

WITNESS INTIMIDATION

IN THE

INDUSTRIAL COURT

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INTRODUCTION

It is in the nature of adversarial proceedings that parties are set against each other, challenging versions of fact and arguing points of law in competition with each other. They do so before a person or persons appointed to listen, to weigh and to decide which versions and arguments should prevail. Witnesses called to give evidence by one or other party are inevitably involved in the muscular give and take of the competition. The process is a robust one and its value to a measure depends on the commitment of the various parties to their positions and their willingness to express these freely and without compromise in the presence of those who challenge them. It requires courage. For many people the experience of giving evidence in court comes as an unpleasant shock, meeting, as they do, not the accommodation and trust that they are used to in their daily dealings but doubt, mistrust and opposition. Insofar as their evidence is to the detriment of another, they speak in the knowledge of cultivating enmity and possibly of inviting reprisal. It says a great deal for the respect accorded to the law and its processes and for people's desire for justice that adversarial proceedings do not generally find that courage lacking.

Yet there may be circumstances where traditional adversarial proceedings are asking too much of those it needs to participate, that the cost or perceived cost of giving evidence against another is such that the witness or potential witness will not come forward. How should the court proceed?

Should it compel a reluctant and fearful witness to appear and speak to what he or she knows? In practice the court may require the presence of the witness, but it cannot hope to extract evidence of comparable value to that which is freely given. Nor will it know who to call, who in the community knows something germane to the issue but is too frightened to come forward. A witness who is too intimidated to come forward voluntarily is unlikely to be reliable or useful if obliged to speak as a result of further intimidation by the court. The cast of proceedings in the adversarial process does not readily admit such an inquisitorial approach.

A second option the court might take is simply to forgo the evidence it believes would assist it, even where it does so in the strong conviction that justice is not being done and that this is a result of intimidation triumphing over judicial process. To take this option is to accept two defeats. The one is in the case itself where, for example, a guilty person

might go free, the other is more damaging in the community at large where respect for legal process is eroded, the law regarded as less powerful than forces of anarchy and intimidation. The cost is high particularly if it habituates a community to excuse itself from speaking up in court even without intolerable pressure. Nevertheless, this option might still be preferable in the longer term if it preserves the integrity of the adversarial process.

A third option is to devise ways to accommodate the fearful witness in such a manner that he or she is able to give evidence without exposure to the risk feared.

This paper is concerned with looking at the ways in which the industrial court has struggled with this third option, endeavouring to balance the needs of the witness with the rights of other parties that are likely to be put at risk if adversarial proceedings in open court are modified.

The leading case, which will be considered in detail, is Transport and General Workers Union and Another v Durban Transport Management Board.¹ Here Freemantle SM sets out a two-stage procedure for taking evidence from witnesses whose identity is largely concealed. As the most developed approach to the issue it deserves and rewards close scrutiny.

The methodology of the paper will be to contextualise the issues raised in this case. It will do so by looking first, in the remainder of this introduction, at the environment in which the events that form the substance of recent cases of this nature take place. This will be followed by an assessment of what established rules on taking evidence in open court have to offer the industrial court. Rules on the admission of hearsay evidence, in particular, will be considered. And before turning to consider how the courts have coped in recent cases an examination of the nature of the industrial court will be made with particular reference to the latitude it enjoys, and any specific obligations it may have, in taking evidence. In giving the paper this shape it is hoped that the various strategies employed in recent cases will be contextualised and can be compared and evaluated without the need for extensive digression.

¹ 1991 12 ILJ 1113

The core issue in the cases where witnesses are afforded some degree of concealment in exchange for their testimony is the trade-off between witness protection and full and open judicial process. The more the witness is concealed the more likely it is that a party to the case is prejudiced and concomitantly that the process of the court falls into disrepute. One of the difficulties in evaluating this trade-off is that the two factors do not admit the same degree of abstraction. To put it differently, it is easy to keep the argument on a level where the general and long-lasting damage done to the court that compromises its procedures, carries more weight than the local circumstance of a particular witness afraid to give testimony. There is a distance between the mind-set of the academic lawyer and that of the street lawyer, a distance between principle and pragmatism and regard to each is involved in making the tough decisions these cases demand. Particularly because our personal experience of violence is notably uneven in this country it is easy to underestimate the incidence of witness intimidation and reprisal and the level of force threatened and used. To do so may not only make us inconsiderate in particular instances, it may also distort our impression of how well the present system of justice is functioning.

Before looking at the details and niceties of the rules of evidence followed in our courts, rules tried and tested and justly respected in their application in relatively stable communities, it is worth taking firmly into our minds the levels of violence prevalent in the communities from which the witnesses in the relevant recent cases were drawn. It has been a period in which such brutal devices as the 'necklace' killing have emerged, when the visibility of violence disproportionate to its apparent immediate cause has occasioned widespread anxiety and sensitivity to threats. In such an environment intimidation thrives and need not be explicit nor emphasised to be effective.

One needs further to recognise the political current in labour disputes and that issues of solidarity entrenched in political behaviour reinforce worker solidarity. To give evidence against those involved in anti-employer activity, however 'illegal' that activity might be, is to risk reprisal, and the political undertow might legitimise in this climate a reprisal that would be unacceptable in a less polarised society. This political change in intimidation cases can be seen clearly in Food and

Allied Workers Union & Others v CG Smith Sugar Ltd, Noodsberg² where the events in question took place on 15 and 16 June 1987 and concerned the observance of Soweto Day, and also in an illuminating case not to do with labour, Hlongwane and Others v Rector, St Francis College, & Others³ where schoolchildren arranged a stayaway on 21 and 22 March to commemorate the anniversary of Sharpeville.

In looking at the environment in which industrial court intimidation cases are located, one needs to look not only at the broader conditions in the community but also at the particular situation of the workplace. The peculiar and close relationship co-workers and workers and management find themselves in in the workplace has been specifically considered by De Kock M in FAWU & Others v CG Smith Sugar Ltd, Noodsberg:-

'This court must, in applying the above principles, never overlook the fact that it is called upon to deal with disputes which arise from the employment relationship. In most cases there will be a close daily relationship between the parties and the witnesses, a situation which does not often arise in litigation in ordinary courts of law. The type of harm which a witness may fear and which is likely to occur will therefore also differ from the harm to which reference is made in most of the decided cases in courts of law.

.....

The court must also bear in mind that the opportunity for harm is greater than it would be outside the employment sphere. It is very difficult to protect a witness in the employment sphere. The difficulty of protecting an employee against victimisation by a more senior employee is self-evident. Protecting an employee against physical harm from other employees is equally difficult if not impossible. Accidental injury is often easy to arrange. Employees must go to the change room. They have to go home. They would use the same routes and the same transport as the employees who wish to harm them. The court must not lose sight of this fact when judging the likelihood of harm.'⁴

These factors in the larger and in the more specific environment need to be fully apprehended and appreciated before a judgment can be made in a particular case as to whether a witness has a well-founded reason to fear for his or her own safety in the circumstances of the case.

² 1989 10 ILJ 903

³ 1989 (3) SA 318

⁴ 1989 10 ILJ 903 at 912

It is worth focussing for a moment on the role of the presiding officer in cases where a departure from standard evidentiary procedure is sought. Traditionally it is the function of a judge to control procedure in the court and, where there is no jury, to determine, with or without the assistance of assessors, the merits of the case. The two functions do not sit uncomfortably together, largely because the rules of procedure are established and the judge is confined to ensuring compliance with them according to precedent. The particular characteristic of the cases studied in this paper is that the presiding officer is faced with the task of finding unorthodox and generally less desirable ways of taking evidence in order to protect witnesses. In taking this responsibility upon himself he implicitly asks the question: 'Will the procedure I establish put me in a position at the close of the case to make a fair decision?' The danger is that he might overestimate his capacity to redress, for example, the opportunity for cross-examination that he has denied.

A judicial officer is invariably obliged to evaluate the quality of evidence placed before him. Where he restricts the opportunity for this to be tested and challenged in open court, he needs to have a good understanding of his own powers to give that evidence an appropriate weighting in his deliberations.

EVIDENCE AND HEARSAY

A distinction needs to be drawn between proceedings that are held in camera and those which suffer the more severe restriction of concealing witnesses from the parties they accuse. In the former the principle of conducting hearings in open court is violated, but there are circumstances which make in camera hearings desirable and there is reasonably wide acceptance of such proceedings in cases involving sexual offences and minors. Although the process of the court is partly concealed from public scrutiny, the integrity of the proceedings within that limitation is preserved. In the latter the concealment interferes further with the balance of rights and opportunities afforded the contesting parties; it violates the audi alterem partem rule.

In order to measure the tradition and the values that concealment in these cases compromises, a brief discussion of open proceedings follows.

The principle that justice should be done in open court is widely acknowledged. It has a long and respectable pedigree frequently acknowledged in the industrial court.

Bulbulia M, in National Union of Mineworkers and Another v Free State Consolidated Gold Mines Operations Ltd, refers to the principle as 'a universal rule well ingrained in our jurisprudence.'¹ He points out that Section 32 of the Cape Charter of Justice obliged the supreme and circuit courts to conduct their proceedings in open courts. The rule 'lays down a proposition which is well established in the law of all democratic countries, namely, that judicial proceedings shall take place in open court save in exceptional circumstances.'² Looking beyond these shores he goes back to Solon, the Athenian law-giver (594 BC) and to the English law where Lord Hewart CJ remarked, '.... a long line of cases shows that it is not merely of some importance but it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'³

In the above case the application for restricted hearings in respect of certain witnesses was refused. But even where proceedings in secret have been authorised, the value of open court proceedings has been acknowledged.

¹ 1989 10 ILJ 1117 at 1124

² Ibid

³ R v Sussex Justices, ex parte McCarthy (1924) 1 KB 256 at 259

So De Kock M in FAWU and Others v CG Smith Sugar Ltd, Noodsberg says, in reference to the industrial court determining a dispute in terms of s46(9) of the Act, 'The court correctly, in my opinion, accepts that it must not only ensure that justice is done but must ensure that justice is seen to be done',⁴ though it should be noted that his following words, 'This is in the interest of the parties involved in a dispute and labour relations generally',⁵ suggest this is less a matter of legal principle than of sound policy. But a little later he repeats the idea, 'The principle that justice must be done in open court so that it can be seen to be done is a principle which is applied and has been applied for a very long time in courts of law both in this country and in other countries'.⁶ Against this he poses the problem he has to resolve, 'It is not the principle which creates problems but the application of that principle and the extent to which the court must permit departures from the principle'.⁷

Marcus⁸ is critical of De Kock's procedural decision in this case and endorses the return to principle he finds in National Union of Mineworkers and Another v Free State Consolidated Gold Mines Operations Ltd.⁹ In the same article he offers further support for the principle of the open court in quotations from Wigmore that were noted with approval by Ackermann J in S v Leepile and Others:-

'Subjectively [the openness of the trial] produces in the witness's mind a disinclination to falsify: first by stimulating the instinctive responsibility to public opinion, symbolized in the audience, and ready to scorn a demonstrated liar; and next, by inducing the fear of exposure of subsequent falsities through disclosure by informed persons who may chance to be present or to hear of the testimony from others present.'¹⁰

⁴ 1989 10 ILJ 907 at 910

⁵ Ibid

⁶ Ibid at 911

⁷ Ibid

⁸ 'Shut up or pipe up', Employment Law Volume 6, No.2 November 1989, 30

⁹ 1989 10 ILJ 1117

¹⁰ Employment Law Volume 6, No.2 November 1989, 30 at 31

His second point, taken from the same source, concerns the accountability of judges and, given the heavy responsibility presiding officers take upon themselves when departing from open proceedings, is significant:-

'[Judicial officers] in acting under the public gaze are more strongly moved to a strict conscientiousness in the performance of [their] duty. In all experience, secret tribunals have exhibited abuses which have been wanting in Courts whose procedures were public A strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy.'¹¹

As was suggested at the close of the first part of this paper, the abuse to which presiding officers in these cases in the industrial court might be most prone is an excessive confidence that their own judgment can compensate for the forgone rigour of cross-examination.

In his play The Caucasian Chalk Circle Bertolt Brecht sets up the reprobate Azdak as the judge to replace the previous corrupt bench. He is the judge from the common people who knows that the credibility of the court depends on its open functioning. His succinct, though bawdy, approval of an open court is couched as follows:-

'It does justice good to be done in the open: the wind blows her skirts up and you can see what she's got.'¹²

Turning to the second degree of concealment, where the witness is not fully accessible to the other party, De Kock M comments usefully as follows:-

'Courts do not lightly consent to the identity of a witness being concealed as that hampers cross-examination. The background of the witness cannot be investigated. It is impossible to examine his character and propensity for telling the truth or his general credibility. It is difficult to establish that the witness was at the places mentioned by him. It is impossible to examine whether the witness has any animosity towards the person against whom he is testifying. There is a possibility that an application may in fact be made not to protect the witness against harm but against thorough cross-examination. The person who decides to admit evidence in camera must always be on the alert that there are no such ulterior motives.'¹³

¹¹ Ibid

¹² Brecht B, The Caucasian Chalk Circle in Parables for the Theatre, p.185 (Penguin).

¹³ 1989 10 ILJ 907 at 911

Hoffmann and Zeffertt comment in a very similar vein in showing why hearsay evidence is generally unacceptable to the court:-

'The principal modern justification is that hearsay evidence is untrustworthy because it cannot be tested by cross-examination. It is not only that the maker of the statement might have been deliberately lying; he may simply have been mistaken owing to deficiencies in his powers of observation or memory, or he may have narrated the facts in a garbled or misleading manner. The purpose of cross-examination is to expose these deficiencies, and if the maker of the statement is not before the court, this safeguard is lost.'¹⁴

In an article in Labour Law Briefs, Lansdown's Outlines of South African Criminal Law and Procedure is quoted from, for a practical definition of hearsay:-

'When a person testifies to a fact of which he has become aware by means of a report of some other person and not through the activities of his own senses of perception, his evidence is said to be hearsay.'¹⁵

From this it can be seen that hearsay is a category of evidence with which we are particularly concerned in considering cases where witnesses are not prepared to come forward in open court to testify themselves as to what they have seen or heard. It is a category of evidence not generally admissible in court, save for a few exceptions. Lord Devlin points to the jury system as a primary reason for excluding hearsay, as jurors are not trained to evaluate the comparative weight of evidence:-

'It is extremely difficult for a jury to give the same attention to considerations of weight that a judge does. It comes easily to a judge to say - 'I must be careful about accepting this because after all the witness is not speaking on oath; he has not been cross-examined; I do not know the circumstances in which the statement was taken' and so forth. Those considerations do not come so easily to a jury, and because of the difficulty that a jury has in distinguishing between various grades of weight, the common law thought it wiser to exclude much evidence, such as hearsay, altogether. I cannot see why these considerations should any longer apply to matters that are being determined by a judge alone.'¹⁶

¹⁴ Hoffmann LH and Zeffertt DT, The South African Law of Evidence, 4th ed., (Butterworths) p.125.

¹⁵ Labour Law Briefs, volume 1, no.12, 15 July 1988, p.83.

¹⁶ Bearmans Ltd v Metropolitan Police District Receiver (1961) 1 All ER, 384 at 392.

It may be that a judge alone does have the necessary experience, discretion and good judgment not to be precluded from hearsay and assessing hearsay evidence. The recent amendment to our law in this regard, section 3 of the Law of Evidence Amendment Act,¹⁷ supersedes the common law on hearsay and offers the court a structured way to make the assessment Lord Devlin felt to be appropriate.

The salient parts of section 3 for our purposes are the definition of 'hearsay evidence' in 3 (4) as 'evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence', and the basis for admitting evidence, notwithstanding its hearsay nature, set out in section 3 (1)(c). Section 3 (1) reads as follows:-

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

- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings, or
- (c) the court, having regard to -
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.'

Although we are dealing here with rules of evidence applicable in civil and criminal proceedings and these do not bind the industrial court, this careful enunciation of when hearsay evidence should be admitted, set out in

¹⁷ Act 45 of 1988.

section 3 (1)(c), appeals to 'the interests of justice' and the industrial court, as a court of equity, is able to draw on this new resource.

Two recent supreme court cases give guidance on how section 3 of the Law of Evidence Amendment Act is to be applied.

In Mdani v Allianz Insurance Ltd,¹⁸ an appellate division judgment given by Van Heerden JA, the court ruled that the provisions of section 3 (1)(c) were applicable. The point at issue was whether certain extra-curial statements were inadmissible in the court a quo. That court had found that not only was the evidence concerned hearsay, but was also an inadmissible vicarious admission. It did so, according to Van Heerden JA on a misreading of Corbett JA's judgment in Union and South West Africa Insurance Co. Ltd v Quntana NO.¹⁹ Because the court a quo found this second basis for excluding the evidence it felt itself bound by section 3 (2) of the Law of Evidence Amendment Act which reads:- 'The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.' Van Heerden JA ruled that as the evidence in question could not be excluded on any basis other than it being hearsay, the trial court should have considered its admissibility under section 3 (1)(c) and he sent the matter back to that court for such consideration.

In the course of his judgment Van Heerden JA considered a passage from The South African Law of Evidence²⁰ which had been relied upon in the court a quo and which he felt to be in error. In his comment he drew an important distinction between evidence that purports to show that a statement was made and that which purports to show the statement was true -

'.... in my view the passage confuses two different questions, ie whether an extra-curial admission was made and whether its content is true. If A testified that B made such an admission, A's evidence in itself is clearly not hearsay. Whether B in fact made the admission, depends upon A's credibility and can be tested by cross-examination. What is hearsay, is the content of the admission if it is to be used to establish the truth of what

¹⁸ 1991 (1) SA 184.

¹⁹ 1977 (4) SA 410 (A)

²⁰ Hoffmann LH and Zeffertt DT, The South African Law of Evidence, 4th ed., (Butterworths).

was said. And whether the content is true or not, depends entirely upon B's credibility.²¹

The second case is Hlongwane and Others v Rector, St Francis College, and Others.²² The judgment of Galgut J in this case, in the Durban and Coast Local Division, is important for two reasons. Firstly, the circumstances and the issues it considers very closely parallel the industrial court cases that have had to cope with intimidation. Secondly, the judgment serves as a model for the seriatim consideration of the questions raised in section 3 (1)(c).

The case concerns the suspension or expulsion of members of the matriculation class at St Francis College, Marianhill, following events on 22 March 1988 and subsequent violence following the reinstatement of the pupils by Howard JP in an earlier case before that court. At issue was the evidence of Brother Crispin, the Rector of the school, who could not be cross-examined as the matter was an application and not an action.

In his conduct of the steps taken against those he had identified as ringleaders in the initial stayaway and the subsequent steps in protecting those at the school, Brother Crispin had relied upon information given to him. He refused to identify the source of that information as he believed this would expose the informants to real and unacceptable risk of reprisal. It was common cause that if the hearsay evidence was admissible Brother Crispin's actions were not a breach of contract; if it were not then there was no case for the continued exclusion of the male members of the matriculation class. Though he doubted that contract was the proper basis of the application, Galgut J carefully weighed the issues for and against accepting the hearsay evidence and found on balance that, given all the circumstances, the evidence should be accepted.

The judgment, given only three days after the Law of Evidence Amendment Act had come into operation, is significant for the way it places legal process in the context of the turbulent environment of the community it serves.

²¹ Mdani v Allianz Insurance Ltd 1991 (1) SA 184 at 189

²² 1989 (3) SA 318

STRATEGIES AND DECISIONS

Because the industrial court, when it is sitting to determine whether a labour practice has been unfair, is a court of equity not bound by its own precedent, our purpose in looking at its recent decisions involving witness intimidation is not so much to establish what the law presently is, as to consider how closely various applications and strategies accord with what we understand to be the guiding, underlying principles. For the most part we are concerned with matters of procedure, at ways in which truth may be discovered through the process of the court and particularly how the court accommodates conflicting demands in attempting to satisfy these principles. The objective is not to articulate the current state of the law, but to look creatively at what has been done, to indicate strengths and weaknesses and to suggest, however tentatively, the direction the court might take in hearing such cases in future.

It is in the nature of these cases that we are faced with a bundle of considerations all closely involved with each other. In analysis much store is to be set by separating the various threads. With this in mind, this part of the paper will look first at some decisions where these threads can most clearly be seen before turning to the richer, more complex cases which demonstrate some dextrous weaving.

One of the most balanced and instructive of recent, recorded decisions is that of Brand A in an arbitration involving Secunda Collieries and Chemical Workers Industrial Union.¹ The matter arose out of the dismissal of six workers (the grievants) for alleged intimidation in enforcing an overtime ban. The company indicated that there were two witnesses who had given evidence to it and at the disciplinary hearing their identities had not been disclosed to the grievants in order to protect them from possible harm. Indeed, it was disclosed 'that apart from not disclosing the names of the witnesses, it had been necessary in the disciplinary enquiry to camouflage the version of the witnesses from the grievants in so far as the version related to a one-on-one intimidation situation because if this version had been disclosed to the grievants they would have been able to identify the witnesses.'²

¹ 1992 13 ILJ 454 (ARB)

² Ibid at 456

In this case the court found that the original finding of the stipendiary stewards against the appellant was vitiated by a disregard of the requirements of natural justice that was not remedied in the hearing of two subsequent appeals.

One of the problems that more sophisticated judicial bodies have in considering appeals from domestic tribunals is determining what standards can reasonably be expected from the less formal, less judicially practised hearing of first instance. It is partly because there needs to be consonance of the procedure in the industrial court with the procedure expected from disciplinary enquiries that the industrial court is given flexibility in its procedure. This need for consistency in the two stages of the hearing is stressed in the following passage from Labour Law Briefs:-

'One of the major questions to be answered is whether an employer's disciplinary tribunal is entitled to admit hearsay evidence to establish any relevant fact at a hearing. The law in this regard seems particularly clear. A disciplinary inquiry is not a court of law. Only courts of law are required to observe the rules of evidence which include the rule against the admission of hearsay evidence. Disciplinary inquiries are not 'civil proceedings' and therefore the statutory laws enumerated above do not apply to them. The answer is therefore that disciplinary tribunals are entitled to admit hearsay evidence at hearings.

Another question concerns the consequence of admitting hearsay evidence if the decision of the tribunal is referred to ... the Industrial Court. Potential problems can arise if ... the Industrial Court should decline to admit evidence led before the disciplinary inquiry because it consists of hearsay evidence.

... The Industrial Court is not a court of law. It is an administrative body. Administrative bodies are not bound to follow the rules of evidence applicable in a court of law The statutory laws referred to above do not apply to the Industrial Court for the court proceedings ... are administrative proceedings and not civil legal proceedings. Thus in principle the same evidence which was led in a disciplinary hearing could be led in the Industrial Court.'³

The flexibility accorded the industrial court corresponds to the diversity of forms in which disciplinary decisions are taken in the workplace and here allowance has to be made for the size and sophistication of the employer's business. With this necessarily strong link between what is

³ Labour Law Briefs, volume 1, no.12, 15 July 1988, p.84.

procedurally acceptable in the workplace and the practice of the industrial court, one of the measures of procedural fairness in the court is what constitutes a fair hearing in a disciplinary enquiry.

In the first of two articles on The Right to a Hearing before Dismissal, Cameron sets out firstly the need for a hearing and secondly what its essential ingredients are. One of the ten essentials is that the 'employee should be allowed to challenge his accusers.'⁴ This means 'that he or she should be able to put questions to them which challenge the reliability of their version.'⁵ Cameron suggests two reasons for this. The first is that this allows the employee to find weaknesses in the case of his accusers. The second is not commonly cited and is worth quoting - '... questions will enable the witnesses to comment on the accused employee's version and to rebut it by reacting to it. The contest of versions should not occur in a vacuum and the opportunity to question and reply is probably the only adequate means of pitting two or more conflicting versions fairly against each other.'⁶ He goes on to say that this should happen face-to-face if the requirements of elementary fairness are to be met.

Cameron is here pointing to the dynamic of viva voce dispute, to the energetic contest of versions and opinions from which some light may emerge for the presiding officer. It is hard to imagine a substitute for this and it is important to consider what is lost if this open contest is unable to take place.

Section 17 (22)(a) of the Labour Relations Act provides for a Rules Board and section 17 (22)(c)(i) empowers the Board to make rules 'regulating the conduct of the proceedings of the industrial court.' For our purposes, two comments are worth making on the rules drawn up pursuant to these sections. The first is that they reflect the nature of the industrial court in its quasi-judicial mode as clearly adversarial in character and organised along the lines of a civil court. Rule 3 that deals with the officers of the court and their duties and rule 4 that deals with the service of documents, clearly fit this paradigm. The second is the formal adherence

⁴ The Right to a Hearing before Dismissal - Part 1, ILJ, volume 7, part 2, 1986, 183 at 210.

⁵ Ibid at 210

⁶ Ibid at 210

to civil proceedings with regard to the admissability of evidence set out in rule 8 (1): 'Unless the court, of its own motion, or on application, issues a directive to the contrary as to the admissability of evidence, only evidence which would be admissable in civil proceedings in a court of law shall be admissable in the court.' This takes us back to the significance of the evidentiary rules of the civil court.

In the case of FAWU and Others v CG Smith Sugar Ltd, Noodsberg,⁷ a significant new factor was introduced to the question of whether witnesses might give evidence in secret in the industrial court. Here our concern is not with the flexibility allowed to the court to achieve a fair hearing, but with the powers of the presiding officer to interrogate witnesses and their right to demand that this be done in private. Our focus is not broadly on the ways in which the court may achieve its mandate, but narrowly on specific sections of the Labour Relations Act which, taken together, have been understood to charge the presiding officer with specific responsibilities. In this case De Kock M prefaces his discussion of this issue as follows:-

'A factor which has not yet been considered by any court in relation to an application to hear evidence in camera is the right which a witness has to giving his evidence in camera in this court.'⁸

As it stands, section 12 (7) of the Act has no reference to the conduct of proceedings in the industrial court sitting to determine an application in terms of 46 (9). It reads as follows:-

'(7) The interrogation of any witness by the registrar shall be conducted in private, unless the registrar otherwise decides: Provided that at the request of any witness the interrogation of that witness shall be conducted in private: Provided further that the registrar may, in his discretion, and with the consent of the witness authorize the presence of any specified person at the interrogation of that witness.'

It is couched in language appropriate to the registrar's administrative functions; it is not language appropriate to adversarial proceedings in court. Nevertheless, section 17 (17)(a) extends the application of section 12 (7) mutatis mutandis to 'the industrial court or any member or members

⁷ 1989 10 ILJ 907

⁸ Ibid at 913

dealing with any matter or carrying out any investigation in terms of subsection (14)(a).' Subsection (14)(a) embraces the full range of activities entrusted to the industrial court by the Act.

De Kock M takes his position from an article in Labour Law Briefs which had explored the implications of reading these sections together earlier in 1989. He quotes with approval the following conclusion drawn in that article:

'It seems clear in terms of s12 (7) that the complainant or witness who is required to give evidence is entitled:

- (a) to request that his evidence be given in camera (behind closed doors) and that the Court is obliged to give effect to that request; and
- (b) to refuse to consent to the presence of any person at the interrogation including, probably, the opposing party and his legal or other representative.'⁹

De Kock M then concludes that where the court calls a witness, it has no discretion if that witness wishes to rely on this right granted by the Act. He goes further, saying that the court would be misdirecting itself if it were to refuse to call a material witness because it was unwilling to hear his evidence in camera. Further, it is in the interests of open justice to hear evidence in camera 'with greater alacrity' as witnesses who would not come forward unless granted this protection would have to be called by the court and could then insist on their right embodied in section 17 (17)(a) read with section 12 (7) of the Act. With respect, the reasoning is not wholly clear on this last point, but in essence it calls on the court to grant what might be a lesser request for privacy rather than be obliged to afford a witness complete secrecy.

It seems clear from the way his reasoning progresses and from what he says elsewhere in his judgment, that De Kock M does have some difficulty with the incursion into the adversarial nature of proceedings that acknowledgment of this right brings with it. He expresses his sense of the court's status in section 46 (9) applications as follows:-

'This court, when it determines a dispute in terms of s 46 (9) of the Act, does not sit as a court of law but as an administrative tribunal with a quasi-judicial function. The court's function is, however, more judicial than administrative and the court therefore follows the adversarial procedures which are followed in a court of law despite the fact that it is

⁹ Ibid at 913

not obliged to do so.¹⁰

But there is a shift when he moves on to consider the right discussed above:

'This court is in reality a court of enquiry. The Act provides that the court shall determine a dispute referred to it in terms of s 46 (9). The court must ensure that it hears all evidence which is necessary to the attainment of justice. If the court knows that a witness is available who can testify to facts which are relevant to the issue and such a witness is for some reason not called by one of the parties, the court would be obliged to consider calling that witness for interrogation by it.'¹¹

How active is the court to be in gathering evidence? To what extent does this right to witness privacy, uncovered in the article in Labour Law Briefs, sit consistently with adversarial proceedings? These are important questions that need to be addressed.

Bulbulia M in National Union of Mineworkers and Another v Free State Consolidated Gold Mines Operations Ltd (President Steyn Mine)¹² declined to follow the lead of De Kock M on this issue.

In his argument, Bulbulia M first places section 12 (7) of the Act in the context of section 12 as a whole which accords to the industrial registrar special powers to enquire into the affairs of a registered trade union, an employers organisation or an industrial council. These powers include the interrogation of witnesses who are not permitted legal or other representation. The enquiry is purely an administrative investigation conducted on an inquisitorial basis.

Turning to section 17 (11), Bulbulia M distinguishes those functions of the industrial court which are quasi-judicial in nature from those that are of an administrative or investigatory nature. He concludes that it is 'only when dealing with this latter class of functions that it becomes appropriate for the court to exercise, mutatis mutandis, its special inquisitorial powers under s 12 (7) and to obtain information from witnesses by way of interrogation.'¹³ It is, therefore, only appropriate for witnesses to enjoy

¹⁰ Ibid at 910

¹¹ Ibid at 913

¹² 1989 10 ILJ 1117

¹³ Ibid at 1121

the protection of private hearing when the court is exercising investigatory rather than quasi-judicial functions.

A little later Bulbulia M considers the problems that would arise if the presiding officer in a quasi-judicial hearing were to cast himself in the role of an inquisitor. From his own reasoning he comes to the conclusion that 'there is no absolute right for a witness to be heard in camera at a s 46 (9) hearing' and that the proposition put forward in the article in Labour Law Briefs that De Kock M followed 'is, with respect, not a correct statement of the law in so far as it is meant to include hearings conducted by the court under s 46 (9).'¹⁴

The argument put forward by Bulbulia M in this case is persuasive. In the process of broadening the application of section 12 (7) through section 17 (17)(a), the legislator appears inadvertently to have failed to discriminate the court sitting in one mode from it sitting in another. Nevertheless, as it stands, the reading of the Act in this particular that is advanced in Labour Law Briefs is literally plausible. This is a significant factor in the issue of witness anonymity in the industrial court and clearer legislative direction would put decisions in this regard on a firmer footing.

¹⁴ Ibid at 1124

THE INDUSTRIAL COURT

The industrial court is a creature of statute, taking its powers from section 17 of the Labour Relations Act,¹ as amended, read in conjunction with other sections of that Act. It is a single court which sits occasionally in various centres, not bound by its own previous decisions, but nevertheless sensitive to the value of establishing consistency in labour relations. Section 17 sets out its various functions among which (section 17f) is to make determinations in terms of section 46(9), that is to determine the fairness of a labour practice referred to it. Sitting as such, the court is a quasi-judicial tribunal that enjoys considerable latitude in the conduct of its proceedings.

If we are to evaluate its performance in the manner in which it chooses to take evidence, we may look profitably in three directions: to the courts, to the conduct of domestic tribunals, to the particular needs and constraints of labour tribunals.

As we are dealing with adversarial proceedings before a judicial officer the rules of evidence applicable in civil courts, that have been discussed briefly above, inevitably serve as a model for the industrial court. It may be necessary and desirable to depart from these rules on occasion, but to treat them too readily as technicalities which tribunals with greater flexibility may improve upon is to underestimate the cumulative judicial wisdom they embody.

If we look behind these rules of evidence, we are looking for a substratum that may be characterised as 'natural justice' or 'the fundamental principles of justice'. This essentially is the basis upon which a domestic tribunal operates. In Turner v Jockey Club of South Africa, Botha JA sets out what these principles imply:-

'The principles of natural justice do not require a domestic tribunal to follow the procedure and to apply the technical rules of evidence observed in a court of law, but they do require such a tribunal to adopt a procedure which would afford the person charged a proper hearing by the tribunal, and an opportunity of producing his evidence and of correcting or contradicting any prejudicial statement or allegation made against him The tribunal is required to listen fairly to both sides and to observe 'the principles of fair play' In addition to what may be described as the procedural requirements, the fundamental principles of justice require a domestic tribunal to discharge its duties honestly and impartially.'²

¹ Act 28 of 1956

² 1974 (3) SA 633 at 646

At the outset of the arbitration the company, who wished one of these witnesses to be examined in private, made the following application. It is worth setting out in full as it is the essence of the relief sought in the majority of these cases and it serves as a model for consideration. The arbitrator records that he was asked:-

- '1. that I examine a witness to the alleged intimidation in the absence of the grievants and the union;
2. that I do not directly or indirectly disclose the name of the witness to the grievants or the union;
3. that I do not convey any information received from the witness to the union or the grievants which may enable them to identify the witness;
4. that I say nothing in any award which could lead the union or the grievants to identify the witness;
5. alternatively, that I admit the hearsay evidence of Mr Smith and Mr Hattingh as to what the two witnesses said to them subject to the same provisions of confidentiality.'

The company called three witnesses to lay the foundation for such an application and evidence was led purporting to show the materiality of the testimony of this witness and his co-worker and particularly the reality of the intimidation which precluded him from testifying in open court. The evidence suggested a balanced appraisal by officers of the company of the risk and perception of risk suffered by the witnesses in question. Insofar as the evidence reported experiences communicated to the officers by the witnesses, it was hearsay, though hearsay accessible to at least partial substantiation were the application for private testimony to be allowed. The officers appeared concerned for the safety of the witness, but one has to bear in mind the possibility that it was not in their interests for the testimony to be exposed to open cross-examination. A benign appearance can conceal a mischievous intent.

Brand A considered the familiar tension between the virtue of an open court and the need, on occasion, for justice to be done in secret if it is to be done at all. In keeping with the moderate and balanced tenor of his arbitration he was cautious about abusing his own powers:- 'It is generally accepted that secret adjudication does not engender confidence in the adjudicator or the system of adjudication.'⁴ He set out three criteria

³ Ibid at 455

⁴ Ibid at 458

necessary for establishing a proper balance in applications of this nature:-

- '(a) that the evidence sought to be led by the anonymous witness is essential for the establishment of the case; and
- (b) that it is established in evidence that there is a reasonable possibility that the anonymous witness would be harmed if he or she gave evidence and his or her identity was established; and
- (c) that notwithstanding the anonymity of the witness the person against whom the anonymous witness is giving evidence is given a proper opportunity to challenge the version given by the anonymous witness.'⁵

In the matter before him Brand A decided that the evidence could be material and decisive. He was not satisfied, though, that the witness had a reasonable fear of being harmed, saying that while this might have been the case at the time of the industrial unrest, the present environment did not support such a contention. However, the burden of making this decision was somewhat alleviated as he felt the third requirement was not satisfied.

If the witness testifying in secret is one of many witnesses to an event then it is possible to put to the accused party a complete version of the case he has to answer. In this case, not only is it proposed that there can be no direct cross-examination of the witness, but it is also not possible for the grievants to know fully what it is they have to rebut. It was acknowledged that at the disciplinary enquiry the evidence had to be camouflaged to protect the anonymity of the witnesses.

In the circumstances, Brand A felt there was a real risk of a material failure of justice if he were to grant the order sought by the company. This would be the case if he were to hear the witness in secret and 'even more true in the case of the hearsay evidence of Mr Smith and Mr Hattingh.'⁶ As he concluded:- '... if I cannot put to the grievants when and where and how they are alleged to have intimidated, then justice will not be done...'⁷ And as he points out, this is a flaw that his inquisitorial powers cannot remedy.

The case is instructive for its clarity and for the extreme instance of disadvantage that secret testimony would impose upon the other party. In other cases this disadvantage is less acute but needs to be recognised in

⁵ Ibid at 458

⁶ Ibid at 459

⁷ Ibid at 460

whatever degree it is suffered.

It is worth noting the tension between criteria (a) and (c) set out above, criteria which are generally acknowledged in cases of this nature. It will often be the case that the less the testimony in question is corroborated by other similar evidence, the more it is essential for the establishment of the case. Conversely, where the testimony is similar to other evidence able to be led in open court and where the other party accordingly is less disadvantaged by its admission in secret, it is likely that its admission will be judged less material to the establishment of the case.

If the arbitration in Secunda Collieries and Chemical Workers Industrial Union appears as a model for the even-handed evaluation of the intimidatory pressures on witnesses, it is worth turning to a case where the presiding officer appears less than sympathetic to the dangers the witness fears. This is to revisit National Union of Mineworkers & Another v Free State Consolidated Gold Mines Operations Ltd (President Steyn Mine)⁸ where, after a careful discussion of section 17 (17)(a), Bulbulia M considers the situation of those witnesses in respect of whom he has to determine the application for in camera hearings. He does this largely on the basis of statements laid before the court and what makes his assessment problematic is that he does not separate the issues. The question of whether there is real danger to the witnesses in testifying in open court is considered alongside a prima facie estimation of their credibility. The value or materiality of the testimony is not assessed separately from the reasons why it is urged to take it in secret. As a result, a very definite question mark over the credibility of the witnesses appears to shape an attitude to their situation that is inconsiderate to their risk.

To be specific, Bulbulia M points to a suspicious characteristic of three of the statements in that they are, word for word, identical. This, together with other factors, points to the unreliability of the evidence they would offer. In assessing their risk, he notes that they did not report an incident of alleged intimidation to the police or lay any charges in terms of the Intimidation Act. Further, he discounts an affidavit linking the death of a Mr Nyane with the fact that he gave evidence at a similar disciplinary enquiry. Thirdly, he minimises a threat allegedly uttered

⁸ 1989 10 ILJ 1117

personally by the second applicant. He does so in the following words:-

'The 'threat' allegedly uttered personally by the second applicant against G that the latter would be 'accused and sentenced' after the strike may at first glance appear to be sinister or intimidatory; actually it is vague and open to any number of meanings. There is no suggestion that it was the second applicant (and not anybody else) that would accuse and sentence G, and one can only speculate as to what the 'sentence' would have been, because the word as such does not necessarily imply death or physical harm.'⁹

Given the prevailing socio-political climate in the country and the widespread incidence of violence, it is extraordinary that Bulbulia M could find this 'threat' so lacking in intimidatory resonance. He concludes his rejection of the application with the following categorisation of the witnesses:-

'Five of the witnesses in this case are informers. If employees take it upon themselves to act as informers upon their fellow employees then they should be prepared to take all the risks incidental to such a role. There is no special duty upon the court to protect them or to conceal their identities.'¹⁰

This is not a helpful contribution to the issue of accommodating fearful witnesses.

It seems to me that if there was sufficient prima facie evidence to suggest that the testimony of the witnesses was not worth having, Bulbulia M should have said so and left it at that. He does not offer us a useful model for assessing a witness's risk of reprisal.

Two further cases serve as useful markers with regard to the sufficiency of opportunity afforded to accused parties to defend themselves where material evidence is inaccessible to them. The first of these is Sosibo v SA Stevedores¹¹ which is an application for reinstatement under section 43 of the Act.

The case concerns the attempted theft of a steering compass from a ship being serviced by a stevedoring company. At an initial enquiry on board ship

⁹ Ibid at 1128

¹⁰ Ibid at 1128

¹¹ 1987 8 ILJ 789

to establish the facts, various statements were taken from members of the ship's crew, the lashing induna of the stevedoring company and his supervisor. These statements were not all taken in the presence of the induna, nor did he become aware at this stage that suspicion had fallen upon him.

Subsequently a disciplinary enquiry was held after the ship had departed taking material witnesses with it. The induna was found to be guilty of the attempted theft and was dismissed. In assessing the adequacy of the procedure, the court found that the process did not fulfil the requirements of an impartial enquiry. John AM reasoned:-

'At the initial enquiry the supervisor and the applicant each gave their statements when the other was not present, which would appear to be perfectly acceptable practice where an enquiry to establish the facts is under way. Nevertheless, once the statements had been made by each of them the applicant should have been told what the supervisor had said and been given the opportunity to question him. If this did not happen on that occasion or could not be arranged, then he should certainly have had the opportunity to put questions to the supervisor at the subsequent hearings at which management declined to call the supervisor.'¹²

The second case is Checkers SA Ltd and SA Commercial Catering & Allied Workers Union,¹³ an arbitration. The grievant had been charged with performing an incorrect till procedure, ringing up a 'no sale' and taking a R50 note from a test shopper. The note, identifiable by its number, was later found in her handbag. This and other corroborating evidence weighed heavily against the grievant and she was dismissed. A material witness, the test shopper, was not available to give evidence at the arbitration as she had left the employ of the company and was unwilling to give testimony.

De Villiers A found that the company had made a sufficient attempt to secure the presence of the test shopper for him not to draw an adverse inference from her absence. He found also that the union's case was not materially prejudiced simply because it could not cross-examine the test shopper; there was sufficient corroboration and circumstantial evidence to make her hearsay evidence acceptable. The dismissal was upheld.

The two cases are worth studying for the measure they offer of what

¹² Ibid at 792

¹³ 1992 13 ILJ 446 (ARB)

constitutes a fair hearing in this respect. Where they differ from the cases involving intimidation is that in the latter the inaccessibility of the witness giving evidence in secret is deliberate rather than fortuitous and the loss to the accused party has to be weighed against a certain gain rather than to be seen in isolation.

De Kock M in FAWU & Others v CG Smith Sugar Ltd, Noodsberg¹⁴ probes the essentials of a fair hearing. In the final analysis, procedural fairness has to be taken together with substantive fairness to determine whether a dismissal has been fair, but as we are concerned only with procedural issues, it is what he has to say in this regard that is relevant for this paper.

He refers to Twala v ABC Shoe Store, where Fabricius AM says that the 'duty to act fairly is nothing other than to observe the principles of natural justice.'¹⁵ In a domestic tribunal this does not necessarily include the right of the person charged to cross-examine witnesses.

'This court has not been referred to any case nor have I been able to find any case in which this court has held that the right to face one's accuser and to cross-examine him is an indispensable requirement of a fair hearing. The furthest the court has gone is in Sosibo v SA Stevedores Ltd (1987) 8 ILJ 789 (IC).'¹⁶

A little later:-

'Those presiding at a disciplinary enquiry have a duty to ensure fairness which would include a proper evaluation of the evidence presented. Lack of cross-examination, where there is no reason not to allow cross-examination, may result in the credibility of witnesses or the acceptability of evidence not being properly evaluated. The finding would be unfair for that reason and not for the reason that the person charged was not given the opportunity of facing his accuser and cross-examining him.'¹⁷

And finally:-

'The right to cross-examine is, however, clearly not an essential

¹⁴ 1989 10 ILJ 907

¹⁵ 1987 8 ILJ 714 (IC) at 717

¹⁶ 1989 10 ILJ 907 at 916

¹⁷ Ibid at 916

requirement of a fair hearing according to the principles of natural justice.¹⁸

What De Kock M is doing here is re-asserting the flexibility of the industrial court. It is a court where you may look behind the rules that bind more formal bodies, and work from first principles. He does so emphatically as it is necessary for him to make a clear space in which his strategy for hearing witnesses in private may operate. Nevertheless, he does so in the broader context set out in the section on 'Evidence and Hearsay' above, and he is establishing the sub-minimum for the satisfaction of natural justice rather than the ideal.

Transport & General Workers Union & Another v Durban Transport Management Board¹⁹ is an important case for a number of reasons. It is couched in moderate, measured language that suggests the decision flows from the reasoning it puts forward. Its argument is laid out methodically and its principles are clearly sourced. It deals with both a successful and an unsuccessful application for evidence to be heard in private. It offers the most developed strategy for considering and taking such evidence.

The case is about a work stoppage that occurred in March 1990. It involved bus drivers who belonged to two unions, the TGWU and the Durban Municipal Employees Society (DMES). The participation of the DMES drivers, it is alleged, sprang from intimidation. All but two drivers, who had continued their efforts to work, had their services terminated. They seek reinstatement.

The judgment, as recorded, sets out the rationale of Freemantle SM in granting an application from respondent for certain evidence to be heard in camera. This evidence was the first part of a two-stage operation contemplated by respondent's legal representative. In introducing this rationale, Freemantle SM sets the brief history of the case so far where 12 witnesses had testified for respondent, the case for the DMES was scarcely opened before it was closed by their representative after his request for evidence to be heard in camera was turned down and the respondent's similar request was then granted.

¹⁸ Ibid at 916

¹⁹ 1991 12 ILJ 1113

Freemantle turns first to the criminal law for assistance in establishing what the requirements are for a hearing in camera. In particular he follows the lead of Spoelstra J in S v Pastoors.²⁰ Chief among the guidelines listed in this case are that departures from open court should be allowed only where such a deviation is necessary to secure justice, that the onus of satisfying the court that such special circumstances exist rests with the applicant, that the court may deviate from open court if there is a likelihood that harm may result to a person if he testifies, that 'a likelihood that harm may result' means a reasonable possibility of such harm, neither a probability on one hand nor a far-fetched one on the other, and that where this possibility of harm has been established the court must exercise its discretion based on the facts and circumstances of each particular case.

This is amplified in a quotation from the judgment of Van Dijkhorst J in S v Baleka and Others:-

'Should State security, good order, public morals or the administration of justice require it, the Court may direct the proceedings to be held in camera.'²¹

and later

'Even if the Court has serious doubts whether the proposed order will prevent reprisals against the witness, if it will have the effect of alleviating his fears and thereby removing his inhibitions against free and truthful testimony, the administration of justice will have gained. This consideration favours the granting of an order that the case be held in camera.'²²

This comment indicates the difficulty of effectively protecting a witness from reprisal and underlines the fact that the concern of the court is to obtain full and truthful testimony, not to protect the witness.

In concluding his reference to criminal procedure, Freemantle SM draws the issue of the intimidated witness into the class of exceptions the criminal law envisages:-

²⁰ 1986 (4) SA 222 (W)

²¹ 1986 (4) SA 200 (T) at 201

²² Ibid at 203

'Where s 153 (1) of the Criminal Procedure Act refers to state security, good order, public morals or the administration of justice, that no doubt is a numerus clausus of matters which would move the court in a criminal case to direct that matters proceed in camera. They are, however, all elements of public policy, in the broad sense, and this has many other components. It is in my view public policy which requires other tenets to yield in appropriate circumstances to 'the greater principle that justice must be done.'

Now it is perfectly clear that public policy does not countenance the achievement of objectives by intimidatory methods.'²³

It is not clear what Freemantle SM understands by justice in the phrase 'the greater principle that justice must be done'. It seems to me that 'justice' in the sense of fair treatment for the accused often has to be compromised rather than served in the interests of state security and good order. If the word has a broader meaning here then there seems to be an element of confusion. It is good to confound intimidators, but the movement away from the open court to in camera proceedings involves a loss, a trade-off that may be worthwhile depending on the circumstances. To couch it in language that suggests it involves a shift towards another and perhaps a better form of justice is deceptive. The ingredient that is most conspicuously lacking in Freemantle SM's judgment in this case is any questioning of the fundamental desirability of in camera protection for intimidated witnesses. This is probably due to his understanding of section 17 (17)(a), which accords with De Kock M and rejects Bulbulia M's interpretation.

In Govender v SASKO (Pty) Ltd t/a Richards Bay Bakery,²⁴ De Kock M had the opportunity to consider and reject the decision of Bulbulia M in NUM and Another v Free State Consolidated Gold Mines Operations Ltd.²⁵ This he did, amplifying a little on his earlier ruling in FAWU & Others v CG Smith Sugar Ltd, Noodsberg.²⁶ He reiterated the unavoidable literal reading of the sections taken together and pointed out that unless this reading prevailed there was no provision to compel witnesses to attend court and testify:-

²³ 1991 12 ILJ 1113 at 1118

²⁴ 1990 11 ILJ 1282

²⁵ 1989 10 ILJ 1117

²⁶ 1989 10 ILJ 907

'(e) One expects that the court and/or the parties to disputes will be enabled to compel reluctant witnesses to attend court and to testify. There is no provision which enables parties to compel the attendance of witnesses. Section 17 (17) read with s12 enables the court to do so. To seek that authority in s17 (11)(g) and (h) when there is express authority is untenable and contrived. There is simply no need to invoke incidental authority when there is express authority.'²⁷

It is clear that Freemantle SM similarly accepts the inevitable application of this reading of the act. He expresses himself in agreement with De Kock M's approach in the earlier case (he notes with approval his second assessment only at the end of his own judgment) and disagrees, respectfully, with the part of Bulbulia M's judgment that pronounces upon the effect of section 12 (7) of the Act. Counsel for TGWU argued that the expression mutatis mutandis allowed a certain latitude which might enable the court to make more sense of this provision. He suggested that this could be read to apply section 12 (7) only when it was fitting and this would not be where the industrial court was sitting in section 46 (9) proceedings. Freemantle SM comprehensively rejects this in the following terms:-

'Add to this the fact that the provisions of the various subsections 'shall' apply, which is not such a use of the word 'shall' as prompts an enquiry whether it is directory or peremptory. In short, the industrial court, with reference to its functions, willy-nilly has the powers conferred upon the registrar and the stated subsections apply willy-nilly to the exercise of those powers.

That the permissible mutation of those subsections in applying them may be difficult is no reason to avoid doing so: nor can changes be made to them merely because that is suitable. They must be put into effect literally and, as I understand it, only to the extent that they require tailoring to their different surroundings may they then be altered.

I therefore take Mr Acker's point that the provisions of s 12 (7) are a significant factor in considering an application such as this, namely for evidence to be taken, in effect, in private. If such a directive is appropriate, anonymity of the witnesses would be a naturally concomitant question to consider.'²⁸

Once we are set firmly upon this path we can look only for a procedure to

²⁷ 1990 11 ILJ 1282 at 1288

²⁸ 1991 12 ILJ 1113 at 1120

mitigate the risks to a fair hearing that it carries with it. Freemantle SM proceeds to detail such a procedure within this framework. The more radical question is closed.

Two aspects of the procedure to be adopted in this case now need to be considered. The first is the separation of the client from his legal representative, implied in the order, and the second is the main innovation in this judgment, the clear delineation of a two-stage process.

The first part of the order made by the court on 8 March 1991, upon the rationale for which this judgment is based, reads as follows:-

- '1. It is ordered that the evidence of the witnesses identified in the evidence of Denese Mary Jordan as A,B and C is to be heard in camera in the presence of court officials and the legal representatives of all parties, including Mr Maree.
2. It is directed that the identity of the witnesses may not be disclosed to any person other than those permitted to be present during the hearing of their evidence'²⁹

This order, in allowing the legal representatives of the parties to be present but excluding in particular those persons against whom the evidence is given, follows a similar order in FAWU & Others v CG Smith Sugar Ltd, Noodsberg, where De Kock M noted the consequences:-

'It will be noted from the order that the applicants' legal representatives were entitled to be present, to know the identity of the witness and to cross-examine the witness. They, on the instructions of the applicants, were not present whilst evidence was heard in camera and therefore did not make use of the opportunity of cross-examining those witnesses. They also declined, by reason of their instructions, to peruse the transcript of the evidence heard in camera. The court, with the consent and assistance of the respondent's legal advisers, prepared an expurgated copy of the transcript of the evidence which was then made available to the applicants and their legal representatives.'³⁰

There is no reason to believe that Freemantle SM did not contemplate a similar procedure although he could not tell whether the legal representatives of the applicants would be present.

²⁹ Ibid at 1115

³⁰ 1989 10 ILJ 907 at 909

What are the disabilities implicit in this procedure? The more general shortcomings of interfering with procedure in open court have been discussed above, but how does this contemplated procedure that separates legal representative from client impinge on each of the parties?

The party against whom the evidence is given is unlikely to know the precise details of what he is accused. He is unable himself to use, or to communicate to his representative, knowledge of the character of the witness or his own relationship to the witness. (In EAWU & Another v The Productions Casting Co. (Pty) Ltd, one of the witnesses had been prompted to give evidence because he had personally fallen out with the accused.)³¹ This may allow the witness to prosecute a feud with the accused, the existence of which is unknown to other parties in the closed hearing. He is unable to exercise his knowledge of the details of the dispute to rebut accusations. In general, he is dislodged from the foreground of his own case and loses the security of a definitive grasp of events in court.

The legal representative has to proceed without the benefit of instructions from his client. He is therefore restricted to a greater or lesser extent in the range of his cross-examination. After the closed hearing, he is obliged to conceal from his client information that in his best interests he should know and yet continue to champion that client, sharing an identity of interests with him.

The witness is able to enjoy a latitude in presenting the evidence, confident, in a way not possible in open court where correction may come from any source, that in certain respects falsity and fabrication may go undetected. More innocently, his evidence may err inadvertently without the corrective honing of fully-informed cross-examination.

The presiding officer cannot enjoy the full rigour of adversarial proceedings in sifting out the evidence and he is likely to be drawn into the arena, so changing the nature of the hearing from adversarial to inquisitorial. (The presence of the legal representatives to some extent will offset this.) He is obliged further to assess the weight he should give to evidence taken in this compromised forum.

In general the disabilities are of two kinds; those that affect the quality of the evidence gathered in such a private hearing and those that

³¹ 1988 9 ILJ 702 at 704

cast a shadow over the rest of the proceedings and the judicial process itself. There is also the further criticism that an order implementing a procedure of this nature puts a premium on legal representation. This is undesirable.

The two-stage procedure was suggested to the court by counsel for the respondent and Freemantle SM characterised it as follows:-

'... Mr Acker contemplated two procedural stages to that part of the hearing. The first would be to explore the fears allegedly held by the witnesses concerned about testifying in open court. Thereafter, if found to be appropriate, evidence on the merits would follow, also in camera.'³²

In this case the first stage would involve three witnesses giving private evidence and the second stage, if reached, would involve two of these. A little later Freemantle SM comments:-

'The stage one-stage two procedure is one that appealed to me as being sensible, and if the latter is reached it is open to the opponent to argue the weight to be attached to evidence the opportunity to test which may have been limited by the circumstances.'³³

'Opponent' here probably has to be construed as the representative of the accused party in practice, though it would not preclude the party if he felt sufficiently informed.

Freemantle then sets out a list of items to be considered for stage two to be reached. He draws from the guidelines of Spoelstra J in S v Pastoors³⁴ and also embraces principles gleaned from other cases insofar as they affect and should be applied in industrial court proceedings where intimidation or threat are involved. The summary he offers is a useful digest of where we are at present on the issues and for this reason it is set out in full below:-

1. The cardinal principle is that justice must be done in accordance with the rules of justice.
2. Justice must also be seen to be done, to which end the basic rule is that adversarial proceedings must be held and evidence given in open court.

³² 1991 12 ILJ 1113 at 1116

³³ Ibid at 1121

³⁴ 1986 (4) SA 222 (W)

3. The open court rule will be curtailed only where special circumstances exist which require such an inroad to achieve the cardinal object of doing justice.
4. The burden of satisfying the court that special circumstances of that nature exist rests upon the party relying upon them.
5. The court has a discretion to dispense with the open court basic rule.
6. A special circumstance which may justify the exercise of that discretion is that there is a likelihood that harm may result to a person if he testifies in open court proceedings.
7. In that context the likelihood of harm means a reasonable possibility not necessarily amounting to a probability but being on the other hand neither far-fetched nor remote.
8. That the proposed order cannot be absolutely effective should not deter the court from granting it despite even serious doubts, if it will have the effect of allaying fears and thereby promote free and truthful testimony.
9. The principle of testimony in private is recognised in s 12 (7) of the Labour Relations Act.
10. The nature of the evidence foreshadowed for the private hearing is an important factor to be considered.
11. Whether the court's discretion should favour the granting of such an order will depend on the circumstances of the case and the weight accorded to the evidence in the application which is before the court.
12. The deviation from the ordinary principles and rules must extend no further and continue no longer than the exigencies of the matter necessarily require, but may include anonymity.³⁵

Counsel for the TGWU opposed the notion of a first stage, insisting that the party seeking proceedings in private must make its case for them in open court. Freemantle SM pointed to the absurdity of this in those cases where the person who has evidence on the merits is the same one who lives in fear of reprisal: only if he exposes himself in open court would he be allowed to testify privately. This argument is persuasive.

We come effectively to a three-stage operation where the party seeking evidence in private must establish in open court that prima facie there is reason to believe that there is evidence which, if heard in private, might

³⁵ 1991 12 ILJ 1113 at 1122

satisfy the court that special circumstances exist to deviate from its normal procedure.

Of necessity this will often involve putting up hearsay in open court, but this is not a serious defect as it may later be converted into harder evidence, albeit within the restricted ambit of a private hearing, and the hearsay is not offered for the truth of its content but to indicate that other testimony exists.

Later in his judgment, Freemantle SM was able to delineate more precisely the nature of this three-stage procedure:-

'The party concerned brings an interlocutory application for evidence on the merits to be taken in private and in support of that application tenders evidence in support of it. Of the evidence so tendered some of it is given in open court but some of it, sensitive in itself because the deponent's identity is involved, is tendered in private: the whole of that interlocutory proceeding being aimed at establishing the case for evidence in private on the merits.'³⁶

He draws further support for this procedure in drawing a parallel with an application for an 'Anton Piller order'. A similar difficulty with revelation in open court operates here. He refers to Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another, quoting a passage from the judgment of Van Dijkhorst J. Elsewhere in that judgment there is further indication of the similar procedural dilemma shared by these applications:-

'A practical difficulty has arisen in England which also exists here. It is that in cases where it is intended to apply that the matter be heard in camera, theoretically a decision can only be reached upon this prayer after debate thereon in open Court. This procedure renders the order, should it be granted, ineffective. In practice, of course, the matter is heard in Chambers and no outsider is present, though the public have a right to be there. To obviate this difficulty a rule of practice has been laid down in England requiring a certificate by counsel that in his personal opinion the matter is one in which special circumstances exist rendering it such that it should be heard in camera, and giving the reasons therefor. Upon this certificate the Court then acts and closes its doors before the

³⁶ Ibid at 1126

commencement of the application.³⁷

In concluding his comments on the procedure, Freemantle SM says:-

'... the Anton Piller situation also illustrates why there are circumstances when one's opponent may be excluded from the hearing. It amounts to the exclusion of those whose cause will or may be detrimentally affected by the evidence concerned, because of what may otherwise happen.'³⁸

By way of contrast with the success of the application for the taking of private evidence from witnesses called by the respondent, the reasons for the failure of the DMES application, briefly given here, are worth noting. Firstly, they would all be members of the DMES involved in the case and their identity was therefore known. Secondly, their evidence was to go no further than being exculpatory. Thirdly, no basis for the alleged fears of the witnesses was put forward. Fourthly, there was no evidence in support of the application and no indication of the nature of the evidence tendered by the additional witness.

Freemantle SM takes pains throughout his judgment to make clear the basis on which he is proceeding, the procedural framework within which he is working. He is equally methodical and forthcoming in giving his reasons for moving into stage one of his two-part procedure: that is he sets out in detail the issues of fact that suggest prima facie the procedure is worth entering. The extensive listing, on pages 1124 and 1125 of his judgment, of the variety of factors that cumulatively persuade him to his decision is instructive and exemplary. There is a particular need for order and structure in these judgments as they bring a salutary discipline to the exercise of a discretion in departing from established rules of procedure. The systematic thinking found in this case may profitably be contrasted with the latter part of the judgment in NUM & Another v Free State Consolidated Gold Mines Operations Ltd (President Steyn Mine).³⁹

There is an interesting postscript to the case considered above in Nene & Others v Durban Transport Management Board.⁴⁰ Here we have the same

³⁷ 1984 (4) 149 at 159

³⁸ 1991 12 ILJ 1113 at 1127

³⁹ 1989 10 ILJ 1117

⁴⁰ 1992 13 ILJ 684 (IC)

parties who appeared in the section 46 (9) proceedings (with the apparent exception of the DMES) now meeting in arbitration, again before Freemantle SM. It appears from the introductory comments that the section 46 (9) proceedings were aborted. Evidence from those proceedings is carried forward as evidence in this arbitration, but the ruling given that the evidence of the three witnesses should be taken in private has not been carried forward and the application by the DTMB in this regard has to be considered again.

Freemantle SM briefly reviews the implication of the changed setting for this application - in arbitration rather than s 46 (9) proceedings - and finds no reason materially to alter his earlier ruling. He addresses two contentions of counsel for the employees. The first, that as the Act provides for an individual to present his case at the arbitration proceedings this contemplates ipso facto that he is entitled as of right to be present throughout the proceedings, he rejects. The second, a renewed insistence on the inseparability of lawyer and client, he rejects with some spirit suggesting that someone other than his client's 'alter ego' might represent him. The admittedly close nature of this relationship did not transcend the principles of natural justice.

In looking at the matter again, and from the arbitration standpoint, Freemantle SM has considered a line of cases which follow the judgment in Beier & Bechler v Minister of the Interior & Others.⁴¹ The matter involved an administrative proceeding and the grievance concerned the non-disclosure to the applicants of information against them contained in official records. From the judgment:-

'Exceptions may have to be made in very special circumstances, e.g. in the case of an emergency or possibly in a case where the disclosure of the information might result in the disclosure of its source and the disclosure of its source would be in conflict with public policy or detrimental to the public interest. In such cases the proper way of putting it would be that, very exceptionally, the requirements of natural justice might be departed from, not that a weaker brand of fairness would still be legitimately describable as natural justice.'⁴²

It seems to me that this is refreshingly clear and it appears that Freemantle SM

⁴¹ 1984 (3) SA 409 (A)

⁴² Ibid at 452

has moved to an acceptance of this distinction since the earlier hearing. However, after reference to other cases in this line he concludes:-

'Now, whilst that line of cases had mainly to do with a departure from the audi alterem partem rule, the tenet they apply is clear, namely that where adherence for its own sake to the requirements of natural justice would threaten its very ends, then it is in the interests of justice that those principles should give way to mechanisms calculated to defeat the threat.'⁴³

We are again back to a notion of justice which is unmanageably broad. With respect, Freemantle SM conceals the very real trade-off that has to be made in cases of this nature, in language that is comforting rather than illuminating.

⁴³ 1992 13 ILJ 684 (IC) at 687

CONCLUSION

It is not in the public interest that threats and intimidation should protect the guilty from prosecution whether this is in the criminal, in the civil or in the industrial domain. Nor is it in the public interest that the innocent should be found guilty because we have doctored our judicial process to combat these evils. The cases we have been considering show the industrial court looking for a way to neutralise the disruptive force of intimidation in labour disputes. Two powerful pressures are felt in making these decisions: the one is the unquestionable virtue of the adversarial process in open court; the other is the undeniably violent society the law must serve.

If there is to be an acceptable alternative to process in open court where these pressures may be accommodated, it has to be legitimate and enjoy the respect of all parties. Ad hoc and variable solutions from case to case will bring the court into disrepute.

Two pieces of legislation offer themselves as particular bases on which to establish the necessary procedure. The one, section 17 (17)(a) read with section 12 (7) of the Labour Relations Act,¹ has had a deservedly unhappy reception among labour lawyers. It does not inspire confidence that it says altogether what it means to say and it encourages creative interpretation. Nevertheless, as it stands, there seems to be no escaping the literal reading endorsed by Freemantle SM, 'willy-nilly'. The other piece of legislation, which is more enabling than restrictive, is section 3 (1)(c) of the Law of Evidence Amendment Act.² Here are set out careful guidelines for the admission of hearsay evidence.

Taking evidence in private with limited scope for cross-examination produces what Freemantle SM calls 'harder'³ evidence than hearsay even though it may not be accorded the full weight of evidence taken in open court. It follows that if section 3 (1)(c) admits hearsay under certain conditions, it also makes acceptable evidence that complies with these conditions, taken in these private hearings.

Beyond this legislated base, what is needed is the establishment in

¹ Act 28 of 1956

² Act 45 of 1988

³ 1991 12 ILJ 1113 at 1123

the courts of a process and modus operandi that observes the necessary cautions and restrictions. This, I believe, is what Freemantle SM endeavours to do in his judgment in TGWU & Another v Durban Transport Management Board.⁴ It is a constructive judgment that cultivates respect for the procedure he wishes to establish. It is, no doubt, because he appreciates the need for this procedure to be regarded as appropriate to the circumstances, rather than as an acceptable compromise, a second-rate vehicle for attaining justice, that he avoids the language of trade-off and shortcoming for which I criticised him above. It seems to me that he has taken the right decision, that we should put the question of whether such a procedure is desirable behind us and concentrate on giving it credibility.

This endorsement of hearings that permit limited access in cases involving intimidation depends on the scrupulous examination of all the relevant circumstances in a particular case. It is for this reason also that TGWU & Another v Durban Transport Management Board⁵ stands out as an exemplary judgment as, in the civil court, does Hlongwane & Others v Rector, St Francis College, and Others.⁶

⁴ Ibid

⁵ Ibid

⁶ 1989 (3) SA 318

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