Completed cross-examination

By Michael Miller

A pre-requisite for a fair trial?

A litigant in both civil and criminal law proceedings has a right to cross-examine any witness called by the other side who has been duly sworn.

However, it often happens that trials are protracted and postponed for long periods of time. In some reported cases the witness has died by the time the trial is resumed. Is the evidence of the witness in respect of whom cross-examination has not been completed admissible?

Although this situation appears to arise mainly in criminal law cases, all that is stated below applies equally to civil cases. The cases show that there are two different approaches by the courts. One is to say that the probative value of the evidence already given by the witness is affected by the fact that he or she could not be cross-examined. It would follow that, if the probative value is not affected, the evidence may indeed be admissible. The other is simply to rule it inadmissible. On either approach, the court cannot take such incomplete evidence into consideration in reaching its judgment.

Some cases dealing with incomplete cross-examination

Engles v Hoffman 1992 (2) SA 650 (C) was a civil trial. On the seventh day of the trial the defendant commenced giving evidence in his defence. On resumption of the trial after an intervening long weekend, the defendant was absent. It appeared that, over the long weekend, he had suffered a nervous breakdown. Finally, about 18 months after the defendant had commenced his evidence, the defendant's attorney brought an application asking that the defendant be excused from further attendance and that the evidence that had been given by him should be regarded as not having been given and ignored for the determination of the trial. Tebbutt J granted the application.

S v Motlhabane and Others 1995 (2) SACR 528 (B) was a criminal trial before Khumalo J of certain accused persons on charges of murder and robbery. One of the state witnesses died during the trial. Counsel for the accused had commenced his cross-examination of the witness, but had not completed it at the time of the witness's death. At the end of the state's case, counsel for the accused applied for discharge of the accused in terms of s 174 of the Criminal Procedure Act 51 of 1977 on the basis that the evidence of the witness who died should not be taken into account and that, based on the remainder of the evidence, no reasonable man might convict the accused.

Khumalo J came to the conclusion that if a witness dies before cross-examination commences, his evidence is untested and must be regarded as *pro non scripto* (at 531e). If cross-examination had commenced, then the opposing party may, if he or she considers that the purposes of cross-examination have been achieved, agree that the evidence of the deceased witness be considered with the rest of the evidence. Khumalo J excluded the evidence of the witness who had died and came to the conclusion that the interests of justice would be best served by allowing the application for discharge (at 535g).

S v Manqaba 2005 (2) SACR 489 (W) was a minimum sentence hearing in terms of s 52 of the Criminal Law Amendment Act 105 of 1997 (now repealed) before Satchwell J. This section provided that, in certain cases, a regional magistrate could not sentence a person convicted of rape (as was the case here), but was obliged to refer the matter to the High Court for sentencing.

During the trial in the regional court, the magistrate refused to allow cross-examination of the complainant concerning the contents of statements that she had made to the police. Satchwell J came to the conclusion that the refusal to allow such cross-examination was an irregularity and set the conviction aside.

In *S v Mgudu* 2008 (1) SACR 71 (N) the state, during the trial in the magistrate's court, called one L as a witness and the defence attorney reserved cross-examination of the witness 'pending the outcome of the state's case'. After the state closed its case, the attorney applied for discharge in terms of s 174 of the Criminal Procedure Act, which application was refused.

The defence then applied to recall L for the purposes of cross-examination. The magistrate initially granted this application but then revoked it on the ground that such a procedure was irregular. The magistrate sent the matter on special review.

Madondo J came to the conclusion that the failure to allow cross-examination *in casu* would prejudice the accused 'since there will be no knowledge of what favourable evidence he might have been able to elicit' (at para 26). He went on to point out that s 35(3) of the Constitution guarantees the right to a fair trial and that there can be no fair trial without the exercise of the right to cross-examine witnesses. His view was that he should interfere with the conducting of the criminal proceedings as otherwise a grave injustice would be caused to the accused. The case was remitted to the magistrate who was directed to recall the witness and allow the defence attorney to cross-examine her.

S v Msimango and Another 2010 (1) SACR 544 (GSJ) was a criminal trial in the South Gauteng High Court before Moshidi J. During the course of his cross-examination a state witness died. After considering the cases referred to above as well as similar cases in foreign jurisdictions, Moshidi J held that no probative value should be attached to evidence where cross-examination of a witness was absent 'for whatever reason including illness or death' (at para 26).

Finally, *S v Khumalo* (GSJ) (unreported case no 110/12, 22-8-2012) (Wepener J) concerned a state witness in a trial in the district court whom the defence attorney had begun cross-examining; however, the matter was postponed to a subsequent date for further cross-examination. On the subsequent trial date the witness failed to attend court and the state's case was closed. The defence attorney applied for discharge in terms of s 174 of the Criminal Procedure Act on the grounds that the accused's right to cross-examination had been infringed and that this was fatal to the state's case. The application was refused and the defence's case was closed without leading any further evidence. In delivering his judgment, the magistrate referred to the evidence of the witness and found him to be credible.

After conviction, the matter was referred to the regional court on account of the accused's previous convictions. The regional magistrate refused to confirm the conviction and sent the matter to the High Court on special review. In setting aside the conviction, Wepener J (at para 17) again came to the conclusion that a fair trial encompasses the right to cross-examine witnesses. He concluded that 'where an accused's right to cross-examine a witness is curtailed for whatever reason other than the accused's refusal or failure to cross-examine a witness of his own volition, infringes on his right to a fair trial guaranteed by the Constitution'. He went on to conclude that the irregularity was of such a nature that the accused's right to a fair trial had been infringed. The accused's conviction was set aside.

In criminal law proceedings the right to cross-examination is guaranteed by s 35(3)(*i*) of the Constitution and by s 166 of the Criminal Procedure Act. Section 35(3)(*i*) of the Constitution provides that an accused person has the right to 'adduce and challenge evidence'. The challenging of evidence is through cross-examination. It is therefore a constitutional right.

In civil cases there is no express constitutional or statutory right to cross-examination. In terms of the common law such right probably originates from the *audi alteram partem* rule. In addition, s 34 of the Constitution guarantees a litigant the right to a 'fair public hearing', which would be breached were cross-examination not allowed.

Conclusion

The cases referred to above suggest that incomplete evidence may be excluded on one of two bases. The first is that it is simply inadmissible and in contravention of a party's constitutional rights. The second is that the evidence has no probative value.

At first blush, the distinction may seem to be academic. I submit that it is not. If evidence is inadmissible on the basis that it has no probative value, how is this to be decided? In the *Msimango* case, Moshidi J referred to various tests that had been propounded in earlier cases in South Africa and elsewhere. These included factors such as –

- whether or not there had been full cross-examination;
- whether the cross-examination was perhaps complete on certain aspects but not on others;
- whether a particular aspect had been fully cross-examined;
- whether it was the cross-examiner's intention to return to any particular aspect,
- whether evidence on a particular issue had been dealt with elsewhere;
- the possible limitation of the right to cross-examine; and
- whether the witness is a single witness.

Although the judge did not accept any of these tests in the *Msimango* case, it is suggestive of the fact that there is a discretion on whether or not to admit the evidence in question. In my opinion, there cannot be such a discretion.

In *S v Shabangu* 1976 (3) SA 555 (A) a criminal trial proceeded without legal representation where the accused wanted legal representation. In setting aside the conviction Jansen JA pointed out that 'it is impossible to say what effect a properly conducted defence could have had on the ultimate result' (at 558F).

A party has a right to adduce and challenge evidence. It is unknown what the result of a complete cross-examination may have been or how it may have affected the outcome of the case. Whether it is because of the right of an accused person to adduce and challenge evidence in terms of s 35(3)(*i*) of the Constitution, or the right of a litigant in a civil case to a fair public hearing in terms of s 34 of the Constitution or whether it is because of the *audi alteram partem* rule, a party has the right to be afforded an opportunity to complete cross-examination of a witness called by the other party whose evidence is prejudicial or potentially prejudicial to him or her. Without that it cannot be said that there was a fair trial.

It follows from this that there can be no discretion to admit such evidence and that its exclusion has nothing to do with the probative value thereof. It is a guaranteed right. I am of the opinion that where cross-examination has not been completed such evidence should simply be excluded and treated as inadmissible and *pro non scripto*.

Michael Miller *BA (NMMU) LLM (UJ)* is an advocate and senior legal researcher at Legal Aid South Africa in Johannesburg.