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S v LITAKO 2014 SACR 431 (SCA): A CLARIFICATION ON EXTRA CURIAL STATEMENTS AND HEARSAY

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1 Introduction

On 16 April, 2014 the Supreme Court of Appeal handed down judgment in the matter of *S v Litako*.[1] The judgment reconsiders the landmark decision of the same court, *S v Ndhlovu,*[2] in which the court held that an informal admission made by one accused could be admitted against a co-accused even if the accused in court denies making the statement and the statement itself is therefore considered to be hearsay. The court in *Ndhlovu* applied section 3 of the *Law of Evidence Amendment Act*[3] and found that the hearsay extra curial admission could be admitted in the interests of justice.[4] In *Litako,* however, the court found that section 3 did not overrule an existing common law rule, which is that the extra curial statement of an accused (whether an informal admission or a confession) cannot be tendered against a co-accused.[5] This is because section 3 does not expressly overrule this common law rule. Rather, the provision itself requests that its application be subject to the common law.[6]

The judgment is noteworthy for various reasons. Firstly, its fundamental message is that section 3 does not replace the long-held common law rule that the extra curial statement of an accused cannot be tendered against a co-accused. This is in keeping with the existing treatment of accomplice evidence. This evidence was historically approached with caution, as accused persons were known for trying to pass blame onto a co-accused.[7] Secondly, the judgment highlights the current confusion in the

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1 *S v Litako* 2014 2 SACR 431 (SCA) (hereinafter referred to as "*Litako*")

2 *S v Ndhlovu* 2002 2 SACR 325 (SCA) (hereinafter referred to as "*Ndhlovu*").

3 *Law of Evidence Amendment Act* 45 of 1988 (hereinafter referred to as the "*LEAA*").

4 S 3(1)(c) of the *LEAA*.

5 *Litako* para 71.

6 *Litako* para 52.

7 See *Litako* para 39, quoting the court in the matter of *R v Matsitwane* 1942 AD 213 (hereinafter referred to as "*Matsitwane*") 218.

relationship between statute and common law with regards to informal admissions and confessions. The court carefully and decisively addresses this confusion and brings much-needed clarity to this area of law. Thirdly, the court employs methods of statutory interpretation to re-examine the principle from *Ndhlovu* and finds that the court in that case did not apply its mind correctly in disregarding the common law rule. The court undertook a teleological approach to interpretation by infusing the meaning of the words with the spirit, purport and objects of the Bill of Rights[8] and found that the statute had not overruled the common law rule. In this way, the applicable statutory provisions were interpreted through the "prism of the Bill of Rights."[9] It is argued that this interpretation is not "unduly strained"[10] and is appropriately used by the court. Finally, the judgment appears to ring true with practitioners and has been cited with approval by the attorney's profession.[11]

It is useful at this juncture to look at the law regarding the admission of extra curial statements in criminal proceedings to determine whether the court was correct in its analysis of the common law rule.

2 The common law rule: is there confusion between statute and common law?

The common law rule is that an accused's extra-curial statement, i.e. a statement made out of court, cannot be tendered in court as evidence against a co-accused.[12] The rule has its roots in the English common law[13] and is still applicable in England.[14] The development of the law of evidence in South Africa was heavily influenced by English law due to its incorporation in the South African colonies from the period 1830 to 1902.[15] Thus, South African case law decided prior to the formation of the Republic

8 This is essentially the directive of s 39(2) of the *Constitution of the Republic of South Africa*, 1996.

9 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 1 SA 545 (CC) (hereinafter referred to as "*Hyundai*") para 21.

10 This phrase is taken from the court in *Hyundai* para 24 above. The court here laid down the application of s 39(2) of the *Constitution*.

11 Olsen 2014 *De Rebus* 42.

12 *Litako* para 39, where the court refers to the first known reference to the rule in South Africa in the Appellate Division matter of *Matsitwane*.

13 *Litako* paras 32-37.

14 *Litako* para 37.

15 See further Van Der Merwe "Sources of South African Law of Evidence" 25.

of South Africa on 31 May 1961 accurately reflects the English law of evidence.[16] Cases decided from 31 May 1961 onwards may deviate from the English law if found to be incompatible with constitutional provisions or an established South African rule of practice[17] or the Supreme Court of Appeal believes that the English decision was incorrectly decided.[18] In 1942, the Appellate Division affirmatively applied this common law rule in South Africa[19] and it was consistently applied by our courts until the landmark decision in *Ndhlovu*.

It is important to note that despite the common law's referring to extra curial statements as a collective term reflecting both confessions and informal admissions, the *Criminal Procedure Act*[20] as well as the respective common law definitions distinguish between them in various ways. A confession is understood to be an unequivocal acknowledgement of guilt, made out of court.[21] An informal admission is a statement made out of court which is adverse to that party's case.[22] The rules for admissibility for a confession are codified in section 217 of the CPA and the rules for admissibility for an informal admission are codified in the same act in section 219A. All that is required for an informal admission to be admitted is that it is proved to have been voluntarily made. The rules for the admissibility of a confession require that it be made voluntarily, in sound and sober senses and without undue influence. It has been argued that this is a distinction without difference and that the rules for admissibility should be the same, regardless of whether the extra curial statement amounts to an admission or a confession.[23] Indeed, the constitutionality of such distinction was raised in *Molimi*[24] but was left undecided. This issue was raised for the first time in the proceedings at the Constitutional Court and as such, the court felt that

16 Van Der Merwe "Sources of South African Law of Evidence" 24.
17 *Ex parte Minister of Justice: In re R v Pillay* 1945 AD 653.
18 This is by implication of the decision in *Van der Linde v Calitz* 1967 2 SA 239 (A)
19 *Matsitwane.*
20 *Criminal Procedure Act* 51 of 1977 (hereinafter referred to as the "*CPA*").
21 *R v Becker* 1929 AD 167 177.
22 *S v Molimi* 2008 2 SACR 76 (CC) (hereinafter referred to as "*Molimi*") para 28. See further Schwikkard "Informal Admissions" 305.
23 See further Schwikkard "Informal Admissions" 327 fn 167, referring to the SALC *Project 73.*
24 *Molimi* paras 48-49.

the issue could not be decided, however strong the merits, as the court would then be a court of first and final instance.

A further distinction appears when one looks further into the CPA. Section 219 explicitly states that a confession made by a person is not admissible against another person. A similar explicit provision does not exist with regards to informal admissions. Upon a careful reading of section 219A(1) relating to the admissibility of informal admissions, the provision requires that a voluntary extra curial admission, which does not amount to a confession, made "by any person" shall be admissible "against him." Interestingly, this was interpreted by the court in *Litako* to have the same effect as section 219, and indicated to the court that the legislature did not contemplate such an admission's being tendered as evidence against anyone else.[25]
The court in *Ndhlovu,* however, did not discuss the common law rule at all. This omission affirmed the stance of the trial court that section 3 of the LEAA allowed the court to disregard the common law rule.[26] This further implies that the court in *Ndhlovu* believed that the legislature did intend to draw a distinction between informal admissions and confessions. The court here focused on the application of section 3 (LEAA) and added valuable content to the underdeveloped jurisprudence in the area.[27] In terms of section 3(4) (LEAA), hearsay evidence is defined to be evidence, whether oral or in writing, the probative value of which depends upon the credibility of someone other than the person giving such evidence. It is to be excluded unless both parties consent to its admission,[28] the party upon whose credibility the probative value of the hearsay depends later testifies in court[29] or if it is in the interests of justice[30] to allow the evidence to be admitted after giving due consideration to seven cumulatively weighed factors.[31]In its analysis, the court in *Ndhlovu* decided that where the interests

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25 *Litako* para 39.
26 *S v Ndhlovu* 2001 1 SACR 85 (W) paras 48-49 (hereinafter referred to as "*Ndhlovu* trial court".
27 Schwikkard 2003 *SALJ* 63.
28 S 3(1)(a) of the *LEAA*.
29 S 3(1)(b) of the *LEAA*.
30 S 3(1)(c) of the *LEAA*.
31 S 3(1)(c)(i)-(vii) of the *LEAA*. Such factors are: the nature of the proceedings; the nature of the evidence; the purpose for which the evidence is tendered; the probative value of the evidence; the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; any prejudice to a party which the admission of such evidence might entail; and any other factor which in the opinion of the court should be taken into account.

of justice, which are constitutionally measured, require the admission of the statement, the constitutional right to a fair trial (or indeed any constitutional right) is not infringed.[32]

It is also important to point out that section 217(1)(b)(ii) (CPA) details that a confession is presumed to have been freely and voluntarily made by a person in sound and sober senses and without undue influence, if it is reduced to writing by or in the presence of a magistrate and if it appears from the document that the confession was freely and voluntarily made. This rebuttable presumption can be refuted on a balance of probabilities. Seeing as how the party who will usually have the burden of proving that the confession was not freely and voluntarily made is the accused person, the Constitutional Court in the matter of *S v Zuma*[33] found that the presumption undermined the accused's right to remain silent, the right not to be compelled to make a confession and the right not to be a compellable witness against oneself.[34]The right to a fair trial encapsulated in section 35(3) of the *Constitution* was broader than the individual rights in the provision, and included a concept of substantive fairness which demanded that in criminal trials, the burden of proof was always on the prosecution and not the accused.[35] Thus section 217(b)(ii) was unconstitutional. This implies that for the purposes of section 217(b)(ii), the burden is on the prosecution to prove that a confession reduced to writing by or in the presence of a magistrate is freely and voluntarily made by a person in sound and sober senses without undue influence. Interestingly, a similar presumption in relation to admissions is to be found in section 219A(1)(b) (CPA). It has been argued that such a provision will not withstand constitutional muster based on the same argument as that put forward in *Zuma*.[36] The South African Law Commission has recommended that informal admissions and confessions be subject to the same requirements for admissibility.[37] To date, no legislative changes have been made.

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32 *Ndhlovu* para 24.
33 *S v Zuma* 1995 2 SA 642 (CC), hereinafter referred to as "*Zuma*".
34 *Zuma* para 33.
35 *Zuma* para 33. For further discussion, see Schwikkard "Confessions in Criminal Trials" 345.
36 See Schwikkard "Informal Admissions" 331.
37 SALC *Project 73.*

Which interpretation of the common law and statute is correct? At this point, it is important to look at the judgment of the Supreme Court of Appeal in *Litako.*

3 The *Litako* decision

3.1 Facts and the court a quo decision

The case involved the commission of certain crimes at the White House Tavern in Madikwe, North West Province on the night of 4 February 2007. On the night in question, the owner of the tavern and one of her patrons were robbed of R5000 and their cellular telephones.[38] One patron was assaulted and in the violent gun battle which ensued, another patron was murdered. Six accused persons were charged in the North West High Court with murder, two counts of robbery with aggravating circumstances, assault with intent to do grievous bodily harm, four counts of the possession of firearms in contravention of section 3 read with sections 1, 103, 117, 120(1)(a) and Schedule 4 of the *Firearms Control Act* 60 of 2000, and one count of the unlawful possession of ammunition in contravention of section 90 read with sections 1, 103, 117, 120(1)(a), 121 and Schedule 4 of the Firearms Control Act. The accused persons pleaded not guilty to all the charges. Largely on the basis of a statement made by the first accused to a magistrate which implicated his co-accuseds, Hendricks J found all six accused persons guilty and they were convicted.

It is useful to analyse the trial court's assessment of the evidence. The first accused denied the truth of the contents of the statement and argued that it had not been freely and voluntarily made. In terms of section 219A(1)(CPA), the only requirement for the admissibility of an informal admission is that it is freely and voluntarily made. However, if such an admission is reduced to writing by or in the presence of a magistrate, and if it appears from the document that the admission was freely and voluntarily made, it is presumed to be such upon mere production. If an accused person wishes to challenge this presumption, he must discharge this burden on a balance of probabilities. As pointed out earlier, the constitutionality of this provision is in doubt due to the finding of the court in *Zuma*. Interestingly, this was not alleged

38 *Litako* para 1.

by the parties and was thus not determined by the court in *Litako*. If the court *a quo* or SCA did find that section 219A(1)(CPA) was unconstitutional (and this was then confirmed by the Constitutional Court), it would seem likely that no reliance would have been placed on the notorious admission and the resultant convictions would not have made.

The prosecution did not provide any reliable, direct evidence implicating the accused persons. The eye witness accounts by the tavern owner and a patron were inconsistent and unreliable.[39] Furthermore, it was admitted by the prosecution that there was no acceptable ballistics evidence linking any of the accused persons to the crimes.[40] Essentially, the state's case was hinged on the notorious admission made by the first accused.[41]

A trial within a trial was conducted in the court *a quo* to determine the admissibility of the statement. Given the wording of section 219A(1)(b)(CPA), the burden of proving that the statement had not been freely and voluntarily made rested with the first accused.[42]The first accused led evidence to show that he had been assaulted by the police and threatened in order to induce the statement.[43] The magistrate who had taken the statement from the first accused testified that he had been meticulous in ensuring that the statement was made freely and voluntarily. He informed the first accused of his constitutional rights and enquired whether he had been assaulted or in any other way influenced to make a statement.[44] Hendricks J rejected the evidence of the first accused and held the statement to be admissible.[45] The statement was held to be admissible against his co-accuseds on the basis of section 3 (LEAA).[46] The trial court used the decisions in *Ndhlovu* and *Molimi* as authority for admitting the statement made by the first accused. The court reasoned that if the interests of justice

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39 *Litako* paras 8, 9, 11, 13.
40 *Litako* para 22.
41 *Litako* para 23.
42 The author has been unable to obtain a copy of the judgment of the court *a quo* in *Litako.* A discussion on the decision of that court is thus limited to the comments made by the SCA in *Litako.*
43 *Litako* para 25.
44 *Litako* para 24.
45 *Litako* para 26.
46 *Litako* para 26.

require the admission of the hearsay evidence, the right of the accused person to challenge the admissibility of the evidence does not include the right to cross examine.[47] Despite testifying at the trial within a trial to determine the admissibility of the statement, the first accused did not testify with regards to the merit of the charges.[48] The court held this failure to testify against him and rejected the evidence of the other accused persons that they had not been involved in the incident.[49] On the basis of the extra curial statement, the trial judge found that the eye witness accounts were corroborated and the firearms found in the possession of the second and fourth accuseds could be positively linked to the robbery.[50] By applying the doctrine of common purpose, the court concluded that the accuseds had acted in concert in perpetrating the offences.[51]

The matter was then sent on appeal to the Supreme Court of Appeal. A discussion of that decision follows.

3.2 The SCA decision and analysis

3.2.1 The reasoning of court and an analysis

The decision of the Supreme Court of Appeal (SCA) was written by judges Navsa and Ponnan, with judges Leach, Petse and Swain concurring. The court approached the matter from three discussion points. Firstly, the court discussed the development of the law in relation to the admissibility of extra curial statements made by an accused and tendered against a co-accused. Secondly, the judgment closely examined and scrutinised the decision in *Ndhlovu.* Thirdly, the court decided whether the convictions in the matter were well founded.

With regard to the first issue, the court carefully chronicled the development of the common law rule and the treatment of confessions and informal admissions in the

47 *Litako* para 29.
48 *Litako* para 4.
49 *Litako* para 30.
50 *Litako* para 28.
51 *Litako* para 30.

common law. By referring to *R v George Cecil Rhodes*[52], the court found an early English source for the rule that an extra curial admission made by an accused cannot be tendered against a co-accused.[53] This English case, decided before the 31 May 1961, is part of South African common law and is binding. The court then looked at the case of *R v Spinks*[54], decided after 31 May 1961 and found the dictum instructive. However, reference to this case is at best persuasive since the case was decided after 31 May 1961 and is considered to be foreign law. Be that as it may, the *Rhodes* decision is instructive and as stated earlier can be overruled only if the Supreme Court of Appeal believes that it was incorrectly decided, is deemed to be unconstitutional, or is contrary to an established rule of practice in South African courts. The common law rule has in fact been consistently applied by our courts.[55]

The court then briefly analysed the applicable provisions of the CPA.[56] On its interpretation of section 219A, an informal admission made voluntarily is admissible only against its maker. Thus the court deduced that the legislature did not intend that such an admission could be tendered against anyone else. To its mind, this interpretation is linked to and is similar to the prohibition on the use of confessions against another found in section 219.[57] The court does not delve further in its assessment to determine the implication, if any, for the legislative omission of a similar explicit prohibition applicable to informal admissions.

With regards to the second issue, the court drew attention to the fact that the *Ndhlovu* judgment did not refer to the common law rule at all. On a technical point, the court made special mention of the facts of *Ndhlovu* in order to deduce that the nature of the hearsay statements in that case could have been interpreted to be confessions.[58] However, the statements were tendered as admissions and as such, the trial court found that there was no statutory bar to the use of the statements against a co-

52 *R v George Cecil Rhodes* 1960 44 Cr App Rep 23, 28 (hereinafter referred to as "*Rhodes*").
53 *Litako* para 34.
54 *R v Spinks* 1982 1 All ER 587 (CA).
55 *Litako* paras 39-42. The court traces this back to the case of *Matsitwane.*
56 *Litako* para 38.
57 *Litako* paras 38, 54 above.
58 *Litako* para 49 above.

accused.[59] Hence, section 3 of the LEAA could be invoked and the common law rule could be disregarded.[60] On appeal, the court in *Ndhlovu* did not even consider the common law rule, thereby implying its acceptance of the trial court's reasoning. The court here was focused on the enquiry submitted i.e. whether section 3 was constitutional in the light of the accused's right to adduce and challenge evidence, rather than the applicability of the common law rule. This oversight by the trial and appeal court in *Ndhlovu* is criticised in *Litako* for not taking due consideration of the inherent dangers in the admission of hearsay evidence, especially in relation to the use of extra curial statements made by one accused against a co-accused.[61]

The court further expressed the opinion that on a jurisprudential level, admissions and confessions should be treated the same in the law. The effect of the use of an extra curial statement tendered against a co-accused could either be tangential or devastating, and depended on the court's categorisation of the statement as an admission or a confession.[62] For instance, a true calamity might result if the trial court decided that the statement was an admission and on appeal it was found to be a confession. That might result in the accused's being asked questions about inadmissible evidence, infringing his right to a fair trial.[63]On that note, the court affirmed the minority opinion in *Balkwell v S*, and found that the admission of an extra curial statement of an accused against a co-accused infringed the right to a fair trial, as the co-accused in such an instance would have to engage in legal battle "without the sword of cross-examination or the shield of the cautionary rules of evidence."[64] In this instance, an extra curial statement admitted as hearsay in terms of section 3 of the *LEAA* would have to pass a lower threshold of scrutiny than *viva voce* evidence.[65] The inherent unreliable nature of hearsay evidence, coupled with the caution of admitting the evidence of an accomplice[66] warranted such evidence to be excluded

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59 This position has been cited with approval in the case of *S v Ralukukwe* 2006 2 SACR 394 (SCA) (hereinafter referred to as "*Ralukukwe*").
60 *Ndhlovu* trial court paras 48-49.
61 *Litako* para 51.
62 *Litako* para 54.
63 *Litako* para 54.
64 *Balkwell v S* 2007 3 All SA 465 (SCA) paras 32-35, hereinafter referred to as "*Balkwell*".
65 *Litako* para 46.
66 *Litako* paras 46, 65.

because it had the effect of infringing the accused's right to a fair trial.[67]By invoking a teleological or value laden approach to interpretation[68], the court concluded that the constitutional values which underpin the criminal justice system have as their objective a fair trial for accused persons and this demands that the extra curial statement of an accused be inadmissible against a co-accused. In other words, constitutionally measured, it would not be in the interests of justice to allow such admission.

The court's next line of attack against *Ndhlovu* is found in its brief analysis of the text of section 3 of the LEAA, in which it draws attention to the fact that the provision is prefaced with the words, "Subject to the provisions of any other law…" By using certain common law cannons of construction, the court concludes that this implies that section 3 does not expressly override the common law but is actually subject to the common law.[69] If the intention of the legislature had been to alter the common law, such an intention would have had to be made express in the legislation. Failing this, the statute must be interpreted in conformity with the common law rather than against it.

Thirdly, the court then decided that given the inadmissibility of the statement, all convictions and sentences could not stand.[70] Despite the statement's being admissible against its maker, i.e. the first accused, it could not on its own found a conviction against this accused on the charges against him. This was due to the unreliable nature of the other forms of evidence tendered by the prosecution.

While perhaps intuitively the best normative outcome was reached by the court, it is useful to examine whether the court was correct in its analysis of the relationship between the statute (CPA and LEAA) and the common law. An analysis of the court's approach to statutory interpretation is thus required.

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67 *Litako* para 6.
68 See further Du Plessis *Re-interpretation of Statutes* 247.
69 *Litako* para 52.
70 *Litako* para 68.

3.2.2 Methods of statutory interpretation analysed

This part of the case note will examine two aspects of statutory interpretation which arose out of the *Litako* decision. The first aspect relates to the use of cannons of construction. It is argued that upon proper application of these rules, the correct outcome was reached by the court. The second aspect raised is in relation to the teleological method of statutory interpretation employed by the court, which is an application of section 39(2) of the *Constitution*. With respect to this aspect, it is argued that the court's reasoning is not "unduly strained" and is in balance with the meaning of the text and the constitutional imperative.

3.2.2.1 The use of cannons of construction

Cannons of construction are the rules and presumptions of statutory interpretation traced to Roman-Dutch and English law.[71] Cannons cannot be used to reach the sole answer to an interpretative dilemma.[72] They are merely means to justify, explain and lend legitimacy to an outcome, when the language of a provision is not clear.[73] Du Plessis has argued that these cannons have not lost their interpretative function in the constitutional dispensation and can still be used to guide constitutional interpretation in terms of section 39(2) of the *Constitution*.[74] These cannons were mentioned very briefly by the court in a paragraph.[75] Further examination of these cannons could be used to bolster the decision reached by the court.

For instance, an applicable presumption which could have been invoked by the court is

> ... [w]here an Act is capable of two interpretations, that one should be preferred which does not take away existing rights, unless it is plain that such was the intention of the Legislature.[76]

71 Du Plessis *Re-interpretation of Statutes* 122-123.
72 Du Plessis *Re-interpretation of Statutes* 126.
73 Du Plessis *Re-interpretation of Statutes* 126, 149.
74 Du Plessis *Re-interpretation of Statutes* 153.
75 *Litako* para 52.
76 Per Solomon JA in *Tvl Investment Co Ltd v Springs Municipality* 1922 AD 337, 347.

It is clear and has been explained above that section 219A of the CPA is capable of two interpretations. Indeed the court in *Ralukukwe*[77] and the trial court in *Ndhlovu*[78] have both interpreted the provision to not constitute a prohibition on the use of an informal admission against a co-accused. The trial court in *Ndhlovu* went on further to state that this meant that the common law rule could be overruled by section 3 of the LEAA.[79] By application of the presumption, it would mean that section 219A should be interpreted so as to not take away existing rights and this would imply that it prohibits the use of informal admissions tendered against a co-accused. This presumption is clearly in conformity with constitutional values and complies with section 39(2).

Another applicable presumption which could have been invoked by the court is the maxim *semper in dubiis benigniora praeferenda sunt*, which means that "in cases of doubt the most beneficial interpretation is to be preferred".[80] This presumption is in keeping with constitutional values and the directive of section 39(2).

The court, however, applied the presumption referred to in the case of *Casserly v Stubbs,*[81]where it was held that

> ... [w]e cannot infer that a statute intends to alter the common law. The statute must either explicitly say that it is the intention of the legislature to alter the common law, or the inference from the Ordinance must be such that we can come to no other conclusion than that the legislature did have such an intention.

Furthermore, the court found that it was a sound rule to construe a statute in conformity with the common law rather than against it, except where it is clear that the statute intends to alter the common law.[82] These cannons do not make mention of the protection of existing rights and it is submitted that it could in its application be incompatible with section 39(2). The court would have done better if it had referred to cannons which are in clear conformity with section 39(2).

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77 *Ralukukwe* para 10.
78 *Ndhlovu* trial court paras 48-49.
79 *Ndhlovu* trial court paras 48-49.
80 Du Plessis *Re-interpretation of Statutes* 161.
81 *Casserly v Stubbs* 1916 TPD 310 312.
82 *Litako* para 52, where the court referred to the case of *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811 823.

The application of section 39(2) is explained below.

3.2.2.2 Application of section 39(2)

In terms of section 39(2), every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation and when developing the common law. All statutes must be interpreted through "the prism of the Bill of Rights".[83] The "most constitutional" interpretation of a provision is preferred over any other interpretation, whether constitutionally compatible or not.[84]
According to Bishop and Brickhill, section 39(2) is "an explicit response to the overtly literalist approach to interpretation" of the apartheid era judiciary.[85] The case of *Hyundai*[86] provides a guide as to how section 39(2) should be applied. In that case the court said that:

> … judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section.[87]

There are limits to this application and the interpretation must not be "unduly strained";[88] in other words, the formulation of the provision must be capable of such an interpretation. The provision thus requires a liberal and rights-affirming approach to interpretation which should, at the same time, be mindful of the text and exercised appropriately with restraint.

Indeed, the Constitution demands a purposive approach to interpretation.[89] This approach requires interpreting a statute in the light of its context i.e. its scope, purpose and background.[90] According to Du Plessis, purposive interpretation is teleological interpretation,[91] which is in turn a form of interpretation informed by the values of the

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83 *Hyundai* para 21.
84 Bishop and Brickhill 2012 *SALJ* 685.
85 Bishop and Brickhill 2012 *SALJ* 683.
86 *Hyundai.*
87 *Hyundai* para 23.
88 *Hyundai* para 24.
89 *Bertie Van Zyl (Pty) Ltd v Minister for Safety and Security* 2010 2 SA 181 (CC) para 21.
90 *Jaga v Dönges; Bhana v Dönges* 1950 4 SA 653 (A) 662G-H.
91 Du Plessis 1998 *Acta Juridica* 15.

legal order i.e constitutional values.[92]Thus it can be deduced that section 39(2) requires a teleological approach to statutory interpretation.

Despite not specifically referring to section 39(2) or to teleological (or purposive) interpretation, the court in *Litako* effectively applied this approach with the restraint required. The court chose to interpret section 219A in a manner which promoted the rights of accused persons, rather than choosing an interpretation which denied these rights. This approach was appropriate because the text of section 219A (CPA) and section 3 (LEAA) allowed for such an interpretation to not be "unduly strained." Thus despite not explicitly referring to the constitutional mandate of section 39(2) the court gave effect to it, and it is for this reason that the judgment is sound.

4 Conclusion

The judgment has been positively received within the attorney's profession. In a recent publication of a South African attorney's journal, it was hailed as being of "seminal importance" since it cleared up the "confusion and uncertainty" created by *Ndhlovu.*[93] Furthermore, it was felt that the judgment should be lauded because it recognised that an admission could be as incriminatory as a confession and that the right of an accused to adduce and challenge evidence is integral to his right to a fair trial.[94]

It is not known at this point whether the matter will be appealed to the Constitutional Court. From a constitutional perspective the judgment appears to be sound, as due consideration is given to interpreting the statutory provisions within the prism of the Bill of Rights. The judgment may be the impetus required to drive the legislature to finally remove the statutory distinctions between confessions and their "poor relations",[95] informal admissions.

How will this judgment affect the future prosecution of crimes? The court in *Litako* dryly commented that post *Ndhlovu,* prosecutors have tried to categorise extra curial

92 Du Plessis *Re-interpretation of Statutes* 247.
93 Olsen 2014 *De Rebus* 42.
94 Olsen 2014 *De Rebus* 43.
95 Olsen 2014 *De Rebus* 43.

statements made by co-accused as admissions, and defence counsel have sought to have such statements categorised as confessions.[96] Perhaps the judgment may lay this perversity to rest.

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[96] *Litako* para 58.

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LIST OF ABBREVIATIONS

CPA	*Criminal Procedure Act* 51 of 1977
LEAA	*Law of Evidence Amendment Act* 45 of 1988
SALC	South African Law Commission
SALJ	South African Law Journal
SCA	Supreme Court of Appeal