

Sustained! Objecting to evidence in arbitrations.

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Overview:

1. To explain the legislative context of labour dispute resolution.
2. To explain the use and function of the rules of evidence in CCMA arbitrations in certain key areas.
3. To demonstrate the need for flexibility in their use and their unsuitability if adhered to rigorously

Labour Relations Act, 1995

One of the main, overall imperatives of the LRA is to **facilitate effective dispute resolution.**

This entails quick and efficient processes.

Section 138 of the LRA provides :

The commissioner may conduct the arbitration in a manner that s/he considers appropriate in order to determine the dispute fairly and quickly, **but must deal with the substantial merits of the dispute with the minimum of legal formality.**

*There are limits on the rights of lawyers to represent parties in dismissal disputes – to assist the aim of having less legal formality in CCMA arbitrations.

“The proceedings in the CCMA are not judicial proceedings. **Nevertheless it is to be expected that the principles of the SA law of civil procedure [which includes the law of evidence] will guide practice and procedure in the CCMA”.**

Du Toit et al, The LRA: A Comprehensive Guide @ 321

Deutch v Pinto 1996 7 6 SALLR 105 LC

“The CCMA is not established as a court of law...When arbitrating it follows the rules of **natural justice** ...it arrives at its decisions and makes its awards in a **judicial manner**.
..No appeal lies against findings of fact and rulings on law to any court of law including the Labour Court...The Labour Court [does however]supervise the arbitration process [through **review**].” @ 110 H

- Evidence comprises :

oral evidence(witnesses)

documentary evidence (anything on which
info is recorded)

real evidence (material, physical 'stuff')

When is it appropriate and legally proper to object to evidence in arbitrations ?

*Admissibility,

*The probative value of evidence.

Civil law : The general criterion for admissibility is relevance

- Relevance : 3-fold definition
 - Evidence which can logically and rationally be shown to help in proving the facts in dispute

And which will not unduly waste the arbitration's time for only a peripheral and insignificant relevance

And which will not unduly waste the
arbitrator's time for only a dubious
purpose

- There are also **exclusionary rules** which serve to exclude certain types of evidence because:
 - It is accepted as being irrelevant (eg: character evidence, similar fact evidence and opinion evidence)
 - It is accepted as being irredeemably unreliable(eg: evidence obtained through force; hearsay evidence)
 - For policy reasons (eg : privileged evidence, evidence obtained through improper means)

- There are many **exceptions** to the exclusionary rules !
- Also, the CCMA is required to deal with disputes with the minimum legal formality...this means that the **exclusionary rules will not be applied as strictly, if at all.**
- AND, the CCMA will be entitled to use stricter criteria for relevance

Application of the rules of evidence in the CCMA

1. Are written statements by witnesses admissible as evidence ?
2. Is video/CCTV footage of employees admissible as evidence ?
3. Is polygraph evidence admissible ?
4. Is documentary evidence admissible ?

Documentary evidence

*authenticated by author, producer, signatory, lawful possessor- or someone else with an intimate connection with the document : to confirm it is what it purports to be and is unaltered.

* Unless the parties agree otherwise

Disciplinary code

- Usually authenticated by an employer witness with knowledge of the code to confirm it
- Unless the parties agree

Transcript/Minutes of disciplinary enquiry

Authenticated by chair person, scribe, anyone at the hearing who can confirm that the document is what it says it is, and reflects the proceedings accurately.

Other party may dispute the accuracy or completeness of the minutes

Medical certificate

- *authenticated by the employee
- *weight to be attached will be another matter
- *Hearsay evidence ? (Le Monde Luggage cc v Commissioner Dunn and others 2007 10 BLLR 909 LAC)

Witness statement/affidavit

- Hearsay evidence
- Admissible if there is good reason for not being able to bring the witness personally (Ismail v Nationwide Airlines)
- Reliability ? – if corroboration exists and/or it fits into the jigsaw puzzle to complete puzzle

Video / surveillance footage

- Witness introducing it must show it's a true representation of the facts, and has not been tampered with.
- Must be of employees in operational areas—where there is no expectation of privacy by the employees.
- This excludes excluding change rooms and toilets (unless the employees have specifically consented to this)

Telephone call recordings/interception of e- mails/faxes

Regulation of Interception of
Communications and Provisions of
Communications Related Information
Act 2002 (RICA)

- Employees must be told beforehand
 - Authorised by CEO or HOD
 - Good reason to intercept/monitor
- No other less drastic means available

Entrapment

- Pre existing suspicion
- Trap must not go beyond providing an opportunity to commit the offence

Polygraph evidence

- Not accepted as evidence of truth/lies
 - Conflicting case law
- Inadmissible because not a reliable proved science OR
- Admissible to corroborate other evidence OR
- Admissible but carries virtually no weight

Conclusion

- CCMA –
 - Minimum legal formality
 - Common sense