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Does the Adversarial System Truly Deliver Justice in South Africa? A Critical Analysis

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ABSTRACT

A pillar of South Africa's legal system, the adversarial system places a strong emphasis on party-driven litigation in which competing parties argue their positions before an impartial judge. Critics contend that this system may put procedural wins ahead of substantive justice, despite its intention to guarantee fairness through vigorous debate. The effectiveness of the adversarial approach in delivering justice in South Africa is critically examined in this paper, as is whether its emphasis on competitive legal strategies compromises truth-seeking and equitable outcomes. This paper critically examines whether South Africa's adversarial legal system delivers substantive justice or merely procedural fairness. Drawing on case law, comparative jurisprudence, and scholarly analysis, it explores how disparities in legal representation, procedural delays, and adversarial tactics impact truth-seeking and equitable outcomes. Using high-profile trials such as those of Senzo Meyiwa and Timothy Omotoso, the study highlights systemic flaws and proposes reforms, including judicial intervention and hybrid procedural models. The findings suggest that while the adversarial system upholds formal fairness, it often fails to meet the constitutional promise of substantive justice. The study examines important issues, including the impact of differences in legal representation, deliberate manipulation of evidence, and the system's ability to resolve systemic inequities, by examining case law, procedural dynamics, and comparative viewpoints.

Keywords: Adversarial System, Procedural Justice, Legal Representation, Inequality, Judicial Reform.

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INTRODUCTION

South Africa's legal system is fundamentally rooted in the adversarial model, a framework inherited from its colonial past and shaped by common law traditions. In this system, opposing parties, typically the prosecution and defense in criminal matters, or plaintiff and defendant in civil disputes, present their cases before a neutral judge or jury.[1] The tribunal, while impartial, plays a largely passive role, relying on the parties to investigate, prepare, and argue their cases. As Langbein explains, the adversarial process is characterized by partisan advocacy, where justice is pursued through structured legal contestation.[2] Similarly, Hoexter and Penfold describe it as a model that seeks fairness through the clash of opposing viewpoints, with the judiciary ensuring procedural regularity.[3]

[1] Philip Langbroek et al., "EditorialMethodology of Legal Research: Challenges and Opportunities," *Utrecht Law Review* 13, no. 3 (2017).
[2] J. H. Langbein, "The German Advantage in Civil Procedure," *The University of Chicago Law Review* 52, no. 4 (1985): 823–66.
[3] C. Hoexter and G. Penfold, *Administrative Law in South Africa* (Juta, 2020).

While the adversarial system is designed to uphold fairness and due process, critics argue that it often prioritizes procedural victories over substantive justice.[4] This concern is particularly acute in cases involving vulnerable witnesses, media influence, and disparities in legal resources. In such contexts, the system's reliance on party-driven litigation may inadvertently disadvantage those with limited means or diminished capacity to advocate effectively. Despite its entrenched role in South African jurisprudence, there remains a critical gap in understanding whether the adversarial model consistently delivers equitable outcomes, especially in light of evolving constitutional values and human rights norms.

This paper investigates the extent to which South Africa's adversarial system promotes or undermines substantive justice. It explores how structural features of the model affect access to justice, particularly for marginalized groups, and evaluates whether procedural fairness translates into just outcomes. To address this gap, the study draws comparative insights from jurisdictions that employ inquisitorial or hybrid systems, assessing whether alternative models offer more inclusive and responsive mechanisms for adjudication.

The analysis proceeds in four parts. First, it outlines the theoretical foundations and historical evolution of the adversarial system in South Africa. Second, it examines key critiques of the model, focusing on its impact on vulnerable witnesses, media interference, and resource asymmetries. Third, it presents comparative perspectives from inquisitorial and hybrid jurisdictions, including selected European and Latin American systems. Finally, the paper evaluates reform proposals and considers whether South Africa might benefit from integrating inquisitorial elements to enhance substantive justice. South Africa's legal system is rooted in the adversarial model, where opposing parties present their cases before a neutral judge.[5] While this system is designed to ensure fairness through structured legal debate, critics argue that it prioritizes procedural victories over substantive justice. This paper investigates whether the adversarial system truly delivers justice in South Africa, especially in cases involving vulnerable witnesses, media influence, and resource disparities. It also considers comparative insights from jurisdictions with inquisitorial or hybrid models.

METHODOLOGY

This study employed a qualitative legal research methodology, analyzing South African case law, statutory provisions, and academic literature.[6] It incorporated comparative perspectives from Canada, Mauritius, and Germany to evaluate ethical advocacy and procedural fairness.[7] The selected cases, Senzo Meyiwa, Timothy Omotoso, and Thabo Bester, serve as focal points for examining systemic strengths and weaknesses.

DISCUSSION

How the adversarial system works in South Africa and its impact on justice

In as much as this system ensures fairness by giving both sides an opportunity to argue their case, it can also favor those with better legal representation. While it promotes justice through structured legal debate, it sometimes leads to delays and uneven access to legal resources, affecting outcomes for individuals who cannot afford skilled representation. The former South African football captain *Senzo Meyiwa's murder trial*[8] served as a *litmus* test for how well the adversarial legal system administers justice. The search for the truth in this well-known case has been both enlightened and complicated by the adversarial system, which is based on opposing parties presenting their cases before an impartial judge.[9] The Meyiwa trial illustrates how adversarial tactics such as strategic delays and aggressive cross-examination can distort the pursuit of truth. While cross-examination revealed inconsistencies, it also retraumatized witnesses, raising ethical concerns. Comparative jurisprudence, such as *Lougheed v. Armbruster*,[10] underscores the duty of counsel to avoid vexatious litigation, a standard South Africa has yet to codify. This system's

[4] Langbroek et al., "EditorialMethodology of Legal Research: Challenges and Opportunities."
[5] Stephen McG Bundy, "The Policy in Favor of Settlement in an Adversary System," *Hastings LJ* 44 (1992): 1.
[6] Ian Dobinson and Francis Johns, *Qualitative Legal Research*, vol. 16 (Edinburgh: Edinburgh University Press, 2007).
[7] Langbroek et al., "EditorialMethodology of Legal Research: Challenges and Opportunities."
[8] *Director of Public Prosecutions, Gauteng v. Muzikawukhulelwa Sibiya & Others*
[9] S. Van der Merwe, *The Adversarial System: A South African Perspective* (Cape Town: Cape Town University Press, 2021).
[10] *Lougheed v. Armbruster,*

emphasis on party-driven investigations, in which the defence and prosecution develop opposing arguments to influence the court, is one of its distinguishing characteristics. The defence has reacted with allegations of police coercion and improper handling of evidence in the Meyiwa trial, while the prosecution has maintained that the accused were involved in a bungled robbery. This has led to concerns about whether the adversarial process puts winning ahead of obtaining the truth.[11]

The trial's course has also been significantly influenced by the calibre of the legal counsel, which has brought to light structural injustices in the adversarial approach. The different efficacy of the defence tactics in this case demonstrates how differences in legal resources, such as state-funded versus privately paid counsel, can distort results.[12] Additionally, the adversarial system's use of cross-examination to gauge the credibility of witnesses has been both advantageous and disadvantageous. Critics contend that aggressive questioning might frighten witnesses and obfuscate rather than reveal the truth, even if it has shown contradictions in statements, especially from important witnesses like Kelly Khumalo and police officers.[13]

Public trust in the adversarial system's capacity to provide prompt justice has been further eroded by delays and procedural strategies. Postponements, legal objections, and changes in legal teams have all afflicted the Meyiwa trial; they are all typical adversarial tactics used to obtain tactical advantages.[14] In addition to adding to Meyiwa's family's misery, these delays run the risk of undermining public confidence in the legal system since it is seen as being exploited rather than delivering justice.[15] Furthermore, the adversarial system is ill-prepared to handle the external pressures brought about by the case's heavy media coverage and public conjecture. The adversarial system's supposed neutrality is complicated by high-profile cases that frequently turn into battlegrounds for narratives outside of the courtroom.[16]
Ultimately, the Meyiwa trial exposes both the strengths and limitations of the adversarial system in South Africa. While the system ensures procedural fairness by allowing both sides to present their cases, it struggles with delays, resource imbalances, and the challenge of uncovering the objective truth.[17] Reforms such as stronger judicial oversight to curb delays, improved forensic and police accountability, and protections for vulnerable witnesses could enhance the system's ability to deliver justice. The *Meyiwa case* serves as a poignant reminder that justice is not merely a legal outcome but a societal expectation, one that the adversarial system must evolve to meet.[18]

The efficacy of the adversarial legal system to administer justice in intricate cases involving vulnerable witnesses has been put to the test in the well-publicized trial of Nigerian televangelist Timothy Omotoso, who was charged with human trafficking, rape, and sexual assault in South Africa. The trial's adversarial format, in which the defence and prosecution vigorously disputed the veracity of the witnesses and the evidence, brought to light the system's shortcomings in shielding victims from secondary trauma as well as its strengths in determining the truth through cross-examination.[19] According to legal experts, the adversarial approach's contentious courtroom atmosphere may retraumatize survivors even though it is meant to serve the truth-seeking purpose.[20]

A critical examination of the Omotoso case reveals how the adversarial system's procedural rules created significant delays, with the trial lasting over five years since the 2017 arrest. These delays were exacerbated by multiple applications for postponements, changes in legal representation, and disputes over evidence - all common tactical maneuvers in adversarial litigation.[21] Research shows that such prolonged proceedings particularly disadvantage victims of sexual crimes, who must repeatedly relive

[11] D. Moseneke, *Reflections on South Africa's Adversarial Legal System* (Pretoria University Press, 2022).
[12] A. Skelton, "Legal Aid and Inequality in South African Courts," *Constitutional Law Review*, 2020.
[13] J. Duncan, *Cross-Examination and Truth in Adversarial Systems* (Oxford University Press, 2019).
[14] D. Bhana, "Delays in South African Criminal Trials: Causes and Solutions Director of Public Prosecutions, Gauteng v. Muzikawukhulelwa Sibiya & Others," 2021.
[15] L. Muntingh, *Delays and Their Impact on Victims in Criminal Cases* (CSPRI, 2020).
[16] S. Koyana, "Media Influence on High-Profile Trials in South Africa," *SA Law Journal*, 2023.
[17] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28 (17 September 2021)
[18] T. Madonsela, *Justice and Public Trust in South Africa* (HSRC Press, 2022).
[19] *S v. Omotoso* 2018 (2) SACR 515 (ECG)
[20] L. Vetten, "Mortality of Women From Intimate Partner Violence in South Africa: A National Epidemiological Study," *Violence and Victims*, 2009.
[21] *S v. Omotoso 2018* (2) SACR 515 (ECG)

their trauma while awaiting resolution.[22] The case also demonstrated the resource imbalance inherent in the system, where Omotoso's high-powered legal team, led by Advocate Daubermann, outmatched the state's prosecution in both resources and experience.

The treatment of witnesses in the Omotoso trial sparked national debate about whether the adversarial system's confrontational approach serves justice in gender-based violence cases. During cross-examination, survivors faced aggressive questioning about intimate details of their assaults, with some breaking down on the stand.[23] While the defense argued this was necessary to test credibility, gender activists contended that such methods deter victims from coming forward and perpetuate rape culture.[24] The case prompted calls for South Africa to adopt more inquisitorial elements in sexual offense trials, such as allowing pre-recorded testimony or intermediary protections.

From a broader justice perspective, the *Omotoso trial* revealed systemic challenges in the adversarial model's application to complex organized crime. The prosecution struggled to prove the human trafficking charges due to the adversarial system's heavy reliance on witness testimony rather than investigative judicial oversight.[25] Comparative studies suggest that hybrid systems with more active judicial case management might better handle such multifaceted cases. The eventual conviction on some counts but acquittal on others after years of litigation left many questioning whether the adversarial process delivered proportional justice, given the resources expended.

Authors were reminded of the American television series "Prison Break" by the dramatic escape of *Thabo Bester*, also known as the *"Facebook rapist*," from prison. However, his escape has drawn attention to the Department of Correctional Services' (DCS) shortcomings and wrongdoing. Many convicted and awaiting trial detainees are able to escape from prison due to these flaws.[26] Prison officials and the community are very concerned about escaping from correctional facilities because it not only endangers public safety but also damages the reputation of the legal system and may lead to additional criminal behaviour. These loopholes in the adversarial system allow offenders to manipulate the country's legal system, getting away with their wrongdoings. Charges against the accused include desecration of a corpse, fraud, corruption, aiding an escape, and defeating the ends of justice. These charges are related to a plot in which Bester fabricated his own death and escaped from custody before being apprehended in Tanzania in 2023 with his partner, Dr. Nandipha Magudumana.

During pre-trial sessions, the National Prosecuting Authority (NPA) unexpectedly dropped charges against former G4S employee John Masukela. Amanda Bester, the prosecutor, simply said, "We can excuse him, and he can go in peace," without providing a rationale for the ruling.[27]

In an adversarial legal system like South Africa's, the prosecution and defence are expected to present opposing arguments before an impartial judge or jury, with the goal of uncovering the truth through this contest.[28] The sudden withdrawal of charges against John Masukela without explanation raises serious concerns about the integrity and transparency of that process.

In theory, the National Prosecuting Authority (NPA) should only proceed with charges when there is sufficient evidence and a reasonable prospect of conviction.[29] However, when a prosecutor dismisses a case with a vague statement like "he can go in peace," it undermines public confidence in the system's fairness and accountability. The adversarial model depends on both sides being given a fair opportunity to argue their case, and for decisions to be justified with clear reasoning. However, it is a trend that is now used to delay or disrupt justice.

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[22] M. Machisa et al., "Factors Associated with Rape Case Attrition in the South African Criminal Justice System: A National Cross-Sectional Study. ," *The British Journal of Criminology* 63, no. 3 (2023): 588–614.

[23] H.L. Westcott and M. Page, "Cross-examination, Sexual Abuse and Child Witness Identity. Child Abuse Review:," *Journal of the British Association for the Study and Prevention of Child Abuse and Neglect* 11, no. 3 (2002).

[24] A. Cole, "All of Us Are Vulnerable, but Some Are More Vulnerable than Others: The Political Ambiguity of Vulnerability Studies, an Ambivalent Critique," *Critical Horizons* 17, no. 2 (2016): 260–77.

[25] Mookgo S. Kgatle and Maria Frahm-Arp., "'Abuse, Power and Discourse in the Public Trial of Timothy Omotoso.' ," *Verbum et Ecclesia* 43, no. 1 (2022): 2270.

[26] K. Geldenhuys, "Prison Break," *Servamus Community-Based Safety and Security Magazine* 117, no. 7 (2024): .24-28.

[27] J. Redpath, "Failing to Prosecute? Assessing the State of the National Prosecuting Authority in South Africa," *Institute for Security Studies Monographs* 186. (2012): 108.

[28] D.W.M. Broughton, *Limitations of the Accusatorial (Adversarial) Trial Process: Fairness and Impartiality as Principal Concerns.* , vol. 82 (THRHR, 2019).

[29] J.P. Williams, "Assessing the Independence and Credibility of the National Prosecuting Authority.," 2019.

This incident also reflects broader criticisms of the NPA's recent performance. The authority has faced mounting scrutiny over high-profile failures, allegations of internal sabotage, and accusations of political interference. If decisions like this are made without transparency, it risks reinforcing the perception that justice is not being served equally or worse, that the system is being manipulated. It also raises suspicions about the involvement of Brown Envelope (bribery). In short, while the adversarial system is designed to protect fairness, its effectiveness hinges on the integrity and professionalism of its participants. When those standards slip, the entire system feels the impact.

International Perspectives on Legal Ethics in the Adversarial System

The South African Constitution's Section 39(1)(c) allows judges to take international law into account when interpreting the Bill of Rights.[30] South African courts have been able to use a wide variety of comparative jurisprudence thanks to this discretionary power, especially from developed constitutional democracies like the US, Canada, Germany, and the UK. The Constitutional Court has regularly consulted foreign case law to guide its reasoning, particularly in areas where domestic jurisprudence is still developing, as stated in The Use and Impact of Foreign Law in Constitutional Adjudication in South Africa. The Court has, however, also issued a warning against the mindless adoption of foreign legal doctrines, stressing that such allusions must be appropriate for the circumstances and mindful of South Africa's own legal and social environment.

Relating to the above portion in relation to the Adversarial System, under the Canadian case of *Lougheed v. Armbuster*, the British Columbia Court of Appeal noted that under an adversarial system,[31] the customary practice of judicial non-intervention assumes that attorneys would fulfil their obligations, which are, to emphasise, "...to do right by their clients and right by the court." In this context, "right" means considering all legally significant arguments and excluding those that are not. The explanation is straightforward. Counsel must help the court administer justice in accordance with the law. A determination that it is wrong to advance a hopeless matter is supported by provisions in the law societies of Canada's rules of professional conduct. According to the regulations in British Columbia and Ontario, the attorney must treat the tribunal with openness, justice, civility, and respect while representing the client resolutely and honourably within the bounds of the law.[32]

The lawyer shall refrain from using pointless or vexatious objections and delaying tactics, according to the rule's explanation, among other things. So, in relation to this context in South Africa, on the side of the Judge Rule 37(9) A of the uniform Rules of Court should be applied.[33]

> "I've been instructed to…" or "Those were my Instructions" This kind of "argument" is poor, even reprehensible, advocacy. One can rightfully spend less time on an issue that is genuinely debatable (but weak in the opinion of counsel), but she shouldn't convey to the judge that she and the bench agree that the point is flawed.

The Privy Council's recent ruling in *Sumodhee v. State of Mauritius* clarified the connection between the ethical obligation of counsel to refrain from arguing pointless arguments and the appropriate administration of justice. The appeal's grounds were shown to be unfounded.[34] Lord Hughes stated the following as a postscript to the appeal's denial: Counsel has a professional obligation to both the court and his client when preparing notices of appeal and conducting trials.[35] These obligations shouldn't conflict, but it goes without saying that the duty to the court comes first. One of the responsibilities of the court is to refrain from bringing up grounds for appeal until the issue is sufficiently debatable.[36] A determination that it is wrong to advance a hopeless matter is supported by provisions in the law societies of Canada's rules of professional conduct.

[30] Constitution of the Republic of South Africa, 1996, s 39(1)(c)
[31] *Lougheed Enterprises Ltd v Armbruster* 1992 CanLII 1742 (BCCA); (1992) 63 BCLR (2d) 317 (CA) at 324-325.
[32] Rules 5.1-1.of the Solicitors' Code of Conduct 2011; Rule C9(2)(b) of the Code of Conduct contained in the Bar Standards Handbook 3 ed April 2017.
[33] Rule 37(9) A of the uniform Rules of Court
[34] *Sumodhee & others v The State of Mauritius* [2017] UKPC 17.
[35] W.W. Schwarzer, *Dealing with Incompetent Counsel--The Trial Judge's Role*, vol. 93 (Harv. L. Rev., 1979).
[36] H.L. Dalton, "Taking the Right to Appeal (More or Less) Seriously," *The Yale Law Journal* 95, no. 1 (1985): 62–107.

According to the regulations in British Columbia and Ontario, the attorney must treat the tribunal with openness, civility, and respect while representing the client resolutely and honourably within the bounds of the law.[37] A lawyer should refrain from using pointless or vexatious objections and delaying tactics, according to the rule's explanation, among other things. Despite being lawful in and of itself, such actions are obviously driven by the client's malice, by helping the client do something dishonourable, or by making a statement that lacks a reasonable basis as accurate. According to Quebec law, a lawyer is required to step aside if a client continues to pursue actions that the lawyer deems harmful. She must abstain from all procedures that are merely dilatory and is not allowed to act in a way that would harm the administration of justice.[38] The URPC in South Africa does not contain any regulations that specifically or even implicitly prohibit attorneys from pursuing a matter that has no chance of success. The URPC is not a comprehensive code of ethics, though. I believe that it is wrong for an advocate in this nation to take action in favour of a matter that has no chance of success. Several areas of the law suggest that this is the case.

RECOMMENDATIONS

To strengthen ethical advocacy within South Africa's adversarial legal system, several measures should be considered. Codify Ethical Boundaries, The Uniform Rules of Professional Conduct (URPC) should be expanded to explicitly discourage the advancement of hopeless or vexatious matters. Drawing from Canadian and Mauritian standards, South Africa could benefit from clearer guidance on the ethical limits of advocacy. Judicial Oversight and Training: Judges should be empowered and encouraged to enforce ethical standards during litigation, particularly under Rule 37(9)(a). Judicial training programs could emphasize the importance of curbing poor advocacy practices and promoting integrity in courtroom conduct. Professional Development: Legal practitioners should undergo continuous ethics training that includes comparative perspectives. This would help instill a culture of responsible lawyering that balances client advocacy with the duty to the court. Incorporate Comparative Jurisprudence: South African courts and legal institutions should continue to engage with foreign jurisprudence, not as a blueprint, but as a reflective tool to refine local ethical standards in line with constitutional values.

CONCLUSION

The adversarial system thrives on the integrity and professionalism of its participants. While South Africa's legal framework provides a robust foundation for fair trial rights and judicial independence, the ethical dimension of advocacy remains underdeveloped in certain respects. Comparative insights from Canada, Mauritius, and other jurisdictions reveal a shared commitment to curbing abusive litigation tactics and reinforcing the lawyer's dual duty to client and court. By embracing these lessons and refining its own ethical codes, South Africa can ensure that its adversarial system not only protects rights but also upholds the dignity and legitimacy of the legal process. In doing so, it affirms the Constitution's vision of a just, open, and democratic society grounded in human dignity, equality, and freedom.

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