THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 438/20

In the matter between:

MAWANDA MAKHALA **FIRST APPELLANT**

VELILE WAXA **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Makhala & Another v The State* (438/2020) [2021] ZASCA 19 (18 February 2022).

Coram: MOCUMIE, MAKGOKA and MOTHLE JJA and MEYER and UNTERHALTER AJJA

Heard: 2 November 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 12h00 on 18 February 2022.

Summary: Criminal Procedure – State witness recanting prior inconsistent statements – the constitutional rights of witness – hearsay evidence – admissibility of statements – section 3(1) of the Law of Evidence Amendment Act 45 of 1988 – admissibility at common law –

declaration of a witness as hostile – accomplice evidence – cautionary rule – corroborative evidence – burden of proof.

ORDER

On appeal from: The High Court, Western Cape Division, Eastern Circuit Local Division (Henney J, sitting as the court of first instance):
The appeal is dismissed.

JUDGMENT

Unterhalter AJA

Introduction

[1] The first and second appellants were convicted by Henney J in the high court on one count of murder, one count of possession of an unlicensed firearm and one count of the unlawful possession of ammunition. The appellants were each sentenced to life imprisonment for the murder and five years of imprisonment on the remaining counts, which were ordered to run concurrently with the life sentences. The appellants were granted leave to appeal to this Court.

[2] On 23 July 2018, Mr Molosi attended a school governing body meeting at Concordia High School. He was the chair of the governing body. He was also a councillor of the Knysna Municipal Council. After the meeting, he was given a lift and dropped off near his home. While walking home, he was shot and killed.

[3] A team of police officers was appointed to investigate the murder. The police received information that the first appellant, Mr Mawanda Makhala, was seen in the Pop Inn Tavern in Concordia on the weekend before the murder, with two other persons, one of whom was his brother, Mr Luzuko Makhala. On 1 August 2018, Sergeant Wilson traced Luzuko Makhala who confirmed that he was in the area during the weekend of the murder. Luzuko Makhala said that he had given a lift to an unknown man in the Eastern Cape and then drove to Knysna over the weekend in question. Sergeant Wilson, however, viewed camera footage of the N2 highway, which showed that Luzuko Makhala's vehicle was travelling from Cape Town to Knysna on 22 July 2018.

[4] Confronted with this evidence, according to Sergeant Wilson, Luzuko Makhala indicated that he wished to recount his part in the murder of Mr Molosi. His rights were explained to him. Luzuko Makhala was informed that he would be treated as a witness under s 204 of the Criminal Procedure Act 51 of 1977 (CPA). Section 204 permits a witness to give incriminating evidence for the prosecution. Upon testifying frankly and honestly, such a witness may be discharged from prosecution by the court.

[5] Luzuko Makhala gave first statement to Colonel Ngxaki on 13 August 2018. Colonel Ngxaki, a policeman of some 25 years' experience, gave evidence at the trial. He testified that Luzuko Makhala was informed of his constitutional rights: his right to legal representation, his right to remain silent and not to incriminate himself. Section 204 of the CPA was also explained to him. Freely and voluntarily, according to Colonel Ngxaki's testimony, Luzuko Makhala made a detailed statement that

Colonel Ngxaki wrote down. I shall refer to this statement as the first statement.

[6] The following was recorded in the first statement. The second appellant, Mr Velile Waxa, was an independent councillor of the Knysna Municipal Council. Mr Waxa sought the services of a hitman to kill Mr Molosi, a councillor representing the African National Congress (ANC). Mawanda Makhala (first appellant) asked whether his brother, Luzuko Makhala, knew of such a person. Luzuko Makhala did. The person he procured was the third accused in the trial, Mr Vela Dumile. Luzuko Makhala introduced Mr Dumile to Mr Waxa. He brought Mr Dumile from Cape Town to Knysna to kill Mr Molosi. In addition, he facilitated the killing by ensuring that Makhala pointed out the home of Mr Molosi to Mr Dumile prior to the shooting and after that, Mr Dumile shot Mr Molosi. Thereafter, Luzuko Makhala transported Mr Dumile back to Cape Town.

[7] Luzuko Makhala gave a second statement to Sergeant Mdokwana. Sergeant Mdokwana was transporting Luzuko Makhala from Knysna back to Cape Town. Luzuko Makhala recounted that on 18 July 2018, he had received a call from Mr Waxa, who said that he would be sending him R1000 to purchase petrol to transport Mr Dumile to Knysna. On 20 July 2018, Luzuko Makhala drew the money, and Mr Waxa called him to confirm whether he had received the money. Sergeant Mdokwana asked Luzuko Makhala whether he would confirm this in a statement. He agreed, and this was done. I shall refer to this as the second statement. Luzuko Makhala also handed over his Nokia cell phone.

[8] The first and second statements incriminated Mawanda Makhala, Mr Waxa, Mr Dumile and Luzuko Makhala in the murder of Mr Molosi. The trial court admitted the first and second statements into evidence and relied upon these statements to convict the accused of murder and the related counts. The central question in this appeal is whether the trial court was correct to do so. It is common ground in this appeal that without recourse to this evidence, the appellants' convictions cannot stand.

The trial court's judgment

[9] The State called Luzuko Makhala to give evidence. Without forewarning to the prosecution, Luzuko Makhala recanted the contents of his first and second statements that incriminated himself and the accused in the murder. The prosecution sought to have Luzuko Makhala declared a hostile witness. The trial court did so. Luzuko Makhala testified that the incriminating portions of the statements were fabrications that the police forced him to record in the statements. He claimed that he was intimidated by the police and threatened with assault and as a result, made statements that he thought the police wanted from him.

[10] The trial court's judgment, quite properly, devoted considerable attention to the first and second statements and whether the State could place reliance upon them, in the light of Luzuko Makhala's recantation in the witness box of the incriminating portions of the statements.

[11] First, the trial court considered whether Luzuko Makhala was forced to make the statements by the police and did not do so freely and voluntarily. The trial court found that the evidence of Colonel Ngxaki and

Sergeant Mdokwana, who took down the statements, was 'overwhelmingly convincing' and corroborated by Sergeant Wilson. Luzuko Makhala was found to be the author, originator and principal source of the two statements.

[12] Second, the trial court considered whether the first and second statements should be admitted into evidence in terms of s 3(1) of the Law of Evidence Amendment Act 45 of 1988 (the Hearsay Act). Upon a consideration of the factors listed in s 3(1)*(c)*, the trial court admitted the two statements into evidence. Among the factors considered were the probative value of the evidence and the caution that was warranted before admitting the statements, given Luzuko Makhala's participation in the commission of the crimes. The trial court considered the risk of falsity to be minimal. Furthermore, the content of the statements included information otherwise unknown to the police. Aspects of the statements were also confirmed by independent and objective evidence, principally the identification of the third accused, Mr Dumile, by Dumisani Molosi and Mrs Molosi (the son and wife of the deceased). They identified Mr Dumile as the person who had come to the Molosi's house to inquire as to the whereabouts of Mr Molosi before the murder. This, the trial court found, supported the probative value of the statements.

[13] Third, the trial court assessed the evidence given by the accused at trial and the witness who testified on behalf of the third accused. The evidence of the accused was found not to be reasonably possibly true and was rejected as false.

[14] The trial court concluded that the accused were guilty on all three counts. The admission of the first and second statements into evidence by the trial court was central to this holding by the trial court.

The issues on appeal

[15] The appellants challenged the trial court's admission and use of the first and second statements. If these statements should not have been admitted into evidence or the use of this evidence was otherwise excluded, then, given the decisive centrality of the statements, the appellants' convictions are unsound. This was common ground between the parties, and this position is not to be doubted.

[16] Though overlapping in certain respects, the appellants' challenges may broadly be understood as follows. First, the statements must have been lawfully given. If the statements were not given freely and voluntarily, or were extracted in violation of the rights of Luzuko Makhala, or were induced by false assurances, or were otherwise compromising of the standards that render a trial fair, then no reliance should have been placed upon the statements, and the trial court was in error in doing so. If evidence is illegally obtained, it stands to be excluded. I shall refer to this challenge as the legality challenge.

[17] Second, the appellants contended that the trial court should not have admitted the statements into evidence. The admissibility of the statements is not simply a question of the application of s 3(1)*(c)* of the Hearsay Act, more is required. Here too, questions of voluntariness, reliability, accuracy and an appreciation of the circumstances under which the statements were

given must be considered. The appellants' submitted that the statements do not measure up to what is required of a trial court for it to place reliance upon the statements. In addition, the appellants' contended, the trial court should have considered whether justice is served by reliance upon hearsay evidence, as the key evidence by recourse to which the trial court convicted the appellants. The trial court did not do so. For these reasons also, the convictions cannot, therefore, stand. I shall refer to this as the hearsay challenge.

[18] Third, the trial court admitted the statements consequent upon its declaration that Luzuko Makhala was a hostile witness. The appellants submitted that the trial court erred in this declaration because it failed properly to appreciate what it is to be a hostile witness. Luzuko Makhala was not a hostile witness, and hence his prior statements ought not to have been admitted into evidence. I shall refer to this as the hostile witness challenge.

[19] Fourth, the statements were made by an accomplice. The dangers of such evidence are well known. Although the trial court referenced the cautionary rule of application to the statements of an accomplice, the trial court failed properly to assess the risks inherent in the statements. Had the trial court done so, it would not have placed the reliance that it did upon the statements. For this reason also, the convictions are, therefore, unsound. I shall refer to this as the cautionary challenge.

[20] Lastly, even if the statements are admitted or relied upon, and given that Luzuko Makhala was plainly a liar and dishonest, more was required

by way of corroboration for the State to prove its case beyond reasonable doubt. Such corroborative evidence, as there was, did not discharge the State's burden of proof. Hence, the convictions cannot stand. I will refer to this as the onus challenge.

[21] I shall consider these challenges in turn.

The legality challenge

[22] At common law, the general rule was that relevant evidence was admissible, notwithstanding the want of legality in its production.[1] This rule was subject to the recognition that the courts enjoyed a discretion to exclude evidence, otherwise admissible, that operated unfairly against the accused.[2] The common law's residual regulation of illegally obtained evidence has been changed by s 35(5) of the Constitution. This provision reads as follows, '[e]vidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice'. As *S v Tandwa*[3] explained, s 35(5) allows that the admission of evidence that violates a right in the Bill of Rights will not always render the trial unfair, but the evidence must be excluded if it does so. So too, such evidence may not render the trial unfair but may nevertheless be detrimental to the administration of justice. If that is so, then the evidence must also be excluded.

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[1] *S v Pillay* 2004 (2) SACR 419 (SCA) para 6.
[2] See *S v Mushimba* 1977 (2) SA 829 (A) citing *Kuruma Son of Kaniu v Reginam* (1955) 1 All E.R. 236 op bl. 239.
[3] *S v Tandwa and Others* [2007] ZASCA 34, 2008 (1) SACR 613 paras 117-120.

[23] The framing of s 35(5) is distinctive in the scheme of s 35 because it is not specifically formulated to regulate the rights of arrested, detained or accused persons, as is the case in ss 35(1)–(3). In *S v Mthembu*,[4] this court observed that s 35(5) requires the exclusion of evidence improperly obtained from any person, not only from an accused. This must be so because the provision is concerned to ensure that the trial is fair and to secure the administration of justice from any detriment. While much of a trial's fairness is concerned with the rights of the accused, the administration of justice has a wider remit that seeks to uphold the integrity of our institutions of justice. It follows that if evidence is procured from a person, whether or not that person is an accused, in a manner that violates the Bill of Rights, then s 35(5) is engaged to determine whether such evidence should be excluded. Thus, s 35(5) will be of application to the two statements procured from Luzuko Makhala if the statements were obtained in a manner that violated his rights in the Bill of Rights. I turn to consider this question.

[24] The appellants contended that the two statements were procured from Luzuko Makhala in violation of his rights. Those rights are claimed to have been violated because the statements were not made voluntarily, that is, of his own free will. Rather, they were induced by false promises that he spoke under indemnity from prosecution. Luzuko Makhala was also not given his right to consult a lawyer, nor was he informed of his right against self-incrimination.

[4] *S v Mthembu* [2008] ZASCA 51; [2008] 3 All SA 159 (SCA); [2008] 4 All SA 517 (SCA); 2008 (2) SACR 407 (SCA) para 27.

[25] These contentions must surmount a threshold issue: was Luzuko Makhala a detained, arrested or accused person, and if not, what rights of his in the Bill of Rights were violated? This issue arises because ss 35(1)-(3) confer rights upon everyone who is arrested (ss (1)), everyone who is detained (ss (2)), and to every accused person (ss (3)). The evidence of the policemen who engaged with Luzuko Makhala, which the trial court accepted, does not show that he was arrested, detained or became an accused person. On the contrary, as I have recounted, Sergeant Wilson took up his enquiries with Luzuko Makhala to ascertain his whereabouts over the weekend of 22-23 July 2018. Luzuko Makhala was not even a suspect at that stage. Rather, Sergeant Wilson questioned him again because the account he had given did not tally with the camera footage seen by Sergeant Wilson. It was then that Luzuko Makhala chose to cooperate with the police and make the statements that he did.

[26] Clearly, upon indicating his willingness to make a statement of his complicity in the murder, Luzuko Makhala was an accomplice. However, at no point, as evidenced by the facts, was he detained or arrested; he proceeded to make the first and second statements willingly. The clear understanding of the prosecution was that he was to testify for the State at the trial and was called as a witness to do so. His surprise recantation in the witness box of his prior statements took the prosecution by surprise and resulted in him being declared a hostile witness. This sequence of events demonstrates that Luzuko Makhala was never an arrested, detained or accused person, even under the most extended meanings of these concepts.

[27] It follows that Luzuko Makhala had no rights under s 35 that could have been violated. Bearing this in mind, what other rights in the Bill of Rights might Luzuko Makhala have enjoyed? None were suggested to us by counsel.

[28] Counsel for the appellants did, however, submit that the right to a legal practitioner, the right to remain silent and the right to make a statement voluntarily were rights enjoyed by a suspect and that Luzuko Makhala was, or at least became, a suspect when he indicated that he would make a statement to the police concerning his participation in the murder.

[29] Our case law has not taken a consistent position as to whether the rights recognised in s 35, that are of application to arrested or detained persons, are also enjoyed by persons suspected by the police of committing a crime, who have not been arrested or detained. The different positions are well summarised in *S v Orrie*.[5] In what measure suspects enjoy, some of the rights extended to detained and arrested person is not settled. However, once a person is a suspect, what they say that is incriminating is likely to have consequences. They may be arrested, detained and ultimately accused of the crime, or they may seek to assist the prosecution as a witness. Either outcome carries significant legal entailments. This provides the justification for recognising that a suspect should be informed of their right to remain silent, the consequences of not doing so, and their right to secure the services of a legal practitioner.

[5] *S v Orrie and Another* [2005] 2 All SA 212 (C); 2005 (1) SACR 63 (C).

[30] However, any such rights of a suspect cannot derive from s 35. Section 35 is concerned with the rights of arrested, detained and accused persons. To be a suspect will ordinarily be the basis for a person to be arrested, detained or accused. However, being a suspect does not, without more, make a person one who is arrested, detained or accused. Hence, the rights of a suspect are not recognised in s 35. It may be that these rights could fall within the scope of the right to security of the person (s 12 of the Constitution), or more tenuously, the right to the protection of dignity (s 10 of the Constitution) or as an incident of the protections provided under the Judges' Rules to suspects,[6] when deciding whether evidence of what they have said may be used in evidence at a trial.

[31] I will assume, without deciding, that a suspect is entitled, before taking a step that may have significant implications, to be informed of their right to silence and their right to consult a legal practitioner. I will also assume, without deciding, that quite apart from s 35(5) of the Constitution, the common law rule that excludes illegally obtained evidence continues to have application in circumstances where s 35(5) is not of application because the right infringed is not a right in the Bill of Rights.

[32] On these assumptions, does any basis exist to conclude that Luzuko Makhala had his rights as a suspect infringed, and if so, that the appellants' trial would be rendered unfair by admitting into evidence the two statements, or would there be detriment to the administration of justice?

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[6] See *S v Mthethwa* 2004 (1) SACR 449 (E).

[33] The appellants relied on the form that was used to take down the first statement upon which the following was recorded: only the Director of Public Prosecutions (DPP) can make a decision as to whether Luzuko Makhala would be utilized as a witness in terms of s 204 of the CPA; should the DPP decline to do so his statement will not be tendered by the State in evidence against him; Luzuko Makhala was warned that he is under no obligation to make any statement or admit anything that may incriminate him; he may first consult an attorney and obtain legal advice before making a statement; and that he makes the statement voluntarily. The appellants contend that the first statement does not record how Luzuko Makhala responded to the warnings and information given in the statement, nor whether the information given to him was properly understood.

[34] There are a number of obstacles that the appellants would have to surmount to make out a basis for excluding the two statements on the basis that Luzuko Makhala's rights were violated.

[35] First, if Luzuko Makhala enjoyed rights as a suspect, when did he become a suspect? When Sergeant Wilson presented him with evidence that he was driving from Cape Town to Knysna, and not from the Eastern Cape, Sergeant Wilson's testimony was that LuzukoMakhala was apologetic, and at that stage, wished to tell the police what had happened. Luzuko Makhala was not a suspect when confronted by Sergeant Wilson with the evidence that his prior account of his movements was untruthful. His decision to make a statement to the police was not as a suspect, but according to Sergeant's Wilson testimony, a freely made response, having been caught in an obvious falsehood. Whatever Luzuko Makhala's

reasons, he decided to co-operate with the police and make a statement before he was a suspect, and without any coercion. Once that is so, the police were under no duty, at that stage, to warn him of his rights to remain silent and to consult a legal practitioner. He had no such rights because he was not a suspect. He was simply a person assisting the police with their investigation and chose to tell the police what he knew. It may be that once Luzuko Makhala had conveyed his decision to Sergeant Wilson that he wished to come clean that he became a suspect. However, by then, the die was cast, his choice was made, and it is hard to imagine why he could then claim the right to remain silent and the right to consult a legal practitioner.

[36] Second, even if Luzuko Makhala was a suspect, on the evidence of Sergeant Wilson, Colonel Ngxaki, and Sergeant Mdokwana, which evidence was all accepted by the trial court, there was no indication that any of his rights were violated. Colonel Ngxaki informed Luzuko Makhala of his right to silence, his right not to incriminate himself and his right to consult with a legal practitioner. There was no indication that Luzuko Makhala did not understand what was being said to him or that he wished to have time to consider his position and procure the services of an attorney. Luzuko Makhala had chosen to assist the police. His position as a potential witness for the prosecution was explained to him. The use to which his statement could be put was also made clear. He was making the statement voluntarily. Luzuko Makhala's testimony that his statements were coerced by the police and fabricated to do their bidding was rejected by the trial court, and rightly so. There is no reason to revise that assessment of this evidence by the trial court. On the facts found by the trial court, based not simply on the form used to capture the statements but

the testimony of the policemen who attended upon Luzuko Makhala when he made the statements, there was no violation of his rights.

[37] The appellants also contend that the form used by Colonel Ngxaki, when taking down the first statement, contained the misleading undertaking that Luzuko Makhala's incriminating statement would not be used against him if he was not accepted as a state witness. This, it was submitted, is not the position because s 204(4)*(a)* of the CPA protects a State witness who testifies at trial but is not discharged from prosecution. The provision does not protect the prior statements of a witness who may never become a state witness at all. Whether the prior statement of a witness may be admitted into evidence is a matter to which I will come. On this aspect of the case, however, it suffices to observe that there was no showing that the undertaking was in any way operative in bringing about Luzuko Makhala's willingness to give the statements that he did. As I have explained, that came about at an earlier point in his engagement with the police and for reasons unconnected to any prudential assessment of what his statement could be used for.

[38] Third, s 35(5) of the Constitution excludes evidence obtained in a manner that violates any right in the Bill of Rights if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice. As I have observed, *Mthembu* held that s 35(5) of the Constitution requires evidence of any person, not only the evidence of the accused, to be excluded if obtained in violation of that person's rights in the Bill of Rights. Even if the appellants could substantiate their contention that some right of Luzuko Makhala was violated, how does that

render their trial unfair or give rise to detriment to administration of justice? That case was not made out by the appellants. Luzuko Makhala gave evidence at the trial. He was available to be cross-examined on every aspect of the two statements and the circumstances in which they were made. Indeed, upon his recantation in the witness box, Luzuko Makhala did everything he could to assist the appellants' case. In these circumstances, it is hard to discern how the trial was rendered unfair. There was no unfairness visited on the appellants. Just as the trial court accepted the evidence of the policemen who testified as to how the statements came to be made by Luzuko Makhala, I similarly conclude: there was no coercion; he acted voluntarily, out of some combination of apology and self-interest. No detriment to the administration of justice is apparent.

[39] In summation, then, whether under s 35(5) of the Constitution or at common law, the two statements were not obtained in violation of Luzuko Makhala's rights. The trial was not rendered unfair by the admission of the statements, nor was there anything done in securing the statements that constituted any material detriment to the administration of justice. The legality challenge must therefore fail.

The hearsay challenge

[40] The hearsay challenge gives rise to a number of issues. It will be recalled that the hearsay challenge proposes that the extra-curial statements made by a witness who is an accomplice should not be admitted into evidence as against the accused, or should not be admitted without careful consideration of the dangers of doing so, in order to preserve the fairness of the trial. Among the matters that will warrant consideration are the

following. Were the statements made voluntarily? Is there reason to think the statements are truthful? What of the dangers inherent in an accomplice's evidence? Finally, what of the risks associated with the admission of hearsay evidence?

[41] Our courts have offered different approaches as to how to treat the admissibility of the extra-curial statements of a witness. Sometimes the witness is an accused whose extra-curial statements are sought to be admitted into evidence against their co-accused. Sometimes, as in the present matter, the extra-curial statements are those of a witness who is an accomplice. In other cases, the witness may be neither an accused nor an accomplice. One approach is to consider the extra-curial statement hearsay evidence and apply the regime of the Hearsay Act to determine whether the extra-curial statements should be admitted into evidence. This position was adopted in *S v Ndhlovu.*[7] A second approach is to treat the dangers inherent in evidence of this kind as too great and exclude its admission against the accused. That was done in *Litako and Others v S,*[8] where the extra-curial statements of one accused were not admitted into evidence as against the other accused. A third approach is to consider the common law rule that a prior inconsistent statement of a witness is admissible to impeach the credibility of the witness who made the statement, but it cannot be tendered as proof of the contents of the statement. I shall refer to this as the rule against prior inconsistency. In *S v Mathonsi*,[9] the court revisited the rule against prior inconsistency and allowed the prior extra-

[7] *S v Ndhlovu and Others* [2002] 3 All SA 760 (SCA).
[8] *Litako and Others v S* [2014] ZASCA 54; [2014] 3 All SA 138 (SCA); 2014 (2) SACR 431 (SCA); 2015 (3) SA 287 (SCA).
[9] *Mathonsi v S* [2011] ZAKZPHC 33; 2012 (1) SACR 335 (KZP).

curial statement of a witness to be admitted as probative evidence of the contents of the statement, but only on the basis that the statement would be admissible if given in court, that it was voluntarily made, under circumstances where the maker was likely to be telling the truth, and that the statement was accurately transcribed (if in writing).

[42] These rulings are unified in their recognition that the admission into evidence of the extra-curial statements of a witness carries dangers that may impact upon the fairness of the trial. However, the different approaches have led to some difficulty and inconsistency, as well as critical academic commentary. I turn then to consider under what rule the admission into evidence of the extra-curial statements of a witness, who is an accomplice, should be determined.

[43] I commence with the question as to whether the two statements of Luzuko Makhala constitute hearsay evidence under the definition of hearsay in the Hearsay Act. Section 3 (4) of the Hearsay Act 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'. This definition focuses upon the declarant to determine whether the evidence is hearsay. In the present case, does the probative value of the two statements depend upon the credibility of anyone other than Luzuko Makhala?

[44] The simplicity of the definition of hearsay has nevertheless occasioned some difficulty. The difficulty was encapsulated in *Ndhlovu.*[10]

[10] Ibid fn 7 *Ndhlovu* para 29.

What if the person who made the extra-curial statement does not testify; or testifies but denies making the statement; or testifies and admits making the statement but denies its correctness, or testifies but cannot recall whether or not they made the statement, or testifies and confirms making the statement and its correctness. *Ndhlovu* reasons that the definition of hearsay in the Hearsay Act does not make an extra-curial statement admissible simply because the person who is said to have made the statement is called to give evidence as a witness at the trial. Rather, the extra-curial statement of the witness will be admitted upon the court having regard to the matters listed in s 3(1)*(c)(*i)-(vii) and being of the opinion that the evidence should be admitted in the interests of justice.

[45] The holding in *Ndhlovu* that the extra-curial statements of two accused, incriminating of their co-accused, when disavowed by them at trial, were not admissible simply because the extra-curial declarants testify at trial was reasoned in the following way. To admit the extra-curial statements, when the witness disavows making them, or cannot recall doing so, would not permit of the safeguard of cross-examination if the statement was admitted into evidence. The evidence would, without more, be untrustworthy. Hence, other safeguards are required, and that is what s 3(1)(*c)* secures. Furthermore, the probative value of the extra-curial statements does not depend upon the credibility of the declarant at the time they give evidence at trial but at the time that the extra-curial statement is made. The admissibility of the extra-curial statements thus required the trial court to make a ruling under s 3(1)*(c)* of the Hearsay Act, that is to say, on the basis of what the interests of justice required. It was found that

the extra-curial statements of the two accused in *S v Ndhlovu* were admissible upon an application of s 3(1)*(c)*, as against their co-accused.

[46] The holding in *Ndhlovu* that the extra-curial admissions of two accused, amounting to the incrimination of the co-accused and then being admissible against the co-accused, was reconsidered in *Litako*. In *Litako*, this court referenced the English common law position and our common law that an accused's confession or admission is admissible in evidence only against the declarant and not their co-accused. The use of the Hearsay Act to have the informal admissions of an accused admitted in evidence against a co-accused gives rise to dangers pertaining to the fairness of the trial that the common law prohibition guards against. This Court referenced the introductory words of s 3(1) of the Hearsay Act, which renders its provisions 'subject to any other law'. That law includes the common law. There was no warrant to think that the protections of the common law that exclude the admissibility of the admissions or confession of one accused against another had been abrogated by the Hearsay Act. The Court held that the extra-curial admission of one accused does not constitute evidence against a co-accused and is therefore not admissible against such co-accused.[11]

[47] Therefore, where *Ndhlovu* considered that the protections contained in s 3(1)*(c)* of the Hearsay Act provided sufficient protections to permit the admission of the extra-curial statements of one accused against their co-accused in certain warranted cases, *Litako* holds that this is impermissible, notwithstanding the provisions of the Hearsay Act.

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[11] *Litako* at 307G.

[48] In *Mathonsi,* a witness, Mr Cele, provided a written statement to the police in which he implicated the accused in a murder. When Mr Cele gave evidence at trial, he gave a version at odds with his statement, which he claimed had been exacted under duress. Mr Cele was declared a hostile witness and was cross-examined by both the prosecution and the defence. The trial court admitted the written statement into evidence and considered it when convicting the accused. The accused appealed and contended that the trial court should not have admitted the contents of Mr Cele's written statement into evidence.

[49] In the high court, Madondo J examined the common law rule pertaining to the admissibility of prior inconsistent statements: such statements are admissible to discredit the witness, but not as evidence of the facts contained in the statements. After an analysis of the position in a number of common law jurisdictions, the high court adopted the ruling of the Canadian Supreme Court in *R v B (K.G.).*[12] Following *R v B (KG)*, a prior inconsistent statement was admissible as proof of its contents if five conditions are met:

'(1) the evidence contained in the prior statement is such it would be admissible if given in a court; (2) the statement has been made voluntarily by the witness and is not the result of any undue pressure, threats or inducements; (3) the statement was made in circumstances, which viewed objectively would bring home to the witness the importance of telling the truth; (4) that the statement is reliable in that it has been fully and accurately transcribed or recorded; and (5) the statement was made in circumstances that the witness would be liable to criminal prosecution for giving a deliberately false statement.'[13]

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[12] *R v B (K.G.)* [1993] 1 S.C.R 740.
[13] *Ibid* at 746.

To these conditions, Madondo J added a sixth condition: the accused must be afforded the opportunity to cross-examine the person who made the statement. This new rule was required in recognition of what Lamer CJ in *R v B (K.G.)* characterised as 'the changed means and methods of proof in modern society'.[14]

[50] In *Rathumbu v S,*[15] this Court also had occasion to consider the sworn statement of the appellant's sister that incriminated the appellant. Ms Rathumbu also recanted the contents of her statement when called to give evidence. She was declared a hostile witness and cross-examined on her sworn statement. The trial court relied upon the contents of the sworn statement and convicted the appellant. On appeal, this Court did not address the common law rule as to the limited purpose for which a prior inconsistent statement could be used at trial. Rather, it considered whether the sworn statement was correctly admitted into evidence, in compliance with s 3(1)*(c)* of the Hearsay Act, relying upon *Ndhlovu.*

[51] How then to determine the hearsay challenge in light of this body of case law? It seems logical to commence with the Hearsay Act. The legislature has provided a statutory regime that requires that hearsay evidence shall not be admitted into evidence in criminal proceedings, save under stated conditions. If the two statements of Luzuko Makhala constitute hearsay evidence, then their admissibility is to be decided, in the first place, in compliance with the Hearsay Act.

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[14] *Ibid* at 741.
[15] *Rathumbu v S* [2012] ZASCA 51; 2012 (2) SACR 219 (SCA).

[52] At common law, an extra-curial statement was hearsay if it was made by a declarant who was not called to give evidence and was hence not subject to cross-examination. Unless one of the exceptions to the hearsay rule was of application, the extra-curial statement was excluded. The rationale for the exclusion was that if the declarant could not be tested under cross-examination as to the truth of the statement, the trial court might rely upon it, when such reliance was not warranted. That would be prejudicial to the accused.

[53] As I have observed, the Hearsay Act defines hearsay evidence to mean evidence, 'the probative value of which depends upon the credibility of any person other than the person giving such evidence'. *Ndhlovu* ruled that the prior incriminating extra-curial statement of an accused could not be admitted into evidence against his co-accused simply because the declarant was called to give evidence. To admit the evidence, the requirements of s 3(1)*(c)* must be met, and the court must be of the opinion that the evidence should be admitted in the interests of justice.

[54] It will be recalled that this Court in *Ndhlovu* had two principal reasons for its interpretation of the Hearsay Act. First, if the witness who made the extra-curial statement disavows the statement, or cannot recall making it, or is unable to affirm some aspect of the statement that is:

'not in substance materially different from when the declarant does not testify at all . . .When the hearsay declarant is called as a witness, but does not confirm the statement, or repudiates it, the test of cross-examination is similarly absent, and similar safeguards are required.'[16]

[16] *Ndhlovu* para 30.

Second, the probative value of the extra-curial statement does not depend upon credibility of the declarant when they give evidence at trial but at the time when the statement was made. The court put the matter thus,'[a]nd the admissibility of those statements depended not on the happenstance of whether they chose to testify but on the interests of justice.'[17]

[55] The different circumstances postulated in *Ndhlovu* pose different issues. If the person who made the extra-curial statement is not called to testify, the statement is hearsay under the definition because the probative value of the statement does depend upon the credibility of a person who is not called to give evidence at trial. The extra-curial statement will be excluded unless the court is satisfied that the requirements of s 3(1)*(c)* are met. This outcome is consistent with the common law rationale that the extra-curial statement of a person not called to testify is excluded because there is no opportunity given to cross-examine and test the probative value of the statement.

[56] If the person who made the statement is called to testify but denies making the statement, a different question arises: does the evidence to be admitted exist at all, and if so, is it attributable to the witness? That is a prior question that is settled not upon an application of the Hearsay Act, which is predicated upon the evidence that is to be admitted, existing and being evidence attributable to a particular person. The court must first decide this question. In the face of a denial by the witness that they made the statement, other evidence will usually be required to settle the matter. If the court determines that a particular person made the extra-curial

[17] Ibid para 33.

statement, it can then decide whether its probative value depends upon the credibility of the person giving evidence. In the present case, once the trial court was satisfied that the two statements were made by Luzuko Makhala, then their probative value depended upon his credibility as a witness called to give evidence at trial.

[57] Where the witness cannot recall whether they made the statement, the trial court is confronted with the same issue that arises when a witness denies making the statement. There is no affirmative evidence from the witness that the statement exists or, if it does, whether the statement is attributable to the witness. Here too, the court must decide this preliminary question before determining upon whose credibility the probative value of the statement depends.

[58] Where the witness confirms making the extra-curial statement, but denies its truthfulness, the witness is available to be cross-examined so as to test that denial. Here the probative value of the statement does depend upon the witness called to give evidence. The court may then attribute to the statement the evidential value it warrants after the witness who made the statement has been tested under cross-examination. So too, where the witness confirms making the extra-curial statement and its correctness, there seems little reason to exclude the statement if the evidence can then be tested under cross-examination.

[59] On this analysis, where a witness denies making a prior extra-curial statement or has no recollection of doing so, there will have to be evidence before the trial court permitting it to rule that such a statement was made

by the witness who has been called to testify. If it is not clear that the extra-curial statement was made at all, then it will not be possible to determine upon whose credibility the probative value of the evidence depends. The very existence of the evidence is not established, and this ends the question of its admissibility. If it is clear that an extra-curial statement was made, but it is not shown that it was made by the witness called to testify at trial, then the statement is clearly hearsay because its probative value depends either upon the credibility of a person not called as a witness or it cannot be ascertained upon whose credibility the statement depends. Once, then, the extra-curial statement is hearsay, its admission depends upon an application of s 3(1)*(c)*.

[60] If, however, the witness called to testify acknowledges that he or she made the statement, then its probative value does depend upon the person giving such evidence. The evidence is not hearsay under the statutory definition. Is s 3(1)*(c)* nevertheless of application? In *Ndhlovu* the court thought so because it apprehended the danger that the witness may not be able to recall everything that the statement contains, and the probative value of the statement depends upon the credibility of the witness at the time that the statement was made and not when the witness gives evidence in court. Once that is so, the ability to cross-examine the witness effectively is compromised, and absent the safeguards of s 3(1)*(c)*, the admission of the evidence would not be consistent with the imperative that the trial must be fair.

[61] I am doubtful that this reasoning holds good. Once it is clear that the extra-curial statement was made by the person called to give evidence, the

fact that this witness does not recall some or indeed all of what is contained in the statement, or denies the contents of the statement altogether, does not mean that the accused's right to challenge the statement by cross-examining the witness has been compromised. The witness' recollection will be tested under cross-examination. If the witness is believed, the extra-curial statement will have probative value only to the extent of the witness's recollection. If the witness is disbelieved, the trial court will then have to consider what weight, if any, to attach to the statement. There is no bar to the witness' credibility being tested under cross-examination by the accused, placing the court in a position to decide upon the evidential value of the statement. If the evidence is not hearsay, it may be admitted without risk to the accused's rights to cross-examine.

[62] To this, following *Ndhlovu*, it might be said that the witness who recants or cannot recall the contents of his or her extra-curial statement is akin to a witness not called to give evidence at all. That is not so. An eye-witness may not be able to recall all they have seen or may recall nothing at all of a material issue in the trial. We do not say that this is akin to the witness not being called at all and the right to cross-examine being compromised. Rather, the cross-examination will assist to determine how far the testimony of the witness may be relied upon. The trial court's task is then to determine what value if any, the evidence has. It is hard to see why an extra-curial statement made by the witness testifying before the court should be treated differently or why the right to cross-examine upon the statement has been vacated. The danger of hearsay evidence, long recognised at common law, does not arise when the declarant who made the statement is called as a witness at trial and is subjected to cross-

examination. It is then for the trial court to decide upon the testimonial value of the extra-curial statement.

[63] Nor, upon reflection, is it availing to exclude the extra-curial statement made by the witness who is called to testify because the statement depends upon the credibility of the witness at the time of making the statement rather than when testifying in court. First, the fact that the witness disavows his or her earlier statement does not mean the court cannot give credence to either version of what the witness has said. Contradiction in the evidence of a witness, whether arising from their oral testimony in court or by reference to a prior statement, requires the trial court again to consider what evidence it should accept and what weight it enjoys. There is no reason to exclude the extra-curial statement on the grounds of contradiction. Second, when the witness gives oral testimony in court, the very question as to why the extra-curial statement was made and what opportunity the witness had at the time to observe what the statement records are the very matters that may be taken up in cross-examination. It is true that the trial court does not have the benefit of observing the demeanour of the witness at the time the statement was made, and, in some instances, the statement will not have been given under oath. However, here too, in my view, cross-examination of the witness will ordinarily bring to light the circumstances in which the statement was made and its reliability. Cross-examination is the forensic means by which the evidential value of the statement may be ascertained. Admitting the extra-curial statement does not curtail cross-examination or blunt its value. It is then for the trial court to ascertain the evidential value of the statement made by the witness.

[64] In my view, the correct interpretation of the Hearsay Act is that once a court has determined that an extra-curial statement was made by a witness called to testify, the extra-curial statement is not hearsay, and it may be admitted without determining whether it is in the interests of justice to do so by recourse to s 3(1)*(c)*. Admitting the extra-curial evidence does not render the right to cross-examine nugatory. On the contrary, cross-examination of the witness must be given full rein to permit the trial court to determine whether the extra-curial statement has any value at all and, if so, what weight should be attached to it.

[65] This, however, does not end the analysis of the hearsay challenge because, as my review of the case law indicates, s 3(1) of the Hearsay Act commences with the words 'Subject to the provisions of any other law…'. *Litako* observed that in the interpretation of the Hearsay Act, the position at common law must be considered. The court in *Litako* held that notwithstanding the provisions of s 3(1) of the Hearsay Act, the extra-curial admissions of one accused does not constitute evidence against a co-accused and is therefore not admissible against such co-accused.[18]

[66] *Litako* traced the rule of the English law, as received into our common law, that the admission or confession of one accused, if admissible, is evidence only against the maker of the statement and not against the co-accused, unless they act pursuant to a common design. The rule excluding the use of the extra-curial statements made by one accused against another was in part based upon concerns as to hearsay evidence. But the rule also reflected the caution that should attach to the propensity

[18] *Litako* para 67.

of one accused to shift blame to another. The decision further references the following difficulty: if an admission or confession of one accused is ruled as admissible, that does not compel the maker of the admission or confession to testify at trial. They have every right not to do so. Where then does that leave the rights of the co-accused to cross-examine the maker of the admission or confession if they were to be admissible against the co-accused? *Litako* makes it plain that, in this situation, the rights of the co-accused to cross-examine are rendered nugatory. That would render the trial unfair. Hence, the bar upon the use of admissions and confessions by one accused against another.

[67] The present matter does not concern the admissions or confession of an accused. We are concerned with the extra-curial statements of a witness who is an accomplice, not an accused, who is called to testify at trial. This distinction is important. In *Litako,* one of the accused had made a statement to a magistrate, exculpating himself and implicating his co-accused in a murder. Although this accused testified at the trial within a trial to determine the admissibility of the statement, he did not testify in his defence on the merits. His co-accused, who did testify, were convicted, principally on the basis of the statement. The trial court ruled the statement made by the one accused admissible against his co-accused upon an application of s 3(1)*(c)* of the Hearsay Act.

[68] *Litako* was concerned with the extra-curial statement of an accused who does not testify at trial on the merits. The probative value of the statement depended upon the credibility of its declarant, who chose not to testify. The statement was thus hearsay. This Court in *Litako* was not

willing to allow the statement to be admitted into evidence as against the co-accused, notwithstanding the protections in s 3(1)*(c)*, the observance of which might nevertheless allow for the evidence to be admitted. The Court considered the dangers attaching to hearsay evidence, the doubtful value of such evidence and the serious erosion of the rights of the co-accused to cross-examine the maker of the statement as to the truth of its contents warranted the reaffirmation of the common-law rule that the extra-curial statement of one accused is not admissible against his co-accused.

[69] Where, as in the present matter, the maker of the extra-curial statement is a witness who does give evidence at trial, then, as I have sought to explain, the statement is not hearsay under the Hearsay Act, and the accused has full enjoyment of the right to cross-examine the witness. The reasoning in *Litako* is not of application to the position of a witness who made an extra-curial statement that incriminates the accused. The maker of the statement is a witness before the trial court. The statement is open to challenge by the accused on every aspect of the statement that incriminates them. I recall that the warnings as to the dangers of hearsay evidence, framed fully in *S v Ramavhale,*[19] are not present when the extra-curial statement of a witness called to testify at trial is under consideration. The witness testifies under oath and is subject to cross-examination by the parties against whom he is called. Accordingly, '[h]is powers of perception, his opportunities for observation, his attentiveness in observing, the strength of his recollection, and his disposition to speak the

[19] *S v Ramavhale* 1996 (1) SACR 639 (SCA).

truth'[20] may all be tested. What value the trial court then attributes to the statement is quite another matter.

[70] It follows that the reasoning in *Litako* that precludes the admission or confession of one accused being admitted into evidence against his or her co-accused is not of application where a witness called to give evidence made a prior extra-curial statement that is sought to be admitted into evidence as against the accused. The extra-curial statement is not hearsay, the rights of the accused to cross-examine may be fully exercised, and there is no *a priori* reason to suppose the extra-curial statement is of doubtful value.

[71] I turn to consider the treatment of a prior inconsistent statement made by a witness and the refashioning of the common law rule that a witness' prior sworn statement may be used to impeach the credit of the witness but may not be admitted into evidence for the truth of its contents. As I have referenced above, in *Mathonsi*, the high court adopted the five-part test enunciated in the Canadian Supreme Court in *R v B (K.G.).* Under this reformulation of the common law rule, a witness' prior inconsistent statement is admissible as to the truth of its contents if the conditions stipulated under the five-part test are met to the satisfaction of the trial court, to which the high court in *Mathonsi* added the further stipulation that the accused must be able to cross-examine the witness who made the statement as to its contents.

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[20] Cited in *Litako* para 66 quoting John Pitt Taylor *Treatise on the Law of Evidence* 12th ed (1931) para 567.

[72] The adoption by the high court in *Mathonsi* of the majority judgment in *R v B (K.G.)* requires careful reflection. *R v B (K.G.)* was considered again by the Canadian Supreme Court in *R v U (F.J.).*[21] The following emerges from these cases. First, the reconsideration of the common law rule as to the use of prior inconsistent statement formed part of the wider recasting of the common law in Canada regarding the treatment of hearsay evidence. Hearsay was not treated under the inflexible approach to hearsay and its exceptions that once marked the common law. Rather, hearsay was to be admitted and used for the truth of its contents when it was shown to be reliable and necessary. Second, the prior inconsistent statement of a witness was admissible for the truth of its contents if it met the required standards of reliability and necessity. Third, in *R v U (F.J.),* the court again considered what would be required to make out these standards and made it clear that flexibility should be shown in assessing the reliability risks associated with admitting the prior statement.

[73] These authorities are of much assistance, but as always, their wholesale adoption should be carefully considered, not least because, unlike the position in Canadian law, we have a statute that regulates the use of hearsay evidence. *R v B (K.B.)* and *R v U (F.J.)* developed the common law. We must apply the Hearsay Act, unless some aspect of the common law may be taken to continue to govern the question at issue, as occurred in *Litako,* or some aspect of the common law survives the passage of the Hearsay Act and compliments that enactment.

[21] *R v U (F.J.)* [1995] 3 SCR 764.

[74] I recognise the paramount importance of the constitutional requirement that the appellants before us must have enjoyed a fair trial. The question is whether the admission into evidence of the two statements of Luzuko Makhala, under the provisions of the Hearsay Act, visited any unfairness on the appellants? I have set out above, in my analysis of the application of the Hearsay Act to the two statements, why it is that the ability of the appellants to cross-examine Luzuko Makhala provides considerable safeguards for the appellants as to the use to which the statements may be put.

[75] Are further safeguards required beyond the right to cross-examine Luzuko Makhala. *R v U (F.J.)* makes it plain that the availability of the witness who made the prior statements to be cross-examined goes a very long way to ensure that prior statements may be admitted into evidence for the truth of their contents to permit the trier of fact to assess the evidential value of these statements. The court quotes the following from the leading work of J W Strong *McCormick on Evidence* 4 ed (1992), with approval:

'The witness who has told one story aforetime and another today has opened the gates to all the vistas of truth which the common law practice of cross-examination and re-examination was invented to explore. The reasons for the change of face, whether forgetfulness, carelessness, pity, terror, or greed, may be explored by the two questioners in the presence of the trier of fact, under oath, casting light on which is the true story and which the false. It is hard to escape the view that evidence of a prior inconsistent statement, when declarant is on the stand to explain it if he can, has in high degree the safeguards of examined testimony . . ..'[22]

[22] *Ibid* at para 38.

[76] What then remained of concern to the court in *R v U (F.J.)*, given its recognition that cross-examination goes a substantial part of the way to ensure that the reliability of the prior inconsistent statement can adequately be assessed by the trier of fact, was the following: the prior inconsistent statement may be subject to reliability risks because it depends upon the credibility of the witness at the time the statements were made. This may deprive the court of the benefit of the witness being subject to cross-examination at the time that he or she makes the prior statement, the statement may not be given under oath, and the demeanour of the witness in making the statement is not observed by the trier of fact. For this reason, the court considered that it would be desirable that the prior statement be taken under oath and video-taped. This would alleviate at least two of the three concerns raised. The court observed that a prior inconsistent statement may be admitted even without these safeguards, if there are sufficient guarantees of the reliability of the prior statement.[23]

[77] There is an important distinction to be drawn between the stipulation of reliability requirements in order to admit a prior inconsistent statement and the consideration of the reliability of the evidence in determining its value to the trier of fact. Once the witness who made the prior inconsistent statement is available for cross-examination, then, in my view, the threshold requirement for admitting the statement is met, subject to two further requirements that I will set out below.

[78] This is so because the accused at trial will be able, fully, to exercise their right of cross-examination, and to contest every aspect of the

[23] *Ibid* at para 39.

statement's reliability. Where the prior statement is not made under oath, the trial court will weigh this matter when deciding the evidential value of the statement. Obviously, the circumstances under which the statement was given will be relevant to an assessment as to whether it is likely that the declarant was telling the truth when making the statement. Making a statement under oath is part of that assessment. However, in a secular age, the value of an oath is often exaggerated and should not be raised to a threshold requirement to admit the prior statement.

[79] So too, the use of video to record the declarant making the statement is helpful, but not necessary, to admit the prior statement. The trial court will instead take account of the fact that it was not in a position to observe the demeanour of the witness at the time the statement was made. As the court noted in *Standard Bank of South Africa Limited v Sibanda*,[24] the value of demeanour evidence should not be exaggerated. The Court will consider the evidence that is given and the circumstances in which the statement was made. This will determine the weight the trial court attaches to the prior statements.

[80] While there are disadvantages that attach to the fact that the credibility of the declarant is not tested at the time the statement is made, they are not of an order of magnitude to warrant the exclusion of the prior statement. The trial court will take these disadvantages into account when assessing the evidential value of the prior statement, to the extent that they

[24] *Standard Bank of South Africa Limited v Sibanda* [2019] ZAGPJHC 481; 2021 (5) SA 276 (GJ) paras 5 -10

are not mitigated by the taking of an oath and the recording of the statement.

[81] The further requirement, to be found in *Mathonsi*, that the prior statement must have been fully and accurately transcribed is not a threshold requirement of reliability. As I have endeavoured to explain, the application of the Hearsay Act always requires the trial court to determine what statement was made, so as to know what evidence is sought to be admitted. That must be done; it determines not whether a statement is reliable, but whether it exists.

[82] Two further requirements must be met to render prior statements admissible, in addition to the availability of the declarant to give evidence at trial and face cross-examination. First, the evidence contained in the prior statement must be admissible, as if it had been given in court. That is to say, there must not be some other basis for exclusion outside the application of the Hearsay Act. Second, the prior statement must have been made voluntarily. This requirement is an entailment, explored fully in *Litako*, of the common law's concern that there should be no taint that evidence was procured at the instance of the police or any other agency through coercion, undue influence or improper inducement. Although it fosters reliability, this requirement is rooted in the disciplining of power that may otherwise be improperly used to procure evidence. These two requirements flow from the overriding inherent supervisory power of a trial court in a criminal trial to ensure that the trial is fair. Nothing in the Hearsay Act derogates from the exercise by the trial court of this supervisory competence.

[83] In sum, I am not in agreement with the holding in *Mathonsi* that the threshold requirements derived from *R v B (K.G.)* must be met in order to admit into evidence, for the truth of its contents, the prior inconsistent statement of a witness at a criminal trial. It suffices that the witness who made the statement is available for cross-examination by the accused. The prior statement must otherwise be admissible by asking whether it would have been admissible if it had formed part of the testimony given by the witness at trial. This consideration is important because the trial court will have to consider whether the prior statement is relevant. In part, the common law rule excluding the admission of a prior inconsistent statement for the truth of its contents was predicated upon its presumptive irrelevance. Finally, the prior statement must have been voluntarily made.

[84] Turning then to the two statements that were admitted into evidence by the trial court upon an application of the Hearsay Act, I can find no fault with that decision. Luzuko Makhala was called as a witness and was available to the appellants for cross-examination. The reliability of the two statements was thus fully open to scrutiny. Luzuko Makhala recanted his prior statements in the witness box. There was every need then to consider his testimony in the light of his prior statements. For the reasons already traversed when I considered the legality challenge, the evidence of the policemen who testified was accepted by the trial court. That evidence established that Luzuko Makhala made the two statements voluntarily. As I have indicated in respect of the legality challenge, there is also no basis to contend that Luzuko Makhala made the statements as a result of improper inducements. Had the prior statements formed part of the

testimony given by Luzuko Makhala in court, there was no other rule of evidence that would have excluded the statements.

[85] Indeed, the trial court in deciding to admit the two statements, went further than I have found the law requires. The trial court applied s 3(1)*(c)* of the Hearsay Act and concluded that the evidence should be admitted in the interests of justice. I have found that the two statements are not hearsay as defined in the Hearsay Act. But this matters not. To have gone beyond what I have found to be required does not render the hearsay challenge any more compelling. That challenge, for the reasons given, must fail.

The hostile witness challenge

[86] The appellants contend that the trial court declared Luzuko Makhala to be a hostile witness, when, on a proper appreciation of the test to make such a declaration, he should not have been so declared.

[87] The appellants contend, relying upon *S v Steyn*,[25] that the test is not an objective one, but the hostile witness must have an intention to prejudice the case of the litigant who called him. Luzuko Makhala had no such intention.

[88] The mere fact that a witness gives evidence that is unfavourable to the party calling the witness does not render the witness hostile. However, the need to show an intention to prejudice, as reflected in *Steyn*, does not appear to be the position in English law on 13th May 1961, as required by

[25] *S v Steyn en Andere* 1987 (1) SA 353 (W); [1987] 3 All SA 19 (W) at 355.

s 190(1) of the CPA. The test was stated in *Meyer's Trustee v Malan*[26] to be as follows: the court must decide whether the witness is adverse from his demeanour, his relationship to the party calling him, and the general circumstances of the case. This test is not predicated on proof of a subjective intent to prejudice.

[89] Ultimately, it is unnecessary to determine this difference. The trial court was in a position to assess what occurred to cause Luzuko Makhala to give evidence at variance with the evidence the prosecution was under the impression he would provide. Luzuko Makhala made an assiduous effort in his evidence in chief to exclude from his two statements those passages that incriminated the appellants and himself. He sought to put up a contradictory, exculpatory version. The trial court rejected his explanation as to how he came to make the two statements. The first appellant's former counsel approached him to withdraw his cooperation from the prosecution. In these circumstances, even if the test is predicated upon an intent to prejudice the State's case, it is an entirely proper inference to draw from LuzukoMakhala's conduct. Accordingly, there is no basis to interfere with the exercise by the trial court of its discretion in making the declaration that it did.

[90] Counsel for the appellants submitted that Luzuko Makhala should have been given legal representation when the State sought to declare him a hostile witness. Worse still, it is contended that the trial court failed to extend to Luzuko Makhala his right to legal representation when he requested to be allowed an attorney.

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[26] *Meyer's Trustee v Malan* 1911 TPD 559 at 561.

[91] What the record shows is that Luzuko Makhala enquired as to whether he was allowed to have an attorney for the purpose of the trial court deciding whether to declare him a hostile witness. The trial court did not preclude him from securing the services of an attorney. What Luzuko Makhala went on to raise with the trial court was whether he was entitled to an attorney, in the sense of having one provided to him. The trial court indicated that he was not an arrested, detained or accused person as contemplated under the Constitution and had no such entitlement.

[92] The Constitution distinguishes different rights to legal representation. In terms of s 35(2)*(b)*, a detainee has the right to choose and consult with a legal practitioner, and to be informed of that right. In terms of s 35(3)*(f)*, an accused also has the right to choose a legal representative and be represented by one. Section 35(3)*(g)* affords the right to an accused to have a legal practitioner assigned, at State expense, if substantial injustice would otherwise result. Thus, the Constitution clearly distinguishes the right to choose a legal representative and the right, at state expense, to be provided with a legal representative. Section 35 makes no provision for a witness to be provided with a legal practitioner.

[93] Doubtless, a court is invested with the inherent power to conduct its proceedings fairly, and that may entail, in a particular case, that the court should give consideration to a legal practitioner being assigned to assist a witness. However, that cannot be done on the basis of a test less rigorous than that of application to an accused, whose potential detriment is plainly pressing. The constitutional test for an accused is that, absent the assignment of a legal practitioner, a substantial injustice would result.

[94] No such showing was ever made by Luzuko Makhala to the trial court. He was never denied a right to choose to be represented by an attorney, and he never made a case as to the substantial injustice he would suffer if an attorney was not provided for him at state expense. Once that is so, he suffered no infringement of his rights.

[95] The appellants' hostile witness challenge must therefore fail.

The cautionary challenge

[96] Luzuko Makhala was an accomplice. The trial court recognised the cautionary rule applicable to the evidence of an accomplice. The appellants submit that the trial court failed properly to apply the rule to treat the statements of Luzuko Makhala with the caution they deserved.

[97] I find no basis in the judgment of the trial judge to support this criticism. The trial judge took the position, on the evidence of the policemen, which he accepted, that Luzuko Makhala had sought to cooperate with the police and had volunteered the information known to him. He recanted in the witness box, under pressure that appears to have come about due to the consultation with the first appellant's erstwhile counsel. Whatever the reason for his recantation, the trial judge found that his prior, voluntary co-operation was not consistent with an accomplice seeking to implicate others to seek favour with the police or falsely implicate others. The police learnt information from the statements that they did not otherwise know, which advanced their investigation and was incriminating of the appellants. Finally, the trial judge found there was material evidence that corroborated the two statements. On this basis, the

trial judge found that although the cautionary rule was applicable to the evidence of Luzuko Makhala, this did not prevent the court from relying upon the probative value of the two statements. The reasoning of the trial judge cannot be faulted.

[98] The cautionary challenge accordingly also fails.

The onus challenge

[99] Finally, the appellants submitted that even if the two statements were properly received in evidence, there was insufficient corroborative evidence to convict the appellants. Luzuko Makhala was a liar. His oral testimony was at variance with his two statements which required the State to provide sufficient evidence to corroborate the contents of the two statements. The State failed to do so and thereby failed to discharge its onus of proof. The trial court was in error to find otherwise.

[100] The judgment of the trial judge made a careful assessment of the corroborative evidence. There was evidence that the first appellant was making preparations to flee when he was told by Luzuko Makhala, his brother, that he had told the police everything. The first statement indicated that the first appellant had taken Mr Dumile, the third accused, to point out where Mr Molosi was residing. Mr Molosi's son, Dumisani, gave evidence that Mr Dumile had come to the house to enquire as to the whereabouts of Mr Molosi on 22 July 2018. Mrs Molosi also identified Mr Dumile as having come to the house on 23 July 2018 with a similar question, shortly before Mr Molosi was shot and killed. The first statement of Luzuko Makhala stated that Mr Dumile had gone to the house of Mr Molosi to find

out the whereabouts of the deceased and that Mr Dumile returned and said that Mr Molosi was not at his home but attending a meeting. This evidence, the trial judge found, was corroborative of the first statement.

[101] The appellants do not contend there was no corroborative evidence but rather that it was insufficient. Here too, I can find no fault with the conclusion to which the trial judge came. The first statement was corroborated in material respects. The corroboration most certainly placed the first appellant, Mr Dumile and Luzuko Makhala at the heart of the conspiracy to murder Mr Molosi. That sufficed to permit the trial court to rely upon the probative value of the two statements. The two statements, taken together with the circumstances in which the statements came to be made, the recantation by Luzuko Makhala under obvious pressure and the fact that evidence of the appellants could not be believed, sufficed to discharge the burden of proof resting upon the State.

[102] The onus challenge must, accordingly, also fail.

Conclusion

[103] I have found that each of the challenges brought by the appellants fails. The two statements made by Luzuko Makhala to the police were not unlawfully obtained, and the two statements were correctly admitted into evidence. That evidence afforded proof of the appellants' complicity in the murder of Mr Molosi and the further charges associated with his murder. There was no failing on the part of the trial judge in cautioning himself against the frailties of the evidence of Luzuko Makhala as an accomplice, nor in his declaration of Luzuko Makhala as a hostile witness. The trial

judge correctly found that there was sufficient evidence to corroborate the statements of Luzuko Makhala and that, upon consideration of all the evidence, the State had discharged its burden of proof.

[104] In the result, the following order is made:
The appeal is dismissed.

DAVID UNTERHALTER
ACTING JUDGE OF APPEAL

Meyer AJA (Mocumie, Makgoka and Mothle JJA concurring)

[105] I have had the benefit of reading the judgment of our colleague Unterhalter AJA (the first judgment). I agree with its summation of the pertinent facts and issues on appeal and with the reasoning and conclusions reached that the two statements in question were not obtained in violation of Luzuko Makhala's rights; the trial was not rendered unfair by the admission of the statements; nor was there anything done in securing the statements that constituted any material detriment to the administration of justice; that the trial court correctly declared Luzuko Makhala to be a hostile witness; that he was not denied a right to choose to be represented by an attorney and he did not make a case as to the substantial injustice he would suffer if an attorney was not provided for him at state expense before he was declared hostile; that the trial court properly applied the cautionary

rule applicable to the evidence of an accomplice; and that there was sufficient corroborative evidence to convict the appellants.

[106] I further agree that the trial court applied s 3(1)*(c)* of the Law of Evidence Amendment Act 45 of 1988 (the Hearsay Act) and concluded that the two statements should be admitted in the interests of justice and with the ultimate conclusion that:

'[t]he two statements made by Luzuko Makhala to the police were not unlawfully obtained and the two statements were correctly admitted into evidence. That evidence afforded proof of the appellants' complicity in the murder of Mr Molosi and the further charges associated with his murder. There was no failing on the part of the trial judge in cautioning himself against the frailties of the evidence of Luzuko Makhala as an accomplice, nor in his declaration of Luzuko Makhala as a hostile witness. The trial court correctly found that there was sufficient evidence to corroborate the statements of Luzuko Makhala and that, upon a consideration of all the evidence, the State had discharged its burden of proof.'

I, therefore, agree with the order proposed in the first judgment that the appeal be dismissed.

[107] However, I am respectfully unable to agree with the conclusion in the first judgment that s 3(1)*(c)* of the Hearsay Act finds no application to the admission into evidence of extra-curial statements made by a s 204 state witness,[27] who, when testifying, recants such statements that incriminate him or herself and the accused in the commission of the offence or offences

[27] Section 204 of the Criminal Procedure Act 51 of 1977. That is a witness who is called on behalf of the prosecution at criminal proceedings and who is required by the prosecution to answer questions which may incriminate such witness regarding an offence specified by the prosecutor, and who may be discharged from prosecution in respect of the offence in question if he or she 'in the opinion of the court, answers frankly and honestly all questions put to him' or her.

in question, and the reasoning in reaching that conclusion (the s 3(1)*(c)* conclusion). These are my reasons.

[108] The common law definition of hearsay evidence is 'any statement other than one made by a person while giving oral evidence in the proceedings, and presented as evidence of any fact or opinion stated'.[28] With effect from 3 October, 1988 the Hearsay Act redefines hearsay and allows for a more flexible discretionary approach to the admissibility of hearsay evidence. Section 3 of the Hearsay Act reads thus:

'(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 interests 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.

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[28] P J Schwikkard and S E Van der Merwe *Principles of Evidence* (2009) 285.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1)*(b)* if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph *(a)* of subsection (1) or is admitted by the court in terms of paragraph *(c)* of that subsection.
(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 party against whom hearsay evidence is to be adduced, including the prosecution.'

[109] The first judgment is to the effect that the prior decisions of this Court in *S v Rathumbu*[29] and in *S v Mamushe*[30] are clearly wrong. In those judgments, the safeguards provided for in s 3(1)*(c)* of the Hearsay Act were applied to the admission into evidence of a prior inconsistent extra-curial statement made by a s 204 state witness who, when testifying, recants such statement that incriminates him or herself and the accused in the commission of the offence or offences in question. As I will demonstrate, the application of s 3(1)*(c)* to such inconsistent extra-curial statements of a s 204 state witness is sound, and this Court, in my view, should not depart from those previous decisions.

[110] We are not dealing in the present case with the admissibility of extra-curial hearsay admissions against co-accused persons in criminal cases. This Court, in *Ndhlovu and Others v S* ,[31] in principle decided in favour of

[29] *S v Rathumbu* [2012] ZASCA 5; 2012 (2) SACR 219 (SCA).
[30] *S v Mamushe* [2007] ZASCA 58; [2007] SCA 58 (RSA); [2007] 4 All SA 972 (SCA).
[31] *Ndhlovu and Others v S* 2002 (2) SACR 325 (SCA); 2002 (6) SA 305 (SCA); [2002] 3 All SA 760 (SCA).

the admission of this category of evidence on a discretionary basis in terms of s 3(1)*(c)* of the Hearsay Act. Thereafter, this Court started to question the wisdom of this approach[32] and held that an extra-curial admission could under no circumstances be admissible against a co-accused. Instead, we are dealing with the situation where a prosecutor calls a s 204 witness to testify on the strength of the state witness's extra-curial statement, and the state witness performs an about-turn in the witness box and testifies in favour of the defence or develops a sudden case of amnesia. The question then arises whether the trial court has a discretion in terms of s 3(1)*(c)* of the Hearsay Act to admit the evidence if it is of the opinion that it is in the interests of justice to do so, having regard to the various factors enumerated in the section and 'any other factor which should in the opinion of the court be taken into account'.

[111] It is a long-standing rule of our common law, derived from English law that in such cases, the state witness' extra-curial statement may be used solely for the purposes of impeaching him or her and may not be tendered into court as proof for the facts contained therein. Bellengère and Walker[33] searched for the rationale of the common law rule in our jurisprudence and that of other jurisdictions and concluded that 'as far as South African law is concerned, the rule rested on a dual foundation; namely: (1) the traditional objections to hearsay evidence; and (2) the notion that no probative value can be attached to contradictory evidence'.[34]

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[32] See S v *Balkwell and Another* [2007] 3 All SA 465 (SCA); *Libazi v S* [2010] ZASCA 91; 2010 (2) SACR 233 (SCA); [2011] 1 All SA 246 (SCA) and *Litako and Others v S* [2014] ZASCA 54; [2014] 3 All SA 138 (SCA); 2014 (2) SACR 431 (SCA); 2015 (3) SA 287 (SCA).
[33] Adrian Bellengère and Shelley Walker 'When the truth lies elsewhere: A comment on the admissibility of prior inconsistent statements in light of *S v Mathonsi* 2012 (1) SACR 335 (KZP) and *S v Rathumbu* 2012 (2) SACR 219 (SCA)' (2013) 26 *SACJ* 175.
[34] At 175-177.

[112] The learned commentators point out that the rationale behind the admission of hearsay evidence is based on the common law conception and rendered redundant in 1988 when our law concerning hearsay was amended by the Hearsay Act.[35] Insofar as the contradiction rationale is concerned, the learned commentators state:[36]

'The objection that, faced with a contradiction between a witness's viva voce evidence and what he said on an earlier occasion, the court cannot give credence to either version, is equally groundless. The old maxims *"falsus in uno, falsus in omnibus"* (false in one thing, false in everything) and *"semel mentitus, semper mentitur"* (once a liar, always a liar) are not part of the South African law of evidence (*R v Gumede* 1949 (3) SA 749 (A) at 576A).

Certainly a witness's contradictions may cast doubt on his credibility (and commonly do), but this is a matter for the court to determine, in light of all the available evidence. Thus, the mere fact that a witness has contradicted himself is no reason to disregard or exclude his evidence in entirety. This applies irrespective of whether the witness has contradicted himself in his viva voce evidence, or on some other occasion (*S v Mathonsi* 2012 (1) SACR 335 (KZP) at paras [34] to [37] and further authorities cited therein).'

[113] The learned commentators continue to state:[37]

'It would be evident from the above that there is no longer any valid reason for the retention of the rule. On the contrary, its only contribution in most cases has been to exclude relevant evidence, which would have assisted the court in determining the truth. In the circumstances, it is hardly surprising that the rule has been abolished, not only in England and Wales (s 119 and 120 of the Criminal Justice Act 2003), but also in Australia (s 60 of the Evidence Act 2 of 1995), Canada (*R v B* (supra) [*R v B* (K.G.) [1993] 1 SCR 740]), American federal law (s 801(d)(1) of the Federal Rules of Evidence 1975) and a number of individual American states, such as Alaska, Arizona, California, Indiana, Kentucky, North Dakota, West Virginia and Wisconsin (SM Terrell

[35] Ibid at 177-178.
[36] Ibid at 178.
[37] Ibid at 178-179.

"Prior Statements as Substantive Evidence in Indiana" *Indiana LR* (1979) 12(2) 495, 502-517); jurisdictions whose law of evidence, like that of South Africa, was originally derived from English law.
In light of the two recent cases referred to above [*Mathonsi* and *Rathumbu*], it appears that South Africa is at last following suit'.

[114] I subscribe to the views expressed by the learned commentators, Bellengère and Walker. It may be argued, which argument found favour with the first judgment, that the contents of a 204 state witness' prior inconsistent statement are not hearsay evidence, since their probative value depends on the state witness' credibility, who, him or herself, is testifying.[38] However, although a s 204 state witness is compelled to give his or her evidence under the sanction of an oath, or its equivalent, a solemn affirmation, and be subject to cross-examination by the accused person or persons against whom he or she is called to testify and who had access to all evidence in possession of the state prior to the trial, there seems to be a compelling rationale for our courts to treat the disavowed prior inconsistent statement as hearsay evidence within the meaning of s 3(4) of the Hearsay Act. Treating such statement as hearsay enables the trial court to subject such evidence to the preconditions required in s 3(1)*(c)* of the Hearsay Act and to admit such evidence only if the court 'is of the opinion that such evidence should be admitted in the interests of justice'. Such interpretation of 'hearsay evidence' as defined in s 3(4) of the Hearsay Act promotes 'the spirit, purport and objects of the Bill of Rights' contained in chapter 2 of the Constitution of South Africa,[39] and particularly an accused person's fundamental constitutional 'right to a fair trial', enshrined in s 35(3) of the

[38] See BC Naude 'The substantive use of a prior inconsistent statement' (2013) 26 *SACJ* 55 at 59-61.
[39] Section 39(2) of the Constitution enjoins a court to 'promote the spirit, purport and objects of the Bill of Rights' when 'interpreting any legislation'.

Bill of Rights, because the effectiveness of the cross-examination of a state witness who denies having made the prior inconsistent statement or cannot remember having made it, may in a given case be compromised.[40]

[115] In *Rathumbu*, this Court held that a disavowed prior written statement of a state witness is essentially hearsay evidence, that the probative value of the statement depends on the credibility of the witness at the time of making the statement, and that the central question is whether the interests of justice require that the prior statement be admitted despite the witness's later disavowal thereof. In *Mamushe,* this Court held that the extra-curial statement by a state witness is not admissible in evidence against an accused person under s 3(1)*(b)* of the Hearsay Act unless the prior statement is confirmed by its maker in court. This Court declined to admit the state witness' prior statement, which she disavowed in court, under s 3(1)*(c)* of the Hearsay Act, inter alia because 'the identification evidence deposed to by Ms Martin in her statements appears to be of the most unreliable kind'. The doctrine of precedent also binds courts of final jurisdiction to their own decisions unless the court is satisfied that a previous decision of its own is clearly wrong, which is not so in this case.[41]

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[40] *Ibid* BC Naude fn 38 at 61-63.

[41] *Camps Bay Ratepayers' Association & Another v Harrison & Another* 2011 (2) BCLR 121 (CC); [2010] ZACC 19 (CC); 2011 (4) SA 42 (CC) paras 28-30. See also *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* [2013] ZACC 25; 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC); *Firstrand Bank Limited v Kona and Another* [2015] ZASCA 11; 2015 (5) SA 237 (SCA); *BSB International Link CC v Readam South Africa (Pty) Ltd* [2016] ZASCA 58; [2016] 2 All SA 633 (SCA); 2016 (4) SA 83; *Standard Bank of South Africa Limited v Hendricks and Another; Standard Bank of South Africa Limited v Sampson and Another; Standard Bank of South Africa Limited v Kamfer; Standard Bank of South Africa Limited v Adams and Another; Standard Bank of South Africa Limited v Botha NO; Absa Bank Limited v Louw* [2018] ZAWCHC 175; [2019] 1 All SA 839 (WCC); 2019 (2) SA 620 (WCC); *Firstrand Bank Ltd t/a First National Bank v Moonsamy t/a Synka Liquors* [2020] ZAGPJHC 105; 2021 (1) SA 225 (GJ) and *Investec Bank Limited v Fraser NO and* Another [2020] ZAGPJHC 107; 2020 (6) SA 211 (GJ).

Like the courts of foreign jurisdictions, this court has laid down its own safeguards before admitting the conflicting extra-curial statement of a state witness who performs an about-turn in the witness box and testifies in favour of the defence or develops a sudden case of amnesia.

[116] Finally, in *Mathonsi*[42], the high court held that the common law rule that a witness' prior inconsistent statement may be used solely to impeach him or her and may not be tendered into court as proof for the facts contained therein must be replaced by a new rule recognising the changed means and methods of proof in modern society. Madondo J then approved and applied the decision of the Supreme Court of Canada in *R v B (KG)* [1993] 1 SCR 740, and held that the prior inconsistent statement of a hostile state witness may be used as evidence of the truth of the matter stated in the statement if the trial court is satisfied beyond reasonable doubt that the conditions referred to in para 49 of the first judgment are fulfilled as well as the sixth condition which he added.

[117] However, the common law principle that a state witness' extra-curial inconsistent statement may be used solely for the purposes of impeaching him or her and may not be tendered into court as proof of the facts contained therein no longer finds application in our law. In this country, we have our definition of hearsay evidence and legislative instrument prescribing the factors or safeguards that the court must consider in deciding whether the extra-curial inconsistent hearsay statement of a state witness should be admitted as evidence in the interests of justice. Our courts, therefore, are not permitted to substitute our statutory prescripts

[42] *S v Mathonsi* 2012 (1) SACR 335 (KZP).

with common law principles or statutory provisions of foreign jurisdictions in deciding whether such hearsay should be admitted as evidence. Therefore, the decision in *Mathonsi* is wrong.

[118] I have mentioned that our Hearsay Act allows for a more flexible discretionary approach to the admissibility of hearsay evidence than the common law did. In deciding whether hearsay should be admitted in the interests of justice, the court is not limited to the factors listed in s (3)(1)*(c)*(i) to (vi) but empowered in terms of s 3(1)*(c)*(vii) to have regard to 'any other factor which should in the opinion of the court be taken into account'. If in deciding whether hearsay should be admitted in the interests of justice in terms of s 3(1)*(c)* of the Hearsay Act in a given case, the trial court is of the opinion that a factor taken into account in another jurisdiction when admitting hearsay into evidence should additionally be taken into account, it is by virtue of s 3(1)*(c)*(vii) empowered to do so.

[119] It is within this limited ambit that I support the order of the first judgment dismissing the appeal.

PA MEYER

ACTING JUDGE OF APPEAL

Appearances:

For appellants:	J. Van der Berg
Instructed by:	Dercksens Inc., Cape Town
	Symington & De Kok, Bloemfontein
For respondent:	M. Meningo
Instructed by:	Director of Public Prosecutions, Cape Town
	Director of Public Prosecutions, Bloemfontein