



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

**Reportable / Not
reportable**

Case no: 516/2018

In the matter between:

SAMUEL VUYANE MKIWANE

Plaintiff

and

KOOS MOTAPANYANE

First Defendant

MINISTER OF POLICE

Second defendant

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

Third defendant

Neutral citation: XXX

Coram: Cronje AJ

Heard: 21 August 2024

Delivered: 18 September 2024

Summary: Evidence – unlawful arrest and detention – arresting police officer and investigating officer deceased – admissibility of statements – hearsay – Law of Evidence Amendment Act 45 of 1988 – Civil Proceedings Evidence Act 25 of 1965 – application granted.

ORDER

1. The application succeeds.
 2. The costs of the application are costs in the cause.
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JUDGMENT

Cronje AJ

Introduction:

[1] The plaintiff instituted action against the defendants, claiming that the first defendant (Motapanyane), acting within the course and scope of his employment with the second defendant as arresting officer, laid a false charge of housebreaking with the intent to steal and theft against him whereupon he was wrongfully and unlawfully detained for 219 days. He was later discharged in terms of s 174 of the Criminal Procedure Act 51 of 1977 (CPA). He claims damages of R2.2 million against the defendants. Motapanyane passed away on 30 June 2021, and Mr ZS Ntuli (Ntuli), the investigating officer, passed away on 8 September 2022.

The defendants' application to admit hearsay

[2] On 19 July 2024, the second and third defendants (defendants) applied for the admission of the written statements of Motapanyane that he deposed to on 4 and 7 September 2015, in terms of s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 (LEAA) read with s 34(1)(a)(ii) and 34(2)(b) of the Civil Proceedings Evidence Act 25 of 1965 (CPEA).

[3] They pray that the statement of Ntuli, dated 31 August 2015, the warning statement of the plaintiff taken by Ntuli, and the SAPS3M(k) (bail information statement) as signed by Ntuli be admitted in terms of the same sections of the respective Acts

referred to above.

[4] Motapanyane arrested the plaintiff on suspicion of housebreaking related to a robbery at a business under CAS 107/08/2015. While preparing for trial, it became known that Motapanyane and Ntuli passed away. The statements and documents are the defendants' only evidence to present their case. The statements describe information received on the whereabouts of suspects in the robbery and a description of items found.

[5] Ntuli took the plaintiff's warning statement in which he allegedly admitted to assisting other accused persons in selling stolen items. In addition, the evidence sought to be admitted would show that Motapanyane harboured a reasonable suspicion of a Schedule 1 offence when the plaintiff was arrested.

[6] Motapanyane was the only arresting officer, and Ntuli was the only investigating officer. The defendants concede that the admission of the evidence may significantly prejudice the plaintiff, but admitting it would serve the interest of justice. The Rule 37 minutes record that the record of the criminal proceedings and the contents of the docket were to be accepted as evidence without further proof.

The plaintiff's objection

[7] The plaintiff states that it is common cause that the statements and documents which form part of the basis of the application were duly discovered and form part of the trial bundle in the main action. The pre-trial conference held on 9 November 2021 records that it was agreed that the record of the criminal proceedings and the contents of the docket should be admitted as evidence without further proof. The application should therefore be dismissed with costs. He pleaded over, alleging no offences such as 'housebreaking' and 'business robbery' exist in Schedule 1 of the CPA.

[8] The documents do not constitute hearsay evidence. The statement by the first defendant itself contains hearsay evidence from other third parties, and the probative value does not depend on him. Ntuli's statement is irrelevant and does not implicate the plaintiff.

The Law of Evidence Amendment Act 45 of 1988

[9] In respect of the admissibility of hearsay evidence, s 3 of the LEAA provides, *inter alia*, that hearsay evidence shall not be admitted as evidence during civil proceedings unless each party against whom the evidence is to be adduced, agrees to the admission thereof as evidence at such proceedings, or the court, having regard to the nature of the proceedings, the nature of the evidence, the purpose for which the evidence is tendered, the probative value of the evidence, the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends, any prejudice to a party, and any other factor which should in the opinion of the court be taken into account, believes that such evidence should be admitted in the interests of justice.

The Civil Proceedings Evidence Act 25 of 1965

[10] The CPEA *inter alia*, provides that in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall on production of the original document be admissible as evidence of that fact, provided the person who made the statement either had personal knowledge of the matters dealt with in the statement, or where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with therein are not within his knowledge) in the performance of a duty to record information supplied to him by a person who had or might reasonably have been supposed to have personal knowledge of those matters. The person who made the statement will be called a witness in the proceedings unless he is dead. The court may if having regard to all the circumstances of the case, if it is satisfied that undue delay or expense would otherwise be caused, admit such a statement, notwithstanding that the person who made the statement is available but is not called as a witness. In estimating the weight, if any, to be attached to a statement admissible as evidence, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the person who made the statement had any incentive to conceal or misrepresent facts.

Arguments

[11] Mrs Nhlapo-Merabe argues that the plaintiff indicated that he does not oppose

the admission of the evidence. The real bone of contention is the weight that ought to be afforded to the evidence, and such is best suited for argument once all the evidence has been placed before the Court.

[12] She refers to *Sheffryk v MEC for Police, Road and Transport Free State Province*¹ where it was held:

'It is said that a document only proves what is written in it, but not the truth of what is written. Before the contents of a document may be presented as the truth, the admissibility requirement must be fulfilled. The contents must not be irrelevant, the document must not contain an inadmissible confession, etc. Because a document usually reflects somebody's knowledge and thoughts, care must be taken to ensure that it does not infringe the hearsay rule and perhaps the opinion rule.'² (Footnote omitted.)

[13] The statements and documents play a pivotal role in the matter, and Motapanyane, as the arresting officer, entertained a reasonable suspicion when arresting the plaintiff. Furthermore, the material aspects of Motapanyane's statement are corroborated by the plaintiff's warning statement taken by Ntuli. Both statements are based on first-hand accounts of Motapanyane and Ntuli.

[14] Mr Nkhahle, for the plaintiff, argues that s 2 of the CPEA provides that no evidence as to any fact, matter or thing which is irrelevant or immaterial and cannot conduce to proof or disprove any point of fact in issue shall be admissible. In addition, s 3(1)(c) of the LEAA provides that hearsay evidence shall not be admitted as evidence in civil proceedings unless the Court, having regard to the probative value of the evidence, is of the opinion that such evidence should be admitted in the interest of justice. The evidence has to be relevant.

[15] In *Duncan v Minister of Law and Order for the Republic of South Africa*³ the Supreme Court of Appeal (SCA) stated that jurisdictional facts must exist before the power conferred by s 40(1)(b) of the CPA may be invoked. These facts include the arrestor being a peace officer, the suspicion that the arrestee committed an offence referred to in Schedule 1 of the CPA, and the suspicion resting on reasonable grounds.

¹ *Sheffryk v MEC for Police, Road and Transport Free State Province* [2022] ZAFSHC 142 para 1.

² Par 1.

³ *Duncan v Minister of Law and Order for the Republic of South Africa* [1986] ZASCA 24; [1986] 2 All SA 241 (A).

[16] The defendants' plea does not refer to any specific offence in Schedule 1. The arresting statement of Motapanyane does not indicate the offence for which the plaintiff was arrested. Motapanyane's arrest statement contains hearsay information from third parties, which does not incriminate the plaintiff in any criminal offence. The plaintiff was not apprised of his constitutional rights, and Motapanyane, holding the rank of a warrant officer, was not empowered to conduct a pointing-out by the plaintiff. This also applies to the fact that there was proximity between Motapanyane and the plaintiff. In *Komane v S*⁴ the SCA held:

'Warrant Officer Makhubela should have arranged for a pointing out as he testified that during the arrest of the applicant on 9 December 2015, he had offered to point out where the money was hidden. Warrant Officer Ramotebele, together with the rest of the non-commissioned officers, ought not to have proceeded with the pointing out. This is because the pointing out process must be conducted by an officer who was not involved in the investigation of the matter. In this case Warrant Officer Ramotebele and others, by virtue of being the investigating officers in the case, were precluded from carrying out the pointing out. Warrant Officer Ramotebele's assertions that the applicant had been apprised of his legal rights did not ratify the flawed process, as the law requires that the accused be apprised of the right to legal representation specifically for the purposes of conducting a pointing out.'⁵

[17] One of Motapanyane's statements does not concern the plaintiff at all. The statement of Ntuli similarly does not refer to the plaintiff and is, therefore, irrelevant. The plaintiff's narration in his warning statement is also exculpatory. He submits that the application stands to be dismissed with costs.

Evaluation

[18] The purpose of determining the admissibility of the documents is not to judge the prospects for succeeding in or defending the claim. The evidence the defendants seeks to be admitted is to justify the basis on which the plaintiff was arrested and detained. When the documents are read together, they provide a matrix of facts that appears to involve the plaintiff. Motapanyane and Ntuli are deceased; neither can testify and the documents record what occurred at the given time. Excluding the evidence would constrain the defendants from presenting a defence.

⁴ *Komane v S* [2022] ZASCA 55.

⁵ *Ibid* para 27.

[19] In *S v Ndhlovu and Others*,⁶ the SCA held that the impossibility of cross-examining hearsay is not necessarily determinative for the question of whether the evidence can be accepted. It held:

'The Bill of Rights does not guarantee an entitlement to subject all evidence to cross-examination. It contains 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.' (Footnote omitted.)

[20] In considering prejudice, the same Court held:

'The question whether the admission of hearsay might entail 'any prejudice to a party' ((ss (1)(c)(vi)) has already been alluded to (para 13 above). 'Prejudice' in the section 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. That prejudice is always present when hearsay is admitted. It must be weighed against the reliability of the hearsay in deciding whether, despite the inevitable prejudice, the interests of justice require its admission. The suggestion that the prejudice in question might include the disadvantage ensuing from the hearsay being accorded its just evidential weight once admitted must however be discountenanced. A just verdict, based on evidence admitted because the interests of justice require it, cannot constitute 'prejudice'. In the present case, Goldstein J found it unnecessary to take a final view, but accepted that 'the strengthening of the State case does constitute prejudice'. That concession to the proposition in question was in my view misplaced. 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 that 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.'⁷ (Footnotes omitted.)

[21] In respect of the consideration of any other factor, the Court held:

⁶ *S v Ndhlovu and Others* [2002] ZASCA 70; [2002] 3 All SA 760 (SCA).

⁷ *Ibid* paras 49-50.

'It remains to consider 'any other factor which should in the opinion of the court be taken into account' (sub-para (c)(vii)). I can think of only one. It is that the admission of hearsay evidence in circumstances such as the present may affect the manner in which police conduct their investigations. The surest proof of guilt is real evidence – eyewitness accounts, first-hand identification, fingerprints, hairs, traces of fabrics, articles left at the crime scene or found upon a suspect. Because of the procedural prejudice it inflicts, hearsay evidence is always less than ideal, and it would be a regrettable consequence of the implementation of the statute if its admission encouraged less reliance on adequate police investigatory procedures. That consideration cannot however lead to the exclusion of otherwise admissible evidence in terms of the statute. In the present case, the quality of the hearsay evidence and the extraneous reliability guarantors make it imperative that it be admitted, as Goldstein J rightly held.' ⁸

[22] I conclude that the statements and the docket are admissible. There was an agreement to that effect. The documents also pass the muster of the LEAA and CPEA.

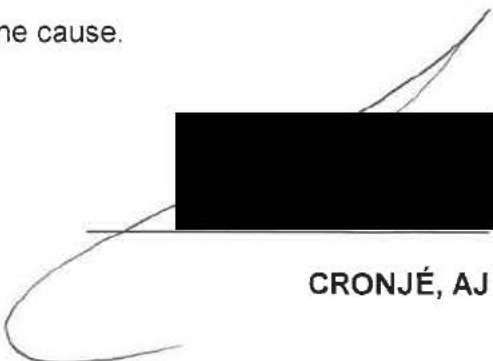
Costs

[23] The Rule 37 minutes records that the record of the criminal proceedings and the contents of the docket shall be accepted as evidence without further proof. Both parties relied on case law to elucidate the principles. It cannot be said that the application was ill-conceived or that the arguments were of no assistance. All the evidence will be evaluated at the end of the trial, and the court would only be able to afford weight to the evidence presented. It would be fair and in the interest of justice that cost be costs in the cause.

Ruling

[24] I therefore make the following ruling:

1. The application succeeds.
2. The costs of the application are costs in the cause.


CRONJÉ, AJ

⁸ Ibid para 52.

Appearances:

For the plaintiff:

Adv RJ Nkhahle

Instructed by:

Litheko Motsoeneng Inc
Bloemfontein

Instructed by:

For the defendant:

Adv K Nhlapo-Merabe

Instructed by:

Office of the State Attorney
Bloemfontein