence was admitted in the interest of justice.<sup>22</sup> The LAC held that there is no absolute prohibition on admitting hearsay evidence during arbitration proceedings.<sup>23</sup> The factors to be considered of when hearsay evidence is admissible, as set out in the *Southern Sun Hotel* case, was confirmed by the court, as well as the legislature's objective to declare hearsay evidence admissible if it is in the interest of justice.<sup>24</sup> Zeffert<sup>25</sup> concisely summarises that the admissibility of hearsay evidence, in the interest of justice, is admissible once the court has paid regard to the seven factors indicated in section 3(1)(c) of the *LEAA*.<sup>26</sup> The principle of the admissibility of hearsay evidence in the interest of justice is clear. The seven statutory factors have to be taken into account by the adjudicating forum before the hearsay evidence is admissible, based on the interest of justice.

The law is, however, an ever-developing mechanism and the LAC now provides for specific principles to be taken into account when determining the admissibility of hearsay evidence in dismissal proceedings, as set out in *Exxaro Coal* case. Determining the admissibility of hearsay evidence have great consequences, especially if the evaluation thereof was incorrect. This study considers the principles for determining the admissibility of hearsay evidence as set out in the *Exxaro Coal* case, and the evaluation of hearsay evidence in order to assure that the admissibility of the evidence remains in the interest of justice. The LAC provides that section 3 of the *LEAA* essentially means that hearsay evidence is to be excluded if there is no agreement to receive the evidence, unless the interest of justice requires its admission,<sup>27</sup> and that hearsay evidence that is not admitted in line with the provisions of this section is not

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<sup>21</sup> 2013 ZALAC (hereinafter the *Sisonke* case).

<sup>22</sup> *Sisonke* paras 27-28.

<sup>23</sup> *Sisonke* para 27.

<sup>24</sup> *Sisonke* para 27.

<sup>25</sup> Zeffert and Paizes *The South African Law of Evidence* 415.

<sup>26</sup> Zeffert and Paizes *The South African Law of Evidence* 415. See also s 3(1)(c) of the *LEAA*.

<sup>27</sup> *Exxaro Coal* para 19.



evidence at all.<sup>28</sup> An amendment regarding the rules of admissibility of hearsay evidence was supported by the LAC, especially considering the powers of commissioners in terms of section 138 of the *LRA*.<sup>29</sup> Section 138 of the *LRA* does however not suggest that a commissioner may arbitrarily admit, or deny, hearsay evidence or any other form of evidence.<sup>30</sup>

## **1.2 Literature review**

This study analysis how the admissibility of hearsay evidence in dismissal proceedings are to be determined, specifically relying on case law that focus on the provisions of section 3(1) of the *LEAA* as well as section 138 of the *LRA*. During the majority of dismissal proceedings, the leading of evidence takes place and the rules of evidence are applied to prove the facts. Basson<sup>31</sup> defines arbitration in terms of the *LRA* as a method where an objective third person listens to both parties' description of the relevant facts, and then adjudication of the dispute between the parties takes place at the end of the matter, usually with the issuing of a written award or written judgment.<sup>32</sup> Section 138 of the *LRA* provides the commissioner with the power and discretion to conduct the arbitration in a manner that he deems to be appropriate. The commissioner may adopt a procedure that he deems fit and appropriate, which normally includes an easing of the traditional rules of evidence and the admissibility thereof.<sup>33</sup>

With specific reference to the *Exxaro Coal* matter, the traditional rules towards the admissibility of hearsay evidence has notably been eased. Section 134 of the *LRA* provides that the CCMA may adjudicate disputes arising from matters of mutual interest to the parties.<sup>34</sup> In *De Beers Consolidated Ltd v CCMA*<sup>35</sup> a "matter of mutual

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<sup>28</sup> *Exxaro Coal* para 19; *S v Ndhlovu* 2002 2 SACR 325 (SCA) para 14 (hereinafter the *Ndhlovu* case).

<sup>29</sup> Malope 2019 *De Rebus* 28-29.

<sup>30</sup> *Exxaro Coal* para 21.

<sup>31</sup> Basson *et al* *The New Essential Labour Law Handbook* 384.

<sup>32</sup> Basson *et al* *The New Essential Labour Law Handbook* 384; Van Niekerk, Smit and Christianson *Law@work* 473; *Carephone* para 20; Faris 2008 *De Jure* 509; Peté *et al* *Civil procedure A Practical Guide* 505.

<sup>33</sup> Ndlovu *The admission of hearsay evidence* 2.

<sup>34</sup> Van Niekerk, Smit and Christianson *Law@work* 472; S 191 of the *LRA*.

<sup>35</sup> 2000 5 BLLR 578 (LC) (hereinafter the *De Beers* case).

interest" was described as any issue concerning employment.<sup>36</sup> The "difference in opinion", for purposes of this study, is between an employer and employee, which led to the termination of the employment relationship. Always relevant thereto, is the employee's right to fair labour practices, as contained in the *Constitution*,<sup>37</sup> which is a fundamental right. Section 23 of the *Constitution* provides that: "Everyone has the right to fair labour practices."<sup>38</sup> Section 35(3)(i) of the *Constitution* further provides that any accused person has the right to a fair trial which includes the right to present and challenge evidence.<sup>39</sup> Section 185 of the *LRA* specifically provides that every employee has a right not to be unfairly dismissed. In *Naraindath v CCMA*<sup>40</sup> the LC reviewed an arbitration award regarding the dismissal of an employee. According to the applicant, the award was grossly irregular due to the commissioner's conduct, as the award was made solely by relying on hearsay evidence without testing this hearsay evidence by way of cross-examination.<sup>41</sup> The commissioner found that the employee failed to challenge these witnesses during the disciplinary hearing and failed to give a credible explanation to the charges against him. As the evidence was unchallenged, the commissioner found that there is no need for the cross-examination of this unchallenged evidence and the LC agreed with this finding.<sup>42</sup> The LC further found that the commissioners' reliance on hearsay evidence, which evidence the commissioner finds to be reliable, cannot constitute a reviewable irregularity.<sup>43</sup> In *Giesecke and Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security*<sup>44</sup> the SCA held that an interrelated and collective approach towards the factors as set out in sections 3(1)(c)(i)-(vi) of the *LEAA* (as well as any other factors, in the opinion of the court)

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<sup>36</sup> *De Beers* para 16; *National Union of Metal Mineworkers of South Africa obo Members v South African Airways SOC Ltd* 2017 9 BLLR 867 (LAC) para 33; Van Niekerk, Smit and Christianson *Law@work* 473.

<sup>37</sup> *Constitution of the Republic of South Africa*, 1996 (hereinafter the *Constitution*).

<sup>38</sup> Section 23(1) of the *Constitution*.

<sup>39</sup> Section 25(3)(i) of the *Constitution*.

<sup>40</sup> 2000 6 BLLR 716 (LC) (hereinafter the *Naraindath* case).

<sup>41</sup> *Naraindath* para 19.

<sup>42</sup> *Naraindath* para 41.

<sup>43</sup> *Naraindath* para 42; Jackson 2006 <https://www.bowmanslaw.com/insights/back-to-basics-a-guideline-on-how-to-deal-with-hearsay-evidence-in-employment-related-disputes>.

<sup>44</sup> 2012 JOL 28222 (SCA) (hereinafter the *Giesecke* case).

should be taken into account. There is great flexibility to admit hearsay evidence with the ultimate goal necessitating the adjudication in the interest of justice.<sup>45</sup>

Using applicable case law, this study considers the guidelines and principles as set out by the South African judiciary when determining the admissibility of hearsay evidence. The *Exxaro Coal* case, as one of the most recent cases, is referred to throughout this study, as it paves the foundation for determining the rule of law and applicable legal principles when determining the admissibility of hearsay evidence. Determining the admissibility of hearsay evidence during dismissal proceedings plays an imperative role in the fundamental fairness of the proceedings. The CCMA issued the *Guidelines on Misconduct Arbitrations*,<sup>46</sup> which specifically deal with a commissioner's conduct during arbitration proceedings. Notably, commissioners are to take any code of good practice and any guidelines published by the CCMA into account. These guidelines, *inter alia*, deal with how a commissioner should evaluate evidence for purposes of making an award<sup>47</sup> and the circumstances in which a commissioner must draw a party's attention to the fact that there was no cross-examination of a witness.<sup>48</sup> Naude<sup>49</sup> indicates that the court, when considering the admissibility of hearsay evidence, must consider certain factors such as: the probative value of evidence; prejudice in any form to any party; and any other relevant factors in the opinion of the court.<sup>50</sup> Whitear-Nel<sup>51</sup> confirms that the reliability or probative value of this evidence incorporates an enquiry of the admissibility, which is necessary in determining the admissibility of hearsay evidence.<sup>52</sup> In the analysis of the guidelines set out by the courts, the LAC in *ABSA Bank Ltd v Naidu*<sup>53</sup> confirmed that the concept of uniformity is trite.<sup>54</sup> The *Guidelines on Misconduct Arbitrations* is specifically aimed at encouraging consistent decision-making in misconduct matters.<sup>55</sup> Cognisance is taken of the reference to equality in

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<sup>45</sup> *Giesecke* para 31.

<sup>46</sup> Reg 1 in GN R224 in GG 38573 of 17 March 2015 (hereinafter the *Guidelines on Misconduct Arbitrations* or the guidelines).

<sup>47</sup> Reg 2.2 in GN R224 in GG 38573 of 17 March 2015.

<sup>48</sup> Reg 21 in GN R224 in GG 38573 of 17 March 2015.

<sup>49</sup> Naude 2006 *South African Law Journal of Criminal Justice* 320.

<sup>50</sup> Naude 2006 *South African Law Journal of Criminal Justice* 320.

<sup>51</sup> Whitear-Nel 2012 *Stellenbosch Law Review* 241.

<sup>52</sup> Whitear-Nel 2012 *Stellenbosch Law Review* 241.

<sup>53</sup> 2015 36 *ILJ* 602 (LAC) (hereinafter the *Naidu* case).

<sup>54</sup> *Naidu* para 35.

<sup>55</sup> Reg 3 in GN R224 in GG 38573 of 17 March 2015.

law found in the *Naidu* matter, and in my view should be applied when determining the admissibility of hearsay evidence. In *Head of Department of Education v Mofokeng*<sup>56</sup> the LAC found that before an irregularity regarding the application of the commissioner's mind will result in the setting aside of the award, the applicant must, in addition, expose a misconception of the actual enquiry or that the actual result is an unreasonable outcome.<sup>57</sup> The assessment of the allegations of flaws in the reasoning of the commissioner is taken into consideration, in order to ascertain if the arbitrator did indeed arrive at an unreasonable result, or undertook the enquiry erroneously.<sup>58</sup> There are certain phases for analysing an arbitration award, and the final analysis depends on the materiality of the error, or irregularity, and its relation to the outcome.<sup>59</sup>

The Constitutional Court (CC) in *Sidumo v Rustenburg Platinum Mines* held that the LC may interfere with an arbitration award when the decision of the commissioner was unreasonable.<sup>60</sup> This does not mean that an arbitration award will simply be set aside because another commissioner would have reached a different conclusion. When determining the admissibility of hearsay evidence during dismissal proceedings, in my view, the commissioner should strike a balance between applying the rules of law and the right to a fair hearing.

### **1.3 Scope and limitations of the study**

The scope of this study is focused on the determination of the admissibility of hearsay evidence in dismissal proceedings. The principal legislation taken into consideration is the *LRA* and the *LEAA*, but where necessary reference is to be made to other South African statutes, relevant to the admissibility of hearsay evidence. The focus of this study is on the determination of the admissibility of hearsay evidence during dismissal proceedings. The fairness of the dismissal proceeding is also considered in this analysis, with reference to how and when hearsay evidence is allowed. This study only focuses on the South African law and the practical legal approaches, as this study is a

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<sup>56</sup> 2015 1 BLLR 50 (LAC) (hereinafter the *Mofokeng* case).

<sup>57</sup> *Mofokeng* para 30.

<sup>58</sup> *Mofokeng* para 32.

<sup>59</sup> *Mofokeng* para 33.

<sup>60</sup> *Sidumo* para 119.

mini-dissertation with a restriction on the length of this study and time constraints due to this mini-dissertation forming part of a structured LLM.

#### **1.4 Rational and justification**

The legislature, clearly alert to the difficulties relating the treatment of hearsay evidence in South African law, introduced the *LEAA*. The *LEAA*, especially section 3, is aimed at producing a better dispensation of hearsay evidence, and provides a mechanism in order to determine when the admissibility of hearsay evidence is appropriate.<sup>61</sup> These attendant rights provide employees, engaged in dismissal proceedings, with an opportunity to present hearsay evidence. In particular, this creates circumstances where the commissioner has to apply the rule of law and legal principles in order to determine the admissibility of the hearsay evidence. This study focuses on the determination of the admissibility of hearsay evidence during dismissal proceedings. Recommendations are made as to which aspects commissioners should take into account when applying this legal rule. A discussion of the relevant principles as set out in the South African law framework follows, which may assist commissioners when considering the admissibility of hearsay evidence.

#### **1.5 Framework (structure) of the study**

This mini-dissertation consists of four chapters. Chapter 1 delivers the outline of the research and a background to the study. Chapter 2 explores the arbitration proceedings and the admissibility of hearsay evidence, the meaning of dismissal, dismissal proceedings, the meaning of hearsay evidence, and the expectation concerning a commissioner with regards to the admissibility of hearsay evidence during dismissal proceedings. Chapter 3 considers the law (such as the *LEAA*) regulating hearsay evidence in dismissal proceedings, the established court factors, the recent guidelines and principles provided by South African law in determining the admissibility of hearsay evidence, and when it is in the interest of justice. Chapter 4 provides the researcher's findings, recommendations, and conclusion.

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<sup>61</sup> *Southern Sun Hotels* para 13.

## **1.6 Research methods**

This research is a qualitative study based on literature review. The researcher relies on case law, legislation, journal material, electronic sources, and library access to relevant books on this topic. The purpose of the qualitative method is to explore and assess relevant sources concerning the research topic, in order to recommend an approach to the problem statement. For purposes of this research, the North West University Potchefstroom Electronic Law Journal Referencing style is utilised.

## **1.7 Statement regarding ethics**

This is a qualitative study in which all primary and secondary sources are referenced and acknowledged. No individual or group interviews and questionnaires are used as instruments of research with the objective of holding discussions concerning any topics or issues that might be sensitive, embarrassing, or upsetting. No criminal or other disclosures requiring legal action and having potential adverse effects, risk or hazards for research participants are made in the course of the study. Therefore, there is no need for arrangements to be made in respect of insurance and/or indemnity to meet the potential legal liability of the North West University for harm to participants arising from the conduct of the research. The ethical questionnaire has been completed and is signed by my supervisor. In my view, there is no need to obtain an ethical clearance certificate from the Faculty's Ethics Committee, due to the aforementioned reasons.

## **1.8 Conclusion**

In order for the reader to fully appreciate this study it is necessary to provide a brief overview of the significant meaning of the terms: dismissal; dismissal proceedings; hearsay evidence; and what expectations there are towards commissioners conducting dismissal proceedings. This is reflected in chapter 2 of the study. Every aspect mentioned has a direct relation to the point where the admissibility of hearsay evidence becomes relevant. Hearsay evidence is generally inadmissible,<sup>62</sup> however, this does not mean that hearsay evidence is always inadmissible. When hearsay evidence should

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<sup>62</sup> Section 3(1) of the *LEAA*; Mujuzi 2020 *ILJ* 812; *Van Willing* para 23.

be considered as admissible by commissioners<sup>63</sup> in terms of legislation and case law, is considered in chapter 3. The final chapter illuminates the findings of the study at the hand of which recommendations and a conclusion is made in chapter 4.

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<sup>63</sup> Mujuzi 2020 *ILJ* 812.

## Chapter 2

### 2 Arbitration proceedings and the admissibility of hearsay evidence

#### 2.1 Introduction

This chapter provides a brief overview regarding the meaning of "dismissal", "dismissal proceedings" as well as an indication of the meaning of "hearsay evidence" which follows in paragraph 2.2. An analysis of what is meant by the term "hearsay evidence" and the expectations towards commissioners when it comes to the admissibility of hearsay evidence during dismissal proceedings is discussed in paragraph 2.3 of this chapter. The CCMA sets out guidelines on misconduct arbitration. These guidelines were published during September 2011 and came into effect in January 2012.<sup>64</sup> The guidelines specifically deal with the issue of how commissioners should evaluate evidence in order to make an award, amongst other issues.<sup>65</sup>

A further indication to commissioners pertain to the interpretation of the law, and the guidelines state that the CCMA and all its commissioners should interpret and apply the *LRA* and other legislation in accordance with the judicial decisions of the courts.<sup>66</sup> Commissioners must follow the most recent binding decision of the highest court dealing with that specific provision when interpreting the law;<sup>67</sup> and this includes the interpretation of section 3(1)(c) of the *LEAA*, and more specifically the recent LAC judgment in *Exxaro Coal (Pty) Ltd v Gabriel Chipana*.<sup>68</sup> The procedure on how to conduct dismissal proceedings includes an obligation on commissioners that they must inform the parties of their powers as well as the procedure which will be followed.<sup>69</sup> Reference is also made to the powers of commissioners in terms of section 138(1) and section 138(2) of the *LRA*.<sup>70</sup> In accordance with section 138(2) of the *LRA*, each party to the proceedings may give evidence, subject to the commissioner's discretion.<sup>71</sup> In

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<sup>64</sup> GN R602 in GG 34573 of 2 September 2011.

<sup>65</sup> Reg 2.2 in GN R602 in GG 34573 of 2 September 2011.

<sup>66</sup> Reg 6 in GN R602 in GG 34573 of 2 September 2011.

<sup>67</sup> Reg 7 in GN R602 in GG 34573 of 2 September 2011.

<sup>68</sup> See also Reg 7 in GN R602 in GG 34573 of 2 September 2011.

<sup>69</sup> Reg 11 in GN R602 in GG 34573 of 2 September 2011.

<sup>70</sup> Reg 12-15 in GN R602 in GG 34573 of 2 September 2011.

<sup>71</sup> See also Reg 14.1 in GN R602 in GG 34573 of 2 September 2011.



the *Naraindath*<sup>72</sup> case, the court adopted the approach that commissioners should approve evidence as applied in the Small Claims Court.<sup>73</sup> The LC specifically held that hearsay evidence may be admitted if the commissioner was satisfied that there are proper grounds to rely on the hearsay evidence.<sup>74</sup> The assessment of the evidence by commissioners are specifically dealt with in three broad measures:<sup>75</sup> first, the assessment of the background facts;<sup>76</sup> second, the assessment of the summary of the evidence led;<sup>77</sup> and third, the analysis of the evidence.<sup>78</sup> The analysis of evidence includes a determination of the relevant facts, in order to come to a decision to dismiss. This is based on the findings of facts, after the commissioner assess the credibility, probability, and the assessment of the relevant rules.<sup>79</sup>

A commissioner must consider the evidence as a whole, by considering, *inter alia*, the following factors:<sup>80</sup> the probabilities, and determining which of the different versions provided are more probable;<sup>81</sup> the reliability of witnesses<sup>82</sup> (by assessing the extent of the witnesses' first-hand-knowledge of the events);<sup>83</sup> and any corroborating witnesses.<sup>84</sup> These are the aspects (or factors) that were taken into consideration by commissioners regarding dismissals during 2012, along with the code of good practices in schedule 8 of the *LRA*.<sup>85</sup> The manner in which commissioners are conducting arbitrations has changed over the years and there is a new nature of expectations concerning commissioners. In order to understand when these factors are relevant to commissioners is dealt with in paragraph 2.4 of this chapter. For now, the meaning of "dismissal" and "dismissal proceedings" is considered.

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<sup>72</sup> *Naraindath* para 32; Reg 12.2 in GN R602 in GG 34573 of 2 September 2011.

<sup>73</sup> *Naraindath* para 32.

<sup>74</sup> *Naraindath* para 34.

<sup>75</sup> Reg 49 in GN R602 in GG 34573 of 2 September 2011.

<sup>76</sup> Reg 49.1 in GN R602 in GG 34573 of 2 September 2011.

<sup>77</sup> Reg 49.2 in GN R602 in GG 34573 of 2 September 2011.

<sup>78</sup> Reg 49.3 in GN R602 in GG 34573 of 2 September 2011.

<sup>79</sup> Reg 55 in GN R602 in GG 34573 of 2 September 2011; Jackson 2006 <https://www.bowmanslaw.com/insights/back/-to-basics-a-guideline-on-how-to-deal-with-hearsay-evidence-in-employment-related-disputes>.

<sup>80</sup> Reg 56 in GN R602 in GG 34573 of 2 September 2011.

<sup>81</sup> Reg 56.1 in GN R602 in GG 34573 of 2 September 2011.

<sup>82</sup> Reg 56.2 in GN R602 in GG 34573 of 2 September 2011.

<sup>83</sup> Reg 56.2.1 in GN R602 in GG 34573 of 2 September 2011.

<sup>84</sup> Reg 56.2.4 in GN R602 in GG 34573 of 2 September 2011.

<sup>85</sup> Schedule 8 of the *LRA*: The Code of Good Practices: Dismissal.

## **2.2 The meaning of dismissal and dismissal proceedings**

The meaning of "dismissal" is outlined in section 186(1) of *LRA*, which, *inter alia*, provides that "dismissals" take place when an employer terminates the employment of the employee with or without notice.<sup>86</sup> During dismissal proceedings an objective third party considers both parties' versions of events and then makes a decision regarding the dispute between the parties.<sup>87</sup> Section 138 of the *LRA* provides that the commissioner, being the objective third party, has the power to approach the dismissal proceeding in a way that he deems to be appropriate, in order to assure that the proceedings result in the quick and fair resolution of the "differences in opinion" between the two parties.

The substantial merits of the "differences in opinion" should be addressed in a way with minimum legal formalities.<sup>88</sup> Grogan<sup>89</sup> confirms that the finalisation of disputes are to be swift and informal. This does, however, not create a situation where the commissioner can disregard legal formalities that form a part of the principles of natural justice.<sup>90</sup> One of these legal formalities is the admissibility of hearsay evidence during dismissal proceedings. In *Mgobhozi v Naidoo*<sup>91</sup> the LAC found it necessary, to consider the status of the LC and held that the LC, being one of equity, does not imply that it has a general justifiable discretion when determining the admissibility of evidence. It was further held that the rules of evidence applicable in the LC are the same as in the High Court (HC).<sup>92</sup> Section 151(2) of the *LRA* provides that the LC is a superior court with authority, inherent powers and standing, equivalent to that of a HC concerning matters within its jurisdiction.<sup>93</sup>

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<sup>86</sup> See also Grogan *Dismissal* 15.

<sup>87</sup> Basson *et al The New Essential Labour Law Handbook* 384; Grogan *Dismissal* 692; Rapatsa 2018 *Juridical Tribune* 207-208.

<sup>88</sup> See specifically s 138(1) of the *LRA*; Van Niekerk, Smit and Christianson *Law@work* 472; *Sidumo* para 266; *Tao* para 65.

<sup>89</sup> Grogan *Dismissal* 691.

<sup>90</sup> Grogan *Dismissal* 691; Basson *et al The New Essential Labour Law Handbook* 385; *Ramabulana* paras 7, 11; *Mnguni* para 25.

<sup>91</sup> 2006 3 BLLR 242 (LAC) (hereinafter the *Mgobhozi* case).

<sup>92</sup> *Mgobhozi* para H.

<sup>93</sup> *Mgobhozi* para 18.

During dismissal proceedings there is an onus on the employee to prove that there was indeed a termination of their employment relationship with the employer<sup>94</sup> and the employer must prove that the dismissal was fair.<sup>95</sup> The test to discharge the onus in all proceedings under the *LRA*, which include dismissal proceedings, is on a balance of probabilities.<sup>96</sup> In the event of an unfair labour practice dispute, the commissioner determining the dispute may base his determination on any terms he deems reasonable, which may inevitably include an order of reinstatement, re-employment, or compensation.<sup>97</sup>

Grogan<sup>98</sup> indicates that arbitration proceedings are not just a review of the decision by the employer to dismiss the employee, as it necessitates a total re-hearing of the merits of the dispute and an investigation into the fairness of the procedure followed by the employer.<sup>99</sup> The commissioner has a discretion, and subject to his discretion the parties may call witnesses who may be questioned by both parties.<sup>100</sup> The parties may present documentary and oral evidence and they may provide closing arguments to the commissioner.<sup>101</sup> The final decision regarding the parties' "differences in opinion" by the commissioner is known as an arbitration award (hereinafter referred to as an award). A commissioner's award is reviewable by the LC in terms of section 145 of the *LRA*, which clearly indicates that an award is reviewable if there is an allegation from a party that there was a defect in the arbitration proceeding due to the commissioner's influence.<sup>102</sup> A gross irregularity by a commissioner during an arbitration proceeding can, for example, be when the commissioner neglects to provide both parties with a fair opportunity to lead, and challenge, evidence during the course of the proceeding, thus preventing the parties from providing their version completely and

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<sup>94</sup> *Sidumo* para 58; Grogan *Dismissal* 105; S 192(2) of the *LRA*; Grogan *Workplace Law* 169.

<sup>95</sup> Grogan *Workplace Law* 145; *Springbok* para 68.

<sup>96</sup> Grogan *Dismissal* 105.

<sup>97</sup> Section 193(4) of the *LRA*.

<sup>98</sup> Grogan *Dismissal* 692.

<sup>99</sup> Grogan *Dismissal* 692; *Gibbs* 21-24; Van Niekerk, Smit and Christianson *Law@work* 481; Albertyn 2018 <https://labourman.co.za/when-is-hearsay-evidence-enough-in-a-labour-dispute-case/>; *Nkomati Joint Venture v CCMA* (2019) 40 ILJ 819 (LAC) para 16 (hereinafter the *Nkomati* case).

<sup>100</sup> Grogan *Workplace Law* 474; Van Niekerk, Smit and Christianson *Law@work* 481; Reg 14 in GN R602 in GG 34573 of 2 September 2011; S 138(2) of the *LRA*.

<sup>101</sup> Grogan *Workplace Law* 474; Van Niekerk, Smit and Christianson *Law@work* 481; Reg 14 in GN R602 in GG 34573 of 2 September 2011.

<sup>102</sup> Van Niekerk, Smit and Christianson *Law@work* 488; Grogan *Workplace Law* 475; Grogan *Dismissal* 692.

appropriately.<sup>103</sup> The commissioner's decision(s) should be reasonable. The test for determining if an award is reasonable, is made with reference to whether another commissioner (given the same evidence as during the arbitration proceedings) would reach the same conclusion.<sup>104</sup> Specific reference is made to hearsay evidence throughout this study and it is deemed necessary to understand the meaning of the term "hearsay evidence".

### ***2.3 The law of evidence, the specific meaning of hearsay evidence and expectations towards commissioners***

The term "hearsay evidence" refers to evidence which is provided to the court, whether oral or in writing, with the probative value of this evidence depending upon the credibility of any other person than the person providing this evidence.<sup>105</sup> The main role of the law of evidence is: to determine if the alleged facts are admissible; how these facts are proved; which rules are to be considered to assess the weight of evidence; and which standard of proof is to be fulfilled before the burden of proof is satisfied.<sup>106</sup>

Despite the progresses made in our law, there seems to be an impression amongst legal practitioners that commissioners are uncertain about whether or not hearsay evidence is admissible during dismissal proceedings.<sup>107</sup> This misunderstanding of hearsay evidence seemingly only pertains to the admissibility of hearsay evidence, especially when the other party consents to the admission thereof; and in other circumstances, if the consent from the other party is not the relevant factor, what exactly are the circumstances when hearsay evidence is admissible?<sup>108</sup>

Evidence undoubtedly plays a vital role in adjudicating any matter. The importance of the principles to admit or deny hearsay evidence must take place within the rules of

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<sup>103</sup> *Afrox Ltd v Laka* 1999 5 BLLR 467 (LC) para 4; Van Niekerk, Smit and Christianson *Law@work* 489.

<sup>104</sup> *Sidumo* para 110; Grogan *Workplace Law* 475; *Nkomati* para 15; Van Niekerk, Smit and Christianson *Law@work* 481.

<sup>105</sup> Section 3(4) of the *LEAA*; Schwikkard and Van Der Merwe *Principles of Evidence* 293; Bekink 2017 *De Jure* 186; Naude *SACJ* 320; Whitear 2018 *OBITER* 574.

<sup>106</sup> Schwikkard and Van Der Merwe *Principles of Evidence* 4; Naude *SACJ* 320.

<sup>107</sup> Mahlangu 2019 <http://www.golegal.co.za>; Whitear-Nel 2012 *STELL LR* 241.

<sup>108</sup> Mahlangu 2019 <http://www.golegal.co.za>.

the law of evidence.<sup>109</sup> These include taking into account, *inter alia*, the nature of the proceedings, and the evidence,<sup>110</sup> considering the probative value of the hearsay evidence<sup>111</sup> (by establishing if the hearsay evidence is sufficiently relevant), and weighting the probability of prejudice to the other party against this relevance.<sup>112</sup> The *Guidelines on Misconduct Arbitrations* have to be applied by the commissioners during dismissal proceedings.<sup>113</sup> These rules and guidelines include, but are not limited to: the manner in which commissioners evaluate evidence;<sup>114</sup> and the interpretation of the law by commissioners<sup>115</sup> (especially that hearsay evidence shall not be admitted as evidence unless the commissioner is of the view that other factors should be taken into account, which factors are considered to be in the interest of justice in the commissioner's opinion).<sup>116</sup> In *Food and Allied Workers Union v Amalgamated Beverage Industries Ltd*<sup>117</sup> the Labour Appeal Court found that it is necessary for each party to lay an evidential foundation, as these parties cannot merely rely on the arguments alone. In this judgment the court confirmed that arguments without an evidential foundation is to be considered as a mere inference.<sup>118</sup> Section 145 of the *LRA* provides that any party to a dispute, who asserts that there was a deficiency in any arbitration proceeding, may apply to the LC for an order to set aside the arbitration award.<sup>119</sup> One of the deficiencies listed in the *LRA* is the situation where a commissioner committed a gross irregularity, regarding the conduct during the proceedings.<sup>120</sup> A gross irregularity can occur when the commissioner duly refuses, or unduly allows, the admissibility of hearsay evidence. In *FAWU v Labuschagne*<sup>121</sup> the LC held that hearsay evidence is generally admissible,<sup>122</sup> however, this general rule

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<sup>109</sup> Schwikkard and Van Der Merwe *Principles of Evidence* 4.

<sup>110</sup> Section 3(1)(c)(i) of the *LEAA*; S 3(1)(c)(ii) of the *LEAA*.

<sup>111</sup> Section 3(1)(c)(iv) of the *LEAA*.

<sup>112</sup> Schwikkard and Van Der Merwe *Principles of Evidence* 299; Zeffert and Paizes *The South African Law of Evidence* 427.

<sup>113</sup> Reg 1 in GN R602 in GG 34573 of 2 September 2011.

<sup>114</sup> Reg 48 and 55 in GN R602 in GG 34573 of 2 September 2011.

<sup>115</sup> Reg 6, 7 in GN R602 in GG 34573 of 2 September 2011.

<sup>116</sup> Section 3(1)(c)(vii) of the *LEAA*; Zeffert and Paizes *The South African Law of Evidence* 415; *Southern Sun Hotels* paras 14, 19.

<sup>117</sup> 1994 15 *ILJ* 1057 (LAC) (hereinafter the *Food* case).

<sup>118</sup> *Food* para 12.

<sup>119</sup> Section 145(1) of the *LRA*.

<sup>120</sup> Section 145(2)(a)(ii) of the *LRA*; *Herholdt v Nedbank Ltd* 2013 11 *BLLR* 1074 (SCA) para 10 (hereinafter the *Herholdt* case).

<sup>121</sup> 1998 JOL 4239 (LC) (hereinafter the *Labuschagne* case).

<sup>122</sup> *Labuschagne* para 6.

only relates to applicable, relevant, and reliable hearsay evidence.<sup>123</sup> Arbitration awards are set aside on a regular basis due to the failure by the commissioner to follow the rules of evidence and procedure.<sup>124</sup> In *Karan Beef (Pty) Ltd v Mbovane*<sup>125</sup> the review of the arbitration award was successful on the basis that the commissioner failed to comply with the rules of evidence.<sup>126</sup> Clearly, commissioners need to apply the rule of law when exercising their discretion.<sup>127</sup>

The legislature, clearly alert to the difficulties relating the treatment of hearsay evidence in South African law,<sup>128</sup> formulated the *LEAA*. In *Naraindath v CCMA* the LC found that reliance by a commissioner on hearsay evidence (that the commissioner finds to be reliable) cannot constitute a reviewable irregularity. If the courts have a discretion to find hearsay evidence admissible, so too does a commissioner.<sup>129</sup>

In the *Southern Sun Hotels* case, the Labour Appeal Court held that the legislature seemingly attempts to create an adequate foundation for receiving hearsay evidence.<sup>130</sup> The LAC's description of its understanding of the legislature's objective was to create an adequate indulgence of hearsay evidence. The legislature has provided a test to the courts, in order to determine if hearsay evidence should be admissible or not. An instance in which such evidence is admissible refers to instances where the evidence is in the interest of justice<sup>131</sup> and this test for the admissibility of hearsay evidence during dismissal proceedings was based on whether it would be in the interest of justice to admit the hearsay evidence.<sup>132</sup> It is unlikely that the legislature would demand a higher test for tribunals, in comparison to the test for courts of law, for the admission of hearsay evidence.<sup>133</sup> The LAC held that the factors to determine whether certain hearsay evidence is admissible in the interest of justice, should be

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<sup>123</sup> *Mnguni* para 25.

<sup>124</sup> Whitear-Nel 2012 *Stellenbosch Law Review* 244.

<sup>125</sup> 2008 29 *ILJ* 2959 (LC) (hereinafter the *Karan Beef* case).

<sup>126</sup> *Karan Beef* paras 19-20; *Sidumo* para 102.

<sup>127</sup> Section 138(2) of the *LRA*.

<sup>128</sup> Zeffert and Paizes *The South African Law of Evidence* 405.

<sup>129</sup> *Naraindath* para 42; *Le Grange v Astron Energy (Pty) Ltd* 2020 2 *BALR* 113 (NBCCI) para 35; *Mgobhozi* para 18.

<sup>130</sup> *Southern Sun Hotels* para 13.

<sup>131</sup> *Southern Sun Hotels* para 14.

<sup>132</sup> *Southern Sun Hotels* paras 14, 19.

<sup>133</sup> *Southern Sun Hotels* para 28; *Carephone (Pty) Ltd v Marcus* 1998 11 *BLLR* 1093 (LAC) para 33 (hereinafter the *Carephone* case).

based on all seven factors set out in section 3(1)(c)(i)-(vii) of the *LEAA*.<sup>134</sup> These factors specifically include any other factors, in the court's opinion, which should be taken into account as it is in the interest of justice.<sup>135</sup> The nature of this hearsay evidence was based on Mr Groebel, who testified that Mr Moremi told him that the second respondent threatened Mr Moremi, and this evidence was corroborated by an affidavit of Mr Moremi.<sup>136</sup> The threat by the second respondent was, allegedly, that he (the second respondent) would kill Mr Moremi.<sup>137</sup> The court found this evidence central to both the substantial and procedural fairness of the proceedings, and of the dismissal of the second respondent.<sup>138</sup> Upon considering any other factors that have to be taken into account in the court's opinion,<sup>139</sup> the LAC found that Mr Moremi was not prepared to risk his life to testify, and that he cannot be blamed for that.<sup>140</sup> The court's conclusion, after considering the aforementioned factors, was that the hearsay evidence should have been admitted and that the evidence would then have been sufficient to find that the second respondent threatened Mr Moremi, which led to his substantially fair dismissal.<sup>141</sup> These factors specifically include any other factors, which in the court's opinion should be taken into account because it is in the interest of justice.<sup>142</sup> The SCA in *Giesecke and Devrient Southern Africa* held that there has to be an interrelated and collective approach towards the seven factors in section 3(1)(c)(i)-(vi) of the *LEAA*, as well as any other factors, in the opinion of the court, which should be taken into account. There is great flexibility to admit hearsay evidence with the ultimate goal of necessitating to do what is in the interest of justice.<sup>143</sup> In *S v Ndhlovu*<sup>144</sup> the SCA reaffirmed that commissioners too, will have to be meticulous when

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<sup>134</sup> *Southern Sun Hotels* para 14; S 3(1)(c) of the *LEAA* refers to the nature of proceedings; nature of the evidence; the purpose for tendering the evidence; probative value of the evidence; reasons why evidence is not provided by person upon who's credibility the probative value relies; any prejudice to any party by admitting this evidence; any other factors commissioners are of the view should be taken into account, in the interest of justice.

<sup>135</sup> *Southern Sun Hotels* para 14. See also s 3(1)(c)(vii) of the *LEAA*.

<sup>136</sup> *Southern Sun Hotels* para 17.

<sup>137</sup> *Southern Sun Hotels* paras 17, 24.

<sup>138</sup> *Southern Sun Hotels* para 17.

<sup>139</sup> Section 3(1)(c)(vii) of the *LEAA*.

<sup>140</sup> *Southern Sun Hotels* para 28.

<sup>141</sup> *Southern Sun Hotels* para 29.

<sup>142</sup> *Southern Sun Hotels* para 14; S 3(1)(c)(vii) of the *LEAA*.

<sup>143</sup> *Giesecke* para 31.

<sup>144</sup> 2002 2 SACR 325 (SCA).

considering the hearsay provisions in the *LEAA*, in order to safeguard the fundamental right to a fair dismissal proceeding.<sup>145</sup>

In order to determine the admissibility of hearsay evidence an analysis of the specific seven provisions of section 3(1)(c)(i)-(vii) of the *LEAA* has to be considered, as this section of the *LEAA* allows for exceptions where hearsay evidence is admissible, *contra* to the general rule that hearsay evidence is inadmissible.<sup>146</sup> It was accepted in the *Ndhlovu* matter<sup>147</sup> that if there is no agreement to receive hearsay evidence, the hearsay evidence should not be admitted unless the admission is required in the interest of justice.<sup>148</sup> These determining factors for the admissibility of hearsay evidence is considered in order for these factors to be easily accessible to commissioners, as it is clear from the *LEAA* that the general rule of hearsay evidence (as being inadmissible) is subject to three exceptions.<sup>149</sup>

#### **2.4 Determining factors of the admissibility of hearsay evidence**

During most,<sup>150</sup> if not all, dismissal proceedings the leading of evidence takes place. Commissioners are allowed to conduct dismissal proceedings in a manner which they deem appropriate.<sup>151</sup> The *Constitution* must, however, always be taken into account as it is the supreme law of the Republic of South Africa.<sup>152</sup> Commissioners should also specifically consider the right to a fair hearing as any evidence obtained in a way which infringes any party's fundamental rights (as contained in the Bill of Rights)<sup>153</sup> must be considered to be inadmissible, if the admission of such evidence would render the trial unfair, or if the admission of such evidence will be damaging to the administration of justice.<sup>154</sup>

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<sup>145</sup> *Ndhlovu* para 17.

<sup>146</sup> Schwikkard and Van Der Merwe *Principles of Evidence* 287.

<sup>147</sup> *Ndhlovu* paras 12, 15.

<sup>148</sup> *Ndhlovu* para 12; Whitear-Nel 2012 *STELL LR* 245.

<sup>149</sup> Schwikkard 2003 *SALJ* 63.

<sup>150</sup> *Exxaro Coal* para 20.

<sup>151</sup> Section 138(1) of the *LRA*; *Ndlovu The admission of hearsay evidence* 13.

<sup>152</sup> The Preamble of the *Constitution*.

<sup>153</sup> Chapter 2 of the *Constitution*.

<sup>154</sup> Section 35 of the *Constitution*; Schwikkard and Van Der Merwe *Principles of Evidence* 243.



There is, however, a limitation clause permitting the limitation of a party's rights as contained in the Bill of Rights. This limitation may take place when it is rational and acceptable in an open and democratic society.<sup>155</sup> Hearsay evidence, which as a general rule is inadmissible,<sup>156</sup> is a common encounter for commissioners.<sup>157</sup> Accordingly, there is an expectation that commissioners will apply the applicable law and evidence rules to all the evidence submitted.<sup>158</sup>

In *NUM v CCMA*<sup>159</sup> the LC held that the commissioner took cognisance of the hearsay evidence and his discretion to determine if the admission of the hearsay evidence is in the interest of justice, and the commissioner accordingly found it to be in the interest of justice.<sup>160</sup> The LC further held that the manner in which the commissioner assessed the evidence and assessed the discharge of the onus (on a balance of probabilities) by the third respondent was reasonable, and the commissioner could not be faulted.<sup>161</sup> In the *Exxaro Coal* matter the LAC reaffirmed that a commissioner may adapt the provisions of section 3 of the *LEAA* for dismissal proceedings, and more specifically section 3(1)(c) of the *LEAA*. In application of this section, the word "court" may refer to a commissioner and criminal, or civil, proceedings may refer to dismissal proceedings.<sup>162</sup>

Upon determining the admissibility of hearsay evidence, a commissioner must consider all seven factors as outlined in section 3(1)(c) of the *LEAA*. The first of the seven factors requires a consideration of the nature of the proceedings by commissioners.<sup>163</sup> This includes dismissal proceedings, where commissioners take on an active role in order to obtain the truth, and the ordinary rules of evidence apply subject to the

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<sup>155</sup> Section 36 of the *Constitution*; *Ndhlovu* para 24; Naude 2006 *South African Law Journal of Criminal Justice* 321.

<sup>156</sup> Section 3(1) of the *LEAA*; Schwikkard and Van Der Merwe *Principles of Evidence* 287.

<sup>157</sup> Schwikkard and Van Der Merwe *Principles of Evidence* 298-289.

<sup>158</sup> Reg 1 in GN R602 in GG 34573 of 2 September 2011; Withear-Nel and Hambidge 2020 *Without Prejudice* 44.

<sup>159</sup> 2010 6 BLLR 681 (LC) (hereinafter the *NUM* case).

<sup>160</sup> *NUM* para 24.

<sup>161</sup> *NUM* para 25.

<sup>162</sup> *Exxaro Coal* para 22.

<sup>163</sup> Section 3(1)(c)(i) of the *LEAA*.

requirement of fairness. Thus, commissioners must pay attention to hearsay evidence.<sup>164</sup>

The second factor requires that commissioners must consider the nature of the evidence.<sup>165</sup> The main concern of this factor is the reliability of the evidence offered, and commissioners should consider the straightforwardness of the subject matter together with the lack of contradictory evidence.<sup>166</sup> The third factor requires that commissioners must determine the purpose for which the evidence is submitted.<sup>167</sup> The admissibility of this evidence depends on the extent and consideration of all the listed factors under this subsection.<sup>168</sup>

The fourth factor requires that commissioners must determine the probative value of the evidence offered.<sup>169</sup> Determining the probative value of the evidence, together with the possible prejudicial consequence of the evidence, is legally relevant when the first outweighs the second.<sup>170</sup> Legal relevance is an essential condition for admissibility of hearsay evidence and forms part of the factor to consider, especially if the evidence offered is in the interest of justice.<sup>171</sup> The fifth factor requires that commissioners must determine why the person on whose trustworthiness the probative value of such evidence depends, is not providing the offered evidence, personally.<sup>172</sup>

Hearsay evidence is prejudicial in nature, and this factor requires a party to establish the necessity to offer such evidence.<sup>173</sup> Zeffert<sup>174</sup> stresses the fact that even though a good reason (like the death of a declarant to an affidavit) cannot assure that the evidence offered during the proceedings will be admissible. All the factors should still

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<sup>164</sup> *Ross v South Peninsula Municipality* 2000 4 All SA 85 (C) paras 595-59; Zeffert and Paizes *The South African Law of Evidence* 420; Schwikkard and Van Der Merwe *Principles of Evidence* 297; *Southern Sun Hotels* para 13; *Mgobhozi* para 24; *Edcon* para 15; *Exxaro Coal* para 24; *Van Willing* para 24.

<sup>165</sup> Section 3(1)(c)(ii) of the *LEAA*.

<sup>166</sup> Schwikkard and Van Der Merwe *Principles of Evidence* 298; *Southern Sun Hotels* para 17; *Van Willing* para 26.

<sup>167</sup> Section 3(1)(c)(iii) of the *LEAA*.

<sup>168</sup> Zeffert and Paizes *The South African Law of Evidence* 427; *Van Willing* para 27.

<sup>169</sup> Section 3(1)(c)(iv) of the *LEAA*; *Southern Sun Hotels* para 21.

<sup>170</sup> Whitear 2018 *OBITER* 576.

<sup>171</sup> Zeffert and Paizes *The South African Law of Evidence* 427-428; *Van Willing* para 28.

<sup>172</sup> Section 3(1)(c)(v) of the *LEAA*; *Southern Sun Hotels* para 25.

<sup>173</sup> Schwikkard and Van Der Merwe *Principles of Evidence* 299; Lutchman 2015 *PER* 431.

<sup>174</sup> Zeffert and Paizes *The South African Law of Evidence* 430.

be considered together with the reason for the absence of the specific witness and a commissioner must specifically determine if the evidence offered is in the interest of justice.<sup>175</sup>

The sixth factor: a commissioner must first consider any prejudice that the admission of this evidence might have towards a party.<sup>176</sup> The seventh subsection: a commissioner must consider any other factors which, in his opinion, should be taken into account and should the commissioner be of the opinion that such evidence is admissible due to it being in the interest of justice.<sup>177</sup> These exceptions are factors commissioners could take into account when using their discretion in order to determine the admissibility of the evidence, especially evidence which falls under the category of "in the interest of justice".<sup>178</sup>

For purposes of the remainder of this study, the focus is on the seventh factor, pertaining to when a commissioner has to consider any other factors which in his opinion, should be taken into account in the interest of justice. In the *Sisonke* matter one of the factors by which the appellant was aggrieved was the commissioner's reliance on hearsay evidence, which the appellant deemed to be inappropriate.<sup>179</sup> The LAC once again confirmed that a commissioner may rely on hearsay evidence if the hearsay evidence, in his opinion, is in the interest of justice.<sup>180</sup> The LAC held that there is no absolute prohibition on admitting hearsay evidence during arbitration proceedings.<sup>181</sup> The factors of when hearsay evidence is admissible as set out in the *Southern Sun Hotel* matter was reaffirmed, and the legislature's objective to declare hearsay evidence admissible (in the interest of justice)<sup>182</sup> was also reiterated. Even though the remainder of the bench concurred, additional reasons were provided for the dismissal of this appeal.

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<sup>175</sup> Zeffert and Paizes *The South African Law of Evidence* 431; *Giesecke* para 31.

<sup>176</sup> Section 3(1)(c)(vi) of the *LEAA*; *Van Willing* para 32.

<sup>177</sup> Section 3(1)(c)(vii) of the *LEAA*; *Southern Sun Hotels* para 28.

<sup>178</sup> Schwikkard and Van Der Merwe *Principles of Evidence* 302; Zeffert and Paizes *The South African Law of Evidence* 436.

<sup>179</sup> *Sisonke* para 19(b).

<sup>180</sup> *Sisonke* paras 27, 28.

<sup>181</sup> *Sisonke* para 27.

<sup>182</sup> *Sisonke* para 27; *Southern Sun Hotels* para 19.

The LAC specifically held that the commissioner could not be faulted in the reasoning of the award, as the appellant only relied on one witness and the commissioner considered all the material before him in order to arrive at a reasonable decision. The material included letters provided by the respondent, upon which the appellant's hearsay complaint was based, but this was not the only material before the commissioner.<sup>183</sup>

Since hearsay evidence is generally inadmissible,<sup>184</sup> it is expected of a commissioner to clearly indicate the foundation for the admissibility or inadmissibility of hearsay evidence. This requires a commissioner to make reference to the specific legislation or case law relied on, in order to reach a conclusion.<sup>185</sup> Zeffert<sup>186</sup> indicates that this seventh factor<sup>187</sup> is on the face value thereof, very wide, and potentially far-reaching.

In the *S v Shaik* case, some of the appellants' convictions rested on hearsay evidence offered by the state. The SCA held that sight should not be lost of the true test for the admission of evidence, and the true test is that the hearsay evidence should be in the interest of justice.<sup>188</sup> In the *Van Willing* case the SCA confirmed the use of the seventh factor to admit hearsay evidence, by concluding that the hearsay evidence was admissible because of its high probative value, its reliability, and due to the slim risk of prejudice towards the appellants. The SCA held that the HC dealt with all seven factors and the SCA was not referred to any misdirection in this regard.<sup>189</sup> Therefore, in *Van Willing v S*<sup>190</sup> the Supreme Court of Appeal (SCA) confirmed that the true test for the admission of hearsay evidence, as indicated in *S v Shaik*,<sup>191</sup> is that hearsay evidence should only be admitted after the cumulative consideration of all seven factors indicate that the hearsay evidence should indeed be admitted.<sup>192</sup>

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<sup>183</sup> *Sisonke* paras 39, 40.

<sup>184</sup> Section 3(1) of the *LEAA*; Mujuzi 2020 *ILJ* 812; *Van Willing* para 23.

<sup>185</sup> Mujuzi 2020 *ILJ* 812.

<sup>186</sup> Zeffert and Paizes *The South African Law of Evidence* 415.

<sup>187</sup> Section 3(1)(c)(vii) of the *LEAA*.

<sup>188</sup> *Shaik* para 171.

<sup>189</sup> *Van Willing* para 32; Zeffert and Paizes *The South African Law of Evidence* 416-417.

<sup>190</sup> 2015 JOL 33065 (SCA) para 34 (hereinafter the *Van Willing* case).

<sup>191</sup> 2007 2 All SA 9 (SCA) (hereinafter the *Shaik* case).

<sup>192</sup> *Shaik* para 170.

There is clearly an expectation that a commissioner must be familiar with all seven factors, and must also be aware of when these factors should be applied in order to determine the admissibility of hearsay evidence. During this determination these factors should be considered cumulatively.

## **2.5 Conclusion**

This chapter underlines the powers of commissioners in terms of section 3(1) of the *LEAA*. It also makes reference to the seven factors listed in section 3(1)(c) of the *LEAA*, which indicates when hearsay evidence may be admissible. In the recent *Exxaro Coal* matter the LAC, relying on section 3 of the *LEAA*, again had regard to the admissibility of hearsay evidence. The appeal was based on the commissioner's failure to have due regard for all the factors under section 3(1)(c) of the *LEAA*, in that the commissioner's decision to exclude hearsay evidence was solely based on the fact that the employee failed to give consent to make use of the hearsay evidence.<sup>193</sup> The LAC highlighted additional guidelines, when relying on the *LEAA* and specifically on the seven factors, in order to determine the admissibility of hearsay evidence in dismissal proceedings.<sup>194</sup>

There is still no exception to the rule that the seven factors listed in section 3(1)(c) of the *LEAA* should be considered as a whole. The aim of chapter two is to provide a clear indication of the meaning of the terms "dismissal", "dismissal proceedings" and specifically the meaning of "hearsay evidence", which is of significance to this study. With the clarification of these terms, attention is drawn to the applicability of the law of evidence, specifically when commissioners deal with hearsay evidence. The questions of when a commissioner may admit hearsay evidence during dismissal proceedings in terms of the law of evidence is discussed and an adequate reflection on how commissioners should determine the admissibility of hearsay evidence in terms of section 3(1)(i)-(vii) of the *LEAA* has been presented.

The next question, however, leads to the interpretation of relevant court decisions regarding the admissibility of hearsay evidence. The most recent LAC case law on this matter is the *Exxaro Coal* matter, which is analysed in chapter 3 below, in order to

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<sup>193</sup> Section 3(1)(a) of the *LEAA*; *Exxaro Coal* paras 2, 9.

<sup>194</sup> *Exxaro Coal* para 24.

provide insight into the safeguards available to commissioners when considering the admissibility of hearsay evidence.

## Chapter 3

### 3 Admissibility of hearsay evidence during dismissal proceedings

#### 3.1 Introduction

This chapter focuses on the recent LAC judgment in the *Exxaro Coal* matter, by shedding noteworthy light on the safeguards and precautions available to commissioners when considering hearsay evidence in terms of the *LEAA*, during dismissal proceedings. One of the most compelling reasons for the general rule<sup>195</sup> that hearsay evidence is inadmissible, is because hearsay evidence is considered to be unreliable and might mislead the court.<sup>196</sup>

In *Makhathini v Road Accident Fund*<sup>197</sup> the SCA held that section 3 of the *LEAA* introduces a general statutory exception to the general rule of inadmissibility, only if there is compliance with the preconditions as set out in section 3 of the *LEAA*.<sup>198</sup> The three exceptions<sup>199</sup> to the general rule of the inadmissibility of hearsay evidence in terms of the *LEAA* is: first, where the opposing party against whom the evidence is offered consents to the use of the hearsay evidence;<sup>200</sup> second, where the third person upon whose credibility the probative value of the evidence rests, will testify;<sup>201</sup> and third, where commissioners are of the opinion that hearsay evidence is in the interest of justice.<sup>202</sup> The question of when hearsay evidence is in the interest of justice is the main focus of this chapter and is addressed by analysing the judicial decision of the LAC in the *Exxaro Coal* matter.

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<sup>195</sup> *Makhathini v Road Accident Fund* 2002 1 SA 511 (SCA) para 22 (hereinafter the *Makhathini* case).

<sup>196</sup> Bekink 2017 *De Jure* 187; Schwikkard and Van Der Merwe *Principles of Evidence* 288; *Ndhlovu* para 30.

<sup>197</sup> *Makhathini* para 22.

<sup>198</sup> *Makhathini* para 22.

<sup>199</sup> Whitear 2018 *OBITER* 575; Whitear-Nel 2020 *ILJ* 1589; Mujuzi 2013 *International Journal of Evidence & Proof* 348; Mujuzi 2015 *International Journal of Evidence & Proof* 4.

<sup>200</sup> Section 3(1)(a) of the *LEAA*; *Exxaro Coal* para 18; *Lyttleton Dolomite (Pty) Ltd v NUM obo Lekgau and Others* (ZALCJHB) unreported case number JR288/18 of 11 August 2020 para 22 (hereinafter the *Lyttleton* case); Mujuzi 2013 *International Journal of Evidence & Proof* 350.

<sup>201</sup> Section 3(1)(b) of the *LEAA*; *Exxaro Coal* para 18; Mujuzi 2013 *International Journal of Evidence & Proof* 350.

<sup>202</sup> Section 3(1)(c) of the *LEAA*; *Exxaro Coal* para 18; *Van Willing* para 22; Mujuzi 2013 *International Journal of Evidence & Proof* 350.

In the *Exxaro Coal* matter, the LAC clearly provides additional principles to take into account when dealing with hearsay evidence in dismissal proceedings.<sup>203</sup> Mr Chipana was working in the human resources department when allegations arose that he was selling jobs to members of the public, and accordingly a charge of misconduct in the form of dishonesty was brought against him.<sup>204</sup> A second charge of dishonesty was brought against him in light of the misuse of his position at Exxaro.<sup>205</sup> Grogan<sup>206</sup> describes misconduct as an action by an employee, which can lead to an employee being accountable or blameworthy as the conduct of the employee was avoidable.<sup>207</sup> During Mr Chipana's disciplinary hearing, members of the forensic auditing team (who investigated the allegations) testified about what the complainants told the team of investigators. The complainants also attested to affidavits but were not at the hearing. The alleged reason for their absence being that Mr Chipana was intimidating the witnesses. Mr Chipana was found guilty of misconduct and a recommendation of dismissal was made.<sup>208</sup> The late ruling<sup>209</sup> on the hearsay evidence by the commissioner and the passive attitude towards this evidence by the commissioner was held to be unfair to both parties.<sup>210</sup> The LAC held that the safeguards and precautions of section 3 of the *LEAA*, apply equally to arbitration proceedings in order to ensure fairness and it serves as a guide to commissioners when faced with the admissibility of hearsay evidence.<sup>211</sup> The court held that section 3(1)(c) of the *LEAA* is not a licence for the general admission of hearsay evidence during these proceedings, and that the application of this section, by commissioners, must ensure that fairness is upheld.<sup>212</sup> In terms of section 3(1)(c) of the *LEAA* there are seven factors commissioners have to collectively consider when determining the admissibility of hearsay evidence. The *Exxaro Coal* matter specifically addresses the seventh factor, relating to when hearsay evidence is considered to be in the interest of justice, by adding further safeguards that commissioners have to take into account during their determination (of whether

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<sup>203</sup> *Exxaro Coal* para 24.

<sup>204</sup> *Exxaro Coal* para 5.

<sup>205</sup> *Exxaro Coal* para 6.

<sup>206</sup> Grogan *Workplace Law* 167.

<sup>207</sup> Grogan *Workplace Law* 167.

<sup>208</sup> *Exxaro Coal* para 7.

<sup>209</sup> *Exxaro Coal* para 31.

<sup>210</sup> *Exxaro Coal* paras 25, 29.

<sup>211</sup> *Exxaro Coal* para 24.

<sup>212</sup> *Exxaro Coal* para 24.



or not hearsay evidence is admissible). The seven factors in terms of section 3(1)(c) of the *LEAA* requires commissioners to: have regard to the nature of the proceedings;<sup>213</sup> the nature of the evidence;<sup>214</sup> the purpose for which the evidence is offered;<sup>215</sup> the probative value of the evidence;<sup>216</sup> the reason why the person upon whose credibility the probative value of this evidence depends is not testifying;<sup>217</sup> if this evidence may cause prejudice to any party;<sup>218</sup> and any other factors, which in the commissioners' opinion, should be taken into account, in the interest of justice.<sup>219</sup>

In the *Giesecke* case the SCA made it clear that the purpose of section 3(1)(c) of the *LEAA* was to replace the disproportionate strictness and inflexibility of the common-law position towards hearsay evidence, by forming an alternative path for the admission of hearsay evidence when it is in the interest of justice to do so.<sup>220</sup> The SCA further held that section 3(1)(c) of the *LEAA* necessitates that that courts have regard to the collective and interrelated effect of all seven considerations in the subsections of section 3(1)(c) of the *LEAA* (the seven subsections listed above as the seven factors commissioners have to consider).<sup>221</sup> The SCA confirms that these seven factors must be considered collectively, the definitive goal being to act in the interest of justice.<sup>222</sup> The analyses of section 3(1)(c)(vii), when evidence is considered to be in the interest of justice by commissioners, plays a very important role in arbitration proceedings and is dealt with extensively in paragraph 3.3 below.

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<sup>213</sup> Section 3(1)(c)(i) of the *LEAA*; *Exxaro Coal* para 18; Zeffert and Paizes *The South African Law of Evidence* 417.

<sup>214</sup> Section 3(1)(c)(ii) of the *LEAA*; *Exxaro Coal* para 18; Zeffert and Paizes *The South African Law of Evidence* 421.

<sup>215</sup> Section 3(1)(c)(iii) of the *LEAA*; *Exxaro Coal* para 18; Zeffert and Paizes *The South African Law of Evidence* 426.

<sup>216</sup> Section 3(1)(c)(iv) of the *LEAA*; *Exxaro Coal* para 18; Schwikkard and Van Der Merwe *Principles of Evidence* 299; *Giesecke* para 30; Zeffert and Paizes *The South African Law of Evidence* 427.

<sup>217</sup> Section 3(1)(c)(v) of the *LEAA*; *Exxaro Coal* para 18; Zeffert and Paizes *The South African Law of Evidence* 428.

<sup>218</sup> Section 3(1)(c)(vi) of the *LEAA*; *Exxaro Coal* para 18; Zeffert and Paizes *The South African Law of Evidence* 431.

<sup>219</sup> Section 3(1)(c)(vii) of the *LEAA*; *Exxaro Coal* para 18; Bekink 2017 *De Jure* 187; Whitear 2018 *OBITER* 576; Zeffert and Paizes *The South African Law of Evidence* 436.

<sup>220</sup> *Giesecke* para 28.

<sup>221</sup> *Giesecke* para 31; Mujuzi 2013 *International Journal of Evidence & Proof* 350.

<sup>222</sup> Bekink 2017 *De Jure* 188; Mujuzi 2013 *International Journal of Evidence & Proof* 350; *Giesecke* para 31; *Makhathini* paras 35-36; *Litako v S* 2014 3 ALL SA 138 (SCA) para 71.

Commissioners must carefully consider all the specific and invaluable guidelines provided by the LAC, in the *Exxaro Coal* matter, when it comes to the admissibility of hearsay evidence in dismissal proceedings. In the next section under paragraph 3.2, this study analyses the discretion of commissioners regarding the new safeguards that commissioners must apply, as per the judicial decision in the *Exxaro Coal* matter, with specific reference to the broad overall fairness towards both parties during dismissal proceedings, and the application of section 3(1)(c) of the *LEAA*.

### **3.2 Commissioners discretion, fairness of proceedings and the application of the LEAA**

It is necessary to note that in terms of the *LRA*, commissioners are awarded a discretion.<sup>223</sup> This discretion awarded to commissioners is used in order to determine the manner in which the specific commissioner should conduct a specific dismissal proceeding. Section 138(1)<sup>224</sup> provides that commissioners have a discretion to conduct dismissal proceedings in an appropriate manner which is deemed reasonable by the commissioner, whilst maintaining an environment with a minimum of legal formalities.<sup>225</sup>

The statutory requirements are aimed to determine disputes in a fair and quick manner, but specifically with minimum legal formalities.<sup>226</sup> The commissioner decides how the dismissal proceedings is to be conducted and informs the parties of the form of the proceedings.<sup>227</sup> This approach falls under the discretion of a commissioner, as long as the results of the proceedings are that which another reasonable decision maker could reach, when the exact same issue and evidence is placed before this other decision maker.<sup>228</sup> Commissioners cannot merely admit hearsay evidence or just exclude hearsay evidence in a willy-nilly manner,<sup>229</sup> even with the discretion bestowed

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<sup>223</sup> Section 138(1) of the *LRA*; Reg 12 in GN R602 in GG 34573 of 2 September 2011.

<sup>224</sup> Of the *LRA*; See also Reg 12 in GN R602 in GG 34573 of 2 September 2011.

<sup>225</sup> Section 138(1) of the *LRA*; Reg 12 in GN R602 in GG 34573 of 2 September 2011.

<sup>226</sup> Section 138(1) of the *LRA*; Reg 12 in GN R602 in GG 34573 of 2 September 2011; Malope 2019 *De Rebus* 29; Whitear-Nel 2020 *ILJ* 1587.

<sup>227</sup> Reg 13 in GN R602 in GG 34573 of 2 September 2011.

<sup>228</sup> *Sidumo* para 119; *Herholdt* paras 12, 25.

<sup>229</sup> *Exxaro Coal* para 21; Whitear 2019 <http://www.linkedin.com/pulse/hearsay-evidence-labour-context-new-developments-whitear>; Whitear-Nel 2020 *ILJ* 1588.

upon them. The LAC is now insisting that a commissioner rather applies the *LEAA* in labour proceedings by approaching evidence in the same manner as in a criminal or civil court.<sup>230</sup> Where reference is made to a court in the *LEAA*, the understanding must be that it includes commissioners.<sup>231</sup>

The requirements of the *Exxaro Coal* matter may be seen as challenging in consideration to the discretion of commissioners,<sup>232</sup> but when considering the *Exxaro Coal* matter there has indeed been a variation of the safeguards commissioners should consider regarding the admissibility of hearsay evidence in dismissal proceedings.<sup>233</sup> The LAC, however, indicated that there should be minimum legal formalities but does not propose that commissioners may arbitrarily admit or deny any evidence, including hearsay evidence.<sup>234</sup>

The LAC further held that it is ultimately the commissioner's responsibility to ensure that the proceedings are fair to both sides and there is an expectation that the commissioner knows the law regarding the admission of hearsay evidence.<sup>235</sup> The discretion of a commissioner was therefore not overlooked in the *Exxaro Coal* matter, and section 138 of the *LRA* was taken into consideration in addition to the fact that commissioners are not obligated to apply legislation in the event that the commissioner has good reason to refrain from applying the specific legislation.<sup>236</sup> The LAC however held that this discretion of a commissioner does not suggest that there ought to be zero legal formalities.<sup>237</sup>

According to the LAC any hands-on commissioner will apply the invaluable guidelines of the *LEAA* when dealing with hearsay evidence.<sup>238</sup> The LAC indicated that when a

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<sup>230</sup> *Exxaro Coal* para 22; Whitear-Nel 2020 *ILJ* 1587.

<sup>231</sup> *Exxaro Coal* para 22; Whitear-Nel 2020 *ILJ* 1587.

<sup>232</sup> Whitear-Nel 2001 *ILJ* 1481; Whitear 2019 <http://www.linkedin.com/pulse/hearsay-evidence-labour-context-new-developments-whitear>; Whitear-Nel 2020 *ILJ* 1598.

<sup>233</sup> Malope 2019 *De Rebus* 29.

<sup>234</sup> *Exxaro Coal* paras 18, 21; Whitear 2019 <http://www.linkedin.com/pulse/hearsay-evidence-labour-context-new-developments-whitear>; Whitear-Nel 2020 *ILJ* 1587; Whitear-Nel and Hambidge 2020 *Without Prejudice* 44.

<sup>235</sup> *Exxaro Coal* paras 18, 31.

<sup>236</sup> Reg 4, 5 in GN R602 in GG 34573 of 2 September 2011.

<sup>237</sup> *Exxaro Coal* para 21.

<sup>238</sup> *Exxaro Coal* para 21.

commissioner applies the *LEAA* or any statute for that matter, that it is mandatory for a commissioner to ascertain exactly what the statute entails.<sup>239</sup>

When considering hearsay evidence, there is an expectation to take the probative value, the possibility of prejudice towards a party, and the weight to attach to the hearsay evidence into account.<sup>240</sup> Commissioners should, for purposes of section 3(1)(c), consider the probative value of the hearsay evidence by establishing what the hearsay ought to prove, if found to be admissible, and if this hearsay evidence would be reliable proof.<sup>241</sup> The prejudice to consider pertains to procedural prejudice toward the party against whom the hearsay is submitted.<sup>242</sup>

The distinction which a commissioner makes between the admissibility and the weight attached to hearsay evidence is unavoidable, as the consideration of admissibility contains the consideration of reliability in order to determine the relevance of the hearsay evidence.<sup>243</sup> The reliability of hearsay evidence is considered in relation to all other admissible evidence, and the determination of the weight of the evidence takes place at this point.<sup>244</sup> Commissioners must be objective, with the fairness aspect taken into consideration in terms of the rules of law. It is also important for a commissioner to bear in mind that fairness does not indicate that both parties should be content with the decision or that a compromise should be reached.<sup>245</sup>

The LC rightly indicated that there has been a trend amongst commissioners to allow hearsay evidence, without testing the admissibility, but merely deciding the weight or probative value to attach to the hearsay evidence.<sup>246</sup> In *Minister of Police v M*<sup>247</sup> the LC found that the application, by the South African Police Service (SAPS), to have transcripts of the internal disciplinary hearing admitted as hearsay evidence was

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<sup>239</sup> *Exxaro Coal* para 18; Reg 4 in GN R602 in GG 34573 of 2 September 2011.

<sup>240</sup> Schwikkard 2003 *ILJ* 66; *POPCRU obo Maseko v Department of Correctional Services* 2011 BLLR 450 (LC) paras 47-48; Naude 2006 *South African Journal of Criminal Justice* 320.

<sup>241</sup> Schwikkard 2003 *ILJ* 66.

<sup>242</sup> Schwikkard 2003 *ILJ* 66; *Ndlovu* para 49.

<sup>243</sup> Schwikkard 2003 *ILJ* 66.

<sup>244</sup> Schwikkard 2003 *ILJ* 67.

<sup>245</sup> Hanekom *The Application of the Hearsay Rule in Labour Law Proceedings* 19.

<sup>246</sup> Whitear 2019 <http://www.linkedin.com/pulse/hearsay-evidence-labour-context-new-developments-whitear>.

<sup>247</sup> 2017 38 *IJL* 402 (LC) (hereinafter the *M* case).

correctly admitted, based on section 3(1)(c)(vii) as being in the interest of justice.<sup>248</sup> The LC held that the failure of a commissioner to attach sufficient weight to hearsay evidence may establish an irregularity or substantial error.<sup>249</sup> Commissioners are obligated to consider all the relevant evidence received during dismissal proceedings.<sup>250</sup> The LAC's judgment in the *Exxaro Coal* matter indicates that the admission of hearsay evidence without applying section 3 of the *LEAA*, is not evidence at all.<sup>251</sup> Both the nature and probative value of hearsay evidence are considered before commissioners find hearsay evidence to be admissible, and only thereafter is relevant weight attributed to the specific hearsay evidence.<sup>252</sup>

In *Minister of Police v M* the LC indicated that it would be a reviewable irregularity to either assign too much, or too little, weight to hearsay evidence.<sup>253</sup> Hearsay evidence is a familiar form of evidence received by commissioners during arbitration proceedings. When commissioners determine the admissibility of hearsay evidence, it should be when the specific hearsay evidence is considered to be in the interest of justice.<sup>254</sup> An analysis follows in paragraph 3.3 below, detailing the new safeguards incorporated into labour law by the LAC, specifically in light of the admissibility of hearsay evidence, when commissioners consider the hearsay evidence to be in the interest of justice in terms of the *LEAA*.

### **3.3 Admissibility of hearsay evidence being in the interest of justice**

Commissioners can exercise their discretion in terms of section 3 of the *LEAA*, as this part of the law applies equally to arbitration proceedings, in order to ensure fairness and to serve as a guide to commissioners when considering hearsay evidence.<sup>255</sup> Therefore, in dismissal proceedings, any other factors a commissioner deems necessary may be taken into account as to allow hearsay evidence in the interest of

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<sup>248</sup> *M* para 6; Bekink 2017 *De Jure* 189.

<sup>249</sup> *M* paras 35-37; Bekink 2017 *De Jure* 189.

<sup>250</sup> Reg 48, 52, 55 in GN R602 in GG 34573 of 2 September 2011.

<sup>251</sup> *Exxaro Coal* para 19; *Ndhlovu* para 14; Malope 2019 *De Rebus* 29.

<sup>252</sup> Whitear-Nel 2020 *ILJ* 1595; Schwikkard 2003 *ILJ* 66.

<sup>253</sup> *M* para 43.

<sup>254</sup> Bekink 2017 *De Jure* 187.

<sup>255</sup> *Exxaro Coal* paras 19, 24.

justice.<sup>256</sup> The decision to admit hearsay evidence due to the opinion of a commissioner, because the evidence is in the interest of justice, should be a rational decision and must be based on all relevant factors.<sup>257</sup> In *Musi AJA in Public Servant's Association of SA v Minister: Department of Home Affairs*<sup>258</sup> the LAC ruled that courts may receive hearsay evidence if the interest of justice<sup>259</sup> and it requires the hearsay evidence to then be admitted.<sup>260</sup>

There is an expectation that commissioners ought to be familiar with hearsay evidence, that commissioners can readily identify hearsay evidence, and that commissioners will apply the *LEAA* when considering hearsay evidence.<sup>261</sup> Previous case law provides guidance in this regard, and there has been an evolution in the labour law regarding hearsay evidence. The LAC imported<sup>262</sup> specific safeguards, including that which a commissioner must take into consideration when determining the admissibility of hearsay evidence, in terms of section 3(1)(c) of the *LEAA*.

Commissioners considering the available aspects will have to consider the six safeguards as indicated in the *Exxaro Coal* matter, regarding the admissibility of hearsay evidence considered to be in the interest of justice. First, section 3(1)(c) of the *LEAA*, is not authority for across-the-board admissions of hearsay evidence in dismissal proceedings;<sup>263</sup> second, in applying section 3(1)(c) commissioners should uphold the requirement that arbitration proceedings should be fair;<sup>264</sup> third, commissioners should be attentive to the introduction of hearsay evidence during the proceedings, and should refrain from being passive in this regard;<sup>265</sup> fourth, if a party will rely on hearsay evidence, this must be made known by that party as early as possible and commissioners should at the beginning of the proceedings call for an

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<sup>256</sup> Section 3(1)(c)(vii) of the *LEAA*; Bekink 2017 *De Jure* 187; Naude 2006 *South African Journal of Criminal Justice* 320.

<sup>257</sup> Whitear-Nel 2012 *STELL LR* 251; Truter 2019 <https://www.labourwise.co.za/labour-articles/hearsay-evidence-in-disciplinary-and-arbitration-hearings>.

<sup>258</sup> 2013 3 BLLR 237 (LAC) (hereinafter the *Musi AJA* case).

<sup>259</sup> *Shaik* para 171; *Musi AJA* para 19.

<sup>260</sup> *Musi AJA* para 19.

<sup>261</sup> *Exxaro Coal* para 20; Whitear-Nel 2020 *ILJ* 1593; Hanekom *The Application of the Hearsay Rule in Labour Law Proceedings* 11.

<sup>262</sup> Whitear-Nel *ILJ* 1593; *Exxaro Coal* paras 24, 34.

<sup>263</sup> *Exxaro Coal* para 24; Whitear-Nel 2020 *ILJ* 1593.

<sup>264</sup> *Exxaro Coal* para 24; Whitear-Nel 2020 *ILJ* 1593.

<sup>265</sup> *Exxaro Coal* para 24; Whitear-Nel 2020 *ILJ* 1593.

indication from the parties if they have such an intention;<sup>266</sup> fifth, commissioners should provide an explanation regarding the important provisions of section 3(1)(c) or at least provide an explanation of the fair standard and procedures commissioners use when considering the admissibility of hearsay evidence;<sup>267</sup> last, commissioners must rule on the admissibility of hearsay evidence in a timely fashion, the timing of this ruling is fundamental to ensure the fairness of the arbitration proceedings.<sup>268</sup>

The LAC specifically indicates that these safeguards are adaptable to arbitration proceedings, due to the similarities between civil and arbitration proceedings.<sup>269</sup> The application of these safeguards are to ensure fairness and aimed to provide guidance to commissioners when applying section 3(1)(c) of the *LEAA*, specifically in regards to hearsay evidence.<sup>270</sup> These six safeguards are considered individually in paragraph 3.3.1 below, to assure the understanding of each safeguard.

### *3.3.1 Safety measures when determining admissibility of hearsay evidence*

The *Exxaro Coal* matter introduced the following safety measures into labour law, when commissioners have to determine the admissibility of hearsay evidence, which is considered to be in the interest of justice. The LAC's first safeguard indicates that commissioners cannot accept hearsay evidence unconditionally by simply referring to section 3(1)(c).<sup>271</sup> This highlights the fact that commissioners must always ensure that fairness prevails. This safeguard is in line with the CCMA Guidelines regarding misconduct arbitrations, where the CCMA specifically indicates that commissioners must comply with each element of section 33(1) of the *Constitution*.<sup>272</sup>

The three elements in section 33(1) of the *Constitution* is the right of everyone to fair actions which are lawful, reasonable and procedurally fair.<sup>273</sup> The CCMA and all

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<sup>266</sup> *Exxaro Coal* para 24; Whitear-Nel 2020 *ILJ* 1594.

<sup>267</sup> *Exxaro Coal* para 24; Whitear-Nel 2020 *ILJ* 1594.

<sup>268</sup> *Exxaro Coal* para 24; Whitear-Nel 2020 *ILJ* 1595; Mujuzi 2020 *ILJ* 819.

<sup>269</sup> *Exxaro Coal* para 24.

<sup>270</sup> *Exxaro Coal* para 24.

<sup>271</sup> Malope 2019 *De Rebus* 29.

<sup>272</sup> Reg 10 in GN R602 in GG 34573 of 2 September 2011.

<sup>273</sup> Reg 10 in GN R602 in GG 34573 of 2 September 2011.

commissioners have an obligation to interpret and apply the *LRA* and other legislation in accordance with judicial decisions of courts, such as the LAC.<sup>274</sup>

The first safeguard should theoretically not be a new safeguard to commissioners, as this safety measure is already part of the commissioners' CCMA Guidelines. The second safeguard indicates that a commissioner must be careful not to compromise fairness.<sup>275</sup> This forms part of the CCMA Guidelines as well as the *LRA*<sup>276</sup> and the expectation towards a commissioner to adhere to all the safeguards.<sup>277</sup> These guidelines are also an obligation on commissioners to adhere to the aim to create arbitration awards that are lawful, reasonable, and fair. This obligation towards commissioners are drawn directly from section 33(1) of the *Constitution*, which specifies that everyone has a right to administrative action which is lawful, reasonable, and procedurally fair.<sup>278</sup>

A commissioner must therefore guide against failure in order to ensure the lawful, reasonable, and procedurally fair dismissal proceedings. These three elements are fundamental rights of each and every person in South Africa, including both parties to dismissal proceedings.

The third safeguard indicates that a commissioner must be alert to the introduction of hearsay evidence and proactively deal with this hearsay evidence.<sup>279</sup> In *Ndhlovu v S*<sup>280</sup> the SCA held that a presiding officer may not passively listen to hearsay evidence and that there is a duty on presiding officers, or for that matter, commissioners to safeguard the fundamental rights of both parties to a fair trial.<sup>281</sup> Parties to dismissal proceedings may give evidence, call witnesses, question witness, and provide concluding arguments.<sup>282</sup> Even though commissioners may decide the form of the

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<sup>274</sup> Reg 6 in GN R602 in GG 34573 of 2 September 2011.

<sup>275</sup> *Exxaro Coal* para 24; Whitear-Nel 2020 *ILJ* 1593; Zeffert and Paizes *The South African Law of Evidence* 432.

<sup>276</sup> Reg 12 in GN R602 in GG 34573 of 2 September 2011; S 138(1) of the *LRA*.

<sup>277</sup> Section 138(6) of the *LRA*.

<sup>278</sup> Reg 10 in GN R602 in GG 34573 of September 2011; Israelstam date unknown <https://www.labourguide.co.za/ccma-information/169-CCMA-guidelines-will-promote-consistency>.

<sup>279</sup> *Exxaro Coal* para 24; Whitear-Nel 2020 *ILJ* 1593; Zeffert and Paizes *The South African Law of Evidence* 420.

<sup>280</sup> 2002 2 SACR 325 (SCA).

<sup>281</sup> *Ndhlovu* para 17.

<sup>282</sup> See Reg 12 in GN R602 in GG 34573 of 2 September 2011; S 138(2) of the *LRA*.



dismissal proceedings, the rights of parties as per section 138(2) of the *LRA* irrespectively remains.<sup>283</sup> The introduction of hearsay evidence is therefore an ever looming possibility. The fourth safeguard indicates that commissioners must, from the outset of dismissal proceedings, inquire if either of the parties will rely on hearsay evidence, to prevent surprises and to assure that each party understands the evidentiary challenge.<sup>284</sup>

In civil proceedings, the submission of hearsay evidence is commonly received by the opposing party as a surprise, creating a situation where there is limited, or no time to formulate a foundation for challenging the credibility of the hearsay evidence.<sup>285</sup> By obligating a commissioner to ascertain this aspect as early as possible, this aspect can contribute to the fairness of the dismissal proceedings, as well as fairness towards all the parties involved in the proceedings.<sup>286</sup> Regulation 20.9<sup>287</sup> specifically makes reference to the duty of a commissioner to inform the parties if the evidence of a witness is in dispute, that the opposing party should eventually question the witness regarding the evidence in dispute, and place its version to the witness in order for the witness to respond to its version.<sup>288</sup>

The fifth safeguard indicates that commissioners must explain section 3 of the *LEAA* regarding the admission of hearsay evidence, alternatively, the commissioner must explain any other procedure which the commissioner will be following in order to consider evidence.<sup>289</sup> Commissioners must, however, follow the provisions of recent binding decisions.<sup>290</sup> Where a commissioner could decide to make use of a different approach if good reasons are shown,<sup>291</sup> the application of the rigid common-law approach has been found to be inconsistent with fairness and reasonableness.<sup>292</sup> It is noteworthy that in the first stage of the dismissal proceedings, a commissioner is

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<sup>283</sup> See Reg 15 in GN R602 in GG 34573 of 2 September 2011.

<sup>284</sup> *Exxaro Coal* para 24; *Whitear-Nel* 2020 *ILJ* 1594.

<sup>285</sup> Schwikkard and Van Der Merwe *Principles of Evidence* 288-289.

<sup>286</sup> *S v Molimi* 2008 3 SA 608 (CC) paras 42, 54 (hereinafter the *Molimi* case); *Van der Walt v S* 2020 2 SACR 371 (CC) paras 25-26, 28 (hereinafter the *Van der Walt* case).

<sup>287</sup> In GN R602 in GG 34573 of 2 September 2011.

<sup>288</sup> *Nkomati* para 5.

<sup>289</sup> *Exxaro Coal* para 24; *Whitear-Nel* 2020 *ILJ* 1594.

<sup>290</sup> Reg 7 in GN R602 in GG 34573 of 2 September 2011.

<sup>291</sup> Reg 5 in GN R602 in GG 34573 of 2 September 2011; *Edcon* para 15.

<sup>292</sup> *Exxaro Coal* para 21.

expected to welcome parties and advise the parties on certain aspects, including the rules of the proceedings (for example, how and when to raise objections).<sup>293</sup> It further includes that a commissioner should advise parties of their rights in terms of section 138(2) of the *LRA*<sup>294</sup> and the requirements of when evidence is in dispute, the questioning of witnesses at the appropriate stage, placing the party's version to the witness, and the opportunity of the witness to respond.<sup>295</sup>

Regulation 21<sup>296</sup> indicates that when a party's representative does not understand the nature of proceeding and this failure of knowledge prejudices the party, a commissioner should draw the specific party's attention to this, including: the failure to lead proper evidence under oath;<sup>297</sup> the failure of proper cross-examination, or indicating the party's version;<sup>298</sup> or when a new version is provided during the proceedings.<sup>299</sup> In *Nkomati Joint Venture v CCMA* the main issue pertained to the nature and extent of a commissioner's duties to assist parties who are legally unrepresented. The court held that there is indeed a duty on presiding officers to assist these parties with their conduct during arbitration proceedings.<sup>300</sup>

In the *Ndhlovu* matter<sup>301</sup> the SCA specifically indicates that the *LEAA* cannot be relied upon if the presiding officer failed to explain the provisions of section 3 of the *LEAA* to an unrepresented accused.<sup>302</sup> The sixth and final safeguard incorporated into labour law by the LAC, indicates that a commissioner must make a timeous ruling on the admissibility of hearsay evidence.<sup>303</sup> The failure to make a timeous ruling on the admissibility of hearsay evidence is prejudicial to the opposing party as it creates uncertainty regarding exactly which case the opposing party has to meet,<sup>304</sup> and the late ruling on the admissibility of hearsay evidence will also prejudice the interest of

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<sup>293</sup> Reg 20.5 in GN R602 in GG 34573 of 2 September 2011.

<sup>294</sup> See Reg 20.6 in GN R602 in GG 34573 of 2 September 2011.

<sup>295</sup> See Reg 20.9 in GN R602 in GG 34573 of 2 September 2011.

<sup>296</sup> In GN R602 in GG 34573 of September 2011.

<sup>297</sup> Reg 21.1 in GN R602 in GG 34573 of September 2011.

<sup>298</sup> Reg 21.2 in GN R602 in GG 34573 of September 2011.

<sup>299</sup> Reg 21.3 in GN R602 in GG 34573 of September 2011.

<sup>300</sup> *Nkomati* paras 4-5.

<sup>301</sup> 2002 2 SACR 325 (SCA).

<sup>302</sup> *Ndhlovu* para 17.

<sup>303</sup> *Exxaro Coal* para 24; *Whitewar-Nel* 2020 *ILJ* 1595; *Mujuzi* 2020 *ILJ* 819; *Ndhlovu* para 18.

<sup>304</sup> *Molimi* paras 42, 54; *Van der Walt* paras 25-26, 28.

justice.<sup>305</sup> In terms of the CCMA Guidelines, each party has the opportunity to question witnesses and challenge testimonies during stage four of the proceedings.<sup>306</sup> It will not be possible for parties to make use of such an opportunity, in the event that a commissioner fails to make a ruling on the admissibility of the hearsay evidence, as and when it is presented.

Commissioners are expected to advise parties on how to present evidence and how to test evidence. Commissioners should also take into consideration the experience of the parties or their legal representatives in appearing at dismissal proceedings.<sup>307</sup> Failure to raise an objection to hearsay evidence by the party against whom it is introduced, is not unexpected, as many people are unrepresented during dismissal proceedings.<sup>308</sup> It is here where a commissioner is expected to refrain from taking in a passive attitude.<sup>309</sup> In the *Nkomati* matter the LAC referred to the duty of a commissioner to intervene in accordance with the CCMA Guidelines.<sup>310</sup> The CCMA Guidelines<sup>311</sup> refers to the duty of a commissioner at the start of the dismissal proceedings and also refers to the advice a commissioner must provide to the parties, especially in Regulation 20 and Regulation 21. This is also known as the so-called "helping hand" principle.<sup>312</sup>

The LAC clarified that the reasoning by the LC, indicating that the helping hand principle was dispensed with in the *Sidumo* matter, is incorrect.<sup>313</sup> Prevention of procedural defects is one of the purposes of the helping hand principle, in order to ensure a complete ventilation of the disputes and a fair trial of the issues.<sup>314</sup> An unreasonable award as well as an incident where the nature of enquiries is flawed, due to the failure by a commissioner to properly ventilate the issues, are both reviewable irregularities.<sup>315</sup>

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<sup>305</sup> *Molimi* paras 43, 55; *Van der Walt* para 30.

<sup>306</sup> Reg 31 in GN R602 in GG 34573 of 2 September 2011.

<sup>307</sup> Reg 32, 32.5 in GN R602 in GG 34573 of 2 September 2011.

<sup>308</sup> *Whitear-Nel* 2020 *ILJ* 1595.

<sup>309</sup> *Exxaro Coal* para 29.

<sup>310</sup> *Nkomati* para 18.

<sup>311</sup> See GN R602 in GG 34573 of 2 September 2011.

<sup>312</sup> *Nkomati* para 5.

<sup>313</sup> *Nkomati* para 18.

<sup>314</sup> *Nkomati* para 18.

<sup>315</sup> *Nkomati* para 18.

When a commissioner realises, as in the *Nkomati* matter, that a representative for example, is unaware that he has to lead evidence regarding the merits of the matter, the commissioner must apply the helping hand principle, by indicating the entitlement of a party to reopen its case and lead the necessary evidence regarding the merits of the matter.<sup>316</sup>

It is clear from the safeguards provided by the courts that commissioners cannot remain passive during dismissal proceedings, and that commissioners have to apply and comply with the *LRA*, any codes of good conduct, as well as judicial decisions of courts which are binding on them.

### **3.4 Conclusion**

In the *Exxaro Coal* matter the admissibility of the hearsay evidence was only addressed during the closing arguments and the ruling on admissibility was only made in the award, finding the hearsay evidence to be inadmissible.<sup>317</sup> When considering the six safeguards of the *Exxaro Coal* matter, it would seem that all six safeguards have specifically formed part of codes of good conduct, the *LRA*, and previous case law. Given that not all six safeguards have specifically been addressed from a labour law context, all six safeguards have indeed been addressed in judicial decisions binding on commissioners. The nature of these safety measures are not that extreme as to create dismissal proceedings that now consist of tremendous amounts of legal formalities, as the main objectives of the *LRA* is still adhered to, and the labour law is merely evolving.<sup>318</sup>

Procedural fairness requires commissioners to intervene in accordance with the CCMA Guidelines and the failure to comply with the CCMA Guidelines will result in an unreasonable award being made.<sup>319</sup> The timing of a ruling on hearsay evidence and passiveness by a commissioner during these proceedings are inconsistent with a

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<sup>316</sup> *Nkomati* para 21.

<sup>317</sup> *Exxaro Coal* para 28.

<sup>318</sup> Section 138(1) of the *LRA*; Grogan *Dismissal* 691; Basson *et al The New Essential Labour Law Handbook* 385; *Ramabulana* paras 7, 11.

<sup>319</sup> *Sidumo* para 110; Grogan *Workplace Law* 475; *Nkomati* para 15; Van Niekerk, Smit and Christianson *Law@work* 481.

commissioner's duty to determine disputes fairly or quickly.<sup>320</sup> The LAC found that a prompt address on the admissibility of hearsay evidence in this regard could result in quicker and cheaper determinations of the dispute.<sup>321</sup>

The LC reaffirmed the helping hand principle in the matter of *Lyttleton Dolomite v NUM obo A Lekgautu* CCMA Guidelines under Regulation 20 and Regulation 21.<sup>322</sup> The issue in the *Lyttleton* matter pertained to the commissioner's process in making a ruling regarding the admissibility of the hearsay evidence,<sup>323</sup> and it was accepted that section 3(1) of the *LEAA* fundamentally means that hearsay evidence is to be excluded without an agreement to receive the hearsay evidence, unless it would be in the interest of justice to find the hearsay evidence admissible.<sup>324</sup>

Commissioners therefore have the CCMA Guidelines, the *LRA*, recent case law and all codes of conduct to guide them, when determining the admissibility of hearsay evidence.<sup>325</sup> The safeguards as set out by the LAC for commissioners when considering the admissibility of hearsay evidence is definitely a precaution to ensure that all proceedings, including dismissal proceeding, are dealt with in a fair, expeditious, and cost-effective manner.

It is clear that the LAC obliges commissioners to refer to the *LEAA* when dealing with hearsay evidence. The LAC, however, took into account that hearsay evidence can be overwhelming and therefore provides safeguards to ensure fairness.<sup>326</sup> The promotion of fairness in dismissal proceedings, as reflected in section 138 of the *LRA* and in the codes of good conduct, in my view, merely reaffirms and reminds commissioners to resolve disputes in a prompt, fair, cost effectively manner, and save for the obligation to apply the *LEAA*, in a manner with as little as possible legal formalities.

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<sup>320</sup> *Exxaro Coal* para 29.

<sup>321</sup> *Exxaro Coal* para 29.

<sup>322</sup> *Lyttleton* para 16; *Nkomati* para 819; Reg 20, 21 in GN R602 in GG 34573 of September 2011.

<sup>323</sup> *Lyttleton* para 19.

<sup>324</sup> *Lyttleton* para 23; *Ndhlovu* para 14, 16.

<sup>325</sup> Section 138(6) of the *LRA*.

<sup>326</sup> *Exxaro Coal* para 24; Mujuzi 2020 *ILJ* 819.

In light of this study's findings, the researcher proceeds to make recommendations and draw a final conclusion regarding the determination of admissibility of hearsay evidence during dismissal proceedings, in chapter 4 below.

## Chapter 4

### 4 Recommendations and conclusion

#### 4.1 Introduction

The aim of this study is to provide an informal guide to commissioners in practice, regarding the latest safeguards available to them when considering the admissibility of hearsay evidence during dismissal proceedings. The right of each and every person to fair labour practices<sup>327</sup> forms part of every person's fundamental rights in South Africa,<sup>328</sup> which includes fair dismissal proceedings.

Dismissal proceedings are discussed in chapter 2, which includes the fact that objective third parties (commissioners) will consider the dispute between the parties and make a decision after the consideration of both versions.<sup>329</sup> It is indicated that these proceedings are to be dealt with in a quick and fair manner, with minimum legal formalities,<sup>330</sup> although legal formalities that form part of the principles of natural justice can, however, not be discarded.<sup>331</sup> Determining of the admissibility of hearsay evidence during the dismissal proceedings, leads to an analysis of previous judicial decisions regarding section 3 of the *LEAA* in chapter 3. It is indicated that commissioners have a discretion to conduct proceedings in any manner they deem to be reasonable.<sup>332</sup>

The study indicates the clear existence of a general statutory exception regarding the admissibility of hearsay evidence, despite the general rule being that hearsay evidence is inadmissible.<sup>333</sup> It is further indicated, in chapter 3, that this legal exception in terms of the *LEAA*, shall only be applicable if the hearsay evidence complies with all the requirements set out in section 3 of the *LEAA*.<sup>334</sup> The expectation towards

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<sup>327</sup> Section 23(1) of the *Constitution*.

<sup>328</sup> Chapter 2 of the *Constitution*.

<sup>329</sup> Section 138 of the *LRA*.

<sup>330</sup> Section 138 of the *LRA*.

<sup>331</sup> Grogan *Dismissal* 691; Basson *et al The New Essential Labour Law Handbook* 385; Ramabulana paras 7, 11; Mnguni para 25.

<sup>332</sup> Sidumo para 119; Herholdt paras 12, 25.

<sup>333</sup> Section 3(1) of the *LEAA*; Schwikkard and Van Der Merwe *Principles of Evidence* 287.

<sup>334</sup> Makhathini para 22.

commissioners, in their approaches regarding the admissibility of hearsay evidence in terms of the *LEAA* is illuminated, based on case law as discussed throughout chapter 3.

Once these statutory provisions are indicated, paragraph 3.3.1 of the study proceeds to take a deep dive into the compulsory safeguards from the LAC, regarding the additional six safety measure to be taken into consideration by commissioners when determining the admissibility of hearsay evidence in the interest of justice, as per the *LEAA*.<sup>335</sup> It is impossible to ignore the discretion of commissioners specified in section 138 of the *LRA*. It is, however, indicated that this discretion of a commissioner does not mean that a commissioner may apply a lesser standard of procedural law when it comes to hearsay evidence.<sup>336</sup>

There can never be an insinuation by section 138 of the *LRA* that a commissioner may ignore the law or create their own law,<sup>337</sup> and the interpretation and application of section 3(1)(c) of the *LEAA* can consequently not be made less technical. In *POPCRU obo Maseko v Department of Correctional Services* the LC confirmed that the test in terms of section 3 of the *LEAA* should be applied when hearsay evidence is received in statutory arbitration proceedings.<sup>338</sup> The LC further held that awards of commissioners may be set aside: if commissioners fail to ask the right questions in applying the principles of section 3(1)(c) of the *LEAA*; if a commissioner ignores relevant aspects, and take note of irrelevant aspects; and if such irregularities regarding the admission of hearsay evidence could be seen as a gross irregularity, resulting in the award being set aside.<sup>339</sup>

There is also confirmation from the LC that the common-law rules regarding hearsay evidence in both civil and criminal courts was replaced by section 3 of the *LEAA*<sup>340</sup> and the LAC (in the *Exxaro Coal*/matter) confirmed that commissioners should adapt section

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<sup>335</sup> *Exxaro Coal* para 24.

<sup>336</sup> Hanekom *The Application of the Hearsay Rule in Labour Law Proceedings* 11.

<sup>337</sup> Hanekom *The Application of the Hearsay Rule in Labour Law Proceedings* 12-13.

<sup>338</sup> *Maseko* para 42.

<sup>339</sup> *Maseko* paras 47-48.

<sup>340</sup> *Maseko* para 41.



3 of the *LEAA* to be imported into the labour context, including the determination of hearsay evidence during dismissal proceedings.

When commissioners read section 3 of the *LEAA* the word "commissioner" should be read in where reference is made to the word "court", be it a criminal or civil court.<sup>341</sup> Therefore, any decisions in criminal cases or civil cases, regarding the determination of the admissibility of hearsay evidence in terms of the *LEAA*, should be considered as imported into the labour law context.

#### **4.2 Recommendations based on the findings of the study**

One of the main objectives of the *LRA* is to ensure an atmosphere consisting of relatively simple procedures, to quickly resolve disputes between parties, and that dismissal proceedings should have as few legal formalities as possible.<sup>342</sup> It appears from the researcher's findings that the *Exxaro Coal* matter is introducing some measures of legal formality, in light with the LAC's indication that some measure of formality is more acceptable than unfairness towards any party.<sup>343</sup> The LAC's finding in the *Exxaro Coal* matter, also coincides and reaffirms the *Naidu* case's confirmation of the concept of uniformity and the fact that the *Guidelines on Misconduct Arbitrations* inspires the consistency of decision-making in dismissal proceedings.<sup>344</sup>

The fact remains that both parties to dismissal proceedings should ensure that they have enough evidence to place before the commissioner, in order to create a situation in which the commissioner can make a finding based on the provided facts, as well as all the evidence produced. It is clear from the researcher's findings that commissioners cannot be expected to make a sound award with only some of the facts, or by only relying on some of the evidence, which is necessary to prove and support a party's version of events.

The introduction of some measure of legal formalities in dismissal proceedings, especially when considering hearsay evidence in terms of the *LEAA*, by the *Exxaro Coal*

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<sup>341</sup> *Exxaro Coal* para 22.

<sup>342</sup> Section 138 of the *LRA*.

<sup>343</sup> *Exxaro Coal* para 24.

<sup>344</sup> *Naidu* para 35; Reg 3 in GN R224 in GG 38573 of 17 March 2015.

matter, does not seem to be welcomed by all. There have been specific indications that the legal formality regarding hearsay evidence is inappropriate, seeing that labour dispute resolutions were not meant to follow such unquestioning imitation of procedures prescribed for criminal courts.<sup>345</sup> The researcher respectfully submits that commissioners ought to know the law, and the codes of conduct, and notwithstanding their discretions, must always ensure the fairness of proceedings.

Accordingly, it is recommended that commissioners properly consider the admissibility of hearsay evidence in terms of the jurisprudence, codes of conduct, and the CCMA Guidelines, in order to obtain the necessary guidance when attending to dismissal proceedings. This first recommendation is made specifically regarding all the relevant factors under section 3(1)(c) of the *LEAA*, which ought to be taken into account cumulatively by commissioners, when considering the interest of justice.<sup>346</sup>

Therefore, section 3(1)(c) of the *LEAA* is one of the statutory provisions a commissioner ought to know by heart. Second, when applying section 3(1)(c) of the *LEAA*, procedural fairness as a whole (regarding both parties) must be upheld by the commissioner. Third, a commissioner ought to be alert to the introduction of hearsay evidence and should refrain from remaining passive if hearsay evidence is introduced. Whether there is an objection from the opposing party or not, there is an obligation on the commissioner to safeguard both parties' fundamental rights to a fair dismissal proceeding. Fourth, a commissioner must ask both parties at the beginning of the proceedings, if there might be an intention to submit hearsay evidence during the dismissal proceedings. This must be done as soon as possible and goes hand-in-hand with the fifth recommendation. Fifth, a commissioner ought to explain the provisions of section 3(1)(c) of the *LEAA* to the parties.

It is therefore recommended that the explanation takes place at the beginning of the dismissal proceedings. The researcher submits, if the provision 3(1)(c) of the *LEAA* is explained at the beginning of dismissal proceedings, it would be easier for a commissioner to ascertain if any of the parties are intending to submit hearsay

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<sup>345</sup> Whitear 2019 <http://www.linkedin.com/pulse/hearsay-evidence-labour-context-new-developments-whitear>; Whitear-Nel 2020 *ILJ* 1587.

<sup>346</sup> *Exxaro Coal* para 36; Mahlangu 2019 <http://www.golegal.co.za>.

evidence during the course of the dismissal proceedings, and consequently prevent prejudice to the both parties.<sup>347</sup> It is further recommended that the already existing information sheet<sup>348</sup> available on the CCMA's website, which explains the different components of an arbitration, should be amended. This suggested amended information sheet should include the meaning of hearsay evidence in understandable language, that parties will be expected to indicate that they have the intention to refer to hearsay evidence at the beginning of the proceedings, how the admissibility of hearsay evidence during dismissal proceedings are determined and finally an indication of the six safeguards as per the *Exxaro Coal* matter, when the interest of justice aspect is being considered. This suggested amended information sheet will, in my view, assist to provide a sound legal foundation to both parties in respect of the *LEAA* and the handling of hearsay evidence in dismissal proceedings and can also be used by commissioners as a quick and easy reference regarding hearsay evidence. The last recommendation the researcher submits, is a reminder of the expectation towards commissioners that a timeous ruling will be made regarding hearsay evidence. This creates a situation wherein a commissioner has to be alert to hearsay evidence even if the parties failed to indicate that hearsay evidence will be submitted. This will be possible, in my view, when the commissioner has a sound legal foundation in respect of the *LEAA* and the handling of hearsay evidence in dismissal proceedings, this sound legal foundation can be enhanced making use of all the resources provided by the CCMA.

In order for a commissioner to make a timeous ruling, it will further be required from the commissioner to be able to recognise hearsay evidence and to actively respond to these submissions. The late ruling on admissibility of evidence is prejudicial to one or both of the parties and results in unfairness.<sup>349</sup> It is clear from the jurisprudence referred to that section 3(1)(c) of the *LEAA* is not merely going to disappear from dismissal proceedings, because of the legal formality attached to this section.

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<sup>347</sup> Mahlangu 2019 <http://www.golegal.co.za>.

<sup>348</sup> CCMA date unknown <http://www.ccma.org.za/Advice/Information-Sheet>.

<sup>349</sup> *Exxaro Coal* para 34.

The LAC prefers some legal formality, rather than unfairness towards any party.<sup>350</sup> The CCMA Guidelines were drafted with the specific purpose to inspire consistent decision making by commissioners dealing with dismissal proceedings.<sup>351</sup> Commissioners must always guide against failing to ensure lawful, reasonable, and fair dismissal proceedings. When a commissioner applies section 3(1)(c) of the *LEAA*, all seven aspects must be taken into consideration, collectively, and when the interest of justice aspect is being considered, the six safeguards as per the *Exxaro Coal* matter is not a suggestion but an obligation.

It is submitted that the adherence of the jurisprudence ensures the fairness, lawfulness, and reasonableness of the proceedings. When these three aspects are taken into consideration together with the safeguards from the *Exxaro Coal* matter, it can lead to a speedy conclusion of the proceedings, whilst keeping proceedings as non-technical and informal as possible.

### **4.3 Conclusion**

Even though the admissibility of hearsay evidence during dismissal proceedings are not regarded procedurally unfair, all parties should bear in mind that the onus must be discharged on a balance of probabilities.<sup>352</sup> Just because dismissal proceedings are less formal as per section 138 of the *LRA*, it does not create a situation where a commissioner can open floodgates regarding hearsay evidence, since jurisprudence indicates that caution must be taken by a commissioner when considering the admissibility of hearsay evidence,<sup>353</sup> and to consider all the circumstances which may allow the hearsay evidence to be admissible in the interest of justice.<sup>354</sup>

At the end of the day, even with a certain amount of legal formalities, justice must be upheld in line with the applicable law. The discretion of a commissioner to deal with

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<sup>350</sup> *Exxaro Coal* para 24.

<sup>351</sup> Israelstam date unknown <https://www.labourguide.co.za/ccma-information/169-CCMA-guidelines-will-promote-consistency>.

<sup>352</sup> Truter 2019 <https://www.labourwise.co.za/labour-articles/hearsay-evidence-in-disciplinary-and-arbitration-hearings>.

<sup>353</sup> *Ndhlovu* para 16.

<sup>354</sup> *Exxaro Coal* para 18; *Van Willing* para 22; Mujuzi 2013 *International Journal of Evidence and Proof* 366; *Ndhlovu* paras 14, 16.

dismissal proceedings in a manner which is deemed proper and reasonable by the specific commissioner, in my opinion, has not been taken away by the *Exxaro Coal* matter.

The *Exxaro Coal* matter, being at the centre of this study, clearly indicates that the admissibility of hearsay evidence depends on the circumstances on a case-to-case basis. The manner in which to determine the admissibility of hearsay evidence, when commissioners make use of the *LEAA*, is however set in stone. The *Exxaro Coal* matter is a valuable addition to the jurisprudence, especially considering the additional guidance it provides when considering the admissibility of hearsay evidence, specifically hearsay evidence considered to be in the interest of justice. There appears to be a simultaneous attempt to ensure overall fairness when applying the six safeguards set out in the *Exxaro Coal* matter. A commissioner must apply all procedural safeguards against unfair dismissal proceedings and misfortune in the administration of justice to either of the parties<sup>355</sup> to the proceedings.

The admission of hearsay evidence may lead to the disadvantage of one of the parties and the six additional safeguards in the *Exxaro Coal* matter will assist a commissioner in determining the admissibility of hearsay evidence. Determining whether or not hearsay evidence is admissible is an extremely complex decision to make, which necessitates a strong understanding of the law of evidence,<sup>356</sup> as there has to be a balance between making a decision which is fair<sup>357</sup> and reasonable towards the employer, and simultaneously refrain from infringing on the labour laws protecting employees.<sup>358</sup>

Commissioners should strike a balance between the best interest of each party as well as each party's right to fair dismissal proceedings. Determining the admissibility of hearsay evidence during dismissal proceedings has been addressed throughout this study and the necessary safeguards to be considered by a commissioner during this

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<sup>355</sup> Whitear-Nel 2012 *STELL LR* 251.

<sup>356</sup> Israelstam 2019 <https://www.labourlawadvice.co.za/hearsay-evidence-can-render-dismissals-unfair/>.

<sup>357</sup> Visser 2019 *South African Journal of Criminal Justice* 418.

<sup>358</sup> Israelstam 2019 <https://www.labourlawadvice.co.za/hearsay-evidence-can-render-dismissals-unfair/>; Visser 2019 *South African Journal of Criminal Justice* 413.

determination has been illuminated at the hand of the LAC's decision in the *Exxaro Coal* matter.

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