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CRITICAL ANALYSIS ON THE INTERPRETATION AND APPLICATION OF THE LAW GOVERNING ADMISSIBILITY OF HEARSAY EVIDENCE IN CIVIL PROCEEDINGS IN LESOTHO; A PLEA FOR REFORM.

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CHAPTER ONE

Introduction

The admissibility of evidence in civil proceedings has since colonial times been governed by the *Evidence in Civil Proceedings Ordinance (referred to as the Ordinance).*[1]This piece of legislation remains in force to this day. The Ordinance makes it binding for the courts to apply the English Law of evidence in determining matters that relate to the admissibility of hearsay evidence in civil proceedings. As a result of this provision, and the development of English Law the current law applicable to the admissibility of evidence in civil proceedings is the *English Civil Evidence Act.*[2]

Due to the progression of time and the adoption of common law from jurisdictions such as South Africa, many changes have occurred in the application of the above legislations. Our Courts have widely adopted the attitude of applying the South African approach when dealing with admissibility of evidence. As a result of this there is a clash and confusion eminent in our judicial system. That is to say, the confusion is present to a notable degree and cannot easily be overlooked.

This paper discusses the interpretation of the provisions of the law that governs the admissibility of hearsay evidence in civil proceedings in Lesotho. The aim is to look into the practice of the courts of law in civil cases as against the statutory provisions for purposes of determining whether or not there is adverse impact of basing court decisions on a line of reasoning that emanates from the South African law, and if not, to determine whether a time for reform of the Ordinance has arrived. The paper focuses on hearsay evidence in civil proceedings and how such evidence should be treated in the courts of law.

Background

[1] Evidence in Civil Proceedings Ordinance No. 72 of 1830
[2] English Civil Evidence Act 1995

Prior to 1806, court proceedings and theorems were applied by laymen in camera. As a result of this, there were no reasoned judgements or precedents. In 1806 the English decided that Roman Dutch law would be applicable in Lesotho in order to preside over cases and start applying a form of precedent. The locals increasingly went for training in England and the English language was introduced in our courts. The English principles of procedure and evidence were inevitably introduced.[3]

In 1828, the Commission of Inquiry was set up and it recommended the adoption of the English procedure and evidence. From 1828- 1830, a committee of judges was set up to declare the law of evidence and to adopt the English rules of evidence. Some specific laws of evidence such as *section 14* of the Ordinance which governs admissibility of relevant evidence were codified. However, some areas of law like ones governing hearsay evidence were adhered to as per the provisions of the British law, hence the existence of such provisions as *section 22 of the Ordinance.*

Upon realization that there was need for enhancement of Lesotho's national security, Basotho sought British protection before 1868 and was consequently declared a British Territory in 1868. Subsequent to which it was attached to the Cape of Good Hope Colony.[4] After the Gun war of 1881 in 1884, the annexation of Lesotho to the Cape was terminated and Lesotho was put directly under Britain through the High Commissioner in South Africa. *Proclamation 2B* [5] remained in force thereafter.

By virtue of *section 12* of this Proclamation, Roman- Dutch law as practiced in the Cape became our common law, Customary law remained our source of law especially in cases where parties were all African and lastly, legislation was acknowledged as a source of our law. On top of this, *section 1* of the Proclamation empowered a Resident Commissioner, who was appointed it terms of *Proclamation of 1884,*[6] to hold a Court and to exercise jurisdiction in and adjudicate upon all causes civil or criminal. This proclamation created Lesotho's legal system that has been carried through into independence.

Post-independence, Lesotho took over the laws as had previously been in force. The laws were subject to modifications, adaptations, qualifications and exceptions that could reconcile them

[3] W.C.M Maqutu, 'Contemporary Family Law,' 2nd Ed. (2005) National University of Lesotho Publishing House – Roma 180 Lesotho
[4] Annexation Proclamation 14 of 1968
[5] General Law Proclamation 2B of 1884
[6] Proclamation no. 1 of 1884

with the laws enacted as a result of independence, the Constitution and the Order in Council to which it was scheduled.[7] Section 1 of the *Independence Order in Council*,[8] provides that *" The existing laws shall, as from the appointed day, be construed with such modification, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Lesotho Independence Act 1966 and this order."*

The term 'existing laws' is said under *section 4* to mean any proclamation, law, rule, regulation, order, or other instrument continuing in operation under the existing Court of Appeal Orders (sec 1, Nos, 1369 of 1954, 1187 of 1964 and 133 of 1965) and having effect as part of the law of Basutoland immediately before the appointed day or any Act of parliament of the United Kingdom or Order of her Majesty in Council so having effect and includes the Customary Law of Basutoland and any other unwritten rule of law so having effect.

In as much as the laws were and still remain subject to this provision, most of them have never enjoyed the privilege of either being modified or qualified. Mostly because upon application, the realization was either that they were not in any way conflicting with the post-independence legislation or that our legislature was then not faced with the rapid changing *mores* of society that required modification of certain laws.

One of the laws that were not changed after independence is the *Civil Ordinance 1830.*[9] It is the law that governs admissibility of evidence in civil proceedings, be it application proceedings or a trial. This law provides under *section 22* that hearsay evidence shall be admissible in any case in which such evidence would be admissible in any similar case in the Supreme Court of Judicature of England. It is the very law that forms the basis of this dissertation.

This paper basically aims to give the interpretation of section 22 above with the object of comparing the application of this provision in the courts of law (practice) against what the legislature prescribes. Ideally, it aims to discern the repercussions likely to be suffered by the conflict identifiable in judicial practices when it comes to the application of the rules of admissibility of hearsay evidence as stipulated in the Ordinance, and also to determine whether a time for reform has arrived for this law.

[7] V.V Palmer, 'The Legal System of Lesotho," (1972). The Michie Company, Law Publishers, Charlottesville, Virginia

[8] Independence Order in Council No. 1172 of 1966

[9] Evidence in Civil Proceedings Ordinance 72 of 1830

Definition and Admissibility of Hearsay Evidence

Based on section 22 of the Ordinance, admissibility of hearsay evidence is dependent on the practice in the Supreme Court of Judicature in England. This court is bound to comply with the *Civil Evidence Act* upon determining admissibility of hearsay evidence. It is therefore necessary to begin with the definition of hearsay evidence as stipulated in the Act. Hearsay is defined as a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated, and this includes hearsay of whatever degree.[10]For evidence to be regarded as hearsay therefore, it has to have been said or made by someone who is not giving evidence in court and it must be tendered as proof of the truth of the statement made out of court on a prior occasion.

The general rule is that hearsay evidence in civil proceedings shall not be excluded merely because it is hearsay.[11]This rule has focused hearsay evidence to weight rather than to admissibility, and the weight is assessed through considerations set out in section 4(2)[12] namely; the reasonableness and practicability of the person calling the evidence to have produced the original maker of the statement, whether the original statement was made at or near the same time as the matters stated, whether the evidence involves multiple hearsay, whether the person involved had any motive to conceal or misrepresent matters, whether the original statement was an edited account or was made in collaboration with another, or for a particular purpose, and lastly, whether the circumstances of the hearsay evidence suggest an attempt to prevent proper evaluation of its weight.

Two possible reasons why hearsay is generally admissible are that; as opposed to an accused in criminal proceedings, parties in civil proceedings do not require special protection from a mistaken judgement. Secondly, unlike in the case of a suspect, a potential party to civil proceedings does not need protection from illegal, unfair or improper treatment in the manner in which evidence was obtained. The consequences of admission of this type of evidence are

[10] Section 1(2) of the English Civil Evidence Act
[11] Section 1(1) Ibid
[12] English Civil Evidence Act

less severe compared to the ones in criminal cases hence their scale of proof differ. Proof in criminal cases is beyond reasonable doubt and in civil cases is on a balance of probabilities. For this reason, hearsay rule should not be applied in civil proceedings with the same severity as in criminal cases.

An exclusion to the hearsay rules in under section 5[13] and provides that hearsay is not admissible if the maker of the statement would not have been competent to be a witness, if they are either too young to testify in court, or they are of unsound mind, or if they lack understanding. If such a person is competent, he ought to comply with the procedure stipulated under section 2. He must provide a notice of proposal to adduce hearsay evidence and such notice should identify the hearsay evidence, state the party's intention to rely on the evidence at a trial and explain why the witness cannot be called. On this note, the court may specify classes of proceedings in which a party intending to rely on hearsay evidence must give advance notice to the other parties, make provision for the other parties to request particulars of hearsay evidence intended to be adduced, and even prescribe the manner and time for complying with the above.

On the other hand, the general rule under common law is that hearsay evidence is generally inadmissible, regardless of whether it is in civil or criminal cases.[14]Reasons for this general prohibition of hearsay evidence are that, hearsay evidence could be prejudicial to the person against whom the statement is made, in the sense that he would be denied opportunity to confront the accuser and cross-examine him with the view of challenging or disproving the statement in question or to expose weaknesses in the statement as was made by the original person during the trial proceedings. The presence of the original maker of the statement is crucial in that it makes it easy to identify and address the defects in the hearsay statement. Such evidence is inadmissible even in cases where there is a recording, video camera or a written document as long as the maker of the statement is unavailable in court.[15]

T. Murphy, lays out a test applicable in determining whether evidence qualifies as hearsay or not. He states that such statement must have been made on a prior occasion; the person who made the statement must not be the one in court; and it must be tendered in court with the intention to prove the truth in such a statement. Common law has several exceptions to this

[13] ibid
[14] LH Hoffman and DT Zeffertt, 'The South African Law of Evidence', 2nd Ed. LexisNexis. Durban
[15] T. Murphy, "The Admissibility of CCTV Evidence in Criminal Proceedings," IRLCT vol 13, 1999- issue 3

rule, *re gestae doctrine*,[16]*declaration of deceased persons*,[17]*Public Documents,* and *Statutory Exceptions.*

It is worth noting that admissibility of hearsay evidence in Lesotho's courts differs depending on the kind of proceedings dealt with. The common law principles discussed above are derived from South Africa. These are mostly applied in criminal matters due to the provision under the *Criminal Procedure and Evidence Act.*[18] The effect of this provision was that English decisions on common law and on statute before the fourth of October 1966 are binding on the High Court of Lesotho. The English decisions that interpret English statutes after independence on evidence law are inapplicable and those interpreting the common law after this date are highly persuasive. As a result of this, South African decisions that interpret the common law and statutes in *para materia* post-independence are highly persuasive. This means that South African decisions interpreting statutes that are not in *para materia* are not applicable. After independence common law was relied on to address issues that could not be handled by the *English Criminal Evidence Act*,[19] but at the same time it needed to be I alignment with the Act in that it could not be far fetched and inconsistent.

On the other hand, admissibility of hearsay evidence in civil proceedings in Lesotho, is regulated by the *Evidence in Civil Proceedings Ordinance.*[20]Implications derived from this provision are that, all the English decisions on common law and on statute on civil evidence are binding on the High Court of Lesotho. The English decisions interpreting the common law before and after independence are applicable in civil evidence law and lastly, the South African decisions interpreting common law and the statutes which are in *para materia* are highly persuasive only if they do not contravene the English Civil Evidence Law.

Problem Statement

In civil litigation, the legislature has always made it clear that, "no evidence which is of the nature of hearsay evidence shall be admissible in any case in which such evidence would be

[16] R v Mokhosi (1961-62) HCTLR 53
[17] R v Hine 1910 CPD 371
[18] Criminal Procedure and Evidence Act no. 9 of 1981
Section 225: No evidence which is in the nature of hearsay evidence shall be admissible in any case in which such evidence would be inadmissible in any similar case depending in the Supreme Court of Judicature in England prior to the 4th October 1966.
[19] English Criminal Evidence Act of 1965
[20] Evidence in Civil Proceedings Ordinance 72 of 1930
Section 22: No Evidence which is of the nature of hearsay evidence shall be admissible in any case in which such evidence would be inadmissible in any similar case depending in the Supreme Court of Judicature in England.

inadmissible in any case in which evidence would be inadmissible in any similar case depending in the Supreme Court of Judicature in England[21]." The literal interpretation of this provision is that admissibility of hearsay evidence in Lesotho is solely dependent on whether or not such evidence in a similar case is admissible in the Supreme Court of Judicature in England. The interpretation and application of this provision could be marked in the case of *LEC v Forester*[22].

In that case, the court had to determine whether conviction of the respondent in the pending criminal case would be admissible in that court and whether it laid much weight or substance to the issue at hand. It was held that such conviction would suffice to be regarded hearsay evidence on grounds that it would have been a decision made by another court in a criminal trial and would have been brought in the civil proceedings merely as hearsay evidence. Upon determining admissibility of such evidence, the court relied on section 22 of the Ordinance[23] and interpreted it to mean that the court must have recourse to the law as is in England and this will enable it to ascertain at what state our law is regarding admissibility of evidence. This is the law as it stands in Lesotho.

Although this has been laid down clearly, there seems to be confusion when it comes to the application of the law with regard to admissibility of hearsay evidence. In practice, the courts are bent towards the common law approach that as a general rule, hearsay evidence is inadmissible in court. *Zeffert*[24] states numerous reasons why such evidence is inadmissible. They include the fact that the maker of the statement may intend to mislead whomever the statement was told to or that he genuinely meant to tell the truth but his truth has merely been a misconception of the situation.

This attitude can clearly be seen in trial proceedings. In the case of *R v Maliehe & Others*[25], the High Court was to determine the issue of admissibility of hearsay evidence. The court a quo, was quick to disallow evidence tendered by the crown witness merely on the basis that it was hearsay. The High Court was not hesitant to be in agreement with this contention although the decision in the court a quo had not been final on the basis that the court was *functus oficio.* On appeal, *Maliehe and Others v R,*[26] the court stated, reference had to the case of *R v Miller*

[21] Evidence in Civil Proceedings Ordinance Supra
[22] LEC v Forrester 1978 LLR 132 @ 138
[23] Evidence in Civil Proceedings Ordinance Supra
[24] LH Hoffman and DT Zeffertt, 'The South African Law of Evidence' supra
[25] R v Maliehe and Others (CRI/T/2/92)
[26] Maliehe and Others v R (C of A (CRI) NO. 4 OF 96 [1997] LSCA 7 (03 February)

1939 AD 106, that "*Speaking in general terms, a statement by a person not called as a witness is inadmissible if it is tendered in order to prove the truth of what was said.*" One would argue that the general rule of inadmissibility was laid in criminal proceedings, as a result it has no relevance to civil proceedings. The problem however is the words used, 'speaking in general terms.' These words are phrased in a manner that gives the impression that the general rule is that hearsay evidence is inadmissible be it in criminal or civil proceedings.

According to the provisions under the *Law of Evidence Amendment Act,*[27] the general rule applicable in the admissibility of hearsay evidence is that such evidence shall not be admitted as evidence at criminal or civil proceedings. Thereafter, the exceptions are laid out on when hearsay evidence would be admissible. This means that when the South African courts preside over a case regardless of whether it is in criminal or civil proceedings, the general approach is that such evidence is inadmissible. Now, Lesotho courts upon application of the rules of admissibility refer to the South African approach as though it were similar to the rules of admissibility prescribed by the current legislation on admissibility.

The courts align themselves with the South African law despite the fact that the applicable legislation in Lesotho vastly differs from the position of the law in South African. The rule that hearsay evidence was inadmissible in court has now extended from trial proceedings to application proceedings, Civil Applications to be precise. In the case of *Asman v His Wordship Magistrate Makara and others,*[28] the Applicant had given account of what he was told by his attorneys in relation to what transpired in the proceedings when he was absent. The Court readily wanted to reject the hearsay evidence on the ground that it is generally inadmissible under common law and is the common practice as per trial proceedings. It failed to draw the distinction between civil trials and criminal trials; but instead it generally adopted the practice without adherence to the fact that the laws governing the two differ and for that reason that they are governed by separate legislations. In handling the matter, the court approached the matter as though hearsay evidence is generally inadmissible in the courts as is the common practice under the common law.

It is worth noting that the law of admissibility in criminal cases differs from the law of admissibility in civil cases. *Section 225 of the Criminal Procedure and Evidence Act,*[29] provides for admissibility of hearsay evidence as prescribed by the Supreme Court of

[27] Law of Evidence Act no. 45 of 1988 South African Legislation, section 3(1)
[28] Asman v His Worship Magistrate Makara & Others (CIV/APN/466/2004) LSHC 149 (02 December 2004)
[29] Criminal Procedure and Evidence Act no. 9 of 1981

Judicature in England prior to the fourth day of October 1966. Generally, hearsay was inadmissible then, hence the general approach is that such evidence is inadmissible. This approach therefore makes it easier to refer to the South African law in criminal cases. However, in civil cases, emphasis is that the law is applicable as is for the time being in the Supreme Court of Judicature in England. The question posed at this juncture is whether our courts should abandon this approach and rely solely on common law as it is in South Africa or whether they should stick to the legislation as is? Another issue is whether our legislation on admissibility of evidence is dated and no longer accommodates societal changes of society? Also, whether practice of courts have implications that Lesotho does not take seriously the legislative measures.

Formulation of hypothesis

- As the primary rule of interpretation, the literal approach to the meaning of words that are clear should take precedence and be put into effect. This should be equated to the legislature's intention.[30] It is an indicator that the legislature knew what it was doing when it drafted the Ordinance and had intended the law to be applicable as stipulated in the Ordinance.
- The rule must remain relatively constant over time, it must be prospective and also flexible enough to accommodate the changing mores of society[31]. This rule seeks to address the question of whether the time has come to abandon the legislation that was long enacted to accommodate the changed practices.
- Application of the English Laws in our courts post the independence is tantamount to failure to fulfil the responsibility of independently holding the competence to govern or lead this nation.

Aims and Objectives of the Research

- To discover in depth to what extent the English Civil Law on admissibility of hearsay evidence should be applicable in Lesotho.
- To reconcile the conflicting nature admissibility of hearsay evidence in the English Laws as against the common belief and practice.

[30] Principal Immigration Officer v Hawabu 1936 AD 26
[31] MP Golding, Retroactive Legislation and Restoration of the Rule of Law. 1993 https://www.jstor.org

- To find out whether the implications of the applicability of admissibility of hearsay evidence laws warrant a course for reform.

CHAPTER TWO

Introduction

The interpretation and application of Section 22 of the Ordinance in Lesotho's Courts is a rather complex topic based on the fact that there are a lot of contradictions and different opinions in the matter, for instance, there is reliance on different jurisdictions which has created a confused legal system that no longer knows the right track to take when presiding over hearsay matters in both civil proceedings.[32] As a result of this the courts are no longer able to draw a distinction between the application of hearsay rules according to the statutory provisions and the predominant common law position. In order to have clarity, this chapter deals with the interpretation of section 22 above and also delves into the application of such provision in the courts. The discussion will be centered around three jurisdictions, the English version, Lesotho and South African version. This is because Lesotho's statutory law dictates that Lesotho adhere to the law of England in the Civil Evidence law while great influence in the common law is sourced from the South African legal system.

Interpretation of section 22 of the Ordinance

Section 15 of the Interpretation Act[33] provides that every enactment ought to be deemed remedial, and should be given a fair, large and liberal construction and interpretation as best ensures the attainment of its objects. The provision is broad and does not provide the specific guidelines on the interpretation of an Act. As a result of this, reference is made to the common law rules of interpretation. According to *Botha,*[34] statutory interpretation is composed of the body of rules and principles used to construct the correct meaning of the legislative provisions that is to be applied in practical situations. These rules and principles are used to provide the juridical understanding of legal texts. The *Interpretation Act,* however, does not contain these rules of interpretation, hence reference will be made to the South African rules of interpretation.

South Africa adopted the Roman-Dutch law during its colonization. The rule of interpretation was that purposive approach prevails upon interpreting provisions of a statute.[35] However, all was changed when the English law took over the Cape. The literal interpretation, which was

[32] LEC v Forester 1978 LLR 132: read with Thakalekoala v Lesotho Bank (CIV/APN/107/86) [1987] LSCA 121 (03 Aug 1987

[33] Interpretation Act No. 19 of 1977

[34] C. Botha, 'Statutory Interpretation.' 3rd d. (1998) Juta & Co. Ltd. Lansdowne 7779

[35] ibid

popular in legal systems influenced by the English Law took predominance over the purposive approach and it became the primary rule of interpretation.[36]

The literal interpretation means that words to be interpreted should be given a literal or grammatical meaning. This highlights the plain language movement which advises that all legal texts be drafted in a manner that can easily be understood and delivers the message to the reader of what the law expects of them. It is worth noting that clarity and comprehensibility that is advocated for in plain language cannot compromise the certainty and accuracy of the law, they can only be reconciled.[37]

The plain meaning approach dictates that where the meaning of words is clear in the text, such meaning should be put into effect and should be tantamount to the intention of the legislature.[38] Where the text is vague, ambiguous, misleading or absurd, purposive approach will be taken into consideration.[39] In 1875, in the *De Villiers Case*[40] the literal approach was introduced to South Africa. It was held that legislation that had been adopted after the British had taken over the Cape should be interpreted in accordance with the English rules of interpretation. It is the very approach and the very rules of interpretation that have been applied in Lesotho. See the case of *Sechele v Public Officers Defined Contribution Pension Fund and Others.*[41] This is the constitutional case that discusses the rules of interpretation and emphasizes the importance of aligning them to the constitutional rights.

The literal approach on its own however could not suffice. As a result, both the primary rule of interpretation, literal approach, and the golden rule of interpretation, the shift to purposive approach where the text is ambiguous were applied. In the *Dadoo Case*[42] gradual change was made that the intention of the legislature be deduced from particular words or phrases used in the text. That is the plain meaning of the text was in the form of 'intentional' disguise. Later in 1950, in *Jaga v Donges,*[43] it was held that the interpreter of the text could still look into the broader context of the legislation even when the text was clear. Proper construction is derived from both the text and its context. As a result, the two cannot be separated.

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[36] ibid
[37] C. Botha, 'Statutory Interpretation.' Supra
[38] Principal Immigration Officer v Hawabu 1936 AD 26
[39] Venter v R 1907 TS 1910 914
[40] De Villiers v Cape Divisional Council 1875 Buch 50
[41] Sechele v Public Officers Defined Contribution Pension Fund an Others (6/2010) (NULL) [2010] LSHC 94 (13 December 2010)
[42] Dadoo Ltd v Krugersdorp Municipal Council 1920 AD 530
[43] Jaga v Donges 1950 (4) SA 653

In the case of *Stellenbosch Farmers' Wineries v Distillers Corporation (SA) Ltd,*[44] Wessels JA held that courts have the duty to read the section of the Act which needs sensible interpretation, with due regard to the meanings which allowed grammatical usage assigned to the words used in the section in question and, on the other hand, to the contextual scene, which involves consideration of the language of the rest of the statute as well as the matter of the statute, its apparent scope and purpose, and within the limits, its background. The end point is for the court to balance all these various considerations and thereby ascertain the will of the legislature and state its legal effect with reference to the facts of the case before it. The fact that there must be a balance between the text and context does not mean that the legislative text can be ignored. Clear stipulations need not be overlooked and context must be encored to the particular text in question.[45]

Section 22 of the Ordinance[46] provides that no evidence which is of the nature of hearsay evidence shall be admissible in any similar case depending on the Supreme Court of Judicature in England. The phrasing in this section is clear to the interpreter and is comprehensible. It provides that hearsay evidence in civil cases in Lesotho shall be inadmissible only to the extent that the same is done in a similar case in the England Supreme Court of Judicature. This means that where such evidence in inadmissible in the England Supreme Court of Judicature, it is also inadmissible in Lesotho and where such evidence tendered is admissible in the former jurisdiction, it is also admissible in Lesotho. Section 14 of the *Interpretation Act*[47] states that the term 'shall' must be construed as an imperative, as a result, the word 'shall' in section 22 of the Ordinance gives a peremptory effect to the provision which binds Lesotho to the English law of hearsay evidence in civil proceedings.

A clear interpretation of this section is discussed in the case of *LEC v Forester.*[48] In this case, Forester was suing for unlawful dismissal. During the process, there had been a criminal case that was pending. The contention of Forester's counsel was that, the criminal case be done away with first before proceeding to this civil trial. The argument was that the decision in the criminal court would be highly relevant and would be the best evidence. It was held that the decision would be hearsay and as such would be governed by section 22 of the Ordinance. Upon interpreting the section, the court said that it must have recourse to the law of England

[44] Stellenbosch Farmers' Wineries v Distillers Cooperation (SA) Ltd 1962 1 SA 458 (A) @ 476 E - F
[45] S v Zuma 1995 (2) SA 642
[46] Evidence in Civil Proceedings Ordinance Supra
[47] Interpretation Act supra
[48] LEC v Forrester 1978 LLR 132

in order to ascertain what the state of Lesotho law is concerning admissibility of evidence, in civil proceedings.[49] Thereafter, authority on admissibility of hearsay evidence in civil proceedings was taken from the English case, *Hollington v Hewthorn*[50]for admissibility of relevant evidence and admissibility of a conviction as hearsay evidence. Such was said to be the opinion of another court and therefore irrelevant according to section 17 of the Ordinance. However, it could only be said to be admissible in evidence if it were to prove that such individual had committed an offence and if proof that an offence was committed was material in the case before the court.

Application

The abovementioned *LEC Case* draws a line on how section 22 of the Ordinance should be applied. In 1837, the rule against hearsay evidence was introduced in the English Courts through the case of *Wright v Doe d. Tatham*.[51] This was a case of inheritance whereby the deceased Mr. Marsden had written a will leaving his valuable real property to his servant George Wright. The sole heir, Sandford Tatham sued arguing that the will should be set aside because Wright had procured it by fraudulent means as Mr. Marsden lacked the proper understanding of what he was doing because of his mental incapacity. Wright adduced three letters before the court as proof that Mr. Marsden had been handling his affairs perfectly fine. The issue was whether or not such letters should be admissible before the court? The House of Lords held that such letter should be inadmissible because they implied the statement that Marsden was of sound mind.

According to the *Wright case* and the many that followed, hearsay was generally inadmissible. This means that Lesotho cases that were presided over by then ought to have had hearsay evidence in civil proceedings generally inadmissible. Later in the years, hearsay began to gradually be admissible. The courts identified the challenge of generally having hearsay evidence as inadmissible and introduced some of the exceptions such as a conviction.[52] The

[49] Ex Parte Minister of Justice: In re Rex v Demingo 1951 (1) SA 36
[50] Hollington v Hewthorn (1943) 2 ALL ER 35
[51] Wright v Doe d. Tatham (1837) 112 E.R 488, Ingram v Ingram (1956) 1 ALL ER 785, and Goody v Odhams Press Ltd (1966) 3 ALL ER 369
[52] Hollington v Hewthorn Supra

English Civil Evidence Act, 1968[53] was later introduced and all it did was to attempt to be not too strict and not too relaxed in the admission of hearsay evidence in civil proceedings.

It provided that hearsay shall only be admissible to the extent that it is admissible to any provision in the Act or any other statutory provision or by agreement between the parties, but not otherwise. Even though the exceptions had been made, it could still be read that the general rule was that hearsay evidence was inadmissible. As a result of this, in most civil cases hearsay evidence was inadmissible except in certain circumstances prescribed in section 1(1) of the Act. Take for example the 1987 *Thakalekoala case.*[54]

In this case, applicant had alleged that she was unfairly dismissed on the ground that her dismissal was based on hearsay evidence since it emanated from information supplied by one Miss Mofuoa who had been caught kite-flying her account. Miss Mofuoa indicated that the applicant had taught her the kite-flying process which was considered theft in the bank. The court held that when investigations were being carried out, such information was not hearsay, rather it was merely implicating the applicant during an inquiry and that the very evidence was hearsay before the court on the ground that it had been said by Miss Mofuoa.

As a result, the very evidence would be inadmissible in the court if it were provided otherwise than by Miss Mofuoa since it was hearsay. In this case, the decision that hearsay evidence was inadmissible was rightly made on the ground that it was based on the rule applicable in accordance with section 22 of the Ordinance and the 1968 section 1(1) of the English Civil Evidence Act.

Change arose when the *English Civil Evidence Act, 1995*[55]was introduced. This Act made hearsay evidence generally admissible in civil proceedings. The challenge arose at this juncture wherein the courts were held to the past 1968 rule. They reasoned it out using the South African law and treated it as though admissibility of hearsay evidence in civil proceedings was the same as that of the criminal proceedings. Take the case of *Teko and Another v Mathe and others Case.*[56]The case was instituted close to three years later after the enactment of the 1995 English Civil Evidence Act. Surely, the courts must have been aware of the change in the admissibility of hearsay evidence based on research and compliance with the relevant laws. The case had

[53] English Civil Evidence Act of 1968
[54] Thakalekoala v Lesotho Bank (CIV/APN/107/86) [1987] LSCA 121 (03 Aug 1987)
[55] English Civil Evidence Act 1995 supra
[56] Teko and others v Mathe and Others (CIV/APN/172/1998 (CIV/APN/12/2001)) (CIV/APN/172/1998) [2005] LSHC 41 (28 Feb 2005)

been dragging for a very long time to give courts opportunity to familiarize themselves with the changes in the admissibility of hearsay evidence. However, reference was still made to the South African exclusionary rule of hearsay. This begs the question whether the courts were aware of this rule or they intentionally decided to overlook it because of the lack of interest in the English law pertaining to several things including hearsay rules.

The court ought to have reasonably been aware of the change that had transpired in their jurisdiction because section 22 of the Ordinance constantly serves as a reminder of which authority ought to be considered when it comes to handling matters of hearsay in civil proceedings and the LEC v Forester case has given proper guidance on the application of hearsay rules in civil proceedings. Due diligence and careful adherence to the relevant laws would have referred the court to the appropriate piece of legislation govern matters of hearsay.

In the *Teko Case,* council for the Applicants moved the court to strike out certain paragraphs of the respondent's affidavits deposed to by the first Respondent because they were unsustainable and irrelevant hearsay and as such ought to be struck out by the court. When deciding the matter, the court made reference to *Zeffert*[57] as authority on hearsay rules. The court indicated that hearsay evidence should not be admissible on the ground that, as per Zeffert, it could not be tested by cross-examination which has the purpose of exposing deficiencies. The position is held in both the South African and English jurisdictions.

The problem however is the line of reasoning which is misleading in that it refers the parties to the wrong jurisdiction and also applies the incorrect principle that hearsay is generally inadmissible. Furthermore, it fails to draw the distinction between the application of hearsay evidence in civil proceedings and in criminal proceedings. It further fails it show the indicator between burdens of proof and the possible consequences of the outcome in each.

Another case reflecting the same misconception is that of *Hajee Haroon Asman v His Worship Chief Magistrate Makara and three others.*[58]The respondent in this case had raised several points *in limine* that included the fact that the application was defective, improper and/or irregular in that the affidavit filed in support thereof was based on the and/ or is riddled through with inadmissible hearsay evidence. The same South African principles were applied in dealing

[57] LH Hoffman & DT Zeffert, 'The South African Law of Evidence' Supra
[58] Hajee Haroon Asman v His Worship Chief Magistrate and three others CIV/APN/466/2004

with this matter and the further challenge was that it was passed on to application proceedings according to this case and the *Asman v His Worship Magistrate Makara and others.*[59]

In the former case, the court held that the rule against hearsay is not limited to action proceedings, but in application proceedings, the rules of evidence are the same as in trial cases so that hearsay allegations are not, in general permissible except in those cases where they should be permissible in a trial action. The above cases prove that our courts have developed an attitude that hearsay evidence should be dealt with according to the South African law. The worst past is that not only does this occur in civil trials but also happens in application proceedings. However, what can be derived from the rule stated above is that the rules of evidence apply in both trial and application proceedings. Consequently, it us proper to fix the entire system rather than to keep passing an error to the next.

The current position of the law in terms of section 22 of the Ordinance and the English Civil Evidence Act is that hearsay evidence is generally admissible in our courts of law. This is due to the proper interpretation of the above section as per the case of LEC v Forester and the binding effect of the English law in Lesotho system. Tracing back the history of hearsay rules, it is clear that it does not matter the law and Lesotho's views of it. If England changes the position of the law based on what transpires in its jurisdiction, Lesotho is bound to bey regardless of whether the implications adversely affect Lesotho.

Although this is the case, in most proceedings, Lesotho courts base themselves on the South African legal system. As a result of this, they have established a practice that hearsay evidence is generally inadmissible as per the South African authorities. Due to this, it is proper to determine whether section 22 of the ordinance has become a bar towards developing Lesotho law and freely adhering to the law that the country so properly fancies thus calling for reform in order for Lesotho to enact laws that are appropriate for it as a state and are based on the mores of our society. Even though that would be appropriate, it is to look into both systems, see what most countries are doing, why doing it and how it will affect Lesotho. This will enable Lesotho to independently determine the rules of hearsay that it deems fit as a nation without peremptory provisions that force it to look into a law that may be adverse to the country.

[59] Asman v His Worship Magistrate Makara and Others (CIV/APN/466/2004) [2004] LSHC 149 (02 Dec 2004)

CHAPTER 3

Introduction

The rule against hearsay evidence was commonly accepted by several jurisdictions such as the previously discussed, South Africa,[60]England[61] and Lesotho,[62] for a long time. However, as time progressed, there was gradual shift towards general acceptance of hearsay evidence in the latter two states.[63] The challenge with Lesotho is that the law relied upon in the admissibility of evidence is the law that had been in force before independence[64] and does not give the parliament opportunity to base itself on its own observations, rather it binds Lesotho to the changes in England without question.[65] The purpose of this chapter is to compare the law of hearsay in different jurisdictions, to discover what the law is, how it had been should there have been changes and the rationale behind the law as is and as was where changes were made. This would serve as a guide towards answering the question whether there is need for reform in Lesotho.

England

In the 19th Century, common law emerged as part of the development of the adversarial system. It did not favour extra-judicial assertions that could not be subjected to cross-examination, as a result of this the gradual erosion of hearsay could be traced and this is evidenced by the introduction of exceptions brought about by practical considerations or the acceptance that particular types of hearsay evidence were inherently more reliable, either because of the manner in which they were recorded, such as Public documents, or because the statement was contrary to the interests of its maker, like adverse admissions. Other types of hearsay evidence were admitted because they were the 'best' evidence there could be and the only available method of proof of fact such as evidence of age.[66]

[60] The Law of Evidence Amendment Act 45 of 1988
[61] English Civil Evidence Act Ch. 64 of 1968
[62] Evidence in Civil Proceedings Ordinance 72 of 1830 which referred to the English Civil Evidence Act Ch.64 of 1968
[63] English Civil Evidence Act Ch. 38 of 1995
[64] W.C.M Maqutu, 'Contemporary Family Law,' 2nd Ed. (2005) National University of Lesotho Publishing House – Roma 180 Lesotho
[65] Evidence in Civil Proceedings Ordinance Supra
[66] D. M Dwyer. 'Developments in the Principles of Civil Evidence in Nineteenth Century England.'

Statutory revision of the rules was made both in the criminal and civil proceedings due to the challenge that was faced in the case of *Myers v D.P.P.*[67] This case involved car theft whereby their key identification was their unique and indelible cylinder block numbers. During the manufacture of the cars, the process had been observed by workmen and the numbers were recorded on cards. The cards were microfilmed and the originals in turn burned. The Crown called upon the person in possession of the microfilms to testify and his evidence was held to be inadmissible on the ground that he had not personally made the record and could not prove its correctness. The House of Lords found the limits of existing exceptions unsatisfactory but they were of the opinion that further reform could not be possible by simply extending the common law exceptions to the rule. Consequently, the Criminal Evidence Act 1965 relaxed the law regarding admission of business records. On the other hand, recommendations were made to have the Civil Evidence Act of 1968 as a result of which first-hand and second-hand hearsay found in records was made admissible provided that certain procedure was followed.

The relaxation of the rule against hearsay was found to not be enough in the civil proceedings, as a result, it was provisionally recommended that the rule excluding hearsay evidence should be abolished, rather there should be safeguards against any abuse of the power to adduce hearsay evidence.[68] The reasons were that the then statutory regime was unwieldy, the law was unnecessarily difficult to understand and in some instances outmoded. Another reason was that the rules governing practical application were too complicated, due to this great reliance was placed on the parties on the rule which allowed hearsay evidence to be rendered admissible regardless of the party's non-compliance with the requirements.[69]

Further, there had been an indicator that the then recent developments in the law and practice of civil litigation pointed to a new approach which emphasized ensuring that so far as possible and subject to the consideration of reliability and weight, all relevant evidence was capable of being adduced.[70] Also, litigation is carried out in a more open climate, whereupon parties identify and refine the issues in advance which makes it less likely for the parties to manipulate technical points at the trial stage[71]

[67] Myers v D.P.P [1965] A.C. 1001
[68] The Hearsay Rule in Civil Proceedings (1991), Consultation Paper no. 117
[69] Ibid
[70] Ventouris v Mountain (no. 2) [1992] 1 W.L.R 887 at 899 Balcombe L.J "The modern tendency in civil proceedings to admit all relevant evidence, and the judge should be trusted to give only proper weight to evidence which is not the best evidence."
[71] C. Glasser, "Civil Procedure and the Lawyers- The adversary system and the Decline of the Orality Principle." (1993) 56 M.L.R 307 as from; Hearsay Rule in Civil Proceedings Law Com. No. 216.

The other reason furnished was that some rules of admissibility may be perceived by intelligent and rational witness as detrimental and therefore dissatisfied with their existence as they sometimes prevent them from furnishing evidence which they perceived as relevant and cogent. Laymen on the other hand have difficulty understanding and accepting these rules as a result of which it may lead to public confidence in the judicial system being ultimately diminished. The need to maintain that confidence provides further reason to re-examine the rule and its operation in practice.[72]

The above recommendations and gradual changes in the law led to England changing from the rules against hearsay to generally accepting hearsay evidence as admissible in the courts of law provided the safeguards that protect against abuse of this rule are complied with.[73]The 1995 Act not only takes up the recommendations made above but also abolishes the rule against hearsay in civil proceedings. The 1968 Act had already created significant exceptions to the hearsay rule as mentioned above, on the other hand, the 1995 statute has carried the process to its logical conclusion. It has brought about a major change in the structure of English civil trials.

South Africa

When the English common law developed a rule that hearsay evidence should be excluded uncompromisingly if it could not be accommodated within the existing, recognized exceptions whether statutory or at common law, South Africa by means of legislative enactments received this rule, in this form, the effect of which it incorporated the English common law.[74] The hearsay rule had strict application, the result of which no new exceptions could be introduced by the courts.[75] The rule was inflexible in that it could not be received if it did not form part of the common law or statutory exceptions. Then, the fact that hearsay evidence was highly relevant or reliable could not alter the rigidity of the rule, inasmuch as the primary reason for the exclusion of hearsay was its general unreliability.[76]

Since the rule's evidential value rested on the untested memory, perception, sincerity and narrative capacity of the maker of the statement who was not under oath, cross-examination,

[72] Hearsay Rule in Civil Proceedings Law Com no. 216
[73] English Civil Evidence Act of 1995
[74]Section 42 of the Civil Proceedings Act no. 22 of 1965, "The law of evidence including the law relating to the competency, compellability, examination and cross-examination of witnesses which was in force in respect of civil proceedings on the 30th May 1961, shall apply in any case not provided for by this Act or any other law."
[75] Myers v DPP Supra
[76] H. Dennis, The Law of Evidence. 3rd Ed. (2007). London Sweet & Maxwell Ltd

or any procedures of the adversarial system,[77] the rationale for exclusion disappeared in a case where the objections were raised and overcome. If there was absence of a recognized exception, the evidence had to be excluded. The need for reassessment and reform in the hearsay law was prompted by the fact that the rule was distorted and manipulated to accommodate the dictates of individual justice and necessity which happened at the expense of logic and principle.[78]

Upon realization of the adverse impact of the application of the exclusionary rule and its exceptions, and the decision in the Appellate Court to prevent the creation of new hearsay exceptions by the courts,[79] the assertion-oriented definition of hearsay was adopted in South Africa. The assertion-oriented definition of hearsay focuses on whether an out of court statement is used to prove the truth of what it asserts.[80]Consequently, statements that were tendered to establish something other than the truth in what they asserted were non-hearsay and admissible. An example is the case of *International Tobacco Co (SA) Ltd v United Tobacco Cos (South) Ltd.*[81]Evidence of various rumors that had been conveyed to the commercial traveler was received by the court on the basis that the truth in the rumors was not in question, rather the fact that the rumors were circulating.

This definition had tremendous impact in that it freed highly probative evidence from the hearsay entrapment, however it was at a cost since some evidence was hearsay-like and still entailed the dangers of hearsay inasmuch as it was tendered not to prove the truth of what was stated. The effect of this created a confusion between the meaning of hearsay and the rationale underlying its exclusion. This is evidenced in the case of implied assertions whereby for instance there is a question of testamentary capacity of the testator, where the letters are tendered in evidence in order to prove that they were written on matters and language proper in communication with someone who has reasonable intelligence which proves the testator to possess adequate understanding of the affairs not to prove anything expressly stated in those letters.[82]

[77] S v Molimi 2008 (3) SA 608 (CC)
[78] A. Paizes, "Public-Opinion Polls and the Borders of Hearsay" 1983 SALJ 71
[79] Vulcan Rubber Works (Pty) Ltd v SAR & H 1958 (2) SA 285 (A)
[80] McCornick, "Evidence and the Concept of Hearsay: A Critical Analysis Followed by Suggestions to Law Teachers" 1981 Minnesota LR 423; As opposed to the declarant-oriented definition which labels as hearsay all evidence that is latently unreliable susceptible to the hearsay dangers of lack of memory and insincerity.
[81] International Tobacco Co. (SA) Ltd v United Tobacco Cos (South) Ltd 1953 (3) SA 343 (W)
[82] Wright v Doe d Tatham (1837) 7 Ad & Ei 313

If implied assertions are taken to be hearsay,[83]clearly new criteria for determining admissibility had to be found and this was not up to the South African courts.[84]For this reason, the legislature needed to find a solution addressing the issue of a definition of hearsay which considered all evidence that relied for its evidential value on the credibility of the maker of the statement out of court and thus raised the hearsay dangers. Secondly, the creation of a more elastic and discretionary rule to receive or exclude hearsay depending on the extent to which the dangers of hearsay could be eliminated or reduced by the circumstances of reliability present in a case.[85]

As a result of the above challenges, the adopted English hearsay rule was distorted in order to receive valuable, relevant and reliable evidence since it was discovered that not all hearsay is objectionable or unreliable. It gave birth to the *Law of Evidence Amendment Act 1988.*[86] Section of this Act did away with the rigid rule and exception approach that was a challenge in the common law and replaces with a flexible approach that give courts the power to receive hearsay evidence in cases where the traditional dangers are either satisfactorily accounted for or are insufficiently significant to outweigh other considerations.

As compared to the English law, the South African law is still restricting in a number of ways. Firstly, hearsay evidence is treated in the same manner both in the civil and criminal proceedings.[87] It overlooks the issues of burden of proof and weight of cases in both types of proceedings. Secondly, it maintains the rule that hearsay evidence is generally inadmissibly provided it does not fall under the exceptions tabulated under section 3. Progress is on the fact that it has departed from the assertion-oriented definition to the declarant-oriented definition which identifies hearsay according to whether or not the traditional hearsay dangers are present. Gradual move towards the loosening of the rigid exclusionary rule drives the South African law towards the English rule that hearsay evidence should be admissible in civil proceedings as much as it is not there yet.

Nigeria

[83] S v Van Niekerk 1964 (1) SA 729 (C)
[84] Vulcan Rubber Works (Pty) Ltd case supra
[85]DT Zeffert. 'The South African Law of Evidence' 2nd Ed. (2007). LexisNexis Durban
[86] The Law of Evidence Amendment Act no. 45 of 1988
[87] Section 3(1) ibid

The English common law of evidence was adopted in Nigeria during the colonialism and in turn introduced the law governing hearsay evidence.[88]In 1943, the *Evidence Ordinance*[89]was introduced. It shall be referred to as the *Evidence Act* in this paper. For some time there had been effort to reform this Act which resulted in the preparation of the Nigerian Law Reform Commission, a *Draft Evidence Decree*.[90]The Evidence Act does not depart to a large extent from the common law position, in fact, it provides that nothing in the Act shall prejudice the admissibility of any evidence which would, apart from the provisions of the Act be admissible.[91] It allows the inclusive rules of common law to be applicable where the Act is silent. The section only tolerates common law rules that authorize admissibility and not those that mandate inadmissibility of hearsay. The challenge with this Act is that it does not create a steadfast rule which departs from the common law, rather it has become not so useful as the courts continue to apply the common law rules of hearsay sometimes without reference to the Act itself. This is due to the fact that the Evidence Act does not contain the express provision of hearsay, rather it can be implied under section 77 of that Act.

Reliance had to the English common law adopted at that time, hearsay evidence is generally inadmissible in Nigeria.[92] This rule is however burdened with too many exceptions that some argue that the rule itself should be an exception rather than a rule,[93] a bend towards the current position of the English hearsay rule.

In 1945, the *Evidence Act*[94] was enacted following the recommendations. Section 76 of the Act governs the rule against hearsay. Rationale for the rule against hearsay was that the repetition if the statement depreciated the truth it entailed on its initial assertion, it was vulnerable to manipulation and lastly, the initial assertion could not be subjected to cross-examination and was not made under oath.[95]Many of the exceptions that arose later in the years were either from the statutory provisions or creations of the courts.[96] Section 33(a)-(f) of the 1945 Evidence Act

[88] This was due to the reception statutes such as; Ordinance no. 3 of 1863, Interpretation Act, Cap 89, section 45, High Court Law of Eastern Region no. 27 of 1955, High Court Law of Northern Region no. 8 of 1955, Law of England (application) Law of Nigeria Cap 60, Western Region High Court Law Cap 44

[89] Evidence Ordinance no. 27 of 1943; Now referred to as Evidence Act Cap 112. Laws of the Federation of Nigeria, 1990.

[90] Workshop Papers on the Reform of the Evidence Act. (1995) NLRC 324

[91] Section 5(a) of Evidence Act supra

[92] See also section 34 of the Draft Evidence Decree supra. "Hearsay evidence is not admissible except as provided in this part of the Decree or by any other enactment"

[93] FF Rossi. 'The silent revolution; Regarding the exclusion of hearsay as a fiction" 9 Litigation 13

[94] Evidence Act of 1945

[95] M. O. Akhigbe. 'The Hearsay Evidence under Nigerian Law.' 1994 vol 3

[96] ibid

create some of these exceptions upon which conditions for admissibility of statements in relation to various circumstances. What the provision does is lay conditions upon which hearsay evidence may be admissible, it caters for dying declarations made by the deceased as to the cause of his death, declaration made in the course of business that is relevant and admissible and the declaration made against the former interests. These provisions are an indicator that just as in the South African law, the law of evidence in criminal and civil proceedings are governed by the same law, thus making it difficult to relax the hearsay rule in civil proceedings and to keep it rigid in the criminal proceedings. Section 34 also provides an exception that hearsay evidence may be admissible if it was made in the previous judicial proceedings and is relevant to the proceedings then held even though the original maker of the statement could not attend the proceedings or died.[97]

When observing the issues of section 85 of admissibility of affidavits deposed to on information supplied by third party and believed to be true by the deponent which overlooks the provisions of section 76 of the Act, the question posed is whether the legal system of Nigeria knows what it is doing in matters of hearsay or the rule against hearsay evidence is held on to in vein? The purpose for which the Evidence Act restricts admissibility of hearsay evidence has been defeated by the very Act.

As compared to the English law and the South African law, the Nigerian law has lost the essence of hearsay rule in that the provisions of section 76 have been made nugatory in effectiveness by the exceptions so produced. This is so because the exclusionary rule so held has been negated by a plethora of exceptions enacted. Secondly, as against the South African law, hearsay rule in Nigeria which like South Africa governs both civil and criminal proceedings have lost its spine. It has become too relaxed for criminal proceedings and too distorted for direction in the civil proceedings. The indicator here is that the exclusionary rule has lost its effectiveness. It highlights the fact that too much rigidity can lead to chaos and the only solution is the balance of both the rigidity and flexibility of the rule. The English common law had created a foundation that needed little modification to produce good results and to keep the hearsay rule in efficient force that is not detrimental to the society and the legal system.

[97] Other exceptions are in section 90 of the Act, Section 5 (a) for the English Common Law doctrine of res-gestae, sections 37-41 for documentary evidence, section 44 for oral evidence on specific circumstances, section 85 for affidavit evidence which includes evidence deposed to for information that had been supplied by third party which he believes to be true. The exception negates the provisions of section 76 which require personal knowledge of issues in the judicial proceedings but still, it remains.

United States of America

Since 1675, the fundamental application of the hearsay rule was to exclude all extra-judicial testimonial assertions from evidence admissible in court[98] if tendered to prove the truth contained therein. Similar rationale to the other jurisdictions was held that the evidence was unreliable in that it could not be probed and tested through cross-examination. [99] As time progressed, exceptions in different states were developed on the basis that evidence in question, inasmuch as it was hearsay, it could be deemed sufficiently trustworthy to warrant the exclusion from the rule. The confusion was created on the fact that different exceptions were developed from different states and some of them differed from the practice in the federal courts the result of which the *Federal Rules of Civil Procedure, 1937* were adopted by the Supreme Court.[100] Rule 43(a) attempted to guide federal courts in looking for appropriate rule of evidence such as the United States statutes, rules of evidence in the United States courts used in suits of equity or rule of evidence from a court located where the federal court was sitting. Consistent application remained difficult still. [101]

In 1898 codification was attempted which made uniform the hearsay rule and its exceptions. [102]The *Massachusetts Hearsay Statute of 1898* was enacted. In 1942, the American Law institute promulgated the 112 rules comprising of the *Model Code of Evidence* which proposed the admission of hearsay evidence whenever the person testifying had the first hand knowledge of the facts.[103] It was never accepted by any jurisdiction, however, it was influential even to the Federal Rules of Evidence.[104] The Uniform Rules of Evidence were adopted in 1953 and approved by American Law Institute in 1954.[105] He struggle continued until 1961 when the Judicial Conference of the United States approved a proposal of the Standing Committee on Rules of Practice and Procedure for a Federal Rules of Evidence Project. Time progressed and the same challenge was continuing until 1973 when the Subcommittee published final draft of the Federal Rules which was in turn approved by the House of Representatives and applied to most states. It was then that codification was easier and accepted by several states.

[98] J. Wigmore, ' Wigmore on Evidence.' 3rd Ed. (1940)
[99] ibid
[100] It was vested with the rule-making power by the rule-making statute of 1934, 28 U.S.C s 723
[101] Preliminary Study of the Advisability and Feasibility of Developing Uniform Rules of Evidence for Federal Courts, (1962) 30 F.R.D 73
[102] J. Wigmore supra
[103] Model Code of Evidence (1942) rule 503 (a)
[104] A.E Jenner, Esq., Chairman, Advisory Committee on Rules of Evidence, 46 F.R.D 161 (1954)
[105] Uniform Rules of Evidence (1953)

Since the codification, several changes have been made to the rule until to date.[106]Currently, the standing law is the *Federal Rules of Evidence*[107] Article VIII for the hearsay rule. Rule 802 provides that as a general rule hearsay evidence is not admissible in the federal courts. Beneath the rule, there are exceptions. The exceptions include instances where there are statutes that allow for them aside from the Federal Rules of Evidence, rules so prescribed by the Supreme Court and the exceptions outlined in the Rules of Evidence itself. Regard being had to the challenge of codification in the history of hearsay, statutes that provide exceptions in individual states which are not covered in these rules remain confusing to how exactly this rule stands in America. The exceptions acknowledged by these rules are stipulated in Rule 803and 804. They are so many that they defeat the purpose of the rule and just as in Nigeria, it is not easy to tell whether the rule is still effective.

United States of America just as in South Africa and Nigeria maintains the exclusionary rule of evidence. Nigeria and United States on the other hand have adopted too many exceptions that in a way have done away with the rule to some extent. What can be seen is that these states are all faced with the challenge of maintaining a balance between the rigidity and flexibility of the law. The challenge is created by the fact that hearsay rules govern both the criminal and civil cases. It is undeniable that the two differ in that the burden of proof is either on the balance of probability or beyond reasonable doubt. Even the consequences differ on these two types of trials. What can be seen from the above however is that most jurisdiction are departing from the exclusionary rule of hearsay evidence for several reasons mainly to carry out justice. The more the rule is discussed is the more it is discovered that the rule needs not be kept as a rule of exclusion. Even though this is case, there needs to be direction on how such evidence ad be tendered such that it is reliable and relevant in dealing with a matter. The problem with the United States however is that not only are there too many exceptions but also, in terms of Rules 805, hearsay within hearsay is admissible if the two when combined suffice to fall under the exception of hearsay. The problem with this is that it is farfetched and reduces the chances of maintaining the exclusionary rule. It can be seen that most states are gradually moving towards declaring hearsay as admissible even though the approach towards fixing the problem differs from jurisdiction to jurisdiction.

[106] Federal Rules of Evidence, December 1, 2018
[107] ibid

CHAPTER 4

Introduction

Lesotho's civil evidence law is based on the position of the law as practiced in the Supreme Court of Judicature in England.[108] This makes it subject to the English Civil Evidence Act.[109]The *Evidence in Civil Proceedings Ordinance,*[110]that regulates the law of evidence in civil proceedings in Lesotho has never been modified or qualified post-independence. As a result, its effectiveness is very minimal because in practice, courts nowadays apply the South African law in civil cases. As has been discussed in the previous chapter, the South African Evidence Law and the English Civil Evidence law are different as the former derives from the Roman Dutch Law and the latter from the English Common Law.

Practice by Lesotho's courts upon application of evidence law is done without due regard to whether South African Law of evidence is compatible with the practice in the Supreme Court of Judicature of England.[111] This poses the question whether Lesotho legislation ought to be revisited to meet the changed practices in courts. One of the major reasons why laws are modified is to ensure that such laws are flexible enough to accommodate the rapid societal changes while constant enough to maintain certainty. The aim of this chapter is to briefly provide a summary of this research, discuss the short comings identified in the research and make suitable recommendations based on the information had in the previous chapters.

The previous chapters stablished that according to the South African law, hearsay evidence is generally inadmissible. This, however, differs from Lesotho's law that has differing approaches to the admissibility of hearsay evidence in civil and criminal proceedings as each is governed by its own piece of legislation.[112] The general implication in criminal proceedings is that the English decisions based on the common law and statute on evidence law before 1966 are binding on the High Court of Lesotho. On the other hand, English decisions interpreting English statutes after 1966 on evidence law are inapplicable. Further to this, English decisions that interpret common law after 1966 are highly persuasive. South African decisions on the

[108] Evidence in Civil Proceedings Ordinance supra
[109] English Civil Evidence Act supra
[110] Supra
[111] Thakalekoala v Lesotho Bank (CIV/APN/107/86) [1987] LSCA 121 (03 Aug 1987); Teko and others v Mathe and Others (CIV/APN/172/1998 (CIV/APN/12/2001)) (CIV/APN/172/1998) [2005] LSHC 41 (28 Feb 2005)
[112] Evidence in Civil Proceedings supra and Criminal Procedure and Evidence Act supra

other hand that interpret common law are highly persuasive based on the fact that they apply Roman Dutch Law as their common law. This gives Lesotho the opportunity to determine the compatibility of the two common laws and to choose the appropriate law applicable in the courts. Similarly, decisions that interpret statutes that are in *pari materia* are highly persuasive, while those that are not in *pari materia* are inapplicable. The Ordinance is peculiar in that the English Supreme Court of Judicature decisions on the state of the common law and statute on evidence law before and after 1966 are binding on the High Court of Lesotho. The South African decisions that interpret the common law, Roman Dutch Law that is, are highly persuasive

The effect of section 22 of the Ordinance and the English Civil Evidence Act is that hearsay evidence is generally admissible in civil matters in the Lesotho courts of law. This is due to the proper interpretation of the above section as per the case of LEC v Forrester[113] and the binding effect of the English law in Lesotho system. Tracing back the history of hearsay rules, it is clear that Lesotho has had no law of its own and that all it has done is to comply with the law as practiced in the Supreme Court of Judicature in England regardless of the changing circumstances in its country, and the difference in societal mores of England and Lesotho. If England changes the position of the law based on what transpires in its jurisdiction, Lesotho is bound to obey regardless of whether the implications adversely affect it.

In most proceedings, it has become practice that Lesotho courts base themselves on the South African legal system. As a result of this, they have established a practice that hearsay evidence is generally inadmissible as per the South African authorities. Due to this, it is proper to determine whether section 22 of the Ordinance has become a bar towards developing Lesotho law and freely adhering to the law that the country finds suitable thus calling for reform in order for Lesotho to enact laws that are appropriate for it as a state and are based on the mores of its society. Even though that would be appropriate, it is wiser to look into both systems, see what most countries are doing, why they are doing it and how it will affect Lesotho. This will enable Lesotho to independently determine the rules of hearsay that it deems fit as a nation without peremptory provisions that force it to look into a law of another country that may be adverse to the Lesotho's state.

[113] LEC v Forrester supra

In terms of the *Independence Order in Council, 1966*[114] pieces of legislation can be construed with such modification, adaptation, qualification, and exceptions as may be necessary. Modifications, adaptations, qualifications and exceptions were necessary to bring existing legislation in conformity with the advent of independence and the adoption of a new constitution. According to section 70(1) of the *Constitution,*[115] the Parliament of Lesotho is vested with legislative powers. These powers include the development of Lesotho's Law of evidence in civil proceedings which can modify or depart completely from the provisions of the *Evidence in Civil Proceedings Ordinance.* This means that reforms are permissible on the basis of the above provision.

Changes required in the Ordinance are for the binding effect of the English law which can be cut off based on the above legislation. Again, it can be seen that most countries are gradually shifting towards the relaxation of exclusionary rule of hearsay. An English case that generally marks the change both in England and South Africa is *Myers v DPP.*[116] In England, several recommendations and gradual changes in the law led to the transition from the rules against hearsay to general acceptance of hearsay evidence provided the safeguards that protect against abuse of this rule are complied with.[117]The 1995 Act abolishes the rule against hearsay in civil proceedings. The 1968 Act had already created significant exceptions to the hearsay rule which made it easier to finalize the hearsay stand point in England that has brought about a major change in the structure of English civil trials.

Tracing back the South African history of hearsay evidence rule, it can also be seen that even though the movement is slow and affects both civil and criminal cases, changes are in fact occurring and they also slowly drive to a point of abolition of the rule against hearsay. This change was affected by the Myers case as well. The United States of America on the other hand has completely discarded the gist of hearsay rule. The exclusionary rule with several exceptions has defeated the purpose that was supposed to be served by the hearsay rule. This confusion is the one that rubbed off to Nigeria. Nigeria to date has its hearsay rule vastly overpowered by several exceptions that have made the country lose sense of the rule.

Based on the above analysis, Lesotho's reform must be careful such that Lesotho releases itself from the bonds of the English law while at the same time keeping fragments of the laws learned

[114] Independence Order in Council No. 1172 of 1966 section 1
[115] The Constitution of Lesotho 1993
[116] Myers v DPP [1995] A.C 1001
[117] English Civil Evidence Act of 1995

from the practice in the Supreme Court of Judicature in England to use them as a guide towards enacting a stable, clear and rational law that conforms with universal changes. That way, Lesotho would be ensuring that it avoids challenges already undergone by other countries that have followed the same path. This is to give Lesotho opportunity to freely make its laws, laws that do not require adherence to another jurisdiction. To balance the breakage of bonds and to also keep in line with proper measures of admitting hearsay, the reform can be guided by the English law only to the extent of it building a proper structure and completely cut off strict adherence to the laws of England.

Safeguards against the abuse of rendering hearsay evidence generally admissible in civil matters are outlined in the *English Civil Evidence Act.*[118] Section 4(2) focuses hearsay evidence on the weight of evidence upon admission. It sets out considerations upon assessing the evidence and these include; the reasonableness of the party calling the evidence to have produced the original maker; whether the original statement was made at or near the same time as the evidence it mentions; whether the evidence the evidence involves multiple hearsay; whether any person involved had any motive to conceal or misrepresent matters; whether the original statement was an edited account, or was made in collaboration with another, or for a particular purpose; lastly whether the circumstances of hearsay evidence suggest an attempt to prevent proper evaluation of its weight. These provisions serve as a guide towards the adoption of safeguards in Lesotho's piece of legislation. They ensure that not all hearsay, especially one intended to prejudice the opponent, is admissible in courts.

Conclusion

The abovementioned considerations that determine whether hearsay evidence should be admitted in court are but a brief of how admissibility of hearsay evidence can be managed or protected against abuse by the parties. There ought to also be due process of how hearsay evidence may be tendered in court. This would prevent the tender of such evidence from being prejudicial to the other party. The system of Lesotho must also take into account that there are some occurrences that adversely affect the society such as the drastic change brought about by the Covid-19 pandemic. This kind of change has introduced a new kind of normal whereby social distancing is of paramount importance. The legal system of Lesotho must attempt to develop in order to administer justice even in such circumstances and developing a technological means of presiding over proceedings may be one of them. In a technological era

[118] English Civil Evidence Act 1995 supra

such as this one, cross-examination will not be that much of an issue. It is therefore important to consider adapting and developing Lesotho's laws to such a position. Admissibility of hearsay evidence and reform of the entire Ordinance may be done such that it becomes compatible with the changed circumstances.

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