IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JR 2134/2008

In the matter between:

POPCRU obo G MASEKO **Applicant**

and

THE DEPARTMENT OF CORRECTIONAL SERVICES **1ST Respondent**

GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL **2ND Respondent**

M LOYSON N.O. **3RD Respondent**

JUDGMENT

LAGRANGE,AJ

Introduction

1. The applicant seeks to review and set aside an arbitration award of the third respondent, dated 15 September 2008, issued under the auspices of the second respondent ('the bargaining council'). The arbitrator confirmed the applicant's dismissal was both substantively and procedurally fair.
2. The arbitrator wrote a detailed award in which she summarized each witness's evidence and concluding with a reasonably detailed analysis of the evidence and argument.

Background

3. The applicant was employed as a warder by the Department of Correctional Services, the first respondent, at Modderbee Correctional Centre, Benoni.

4. The applicant had been charged and found guilty of contravening clause (x) of the Disciplinary Code and Procedure Resolution 1of 2006. According to the extract of the code appearing in the bundle, clause (x) describes the misconduct, which he was accused of committing on 14 December 2008, as "… permitting an offender to take alcohol or a prohibited drug or to have these substances in his/her possession." The applicant was charged with this misconduct for having allegedly given a previous offender and awaiting-trial prisoner, Mr S Saka, a bag full of dagga to be sold. He also allegedly escorted the prisoner to G-unit of the facility in order to sell the dagga.

5. An outline of the material evidence is set out below.

6. Mr Mokoena, a trainee prison officer at the time of the incident, testified for the employer at the arbitration hearing, though not at the disciplinary enquiry. According to his testimony Saka and another awaiting trial prisoner and previous offender, Mr Fox, arrived at G-section of the prison accompanied by the applicant. The applicant flatly denies escorting either of the prisoners to G-Section.

7. Some 10 or 20 minutes after admitting the two prisoners, Mokoena received a tip-off from another prisoner in the section that offenders on the top floor of the section had dagga on them. On searching prisoners on the top floor, he found dagga on Saka.

8. The dagga was confiscated by Mokoena and thrown away according to his evidence. This was contrary to normal procedures. He ought to have handed the dagga in and recorded the confiscation in a register.

9. Mokoena was still a student at the time of the incident and his supervisors were not present when he received the two prisoners. He testified that he would not have allowed them to enter the section if they had not been escorted. He did not search them at the time of entry because he thought they would already have been searched, but he conceded he ought to have done so. He also testified that he did not ask the inmates where the dagga had come from. It appears therefore he was unaware of the applicant's possible connection with the confiscated dagga until he was approached by the officer investigating a complaint laid by Saka that the applicant had assaulted him.

10. Saka's lodged the complaint because he alleged that after he and Fox had been searched and the dagga was confiscated, the applicant demanded money for the dagga he had given him to sell. When he related what had happened to the applicant, he claims the applicant struck him. Following up on the confiscation of the dagga mentioned in the statements, led to Mokoena being approached to corroborate events he was aware of. It was evident from Thwala's evidence that Saka and Fox did not even know Mokoena's name and had to be taken to G-section to identify him.

11. There were some discrepancies between Mokoena's evidence and the statements of the inmates as to whether the inmates were searched on the same day they were admitted to G-unit or the day after, which he could not explain. He conceded that he had unlawfully discarded the dagga. Contrary to what appears in Saka's statement,

Mokoena was adamant that the applicant accompanied both offenders and not just Saka. Fox said they were both escorted by the applicant to G-section.

12. Mokoena stated that in the ordinary course of work, if the applicant was performing duties in B-section he would not be required to visit G-unit. The applicant did not dispute Mokoena's evidence in this regard, but denied going near G-unit at the time, stating also that he had not been near G-unit for a very long time.

13. At the disciplinary enquiry, the only witnesses to testify were the two awaiting-trial prisoners, who had also signed affidavits implicating the applicant as the initiator of the dagga sales. By the time the arbitration hearing was held they were no longer in custody and could not be traced at the addresses they had provided. At the arbitration hearing, given the unavailability of the two former prisoners, other witnesses testified for the employer.

14. One of these was Mr Thwala, a loss control officer who was the initiator at the original enquiry. He confirmed that the offenders had identified Mokoena as the official who had searched them for dagga. He said he had tried to call Mokoena as a witness at the internal inquiry, but the chairperson had refused to hear his evidence because the applicant had objected to the him testifying without having made a sworn statement prior to giving oral evidence. Thwala also confirmed that when the employer attempted to trace the offenders to give evidence at the arbitration, it was established that the Daveyton addresses they had provided were false.

15. Mr D T Chiloane, the disciplinary enquiry chairperson, testified on the procedure for confiscating and registering dagga, amongst other things. He confirmed that he had disallowed Mokoena's testimony at the enquiry because the employee party had been unprepared to deal with it in the absence of a sworn statement being provided beforehand. Mr I Mapiyeye gave evidence on the procedure to be followed when a prisoner was moved between different units at Modderbee. This entailed the completion of a movement register. Under cross-examination, he said that if an

officer escorted an inmate from one unit to another, the gateman - who would have been Mokoena in this instance - had to search the inmate before admission.

16. The applicant flatly denied ever escorting the inmates to G-unit as alleged. He confirmed that if he had escorted the two inmates it would have been recorded in the movement register.

17. The applicant could not say why the two offenders would have implicated him, other than suggesting it was because he was strict in the conduct of his duties. He did not know either of the prisoners before the enquiry. He could not think of a reason why Mokoena might have falsely implicated him.

18. Mokoena confirmed that prisoners had identified him as the person who had searched them, which was corroborated by Thwala who was present when the identification of Mokoena by Fox and Saka took place. It is significant that before he was approached by the investigator, Mokoena had no knowledge of the applicant's alleged connection to the dagga he confiscated from the inmates.

The arbitrator's award

19. The arbitrator correctly identified that the onus lay on the employer to prove on a balance of probabilities that the applicant had given an inmate dagga to be sold.

20. The arbitrator carefully considered Mokoena's failings in not following proper procedures in his handling of the dagga he discovered, but dismissed the suggestion that this was a fabrication, because there was no reason for him to have made up the story, more particularly one which the two inmates had independently related. The arbitrator found that 'a coalition' between the two inmates and Mokoena against the applicant was unlikely given the context in which the allegations arose.

21. The arbitrator then adds an important cautionary note. She agrees that Mokoena's

testimony relating to the applicant only concerned the applicant accompanying the inmates to G-unit, and did not in any way link him to the dagga found on one of the inmates.

22. In reviewing the evidence of Mapiyeye and the applicant on the procedure to be followed when prisoners are moved from one unit to another, the arbitrator concluded that the procedure of signing a register and reporting the movement to the unit manager before departing from the section with inmates, was a protocol which should have been followed. However, if it was not complied with this would not have prevented someone in the applicant's position from moving prisoners between sections. On the evidence of Mokoena and the statements of the inmates the arbitrator appears to have accepted that the applicant did indeed accompany them to G-unit, but that he had done so without complying with either of the preliminary procedures. On this basis, she inferred that the only reason the applicant would have bypassed the procedures was that he had an improper motive for not recording the transfer of the prisoners.

23. In concluding her analysis, the arbitrator turns her attention to the statements of the two inmates, and why she admitted them in the arbitration hearing despite the fact that they amounted to hearsay. In explaining her decision to admit them, the arbitrator goes through a number of the factors set out in section 3 of the Law of Evidence Amendment Act 45 of 1998.

24. The arbitrator's analysis of the factors she considered may be summarily stated as follows:

    24.1. The applicant opposed the admission of the statements because the deponents would not be testifying;
    24.2. The nature of the proceedings in which the hearsay was sought to be introduced were arbitration proceedings under the LRA, in which

commissioners are not as strictly bound by the rules of evidence as courts of law and had a discretion to admit hearsay evidence 'when required';

24.3. The nature of the evidence was that it was of crucial importance because it formed the 'very basis upon which' proceedings were initiated in the first place and on the strength of which, amongst other things, he was found guilty at the disciplinary enquiry;

24.4. The purpose for which the evidence was tendered was to confirm the misconduct of the applicant and to justify his dismissal;

24.5. In considering the probative value of the evidence, the arbitrator held that the employer would have been deprived of 'damning' evidence linking the applicant directly to the supply and sale of dagga and of evidence corroborating the testimony of Mokoena. The arbitrator then states:

> "*For the applicant employee too, the evidence of the inmates contained in the statements is of crucial importance. It is of importance that the evidence be tested in the arbitration hearing – a hearing de novo where, irrespective of the evidence presented at the disciplinary enquiry, all relevant evidence had to be presented de novo. Given the absence of the two witnesses, the applicant party did not have the benefit of cross-examining them and for the commissioner to observe their demeanor whilst testifying*."

24.6. The arbitrator held that the reason it was not possible to hear the oral testimony of the inmates, was not due to any fault on the side of the employer. After making this observation, the commissioner comments that in the Department of Correctional Services, witnesses to events are often inmates who are only temporarily at the institution, leaving the employer with little alternative but to submit their sworn affidavits rather than abandon its defence. The arbitrator also noted that an important factor in this instance, was that the two inmates had testified at the disciplinary enquiry and were cross-examined by the applicant's representative at that

stage. Moreover the contents of the statements were put to the applicant at the arbitration hearing and he simply denied them.

Grounds of Review

25. Initially the applicant cited a number of grounds of review, but in his supplementary affidavit he expressly disavowed these and focused exclusively on the admission of the affidavits of the two inmates and the ramifications thereof. A number of issues were raised in this regard, namely:
    25.1. the arbitrator should not have admitted the statements of the inmates;
    25.2. nobody had testified that the statements were authentic;
    25.3. the arbitrator relied on the affidavits even though the applicant could not cross-examine the alleged deponents;
    25.4. the affidavits contained the only evidence that implicated the applicant in the misconduct under consideration;
    25.5. the purpose for which the affidavits were tendered was to secure his dismissal, and
    25.6. the arbitrator ought to have rejected allegations made in the statements in view of the surrounding evidence.

26. It is apparent that some of the grounds of review mentioned in paragraphs 25.2 directly concern factors that a court must have regard to in deciding if it is in the interests of justice to admit hearsay evidence in terms of section 3(1) of the Law of Evidence Amendment Act 45 of 1988 ('the Evidence Act'). As such they may provide support for the first mentioned ground of review, namely that the arbitrator's admission of the evidence was a material flaw in her conduct of the proceedings warranting the award being set aside on review. The pertinent elements of section 3(1) are dealt with in evaluating the grounds of review below.

Authentication of the affidavits

27. At no stage when the statements were referred to in the course of the arbitration hearing did the issue of their authenticity arise. The most probable reason for this is that according to the uncontested evidence of Mr Thwala, the initiator of the enquiry, the chairperson had prevented him from calling Mokoena to testify precisely because Mokoena had not made a sworn statement and the applicant had objected to him giving evidence without having done so. By contrast, the applicant did not object to the inmates testifying at the enquiry because their statements had been provided beforehand.

28. It is somewhat disingenuous for the applicant to now dispute the authenticity of statements which were clearly not disputed in the original enquiry.?? Moreover, the applicant did nothing to alert the arbitrator to the fact that not only did he take issue with the evidence in the statements because of its hearsay character, but also that the very authenticity of the statements was in dispute.

29. When the transcript of the arbitration hearing is considered it appears that in those proceedings there was an understanding reached on how the statements would be dealt with and the applicant focused more on the question of the weight to be attached to them rather than whether or not they could be admitted at all.

30. At the start of the arbitration hearing there was some discussion between the arbitrator and the parties about the prospect of the two former inmates not being available as witnesses. Later, it materialized that they could not be traced by the respondent because the addresses they had given turned out to be false.

31. After the employer had led the *viva voce* evidence of its witnesses, the arbitrator raised the issue of how the affidavits might be dealt with in evidence. At that stage in

the enquiry the arbitrator seemed to be of the view that the affidavits did constitute evidence that might be admitted but she also accepted that it was problematic evidence because there was no opportunity to cross-examine the deponents, and accordingly the relative weight to be attributed to the evidence on affidavit would have to be considered. The arbitrator suggested that the applicant should put the allegations contained in the affidavits to the applicant. Importantly, both the employer's representative and the applicant's representative, said they were satisfied with the matter proceeding on this basis. According to the arbitrator's award, the applicant argued at the end of the hearing that no weight should be attached to the affidavits because they could not be tested under cross-examination.

32. On the second day of the hearing, Mr Ngudle replaced Mr Lessing as the employer's representative when the arbitration hearing reconvened. The arbitrator also mentioned to Mr Ngudle that he would have to put the statements to the applicant if he wanted them to be taken into account.

33. Under cross-examine the applicant agreed that Saka had previously testified at the enquiry that he had been given dagga by the applicant. The applicant denied the truth of this allegation and suggested that Saka's motive for making the allegation was that he was very strict and that the inmates sometimes did not like this. However, the applicant testified he had no specific knowledge of either Saka or Fox prior to them testifying against him at the enquiry, nor had he any previous dealings with them. The applicant had no explanation why either Saka and Fox, in particular, would have falsely claimed he had escorted them from B section to G-section. Incidentally, when Ngudle put the version to the applicant, that he had escorted both the inmates to G-section, his version was challenged because Saka's statement only made mention of himself being escorted to G block.

34. Ngudle also asked the applicant why Saka would testify that the applicant had given him dagga and escorted him to G-section and why Mokoena would have testified to confiscating dagga from one of the prisoner's, if the applicant never went to G-

section as he claimed. The applicant could only reiterate his contention that he was strict in the performance of his duties, but could not offer an explanation for Mokoena's evidence. However he pointed out that there was no proof of him having moved the prisoners to G-section because there was no entry in the movement register which should have been completed if he had done so.

35. In the course of further cross-examination, Ngudle referred again to Saka's allegation that the applicant had given him dagga and taken him to G-section to sell it, before asking the applicant to explain why Makoena would have given evidence which corroborated Saka's statement. The applicant persisted with his denial that he never went to G-section. The applicant further claimed that Saka was lying when he alleged in his statement that the applicant had demanded money from him, for the dagga that had allegedly been sold by Saka. Under re-examination, the applicant's own representative again relied on Saka's statement to suggest that Mokoena was wrong when he claimed the applicant had escorted the two prisoners to G-section.

36. What emerges from the above is that the applicant did not object to the use of the statements in the arbitration proceedings. In fact, his own representative relied on Saka's statement to try and cast doubt on the reliability of Mokoena's evidence. Further, the parties actually agreed that the contents of the statements could be put to the applicant, in the course of evidence been led. At no stage during the arbitration hearing did the applicant contend that the statements ought to be excluded as evidence. The employer's representative may not have put all the details in the statements to the applicant, but did deal with the central allegation that the applicant had given Saka dagga, asked him to sell it and had taken the prisoners' to G-section in order to do so. The thrust of the employer's case in putting the prisoners' version of events to the applicant, was to put to him the improbabilities of their version being corroborated by Mokoena unless they were telling the truth.

37. On the basis of how the affidavits were in fact dealt with, it was strictly speaking not necessary for the arbitrator to have considered the question of whether to admit them

or not as evidence, since the applicant had not insisted on a ruling on their admissibility when the employer relied on them in cross-examination, and his own representative had also made use of Saka's statement to cross-examine the employer's witnesses. In the circumstances, it would appear that the applicant consented to their admissibility whilst not admitting that they should carry any weight. As such, the requirement for admitting hearsay evidence in terms of section 3(1)(a) of the Evidence Act appear to have been met. Section 3(1)(a) permits the reception of hearsay evidence if "… each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings."

38. Nevertheless, because the arbitrator still made a ruling on the admissibility of the affidavits and because the thrust of the review is an attack on her reasoning in this regard, I will assume the inmates' affidavits were not admitted on this basis.

39. Before considering the other grounds of review a brief discussion of the application of section 3 of the Evidence Act in the context of statutory arbitrations under the LRA is useful.

The admission of hearsay evidence in statutory arbitration proceedings

40. In ***Hewan v Kourie NO and another*** **1993 (3) SA 233 (T)** at 238I-230A, Du Plessis J, quoted with approval the following description of the role of the hearsay rule, by the learned author Paizes, '(t)he hearsay rule spans the straits between two conflicting evidentiary principles. On the one hand, it is desirable that all relevant evidence be received and evaluated by the trier of fact, and on the other, it is equally desirable that all witnesses testify subject to "ideal conditions" of the court room, where such evaluation may be properly conducted.'

41. The common law rules governing hearsay in the civil and criminal courts have been replaced by section 3 of the Law of Evidence Amendment Act 45 of 1988 ('the Evidence Act') provides as follows:

Hearsay evidence

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.

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

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1) (b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of

that subsection.

(4) For the purposes of this section-

'hearsay evidence' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;

'party' means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.

42. Under the previous Labour Relations Act of 1956, the LAC held that even though industrial court proceedings were not civil proceedings, and, strictly speaking, did not therefore fall within the ambit of the Evidence Act, the legislature could not have intended that an administrative tribunal like the Industrial Court should apply a more stringent test than the one set out in section 3 of the Evidence Act before admitting hearsay evidence.[1] More recently, the LAC has stated that the test set out in section 3 of the Evidence Act should be applied to the reception of hearsay evidence in statutory arbitration proceedings.[2]

43. On the other hand, the LAC has also endorsed the statement made by Wallis AJ, as he then was, in ***Naraindath D v Commission for Conciliation, Mediation & Arbitration & others*** **(2000) 21 ILJ 1151 (LC)** at par [26], that:

'It would stultify the entire purpose of the legislation if this court were, in the face of such clearly stated intentions, to insist on arbitrators appointed by the CCMA to resolve unfair dismissal disputes conducting those disputes in slavish imitation of the procedures which are adopted in a court of law and subject to the technical rules of evidence which apply in those courts.[3]

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1 ***Southern Sun Hotels (Pty) Ltd v SA Commercial Catering & Allied Workers Union & another*** **(2000) 21 ILJ 1315 (LAC)** at

2 See ***Edcon Ltd v Pillermer NO & others*** **(2008) 29 ILJ 614 (LAC)** at 619-620, paras [14] – [16]

3 ***Le Monde Luggage CC t/a Pakwells Petje v Dunn NO & Others*** **(2007) 28 ILJ 2238 (LAC)** at 2243 paras [17] – [18]

44. While it may seem that there is a tension between the requirement that section 3 of the Evidence Act must be applied by arbitrators when deciding whether or not to admit hearsay evidence and precept that strict adherence to formal rules of evidence is not required in arbitration proceedings, it must be remembered that section 3(1)(c) requires the arbitrator to consider the nature of the proceedings when making a ruling on the admission of hearsay evidence.

45. Thus, in the *Edcon* matter, in which the arbitrator had relied on written statements of management employees that vouched for the employee's good character, the court regarded factors such as the employer's ability to call those witnesses to testify if it disputed the contents of those statements, and the fact that the arbitration would have been prolonged beyond the date the arbitrator had set for finalizing the case as factors, which justified the admission of the statements as evidence. In taking account of such factors, the court was clearly making significant allowance for pragmatic considerations which arise in the context of conducting an expeditious arbitration hearing involving an employer and employee.

46. The approach of the LAC in *Edcon* also illustrates that the general principle of not applying rules of evidence slavishly in arbitration proceedings, which it confirmed in the *Le Monde Luggage* case,[4] does not amount to an open invitation to ignore those principles. Rather, it suggests that deviations from those principles must be justified by the particular circumstances of the arbitration in question.

47. In the context of an appeal in civil proceedings, the AD, as it then was, held that "(a) decision on the admissibility of evidence is, in general, one of law, not discretion, and this Court is fully entitled to overrule such a decision by a lower court if this Court considers it wrong." (***McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd v Dax Prop CC***).[5]

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4 See fn 3 above.

5 **1997 (1) SA 1 (A)** at 27D-E. The SCA has reaffirmed this principle in ***Makhathini v Road Accident Fund*** **2002 (1) SA 511 (SCA)** at 521 par [26] and ***S v Shaik & Others***

48. However, in the context of a review of an arbitration award this court should not set aside an award if the arbitrator applied the correct principles embodied in section 3(1)(c) but arrived at a decision on admissibility which a court of appeal might find to be wrong. Nevertheless, if the arbitrator asked the wrong questions in applying the test, ignored relevant considerations, or took account of other irrelevant ones, such irregularities, in making a decision on admitting hearsay evidence, could result in the award being set aside on the basis of a gross irregularity, if the admission of the hearsay evidence was a material issue in the case. Such a gross irregularity would also render the award one that fell short of the standard of reasonableness as set out in ***Sidumo & Another v Rustenburg Platinum Mines Ltd & Others*** **(2007) 28 ILJ 2405 (CC)**.

49. In this instance, the arbitrator clearly did give consideration to all of the factors mentioned in sub-sections 3(1)(c)(i) to (vi) of the Evidence Act. The central question in this application is whether the grounds of review raised by the applicant show that the arbitrator's admission and consideration of the hearsay evidence entailed one or more irregularities of the type mentioned.

50. The arbitrator recognized the general principle that arbitration proceedings are not the same as civil or criminal proceedings. At the end of her award, she also observed that there was a recurrent problem of transient witnesses which came up in hearings held by the Department of Correctional Services. The arbitrator clearly considered this feature of hearings in that context to be factor in favour of relying on hearsay evidence in the proceedings before her. In this matter, she found it was significant that the deponents had given *viva voce* evidence in the disciplinary enquiry and the applicant had cross-examined them in that forum. Consequently, it cannot be said she did not give thought to the specific character of the proceedings she was engaged in.[6]

2007 (1) SA 240 (SCA) 299 at par [170]
6 Paragraph 5.9 of the award

The arbitrator's reliance on the statements despite the applicant's inability to cross-examine the deponents

51. This ground of review might be interpreted as a criticism of the arbitrator's evaluation of section 3(c)(vi) of the Evidence Act, namely that the prejudice of the hearsay evidence to the applicant was a factor which should have tipped the balance in favour of its exclusion. In what way did the arbitrator rely on the statements of the inmates in reaching her factual conclusions? The arbitrator was chiefly concerned with how the applicant had responded to the question why Saka and Fox would have implicated him by making the allegation that he had given Saka dagga, and why they would have corroborated Mokoena's evidence about been escorted to G-section. The arbitrator also considered the applicant's denial that he had ever taken money from Saka. She further had regard to Saka's statement, which gave the impression that only he had been taken to G-section and had sold dagga, rather than he and Fox together.

52. Accordingly, the principal way in which the arbitrator placed reliance on the statements of Saka and Fox was how their statements tied in with Mokoena's evidence that the applicant had escorted them to G-section and that Mokoena had searched them and found the dagga.

53. The arbitrator concluded that they probably were escorted to G-section by the applicant. The applicant's response to this was a bare denial and a defence which relied heavily on the absence of an entry in the movement register. However, there was evidence that the applicant did not have to make an entry in the movement register before moving the two inmates to G-section, even if he should have done so. A key finding of the arbitrator was that Mokoena had no apparent motive to fabricate his evidence and on this basis the arbitrator preferred the evidence of Mokoena over the applicant.

54. Having concluded that the applicant did escort the two inmates to G-section, it was not unreasonable of the arbitrator to infer that his failure to follow mandatory procedures, which would have recorded this activity, suggested his motive for moving the inmates was suspect. In the absence of any innocent explanation being tendered for such conduct by the applicant, because he stuck to his bald denial of ever transferring the prisoners, this was a perfectly legitimate conclusion to draw.

55. By contrast, the discovery of the dagga, and the inmates' explanation of why they had it on them, does provide a plausible explanation why the applicant moved the two inmates to G-section, and also why the applicant did not record that movement in the register. It is important to bear in mind that the incident came to light not because Mokoena reported the discovery of the dagga or the movement of the two inmates, but because, Saka had complained of being assaulted by the applicant. It was the investigation into this complaint that brought Mokoena's evidence to light, when he was identified by Saka and Fox as the officer who received them at G-section and who found the dagga on them. His evidence in turn tends to corroborate two important aspects of their evidence: that they were escorted to G-section and that dagga was found on one them.

56. The fact that these elements of their statements were corroborated also strengthened the possibility that their explanation of why they had dagga in their possession was true as well, namely that the applicant had given it to Saka to sell. It might be argued that this would have to be tempered with the knowledge that the two inmates might have been attempting to implicate the applicant in order to exonerate their own conduct in relation to the confiscation of the dagga. Accomplice evidence is generally to be treated with caution.[7] On the other hand in this case, the whole matter came to light not as a result of Saka and Fox having been charged with any offence in relation to the dagga, but because Saka lodged a complaint of assault against the applicant and in the course of both of them making statements in connection with this, voluntarily revealed the dagga transaction. Thus, the extent to which an exculpatory motive on

7 See, for example, ***Chemical Workers union & Another v Algorax (Pty) Ltd*** **(1995) 16** ***ILJ*** **933 (IC)** at 939B-C

the part of Saka or Fox might diminish the reliability of their evidence appears to be less significant in this matter when compared to the usual situation where the accomplices are co-defendants on the same charge.

57. Having justifiably concluded that the applicant had moved the inmates without recording their movement and without any obvious *bona fide* reason for doing so, it was not unreasonable for the arbitrator to infer that he did so for an improper purpose. The statement of the inmates provided a plausible explanation for what would otherwise have been inexplicable conduct on his part.

58. It is also important to note that the evidence of Saka and Fox pertained to issues within the applicant's direct knowledge as it concerned his own alleged actions. As such, the evidence in the affidavits which the arbitrator relied on was not, in the main, evidence which was prejudicial in the sense that the applicant had no way of contradicting it because he could have no personal knowledge of the events described.[8] Certainly he was in a position to deal with the movement of the prisoners and whether he had any transactions with the prisoners regarding the supply and sale of dagga.

59. It is also noteworthy that the applicant's representative, Mr Mosheledi, used Saka's statement to cross-examine Mokoena about his search of the prisoners, in an attempt to emphasise discrepancies in their versions about when the search took place. Mosheledi also relied on Saka's statement to suggest that Mokoena must have been mistaken when he alleged that the applicant brought two inmates and not one to G-section.

60. Based on the applicant's own defence, the only point on which the applicant might have cross-examined the prisoners was for the purpose of attributing a motive to them to lie, namely that he was stricter than other officers. However, it was also apparent from the applicant's own evidence that he could not provide details of any specific

8 This is another factor which should be weighed up in deciding whether or not to admit hearsay evidence. See ***S v Shaik and Others*** **2007 (1) SA 240 (SCA)** at 302, [178]

events which arose between himself and either of the two prisoners which would have demonstrated that they had personally been prejudiced or harshly dealt with by him. At best therefore, his cross-examination could only have sought to elicit confirmation that inmates in general considered him strict and he might have tested the two inmates credibility in broad terms.

The affidavits were the only evidence directly implicating the applicant

61. It is correct that the affidavits on their own were the only direct evidence which linked the applicant to the sale of dagga. However, this was not the only evidence linking the applicant to the two inmates. Firstlly, there was the evidence of Mokoena, who independently testified that the applicant escorted them to his section. Secondly, Mokoena testified to finding dagga on Saka. Thirdly there was the evidence that no entry had been made in the movement register. The first two pieces of evidence are powerful corroboration of important parts of the inmates' statements. The corroborative effect of Mokoena's evidence also has the effect of raising the probability that other aspects of the evidence in the statements might be true. In this regard, it must be recognized that the probative value of hearsay evidence might be strengthened by other independent evidence tending to corroborate aspects of the hearsay evidence.

62. It is also important to note that this is not a case in which the evidence in the statements can be easily dismissed as the statements of accomplices, or suspects who sought to explain away their possession of dagga by blaming the applicant. When Mokoena discovered the dagga on Saka he merely confiscated it and did not pursue the matter further. The dagga possession only came to light as a result of Saka complaining about an alleged assault by the applicant in which the background to the assault related to the alleged dagga transaction.

63. In other words, the information about being in possession of dagga was first volunteered by Saka when he could simply have kept quiet about the alleged assault and question of dagga dealing would not have come to light. Had the chain of events been different, so too would the weight that could be attached to Saka and Fox's statements. For example, if it been the case that Mokoena had recorded the confiscation of the dagga and that report had led to an investigation into Saka and Fox's involvement in dealing in dagga, which in turn led to them implicating the applicant as the instigator of the dagga sales, the probative value of the Saka and Fox's statements in implicating the applicant would have been significantly weaker.

The arbitrator's consideration of the surrounding evidence in evaluating the statements

64. The surrounding evidence which the applicant submits the arbitrator ought to have considered before accepting the allegations in the two inmates' affidavits was that:

64.1. Mokoena's evidence did not link the applicant to the dagga;

64.2. there was no independent testimony confirming that he gave the dagga to Saka;

64.3. there was no record to corroborate that dagga was found on any of the inmates, and

64.4. there was no record of him going to G-unit on that day.

65. In the applicant's heads of argument, it is contended that the importance of admitting the two statements as evidence is that they provide the only basis on which the arbitrator found the applicant guilty, because the rest of the evidence was insufficient to even establish a *prima facie* case against him.

66. On consideration of the commissioner's reasoning, I do not accept the commissioner failed to consider the surrounding factors mentioned above. It seems clear that the commissioner was acutely aware of the absence of evidence, apart from the affidavits,

linking the applicant to the dagga found on Saka and that there was no other evidence of the applicant supplying Saka with dagga.

67. The arbitrator also dealt quite extensively with the implications of there being no other record of the applicant going to G-unit on that day, when she analyzed the inference to be drawn from that in the light of Mokoena's testimony. The commissioner was aware too that Mokoena had discarded the dagga and that it had not been recorded, though it is arguable she did not attach much significance to this. However, it must not be forgotten that there was no reason why Mokoena would have falsely corroborated the inmates' claim about being searched by him, in the absence of any evidentiary basis of a complex plot to implicate the applicant. The commissioner specifically mentions the fact that the statements of the inmates independently corroborate Mokoena's account. Conversely, his testimony confirms their account that they had dagga on them which was confiscated.

68. However, if the commissioner was wrong in her evaluation of the surrounding circumstances that is not a sufficient basis for setting aside her decision unless it was so plainly wrong that no reasonable arbitrator could have made the same evaluation.

The nature of the evidence

69. This factor is primarily concerned with the characterisation of the hearsay evidence under consideration.[9]

70. In this instance, the arbitrator appears to have understood a consideration of the nature of the evidence as being the same thing as a deliberation on the purpose for which the evidence is introduced. Thus, she emphasizes the importance of the hearsay evidence as the foundation of the employers' case. However, I am not persuaded that by not characterizing her enquiry correctly, she committed a material

9 ***Makhathini v Road Accident Fund*** **2002 (1) SA 511 (SCA)** at 522-523 par [30].

error, which fatally flawed her overall assessment of whether the hearsay should have been admitted.

The purpose for which the evidence was tendered

71. The arbitrator correctly identifies that the evidence was crucial in finding the applicant guilty of the charge. Even though the arbitrator refers to it as evidence to 'confirm' the misconduct, when she deals with its probative value she acknowledges it as essential to the proof of the misconduct in question, without which the employer could not defend the decision it took in the disciplinary enquiry.

72. The main principle guiding consideration of the purpose of the evidence has been expressed as follows in the context of criminal cases:

> "a Judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there are compelling justifications for doing so"

73. This approach, which was first articulated in ***S v Ramavhale*** **1996 (1) SACR 639 (A)** at 649c–d, appears to have been endorsed in the more recent decision of the SCA in *Ndhlovu's* case[10], even though a contrary view was expressed in ***S v Mpofu*** **1993 (3) SA 864 (N)** at 873B.

74. It is obvious that the arbitrator was aware of the centrality of the hearsay evidence of the two inmates and appreciated its decisive character in the case. However, it seems that the decisive nature of the evidence was seen by the arbitrator as a compelling factor favouring its admission and one that was all important, rather than one that called for additional justification before it could be received. It is important to note that the principle enunciated in *Ramavahale's* case does not mean such evidence

10 At par [39] of the judgement.

should not be received.

75. In passing it should be mentioned that nowhere does the arbitration record reveal that the employer intended to rely so heavily on those statements. When belated reference was made to them in the course of cross-examining the applicant, the arbitrator did not ask the parties to address her on the question of their admission.

The probative value of the evidence

76. In ***S v Ndhlovu and others*** **[2002]**, the SCA described this factor in the following terms:

> "Probative value' means value for purposes of proof. This means not only, 'what will the hearsay evidence prove if admitted?', but 'will it do so reliably?'"

77. In considering the reliability of the hearsay evidence in that case, the SCA looked at all other respects in which the statements were accurate and then asked if it was likely that the portion of the statement implicating the accused against whom the hearsay evidence would be admitted was also likely to be true. In this instance the arbitrator correctly identified that the hearsay evidence was crucial to proving the applicant's misconduct, and that without it there was no evidence directly linking the applicant to the dagga discovered on Saka, or with the sale of dagga.

78. The arbitrator did consider to what extent the statements could be considered reliable. In her summary of her consideration of the hearsay evidence, the arbitrator did not go into great detail and focused more on the implications of admitting the hearsay evidence for the parties, both in terms of its effect on the success of the employer's case, but also in terms of its prejudicial implications for the applicant.

79. However, it is clear that she did consider the reliability of the statements when she evaluated the possibility that they may have been produced as part of a conspiracy against the applicant. In paragraph 5.4 of her award she expresses her view on the improbabilities of a congruence between Mokoena's testimony and the hearsay evidence being the result of a conspiracy against the applicant. Accordingly, it cannot be said she did not evaluate the reliability of this evidence.

The reason why the deponents were not available to testify

80. The arbitrator correctly found that the reason for their non-availability as witnesses was owing to them having been released from custody and failing to provide correct addresses, none of which the employer could be blamed for.

Prejudice of admitting the hearsay

81. The prejudice under consideration here is the procedural prejudice the applicant would suffer in not being able to cross-examine the witnesses, which had to be weighed against the reliability of the hearsay evidence in deciding whether, despite the inevitable prejudice, the interests of justice require its admission. It does not include the prejudicial impact the evidence is likely to have on the applicant's case if it is admitted and once it has been weighed.[11]

82. The arbitrator did consider the prejudice to the applicant of not having an opportunity to cross-examine the deponents to the statements and balanced this against the importance of the evidence to the respondent. It must also be pointed out that in her evaluation of the applicant's defence she found it was characterized by a bald denial

11 *Ndhlovu*'s case, supra, at paras [49] – [50]

of all the relevant facts. As discussed above, there was no obvious specific prejudice that the applicant would have suffered in not being able to cross-examine the deponents, and her failure to exclude the evidence on this ground was not unreasonable.

Conclusion

83. In conclusion, I am satisfied that the cumulative consideration of the factors set out in section 3 of the Evidence Act by the arbitrator which resulted in her admitting the evidence was not unreasonable, even if I am wrong about the fact that the parties in fact reached an understanding about its admission.

84. I am also satisfied that the other grounds of review raised by the applicant do not justify setting aside the award

Order

85. Accordingly, the following order is made –

85.1. The review application is dismissed

85.2. No order is made as to costs.

ROBERT LAGRANGE
JUDGE OF THE LABOUR COURT

Date of hearing: 3 February 2010
Date of judgment: 30 August 2010

Appearances:

For the applicant: Mr Basson
Instructed by Groskopf Attorneys

For the respondent: Mr Matlejoane
Instructed by the State Attorney