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A critical overview of the admission of hearsay evidence, similar fact evidence and the swearing in of witnesses in Commission for Conciliation Mediation and Arbitration arbitrations

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DECLARATION

I, Dexter Ntokozo Thwala, declare that this dissertation is a product of my own work except as cited in the references. The dissertation has not been previously submitted either in part or in its entirety at any other university for the award of a degree.

Signed in Pietermaritzburg on this the ..5TH... day of April 2022

Signature 

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LIST OF ABBREVIATIONS

LC	Labour Court
LAC	Labour Appeal Court
CC	Constitutional Court
CCMA	Commission for Conciliation Mediation and Arbitration
LRA	Labour Relations Act
BCEA	Basic Conditions of Employment Act
EEA	Employment Equity Act
SCA	Supreme Court of Appeal
CPEA	Civil Proceedings Evidence Act
CPA	Criminal Procedure Act
CEA	Computer Evidence Act
ECTA	Electronic Communications and Transactions Act
LEAA	Law of Evidence Amendment Act
Guidelines	CCMA Guidelines on Misconduct Arbitrations

ABSTRACT

Section 138 (1) of the LRA gives commissioners powers to conduct arbitration proceedings in a manner they consider appropriate in order to determine disputes fairly and quickly. However, even though the LRA gives them such powers, they have to deal with merits of the dispute while ensuring that legal formalities are kept to the minimum and should be as non-legalistic as possible. This is in view of the fact that arbitration proceedings should not seek to imitate court proceedings, but they should be simple and non-legalistic.

This dissertation investigates the admission of evidence in CCMA arbitration proceedings, and the swearing in process. It focuses on the critical overview of the admission of hearsay evidence, similar fact evidence and the swearing in of witnesses in CCMA arbitrations, within the context of the provisions of Section 138 of the LRA. The first part of the dissertation provides a detailed analysis of the concept of evidence and related concepts. It also examines the conduct of statutory arbitrations in terms of the LRA. The second part presents and analyses the aforementioned types of evidence and the swearing in of witnesses in CCMA arbitrations. The detailed analysis in respect of the admission of the abovementioned types of evidence and the swearing in of witnesses is made with the assistance of the applicable statutory provisions and case law and academic contributions. The dissertation also analyses trends and developments and identifies and investigates problems and possible solutions in the area of the dissertation topic.

The dissertation concludes with suggestions as to how arbitration proceedings can be conducted in a quick and non-legalistic manner, while at the same time ensuring that they are conducted in a fair fashion. In addition, recommendations are made with an aim of facilitating reforms and further research on the principles relating to the admission of the abovementioned types of evidence, the swearing in of witnesses and the conduct of CCMA arbitration proceedings in terms of the LRA.

TABLE OF CONTENTS **PAGE**

CHAPTER 1: INTRODUCTION

1.1 Introduction and background

Labour disputes are dealt with in terms of the provisions of the Labour Relations Act No. 66 of 1995 (the LRA), the Employment Equity Act No. 55 of 1998 (the EEA) or the Basic Conditions of Employment Act No 75 of 1997 (the BCEA). The Commission for Conciliation, Mediation and Arbitration (the CCMA) and bargaining councils were established in terms of the LRA to deal with labour disputes. When labour disputes are referred to the CCMA for arbitration, CCMA commissioners have to apply the rules of evidence when conducting arbitration proceedings. Section 138 of the LRA[1] however suggests that the rules of evidence need not be applied as strictly as in the civil and criminal courts. This is also reflected in the CCMA Guidelines on Misconduct Arbitrations (the Guidelines), [2] which state that the LRA does not require arbitrators to act in the same manner as the courts.

Section 138(1) of the LRA provides that "the commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with substantial merits of the dispute with the minimum of legal formalities."[3] This means that arbitration proceedings at the CCMA must be less procedurally complex and more informal than court proceedings. They should be non-legalistic and should not seek to imitate court proceedings. The Labour Court (the LC), exercising its powers of review, has established precedent that forces arbitrators to adopt some formality and apply some of the rules of evidence strictly. Even though arbitrators are expected to deal with disputes quickly and fairly and with a minimum of legal formalities, they should adhere to the rules of evidence to the extent appropriate. The issue is whether the rules of evidence should be applied as strictly as in court proceedings, and when deviating from them will be considered fair.

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[1] Act 66 of 1995; s 138.
[2] *CCMA Guidelines on Misconduct Arbitration* Published under GN R224 in GG 38573 of 17 March 2015.
[3] Act 66 of 1995; s 138.

The broad aim of this research is to provide a critical overview of certain of the rules of evidence as applied in CCMA arbitrations. This will be done by examining hearsay evidence, similar fact evidence and the swearing in of witnesses in CCMA arbitrations.

The importance of section 138(1) of the LRA is evident in the significant case of *Naraindath v CCMA & Others,*[4] where the LC dealt with the approach used by the arbitrator in unfair dismissal proceedings. The court held as follows, at paragraph [26]:

> "it would stultify the entire purpose of the legislation if this court were, in the face of clearly stated intention, to insist on arbitrators appointed by the CCMA to resolve unfair dismissal disputes by conducting those proceedings 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: Such an approach is… contrary to the express provisions of the LRA."[5]

What the LC argued here was that the purpose of the LRA would be hampered if the LC were to insist that CCMA commissioners resolve disputes by conducting arbitration proceedings in a subservient manner of imitating court proceedings, under the technical rules that apply to courts. That approach would not be in line with the provisions of section 138 of the LRA, which requires that CCMA commissioners conduct arbitration hearings in a quick and fair manner and with a minimum of legal formalities.

1.2 Statement of purpose

The purpose of this study is to examine the application of the law of evidence in CCMA arbitrations, in light of the need to ensure minimum legal formalities, as provided for in section 138(1) of the LRA.

The research will examine the admissibility of hearsay evidence and similar fact evidence amongst other issues. It will also examine the swearing in of witnesses in CCMA arbitrations. It has to be noted that there is a need for a better understanding of the application of the law of evidence in the context of CCMA arbitration proceedings in order to ensure that arbitrations are conducted with a minimum of legal formalities and do not seek to imitate court proceedings.

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[4] *Naraindath v Commission for Conciliation Mediation and Arbitration & Others* [2000] 6 BLLR 716 (LC).
[5] *Naraindath* (note 4 above).

1.3 Rationale for the study

The reason for conducting this study is that when applying the rules of evidence in CCMA arbitration proceedings, some commissioners tend to adopt a strict and legalistic approach. This has been evident in the manner in which some CCMA commissioners have dealt with various types of evidence, including hearsay evidence and similar fact evidence, as well as the swearing in of witnesses in the CCMA arbitration proceedings, which has tended to be more legally formalistic rather than being non-legalistic as expected in terms of section 138(1) of the LRA. It has to be noted that the LC, when reviewing CCMA arbitration awards, also insists on legalistic standards from time to time rather than appreciating section 138 of the LRA.

The reason why this study has to be conducted, therefore, is to conduct a critical overview and evaluation of the application of the rules of evidence in CCMA arbitrations, with a view to ensuring that the application of the rules is done with a minimum of legal formalities as provided for in section 138(1) of the LRA.

1.4 Research questions

This research aims to answer the following questions pertaining to the law of evidence in CCMA arbitrations:

(a) What constitutes evidence and proof?
(b) What is admissibility and weight of evidence?
(c) What are the forms of evidence by which facts can be proven?
(d) How are statutory arbitrations conducted in terms of the LRA?
(e) When is hearsay evidence admissible in CCMA arbitration proceedings?
(f) When is similar fact evidence admissible in CCMA arbitration proceedings?
(g) Do witnesses in the CCMA arbitration proceedings have to be sworn in?
(h) What are the suggestions and recommendations regarding the admission of evidence, and swearing in of witnesses in CCMA proceedings?

1.5 Methodology

Since this research uses the desktop based research method, secondary data will be obtained from different textbooks, journal articles, statutes, online publications and law reports. Recent and relevant newspaper articles and internet sources will also be used. Online sources that can be accessed through the University of KwaZulu-Natal off-campus access to databases will also be used. The methodological step is the qualitative method of gathering data. The approach that will be used will enable one to examine various aspects related to the law of evidence as applied in CCMA arbitrations.

1.6 Literature review

Various scholars have laid a remarkable groundwork for the proposed research problem. To start with, there are various textbooks that have been written about the law of evidence in in criminal and civil proceedings and in labour matters. One of these textbooks is The Law of Evidence in South Africa: Basic Principles,[6] where Bellengere…et al examine evidence in labour matters.

Another relevant textbook in which various forms of evidence and its application are examined is Principles of Evidence by Schwikkard and Van Der Merwe.[7] This book contains valuable information on the principles of evidence that is relevant to the proposed study. Even though the work in this book is mainly focused on the law of evidence as applied in criminal and civil proceedings, one has to bear in mind that the standard of proof that is applied in civil proceedings is one of the balance of probabilities, the same standard of proof that applies in arbitration proceedings at the CCMA and bargaining councils.

There are a number of other published sources, i.e. journal articles, on the law of evidence as applicable to labour matters that will be used. Whitear-Nel has published various journal articles in which she deals extensively with the admission and the application of the law of evidence in labour proceedings. Some of these journal articles are Hearsay Evidence Admitted at an Internal Disciplinary Inquiry,[8] No Ordinary Hearsay: A discussion of Minister of Police

[6] A Bellengere… et al *The Law of Evidence in South Africa: Basic Principles: Procedural Law* (2013).
[7] PJ Schwikkard & SE van der Merwe *Principles of Evidence* 4ed (2018).
[8] N Whitear-Nel '*Hearsay Evidence Admitted at an Internal Disciplinary Inquiry*' (2001) 9:2 Juta's Business Law 73-75.

v RM M, Safety and Security Sectoral Bargaining Council and Smith NO,[9] Admissibility of Documentary Hearsay Evidence in Arbitrations in terms of The Labour Relations Act 66 of 1996.[10] In Similar Fact Evidence in Arbitration Proceedings,[11] Whitcher examines similar fact evidence in arbitration proceedings and outlines the rule against hearsay evidence. She also deals with admissibility of similar fact evidence. Other scholars have also written about similar fact evidence and their sources will be used in the proposed research.

The most up to date and/ or relevant case law will also be used in the research. In *Exxaro Coal Pty (Ltd) & Another v Chipana,*[12] the LC imported strict rules of evidence pertaining to hearsay into CCMA arbitrations. In *Gaga v Anglo Platinum Ltd & Others,*[13] the Labour Appeal Court (the LAC) addressed the refusal of the admissibility of similar fact evidence in CCMA arbitration proceedings. The LAC held that the commissioner committed a reviewable irregularity by excluding similar fact evidence. These cases and other relevant cases have implications for CCMA commissioners and labour law practitioners in general. Therefore, they will be examined in this dissertation.

In as much as a lot has been done in researching the application of the law of evidence in CCMA and bargaining council arbitration proceedings, this research will contribute significantly to the literature in this field. It will contribute in that future researchers will be able to learn from the current trends and practices in as far as the application of the law of evidence in CCMA and bargaining council arbitration proceedings are concerned. This will in turn enable them to make a meaningful contribution to the development of the application of the law of evidence in the context of arbitrations. This will also help in ensuring that there are reforms in the application of the law of evidence in arbitration proceedings.

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[9] N Whitear *'No Ordinary Hearsay: A Discussion of Minister of Police v RM M, Safety and Security Sectoral Bargaining Council and Smith NO'* (2017) 38 *ILJ* 402 (LC).
[10] N Whitear-Nel *'Admissibility of Documentary Hearsay Evidence in Arbitrations in terms of the Labour Relations Act 66 of 1996'* 23 Stellenbosch L. REV. 241 (2012).
[11] B Whitcher *'Similar Fact Evidence in Arbitration Proceedings'* (2014) *35 ILJ* 89.
[12] *Exxaro Coal & Another v Chipana & Others* (2019) 40 *ILJ* 2485 (LAC).
[13] *Gaga v Anglo Platinum & Others* [2012] 3 BLLR 285 (LAC).

1.7 Chapter breakdown

Chapter one will introduce the research topic and provide a brief background of the study. It will also give some detail regarding the statement of purpose, rationale for the study, research questions, methodology and literature review.

Chapter two will focus on the concepts of evidence and proof. It will also provide a comparison between the two concepts and examine related concepts like prima facie evidence, prima facie proof, conclusive proof, the onus of proof and the standard of proof.

Chapter three will examine the weight and admissibility of evidence. It will mainly focus on the weight of evidence by looking at the concepts of credibility, reliability and probabilities. It will also focus on the concept of admissibility of evidence in detail.

Chapter four will cover some of the forms of evidence and the presentation thereof. Focus will mainly be on oral evidence, real evidence, documentary evidence and electronic evidence.

In chapter five the conduct of statutory arbitrations in the CCMA will be covered, where the powers and duties of arbitrators in terms of section 138 of the LRA will be examined. Further, in this chapter, the concept of 'minimum legal formalities,' as provided in section 138(1) of the LRA will be investigated and discussed.

In chapters six and seven, hearsay evidence and similar fact evidence will be examined in detail. The application, admissibility and the exclusionary rules in respect of each of the abovementioned types of evidence will be discussed.

In chapter eight, the swearing in of witnesses in the CCMA will be examined. The relevant case law and the different lines of authority in respect the swearing in of witnesses in the CCMA will be investigated in detail.

The study will be concluded in chapter nine, where an answer to the main research question will be clearly stated and a summary and a reflection on the research will be provided. Further, recommendations for future work in respect of the application of the law of evidence in CCMA arbitrations will be made, taking into consideration the provisions of section 138(1) of the LRA in respect of dealing with the merits of a dispute with the minimum of legal formalities.

CHAPTER 2: MEANING OF EVIDENCE AND PROOF

2.1 Introduction

In the discussion that will follow, the concept of evidence and the meaning thereof will be examined in detail. Definitions of evidence by various scholars will be considered, with an aim of providing a clear picture of what evidence actually constitutes. Further, the concept of evidence will be compared with the concept of proof and the relationship between these two concepts will be examined. The concept of prima facie evidence, prima facie proof and conclusive proof will also be examined and a distinction between the three concepts will be made. Lastly, the chapter will be concluded by examining what the onus of proof and the standard of proof mean.

2.2 What is evidence?

Various scholars have defined the concept of evidence differently. According to Schwikkard and van der Merwe, "evidence consists of oral statements made in court under oath or affirmation or warning. It also includes documentary evidence and objects produced and received in court."[14] Bellengere…et al define evidence as "any information that a court has formally admitted in civil or criminal proceedings or at administrative or quasi-judicial hearings."[15] Taylor states that evidence as "information that is given in a legal investigation, to establish the fact or point in question. According to Sheppard, "evidence is anything or statement that might prove the truth of the fact at issue. It is that which demonstrates, makes clear, or proves the truth of the fact at issue."[16]

What appears to be common in the abovementioned definitions is that evidence constitutes statements, information, facts or things. It could be oral and written statements. It has to be noted that evidence constitutes statements, information or facts that come from various sources, the main source being witnesses that are called to testify orally in court or arbitration proceedings. Other sources of evidence are documents, video recordings, photographs and

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[14] PJ Schwikkard & SE van der Merwe (note 7 above) 20.
[15] A Bellengere...et al (note 6 above) 1.
[16] SM Sheppard *The Wolters Kluwer Bouvier Law Dictionary: Compact Edition* (2011) 396.

material objects. Most importantly, information in relation to a certain matter in dispute cannot simply be regarded as evidence. Information will become evidence when it is admitted by the court.

2.3 Evidence versus proof

The important point to note is that the terms evidence and proof are sometimes used interchangeably. These terms are, however, not the same. Evidence is not proof and proof is not evidence. Broadly speaking, information that is presented in court or arbitration proceedings in order to establish particular facts is referred to as evidence. Such information is presented through witnesses, documents, photographs, video recordings, audio recordings and in a number of other ways. Once such information is presented, the court/CCMA commissioner will have to weigh such information and evaluate it. Should the court/CCMA commissioner decide that such information/ facts is true, using the test of balance of probabilities, she would then be able to determine the matter appropriately.

According to Sheppard, proof is "the evidence that demonstrates the truth or falsity of a claim. It is a demonstration of the truth or falsity of some argument of claim based upon evidence and argument."[17] Proof is made up of sufficient evidence. It comes into being when there is sufficient relevant, credible, reliable and probable evidence. Sufficient evidence enables the decision maker to make factual findings using the test of the balance of probabilities. Each of these factors will be revisited below.

2.4 Prima facie evidence, prima facie proof and conclusive proof

As a point of departure, it is important to make a distinction between prima facie evidence and prima facie proof. This is important because the two concepts are sometimes used interchangeably, whereas they are not the same. According to Sheppard, [18] prima facie evidence is evidence sufficient to win an action if not rebutted. This means that it is that quantity of evidence that is admissible and is sufficient to support a party's claim of law.

[17] SM Sheppard (note 16 above) 875.
[18] SM Sheppard (note 16 above) 875.

According to Bellengere ..et al,[19]prima facie evidence is "evidence that looks compelling, invites a response and, in the absence of such response, will probably be found by the court to constitute proof." In other words, when prima facie evidence is led and a response is not made to that evidence, such evidence will constitute proof.

Bellengere… et al[20] state that prima facie means that which is superficially compelling with the potential to become conclusive, but which is still subject to possibly being challenged. According to Bellengere … et al,[21] prima facie proof is that proof which is used to establish a prima facie case. This prima facie proof can, however, still be disputed or contradicted. If it is not disputed or contradicted it will become conclusive proof.

Bellengere … et al define conclusive proof as "evidence which has become proof and which can no longer be contradicted."[22] It is worth noting that Schwikkard and van der Merwe[23] agree with Bellengere…et al in this regard, in that the former state that conclusive proof means that rebuttal is no longer possible as it is proof which is regarded as decisive and final.

2.5 The onus of proof

The basic principle regarding onus is that 'the party who alleges must prove.' Onus is the duty to prove and it rests on the party that has a duty to prove a particular case. Section 192 of the LRA[24] deals with onus in dismissal disputes and in subsection (1)[25] provides that "in any proceedings concerning any dismissal, the employee must establish the existence of a dismissal." This provision is important in that it indicates that onus initially lies with the employee to prove the existence of the dismissal. Subsection (2) of section 192 of the LRA[26] provides further that "if the existence of the dismissal is established, the employer must prove

[19] A Bellengere...et al *Law of Evidence in South Africa: Procedural Law* 2ed (2019) 70.
[20] A Bellengere...et al (note 19 above) 70.
[21] A Bellengere...et al (note 19 above) 70.
[22] A Bellengere...et al (note 19 above) 72.
[23] PJ Schwikkard & SE van der Merwe (note 7 above) 22.
[24] Act 66 of 1995; s 192.
[25] Act 66 of 1995; s 192(1).
[26] Act 66 of 1995; s 192(2).

that the dismissal is fair." The meaning of this is that as soon as the employee has proved the existence of the dismissal, the onus shifts to the employer, who has to prove that that the dismissal was fair.

Section 11 of the EEA,[27] in subsection (1) and (2) respectively, makes a distinction between an unfair discrimination that is alleged on the grounds listed in section 6(1) of the same Act and that which is alleged on an arbitrary ground. If unfair discrimination is alleged on listed grounds the employer must prove that such discrimination has not occurred or it is based on or is in accordance with reason or logic and not unfair. If the basis of unfair discrimination is arbitrary grounds, the complainant must prove that the conduct in question is not rational, amounts to discrimination and discrimination is unfair. What is significant with abovementioned EEA provisions is that onus lies with the employer on listed grounds, whereas it lies with the complainant on arbitrary grounds.

In discrimination disputes that are lodged in terms of the EEA the onus of proof also shifts from one party to another, i.e. from the employee to the employer. The case of *Ntai & Others v South African Breweries*[28] dealt with the proceedings concerning discrimination, where the onus shifted from the employee to the employer. In this case Basson J dealt with the onus thatlies on the applicants to prove the discrimination they alleged the respondent had committed. Basson J stated that "...once an applicant proves discrimination, the onus shifts to the employerto prove that such discrimination was nevertheless fair."[29] Basson reasoned that the unfair discrimination claimant has to establish a prima facie case, which will in turn require the employer to justify its actions. The mere allegation of discrimination would not be enough to establish a prima facie case. Further, a mere differentiation in pay between employees does mean that there is an act of discrimination by the employer. For that differentiation to amount to discrimination it has to be based on unacceptable grounds, like race. The LC found that the applicants had failed to identify unlisted grounds on which they formed their unfair discrimination claim. Since the applicants had alleged discrimination on arbitrary grounds, the onus was with them to prove that the conduct by the respondent amounted to unfair

[27] Act 55 of 1998; s 11.
[28] *Ntai & Others v South African Breweries* (2001) 22 *ILJ* 214 (LC).
[29] Ibid.

discrimination. It is worth noting that in dismissal disputes and discrimination disputes, the onus initially lies with the employee and thereafter shifts to the employer.

In unfair labour practice disputes, the onus of proof lies with the employee. The employee has to prove that the employer has committed an unfair labour practice as provided for in section 186(2)[30] of the LRA. Not everything the employee regards as unfair at work qualifies to be an unfair labour practice. Section 186(2) provides limited grounds on which unfair labour practice dispute may be based.

It is worth noting that onus of proof goes together with the duty to prove. Therefore, when discussing the onus of proof, the provisions of Schedule 8 to the LRA[31] cannot be left out as they deal with the issue. Item 2(4) provides that "where the dismissal is not automatically unfair, the employer has to show that the employee's dismissal is related to the employee's conduct or capacity, or is based on the operational requirements of the business. Should the employer fail to do that, or fails to prove that the dismissal was effected in accordance with a fair procedure, the dismissal will be regarded as unfair."[32] This is in line with section 192(2) of the LRA, [33] which provides that once the existence of a dismissal is established, the onus moves to the employer, who will have to prove that the dismissal was fair. Should the employerfail to prove that the dismissal was fair, it will be regarded as unfair.

2.6 The standard of proof

The standard of proof means the amount of proof that is essential to prove a fact. Broadly speaking, it means the test that is used to prove whether the party that has made allegations has discharged the onus upon it. The standard of proof that is used to prove allegations in criminal proceedings and civil proceedings is not the same. In criminal proceedings the standard of proof that is used is that of proof beyond a reasonable doubt. In civil proceedings, on the otherhand, the standard of proof that is used is that of proof on a balance of probabilities. The most

[30] Act 66 of 1996; s 186(2).
[31] Act 66 of 1995; Schedule 8.
[32] Act 66 of 1995; Schedule 8: item 2.
[33] Act 66 of 1995; s192(2).

important point to note is that civil proceedings and quasi-judicial proceedings, like arbitration proceedings, use the same standard of proof, i.e. the balance of probabilities. When using this standard of proof in a misconduct dispute, for instance, it has to be more probable than not that the employee committed the offence he is alleged to have committed.

What is significant in respect of the test of the balance of probabilities is that it is not as strict as the test of beyond reasonable doubt that is applied in criminal proceedings in a court of law. To confirm this assertion, in *Early Bird Farms v Mlambo*,[34] the LAC held that the employer did not have to prove with absolute certainty that the employee was guilty of the alleged misconduct but that proof on a balance of probabilities was sufficient. With the test of beyond reasonable doubt, a reasonable doubt would lead to a court making a finding of not guilty in a criminal case, for instance. In view of the fact that courts and the CCMA use different standards of proof, it is possible that an employee can be acquitted in criminal case of fraud, for instance, but still found guilty by an arbitrator in a statutory labour arbitration. This is because in a criminal case the court would be using beyond reasonable doubt as the standard of proof, whereas the arbitrator would be using balance of probabilities as the standard of proof. This could lead to a situation where the same set of facts presented at court and CCMA, respectively, could lead to different findings being made.

2.7 Conclusion

In this chapter, the concept of evidence was examined in detail and a distinction between evidence and proof was made, thereby providing clarity in respect of the two concepts. A distinction was also made between prima facie evidence, prima facie proof and conclusive proof. The concept of onus of proof was also examined in detail. Through examining the abovementioned concepts, a clear picture has been provided as to what constitutes evidence. Further, a clear understanding of concepts related to evidence has been provided.

[34] *Early Bird Farms v Mlambo* [1997] 5 BLLR 541 (LAC).

CHAPTER 3: WEIGHT AND ADMISSIBILITY OF EVIDENCE

3.1 Introduction

In this chapter two concepts will be examined, i.e. the weight of evidence and admissibility of evidence. Further, a distinction will be made between the two concepts. When evaluating the weight of evidence, the court/CCMA should assess credibility, reliability and preponderance of probabilities. The concept of evaluating the weight of evidence will be examined in detail. The concept of admissibility of evidence will also be examined in detail as well as the factors that have to be considered in respect of the admissibility of specific types of evidence, being hearsay and similar fact.

3.2 Weight of evidence

The Supreme Court of Appeal (the SCA) in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*[35] dealt with the issue of credibility of witnesses, their reliability and the probability or improbability of the versions of the respective parties. The SCA outlined the process that the court should follow in resolving factual disputes. The court held that a court should make findings on the credibility of various witnesses and their reliability. The court should also make findings on the preponderance of probabilities of each party's version regarding the disputed issues. After that the court will decide whether the party that has the onus of proof has been able to discharge it.[36]

What the SCA said was simply that credible, reliable and probable evidence has to be tendered for a party to discharge their burden of proof. The decision maker will then be able to examine and evaluate that evidence and thereafter make factual findings on the issues in dispute, using the appropriate standard of proof. In the case of arbitration proceedings, in evaluating evidence, the CCMA commissioner will have to weigh the evidence properly tendered and determine whether one party's version is more probable than the other party's version.

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[35] *Stellenbosch Farmers' Winery Group Ltd & Another v Martell et Cie & Others* (2003) (1) SA 11 (SCA).
[36] *Ibid.*

An important point to note is that evidence that is not admissible cannot be weighed. It plays no role in the decision making process. The decision maker has to evaluate evidence in order to assess its weight and there are many factors that are relevant to evaluating evidence. Broadly speaking, weight or probative value of evidence refers to how much weight will be placed on it by the decision maker. Some of the factors that add weight to a party's case are consistency, corroboration and whether the witness is an independent witness.

Consistency occurs when a witness says the same thing during cross-examination as during evidence in chief. Such a witness would be regarded as consistent in her testimony and that consistency would add weight to a party's case. Where a witness deviates from previous statements, she would be regarded as inconsistent and her evidence would lack the necessary weight and would not add weight to a party's case.

Corroboration takes place when evidence is supported, confirmed or strengthened by other evidence. In other words, for there to be corroboration a person would have to testify in support of evidence that has already been tendered by another person earlier on. When there is corroboration in respect of evidence that has been tendered, that would add weight to a party's case.

In some cases, it could happen that evidence is tendered by an independent witness, that is, a witness who is not directly involved in the matter, who does not know any of the parties in dispute and has no interest in the matter. Evidence tendered by an independent witness would add weight to a party's case as compared to that tendered by a witness who is involved in the matter and has some relationship in one way or another with any of the parties in dispute.

The abovementioned factors are taken into account in determining the party's case and attaching weight to it. When evaluating the weight of evidence, the court/CCMA must assess credibility, reliability and the preponderance of probabilities. Each of these aspects will be considered below.

3.2.1 Credibility

Credibility of a witness refers to whether a witness is judged to be telling the truth. It refers to the believability or truthfulness (veracity) of a witness. This view is supported by

Bellengere…et al, [37]who argues that "credibility is an evaluation of a witness's truthfulness only." The truthfulness of the witness depends on a variety of factors, such as the witness's demeanour, bias, internal contradictions, probability or improbability of his version and other factors. Therefore, a witness whose demeanour is not good, who contradicts himself in his testimony, who gives an improbable version of events that took place, will be lackingcredibility and less weight will be attached to their testimony. In assessing the credibility of a witness, the decision maker should not single out one factor. She should rather do a holistic evaluation of the witness as well as their testimony.

The Guidelines[38] also provide that the process of analyzing evidence by the CCMA commissioner involves findings of fact based on an assessment of credibility and the applicable rules of evidence, amongst other factors. It is a process that requires that the CCMA commissioner weighs evidence as a whole while assessing (inter alia) the credibility of the witness, including demeanour of that witness.

The LC in *Marapula & Others v Consteen*[39] dealt with the issue of credibility of witnesses and the probability and improbability of what they say and held that the proper approach to evaluation of evidence is the credibility of witnesses and the probability and improbability of what they should not say should not be regarded as separate enquiries to be considered using a piecemeal approach. This means that it would be incorrect for the decision maker to look at credibility in isolation when evaluating the weight of evidence; the issue of probabilities should also be considered.

When assessing probabilities, CCMA commissioners should also consider the issues of internal consistency and external inconsistencies. Internal inconsistency arises when there is contradiction in respect of the version given by the same witness. External inconsistency arises when one witness contradicts another witness on the same side. It can also arise when a witness's version is inconsistent with documentary evidence that has been presented.

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[37] A Bellengere...et al (note 6 above) 174.
[38] *CCMA Guidelines* (note 2 above).
[39] *Marapula & Others v Consteen* (1999) 20 *ILJ* 1837 (LAC).

3.2.2 Reliability

In an instance where a witness lies in court or in arbitration proceedings, he would have no credibility and her evidence would therefore be unreliable. A truthful witness may also be found to be unreliable and her evidence therefore given lesser weight. Reliability of evidence is one the most important factors that the court/CCMA should consider in evaluating the weight of evidence.

According to Bellengere…et al, [40] when assessing the reliability of evidence, the court must take into account whether the witness had a good opportunity to observe what he or she had seen or experienced, whether his memory is accurate, whether the witness has reconstructed the events correctly and can recount dispassionately, whether the witness's recollection was not tampered with by someone suggesting facts to him or her or discussing the matter with other witnesses, whether the witness's version is not inherently improbable, whether the witness's recollection of events was aided by notes or statements he or she made at the time of the event or close to the time of the event when the event was still fresh in his or her mind, whether the witness had reason to take notice of and remember the event he or she is testifying to, whether his account is probable and whether the witness's version was given in response to questions that did not suggest the answer on important disputed facts.

Broadly speaking, the evaluation of evidence is concerned with how believable and reliable witnesses are. Various scholars and courts have maintained that unreliable evidence involves hearsay evidence, documents, video tapes, photographs, lie detectors or breathalysers, amongst other types of evidence. All these types of evidence are said to be unreliable if not corroborated. It is important to note that reliable evidence should be preferred over unreliable evidence.

3.2.3 Probabilities

Probability is one of the factors that should be assessed by the court/CCMA when evaluating the weight of evidence. According to Sheppard, [41] 'probable' means 'likely to be true' and it

[40] A Bellengere...et al (note 19 above) 385.
[41] SM Sheppard (note 16 above).

is the likelihood of an event or a condition being true. In civil and arbitration proceedings the standard of proof that is used is the balance of probabilities. When evidence is presented the court/ CCMA has to make a finding on the probability or improbability of each of the parties' version. The court/CCMA may prefer one version over the other because it is more probable or is more likely to be true.

The Guidelines[42] provide that the process of analyzing evidence by the CCMA commissioner involves findings of fact based on an assessment of probabilities, amongst other factors. The CCMA commissioner must weigh evidence as a whole while taking into account the issue of probabilities, a process which requires a formulation of the contending versions and the weighing up of those versions so as to determine which one is more probable. This will require the CCMA commissioner to use the standard of proof of the balance of probabilities.

When the court/CCMA commissioner assesses the credibility of a witness, a witness may appear to be credible, only to find that his credibility is in conflict with the probabilities of the case as a whole. In that case the court/ CCMA commissioner would have to make a decision on whether it prefers credibility or probabilities. In a recent *Network Field Marketing v Mngezana*[43] judgement, the LC held that in resolving a dispute of fact, a commissioner should make a balanced assessment of the credibility, reliability and probability of the different versions that have been presented. Credibility should not be relied upon as the sole means of determining the probative value of evidence. It is an exercise that would require the court/ CCMA commissioner to look at probabilities as well, in an assessment of the weight of evidence. It is important, therefore that the court/CCMA commissioner does not base its decision on certain isolated facts, but must evaluate at all the evidence that has been presented. They should use a holistic approach in evaluating evidence and consider the factors of reliability, credibility and probabilities together.

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[42] *CCMA Guidelines* (note 2 above).
[43] *Network Field Marketing v Mngezana NO & Others* (2011) 32 *ILJ* 1705 (LC).

3.3 Admissibility of evidence

According to Sheppard, "admissibility refers to the fitness of any piece of evidence or testimony for its introduction into court in a given cause of action. It is the appropriateness of introducing each piece of evidence or testimony under the rules of evidence."[44] Any piece of evidence would be fit/be appropriate to be introduced into court if it is relevant and reliable, among other requirements specific to the particular type of evidence.

An important point to note is that not all evidence that is tendered in criminal, civil or arbitration proceedings is permitted. There is evidence that is permitted and that which is not permitted in terms of the rules of evidence. Flowing from that one can say that in criminal, civil and arbitration proceedings it has to be established whether the evidence that a witness is tendering is permitted or not. Hence the concept of 'admissibility' of evidence. If there is a question as to whether evidence is admissible or not, the decision maker will have to make a ruling in that regard before that evidence can be presented.

In criminal and civil proceedings and statutory arbitration proceedings, evidence is allowed or is admissible if it is relevant, reliable and its admission would not be contrary to policy. It has to be emphasised that relevance is the first test for evidence. For al all evidence to be admissible it must be relevant. Admissibility and relevance of evidence go hand in hand. Relevance is the first hurdle to admissibility. Then the various types of evidence have their own rules regarding admissibility. The relevance consideration is an umbrella concept. It has been argued that relevant evidence is evidence that proves or disproves an issue in dispute. In terms of section 2 of Civil Proceedings Evidence Act 25 of 1965 (the CPEA),[45] irrelevant evidence and that which cannot help to prove or disprove an issue in dispute will not be admissible. An equivalent provision in respect of criminal cases is found in section 210 of the Criminal Procedure Act 51 of 1977 (the CPA), [46] which also provides for non-admissibility of irrelevant or immaterial evidence.

[44] SM Sheppard (note 16 above) 38.
[45] Act 25 of 1965; s 2.
[46] Act 51 of 1977; s 210.

According to Sheppard,[47] relevant evidence is evidence that might assist in the finding of a fact of consequence in an action. Irrelevant evidence is generally inadmissible. Occasionally irrelevant evidence will be admitted for policy reasons, like an accused's evidence of his good character. Sheppard states that "irrelevant evidence is evidence that cannot assist in the finding of a fact of consequence in an action, evidence that has no likelihood of assisting a trier of fact in ascertaining any fact in issue in an action."[48] The reason why irrelevant evidence is inadmissible is that it does not assist the decision maker in determining the issue in dispute. It also does not add any weight on the case of the party that adduces it. In statutory arbitrations relevance is the key requirement of admissibility. Therefore, only that evidence which is relevant should be presented by the parties in dispute. CCMA commissioners should be able to distinguish between facts that are sufficiently relevant and those that are too remote and will not assist them in resolving the dispute at hand.

3.4 Conclusion

In this chapter the concepts of weight of evidence and admissibility of evidence were examined and a distinction between the two made. After making a distinction between the two concepts, it became clear that the two concepts are not the same. It emerged that credibility, reliability and probabilities go together in weighing evidence that has been presented. Therefore, CCMA commissioners cannot consider credibility without considering probabilities when assessing the weight of evidence that has been tendered. They also cannot consider the reliability of evidence without considering the preponderance of probabilities.

[47] SM Sheppard (note 16 above) 401.
[48] SM Sheppard (note 16 above) 401.

CHAPTER 4: FORMS OF EVIDENCE

4.1 Introduction

This chapter will examine various forms of evidence and a distinction will be made between the same. The forms of evidence that will be examined are oral evidence, real evidence, documentary evidence and electronic evidence. Various pieces of legislation that regulate the abovementioned forms of evidence will also be considered. Case law in respect of the abovementioned forms of evidence will also be considered.

4.2 Oral evidence

Oral evidence is the main type of evidence and is tendered verbally by a witness who is usually present in court or arbitration proceedings. It is evidence that is tendered orally by a witness on what they actually saw, heard or otherwise witnessed and is presented through evidence in chief, cross-examination and re-examination. There is an advantage when evidence is tendered orally by a witness in that the other party would be able to cross-examine that witness. Further, the presiding officer would be able to observe the demeanour of that witness, during all the stages the proceedings, i.e. when they are sworn in, during evidence in chief, cross-examination and re-examination.

Section 161 of the Criminal Procedure Act[49] (the CPA) provides that a witness at criminal proceedings has to give his evidence *viva voce.* The equivalent provision which requires oral testimony by witnesses in civil proceedings is section 42 of the CPEA.[50] The principle that evidence has to be given *viva voce* also applies to arbitration proceedings. Clause 14 of the Guidelines[51] provides that parties may present their evidence through witnesses who will have to be questioned and thereafter present their closing arguments.

Exhibits, if any, in civil, criminal and arbitration proceedings, have to be introduced through oral evidence, where a witness would have to identify or describe these. The same principle

[49] Act 51 of 1977; s 161.
[50] Act 25 of 1965; s 42.
[51] *CCMA Guidelines* (note 2 above) Clause 14.

applies to documentary evidence. As it is often said that 'documents do not speak for themselves', a witness has to testify on a document that has been introduced. According to Jordaan ...et al,[52] to prove the authenticity of a document and to ensure that that document is admitted as evidence, a witness has to testify about the document as such document will not simply be admitted at face value. Thus a document produced in court/CCMA proceedings as evidence has no value unless a person speaks to that document.

4.3 Real evidence

Real evidence, also called physical evidence, involves physical objects like photographs, audiotapes, videotapes, fingerprints, handwriting, blood tests, inspections in loco, a knife or a gun, which have to be handed in as exhibits to prove a case. These physical objects have to be supported by the witness's testimony for them to add weight to a party's case. To support this, Zeffertt and Paizes suggest that "real evidence is seldom of much assistance unless it is supplemented by the testimony of witnesses."[53] Thus oral evidence is the most important form of evidence, as real evidence has to be presented through oral evidence. However, there are instances where oral evidence may be used to describe relevant real evidence that has not been produced in court. This is what is called reported real evidence and should be contrasted to immediate real evidence, where the witness does not only identify and orally describe real evidence, but also presents it to court.

Real evidence will only be admitted if it is relevant to the issue in dispute. Any irrelevant real evidence will not assist the decision maker in determining a dispute and will therefore not be admitted. Bellengere ... et al,[54] support the abovementioned principle and state that there are admissibility requirements in respect of real evidence and one of these is that the object being admitted as real evidence "must be relevant to proceedings. Further, it must be properly identified and must not be excluded by any other rule of evidence." [55] It has to be stated that testimony tendered orally by a witness remains important in that it helps in clarifying what that item of real evidence which has been introduced is and how relevant it is to the issue in dispute.

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[52] B Jordaan ...et al *Basic Law of Evidence in Labour Arbitration* 2ed (2011) 61.
[53] DT Zeffertt & AP Paizes *The South African Law of Evidence* 3ed (2017) 967.
[54] A Bellengere...et al (note 6 above) 64.
[55] Ibid.

4.4 Documentary evidence

An important point to note is that there is no one definition as to what constitutes a document and various statutes and courts have differed in this regard. Section 33 of the CPEA provides that 'document' is any book, map, drawing or photograph.[56] Section 221(5) of the CPA provides that "a document is any device by means of which information is stored or recorded."[57] Section 246 and 247 of the CPA[58] refers to document as any document, which includes any newspaper, magazine, book, pamphlet, letter, circular letter, list, register, placard or poster. In *Seccombe and Others v Attorney-General* the court defined a 'document' as everything that contains the written or pictorial proof of something.[59] The abovementioned definitions show that the meaning of word "document" is broader than what one might at first suppose. Further, the definitions show that there is no one particular definition that can be attributed to a document. This requires that courts/ CCMA commissioners are open minded and flexible when dealing with documentary evidence and assessing its weight.

There is a distinction between public documents, official documents and private documents. Public documents are those that are written by a public official, in the carrying out of a public duty, which are meant for public use and to which the public has a right of access. Official documents are those in the custody and under control of a state official. They are often public documents. Private documents are any documents that are not public documents. They include letters and contracts of private persons as well as some state documents like departmental correspondence.

One of the main admissibility prerequisites in respect of documents is that the contents of the document must be relevant. Further, the author of the document should be competent to provide testimonial evidence in respect of that document. Sheppard[60] states that the best evidence rule requires that the original of a text or image should be used, if possible. The rule requires that

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[56] Act 25 of 1965; s 33.
[57] Act 51 of 1977; s 221.
[58] Act 51 of 1977; s 246.
[59] *Seccombe v Attorney-General* (1919) *TPD* 270 277.
[60] SM Sheppard (note 16 above) 398.

an original of a writing, photo, recording, or similar object be admitted to prove its contents. A substitute of the original will only be allowed in certain circumstances, such as where the original is not available or after an effort to produce the same has failed. This also the case in a court of law, a party has to submit an original document, i.e. primary evidence, where the contents of a document have to be proved. A copy of a document, i.e. secondary evidence, can also be submitted in certain circumstances.

Even though an original document has to be submitted as documentary evidence in court proceedings, there are exceptions to the originality requirement. The first exception is if the party can prove a fact using some other means other than the original document. The second exception is where original documents have been lost, destroyed or cannot be located, in which case copies can be used.

When the existence of the document is in dispute, the primary evidence rule does not apply. It also does not apply when what has to be proved is the existence of the relationship for the document has to be proved. In instances where it can be shown that the original document has been damaged, cannot be found after it has been searched, the issuing of the original may result to criminal charges or the issuing of the original is impossible, secondary evidence may be admissible. It is also possible that the original may be with another person who may refuse to produce the same. In quasi-judicial proceedings, like statutory arbitration proceedings, copies are most often submitted. The question of originality usually only becomes an issue if the opposing party alleges that the copies have been interfered with.

4.5 Electronic evidence

The Electronic Evidence Communications Act 25 of 2002 (the ECTA) is focused on electronic evidence and provides for the facilitation and regulation of electronic communications, as compared to other pieces of legislation, were enacted before it. Section 1 of the ECTA[61] defines data as "electronic representations of information in any form and also defines a data message as data generated, sent, received or stored by electronic means and includes voice and stored

[61] Act 25 of 2002; s1.

record." Previous pieces of legislation did not make mention of data and data messages. Section 11(1) of the ECTA provides that the fact that information is a data message would not render it as having no legal force and effect. [62] Section 15(1) of the ECTA is more inclusionary in that it supports the admissibility of data messages. [63] This inclusionary approach is evident in *Ndlovu v Minister of Correctional Services and Another,*[64] where the court was of the view that section 15 facilitates admissibility of electronic evidence as it is against the rejection of a data message on the grounds that it was generated electronically.

There is some controversy whether electronic evidence can fall under the definition of hearsay evidence. This question was answered by the court in *Ndlovu v Minister of Correctional Services,*[65] where the court held that "where the probative value of the information contained in the electronic evidence depends on the credibility of the natural person, it would qualify as hearsay evidence and where it depends on the credibility of the computer, that evidence will not be regarded as hearsay evidence." In *S v Mashiyi,*[66] the decision that was based on the rationale of the *Harper*[67] case, the court could not admit documents containing computer information, maintaining that that a computer is not a person and as such, computer produced evidence could not depend on the probative value of a person. In *Ndiki,* [68] the court rejected the reasoning in *Mashiyi*[69] and held that "computer generated evidence may be admissible as hearsay evidence in terms of section 3 of the LEAA. Evidence which depends only upon the reliability and accuracy of the computer itself and its operating systems or programs constitutes real evidence." From the abovementioned court decisions, it is evident that courts have differed on whether electronic evidence can be regarded as hearsay evidence or not. The issue that courts grappled with was whether it is the credibility of a person or that of the computer that should be considered when electronic computer evidence is being dealt with.

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[62] Act 25 of 2002; s11.
[63] Act 25 of 2002; s15.
[64] *Ndlovu v Minister of Correctional Services and Another* (2006) 4 All SA 165 (W).
[65] Ibid.
[66] *S v Mashiyi and Another* (2002) 2 SACR 387 (Tk).
[67] *S v Harper and Another* (1981) (1) *SA* 88 (D).
[68] *S V Ndiki & Others* (2007) 2 *All SA* 185 (Ck).
[69] *S v Mashiyi and Another* (note 66 above).

4.6 Conclusion

In this chapter various forms of evidence, i.e. oral evidence, real evidence, documentary evidence and electronic evidence were examined in detail. In the discussion above, it became clear that oral evidence is the most important form of evidence in that real evidence, documentary evidence and electronic evidence cannot be presented without oral evidence. Various pieces of legislation and case law relevant to the abovementioned forms of evidence were also considered. From the discussion above, there is clear understanding of the abovementioned forms of evidence.

CHAPTER 5: THE CONDUCT OF STATUTORY ARBITRATIONS IN TERMS OF THE LABOUR RELATIONS ACT

5.1 Introduction

In this chapter the conduct of statutory arbitration proceedings in terms of the LRA will be examined in detail, with particular focus on the duties of the commissioner, the use of the inquisitorial versus the adversarial approach by commissioners and the meaning of arbitration hearings as hearings *de novo*. The main focus will be the conduct of arbitration proceedings while taking into consideration the provisions of section 138 of the LRA.

5.2 Powers and duties of commissioners

Section 138 of the LRA regulates the powers of commissioners in conducting arbitration proceedings. Subsection (1) provides that "the commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with substantial merits of the dispute with the minimum of legal formalities."[70] Subsection (2) provides that "subject to the discretion of the commissioner as to the appropriate form of the proceedings, a party to the dispute may give evidence, call witnesses, question the witnesses of any other party, and address concluding arguments to the commissioner."[71] An explanation in respect of these two subsections will be given below.

In line with section 138(1) of the LRA, Clause 13 of the Guidelines[72] provides that CCMA commissioners have to decide on the form of an arbitration and advise the parties to the dispute of that decision. In line with section 138(2), Clause 14 of the Guidelines[73] outlines the commissioner's discretion as to the form of proceedings. Most importantly, even though the CCMA commissioners are granted a discretion to conduct arbitration proceedings in a manner they consider appropriate, they should ensure that the proceedings are conducted in a simple

[70] Act 66 of 1995; s 138(1).
[71] Act 66 of 1995; s 138(2).
[72] *CCMA Guidelines* (note 2 above).
[73] Ibid.

and non-legalistic manner. They should bear in mind that arbitration proceedings are not court proceedings and should not be equated to the latter. It is not required that they should conduct arbitration proceedings without legal formalities at all, but it is expected that these should be minimal.

Section 142 of the LRA[74] provides for the powers of commissioners when attempting to resolve disputes. The commissioner has powers to subpoena witnesses, experts and any person to appear before the CCMA to give evidence to be questioned. The commissioner may also administer an oath or accept an affirmation from any person who appears before the CCMA. She may also conduct an inspection in loco, examine, demand the production of and seize any book document or object that may assist her to resolve a dispute. She may also take statement from any person who is willing to give the same. She may also inspect and retain any books and documents that have been produced or seized by the CCMA.

Section 142(9) of the LRA[75] gives further discretion to CCMA commissioners. It empowers them to make a finding that a party is in contempt of the CCMA if she commits any of the acts mentioned in subsection (8), for instance when she refuses to take the oath or affirmation or she willfully interrupts the CCMA proceedings or misbehaves. The above provisions are an indication that that CCMA commissioners have a wide discretion when conducting arbitration proceedings in terms of the LRA.

Section 138 also places obligations on CCMA commissioners. They have an obligation to decide as to how arbitration proceedings are to be conducted. They also have an obligation to determine the dispute fairly and quickly, while dealing with the merits of the dispute with the minimum of legal formalities. It is therefore critical that CCMA commissioners understand the level of their statutory discretion. It is also expected that they should exercise such powers diligently

[74] Act 66 of 1995; s142.
[75] Act 66 of 1995; s 142(9).

5.3 The inquisitorial approach versus the adversarial approach

CCMA commissioners have a discretion to decide on the appropriate form of the proceedings and the rights of each of the parties during such proceedings. Bellengere…et al[76] have argued that an arbitrator can use his discretion whether to adopt an adversarial procedure, where the parties control the flow of evidence and question the witnesses, or an inquisitorial approach, where the arbitrator does most of the questioning and determines the flow of evidence, when dealing with the dispute with the minimum of legal formalities. Simply put, using an inquisitorial approach the CCMA commissioner will be more involved in the arbitration proceedings, whereas using the adversarial approach she would be less involved.

Clause 32 of the Guidelines [77] states that "…the arbitrator should advise the parties how the evidence is to be presented and tested. When deciding on the form proceedings are to take, the arbitrator should consider the complexity of the factual and legal matters involved in the case; the attitude of the parties to the form of proceedings; whether the parties are represented; whether legal representation has been permitted; and the experience of the parties or their representatives in appearing at arbitrations." This means that CCMA commissioners should assist the parties in the arbitration proceedings. They should also ensure that parties who are unrepresented or inexperienced are familiarized or are made aware of the rules that are applicable in the proceedings. They should also guide the parties in the arbitration proceedings.

Clause 33 of the Guidelines[78] provides that the commissioner in arbitration proceedings has a role of finding the facts and determining the probabilities. This would require her to question witnesses and requiring the parties to produce documentary and other forms of evidence in support of the evidence. That approach would be inquisitorial. On the other hand, when the parties are mainly in charge with regard to the processes of calling witnesses, presenting their cases, cross-examination, that would be an adversarial approach. In statutory arbitration proceedings, the adversarial approach is mostly used.

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[76] A Bellengere...et al (note 6 above) 425
[77] *CCMA Guidelines* (note 2 above).
[78] Ibid.

It is important to point out that CCMA commissioners have to be able to strike a balance between being informal and being too legalistic when conducting arbitration proceedings. Where a commissioner adopts an inquisitorial approach and attempts to help a weaker party during arbitration proceedings, allegations of bias against him might be raised against her. Any CCMA commissioner should be cautious of the fact that parties in arbitration proceedings may not be equal in terms of skills, knowledge, experience and ability. To ensure that arbitration proceedings flow smoothly and are evenly balanced, the arbitrator may come to an aid of a weaker party. The test for bias was formulated in the by the CC in *President of RSA v SARFU & Others*, where the court held that the test is "whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the justice in question had not brought an impartial mind to bear the adjudication of the case."[79] Thus CCMA commissioners should be mindful of the fact that they may be faced with allegations of bias (or apprehension of bias) when conducting arbitration proceedings.

Where the CCMA commissioner decides to use an inquisitorial approach, she should observe the rules of natural justice. Therefore, even though he may come to the aid of the weaker party, it should not be to the prejudice of the other party to the dispute. Should that happen, it would create a perception of bias on the part of the commissioner. It is required that CCMA commissioners deal with the substantial merits of the dispute in an impartial, unbiased, fair and even-handed manner. They can do this by exercising one of the rules of natural justice, i.e. the *audi alteram principle*, where, when extending a helping hand to one party, they would also allow the other party an opportunity to be heard.

When dealing with an appropriate conduct on the part of the commissioner, Clauses 20 and 21 of the Guidelines[80] are of great importance and cannot be overlooked. Clause 20 of the Guidelines[81] provides for the housekeeping arrangements that should be made by the arbitrator at the start of the arbitration, after welcoming the parties. Among other things, she should advise the parties of her appointment to the case, their rights in terms of Section 138(2) of the LRA, how documents will be introduced into proceedings, the parties' right to conciliate during

[79] *President of RSA v SARFU & Others* (1999) (4) SA 147 (CC).
[80] *CCMA Guidelines* (note 2 above).
[81] Ibid.

the arbitration proceedings, the language that will be used in the proceedings and whether the services of an interpreter will be used.

According to Clause 21 of the Guidelines,[82] the experience of the parties or that of their representatives, their knowledge and experience in CCMA arbitration procedures will determine the extent to which an arbitrator deals with the issues mentioned in Clause 20 above. In terms of Clause 20,[83] if it becomes clear that any of the parties in the arbitration proceedings does not understand the nature of the proceedings and as a result its case is prejudiced, the arbitrator should address that situation. The provisions of Clauses 20 and 21 are significant and important for CCMA commissioners and they should be adhered to in conducting arbitration proceedings. Looking at the nature of the CMA commissioner's duties as reflected in Clauses 20 and 21, it goes without saying that an appropriate conduct on the part of the commissioner should be in line with the aforementioned Clauses. In dealing with the issues mentioned in the abovementioned Clauses, CCMA commissioners should ensure that arbitration proceedings are conducted in a simple and non-legalistic fashion.

5.4 Arbitrations as hearings de novo

As a point of departure, it is important to look at the meaning of the term 'de novo'. This will not only help one in getting a better understanding of the term itself, but will also help in ensuring that one understands the term in the context of arbitration proceedings. According to Bellengere... et al, the term de novo simply means "to start anew or afresh, i.e. from the beginning."[84] This is the nature of the arbitration hearing, it starts afresh, from the beginning, where parties have to call witnesses in presenting their cases.

Clause 17 of the Guidelines also provides that "an arbitration is a new hearing, which means that the evidence concerning the reason for dismissal is heard afresh before the arbitrator."[85] An arbitrator, therefore, cannot use evidence that was led during disciplinary proceedings in other to determine the outcome of arbitration proceedings. This does not mean, however, that

[82] Ibid.

[83] *CCMA Guidelines* (note 2 above).

[84] A Bellengere ... et al (note 6 above) 478.

[85] *CCMA Guidelines* (note 2 above) Clause 17.

the disciplinary hearing proceedings are totally irrelevant during arbitration proceedings. As Bellengere … et al points out that transcripts of an internal disciplinary hearing may be used in an arbitration hearing. They may be used to test the consistency of testimony given at the arbitration.[86]

The fact that arbitration hearings are hearings de novo has been confirmed by our courts, as it is evident in the court decisions that follow. In *Sidumo & Another v Rustenburg Platinum Mines,*[87] the landmark CC decision of a dismissal dispute, the apex court confirmed that an arbitration under the LRA is a new hearing.

In *County Fair Foods v CCMA & Others,*[88] the LAC held that "the commissioner must reach a decision on evidence presented at arbitration, and it is not limited to evidence that was before the employer at the time of its decision." The above was also confirmed in *Minister of Safety & Security v Safety & Security Bargaining Council & Others,*[89] where the LC held that an arbitration hearing is a new hearing, it is not merely a review of what took place during the internal disciplinary hearing. It is important therefore that CCMA commissioners focus on evidence that is before them in arbitration proceedings and that they base their decision on that evidence. This would ensure that arbitrations are conducted in a fair manner in line with section 138 of the LRA.

It would be improper for the commissioner to rely on evidence that was led during the disciplinary hearing, in instances where a particular witness does not testify during the arbitration proceedings. The commissioner has to rely on evidence that is before him during the arbitration proceedings. This was confirmed by the LC in *Karan Beef v Bovane NO,*[90] where the decision of the commissioner who had relied on evidence that was not before the CCMA was reviewed and set aside.

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[86] A Bellengere...et al (note 6 above) 426.
[87] *Sidumo & Another v Rustenburg Platinum Mines* (2007) 28 *ILJ* 2405 (CC).
[88] *County Fair Foods v CCMA & Others* (1999) 20 *ILJ* 1701 (LAC).
[89] *Minister of Safety & Security v Safety & Security Bargaining Council & Others* (2010) 31 *ILJ* 1813 (LAC).
[90] *Karan Beef (Pty) Ltd v Bovane NO* [2008] 8 BLLR 766 (LC).

5.5 Conclusion

In this chapter, the main aspects related to the conduct of arbitration proceedings in terms of the LRA were examined, those issues being the duties and powers of the commissioners, the use of the inquisitorial and adversarial approach in arbitration proceedings and the fact that arbitration hearings are hearings de novo. By examining the aforementioned aspects, the key principles relating to the conduct of arbitration proceedings under the LRA were made clear. Case law and statutory provisions related to the conduct of arbitration proceedings was also considered. Most importantly, the provisions of section 138 of the LRA which gives commissioner discretionary powers when conducting arbitration proceedings was highlighted and a need to adhere to the same outlined.

CHAPTER 6: HEARSAY EVIDENCE

6.1 Introduction

While there is a need to resolve disputes quickly and fairly but with a minimum of legal formalities, as provided in Section 138 of the LRA, the LC tends to be inclined towards being too legalistic when reviewing arbitration awards, as reflected in some of its decisions. This is evident in the approach adopted by the LAC in *Exxaro Coal Ltd v Chipana & Others,*[91] where the court was cautious against the wholesale admission of hearsay evidence. This chapter will examine the concept of hearsay evidence and its application in court and arbitration proceedings, its admissibility and its probative value as well as rules for its exclusion.

6.2 Meaning of hearsay evidence

The statute that provides a definition of hearsay evidence is the Law of Evidence Amendment Act 45 of 1988 (the LEAA).[92] In section 3(4) of the LEAA hearsay evidence is defined as "…evidence, whether oral or in writing, the probative value of which depends the credibility of any person other than the person giving such evidence."[93] This definition gives one an idea that probative value of hearsay evidence is dependent upon the credibility of a person who is not giving such evidence. This tends to be problematic as that person would not be present to be cross-examined and the presiding officer would not be able to observe their demeanour and they would not be sworn in.

Bellengere …et al give a simple definition of hearsay evidence and state that "…it is merely a witness testifying about what he or she 'heard' another person 'say', hence the term 'hearsay'."[94] Whitear-Nel,[95] in an exposition of what hearsay evidence constitutes, considers a situation where a witness gives evidence, not based on his own personal experience, but based on what someone else told him, resulting to a situation where the reliability of the evidence is

[91] *Exxaro* (note 12 above).
[92] Act 45 of 1988.
[93] Ibid.
[94] A Bellengere … et al (note 19 above) 265.
[95] N Whitear-Nel (note 8 above).

not dependent on the person who testifies, but on the correctness of the information given by an absent third party. This would be problematic as the accuracy of the information would be compromised/distorted.

When looking at the abovementioned definitions, they give a picture of a witness who does not testify based on his personal experience, but testifies on what she was told or she heard. When such hearsay evidence is tendered, challenges will arise. One of the challenges is that the witness who testifies on hearsay will not be able to answer some of the questions properly as he would not have witnessed the issue she is testifying on. Further, the decision maker will not be able to assess the credibility of the person who actually witnessed the incident, as she will not be present in the arbitration hearing and there will be no swearing in or cross-examination of the source.

6.3 Admissibility and probative value of hearsay evidence

Admissibility and probative value of hearsay evidence are interlinked concepts, but they are not the same. Due to the fact that common law was rigid in as far as the admissibility of hearsay evidence, the LEAA, which regulates the admissibility of hearsay evidence in civil and criminal matters, was enacted. The intention of the legislature was to preserve the general exclusionary rules applicable to hearsay but to introduce a degree of flexibility regarding its admissibility in exceptional circumstances. Section 3 of the LEAA[96] deals with the admissibility of hearsay evidence and provides hearsay evidence is generally inadmissible. There are, however, exceptions to this rule. Hearsay evidence is admissible when the parties agree, when the person on whose credibility the probative evidence depends is going to testify later on and where its admission is required for interests of justice purposes. The decision whether the interests of justice require the admission of hearsay evidence will be made by taking into account the nature of the proceedings; the nature of the evidence; the purpose for which the hearsay is tendered; the reason why the witness cannot testify personally; whether the parties would be duly prejudiced; the probative value of the evidence and any other factor considered to be relevant by the court.

[96] Act 45 of 1988; s 3.

6.4 Rules for excluding hearsay evidence

The common law rule excluded hearsay evidence as it was unreliable. Hearsay evidence has mainly been excluded because the source of evidence on which a witness testifies cannot be cross-examined. Further, when hearsay evidence is tendered, the decision maker will not be in a position to observe the demeanour of a witness and will therefore be unable to assess his credibility. Lastly, the source of evidence would not be under oath, only witness who testifies on hearsay will be under oath.

An important point to note is that hearsay evidence is admissible in terms of LEAA in certain circumstances. The LAC has stated clearly that CCMA commissioners should not admit or exclude hearsay evidence haphazardly, without taking into consideration the exceptional circumstances under which it should be admitted as provided in the LEAA. CCMA commissioners should be guided by the provisions of section 3 of the LEAA and apply the law as required. Most importantly, they should consider the interests of justice in determining whether to admit or exclude hearsay evidence.

6.5 Admissibility of hearsay evidence in arbitration proceedings

In dealing with the question of whether to admit or not admit hearsay evidence, CCMA commissioners must be guided by the provisions of the LEAA, which they must follow. In a pre *Exxaro*[97] article, Whitear-Nel, [98] examines the position regarding the admissibility of hearsay evidence in disciplinary enquiries and CCMA arbitrations. She reviews the provisions of section 3 of the LEAA and considers various cases in which the LC and the CCMA adopted different approaches with regard to the admissibility of hearsay evidence and documentary hearsay evidence. One of the most significant cases that is examined in the article is the *Nairaindath*[99]case. The one of the most significant arguments made in the article is that "commissioners should not hastily exclude hearsay evidence from proceedings, they should rather focus on whether it is relevant and on the reliability of hearsay documentary

[97] *Exxaro* (note 12 above).

[98] N Whitear-Nel *'Hearsay Evidence in disciplinary enquiries and CCMA arbitrations'* (2001) 22 *ILJ* 1481.

[99] Naraindath (note 4 above).

evidence."[100] Even though this article is pre *Exxaro,*[101] it is significant in that it highlights the importance taking the provisions of section 3 of the LEAA into account and adopting a less formal approach in conducting arbitration hearings, in line with section 138 of the LRA.

One of the cases in which the provisions of the LEAA were considered is *Swiss South Africa Louw NO & Others.*[102] In this case the court had to decide whether the commissioner was correct in rejecting hearsay evidence contained in an email report. The court looked at the provisions of section 3 of the LEAA and stated that hearsay evidence remains inadmissible in civil and criminal cases, except in circumstances that are provided in section 3. The court stated that arbitration proceedings held under the auspices of the CCMA are not criminal nor civil proceedings as is envisaged in section 3(1) of the LEAA. The court came up with the approach that CCMA commissioners have to deal with disputes with the least legal formalities and they should exercise some degree of flexibility and be guided by the provisions of section 138 of the LRA. The court adopted as stance that hearsay evidence may be admitted at the CCMA, but this will depend on the circumstances of each case. The court did not want to view arbitration proceedings in the same manner as civil and criminal court proceedings. Even though LC this decision is pre *Exxaro*, [103]it shows that the LC has previously adopted a flexible approach with regard to the admissibility of hearsay evidence.

In another pre *Exxaro*[104] article, Whitear-Nel[105] examines the admissibility of documentary evidence in arbitration proceedings in terms of the LRA by examining the *POPCRU obo Maseko v Department of Correctional Services*[106] case, where Maseko's argument was that the arbitrator should not have relied on the affidavits as these could not be cross-examined. In this case, the court, having gone through the provisions of section 3 of the LEAA, found that the arbitrator's decision in admitting hearsay evidence was reasonable. Whitear-Nel, argues that arbitration proceedings cannot be equated to civil and criminal proceedings and that the provisions of the LEAA should be taken into consideration when dealing with hearsay evidence

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[100] Ibid.
[101] *Exxaro* (note 12 above).
[102] *Swiss South Africa v Louw NO & Others* (2006) 27 *ILJ* 395 (LC).
[103] *Exxaro* (note 12 above).
[104] Ibid.
[105] N Whitear-Nel (note 8 above).
[106] *POPCRU obo Maseko v Department of Correctional Services* [2011] 2 BLLR 188 (LC).

in arbitration proceedings. According to Whitear-Nel, an overly technical and legalistic approach is not necessary in labour arbitrations. What is necessary and important is whether the interests of both parties are served, amongst other things. Even though this article is pre *Exxaro*, [107] the argument made is in line with the provisions of section 138 of the LEA and it emphasises the fact that the interest of justice are of paramount importance in determining whether to admit hearsay evidence.

In another pre *Exxaro*[108] article, Whitear [109] argues that arbitration proceedings should not seek to imitate criminal courts, but must follow basic rules of fair procedure and evidence. According to Whitear, the case illustrates the approach of being less formalistic, while remaining true to basic rules of evidence, an approach that would be in line with the provisions of Section 138 of the LRA and should be followed by CCMA commissioners.

While the trend of admitting hearsay evidence and then attaching relevant weight to it has developed, as evident in *Minister of Police v M and Others,*[110] in the remarkable decision of *Exxaro,*[111] the LAC provided clear guidelines of dealing with hearsay evidence. The court came up with a new position on the admission of hearsay evidence and was cautious against the wholesale admission of hearsay evidence. The court reaffirmed that "while section 138 of the LRA gives arbitrators a discretion to conduct arbitrations in a manner they consider appropriate, it does not imply that the commissioner may arbitrarily receive or exclude hearsay evidence… ." The court held the arbitrator should apply the provisions of the LEAA in determining the admission of hearsay evidence. The court interpreted section 3 of the LEAA to mean that if there is no agreement to receive hearsay evidence it should be excluded, unless interests of justice require its admission. The court referred to the case of *S v Ndhlovu and Others*[112] and concurred that hearsay evidence that is not admitted in terms of section 3 of the LEAA is not evidence at all.

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[107] *Exxaro* (note 12 above).
[108] Ibid.
[109] N Whitear (note 10 above).
[110] Ibid.
[111] *Exxaro* (note 12 above).
[112] *S v Ndhlovu and Others* (2002) 2 SACR 325 (SCA).

The procedural formality that was advocated by the LAC is considered by some scholars as problematic. It has been argued that it would hamper the effective resolution of disputes as it will contribute to an unnecessary imitation of the court proceedings, whereas disputes should be resolved through simple and non-technical procedures, as provided in section 138 of the LRA. The LAC set a precedent that enforces CCMA commissioners to adopt a formal approach. It has to be noted though that the *Exxaro*[113] decision binds the CCMA. This means that CCMA commissioners must exercise their discretion in terms of section 138 of the LRA while taking into consideration the interpretation that has been provided by the LAC in *Exxaro*. This is important as the LAC is a court of last instance in the interpretation of labour matters. Therefore, CCMA commissioners should adhere to the LAC's interpretation of the law.

Even though the LAC has accepted that section 3 of the LEAA should be applied in determining the admissibility of hearsay evidence in statutory arbitrations, through its decisions in *Southern Sun Hotels (Pty) Ltd v SACCAWU and Another,*[114] *Edcon Ltd v Pillener NO & Others*[115] and recently in *Exxaro,*[116] commissioners should guard against slavishly following the precedent set in civil and criminal courts. It is submitted that that would hamper the effective resolution of disputes. While in the previous decisions the LC has adopted a trend of admitting hearsay evidence and attaching weight to it, the LAC in *Exxaro*[117] came with a stricter approach regarding the admission of hearsay evidence.

Whitear-Nel and Hambidge, [118]effectively examine the position taken by our labour courts on hearsay evidence, by critically reviewing the *Exxaro*[119] decision. They unpack the concept of hearsay evidence, its admissibility and its probative value and they do this by analysing the provisions of Section 3 of the LEAA. The main idea that is expressed by Whitear-Nel and Hambidge is that the provisions of section 3 of the LEAA are important in dealing with hearsay evidence. Whitear-Nel and Hambidge are against an overly formalistic approach to hearsay evidence and are of the view that it is inappropriate in the labour context. According to them the crucial question should be whether the interests of justice require the admission of hearsay

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[113] *Exxaro* (note 12 above).
[114] *Southern Sun Hotels (Pty) Ltd v SACCAWU & Another* (2000) 21 *ILJ* 1315 (LAC).
[115] *Edcon Ltd v Pillener NO & Others* [2008] 5 BLLR 391 (LAC).
[116] *Exxaro* (note 12 above).
[117] Ibid.
[118] N Whitear-Nel & E Hambidge *Hearsay Evidence in Labour Arbitrations: More Formality* (2020) 20(1) 43-44.

[119] *Exxaro* (note 12 above).

evidence, as provided in section 3 of the LEAA. They support the trend that has been adopted in labour arbitrations, the trend of admitting hearsay and determining what weight should be attached to it. They are against the strict application of the rules of evidence.

6.6 Conclusion

From the above discussion, it goes without saying that the provisions of Section 138 of the LRA and Section 3 of the LEEA cannot be overlooked when dealing with hearsay evidence. As much CCMA commissioners have to resolve disputes quickly and fairly, they should do that while ensuring that arbitration proceedings are as simple as possible and that they do not imitate court proceedings. Further, the provisions of Section 3 of the LEAA are important and should be taken into account when commissioners are dealing with hearsay evidence. Section 3(1) of the LEAA does away with rigidity of the common law in favour of an approach that allows the court to admit hearsay evidence whenever interest of justice require it. The same approach should be adopted by commissioners. This is despite the fact that the LAC has adopted an approach that is regarded as formalistic.

CHAPTER 7: SIMILAR FACT EVIDENCE

7.1 Introduction

The admissibility of similar fact evidence has been surrounded with controversy for quite some time, since the significant decision of *Makin v Attorney-General of New South Wales.*[120] Courts and various scholars have differed regarding admissibility of similar fact evidence. This is mainly due to its prejudicial effect on the party against whom it is used, as it has been argued that some similar facts cannot be used to prove a matter that is currently in dispute as such conduct would be prejudicial against that party. In this chapter, the meaning of similar fact evidence, its admissibility, rules for its exclusion and its admission in arbitration in arbitration proceedings will be examined.

7.2 Meaning of similar fact evidence

Various scholars have provided different definitions of similar fact evidence. Barrat…et al,[121] regard similar fact evidence as propensity to act in a certain way. In explaining the meaning of similar fact evidence, Bellengere…et al[122] makes a distinction between similar fact evidence in simple terms and in evidentiary terms. In simple terms, it means evidence that a person charged of committing a certain offence, has behaved in a similar way previously. Inevidentiary terms, it involves evidence of illegal or immoral conduct by a person in circumstances that are relating to or have a strong resemblance to that person's conduct in a circumstance that is a charge or dispute. According to Bellengere…et al,[123] similar fact evidence consists of facts that are in issue before the court and facts that are similar to the factsin issue but are themselves not in issue. From the abovementioned definitions, it can be said that similar fact evidence is used in instances where a party has to show that a person has in the past behaved in a similar manner he has behaved in the current circumstances in the matterat hand. It becomes prejudicial to a person if their past behaviour is used to determine his likelihood to behave in a similar manner in the current circumstances.

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[120] *Makin v Attorney-General of the New South Wales* (1894) AC 57.
[121] A Barratt…et al *Introduction to South African Law: Fresh Perspectives* 3ed (2019) 386.
[122] A Bellengere…et al (note 6 above) 246.
[123] Ibid.

7.3 Admissibility of similar fact evidence

According to Barrat[124] similar fact evidence is inadmissible, if its only purpose is to show the court that the accused is a person likely to act in line with prior conduct. Section 210 of the CPA[125] provides a general principle regarding the admissibility of evidence and states that " no evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot conduce to prove or disprove any point of fact at issue in criminal proceedings." The same principle applies to similar fact evidence. Irrelevant similar fact evidence would therefore not be admissible.

It has been argued that the admission of similar fact evidence by courts is prejudicial to the accused. Therefore, our courts have held it is generally inadmissible. But there are circumstances where it may be admitted. It is important to note that for similar fact evidence to be admitted, there has to be a link between the similar fact and the fact in issue. The test is whether there is a link between the current offence on which the court has to decide and the previous conduct. This means that should there be a weak link or no link at all between similar fact and the fact in issue, such similar fact evidence will not be admitted.

Further, for similar fact evidence to be admitted, not only has it to be relevant, but it has to be sufficiently relevant. According to Zeffertt and Paizes,[126] whether similar fact evidence is relevant or not depends on whether the same circumstances have a probability to bring about the same results…however, it is not often possible to satisfy the court that the conditions on both occasions were sufficiently similar. This means that a lot of effort has to be put by the party adducing similar fact evidence to satisfy the court that on two previous occasions, for instance, the conditions were similar to the current one, which is not an easy task.

Despite the fact that similar fact evidence has to be relevant, for it to be admitted it has to have strong probative force. The House of Lords in *DPP v P* [127] held that the probative force of the evidence has to be assessed in an infinite number of circumstances, in order to determine

[124] Barrat…et al (note 121 above) 386.
[125] Act 51 of 1977; s210.
[126] DT Zeffertt & AP Paizes (note 53 above) 283.
[127] *DPP v P* (1991) 3 WLR 161.

whether the evidence has sufficient probative value to outweigh its prejudicial effect. This argument was supported by Benita Whitcher,[128] who argued that similar fact evidence is inadmissible, but it is only admissible when its probative value, in respect of fact in issue, outweighs its prejudicial effect. Barrat…et al[129] also support this argument by saying similar fact evidence is admissible only to prove accused's guilt in matter before the court, therefore it must have a high probative value. What is significant here is that the probative value/force of similar fact evidence that has to be strong enough to outweigh its prejudicial effect. Therefore, the party that uses similar fact evidence has to satisfy the court in the above regard. It is submitted that this is not an easy task.

The use of similar fact evidence has evolved since the leading case of *Makin.*[130] In this case the similar fact rule was formulated by Lord Herschell. The court held that similar fact evidence was inadmissible but found that it was relevant and admissible in as far as to rebut the accused's defence that the child in question had died accidentally. The *Makin* formulation has been widely applied by our courts in dealing with similar fact evidence. In another landmark decisionof *DPP v Boardman,*[131] the application of the law of evidence relating to similar fact was reviewed. The court held that similar fact evidence as an item of circumstantial evidence is admissible when its probative value outweighs its prejudicial effect. This court decision supports the fact that that has been stated above, that the probative value of similar fact evidence has to be strong enough to outweigh its prejudicial effect.

To ensure that similar fact evidence is not be prejudicial to the other party, that party has to be given sufficient notice that similar fact evidence will be tendered, so that that party would be able to prepare its defence accordingly. According to Zeffertt and Paizes,[132] the receiving of similar fact evidence is disadvantageous as it leads to a waste of time which may be involved when collateral issues of the same kind are examined together with the main issue before the court. It a process that would involve the calling of various witnesses that would have to be led

[128] B Whitcher (note 11 above) 90.
[129] Barrat…et al (note 121 above).
[130] *Makin v Attorney-General of the New South Wales* (note 120 above).
[131] *DPP v Boardman* (1975) AC.
[132] DT Zeffertt & AP Paizes (note 53 above) 284.

and cross-examined on the issues in dispute. The prejudicial effect of similar fact evidence was also outlined by Taylor[133] when he stated that such evidence is highly prejudicial as it is used to strengthen other uncertain evidence. It is submitted that the prejudicial effect of similar fact evidence mainly stems from the fact that it is unfair to the party against whom it is adduced, as it may unfairly strengthen other evidence against that party, which may be uncertain at that point in time. It is submitted that one of the factors that may render similar fact evidence prejudicial to a person is that he may be a changed person, for instance. Therefore, the use of similar facts to support the present claim of misconduct may be prejudicial to that person.

7.4 Rules for excluding similar fact evidence

Similar fact evidence has mainly been excluded because it is irrelevant. This has been argued by Bellengere…et al, [134] who stated that one of the reasons why similar fact evidence may be excluded is that it is usually irrelevant in that it is not related to the issue at hand. It may also be excluded because it is inconvenient to use as it raises many collateral issues that might be distracting, expensive and time consuming. It may also be excluded because creates more work for the defence as in most cases the accused would be surprised when similar fact evidence is led. Lastly, it may also be prejudicial because in that if freely admitted, it may lead to instances where police would not conduct thorough investigations, with the hope that the court would decide based on the accused's previous records. The mere fact that the accused has committed three previous similar offences does not necessarily assist the court in determining the fact in issue before the court.

Bellengere…et al[135] equate similar fact evidence with character evidence as it is based on how one has behaved in the past and that has an impact on that person's character. The argument is that as character evidence it apportions liability or guilt based on past misconduct of a similar nature. Hence it is generally excluded. This view is supported, as a person's character should not be used to decide on a current matter.

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[133] A Taylor *Principles of Evidence* 2ed (2000) 277.
[134] A Bellengere…et al (note 6 above) 247.
[135] Ibid.

7.5 Admissibility of similar fact evidence in arbitration proceedings

The LC has considered the use of similar fact evidence in the context of arbitration proceedings in *Western Cape Government: Department of Education v Hannekom NO & Others,* [136] where during the arbitration proceedings the commissioner had found that similar fact evidence presented was not admissible. On review, the LC considered the commissioner's approach to similar fact evidence led at the arbitration hearing. The court found that previous disciplinary offence should have been taken into account in the commissioner's evaluation of a suitable action.

In the remarkable decision of *Gaga*, [137] the LAC considered the use of similar fact evidence in a sexual harassment dispute. In the arbitration proceedings held at the CCMA, that involved Anglo Gold Limited Group Human Resources Manager Mr *Gaga*,[138] the employer wanted to lead similar fact evidence through two other employees of the company who had also been subjected to sexual harassment by Gaga. The CCMA commissioner did not admit similar fact evidence. In the *Gaga*[139] case, the LAC held that the commissioner committed misconduct and a gross irregularity, as provided in section 145(2)(a) of the LRA, [140] by excluding similar fact evidence and in the conduct of the proceedings. The commissioner's decision was therefore an irregularity which was reviewable.

The abovementioned *Hannekom*[141] and *Gaga*[142] decisions are significant in that our labour courts affirmed that there are instances where similar fact evidence should be a material consideration when the decision maker has to decide on certain acts of misconduct. Further, section 138 of the LRA[143] gives CCMA commissioners a discretion to deal with the substantial merits of the dispute with a minimum of legal formalities. The abovementioned court decisions are remarkable in that they reaffirmed that the rules of evidence should not be applied in a strictly. The courts adopted a flexible approach in as far as the admission of similar fact

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[136] *Western Cape Government: Department of Education v Hannekom NO & Others* [2019] 31 ZALCCT (LC).
[137] *Gaga* (note 13 above).
[138] Ibid.
[139] Ibid.
[140] Act 66 of 1995; s 145.
[141] *Western Cape Government* (note 136 above).
[142] *Gaga* (note 13 above).
[143] Act 66 of 1995: s 138.

evidence is concerned. The LAC *Gaga*[144] decision set a precedent that should be followed by CCMA commissioners when faced with requests for the admission of similar fact evidence. The *Exxaro*[145] decision, in contrast, the LAC adopted a strict approach and was against the wholesale admission of hearsay evidence and reaffirmed the position that CCMA commissioners should exercise some degree of formality in applying the rules of evidence.

7.6 Conclusion

This chapter examined similar fact evidence and its admission in court and arbitration proceedings. As evident in the discussion above, that various scholars and different courts, since the *Makin*[146] formulation, have held different views regarding the admission of similar fact evidence. The view that is held in this dissertation is that commissioners should be cautious when admitting similar fact evidence. They should ensure that it is not prejudicial to the party against whom it is tendered. Should similar facts evidence be admitted to the prejudice of the accused, it would render the arbitration unfair and would constitute a reviewable irregularity on the part of the commissioner. Further, the precedent set by the LAC in *Gaga*[147] supports the provisions of section 138 of the LRA and allows CCMA commissioners to exercise their discretion as required and minimise and conduct arbitrations with a minimum of legal formalities.

[144] Ibid.
[145] *Exxaro* (note12 above).
[146] *Makin* (note 120 above).
[147] *Gaga* (note 13 above).

CHAPTER 8: SWEARING IN OF WITNESSES

8.1 Introduction

In this chapter, the meaning of the concept of swearing in of witnesses, its implications and its importance will be examined. This will be followed by considering the swearing in of witnesses in court proceedings. The swearing in of witnesses in arbitration proceedings conducted under the auspices of the CCMA will also be examined together with the relevant statutory provisions and case law. The significance of section 138 of the LRA in respect of the swearing in of witnesses will also be examined.

8.2 The meaning of swearing in of witnesses

The swearing in of witnesses is necessary and important in criminal, civil and arbitration proceedings. In simple terms, the swearing in of witnesses is a process that is administered by the decision maker in criminal, civil or arbitration proceedings before they give their testimony. Witnesses are usually not sworn in disciplinary hearings. The swearing in of witnesses can be done through the administering of an oath, an affirmation or admonition. According to Sheppard,[148] "swearing in the legal context involves to take or to administer an oath. It is the process of taking an oath, and the same word is used to depict the administration of an oath."

Affirmation is a process that is administered mainly to a witness who, for one reason or another, objects to take the prescribed oath. A witness may have religious reasons, for instance, not to take the prescribed oath. In that case an affirmation will be administered to that witness, where she will make a declaration that she will be telling the truth when testifying. The admonishment on the other hand is a process that is administered to a witness who does not understand the nature of an oath or affirmation. In that case the presiding officer will have to admonish the witness to speak the truth, instead of administering an oath or affirmation.

[148] SM Sheppard (note 16 above).

8.3 Swearing in of witnesses in criminal and civil proceedings

In criminal and civil proceedings, evidence that is tendered by witnesses must be given under oath, affirmation in lieu of oath or admonition, all of which must be administered by the presiding officer or the registrar of the court. The swearing in of witnesses in court proceedings is captured in statutes. Section 39(1) the CPEA[149] provides that persons referred to in section 40 and 41 of the same Act have to be examined as witnesses upon oath. Subsection (2) provides that the oath has to be administered to a witness in a form that would clearly convey the meaning thereof and which he will consider to be binding on his conscience. Section 40 of the CPEA[150] provides for affirmations in lieu of oath and section 41[151] provides for instances when unsworn or unaffirmed testimony is admissible.

The CPA also makes a provision for the examination of a witness under oath. Section 162 (1) of the CPA[152] provides that in criminal proceedings a person must be examined as a witness under oath, where she will have to swear that the evidence that she will give will be there truth. In terms of subsection (2) of the CPA[153] a person who wishes to take an oath with an uplifted hand, will be allowed to take it in that manner. Section 163 of the CPA[154] allows a person who objects to taking the oath or to taking it in a prescribed manner, does not consider it binding on her conscience or regards it as against her religion, to have an affirmation administered on her, in lieu of an oath, where she will have to affirm that the evidence that she will give will be the truth.

Section 164 of the CPA[155] provides for an instance when unsworn or unaffirmed evidence is admissible. This takes place in an instance where a person who appears not to understand the nature and import of the oath or affirmation is allowed to give evidence without taking an oath or affirmation. In such an instance that person would have to be admonished by the presiding officer to speak the truth.

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[149] Act 25 of 1965; s 39.
[150] Act 25 of 1965; s 40.
[151] Act 25 of 1965; s 41.
[152] Act 51 of 1977; s 162(1).
[153] Act 51 of 1977; s 162(2).
[154] Act 51 of 1977; s 163.
[155] Act 51 of 1977; s164.

It often happens that a witness who appears in court does not understand the nature of an oath or affirmation. Under such circumstances the decision maker will have to use this provision.

Section 165 of the CPA[156] provides for an instance where a person has to give evidence through an interpreter or an intermediary. In that case the oath, affirmation or admonition may be administered by the presiding officer or the court registrar, through an interpreter or an intermediary. There are instances where minors have to testify in court. In such instances, the decision maker will have to use this provision.

When looking at the abovementioned statutory provisions and the swearing in of witnesses in the context of criminal and civil proceedings, it goes without saying that the swearing in of witnesses in criminal and civil proceedings is a compulsory requirement. There is nothing strange with that as court proceedings have traditionally have use a high degree of legal formality. In as much courts are expected to deal with their matters in a quick and fair manner, they are also expected to exercise the strict application of the rules of evidence and adhere to the applicable statutory provisions.

8.4 Swearing in of witnesses in arbitration proceedings

It is necessary that the swearing in of witnesses is considered not only in the context of civil and criminal court proceedings, but also in the context of arbitration proceedings. This will help in ensuring that the concept of swearing in of witnesses is understood in a broader context. Below, statutory provisions and case law regarding the swearing in of witnesses in arbitration proceedings will be outlined.

Section 142 of the LRA[157] provides for the powers of commissioners when attempting to resolve disputes and subsection (1)(e) thereof provides that a commissioner may administer an oath or accept an affirmation from any person called to give evidence in arbitration proceedings. This provision states that the commissioner 'may' and therefore gives the CCMA

[156] Act 51 of 1977; s165.
[157] Act 66 of 1995; s142.

commissioner a discretion to administer an oath or an affirmation. Clause 35 of the Guidelines[158] supports this provision and states that the commissioner has to swear in or affirm the witness.

Section 142(8) (c) of the LRA[159] provides that a person who refuses to take oath or to make an affirmation commits contempt of the CCMA. In such an instance, the CCMA commissioner may in terms of subsection (9)[160] make a finding that that person is in contempt and may refer that finding with the record of the proceedings to the LC for a decision. This provision is a clear indication that refusal to take an oath or affirmation would have serious consequences. This in turn is also an indication that the provision is not in line with the provisions of section 138 of the LRA,[161] which requires that a less formal approach is adopted by CCMA commissioners.

Case law in respect of the swearing in of witnesses in labour disputes cannot be overlooked and needs to be considered. The LC in *Rowmoor Investment v Wilson & Others*[162] the Applicant sought to review and set aside an award issued by the CCMA commissioner. One of the issues raised by the Applicant was that the commissioner failed to administer an oath or affirmation before taking evidence from the witness of the employee. The LC held that a commissioner has a discretion whether or not to administer the oath or affirmation. The court made reference to *Morningside Farm v Van Standen NO & Another,*[163] where the LC disagreed with the employee's contention that the failure to swear in a witness did not amount to an irregularity. The court relied on the provisions of section 142(1)(e) of the LRA[164] and held that it would be a gross irregularity on the part of the commissioner should she fail to administer an oath or to conduct an affirmation on a witness. The court also remarked that in criminal cases the testimony of a witness that has not been subjected to an oath, affirmed or admonished in terms of the CPA, does not qualify as evidence and will not secure a conviction. The court further remarked that in criminal matters the decision maker has a duty imposed by the statute to

[158] *CCMA Guidelines* (note 2 above).
[159] Act 66 of 1995; s 142(8)(c).
[160] Act 66 of 1995; s 142(9).
[161] Act 66 of 1995; s 138.
[162] *Rowmoor Investment v Wilson & Others* (2008) 29 *ILJ* 2275 (LC).
[163] *Morningside Farm v van Staden NO & Another* (1998) 19 *ILJ* 1204 (LC).
[164] Act 66 of 1995; s 142(1)(e).

administer an oath or affirmation, whereas in arbitration proceedings the commissioner has freedom as provided in section 142(1)(e) of the LRA[165] to decide whether to administer an oath or an affirmation. In this decision the LC adopted a flexible approach regarding the swearing in of witnesses. Such an approach is in line with the provisions of section 138 of the LRA.[166]

In *Magnum Security v Thobejane & Others*[167] the LC the applicant brought an application for review of the proceedings, because the commissioner had accepted evidence of a witness (as reliable), whereas that witness had not testified under oath and disbelieved a witness who had testified under oath. The court made reference to the *Morningside Farm*[168] case, where the court held that an arbitrator who does not hear evidence under oath commits a gross irregularity. The award was set aside and the matter was referred back to the CCMA to be arbitrated by a different commissioner. Section 138 of the LRA[169] grants CCMA commissioners a discretion to conduct arbitration proceedings with a minimum of legal formalities. It is evident in this case that the LC adopted a strict approach with regard to the testimony that is tendered withoutan oath. Such an approach is not in line with the provisions of section 138 of the LRA.[170]This decision is one of those where the LC has tended to compel CCMA commissioners to adopt some degree of formality in dealing with the rules of evidence. Another LC decision where the LC has adopted a strict approach in the conduct of arbitration proceedings is that of *Klassen v CCMA and Others*, [171] where the LC held that where a witness gives evidence without taking the prescribed oath, such will have an impact on the evidence that is tendered.

In court proceedings there is a duty imposed by the statutory provisions that evidence has to be given under oath, affirmation in lieu of oath or admonition. In arbitration proceedings the commissioner may administer an oath or accept an affirmation from a witness that has been called to give evidence. The commissioner is given a discretion in terms of section 142(1)(e) of the LRA[172] whether or not to administer an oath or an affirmation. Further, refusal to take

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[165] Ibid.
[166] Act 66 of 1995; s 138.
[167] *Magnum Security v Thobejane* & Others (2002) ZALC (LC).
[168] *Morningside Farm v van Staden NO & Another* (note 163 above).
[169] Act 66 of 1995; s 138.
[170] Ibid.
[171] *Klassen v CCMA & Others* [2005] 10 BLLR 964 (LC).
[172] Act 66 of 1995; s 142(1)(e).

an oath or affirmation constitutes contempt. This means that the taking of oath or affirmation will always be preferred by CCMA commissioners. This has implications for section 138 of the LRA,[173] which gives CCMA commissioners a discretion to conduct arbitrations with the minimum of legal formalities. To ensure that arbitration proceedings are less formal, a commissioner may use his discretion and choose whether to administer an oath or affirmation. This would not constitute an irregularity and will ensure that arbitration hearings are not too formal as court proceedings.

8.5 Conclusion

This chapter examined the concept of swearing in of witnesses in court and arbitration proceedings and the applicable statutory provisions and case law. The implications of testimony that is heard with and without an oath or affirmation being administered was examined through the relevant case law and statutory provisions. What came out clearly is that CCMA commissioners should be flexible when swearing in witnesses in CCMA arbitration proceedings. They should not adopt a strict approach as courts of law. The LC has, through some its decisions, adopted a less formal approach. A flexible approach that was adopted by the LC in *Rowmoore*[174]should be adopted by CCMA commissioners. Adopting a flexible approach would be in line with section 138 of the LRA, [175]which gives CCMA commissioners a discretion to conduct arbitrations in any manner they deem fit.

[173] Act 66 of 1995; s 138.
[174] *Rowmoore* (note 162 above).
[175] Act 66 of 1995; s 138.

CHAPTER 9: CONCLUSION

The purpose of this dissertation was to provide a critical overview of the admission of hearsay evidence, similar fact evidence and the swearing in of witnesses in CCMA arbitrations. It was particularly aimed at highlighting the controversies and problems associated with admissibility of the abovementioned kinds of evidence and the swearing in of witnesses and at answering the questions that appear in chapter one of this dissertation.

As a background, in the first part of this dissertation the concept of evidence and related concepts were examined. The conduct of statutory arbitrations in terms of the LRA was also examined, with particular emphasis on the powers of CCMA commissioners as provided in the LRA. A clear picture was painted as to what constitute evidence and what constitute proof. The manner in which onus shifts between the parties to the dispute was also highlighted. It was also clarified that the standard of proof of the balance of probabilities used in arbitration proceedings is lower than that of beyond reasonable doubt used in courts.

The concepts that determine the weight of evidence, i.e. credibility, reliability and probabilities were also examined. What is important is that the party that has to discharge its burden of proof has to submit credible, reliable and probable evidence. In determining the weight of evidence, all these factors have to be evaluated in assessing the weight of evidence. Thus it would be incorrect for CCMA commissioners to assess only the credibility of a witness and leave out reliability and probabilities.

Various forms of evidence were also considered. It goes without saying that oral evidence is the most important form of evidence. This is because evidence is tendered orally by witnesses in court/ CCMA proceedings. Other forms of evidence support what has been said by word of mouth by witnesses.

When looking at the conduct of statutory arbitrations in terms of the LRA, it is clear that CCMA commissioners have a wide discretion that is given to them by section 138 of the LRA, which

allows them to conduct arbitrations in the manner they deem fit. For instance, they may choose to use an inquisitorial or adversarial approach.

In the second part of the dissertation, the admission of two types of evidence, i.e. hearsay evidence and similar fact evidence were examined. The concept of the swearing in of witnesses in CCMA arbitrations was also examined.

Most importantly, CCMA commissioners should be guided by the provisions of section 3 of the LEAA when dealing with hearsay evidence. The interests of justice are of paramount importance in determining whether to admit hearsay evidence. Commissioners should also be guided by section 138 of the LRA. On top of that, there is the *Exxaro*[176] decision that binds the CCMA. In as much as the CCMA commissioners are expected to exercise their discretion in terms of section 138 of the LRA as to how to conduct arbitrations, they should also take into account the interpretation of the law that has been provided by the LAC in *Exxaro*.[177] This is important as the LAC is a court of last instance in the interpretation of labour matters. It has to be noted, however, that the LAC has limited CCMA commissioners' discretion and has set a precedent that compels CCMA commissioners to adopt some form of formality in applying the rules of evidence, as it is evident in *Exxaro*.[178]

CCMA commissioners should also be cautious when admitting similar fact evidence, as its admission can be prejudicial to the party against whom it is used and render the proceedings unfair. Unfair arbitration proceedings would not only be contrary to the provisions of the LRA, but would also be contrary to the provisions of Section 23 of the Constitution, which requires that labour practices are fair. CCMA commissioners also have to be cautious when admitting similar fact evidence as there may be delays in finalising disputes, which may in turn be contrary to the provisions of section 138 of the LRA, which require that disputes are dealt with quickly. It is important that the party seeking to lead similar fact evidence to illustrate that it is of material consideration and that it will not be prejudicial to the other party.

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[176] *Exxaro* (note 12 above).
[177] Ibid.
[178] Ibid.

In court proceedings an oath, affirmation or admonishment of witnesses is administered and courts are bound by statutes in this regard. It goes without saying, therefore, that any evidence that is tendered in a court of law without an oath, affirmation or admonishment having been administered to a witness will not be regarded as evidence. In arbitration proceedings, on the other hand, the LRA empowers CCMA commissioners to use their discretion whether they administer an oath or affirmation. Further, our labour courts have stated that it will not render the arbitration proceedings unfair if witnesses in arbitration proceedings are not sworn in. This gives CCMA commissioners some flexibility and is in line with section 138 of the LRA.

It is evident in the previous chapters that the admission of evidence in CCMA arbitrations has been and will always be a problematic and controversial topic. Problems and controversies associated with the admission of evidence have been outlined in this dissertation through a critical examination of case law, various pieces of legislation and scholarly writings. Based on the above, this dissertation favours the view that arbitration proceedings should not seek to imitate court proceedings. They should be non-legalistic and should be as simple as possible to the parties. This would ensure that the proceedings are conducted in quick and fair manner, thereby complying with the provisions of Section 138 of the LRA.

It is suggested that CCMA commissioners should be guided by the provisions of section 3 of the LEAA in admitting hearsay evidence. It is also suggested that they should use their discretion in terms of section 138 of the LRA. Further, the LAC has set a precedent with regard to the admission of hearsay evidence, which they must follow, while exercising caution that they are not applying the admissibility rules strictly as in a court of law.

This dissertation supports the approach advanced by Whitcher[179] that arbitration proceedings are supposed to be speedy and cheap and that would be compromised if similar fact evidence is admitted anyhow. It is suggested that this is the approach that should be adopted by CCMA commissioners as it would contribute in ensuring that CCMA arbitration proceedings are not prolonged unnecessarily.

[179] B Whitcher (note 11 above).

It is further suggested that CCMA commissioners should be guided by section 142(1)(e) of the LRA when swearing in witnesses in arbitration proceedings. This section gives CCMA commissioners a discretion whether administer an oath or an affirmation. It is suggested that in line with section 138 of the LRA, which requires that arbitrations are conducted with a minimum of legal formalities, CCMA commissioner should exercise their discretion as to whether to administer an oath or affirmation when conducting arbitrations.

Lastly, it has to be noted that the LC has used its powers of review and set a precedent that binds the CCMA. It is unfortunate that CCMA commissioners are compelled to adopt a formal approach that is used by courts when applying the rules of evidence in arbitrations. Despite the binding effect of the LC decisions, it is recommended that CCMA commissioners should not apply admissibility rules as strictly as in court proceedings.

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Mr Dexter Ntokozo Thwala (9035370)
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Dear Mr Dexter Ntokozo Thwala,

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Project title: A critical overview of the admission of hearsay evidence, similar fact evidence and the swearing in of witnesses in Commission for Conciliation Mediation and Arbitration arbitrations

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