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

CASE NO: CC08/2018

In the matter between:

THE STATE

And

ELTON LENTING AND 19 OTHERS **ACCUSED**

JUDGMENT – 31 July 2023

LEKHULENI J

[1] The criminal trial against the twenty accused is pending before this court. On 27 July 2023, the State tendered evidence in the form of a statement. The statement was made by Brandon Ashley David, who has since passed away. By agreement with the defence, the State handed in the deceased's death certificate and a copy of his identification document. Pursuant thereto, the State called Sergeant Zolane Damase, who took the statement from the deceased. In his evidence in chief, Sergeant Damase testified that he has 17 years of experience as a Police Officer and he is stationed at Delft - SAPS.

[2] He was shown the witness statement of the deceased bearing CAS 464/09/2014. The witness testified that he commissioned the statement on 13 September 2014 at 23h50. He confirmed that the handwriting of the statement was his and that it was the statement of the deceased, Brandon Ashley David. Sergeant Damase further testified that he does not have an independent recollection of taking this statement from the deceased. Mr Damon, who appeared on behalf of the State, requested Sergeant Damase to read the statement into the record.

[3] Before the witness could read the statement into the record, Mr De Villiers, appearing for accused 1, 2, 3, and 9, objected to the handing in of this statement and also took issue that the witness should read same into the record. Counsel contended that if the State wants to apply for the handing in of this statement, the State must make a substantive application and comply with the jurisdictional requirements set out in section 3(1)(c) of the Law and Evidence Amendment Act 45 of 1988 (*"the Law of Evidence Amendment Act")*. Counsel further submitted that the decision of the Constitutional Court in *S v Kapa* 2023 (1) SACR 583 (CC)*,* did not do away with the provisions of section 3(1)(c) of the Law and Evidence Amendment Act. His colleagues supported his objection, notably Mr Johnson, who appeared for accused 8 and 17, and Mr Badenhorst, who appeared for accused 5, 7, 9, and 12.

[4] Mr Strauss, who represents accused 4, 13, and 15 also objected to the handing in of this statement on different grounds. He argued that the court should decide on the admissibility of this document at this stage of the proceedings and not wait for later when the evidence is evaluated to decide on this issue. In addition, Mr Strauss argued that it would prejudice the accused to have issues hanging in the air without knowing whether this statement is admitted or not. The accused, so the contention proceeded, should know whether the court accepts this document so that they can prepare and mount their defence accordingly.

[5] The court thereafter engaged Mr Damon, who represented the State, on the issue of prejudice raised by Mr Strauss. The court also quizzed Mr Damon on whether the evaluation of this hearsay statement together with other evidence at the end of the trial would not prejudice the accused as they should know in time whether the court accepts or rejects the statement to enable them to present their case with certainty. In

response, Mr Damon argued that the decision of the Constitutional Court in *Kapa* changed the approach that the court should take in dealing with the admission of hearsay statements as in the present matter. Mr Damon shared the views expressed by Mr Klopper, who represents accused 14, 18, 19, and 20 that the decision in *Kapa* has considerably changed the legal landscape in dealing with hearsay evidence, especially the statements of deceased persons. Both Counsels contended that the Constitutional Court did not do away with section 3(1)(c) of the Law of Evidence Amendment Act; however, pursuant to that decision, the court has to adopt a holistic approach to consider whether it should accept the deceased's statement or not.

[6] The court was also informed that similar applications will be made as this case progresses. For this reason, the court gave all the legal representatives appearing on behalf of the accused an opportunity to address it on this issue so that it could make an informed decision. I have since relooked at the Constitutional Court decision of *Kapa,* and I agree with Mr Johnson and Mr Klopper that that case did not do away with section 3(1)(c) of the Law of Evidence Amendment Act. For hearsay evidence, in the form of a deceased statement, shall not be admitted as evidence until the jurisdictional facts set out in section 3(1)(c) are satisfied or unless same is admitted by agreement in terms of section 3(1)(a) of the same Act.

[7] The critical issue, which in my view, was addressed by the Constitutional Court in *Kapa*, is how the court should deal with such an application and at what stage the court should consider the requirements set out in section 3(1)(c) of the Law of Evidence Amendment Act. Simply put, the Constitutional Court considered the correct approach to adopt when dealing with hearsay evidence, particularly a deceased statement. From the submissions made by the various Counsels in this case, I gathered that there are differing opinions on how the court should deal with such a matter following the decision of the Constitutional Court in *Kapa*. There are two schools of thought holding divergent views.

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

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

[9] In my view, there is far more force in the argument that the *Kapa* decision has significantly changed the approach the court must follow when considering hearsay evidence in the form of a deceased's statement. At para 98 of the judgment, Madjiedt J, writing for the majority, rejected the view held by the first school of thought in the present matter and stated as follows:

> "In this approach, the first judgment impermissibly evaluates the probative value of the statement in a piecemeal fashion. It should instead apply a holistic approach, assessing whether on the whole the statement was of adequate probative value in light of all of the other circumstantial evidence taken together. Approached in this way, the outcome must be different."

[10] From this excerpt, it is abundantly clear that in considering a hearsay statement made by a deceased person, the court must consider the statement *vis-a-vis* other evidence. The decision in *Kapa* enjoins the court to adopt a comprehensive approach as opposed to an impermissible piecemeal evaluation of evidence. The court must look at the statement of the deceased in light of other evidence, including circumstantial, direct, and documentary evidence, and determine whether it is in the interest of justice to admit such a statement for the purposes of proof.

[11] It must be stressed that in admitting the deceased statement in *Kapa,* the Constitutional Court adopted a holistic approach and considered the DNA, the injuries suffered by the deceased, the evidence of the pathologist who conducted the Post-Mortem Report and found that the injuries and the objects that may have caused them, as described by the pathologist in her report and oral testimony, were consistent with the events described by Ms Dasi (the deponent) in her statement (the deceased statement). The court jettisoned the evaluation of the probative value of the deceased statement in a piecemeal fashion. Instead, the court took the view that the impugned statement was reliable and was sufficiently corroborated by other evidence in the form of circumstantial evidence in that matter.

[12] Notably, the court found that the fact that the deceased's statement is corroborated by other witnesses' testimony and the objective medical evidence point to its truthfulness, reliability, and probative value. In other words, considering the requirements set out in section 3(1)(c), the court looked at the evidence presented before the trial court in its entirety and found the deceased's statement credible and reliable.

[13] I understand the issue of prejudice that Mr Strauss has raised. This question, in my view, was answered by the Constitutional Court in *Kapa*. In that case, the Constitutional Court quoted with approval the Supreme Court of Appeal (*"the SCA"*) case of *S v Ndhlovu* 2002 (6) SA 305 (SCA), in which the SCA considered whether the admission of hearsay evidence in itself violates the constitutional right to challenge evidence as entrenched in section 35(3)(i) of the Constitution and, consequently, the right to a fair trial. The SCA held that the criteria in section 3(1)(c) – which must be interpreted in accordance with the values of the Constitution and the 'norms of the objective value system it embodies – protects against the unregulated admission of hearsay evidence and thereby sufficiently guards the rights of an accused. To this end, Cameron JA, writing for the unanimous court stated:

> "[24] The Bill of Rights does not guarantee an entitlement to subject all evidence to cross examination. What it contains is the right (subject to limitation in terms of section 36) to 'challenge evidence'. Where that evidence is hearsay, the right entails that the accused is entitled to resist its admission and to scrutinise its probative value, including its reliability. The provisions enshrine these entitlements. But where the interests of justice, constitutionally measured, require that hearsay evidence be admitted, no constitutional right is infringed."

[14] Importantly, the SCA stated that a just verdict, based on evidence admitted because the interest of justice requires it, cannot constitute prejudice. The court further observed that where the interests of justice require the admission of hearsay, the resultant strengthening of the opposing case cannot count as prejudice for statutory purposes, since in weighing the interests of justice the court must already have

concluded that the reliability of the evidence is such that its admission is necessary and justified.

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

LEKHULENI JD

JUDGE OF THE HIGH COURT