IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: CC18/2021

In the matter between

THE STATE

V

GCINITHEMBA BEJA ACCUSED 1

FUNDILE MASETI ACCUSED 2

Date of Hearing: 02 May 2023
Date of Judgment: 19 May 2023 (to be delivered via email to the respective counsel)

SECTION 190(1) JUDGMENT

THULARE J

[1] This is an opposed application for the impeachment of a State witness, Thobelani Wanda Tofile (Tofile) also known as Mampintsha, by the State. Tofile refused to co-

operate with the SAPS and the Prosecution about his attendance to give evidence and the court had to issue a warrant of arrest for him to be brought to court. He was an awaiting trial prisoner in another matter. An eye witness to the incident for which the accused are arraigned, Mr X, had implicated Tofile and both accused as the persons who attacked and shot a number of people who were having a party in section Q, Site B, Khayelitsha. Some of the people were wounded, others fatally. As a result of the threat to his person, Mr X was in police protection and during his testimony, upon application by the State, the court ordered that his identity not be revealed. Mr X also testified through audio visual resources and not in open court.

[2] The issue was whether the witness, Tofile, was to be impeached. It has to be stressed that the question that the court had to pronounce on in the trial-within-a-trial was solely on the impeachment of the witness. The trial-within-a-trial was not intended to consider the appropriate weight, if any, to be attached to his evidence. That will be done when the court is called upon to pronounce its judgment.

[3] Nokwanele Makhetha, the sister to Ntandazo Makhetha (Ntera) knew Tofile and accused 2 who was known as Phiri. She knew them as friends of Ntera. Ntera hosted the party where the shooting occurred on 8 March 2020. Nokwanele was inside the house in a room at the property where she shooting happened but did not see who were the shooters. It was on the basis that she knew Phiri and Tofile being friends of Ntera, that she did not believe that they could be the ones who had attacked and shot at Ntera and/or the people that Ntera hosted at the party. She knew accused 2 as Phiri. It is against this background that the police sought Tofile, not as an accused, but as a witness in the multiple-murder and attempted murder case, to obtain his statement.

[4] Mpendulo Tyali and Sizwe Ncaku were members of the SAPS and Dectective Sergeants who were involved in the investigation of gang-related violence in the Western Cape. Their commander was now retired Colonel Nceba Mathentamo. Tyali managed to get the cellphone number of Tofile and communicated with him about taking his statement. Although the two spoke a number of times on the telephone, and

Tofile agreed to make a statement, Tofile never got to Tyali for Tyali to take his statement. Tofile subsequently signed a written statement before Tyali, which the State alleged was the disavowed previous inconsistent statement. This is common cause. It is the circumstances under which the statement was made and signed, where the parties differ. In the light of the possibility of infringements of Tofile's constitutional rights, in the face of his allegations of being induced to make the disavowed previous inconsistent statement, and that he was a lay-person and according to him indigent, the court allowed him to enjoy legal representation limited to the impeachment application and the decision thereon. Adv, Vakele is thanked for his industry in the matter, on behalf of Tofile.

[5] The State case was that Tyali, Ncaku, Constable Sibusisio Manqindi, Constable Tarrance Basholo and Mathentamo were in an office occupied by the Anti-Gang Unit in Lentegeur SAPS. Only the first three testified in respect of the impeachment application. Manqindi and Basholo went to fetch Tofile from cells at Lentegeur and brought him to that office on the instructions of Mathentamo. A casual discussion on general irrelevant topics was an introduction, which included Tofile speaking in English with a Colonel Tarentaal who walked into the room shortly after Tofile arrived in the room. Tarentaal left before the interview. Back to the business of the meeting, Tofile confirmed that he was on the scene at the time of the incident. He agreed to make a statement on what happened on the night of 7-8 March 2020 at Ntera's house. He raised concerns about his safety as he feared the people implicated, amongst others requesting an assurance that he will have protection including testifying audio-visually so that he did not have to face the accused when he testified in court. When Tofile started telling the police about the incident, Tyali wrote down as Tofile narrated what happened. Tofile was satisfied with what Tyali wrote and appended his signature on the statement after its completion. All this happened in that office in the presence of the other four police officers. Ncaku followed the interview, and watched Tyali write down as Tofile narrated what happened. In his statement, Tofile mentioned the two accused, and other suspects which the police did not know about, as being part of the shooters.

[6] Manqindi said although he was in the meeting, he did not pay attention to what was being said as he stood by the window and looked outside. He was however present in the room during the interview and saw the discussion between Tyali and Stofile, but did not listen to what was actually being said. The State case was that the date stamps and commissioner's stamp were not in the room. The Statement was given to Manqindi to commission. Detectives did not carry the date stamps and commissioning stamps with them around, and it was practice in the SAPS, and very common within Detectives, to take a statement of a witness and have the witness sign the statement, and to later append the date stamps and commissioning stamps to record the commissioning, later and at the service centre, as it is at the service centre where the stamps are generally kept. According to him, the Lenteguer office was new as the Anti-Gang Unit was in the main operating from Cape Town, and he had just joined the unit, and was from Site B Police Station in Khayelitsha. He did not commission the statement at Lentegeur, but went back to site B to commission the affidavit. He did not cause Tofile to take the oath before him. He and Basholo were the ones who took Tofile back to the cells after the interview.

[7] Tofile's version is that he was detained in Phillipi SAPS for unlawful possession of a firearm. He was called to an office of the investigating officer of that case, at Phillipi, and found him in the presence of Tyali. According to Tofile, it was at Phillipi where Tyali made him an offer that he should incriminate the accused in exchange for the charges of unlawful possession of a firearm and another two charges of murder being withdrawn against him. He was taken back to the cells. He was taken back to that office where he found Tyali in possession of the statement which was already written. In exchange for the withdrawal of the unlawful possession of a firearm and two murder charges against him, and not being charged in this matter, he signed the statement that Tyali presented to him. He did not know what the contents of the statement was.

[8] Simply put, in his disavowed previous inconsistent statement Tofile saw the two accused and others shoot at the people who attended the party. In his *viva voce*

evidence Tofile did not see who shot. Section 190(1) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (the CPA) read as follows:

"190 Impeachment or support of credibility of witness

(1) Any party may in criminal proceedings impeach or support the credibility of any witness called against or on behalf of such party in any manner in which and by any evidence by which the credibility of such witness might on the thirtieth day of May, 1961, have been impeached or supported by such party."

[9] The application by the State was very narrow. The State asked the court to declare the witness, Tofile, hostile. This was aimed at allowing the State to cross-examine its own witness. This is because the rule is that a party may not cross-examine its own witness unless the court forms the opinion that the witness was hostile [*Commentary on the Criminal Procedure Act,* Du Toit and others, Service 57, 2016, 23-17]. In *Rex v Wellers* 1918 TPD 234, Wessels said at 237-238:

"Then we have a third class of case, where a person approaches a party, tells him what evidence he can give, and then goes into the box and tells a diametrically opposite story adverse to the party calling him; the witness has in this case deceived the party into putting him into the box. In such a case it is necessary in the interests of justice that the examining counsel should be allowed to cross-examine the witness and to show that he really deceived the party calling him; his statement must be put to the witness, and he must be asked whether or not he has made such a statement. It seems to me clear that any previous statement made by a witness who is called, say, by a plaintiff, which entirely contradicts the evidence he gives in the witness box, ought to be placed before him and if he admits it it ought to be brought to the knowledge of the judge that he has made, to the party calling him, an entirely different statement from what he is stating in the box. That being so, the Judge will give leave to cross-examine the witness, and if he has made a contrary statement previously, dismiss his evidence as not being trustworthy."

[10] The last sentence no longer represents the correct approach. The new approach was set out in *Makhala & Another v S* 2022 (1) SACR 485 (SCA) at para 111-115 as follows:

"[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 [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] 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'.[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.[Ibid at 177-178] Insofar as the contradiction rationale is concerned, the learned commentators state:[Ibid at 178]
'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: [Ibid at 178-179]
'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 "*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.[See BC Naude 'The substantive use of a prior inconsistent statement' (2013) 26 SACJ 55 at 59-61.] 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,[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'.] and particularly an accused person's fundamental constitutional 'right to a fair trial', enshrined in s 35(3) of the 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.[Ibid BC Naude fn 38 at 61-63]

[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. [*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."

[11] The court continued as follows at para 117 and 118:

"[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 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."

[12] Commenting on section 190(2), which I find appropriate also in respect of section 190(1), it was said in *S v Hancock* 2004 JDR 0418 (SCA) at para 11:

"[11] Section 190(2) allows a person to discredit his witness if such witness turns hostile whilst testifying. A witness is hostile if he is not desirous of telling the truth at the instance of the party calling him (Stephen Digest of the Law of Evidence 12th ed art 147)."

[13] Section 190(1) provides for one of the exceptional cases where a previous inconsistent statement made by a witness is admitted into evidence. The purpose is to call into question and discredit the credibility of the witness, to disparage his character and to cast an imputation upon their motive for an about-turn. The intention is to challenge the honesty of the witness and the veracity of the second statement. An application to impeach a witness is only a start of what may lead, as it did in this matter, to the next phase, being a trial-within-a-trial. A trial-within-a-trial is only part of the process that may or may not lead to the acceptance or rejection of some of or the whole of such a witness' testimony. An impeachment process is related to the witness being deemed adverse. The witness should first be deemed adverse before they could be cross-examined [*Rex v Saqwashula* 1930 AD 437 at 441]. The questions in cross-examination cannot properly be put to a witness, before the witness, in the opinion of the presiding officer, proved adverse to the party who called such witness. In other words, it is the opinion of the presiding officer that the witness is hostile to the party that founds cross-examination of a party's own witness.

[14] Tofile did not want to consult with the prosecutor. When the prosecutor succeeded in meeting him, after he was arrested and was in prison awaiting trial on a different matter, he told the prosecutor that he did not want to testify and that he was not a State witness. On his own version, Tofile was on the scene at the time of the shooting and had signed a statement in the presence of Tyali. His hostility to the prosecution was highly obvious. As a person who was likely to give material evidence in these criminal proceedings, the State led the evidence of the investigating officer under oath that Tofile was evading service of the subpoena, and the court issued a warrant for his arrest to appear at the proceedings.

[15] The fact that Tofile contradicted himself in *viva voce* evidence and in his prior statement is no reason to disregard or exclude his evidence in its entirety. His disavowed prior inconsistent statement is hearsay evidence within the meaning of section 3(4) of the Law of Evidence Amendment Act, 1988 (Act No. 45 of 1988) (HEA) [*Makhala* para 114]. Section 3(1)(c) of the provides:

"3 Hearsay evidence

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

(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."

[16] The question whether the court should declare a witness hostile entails an exercise of a discretion by the court [*Saqwashula; Commentary on the CPA,* issue 57, 2016, 23-18]. A discretion should be judicially exercised [*S v Botha* 2017 JDR 1769 (SCA) para

34]. In my view, it was not desirable at this stage to deal fully with the assessment of the factors to which the court had regard to, as it involved the assessment of the credibility of the witnesses, both for the State and Tofile. Two of the witnesses for the State in the impeachment application also testified in the main trial against the accused. This matter cannot be decided in pieces. It cannot be denied that credibility played a role in the impeachment application. The credibility of a witness is a factor at the stage of a consideration of an impeachment and must be taken into account to the extent that it is necessary. However, the test remains whether in the opinion of the court Tofile stood to be impeached. The fact that criticism was levelled to the commissioning of the statement can be answered by reference to *Rex v Valacha and Another* 1945 AD 826 at 837 where it was said:

"Naturally, the fact that the statement is not made under oath, and is not subject to cross-examination, detracts very much from the weight to be given to those portions of the statement favourable to its author as compared with the weight which would be given to them if he had made them under oath, but he is entitled to have them taken into consideration, to be accepted or rejected according to the Court's view of their cogency."

[17] I was persuaded that the statement of Tofile which the State tendered was, *prima facie,* freely and voluntarily made and that no promises from the police induced the statement [*S v Sheehama* 1991(2) SA 860 (A) at 873E-I]. The question of whether the disavowed previous inconsistent statement was admissible in evidence is distinct from the question whether it was proved beyond reasonable doubt that Tofile made the statement whose contents are accepted as the truth. The latter is the function of the court when considering the totality of the evidence, just like other facts in dispute [*S v Dhlamini and Another* 1971 (1) SA 807 (A) at 810E-F]. Tofile's statement was obtained in the course of an investigation into crime. The ruling that his statement was admissible was interlocutory and always open to challenge by the defence after laying a proper basis [*S v M* 2003 (1) SA 341 (SCA) at para 30]. The Court has a discretion to exclude evidence improperly obtained. Section 35(5) of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) (the Constitution) reads:

“35 (5) Evidence 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.”

[18] For these reasons I found Tofile hostile, and thus allowed the prosecution to cross-examine him.

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DM THULARE

JUDGE OG THE HIGH COURT