THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 749/2010

In the matter between:

GIESECKE & DEVRIENT SOUTHERN AFRICA (PTY) LTD	**APPELLANT**
v	
THE MINISTER OF SAFETY AND SECURITY	**RESPONDENT**

Neutral citation: *Giesecke & Devrient v Minister of Safety and Security* (749/10) [2011] ZASCA 220 (30 November 2011)

Coram: Brand, Lewis, Cachalia, Mhlantla and Shongwe JJA

Heard: **9 November 2011**

Delivered: **30 November 2011**

Summary: **Robbery – allegations of police involvement – vicarious liability of the respondent – admissibility of hearsay statements in terms of s 3(1)(*c*) of the Law of Evidence Amendment Act 45 of 1988.**

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Mbha J sitting as court of first instance):

(1) The appeal is upheld (save to the extent set out in (2)) with costs, including the costs of two counsel.

(2) The dismissal of the appellant's main claim for payment of the sum of R23 914 610 is confirmed.

(3) The dismissal of the appellant's alternative claim for payment of the sums of R3 million and R1.2 million, is set aside together with the trial court's costs order in favour of the respondent.

(4) The six statements by Mr Solomon Dube and the five statements by Mr Richard Gumede included in the record of the proceedings, are admitted in evidence under s 3(1)(*c*) of the Law of Evidence Amendment Act 45 of 1988.

(5) The matters referred to in (3) above are remitted to the trial court for reconsideration after the respondent has been given the opportunity to apply for the reopening of his case.

JUDGMENT

BRAND JA (Lewis, Cachalia, Mhlantla and Shongwe JJA concurring)

[1] The appellant, Giesecke & Devrient Southern Africa (Pty) Ltd, provided cash processing and security services for banks and casinos. One of its customers was the owner of a casino, known as Monte Casino, in the north of Johannesburg. As part of its services, the appellant conducted a secure cash centre in the basement of the Monte Casino premises where it received the cash generated by the casino's activities. On Sunday 5 September 2004 at approximately 15h30 an armed robbery took place at Monte Casino. In the event

some R24 million was stolen from the cash centre operated by the appellant. Pursuant to its contract with the casino owner, the appellant was held responsible for the loss. Subsequent investigations revealed that an employee of the casino, Mr Solomon Dube, was involved in the robbery. Under interrogation Dube, in turn, implicated members of the South African Police Services (the police).

[2] On the strength of these accusations, the appellant issued summons in the South Gauteng High Court, Johannesburg, against the respondent, the Minister of Safety and Security, for the loss it had suffered in this way. In its particulars of claim the appellant's main claim was for the full amount that was stolen. As the basis for this claim, the appellant relied on the allegation that the robbery was perpetrated with the active assistance of a policeman, Inspector William Kgathi, of the Johannesburg Serious and Violent Crime Unit (SVCU) of the police. As an alternative basis for its main claim, the appellant alleged that Kgathi at least had prior knowledge of the robbery; that he was present at Monte Casino at the time of the robbery; that he could and should have prevented the robbery; but that he had wrongfully failed to do so. In any event, so the appellant alleged, Kgathi acted in the course and scope of his employment as a member of the police for whom the respondent bears ultimate responsibility.

[3] Apart from the main claim, the appellant also advanced an alternative claim against the respondent for amounts of R4.2 million in aggregate. In broad outline this claim rested on the allegation that Kgathi and two other members of the SVCU, Captain Ravichandarn Naidoo and Inspector Sathisagren Govender had recovered these amounts from the robbers, but appropriated the money for themselves instead of paying it over to the police for the benefit of the appellant. In all these instances, so the appellants alleged, the three policemen involved acted in the course and scope of their employment as members of the police, which rendered the respondent vicariously liable for their wrongful conduct.

[4] When the matter came before Mbha J in the court a quo, he dismissed both the appellant's main claim and its alternative claim with costs. The appeal to this court against that judgment is with the leave of the court a quo. As to the issues arising on appeal, it can be said by way of introduction that a large part of the appellant's case rested on hearsay statements by alleged participants in the robbery who did not give evidence at the trial. Hence some of the major issues turn on the admissibility of these hearsay statements. But a better understanding of these and other issues requires a more detailed account of the background facts. Despite major factual disputes, there are large areas of common ground. I propose to cover these areas first without necessarily indicating the sources from which they derive.

[5] The leading role player in the saga proved to be Inspector Kgathi. Apart from being a policeman, he turned out to be a compulsive gambler. The records of Monte Casino showed that between July 2001 and November 2004 he had played the slot machines at the casino on no less than 618 days. Based on his regular visits and his substantial spending, he became a platinum card holder of the casino. One of the privileges linked to the status he thus attained was to park in the casino's VIP parking area. That area was in the basement of the casino, adjacent to the cash centre operated by the appellant.

[6] Immediately after the robbery, the robbers removed the video tapes from the cameras in the appellant's cash centre, but not from the cameras in the VIP parking area. Analysis of the available tapes revealed that the robbers entered the casino premises in their silver BMW via the VIP parking area, at 14h43 on the afternoon of the robbery and that Kgathi arrived in the same area four minutes thereafter. Moreover, this footage also showed that subsequent to the robbery Kgathi left the premises again about four minutes after the robbers. Later that afternoon, Kgathi returned to Monte Casino, this time in his capacity as one of the members of the SVCU, who were instructed to investigate the robbery.

[7] As could be expected, the appellant's cash centre at Monte Casino was professionally and efficiently secured. Yet, the security proved not to be entirely flawless. The flaw in the system unveiled by hindsight was that, though only employees of the appellant were allowed in the secure area of the cash centre, the practice was for the appellant's employees on duty to call in a member of the casino staff whenever a counterfeit note was discovered. That is what happened on 5 September 2004. A counterfeit note, obviously infiltrated into the system, was discovered by one of the appellant's employees. The casino staff member called to the secure area was Dube. When the door was opened for him, he entered the secure area with four armed robbers. In an attempt to conceal Dube's complicity, he was held up at gunpoint himself. Later that same afternoon he was, however, identified as a suspect by members of the SVCU.

[8] About 30 minutes after the robbery, Dube made his first statement under oath to members of the SVCU. In that statement he disavowed any involvement in the robbery and claimed to be a victim instead. Two days later, however, he made a statement to Naidoo, which amounted to a confession and an avoidance. According to this statement, Dube admitted that he was a party to the robbery. He alleged, however, that he was forced to participate by one of the robbers, known to him as Zulu. In this statement Dube also disclosed the names of those involved in the robbery, who were then interviewed by the members of the SVCU. One of those thus implicated by Dube was Mr Richard Gumede who subsequently made a statement to the SVCU in which he also admitted his involvement in the robbery.

[9] Not long after these events, rumours of misconduct by members of the SVCU came to the notice of higher authorities in the police. In consequence, another police unit, known as Fedisa, was instructed to investigate these rumours. The commanding officer of Fedisa at the time was Senior Superintendent Marthinus Botha who took personal control of the investigations and who later testified on behalf of the appellant at the trial. According to Botha's

evidence, his unit investigated several cases against members of the SVCU in general and the trio of Kgathi, Naidoo and Govender in particular. One of these cases related to the Monte Casino robbery.

[10] As part of the latter investigation Botha interviewed Dube, who was in prison at the time, on 18 September 2004. Though the interview was conducted in English, so Botha testified, it was recorded by another member of Fedisa, Inspector Andrews, in a statement in Afrikaans. This statement, which Dube confirmed under oath, started with a confirmation of an undertaking by Botha that the contents of that statement would not be used against Dube in any way. According to the statement, Dube then again admitted that he was part of the group of persons involved in the casino robbery. On 6 September 2004, the day after the event, so he said, he received a message from Zulu that he could collect his share of the spoils at a house in Thembisa (in the east of Johannesburg) where it was left in a black travelling bag. On the same day he went to the house where he collected the bag. It contained a large amount of cash. Though he counted up to R3 million, he left some of the money uncounted, which he estimated to be about R500 000. Thereafter he again locked the money in the same travelling bag and left it there.

[11] The next day, Thursday 7 September 2004, Dube said, he was woken up during the early hours of the morning by Kgathi and other members of the SVCU. They were particularly interested in the whereabouts of the money that he had received. When he refused to tell them, they started to assault and torture him. Amongst other things, they applied electrical shocks to sensitive parts of his body and smothered him with a rubber tube. By these means they eventually established where the money was. Kgathi and others then took him to the house in Thembisa where he handed over the money to them. On their way back they stopped at a place, the location of which was concealed, where they met with other persons who were later also identified by Dube as members of the SVCU. When he eventually arrived at the police station in the company of these SVCU

members, so Dube said, he could see that the bag was much lighter than when he handed it to them.

[12] It was common cause that the money entered into the police register of exhibits as having been recovered from Dube, amounted to only R431 000 which, on Dube's version, left R3 069 000 unaccounted for. But three days after making his statement to Botha, Dube made a further statement in his own handwriting to the SVCU, which he again confirmed under oath. In this statement he recanted the accusations against members of the SVCU that he made to Botha. The averment in his statement to Botha that he gave R3.5 million to the police, so Dube now said, was suggested to him by Botha. As far as he knew, he now said, all the money that he gave to the police was accounted for in the police register.

[13] On 23 September 2004 Dube applied for bail. In support of that application he made a further statement under oath. This time he reverted to his original denial of any complicity in the Monte Casino robbery. His explanations for his earlier statements to the police went along the following lines. Though he repeated his allegation that he was tortured and assaulted by the SVCU, he denied that he had anything to do with the pointing out of any money. The money which was allegedly recovered and handed in by Kgathi and others, had nothing to do with him. The whole purpose of the torture, so he said, was to compel the untrue admission that the money recovered was his. The allegation in his statement to Botha about the sum of R3.5 million that he handed to the police was equally untrue and suggested to him by Botha. As to his further statement to the SVCU, he alleged that after he was interviewed by Fedisa, he was booked out of prison and taken to a police station by members of the SVCU. At the police station he was again assaulted and tortured, this time to compel him to divulge the contents of his statement to Fedisa. When he eventually told them, he was further tortured until he recanted that statement in his own handwriting.

[14] As part of their investigation, Fedisa members also interviewed Gumede as one of those implicated by Dube. He too made about five different statements, some conflicting, about his involvement in the Monte Casino robbery. The one of real relevance, however, is the statement he made to members of Fedisa on 21 September 2004. According to this statement Gumede received his share of the loot immediately after the robbery. He counted the money and found that it was R1.9 million. He gave R550 000 to his girlfriend, Ms Rachel Lifuwa. Apart from other lesser expenditure, he bought an Audi motor vehicle for about R195 000. He then rented a hotel room and placed the balance, which according to Gumede's calculation, amounted to R1.2 million, in the safe of the room.

[15] Soon thereafter, so Gumede said, he was confronted by three members of the SVCU that he later identified as including Kgathi, Govender and Naidoo. They wanted to know where he had hidden his share of the stolen money. When he refused to tell them, they assaulted him until he took them to the hotel room where he had locked the R1.2 million. There Kgathi and others opened the safe with the key that he gave them and took the money. It is common cause that of the money recovered from Gumede only R607 000 was handed in which, on Gumede's version, left R593 000 unaccounted for. But I must add that, according to Botha's testimony at the trial, it was later discovered that Gumede apparently also paid R250 000 for a Mercedes Benz, which he did not mention in any statement.

[16] Following the statement by Gumede, members of Fedisa also interviewed his girlfriend, Ms Rachel Lifuwa. She confirmed that she received a large amount of money from Gumede on 6 September 2004. She did not count the money but Gumede told her, she said, that it was R550 000. On 9 September 2004, she was confronted by three policemen, whom she later identified as Kgathi, Naidoo and Govender. They wanted to know from her where the money was that she received from Gumede. When she refused to tell them, they took her to the police station where they assaulted and tortured her severely. Eventually she

took them to where the money was and she handed it to them. It is common cause that on this occasion only R85 000 was accounted for in the exhibit register of the police which, on the joint version of Lifuwa and Gumede, left another R465 000 unaccounted for.

[17] On 11 October 2004, the National Director of Public Prosecutions sought and obtained an order from the South Gauteng High Court, Johannesburg, under s 26 of the Prevention of Organised Crime Act 121 of 1998 (POCA) against Kgathi, Naidoo, Govender and their spouses as respondents. In terms of the order a curator bonis was appointed to take control of their assets pending a confiscation order under the Act. The application relied on a supporting affidavit by Botha. It referred not only to the casino robbery, but also to other cases where the trio of Kgathi, Naidoo and Govender were allegedly involved in alleged criminal conduct. Broadly stated, their alleged modus operandi in all these cases was to target individuals suspected of theft or robbery. They then approached these suspects on the pretext of investigating a crime. In the process they forced the suspects, usually by means of torture and assault, to disclose the whereabouts of the spoils. They then seized the stolen money or goods but only accounted for part of it in the police exhibit register. The rest they retained and appropriated for themselves. As far as the Monte Casino incident was concerned, Botha's statement relied mainly on the statements of Dube, Gumede and Lifuwa to which I have referred. In his statement Botha also pointed out that the lifestyle and assets of Kgathi, Naidoo and Govender reflected incomes way above those earned by them and their spouses.

[18] In his evidence before the court a quo, Botha confirmed the contents of his affidavit in the POCA application, including the fact that Dube made the statement to him which Andrews recorded in Afrikaans. He also denied Dube's subsequent handwritten statement to the SVCU that the crucial part of the earlier statement did not come from Dube but from him. Botha further testified that, as part of his investigations, he obtained the cell phone records, inter alia of Kgathi

and those who could possibly have been involved in the Monte Casino robbery. His analysis of these records revealed three telephone calls made by the suspect Zulu to Kgathi on 7 September 2004, that is, two days after the robbery, which all lasted longer than five minutes. These records, however, revealed no contact between Kgathi and any other suspect preceding the robbery. Further evidence of relevance by Botha was that during his investigations, he was threatened with assault and even death by members of the SVCU, including Kgathi, Naidoo and Govender.

[19] Subsequent to the attachment order under POCA, so Botha testified, Kgathi, Naidoo and Govender were charged with some of the crimes referred to in his POCA affidavit, including those resulting from the Monte Casino incident. They were convicted on two of those charges and sentenced to 15 years' imprisonment. On the Monte Casino charges, they were, however, acquitted. The reason for the acquittal was that Dube, who was on bail at the time, absconded before he could be called as a witness in the criminal trial. Though Gumede started to give evidence at that trial, he also disappeared during an adjournment, before the completion of his cross-examination on behalf of the three accused. Because the criminal charges arising from the Monte Casino incident relied almost entirely on the statements by these two witnesses, an acquittal at the end of the State's case on these charges, was a foregone conclusion.

[20] Another witness called on behalf of the appellant at the trial was an expert, Professor Paul Fatti who is a statistical consultant. The import of his evidence was that, though Kgathi was a gambler who visited Monte Casino regularly, it was highly unlikely that he would be present at the casino during the exact period of the robbery. As a statistical probability Fatti expressed the chance of that happening as no more than .32 per cent or 3.2 in 1 000. This suggests, so he testified, that from a statistical point of view Kgathi's presence during that precise period was the result of premeditation or design rather than a matter of coincidence or pure chance.

[21] The appellant also called a number of other witnesses. However, I think it is fair to say that the relevant part of their testimony is reflected under the rubric of what was common cause. I conclude my recordal of the factual background by stating what is perhaps obvious but nonetheless fundamental, namely that the appellant closed its case without calling Dube, Gumede and Lifuwa. Nonetheless, it was clear at that stage that the appellant would seek to rely on the hearsay statements by these three witnesses to Fedisa. In consequence the respondent asked the court to rule on the admissibility of these statements at that stage of the proceedings. Despite counter arguments by the appellant that the ruling should stand over until the end of the case, the court a quo acceded to the respondent's request. It then ruled the hearsay statements inadmissible. Following upon that ruling, the respondent closed his case without calling any witnesses. What then happened is history: the court a quo dismissed the appellant's claims, both in the main and the alternative, with costs.

Admissibility of hearsay statements

[22] In their heads of argument counsel for the appellant confronted the issues raised by the exclusion of hearsay statements at the outset. In the argument before us, they proposed, however, that we deal with the merits of the main claim first, without reference to the hearsay statements. Since the main claim is not supported by the contents of the hearsay statements, the approach proposed by counsel was not difficult to understand. But I find the proposal untenable. Simply stated, I think it would be inappropriate to decide the main claim without reference to evidence which may prove to be admissible and which may prove to destroy that claim. Hence I shall start with the issues of admissibility.

[23] Under this heading the first question arising results from the appellant's objection against the timing of the court a quo's ruling on admissibility. According to this objection, the court should have considered this ruling only at the end of the case, after hearing all the evidence and not as it did at the end of the appellant's case. I do not think the answer to the question thus raised would

make any difference to the outcome of the appeal. Yet, as a matter of principle, it is not entirely insignificant. I shall therefore venture an answer. But in the circumstances, I propose to do so without unnecessary elaboration. In criminal proceedings the issue raised by the appellant's objection had been answered. That answer appears from the following statement by Cameron JA in *S v Ndhlovu* 2002 (2) SACR 325 (SCA) para 18:

'. . . [A]n accused cannot be ambushed by the late or unheralded admission of hearsay evidence. The trial court must be asked clearly and timeously to consider and rule on its admissibility. This cannot be done for the first time at the end of the trial, nor in argument, still less in the court's judgment, nor on appeal. The prosecution, before closing its case, must clearly signal its intention to invoke the provisions of [s 3 of the Law of Evidence Amendment Act 45 of 1988], and, before the State closes its case, the trial Judge must rule on admissibility, so that the accused can appreciate the full evidentiary ambit he or she faces.'

(See also *S v Molimi* 2008 (2) SACR 76 (CC) para 17.)

[24] The court a quo held that the position should be no different in civil proceedings. The appellant's contention was, however, that the court had erred. The difference between the two, so the appellant's argument went, is that in criminal proceedings effect must be given to the constitutional right of an accused person to a fair trial, in particular, the presumption of innocence and the right to challenge evidence (in s 35(3)(*h*) and 35(3)(*i*) of the Constitution of the Republic of South Africa, 1996). But as I see it, the argument loses sight of s 34 of the Constitution which also entitles both parties to civil proceedings to a fair public hearing. That right is given effect to, inter alia, by the Uniform Rules of Court. In terms of rule 39 the defendant is afforded the right, where the plaintiff bears the onus, to apply for absolution from the instance at the end of the plaintiff's case or to close its own case without leading any evidence if the plaintiff has failed to establish a case which requires an answer. As I see it, it is essential for a proper exercise of these rights that the defendant should know whether the court considers the hearsay evidence relied upon by the plaintiff, admissible or

not. Stated somewhat differently, in order to decide whether the plaintiff has made out a case to answer, a defendant is entitled to know the constituent elements of that case. It follows that rulings on the admissibility of hearsay evidence in civil proceedings should also be made at the end of the plaintiff's case.

[25] The appellant's application for the admission of the hearsay statements rested on two statutory enactments, to wit Part VI (sections 33-38) of the Civil Proceedings Evidence Act 25 of 1965 (the Evidence Act) and s 3 of the Law of Evidence Amendment Act 45 of 1988 (the Hearsay Act). The court a quo started its enquiry into the merits of the appellant's application with reference to the detailed provisions of the Evidence Act. It then came to the conclusion that the hearsay evidence tendered had failed to clear several of the hurdles put up by those provisions. I do not find it necessary to quote the detailed provisions of the Evidence Act nor to repeat the analysis by the court a quo as to whether those provisions had been satisfied on the facts of this case. This is because I believe that the admissibility issue can be resolved in terms of s 3(1) of the Hearsay Act. Suffice it therefore to say that, though I am not in agreement with every one of the court a quo's findings in applying the Evidence Act, I tend to agree that the hearsay statements tendered were not admissible under that Act.

[26] This brings me to what I regard as the crux of the admissibility issue, which turns on s 3(1) of the Hearsay Act. The relevant part of this section provides:

'(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.'

[27] Subsections 1(*a*) and 1(*b*) of s 3 clearly have no bearing on the issues in this matter. The court a quo found that the hearsay statements were also inadmissible under s 3(1)(*c*). In broad outline the court's reasons for this finding appear to be threefold:

(a) The introductory phrase '[s]ubject to the provisions of any other law' in s 3(1) excludes any hearsay evidence which is found to be inadmissible under any other law. Since the hearsay statements under consideration have been found to be inadmissible under the Evidence Act, they are likewise excluded by s 3.

(b) No sufficient or reasonable explanation was given why the persons upon whose credibility the probative value of the evidence depends, were not called as witnesses. Hence the court was unable to consider the factor contemplated by s 3(1)(*c*)(iv).

(c) Since the hearsay statements are inadmissible they can have no probative value for purposes of the consideration contemplated under s 3(*c*)(v). In any event, the statements would have very little, if any, probative value. This is so, the court held, because both Dube and Gumede made a number of conflicting statements in which they did not implicate the three policemen. The suspicion is unavoidable, so the court a quo held, that Dube and Gumede had a motive to minimise their own involvement in the robbery by implicating Kgathi and his two companions.

[28] I consider all these reasons to be flawed. As to the consideration in (a), the flaw lies, as I see it, in the meaning which the court attributed to the phrase '[s]ubject to the provisions of any other law'. According to my understanding, the phrase does not mean that a negative ruling on admissibility in terms of some other law, such as the Evidence Act or the common law, also rules out the admission of the evidence under s 3. That, after all, would leave s 3 with rather limited, if any, scope for application where hearsay evidence would be admissible only under the section when it is already allowed by some other law. As I see it, the 'other laws' referred to in the phrase are merely alternative avenues to admissibility and do not rule out the reception of the evidence in the interests of justice under s 3(1)(*c*) (see eg also D T Zeffertt A P Paizes A St Q Skeen, *The South African Law of Evidence* (2003) at 382). As explained in *S v Ndhlovu* (supra) para 15, the very purpose for the introduction of s 3(1)(*c*) was to 'supersede the excessive rigidity and inflexibility – and occasional absurdity – of the common law position' by creating another avenue for the admission of hearsay evidence which turns on what the interests of justice require. Moreover, I find support for this understanding in the approach adopted by our courts, at least by implication if not yet explicitly, that we are dealing with alternative avenues of admissibility (see eg *Skilya Property Investments (Pty) Ltd v Lloyds of London Underwriting Syndicate Nos 960, 48, 1183 and 2183* 2002 (3) SA 765 (T) at 800E-G; 804I-J).

[29] As to the consideration in (b) the clear and uncontested evidence was that both Dube and Gumede had absconded in circumstances which rendered them fugitives from justice. The police were unable to locate them, not only as accused persons in their own trial, but also as state witnesses in the trial against Kgathi and his two companions. This was sufficient evidence from which to draw the conclusion that it was not reasonably practical to secure the attendance of these witnesses. I can find no justification for placing the onus on a private litigant, like the appellant, to secure the attendance of witnesses in circumstances where the police had clearly been unable to do so for purposes of criminal proceedings. As

to Lifuwa, on the other hand, it was conceded on behalf of the appellant that there was no information about her whereabouts.

[30] The first of the two considerations in (c) with reference to the probative value of the hearsay statements, namely that the statements had no probative value because they were inadmissible, took the court on a circuitous route. The real enquiry into the probative value of the proposed hearsay evidence must assume that the evidence will be admitted under the section. If it is not, the evidence is simply irrelevant. The enquiry into its probative value does not even arise. The court a quo's second consideration referred to in (c), which pertains to the conflicting statements by Dube and Gumede is a valid one. Yet, I do not believe that these conflicts render their allegations against Kgathi and the other two policemen without any probative value at all. On the contrary, while there are obvious reasons for their denial of any complicity in the robbery, I can see no reason why they would falsely implicate the three policemen. The court a quo found that their motive could have been to minimise their own involvement in the robbery by implicating the two policemen. But I fail to see the logic in this line of reasoning. It begs the rhetorical question as to how the two admitted robbers could minimise their role in the robbery by alleging that the police had taken away the spoils.

[31] This leads me to the unavoidable conclusion that the court a quo failed to exercise the discretion bestowed upon it by s 3(1)(*c*) properly, if at all. The section requires that the court should have regard to the collective and interrelated effect of all the considerations in paras (i) – (iv) of the section and any other factor that should, in the opinion of the court, be taken into account. The section thus introduces a high degree of flexibility to the admission of hearsay evidence with the ultimate goal of doing what the interests of justice require.

[32] I find it unnecessary to test the facts of this case against each one of the six named factors individually. I think it is safe to say that none of them specifically militate against the admissibility of the hearsay statements concerned. The nature of the evidence consists of statements under oath; the purpose for which it is tendered is to prove the appellant's case, there is no hidden agenda; the reason why the makers of the statements were not called is because they could not be found; and so forth. The only real consideration offending against the introduction of these statements, as I see it, is the prejudice that the respondent will suffer. By that I do not mean, of course, that the contents of the statements will advance the appellant's case and at the same time be detrimental to the respondent's case. Interests of justice require the right answer. It does not matter in whose favour the right answer might be. The respondent's prejudice lies in the fact that he will be deprived of the opportunity to test this evidence through cross-examination, which is undoubtedly a real disadvantage. On the other hand, that disadvantage can to some extent be reduced by calling Kgathi and the other two policemen involved to give evidence. Moreover, the respondent's disadvantage must be weighed against the prejudice that the appellant will suffer if the evidence is disallowed.

[33] In evaluating the appellant's prejudice I find a number of indicators in the evidence placed before the court a quo that the contents of these statements may well be true. I shall name but a few.

(a) All three policemen lived way beyond their means.

(b) These three policemen and other members of their unit were prepared to threaten Botha, who is a very senior police officer, with harm and even with death for continuing with his investigation.

(c) According to Botha's testimony, recoveries of money by Kgathi and his two companions were not dealt with in compliance with police procedure.

(d) I see no real benefit for Dube and Gumede in antagonising these three policemen, who were known not to be averse to violence, through false accusations. Botha promised Dube and Gumede no benefits. It is true that he

undertook not to use Dube's statement against him. But that, as I see it, would hold no greater benefit for Dube than to say nothing at all.

(e) Members of the SVCU unit saw fit to take a subsequent statement from Dube which essentially accused a senior policeman of obstructing the ends of justice and which bears the clear hallmark of being contrived.

(f) The respondent's own department found the statements which the appellant seek to introduce against them of sufficient weight and probity to form the basis of an application under POCA and of criminal charges against the three policemen.

[34] In performing the balancing act between the conflicting interests of the parties, I conclude that the hearsay statements by Dube and Gumede should have been admitted. I do not think the same can be said of Lifuwa. The appellant tendered no explanation why she was not called as a witness. In the circumstances I can see no cogent reason why the respondent should suffer the prejudice of not being able to test her evidence in cross-examination if she was readily available as a witness.

The main claim

[35] This brings me to the next enquiry. It pertains to the impact of the admission of the hearsay statements by Dube and Gumede on the substance of the appellant's claims. In this regard the appellant's primary contention was that, even without reference to the hearsay statements, its main claim should succeed. As I have already pointed out, however, that is the wrong question. The right question is whether in the light of all the evidence, including the hearsay evidence which has now been found admissible, the appellant had succeeded in proving its main claim on a balance of probabilities. The appellant's counsel submitted that he did. In support of this contention they relied on a number of factors which, in the submission of counsel, indicated that even if Kgathi did not partake in the robbery, he at least knew beforehand that it was going to occur. These factors, according to counsel, included the following:

(a) Kgathi's presence at the precise time of the robbery;

(b) The statistical evidence of Prof Fatti that the chances of Kgathi being present during the precise period of the robbery, was no more than 3.2 in 1 000;

(c) The recoveries of money were not recorded in the register according to police procedure;

(d) Botha gave evidence of a scheme or modus operandi which fitted in with Kgathi's involvement in the robbery;

(e) Botha was threatened by Kgathi and his companions; and

(f) Kgathi's lifestyle exceeded the joint income of him and his wife.

[36] It should, however, be apparent by now that the factors referred to in (c) to (f) are more consistent with the appellant's alternative claim – that Kgathi and others stole part of the money they recovered from the robbers – than his main claim – that Kgathi was involved in the robbery. Hence only the factors in (a) and (b) can be looked upon as pointers to the main claim. I do not believe, however, that standing on their own these two considerations, which are entirely reliant on a statistical model, can sustain any case on their own. Of great importance to the statistical model is that Kgathi was there during exactly the same period as the robbers. But assuming that Kgathi was party to the robbery, such exact timing would appear to be of no consequence unless Kgathi actually took part in the robbery itself which, according to the video cameras in the casino, he did not. As a fact these cameras showed that during that period, Kgathi was playing the slot machines in another part of the building.

[37] Moreover, there are two considerations emanating from the hearsay statements which seem to militate against the appellant's main claim. First, it is unlikely that Kgathi would partake in an assault upon his accomplices in the robbery and thereby run the risk that they may disclose his involvement. Second, I can think of no reason why Dube and Gumede would decide to implicate Kgathi but at the same time continue to conceal his involvement, particularly after he had tortured them and taken away their share of the loot. The answer given by

the appellant's counsel to these difficulties was that Dube and Gumede could have been unaware of Kgathi's involvement. That, however, seems to take us even deeper into the realm of pure speculation which is entirely devoid of any factual foundation. It follows that, in my view, the appellant's main claim was rightly dismissed by the court a quo.

The alternative claim

[38] Quite the opposite holds true of the appellant's alternative claim which is directly supported by the allegations contained in the hearsay statements. Yet it appears to me that the respondent may have some evidence to rebut the statements which he decided not to adduce when the hearsay statements were excluded by the court a quo. Since that possibility cannot be excluded, it seems fair to adopt the procedure followed in *Mdani v Allianz Insurance Ltd* 1991 (1) SA 184 (A) at 190B-E by referring the matter back to the court a quo. That will allow the respondent the opportunity to apply for leave to reopen his case.

[39] To complete the picture I may add that if the appellant should succeed in establishing the allegations it relies upon for its alternative claim, namely that Kgathi and the two other policemen had failed to account for the money they recovered from the robbers, vicarious liability on the part of the respondent should raise no difficulty. It would mean that the policemen were doing what they were employed to do, that is to investigate the robbery and to recover the money, but that they were doing so in a dishonest way. This would put the case on the same side of the dividing line as, for instance, *Minister van Veiligheid en Sekuriteit v Japmoco BK h/a Status Motors* 2002 (5) SA 649 (SCA) para 16 – where the Minister was held vicariously liable – rather than, for example, on the side of *Minister van Veiligheid en Sekuriteit v Phoebus Apollo Aviation Bk* 2002 (5) SA 475 (SCA) para 15, where he was not.

[40] For these reasons:

(1) The appeal is upheld (save to the extent set out in (2)) with costs, including the costs of two counsel.

(2) The dismissal of the appellant's main claim for payment of the sum of R23 914 610 is confirmed.

(3) The dismissal of the appellant's alternative claim for payment of the sums of R3 million and R1.2 million, is set aside together with the trial court's costs order in favour of the respondent.

(4) The six statements by Mr Solomon Dube and the five statements by Mr Richard Gumede included in the record of the proceedings, are admitted in evidence under s 3(1)(*c*) of the Law of Evidence Amendment Act 45 of 1988.

(5) The matters referred to in (3) above are remitted to the trial court for reconsideration after the respondent has been given the opportunity to apply for the reopening of his case.

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F D J BRAND

JUDGE OF APPEAL

APPEARANCES:

APPELLANTS:	A O Cook SC
	A D Stein
	Instructed by Norton Rose South Africa, Sandton Webbers, Bloemfontein
RESPONDENTS:	B Roux SC
	M W Dlamini
	Instructed by The State Attorney, Johannesburg The State Attorney, Bloemfontein