**IN THE HIGH COURT OF SOUTH AFRICA**
**(WESTERN CAPE DIVISION, CAPE TOWN)**

**Case Number: SS45/17**

In the matter between:

**THE STATE**

VS

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| **MAKHI KAPA** | Accused 1 |
| **SIVIWE MLOTYWA** | Accused 2 |
| **ANELE GXOWA** | Accused 3 |
| **MASONWABE MAKOMA** | Accused 4 |
| **VUYILE SOPENI** | Accused 5 |
| **VIWE VUBELA** | Accused 6 |
| **ODWA MFUNDISI** | Accused 7 |

**Date Heard: 30 April 2018**
**Delivered: 02 May 2018**

# Reasons for Judgment on the Admissibility of the hearsay Evidence Delivered on 02 May 2018

**Andrews AJ**

**Introduction**

[1] The accuseds before court have been arraigned on 4 counts of kidnapping, 2 counts of murder, 1 count of attempted murder and 2 counts of assault with intent to do grievous bodily harm.

[2] The state brought an application for the admission of hearsay oral and written statements made by the complainant in count 9 prior to her death. In support of its application the state called the investigating officer, Detective Sergeant Simphiwe Msolo His testimony related to the interview he had with the deceased, Bomikazi Dasi. **Exhibit "N"** being the death certificate of Bomikazi Dasi (hereinafter referred to as the deceased) was handed up in support of the application.

[3] According to Sgt Msolo's testimony, he took the deceased to his office where she related to him what had happened on 21 August 2016, being the date of the alleged incidents. The deceased narrated her story to him in isiXhosa and he translated what she told him into English. After the interview was concluded Sgt Msolo read the statement back to the deceased in isiXhosa and she confirmed the correctness of the statement whereafter it was signed duly commissioned.

**Principle Submissions by state**

[4] The state argued that the statement that the witness deposed meets the admissibility requirements of Section 3 of the Law of Evidence Amendment Act 45 of 1988. It was further argued that the interests of justice justifies and permits the admissibility thereof.

**Principle submissions by defence**

[5] Mr Vakhele, on behalf of the accuseds opposed the application and pointed out that his clients will be severely prejudiced if regard is had to the purpose for which the state seeks the statement to be admitted which would impact on the accuseds right to a fair trial. Furthermore, the admission of the statement should be considered in the context of the evidence the court has before it at the time the application was brought and that no reliability can attached to the statement.

**Legal Principles and evaluation**

[6] Section 210 of the Criminal procedure Act 51 of 1977 provides that no evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot conduce or prove or disprove any point of fact at issue in criminal proceedings.

[7] In terms of subsec 3(4), ‘hearsay evidence’, for the purposes of the section, is defined 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. The statement of the deceased in particular as far as the relevant portion of the statement is concerned which may or may not relate to the narow issue before this court is clearly hearsay evidence for the purpose of Section 3 (4) of Act 45 of 1988.

[8] It is clear that Section 3 of Act 45 of 1988 makes the admission of the oral and written statements and reports admissible notwithstanding the effect that probative

value of it is dependent upon the credibility of a person who is not before the court. It is furthermore clear that the reception of the evidence is not permitted unless the interests of justice justifies and permits its admissibility.

[9] Since the person upon whose credibility the probative value of the evidence depends is not subjected to cross examination which is designed to identify, assess and eliminate portions of the evidence that renders it potentially unreliable, it is incumbent on a court to be alive to the concomitant potential dangers. Only then will a court be in a position to determine the extent of the prejudice caused to an adversary by the denial of that party of the benefit of those devices which in a criminal case amounts to a constitutional right like to cross-examine the person who made the statement and reports.[1]

[10] Heimstra's Criminal Procedure at para 24-40 points out that Section 3 of Act 45 of 1988 does not purport to make previously inadmissible evidence admissible. On the contrary, the intention was, in circumstances indicated in subsection 3(2) to allow for the reception of previously inadmissible hearsay evidence.

[11] Heimstra's Criminal Procedure 2008 at 216 also makes it clear that *'it could hardly have been the legislature's intention to give the presiding officer a limitless discretion.'* In fact the defence's opposition was prefaced detailed submission relating to the yardstick by which the discretion of the court should be measured.

[1] See DT Zeffert, AP Paizes & Skeen: The SA Law of Evidence 2003 at 373.

**The Approach to section 3(1)(c)**

[12] In ***Sv Ndhlovu*** 2002 (2) SACR 325 (SCA) [2] Cameron JA held that:

> *"What the statute does is to create supple standards within which courts may consider whether the interests of justice warrant the admission of hearsay notwithstanding the procedural and substantive disadvantages its reception might entail, The Act thus introduces the very feature this Court held the common law lacked, namely 'a principle that the rule against hearsay may be relaxed or is subject to a general qualification if the Court thinks that the case is one of necessity….*
>
> The *"…statute's fundamental test, namely the "interests of justice", as well as the criteria it poses as relevant to the test, must now be interpreted in accordance with the values of the Constitution and the 'norms of the objective value system' it embodies"*[3]
>
> *'The 1988 Act was thus designed to create a general framework to regulate the admission of hearsay evidence that would supersede the excessive rigidity and inflexibility – and occasional absurdity – of the common law position."*[4]

[13] It is trite that an accused person has a constitutional right to a fair trial, which includes the right to challenge evidence.[5] It does not however follow that because an accused has the right to challenge evidence which includes his right to cross-examine the person who purportedly made the statement does not mean that admitting the hearsay evidence will result in an unfair trial. As pointed out in ***S v Ndhlovu and Others*** *(supra)* at 340:

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[2] At 336b-c.
[3] At 336g-337a
[4] At 346
[5] Section 35(3) (i) of the Constitution of the Republic of South Africa, Act 108 of 1996.

*'The Bill of Rights does not guarantee an entitlement to subject all evidence to cross-examination. What it contains is the right to challenge evidence. Where the evidence is hearsay, the right entails that the accused is entitled to resist its admission and to scrutinize its probative value, including its reliability…But where the interest of justice, constitutionally measured, require that hearsay evidence be admitted, no constitutional right is infringed. Put differently, where the interest of justice require that hearsay statement be admitted, the right to challenge evidence does not encompass the right to cross-examine the original declarant.'*

[14] When it therefore comes to the admissibility of hearsay evidence, its admission is permissible if the jurisdictional factors and safeguards set out in s 3(1) of the Act are present. The enquiry takes on two stages. In evaluating whether hearsay can be admitted in terms of section 3(1)(c), the court must firstly consider whether the evidence might be inadmissible on any other ground other than the fact that the evidence is hearsay. This stage was dealt with earlier as it encapsulates the authenticity and correctness of the statement taken by the investigating officer. Only if the statement is not inadmissible on grounds relating to the manner it has been taken down, will the court be in a position to decide on the admissibility of the statement in terms of the provisions of section 3(1)(c) and make a finding whether it is in the interest of justice to admit the statement.

[15] Once it has been established that there is no other ground rendering the evidence inadmissible, the court must consider whether the admission of the evidence would be in the interest of justice. The Legislature has, in order to ensure fairness included certain safeguards. These are the seven considerations mentioned in paragraph (c)(i) to (vii) of Section 3 (1) of the Act and should be read cumulatively rather than seperately. In this regard the Act provides:

*"3.* ***Hearsay evidence***

*Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless–*

*. . .*

*(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.'*

[16] The court should have regard to each of the six specified factors and in addition to any other factor which the court is of the opinion must be considered, in order to decide whether it is in the interests of justice to admit the said hearsay evidence in terms of section 3(1)(c) of Act 45 of 1988. See ***Mbanjwa*** 2000 (2) SACR 100 (D) 110i

[17] I will now briefly deal with the seven jurisdictional factors referred to in the Act and how it relates to the hearsay evidence in this matter:

***The nature of the proceedings***

[18] This is a criminal case where the state bears the onus of establishing the guilt of an accused beyond reasonable doubt. The fact that the state bears the onus will be of considerable importance not only regarding the question of the

admissibility of the hearsay evidence but also in as far as the weight to be attached to the evidence.

[19] There will ordinarily be a reluctance for the court to admit the hearsay evidence not only as a result of the fact that it is untested but also due to the fact accused is already faced with so much more than to burden him with an absent witness. As was pointed out in ***Metedad v National Employer's General Insurance Co Ltd*** 1992 (1) SA 494 (W), at 499H:

> *'Courts have an intuitive reluctance to permit untested evidence to be used against an accused in a criminal trial.'*

***See also S v Ralukukwe*** 2006 (2) SACR 394 (SCA) op 340e-j:

[20] The Appellate Division in ***Ramavhale*** 1996 (1) SACR 639 (A) 647i-j also cautioned that a court should hesitate long before admitting such evidence in a criminal case. Also instructive is the matter of ***S v Mpofu*** 1993 (2) SACR 109 (N) 115c-d, where it was held that: *'… the court is endowed with a wide discretion when it comes to admitting hearsay evidence.'* What is clear is that the facts of each mater will be decisive regarding the admissibility of the hearsay evidence.

***The nature of the evidence***

[21] The nature of the evidence is both oral and in writing as was apparent from the evidence of the police officer Simphiwe Msolo who consulted with the

complainant who testified in court and the deceased. From his evidence, it would appear that the deceased gave her statement freely, voluntarily and spontaneously.

Furthermore, it is common cause that the statement was made two days after the alleged incident.

[22] ***S v Ramavhale*** 1996 (1) SACR 639 (A) confirmed what was stated in ***Metedad*** *(supra)* on 499 namely that the court should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting the accused, unless there are compelling justifications for doing so.

[23] Du Toit et el - Commentary on the Criminal Procedure Act on 24-50 states that the following are central to the exercise of the court's discretion under section 3(1)(c):

(i) The extent to which the probative value depends on the untested credibility of the absent actor or declarant and

(ii) The extent to which the dangers of relying on the absent actor's or declarant's untested sincerity, narrative capacity, memory and perceptive powers can adequately be offset by any counter-indications of trustworthiness (***Dyimbane*** 1990 (2) SACR 502 (SE))

***The purpose of tendering the hearsay evidence***

[24] The state indicated that the purpose of the evidence is that the deceased is a complainant. The hearsay evidence, according to the state, will be used to identify the perpetrators in this matter.

[25] It is trite that hearsay evidence is no longer defined according to the purpose for which it is tendered but rather according to the extent to which one is asked to rely on the credibility of an out-of-court actor or declarant.[6] The question is whether it is central to the issue or not.[7]

[26] In ***S v Dyimbane***[8] Erasmus J held *'The court could therefore scrutinise this hearsay more closely that it would less important evidence for the importance of the evidence is an aspect mitigating against its being admitted…'*

***The probative value of the evidence***

[27] The state argued that the probative value in this matter is high because the source of the hearsay is direct evidence from an eye witness. The deceased was present at the scene.

[28] Hearsay evidence was admitted in a number of criminal proceedings because they were proved to be reliable by corroboration through other evidence. See ***Mbanjwa*** 2000 (2) SACR 100 (D) and ***Ndhlovu*** 2002 (2) SACR 325 (SCA).[9] In

[6] *S v Mpofu* 1993 (2) SA SACR 109 (N).
[7] See *Ramavhale (supra).*
[8] 1990 (2) SA 502 (SE) at 504g-h.
[9] At 342h-I Cameron JA held: *'The probative value of the hearsay evidence depends primarily on the credibility of the declarant a the time of the declaration, and the central question is whether the interests of justice require that the prior statement be admitted notwithstanding its later disavowal or non-affirmation. And though the witness's disavowal of or inability to affirm the prior statement may*

***Mpofu*** 1993 (2) SACR 109 (N) 116i-j the court held that if the evidence carried: "… the hallmark of truthfulness and reliability, then its reception is doubtless justified".

[29] The defence argued that safeguards to hearsay are to be found to be reliable through corroboration. In establishing the probative value, the defence argued that the purpose and probative value should be considered together. It is to be borne in mind that the purpose that the state says it desires this evidence to be admitted is to identify the perpetrators through the admission of the hearsay evidence as being the evidence of the eye witness. It is against this backdrop that the defence argued that it brings into question the reliability of the hearsay. The defence argued that the court is to consider the evidence the court has before it at the stage of this application. On the available evidence, the defence argued, that none of the accuseds are linked to the offences.

[30] The question to be answered is therefore whether this evidence would serve to corroborate the evidence that is already before this court. What this court has is the evidence of **Nonzwakazi Aida Bungane**, the grandmother of deceased **Makhuze Wellden Bungane** (herein after referred to as Makhuze) who testified that all the accuseds are known to her. She narrated that three people arrived at her house in Makhaya, Khayelitsha, one Sunday morning in 2016, namely Lazaro, Aziso and another person. She identified accused number 2 as being the person she knew as Lazaro. She described accused number 2 as having a friendly and happy demeanour when he asked where the young man who stays in the house was (meaning Makhuze). They requested that Makhuze accompany them so that he

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*bear on the question of the statement's reliability at the time it was made, it does not change the nature of the essential enquiry, which is whether the interests of justice require its admission.'*

could point out to them the items that went missing. They undertook to bring him back home whereafter they left with her grandson. Later she noticed that “BIG” (whom she identified as being accused number 4), was carrying Makhuze on his back. Ms Bungane testified that she enquired from accused number 4 why he was carrying her grandson to which he replied that Makhuze was unable to walk. Accused number 4 found him and had picked him up from behind the house of accused number 1. According to Ms Bungani accused number 4 informed her that they were being assaulted at the home of accused number 1.

[31] During cross-examination Ms Bungani refuted the version put to her that and testified that accused number 4, while standing in the yard of her neighbour, informed her that he was told to change his statement. He informed her that “they” no longer want him to say that he picked him from behind the house. “They” want him to say that he picked Makhuzi up from behind the house near to the railway line.

[32] It is trite that the probative value of the statement can be enhanced by the fact that other witnesses had also testified about most of the incident the statement relates to, who had been cross-examined. It is pellucid that there is no other evidence on record pertaining to the incident itself.

[33] Apart from this evidence there is the evidence of the pathologist and DNA analysis. The state placed on record that if the statement is not admitted, the

state has no further witnesses. This was the only eye-witness and that there is nothing left for the state other than this statement.

***Any prejudice to the accused***

[34] It is a fundamental legal principle that where the interest of justice requires the admission of hearsay, the provision does not require the absence of all prejudice. In ***Ndhlovu*** *(supra)* at 347f-348b, the court held that "prejudice" in Section 3(1) (c) (vi), clearly means procedural prejudice to the party against whom the hearsay is tendered. It envisages the fact that the original declarant cannot be cross-examined. The Court held that prejudice, which is always present when hearsay is admitted, must be weighed against the reliability of the hearsay in deciding whether, despite the inevitable prejudice, the interests of justice require its admission. The Court stated that, *"A just verdict, based on evidence admitted because the interests of justice require it, cannot constitute 'prejudice' … Where the interests of justice require the admission of hearsay, the resultant strengthening of the opposing case cannot count as prejudice for statutory purposes, since in weighing the interests of justice the court must have already concluded that the reliability of the evidence is such that its admission is necessary and justified. If these requirements are fulfilled, the very fact that the hearsay justifiably strengthens the proponent's case warrants its admission, since its omission would run counter to the interests of justice."*

[35] The possible prejudice lying therein that the accused did not have the opportunity to test the reliability of the statement made by the deceased, cannot in

itself or by itself, be sufficient to justify the exclusion of the hearsay evidence. See ***S v Mbanjwa*** 2000 (2) SACR 100 (D) 113f.

[36] The state argued that the deceased gave her statement two days after the incidents. The state submitted that it would be counter to the interest of justice if the statement is not admitted. As previously stated, the state has no other evidence available and if this statement is not admitted, it would mean the end of the state's case. The state argued that this statement is crucial to enable the court to evaluate the totality of the evidence in order to reach a just conclusion.

[37] The defence stressed that it is imperative for the court to consider the purpose for which the state seeks to admit the statement and that the authorities are clear that the court should be slow to accept hearsay evidence bearing in mind that the test is based on reliability of the evidence. Sight should not be lost of the principles of natural justice in relation to a fair hearing.

***Any other factor(s)***

[38] In ***S v Saat*** 2004 (1) SACR 87 (W) 94i the court took into consideration the fact that the state would be prejudiced if the evidence is not admitted and decided that, that fact should be taken into account. In ***S v Mpofu*** 1993 (2) SACR 109 (N) the court held that the reception of hearsay evidence in terms of section 3(1)(c) of Act 45 of 1988 should not logically be divorced from a consideration of those factors which at common law made for admissibility of the evidence. This approach was also followed in ***Mbanjwa*** *(supra)* at 113g.

[39] The state argued that the court must consider the totality of the evidence. The defence on the other hand argued that based on the investigating officer's evidence, he took statements from other witnesses as well and that this statement is not the omega of the state's case.

**Conclusion**

[40] In terms of Section 3(1)(c) the court must take into account both the probative value as well as the prejudicial effect of an item of hearsay evidence in determining its admissibility. It is trite law that all hearsay evidence is potentially unreliable. The question to be answered is whether all factors together amounts to a convincing argument that such evidence should be admitted in the interest of justice.

[41] Each factor as a separate determinant of admissibility should be considered cumulatively. In ***S v Dyimbane*** 1990 (2) SACR 502 (SE) 505d Erasmus J held:

> *'... the Court must bear in mind all the factors set out in the section and take an overall view at the end thereof.... and not as a starting point be averse to allowing such evidence because it is tendered by the state'.*

[42] In ***Metedad v National Employer's General Insurance Co Ltd*** 1992 (1) SA 494 (W) 498I-499A it was stated that: *'…The exclusion of the hearsay statement of an otherwise reliable person whose testimony cannot be obtained might be a far greater injustice than any uncertainty which might result from its admission.'*

This approach was considered and followed in ***Van Zyl v Jonathan Ball Publishers (Pty) Ltd*** 1999 (4) SA 571 (W) 588E-G and ***Staggie*** *2*003 (1) SACR 232 (C) 240g-i.

[43] On a conspectus of the evidence which is currently before me, I am alive to the inherent dangers of allowing this evidence in view of the purpose for which the state seeks its admission against the evidence that is already on record. It must be further borne in mind that the reliability of the hearsay evidence must of necessity be tested against onus that rests on the state.

[44] It is essential for the court to have the benefit of all the available evidence in order for it to come to a just decision. I am of the view that disallowing the hearsay evidence will result in a far greater injustice than any uncertainty which might result from its admission. Therefore, in considering the totality of the evidence, legal principles and relevant authorities; in the exercise of my judicial discretion, I find that the interest of justice demands the admission of the oral and written hearsay evidence of the deceased.

[45] In the result, the application is accordingly granted

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**P ANDREWS, AJ**

Acting Judge of the High Court