



Revised

**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST PROVINCIAL DIVISION, MAHIKENG**

CASE NO: CC 21/2023

In the matter between:

THE STATE

and

SIBUSISO MACDONALD KULA

Coram: Reddy J

Reserved: 12 February 2026 Circuit Court Klerksdorp

Delivered: This ruling was handed down on 16 April 2026. It was electronically circulated to the parties' representatives via email. The date and time are deemed to be 12h00 on 28 April 2026.

Summary

Evidence – Hearsay evidence – Admissibility – Application in terms of s 3(1)(c) of Law of Evidence Amendment Act 45 of 1988 – Court must conduct a holistic weighing of all seven jurisdictional factors in s 3(1)(c) – Factors are conjunctive and none is decisive in isolation – Touchstone of admissibility is the interests of

justice – In criminal proceedings the threshold for admission is elevated and courts must hesitate long before admitting hearsay that plays a decisive or significant role in the conviction of an accused – Where accused does not consent to admission and maker cannot testify by reason of death, only s 3(1)(c) is available to the State – Death of maker is a compelling reason for non-availability and weighs in favour of admission but is not determinative – Court must assess whether there are adequate pointers of truthfulness, reliability and probative value to justify admission – Statement ambiguous on its face on the very point for which tendered cannot reliably achieve the purpose of admission – Absence of objective corroboration and failure to obtain available telephone records diminishes probative value – Statement commissioned by a witness who himself testified on the same issue intensifies the traditional dangers of hearsay – State cannot simultaneously contend that it has overwhelming evidence and invoke the “only conduit” reasoning from *Kapa v The State* 2023 (1) SACR 583 (CC) – Such positions are irreconcilable – Application dismissed.

Evidence – Hearsay evidence – Application procedure – Application brought without a founding affidavit, counsel’s heads of argument constituting impermissible conflation of evidence and argument – Material procedural irregularity reflects adversely on manner in which application brought – Court declining to dismiss on procedural ground alone where interests of justice and gravity of proceedings require engagement with merits – Outcome would have been the same notwithstanding any procedural compliance.

Evidence – Hearsay evidence – Constitutional dimension – Section 35(3)(i) of Constitution – Discretion under s 3(1)(c) must be exercised in constitutionally compliant manner with close attention to impact of admission on accused’s right to challenge evidence – Admission of hearsay may not render trial as a whole unfair – Bald assertion that prejudice does not outweigh interests of justice,

without engaging with why deprivation of cross-examination is constitutionally tolerable in specific circumstances, is wholly inadequate – Accused's constitutional fair trial rights are not merely formal considerations but substantive constraints on the s 3(1)(c) discretion.

Evidence – Hearsay evidence – Provisionally admitted evidence – Hearsay evidence of witness recounting what deceased told him remaining provisionally admitted – Ultimate admissibility and weight to be determined at conclusion of trial in light of all the evidence in accordance with s 3(3)(b) of the Act – Section 3(3)(b) providing that hearsay admitted under the section shall not be the only ground upon which a finding of fact may be made will receive full application.

ORDER

- (i) The application for the admission of the statement of the late April Papi "Sphizer" Olifant as hearsay evidence in terms of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 is dismissed.
- (ii) The provisionally admitted hearsay evidence of Sergeant Mpudi, in so far as it recounts what Sphizer told him, remains provisionally admitted. Its ultimate admissibility and the weight to be accorded thereto will be determined at the conclusion of the trial in light of all the evidence and in accordance with section 3(3)(b) of the Law of Evidence Amendment Act 45 of 1988.

**RULING IN TERMS OF SECTION 3(1) (c) OF THE LAW OF
EVIDENCE AMENDMENT ACT 45 OF 1988**

REDDY J

Introduction

[1] The State applies for the admission of a written statement made by the late April Papi "Sphizer" Olifant ("Sphizer") as hearsay evidence in terms of s3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 ("the Act").

[2] The statement concerns the central factual dispute of whether Sphizer telephoned the accused on 27 November 2022 to report the presence of suspicious persons at the accused's section. The accused opposes the application by way of an answering affidavit, deposed to by himself on 11 February 2026. The death of Sphizer has been confirmed and requires no further determination.

In limine

[3] Before navigating the merits, a preliminary comment is necessary. On 9 February 2026, this Court directed that a formal application be brought, supported by affidavit evidence. What the State filed, purportedly in compliance with that direction, is heads of argument drafted by Advocate Tlatsana without a founding affidavit placing the underlying facts before this Court.

[4] As contended by Mr. Dlanjwa, the heads of argument constitute counsel giving evidence and arguing the case simultaneously, an impermissible conflation

of distinct functions. On 9 February 2026, this Court underscored that the application must be supported by affidavit/s, having regard to the gravity of the case. The State's response fell short of the required standard.

[5] The point *in limine* has merit. The purported application on the face is irregular. Notwithstanding same, given the death of Sphizer, and given the gravity of these proceedings, it would be remiss of this Court to dismiss the application on the procedural ground alone. To do so without engaging the merits would not be in the interests of justice.

[6] To circumvent any doubt, although the absence of affidavit evidence constitutes a material irregularity and reflects adversely on the manner in which the application was brought, the outcome of this application does not turn on procedural non-compliance alone. Even if the application had been properly constituted, the substantive deficiencies identified below, considered cumulatively and in light of s3(1)(c) of the Act, would nonetheless have compelled the same result.

The state submissions

[7] Advocate Tlatsana contends that the application is brought in terms of s3(1)(c) of the Act, being the only available remedy since neither consent under s3(1)(a) nor the deponent testifying under s3(1)(b) is possible. Advocate Tlatsana submits that Sphizer died on or about 8 February 2026, the day before his scheduled testimony, and that his death constitutes a compelling reason for non-availability.

[8] Advocate Tlatsana avers that the statement gives a detailed account of the conversation between Sphizer and the accused on 27 November 2022, provides

material corroboration to the oral evidence of Sergeant Mpudi, and is the missing piece necessary to complete the evidentiary picture before this Court.

[9] Advocate Tlatsana, great store in the store in *Kapa v S¹*, contending that Sphizer's statement stands in an analogous position as the "only conduit" through which the relevant evidence can be placed before the Court. Advocate Tlatsana concedes that the accused cannot cross-examine Sphizer but submits that this prejudice does not outweigh the interests of justice. Moreover, Advocate Tlatsana further submits that the state has tendered "overwhelming evidence" against the accused.

The accused's submissions

[10] Mr. Dlanjwa's submissions pivot on seven points. Notwithstanding this Court's adjudication on the point in limine, it is encapsulated in the submissions. First, in limine, Mr. Dlanjwa submits that no proper application is before this Court, that what was filed are heads of argument and nothing more, and that the purported application is a nullity incapable of being cured by any lawful means. To this end, I have found that dispensing with this application on a procedural technicality would result in a miscarriage of justice.

[11] Second, Mr. Dlanjwa raises a broader pattern of prosecutorial conduct that has consistently ambushed the defence throughout these proceedings. Third, Mr. Dlanjwa submits that the investigating officer, Sergeant Mpudi, prepared and commissioned the statement that is the subject of this application, and then testified in these proceedings on the very issue the statement addresses, thereby compromising the independence and reliability of the evidence.

¹ 2023 ZACC 1.

[12] Fourth, Mr. Dlanjwa emphasizes that paragraph 3 of Sphizer's statement employs the word "neve" in a context central to the factual dispute, a word that is ambiguous on its face and unexplained. Fifth, Mr. Dlanjwa advances and invokes the accused's constitutional right to challenge evidence under section 35(3)(i) of the Constitution of the Republic of South Africa, 108 of 1996, and relies on *S v Molimi*² for the proposition that the constitutional dimension of the interests of justice test cannot be elided. Sixth, Mr. Dlanjwa opines that *Kapa* is distinguishable from the present matter. To this end, he argues that in *Kapa*, Ms. Dasi was an eyewitness to the crime. In contrast, Sphizer was not, and that the State's own submission of "overwhelming evidence" directly contradicts its invocation of the "only conduit" reasoning.

[13] Seventh, Mr. Dlanjwa concludes that all seven factors enumerated in section 3(1)(c) of the Act were not properly addressed by the State, as directed by this Court on 9 February 2026, and that the traditional dangers of hearsay are present in full measure. To this end, Mr. Dlanjwa argues that there are no telephone records to corroborate the alleged conversation, despite the investigating officer having been advised to obtain such records under section 205 of the Criminal Procedure Act 51 of 1977.

The law

[14] Section 3 of the Act provides:

"3. Hearsay evidence

(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;

² 2008 (2) SACR 76 (CC).

(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 interests of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence which is otherwise inadmissible.

(3) Hearsay evidence admitted in terms of this section -- (a) shall be the only ground on which a finding of fact may not be made unless the court is satisfied that it is in the interests of justice to make such a finding; and (b) shall not be the only ground on which such a finding may be made.

(4) For the purposes of this section --

'hearsay evidence' means 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;

'party' means the accused or the prosecutor in criminal proceedings, or a party in civil proceedings, as the case may be."

The Legal Principles

[15] Against this legislative landscape, I turn to consider the legal principles. As a point of departure, the accused does not consent to admission of Sphizer's statement, and Sphizer cannot testify by reason of his death. It follows that the two vessels, as provided for in s3(1)(a) and 3(1)(b), of the Act do not avail the state. What stands out is that this application falls to be determined under the rubric s3(1)(c) of the Act.

[16] In *S v Ramavhale*,³ Schutz JA underscores that s3(1) is an exclusionary subsection and that "the touchstone of admissibility is the interest of justice."⁴ The reception of hearsay evidence is not permitted unless the interests of justice justify and permit its admission. That proposition was affirmed by the Constitutional Court on appeal in *Kapa*.⁵ The purpose of the Act was described by the Supreme Court of Appeal in *Cupido v S* as being to cater primarily for non-witnesses who are no longer available to testify due to, for example, death or mental incapacity after the incident.⁶

[17] The common thread that permeates our law is that courts have long cautioned that hearsay evidence must be approached with circumspection in criminal proceedings. In *Ramavhale*, Schutz JA stated that "a judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there are compelling justifications for doing so,"⁷ adding that "[a]n accused person usually has enough

³ 1996 (1) SACR 639 (SCA)

⁴ 1996 (1) SACR 639 (SCA) at 647d.

⁵ 2023 (1) SACR 583 (CC).

⁶ (1257/2022) [2024] ZASCA 4 at para [47].

⁷ *S v Ramavhale* 1996 (1) SACR 639 (SCA) at 649c-d.

to contend with without expecting him also to engage in mortal combat with the absent witness."⁸

[18] In *S v Seemela* the court echoed a cautious approach to the admission of hearsay evidence where it stated that, "[h]earsay evidence has long been recognised to tend to be unreliable" and it is accordingly the court's "intuitive reluctance to permit untested evidence to be used against an accused in a criminal case" that informs the cautious exercise of the s3(1)(c) discretion.⁹ This same caution is reflected in the observation of Zeffert, Paizes, and Grant that courts have warned that a judge should hesitate long before admitting or relying on hearsay evidence which plays a decisive or even a significant part in convicting an accused, unless there are compelling reasons for doing so.¹⁰ That warning resonates with equal force in the present matter.

[19] In *Molimi*, the highest court held that the s3(1)(c) discretion must be exercised in a constitutionally compliant manner, with close attention to the impact of admission on the accused's ability to challenge the evidence against him.¹¹ In *S v Ndhlovu*, Cameron JA held that "[t]he Bill of Rights does not guarantee an entitlement to subject all evidence to cross-examination. What it contains is the right (subject to limitation in terms of s 36) to 'challenge evidence'"¹² and that "[w]here 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."¹³

⁸*S v Ramavhale* 1996 (1) SACR 639 (SCA) at 648a.

⁹*S v Seemela* 2016 (2) SACR 125 (SCA) at para [13].

¹⁰Zeffert, Paizes and Grant *Essential Evidence* (2nd ed, 2020) at 147.

¹¹*S v Molimi* 2008 (2) SACR 76 (CC) at paras [45]-[47].

¹²*S v Ndhlovu and Others* 2002 (6) SA 305 (SCA) at para [24], per Cameron JA: "The Bill of Rights does not guarantee an entitlement to subject all evidence to cross-examination. What it contains is the right (subject to limitation in terms of s 36) to 'challenge evidence'."

¹³*S v Ndhlovu and Others* 2002 (6) SA 305 (SCA) at para [24], per Cameron JA: "Put differently, where the interests of justice require that the hearsay statement be admitted, the

[20] Notably, *Molimi* found that the *Ndhlovu* approach was incorrect insofar as it was applied without proper constitutional analysis. In *Kapa*, Majiedt J, writing for the majority, held that the court must not evaluate the probative value of a hearsay statement "in a piecemeal fashion" but should instead "apply a holistic approach, assessing whether on the whole the statement was of adequate probative value in light of all of the other circumstantial evidence taken together."¹⁴ That holistic approach was affirmed in *S v Lenting and Others*.¹⁵

[21] The determination required under s3(1)(c) of the Act is not a mechanical or formulaic exercise. It entails a value judgment, reached after a holistic weighing of all the enumerated factors, none of which is decisive in isolation. The conclusion reached represents the exercise of this Court's discretion on the particular facts of this case, informed by constitutional imperatives and precedential authority. It is with these principles in mind that the seven jurisdictional factors that form the gateway to the admission of hearsay premised on s3(1)(c) of the Act are to be considered disjunctively or conjunctively.

The application of section 3(1)(c) jurisdictional factors

The nature of the proceedings section 3(1)(c)(i)

[22] It bears stating the obvious. The accused has been indicted before the High Court on serious allegations in which the accused faces five counts, including an

right to 'challenge evidence' does not encompass the right to cross-examine the original declarant."

¹⁴*Kapa v The State* 2023 (1) SACR 583 (CC) at para [98], per Majiedt J: "In this approach, the first judgment impermissibly evaluates the probative value of the statement in a piecemeal fashion. It should instead apply a holistic approach, assessing whether on the whole the statement was of adequate probative value in light of all of the other circumstantial evidence taken together."

¹⁵ (CC08/2018) [2023] ZAWCHC 221 at para [15].

allegation of murder arising from the death of his wife on 27 November 2022. In *Kapa*, it has been suggested that the likelihood of hearsay evidence being admitted is greater in civil proceedings and is "least" in criminal proceedings.¹⁶

[23] The accused's constitutional rights under section 35(3) of the Constitution are fully engaged. This Court observed during the proceedings of 9 February 2026 that a criminal trial is not a game¹⁷. The seriousness of the allegation that a human being lost her life demands that the admission of hearsay of this nature be countenanced only where the interests of justice genuinely require it. This factor strongly militates in favor of caution and sets a correspondingly elevated threshold for admission.

The nature of the evidence section 3(1)(c)(ii)

[24] The evidence in question is a written statement taken from Sphizer by the investigating officer, Sergeant Mpudi, who himself testified in these proceedings on the very issue the statement addresses. In *Kapa* the Constitutional Court stated that "[i]n essence, the enquiry under this rubric is, first, the extent to which the evidence can be considered reliable; and, second, the weighing of the probative value of the evidence against its prejudicial effect," identifying four factors relevant to the reliability question, including any interest in the outcome of the proceedings by the witness, the degree to which the statement is corroborated or contradicted by other evidence, and the contemporaneity and spontaneity of the statement.¹⁸

¹⁶2023 (1) SACR 583 (CC) at para [39].

¹⁷*Rex v Hepworth* 1928 AD 265 at 277

¹⁸*Kapa v The State* 2023 (1) SACR 583 (CC) at para [33], per Majiedt J: "In essence, the enquiry under this rubric is, first, the extent to which the evidence can be considered reliable; and, second, the weighing of the probative value of the evidence against its prejudicial effect. There are a host of factors relevant to the reliability question, namely: (a) any interest in the outcome of the proceedings by the witness; (b) the degree to which it is corroborated or contradicted by other evidence; (c) the contemporaneity and spontaneity of the hearsay statement; and (d) the degree of hearsay."

[25] None of these indicators favours admission in the present matter. The statement records, in paragraph 3, that Sphizer used the word "neve" in a context central to the factual dispute, a word that is ambiguous on its face and unexplained. It would be a slippery slope for this Court to embark on a process of speculation or conjecture to determine whether the word "neve" was a typographical error or an intentional choice. In *Ndhlovu*, Cameron JA alluded to "an intuitive reluctance to permit untested evidence to be used against an accused in a criminal case."¹⁹

[26] The glaring dangers of hearsay, including the inability to evaluate the deponent's perception, memory, narration, and sincerity, are equally present and are intensified by the circumstances in which the statement was made.

The purpose for which the evidence is tendered section 3(1)(c)(iii)

[27] Advocate Tlatsana contends that the purpose is to confirm or deny whether Sphizer telephoned the accused on 27 November 2022 to report suspicious persons near the accused's home. In *Cupido v S* [2024] ZASCA 4, the SCA held that "[p]robative value means value for purposes of proof. This means not only, 'what will the hearsay evidence prove if admitted?', but 'will it do so reliably?'"²⁰ The statement as drafted does not with requisite clarity establish the denial of the telephone call on the crucial point. A statement that is ambiguous on the very issue for which it is tendered cannot reliably achieve the purpose for which admission is sought, and that ambiguity cannot justify the constitutional cost of admission.

¹⁹*S v Ndhlovu and Others* 2002 (6) SA 305 (SCA) at para [23].

²⁰*Cupido v S* (1257/2022) [2024] ZASCA 4 at para [49]: "[p]robative value means value for purposes of proof. This means not only, 'what will the hearsay evidence prove if admitted?', but 'will it do so reliably?'"

The probative value of the evidence section 3(1)(c)(iv)

[28] In *Cupido*, the SCA confirmed that the most compelling justification for admitting hearsay is the presence of "numerous pointers to its truthfulness."²¹ No such pointers exist here. The State has placed before this Court no admissible evidence whatsoever regarding the content or reliability of the statement. As alluded to, the assertions by Advocate Tlatsana in the heads of argument are not evidence. Notably, there are no telephone records to corroborate the alleged conversation, notwithstanding that the investigating officer has an investigative tool available to obtain records, as evinced in s205 of the Criminal Procedure Act 51 of 1977.

[29] The minority judgment of Mbatha AJ in *Kapa* observed pertinently that "[i]t is of no legal significance, in considering whether to admit evidence, how important a party regards a piece of evidence for the bolstering of its own case."²² This contention applies with equal force in the present matter. As confirmed in *S v Kapa and Others*, where the following was stated:

"[a] just verdict, based on evidence admitted because the interests of justice require it, cannot constitute 'prejudice' ... Where the interests of justice require the admission of hearsay, the resultant strengthening of the opposing case cannot count as prejudice for statutory purposes, since in weighing the interests of justice the court must have already concluded that the reliability of the evidence is such that its admission is necessary and justified."²³ This Court has not so concluded. That proposition, therefore, does not assist the State.

²¹*Cupido v S* (1257/2022) [2024] ZASCA 4 at para [49].

²²*Kapa v The State* 2023 (1) SACR 583 (CC), minority judgment per Mbatha AJ.

²³*S v Kapa and Others* [2018] ZAWCHC 3 at para [34]: "A just verdict, based on evidence admitted because the interests of justice require it, cannot constitute 'prejudice' ... Where the interests of justice require the admission of hearsay, the resultant strengthening of the opposing case cannot count as prejudice for statutory purposes, since in weighing the interests of justice the court must have already concluded that the reliability of the evidence is such that its admission is necessary and justified."

The reason why the evidence is not given by the maker section 3(1)(c)(v)

[30] Sphizer died on or about 8 February 2026, the day before the trial was due to resume. This is common cause.

[31] In *Cupido*, the SCA confirmed that :

"[t]he primary objective is to cater for non-witnesses who are no longer available to testify due to, for example, death or mental incapacity after the incident."²⁴

[32] It is an unassailable fact that death is among the most compelling reasons a deponent cannot testify. This would inevitably trigger the provisions of s3(1)(c) of the Act in the absence of s3(1) (a) and (b) not available to a party, and an appropriate remedy for the admission of hearsay evidence. Undoubtedly, this factor weighs in favour of the State's application.

Prejudice to the accused section 3(1)(c)(vi)

[33] Advocate Tlatsana concedes that the accused will be entirely deprived of the opportunity to cross-examine Sphizer. Concerningly, Advocate Tlatsana dismisses this as not outweighing the interests of justice, without engaging with how the prejudice is to be mitigated or why it is constitutionally tolerable in the circumstances of this case.

[34] In *Kapa*, the court acknowledged that "[t]he prejudice occasioned to the applicant as an accused person by the admission of the hearsay evidence is significant. The accused was deprived of an opportunity to cross-examine the witness, which could have shed light on the credibility and reliability of the witness, her powers of observation, and so forth."²⁵

²⁴*Cupido v S* (1257/2022) [2024] ZASCA 4 at para [47].

²⁵*Kapa v The State* 2023 (1) SACR 583 (CC) at para [94], per Majiedt J: "The prejudice occasioned to the applicant as an accused person by the admission of the hearsay evidence is significant. The accused was deprived of an opportunity to cross-examine the witness, which

[35] The majority in *Kapa* admitted the statement notwithstanding that prejudice, but only because the evidence was of adequate probative value in light of all the other circumstantial evidence taken together. The highest court held that "[u]ltimately, the question is whether there are adequate pointers of truthfulness, reliability, and probative value for the statement to be admitted as evidence."²⁶

[36] In the present matter, the threshold has not been met. To this end, in *S v Molimi*, it was held that the section 3(1)(c) discretion cannot be exercised to render the trial as a whole unfair.²⁷ A bald assertion that prejudice does not outweigh the interests of justice, without engaging with the intimate mechanics of why it is constitutionally tolerable in the specific circumstances of this case, is wholly inadequate.

Any other relevant factor section 3(1)(c)(vii)

[37] The State does not engage with this provision at all. First, the State's own submission is that it has tendered "overwhelming evidence" against the accused the statement of Sphizer is not the decisive or indispensable piece of evidence that would justify overriding the accused's constitutional rights. The State cannot simultaneously advance "overwhelming evidence" and invoke the "only conduit" reasoning from *Kapa*. These positions are irreconcilable and undermine the interests of justice argument.

could have shed light on the credibility and reliability of the witness, her powers of observation, and so forth."

²⁶*Kapa v The State* 2023 (1) SACR 583 (CC) at para [103], per Majiedt J: "there can hardly be any doubt that the applicant is being substantially prejudiced by the admission of the statement as he is deprived of the opportunity to cross-examine the deponent. But that is not the only consideration -- the court must also consider the fact that the witness is deceased, and the overriding consideration of the interests of justice. Ultimately, the question is whether there are adequate pointers of truthfulness, reliability, and probative value for the statement to be admitted as evidence."

²⁷*S v Molimi* 2008 (2) SACR 76 (CC) at paras [45]-[47].

[38] Second, in *S v LN* [2025] ZAWCHC 40, the Western Cape High Court on review set aside a conviction in part because hearsay evidence had been allowed to form part of the record without substantive applications for its inclusion being properly made, and without the trial court properly dealing with it on the basis of the provisions of section 3(1)(a), (b) or (c) of the Act.²⁸ That decision reinforces the principle that hearsay applications in criminal proceedings must be properly constituted and properly argued, a standard the present application falls gravely shy of.

[39] The State's reliance on *Kapa* is misplaced. In *Kapa*, the deceased Ms Dasi was an eyewitness to the offence itself. The majority described her statement as the "only conduit" through which the accused's actions could be linked to the crime. In the present matter, Sphizer was not an eyewitness to any crime. He was a person who may or may not have made a telephone call to the accused. The facts are distinguishable.

[40] The minority judgment of Mbatha AJ serves as a salutary reminder that "[t]he statutory interests of justice test for the admission of hearsay evidence has a constitutional dimension, and the admission of hearsay might be so unfair as to infringe the [accused's] fair trial rights."²⁹

[41] The compelling reasoning that underscored the majority's decision in *Kapa*, that a holistic assessment of probative value in light of all the circumstantial evidence demanded admission,³⁰ does not correlate with the

²⁸*S v LN* (12/2023) [2025] ZAWCHC 40 at paras [29] and [71].

²⁹*Kapa v The State* 2023 (1) SACR 583 (CC), minority judgment per Mbatha AJ at para [4]: "The statutory interests of justice test for the admission of hearsay evidence has a constitutional dimension, and the admission of hearsay might be so unfair as to infringe the [accused's] fair trial rights."

³⁰*Kapa v The State* 2023 (1) SACR 583 (CC) at para [98], per Majiedt J.

present facts on four scores. First, the statement of Sphizer is ambiguous on its face; second, it was commissioned by a witness who testified on the same point; third, it is uncorroborated by objective evidence; and fourth, the State simultaneously contends that it has already adduced overwhelming proof.

The Kapa Safeguards

[42] This Court has further considered whether the safeguards identified by the court in *Kapa* could provide a constitutionally compliant basis for admission even if the deficiencies identified above are not individually fatal. The safeguards include directing itself to treat the hearsay with caution; refraining from relying on it as the sole or decisive basis for a finding of fact as contemplated by section 3(3)(b) of the Act; assessing it in conjunction with all other evidence; and expressly acknowledging the specific prejudice suffered by the accused.

[43] In *S v Lenting and Others* [2023] ZAWCHC 221, the court postulated that a holistic approach be adopted and that the evidence be considered in its totality, including the hearsay statement, to determine its truthfulness, reliability, and probative value.³¹ This Court has applied that approach. The safeguards cannot cure the deficiencies present here. As Schutz JA put it in *Ramavhale*, "a judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused."³²

[44] It bears repetition that a statement that is ambiguous on the very issue it is tendered to prove, that was commissioned by a witness who testified on the same point, and that is entirely unsupported by objective corroborating evidence,

³¹*S v Lenting and Others* (CC08/2018) [2023] ZAWCHC 221 at para [10].

³²*S v Ramavhale* 1996 (1) SACR 639 (SCA) at 649c-d.

cannot be rescued by safeguards designed for inherently reliable evidence. The residual probative value of such a statement, even with the full application of the *Kapa* safeguards, would be negligible, insufficient to justify the constitutional cost of admission in proceedings of this gravity.

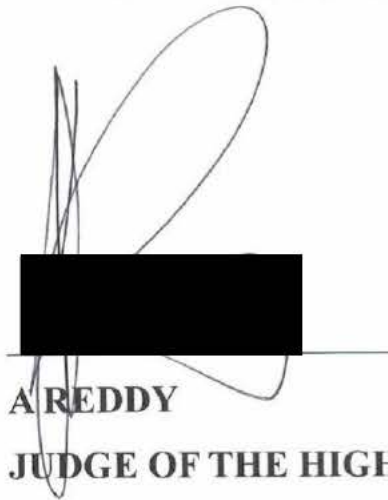
Conclusion

[45] Having weighed all seven factors holistically against one another, and having regard to the nature and gravity of these proceedings, the ambiguity in the statement on the very point for which it is tendered, the circumstances in which it was commissioned by a witness who himself testified on the same issue, the specific and constitutionally significant prejudice to the accused that the State has not adequately addressed, the irreconcilable positions advanced by the State, the inapplicability of the *Kapa* reasoning on the present facts, and the inability of the *Kapa* safeguards to rescue the application, this Court is not persuaded that the interests of justice require or justify the admission of the statement of the late April Papi Sphizer Olifant. The application falls to be dismissed. As the Constitutional Court confirmed in *Kapa*, the ultimate question is "whether there are adequate pointers of truthfulness, reliability, and probative value for the statement to be admitted as evidence."³³ There are none.

[46] The provisionally admitted hearsay evidence of Sergeant Mpudi, in so far as it recounts what Sphizer told him, remains provisionally admitted. Its ultimate admissibility and the weight to be accorded thereto will be determined at the conclusion of the trial in light of all the evidence. In this regard, section 3(3)(b) of the Act, which provides that hearsay admitted under the section shall not be

³³ 2023 (1) SACR 583 (CC) at para [103].

the only ground upon which a finding of fact may be made, will receive full application.

A handwritten signature in black ink, consisting of a large, stylized 'R' followed by a horizontal line. The signature is positioned above a black rectangular redaction box.

A REDDY

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

Appearance

For the State: Advocate Tlatsana

Instructed by: The Director of Public Prosecutions, North West Province.

For the Accused: Mr Dlanjwa, Dlanjwa Attorneys.