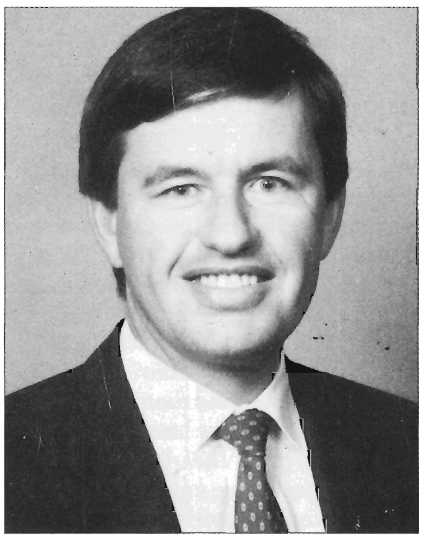
The New Hearsay Rules

Adrian Rall
Pietermaritzburg Bar



Adrian Rall, a member of the Pietermaritzburg Bar and part-time lecturer in Evidence at the University of Natal takes a critical look at sections 3 and 9 of the Law of Evidence Amendment Act, 45 of 1988 (the Act).

The intention of the Legislature in enacting the above two sections of the Act appears to be clear. However, a careful examination shows that it is by no means clear that the sections achieve their objective.

Section 3 defines and lays down requirements for the admissibility of hearsay evidence. Section 9 repeals ss 216 and 223 of the Criminal Procedure Act, 51 of 1977, which dealt with hearsay and dying declarations respectively.

Section 3 reads as follows:

(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 testifies 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 prejudice 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 interest of justice.

(2) 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.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

(4) For the purposes of this section – "hearsay evidence" means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;
"party" means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.

Law Commission

The Act was preceded by an investigation by the SA Law Commission (the Commission) which in turn relied heavily on the doctoral thesis of Dr AP Paizes. The long title of the Act reads ' . . . and to lay down general requirements for the admissibility of hearsay evidence.' Section 9 repeals s 216 (hearsay) and s 223 (dying declarations) of the Criminal Procedure Act, 51 of 1977, thereby repealing the existing hearsay rule in criminal cases. The existing hearsay rule as it is applied in civil cases is not explicitly abolished.

However, because the Act makes specific provision for the admissibility of hearsay evidence (in s 3), by virtue of s 42 of the Civil Proceedings Evidence Act, 25 of 1965, the old rule (ie the law that existed on 30 May 1961) no longer applies.

In this context, the word 'law' in the phrase 'subject to the provisions of any other law' in s 3 must mean 'Act' only and does not include the common law. The effect of the provision that s 3 is subject to the provisions of other Acts is that exceptions to the hearsay rule, created by other statutes, remain in force. It is nevertheless unfortunate that the legislature did not use the word 'Act' which was used by the Commission in its draft proposals.

Object of sections

The object of the sections then appears to be to replace the common law hearsay rule (the old rule) with a new rule. The legislature sought to achieve this object by:

(a) replacing the traditional definition of hearsay, the so-called 'assertion-orientated' definition, with a 'declarant-orientated' definition, and
(b) eliminating the rigidity of the old hearsay rule by allowing the courts a wide discretion when ruling on admissibility.

It is submitted that whilst the discretionary approach (as opposed to the *numerus clausus* approach of, for example *Vulcan Rubber Works v SAR & H* 1958 3 SA 285 (A)) is to be welcomed, s 3 and in particular the new definition of hearsay is confusing.

New definition

The new definition is meaningless. It reads: '"hearsay evidence" means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence.'

This definition was suggested by the Commission and is very similar to that suggested by Paizes.

In order to analyse the definition, the use of traditional hearsay statements is helpful. A witness (W) states 'D (a non-witness declarant) said: "I saw the accused shooting the deceased".'

The evidence in question is the evidence of W, ie what is said in court, and not the statement by D. To this extent the new definition is similar to the old one which was 'evidence of statements made by . . . '.

Under the old rule, if W's evidence was tendered to prove:

(a) that the accused shot the deceased it was inadmissible (true hearsay evidence);

but if tendered to prove:

(b) that D uttered the words in question, it was admissible (not being hearsay at all).

New rule

What of the new rule? In situation (b) the evidence is clearly admissible, and it would seem that the definition does not include such evidence, the probative value of W's evidence being independent of any other evidence. The definition, it would seem, purports to cover situation (a), but does it? This definition presupposes the existence in our law of some rule which provides that such evidence only has probative value if supported by the credible evidence of another witness. However, in the absence of any rule rendering such evidence completely inadmissible (eg the old, now repealed, rule) or providing that such evidence's value depends on the credibility of someone else (no such rule exists) the definition has no meaning. Under the old rule W's statement, has no evidentiary value for purpose (a), whether or not the declarant (D) is called as a witness. If D is not called, the evidence is inadmissible, and if he is, the evidence is irrelevant *alternatively* has no probative value at all. Accordingly, traditional hearsay evidence (eg W's evidence) far from acquiring probative value from the evidence of some other witness (the declarant), loses its probative value when the declarant is called.

Confusion

The definition confuses evidence with the proof of facts which are the subject of the evidence. In the example used, the evidence (the statement under oath by W) is confused with the proof of the fact sought to be proved (the shooting of the deceased). It is the proof of the latter fact which depends on the credibility of another (*in casu* D).

If one were to persist with 'declarant-orientated' definition it would have to read 'evidence . . . which has no probative value in respect of the fact which it is sought to prove.' But even then one is faced with the problem: what rule provides that such evidence has no probative value?

Complicated definition

It is submitted that in the light of the wide discretion granted by s 3(1)(c) it is unnecessary to have a complicated definition. Furthermore, the old definition need not be completely discarded. A definition which includes the common elements of both categories of definition ('declarant' and 'assertion-orientated') is all that is required. The following definition is suggested: 'Any evidence of any statement, including statements by conduct made outside the proceedings in question by someone other than a witness or party in the proceedings'.

A definition of 'statement' would have to be included and should read something like this: 'Any representation of fact, including representations by conduct.'

The advantages of these definitions would be:

(a) they are simple and make sense.
(b) the evidence which it seeks to cover, is covered thereby.
(c) all types of evidence (eg oral, written and other documentary evidence) is included; and
(d) all types of statements are included (including implied assertions).

Whilst evidence for purpose (b) would be included in this definition, and would consequently be *prima facie* inadmissible in terms of s 3(1), courts would obviously allow it as a matter of course. If it is thought that the suggested definition would result in evidence wrongly being excluded or in delays caused by argument on admissibility, the definition could be amended to include the following at the end: 'but shall exclude evidence which is tendered merely to prove that the statement in question was made.'

Modern inventions

Should it be felt that the above definitions do not make it clear whether or not modern inventions such as video recordings are included under 'evidence' or 'statement', the definitions could be amended as follows:

(a) '*hearsay evidence*': 'Any evidence, whether *viva voce* or documentary, of any statement, . . .'

(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*)

□

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

□

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

□

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)