

## Onlangse regspraak/Recent case law

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### *Minister of Police v M* 2017 38 IJL 402 (LC)

*Hearsay evidence and the testimony of child witnesses.*

#### 1 Introduction

Children are often the victims of acts of physical or sexual violence, or bear witness to criminal acts. Consequently, these children may be called upon to testify to these acts of violence in a court of law. While the Criminal Procedure Act 51 of 1977 (the Criminal Procedure Act) addresses procedural issues relating to a child witness, for example that the child does not have to be in the same room as the accused when testifying (see s 170A of the Criminal Procedure Act), the evidential rules applicable to the evaluation of the child's testimony remain the same, irrespective of the age of the witness. A child who is unable to give evidence due to the child, for example, not meeting the competency test, will not be able to rely on someone to tell his or her story to the court, as hearsay is not allowed. A report made to a mother, guardian, social worker or police officer identifying the perpetrator and depicting the event may, hence, be inadmissible as evidence, as this will amount to hearsay, unless the court finds it to be in the interest of justice to admit it. (Zeffert & Paizes *Essential Evidence* (2010) 139).

The purpose of this discussion is to investigate the application of the hearsay-rule to children's evidence not given in testimony during court procedures. A recent decision in a Labour Court dispute, *Minister of Police v M* (2017 38 IJL 402 (LC) (*Minister of Police v M*)), shed valuable light on the applicability of the hearsay rule to a child's evidence. Though this case was decided in the Labour court, the discussion will not *per se* focus on the decision to admit the hearsay evidence, but on the way in which the hearsay evidence was evaluated, as well as the court's finding with regard to the application of the hearsay rule to child witnesses.

#### 2 The Hearsay Rule in Evidence

The term 'hearsay' refers to the situation where a witness reports, during the course of court proceedings, what he or she has heard (from another person) or read. According to section 3(4) of the South African Law of Evidence Amendment Act 45 of 1988 (the Law of Evidence Amendment Act) hearsay is defined as 'evidence, whether oral or in writing, the probative value of which depends on the credibility of any person other than the person giving such evidence'. Various reasons have been

advanced for the exclusion of hearsay evidence, the most compelling being that it is unreliable evidence and may, therefore, mislead the court. It is deemed to be unreliable because the person who witnessed the facts is not present to tell the court under oath what he or she observed. The absence of the original observer prevents the evidence from being subjected to cross-examination (Schmidt & Rademeyer *Law of Evidence* (2013) para 18 1).

The hearsay rule originates from the English common-law and was incorporated as part of the South African law of evidence through legislation. In terms of the English common law evidence so labelled should be excluded uncompromisingly unless it can be accommodated within a recognised exception (Schmidt & Rademeyer para 18 1. See also *Vulcan Rubber Works (Pty) Ltd v SAR & H* 1958 3 SA 285 (A); *S v Mpofo* 1993 3 SA 864 (N)). This remained the position until 1988, when the Law of Evidence Amendment Act brought about some changes, replacing the system with a more flexible approach. Although there is still a general rule against hearsay, the new approach gives courts the power to admit hearsay evidence in cases where the traditional hearsay dangers are either satisfactorily accounted for, or are insufficiently significant (Zeffert & Paizes 135).

Section 3 of the Law of Evidence Amendment Act has introduced three main exceptions to the rule against hearsay. In terms of this section, hearsay may be admitted by agreement; where the person upon whose credibility the probative value of the evidence depends himself or herself testifies at such proceedings; or where the court, having regard to seven listed factors, is of the opinion that such evidence should be admitted in the interests of justice (see s 3 (1)(a)-(c) ).

These exceptions are of significant importance to child witnesses and may prove to be of assistance in instances where a child is unable to give evidence at a trial. In terms of the three exceptions, a report made to a third party (such as a mother, guardian, social worker or police officer) may be admissible if the opposing party agrees to its admission, the child himself or herself testifies at the trial, or the court allows it in terms of its general discretion to admit hearsay evidence when the interests of justice demand it. It is doubtful whether any opposing party in a criminal proceeding would consent to the admission of such evidence. The second category is not applicable as the child does not want to testify or is not allowed to do so, for example where a child does not meet the competency test. The third category may hence prove to be the only means through which to submit children's hearsay evidence (Zeiff 'The child victim as witness in sexual abuse cases-a comparative analysis of the law of evidence and procedure' 1991 *SACJ* 21 31).

Section 3(1)(c) affords the court with the right to admit hearsay evidence if, according to the court's discretion, this is in the interests of justice. In considering the interests of justice and in deciding how much weight should be afforded to the hearsay evidence, certain factors must

be taken into account by the courts. These factors include the nature of the proceedings; the nature of the evidence; the purpose for which the evidence is tendered; the probative value of the evidence; the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; any prejudice to a party which the admission of such evidence might entail; and any other factor which should in the opinion of the court be taken into account (see s 3(1)(c)). The court therefore has to weigh up all the factors in exercising its discretion to admit the hearsay evidence. This provision is the most far-reaching of the three exceptions and has revolutionised the approach to hearsay evidence (Zeffert & Paizes 139). According to Zeffert and Paizes this all depends however, on how far the courts will be prepared to go in exercising the powers given to them in terms of section 3(1)(c). Valuable guidance with regard to the interpretation of section 3(1)(c) was provided in the case of *Minister of Police v M*.

### **3 *Minister of Police v M***

The case concerns a young girl, K, who was sexually abused and raped by her father; RM. The abuse lasted over a period of four years, starting when she was fourteen years old. During this time, RM was employed as a police officer in the VIP protection unit of the South African Police Service (SAPS) (par 8-17). At the age of eighteen K finally reported the matter to a social worker. This resulted in RM being arrested (par 17). After RM's arrest in 2009 he faced both a criminal trial and a disciplinary hearing in which it was alleged that by violating his minor child he had contravened the SAPS code of conduct (par 1-2).

K testified against her father at the internal disciplinary hearing. Her testimony was corroborated by two other witnesses who were present in the house where some of the sexual assaults/rape allegedly occurred. RM was represented by a union representative at the disciplinary hearing. The witnesses were cross-examined by the representative. RM also testified in his own defence and was cross-examined (par 3-4). The presiding officer of the disciplinary hearing, who ran the hearing in a 'tight, fair and professional manner' (par 24), found RM guilty on the charges and he was discharged (par 24). The entire disciplinary hearing was electronically recorded and transcribed by a professional transcription service (par 27).

RM lodged an internal appeal, but was unsuccessful. He then referred an unfair dismissal dispute to the Safety and Security Sectoral Bargaining Council (SSSBC) for arbitration (par 5). As the arbitration constituted a new hearing, the evidence had to be introduced *de novo*. At this point the victim, K, informed SAPS telephonically that, due to the trauma experienced during the disciplinary hearing and the fact that she was in therapy, she refused to testify again. Despite the employer requesting subpoenas for K and the other two witnesses to attend the arbitration, these could not be served due to the fact that insufficient information as to their whereabouts were available (par 5). Consequently, the employer,

SAPS, had to rely on the transcripts of the internal disciplinary hearing to prove the substantive fairness of RM's dismissal. SAPS applied to have the transcripts admitted as hearsay in terms of section 3(1)(c) of the Law of Evidence Amendment Act, namely that it was in the interests of justice (par 6). The commissioner agreed to admit the transcripts as hearsay, but found the weight of the evidence derived from the transcripts against RM 'minimal without additional testimony or documents substantiating the allegations'. The commissioner consequently found RM's dismissal substantively unfair and reinstated him. The Minister of Police challenged this decision in the Labour Court before Whitcher J (par 7).

In evaluating the matter, Whitcher J highlighted that the commissioner correctly admitted the transcripts as hearsay evidence, since they were plainly relevant to the issue in dispute, and SAPS had a good reason for the absence of its main original witness (par 34). The matter however, rested on the question of what *weight* this hearsay evidence should be afforded (par 35). The judge underscored the difficulty in deciding on this matter. She stated that she had some sympathy for the approach adopted by the commissioner in not readily being prepared to ascribe significant weight to the transcripts, unless they were corroborated by other evidence (par 35). Nonetheless, she pointed out, while it may be an error or irregularity to attach too much weight to hearsay evidence, the opposite may be equally true. Not giving hearsay evidence sufficient weight may also constitute a material error or irregularity (par 35-37).

According to Whitcher J, the present case represented an example of a case in which the hearsay evidence was not afforded sufficient weight, in that the commissioner did not seem to realise that the transcripts were not ordinary hearsay, but were 'hearsay of a special type' (par 37). This distinctiveness could be attributed to the fact that the transcripts comprised a bilateral and comprehensive record of earlier proceedings in which the child victim's evidence was corroborated by at least two other witnesses, with the evidence withstanding rigorous cross-examination and in which RM's own defence was 'ventilated and exposed as being implausible' (par 37). Transcripts such as the ones in the present case, Whitcher J stated, must be afforded greater intrinsic weight than simple hearsay (such as a witness statement handed up during the course of a hearing), because they constitute a comprehensive and reliable record of a prior quasi-judicial encounter between the parties (par 40).

Whitcher J concluded that 'in appropriate factual circumstances' hearsay, such as a transcript of a properly run internal hearing, might carry enough weight to require of the accused employee to rebut the allegations contained in the hearsay. According to the judge, a reasonable decision-maker would have appreciated that the transcripts did not contain mere allegations, but rather tested allegations and a contested denial. As such, the transcripts constituted *prima facie* evidence of RM's wrong-doing (par 43). A number of guidelines for what would constitute appropriate factual circumstances to depart from the

norm, as in this case, were set out by the court. In terms of these guidelines, the hearsay should: be contained in a record which is reliable accurate and complete; be tendered on the same factual dispute; be bilateral in nature; be in respect of the allegations; demonstrate internal consistency and some corroboration at the time the hearsay record was created; show that the various allegations were adequately tested in cross-examination; and have been generated in procedurally proper and fair circumstances (par 45). Whitcher J subsequently ordered that the arbitration be set aside and that the matter be heard again before a new commissioner (par 52).

#### 4 Analysis and Comments

It is submitted that the decision and conclusions in *Minister of Police v M* are correct and should be supported for the following reasons:

Firstly, Whitcher J highlighted the difficulty experienced by presiding officers in evaluating hearsay evidence once they have exercised their discretion to introduce hearsay evidence in a given situation. She underlined the importance of striking a balance between giving hearsay evidence too much or too little weight (par 36). This becomes even more difficult when the hearsay is admitted in terms of the sec 3(1)(c). When hearsay is admitted in the interest of justice, the general rules of evidence should be applied in deciding how much weight to afford to the hearsay evidence. These factors include the nature of the proceedings; the nature of the evidence; the purpose for which the evidence is tendered; the reason why the evidence is not being given by the person upon whose credibility the probative value of such evidence depends; any prejudice to a party which the admission of such evidence might entail and any other factor which should in the opinion of the court be taken into account (see s 3(1)(c) of the Law of Evidence Amendment Act). Three of these factors received specific attention in the evaluation of K's account of the case, namely the nature of the evidence; the prejudice to the party which the admission of such evidence might entail and the reason why the evidence was not being given by the person upon whose credibility the probative value of such evidence depended.

With regard to, *inter alia*, the nature of the evidence Whitcher J pointed out that the specific hearsay evidence was 'of a special type' in that it comprised a bilateral and comprehensive record of earlier proceedings. This evidence was furthermore corroborated and survived competent testing by way of cross-examination (par 37). The court stressed that the main argument against affording any weight to hearsay evidence is the fact that it cannot be subjected to cross-examination as the source of the evidence is not present and is it thus prejudicial to the party against whom the hearsay evidence should be tendered (par 41). However, in the scenario under discussion the hearsay evidence was a record of the *source* actually being cross-examined in quasi-judicial proceedings (par 41). The main argument against affording weight to the evidence was thus addressed by the fact that the hearsay evidence was subjected to

cross examination and that the cross examination was also recorded. Also, the prejudice to the party against whom the hearsay record was to be tendered was reduced, in that the party was not deprived of an opportunity to cross-examine the witness but of a *second* opportunity to cross-examine the witness (par 42). The contention by Whitcher J that such evidence should in appropriate circumstances be afforded greater intrinsic weight than simple hearsay evidence (such as a witness statement) is supported.

The second consideration in determining the weight to be afforded to hearsay evidence is the absence of the person at the hearing, upon whose credibility the probative value of such evidence depended. Whitcher J held that, the fact that the child victim was ‘not prepared to go through this trauma any longer’ and was receiving therapy which would be compromised if she had to testify again, as cogent reasons not to testify (par 48). The acceptance of K’s evidence based on the aforementioned reasons is welcomed but the value of this judgment lies in the weight the Court afforded the hearsay evidence. The implication of this finding is that vulnerable victims do not have to give evidence more than once in circumstances where a formal hearing took place and the victim’s evidence as well as the cross-examination of the evidence is properly recorded.

Whitcher J confirms this viewpoint when she states that the system (in instances such as these) envisages that a class of vulnerable victims, such as children, would have to testify at least twice before an offending employee could be removed from service (par 49). However, this state of affairs is not restricted to labour disputes. Although not specifically addressed in the case of *Minister of Police v M* the fact that RM was charged of raping his daughter presupposes a separate criminal prosecution (par 1). In order to succeed with a criminal conviction of rape and sexual assault against RM, K would in all probability have to testify in a criminal court to the acts of violence.

It is widely accepted that children experience secondary traumatisation when having to testify (secondary victimisation has been defined by the United Nations in its United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse, 1985 (GA/RES/40/30) as ‘the victimisation that occurs not as a direct result of a criminal act, but through responses of institutions and individuals to the victim’). In *Director of Public Prosecution, Transvaal v Minister of Justice and Constitutional Development* (2009 2 SACR 130 (CC) at par [28]) the Constitutional Court highlighted this difficulty by stating that the court experience can often be as traumatic and as damaging to the emotional well-being of the child witness as the original abusive acts. This secondary traumatisation may increase with numerous court appearances. It is thus understandable that child witnesses may be reluctant to testify the first time let alone for a second or a third time.

Whitcher J points out that one way of avoiding multiple court appearances and of minimising the secondary traumatisation suffered by vulnerable witnesses, such as children, is to ensure that a complete record of a procedurally fair enquiry is recorded. Presiding officers overseeing such matters should thus take particular care to ensure that the record is accurate and complete and conducted with fairness to all the parties involved in order to safeguard its future use. The transcript of the initial internal hearing can then in appropriate factual circumstances be relied upon should the original witness not be in a position to testify again (par 49-50).

The criminal prosecution of RM will, similar to the arbitration, amount to a new hearing and the evidence will have to be presented *de novo*. Transcripts from the original disciplinary hearing will amount to hearsay evidence and the criminal court will have to exercise its discretion in terms of section 3(1)(c) of the Law of Evidence Amendment Act in deciding whether it will be admitted and once it has admitted the evidence, what probative value to ascribe to it.

This judgment provides guidelines not only on the admittance of hearsay evidence in the interest of justice but also on the weight to afford such evidence. The acceptance of hearsay-evidence based on a discretion (that is whether it is in the interest of justice) has been met with reluctance, especially in criminal cases (Zeffert & Paizes 139; see for example also *S v Cekiso* 1990 4 SA 20 (E) at 22A, where hearsay evidence on ‘controversial issues upon which conflicting evidence has already been given’ was disallowed).

In *S v Ramavhale* (1996 1 SACR 639 (A) at 647-648) the court stated that it has an ‘intuitive reluctance to permit untested evidence to be used against an accused’ in a criminal case as an accused person ‘usually has enough to contend with without expecting him to engage in mortal combat with an absent witness’. It also emphasised that ‘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 is compelling justification for doing so’ (1996 1 SACR 639 (A) at 649*d-e*). The importance of this caution was emphasised in *S v Ndlovu* (2002 2 SACR 325 (SCA) at 337-338) where Cameron JA held that a trial court, in applying the hearsay exceptions, must be scrupulous in ensuring respect for the fundamental right of the accused to a fair trial. Cameron JA concluded, however, that where the interests of justice require the admission of hearsay, the provision ‘does not require the absence of all prejudice’ (at 348). In *S v Shaik*, (2007 1 SA 240 (SCA)) a case where the conviction of the appellants on some of the charges depended heavily on hearsay evidence, the Supreme Court of Appeal received the evidence, stating that ‘sight should not be lost of the true test for the evidence to be admitted, and that is whether the interest of justice demands its reception’ (at par [171]). The aforementioned case law clearly illustrates the difficulty faced by courts of law in striking a balance between the need to protect the interests of the victim and of that of preserving the

rights of an accused. The guidelines provided in *Minister of Police v M* should assist courts in addressing the concerns expressed with regard to not only the admittance of hearsay evidence in the interest of justice but also the subsequent weight such evidence should be afforded. The application of these guidelines to criminal cases is supported by the statutory exception against the hearsay rule set out in section 214 of the Criminal Procedure Act.

In terms of section 214(a)(ii) of the Criminal Procedure Act the evidence of any witness recorded at a preparatory examination, shall be admissible in evidence on the trial of the accused following upon such preparatory examination if it is proved to the satisfaction of the court that:

- the witness is incapable of giving evidence;
- that the accused, or as the case may be, the state had a full opportunity of cross-examining of such witness;
- and the evidence tendered is the evidence recorded before the magistrate, or as the case may be, the regional magistrate.

Such evidence may also be admissible in terms of section 214(b) of the Criminal Procedure Act, if such witness cannot, after a diligent search, be found for purposes of the trial of the accused following upon such preparatory examination or cannot, in the discretion of the court, be compelled to attend such trial (see for example also *R v Matyeni* 1958 (2) SA 573 (EC); *R v Malan* 1948 (2) SA 327 (T)).

Section 235(1) of the Criminal Procedure Act sets out how the evidence in such previous proceedings may be proved in criminal proceedings. In terms of section 235(1) it constitutes sufficient proof of the original record of judicial proceedings if a copy of such record is certified as true, or purports to be certified by the registrar or clerk of the court or by someone who transcribed the proceedings or by other specified officials. Such a copy is deemed as *prima facie* proof that its contents were correctly recorded. It does not prove that the accused actually committed the act, but proves that the witness said what the record portrays. Whether the court made the correct finding has to be decided afresh (*Hiemstra Suid Afrikaanse Strafproses* 4 ed (1987) 473-474).

It is submitted that although, the use of preparatory examination have virtually disappeared in practice, the aforementioned two sections provides solid evidential rules for allowing hearsay evidence in circumstances as described in *Minister of Police v M*, in criminal cases, thereby safeguarding the rights of the accused.

## 5 Conclusion

The case of *Minister of Police v M* illustrates the importance of allowing hearsay evidence of children in appropriate circumstances and affording it the weight it deserves. Valuable guidance is provided by the Court in as

far as the evaluation of the probative value of hearsay evidence 'of a special type' is concerned. Constructive guidelines are furthermore provided to minimise the trauma of numerous court appearances for child witnesses which includes thorough and proper recording of procedurally fair enquiries. By applying these guidelines it is envisaged that a balance will be struck between the best interest of the child witnesses and the right to a fair trial of the accused in criminal cases.

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