

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NUMBER: CC 51/2022

BEFORE THE HONOURABLE ACTING JUDGE J.D. STRÖH

On the 13th October 2025

In the matter between:

MORWANTSIRI JUSTICE MASHIANE

APPLICANT

VERSUSU

**DIRECTOR OF PUBLIC PROSECUTION OF
LIMPOPO**

RESPONDENT

THE STATE

VERSUS

**PHUTI WILLIAM MEHLAPE
MORWANTSIRI JUSTICE MASHIANE
MATSERE PETER MOKGOKONG
KGABO JOHANNES MOLOTO**

**FIRST ACCUSED
SECOND ACCUSED
THIRD ACCUSED
FOURTH ACCUSED**

JUDGEMENT

STRöH AJ

[1] This application for special entry made by the applicant (second accused) came before me in terms of section 317(1) of the Criminal Procedure Act 51 of 1977 (the CPA) as amended. Herein after referred to as "the application".

"The application" consisted of a "second leg" which consist of an application for reconsideration of a previous ruling (interlocutory) made on the 4th September 2025.

[2] Section 317(1) of the CPA states that:

" If an accused is of the view that any of the proceedings in connection with or during his or her trial before a High Court are irregular or not according to law, he or she may, either during his or her trial or within a period of 14 days after his or her conviction or within such extended period as may upon application (in this section referred to as an application for condonation) on good cause be allowed, apply for a special entry to be made on the record (in this section referred to as an application for a special entry) stating in what respect the proceedings are alleged to be irregular or not according to law, and such a special entry shall, upon such application for a special entry, be made unless the court to which or the judge to whom the application for special entry is made is of the opinion that the application is not made bona fide or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of the court."

[3] In "the application", the applicant requested the following order:

3.1 " Noting Special entry of irregularity or illegality in terms of section 317(1) of Act 51 of 1977 as amended, on record in this matter,

3.2 Freddy Pololo Mothapo Mabebas' 204 statements Exhibit "Y1-Y3" is inadmissible against the accused by virtue of the provisions of S219 and S219A of Act 51 of 1977.

3.3 Granting Further and /or alternative relief.”¹

[4] The first leg of “the application” which is the application for special entry consist of two aspects:

“(a) Admissibility of Statements in terms of section 204 of the Criminal Procedure Act 51 of 1977, in terms of hearsay Act, Act 44 of 1988; and

(b) Application in terms of section 184(4) of Act 51 of 1977 by the Respondent, wherein the complainant in count 9, 10 and 11 already deposited affidavits that they do not wish to proceed with this courts. See Exhibit “W1-W4 and X and X1” [The Honourable Court issued warrant of arrest against the complainant without hearing actual respondents (failure to comply with the principle of Audi alterum rule, wherein the accused before court were made respondent when they were actually not. Differently put, the Court allowed the respondent to bring evidence in respect of the above counts which now are supplemented by the admissibility of exhibit “Y1-Y3” to the prejudice of the Applicant in this matter”²

[5] The applicant requested that the points formulated in paragraph 4 of this judgement be entered on record for special entry in terms of section 317 of Act 51 of 1977.

[6] The applicant in “the application” more specifically the section that deals with the first aspect of special entry formulated this aspect of special entry as follows: *“A.317 Special entry of irregularity or illegality in respect of statements made in terms of section 204 by Mr. Freddy Mothapo Mabeba Exhibit Y1-Y3.”³*

[7] The applicant in “the application” avers that the respondent brought an application before this court on the 4th September 2025 in terms of section 3(1)(c) of Act 45 of 1988, Law of Evidence Amendment Act, the hearsay evidence act. The Respondent in its written submission’s response to “the application” of the Applicant confirmed it.⁴

¹Applicant’s Application page 3

²Applicant’s Application page 9

³Applicant’s Application page 10

⁴ Respondent’s submission para 4: “Towards the end of the State case, the respondent sought to introduce hearsay evidence of the late Freddy Pololo Mabeba Mothapo, recorded in two separate police statements obtained by Sergeant Gafane and Colonel Boshomane. The respondent asked the court to invoke the provisions of section 3(1)(c) of Law of Evidence Amendment Act 45 of 1988 in admitting the said hearsay evidence.”

[8] Section 3 (1) (a) –(c) of Act 45 of 1988 states that:

“ (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
- (c) the court, having regard to-
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interest of justice.”

[9] Section 3 (2) Act 45 of 1988 states that: “The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.”

[10] Before I deal further with “the application” I find it necessary to mention what occurred in this court during the criminal trial. Before the respondent requested for the statements of the deceased Freddy Mabeba Pololo Mothapo to be accepted the respondent lead evidence by Sergeant Gafane and Colonel Boshomane.

[11] Sergeant Gafane and Colonel Boshomane were also cross-examined by the applicant’s legal representative during the trial. Both these two witnesses confirmed that each one of them took down a separate statement by the deceased Freddy

Mabeba Pololo Mothapo and they also confirmed their signatories on these statements.

[12] In *Kapa v The State*⁵ the learned Judge Mbatha AJ stated: " Section 3(4) of the Hearsay 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." The evidence given by Sergeant Gafane and Colonel Boshomane in respect of the statements "Y1-Y3 is such evidence."

[13] The respondent in its written submission under the heading "application in terms of section 3(1)(c) of Act 45 of 1988"⁶ paragraph 11 acknowledge that he inadvertently omitted to ask the witnesses to read the contents of the deceased witness statements numbered "Y1-Y3" in court."⁷

[14] The applicant in "the application" alleges that the court has made a ruling that the statements marked "Y1-Y3" be handed up as exhibit's notwithstanding, the reluctance of the respondent to hand up these statements.

[15] The applicant in paragraph 6.2.2 of "the application" stated the following:" The Honourable Court called the above exhibits without affording the legal representatives of the accused/applicant to address it on the admissibility of exhibit "Y1-Y3" being statements made in terms of section 204 of the Criminal Procedure Act..."

[16] However the applicant also in "the application" stated contrary to paragraph 15 and I quote: "In accepting the above exhibits, the Honourable Court ignored the submission by my Legal representative that the contents of the statements (exhibits "Y1-Y3") be covered and not exposed to the eyes of the court" ⁸

[17] The Respondent correctly quoted the Honourable Court ruling in paragraph 12 of the respondent written submission after the exhibits "Y1-Y3" was handed up.

[18] The Honourable Court ruled that the court needed the statements "Y1-Y3" to confirm the evidence that was lead in respect of the deceased name on the statements

⁵ *Kapa v The State* [2023] ZACC 1 para 30

⁶ Respondent's written submission page 4 para 11

⁷ " In the course of leading hearsay evidence, the respondent inadvertently omitted to invite the police witnesses who wrote down the deceased witness's statements to read the contents of the statements into the record"

⁸ Applicant's Application page 12 para 6.2.3

as well as the signature and names of the police witnesses who testified that they took down these statement.

[19] The Honourable Court was never interested in the contents of the statements "Y1-Y3" as same was not read into the record in court. The contents of these statements are still at date of writing of this judgement unknown to this Honourable Court.

[20] The respondent rightfully quoted the ruling this Honourable Court made: "Most importantly, the Honourable Court ruled that during the evaluation of entire evidence at the end of the trial, it would not consider the contents of the said hearsay evidence statements as same did not form part of the court record."⁹

[21] The applicant referred this Honourable Court to Section 219 of the Criminal Procedure Act 51 of 1977 as amended which reads that: "No confession made by any person shall be admissible as evidence against another person."

[22] This Honourable Court was also referred to Section 219A (1) of the Criminal Procedure Act 51 of 1977 as amended which reads that: "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 of that offence and is proved to have been voluntarily made by that person be admissible in evidence against him at criminal proceedings relating to that offence."

[23] The applicant in "the application" alleged that the court in accepting the exhibits/statements "Y1-Y3" acted irregular by not considering the provisions of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 (herein after called "LEAA Act").

[24] The applicant in the previous paragraph of this judgement was referring to the opening words of the LEAA Act which reads that: "Subject to the provisions of any other law".

[25] It is the applicant's submission in "the application" that the wording "any other law" include the Criminal Procedure Act 51 of 1977 as amended and more specifically section 219 and 219A of the Criminal Procedure Act 51 of 1977.

⁹ Respondent's written submission page 4 para 12

[26] The question this Honourable Court must answer is whether it acted irregular when this Honourable Court excepted the exhibits/statements "Y1-Y3" on the conditions that was mentioned in paragraph 18 of this judgement.

[27] The fact that the Honourable Court during the criminal trial did not intervene with the way the evidence was led by the respondent (prosecutor for the state) when Sergeant Gafane and Colonel Boshomane were in the witness stand, is evident of this Honourable Court, not been bias against the Appellant (accused two).

[28] It is important to note that when the Honourable Court wanted exhibits "Y1-Y3" to be handed up, the respondent then at that stage wanted to read the contents of these statements into the record but this Honourable Court refused that it be done.

[29] The reason, this Honourable Court refused the respondent the right to read these exhibits "Y1-Y3" into the record at that stage of the criminal trial, was due to the fact that it would have been regarded as an irregularity or illegality.

[30] These exhibits "Y1-Y3" was supposed to be read into the record when both the two witnesses Sergeant Gafane and Colonel Boshomane were still in the witness stand.

[31] The applicant made the submission in court when arguing "the application" and more specifically with reference to the Constitution, Act 108 of 1996 and section 35(3)(i) which states that : " (3) Every accused person has a right to a fair trial, which includes the right- (i) to adduce and challenge evidence", that the applicant's right was not preserve as contained in the section mentioned in this paragraph of this judgement.

[32] In *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA) Cameron JA held: "It is obvious that the 1988 Act, although pre-constitutional , must so far as possible be read in the light of the Constitution and to give effect to its fundamental values. The Constitution requires as much. Only if the statute's provisions cannot be read conformably with the Constitution would the question of unconstitutionality arise. In my view Goldstein J was, however, clearly right to reject the constitutional challenge. The statute does not license the wholesale admission of hearsay. Long before the Constitution came into effect the common law was alert to the dangers such an approach would have entailed. Not only is hearsay evidence-that is, evidence of a statement by a person other than a witness which is relied on to prove what the statement asserts - not subject to reliability checks applied first-hand testimony (which dismisses its substantive value) , but 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.¹⁰

[33] For these very reasons, this Court emphasized more than four decades ago that “hearsay, unless it is brought within one of the recognized exceptions, is not evidence, i.e. legal evidence, at all”.¹¹

[34] Quoted the dictum of Cameron J in *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA) at para 14 “The 1988 Act does not change that starting point. Subject to the framework it creates, its provisions are exclusionary.¹² Hearsay not admitted in accordance with its provisions is not evidence at all. What the statute does is to create supple standards within which courts may consider whether the interest of justice warrants the admission of hearsay notwithstanding the procedural and substantive disadvantages its reception might entail. *The Act thus introduces the very feature this Court held common law lacked, namely “a principle that the rule against hearsay may be relaxed or is subject to a general qualification if the Court thinks that the case is one of necessity”* (Own emphasis)

[35] “Aside from the importance of these cautionary words, a trial court must in applying the hearsay provisions of the 1988 Act be scrupulous to ensure respect for the accused’s fundamental right to a fair trial. Safeguards including the following are important:

- First, a presiding judicial official generally under a duty to prevent a witness heedlessly giving vent to hearsay evidence. (Own emphasis) More specifically under the Act, it is the duty of a trial Judge to keep inadmissible evidence out, [and] not to listen passively as the record is turned into a papery sump of “evidence”. (Own emphasis).¹³

[36] “A further consideration bearing on the constitutionality of the statute is that this Court has construed the nature of the power the relevant provisions confer on judges in a way that underscores the rigorous legal framework within any decision to admit hearsay evidence will be scrutinised:

¹⁰ See HL Ho “A Theory of Hearsay (1999) 19 Oxford Journal of Legal Studies 402. In *Lee v The Queen* (1998) 72 ALJR 1484 the High Court of Australia stated the process point thus (para 32): “And the concern of the common law is not limited to the quality of evidence, it is a concern about the matter of trial. One very important reason why the common law sets its face against hearsay evidence was because otherwise the party against whom the evidence was led could not cross-examine the maker of the statement. Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial”

¹¹ Para 13 *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA) and *Vulcan Rubber Works (Pty) Ltd v South African Railways and Harbours* 1958 (3) SA 285 (A) 296F (Schreiner JA)

¹² *S v Ramavhale* 1996 (1) SACR 639 (A) at 647 d-e per Shultz JA

¹³ Para 17 *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA), **Bill of Rights s 35(3)**, *S v Zimmerie en ander* 1989 (3) SA 484 (C) 492F-H (Friedman J, Tebbutt and Conradie JJ concurring), *S v Ramavhale* 1996 (1) SACR 639 (A) 651c.

*"A decision on the admissibility of evidence is, in general, one of law, not discretion, and this Court is fully entitled to overrule such a decision by a lower court if this Court considers it wrong"*¹⁴ (Own emphasis)

[37] In making the admission of hearsay evidence subject to broader, more rational and flexible considerations, the 1988 Act's general approach is moreover in keeping with the developments in other democratic societies based on human dignity, equality and freedom. The Supreme Court of Canada, for instance, has underlined the need for increased flexibility in interpreting the hearsay rule, and subject to safeguarding the interest of the accused, has distilled two criteria (reasonable necessity and reliability) governing its admission."¹⁵

[38] "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 s36) to 'challenge evidence'. Where that evidence is hearsay, the right entails that the accused is entitled to resist its admission and to scrutinize its probative value, including its reliability. The provisions enshrined these entitlements. *But where the interest of justice, constitutionally measured, requires that hearsay evidence be admitted, no constitutional right is infringed. Put differently, where the interest 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*".(Own emphasis)¹⁶

[39] In *S v Ndhlovu and Others* Cameron J cited with approval *S v Ndhlovu and others* 2001 (1) SACR 85 (W) and remarked: "But, as Goldstein also observed , where the interest of justice require the admission of hearsay, the provision 'does not require the absence of all prejudice'.¹⁷

[40] This Honourable Court during the criminal trial allowed the evidence of Sergeant Gafane and Colonel Boshomane because it was of the opinion that it was in the interest of justice to hear the evidence of these two witnesses which included the cross-examination by the applicant's legal representative.

[41] The applicant in "the application" more specifically the section that deals with the second aspect of special entry formulated this aspect of special entry as follows: "B.317 Special entry of irregularity or illegality in respect of granting an application by the Respondent in terms of section 184(4) of Act 51 of 1977. Issuing warrant of

¹⁴ Para 22 *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA), *McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and another* 1997 (1) SA 1 (A) 27E (EM Grosskopf JA, Corbett CJ, Nestadt JA, Schultz JA and Plewman AJA concurring)

¹⁵ Para 23 *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA) ,), In term of s 39(1)(c) of the Constitution, when interpreting the Bill of Rights a court "may consider foreign law" , Section 36(1) permits limitation of a right if reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom", *R v Khan* [1990] 2 SCR 531 (SCC)

¹⁶ Para 23 *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA) Compare *S v van der Sandt* 1997 (2) SACR 116 (W) 132 b-f

¹⁷ Para 51 *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA)

arrest against two complainants Morgan Mufunda and Annah Thungoane, thereby forcing them to testify on count 9;10 and 11 against the Applicant when the state has failed to provide service of subpoena or failed to show that the witnesses were evading service of the relevant subpoena.”¹⁸

[42] It is important at this stage to refer this Honourable Court to a written judgement that was given on the 20th day of June 2025 by me in this court, in respect of the application that was before me in terms of section 184(4) of the Criminal Procedure Act 51 of 1977 as amended (CPA).

[43] Section 184(4) of the CPA provides that:

“Whenever any person is likely to give material evidence in criminal proceedings, any magistrate, regional magistrate or judge of the court before which the relevant proceedings are pending may, upon information in writing and on oath that such person is evading service of the relevant subpoena, issue a warrant for his arrest, whereupon the provisions of subsection(2) and (3) shall *mutandis mutandis* apply with reference to such person.”

[44] The applicant in “the application” as quoted in paragraph 41 of this judgement avers that “the state (respondent) has failed to provide service of subpoena or failed to show that the witnesses were evading service of the relevant subpoena”.

[45] However, in the judgement of the 20th June 2025, the Honourable Court refers to the statement by Victoria Mashego for the Director of Public Prosecutions, Limpopo.

[46] This Honourable Court find it necessary to quote paragraphs 9-13 of the judgement of the 20th June 2025. The reason for quoting these paragraphs is to show that the respondent did indicate in Victoria Mashego affidavit, that the witnesses were evading service of the relevant subpoena.

[47] Paragraph 9 -13 of the judgement of the 20th June 2025 stated and I quote:

“ [9] *The Applicant referred in “Exhibit W 2” to the reasons Mr. Morgan Mufunda gave to Victoria Mashego, as to why he is no longer interested to come to Court to testify and also said, “That he put this robbery incident behind him and moved on with life. He had no interest in pursuing criminal charges against the perpetrators.”*¹⁹

¹⁸ Applicant's Application page 15

¹⁹ Exhibit W 2 Founding affidavit Vicoria Mashego., page 7 para 6.3

[10] The reasons given in "Exhibit W2" is reasons given by Mr. Morgan Mufunda to Victoria Mashego and requires this Honourable Court to hear the evidence in person from Mr. Morgan Mufunda. It is only then that this Honourable Court could make a ruling regarding this witness and his willingness to testify in this criminal trial and the possibility of putting this witness in the protection program as contained in section 185 of the CPA.

[11] In respect of the second witness of the State, Ms. Annah Thungoane, it is the Applicant's case that this witness is not willing to give her employment address to the South African Police to provide her with the subpoena to attend this Honourable Court's proceedings in respect of this criminal matter (case number: CC 51/2022).

[12] In paragraph 18 (eighteen) of Victoria Mashego's statement she stated the following:

"The prosecutor further indicated to me although Thabo Moutlana testified concerning this count, his evidence will carry very little or no evidence weight because in his testimony, he ran into the storeroom and hid himself behind piles of liquor crates as he was terrified by the armed men. In his words, he did not see what happened to Mr Morgan Mufunda and Ms. Annah Thungoane in the other section of the liquor store. Therefore, his evidence falls short of proving that the offence was actually committed as envisaged in section 209 of Act 51 Of 1977."

[13] The submission of the Applicant that, the presence in Court of Mr. Morgan Mufunda and Ms. Annah Thungoane is of utmost importance for the State to prove their case in respect of count ten (10) of the indictment, is clear in paragraph 18 (eighteen) of Victoria Mashego's Founding Affidavit as quoted in para [12] of this judgment."

[48] From the above quoted paragraphs 9 -13 of the judgement of the 20th June 2025 it is clear that the respondent did not fail to show that the witnesses were evading service of the relevant subpoena.

[49] This Honourable Court is not prepared to quote the whole judgement of the 20th June 2025 but would also like to refer to paragraph 16 which I quote:

"[16] The legal representative for Respondent 1 (one), 3 (three) and 4 (four) further argued that in paragraph 6 of Victoria Mashego's Founding Affidavit, Mr. Morgan Mufunda "refused" to receive and sign for the subpoena. In Section 184(4) of the CPA the word "evading" is used to receive the subpoena and not "refused".

The Findings of the Court on this Point

This Honourable Court did however search for the meaning of the word "evade" and in the Cambridge Dictionary "evade" was explained as "to avoid or escape from someone or something." If this Honourable Court read and interpreted paragraph 6 of Victoria Mashego's Founding Affidavit it is clear that Mr. Morgan Mufunda's refusal to receive the subpoena is merely to avoid or escape something, which, in this instance, is the subpoena. "

[50] The respondent in its written submission under paragraph 9 of opposing "the application" stated the following: "Any party to the criminal proceedings is entitled to subpoena any competent and compellable witness to testify in his/her case if the evidence of such witness is material, relevant and admissible. Undoubtedly, the evidence of witnesses required by the respondent was material, relevant and admissible at the trial. The only hurdle was that the witnesses evaded service of subpoena and did not wish to give evidence."

[51] The applicant in "the application" in paragraph 6.8 alleges that when the initial application for issuing of warrant for arrest was made, the accused was cited as the respondent in the initial applicant's application and not the two witnesses Morgan Mufunda and Tungoane.

[52] The applicant in "the application" in paragraph 6.9 alleges that the Honourable Court acted irrelevant in that it failed to observe the "audi alteram partem rule" to the actual applicants.

[53] The warrant for arrest was issued for the two witnesses Morgan Mufunda and Tungoane on the 20th day of June 2025 by the Honourable Court .

[54] The warrant for arrest was cancelled by the Honourable Court on the 24th day of June 2025.

[55] The two witnesses were warned on the 24th day of June 2025 to appear before this court in the criminal trial on the 30th June 2025 to give evidence regarding the alleged crime as contained in count 9-11.

[56] The applicant in “the application” in paragraph 6.12 and 6.13 refers to section 180(1) and 180(2) of the CPA which is incorrect. The respondent (the Director of Public Prosecutions, Limpopo) initial application was in terms of section 184 (4) of the CPA.

[57] The applicant also submitted that the evidence that was given in the criminal trial by the two witnesses Morgan Mufunda and Tungoane under a coercion /treat of warrant of arrest, and the admissions of statements “Y1-Y3” renders this trial irregular and/illegal.

[58] However is important to note that the warrant for arrest for Morgan Mufunda and Tungoane was issued in terms of the CPA and more specifically section 184(4) of the CPA.

[59] The admission of statements “Y1-Y3” is fully discussed in this judgement.

[60] In *S v Okah*²⁰ the Learned Judge Cameron stated and I quote: “ The threshold for granting special entries is far lower than that required for granting leave to appeal.²¹Leave to appeal requires reasonable prospects on appeal. By contrast, section 317(1) spells out that any irregularity or illegality must be entered on the record- “unless the court to which...the application for a special entry is made is of the opinion that the application is not made bona fide or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of the court.

[61] In *Xaba*, the Appellate Division interpreted this to mean “that the power of a trial judge to refuse to make a special entry of an alleged irregularity on the record is confined within very narrow limits. That court affirmed its earlier decision in *Nzimande*²²and *Nafte*, which held that a special entry should be made even where there are scant prospects of success on appeal – “ *[i]f the incident of procedure which it is sought to make the subject of a special entry is in any way capable of being regarded as an irregularity or illegality, however little argument there may be advanced*

²⁰ *S v Okah* [2018] ZACC 3 para 54 and 55

²¹ *S v Xaba* 1983 (3) SA 717 (A) (*Xaba*) at 731

²² *R v Nzimande* 1957 (3) SA 772 (A) at 774, where the Appellate Division noted:

“In the light of decisions of this Court it could happen, apparently, that a convicted person might be able to bring an irregularity appearing on the record before this Court by way of a special entry even though he would not be able to obtain leave to appeal on account of the same irregularity.”

in support of it, and however little merit the presiding Judge may consider there is in the application."²³

[62] The "second leg" of "the application" consist of an application for reconsideration of a previous ruling (interlocutory) made on the 4th September 2025.

[63] The applicant in "the application" more specifically the section that deals with the "second leg" of "the application" formulated this aspect as follows: "C. Application for the reconsideration of previous ruling admitting Mr. Freddy Pololo Mothapo (Mabeba) 204 Statements (Exhibits "Y1-Y3").

[64] The applicant submitted in "the application" that the ruling that this Honourable Court made on the 4th September 2025 was interlocutory and in respect of section 3(1)(c) of Act 45 of 1988 (hearsay act). This Honourable Court agrees with the submission of the Applicant in respect of the submission.

[65] The applicant in "the application" in paragraph 6.22 states the following: " Further to the above, I submit that the contents of Exhibit "Y1-Y3" were not read into the record and the contents of such statements remains unknown to the Honourable Court and/ record, which requires reconsideration of the whole exercise by the state to rely on section 3(1) (c) of Act 45 of 1988."

[66] In *S v Fadwaan Murphy* ²⁴ the learned Judge Davis AJ said: "*Now it is well-established that simple interlocutory orders may be changed where they are based on an incorrect interpretation of a statue which only becomes apparent later.*" ²⁵ *The legal point based on s 219 of the CPA had implications for the interpretation of s 3 of the hearsay Act, if the point had merit, it meant that the hearsay ruling would have to be altered and Wenn's statement ruled inadmissible.*"

[67] In *S v Fadwaan* ²⁶the learned Judge Davis AJ also said and I quote: "*In the latter regard it is apposite to note that the Supreme Court of Appeal in Litako and Others v S* ²⁷ *and the Constitutional Court on Mholongo v S* ²⁸ *recognized that the common law rule against the use of confessions and admissions against anyone other than the*

²³ *R v Nafte* 1929 AD 333 at 338-9

²⁴ *S v Fadwaan Murphy* CC 27/2018 para 12

²⁵ *Zondi v MEC Traditional and Local Government Affairs* 2006 (3) SA 1 (CC) para 30

²⁶ *S v Fadwaan Murphy* CC 27/2018 para 51

²⁷ *Litako and Others v S* 2015 (3) SA 287 (SCA) para 51

²⁸ *Mholongo v S* 2015 (2) SACR 323 (CC) paras 27 and 35

maker, which informed sections 219 and 219A, was not only based on the hearsay nature of such extra-curial statement, but also on the dangers inherent in accomplice testimony and the implications for fair trial rights. In *Mhlongo* the Constitutional Court referred to the well-known decision of *S v Hlaphezula*²⁹ in which the Court pointed out the dangers inherent in the in-court testimony of an accomplice implicating a co-accused, and observed that these dangers are intensified when the statement was made out-of-court and its maker cannot be subject to cross-examination³⁰ (or, one might add, effective cross-examination on the contents of the statement where the maker denies having made the statement and attributes the contents to the police, as did Wenn in this case)."

[68] In *S v Fadwaan*³¹ the learned Judge stated the following: "... The Court in *Mabaso* referred³² to the prohibition in s 219 of the CPA against the use of a confession made by any person against any other person, as well as the decision of the Constitutional Court in *Makhubela v S; Matjeke v S* ("*Makhubela*")³³ which confirmed the decision in *Mhlongo* that extra-curial confessions and admissions made by an accused are inadmissible against a co-accused.³⁴

[69] In light of the case law quoted in this judgement, the Honourable Court has no other choice but to set-aside the ruling made on the 4th October 2025 regarding the admissibility of statements "Y1-Y3".

[70] According, I make the following order:

1. That a special entry be made on the record regarding the admissibility of statements in terms of section 204 of the Criminal Procedure Act 51 of 1977, in terms of hearsay Act, Act 44 of 1988;
2. That the special entry be dismissed regarding the application in terms of section 184(4) of Act 51 of 1977 by the Respondent, wherein the complainant

²⁹ *S v Hlaphezula* 1965 (4) SA 439 (A)

³⁰ *Mholongo v S* 2015 (2) SACR 323 (CC) paras 35, footnote 57

³¹ *S v Fadwaan Murphy* CC 27/2018 para 29

³² *Mabaso v S* [2021] ZASCA (9 July 2021) para 25

³³ *Makubela v S* 2017 (2) SACR 665 (CC)

³⁴ *Makhubela v S; Matjeke v S* 2017 (2) SACR 665 (CC) paras 29 and 30

in count 9, 10 and 11 already deposited affidavits that they do not wish to proceed with this courts. See Exhibits "W1-W4 and X and X1."

3. Mr. Freddy Pololo Mothapo (Mabeba) 204 Statements (Exhibits "Y1-Y3") is inadmissible against the accused by virtue of section 219 and 219A of the Criminal Procedure Act 51 of 1977 as amended.




JD STRÖM

**ACTING JUDGE OF THE HIGH COURT
 LIMPOPO DIVISION, POLOKWANE**

Appearance

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