

REPUBLIC OF SOUTH AFRICA



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

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

24 October 2024

DATE

A handwritten signature in blue ink, which appears to be "S. D. S.", is written over a black rectangular redaction box.

SIGNATURE

CASE NUMBER: SS33/2022

In the matter between:

THE STATE

and

NTHAI AZWIHANGWISI SETH

Accused

Coram: DOSIO J

Heard: 22 October 2024

Delivered: 24 October 2024

Summary: Interlocutory – Admissibility – Pro-forma – Founding Affidavit –
Voluntariness

ORDER

This court accordingly finds that the founding affidavit is admissible.

JUDGMENT

DOSIO J:

Introduction

- [1] This is an interlocutory matter wherein a trial-within-a trial was held to determine the following questions, namely:
- (a) firstly, whether the rights as incorporated in a warning statement, ('pro-forma') were fully explained to the suspect ('Mr Nthai'), and
 - (b) secondly, whether the founding affidavit which was handed over by Mr Nthai, to Captain Mhlongo, who completed the warning statement, forms part of the warning statement, and
 - (c) Whether the founding affidavit is admissible.
- [2] Should this court find that the warning statement was not correctly taken down, the defence has requested that the entire warning statement be disavowed, which begs the further question, namely, what is the status of the founding affidavit which is alleged by the State to have been part of the warning statement.
- [3] The State wants to hand in the founding affidavit as being part of the warning statement, whereas the defence is objecting stating that:
- (a) the contents of the founding affidavit amount to an admission and or a confession made by Mr Nthai, and
 - (b) that the State cannot use the contents of the founding affidavit, prepared for a specific purpose in civil proceedings, to prove a subsequent criminal case against the same party.
- [4] The defence is of the contention that this court must first determine whether the founding affidavit indeed forms part of the warning statement. Only once a decision is made in this regard does the question of the admissibility of the founding affidavit become relevant.

- [5] The State contends that the affidavit, contains admissions and should be admitted as part of the warning statement, (Exhibit "A") and be considered as evidence. The State argues that Mr Nthai, a legal professional, was aware of his Constitutional rights and voluntarily handed over the founding affidavit during the criminal investigation. The State cited various cases in its heads of argument emphasizing the balance between bringing criminals to justice and ensuring a fair trial, noting that courts have not traditionally viewed the potential for self-incrimination in civil proceedings as conflicting with the right to remain silent in criminal matters. The State argued further that Mr Nthai did not allege any violation of his rights during the interview with Captain Mhlongo, or in court, suggesting his cooperation.
- [6] Counsel for Mr Nthai argued in the heads of argument that admitting the affidavit would violate Mr Nthai's fair trial rights, specifically the right against self-incrimination and the right to remain silent. It is alleged by the defence that the founding affidavit was created under a legal duty of full disclosure in a civil context, potentially exposing him to criminal prosecution. It is alleged that the possibility of subsequent criminal proceedings and the right to remain silent were not explained when the founding affidavit was made, only during the taking down of the warning statement. The defence contends that admitting the affidavit would essentially force him to testify against himself, undermining the principles of a fair trial. It was pointed out by the defence that the investigating officer only testified to the warning statement's content, not the founding affidavit itself, suggesting a procedural misstep by the State. It was contended by the defence that if the evidence elicited at an examination is found to have been obtained in contravention of the privilege against self-incrimination, then it may be excluded in terms of s 35(5) of the Constitution at a subsequent trial, as s35 (5) of the Constitution states as follows: 'Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.'
- [7] The defence argued that Mr Nthai was under a legal duty to file the founding affidavit for purposes of re-admission as an advocate which potentially could have exposed him to a criminal prosecution, as a result at that stage, the right to self-incrimination and the right to remain silent should have been explained, not at the time the warning statement was made. Reference was made to paragraphs [202], [213] and [214] of the Constitutional Court decision in the matter of *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including*

*Organs of State and Others*¹(‘*Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture*’) [2021] ZACC 28. It was argued that as with the evidence lead at the ‘State Capture’ commission of enquiry, the content of affidavits which were handed in are not admissible as evidence in subsequent criminal proceedings and that the same consideration applies to the present case.

- [8] It was further contended by the defence that evidence which is obtained in breach of the privilege against self-incrimination, will generally be inadmissible. Reference was made to the cases of *S v Orrie and Another*,² *S v Lottering*³ and *S v Seseane*.⁴ Reference was also made by to the matter of *S v Mathebula and Another*⁵ where the court held that: ‘...An accused has the right to remain silent and need not contribute in any way to the process of supplying or obtaining evidence which tends to prove his guilt in the form of self-incriminatory oral or written communications...’
- [9] The Court proceeded with a trial-within-a trial, the purpose of which was to determine whether the warning statement was correctly taken down and all rights were explained to Mr Nthai. In addition, whether the founding affidavit was handed in voluntarily.
- [10] In the trial-within-a trial, Captain Mhlango testified that on 11 April 2022 he went through the pro forma with Mr Nthai. It is clear from the pro-forma that Captain Mhlango explained to the accused:
- (a) That he was being charged for an offence of corruption.
 - (b) That he had the right to remain silent throughout the interview.
 - (c) That he had the right to consult a legal practitioner of his own choice or the legal aid board.
- [11] Mr Nthai as per the warning statement elected not to consult with a legal practitioner and indicated that he would make a statement. Mr Nthai also handed in an affidavit which was filed in court during the application for re-admission as an advocate in the Limpopo High Court. At the time the affidavit was submitted to the Limpopo High Court, Mr Nthai was not yet charged for the offence in casu.

¹ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28

² *S v Orrie and Another* 2005 (1) SACR 63 (C)

³ *S v Lottering* 1999 12 BCLR 1478 (N)

⁴ *S v Seseane* 2000 (2) SACR 225 (O)

⁵ *S v Mathebula and Another* 1977 (1) SACR 10 (W)

- [12] During the interview, Captain Mhlongo asked Mr Nthai if he wanted to make a statement to which Mr Nthai replied he was willing to make a statement and Captain Mhlongo proceeded to take down a statement which is attached and marked as annexure 'A'.
- [13] Captain Mhlongo explained to Mr Nthai that he was entitled to ask him questions concerning his involvement in the offence and that he was not compelled to answer questions and that should he answer questions, the answers would be used as evidence in court. Mr Nthai was once again explained that he could make use of a legal practitioner of his own choice before answering questions.
- [14] Captain Mhlongo noted that Mr Nthai was not injured and neither had he been threatened in any way, furthermore, that Mr Nthai was of sound mind and was not under the influence of intoxicating liquor.
- [15] The Court notes that at paragraph three of the pro-forma the consequences of making a statement are clearly delineated. At paragraph four of the pro-forma, it is noted that '*The suspect handed an affidavit which was filed in court during his application for readmission at the High court Limpopo Division*'. It also circled in paragraph four of the pro-forma, that Mr Nthai did not wish to consult with a legal practitioner. Mr Nthai also did not request an interpreter. On a question from the State Advocate whether Captain Mhlongo had advised Mr Nthai that he was a suspect, the answer was '*correct*'. According to Captain Mhlongo, Mr Nthai understood all the rights explained in the pro-forma warning statement and appended his signature to each page from pages 1 to 11 of the pro-forma.
- [16] During cross-examination Captain Mhlongo conceded that he neglected to cross out he/she in many instances, various paragraphs were not deleted where they should have been deleted, and furthermore that neither he or Mr Nthai initialled various aspects in the pro-forma and that the statement was also not commissioned before Mr Nthai.

First question, whether the rights as incorporated in the warning statement, ('proforma') were fully explained to Mr Nthai

- [17] The maxim, *Omnia praesumuntur rite esse acta donec probetur in contrarium* means that there is a presumption that all official acts have been duly performed until the contrary is proved. The maxim is described by the author Van der Merwe⁶ thus:
 'There is a general presumption that acts or events which occur regularly or routinely have followed a regular or routine course: *omnia praesumuntur rite esse acta*.'⁷
- [18] Irrespective of the failure of Captain Mhlongo in crossing he as opposed to she, it is clear to this Court that the essence of the warning statement relates to Mr Nthai and that he is a male person. I do not find that this failure is of such fatal flaw to render the entire warning statement defective. This defect is condoned. The fact that the statement was not commissioned in the presence of Mr Nthai is equally not defective as it is after all a statement which is completed by Captain Mhlongo. There is no evidence before this court that the warning statement was not indeed commissioned.
- [19] It is presumed that any condition precedent to the validity of an official act has been complied with and, more particularly, that the official, (or body of officials), was qualified to perform the act in question and complied with the necessary formalities.
- [20] As regards the various rights that were explained, this Court cannot fault Captain Mhlongo for his understanding that Mr Nthai knew the rights that were explained to him. It is true that this pro-forma was completed in a great hurry and that various aspects were not deleted, however, the initials of Mr Nthai are reflected alongside paragraphs 3, 4, 5, 6, 7, 8, 10 and 11, together with a full signature on pages 1-11 of the pro-forma.
- [21] While the warning statement may not strictly adhere to all the requirements, applying the maxim '*Omnia praesumuntur rite esse acta donec probetur in contrarium*' allows for a presumption of regularity. This presumption suggests that Captain Mhlongo likely acted in good faith and followed the necessary procedures to the best of his ability when completing the warning statement. This Court accordingly finds there was substantial compliance rendering the warning statement valid.

⁶ Van der Merwe "*Evidence*" in LAWSA 3 ed (2015) vol 18

⁷ Ibid para 242

[22] Even if this Court is wrong in this regard, Mr Nthai elected not to testify in the trial-within-a trial. As a result, there is no evidence to gainsay the evidence of Captain Mhlongo that all the rights as explained in the pro-forma warning statement were indeed explained to Mr Nthai and that he understood them and that he appended his initials alongside the paragraphs on pages 1 to 11. It is true that page 12 does not reflect a name or a signature of Mr Nthai, however in light of the many previous signatures and initials affixed to this warning statement such omission is not material. Mr Nthai is not a layperson. He is a learned man and an advocate who is acutely aware of the consequences of signing documents. If these signatures and initials are indeed not his, this Court would have expected Mr Nthai to testify in the trial-within-a trial and have disputed that he did not understand what was explained to him and that the signatures and initials are indeed not his. There is no evidence that he was induced to sign any of the 12 pages or to append his initials alongside the many paragraphs explaining his legal rights. Accordingly, this Court accepts the evidence of Captain Mhlongo that all the rights were explained and that these are indeed Mr Nthai's signatures.

[23] This Court must note that irrespective of the time pressures that investigating officers are placed under, it is no excuse to rush through the pro-forma warning statements which are essential to ensure that suspects are fully apprised of all their legal rights. This Court must state that on page 5 at paragraph 11, paragraph (a) and (b) should have been circled. It is clear that this was a bona fide omission of Captain Mhlongo.

Second question - whether the founding affidavit which was handed over by Mr Nthai, to Captain Mhlongo forms part of the warning statement.

[24] As regards the handing in of the founding affidavit by Mr Nthai, it is clear that there is nothing said in the pro-forma to cross reference the founding affidavit to this warning statement. There is no mention made in the warning statement as to the number of pages the founding affidavit consists of, the place and date when the founding affidavit was made or when and where it was commissioned. Captain Mhlongo did not read it and also did not make a summary of its contents on pages seven to ten of the pro-forma, which would have indicated to this Court that Captain Mhlongo regarded this as evidence which should be included in a warning statement. As a result, the mere handing up of a document, does not of itself imply that it forms part of the warning statement. More should have been done by Captain Mhlongo to cross-reference the warning statement with the founding affidavit. As a result, this Court cannot find that the founding affidavit forms part

of the warning statement. At most it is an independent document which was handed to captain Mhlongo for purposes of handing it over to the prosecuting authorities for further perusal and consideration. All that forms part of the warning statement is what is incorporated at annexure 'A' which states the following:

'I do not agree with the charges laid against me as the crime involves ethical transgressions of which I have already been punished. I also wish to attach an affidavit filed in court during the re-admission proceedings.'

Third question whether the founding affidavit made in civil proceedings is admissible in criminal proceedings

- [25] It is clear that this founding affidavit was made by Mr Nthai when he was not an accused. Mr Nthai was under a legal duty to make a full and frank disclosure as to the circumstances which resulted in the initial sanction to strike his name off the roll of advocates. It is argued by the defence that this would have exposed Mr Nthai to possible criminal prosecution.
- [26] This court is unaware at this stage what the founding affidavit contains and whether it amounts to a confession of the offences for which he is standing arraigned before this court, or whether it amounts to an admission. What this court is clear on, is that this founding affidavit may amount to an extra curial statement made by Mr Nthai before he was arrested and before this trial commenced.
- [27] Courts are cautious with extra-curial statements.
- [28] Whatever is contained in the founding affidavit was merely to apply for his re-admission. At most, the contents of this founding affidavit are purely for Mr Nthai to have achieved his goal of seeking re-admission as an advocate. It is accepted that such founding affidavit was made voluntarily by Mr Nthai and that he signed it.
- [29] The defence argued that it matters not that the rights to self-incrimination were explained at the time the warning statement was taken, what is of importance is that the right to self-incrimination should have been explained at the time the founding affidavit was made.

- [30] The privilege against self-incrimination and the right to remain silent are a natural consequence of the presumption of innocence which places the burden on the prosecution to prove the accused's guilt beyond reasonable doubt.
- [31] The question to be considered is whether there was a legal duty on the Limpopo High Court to warn Mr Nthai that if he made the founding affidavit for re-admission that anything he stated therein could be used in a criminal case against him. I do not think that in the absence of a criminal prosecution pending, the civil High Court foresaw that Mr Nthai would be prosecuted and that it had a legal duty to warn Mr Nthai of his right to self-incrimination. The defence counsel argued that when Mr Nthai made the founding affidavit he was not told that if he made the statement it will come back to bite him. This is what the defence counsel says, however, Mr Nthai never testified in the trial-within-a-trial so such a statement remains uncorroborated. This Court is not aware who moved the application for Mr Nthai to be re-admitted as an advocate, but if he had legal representation at that stage, it was incumbent on that legal representative to have warned Mr Nthai that he had the right not to self-incriminate himself. The submissions in the founding affidavit were after all made with his knowledge and carried his endorsement. If Mr Nthai moved this application himself, he is learned enough to have realised himself that any evidence which may have led to a criminal prosecution, resulting from what was incorporated in that founding affidavit, could and would possibly be used against him in a criminal trial.
- [32] The defence counsel referred this court to the matter of *MTN (PTY) Ltd and Robert Mmbulaheni Madzonga*⁸ ('MTN') and two others case number 19139/14 (dated 7 March 2023) a decision of the Gauteng Local Division held in Johannesburg. In the *MTN*⁹ case, the applicant, namely *MTN*¹⁰ sought to compel discovery of a range of documents relating to its actions on a case of fraud against the respondents, with specific reference to the second and third respondent's financial records to assist in proving its case. The Court found that a party to a civil action is entitled to refuse to discover material that may tend to incriminate them in parallel proceedings arising from the same facts.

⁸ *MTN (PTY) Ltd and Robert Mmbulaheni Madzonga and two others* case number 19139/14 (dated 7 March 2023)

⁹ Ibid

¹⁰ Ibid

- [33] This Court has no basis to disagree with the finding of the matter of *MTN*,¹¹ however, the facts in the *MTN*¹² case are somewhat distinguishable from the matter in casu, in that the applicants in the *MTN*¹³ case sought to compel the respondents to furnish evidence which would be self-incriminating. At the time the application was made there were parallel criminal and civil proceedings being pursued against the respondents. In the matter in casu, when Mr Nthai handed the founding affidavit to the Limpopo High Court, there were not parallel criminal proceedings instituted at that stage. At the stage that he handed up the founding affidavit to Captain Mhlongo he had also not been compelled to do so, he voluntarily handed it to Captain Mhlongo.
- [34] Reference was made by the defence counsel that if the founding affidavit is self-incriminating it should not be used. Furthermore, it was argued by the defence that as with the State Capture commission of enquiry, the content of affidavits which were handed in were not admissible as evidence in subsequent proceedings and that the same consideration applies to the present matter.
- [35] This Court is privy to the regulations applicable to the Zondo Commission as gazetted in February 2018, together with the amendment of regulation 8(2) signed into law by President Ramaphosa on 20 March 2018, with specific reference to regulation 8(2) which stipulates as follows:
- ‘A self-incriminating answer or a statement given by a witness before the Commission shall not be admissible as evidence against that person in any criminal proceedings brought against that person instituted in any court, except in criminal proceedings where the person concerned is charged with an offence in terms of section 6 of the Commissions Act ...’
- [36] This Court has considered the matter of *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture*¹⁴ which were referred to by the counsel for the defence. In that matter, the Constitutional Court ordered Jacob Zuma to comply with summonses and directives issued by the Commission of Inquiry into Allegations of State Capture (Commission) and to testify. Mr. Zuma publicly defied the Constitutional Court's order and refused to appear before the Commission.

¹¹ Ibid

¹² Ibid

¹³ Ibid

¹⁴ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture* (note 1 above)

- [37] It is true that the right against self-incrimination is protected under Section 35(3)(j) of the Constitution, meaning an accused cannot be compelled to testify in a way that incriminates them. The State Capture commission, was regulated by specific regulations applicable to that commission solely. Those regulations do not apply to matters outside the ambit of the commission. Although the gist of the regulations may have some bearing on self-incrimination in general, the fact remains that in criminal trials once the right to remain silent and not to incriminate oneself is explained and understood by an accused, as in the matter in casu and a suspect voluntarily submits an affidavit to an investigating officer, then such suspect, as in the matter in casu, has limited room to later argue against its use in court.
- [38] The defence counsel argued that the facts of the matter of *Ramthlakgwe v Modimolle-Mookgopong Local Municipality and Another*¹⁵ ('*Ramthlakgwe*') are distinguishable from the matter in casu. This Court disagrees. In the *Ramthlakwe*¹⁶ matter, the applicant was charged with misconduct in connection with 19 payments made to certain service providers on 29 April 2022. The essence of that charge was that he failed to follow the internal control procedures of the municipality. The applicant had no difficulties with the disciplinary hearing in respect of the misconduct charge referred to above proceeding as scheduled and was prepared to defend himself at the disciplinary hearing to ward off the said charge. In fact, the applicant, together with his legal representatives started making preparations for the disciplinary hearing in respect of all the charges. These facts are similar to the matter in casu as Mr Nthai made preparations to hand in his founding affidavit. The applicant in the *Ramthlakwe*¹⁷ matter, through his attorneys of record later protested that the laying of criminal charges against him in respect of some of the charges placed him in a quandary. He alleged that the laying of criminal charges against him compromised his constitutional right to a fair trial as provided for in section 35(3)(h) of the Constitution. The applicant argued that it would be difficult for him to testify freely at the disciplinary hearing on account of fearing giving self-incriminatory evidence which may infringe on his right to fair labour practices as provided for in section 23(1) of the Constitution. This is because if he does not testify at the disciplinary hearing or make submissions thereat, the additional charges may be determined without him having given his side of the story and defended himself to avoid giving self-incriminatory evidence.

¹⁵ *Ramthlakgwe v Modimolle-Mookgopong Local Municipality and Another* (JS562/23) [2023] ZALCJHB 190; (2023) 44 ILJ 2297 (LC)

¹⁶ *Ibid*

¹⁷ *Ibid*

The applicant contended that in all of these circumstances, he stands to be severely prejudiced and that the said prejudice is clearly manifest. These facts are very similar to the matter in *casu*, because Mr Nthai was under a legal duty to make a founding affidavit setting out everything for purposes of his readmission as an advocate, yet at no stage when he did this did he complain that by making this affidavit it would compromise his rights. To the contrary, he made the founding affidavit and furthermore voluntarily handed it up in these criminal proceedings.

[39] The Court in the *Ramthlakwe*¹⁸ matter held that:

'The tension I referred to earlier and how the courts deal with it, that may be manifest between civil proceedings such as a disciplinary hearing and criminal proceedings that an employee may face down the line and the difficult situation an employee may find himself faced with was explained thus by Nugent J in [the matter of] *Equisec (PTY) LTD v Rodrigues and another*¹⁹ 1999 (30 SA 113 (W)):

'Where a person is accused of having committed an act which exposes him to both a civil remedy and a criminal prosecution, he may often find himself in a dilemma. While on the one hand he may prefer for the moment to say nothing at all about the matter so as not to compromise the conduct of his defence in the forthcoming prosecution, on the other hand, to do so may prevent him from fending off the more immediate civil remedy which is being sought against him.'²⁰ [my emphasis]

Further at paragraph 25:

'Still on the subject of a person faced with dilemma brought about by civil proceedings and criminal proceedings being instituted simultaneously, or one after the other, Nugent J said in *Davis v Tipp NO & Others* ('*Davis*')²¹:

'Civil proceedings invariably create the potential for information damaging to the accused to be disclosed by the accused himself, not least so because it will often serve his interest in the civil proceedings to do so. The exposure of an accused person to those inevitable choices has never been considered in this country to conflict with his right to remain silent during the criminal proceedings. Where the Courts have intervened there has always been a further element, which has been potential for State compulsion to divulge information. Even then the Courts have not generally suspended the civil proceedings but in appropriate cases have rather ordered that the element of compulsion should not be implemented.'²²

¹⁸ Ibid

¹⁹ *Equisec (PTY) LTD v Rodrigues and another* 1999 (30 SA 113 (W))

²⁰ Ibid para 17

²¹ *Davis v Tipp NO & Others* 1996 (1) SA 1152 (W) at 1157E-G

²² Ibid page 1157E-G

The court in *Ramthlakwe*²³ ultimately dismissed the application stating the following:

‘In other words, the fact that his alleged misconduct may also amount to a very serious criminal offence must work to his advantage in that he should not be subjected to a disciplinary process. This kind of reasoning which is clearly self-serving, is so flawed, misguided and ill-conceived that it deserves special censure in the form of an appropriate order for costs. It boggles the mind that an employee holding the position of a manager, with the advice of attorneys and counsel, could see himself as being entitled not to be subjected to a disciplinary process at his workplace. This, only on the basis that the misconduct complained of happens to also expose him to criminal prosecution...’²⁴

[40] In the matter of *S v SAAT*,²⁵ the Court ruled that the evidence of two Mozambican policemen in earlier civil proceedings was admissible as evidence in the present criminal proceedings.

[41] In the matter of *Liebenberg v S*²⁶ the questions before the Constitutional court were:
(a) whether evidence arising during the course of the applicant’s employer’s disciplinary process was admissible at the applicant’s criminal trial; and
(b) if not, whether the applicant’s right to a fair trial was infringed.

The applicant feared that his evidence during the disciplinary hearing which was self-incriminating may be used against him in the subsequent criminal trial. At paragraph 31 the Constitutional Court held that:

‘The State argued that the statements made by the applicant were made freely and voluntarily. Additionally, it argued that the high court correctly held that the evidence led in a trial within-a-trial proved that the applicant was not coerced into making these statements.’²⁷

The appeal was ultimately dismissed.

[42] In the matter of *Fourie v Amatola Water Board*,²⁸ the applicant contended that his right to remain silent, that is, his right not to incriminate himself at criminal proceedings, (if and when such criminal proceedings took place), was infringed upon by the employer, (the respondent), that wishes to exercise its right to hold a disciplinary enquiry in regard to the applicant’s alleged misconduct in circumstances where such misconduct will also

²³ Ibid

²⁴ Ibid para 33

²⁵ *S v SAAT* 2004 (1) SA 593 (W)

²⁶ *Liebenberg v S* (CCT 145/22) [2023] ZACC 33; [2024] 1 BLLR 1 (CC) BCLR 132 (CC); 2024 (2) SACR 269 (CC)

²⁷ Ibid para 31

²⁸ *Fourie v Amatola Water Board* (P830/00) [2000] ZALC 133

form the basis of the said criminal proceedings. The Principle in the matter of *Davis*²⁹ supra was applied in this case.

- [43] In the matter of *S v Tandwa and Others*³⁰ the Supreme Court of Appeal stated that:
 ‘we accept that the public flinches when the courts exclude evidence indicating guilt:
 ‘at best of time but particularly in the current state of endemic violent crime in all parts of our country it is unacceptable to the public that such evidence be excluded. Indeed, the reaction is one of shock, fury and outrage when a criminal is freed because of the exclusion of such evidence’³¹
- [44] Section 35(5) of the Constitution is designed to protect individuals from police methods that offend basic principles of human rights. Mr Nthai had a choice. There was no obligation on him to hand in the founding affidavit. He did so voluntarily. There is no way Captain Mhlongo would have known of this founding affidavit, unless Mr Nthai himself made Captain Mhlongo aware of it. It is clear that Mr Nthai co-operated with Captain Mhlongo, after his rights to self-incrimination were explained and only after these rights were explained did he hand over the founding affidavit.
- [45] What is before this Court does not show any basic human rights that have been infringed. The State is of the contention that this founding affidavit does not include a confession as it is not an unequivocal admission of guilt. At most the founding affidavit includes an admission.
- [46] The meaning of ‘voluntarily’ was set out in the matter of *R v Barlin*³² (*‘Barlin’*), which remains as a foundation for the requirement of ‘voluntariness’ at common law. The Appellate Division as it then was stated as follows:
 ‘The common law allows no statement made by an accused person to be given in evidence against himself unless it is shown by the prosecution to have been freely and voluntarily made – in the sense that it has not been induced by any promise or threat proceeding from a person in authority.’³³

²⁹ *Davis* (note 21 above)

³⁰ *S v Tandwa and Others* (538/06) [2007] ZASCA 34; [2007] SCA 34 (RSA)

³¹ *Ibid* para 121

³² *R v Barlin* 1926 AD 459 at 462

³³ *Ibid* page 462

- [47] The Appellate Division, as it then was, in the matter of *S v Yolelo*,³⁴ accepted the definition as set out in the matter of *Barlin*³⁵ and applied it to section 219A of the Criminal Procedure Act 51 of 1977.
- [48] In the matter of *S v Mpetha and others*,³⁶ the Court held that an admission will not be received if it has been induced by a person in authority. The court held that the phrase 'freely and voluntarily' in section 217 and the word 'voluntary' in section 219A conveyed essentially the same idea and that both reflected the common law requirement that the inducement had to emanate from a person in authority.
- [49] In the matter of *S v Mangena and Another*,³⁷ the Court held that:
 '...section 219A [of the Criminal Procedure Act 51 of 1977 ('Act 51 of 1977')] provides only that the admission is voluntarily made as opposed to section 217 which, in relation to confessions, requires that the statement be freely and voluntarily made without the person having been unduly influenced to make it.'³⁸ [my emphasis]
 Further:
 'The natural meaning of the word "voluntarily" (the Concise Oxford English Dictionary sufficing for such elementary purposes, is "done, given, or acting of one's own free will").'³⁹
- [50] Section 219A of Act 51 of 1977, which deals with admissions provides that:
 '(1) Evidence of any admission made extra-judicially by any person in relation to the commission of an offence, shall, if such admission does not constitute a confession to that offence and is proved to have been voluntarily made by the person, be admissible in evidence against him at criminal proceedings relating to that offence...'
- [51] In the matter of *S v Litako*,⁴⁰ the Supreme Court of Appeal held that all that is required for an informal admission to be admitted is that it is proved to have been voluntarily made.

³⁴ *S v Yolelo* 1981 (1) SA 1002 (A)

³⁵ *Barlin* (note 32 above)

³⁶ *S v Mpetha and others* 1983 (1) SA 576 (C),

³⁷ *S v Mangena and Another* 2012 (2) SACR 170 (GSJ)

³⁸ *Ibid* para 31

³⁹ *Ibid* para 32

⁴⁰ *S v Litako* 2014 SACR 431 (SCA)

- [52] The essential requirement for the admissibility of an informal admission in both civil and criminal proceedings is that it was made voluntarily.⁴¹
- [53] In the matter of *S v Peters*,⁴² the Court held that the approach in section 219A, when it requires that an admission should be proved to have been ‘voluntarily made’ is an actual codification of the common-law position. In criminal proceedings the courts tend to focus upon the question whether the admission was induced by any promise or threat by a person in authority.⁴³ In the matter in casu, there is no evidence of a threat or inducement to hand the founding affidavit to Captain Mhlongo.
- [54] In the matter of *S v Lekhwareni and Others*,⁴⁴ the Court dealt with the classification of the statements. It held that:
- ‘In my view *R v Valachia and Another* 1945 AD 826 is dispositive of the point. The case determined that once an admission is contained in an extra curial statement then the entire document becomes evidence before the court, the Appellate Division in the course of its judgment distinguishing between an admission contained in the statement and the balance of the document which may contain exculpatory statements. The distinction between an admission and an exculpatory statement was also made by Grosskopf JA in *S v Cloete* 1994 (1) SACR 420 (A) at 425C-E. See also *S v Mhlongo*; *S v Nkosi* 2015 (2) SACR 323 (CC) at para 33 where the court said: ‘The distinction between confessions and admissions is determined solely by the extent to which the statement implicates its maker. This distinction becomes relevant in determining the safeguards that are put in place to ensure the voluntariness of the confession or admission.’
- [55] In the matter of *Molaza v S*,⁴⁵ the court held that:
- ‘It has long been accepted that admissions made extra-curially can be considered, provided the whole of the statement is put before the court. A court is entitled too, to reject exculpatory portions of the statement while accepting those parts which incriminate the accused. Section 219A of the Criminal Procedure Act 51 of 1977 authorises the receipt of admissions as evidence provided such admissions are constitutionally compliant, relevant and made voluntarily. By parity of reasoning and perhaps even more so where the admissions are made under oath and in open court, when a court, as I do, finds that the admissions of the two acts were made under

⁴¹ see *S v Cele* 1965 1 All SA 183 (A); 1965 1 SA 82 (A), *Felton v Secretary for the Interior* 1972 4 All SA 59 (A)).

⁴² *S v Peters* 1992 (1) SACR 292 (E)

⁴³ see *S v Schultz* 1989 3 All SA 35 (T)

⁴⁴ *S v Lekhwareni and Others* [2016] ZAGPJHC 155

⁴⁵ *Molaza v S* [2020] ZAGPJHC 169

constitutionally compliant circumstances, the admissions are relevant and they were made voluntarily, this evidence can be accepted.’

- [56] Mr Nthai handed the founding Affidavit during the course of the taking down of the warning statement. This was an indication of ‘voluntariness’. Although the facts alleged to in the founding affidavit were made during the course of civil proceedings, Mr Nthai must have been aware that a criminal investigation might ensue. He disclosed the information freely and voluntarily when the application for re-admission was made and was in his sound and sober senses and not coerced when he handed it to Captain Mhlongo. Mr Ntahi is not a lay person, he is an advocate with many years of legal experience and understood his Constitutional rights and the full realisation of the implication of the contents of this founding affidavit when he made the statement and when he handed it over to Captain Mhlongo.
- [57] The primary rule of admissibility is the rule of relevance. The evidence must not only be logically relevant to be admissible, but must also be legally relevant. Relevance is a legal rule which has been formulated in s 210 of Act 51 of 1977 and s2 of the Civil Proceedings Evidence Act. Section 210 states that:
‘No evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot conduct to prove or disprove any point or fact at issue in criminal proceedings.’
- [58] Evidence is relevant if it is logically probative or disprobative of some matter which requires proof.
- [59] If the State is of the contention that this evidence is relevant, then there is no reason not to admit it. The weight that the Court will attach to it will be determined at the end of this trial.
- [60] Should the State be wrong and this Court finds that the founding affidavit does indeed contain a confession, then even then, this court finds the absence of undue influence.
- [61] There is nothing before this court to suggest that Mr Nthai’s freedom of choice was curtailed in handing in the founding affidavit to Captain Mhlongo.

Order

[62] This court accordingly finds that the founding affidavit is admissible.

A handwritten signature in blue ink, consisting of several loops and a trailing flourish, is positioned above a solid black rectangular redaction box.

D DOSIO
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

ON BEHALF OF THE STATE:

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Instructed by the Office of the National
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ON BEHALF OF THE ACCUSED:

Adv. D Pool

Instructed by Denga Incorporated