(b) '*statement*': 'any representation of fact, whether oral, documentary or by conduct'.

To these could be added a definition of 'document' and it is suggested that the one in s 221 of the Criminal Procedure Act, 51 of 1977, be used. It reads: 'includes any device by means of which information is recorded or stored'.

Modified definition

The new rule, using the suggested modified definition of hearsay evidence, would have the same object as the old rule, namely, the exclusion of inherently unreliable evidence. The reluctance of the courts to admit hearsay evidence is fully justified, based as it is on the fact that the declarant does not testify under oath and is consequently not subjected to cross-examination. The unreliability only arises when the evidence is tendered to prove something more that the mere making of the statement. The advantage of the new rule over the old is however that it gives the courts a discretion to allow hearsay evidence in appropriate circumstances. Why Part VI of the Civil Proceedings Evidence Act, 25 of 1965, was not repealed, at least partially, by the Act is not clear. Now that the courts have such a wide discretion, Part VI is largely unnecessary. The only possible area which Part VI covers and which is not covered by s 3, is documentary evidence which is not 'in writing' (eg photographs, videos, etc). Should the suggested amendments be made to the Act, Part VI should be repealed.

Whilst the definition of hearsay evidence in the Act is open to criticism it is wide enough to include implied assertions (whether verbal or by conduct). The reason for this is that the words 'whether oral or in writing' refer to the *evidence* (*in casu* the sworn testimony of W) and not to the subject matter of the evidence (ie the statement by D). There is therefore no limit to the type of statement about which evidence is given.

As indicated earlier, the discretion granted to the courts is to be welcomed, and the factors set out in s 3(1)(c) appear to be comprehensive. However, as a result of the suggested amendments to the definition of hearsay an appropriate amendment to s 3(1)(c)(v) is also required.

First reported decision

The first, and to date, the only reported decision on s 3 of the Act is *Hlongwane v Rector, St Francis College* 1989 3 SA 318 (D). The case involved an application for the setting aside of first respondent's suspension of the applicants from St Francis College. The suspension was based on information supplied to first respondent (ie hearsay in the traditional sense).

In this case no analysis of the Act's definition of hearsay evidence is made. However, the factors set out in s 3(1)(c) were discussed and the hearsay evidence in first respondent's affidavit, which would definitely have been inadmissible prior to the Act, was allowed. The significance of the case is that the hearsay was admitted in circumstances not remotely covered by the exceptions to the old hearsay rule.

Certain factors in *Hlongwane*'s case weighed strongly in favour of admitting the evidence, for example:

(a) indications that the applicants were untruthful;
(b) the prejudice caused to the applicants by their suspension was not as serious as it first seemed; and
(c) the reason for the 'declarants' not deposing to affidavits, was compelling (their lives would have been in danger had their identities been disclosed).

As a result the decision is to be welcomed, but it is doubtful whether the factors favouring the admission of hearsay will often outweigh those favouring its exclusion.

In conclusion, time alone will tell to what extent the courts will follow *Hlongwane*'s case, and in the exercise of their discretion under s 3, admit previously inadmissible evidence. In all probability the courts will be guided by the many decisions under the old rule, and it will be surprising if many new exceptions are created.

Sources

1 SA Law Commission, Project 6 (*Review of the Law of Evidence*) October 1986.
2 Paizes, AP, *The concept of hearsay with particular emphasis on implied hearsay assertions*, Ph D (Wits) 1983.

Note:

According to *Law Talk* 310 (Newsletter of the New Zealand Law Society) dated 3 August 1989 the New Zealand Law Commission recently published a preliminary paper on 'Hearsay Evidence'. It appears that the Commission is 'tentatively disposed' towards codification of the hearsay rule or even its abolition in civil cases. And according to *Law Talk* dated 9 November 1989 the Law Commission meanwhile received from the Minister of Justice a reference relating to the whole of the law of evidence: to 'make recommendations for its reform with a view to codification'.

As is known, the South African Law Commission also considered codifying the law of evidence but eventually concluded that codification was impracticable and probably also unnecessary. Similarly, in Scotland and Canada attempts to codify their laws on this subject were also not successful. ■

It will be interesting to see the outcome of New Zealand's exercise.
– Editor

Books Received

(Some of these books will be reviewed in forthcoming editions of *Consultus*)

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Principles of the Law of Contract 8th edition. By AJ Kerr. Butterworths. Price R119 excl GST (hard cover) R89 excl GST (soft cover)

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Volkereg en sy verhouding tot die Suid-Afrikaanse reg (Tweede uitgawe). Deur H Booysen. Juta en Kie Beperk. Prys R113,24

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Strategies for change. IDASA publication. Price R14,95 (soft cover)

□

Democracy and the Judiciary. IDASA publication. Price R16,95 (soft cover)

□

Essays in honour of Ellison Kahn. Edited by Coenraad Visser. Juta and Co Ltd. Price R109,35

□

Annual survey of South African Law. Editor Paul Boberg. Juta and Co Ltd. Annual subscription R132,45

□

Essays on the History of Law. Edited by DP Visser. Juta and Co Ltd. Price R80,47 (soft cover)

□

Private International Law. By CF Forsyth. Juta and Co Ltd. Price R89 excl GST (soft cover)