

TOWARDS A CLEARER CONSTITUTIONAL MEANING OF THE “BEST INTEREST OF JUSTICE TEST” IN SECTION 3(1) (C) OF THE SOUTH AFRICAN LAW OF EVIDENCE AMENDMENT ACT 45 OF 1988 (THE LEAA)

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ABSTRACT

The “best interest of justice” denotes the best use of discretion by a person in authority. It is a familiar principle in International law prescripts. By its nature of being soft law- the international law assumes this principle as a guide for the enforcement of particular principles in different domestic law legal environments. To this end this principle means that the enforced domestic justice must serve the internationally prescribed interest of law, within domestic legal requirements. It is this principle that influences international child law inclined perspective in domestic legislation. This article explains the rationale for the best interest of justice test in the South African Law of Evidence Amendment Act 45 of 1988 (the LEAA). The article, interprets this test in the light of South African law evolution from the pre-constitutional era -to- constitutional era. It argues that the application of this principle within common law interpretation of the LEAA would not be similar to the constitutional era interpretation. It draws on Constitutional criminal justice improvements to devise a constitutional interpretation of the best interest of justice test in hearsay evidence law.

KEYWORDS

The best interest of justice test; hearsay evidence; South African Law of Evidence Amendment Act 45 of 1988 (LEAA); Common law era interpretation; Constitutional law era interpretation

1. INTRODUCTION

The best interest of justice principle is commonly used where courts or even legislature mitigates for a cautious approach in the need to make certain compromises where in direct procedure based on normal and clearly defined legal principles cannot be followed. [1] The most common area is regarding cases where certain choices are made on behalf of children, for example, in medical law where consent is necessary for doctors to perform certain medical procedures. In this scenario the executor of that particular course would be required to make a *subjectively* fair and equitable evaluation of the law in the light of all circumstances before it. Schneider explained that there are in some instances various impressions on the kind of judicial discretion inferred by the best interest of children test. [2] In *M v S (Centre for Child Law Amicus Curiae)*, [3] for example, the Constitutional Court of South Africa was mandated to reconsider sentencing a mother and single parent within South African normal sentencing criterion for fraudsters in the light of world acclaimed rights of children wherein her children would be left without a guardian. This call denoted that the court ought to not exercise its discretion based on the normal

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sentencing prescripts which ought to apply on the mother but to “inform itself” of a *subjective* situation of her children, in the light of world acclaimed rights of children if their mother were to be sentenced to direct imprisonment. [3]

Even though the court would be expected to make its assessment based on the informed opinions from the *amicus curiae*, the ultimate applicator in the passing of the sentence was the court’s own assessments. The court ought to base its assessments on its understanding of the needs of children who were about to be deprived of their guardian. These demands show that determinations based on the interest of justice test are not stable as they are bound to vary in accordance with the way the individual court sees and understands the available facts and the circumstances of various scenarios placed before it. In agreement with this understanding is Mnookin [4]-[5] who in consonance with Elster [6], regards the “...best interest of children principle to be too indeterminate to be helpful in legal decisions...” [6]Based on these exposures, there is apprehension for injustice in certain cases requiring discretion exercised in the best interest of justice because in this scenario procedure enforces *unguided* intuition.

The same predicament could ensue in the case of a legislation referring to the application of the test without specifications on the approach to be adopted. Seemingly, this is the current position of the South African Law of Evidence Amendment Act 45 of 1988 (the LEAA). Section 3(1)(c) of the Act, gives presiding judicial officers liberty to exercise discretion in their opinion as to whether hearsay evidence is admissible in the interest of justice. It provides seven factors to consider in this exercise. Even though Section 3 of the LEAA makes a provision to courts as to what factors to consider in admitting hearsay evidence, it has some shortcomings as it fails to guide on how these factors should be applied. In terms of section 3 of the LEAA, there is neither clear guidelines in place showing what exactly is the standard nor threshold for the applicability of the best interest of justice test in section 3(1)(c).

On the basis of this silence, it is argued that the apprehension of the Legislature at the inception of this statute prior Constitution, assumed that the courts ought to literally apply the law as it was based on the culture that prevailed then. The jurisprudentially pursued literal application of the factors as they are seems to have sustained in courts to date. Clear from jurisprudence is that the current approach in dealing with the admission of hearsay evidence have not delved in to interpreting in clear terms the meaning of the best interest of justice test infused in section 3(1)(c). Courts are instead endeavoring on establishing either the presence or absence of any factor of the seven factors provided in section 3(1)(c) in order to determine whether they can deem hearsay evidence admissible.

Jurisprudence based on this approach, portrays a medley of assumptions on what the best interests of justice test in hearsay law pertains.[9]- [18] In a nutshell there is still difficulty in attaining a clearer meaning of what the best interest test in hearsay evidence law in terms of the Constitution entails. This situation obscures progressive attempts to defining what the best interest of justice test necessitates in the light of the Constitution as far as admissibility of hearsay evidence is concerned.

This article interprets the best interest test in section 3(1)(c) of the LEAA, based on the evolution of the law since the inception of the LEAA and the improvements that the Constitution has made in South African administration of justice with particular reference to the criminal justice system.

2. THE INTERPRETATION OF SECTION 3 OF THE LEAA

According to this section, hearsay evidence is admissible under three conditions. The first is, through consent of the legal practitioners representing the parties, before court. With reference to

criminal trials, section 3(1)(a) of the LEAA is satisfied when the prosecutor and the defence counsel agree to the admission of hearsay evidence in any form, either oral or documentary and that would not require the court to make any evaluations on the

credibility and the probative value of the evidence tendered like it normally does with the direct evidence. The provision in this section was, however, criticised as an insinuation of injustice at the demise of accused persons. As Monyakane reckoned, it unfairly excludes courts from exercising their constitutional discretion before accepting hearsay evidence and yet crucial evaluations on hearsay evidence are of essence if courts were to satisfy their duty in law with regards to the admissibility of hearsay evidence. [7]

The second condition, according to section 3(1)(b) is that the hearsay evidence will be admitted provisionally while the original declarant would be presented before court to give and confirm the evidence, that is when the court would evaluate the credibility and probative value of the evidence by observing the witness during examination in chief and cross examination stages. The court would then use as a final measure the guidelines and rules provided in common law to assess and evaluate the presented hearsay evidence before admitting it.

The third stance is when applying section 3(1)(c) where the courts would exercise their discretion because they apprehend that justice might escape out of court rooms due to the absence of either consent between representatives of parties before courts or the absence of the testator to give direct evidence. In these circumstances the courts put their integrity at stake and vouch on their subconscious that hearsay evidence would stand common law critical admissibility tests normally applied to direct evidence. The court would then compromise the tests which are normally availed to test the credibility and the probative value of direct evidence. To do that courts seem to have understood the legislature to be requiring that they detect the availability of any of the seven factors outlined in section 3(1)(c). If any of these factors is relevant to the case before court, the courts may find it suitable to can make assumptions on the credibility and probative value of the hearsay evidence in issue. If they feel that it is in the best interest of justice to so do, they can admit the hearsay evidence.

The first factor mentioned in section 3(1)(c) is that courts have to make consideration whether to admit hearsay evidence if they are engaged in cases of a nature that permits budging from normal scrutiny of evidence. Further in cases where the nature of hearsay evidence could permit courts to ignore normal procedure. Furthermore, where the purpose for which evidence is tendered can permit disregard of procedure. At the fourth instance, where the probative value of the evidence attracts courts' disregard of normal scrutiny. Fifthly, the courts can mitigate for the acceptance of hearsay evidence and disregard normal scrutiny done on direct evidence, where there are satisfactory reasons for the absence of testator and therefore it would be impossible for courts to assess credibility of the witness and the probative value of the evidence. The sixth instance is where the courts can ward off any prejudice that may affect the accused upon the hearsay evidence being admitted. Finally, the courts may choose to admit hearsay evidence after taking into consideration, any other factor which in their opinion ought to be taken into account. This section places an onerous duty on courts which if not carried out judiciously results in unconstitutional decisions.

3. THE DUTY OF COURTS IN ADMITTING HEARSAY EVIDENCE

In general hearsay evidence is inadmissible. As such presiding judicial officers are bound with the duty in law to determine its admissibility. Equivalent to the ultimate delivery of justice, this duty is indeed the duty of courts alone and not the parties appearing before courts. Basically, the LEAA may be termed a guideline for courts duty of law. The truth to this measure was emphasised in *S v Molimi* [14] and *S v Ndhlovu* (SCA) [15] respectively, where Nkabinde J and Cameroon JA respectively, held in consonance when referring to section 3(1)(c) of the LEAA,

namely, that in performing this duty which is a *duty in law* courts ought to make certain *considerations* against the admissibility of hearsay evidence, where evidence would not

be confirmed by the actual giver of direct evidence in terms of section 3(1)(b). In a nutshell the judiciary is tasked within the authority of law not only within the LEAA confines to defend justice by not willy-nilly admitting hearsay evidence as the parties presented it or just ignoring the justiciability of the presented hearsay evidence at the expense of justice.

S v Molimi [14] and *S v Ndhlovu* (SCA) [15] concerns trigger a question as to why courts seem to have inconsistent understanding on what actually has to transpire in admitting hearsay evidence presented in terms of section 3(1)(c) of the LEAA. However, South African well acquainted history regarding its legal system reflects a difference in the definition of the concept “authority of law.” This article argues that the evolution in South African legal system is affected by the influence of parliamentary supremacy where judicial discretion was undefined and in most respects left vulnerable to varied interpretations. It is these contours in South African law that have vastly affected judicial interpretation of hearsay evidence best interest test in section 3(1) (c). Apparent in this system are courts decisions symbolising a great difference if not a mark of variance regarding what ought to be admission of hearsay evidence in the best interest of justice. The admission of hearsay evidence in terms of the LEAA as exemplary is marred with uncommon perspectives.

4. PREVAILING PERSPECTIVES ON THE INTERPRETATION OF LEAA BEST INTEREST OF JUSTICE TEST

The obvious fact is that the LEAA was effected long ago, about a decade before the Constitution. This is regarded as the reason behind the limited reference by courts and parties representatives to constitutional provisions in determining the admissibility of hearsay evidence and thus jeopardising the constitutional rationale behind the best interests of justice test inferred in the LEAA.

What further exacerbate the situation are the overwhelming varied demands of justice required in both civil and criminal proceedings while both invoke similar hearsay prescripts. Civil procedure demands hearsay evidence to prove a matter on a balance of probabilities while under criminal procedure hearsay evidence would be admitted with the aim of proving a matter beyond a reasonable doubt. In *Molimi*, [14] a criminal matter-the Constitutional Court observed the *court aquo's* approach to admitting hearsay evidence and found that although the *court aquo* sought to follow section 3(1) (c), the guiding rules prescribed in section 3(1)(c) were ignored, when a co accused who was incriminated by another's evidence was entertained before the court determined the admissibility of hearsay evidence based on the incriminator's disavowed statement. This was held to have led to a serious injustice.

In addition to this observation, what is apparent in that court's decision is that the *court aquo* had ignored the relevance of the principles of fairness mandated by the Constitution in section 35 especially the principle against self-incrimination. Such an oversight ought to have emanated

Because of the nature of section 3(1)(c) rules. These rules create “a too narrow and unclear guideline” as to what exactly is entailed in the standards within which courts may exercise their duty in satisfying the warranted best interests of justice test when admitting hearsay evidence.

Even though section 3(1)(c) seeks to bind courts to inquire at whether the presented evidence would satisfy the interests of justice before it could be admitted, it does not clarify the rationale of this concept regarding its applicability as a guiding principle in hearsay evidence admissibility. There are no guidelines as to how the listed considerations in section 3(1)(c) ought to apply. There remain questions to ask. The first question to ask is whether these factors should apply cumulatively to satisfy the best interest test? Another question is if mere fact that there exists just one factor concerning the presented hearsay evidence satisfies the best interest of justice principle? This marks a confused circumstance. This unguided provision, has led to individualistic and differing approaches by courts when admitting hearsay evidence. [9],[10],[20]-[21] This position of law therefore leads to grave procedural and substantive disadvantages. Some courts when trapped in this confusion ignore the entailed consequences.

It is this frustration which confronted the High Court in *S v Ndhlovu*, [16] where later at the SCA, Cameron JA, even though he never observed the shortcomings of the rules in the Act, found for a need to formulate a rule that makes clear that the “reception of the hearsay evidence must not surprise the accused,” in the sense that, it is admitted at a stage in the trial when the accused is unable to deal with it. The Constitutional Court in *Molimi*, applauded the *Ndhlovu* rule that “addresses fairness to an accused confronted with hearsay evidence [and] emphasise [on] the need to afford accused understanding on the full evidentiary ambit of the case against him.” [14] The Constitutional Court, as observed earlier, was urging on the need for courts to reflect on the “authority of law.” Concisely, the reference to the need to satisfying the interests of justice test meant that courts ought to observe the interpretation of their duty under the LEAA in the context of the authority of law as constitutionally defined. This meant that the satisfaction of the interests of justice test in LEAA could not mean confining their duty within the four corners of the statute, where regard is only paid to the listed considerations. What the authority requires is that courts ought to also consider interpreting the LEAA considerations within the Constitutional principles of fairness and to also assess the *justiciability* of their application in particular cases. This duty is proactive.

The court has to ask itself as to what would eventually be the end result of admitting a particular type of hearsay evidence mentioned in the considerations within particular circumstances. The basis of their question is ought to emanate from their need to satisfy the authority of law within which they ought to act in discharging their duty in law. This law as observed above is the Constitution.[34]

4.1 CONTRADICTORY MEANINGS INFERRED FROM THE INTERPRETATION OF THE LEAA INTEREST OF JUSTICE TEST

In addition to *Ndhlovu* and *Molimi* encounters additional meanings are attached to the best interest of justice phrase in section 3(1)(c) for example, some interpretations by some courts suggest that the LEAA enforces an approach where all seven section 3(1)(c) factors are applied cumulatively without marrying these requirements to affected rights in section 35 of the Constitution. Other courts portray a contrary approach, suggesting that their belief is that the interests of justice test is satisfied if one or the other factor of the seven is apparent in the hearsay evidence presented in court.[9][10][20][21] This consideration may not attract regard to the principles of fair trial, entailed in section 35 of the Constitution. Disregard of section 35 of the Constitution, ensues grave injustices emanating from the lack of reflection on the fairness and justiciability of admitting particular hearsay evidence in particular situations.

The recent Constitutional Court matter of *Molaudzi v S*, [23] where the appellant was unfairly convicted on the basis of hearsay evidence based on co accused disavowed admission, follows multiple matters where the trial courts failed to reflect and proactively measure the veracity of admitting this type of inadmissible hearsay evidence. Due to the prevailing approach in trial courts- to hastily admit co accused hearsay evidence in the form of statements which are even then disavowed by their maker, *Molaudzi v S*, became the worst victim of South African criminal justice system. In the light of available jurisprudence that defied his premise on unfair application of section 3(1)(c), he was nearly denied audience by the Constitutional Court on the

basis of *res judicata* principle. He had been back and forth this court when the case of *Mhlongo v S* [24] which ultimately convinced the Constitutional Court of the need to reconsider the principle in *Ndhlovu v S* came before court.

The Constitutional Court reconsidered its stance on *res judicata*. This was after the South African Justice Center had denied Mr Molaudzi assistance to pursue the matter further bearing the *Ndhlovu v S* inclined South African hearsay law precedent. At the demise of Mr Molaudzi came a fellow prison mate, *Mr Johannes Mogoba*, (also a master of laws student at UNISA) who assisted him draft initial papers to the Constitutional Court. The Constitutional Court re-opened its hands to hear the *Molaudzi v S* matter together with the *Mhlongo v S* matter. These matters were heard in the positive while the Constitutional Court confirmed the SCA reasoning in *Litako v S*.

The Constitutional Court's affirmation of the *Litako v S* [25] Supreme Court of Appeal reasoning implied that constitutional principles of fairness do not agree with the admission of co accused admission as hearsay evidence against another co accused in terms of section 3(1)(c). The Constitutional Court settled the misunderstanding relating to the admissibility of extra- curial admissions of co-accused against another accused in terms of *Ndhlovu v S*. principle of more than 14 years.If the trial Judges in *Molaudzi v S* and *Mhlongo v S* had understood what they ought to do in establishing whether it was in the best interests of justice to admit the tendered inadmissible hearsay evidence of co accused admissions, their duty in law could have been observed within the prescripts of the constitutional authority. Mr *Molaudzi* could not have gone through this pain.

4. 2 LEGAL IMPRESSIONS RAISED IN THE PREVAILING INTERPRETATIONS

A closer look at all the interpretations ignoring the applicability of constitutional principles of fair trial when admitting hearsay evidence portray that courts are confused as to what approach to follow in applying their discretion in terms of the LEAA. They then cannot easily come up with what would be the best decision as to whether to admit hearsay evidence or not. As a result, they express the application of best interest of justice phrase in section 3(1)(c) through inconsistent, shortcoming and sometimes mixed interpretations.

As seen above, some courts strictly apply the guidelines as they are without looking further as to what implications and rationales such application of these guidelines could entail in the current era. [14]-[15]This approach was suitable and best under the common law due the fact that courts powers were subjected to legislative whims, which limited common law judicial discretion. Under common law the duty of the courts was to apply the law "as is" the black letter law principle applied *stricto sensu*.

The common law approach to the interpretation of the law was positivist and not rights based like the current Constitutional era. What was law was what the black law letters entailed within the four corners of the statute. The common law courts ought to apply the law even if it was abhorrent to the principles of justice. [29] In the chase for parliamentary supremacy the right to fair administration of justice was circumscribed legislatively. [8],[22]

It was the understanding of common law courts in most instances that, “even if the Act of Parliament is contrary to reason it is not within the courts’ capacity to countenance because a court of justice cannot set itself above the legislature” and that, since “Acts of Parliament are omnipotent, they cannot be got rid of by declarations of courts of law [relying on] equity.” Obvious to this state of law is the presence of section 3(4) of LEAA which if read in the context of the common law practice is advocating for judicial deference in situations where there are other contradictory Acts of Parliament. In line with the positivist approach to law that the common law adopted, inconsistencies were bound to surface. Common law courts in their decisions assessed legislation simply against the perceived intention of the legislature, rather than scrutinise the justifiability of the end results. Because of parliamentary supremacy, the courts did not apply any other law than the law of the Parliament. Courts relied on the strict and narrow or traditional interpretation of all Acts of Parliament. [8],[22], [26]-[31],[33]

Like their British counterparts, who had to strictly abide by literal prescriptions in parliamentary enactments, common law courts in South Africa were also limited in their operation.[32] Their decisions show that in those circumstances they had difficulty in making meaningful declarations in order to control unfairness and unreasonableness in law. [34] This is a perspective viewed by Burns, amongst others to be different from the constitutional era human rights perspective. [37] The common law courts were also forced to abide by legislative swings, which deprived them of independence. They could not use their informed legal minds in exercising their discretion when deciding matters even in the light of common law principles like natural justice –advocating for rationality and justiciability in meting justice. In the past, parliament could pass retrospective legislation and pass discriminatory or unreasonable statutes, provided they were procedurally correct. This left the courts no room to declare irrational laws unjusticiable. This led to unclear, irrational and unjusticiable interpretations of the law- a legacy much alive in attempting to literally interpret the best interest of justice test in section 3(1)(c) in LEAA

5. WHAT ACTUALLY OUGHT TO BE THE MEANING OF THE BEST INTEREST OF JUSTICE TEST IN HEARSAY EVIDENCE LAW?

The best interest of justice test in hearsay evidence law would be referring to the best interest of justice prescribed in the South African Constitution. This provision, if interpreted from the constitutional era perspective, is a call for denouncing the narrow interpretation of hearsay clause in section 3(1)(c) of the LEAA and adopting a progressive interpretation of this clause.

Reliance on the narrow approach insists on strict literal adherence to the seven guidelines in section 3(1)(c) when admitting hearsay evidence. This is regardless of whether such adoption offends principles of fairness like it happened in *S v Ndhlovu* case. The progressive interpretation of the best interest of justice phrase in section 3(1)(c), on the other hand, supports a wider interpretation of the best interest of justice phrase in hearsay evidence law.

The Constitutional era perspective should emanate from the wide or progressive interpretation. This approach endorses an approach that, courts consider section 3(1)(c) guidelines in the light of the Constitutional right to fairness. This approach will help in the quest to attaining a constitutionally compliant interpretation. To do that, the application of section 3(1)(c) guidelines would be interpreted in the light of the principles entrenched in section 35 of the Constitution. This will capacitate the courts to improve and facilitate rights to fair administration of justice.

The importance of the rights aiming at fairness of a trial in administering criminal justice is well exposed. Fair trial rights are well expressed from a human rights constitutional perspective. The application of these rights cannot fit within the prescripts of a narrowly interpreted legislation. The interpretation within the four corners of the LEAA without reference to constitutional demands of fair trial cannot cater for all the rights entrenched in clause 35 of the Constitution. Literal interpretation cannot express the constitutionally envisaged criminal justice and this can lead to retardation of law of hearsay evidence. A more progressive interpretation is the one that allows room for courts to apply their minds and refer to the wide constitutional objectives as well as specific principles for attaining constitutional criminal justice.

6. CONCLUSION AND RECOMMENDATIONS

The progressive interpretation of the best interest of justice principle in hearsay law would therefore mean that a cumulative interpretation of all the seven factors in section 3(1)(c) must apply across the board to hearsay evidence admissions in terms of the LEAA. These factors must be invoked while validating their compliance with fairness principles as entrenched in section 35 of the Constitution.

This approach will avoid a piecemeal and secluded application of the seven rules without constitutional objectives. Clause 3(1)(c) factors when applied piecemeal and not cumulatively lead to a neglect of certain aspects of the rationale behind the best interests of justice principle in the light of section 35 of the constitution entrenching right to fair trial. If only a cumulative approach is adopted and the justiciability of such approach is not tested by invoking fair trial principles calamities ensue. Similarly if only correct consideration in terms of section 31(c) and not 3(1)(a) takes place, there will be grave injustices. As Monyakane mentioned, it is procedurally and substantively wrong to entrust legal representative with judicial duty in law to admit hearsay evidence as section 3(1)(a) seeks to do.[7]

There is a possibility that counsel may agree on hearsay evidence which needs to pass the test in section 31(c) before it becomes admissible. Section 3(1)(a) must be declared un constitutional so that section 3(1)(c) and 3(1)(b) operate effectively.

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