

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**



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| (1) | REPORTABLE: YES/NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED |

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Case number: SS 43/2012

JPV 2012/52

In the matter between:

THE STATE

And

DITHLAKANYANE, ISAAC TEBOGO

Accused No. 1

MOTAUNG, THABANG SAMSON

Accused No. 2

MKHWANE, HOLYNSWORTH

Accused No. 3

MKHWANE, KEDIBONE SYLVIA

Accused No. 4

KUNENE, LAURA

Accused No. 5

MCENCE, VUYOKAZI

Accused No. 6

KEKANA, JACK LESEJA

Accused No. 7

MOLEFE, KARABO LOUIS

Accused No. 8

NEMATHAGA, JACKY MASALA

Accused No. 9

SMITH, MALCOLM

Accused No. 10

SCOTT, RICARDO

Accused No. 11

MAKENETE, THABO BRADLEY

Accused No. 12

JUDGMENT

INTRODUCTION

1. The prosecution has brought an application in terms of section 2(2) of the Prevention of Organised Crime Act, 121 of 1998, (POCA) for the admission of hearsay evidence contained in affidavits made by four witnesses who, for various reasons, are not available to give evidence. This application is opposed by all twelve accused on a number of different and overlapping grounds.
2. Section 2(2) of POCA provides that “the court may hear evidence, including evidence with regard to hearsay.....notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair”.
3. The indictment alleges that a number of accounts in the South African Post Office Bank were defrauded of funds in a theftuous manner by persons acting pursuant to a conspiracy and therefore as part of ‘racketeering’ or an ‘enterprise’ as defined in and in contravention of POCA.
4. I have not seen the content of the affidavits which the state seeks to lead in evidence but, since the absent witnesses are identified in the indictment and mention has been made of them in the course of the trial, I understand that the content of those affidavits would be more or less along the lines that each is an accountholder, that funds were withdrawn from such account in a specific amount on one or more specific dates and that such withdrawals were not made by the accountholder or were not authorized by them¹. However, I do not base my ruling on any suppositions or speculation as to the content of these affidavits.
5. Ordinarily hearsay evidence is inadmissible for a number of reasons². Certain exceptions to such inadmissibility developed over the years resulting in the enactment of the Law of Evidence Amendment Act 45 of 1988 (the 1988 Act) which provided that “hearsay evidence shall not be admitted as evidence at criminal proceedings” unless certain factors are taken into account which lead the court to the opinion that such evidence “should be admitted in the interests of justice”. I note that Savoi supra has stated that section 2(2) of POCA “effectively does away with the hearsay rule” on charges under section 2(1) of POCA. I am also mindful that

¹ I have heard the evidence of nearly 30 accountholder witnesses to this effect.

² Pertinently summarized in S v Ndhlovu and Others 2002(2) SACR 325 SCA at paragraph 13.

there is a filter to the admissibility of non-objectionable hearsay in the form of the proviso which has been appended to section 2(2).

HEARSAY

6. The first question which I need to decide is whether or not it is hearsay evidence (as contemplated in terms of section 2(2) of POCA) which the state seeks to lead in this application. If the subject matter of this application is not hearsay evidence then section 2(2) cannot assist and the application must fail.
7. The 1988 Act defines 'hearsay evidence' as 'evidence, whether oral or in writing, the probative value of which depends on the credibility of any person other than the person giving such evidence'.
8. POCA does not define hearsay evidence. The recent judgment in Savoi v NDPP 2014(1) SACR 545 CC does not refer to any definition of hearsay but does refer to the judgment in Ndhlovu supra which accepts the 1988 Act as containing the definition applicable in South African law.
9. I therefore approach this present application on the basis that, for section 2(2) to come into play, the evidence sought to be adduced by the state must depend for its probative value on the credibility of someone other than the giver of evidence in court..
10. I understand that this requires that the affidavit must be hearsay, that the content of the affidavit must be hearsay, that the content of the affidavit must depend for its probative value on the credibility of someone other than a person giving evidence in court.
11. Advocate Vos, appearing for the prosecution, argued that the contents of the affidavits are hearsay because the court will not see the deponents to the affidavits in the witness box and cannot assess their credibility. I now agree with Advocate De Vos. The court will not see the deponent and cannot assess the credibility of the deponent. The deponent to the affidavit is the source of the content of the affidavit and the probative value of that content depends on credibility of the deponent. The wording of the definition of hearsay specifically requires that there be a "person other than the person giving such evidence" and that it is the credibility of the non-evidence-giving person which is determinative of the probative value.
12. Advocate Vos then submitted that the giver of the evidence is the person, whether a member of the SAPS or the Post Office, who received or commissioned (or perhaps even wrote down) the affidavit. The taker of the statement gives evidence whilst the probative value of that evidence depends on the credibility of someone else – namely the deponent to the affidavit.

13. The recipient or commissioner of the affidavit cannot give evidence as to the content of the affidavit. All he or she can say is that a statement was written down (by him or her or someone else), that the maker of the statement took an oath that this was a true statement, that such oath was given before a commissioner of oaths, that the maker of the statement signed the document in the presence of the commissioner. In other words, once there is a written document such as an affidavit sought to be adduced into evidence, the only evidence which the third party can give pertains to the circumstances of the making of the affidavit and not the content of the affidavit. The third party who attends at court is a conduit witness who gives evidence but the probative value of the evidence depends on the credibility of another – the signatory/deponent to the affidavit.
14. Once the deponent has signed the document and sworn an oath that this is a true and correct statement, then the deponent has made the statement his or her own. It is not the statement of anyone else. The deponent has accepted responsibility for the contents of the affidavit. Although someone else may have been present when it was written by the deponent, may even have written out the document, may have translated from one language into that in which the document is written, once the deponent signs the statement and once the deponent swears to the truth of the contents of the statement, then the affidavit and its contents belong to the deponent and the contents stand or fall on the credibility of the deponent and no one else.
15. Advocate Vos correctly pointed out the anomaly if such affidavits were not held to be hearsay. On the one hand, where a witness comes to court and testifies that another person made a verbal statement to him or her, such witness would be giving hearsay evidence. It would be hearsay because the probative value of the evidence would depend on the credibility of the absent person who told something to the witness in court. Such evidence might or might not be admissible in terms of section 2(2) of POCA. On the other hand, as in the present case, where a witness comes to court and attempts to hand in a statement signed and sworn to by an absent person it would be absurd for such witness not to be permitted to hand in such affidavit. Such absurdity relies on the grounds that the probative value of the written document/affidavit depends on the credibility of another person, the deponent/signatory to the affidavit. Hearsay may be contained in a written document.
16. In the result, I rule that the affidavits of Messrs and Mesdames Davison Nkomo, Mphepu Maringa, Masechaba Mafatle and Norman Sikhosana are hearsay evidence and are subject to consideration in terms of section 2(2) of POCA.

THE PROVISO TO SECTION 2(2)

17. The proviso to subsection (2) requires that the admission of hearsay evidence “would not render a trial unfair”.
18. In Savoi supra, the Constitutional Court remarked¹ that the approach in section 2(2) ‘effectively does away with the hearsay rule’ on certain charges subject to protection of the fair trial right whilst the 1988 legislation ‘retains the exclusionary rule’ but permits the admission of hearsay evidence only under certain circumstances.
19. It is for the trial court to determine where the admission ‘would be so unfair as to infringe an accused’s fair trial right’. Included in the issues² to be considered are the nature of the evidence, its reliability or lack of it, its probative value and prejudice to the accused.
20. In the present case I have regard to the following:
 - a. This court does not know who interviewed each of the persons who made the affidavit sought to be led in evidence (other than Mrs Sylvia van der Merwe in the case of Mr Davison Nkomo) and the circumstances under which each affidavit was commissioned.
 - b. The court does not know what particular or pertinent prejudice, if any, will result and the nature and degree of such prejudice if the admission is admitted. In other words, the court knows only that the signatory/deponent cannot be cross-examined by the defence but does not know the nature of the evidence nor the impact upon the accused if the hearsay is admitted into evidence.
21. The defence objections to the admissibility of these affidavits are firstly:
 - a. The State has failed to conclusively prove that Nkomo and Maringa are deceased. I am satisfied that the state has produced the best evidence available.
 - b. The State has failed to take adequate steps to procure the attendance at court of Mafatle and Sikhosana. I am satisfied that Mafatle is no longer at the address given by her to the Post Office and is believed to be in Lesotho but that the Embassy of Lesotho has not provided any assistance in tracing her. I am satisfied that Sikhosana can be contacted telephonically but his physical whereabouts are unknown and he is unwilling to give evidence and because he cannot be found, he cannot be subpoenaed or otherwise brought to court.
22. The prosecution has submitted that, absent admission into evidence of these affidavits, the accused (where the indictment relies upon these four account holders) would probably be acquitted on certain counts because the accountholder cannot be called to personally give

evidence in relation to those counts. That may well be correct – but I have already placed on record that I do not know the content of the affidavit nor the probative value which is capable of being placed thereon.

23. The state has further argued that there is public interest that a court should hear all evidence against an accused. I would prefer to phrase the interest somewhat differently. Public interest requires justice to be done; justice can only be done when a court has been furnished with the fullest possible range of available and admissible evidence; justice then requires full and proper scrutiny and assessment of all such evidence. Justice requires fairness to both the accused and to the public but only information obtained and tendered and filtered “in a constitutionally compliant manner” should be admitted into evidence.
24. The defence objections to the admissibility of these affidavits are secondly:
 - a. The obvious prejudice to the accused is that, without admission of these affidavits, there can be no convictions on certain counts. Absent these affidavits, the state’s case is bound to fail. I cannot know this. I do not know this. I have not seen the contents of the affidavit and none of the defence has asked that I do so.
 - b. I am told that the admission of these affidavits would go to ‘the heart of the matter’. I do not know that this is the case. I doubt very much that the affidavits point to any one of the accused. That is the ‘heart’ of the case.
 - c. In one instance, accused 11 has made an admission in terms of section 220 of the CPA to the effect that Mafatle did not request the withdrawal from the relevant account. I am told that this is the only corroboration of that which is contained in the affidavit. It is argued that admission of such affidavit would constitute ‘trial by ambush’ because, absent this admission, there would have been no evidence (other than the affidavit) of the existence of this offence. It is argued that the section 220 admission was only made because it was anticipated that the accountholder, including Mafatle, would give evidence.
 - d. It has been argued that admission into evidence of these affidavits would put the accused on their defence and may compel or propel them into giving evidence. I cannot see that this can be the case. There are many counts against each accused³³. The case against each accused is not limited to only these four accountholders. They are in exactly the same position vis a vis these accountholders as they are in relation to all the other accountholders. They may elect or not to give evidence; they may elect or not to dispute the alleged lack of consent by the accountholders to the withdrawals. All that these affidavits may or may not do is provide (no more than) hearsay evidence that an offence has been perpetrated – I do not know.

³³ Over 120 counts in total against all the accused.

25. In the circumstances, I cannot see that the admission of the affidavits of these accountholders would be so unfair as to infringe the fair trial rights of any accused. The evidence is of the nature of an affidavit – at the end of the day I may make no greater a finding than that a person made a statement under oath which deponent cannot be questioned or challenged. The reliability of the statement is, at this stage, unknown – at the end of the day having heard evidence of the circumstances surrounding the taking of the affidavit or having assessed any corroborating evidence or perhaps even having heard from the accused, I may determine there is some or no reliability to the affidavit. It will only be at the end of the trial, when all the evidence is scrutinized and assessed that I will be in a position to determine if these affidavits have any probative value at all and if so, what.
26. At the present time, the only prejudice to an accused of which I am aware is that to accused 11. I have asked if it is open to accused 11 to withdraw his section 220 admission, have been informed that he cannot so do and my reading of the legislation suggests that accused 11 has no remedy.
27. Accordingly, I take the view that:
- a. The affidavit of Mafatle is not admissible in evidence against accused 11.
 - b. The affidavits of Nkomo, Maringa, Mafatla and Sikhosana are admissible in evidence against all other accused in terms of section 2(2) of POCA.
 - c. The probative value, if any, of these affidavits falls to be determined at the end of the trial and in the context of all the evidence.

DATED AT JOHANNESBURG ON THIS DAY THE 16TH OF OCTOBER 2014

K SATCHWELL

For the State: Advocate A. Vos

For Accused 1: Advocate K. Lawlor

For Accused 2: Advocate M. Baloyi

For Accused 3, Accused 5, & Accused 8: Advocate S. Nobangule

For Accused 4, Accused 6, Accused 10 & Accused 12: Advocate A. Roestorf

For Accused 7 & Accused 9: Attorney C. Pillay

For Accused 11: Advocate J. Van Wyk

Date of Argument: 13th and 14th October 2014

Date of Judgment: 16th October 2014

¹ At paragraph [47]

² At paragraph [49]