**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

Cases CCT 148/14 and CCT 149/14

In the matter between:

**BOSWELL JOHN MHLONGO** Applicant

and

**THE STATE** Respondent

And the matter between:

**ALFRED DISCO NKOSI** Applicant

and

**THE STATE** Respondent

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# APPLICANTS' PRACTICE NOTE

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## The nature of the proceedings

[1] This is an appeal in a criminal matter (combined with an application for leave to appeal, and condonation for the late filing of the application).

[2] The applicants were two of seven co-accused persons who were convicted of murder, robbery, and lesser offences by the High Court. (An eighth co-accused person disappeared during the course of the trial.) All seven the convicted persons appealed to the full bench of the relevant division of the High Court, which upheld the conviction. The applicants and three of their fellow convicted persons petitioned the Supreme Court of Appeal (SCA) for leave to appeal, but the petition was dismissed.

## The issues that will be argued

[3] The central issue that is raised in this appeal is the constitutional tenability of the SCA's judgement in *Ndhlovu*, which pertains to the admissibility of extra-curial admissions by a co-accused against other co-accused.

[4] The central issue gives rise to a secondary constitutional issue, namely the right of an accused person to be discharged at the end of the prosecution's

case where the prosecution failed to present any evidence against such accused person.

[5] Lastly, in the event that the Court finds that *Ndhlovu* is aligned with our constitution, the correctness of the application of *Ndhlovu* by the courts below becomes an issue.

**Relevant portions of the record**

[6] The Court is respectfully requested to read the following portions of the record (about 60 pages):

- First, the factual findings, which are succinctly summarised in the full bench judgement at paragraphs 3 to 15 (pages 139 to 145).
- The parties' respective statements of disputed facts (pages 38 and 40).
- The trial court's reasons for its judgement, at page 121 line 4 to page 131 line 23.
- The full bench's reasons for its judgement that relevant to this appeal, at paragraph 16 (pages 145 to 146), and paragraphs 32 to 45 (pages 153 to 161).
- Lastly, the applicants' notices of motion and founding affidavits (pages 1 to 30). Note that the two applications are almost identical.

[7] For convenience and to save the Court's time, I compiled three summary tables that compare the various versions of the facts that were placed before the trial court by the applicants' co-accused – in particular the incriminating versions. These tables are appended to my heads of argument.

[8] I shared these summary tables with the respondent about two weeks prior to the filing of my heads of argument, allowing sufficient time for the respondent to verify the accuracy of my summary tables; no changes were suggested by the respondent. As such, I suggest that these summary tables can be used fruitfully and that it is not necessary for the Court to read the rest of the record.

**Estimated duration of oral argument**

[9] The estimated duration of oral argument is one hour.

**Summary of the argument**

*Introduction to the human rights analysis*

[10] In convicting the applicants, the courts below purportedly adhered to *Ndhlovu*. In *Ndhlovu* the SCA introduced a new legal norm (contrary to the

common law), namely that an extra-curial admission (but not a confession) by one co-accused person *can* in principle be admitted as evidence against another co-accused person (the *Ndhlovu* legal norm). I submit that the *Ndhlovu* legal norm is not tenable in our constitutional dispensation, as it violates the right to equality and the right to a fair trial; and as there is no justification for such violations.

*Equality*

[11] The equality challenge is based on the confession–admission dichotomy engendered in the *Ndhlovu* legal norm. This dichotomy causes indirect differential treatment of two groups of accused persons:

- *Group A*: Accused persons who are incriminated by extra-curial statements that qualify as 'confessions' by their co-accused; and
- *Group B*: Accused persons who are incriminated by extra-curial statements that qualify as 'admissions' by their co-accused.

[12] According to the *Ndhlovu* legal norm, an incriminating extra-curial statement by a co-accused is not admissible against an accused person who is a member of Group A, but in principle admissible against an accused person who is a member of Group B.

[13] This differentiation between Groups A and B is arbitrary. Accordingly, the *Ndhlovu* legal norm infringes on the right of accused persons in Group B to equal protection and benefit of the law.

[14] In addition, it should be noted that the confession–admission dichotomy engendered in the *Ndhlovu* legal norm has various negative effects in practice.

*Fair trial*

[15] In cases where a co-accused person is incriminated by an extra-curial statement by another co-accused person (the declarant), it is always uncertain whether the co-accused person will be able to cross-examine the declarant, given that the declarant is a co-accused who may rely on his or her right to remain silent.

[16] Cross-examination is core to the right to a fair trial (*contra Ndhlovu*).The appropriate avenue to exclude cross-examination (in exceptional cases) would be to justify such limitation of the accused person's right to a fair trial during the limitation stage of a human rights analysis, and not to artificially remove cross-examination from the ambit of the right to a fair trial during the interpretation stage of a human rights analysis.

[17] Given that there is no guarantee that co-accused persons will testify, the *Ndhlovu* legal norm in principle deprives an accused person of the opportunity to subject the declarant of an incriminating extra-curial admission to cross-examination, given that such declarant is a co-accused person. Accordingly, the *Ndhlovu* legal norm infringes on the right of accused persons to a fair trial.

*Limitation*

[18] The touchstone of the *Ndhlovu* legal norm is the interests of justice. Accordingly, for purposes of the limitation stage of the human rights analysis, it is appropriate that the interests of justice be posited as the government interest purportedly served by the *Ndhlovu* legal norm.

[19] However, the combined dangers of admitting hearsay, and of admitting a statement by a co-accused person, position the interests of justice in fundamental opposition to the admissibility against a co-accused person of an extra-curial admission by another co-accused person. Accordingly, the interests of justice cannot justify the infringements on equality and the right to a fair trial caused by the *Ndhlovu* legal norm.

*Conclusion on the human rights analysis*

[20] The *status quo ante* the *Ndhlovu* legal norm – the common law rule that forbids the admission against one co-accused person of an extra-curial statement (confession or admission) by another co-accused person – should be reinstated. This conclusion is also aligned with developments in comparable foreign jurisdictions.

*Application in casu: the applicants should have been discharged*

[21] Purportedly following the *Ndhlovu* judgement, the courts below admitted the extra-curial statements by Accused 1, 3, 7, and 8 as evidence against their co-accused (including the applicants, who were Accused 2 and 4). At the close of the prosecution's case during the trial, the *<u>only</u>* incriminating evidence against the applicants was these extra-curial statements. Given that the admission of extra-curial statements by a co-accused person against other co-accused persons is unconstitutional, there was *<u>no</u>* admissible evidence against the applicants at the close of the prosecution's case. Accordingly, the applicants should have been discharged. As this did not happen, the remainder of the trial is unconstitutional and irregular. As such, the applicants are entitled to have their conviction and sentence set aside.

*Ndhlovu not applied correctly*

[22] In the event that the Court finds that the *Ndhlovu* legal norm is constitutionally tenable, I submit that the courts below misapplied *Ndhlovu*, and that the extra-curial statements by Accused 1, 3, 7, and 8 were inadmissible against the applicants (who were Accused 2 and 4) within the purview of *Ndhlovu*. Similar to the situation described above, there was accordingly *<u>no</u>* admissible evidence against the applicants at the close of the prosecution's case, and they should have been discharged. As such, on this alternative ground the applicants are also entitled to have their conviction and sentence set aside.

Donrich Jordaan, PhD

Counsel for the applicants (at the request of the Court)

2 February 2015

**LIST OF AUTHORITIES**

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*Litako & others v S* [2014] 3 All SA 138 (SCA)

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**Foreign case law**

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*Crawford v Washington* 541 US 36 (2004) <http://laws.findlaw.com/us/541/36.html>

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