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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA HELD AT PALMRIGDE)**

CASE NUMBER: CC 15/2022

1) REPORTABLE: _____
2) OF INTEREST TO OTHER JUDGES: _____
3) REVISED.
DATE 18 May 2026
SIGNATURE

In the matter of:

THE STATE

versus

MARTIN ROBIN AND 7 OTHERS

**JUDGEMENT
(Admission of Hearsay Evidence)**

[1] Warrant Officer Jack Mills (hereinafter referred to as "Mills") testified on 10 September 2024 that, on 12 December 2018, he received a call from one Mr Louis Jacobus van Sandwyk (hereinafter referred to as "van Sandwyk"), who told him that he had received a call from a person who called himself Willem from Namibia.

Willem told him (van Sandwyk) that he wanted to buy a car from him (van Sandwyk). According to Mills, van Sandwyk's cell phone number that he used to call him was 0[...].

[2] Mr van Sandwyk was not called by the prosecution to confirm what Warrant Officer Mills said to him.

[3] So, as it stands, the evidence that van Sandwyk was called by Willem and stated what Mills testified about in this court is hearsay evidence as defined in section 3(4) of the Law of Evidence Amendment Act, Act 45 of 1988 (hereinafter referred to as "the Hearsay Act"), which defines hearsay evidence 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."

[4] If I understand the State's application correctly, the evidence that we are dealing with here is the evidence by Mills of what van Sandwyk said to him.

[5] The State filed an application in terms of section 3(1)(c) of the Hearsay Act to have the evidence of Mr van Sandwyk admitted as evidence in this matter.

[6] Section 3 of the Hearsay Act provides:

"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;
- (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 the 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.
- (2) 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.”

[7] The courts’ interpretation of the above provisions over the years was summarised in the minority judgment in **Kapa v S (CCT 292/21) 2023 (1) SACR 583 (CC) (24 January 2023)**, when it held that: “Courts are generally hesitant to admit hearsay evidence that is decisive in convicting the accused. The Supreme Court of Appeal in Ndlovu stated that ‘admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused’ should only be done ‘if there is compelling justification for doing so’.”

[8] Both Advocate Marriott for the State and Mr Motlounq for the defence agree, correctly so, that what van Sandwyk told Mills does not amount to an attempt to commit an offence, let alone the commission of an offence. This evidence is a far cry from the hearsay evidence that was tendered in the Kapa matter.

[9] Mr Motlounq, in his submission on behalf of accused 7, exclusively relied on the minority judgment in Kapa. That is not incorrect. However, this court, because of the doctrine of stare decisis, is bound to follow the majority judgment. The minority judgment criticised the trial court and the Supreme Court's admission and eventual conviction of Mr Kapa based on the hearsay evidence of the deceased, Ms Dasi, whose sole evidence incriminated Mr Kapa.

[10] The majority judgment, in turn, criticised the minority judgment for impermissibly evaluating the probative value of the statement in a piecemeal fashion instead of applying a holistic approach in assessing whether, on the whole, the statement was of adequate probative value in light of the other circumstantial evidence taken together.

[11] Majiedt J, giving judgment on behalf of the majority, stated at paragraph 77 that:
"The factors listed in section 3(1)(c) (of the Hearsay Act) must be viewed holistically and weighed collectively in determining whether it is in the interest of justice to admit the hearsay evidence."

[12] At paragraph 79, it is stated that:

"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."

[13] The learned judge states further at paragraph 80 that: "There are a number 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.”

[14] In the present matter, Mills’ interest in the outcome of the proceedings is very minimal, if there is any. Other than the fact that he was a member of the investigating team from the intelligence side of the investigations, it has not been established that he would have had any other interest in the outcome of the proceedings. He neither knew Willem nor van Sandwyk.

[15] Mills’ evidence is circumstantially corroborated by the fact that Mills and Willem met because of this hearsay evidence. Because of this hearsay evidence, Mills phoned Willem and the two subsequently met at Makro, Vanderbijlpark. There is no other evidence, under oath, before this court which shows how Mills and Willem would have met at the said place. The evidence is further corroborated by how Mills and Willem identified each other at the place where they met.

[16] There is proof of contemporaneity and spontaneity in that, according to Mills, after his telephone conversation with van Sandwyk, he phoned Willem and they, Mills and Willem, immediately met thereafter. It must be noted that accused 7 does not deny that he met with Mills and was arrested by Mills.

[17] According to Mr Motloun, there is no evidence adduced by Warrant Officer Venter, the cell phone analyst, to show that there was communication between Mills and Willem. On a perusal of paragraph 19 of Warrant Officer Venter’s report, exhibit VV1, Mills’ cell phone number, 0[...], is not shown as one of the numbers that were analysed by Venter. The cell phone number 0[...] is also not reflected as one of the numbers analysed by Venter. Therefore, one cannot outright say that there was no communication between Mills and Willem.

[18] According to the majority judgment in Kapa, it is not required that every material aspect of the statement must be corroborated. The requirement is that there must be corroboration of every material aspect of the statement or corroboration of a significant number of material aspects. In the latter instance, all the aspects of the statement that have not been corroborated by other pieces of evidence, first, must not contradict other objectively proven facts and, second, must fit into the picture that has been established by all the other objectively proven facts.

[19] The fact that Mills' evidence is circumstantially corroborated by the fact that he conversed with Willem and, as a result thereof, they met at Vanderbijlpark on 12 December 2018 points to its truthfulness, reliability and probative value. In **S v Cupido (1257/2022) [2024]**, the court approved of the dictum in **S v Ndlovu and Others [2002] ZASCA 70; 2002 (3) All SA 760; 2002 (6) SA 305**, where it was pointed out by the court that:

“Probative 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?’ In the present case, the guarantees of reliability are high. The most common justification for admitting the hearsay evidence in the present case is the numerous pointers to its truthfulness.”

[20] These proceedings are indeed criminal proceedings. As has been said, this court will have to tread carefully and exercise extreme caution in the evaluation of the issues in this matter.

[21] The degree of hearsay of the statement in this case is very minimal. As has been stated, it does not come near to any proof of any offence being committed by Willem. It does not even come near the modus operandi allegedly used by the suspects in the alleged commission of the other offences except for the phone call and the offer to purchase an advertised motor vehicle. For all we know, it

might have been a genuine call to purchase the motor vehicle. The statement, as it stands, on its own, does not prove the guilt of the accused at all and I therefore find that there is minimal prejudice to the accused.

[22] Mills' evidence explains why and how he and Willem met each other. The statement establishes why Mills went to the meeting place and, of course, how he and Willem identified each other. As things stand, as has been pointed out, there is no other evidence under oath which explains how and why Mills and Willem met except Mills' evidence. There is therefore no basis upon which this court may reject Mills' evidence.

[23] It is so that the court should take into account why the person upon whom the probative value of the evidence lies does not himself testify. The Act does not specify the instances that the court may consider as excusable to explain why the witness is not called to testify in the matter. That is left to the discretion of the trial court. There have been instances where the hearsay statement has been admitted as evidence against an accused where the witness was present in court but recanted the prior statement that he made to the police, see **S v Rathumbu [2012] ZASCA 51; 2012 (2) SACR 219 (SCA); S v Mathonsi [2011] ZAKZPHC 33; 2012 (1) SACR 335 (KZP); Mawanda Makhala and Another v Director of Public Prosecutions, Western Cape [2024] ZACC 28**. In the **Kapa** matter, the witness passed away before the trial started. See also **S v Lenting and Others 2023 ZAWCHC 221**.

[24] Sergeant Leisa testified that van Sandwyk has immigrated to the United States of America. There are no reasons why this court may doubt the evidence of Sergeant Leisa. Mr Motlounq questioned why van Sandwyk may not be subpoenaed to travel from wherever he is to come and testify in this court, or why a commission de bene esse cannot be established to take the evidence of Mr van Sandwyk wherever he is in the United States of America.

[25] As has been alluded to earlier, the hearsay statement in issue in this matter is an innocuous statement of a person wanting to purchase a motor vehicle advertised for sale. It neither points to the commission of a crime nor to the

alleged modus operandi allegedly used to commit the other offences. At worst, it raised a suspicion. That is all. It really does not justify the payment of the exorbitant expenses of flying van Sandwyk from the United States of America, payment for hotel accommodation and other expenses. Neither does it justify the expenses of setting up a commission *de benne esse*.

[26] Interestingly, in the Lenting case, Lekhuleni J found that the Constitutional Court in the Kapa matter changed how the courts should approach the admission of a hearsay statement. He found that there is no need for the State to bring a separate application for the admission of the hearsay statement but must simply lead evidence of the existence of the statement and submit it as an exhibit during the presentation of its case (the State's case).

[27] In the Lenting matter, the State led the evidence of the police officer who took the deceased's statement and wanted the officer to read the statement and hand it over to the court as an exhibit. The defence objected and wanted the State to bring a formal application for the admission of the statement. The prosecution argued that the Constitutional Court in the Kapa matter had ruled that there is no need for a separate application for the admission of the statement.

[28] The learned judge states as follows at paragraph 7:

"From the submissions made by the various counsel in this case, I gathered that there are different opinions on how the court should deal with such a matter following the decision of the Constitutional Court in Kapa. There are two schools of thought holding divergent views.

(8) The first school of thought believes that the State must make its application, and the court must consider the section 3(1)(c) jurisdictional facts and decide whether it accepts it. Simply put, this school believes that the court must hold a trial within a trial and decide whether to admit the statement, while the second school of thought believes that the court should only

consider the jurisdictional facts set out in section 3(1)(c) of the Act when it evaluates the entire evidence.

(9) In my view, there is far more force in the argument that the Kapa decision has significantly changed the approach the court must follow when considering evidence in the form of a deceased's statement....

(15) In my view, the procedure that the State followed in the present matter in handing in the deceased's statement cannot be faulted. For the court to attach weight to this statement, the jurisdictional facts set out in section 3(1)(c) of the Law of Evidence Amendment Act must be satisfied. In my opinion, that should happen during the analysis of the entire evidence. In evaluating the evidence, the court must adopt the holistic approach and consider the evidence in its totality with the hearsay statement to determine its truthfulness, reliability and probative value. In summary, I agree with Mr Klopper and Mr Damon that the evaluation in terms of section 3(1)(c) should be considered later when all the evidence is evaluated. Therefore, the view espoused by the first school of thought falls to be rejected. Thus, the objection is hereby overruled.”

[29] I express no view on the correctness or otherwise of the approach by the learned judge in the Lenting matter. It is interesting that Thulare J of the same Western Cape Division did not adopt the same approach in the matter of **S v Beja [2023] ZAWCHC 113**. This court is content with the approach we adopted in this matter.

[‘30] This brings me to the submissions made by Mr Motloung in respect of the application filed by the State during September 2024, in which it sought to apply for the admission of van Sandwyk's statement in terms of section 3(1)(c) of the Hearsay Act. The State later sought to abandon that application and brought a new application through which it sought the admission as evidence of the evidence of Warrant Officer Mills that van Sandwyk told him that Willem phoned him and told him that he wanted to buy the motor vehicle advertised for sale by van Sandwyk on OLX.

[31] Mr Motloung objected to the withdrawal of the said statement and argued that the State ought to have submitted an affidavit in terms of Rule 28 of the Uniform Rules of the Superior Court, in which affidavit the State should set out the reasons for the withdrawal or abandonment of the said application.

[32] I do not intend to be long-winded on this aspect as, in my view, it does not take the matter anywhere. At the end of the day, this court cannot make an order which it is unable to enforce. This is in line with the common-law doctrine of effectiveness, which essentially states that a court shall not exercise jurisdiction over a matter unless it can give an effective judgment. In other words, a court can only grant an order where compliance therewith can be expected and where non-compliance therewith can be dealt with accordingly in terms of South African law, see **Veneta Minereria Spa v Carolina Collieries (PTY) Ltd 1987 (4) SA 883(A) at 893F**.

[33] This court cannot force the State to move an application which the State does not want to proceed with further. The court cannot force the State not to abandon an application. What law is this court going to apply if the State does not carry out such order? I therefore find that the objection by Mr Motloung is, with respect, not helpful in this instance. I can understand his frustration but can unfortunately not make an ineffective order.

[34] I have already addressed the jurisdictional requirements of section 3(1)(c) of the Hearsay Act and, without regurgitating what the court considered earlier, it should be emphasised that these are, of course, criminal proceedings. Therefore, the court should be hesitant to admit hearsay evidence, especially where the conviction of the accused will solely result from such hearsay evidence. Both the State and the defence counsel have agreed, correctly so, that the statement is inconsequential and causes very little, if any, prejudice to the accused.

[35] I am of the view that, holistically taken and weighed collectively, all the factors in this matter point to the conclusion that it is in the interest of justice to admit the hearsay evidence in this matter.

[36] It is therefore ruled that the evidence adduced by Warrant Officer Jack Mills, namely that Mr Louis Jacobus van Sandwyk telephoned him and advised him that a person named Willem from Namibia telephoned him and advised him that he wanted to buy a motor vehicle from him that he had advertised for sale on OLX, is admitted as evidence.

Dated at Palmridge on this 18 May 2026

JJ Mlotshwa AJ

Acting Judge, Gauteng High Court, Pretoria