

**SAFLII Note:** Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA SITTING AT PALMRIDGE)**

**CASE NO: CC15/2022**

(1) REPORTABLE:

(2) OF INTEREST TO THE JUDGES:

(3) REVISED.

DATE: 27/02/2025

SIGNATURE:

**In the matter of**

THE STATE

Versus

Martin Robin and Others

Accused

---

**RULING ON THE TRIAL WITHIN A TRIAL**

**Re: THE ADMISSIBILITY OF TWO CELL PHONES AND 4 SIMCARDS**

---

**MLOTSHWA AJ**

1. This is a ruling in the trial within a trial to ascertain if the chain of custody of cell phones and Sim cards allegedly found in possession of accused number 8 was or was not broken.
2. In order to prove that the chain was not broken the State called as witnesses Sergeant Leisa, Captain Fouche and Colonel Rakgetse. Accused testified for the defence.
3. The court is not to going to repeat the evidence of the witnesses verbatim but will refer to same whenever necessary.
4. Sergeant Leisa testified that on 15 August 2019 he, Captain Fouche and Warrant Officer McNeil, armed with a warrant of arrest and a search warrant went to 1[...] C[...] Street, Bedworthpark, Vereeniging to look for one Vinus Indonghela.
5. According to Seargeant Leisa they knocked at the door and a lady opened for them. They introduced themselves and stated to the lady the purpose of their visit.
6. In one of the rooms they found Tobias Mutota, who is accused 8 in this matter. They introduced themselves and informed Mutota of the purpose of their visit that they were looking for Mr Indonghela. According to Leisa, Mutota advised them that Indonghela was not present.
7. Leisa testified that Mutota advised them that Indongela is his brother. Leisa then asked Mutota for his passport which was handed over to him by Mutota. Leisa noticed that it's a Namibian passport which was last stamped on 31 May 2019. Leisa suspected that Mutota might have overstayed in South Africa. He then asked Mutota to accompany them to their offices.
8. Mutota had a white Samsung cell phone in his possession and there were two cell phone Sim cards in the room. Leisa asked Mtutota whose cell phone was that, that is the Samsung. Mutota replied that it is his cell phone. Leisa asked

him about the Sim cards. Mutota informed Leisa that the Sim cards have not been used. According to Leisa he nonetheless took the Sim cards with him. Leisa testified that they also found a Nokia cell phone from the accused although he does not remember where they found it.

9. Leisa testified that he was in possession of the phones as they left with the accused to their offices. At their offices he handed the phones to Captain Fouche.
10. Captain Fouche asked the accused for the pin code of the white Samsung cell phone. Mutota gave to him.
11. Sergeant Leisa testified that on the next day, 16<sup>th</sup> August 2019, he received the phones and the Sim cards from Captain Fouche. The phones were in the same condition that they were when they found them from Mutota, the previous day. He then went to Vereeniging Police Station where he booked the phones in the SAP 13. The SAP 13 number was 755 of 2019. After he booked the cell phones at the SAP 13, he booked them out at the same time and took the phones back to their offices and handed them to Captain Fouche. He never lost sight of the phones from when he took them from Captain Fouche until he brought the phones back to Captain Fouche.
12. The Nokia cell phone was green and black. The Samsung cell phone was white.
13. The phones were sealed in two different forensic bags at their offices. The bags were sealed by him, Sergeant Leisa. He can't remember the forensic bags seal numbers by heart, but he wrote them down in his statement. He also doesn't remember the IMEI numbers of the phones. He also wrote those numbers in his statement.
14. Leisa was given his statement, which was handed in and marked as exhibit FF1 which he recognised as his, which was signed by him and same was commissioned. He confirms the correctness of the statement which he read

before signing it. From his statement he wrote the forensic bag numbers wherein he sealed the white Samsung cell phone and the two Sim cards as PA 5002450880. The IMEI number of the white Samsung Cell phone was 3[...]. The Samsung cell phone number is 0[...].

15. The forensic bag numbers wherein he sealed the Nokia cell phone is PA 5002450879. The Nokia cell phone number is 0[...].2. The IMEI number is 3[...].2.
16. Leisa testified that he did not tamper with the cell phones as well as with the sim cards. The forensic bags were still sealed when he handed them back to Captain Fouche.
17. Leisa was also given the certified copy of the SAP13 register, wherein he booked the phones and the sim cards, and which was handed in and marked as exhibit FF2.
18. Leisa was extensively cross examined about the register which they allegedly kept at their offices to book in the exhibits. Leisa testified that they had this register and undertook to bring same to court the following day. The following day Leisa testified that they cannot locate the register in their offices.
19. Leisa was also extensively cross examined about the Vereeniging SAP 13 register, about the columns that were not completed in the register. Leisa explained that when he went to the police station, he booked in the exhibits. He retained them and took them back to their offices and handed same to Captain Fouche. The court will revert to this issue at a later stage and look at its significance or non-significance thereof.
20. Leisa was handed two forensic bags which contained cell phones and Sim cards, and he testified that those are the phones and Sim cards that were found in possession of accused 8.

21. Sergeant Leisa was extensively cross examined about the register that the OLX team allegedly kept at their offices and in which they booked in the exhibit. He was also cross examined about the SAP13 in which he booked in the exhibits at the Vereeniging Police Station.
22. Sergeant Leisa steadfastly stood by his evidence in chief except to admit that in his oral evidence in court he did not state that he returned to the room to look for the accused's passport and that is when he found the Nokia cell phone under the blanket.
23. The State called Colleen Sebolelo Rakgetse (Rakgetse). She is a Colonel in the South African Police Service, stationed at the Detective Cyber Crime Investigations Unit. She has a diploma in Information Technology and a Bachelor of Technology Degree, all obtained from the Tshwane University of Technology. She has further completed courses relating to the downloading/extraction of data from cellular phones, skimming devices and computers. During November 2019 her rank was that of a Captain. Her day-to-day duties included downloading data from cellular phones, skimming devices and computers.
24. On 5 November 2019 she received sealed forensic evidence bags with evidence bag numbers. The evidence bags were marked "Lenasia South 59/08/2019, SAP13/755/2019". The instructions were for her to download data from the handsets and the Sim cards.
25. The first exhibit bag's numbers were PA 5002450880 and it contained a Samsung SM-A920F with IMEI number 3[...]3. There was a Telkom Sim card inside the Samsung cellular phone. The ICCID number of the card was 8[...]. There were also two loose Sim cards in the forensic bag. The two loose Sim cards were CLTE. The first CLTE ICCID number was 8[...]2. The second CLTE card ICCID number was 8[...]3

26. The second exhibit bag's numbers were PA 500245879 and it contained a Nokia TA-1010 with IMEI numbers 3[...]3. There was a Vodacom Sim card in the cellular phone with ICCID number 8[...]5
27. Rakgetse testified that she received the exhibit bags from their office's administration staff members. When they, as forensic investigators, receive exhibit bags from the administration staff members they sign on an exhibit register book to acknowledge receipt of the exhibit bag/s.
28. When an exhibit is brought to their unit, the administration staff member who receives the exhibit bag allocates a number to the exhibit bag. The number is called the Cyber Crime Investigation number, in short called, the CCI number. This CCI number is then given to the investigating officer who will then use this number in all correspondence or queries between him and the Cyber Crime Investigation Unit. A file is then opened by the administration staff member for the case. The file is handed to the commander who will then in turn allocate it to an investigator to comply with the instructions/request by the investigating officer.
29. The cyber crime investigator, on receipt of the file with the instructions, will then collect the exhibit bag from the administration staff member. As aforesaid the cyber crime investigator will then sign the exhibit register book to acknowledge receipt of the evidence bag. The exhibit register book will therefore show who the cyber crime investigator is and when he/she collected the exhibit bag from the administration staff member.
30. Rakgetse testified that the above procedure was duly followed in this matter. The CCI number allocated to these evidence bags was 554/2019. A certified copy of the relevant page of the exhibit register book was handed in to the court and marked exhibit GG2 after Rakgetse confirmed that same relates to this case. GG2 indeed indicates the CCI number of this matter as 554/2019. Rakgetse testified that she signed on column 5 of the page to acknowledge receipt of the exhibit bags.

31. Rakgetse testified that she took the exhibit bags to her office and took photographs of the exhibit bags. She then took out the cellular phones out of the bags and took photographs of the cellular phones as well. She took out the Sim cards from the phones and took photographs of the Sim cards.
32. She put the items in the safe in her office and locked the safe with her safe key. She is the only one who keeps the key to the safe. As their unit has a shortage of resources, she then waited for her turn to use the office equipment to comply with the instructions of the investigating officer. No one had access to the forensic bags except herself.
33. When eventually she was able to use the office equipment, she connected the Samsung cellular phone in the UFED forensic tool and used cable 100 to download the data from the phone. She used UFED Sim reader to download the data from the Telkom Sim card. No information was changed, altered or taken away from the Sim cards. The loose Vodacom Sim card could not be downloaded. She then generated a report as requested by the investigating officer of the case. She then placed the exhibits, the Samsung cellular in a new forensic bag with numbers: PA5002714437.

## **CAPTAIN FOUCHE**

34. Captain Justus Fouche testified that he had a knowledge of the cell phones relevant to this trial within a trial.
35. On 15 August 2019 the two cell phones, a Samsung and a Nokia cell phone were found in possession of accused 8, Tobias Mutoti.
36. Fouche testified that on the morning of 15 August 2019 they went to execute a warrant of arrest and a search warrant on House number 1[..] C[...] Street, Bethuethpark.

37. In one of the rooms in the house they found accused 8. Accused 8 was alone in the room. He was in possession of a white Samsung cell phone. They took accused 8 with the cell phone to his office.
38. At some stage Sergeant Leisa went back to house number 1[...] C[...] Street, Bethuethelpark with the accused. They went back there to look for the accused's passport which he may have left behind in the room. Sergeant Leisa returned with a Nokia Cell phone.
39. According to Captain Fouche, the accused identified both cell phones as his in the captain's office. That was after the accused had been informed of his Constitutional rights.
40. There were also 2 Sim cards found in possession of the accused which were also placed in the vault by captain Fouche.
41. According to Captain Fouche they only accessed the sms messages from the Nokia cell phone. The Samsung cell phone was accessed in the presence of the accused when he identified it as his. No information was deleted, altered, destroyed or changed when the phones were accessed.
42. According to captain Fouche the phones were kept in the safe until the following morning. He is the only one who has a key to the safe. Therefore no one had access to the phones once put in the safe by him.
43. The following morning, he and Sergeant Leisa accessed the safe and took out the phones. Sergeant Leisa sealed the Samsung Cell phone with the Sim cards in a forensic bag.
44. The Nokia cell phone was sealed by Sergeant Leisa in a separate forensic bag. All this happened in the presence of the captain.
45. Captain Fouche testified that he can identify the cell phones with the cell phone numbers and their IMEI numbers. Captain Fouche testified that he can



not recall the evidence bag numbers by head. He also can not recall the IMEI numbers by head. He had noted these numbers in his statement.

46. According to Captain Fouche, Sergeant Leisa took the bags, and he instructed him to go and book the cell phones in the SAP13 at Vereeniging Police Station. Leisa did that and came bag with the cell phones at about 16h00 and put the cell phones back into the safe, that is the same safe in the captain's office. The seal bags were still properly sealed. The phones in the seal bags remained kept in the safe.
47. The captain was given his statement which he recognised. The statement is signed by the captain under oath. The statement was drafted and signed by the captain. He confirmed the correctness of the content of the statement. From the statement the captain read the IMEI number of the Samsung cell phone as 3[...]
48. The Vodacom Sim card number was 8[...].3. The CLTE card number was 8[...].2. The cell phone number of the Samsung cell phone was 0[...]. The evidence bag number was PA 5002450880.
49. The IMEI number of the Nokia cell phone is 3[...].2. The cell phone number of the Nokia cell phone is 0[...].2. The evidence bag number is PA 5002450879.
50. The above-mentioned evidence bags were kept in the safe. No one accessed the safe as the key thereto was always kept by the captain. The reason to place the evidence bags in the safe is to make sure that the cell phones are not tampered with.
51. The captain handed the sealed bags to Warrant Officer Mills to take them to the Cyber Crime Unit for downloading.
52. The phones were collected by Colonel Van der Merwe from the Cyber Crime Unit. Colonel Van der Merwe was the commander of the unit at the time. The

captain received the cell phones back from Colonel van der Merwe in new seal bags.

53. One of the forensic bags brought back by Colonel van der Merwe had the original bag, 2 Sim cards and a white Samsung cell phone inside. The bag was properly sealed. The seal bag was numbered.
54. The other bag was also new and had a new seal bag number. It contained the original seal bag and a Nokia cell phone. The bag was properly sealed.
55. According to Captain Fouche the bags contained the same cell phones and Sim cards that were sent to the Cyber Crime Unit. The captain put these bags, sealed as they are back into the safe and kept the key with him.
56. On asked by Mr Motloun, under cross examination, why he did not speak about the register that they kept at their offices to register the exhibits, the captain answered that it's because he was not asked about it.
57. The captain explained that the safe that he talks about is like a walk in safe, that is why he calls it a vault. They kept other exhibits in that vault that were from the Forensic Science Laboratory that were to be delivered to the other police units in their area of policing.
58. The register that they kept at their offices was to note in that the register the movements of exhibits that came to their offices. The register was not an official SAPS13 register. They used the register for their own OLX team exhibits. The OLX team is the team that was formed to investigate the cases that are the subject matter of the charges against the accused in this case before court.
59. Captain Fouche testified that he did not know what happened to the register that they kept at their office to register the exhibit. When he left the SAPS, the register was in the vault. He heard from sergeant McNeil that the register is missing.

60. Captain Fouche agreed that that register was important and that is why they drafted it but he does not agree that without the register it was now not possible to trace the movements of those exhibit in that office because the SAP13 register at Vereeniging Police Station is there.
61. The captain did not agree that in the absence of that register it is now difficult to know the movements of those exhibits in that office. The captain asserted that the exhibits were sealed in a forensic bag which was sealed and whoever handled the exhibits had to ascertain that the exhibits are properly sealed.
62. Captain Fouche testified that his statement does not state that Sergeant Leisa went back to House 1[...] C[...] Street with the accused because Seargeant Leisa states this fact in his statement which the captain typed.
63. The captain denied that he deliberately left out to mention the register in his evidence in chief because he knew the register is missing.
64. To a question by Advocate Malatsi-Tefo the captain stated that the documentation of exhibits is a standard police policy that had to be adhered to. The captain further stated that the OLX team was an ad hoc team with a limited time span. According to Captain Fouche the policy required that the exhibits had to be registered at a Police Station and then transferred to the unit. As the exhibits had to be registered at the unit as well, that is why they drafted that register.
65. To a question by Advocate Mokoena the captain testified that he found the Samsung Cell phone in the possession of accused 8. Accused had the phone in his hand. Sergeant Leisa was also in the room.
66. Captain Fouche testified that he was not present when the Nokia Cell phone was found as it was found by Seargeant Leisa at a later stage.

67. Captain Fouche testified that the phone was in good condition. He does not remember if it had any scratches. He cannot remember anything remarkable about the phone. He testified that the Sim cards were found by Sergeant Leisa in the room, but he cannot remember if it was at the same time as when the Samsung cell phone was found.
68. In the room a traffic ticket in the name of Vinus Indongela was found. The accused told them that Indongela is his brother who has gone back to Namibia.
69. It was put to the captain that the accused will deny that he told the police that the room was his. The captain insisted that the accused told them that the room was his.
70. Captain Fouche testified that accused 8 identified both cell phones as his in the captain's office and that was when he came back with Leisa from looking for his passport.
71. According to Captain Fouche the accused gave him the cell phone number of the Samsung cell phone which was locked. The accused also gave to the captain the pin code, 8[...]4 with which to unlock the Samsung cell phone. This could have been between 07:00 and 10:00 that morning.
72. The captain testified that he had the items at his office as he had to access the phones and the sms messages on the phones. This was after the accused had identified both cell phones as his. He can't remember if he also identified the Sim cards. The Sim cards were still in their casings as it seems they had not been used yet.
73. When the captain was alone in his office the cell phones were not yet sealed in the forensic bags as the phones were only put in the forensic bags and sealed in the following morning.

74. The captain explained that Leisa went back to 1[...] C[...] Street as at their offices they could not find the accused's passport, so they thought it was left behind in his room and that is why Sergeant Leisa had to go back to the house with the accused.
75. The captain can't remember if Sergeant Leisa or the accused gave the cell phone to him.
76. The captain testified that he worked on the Nokia cell phone when he was alone in his office. He had worked on the Samsung cell phone when the accused was still present in his office.
77. The captain stated that Sergeant Leisa sealed the bags in his presence when they were in the vault. the phones were kept in a steel cabinet which was inside the vault.
78. The captain was referred to his statement again. According to the statement of Rakgetse the Vodacom ICCID number is 8[...]3. The IMEI of the cell phone is 8[...]3 whereas according to the captain's statement there is the extra numbers being 8825MG. The captain stated that the numbers are the same except that in his statement there is the extra 8825MG which is visible in the Sim card but he cannot explain why Colonel Rakgetse did not put these numbers in her statement.
79. It was also pointed out to the captain that the Samsung IMEI number in his statement is not the same as in Rakgetse's statement. In his statement the number is 3[...], whereas Rakgetse's is 3[...]3. The difference being that the last digit /2 is not contained in Rakgetse's statement. The captain answered that as far as he knows the important numbers are the first 15 numbers. He is not aware of the significance of the last digit of 2.
80. According to the captain's statement, the IMEI number of the Nokia Cell phone is 3[...]2, whereas Rakgetse's IMEI numbers are 3[...]5. The captain

agreed that he can see the discrepancy, there is a digit 6 missing in Rakgetse's numbers.

81. The captain insisted that a cell phone IMEI numbers are always 15. He demonstrated this by opening his own cell phone dialling \*#06# and gave the IMEI numbers of his cell phone as 8[...]4. The numbers are 15.
82. The captain agreed that the date of 20 August 2019 is the probable date on which he gave the exhibits to Warrant Officer Mills to take to the Cyber Crime Investigation Unit for downloading as this is the date on which the Cyber Crime Investigation Unit received the exhibit as per exhibit GG2.
83. The captain agreed that the exhibit could have been kept at his office for 6 days.
84. It was put to the captain that the accused 8 denies that the Nokia cell phone belongs to him or that it was found in his possession. The captain stated that accused 8 identified the Nokia cell phone in his office as his and accused 8 provided the cell phone numbers to the captain.
85. It was also put to the captain that the Samsung cell phone does not belong to accused 8. The captain stated that it is not true as accused 8 provided the captain with the cell phone numbers as well as the pin code to access the phone. While in the office the phone rang and, on the screen, it appeared that the caller was saved as Whitey. The accused told them that Whitey is his brother, Vinus.
86. The captain stated that he answered the phone and told Vinus that there was a warrant for his arrest, and he must hand himself over to the police at Vereeniging. Whitey told the captain that he is in Namibia and dropped the call.

87. It was put to the captain, that the room in which they found the accused in, is not his, but belongs to Vinus. The captain answered that they found the accused alone in that room.
88. It was put to the captain the Vodacom and CLTE Sim cards, do not belong to accused 8. The captain responded by saying that accused 8 never denied that the cards are his. He only told them that the cards have never been used.
89. The captain denied that the discrepancies of the numbers compromised the identity of the cell phones.
90. It was put to the captain that the Samsung in the forensic bag does not belong to the accused, and it is not the one that was found in his possession. The captain said it can be answered when the forensic bag is opened and the IMEI numbers compared, and with the pin code the accused gave to him.
91. It was put to the captain that the cell phone that the captain brought to court has cracks whereas the one that the police seized from accused 8 was new. The captain maintained that this could be established through the IMEI numbers. The captain confirmed that nothing was changed, altered or interfered with on both phones.
92. The captain stated that no photographs of the phones were taken.
93. On re-examination, the captain stated that he does not know what the ICCID numbers are for. He was given the Samsung Sim card, and he confirmed that the IMEI numbers are in column forms.
94. An objection by the defence for the captain to charge the cell phone and open it to ascertain the IMEI numbers of the phone. The objection was overruled. The phone was therefore recharged and opened. The captain read the IMEI numbers of the phone being the same as in his statement except that the number in the phone end with /02 where the captain in his statement did not

have the 0 before the 2. In other words, the captain's last number is /2 instead of /02.

95. That was the case for the State in the trial within a trial.
96. Advocate Mokoena called her client, accused 8, Tobias Mutoti, to the witness stand.
97. Mr Mutoti testified that he is aware that we are dealing with a trial within a trial in respect of the two cell phones and Sim cards that the State alleged were found in his possession.
98. He testified that on 15 August 2019, he was in the room of his cousin, Vinus Indongela. At about 04:00 he heard a big sound. The door of the room was being kicked inwards. He saw lights from a torch and a gun was put to his face. There were a lot of people in the room. They shouted that they are police.
99. The people instructed him to stand up. He did that. The police asked him if he was Vinus. He responded by telling the police that he is Tobias. He told them that Vinus is his cousin and has left for Namibia. According to the accused there were more than ten people inside the room.
100. Captain Fouche asked him for his phone. He showed it to him. He was instructed to lie with his stomach on the floor. Captain Fouche asked him for the pin code of his phone. He, the accused, asked the captain what he was going to do with his phone's pin code. They started to kick him, and he gave them his pin code as he realised that he was going to be hurt if he did not give the police his phone's pin code.
101. The police started to search the room. Sergeant Leisa asked him for his passport. He told him that the passport was in the wardrobe with other documents. The police found a traffic ticket with the name of Vinus Indongela and they said that he is the person that they were looking for.



102. After he had given the pin code to Captain Fouche, Captain Fouche worked on the phone. It was a white Samsung cell phone.
103. After the police finished searching in the room, they then put him on the back of a police van. From House 1[...] C[...] Street, the police went to another house where they also searched but not for a long time. The police then drove with him to their offices.
104. At the offices, the police instructed him to lie on the floor with his stomach. Captain Fouche was busy with his (accused's) phone. He doesn't know what Captain Fouche was searching for on the phone.
105. The police then asked him for his passport. They searched him for his passport. He doesn't know if the police found the passport or not. They then told him that he was under arrest.
106. One exhibit bag with the Nokia cell phone was handed over to the accused. Accused testified that he does not know the Nokia cell phone that was in the exhibit bag. He had never seen the Nokia cell phone before.
107. The second exhibit bag with the Samsung cell phone was handed to the accused. The accused looked at the Samsung cell phone and he testified that the Samsung cell phone is not his. He testified that this cell phone has cracks. His was new. He testified that he saw here in court Captain Fouche switching on the cell phone without a pin code. He testified that the one that the police took from him required a pin code to be accessed.
108. Mutoti testified that it is not true that he went back with Sergeant Leisa to House number 1[...] C[...] Street. He stated that if Sergeant Leisa went back to the house, he did that alone not with him.
109. Accused stated that Whitey is not Vinus but a friend.

110. Accused testified that at no stage was he asked to identify a cell phone or cell phones. He stated that he last saw his cell phone when Captain Fouche was working on it at their offices. He testified that from the captain's office Sergeant Leisa took him to the Vereeniging police station where he was locked up in the cells.
111. To a question by Advocate Marriot the accused testified that both cell phones in the exhibit bags are not his. He has no knowledge of the contents of the cell phones. Whether its WhatsApp messages or whatever else is in the phones, he has no knowledge of what is there.
112. He testified that Whitey is his friend and that is what he told Captain Fouche. He testified that he has no idea why was this never put to Captain Fouche. He testified that he was never alone with Captain Fouche. Leisa was always there.
113. Accused testified he cannot remember his cell phone numbers nor the pin code for his phone. And he cannot dispute the cell phone or pin code numbers furnished by Captain Fouche as he cannot remember them.
114. Accused testified that Vinus left three days prior to the police arresting him. He confirmed that his belongings were in the room in which the police found him.
115. Accused 8 confirmed that a Samsung cell phone was found in his possession, but it is not the one exhibited in court. It was put to the accused that it was never denied to the police that the phones were found in his presence, what was denied is that the phones were found in his possession. Accused stated that his counsel did deny that.
116. It was put to the accused that it was never denied that both cell phones were handed to the captain by Seargeant Leisa. Accused stated that he has no comment to that.

117. Defence case. No witness were called on behalf of the defence.
118. Colonel Rakgetse was recalled by the court in terms of section 167 of the Criminal Procedure Act to clarify issues that were not raised during her evidence in chief and cross examination which became contentious when Captain Fouche was cross examined.
119. Rakgetse explained that there is a difference between the ICCID and IMEI numbers. The ICCID numbers relate to Sim cards whereas the IMEI numbers relate to the handset, that is the cell phone gadget.
120. She does not know if the ICCID numbers, in terms of digits are always the same neither does she also know the those of the IMEI.
121. She testified that the extra digits of 8825 numbers and letters MG contained in Sergeant Leisa's statement did not appear on her tool when she was downloading the data from the Sim card. She did not need the extra numbers and the letters, that is the 8825MG that appear on the captain's statement to do the extraction.
122. She further testified that as far as the forward slash 2 (/2) of Leisa's statement is concerned, that the /2 is not necessary for her purposes. And that the serial number of the phone according to their tool does not include the /2. This as the tool she used brought up the IMEI numbers without the /2.
123. She confirmed that as far as the IMEI numbers of the Nokia cell phone, her numbers were 14 whereas Sergeant Leisa's numbers are 15. She conceded that her numbers missed the digit 6 after the 77.
124. To a question by Advocate Marriot, Rakgetse testified that the serial numbers indicated in Leisa statement refers to the same phone that she downloaded except that Leisa did not mention the make of the phone.

125. She testified that the Nokia cell phone is the same besides that she missed the digit 6 in her statement. She further stated that the phones were in the forensic bags which contained the same numbers as mentioned in Leisa's statement.
126. Asked by Mr Motloun she confirmed that she is not an expert on cell phones she can not say if the IMEI numbers of a cell phone are 14 or 15.
127. She conceded that if there was a difference between her serial numbers and those of the investigators, there would of course be a problem but fortunately there are supporting documentation to verify the phone.
128. To a question by Adv Mokoena, Rakgetse conceded that the serial number of the Samsung in her statement ended with /6 whereas Leisa's ended with /2 but insisted that it was still the same phone.
129. She insisted that the evidence bags that Sergeant Leisa sealed the phones in are the same evidence bags from which she took out the phones.
130. She stated that she got the serial numbers from her tools when she was downloading the data from the handsets.
131. Advocate Marriott for the State contended that the State proved that the chain of custody of the exhibits was not broken and that the court should find that the cell phones and the Sim cards are admissible and be used as evidence against accused 8.
132. Whereas Advocate Mokoena for accused 8 contended that the chain of custody of these exhibits had been broken immensely and that this evidence is unreliable and may have been and or have been tampered with. She therefore contends the court should rule the exhibits are inadmissible as evidence against accused 8. She contends that to rule that the evidence is admissible against the accused would render the trial to be unfair against accused 8 as provided for by section 35 of the Constitution of South Africa.

133. The main bone of contentions by the defence are:

- (i) The register used by the OLX team to register the exhibits has not been produced in this court.
- (ii) That the Samsung cell phone exhibited in this court is not the same Samsung cell phone that was seized from the accused.
- (iii) That the Nokia cell phone is not the property of the accused. That it was not found in his possession.
- (iv) That captain Fouche tampered with the exhibits when he worked on the cell phones alone in his office.
- (v) That the SAP13 register at the Vereeniging Police Station was not completed correctly or that those who are indicated to have completed the columns of the register have not been called by the State to confirm their signatures and to confirm that the exhibits were properly sealed.
- (vi) That there is a difference between the IMEI numbers of the cell phone as contained in the statement of Captain Fouche/Sergeant Leisa and those in the statement of Colonel Rakgetse.

134. It is not disputed that a Samsung cell phone was seized from the possession of accused 8. What is in dispute is whether the Samsung cell phone that is presently presented in this court as an exhibit is the same Samsung cell phone that was seized by the police from the accused. The court will come back this issue in more detail later.

135. Accused 8 denies that the Nokia cell phone is his or that it was found in his possession. He testified that he saw this Nokia cell phone for the first time here in court. On the other hand, Leisa testified that the cell phone was found in the possession of the accused. In his evidence in chief Leisa testified that

he can't remember exactly where the Nokia cell phone was found. But he maintained that it was found in the possession of the accused. Only under cross examination did he concede that in his statement he stated that he and accused 8 went back to the room where they found the accused and when he lifted a blanket on the bed he found the Nokia cell phone. According to his statement he and the accused went back to the room to look for the accused's passport as when they came to their offices, they could not locate the accused's passport. It was thought that the passport was left behind in the room.

136. Fouche in his oral evidence in court corroborated what is stipulated in Leisa's statement. That is the aspect that Leisa went back to the room to look for the accused's passport and that Leisa came back with the Nokia cell phone. This, however, is not contained in the captain's statement. He stated that the reason this was not contained in his statement is because it is Leisa who went there and he, the captain was not with Leisa when Leisa went back to the room with accused 8.
137. According to both Leisa and Fouche, accused 8 identified the Nokia cell phone as his. The police and the accused agree that the accused was alone in the room.
138. The accused denies that he and Leisa went back to the room where the police found him. And seemingly as an after thought he testified that if Leisa went back to the room, he went there alone not with him. The accused testified that at their offices the police asked him for his passport. He does not know if the police found the passport or not. They simple thereafter told him that he is under arrest. The accused did not testify as to what the police told him was the reason for his arrest. To this end Advocate Mokoena referred the court to the case of **S v Ipeleng 1993 (2) SACR 185(T)** which states that it is dangerous to convict an accused person on the basis that he cannot advance a reason why the State witness will falsely implicate him. In my view, there is a difference between asking an accused to explain why a state witness will falsely implicate him and asking him if the police told him why he is arrested.

Its simple its either the police told him why he is arrested or not. This is different from asking why the police would lie and say he was arrested for this whereas he was arrested from something else.

139. It is so that there is a void between Leisa's oral evidence in court and his statement. But can that then mean that his evidence must therefore be rejected? In **S v Oosthuizen 1982 (3) SA 571** it was held that "Not every error made by a witness affects his credibility, in each case the trier of fact has to take into account such matters as the nature of the contradictions, their number and importance and their bearing on other parts of the witnesses' evidence. The court must after evaluating the evidence be satisfied that the truth has been told."
140. The court is mindful that this incident took place almost 5 years ago and obviously because of the fallibility of the human memory some details would be hard to remember. The court takes cognisance that Leisa deposed to his statement on 16 August 2019 a day after the incident when the events of the previous day were still fresh in his memory. The court accepts considering the contemporaneity of his statement and the events that what is contained in his statement is true.
141. The court finds that the Nokia cell phone was found in the possession of the accused. That it is his phone, and it was under his control. The court accepts that Leisa as per his statement and as corroborated by Fouche went back to the room where he in the company of Accused 8 found the Nokia cell phone in the room occupied by the accused. If this was not so, it would not have been necessary for Leisa to complicate things and state that he and accused 8 went back to the room because they could not locate the accused's passport in their office. If the police were lying in this respect, they would simple have testified that the Nokia cell phone was found together with the Samsung cell phone and the Sim cards when the accused was picked up at 1[...] C[...] Street, Bethworthpark.

142. On the other hand, Fouche testified that after he warned the accused of his constitutional rights, the accused admitted that the Nokia cell phone is his. The accused gave him the cell phone numbers of this Nokia cell phone. He accessed the Nokia cell phone and because of information he saw on the phone he then arrested the accused. And that is why the police arrested the accused. By that time, according to evidence the police did not have his passport and his status in the country had not yet been established.
143. The evidence of both Sergeant Leisa and Captain Fouche is that they kept an exhibit register at their offices to make entries of exhibits relating to the OLX cases. They testified that they made an entry into the register when the exhibits were put into the forensic exhibit bags.
144. It is, in fact, so according to the evidence of both Sergeant Leisa and Captain Fouche that the register to record the exhibit at the OLX team offices is now not traceable. Both do not know what happened to this register. According to Captain Fouche he left the register in the safe when he retired from the SAPS.
145. There is no reason for both Sergeant Leisa or the captain to mention that the exhibits were registered in the exhibit register if this register did not exist. In fact, Sergeant Leisa was so confident about the existence of the register that he undertook to go to their offices and come back with the register on the following day. If there was no such register, it is difficult to believe that he would have undertaken to do this if he knew that there was no such register.
146. This court finds that Leisa as testified documented these exhibit bags in the exhibit register in their offices. There is no basis to find that the exhibits were not properly documented at the offices of the OLX team.
147. There is no evidence before this court that the exhibits were interfered with, tampered or altered in any way at the offices of Captain Fouche. The court can not infer that because Captain Fouche was left alone with the phones whilst he worked on them, he therefore tampered with the phones. Of course, it would have been ideal for the captain, to work on the cell phones in the



presence of the accused. But there is no reason to infer that he interfered or tampered with the phones in any form or manner.

148. In **S v Mtsweni 1985 (1) SA 590 A**, it was stated that “Inference must carefully be distinguished from conjecture and speculation. There can be no inference unless there are objective facts to infer to the other facts which to establish. In some cases, the other facts can be inferred with as much practical certainty as if they had been actually observed, in other words the inference does not go beyond reasonable probability. But if there are no positive facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.”
149. According to advocate Mokoena, this court should without any shred of evidence infer that Captain Fouche tampered with the exhibits only by reason that he was left with the phones alone in his office when working on these phones.
150. According to Advocate Mtsweni, the fact that the Samsung cell phone could now be accessed without a pin code as alleged by the accused and as in fact testified to by Captain Fouche means that the Samsung cell phone has been tampered with. The problem with the contention by Advocate Mtsweni is, firstly that he assumes that this Samsung cell phone is the same one that was seized from the accused whereas the accused denies that this Samsung cell phone is his. The second problem is as stated above there is no shred of evidence or a reason to infer that the Samsung cell phone has been tampered with.
151. In **S v Makhubo (A20/2023) [2023] ZAFSHC 185 (2 October 2023)** the court held that the mere challenge of the evidence will not be sufficient to affect the evidential value of prima facie evidence presented by the State. An accused who does so is obliged to lay a foundation for contesting such evidence. No foundation was laid in this matter to suggest or even to infer that the police tampered or interfered with the exhibits. This court can not make a finding on speculation or conjecture.

152. Advocate Mokoena further urged the court that it should find that the chain of custody of the exhibits was not properly proved by reason that the officers who completed and signed the SAP13 register at Vereeniging Police Station were not called to testify to the authenticity of their signatures and to testify about the state of the exhibit bags when the bags were at the police station. She referred the court to decided cases, amongst others the cases of **S v Matshaba 2016 (2) SACR 651 (NWM)** in which it was stated that the State must establish the name of each person who handled the evidence, the date on which it was handled and the duration.
153. Also in **S v Ndlovu [2023] ZWBHC 2 (23 November 2023)**, it was stated that it must be shown in court that the evidence is authentic i.e. it is the same exhibit seized at the crime scene and it was at all times in the custody of a person designated to handle it.
154. If I understand these cases correctly, what is stated is that the State must always account for who handled the exhibits at all the relevant times. If that is the case, do we have a missing link in this matter as to who handled the exhibits from time to time. In other words, do we have a period in which we don't know where and, in whose possession the exhibits were? Or do we have a period in which we don't know who handled the exhibits? I don't think so.
155. The evidence in this court is that the exhibits were at all times known where they were kept or handled and who was responsible for them. The evidence of both Fouche and Leisa is that the exhibits were kept in the safe over the night of 15/16 August 2019. Sergeant Leisa testified that he took the exhibits to the Vereeniging Police Station on 16 August 2019 to book them in the SAP13 there. He made an entry of the exhibits in the SAP13 and as required in terms of the SAP 13 requested the officer in charge to "receive" the exhibits and release them to him at the same time. There is no evidence that the officers at the police station handled the exhibits. The exhibits were never taken into the SAP13 room. Leisa explained that usually when an officer takes

exhibits to the police station the officer will hand them over to the officer in charge at the Client Service Centre where the SAP13 register is kept. The SAP13 clerk collects and signs for all the exhibits at the end of the day shift. In this case, he did not hand over the exhibits at the Client Service Centre. He only booked them in and retained the exhibits which he then took them to Captain Fouche. Captain Fouche kept the exhibits until they were taken to the Cyber Crime Investigation Unit for downloading.

156. In any event the Supreme Court of Appeal in **S v Jantjies en Ander 1993 (2) SACR 475 (A)** approved of the dictum of Eloff J in **S v Boyce 1990 (1) SACR 13 (T)** where the learned Judge said;

“Waar n ontleder n gemerkte en verseelde pakket in dieselfde toestand as waarin dit versend is, ontvang dit nie van belang is in wie se bewaring die gseelde houer was vandat die monster geneem is totdat dit by die ontleder uitgekom het nie.”

157. In other words, the Appeal Court found that when an analyst receives a marked and sealed evidence bag in the same condition in which it was sent to him or her it is not necessary to prove in whose custody the sealed bag was from when the exhibit was taken until it reaches the analyst.

158. The court further stated that

“Wat wel van belang was, en wat deur die staat bewys moes word, was dat die tablette wat Sersant Swart in die besit van die appellante gekry het, dieselde tablette is wat by ontleding bevind is metakaloon te bevat. Dit is prima facie bewys deur die bewerings in die beedigde verklaring rakende die ontvangs van die verseelde en gemerkte pakket, en die ontleding van die inhoud daarvan.”

159. The cases quoted by Advocate Mokoena are cases that were decided in the Provincial Divisions. The Jantjies decision is a decision of the Supreme Court of Appeal, and I am not aware that the decision has ever been overturned. So,

I am bound to follow it. The courts that decided the matters mentioned by Advocate Mokoena for reasons unknown to this court, did not refer to the Jantjies matter.

160. I therefore find that there is no substance in the argument that the State was obliged to call the officers who completed and signed the SAP13 register at the Vereeniging Police Station. In any event as I indicated above, there is no evidence that they handled the exhibit bags.

161. In her work titled "DNA in the courtroom, Principles and Practice" Lierinka Mentjies-Van der Walt posits as follows:

"The chain of custody requirements has two objectives:

- (a) The first is to lay a proper foundation connecting the evidence to the accused or to a place or object that is relevant to the case.
- (b) The second purpose of the chain of custody for physical evidence is to ensure that the object is what its proponent claims it to be.
- (c) She further states that the chain of custody is the means of verifying the authenticity and legal integrity of trace or sample evidence by establishing where the evidence has been and who handled it prior to the trial. Any person who had contact with the evidence must also be accounted for."

162. According to Leisa he placed the Samsung cell phone with the Sim cards in a forensic exhibit bag with seal number PA5002450880 and the Nokia cell phone in a forensic exhibit bag with seal number PA5002450879.

163. If I understood the arguments of both the State and the defence, there is no dispute that Colonel Rakgetse received forensic bags with the serial numbers that correspond with the aforementioned seal numbers. That is in fact, her evidence.

164. According to Leisa and Fouche the cell phone number of the Nokia cell phone was or is 0[...]<sup>2</sup> and the IMEI number is 3[...]<sup>2</sup>.

165. Further according to Leisa and Fouche the cell phone numbers of the Samsung cell phone is 0[...] and the IMEI number is 3[...].
166. The question is whether the cell phones that were found in the possession of accused 8 are the same cell phones in the exhibit bags that have been brought to court as exhibits.
167. The court has already indicated that there is no dispute that a Samsung cell phone was seized by the police from accused 8. The accused disputes that the Samsung cell phone that is in the exhibit bag is his. It was put to Captain Fouche through his counsel that his cell phone was new and had no scratches, that the Samsung cell phone brought to court has scratches. Captain Fouche responded and said it can be proved through accessing the cell phone using the pin code that the accused gave to him and thereafter ascertain the IMEI number of the phone.
168. The above question by Advocate Mokoena and response of Captain Fouche prompted Advocate Marriott in her re-examination of the captain to request the captain to charge the phone and to access the phone through the pin code to ascertain the IMEI numbers of the phone. The defence objected to this process contending that it amounted to leading new evidence. The court as aforesaid, overruled the objection.
169. The captain charged the Samsung cell phone. After charging it sufficiently, he accessed the phone without a pin code which was allegedly furnished to him by accused 8. He then dialled the \*#06# to access the IMEI numbers of the cell phone. He read the IMEI numbers as 3[...]<sup>4</sup>.
170. Advocate Mokoena contends that the IMEI numbers of the Samsung Cell phone are not the same because the numbers read by the captain in court end with /02 whereas those of Colonel Rakgetse end with /6. In view of the court's opinion regarding the identity of the phone the court is not going to go into detail as to the discrepancy of the numbers.

171. The court's main concern is that this Samsung Cell phone in the exhibit bag was accessed by the captain without the need to dial a pin code as alluded to by the captain and the accused. The court allowed the captain to charge the phone so that he could precisely demonstrate that the phone is accessed through a pin code supplied to him by the accused and to ascertain if the IMEI numbers are the same as per his statement.
172. There was no explanation from the captain as to why the phone could now be accessed through no pin code. Advocate Marriott stated that that could be because the phone has been accessed at the Cyber Crime Investigation Unit. That is speculation. And in any event as alluded to by Mr Mtsweni, there is no evidence that Colonel Rakgetse was supplied with a pin code to access the phone. And even if so, the phone would have presumably have locked after the Colonel had worked on it. But all these are speculations.
173. As stated in the work of Lierinka Mentjies-van der Walt a foundation should be laid connecting the evidence to the accused. The court must be certain that the evidence is what its proponent claims it to be.
174. As it happened in the case of **Bamba v S, (20089/14) [2014] ZASCA 219** the phones were not placed in an exhibit bag when they were put in the safe where there were other exhibits. As I said I don't to express a view about the correctness of the IMEI numbers. Although the facts of the Bamba case are distinguishable from the facts of this case the court held that utmost care is required of police in recovering, storing, recording and conveying exhibits.

## **THE SIMCARDS**

175. In the courts view, there was not much contentious arguments about the identity of the SIM cards except that Leisa did not note the ICCID numbers of the cards when he registered the exhibits in the SAP13 register at the Vereeniging Police Station. The other issue is with the extra numbers and letters of 8225 MG on one of the SIM cards. In the courts view this is not a

serious discrepancy as was explained by Colonel Rakgetse that she got the numbers from her tool when she downloaded the data from the card, these extra numbers and letters did not appear from the tool and the tool did not need these extra numbers and letters to download the data from the Sim card.

## **THE NOKIA CELL PHONE**

176. The court has already found that the Nokia cell phone is the property or was in the possession of accused 8. The first leg of the Lierinka Meintjie-van der Walt purpose of the chain of the evidence is proved that the Nokia cell phone is linked to the accused. The second purpose is ascertain whether the Nokia cell phone sent to the Cyber Crime Investigation Unit is the same Nokia cell phone that was seized from the accused and whether it is the same that is in the exhibit bag brought to court.
177. As per the testimony of Leisa, he placed the Nokia cell phone, with the IMEI number 3[...]2 in an exhibit forensic bag with the seal number PA5002450879.
178. This seal bag was delivered at the Cyber Crime Investigation Unit by Warrant Officer Mills. The exhibit was allocated to Colonel Rakgetse for downloading. According to Rakgetse, she took a photograph of the forensic bag, the cell phone and the Sim card that she found inside the phone. According to her, the IMEI number of the Nokia cell phone was 3[...]3 and the SIM card ICCID number was 8[...]5.
179. Rakgetse, during her initial evidence in chief and cross examination was not questioned about the correctness of the IMEI numbers. Only when Captain Fouche was cross examined, the defence raised the discrepancy in the IMEI numbers, pointing out that Rakgetse's numbers were 14 whereas the captain's numbers were 15. The captain testified that the IMEI numbers of a cell phone are always 15. To demonstrate this, he took out his cell phone dialled #06# and gave the IMEI numbers of his cell phone as 8[...]4. The numbers are in fact 15.

180. The court considered the recalling of Rakgetse as essential in the outcome of the case and ordered in terms of section 176 of the Criminal Procedure Act 51 of 1977 that Colonel Rakgetse be recalled.
181. When asked by the court to point out the discrepancy of the IMEI numbers in her statement and those of Sergeant Leisa, the Colonel testified that in her number she missed to include the digit 6 after the 77 digits. In other words, the numbers in her statement after the 77 digits are 274 instead of 6274.
182. Under cross examination by Mr Motloun, she confirmed that she is not an expert on cell phones. Her duties is just to download data form the exhibits sent to the Unit. She can not say whether her numbers are correct or those of the captain or sergeant Leisa are correct. But that she will ascribe the mistake to herself as Leisa as the investigating officer would know the correct numbers.
183. It is clear from a perusal of the numbers and the evidence of Captain Fouche that the Colonel when she wrote the IMEI numbers of the Nokia cell phone missed the digit 6 after the digits of 77. One does not have to be a rocket scientist to notice the omission which the Colonel ascribed to her mistake.
184. It cannot be a mere coincident that the Nokia cell phone that fits the description by Sergeant Leisa and Captain Fouche, that is placed in the forensic bag numbers described by both Sergeant Leisa and Captain Fouche, that the forensic bag with the same corresponding number as recorded by Leisa and with a similar IMEI number except that the IMEI number recorded by the Colonel is short of one digit, which is the digit 6, is totally a different Nokia cell phone than that the one seized from the accused by the police.
185. The court is satisfied that the Nokia cell phone that was downloaded by the Colonel is the same Nokia cell phone that was seized from the possession of accused 8 and is the Nokia cell phone in the exhibit bag that was resealed with the SIM card in a new forensic bag with number PA5002714438.



186. As alluded to earlier the State failed to prove that the Samsung cell phone presented as an exhibit in this court is the same Samsung cell phone that the police seized from accused 8 by virtue that there is no explanation why the Samsung cell phone that is presented as exhibit in court does not now require a pin code to be accessed.

The court therefore makes the following orders:

- (i) The Samsung cell phone with IMEI number 3[...] or /02 and the Sim card with cell phone numbers 0[...] and ICCID number 8[...] are not admitted as evidence against Accused 8 and its contents may not be opened.
- (ii) The SIM cards with ICCID numbers
  - (a) 8[...]2
  - (b) 8[...]3 and
  - (c) 8[...]5 are admitted as evidence against Accused 8.
- (iii) The Nokia cell phone with cell phone numbers 0[...]2 and IMEI number 3[...]2 is admitted as evidence against Accused 8 and its contents may be opened and used as evidence against Accused 8.

Dated at Palmridge on this 27<sup>th</sup> day of February 2025

-----  
**JJ MLOTSHWA**  
Acting Judge of the High Court, Pretoria