

EMPLOYMENT

NEW CHAIRPERSON FOR NWU HUMAN RIGHTS COMMITTEE

The North-West University (NWU) recently appointed Ms Mohsina Chenia, one of our firm's Employment practice directors, as the new chairperson of NWU Human Rights Committee chairperson.



Mohsina Chenia is a director in our Employment practice

NEW CHAIRPERSON FOR NWU HUMAN RIGHTS COMMITTEE

INSPECTING 'IN CAMERA' EVIDENCE – A PROCESS FOR DEALING WITH FEARFUL WITNESSES

Mohsina believes that her extensive and exciting career in law, allows her to fully appreciate the NWU Human Rights Committee's function as an independent human rights body.

Mohsina believes that being altruistic in nature and having an underlying respect for everyone is essential for someone who has other people's human rights at heart. "Such a person is someone who believes that rights should be applied equally to all members of the community."

Mohsina's role as the committee's chairperson is fourfold: "I have to respectfully ensure that members of the NWU are able to understand and enjoy their human rights, and secondly, I have to protect the groups and individuals of the institution against human rights abuses. Thirdly, it is my responsibility to take positive action to facilitate the enjoyment of basic human rights." The fourth aspect of her work as chairperson is to educate. "It is essential to create an awareness of human rights and all it entails."

Mohsina is convinced that the NWU Human Rights Committee has the teeth to really make a difference if someone needs help concerning the infringement of human rights at the institution. "The committee cannot and should not exist without the ability to adequately resolve disputes or grievances of any magnitude."

We wish Mohsina all the very best in her role as chairperson.



PUTTING THE PIECES TOGETHER:
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INSPECTING 'IN CAMERA' EVIDENCE – A PROCESS FOR DEALING WITH FEARFUL WITNESSES

Employers are often faced with scenarios where witnesses are too scared to give evidence during disciplinary or related proceedings due to fear of being identified and targeted after the proceedings conclude. This is especially true where there have been instances of serious misconduct, such as syndicate thefts and strike related violence.

This fear prevents witnesses from coming forward to testify openly about their observations and from identifying wrongdoers, which often results in crucial evidence not being led during the proceedings. For some time, the law has provided a procedure for dealing with these scenarios. However, this solution is often unknown or overlooked by employers.

The process is commonly referred to as "in camera" proceedings. Essentially, this process allows the identity of the witness to remain anonymous, while still enabling the witness to give admissible evidence which is capable of being cross-examined and challenged.

For the purposes of arbitration proceedings, the admissibility of such evidence is firstly borne out of s138(1) of the Labour Relations Act, No 66 of 1995 (LRA), which 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 the substantial merits of the dispute with the minimum of legal formalities*". (our emphasis).

This LRA provision is amplified by the Commission for Conciliation, Mediation and Arbitration (CCMA) Practice Manual on Arbitrations; in particular clause 12.8, which provides that arbitrations can be conducted in camera and in accordance with the "three tier approach". This three tier approach emanates from, among other sources, the decision of *NUM & Others v Deelkraal Gold Mining Co Ltd* (1994) 7 BLLR 97 (IC), where the following process was formulated:

- Stage One – Objective test: Evidence of an objective nature should be led by the employer in order to lay a basis and demonstrate a real or genuine fear, which precludes the witness from coming forward and telling their story openly. At this stage, evidence is often given as to any threat, assault or damage to person or property that may have been made against the witness.
- Stage Two – Subjective test: Once the first stage has been satisfied, the witness must be called to give evidence in camera (which can for instance be done at a undisclosed location and often through a voice changer device) in order to give subjective evidence of their fear and/or the potential intimidation. Very often the decision maker or commissioner will be invited to attend the secret location in order to observe the witness' demeanour while they give evidence. The evidence is streamed live to the main hearing where the parties are located and able to direct questions back to the witness via telephone, skype or other related facility; and

- Stage Three – Once the second stage has been satisfied, the witness is then required to give evidence "in camera" on the merits of the case and is cross examined, and thereafter re-examined so that their evidence is fully tested.

In the *Deelkraal* matter, the court went on to state that, "I am extremely sensitive to the potential harm and prejudice that could result from the deviation from standard norms and rules of justice. Public policy requires that recognized standards of justice be maintained and should not be departed from lightly. However, I am equally of the view that justice may determine that in certain, or more properly, special circumstances, deviation may be appropriate and legitimate if the harm or potential prejudice that might be suffered is not irreparable".

In the decision of *NUMSA obo Goliath & Another v Shelco Shelving* (2003) 5 BALR 587 (CCMA), the CCMA held that where there is a real apprehension that witnesses may be intimidated or fear for their own safety, then in camera evidence may be used provided that the right to cross examination is not curtailed. The only distinction in the *Goliath* case was that stages two and three were combined for practical purposes.

Since then, evidence in camera has been used in disciplinary proceedings, arbitrations, the Labour Court and the Labour Appeal Court. As such, it has become a valid method for dealing with difficult or high profile disciplinary proceedings and arbitrations.

In summary, employers should not simply right-off crucial evidence on account of a witness' fear of testifying. Employers should rather take proactive steps to request that evidence be led in camera where the circumstances justify its admission.

Where formal applications of this nature are required, employers should seek the assistance of an attorney in order to properly prepare the necessary application.

Nicholas Preston

THE XXI WORLD CONGRESS OF THE INTERNATIONAL SOCIETY FOR LABOUR AND SOCIAL SECURITY LAW IS TAKING PLACE IN CAPE TOWN FROM 15 TO 18 SEPTEMBER 2015, HOSTED BY THE SOUTH AFRICAN SOCIETY FOR LABOUR LAW (SASLAW) AND PROUDLY SPONSORED BY CLIFFE DEKKER HOFMEYR AND DLA PIPER AFRICA.

The 21st World Congress promises to provide a platform for a stimulating discussion on labour and social security law in a global environment where sustained economic and social uncertainty appears to have become the norm.

How do we continue to give effect to the basic objectives of labour and social security law under these conditions, and how best might those objectives be secured?

These and other questions will inform our order of business.



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CHAMBERS GLOBAL 2014 - 2015 ranks our Employment practice in Band 2: Employment.

Aadil Patel ranked by CHAMBERS GLOBAL 2015 in Band 2: Employment.

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