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

CASE NO: CC 27 / 2018
REPORTABLE

In the matter of:

THE STATE

versus

FADWAAN MURPHY	Accused 1
SHAFIEKA MURPHY	Accused 2
GLENDA BIRD	Accused 3
DOMINIC DAVIDSON	Accused 4
LEON PAULSEN	Accused 5
FADWAAN MURPHY AS THE REPRESENTATIVE OF ULTERIOR TRADING SOLUTIONS CC	Accused 6
DESMOND DONOVAN JACOBS	Accused 7

REASONS FOR RECONSIDERATION OF PREVIOUS RULING ADMITTING

WENN'S S 204 STATEMENT IN TERMS OF S 3(1)(c) OF ACT 45 OF 1988 HANDED DOWN ON 12 JULY 2023

DAVIS, AJ:

INTRODUCTION

1. The question to be determined was whether the contents of a written statement made by an accused person, who subsequently elects to testify as a State witness in terms of s 204 of the Criminal Procedure Act 51 of 1977 ("**the CPA**") but recants the contents of the statement at trial, can be admitted as hearsay in terms of s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 ("**the Hearsay Act**"),[1] or whether s 219 of the CPA precludes the admission of the statement if it is a confession. [2]

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[1] Section 3(1) of the Hearsay Act reads as follows:

"3(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 testified 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 perjudice 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] Section 219 of the Criminal Procedure Act reads as follows:

"219. No confession made by any person shall be admissible as evidence against any other person."

2. On 18 September 2015 Ms Felicia Wenn ("**Wenn**") and Ms Zuluygha Fortuin ("**Fortuin**") were caught red-handed at 1[...] R[...] Close, Grassy Park in the midst of packing a large stash of the drug known as "tik."[3] Both were arrested and charged with drug dealing. While they were still accused persons facing charges, both gave detailed written statements to the prosecution with a view to becoming state witnesses in terms of s 204 of the CPA. The charges against them were later withdrawn as the prosecution decided to use them as State witnesses against their former co-accused and other accused joined in the case.

3. Wenn and Fortuin both testified for the State in the trial of the accused, who are charged with numerous counts of drug dealing, as well as money laundering and racketeering in contravention of the Prevention of Organized Crime Act 121 of 1988.

4. In the witness box, both Wenn and Fortuin departed materially from the contents of their statements. While the state did not seek to discredit Fortuin, who had nonetheless given evidence useful to the State's case, the prosecution successfully applied to have Wenn declared hostile, and she was thoroughly discredited in cross-examination.

5. The written statements made by Wenn incriminated all of the accused in varying degrees, save for the 7th accused. On the face of it, Wenn's statement amounted to a confession to the offence of drug dealing and contained admissions pertinent to the money laundering and racketeering charges. Counsel for the State did not contend otherwise.

6. At the close of its case the State applied for a ruling in terms of s 3(1)(c) of the Hearsay Act that Wenn's s 204 statement be admitted as evidence as proof of the

[3] Methamphetimine, an undesirable dependence-producing substance in terms of Part III of Schedule 2 of the Drugs and Drug Trafficking Act 140 of 1992.

contents thereof. Reliance was placed in this regard on the decisions in *S v Rathumbu*[4] and *S v Mathonsi.*[5]

7. The defence resisted the application on the grounds that the State had not proved that Wenn had in fact said what was attributed to her in the statement, that Wenn had been unduly influenced in making the statement, and that her constitutional right to legal representation had been violated in the process of procuring the statement. At that stage the point was not raised that Wenn's s 204 statement was inadmissible against the accused in terms of s 219 of the CPA as it amounted to a confession.

8. On 4 November 2019, on the strength of *S v Rathambu,*[6] I ruled that Wenn's s 204 statement was admissible in terms of s 3(1)(c) of the Hearsay Act ("**the hearsay ruling**").[7] In reaching that conclusion, I determined that Wenn's s 204 statement was authentic (in the sense that she had made the statements attributed to her in the written document and had signed it), that it had been freely and voluntarily made, and that it had been legitimately procured (in the sense that Wenn's constitutional rights had not been violated in the process of obtaining the statement). I was also satisfied, having regard to the factors in s 3(1)(c) of the Hearsay Act, that the interests of justice warranted the reception of the statement was evidence. I was at pains to emphasize, however, that while I considered that the statement had sufficient potential probative value to meet the reliability threshold for admissibility in terms of s 3(1)(c), the ultimate weight or probative value of the statement could only be determined on an assessment of all the evidence at the end of the trial.

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[4] 2012 (2) SACR 219 (SCA).

[5] 2012 (1) SACR 335 (KZP).

[6] *Supra.*

[7] The reasons for the ruling form part of the main judgment in the matter.

9. The hearsay ruling was, of course, interlocutory in nature and subject to reconsideration if the circumstances so warranted.[8] At the close of the defence case, counsel applied for a reconsideration of the hearsay ruling as well as my ruling on the admissibility of the evidence of the drugs seized pursuant to the warrantless search conducted by the police at 1[...] R[...] Close on 18 September 2015 ("**the first search and seizure ruling**").

10. The reconsideration application was predicated primarily on the new evidence of a witness called by the Court in terms of s 186 of the CPA at the request of the accused, which had bearing on the credibility of the investigating officer which was integral to both the hearsay ruling and the first search and seizure ruling.

11. Significantly for present purposes, in support of the reconsideration application the defence relied for the first time on the legal point that Wenn's s 204 statement was inadmissible in terms of s 219 of the CPA as it amounted to a confession.

12. Now it is well-established that simple interlocutory orders may be changed where they are based on an incorrect interpretation of a statue which only becomes apparent later.[9] The legal point based on s 219 of the CPA had implications for the interpretation and application of s 3 of the Hearsay Act, in that, if the point had merit, it meant that the hearsay ruling would have to be altered and Wenn's statement ruled inadmissible.

THE RELEVANT CASES

13. At common law admissions and confessions were only admissible as evidence against the maker. The position was that extra-curial statements made by an accused,

[8] *S v Melanzoni* 1952 (3) SA 639 (A) at 644 E; *S v Steyn* 1981 (3) SA 1050 (C) at 1051F; *S v Leepile and Others* 1986 (2) SA 346 (W) at 348 G to 350 C.

[9] *Zondi v MEC Traditional and Local Government Affairs* 2006 (3) SA 1 (CC) para 30.

whether admissions or confessions, could not be used as evidence against another accused.[10]

14. The common law rule was altered in *S v Ndhlovu,*[11] where the Court decided that the extra-curial admissions of an accused incriminating a co-accused could, if disavowed at trial, be used in evidence the latter in terms of s 3(1)(c) of the Hearsay Act.[12]

15. In *Mathonsi v S*[13] the Court had to do with the written statement made by a witness, the contents whereof were subsequently disavowed by the witness who was then declared hostile at trial. A full bench of the Kwazulu-Natal High Court in *Mathonsi* departed from the common law rule that a previous inconsistent statement by a hostile witness can only be used to impeach the witness and not as proof of its contents, and approved and adopted the criteria laid down by the Supreme Court of Canada in *R.v.B. (K.G.)* [1993] 1 S. C. R 740 for the substantive use of a previous inconsistent statement made by a hostile witness.[14] The Court in *Mathonsi* also apparently accepted that the statement could be

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[10] R v Matsitwane 1942 AD 213 at 218; R v Baartman 1960 (3) SA 535 (A) at 542 C - E.

[11] 2002 (6) SA 305 (SCA).

[12] Although Cameron JA posed the question with reference to "an accused's out-of-court statements incriminating a co-accused", the case dealt with the use of admissions by one accused against his co-accused and not confessions (see *S v Mhlongo; S v Nkosi* 2015 (2) SACR 323 (CC); 2015 (8) BCLR 887 (CC) para 26; *S v Litako* 2015 (3) SA 287 (SCA) para 42).

[13] 2012 (1) SACR 335 (KZP).

[14] Mathonsi v S (*supra*) at paras 28 to 33. The criteria laid down in R v B (K.G.) [1993] 1 S.C.R. 740 at 746 were the following:

> "(1) the evidence contained in the prior statement is such that it would be admissible if given in 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."

admitted as hearsay in terms of s 3(1)(c) of the Hearsay Act, without specifically referring to all the requirements laid down in s 3(1)(c).[15]

16. In *Rathumbu v S* [16] the Supreme Court of Appeal, relying on *Ndhlovu*, admitted the written statement of a hostile witness, who subsequently disavowed the statement, as evidence of its contents in terms of s 3(1)(c) of the Hearsay Act.

17. In both *Mathonsi* and *Rathambu* the Court was dealing with a witness who was not an accomplice to the crime(s) in question and had never been charged as a co-accused of the accused on trial.

18. Some thirteen years after the decision in *Ndhlovu*, the Supreme Court of Appeal commented in *Litako and Others v S,*[17] that *Ndhlovu "represented a seismic shift in our law".*[18] The Court in *Litako* traced the origins of the common law rule that confessions and admissions made by an accused are only admissible as evidence against the maker,[19] and noted that the prohibition against the confession of one accused being used against another is captured in s 219 of the CPA,[20] while section 219A of the CPA, which deals with admissions, does not contemplate admission being tendered as evidence against anyone other than the maker.[21]

19. The Court in *Litako* criticized the approach taken in *Ndhlovu*, pointing out that, because the enquiry in *Ndhlovu* focused primarily on the challenge based on the constitutionality of s 3 of the Hearsay Act, no attention was paid to earlier decisions of our courts in which the rule against allowing admissions and confessions to be tendered

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[15] Mathonsi v S (*supra*) at paras 39 read with paras 47 and 48.

[16] 2012 (2) SACR 219 (SCA).

[17] 2015 (3) SA 287 (SCA).

[18] Para 42.

[19] *Litako* paras 32 to 41.

[20] *Litako* para 38.

[21] *Ibid.*

against a co-accused was stated and re-stated.[22] It was also pointed out that, in the High Court decision in *Ndhlovu,*[23] the Court considered that s 3 of the Hearsay Act entitled it to disregard the common law rule,[24] and glossed over the provisions of subsection 3(2) of the Hearsay Act,[25] which provides that, *"The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence."*

20. Regarding the rationale underlying the common law rule, the Court in *Litako* observed that:

> *"The common-law rule was not only an aversion to the admissibility of hearsay evidence, but it developed because of the inherent dangers of permitting the extra-curial statements by one accused against another. It recognized the potential conflicts between the interests of co-accused persons. Furthermore, because a co-accused person cannot be compelled to testify, the common-law rule appreciates that fair trial rights, including the right to fully challenge the state's case, may be hampered.*[26]
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> *…*
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> *This rule excluding the use of extra-curial statements made by one accused against another was not based solely on its hearsay nature, although that in itself would have constituted sound reasons for excluding such evidence. It has always been stated that an admission made by one person is normally irrelevant when tendered for use against another. From the state's perspective it would usually be dealing with statements made by co-accused which, in itself, ought to bring with it a caution. The shifting of blame from one co-accused to another to avoid conviction*

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[22] *Litako p*ara 49.

[23] *S v Ndhlovu and Others* 2001 (1) SACR 85 (W).

[24] *S v Litako (supra)* para 50, referring to the High Court decision in *S v Ndhlovu* (*supra* n 22) at paras 48 and 49.

[25] *Litako* para 50.

[26] *Litako* para 51.

is not uncommon in our criminal justice system. Furthermore, other than when one is dealing with vicarious admissions or statements in furtherance of a conspiracy … it is difficult to see how one accused's extra-curial statement can bind another. Co-accused, more often than not, disavow extra-curial statements made by them and often choose not to testify. They cannot be compelled to testify, and in the event that an extra-curial statement made by one co-accused and implicating the others is ruled admissible and he or she chooses not to testify, the right of the others to challenge the truthfulness of the incriminating parts of such statement is effectively nullified. The right to challenge evidence enshrined in s 35(3) of the Constitution is thereby rendered nugatory."[27]

21. In the light of the rationale for the common law rule against the use of extra-curial admissions by one accused against another, the Court in *Litako* concluded that:

"… it appears to us that the interests of justice are best served by not invoking the [Hearsay] Act for that purpose. Having regard to what is set out above, we are compelled to conclude that our system of criminal justice, underpinned by constitutional values and principles which have, as their objective, a fair trial for accused persons, demands that we hold, s 3 of the Act notwithstanding, 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."[28]

22. Not long after *Litako*, the Constitutional Court in *Mhlongo v S; Nkosi v S* ("***Mhlongo***")[29] had occasion to consider the admissibility of extra-curial statements of an accused against co-accused in a criminal trial. The Constitutional Court characterized the issue at the heart of the appeal as "*the Constitutional tenability of the decision in Ndhlovu,*

[27] *Litako* para 65.

[28] *Litako* para 67.

[29] 2015 (2) SACR 323 (CC); 2015 (8) BCLR 887 (CC).

which allows extra-curial statements to be admitted against a co-accused if it is in the interests of justice to do so".[30]

23. The Court in *Mhlongo* noted that, prior to the Criminal Procedure Code 31 of 1917 ("***the 1917 CPA***"), the common law did not distinguish between statements of an accused as either admissions or confessions. The 1917 CPA introduced a distinction between admissions and confessions, which was retained in its statutory successors. Section 219 of the CPA precludes the admissibility of confessions against another person, while section 219A lays down the requirements for the admissibility of admissions. [31]

24. The Court in *Mhglongo* held that the reasoning in *Ndhlovu*, which held that an extra-curial admission, as opposed to a confession, by an accused is admissible against a co-accused if the requirements of s 3 of the Hearsay Act are met, cannot be supported for a number of reasons.[32] The Court stated in this regard that:

> *"[27] … First, it did not deal with the common law rule against allowing admissions to be tendered against a co-accused. The Court appeared to assume that the hearsay aspect of the evidence was its major pitfall and could be rescued by section 3 of the Evidence Amendment Act.*
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> *[28] Second, the Court in Ndhlovu did not deal with the provisions of s 3(2) of the Evidence Amendment Act. Extra-curial admissions and confessions are hearsay by nature … . Under the common law, hearsay evidence was generally excluded. Section 3(1) of the Evidence Amendment Act codified this common law principle, providing that hearsay evidence is inadmissible, subject to certain exceptions.*

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[30] *Mhlongo* para 17.

[31] *Mglongo* para 25.

[32] *Mglongo* para 26.

[29] Section 3(2) of the Evidence Amendment Act provides that section 3(1) 'shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence'. The statements of co-accused, with which we are confronted in this case, are inadmissible for reasons outside of their hearsay nature.

[30] Third, Ndhlovu did not seem to have regard to the provisions of section 219A of the current CPA - which expressly allows an admission to be admitted only against its maker and is silent regarding other persons. The reasoning of the Supreme Court of Appeal in Litako, that this section does not contemplate extra-curial admissions being tendered against anyone else, is sound.

*[31] Fourth, the Court in Ndhlovu seemed not to have regard to whether the Evidence Amendment Act altered the common law. In interpreting a statute it cannot be inferred that it alters the common law unless there is a clear intention to do so. A statute must be interpreted in a manner that makes the least inroads into the common law. Together with section 3(2), another indicator that the Evidence Amendment Act did not alter the common law is to be found in section 3(1) which provides that '**subject to the provisions of any other law** hearsay evidence shall not be admitted as evidence' unless certain stipulated requriements are met. The Evidence Amendment Act altered the common law in relation to hearsay evidence but it did not alter or intend to alter the common law in relation to the admissibility of extra-curial statements made by an accused against a co-accused." [33]*
[Emphasis in the original]

25. The Court in *Mhglongo* went on to hold that the differentiation between accused implicated by the admissions versus the confessions of a co-accused is irrational and lawfully unsustainable.[34] It concluded that:

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[33] *Mglongo* paras 27 to 31.

[34] *Mglongo* para 37.

"The interpretation adopted in Ndhlovu, that extra-curial admissions are admissible against co-accused in terms of s 3(1)(c) of the Evidence Amendment Act, creates a differentiation that unjustifiably limits the section 9(1) rights of accused implicated by such statements. The pre-Ndhlovu common law position that extra-curial confessions and admissions by accused are inadmissible against co-accused must be restored."[35]

26. In *Khanye and Another v S*[36] and *Makhubela v S; Matjeke v S*[37] and the Constitutional Court affirmed the decision in *Mhlongo* restoring the common law position that extra-curial statements by an accused, whether admissions or confessions, are inadmissible against a co-accused.

27. In an unreported decision of the Kwazulu-Natal Division, Pietermaritzburg in the appeal of *Ngubane and Others v S*, ("*Ngubane*")[38] two accomplices had made written statements in terms of s 204 of the CPA confessing their involvement in certain crimes. The intention was that they would be called as State witnesses, but both men died before the trial. Their statements were admitted as evidence by the trial court in terms of s 3(1)(c) of the Hearsay Act, with the names of the accused redacted with a view to curing any prejudice to the accused. On appeal the High Court held that the trial court had erred. It reasoned in this regard that:

"[41] The exception to the inadmissbility of hearsay evidence which is allowed by Section (3)(1)(c) of the Law of Evidence Amendment Act is qualified by the opening words of the Section which renders its provisions subject to the provisions of any other law. The Criminal Procedure Act is such another law and Section 219 of that Act is a provision which forbids the admission of an extra-curial confession against

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[35] *Mglongo* para 38.

[36] *Khanye and Another v S* 2017 (2) SACR 630 (CC) paras 22 - 23.

[37] *Makhubela v S; Matjeke v S* 2017 (2) SACR 665 (CC) paras 29 and 30.

[38] (AR 158/17)[2018] ZAKZPHC 2 (2 March 2018).

any person except its maker. The exclusion of the names of the accused persons from the statements of Duma and Mahlobo did not make the statements anything other than the confessions they were in their unredacted form.

[42] Furthermore Section 3(2) of the Law of Evidence Amendment Act qualifies the provisions of sub-section 1, stating that those provisions 'shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.' The confessions of Duma and Mahlobo were inadmissible for reasons beside their hearsay nature. (See ***State v Mhlongo, State v Nkosi 2015 (2) SACR 323 (CC) at paragraph 29****). To the extent that any passages in the statements might be regarded as admissions (with or without the deletion of the names of the alleged co-perpetrators), Mhlongo's case (at paragraph 30) establishes that s 3(1) of the Law of Evidence Amendment Act would be equally unavailable as a device to have the statements admitted in evidence against the Appellants. (See also* ***State v Litako 2014 (2) SACR 431 (SCA) at paragraphs 53 and 54****.)*

28. In *Mabaso v S,*[39] the Supreme Court of Appeal had to do with a situation where a co-accused pleaded guilty and made a statement in terms of s 112(2) of the CPA in explanation of his plea. He was then convicted and sentenced, and subsequently agreed to testify against his former co-accused. He went on to make other written statements implicating the accused. At the trial he departed from his previous written statements, and was declared hostile.

29. In convicting the appellant in *Mabaso,* the High Court, on the authority of *Mathonsi*, had relied on the contents of the s 112(2) statement and two further written statements made by the hostile witness in convicting the accused.[40] The Supreme Court of Appeal held in *Mabaso* that the High Court had erred in failing to take into account that one of

[39] *Mabaso v S* [2021] ZASCA (9 July 2021).

[40] *Mabaso* para 22.

the criteria laid down in *Mathonsi* for admissibility of a prior inconsistent statement was that the evidence contained in the statement was such that it would be admissible if given in a court.[41] The Court in *Mabaso* referred[42] to the prohibition in s 219 of the CPA against the use of a confession made by any person against any other person, as well as the decision of the Constitutional Court in *Makhubela v S; Matjeke v S ("Makhubela")* [43] which confirmed the decision in *Mhlongo* that extra-curial confessions and admissions made by an accused are inadmissible against a co-accused.[44]

30. The Court in *Mabaso* held that one of the further statements made by the hostile witness amounted to a confession, which was inadmissible as evidence against any other person in terms of s 219 of the CPA and therefore should not have been used as evidence against the accused,[45] and that the admissions made by the hostile witness in his s 112(2) statement implicating the accused were likewise inadmissible against the accused.[46]

31. In *Makhala v S,*[47] which was decided some seven months after *Mabaso* but did not refer to the decisions in *Mhlongo, Makhubela* and *Mabaso*, the Supreme Court of Appeal had to deal with a situation where one Luzuko Makhala, the brother of the appellant (*"***LM***"),* during the course of a police investigation voluntarily described his role in a murder and was treated as a State witness in terms of s 204 of the Criminal Procedure Act. LM was therefore an accomplice, but he was never charged. He gave two written statements which implicated the appellant in the murder. At the trial, LM recanted the contents of his two statements and was declared hostile. The trial court admitted the two statements as evidence in terms of s 3(1)(c) of the Hearsay Act and relied on part of the

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[41] *Mabaso* para *24.*

[42] *Mabaso* para 25.

[43] 2017 (2) SACR 665 (CC).

[44] *Makhubela v S*; *Matjeke v S (supra)* paras 29 and 30.

[45] *Mabaso* paras 25 and 26.

[46] *Mabaso* para 27.

[47] [2021] ZASCA 19 (18 February 2022).

contents thereof in convicting the accused. On appeal, the appellant challenged the admission and use of LM's statements on various grounds.[48]

32. In a minority judgment, Unterhalter AJA adverted to the different approaches taken by our courts on how to treat the admissibility of the extra-curial statements of a witness,[49] with reference to the decisions in *Ndhlovu*,[50] *Litako*[51] and *Mathonsi*.[52]

33. Unterhalter AJA concluded that the written statements of LM did not amount to hearsay, and could be admitted without recourse to s 3(1)(c) of the Hearsay Act, since the trial court had determined that LM had indeed made the statements, and LM had testified on the merits at the trial and been subject to cross-examination by the defence.[53]

34. Unterhalter AJA considered the reasoning underlying the decision in *Litako* as to why the extra-curial admission or confession of one accused is inadmissible as evidence against another.[54] He distinguished *Litako* on the basis that whereas *Litako* concerned the extra-curial statement of a co-accused who did not testify on the merits at trial, which meant that the statement was hearsay and the rights of the co-accused to cross-examine on the contents of the statement was compromised, the Court in *Makhala* was not concerned with the admissions or confessions made by a co-accused but rather with the extra-curial admissions of a witness, being an accomplice, who testified at the trial on the merits.[55] Unterhalter AJA reasoned in this regard that:

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[48] Described by Unterhalter AJA at paras 16 to 20 as "the legality challenge", "the hearsay challenge", "the cautionary challenge" and "the onus challenge".

[49] *Makhhala* para 41.

[50] *Supra.*

[51] *Supra.*

[52] *Supra.*

[53] *Makhala* para 64.

[54] *Makhala* paras 65 and 66.

[55] *Makhala* paras 67 and 68.

> *"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 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 that incriminates them. I recall that the warnings as to the dangers of hearsay evidence, framed in S v Ramavhale, 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 truth' may all be tested. What value the trial court then attributes to the statement is quite another matter."* [56]

35. The learned Judge accordingly concluded 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 against the accused.[57] He opined that:

> "*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 that the extra-curial statement may be of doubtful value.*" [58]

36. In the majority judgment in *Makhala*, Meyer AJA (with whom Mocumie, Makgoka and Mothle JJA concurred) disagreed with the view of Unterhalter AJA that the extra-

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[56] *Makhala* para 69.

[57] Makhala para 70.

[58] *Ibid*.

curial statements of LM, which were recanted by him at trial, did not amount to hearsay so that the requirements of s 3(1)(c) of the Hearsay Act did not have to be satisfied in admitting such statements.[59] The majority considered that the application of s 3(1)(c) to the inconsistent extra-curial statements of a s 204 witness is sound.

37. Meyer AJA referred to the criticism of *Ndhlovu* in *Litako*, but similarly distinguished *Litako* on the basis that the Court in *Makhala* was not dealing with the extra-curial admissions of a co-accused, but rather with a s 204 witness who departs from his or her extra-curial statement.[60] Meyer AJA stated in this regard that:

> *"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, in principle decided in favour of 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 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'."*[61]

38. The majority in Makhala answered this question in the affirmative, holding that:

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[59] *Makhala* para 107.

[60] *Makhala* para 110.

[61] *Makhala* para 110.

> *"... 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 evidence as hearsay enables the trial court to subject such evidence to the preconditions 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' … promotes … 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."* [62]

39. The majority in *Makhala* went on to hold that the common law rule that a witness' prior inconsistent statements may be used solely for the purposes of impeachment and not as proof of the facts contained therein, no longer finds application in our law[63] and that *Mathonsi* was wrong in laying down separate requirements from s 3 of the Hearsay Act for admitting an extra-curial inconsistent statement as proof of the contents thereof.[64]

40. Thus both the minority and the majority in *Makahla* agreed that the contents of a previous inconsistent statement made by a hostile state witness could be used as evidence against the accused, although they differed on whether or not the statement amounted to hearsay. Significantly for present purposes, the point that sections 219 and 219A of the CPA preclude the use of confessions and admissions as evidence against any person other than the maker was apparently neither raised nor considered.

DISCUSSION OF THE AUTHORITIES

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[62] *Makhala* para 114.

[63] *Makhala* paras 116 and 117.

[64] *Makhala* para 117.

41. Mr Van der Berg contended, *inter alia*, that Wenn's s 204 statement was inadmissible in terms of s 219 of the CPA, regardless of s 3(1)(c) of the Hearsay Act.

42. Ms Heeramun, for the State, relied on *Makhala* in support of the admission of Wenn's s 204 statement in terms of s 3(1)(c) of the Hearsay Act. She contended that s 219 of the CPA does not find application were one is dealing with a s 204 witness who recants his or her prior statement, as opposed to the confession of a co-accused in a criminal trial.

43. It seemed to me, however, Ms Heeramun's argument was at odds with the express wording of s 219 of the CPA, which clearly states that "*no confession made by <u>any person</u> shall be admissible against <u>another person</u>*" (my emphasis).

44. It occurred to me that the distinction drawn in Makhala (in both the majority and minority judgments) between the use of an extra-curial statement of an accomplice who is called as a State witness and turns hostile, and the use of an extra-curial statement of a co-accused, is based on the fact that the dangers of admitting the former as evidence against the accused are mitigated because the hostile witness testifies on the merits at the trial and may be fully cross-examined by the accused - unlike the situation where the statement is made by a co-accused who cannot be compelled to testify, and elects not to testify on the merits at trial.

45. In my respectful opinion, this reasoning - however cogent - did not deal pertinently with, or dispose of, the point based on the express wording of s 219 of the CPA which arose squarely in this case. I was informed by Mr Van der Berg, who appeared for the appellant in *Makhala*, that the point based on s 219 of the CPA was not raised by the appellant in *Makhala* nor dealt with in oral argument before the Court, but that the State submitted supplementary written heads of argument on the applicability of s 219. However, it does not appear from the judgment in *Makhala* that the Court considered the point. Nor was reference made in *Makhala* to the earlier judgments of the Constitutional

Court in *Mhlongo* and Makhubela, followed in *Mabaso*, and the above quoted reasons advanced in *Mhlongo* for rejecting the approach taken in *Ndhlovu.*[65]

46. In my assessment the Constitutional Court in *Mhlongo* established authoritatively that:

46.1. the Hearsay Act did not alter the common law in relation to the admissibility of extra-curial statements (viz. that they are only admissible as evidence against the maker);[66]

46.2. s 3(2) of the Hearsay Act provides that s 3(1) cannot render admissible hearsay statements which are inadmissible on other grounds[67] (such as the aforesaid common law rule, or the provisions of a statute such as the CPA);

46.3. the interpretation of the Hearsay Act adopted in *Ndhlovu* was at odds with the prohibition in s 219A of the CPA, which expressly allows an admission to be admitted only against its maker.[68]

47. Since the Constitutional Court in *Mhlongo* rejected the admission under s 3(1)(c) of an admission against the accused on the grounds that s 219A only allows an admission to be used against its maker, it seemed to me that it must follow that the use of an extra-curial confession is also precluded under s 3(1)(c) of the Hearsay Act on account of the express prohibition in s 219 against the use of a confession against any other person.

48. In my respectful opinion, the statutory prohibitions contained in sections 219 and 219A of the CPA against the use of extra-curial confessions and admissions as evidence against anyone but the maker <u>are not confined to the confessions or admissions made</u>

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[65] *Mhlongo* paras 27 to 31.

[66] *Mhlongo* paras 31.

[67] *Mhlongo* para 29.

[68] *Mhlongo* para 30.

by a co-accused in a criminal trial. I considered that the plain meaning of these provisions entails that the prohibition also operates in circumstances where the confession or admission was made by an accomplice who was never charged and became a State witness in terms of s 204, as happened in *Makhala*, or where the confession or admission was made by a co-accused who pleads guilty and subsequently testifies against the former co-accused, as happened in *Mabaso,* or by a former co-accused who elects to become a State witness in terms of s 204 and the charges against him or her are withdrawn, as happened in the case of Wenn and Fortuin in this matter.

49. It seemed to me that, in order to admit Wenn's s 204 statement as evidence of its contents in terms of s 3(1)(c) of the Hearsay Act on the strength of the reasoning in *Makhala*, I would have to ignore the clear wording of s 219 of the CPA and interpret the words "*against another person*" to mean "*against a co-accused*". To my mind an interpretation which limits the broad meaning of s 219 would infringe the injunction in s 39(2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, as it would circumscribe rather than promote the rights of an accused person to challenge evidence adduced against him or her.[69]

50. Now it is so that the majority judgment in *Makhala* recognized that the effectiveness of the cross-examination of a State witness who denies having made the prior inconsistent statement or cannot recall having made it may be compromised in some cases,[70] and that a court seized with an enquiry under s 3(1)(c) of the Hearsay Act is empowered in terms of s 3(1)(c)(vii) to take into account "*any other factor which should in the opinion of the court be taken into account*", which would included issues relating to the fairness of the trial. That, however, does not, in my respectful view, overcome the difficulty that section 3(2) of the Hearsay Act must be read together with sections 219 and 219 A of the CPA. Section 3(2) expressly states that the provisions of s 3(1) shall not

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[69] The point was made in *Litako* (supra) at para 67 that "O*ne can rightly ask how the rights of an accused person to challenge evidence adduced against him can be more circumscribed under our new constitutional order than they were under the old regime."*

[70] *Makhala* (*supra*) para 114.

render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence, and the provisions of sections 219 and 219 A constitute such other grounds.

51. In the latter regard it is apposite to note that the Supreme Court of Appeal in *Litako*[71] and the Constitutional Court on *Mholongo*[72] recognized that the common law rule against the use of confessions and admissions against anyone other than the maker, which informed sections 219 and 219 A, was not only based on the hearsay nature of such extra-curial statements, but also on the dangers inherent in accomplice testimony and the implications for fair trial rights. In *Mhlongo* the Constitutional Court referred to the well-known decision of *S v Hlaphezula*[73] in which the Court pointed out the dangers inherent in the in-court testimony of an accomplice implicating a co-accused, and observed that these dangers are intensified when the statement was made out-of-court and its maker cannot be subject to cross-examination[74] (or, one might add, effective cross-examination on the contents of the statement where the maker denies having made the statement and attributes the contents to the police, as did Wenn in this case).

52. Although there may be cogent reasons for revisiting what appears to be a blanket prohibition in sections 219 and 219 A of the CPA against the use of extra-curial confessions and admissions against any person other than the maker, s 3(1)(c) of the Hearsay Act notwithstanding, it seemed to me that I am bound by the reasoning in *Mhologo* and the decision in *Mabaso*, and that I am concomitantly not bound to follow *Makhala*, in which the legal point based on s 219 of the CPA was not raised and considered.

53. Ms Heeramun made an impassioned argument for the need to admit Wenn's s 204 statement in terms of s 3(1)(c) of the Hearsay Act in circumstances where there is

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[71] *Litako* (*supra*) para 51.

[72] *Mholongo* (*supra*) paras 27 and 35.

[73] 1965 (4) SA 439 (A).

[74] *Mhlongo* (*supra*) para 35, footnote 57.

evidence to suggest that the first accused, acting through a close associate, influenced Wenn to alter her evidence. I am alive to the difficulties posed by witness tampering to the administration of justice, particularly in matters involving organized crime. It may well be that legislative intervention is called for to amend sections 219 and 219 A of the CPA and 3(2) of the Hearsay Act to ameliorate the problem. But these difficulties cannot be cured by what, in my view, would amount to crossing the boundary between permissible statutory interpretation and impermissible judicial legislation.

54. In short, I concluded that I was bound by the decisions in *Mhlongo* and *Mabaso*, and was therefore constrained to set aside my earlier ruling admitting Wenn's s 204 statement as evidence in terms of s 3(1)(c) of the Hearsay Act.

CONCLUSION

55. For these reasons I made the following ruling on 24 April 2023:

> The ruling made on 4 November 2019 admitting Wenn's s 204 statement as proof of the contents thereof in terms of s 3(1)(c) of the Hearsay Act is set aside and replaced with the following ruling:
>
> > **"Wenn's s 204 statement is inadmissible against the accused by virtue of the provisions of s 219 and s 219A of the Criminal Procedure Act 51 of 1977."**

DIANE DAVIS
ACTING HIGH COURT JUDGE

Appearances:

For the State: Ms A Heeramun, Office of the DPP, Western Cape

For 1st and 6th Accused: Adv J Van der Berg SC, instructed by Mr R Davies, Davies & Associates.

For 2nd Accused: Adv A Paries, instructed by Mr D Langeveldt, Langeveldt Attorneys.

For 4th Accused: Adv T Twalo, instructed by P A Mdanjelwa Attorneys.