Journal of African Law (2023), **67**, 391–408
doi:10.1017/S0021855323000207

RESEARCH ARTICLE

Mpho le Mphonyana: Two Iterations of Admissibility in Africa

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(Accepted 23 December 2022; first published online 26 July 2023)

Abstract

The statutory formulation of the rules of evidential admissibility in African jurisdictions can be characterized into two, positive and negative, broad categories. This article uses the Sowetan trope of a pair of conjoined twins, popularly known as *Mpho le Mphonyana* in South Africa, to analyse these two formulations with a view of exposing eight doctrinal, institutional and theoretical fallacies associated with these (English) common law colonial inheritances in Africa. The continued, and popular, focus on the Euro-American world by African Evidence scholars, notwithstanding the prevalence of these kinds of fallacies, raises serious questions not only about the scholarly and institutional future of African jurisdictions, but also about what precisely Africans think of themselves in a world that renders them largely invisible for scholarly purposes.

Keywords: Law of Evidence; Africa; relevance; admissibility; northbound gaze; decolonization

Introduction

The colonial domination of Africa may have formally ended in the twentieth century, but the enduring vestiges of "coloniality", including what Ndlovu-Gatsheni calls "genocides", "epistemicides" and "linguicides",[1] have rendered any claims about liberation or independence doubtful across the continent. Variations of this scepticism range from Nkrumah famously preferring the term "neo-colonialism" to describe this post-independence period to Modiri's claim that "decolonisation is an insatiable reparatory demand [that] … entails nothing less than an endless fracturing of the world colonialism created".[2] In between these two ends of the spectrum lie more benign claims for "transformation", "human rights", "development" and "democratization".[3] It has also been

* LLB, LLM, PhD. Young Fellow and Senior Lecturer in the Department of Public Law, University of Cape Town. This article is dedicated to my mother, Mpho "Mphonyana" Mothulwe and the resilient people of Soweto, to whom I owe so much for all that is commendable and constructive about my ideas. Some of the early ideas of this article emerged from my time as a postgraduate student of my teacher and now colleague Pamela-Jane Schwikkard, at the University of Cape Town.

1 SJ Ndlovu-Gatsheni *Epistemic Freedom in Africa: Deprovincialisation and Decolonisation* (2018, Routledge) at 3 ("Coloniality is a description of the persistence of colonialism beyond dismantlement of its direct administrative structures"). See generally N Maldonado-Torres "On the coloniality of being" (2007) 21/2–3 *Cultural Studies* 240 at 243; A Quijano "Coloniality of power and Eurocentricism in Latin America" (2000) 15/2 *International Sociology* 215; W Mignolo *The Darker Side of Renaissance: Literacy, Territoriality and Colonisation* (2nd ed, 2003, University of Michigan Press).

2 See K Nkrumah *Neo-Colonialism: The Last Stage of Imperialism* (1965, Panaf Books); J Modiri "The aporias of 'decolonisation' in the South African academy" in O Tella and J Motala (eds) *From Ivory Towers to Ebony Towers: Transforming Humanities Curricula in South Africa, Africa and African-American Studies* (2020, Fanele) 157 at 172.

3 Cf Modiri "The aporias", ibid at 170: "This metaphorisation of decolonisation is also what enables many, especially white scholars – with little evidence of indigenous, African and Global South literature and politics in their previous

puzzling, to say the least, to observe the entrenched trend of African scholars, particularly in the Law of Evidence, being caught in a persistent Ramosean "northbound gaze" towards the Euro-Americas.[4] Within this colonial gaze, "the West remains the generator and exporter of concepts and theories that are tested in Africa".[5] This trend persists despite the many doctrinal, theoretical and institutional (political) problems, eight of which are expounded in the core of this article below, that have arisen from the continued importation of or reliance on Euro-American colonial institutional practices in Africa.[6]

For example, Naudé focuses the bulk of his paper on the admissibility of evidence of a prior sexual relationship between an accused and a complainant in the Canadian case of *R v Goldfinch*[7] because, he says, "South African legislation dealing with the admissibility of such evidence is basically a copy of the Canadian legislation".[8] Barrie and De Villiers hold the view that the state administrative tribunal of Western Australia, which barely has been fifteen years in existence, "offers valuable insight … in regard to the treatment of expert witnesses".[9] According to Visser and Kruger, adopting sections of the American Federal Rules of Evidence (1975) and the English Criminal Practice Directions (2015) "may increase … the quality of scientific testimony … [and] the court's confidence in the reliability of evidence".[10]

The most striking example of this northbound-gazing trend has emerged in Tanzania, where a committee of highly skilled and experienced local lawyers, including members of the Tanzanian Law Reform Commission, the Chief Parliamentary Draftsman of the Attorney General's office, a representative of the Law Society of Tanganyika, the head of the Prevention and Combatting of Corruption Bureau, justices of the Court of Appeal, and the Chief Justice of Tanzania at the time, was assembled in 2009 to reform the Tanzania Evidence Act of 1967.[11] For reasons that are not immediately apparent, the review and eventual drafting of the draft code that would replace this statute was not confined within the borders of Tanzania. First, the Law Society of England and Wales was approached to conduct the review and prepare the draft code, but this was later abandoned due to "financial constraints".[12] Subsequent to this, the Tanzanian reformers once again looked northbound towards an American scholar from Northwestern University, Chicago, Illinois, to undertake the technical aspects of the reform. According to the head of the reform committee, Edward Hoseah, "the Chief Consultant" (that is, the American consultant) "submitted his

scholarship – to draw on the language of decolonisation without any serious commitment to abolishing their own racialised subject position and complicity in maintaining the whiteness of the academy."

4 MB Ramose "'African Renaissance': A northbound gaze" in P Coetzee and A Roux (eds) *The African Philosophy Reader* (2nd ed, 2002, Routledge) 600 at 600. Cf Modiri "The aporias", above at note 2 at 158: "[A]s a result of its imbrication in a northbound and socially white gaze, the Westernised South African university houses a large cadre of academics – from all racial groups – who have neither the training, the will nor the imagination to radically reconfigure the knowledge archive in a way that would initiate a conceptual decolonisation of the discipline and, hence, of the university."

5 O Tella "Transforming humanities curricula in South Africa, Africa and African-American studies" in Tello and Motala (eds) *From Ivory Towers*, above at note 2 at 5.

6 The designation "Euro-American" is used throughout this article to refer generally to jurisdictions in, or associated with, the domineering Global North.

7 *R v Goldfinch* [2019] SCC 38.

8 B Naudé "The admissibility of sexual relationship evidence" (2019) 29/1 *South African Journal on Criminal Justice* 377 at 377.

9 G Barrie and B De Villiers "Revisiting the adversarial approach of dealing with expert evidence: The treatment of expert witnesses by the state administrative tribunal of Western Australia" (2017) 1 *Tydskrif vir die Suid-Afrikaanse Reg* 59 at 60.

10 J Visser and U Kruger "Revisiting admissibility: A review of the challenges in judicial evaluation of expert scientific evidence" (2018) 1 *South African Journal of Criminal Justice* 1 at 24.

11 RJ Allen et al "Reforming the law of evidence of Tanzania (Part one): The social and legal challenges" (2013) 31/1 *Boston University International Law Journal* 217 at 218–19.

12 EG Hoseah "The foundations of the law of evidence and their implications for developing countries: The background of the Tanzania law of evidence project" *Northwestern School of Law Conference: The Foundations of the Law of Evidence and Their Implications for Developing Countries* (2014) 3, available at: <www.bu.edu/ilj/files/2015/03/Hoseah-The-Background-of-the-Tanzania-Law-of-Evidence-Project.pdf> (last accessed 18 June 2023).

https://doi.org/10.1017/S0021855323000207 Published online by Cambridge University Press

draft proposal of the new evidence code for Tanzania" in May 2014.[13] In all these instances, it is also not clear as to why none of the 20 Nubian African jurisdictions with common law colonial heritage, including Kenya, Uganda, Nigeria, Malawi, Zambia, Botswana, South Africa and Sierra Leone, were not consulted instead.[14]

Notwithstanding the fact that one of the chief concerns raised by the Tanzanian Law Reform Commission about the Evidence Act of 1967 was that it was regarded as "a barrier to the successful prosecution of corruption cases in the country, because it does not recognise the utility of circumstantial evidence",[15] not a single word about circumstantial evidence was referred to in the ultimate draft code prepared by the American consultants (led by Ronald J. Allen). In justification of this omission, the head of the reform committee said: "It is this author's belief that although there is no particular provision, which deals with circumstantial evidence, through section 2.1 [the general relevancy provision], circumstantial evidence can be admitted in courts."[16] The American consultants ultimately concluded that the Evidence Act is a "conceptual and drafting nightmare" and "a long, prolix, and at times internally inconsistent document" that "has never been reflective of Tanzanian needs" in that, ironically, "it was written by a British coloniser for use in India".[17] Notwithstanding the giving of all the usual assurances by Allen to the effect that "[a]t the inception of this project … [he] did not intend to draft a replacement code for the [Tanzanian Evidence Act of 1967]",[18] and that "the domestic committee retains ultimate responsibility for leading reform efforts",[19] he and his team produced a draft code consisting of 14 sections and almost 100 subsections, but it does not appear that it has been adopted yet in replacement of the 1967 statute.

It would be rare to observe a jurisdiction in the Euro-American world consulting an African jurisdiction in this way on the technical aspects of reforming its domestic statute, especially in the context of the Law of Evidence. The fact that some African scholars continue to look north raises the broader question as to what precisely Africa thinks of itself in a world that typically regards it as being invisible in so many respects, especially in scholarship and innovation. It also bears recollecting that feelings of deep-seated contempt or degradation towards Africa are not at all new. Hume thought Africans were "naturally inferior to the whites" and that there were "no ingenious manufactures amongst them, no arts, no sciences".[20] Kant held the view that even among the many Africans in the diaspora that were "set free" from the continent, they remained incapable of producing "anything great in art or science or any other praiseworthy quality".[21] According to Hegel, Africans are examples of "the natural man in his completely wild and untamed state" and "there

13 Id at 3.

14 The term "Nubian Africa" is preferred instead of "sub-Saharan" or "sub-tropical" Africa in this article. At least 20 out of 48 of the jurisdictions in this region have common law colonial roots. See S Gyandoh "Tinkering with the criminal justice system in common law in Africa" (1989) 62/4 *Temple Law Review* 1131 at 1135; PG Mahoney "The common law and economic growth: Hayek might be right" (2001) 30/2 *Journal of Legal Studies* 503 at 524 (Appendix A). Cf the countries, divided between "common law", "civil law" and "uncolonized", cited in Appendix A of SF Joireman "Colonised and the rule of law: Comparing the effectiveness of common law and civil law countries" (2004) 15 *Constitutional Political Economy* 315 at 332–33.

15 Hoseah "The foundations", above at note 12 at 5.

16 Id at 12.

17 RJ Allen "Proposed final draft: Tanzania Evidence Act 2014", *Northwestern School of Law Conference: The Foundations of the Law of Evidence and Their Implications for Developing Countries* (2014) 9, available at: <www.bu.edu/ilj/files/2015/03/Proposed-Final-Draft.19.pdf> (last accessed 18 June 2023).

18 RJ Allen "Reforming the law of evidence of Tanzania (Part three): The foundations of the law of evidence and their implications for developing countries" (2015) 33/2 *Boston University International Law Journal* 283 at 284.

19 Allen "Reforming … (Part one)", above at note 11 at 221.

20 D Hume "Of national characters" in *Essays Moral, Political and Literary* (part 1, ed E Miller, 1987, Liberty Fund) 26 at 26 n10.

21 I Kant *Observations on the Feeling of the Beautiful and Sublime* (trans JT Goldthwait, 1960, University of California Press) 97 at 110–11.

https://doi.org/10.1017/S0021855323000207 Published online by Cambridge University Press

is nothing harmonious with humanity to be found in this type of character".[22] Similar sentiments abound in the Law of Evidence. Despite authoring an Evidence statute for India, which continues to be used to date, Stephen regarded indigenous Indian culture and principles of governance as "representing heathenism and barbarism",[23] whereas Wigmore held the view that Africans and Hindu people were "uncivilised" and naturally prone to "lying for lying's sake" when giving witness testimony.[24]

"Wisdom and reasoning in the world," according to Montaigne, "teach us not to be afraid to die",[25] but these are blunt instruments against the dread, the angst, of being alive yet invisible to others in the world. The South African Constitutional Court recently remarked that "[i]t is a truth universally acknowledged" that "[t]o be hated, despised, and alone is the ultimate fear of all human beings".[26] Africa is left isolated and alone under the "flickering candles of intellectual humility, personal compassion and social hope".[27] The persistence of this scholarly trend of gazing northbound towards the Euro-Americas, in my view, further deepens and darkens this existential vortex. However, even in a state of nothingness, there would still have to be African beings.[28] This is the primordial source of light, of decoloniality and of ultimate liberation. There are African beings to observe, and thus constitute or validate, the existence of colonial nothingness itself. In as much as every question is posed towards or about an existing somebody or something, each such question presupposes, by definition, an existing questioner.[29] Even those, in Africa or elsewhere, in the Euro-American world, that purport to render Africa invisible in their northbound gaze, their choice presupposes, at the very least, the existence of African beings. What they then do with this basic presupposition is their own choice.

African scholars have the choice either to continue gazing northbound towards the crown jewels of European and American scholarship or to tilt their focus towards more local decolonial directions. The choice made in this article is the latter. This is a doctrinal project that focuses mainly on the primary legislative and judicial approaches that are presently adopted by Nubian African jurisdictions in regulating the admissibility of evidence.[30] These jurisdictions inherited what has been coined the "golden age of doctrinal scholarship" in the Law of Evidence.[31] According to Stephen, who led much of the drafting of India's major colonial laws, this brand of Evidence scholarship primarily consists of "an enormous number of cases" and "a comparatively small number of Acts of

22 GWF Hegel *Philosophy of History* (trans J Sibree, 2017, Dover) 51 and 79–80.

23 JF Stephen "Foundations of the government of India" (1883) 14 *Nineteenth Century* 542, cited in KJM Smith *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (1988, Cambridge University Press) at 145; J Roach "James Fitzjames Stephen" (1956) 1–2 *Journal of the Royal Asiatic Society of Great Britain and Ireland* 1 at 14. See also the archival correspondence and other materials by Stephen, available at: <www.fitzjames-stephen.blogspot.com> (last accessed 20 October 2021).

24 JH Wigmore *The Principles of Judicial Proof as Given by Logic, Psychology and General Experience and Illustrated in Judicial Trials* (1913, Little, Brown and Company) at 315 and 318.

25 M Montaigne "Of the uncertainty of our judgment" in *The Complete Works of Montaigne: Essays, Travel Journal and Letters* (ed DM Frame, 1948, Hamilton) 67 at 67, citing MT Cicero *Tusculan disputations* (translated by CD Yonge, 1877) 63 and 195–96.

26 *Qwelane v South African Human Rights Commission* [2021] ZACC 22 at 1, citing MJ Matsuda "Public response to racist speech: Considering the victim's story" (1989) 87/8 *Michigan Law Review* 2320.

27 Cf C West *The Cornel West Reader* (1999, Basic Civitas Books) at xv.

28 A similar move was powerfully made in M Heidegger *Being and Time* (trans J Macquarrie and E Robinson, 1962, Harper & Row) at 78 and in JP Sartre *Being and Nothingness: An Essay on Phenomenological Ontology* (trans HE Barnes, 1943, Routledge) at 11.

29 Id at 28.

30 On doctrinal methodology in general, see R Brownsword "Field, frame and focus: Methodological issues in the new legal world" in R van Gestel et al (eds) *Rethinking Legal Scholarship: A Transatlantic Dialogue* (2017, Cambridge University Press) 112 at 112–13; MA Siems and D Sithigh "Why do we do what we do? Comparing legal methods in five law schools through survey evidence" in R van Gestel et al (eds) *Rethinking Legal Scholarship*, id, 31 at 37–38.

31 RC Park "Evidence scholarship, old and new" (1991) 75 *Minnesota Law Review* 849 at 854–55.

https://doi.org/10.1017/S0021855323000207 Published online by Cambridge University Press

Parliament".[32] In the Euro-American world, this brand of Evidence scholarship is largely outdated, and this is one of the reasons why Allen, as mentioned in the discussion earlier, commented that the Tanzanian Evidence Act of 1967 "does not reflect the advances of legal knowledge about evidence".[33] Africa is replete with similar examples of the adoption of a colonial or foreign institutional practice, only for it later to be learned that it has become outdated because the Euro-American world has "moved on". This article uses the imagery of *Mpho le Mphonyana* ("a gift and a small gift"), which was a phrase used to name two popular conjoined twins who were born in the mid-1980s in South Africa, to expound upon eight doctrinal, philosophical and institutional fallacies that have arisen from what Nubian African jurisdictions have inherited from colonial England with respect to the admissibility of evidence. The focus will mainly be on analysing the pertinent statutory provisions regulating the admissibility of evidence, but pertinent examples of cases and scholarly opinions will also be considered for illustrative purposes. Before the discussion of the eight fallacies, a brief overview of the general kinds of statutory provisions that are used to regulate the admissibility of evidence across the continent will be provided by way of background. Subsequent to the analysis of the fallacies, a general summation of the law of admissibility in Africa will be provided as a basis for any possible future reforms.

Mpho le Mphonyana: Irrelevance and relevance

There are two variants of admissibility rules, providing for the admission and exclusion of evidence respectively, that prevail in most Nubian African jurisdictions with common law colonial roots. These variants remain identical to their original colonial versions from the 19th and 20th centuries. There is a plethora of doctrinal, philosophical and institutional fallacies, which are discussed in the next section below, that are associated with the structure, interpretation and application of both these variant formulations, but one of them is even more problematic than the other. In many significant ways, these two variants resemble South Africa's most famous conjoined twins, collectively named Mpho le Mphonyana, from the mid-1980s. Comparable to our two formulations of admissibility, Mpho le Mphonyana appeared to be identical in most respects, but there were fundamental post-natal differences between them. Firstly, as with the admissibility rule, which was mostly conceived of as a singular formulation before the late 19th century,[34] surgical separations of conjoined twins were very rare during this period. There were only 26 recorded surgical separations in the world by 1964, and the separation of Mpho le Mphonyana in 1988 would be only the fourth in South Africa, and the second, after the earlier separation of Nicholette and Nicholine Nthene, at the historic Chris Hani Baragwanath Hospital in Soweto, Johannesburg.[35] Similarly, it was only

32 JF Stephen *A Digest on the Law of Evidence* (1887, Macmillan) at x.

33 RJ Allen et al "Reforming the law of evidence of Tanzania (Part two): Conceptual overview and practical steps" (2014) 32/1 *Boston University International Law Journal* 1 at 5. For an overview of the explosion of scholarship under the "New Evidence Scholarship" banner, see R Park et al "Bayes wars redivivus: An exchange" (2010) 8/1 *International Commentary on Evidence* 1; MS Pardo "The nature and purpose of evidence theory" (2013) 2/3 *Vanderbilt Law Review* 547 at 553.

34 For example, sec 5 of Stephen's Indian Evidence Act of 1875 provided that "[e]vidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others". Other historical examples include *probationes debent esse, id est, perspicuae et faciles intelligi* ("proofs ought to be made evident, that is, clear and easy to be understood") and *in jure non remota causa sed proxima spectator* ("[i]n law the immediate, not the remote cause of any event is to be regarded"); see F Bacon *The Common Lawes of England* (1630, Lawbook Exchange) reg 1; JC Hogan and MD Schwartz "On Bacon's 'Rules and Maxims' of the Common Law" (1983) 76 *Law Library Journal* 48; JC Hogan and MD Schwartz "A Translation of Bacon's Maxims of the Common Law" (1984–85) 77 *Law Library Journal* 707; WM Best *A Treatise on the Principles of Evidence and Practice as to Proofs in Courts of Common Law with Rules for Conducting the Examination and Cross-Examination of Witnesses* (1849, T & JW Johnson) 44 and 79.

35 S Horwitz *Baragwanath Hospital, Soweto: A History of Medical Care 1941–1990* (2013, Wits University Press) at 165–66.

https://doi.org/10.1017/S0021855323000207 Published online by Cambridge University Press

in 1898, several years after Stephen's Evidence doctrine had begun to be exported to Africa and elsewhere in the world,[36] that Thayer would observe that there are in fact "two fundamental conceptions" of admissibility, as opposed to the single formulation that was commonly referred to previously.[37]

Secondly, in as much as the birth, on 7 December 1986, and the subsequent surgical separation of Mpho le Mphonyana were prone to a myriad of complications, neither of the two formulations of the admissibility rule are perfect. Mpho suffered a degree of brain damage, since her head was conjoined to the head of Mphonyana, and she was partially paralysed on the left side of her body, whereas Mphonyana had to remain in intensive care for several months after the surgical separation.[38] However, in both of these two analogous cases, one member of the pair typically is weakened by a greater degree of associated complications. Mphonyana (meaning "small gift" in Setswana), similar to Nicholine Nthene, who suffered from spina bifida and died soon after the separation, was physically smaller and weaker than Mpho from birth.[39] She also experienced significant blood loss and went into cardiac arrest during the surgical separation. Of Thayer's "two fundamental conceptions" of admissibility, the comparably weaker variant is the one that is framed in positive terms, as providing for the admission of evidence. The reasons for this will be given in full in the next section of this article, but it suffices to note at this point that the positive formulation, which is comparable to Mphonyana in our analogy, is in many respects inconsistent with established Evidence doctrine. Thayer summarized this variant of the admissibility criterion as providing that "unless excluded by some rule or principle of law, all that is logically probative is admissible".[40] This "Mphonyana" version was not only preferred by Stephen,[41] but similar versions of it are preferred in jurisdictions such as Uganda, Malawi, Tanzania and Nigeria.[42] Regarding the alternative "Mpho" (negative) version of the admissibility rule, Thayer said that "[t]here is a principle … which forbids receiving anything irrelevant, not logically probative".[43] Kenya, South Africa, Zimbabwe and Namibia are examples of some of the jurisdictions in Africa that have framed their admissibility rule in similar negative terms.[44]

Thirdly, the phrase "two sides of the same coin" has been used by both Evidence scholars and public health commentators respectively, to describe the negative and positive formulations of the admissibility rule and the surgical separation of Mpho le Mphonyana at a hospital that otherwise operated under deplorable conditions at the time.[45] The international acclaim that the Chris Hani Baragwanath Hospital received for the world-class surgical separation of Mpho le Mphonyana was in sharp contrast to the fact that this event occurred in a bleak period of South African history when the millions of black people that the hospital was specifically built to serve

36 The *Ordinance for Altering, Amending and Declaring in Certain Respects the Law of Evidence within this Colony* no 72 of 1 March 1830, in the Cape colony (currently in South Africa), is one of the earlier colonial Evidence statutes in Africa: *R v Gumede* [1942] AD 398 at 412.

37 JB Thayer *A Preliminary Treatise on Evidence at the Common Law* (1898, Little, Brown) at 264.

38 Horwitz *Baragwanath Hospital*, above at note 35 at 171.

39 Id at 165–66.

40 Thayer *A Preliminary Treatise*, above at note 37 at 265.

41 Stephen *A Digest*, above at note 32 at art 2; Indian Evidence Act 1875, sec 5.

42 Evidence Act (cap 6 of the Laws of the Republic of Uganda, 1909), sec 4; Criminal Procedure and Evidence Code (cap 8:01 of the Laws of the Republic of Malawi, 1968), sec 171(1); Evidence Act (cap 6 of the Laws of the United Republic of Tanzania, revised 2019), sec 7; Evidence Act (cap 112 of the Laws of the Federation of Nigeria, 2011), secs 1–3.

43 Thayer *A Preliminary Treatise*, above at note 37 at 264–65.

44 Evidence Act (cap 80 of the Laws of the Republic of Kenya, 1963), sec 5; Civil Proceedings Evidence Act 25 of 1965, sec 2 and Criminal Procedure Act 71 of 1977, sec 210, in South Africa; Criminal Procedure and Evidence Act (cap 9:07 of the Laws of the Republic of Zimbabwe, 1927), sec 252 and Civil Evidence Act (cap 9:07 of the Laws of the Republic of Zimbabwe, 1992), sec 26. Namibia's Evidence statutes are virtually identical, for historical colonial reasons, to those of South Africa.

45 DT Zeffertt and AP Paizes *The South African Law of Evidence* (3rd ed, 2017, LexisNexis) 101; Horwitz *Baragwanath Hospital*, above at note 35 at 191.

https://doi.org/10.1017/S0021855323000207 Published online by Cambridge University Press

were under apartheid domination.[46] Furthermore, the meagre resources that were distributed to the hospital and the resultant deplorable conditions in which care was generally provided led a group of 101 doctors to write an open letter to the government in protest.[47] The reference to the "two sides of the same coin" metaphor is rendered doubtful by this very stark contrast. In light of this, the metaphor of two *different* coins is likely to be more accurate. The relationship between Thayer's "two fundamental conceptions" is also shrouded in doubt. It is not entirely clear why the statutory drafting preferences of African jurisdictions are polarized between the negative (Zimbabwe, Namibia, Kenya and South Africa) and positive (Nigeria, Malawi, Uganda and Tanzania) formulations. It will be argued in the next section that these formulations are neither textual nor functional equivalents, and that a choice of one over the other cannot be made on arbitrary grounds.

Clause 2.1 of the draft code prepared by Allen for Tanzania includes both positive and negative formulations, namely: "All evidence relevant to a material proposition is admissible unless otherwise provided by this Act or by Law. Irrelevant evidence is not admissible."[48] However, although the drafting note left by Allen and his team does not explain the reasons for this particular choice, this proposed formulation appears to be consistent with the current version of the Tanzanian admissibility criterion, which provides that "[s]ubject to the provisions of any other law, evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue, and of such other facts as are hereinafter declared to be relevant, and of no others".[49] Allen's proposal, without a supporting explanation, to reconnect these *Mpho le Mphonyana* formulations after they had been historically separated in Evidence scholarship is likely only to raise more questions than answers to the many complications associated with the admissibility rule in general.

Eight fallacies

A fallacy is an argument that appears to be valid, but is in fact not.[50] It is a logically deceptive string of reasoning that does not rise beyond the level of mere "surface plausibility".[51] The term is traceable back to Aristotle, who added his appendix, *De Sophisticis Elenchis* ("Sophistical Refutations)", to the *Topics* in response to the profiteering Sophists, particularly Gorgias and Protagoras, who made money from teaching people how to deploy deceptive rhetorical techniques.[52] The term fallacy is deployed here to describe the myriad of untenable ways in which the admissibility rule has been described in African Evidence scholarship and doctrine. These descriptions merely give the appearance of logical and doctrinal validity, but this section of the article will show how untenable each of them is. The core of this logical deceptiveness stems from the assumption that the *Mpho le*

46 Not only was the surgical separation reported on Russian and Chinese television broadcasts, but the hospital received between 2,000 and 3,000 visitors per year from across the world during this period; see id at 172–73.

47 D Blumsohn et al "Conditions at Baragwanath Hospital" (1987) 72 *South African Medical Journal* 361 at 361; KRL Huddle "Personal view – Reflections of a retiree: 40 years in public service at Chris Hani Baragwanath Academic Hospital" (2015) *South African Medical Journal* 446; *Administrator of the Transvaal v Traub* [1989] 4 All SA 924 at 2–3; Horwitz *Baragwanath Hospital*, above at note 35 at 178: "By this time the ratio of nurses to patients was 1:75 at Baragwanath, 1:66 at Pretoria's HF Verwoerd Hospital and 1:75 at the Johannesburg General Hospital."

48 Allen "Proposed final draft", above at note 17 at 26.

49 Evidence Act (Tanzania), above at note 42, sec 7.

50 FH van Emeren et al *Fundamentals of Argumentation Theory: A Handbook of Historical Backgrounds and Contemporary Developments* (1996, Lawrence Erlbaum Associates) at 21.

51 D Walton *The New Dialectic: Conversational Contexts of Argument* (1998, Toronto University Press) at 15; J Woods and D Walton *Argument: The Logic of the Fallacies* (1982, McGraw-Hill Ryerson) at 1; D Kelly *The Art of Reasoning: An Introduction to Logic and Critical Thinking* (4th ed, 1988, WW Norton & Company) at 103.

52 Aristotle *De Sophisticis Elenchis* (ed and trans ES Forster, 1955, Harvard University Press) at 13 and 15; CL Hamblin *Fallacies* (1970, Vale Press) 51 and 55; J Bentham *The Handbook of Political Fallacies* (rev and ed H Larrabee, 1962, John Hopkins Press) at 3; M Meyer "Foreword: The Modernity of Rhetoric" in M Meyer (ed) *From Metaphysics to Rhetoric* (1989, Kluwer) 1 at 1; DA Schum *The Evidential Foundations of Probabilistic Reasoning* (1994, Wiley) at 22–23; W Kneale and M Kneale *The Development of Logic* (1962, Clarendon) at 23–24.

https://doi.org/10.1017/S0021855323000207 Published online by Cambridge University Press

Mphonyana versions of the admissibility rule are equivalents, or "two sides of the same coin". The main aim of revealing these fallacies is ultimately to suggest that African legislators across the continent should be wary of the fundamental differences between the *Mpho le Mphonyana* formulations, and to carefully avoid preferring one formulation over another on arbitrary grounds. The next section will then conclude this analysis by summarizing what is left of the law of admissibility in Africa if some of criticisms levelled here are found to have some merit. This concluding summation of the general rules of admissibility in Africa draws from the work of Wigmore and argues that this is a useful base on which African jurisdictions can build in the overall development of the Law of Evidence in Africa.

Fallacy #1: Equivalence

References to the *Mpho le Mphonyana* formulations of admissibility as being "two sides of the same coin"[53] or that they comprise "one foundational rule" that can be "stated in two different ways"[54] rest on an untenable assumption of equivalence that may explain why the prevalence of varying admissibility formulations across the continent has hardly been questioned before. A similar binary of equivalence is latent in the comment by Tobi J of the Nigerian Supreme Court that "[a] document is admissible in evidence if it is relevant to the facts in issue and admissible in law. The converse position is also the law, and it is that a document which is irrelevant to the facts in issue is not admissible."[55] According to Bellengère et al, "[t]he positive form is the position in terms of the common law, while the negative expression is found in statutes".[56] Not only is legislative form or location a superficial way to differentiate rules or doctrinal formulations, but this characterization once again assumes the existence of a measure of substantive equivalence between the *Mpho le Mphonyana* formulations. In fact, these formulations are two very different legal constructs with distinguishable legal implications. The one, the Mpho (negative) version, is an inflexible prohibitive rule of law, whereas the other, the Mphonyana (positive) variant, is a precept or principle that is subject to a countless number of exceptions. For example, when section 210 of South Africa's Criminal Procedure Act 71 of 1977 provides that "[n]o evidence as to any fact, matter or thing which is irrelevant or immaterial and cannot conduce to prove or disprove any point or fact in issue shall be admissible", there are no exceptions at all to this rule.[57] If evidence is found to be irrelevant, it must *ex lege* be excluded. The Mphonyana version places no such obligation on African fact-finders either to admit or exclude evidence. For example, section 171(1) of the Malawi Criminal Procedure and Evidence Code of 1968 provides that "[s]ubject to any other law, evidence may be given in any proceeding of the existence or non-existence of every fact in issue, and of such other facts as are hereinafter declared to be relevant, and of no others".[58]

These two *Mpho le Mphonyana* formulations clearly are neither textual nor functional equivalents, and to assume otherwise without providing any reasons is fallacious, as specifically defined in this article. There are at least three distinguishing features that are pertinent to consider here. Firstly, there is a higher risk of a breach of the rule of law, on the grounds of which statutory

53 Zeffertt and Paizes *South African Law*, above at note 45 at 247.

54 A Bellengère et al *The Law of Evidence in South Africa* (2nd ed, 2019, Oxford University Press) at 54.

55 *Musa Abubaker v EI Chuks* [2007] NGSC 168.

56 Bellengère et al *The Law of Evidence*, above at note 54 at 25.

57 For similar formulations, see Evidence Act (Kenya), above at note 44, sec 5; Criminal Procedure and Evidence Act (Zimbabwe), above at note 44, sec 252; Civil Evidence Act (Zimbabwe), above at note 44, sec 26.

58 Criminal Procedure and Evidence Code (Malawi), above at note 42, sec 171(1). For similar formulations, see Evidence Act (Tanzania), above at note 42, sec 7; Evidence Act (Uganda), above at note 42, sec 4; Evidence Act (Nigeria), above at note 42, sec 1.

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provisions can be challenged as being too vague to be accessible,[59] with the Mphonyana (positive) version of the admissibility rule, as distinguishable from the Mpho (negative) version. For example, the Mphonyana version of the rule in Nigeria is that "[e]vidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereafter declared to be relevant, and of no others".[60] However, as recognized by Thayer over a century ago, "there are many exceptions" to this rule.[61] It is for this reason that the following caveat is added to the Nigerian rule: "For the avoidance of doubt, all evidence given in accordance with section 1 shall, unless excluded in accordance with this or any other Act, or any other legislation validly in force in Nigeria, be admissible in judicial proceedings to which this Act applies."[62] In order to avoid the risk of being in breach of the rule of law, particularly the injunction against vague legislative provisions, these exceptions may need to be provided for in the Nigerian statute as well. Notwithstanding the provision for exclusionary rules in respect of hearsay evidence, opinions and disposition character evidence[63] (all of which in turn have their own further exceptions), the implication in section 1 that some exceptions may be contained in "any other Act" or "any other legislation validly in force in Nigeria" is difficult to reconcile with the anti-vagueness requirements of the rule of law.

Secondly, the rules pertaining to burdens of proof also distinguish the *Mpho le Mphonyana* versions of the admissibility rule.[64] The formulation of the admissibility rule in the negative (Mpho) version places the burden of proof on the litigant adducing the evidence, whereas the positive (Mphonyana) version burdens the party opposing the admission of the evidence.[65] The decision regarding the party on whom the burden of proof should be placed is an institutional one made on policy grounds. Decisions about which of the two formulations to adopt may vary across African legislators, depending on institutional context, but they certainly cannot be made on the fallacious assumption of equivalence, as defined in this article.

The third distinguishing feature is a historical one, pertaining to the tradition of common law Evidence scholarship to which most Nubian African jurisdictions with British colonial heritage typically lay claim. According to Zeffertt and Paizes, it is to the "Rationalist Tradition of Evidence scholarship",[66] encompassing mainly the work of Evidence scholars from the period from Geoffrey Gilbert[67] to John Henry Wigmore,[68] "that South African evidence scholarship belongs".[69] Under this tradition, relevance is a matter of "reason and general experience"[70] and thus "the law has no mandamus to the logical faculty".[71] The absence of strict reasoning rules for conducting relevancy assessments and the reliance on common sense are inevitable consequences of having lay jury

59 See *President of the Republic of South Africa v Hugo* [1997] (4) SA 1 (CC) 102, applied in *Du Toit v Minister of Safety and Security* [2009] (6) SA 128 (CC) 139A ("The rule of law requires accessibility, precision and general application of the law").

60 Evidence Act (Nigeria), above at note 42, sec 1.

61 Thayer *A Preliminary Treatise*, above at note 37 at 265.

62 Evidence Act (Nigeria), above at note 42, sec 1.

63 Id, secs 38, 67 and 77–78.

64 The burdens being referred to here pertain to the interlocutory procedure (trial within a trial) within which contested admissibility proceedings are typically heard. Within this interlocutory context, any of the parties that wishes to adduce evidence would be the applicant, and the opposing party would be the respondent.

65 See *S v Gama* [2013] ZASCA 132 at 13.

66 W Twining *Theories of Evidence: Bentham and Wigmore* (1985, Stanford University Press) at 16; W Twining *Rethinking Evidence: Exploratory Essays* (1994, Northwestern University Press) at 185; P Tillers "Introduction" (1986) 66/3 *Boston University Law Review* 381 at 383.

67 G Gilbert *The Law of Evidence* (1754, Garland Publishers).

68 JH Wigmore *A Treatise on the System of Evidence in Trials at Common Law* (vols 1–4, 1905, Little, Brown and Company).

69 Zeffertt and Paizes *South African Law*, above at note 45 at 33.

70 JB Thayer "Law and logic" (1900) 14/2 *Harvard Law Review* 139 at 141.

71 Thayer *A Preliminary Treatise*, above at note 37 at 313–14.

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fact-finders in common law jurisdictions such as England and Wales and the United States. While Nubian African jurisdictions that have preferred the Mpho (negative) formulation of the admissibility rule have remained consistent with this tradition by not providing for statutory forms of relevant evidence,[72] the evidence statutes of other jurisdictions, such as Kenya, Nigeria, Malawi, Tanzania and Uganda, contain several provisions that stipulate the kinds of evidence that *ex lege* must be taken to be relevant, irrespective of the circumstances.[73]

Fallacy #2: Argumentum ad ignorantiam

The second fallacy is prevalent mostly in Nubian African jurisdictions that use the Mpho (negative) version of the admissibility rule. Evidence that cannot "prove or disprove" a *factum probandum* is always inadmissible.[74] This binary is hardly ever explained in any great detail by scholars and fact-finders across the continent, but its potential for ambiguity warrants addressing here. There are two possible interpretations of "disproving" that may be intended here. One of them is plausible but needs some explication, while the other, in my view, is a symptom of the fallacy of arguing from ignorance (*argumentum ad ignorantiam*). The second of these entails showing that the *factum probandum* has not been established (the "beta interpretation"), whereas the first means establishing the (factual) opposite of the *factum probandum* (the "alpha interpretation"). The beta interpretation is superfluous and / or fallacious for two reasons: firstly, the preceding phrase, "evidence that cannot prove", already covers instances where there is a failure to establish a *factum probandum*. Secondly, requiring a litigant to prove a negative in this strong sense will only lead to the logical fallacy of proving a negative (for example, that the sun did *not* rise this morning).[75] The following analogy may help illustrate this point:[76] let us assume that a book has gone missing in either one of two rooms occupied by X and Y respectively. X can prove that the book is not in his room by showing that it is in fact in Y's room, and Y can, alternatively (that is, if it has not been shown by X that the book is in Y's room), do the same by showing that the book is in X's room. However, without this move, neither X nor Y can prove that the book is *not* in their respective rooms. The best they can say in this regard is that each of them has looked thoroughly in their respective rooms and the book cannot be found. However, to infer the absence of the book from the fact, without more, that neither X nor Y could find it in their rooms would be committing the fallacy of *argumentum ad ignorantiam*.[77]

The fallacy in the beta interpretation lies in the fact that the litigant would be asking the fact-finder to infer from the absence of sufficiently probative evidence that a *factum probandum* has not been established. The basic form of this type of argument from ignorance is "~Kap. Therefore, ~p"[78] (the agent does not know that *p* is true, therefore *p* has not been established).

72 *S v Mpumlo* [1986] (3) SA 485 (E) 487H: "Nowhere in either of these Acts however, or elsewhere, do I find any provision which seeks to define what categories of evidence are admissible."

73 See Evidence Act (Kenya), above at note 44, secs 6–16; Evidence Act (Nigeria), above at note 42, secs 4–13; Criminal Procedure and Evidence Code (Malawi), above at note 42, secs 171(2)–(4); Evidence Act (Tanzania), above at note 42, secs 8–18; Evidence Act (Uganda), above at note 42, secs 5–15.

74 See Civil Proceedings Evidence Act (South Africa), above at note 44, sec 2; Criminal Procedure Act (South Africa), above at note 44, sec 210; Criminal Procedure and Evidence Act (Zimbabwe), above at note 44, sec 252; Civil Evidence Act (Zimbabwe), above at note 44, sec 26.

75 A De Morgan *Formal Logic or the Calculus of Inference, Necessary and Probable* (1847, Cambridge University Press) at 260–61.

76 The original version of this analogy was developed by De Morgan, id at 261–62.

77 A similar example of an argument from ignorance would be arguing that because one cannot hear (from inside a house) any raindrops on one's roof, therefore (without more) it is not raining outside; see DN Walton *Arguments from Ignorance* (1996, Penn State University Press).

78 JH Woods and DN Walton "The fallacy 'ad ignorantiam'" (1978) 32/2 *Dialectica* 87 at 92. Woods and Walton point out that "[t]ypical examples of *ad ignorantiam* have to do with ghosts, telepathy or other psychic phenomena, or religious

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The alpha interpretation not only avoids this fallacious pitfall, but is also consistent with established Evidence doctrine.[79] On this interpretation, both parties in legal proceedings are regarded as having to "prove" (as opposed to "disprove") their respective cases. The party opposing the admissibility of the evidence can still prove their case, but this would not be through attempting to establish that the evidence cannot establish the *factum probandum* concerned (the beta interpretation).[80] Rather, this would be by establishing the (factual) opposite of the *factum probandum* (the alpha interpretation).[81] This latter interpretation was adopted in *Falke v Billiri Local Government Council*, where the Billiri local government was required to prove its defence that it had acquired the land known as Yola Popandi Kulgul as a grazing reserve in 1963.[82] The court interpreted the balance of the burdens of proof between the parties in this way, notwithstanding that the suit was brought by Ahmadu Falke, on behalf of the members of the Sarkin Baka family.

Fallacy #3: Ontological

The requirement that evidence establish the "existence or non-existence" of a *factum probandum* is common across Nubian African jurisdictions that use the Mphonyana (positive) formulations of the admissibility rule.[83] However, it is rarely explained what it means for a *factum probandum* to exist. To the extent that the pertinent statutes across the continent refer to "non-existence", requiring litigants to establish this is likely to plunge them into the danger of the *argumentum ad ignorantiam* fallacy (proving a negative) referred to earlier. In particular, it does not appear to me to be possible to prove the "non-existence" of something. A better interpretation is to understand every party, including opponents, as having to prove something, in the positive sense. Nothing more will be said about this in this section, and the balance of the discussion will focus on the "existence" aspect of the admissibility rule. Quite apart from the absence of an explanation as to the meaning of this concept, there is also a risk of materially divergent interpretations emerging that have significant implications. This was the case, for example, in *S v Bennet* in Zimbabwe, with the result that the testimony of a witness was held to be relevant and admissible when in fact it was not. The

argumentation, all contexts where questions regarding verifiability, testability-in-principle of hypotheses, naturally arise"; id at 96. See also D Walton "The appeal to ignorance, or argumentum ad ignorantiam" (1999) 13 *Argumentation* 367 at 368; Hamblin *Fallacies*, above at note 52 at 43; D Walton *Informal Logic: A Handbook for Critical Argumentation* (1989, Cambridge University Press) at 43–44; IM Copi et al *Introduction to Logic* (14th ed, 2014, Routledge) at 131. Cf E Sober "Absence of evidence and evidence of absence: Evidential transitivity in connection with fossils, fishing, fine-tuning and firing squads" (2009) 143 *Philosophical Studies* 63.

79 Any party raising a special defence or objection against the admissibility of evidence generally bears the duty to prove this defence by laying out the appropriate factual basis for this (see *Falke v Billiri Local Government Council* [2016] NGCA 34; *Pillay v Krishna* [1946] AD 946 at 953). The risk of not doing this is that the adducer's prima facie case for admissibility may be accepted, depending on the overall circumstances, as being final; see *Ex parte Minister of Justice: In re: R v Jacbson and Levy* [1931] AD 466 at 478–79.

80 A caveat worth noting here is that some kinds of arguments from ignorance can be certain reasonable, defined circumstances when epistemic closure can be achieved. However, these particular debates are beyond the scope of this article. See generally B de Cornulier "'Knowing whether', 'knowing who', and epistemic closure" in M Meyer (ed) *Questions and Questioning* (1988, De Gruyter) 182; D Walton "Nonfallacious arguments from ignorance" (1992) 29/4 *American Philosophical Quarterly* 381; Copi *Introduction*, above at note 78 at 132.

81 DN Walton *Arguments*, above at note 77 at 17: "De Morgan does not see the *argumentum ad ignorantiam* as a fallacy, but as a commonly used type of argument that can – under the right conditions – be quite reasonable."

82 *Falke v Billiri*, above at note 79.

83 For Mphonyana versions of the rule, see Evidence Act (Tanzania), above at note 42, sec 7. For similar formulations, see Evidence Act (Uganda), above at note 42, sec 4; Criminal Procedure and Evidence Code (Malawi), above at note 42, sec 171(1); Evidence Act (Nigeria), above at note 42, sec 1. For the Mpho versions, see Evidence Act (Kenya), above at note 44, sec 5; Criminal Procedure and Evidence Act (Zimbabwe), above at note 44, sec 252; Civil Evidence Act (Zimbabwe), above at note 44, sec 26. Cf Stephen *A Digest*, above at note 32 at art 1, where the "existence or non-existence" phrase is invoked in defining the meaning of relevance. Stephen's definition of relevance is cited widely and regularly across the continent (for example, see *R v Katz* [1946] AD 71 at 78).

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Treasurer-General of the Movement for Democratic Change, Roy Bennet, was accused of conspiring with a firearms dealer, Peter M. Hitschmann, to destroy a state telecommunications tower (the "microwave link") in Mashonaland East, Goromonzi District, with the broader intention of deposing the ZANU-PF government in Zimbabwe.[84] The state argued that the testimony of Forgive Munyuki, who was employed by Tel One and had over twenty years of general telecommunications experience, was relevant to establishing "the significance of the microwave link … and the effects of its destruction".[85] The defence objected to this on the ground that this evidence was completely irrelevant. Notwithstanding that this witness was not in charge of or responsible for the specific microwave link in dispute, and that his experience was fairly general, the Harare High Court ultimately found that this evidence was relevant to establishing the "existence or otherwise of the microwave link" and "its purpose and function".[86] "It follows as a matter of irresistible inference and logical deduction," according to Bhunu J, "that if the microwave link had been destroyed, it could no longer perform the function for which it was erected."[87] Not only did the court frame the issue in an obscure way here,[88] but the ultimate ruling on admissibility was also incorrect.

There is much that could be said about this reasoning, and some of it is beyond the limited scope of this article, but the source of what is disagreeable in my view pertains to the court's conception of the meaning of the "existence" of the relevant *factum probandum*. The first question to be addressed in this regard is in respect of which fact was "existence" required to be established; according to Bhunu J, it was the "existence or otherwise" of the microwave link, as indicated earlier. Section 252 of the Criminal Procedure and Evidence Act of Zimbabwe refers to the "existence or non-existence" of a "fact in issue", and not to any or all facts before the Court.[89] The existence of the microwave link is not one of the *facta probanda* of a charge of conspiracy to commit acts of terrorism or sabotage with a common purpose to depose the government of Zimbabwe. The second point to note is that "existence" is not meant in any strong or orthodox ontological sense in the Law of Evidence.[90] Evidential facts are "jumbled mixture[s] of matters of unequal ontological status with an unequal degree of accessibility to our cognitive apparatus".[91] However, notwithstanding this variation, we can at least exclude the possibility that the meaning of "existence" implies that the kinds of *facta probanda* that litigants are required to establish are limited to physical structures such as microwave links, because "the state of a [person's] mind is as much a fact as the state of [their] digestion".[92] The *facta probanda* in *S v Bennet* ought to have pertained mainly towards the existence of an agreement (conspiracy) to destroy the microwave link and ultimately to overthrow the government. The defence correctly argued that the testimony about the existence or otherwise of the microwave link and its significance and purpose from a disinterested third party (Forgive Munyuki) was irrelevant to establishing the alleged conspiracy between Bennet and Hitschmann. The court rejected this argument on the ground that it understood the defence to be arguing that the state was required to follow a strict sequence in calling its witnesses, and in this case to adduce testimony on the conspiracy first and then on the existence and significance

84 *S v Bennet* [2010] ZWHHC 46 at 1.
85 Ibid.
86 Id at 2.
87 Id at 2–3.
88 Id at 1: "The crisp issue for determination is therefore whether or not the destruction or disablement of the microwave link is relevant to the determination of this case."
89 Criminal Procedure and Evidence Act (Zimbabwe), above at note 44, sec 252. Cf Civil Evidence Act (Zimbabwe), above at note 44, sec 26.
90 See generally P van Inwagen and DW Zimmerman "Introduction: What is metaphysics?" in P van Inwagen and DW Zimmerman (eds) *Metaphysics: The Big Questions* (2008, Blackwell) 1 at 7.
91 MR Damaška "Truth in adjudication" (1998) 49 *Hastings Law Journal* 289 at 299; P Tillers "The value of evidence in law" (1988) 39/2 *Northern Ireland Legal Quarterly* 167 at 175.
92 *Edgington v Fitzmaurice* [1885] 29 Ch D 459 at 483.

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of the microwave link.[93] Without commenting on the manner in which the defence presented its argument in this regard, it suffices to note that the ambiguity of the reference to "existence or non-existence" in the admissibility rule ultimately contributed towards the erroneous admission of irrelevant evidence, which *ex lege* is prohibited.

Fallacy #4: Conjunction

The point that evidence that is "inadmissible for [one] purpose may be admissible for another purpose" is well made and generally consistent with evidential fact-finding across the continent.[94] Kruger gives the example that the evidence of an eyewitness may be relevant towards establishing the *identity* of the person that possessed the murder weapon shortly before (or after) the fatal incident, but this testimony would not establish that the said person fired the weapon and *killed* the deceased.[95] On this analysis, the identity of the possessor of the firearm would be what some scholars refer to as a "fact relevant to a *factum probandum*",[96] whereas the orthodox elements of murder (for example, conduct, intention, unlawfulness, capacity and causation) would be the *facta probanda*, depending on which of them is disputed by the accused or defendant. It is also on a similar basis that Zeffertt and Paizes distinguish between "direct" and "circumstantial" evidence by asserting that the former involves the drawing of one basic inference, whereas the latter involves drawing more than one inference in establishing the pertinent *facta probanda*.[97] The rationale for these attempts to widen the scope of relevancy is based on those common instances where evidence "does not directly prove or controvert a point in dispute *but tends to do so*".[98]

This article does not take issue with the rationale for widening the scope of relevance in this way. However, the manner in which some jurisdictions that have deployed the Mpho (negative) version have embarked upon this in their admissibility rules is ambiguous and may give rise to the fallacy of conjunction. The rule in Zimbabwe is that "[e]vidence that is irrelevant or immaterial *and* cannot lead to the proving or disproving of any point or fact in issue shall not be admissible".[99] If irrelevant evidence is *ex lege* inadmissible, then not only is everything in this section after the word "irrelevant" superfluous, but the usage of the word "and" would be a false conjunction.[100] This is because it does not seem to be possible to have evidence that can "lead to the proving … of any … fact in issue" yet is irrelevant (or vice versa). For example, if the evidence in *S v Brown*, regarding the information contained in a phone that was picked up from the crime scene, was found to be irrelevant in proving the elements of the crimes of murder and attempted murder, it would be *ex lege* inadmissible.[101] An alternate finding that such evidence was nevertheless relevant towards establishing the identity of the shooter would be superfluous and a contradiction in terms.[102]

93 *Bennet*, above at note 84 at 1–2.

94 *Enemchukwu v Okoye* [2016] NGCA 105.

95 A Kruger *Hiemstra's Criminal Procedure* (2020, LexisNexis), chap 24, sec 210.

96 PJ Schwikkard and SE van der Merwe *Principles of Evidence* (4th ed, 2015, Juta) at 19–20.

97 Zeffertt and Paizes *South African Law*, above at note 45 at 101.

98 Kruger *Hiemstra's*, above at note 95 at chap 24, sec 210. My emphasis.

99 Civil Evidence Act (Zimbabwe), above at note 44, sec 26; Criminal Procedure and Evidence Act (Zimbabwe), above at note 44, sec 252; Civil Proceedings Evidence Act (South Africa), above at note 44, sec 2; Criminal Procedure Act (South Africa), above at note 44, sec 210. My emphasis.

100 DP van der Merwe "Evidence" in *Law of South Africa* (vol 18, 3rd ed, 2015, LexisNexis) at 107 ("irrelevant evidence is excluded as a matter of law"); *National Director of Public Prosecutions v Zuma* [2009] (1) SACR 361 (SCA), para 23 ("Inadmissible evidence is by its very nature irrelevant"); *Musa Abubaker*, above at note 55 ("If the document is irrelevant, it is rejected with little or no ado"); *Bennet*, above at note 84 at 1.

101 See *S v Brown* [2016] (1) SACR 206 (WCC) at 219B. The court ultimately came to a different conclusion, but the facts and arguments of this case are cited here for illustrative purposes.

102 For the prosecution's argument on admissibility, see id at 210A–B.

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Fallacy #5: Disjunction

Disjunction, typically expressed through the "v" sign in formal logic (for example, *p* v *q*), implies a statement that is valid on the basis of either portion of it that falls before or after the "v" sign, which is roughly translated to mean "or".[103] Therefore, in those jurisdictions such as South Africa that use the Mpho (negative) version of the admissibility rule, evidence that is "irrelevant" is as inadmissible as is evidence that is "immaterial".[104] The fallacy would pertain here if these two concepts were mixed up. In other words, this would be the case in the event that it is conceived that it is possible for evidence to be relevant but immaterial, or irrelevant yet material. In *S v Mayo*, the court ruled that a police pocketbook relied upon by an investigating officer to recall the events surrounding the alleged commission of the crime in question was "irrelevant" towards the credibility of the testifying police officer because "it has not anywhere been suggested that the witness [viz. the investigating officer] has said anything which will be contradicted by accused No 1, insofar as the content of his pocket book is concerned".[105] If a witness is unable to independently recall certain events without relying on a written record, evidence of the contents of this record will always be relevant towards establishing the witness's credibility. Therefore, it appears that what Jones J in *S v Mayo* may have had in mind is the term "materiality", as opposed to "relevance", if his ruling was based on the fact that the credibility of the witness had not been challenged by the accused. According to Montrose, "materiality" pertains to whether the evidence being adduced is targeted towards one or more of the issues in dispute, as opposed to issues that are not before the court.[106] The disputed issues are generally defined by the pleadings, particularly the specific allegations that the accused or defendant denies. In summary, the purported disjunction between "relevance" and "materiality" is far too ambiguous to avoid the potential fallacious pitfalls of either mixing up these two concepts or to presume that a simultaneous logical disjunction between them is possible.

Fallacy #6: Tautology

An attempt similar to that discussed earlier under the fallacy of conjunction has been made to widen the scope of the admissibility rule by reference to "any fact, matter or thing" in jurisdictions that use the Mpho (negative) version of the rule.[107] Not only is the term "evidence" sufficiently broad to include mere "information", and not necessarily "proven" or "admitted" evidence,[108] but Hage has given an expansive definition of "facts" that includes at least seven different variants.[109] The usage of either of these terms, without more, therefore, is a sufficient substitute for the otherwise tautological reference to "any fact, matter or thing".

Fallacy #7: Legal relevance

It has also become common, probably owing to Wigmore, to use the term "legal relevance" as a somewhat ambiguous synonym of "admissibility". According to Wigmore,

103 IM Copi *Introduction*, above at note 78 at 250–51.

104 Civil Proceedings Evidence Act (South Africa), above at note 44, sec 2; Criminal Procedure Act (South Africa), above at note 44, sec 210.

105 *S v Mayo* [1990] (1) SACR 659 (E) 662D–E.

106 D Montrose "Basic concepts of the law of evidence" (1954) 70 *Law Quarterly Review* 527 at 529.

107 Civil Proceedings Evidence Act (South Africa), above at note 44, sec 2; Criminal Procedure Act (South Africa), above at note 44, sec 210; Civil Evidence Act (Zimbabwe), above at note 44, sec 26; Criminal Procedure and Evidence Act (Zimbabwe), above at note 44, sec 252.

108 *Starr v Ramnath* [1954] (2) SA 249 (N) 253F; P Roberts and A Zuckerman *Criminal Evidence* (2nd ed, 2010, Oxford University Press) at 96: "Broadly understood as an ordinary English word, 'evidence' simply means information."

109 J Hage "Of norms" in G Bongiovanni et al (eds) *Handbook of Legal Reasoning and Argumentation* (2018, Springer) loc 3581 at loc 3839 (Kindle numbering). Legal norms are types of fact that "motivate or guide behaviour".

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> "legal relevancy denotes, first of all, something more than a minimum of probative value. Each single piece of evidence must have a plus value. This feature is seen in the form of scores of detailed rules, applying and shaping the fundamental principles of probative value, ie the rules of admissibility with reference to simple relevancy."[110]

Schreiner JA famously held that "[t]he law starts with this practical or common sense relevancy and then adds material to it or, more commonly, excludes material from it", and the result is what is typically referred to as what is "legally relevant".[111] The attempt here is to capture the idea that relevance is not the sole criterion of admissibility.[112] However, the ambiguity of developing a new term called "legal relevance" has led to some even describing relevance as a "question of mixed fact and law".[113] This is in stark contradiction to established Evidence doctrine, particularly Thayer's comments that relevance is entirely a matter of "reason and common experience" and that "the law has no mandamus to the logical faculty".[114] The term "legal relevance" does not appear to perform any other function that is not already performed by the concept of "admissibility".

Fallacy #8: The institutional

For historical institutional reasons relating to the functional distinction between judges and juries, common law Evidence doctrine has always distinguished between the rules of admissibility and those of evaluation. The *Mpho le Mphonyana* versions of the statutory provisions that are the focus of this article pertain entirely to admissibility and not evaluation. However, considerations of aspects such as the credibility and competence of witnesses in determining the admissibility of evidence have given rise to what is referred to here as the institutional fallacy. For example, while Mlyambina J admits that "the strength of evidence is not [a] prerequisite condition on admissibility of evidence", he also says that the admissibility of evidence in Tanzania "requires the court to consider three factors; one, relevance of evidence; two, authenticity or credibility of evidence; and three, competence of evidence".[115] This is a contradiction in terms, because considering the credibility of a witness by definition involves evaluating the weight of such evidence. Another symptom of the commission of this institutional fallacy is the interpretation of relevance to mean that "the best evidence", and in that case, "the original of the document is best", is required.[116] It would be improper to exclude a document simply because it is not an "original", especially in cases where there is a plausible explanation why the original is not available. The better approach, in my view, would be to admit the document, if it is relevant, and then to allocate the appropriate degree of probative weight depending on its reliability. Tobi J of the Nigerian Supreme Court went further to hold that the manner in which evidence is obtained is not pertinent at all to the admissibility enquiry.[117] This probably is an over-stretched interpretation of the admissibility rule, especially taking into account

110 JH Wigmore *Evidence in Trials at Common* (vol 1A, rev P Tillers, 1983, Little, Brown and Company) at 969. According to Tillers, this idea has been generally rejected by US courts and observers: "Most courts and observers today disapprove of Wigmore's claim that legally relevant evidence must have some 'plus value', and they repudiate the notion of legal relevancy insofar as that notion implies the 'plus value' requirement. These courts and observers favor the minimalist version of relevancy, sometimes called 'logical relevancy' … under which evidence having any probative value, however slight, is admissible unless there is a specific reason for exclusion"; id at 969 n2.

111 *R v Matthews* [1960] (1) SA 752 (A) 758, [1960] 1 All SA 568 (A) 572; *S v Letsoko* [1964] (4) SA 768 (A) 775A; *S v Nduna* [2011] 2 All SA 177 (SCA) 18; PJ Maartens and PJ Schwikkard "A juriless jurisdiction and the epistemic rules of evidence" (2011) 128/3 *South African Law Journal* 513 at 522.

112 See *Mkika v Republic* (Criminal Appeal no 47 of 2001) [2003] TZCA 2 at 10–11 and 13.

113 For example, *Meintjies v Wallachs Ltd* [1913] TPD 278 at 285.

114 Thayer "Law and logic", above at note 70 at 141; Thayer *A Preliminary Treatise*, above at note 37 at 313–14.

115 *Arusha City Council v M/S MIC (T) Ltd* (Civil Case no 45 of 2018) [2020] High Court of Tanzania 3015 at 1.

116 Id at 3.

117 *Musa Abubaker*, above at note 55; *Enemchukwu*, above at note 94 ("It is a settled position that in determining the admissibility of evidence, it is the relevance of the evidence such as a document, that is important and not how it was obtained"); *Elias v Disu* [1962] 1 All NLR 214; *S v Igbinovia* [1981] 2 SC 5.

https://doi.org/10.1017/S0021855323000207 Published online by Cambridge University Press

instances where evidence is obtained in breach of certain constitutional rights, but the more benign point is that considerations of the credibility of witnesses in the context of admissibility determinations are examples of the kind of institutional fallacy that elides the common law distinction between admissibility and evaluation.

A summation of admissibility in Africa

The twin decolonial practices of resistance (or "de-struction") and liberation (or "con-struction") characterize the overall methodological focus of this article.[118] The argumentative moves of critically reflecting on Africa's colonial inheritances and positively reconfiguring social institutions across the continent in advancing towards a path of liberation are germane to both African philosophy and decolonial scholarship.[119] The interrogation of the northbound-gazing features of African Evidence scholarship and the eight doctrinal fallacies discussed above are examples of the initial decolonial practice of resistance against or critical reflection on what Africa has inherited from the common law British colonial empire. I will now sum up the overall critique of Evidence scholarship in Africa as generally being northbound-gazing and will identify the potential bases for future law reform initiatives in this area.

Firstly, the continued northbound gaze of African Evidence scholarship has the effect of ignoring what is probably the most complex legal complication that has confronted most African jurisdictions since the advent of colonial conquest. What is typically referred to as "the rules of Evidence", including those pertaining to admissibility as discussed earlier, in fact only refers to what may be conceived of as "state" or "official" rules of Evidence that are separate from indigenous customary law. Pluralism of this sort has several institutional complications, including "conflicts of law", but it is generally unproblematic in theory. However, a range of serious political legitimacy concerns arise when an overwhelming majority of the population of the continent litigates in traditional courts where the state rules of Evidence discussed earlier do not find application.[120] The deployment of colonially inherited rules of Evidence in unrepresentative forums in which the majority of the African population does not litigate bears the risk of the legitimacy of these

118 T Serequeberhan "African philosophy as the practice of resistance" (2009) 4/9 *Journal of Philosophy: A Cross Disciplinary Inquiry* 44 at 46; N Dladla *Here is a Table: A Philosophical Essay on History and Race/ism* (2000, African Sun Media) at 4 ("[T]he present work will comprise both the 'de-structive' aspect of critiquing the analytic philosophical conception of racism and the constructive aspect of providing a historically grounded and critical philosophical account of racism"); T Obenga *African Philosophy* (2015, Brawtley Press) at 22 ("Afrocentricism, then, implies two things: (a) the critique of Western historicism, psychologism, and reductivism; and (b) the orientation of the African mind from its 'natural' centre in order to produce acts of consciousness, or, more correctly, of self-consciousness") and 28; SJ Ndlovu-Gatsheni *Epistemic Freedom*, above at note 1 at 3–4 ("What is projected here is epistemological decolonization as a double task of 'provincializing Europe' and 'deprovincializing Africa'").

119 Dladla, id at 2; Modiri "The aporias", above at note 2 at 159; Tella "Transforming humanities curricula", above at note 5 at 3 ("[T]he overarching theme of curriculum transformation debates is the re-awakening of indigenous knowledge, practices and languages that have been relegated to the background. It is important that Africa-centred scholarship is embraced in order to thwart the hegemony of Western episteme"); C Himonga and F Diallo "Decolonisation and teaching law in Africa with special reference to living customary law" (2017) 20 *Potshefstroom Electronic Law Journal* 1 at 3 ("Decolonisation is, furthermore, a move from a hegemonic or Eurocentric conception of law connected to legal cultures historically rooted in colonialism (and apartheid) in Africa to more inclusive legal cultures"); J Jansen *As by Fire: The End of the South African University* (2017, Tafelberg) at 158–63 (on six different meanings of decolonization).

120 It is estimated that approximately 90% of the overall population uses customary law courts; B Bwire "Integration of African customary legal concepts into modern law: Restorative justice – A Kenyan example" (2019) 9/1 *Societies* 17 at 19. Similarly, it was recorded in the 1960s that over 90% of criminal cases were tried under African customary law; see JS Read "Criminal law in the Africa of today and tomorrow" (1963) 7/1 *African Law Journal* 5 at 16. The equivalent of this demographic is estimated to be approximately 42% in South Africa; see S Mnisi-Weeks *Access to Justice and Human Security: Cultural Contradictions in Rural South Africa* (2018, Routledge) at 43–44.

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institutional practices being impugned for as long as this type of political under-representation persists.[121]

Secondly, the eight fallacies discussed earlier reveal doctrinal problems across the *Mpho le Mphonyana* variants of the admissibility rules on the continent. Therefore, there is sufficient room for reform and improvement for most jurisdictions across Nubian Africa. The solution proposed by Allen and his team in Tanzania combines the two formulations, negative (Mpho) and positive (Mphonyana): "All evidence relevant to a material proposition is admissible unless otherwise provided by this Act or by Law. Irrelevant evidence is not admissible."[122] Quite apart from the fact that the Tanzanian law reformers were engaged in the perennial northbound gaze towards the Euro-American world in seeing legal solutions, there are at least three difficulties with this proposed solution. Firstly, the qualification to the first, positive (Mphonyana), formulation of the rule, namely "unless otherwise provided by this Act or by Law", is far too vague to avoid the potential pitfalls discussed under the equivalence fallacy above, thereby risking being in breach of the anti-vagueness prohibition of the rule of law. Secondly, this vague qualification to the positive formulation does not distinguish between the exclusionary rules and other auxiliary prejudicial factors that can outweigh the relevance of evidence. Thirdly, although as currently framed, Allen may avoid the disjunction fallacy discussed earlier, the risk of fact-finders confusing "relevance" and "materiality" still remains, in my view. For example, it is not clear whether Allen would consider evidence adduced to establish *facta probanda* as well as facts relevant to the *facta probanda* as being material. It is also not clear from his drafting notes what meaning he has given to relevance or materiality.

A comprehensive articulation of a fully decolonized law of admissibility, or a Law of Evidence more generally, is beyond the scope of this article. My main aim has been to argue that there are at least eight (logical) fallacies that currently beset admissibility formulations across the continent and that this situation is unlikely to improve in the short term because much of Evidence scholarship in Africa tends to be northbound-gazing towards Europe. However, for legislators, law reformers and scholars that are interested in initiating reforms within this area of law, this article suggests that the starting point should be to consider the three requirements of admissibility as a base. These were already laid down over a century ago by Wigmore but they do not appear to have been adopted, probably owing to the colonial dominance of Stephen's model historically in statutes across the continent. They need not be adopted wholesale by African jurisdictions, but they provide a useful starting point that should be adapted, in my view, to suit the African context. At any rate, any law reform initiative that hopes to be successful may find it useful to seriously consider the correct legal position as things stand. According to Wigmore, admissibility entails a consideration of three core elements: relevance (what he refers to as "the probative value of specific facts"), "rules of auxiliary policies" (exclusionary rules) and "rules of extrinsic policies" (prejudicial factors).[123] There are numerous exclusionary rules and prejudicial factors at common law that would be impossible to include in a statute. Furthermore, the nature of the common law is also such that the continued incremental revision and / or increase of these rules by judges, as opposed to legislators, is preferred. Therefore, one of the foremost challenges for reformers in this area is to find a way of capturing these rules under a broad category that is not too vague as to be in breach of the rule of law. A discussion of the possible hypothetical models is beyond the scope of this article, but it is sufficient here to at least point out Wigmore's three building blocks as a basis for further reform for the African context.

121 See J Fenrich et al "Introduction" in J Fenrich et al (eds) *The Future of African Customary Law* (2011, Cambridge University Press) 1.

122 Clause 2.1; Allen "Proposed final draft", above at note 17 at 26.

123 Wigmore *Evidence*, above at note 110 at 688.

https://doi.org/10.1017/S0021855323000207 Published online by Cambridge University Press

Conclusion

This article has embarked upon the familiar decolonial path of methodological resistance and liberation by using the familiar local trope of *Mpho le Mphonyana* to critically reflect upon the two main variants (positive and negative) of the evidential admissibility rule across Nubian African jurisdictions. The positive and negative variants of the admissibility rule are analogous to some of the dichotomous features of the story of Mpho le Mphonyana. In particular, a common error of assuming equivalence between these two variants is made, and a successful separation is nevertheless tainted by permanent doctrinal damage in the form of the remaining seven fallacies discussed in this article. For as long as these doctrinal complications persist, the fate of these colonial inheritances is likely to be similar to that of Mpho le Mphonyana.

This article honours the memory of my grandfather and his daughter, whom he named Mpho and nicknamed "Mphonyana", and to South Africa's most famous conjoined twins, Mpho le Mphonyana, from the mid-1980s. Mphonyana died as an infant in 1991, but Mpho lived to the age of 34 despite being partially paralysed from birth on the left side of her body, and died recently, on 7 August 2021.[124]

Competing interests. None

124 Horwitz *Baragwanath Hospital*, above at note 35 at 171. See B Molosankwe "NW premier sends condolences to family of Siamese twin Mpho Mathibela" *IOL* (13 August 2021), available at: <https://www.iol.co.za/news/south-africa/north-west/nw-premier-sends-condolences-to-family-of-siamese-twin-mpho-mathibela-abefb0b1-1267-48fc-8245-c557627ad6e4> (last accessed 1 May 2023).

Cite this article: Mosaka TB (2023). *Mpho le Mphonyana*: Two Iterations of Admissibility in Africa. *Journal of African Law* **67**, 391–408. https://doi.org/10.1017/S0021855323000207