

THE CHALLENGE OF HEARSAY

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In 1986 the South African Law Commission (Project 6 *Review of the Law of Evidence*), drawing heavily on the research of Professor Andrew Paizes, recommended significant amendments in respect of hearsay evidence that were subsequently given legislative force in the Law of Evidence Amendment Act 45 of 1988. The Act defines hearsay 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’ (s 3(4)). It is clear from s 3(1) that the general rule is that hearsay evidence is inadmissible subject to three exceptions: (a) where the party against whom the evidence is adduced consents; (b) where the person upon whose credibility the probative value of the evidence depends testifies; and (c) where a court is of the opinion that it is in the interests of justice that the hearsay be admitted. In deciding whether the interests of justice require that the hearsay evidence be admitted a court, in terms of s 3(1)(c), must have regard to the following factors:

- (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...

These new provisions were directed at ameliorating the rigidity of the common law assertion oriented approach. At common law hearsay evidence was an oral or written statement tendered in order to prove the *truth* of the matters stated and made by a person who was not a party to the case and not called as a witness (see *S v Holshausen* 1984 (4) SA 852 (A)). No matter how relevant, hearsay evidence at common law could only be admitted if it fell within a closed list of exceptions. In enacting s 3 of the Law of Evidence Amendment Act the legislature chose to adopt a more flexible and principled approach to the admission of hearsay evidence. The common law exceptions to the hearsay rule are now regarded as being obsolete but not irrelevant, as they remain factors that the court may take into account in exercising its discretion to admit the evidence in the interests of justice (*Mnyama v Gxalaba* 1990 (1) SA 650 (C)).

Unfortunately, there is the perception that, despite the new reforms, relevant evidence continues to be excluded due to the continued influence of the common law on judicial interpretation. Without endorsing the correctness of this perception, the judgment of the Supreme Court of Appeal in *S v Ndhlovu & others* 2002 (2) SACR 325 (SCA) is to be welcomed for enriching

the relatively undeveloped jurisprudence around s 3 of the Law of Evidence Amendment Act.

Section 3(1)(b)

The court in *Ndhlovu* addressed the application of s 3(1)(b) of the 1988 Act, which provides that hearsay evidence will be admissible if ‘the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings’. The court a quo (*S v Ndhlovu* 2001 (1) SACR 85 (W)) held an extra curial statement made by one accused admissible against his co accused on the basis that the statement was admissible in terms of s 3(1)(b). Goldstein J held that s 3(1)(b) did not require the witness to repeat the extra curial statement under oath. However, as noted on an earlier occasion (see P J Schwikkard ‘Evidence’ 2001 (14) SACJ 259 at 262), the court did not ask the more pertinent question as to whether the persons against whom the extra curial statements were admitted had had the opportunity to cross examine the declarant in respect of its contents. Goldstein J felt compelled to adopt a literal approach in interpreting the subsection as to do otherwise would render s 3(1)(b) superfluous. He reasoned as follows: the subsection would otherwise have ‘no or little purpose since an extra curial statement, which is repeated under oath, need not be referred to at all, and is indeed of doubtful admissibility, constituting as it does a previous consistent statement’ (para 50).

The Supreme Court of Appeal rejected the literal interpretation adopted by Goldstein J and referred to s 3(3) to ascertain the purpose of s 3(1)(b). Section 3(3) permits the provisional admission of hearsay ‘if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings’. Cameron JA identified the rationale of the subsection as follows:

‘Before the Act, a witness whose narrative was conjoined with that of a later witness could not refer at all to the latter’s hearsay statements. This could render the delivery of evidence fragmentary and even incoherent. Any allusion to hearsay would be met with justified objection, and the court would have to wait for the later witness to be called for coherence to emerge. In these circumstances the provision permits the first witness to testify fully and without objection, provided the court is informed that the declarant will in due course be called. If the declarant is not called the hearsay is “left out of account” unless the opposing party agrees to its admission or the interests of justice require its admission under s 3(1)(c).’ (para 28)

The court also identified the difficulties that may arise from adopting an interpretation that allows a hearsay statement to become admissible simply because the extra curial declarant testifies. It noted that the primary rationale for excluding hearsay evidence was its potentially untrustworthiness as the person on whom the probative value of the evidence depends cannot be subject to cross examination. Consequently, the subsection could not have been intended to allow the admission of hearsay evidence in circumstances where such cross examination was absent. This might occur ‘[w]hen the hearsay declarant is called as a witness, but does not confirm the statement, or repudiates it’ (para 30). Where trustworthiness cannot be established through

cross examination the enquiry must be subsumed under s 3(1)(c) and the court must enquire whether the evidence should be admitted in the interests of justice or, as succinctly put by the court, ‘hearsay not affirmed under oath is admissible only if the interests of justice require it’ (para 32).

(The court notes that ‘[r]ule 801(c) of the United States Federal Rules of Court avoids the difficulty attendant upon a literal interpretation of s 3(1)(b) by defining hearsay as “a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted”’ (para 32n51). It is interesting to note that this corresponds with the South African common law definition of hearsay and an assertion orientated approach which was rejected by the legislature in favour of a declarant orientated approach.)

The court considered whether Goldstein J was correct in his conclusion that in any event the evidence was admissible in the interests of justice. It noted that sufficient regard had been given to the nature of the criminal proceedings, and endorsed Goldstein J’s observations regarding the nature of the evidence. Goldstein J noted that the statement was given

‘voluntarily and spontaneously, and before he had any opportunity to fabricate. The information related to a very recent event of which he must have had a very clear memory and in respect of which he had an adequate opportunity for observation. He had personal knowledge of the facts. There is no reason to doubt his ability to observe and perceive properly what occurred. What he conveyed was uncomplicated and easy of comprehension.’ (para 53)

It was on this basis that the court distinguished its finding in *S v Ramavhale* 1996 (1) SACR 639 (A) that hearsay evidence had been improperly admitted. In *Ramavhale* the hearsay in question was the following response to a question put to a state witness as to whether he knew if the deceased had returned to the accused’s house: ‘[i]n fact before we could separate the deceased had indicated that accused had promised him money, so he was supposed to go there’ (at 644j). The Supreme Court of Appeal in *Ndhlovu* described this as a ‘statement of future intention attributed to the deceased by a friend whose testimony was not assuredly disinterested’ (para 42). In contrast the statement made in *Ndhlovu* involved ‘a first hand account of a past event, relayed and recorded soon after its occurrence, by persons not only present but participating themselves’ (ibid). In distinguishing the two types of statements the court emphasized that one was a statement of future intent and the other an account of a past event. Interestingly enough the court in *Ramavhale* does not appear to have made any express observations regarding the fact that the statement in question was one of future intent (although there were many other grounds for concluding that the court a quo had erred in admitting the hearsay evidence in question). Cameron JA does not spell out the significance of this distinction, but refers us to the Canadian case of *Starr v The Queen* [2000] 190 DLR (4 ed) 591 (SCC). The court in *Starr* dealt with an apparently vaguely defined ‘present intention exception’ to the common law rule excluding hearsay (see Colin Tapper *Cross & Tapper on Evidence* 9 ed (1999) 26; this exception is better known as the ‘state of mind’ exception in South

African texts) and held that the fact that hearsay evidence might constitute an expression of the absent declarant's present intention did not make the evidence automatically admissible and that considerations of reliability meant that the exception should not apply when the statement was made under circumstances of suspicion. The relevance of this distinction is perhaps limited in the South African context where the common law exceptions are regarded as obsolete, except in so far as all statements of intention run the danger of giving rise to speculative inferences which in turn might detract from the reliability of the evidence (see *Ndhlovu*, para 44). Perhaps this is the simple point that Cameron JA intends to make by focusing on statements of future intention as a distinguishing point in respect of *Ramavhale*.

Probative value, prejudice and weight

In considering the probative value of the hearsay evidence for the purposes of s 3(1)(c) the court held that a two pronged enquiry was necessary: first it must be established what the hearsay evidence will prove if admitted and secondly whether this would constitute reliable proof. The court turned to the meaning of prejudice in the context of ss 3(1)(c)(vi) and held that ‘ “[p]rejudice” . . . clearly means procedural prejudice to the party against whom the hearsay is tendered. It envisages the fact that the party against whom the hearsay is tendered cannot cross examine the original declarant.’ (para 49) Given the definition of hearsay it is submitted (albeit pedantically) that the prejudice envisaged by the 1988 Act is the inability to cross examine the person *upon whom the probative value of the evidence depends*. Cameron JA held that in determining whether the interests of justice permit the admission of hearsay the court must weigh the inevitable prejudice due to the inability to cross examine against the reliability of the evidence. The court held:

‘The suggestion that the prejudice in question might include the disadvantage ensuing from the hearsay being accorded its just evidential weight once admitted must be discountenanced, however. 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 already have concluded the reliability of the evidence is such that its admission is necessary and justified. If these requisites 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.’ (para 50)

There can be no quarrel with the court here — it is well established that prejudice in the context of hearsay evidence refers to procedural prejudice. Nevertheless, it may be useful to bear in mind the distinction between the admissibility of evidence and the subsequent weight to be accorded to it. Earlier in its judgment the court commented that one of the disadvantages of s 3 is that it merges the question of admissibility and reliability (para 16). However, the question of admissibility inevitably includes a consideration of reliability — as reliability (albeit to a relatively limited extent) is a factor that must be taken into account in determining relevance. Once the evidence is admitted the court will determine the ultimate reliability of the evidence in

the context of all other admissible evidence and it is at this stage that the weight of the evidence will finally be determined — and it might well be that the hearsay nature of the evidence will affect the weight of the evidence. For example, a court might be of the view that the absence of cross examination hampers its ability to assess inconsistencies between the hearsay statement and any other statement. However, this is not a matter of the double accounting of prejudice but a logical consequence of the evaluation of evidence in its entirety.

The constitutional right to challenge evidence

An interesting point addressed by the Supreme Court of Appeal in *Ndhlovu* was the constitutionality of s 3. The court a quo had rather summarily rejected counsel's challenge to the constitutionality of s 3, seemingly on the factual basis that in the circumstances the relevant accused had not been denied their right to cross examine and had in any event not had their right to a fair trial infringed. The Supreme Court of Appeal addressed this point a little more thoroughly.

The court identified the following disadvantages that may accrue as a result of the admission of hearsay evidence. First, it is 'not subject to the reliability checks applied to first hand testimony' and secondly, 'its reception exposes the party opposing its proof to the procedural unfairness of not being able to counter effectively inferences that may be drawn from it' (para 13 and see also *Harksen v Attorney General, Cape* 1999 (1) SA 718 (C)). Presumably it was on the basis of such potential prejudice that counsel for the accused based the assertion that the accused's constitutional right (in terms of s 35(3)(i) of the Constitution) to challenge evidence was infringed by s 3.

However, the court, avoiding the too obvious conclusion that s 3 in so far as it provides for the admissibility of hearsay evidence infringes the right to challenge evidence, noted that s 3 is primarily an exclusionary rule directing that hearsay evidence may not be admitted. Its significant departure from the common law was the creation of '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' (para 14 and see also *Makhathini v Road Accident Fund* 2002 (1) SA 511 (SCA)). Cameron JA held that the legislative criteria to be taken into account in the applying the interests of justice test were 'consonant with the Constitution' (para 16) and reiterated the court's reluctance to admit or rely 'on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there are compelling justifications for doing so' (para 16).

Cameron JA usefully identified a number of duties resting on presiding officers to ensure that an accused's fair trial rights are upheld. They should: (a) actively guard against the inadvertent admission or 'venting' of hearsay evidence (see *S v Zimmerie* 1989 (3) SA 484 (C) at 492F–H; *Ramavhale* (supra) at 651c); (b) ensure that the significance of the contents of s 3 are properly

explained to an unrepresented accused (see *S v Ngwani* 1990 (1) SACR 449 (N)); and (c) protect an accused from ‘the late or unheralded admission of hearsay evidence’ (para 18; see *S v Ndlovu* 1993 (2) SACR 69 (A) at 73b). These requirements are not to be found in the 1988 Act but rather in the courts’ application of the Act.

Cameron JA also emphasized the ‘rigorous legal framework’ created by s 3 with reference to the level of scrutiny that a decision to admit hearsay evidence might be subject to (para 22). The point is that a decision to admit evidence is not simply an exercise of judicial discretion but a decision of law which can be overruled by an appeal court if found to be wrong (see *McDonald’s Corporation v Joburgers Drive Inn Restaurant (Pty) Ltd* 1997 (1) SA 1 (A) at 27E). The court also noted that the manner in which s 3 regulates the admission of hearsay evidence is ‘in keeping with developments in other democratic societies based on human dignity, equality and freedom’ (para 23). It concluded that the constitutional right to challenge evidence had not been infringed. The crux of the court’s reasoning is found in the following passage:

‘It has correctly been observed that the admission of hearsay evidence “by definition denies an accused the right to cross-examine”, since the declarant is not in court and cannot be cross-examined. I cannot accept, however, that “use of hearsay evidence by the state violates the accused’s right to challenge evidence by cross-examination”, if it is meant that the inability to cross-examine the source of a statement in itself violates the right to “challenge” evidence. The Bill of Rights does not guarantee an entitlement to subject all evidence to cross-examination. What it contains is the right (subject to limitation in terms of s 36) to “challenge evidence”. Where that evidence is hearsay, the right entails that the accused is entitled to resist its admission and to scrutinise its probative value, including its reliability. The provisions enshrine these entitlements. But where the interests of justice, constitutionally measured, require that hearsay evidence be admitted, no constitutional right is infringed. Put differently, where the interests of justice require that the hearsay statement be admitted, the right to “challenge evidence” does not encompass the right to cross-examine the original declarant.’ (para 24)

Although not expressly articulated, it is clear that Cameron JA’s interpretation of the right to challenge evidence rejects a notional approach to the interpretation of rights. Stuart Woolman describes such an approach as follows: ‘an interpretive method which holds that any activity or status which could notionally fall within the ambit of a right would be protected’ (‘The right consistency’ (1999) 15 *SAJHR* 166 at 173). There can be little doubt that the right to challenge evidence must ordinarily include the right to cross-examine. The admission of hearsay evidence, by virtue of the definition of hearsay, excludes the cross examination of the person upon whom the probative value depends. (This may or may not be the original declarant — an aspect of the legislative formulation seemingly overlooked by Cameron JA.) Therefore we must assume that the Supreme Court of Appeal eschewed a notional approach or else it would have been forced to engage in the second, justificatory stage of the limitations analysis.

Woolman argues very persuasively for a value based approach to the interpretation of rights. In terms of this approach the party alleging an infringement of a constitutional right ‘must first show that her activity or her status falls within the sphere of activity or status the right was intended to

protect' (op cit at 171). One of the advantages of a value based approach is that by giving a normative content to rights at the first stage of the constitutional analysis it allows the court to identify the rationale underlying the constitutional protection of a particular right, which in turn legitimates the imposition of the stringent burden of justification required by s 36 on the party seeking to limit the right. A value based approach also prevents the premature shifting of the burden to the state and the possibility of resources being wasted in justifying the limitation of an 'activity' which falls outside the ambit of intended protection.

A value based approach to interpretation would require an applicant challenging the constitutionality of s 3 to show that the right to cross examine is protected by the right to a fair trial, that the assertion of the right to cross examine in the circumstances will not frustrate the right to a fair trial and that s 3 effectively restricts the right to a fair trial. The ambit of the right to a fair trial is to be interpreted in accordance with s 39(1) of the Constitution.

Is this what the Supreme Court of Appeal did? The judgment (although making limited reference to the right to a fair trial) would seem to support the following line of reasoning. The right to a fair trial encompasses the right to challenge evidence, the right to challenge evidence sometimes includes the right to cross examine, but not where there are sufficient indicia of reliability to make cross examination superfluous. The purpose of the right to challenge evidence is to ensure that the court considers only reliable evidence in its fact finding function. What the court did not say — but this is perhaps a logical extension of this particular line of thinking (and a necessary one if we are to engage in a value based approach to interpretation) — is that accurate fact finding is an essential component of the right to a fair trial and not admitting reliable hearsay evidence will inhibit the truth seeking function of the court and consequently detract from the right to a fair trial. How does this measure up to the approach taken in other jurisdictions that have adopted the Anglo American rules of evidence subject to the dictates of constitutional supremacy?

As noted by the Supreme Court of Appeal in *Ndhlovu*, hearsay evidence has been held to be constitutionally permissible by the American Supreme Court provided that there are 'sufficient guarantees of reliability' and a requisite degree of necessity (para 25; see *Ohio v Roberts* 448 US 56 (1980)). The first point to note is that, in the absence of an American limitation clause, the Supreme Court's interpretation of rights cannot be unquestioningly applied in a South African context. Secondly, the necessity requirement — suggests that even sufficient guarantees of reliability do not entirely compensate for the absence of cross examination, which is routinely described as being indispensable to the fairness and reliability of the adversarial system (see generally J G Douglass 'Beyond admissibility: Real confrontation, virtual cross examination, and the right to confront hearsay' (1999) 67 *The George Washington LR* 191).

The approach of the Canadian courts cannot be distilled from any one case. In *S v Potvin* [1989] 1 SCR 525 the court held that the exceptional admission of hearsay evidence did not infringe the fundamental principles of justice guaranteed by s 7 of the Canadian Charter of Rights and Freedoms nor the constitutional right to a fair trial and to be presumed innocent (s 11(d)), provided that the accused had an earlier opportunity to cross examine the declarant at the preliminary hearing. However, it is clear that the hearsay rule envisages the admission of evidence in circumstances where there was no prior opportunity to cross examine (see *R v Khan* [1990] 2 SCR 531). The Canadian Supreme Court, while placing substantial emphasis on a prior opportunity to cross examine, has retained a degree of flexibility to meet the dictates of necessity. But, even where hearsay evidence falls to be admitted by virtue of the fact that it meets the criteria of reliability and necessity, the court retains a discretion to exclude it if its admission would result in a Charter violation (J Sopinka, S Lederman & A Bryant *The Law of Evidence in Canada* (1999) 6.96). In developing the common law so as to permit the admissibility of hearsay to be determined by the more flexible criteria of reliability and necessity (*Ares v Venner* [1970] SCR 608), the Supreme Court has avoided conflating the hearsay rule with the scope of the right to challenge evidence (see also *R v Smith* [1992] 2 SCR 915; *R v Finta* [1994] 1 SCR 701; *R v B (KG)* [1993] 1 SCR 740; *R v U (FJ)* [1995] 3 SCR 764).

Cameron JA in contrast conflates admissibility and the right to challenge evidence in his unequivocal assertion that ‘where the interests of justice . . . require that hearsay evidence be admitted, no constitutional right is infringed’ (para 24). This is perhaps correct if it is assumed that one of the other factors that the court must take into account in terms of s 3(1)(c)(vii) is whether the admission of the evidence would infringe any of the accused’s chap 2 rights — but there is little to suggest this line of reasoning in *Ndhlovu*. Instead, in emphasizing reliability, the court seems to go no further than finding sufficient fulfilment of the right to challenge evidence in the admissibility requirements set out in s 3(1)(c). In doing this, the court avoided exploring the content of the right to challenge evidence and the significant role played by cross examination in the fulfilment of that right. The right to challenge evidence, in so far as it is an essential characteristic of the adversarial trial and primarily directed at truth seeking, goes beyond merely establishing the reliability of the hearsay evidence in question. Its most significant component — cross examination — is also an important tool in eliciting favourable information (see *K v The Regional Court Magistrate NO 1996 (1) SACR 434 (E)*). It also has certain features that arguably cannot be replicated by substituted indicia of reliability. For example, contradictions between witnesses or apparent inconsistency in a witness’s statement are better explored through cross examination than the logic of inferences. It is further the best vehicle for ascertaining the credibility of the witness and extracting information that might have been under emphasized or left out in the

evidence in chief (see generally Pat Stillwell *Cross Examination* (1997) 21–5; H C Nicholas ‘Credibility of witnesses’ (1985) 102 *SALJ* 32).

If the Supreme Court of Appeal did engage in a value based approach, it left several questions unanswered. It did not properly explore the ambit of the right to challenge evidence or the depth of the role of cross examination. This is a danger inherent in a misapplication of a value based approach that acts as a barrier to second stage limitations analysis. There can be little doubt that s 3 of the Law of Evidence Amendment Act must pass constitutional muster — however, the failure fully to engage in the first stage of the constitutional analysis as required by a value based approach or, to adopt a notional approach which in this case would inevitably have required the court to move onto the second stage of the analysis — attracts the danger of a narrow interpretation being placed on the right to challenge evidence. If cross examination can be dispensed with if there are sufficient indicia of reliability, the logical conclusion must be that hearsay evidence may be led even when the witness upon whom the probative value of the evidence depends is theoretically available. Whilst this may indeed be in the interests of justice in certain circumstances, for example when a witness is a child complainant in a sexual abuse case, it would seem that given the pivotal role of cross examination in the adversarial system, a full limitations analysis would be merited.