



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal number: A190/2017

In the Appeal between:

L CHABA & 21 OTHERS

Appellant

and

THE STATE

Respondent

CORAM: RAMPAL, ADJP, MATHEBULA et LOUBSER, JJ

HEARD ON: 4 FEBRUARY 2019

DELIVERED: 22 MARCH 2019

Rampal, ADJP

- [1] These are appeal proceedings. The appellants were tried in the Virginia Circuit Court where they were found guilty of various charges and sentenced to various terms of imprisonment. They were all aggrieved by all the verdicts and all the sentences.
- [2] An incident took place at Henneman on 10 April 2014. The underground clean-up operation was launched by the mine security agency. The operation endured until the next day, 11 April 2014. The actual scene of the incident was at number 5 shaft of Masimong Gold Mine. The underlying purpose of the underground security operation was to flush suspected illegal miners out.
- [3] The two-day shaft clean-up operation yielded no immediate arrest. Between 16 April 2014 and 14 July 2014 almost all the accused were arrested on the surface premises of the mine. There were only two exceptions. In one instance one of the appellants was arrested underground in the shaft. In the other instance, one of the appellants was arrested completely off the mine premises.
- [4] The indictment contains a total of 840 charges. The total number of charges is composed of the following types of offences:
- 4.1 managing a criminal enterprise, count 1;
 - 4.2 participating in a criminal enterprise, count 2;
 - 4.3 theft of gold bearing material, count 3-209: 3 groups;
 - 4.4 possession or disposal of ore, count 210-415;
 - 4.5 transporting of ore, count 419-621;
 - 4.6 money-laundering, count 622 – 835: 2 incidents;

- 4.7 possession of explosives, count 836;
- 4.8 attempted murder, count 837 – 838: 2 incidents;
- 4.9 illegal immigration, count 839;
- 4.10 trespassing, count 840.

- [5] Accused 1 was charged with the following:
Count 1 – 840.
- [6] Accused 2 was charged with the following:
Count 1 – 840.
- [7] Accused 3 was charged with the following:
Count 2 – 840.
- [8] Accused 4 was charged with the following:
Count 2 – 840.
- [9] Accused 5 was charged with the following:
Count 2 – 840 excluding count 839.
- [10] Accused 6 was charged with the following:
Count 2 – 840 excluding count 839.
- [11] Accused 7 was charged with the following:
Count 2 – 840.
- [12] Accused 8 was charged with the following:
Count 2 – 840.

- [13] Accused 9 was charged with the following:
Count 2 – 840.
- [14] Accused 10 was charged with the following:
Count 2 – 840 excluding count 839.
- [15] Accused 11 was charged with the following:
Count 2 – 840 excluding count 839.
- [16] Accused 12 was charged with the following:
Count 2 – 840 excluding count 839.
- [17] Accused 13 was charged with the following:
Count 2 – 840 excluding count 839.
- [18] Accused 14 was charged with the following:
Count 2 – 840.
- [19] Accused 15 was charged with the following:
Count 2 – 840.
- [20] Accused 16 was charged with the following:
Count 2 – 840.
- [21] Accused 17 was charged with the following:
Count 2 – 840.
- [22] Accused 18 was charged with the following:

Count 2 – 840.

[23] Accused 19 was charged with the following:
Count 2 – 840 excluding count 839.

[24] Accused 20 was charged with the following:
Count 2 – 840.

[25] Accused 21 was charged with the following:
Count 2 – 840.

[26] Accused 22 was charged with the following:
Count 2 – 840 excluding count 839.

[27] The prosecution dropped the following charges in the second group of theft offences:
count 3, 5, 6, 7, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86 and 136.

[28] To start with, **the conviction component of the appeal** requires appellate reconsideration. The appellants were tried in the Virginia Circuit Court where they all pleaded not guilty to all the charges. Each of them disputed all the elements of each and every charge. None of them disclosed in terms of section 115 Criminal Procedure Act 51/1977 the basis of his or her plea. All of them were legally represented.

[29] The prosecution called nineteen persons who testified for the state. Among others, the prosecution witnesses included the following:

- 29.01 Mr Johan Diedericks Ackerman;
- 29.02 Mr Nicolaas Johannes Oosthuizen;
- 29.03 Mr Daniel Johannes Pretorius;
- 29.04 Brig Johannes Frederick Hattingh;
- 29.05 Ms Gerda Janse van Rensburg;
- 29.06 Ms Nobuhle Mphezi;
- 29.07 Ms Riaan Verster;
- 29.08 Cst Madiogo Mokhoee;
- 29.09 Mr Ruan Binneman;
- 29.10 W/O Harry Lepile Shuping.

[30] The version(s) of the defence was narrated by 22 persons. All of them were the accused persons themselves. None of them called any witnesses.

[31] The court *a quo* handed down the verdict on 20 February 2017. The appellants were all acquitted in respect of:

- Counts: 4, 8-64, 87-135, 137-208: theft of unwrought gold;
- Count 836: possession of explosives;
- Counts 837 and 838: attempted murder.

They were, however, convicted as indicted in respect of the rest of the charges which were individually applicable to them.

[32] The appellants were finally sentenced on 14 March 2017. The sentences varied from the shortest period of imprisonment for 3 years to the longest term of imprisonment for 20 years. I shall revert to the sentence component of the appeal in due course.

[33] Aggrieved by their respective conviction and sentence, all the appellants applied on 14 March 2017 and 15 March 2017 for leave to appeal.

- In respect of accused 1 to accused 7:

The grounds of their appeal are set out in Vol 14 – see p3027 – 3031;

- In respect of accused 8 to accused 12:

The grounds of their appeal are set out in Vol 14 – see p3019- 3027;

- In respect of accused 13 to accused 22:

The grounds of their appeal are set out in Vol 14 – see p3015 – 3018.

On 15 March 2017 the court *a quo* granted a blanket leave to appeal to all of them against each and every conviction and sentence

[35] As regards the convictions, the common ground of the appeal may be condensed as follows:

35.1. The court *a quo* erred by rejecting the possibly true versions of the appellants;

35.2. The court *a quo* erred by accepting the reasonably doubtful version of the prosecution;

- 35.3. The court *a quo* erred by drawing questionable inferences from circumstantial evidence without proven objective facts to justify such inferences;
- 35.4. The court *a quo* erred by finding that the prosecution had proved the identity of the appellants as illegal miners;
- 35.5. The court *a quo* erred by finding that the prosecution had proved the crimes levelled against them beyond reasonable doubt.

[35] I deem it necessary to make a summary of certain undisputed facts. The summary embraces certain facts which, though denied, could nonetheless not be seriously disputed. Those facts were the following:

- Harmony Gold Mine (Pty) Limited, trading as Masimong Gold Mine, was lawfully licensed to mine gold in the district of Hennenman;
- The number 5 shaft of the mine consisted of a number of levels where actual mining operations took place;
- Some mining operations were lawful but others were unlawful;
- The legal miners were issued with identity cards which they were required to use for the purposes of clocking in whenever they went underground;
- They used the same identity cards for the purpose of clocking out when they returned to the surface;
- From the surface down to the underground levels, they were transported down the shaft by means of a cage elevator;

- No-one without an identity clocking card was supposed to be allowed to go down the shaft;
- Notwithstanding the prohibition, illegal miners did find their way down the shaft because it was an open secret that breaches of the clocking systems were committed now and then;
- It was a known fact, that at levels 1750 and 1810, illegal mining had been going on since August 2012;
- During the course of the operation clean-up on 10-11 April 2015 makeshift gold processing plants constructed underground were discovered;
- Certain underground site at level 1810 was specifically designated and utilized as a habitat spot by illegal miners;
- There at the habitat, makeshift beds, letters, books, name lists, house floor plans, and an assortment of documents were found;
- The appellants, save for one, were arrested at shaft 5 between 15 April 2015 and 14 July 2015;
- The only woman in the case, accused 22, and accused 1 had an intimate relationship;
- Mr NkosoXolo Makawula, accused 6, and Ms Bongeka Makawula, accused 22, are siblings;
- None of the appellants was gainfully employed at all times material to this case;
- The conveyancer, Ms Gerda Janse van Rensburg, was instructed to see to the registration of a transfer of residential property purchased by accused 22;

- The purchase was a cash transaction;
- The majority of the appellants are foreign nationals from either Zimbabwe or Mozambique;
- None of the appellants was caught red-handed either mining or processing ore or sleeping underground;
- The appellants, during their incarceration, complained to the Director: Public Prosecution, Free State Province about the conditions of the incarceration.

[36] **In the first place**, I deal with the issue as to whether the alleged offences were actually committed or not.

[37] Mr. Nel, counsel for the appellants, argued that there was no direct evidence presented in the court *a quo* which proved the alleged illegal mining by way of blasting rock with explosives in order to remove ore from rocks; that there was no direct evidence which proved physical possession of the missing ore by anyone and that there was no direct evidence which proved actual transportation of ore from the actual site where it was extracted from any rock to any makeshift plant illegally constructed underground where it was allegedly processed.

[38] In developing that argument further, counsel sceptically suggested that the evidence of Oosthuizen, to the effect that illegal miners, whoever they had been, had used rock drills, hammers and chisels to extract a massive 1211 tons of ore from the rocks, was highly improbable. Counsel submitted that there was a reasonable doubt, in connection with the alleged theft offences in particular, as to whether the element of appropriation had been established.

- [39] The submission was fuelled by Oosthuizen's admission that he could find no tangible proof that the missing ore had in fact been removed from Masimong Gold Mine. In view of all these, counsel submitted that the respondent failed to prove beyond reasonable doubt that the alleged illegal mining offences were indeed committed.
- [40] Mr De Nysschen, counsel for respondent, disagreed. He argued that upon objective assessment of the entire evidence, it became clear that physical possession, transportation and dealing in gold had been proven beyond all doubt. Counsel submitted that it was never the defence of the appellants, at any stage during the course of their entire trial, that the crimes listed in the indictment had not been actually committed.
- [41] The evidence of Ackerman was that ore processing or refinery plants were found in the shaft a few years before the operation clean-up; that such plants were skilfully constructed; that such plants were destroyed in 2012 because they were all illegal; that plant 2 was subsequently and recently constructed at level 1810; that it was a relatively new illegal plant; that it was not known precisely when such plant was actually constructed.
- [42] The evidence of Oosthuizen also concerned some of the exhibits found underground during the course of operation clean-up. Among them were letters addressed to certain individuals suspected to be illegal miners; letters written by certain individuals

suspected to be illegal miners; documents such as gold transaction notes such as "exi o", photograph downloaded from a camera of one of the suspects - see "exi l", and loose photographs found depicting underground images of some of the suspects - see "exi x".

The evidence of Binneman supported that of Ackerman and Oosthuizen.

- [43] The court *a quo* assessed the evidence of those prosecution witnesses. The trial judge did not assess such evidence in isolation. On the contrary, her ladyship assessed such evidence, together with the evidence of some of the appellants themselves. She took into account their evidence during their trial proceedings in the high court as well as the evidence of some of them during their bail proceedings in the district magistrate court.

The evidence pertaining to the dated documents, the dated letters to some of the suspects, the dated letters from some of the suspects, the photographs in the camera of one of the suspects, the loose photographs of some of the suspects found underground, the evidence of the same appellants during the trial proceedings and the evidence of some of the appellants during their bail proceedings were some of the vital pieces of the whole mosaic of the crucial evidence that gave the court *a quo* an idea of the timeline relevant to the commission of the offences.

- [44] The contention of the appellants that there was no evidence to prove the time during which the offences were committed, if any offence was indeed committed, was misplaced. The respondent was not required by law to prove the specific time during which

each of the appellants actually mined the ore at a specific level of the shaft. It was also not essential for the respondent to prove a specific time at which each member of the group arrived on the crime scene underground.

[45] The statutory offence created is participation in a racketeering criminal activity. The essential ingredient being conspiracy to commit an organized criminal activity or to participate in an unlawful enterprise. Participative racketeering normally entails an agreement, express or implicit, to commit an organized unlawful act. Once participative agreement has been concluded, an offence of organized crime is complete. It has been committed. The racketeers can be prosecuted even though no actual criminal activity has been performed. They can be prosecuted even though they are still on the surface before they actually descend to the actual scene underground to perform the unlawful mining activity. The actual performance is not a matter of cardinal importance but the preceding agreement is.

[46] In this instance, there was no evidence of an explicit agreement to participate in the commission of an organized crime of unlawful mining. However, the undisputed evidence showed that gold refining plants were discovered underground. All of them were unlawfully constructed. They would not have been so constructed unless actual mining had taken place and ore actually extracted from the rocks and made available to be processed at the unlawful refinery plants constructed down in the shaft.

- [47] Needless to say that all these physical activities or operations underground were practical manifestations of an implicit agreement possibly concluded somewhere on surface. By its very nature, mining is a laborious and elaborative venture. The collaborative association of those involved was evidenced by the enormous quantity of the ore extracted, the extent of the area chiselled and drilled, the canvas bags on the scene as captured by the video, the common habitat shared as well as the documented name list of miners. Precisely when the participants went down and when they commenced with the illegal mining operation is irrelevant. What is relevant is the solid inference that such activities would have stemmed out of a prior mutual agreement to participate in the carrying out of a prohibited criminal enterprise. They may even have gone down at different times. Some might have even joined the enterprise long after its formation by jumping onto the band-wagon on the way to join the founding members of an already existing racketeering association.
- [48] Those who joined the association later, and thereby aligned themselves with the central purpose of those who formed it earlier, are equally guilty even if they never performed any actual acts of execution on the illegal mining scene underground. For instance, those on the surface whose function it was to provide those underground with food to sustain them down there, implicitly associated themselves with the objective of the criminal enterprise. They thereby became instrumental in the process of furthering such objective.

[49] The question of physical shipment of ore from the point of mining to the point of processing was addressed or traversed in the evidence given by Ackerman. The witness also testified that canvas bags were used to remove the ore from the one point to another. Such acts of physical shifting strengthened the contention that illegal mining activities were indeed committed. The evidence of Ackerman aside, it has to be stressed that, at the trial, it was never pertinently contended, by any of the appellants, that illegal mining did not take place. Such stance was logical given their similar defence. The gist of their common defence was simply that they were not involved in the alleged illegal mining activities because they were never on the crime scene underground. As can be noted, their defence had all the hallmarks of an alibi defence.

[50] In the light of all these, the contentions of the appellants that there was doubt whether any theft was committed holds no water. For the reasons enumerated above, I am inclined to determine the issue in favour of the respondent. The contention was based on one little piece of evidence given by Oosthuizen. The salient principle of the law of evidence is that evidence has to be holistically and not compartmentally evaluated and considered. Taken and considered as a whole, the entire evidence proves, beyond reasonable doubt, that levels 1750 and 1810 were inhabited and that whosoever had so colonized the shaft was motivated by one and only one purpose. And that singular purpose was to illegally mine gold in order to steal and sell it for profit.

Therefore, the appeal cannot succeed on the ground that there was no evidence of criminal mining activities.

- [51] **In the second place**, I deal with the contention that the respondent had failed to prove that any act of unlawful appropriation of gold from the mine was committed. The contention stems from the evidence of Ackerman. Among others, the witness testified that although ore to the tune of R125,0 million was physically extracted from the gold bearing rocks, the value of the ore actually discovered at the makeshift refinery plants was merely R41,0 million. By implication, the actual value of the missing ore was, therefore, R84,0 million. The witness testified that such unaccounted for ore might well still be somewhere on the mine property.
- [52] On the basis of the above evidence, Mr Nel submitted, on behalf of the appellants, that if the ore was still somewhere on the mine, it cannot be said that the mine, as the complainant, has lost control over such ore. At best for the respondent, the evidence established the offence of attempted theft. So submitted counsel.
- [53] The witness, Ackerman, went further to say that the mass of the ore with the monetary value of R41,0 million was 1211 tons; that such quantity of ore was recovered from 4 of the 16 illegally constructed ore processing plants; that when the operation was conducted, illegal miners, whosoever they were, had already mined such quantity of ore; that the ore had already been carried away from the zone where it was extracted from the rock; that the ore had already been heaped at the zone where it was about to be

processed and that it was retrieved by an enterprise known as Rappa Holdings (Pty) Ltd.

- [54] The contention of the appellants failed to impress me. Nothing significant turns on the contention that the 1211 tons had not been shipped out of the mine. The crux of the matter is that 1211 tons of ore had already been actually extracted from the rocks. By itself, the physical extraction completely satisfies the element of appropriation necessarily required to prove the offence of theft. The legal position is analogous to the case of theft from a self-service supermarket. A shoplifter does not first have to physically walk beyond the exit of the supermarket before he can be successfully prosecuted and convicted for theft. See **S v M 1982 (1) SA 309 (O)**. A customer in a jewellery shop who puts a diamond ring in his underpants manifests a clear criminal intent to steal. His conduct justifies his immediate arrest and successful prosecution. He cannot be heard to say he did not steal because the ring was still in the shop.
- [55] The mass of ore with the monetary value of R84,0m is 2481 tons. Such quantity of ore was representative of the ore mined but never recovered anywhere underground or on surface. By the time the operation was launched, it had already been mined, extracted and shipped away from the mining zone. The witness speculated that such quantity of ore might still be on the mine premises.
- [56] The hard fact of the matter is that the exact whereabouts of 2481 tons of ore are unknown. Is such ore still underground? It is very

unlikely. The mining of such a massive quantity of ore must have required a great deal of time, energy and resources. Those who had invested so much efforts to mine it, would not have unwisely stored it underground. They would have appreciated the possibility that it could be stolen. I do not think they would have been that unbusiness-like. The evidence showed that there were numerous processing plants underground. It seems improbable that the perpetrators would have extracted the ore only to conceal it somewhere underground instead of immediately shipping it to the processing plants to be refined and immediately shipped out for sale to their customers outside.

[57] There were letters, written notes dubbed gold transaction notes and other miscellaneous documents referring to money paid or owed which were discovered underground. Obviously a transaction note about money owed suggested that gold had already been delivered to someone who still had to pay for it. All those exhibits strongly militated against any argument that the missing ore might still be hidden somewhere on the mine underground or on the surface. The evidence is overwhelming that the unrecovered ore was shipped off up to the surface and sold. That is theft, plain and simple. The mining company, as the owner, has virtually lost control. The permanence of such deprivation cannot be seriously questioned.

[58] The decision in **S v Tarr 1996 (2) SACR 97 (T)** does not assist the appellant. In that case the court was concerned with control of a "smelting house". In the present case the court *a quo* was concerned with the control of a mineshaft with a number of levels. There is a

huge difference between the two. A mineshaft is to a smelting house what a mountain is to an ant heap. According to the undeniable evidence, shaft 5 has a number of levels. It may be as deep as 4 km or so. It may be connected to one or more other shafts. The decision has also received the attention of the Constitutional Court. See **S v Tarr 2019 (1) BCLR 151 (CC)**

- [59] Such a deep hole with a vast ramification of long tunnels cannot be as well controlled as a tiny smelting house. The mere menace of illegal mining is indicative of fragile control measures. That the particular mineshaft lacked effective control measures is also borne out by the fact that it was inhabited contrary to safety regulations. The evidence further shows that the clocking system designed to enhance efficient access control is sometimes manipulated to give access to unauthorized persons. Such deliberate breaches of the system weakened the control measures.
- [60] In the light of all the above considerations, I am not persuaded that the perpetrators, or illegal miners, carried out the activities at the mine so well controlled that they could not have removed any gold from there. On the contrary, the evidence indicated that the access control measures left much to be desired. Therefore, the submission that the missing bulk of the ore was still somewhere on the mine was unpersuasive.
- [61] Consider this: if the perpetrators had known that there was no way that they would be able to get their stolen golden loot out of the mine to sell it somewhere:

- They would not have taken all the trouble of going down the shaft in the first place;
- They would not have taken the trouble of establishing a human habitat down there;
- They would not have stayed there for such long periods of time;
- They would not have imported mining tools such as chisels, canvas bags, explosives and hammers;
- They would not have foolishly expended time, labour and money;
- They would not have paid "workers" in other words *bona fide* employees of the mine who collaborated with them to have gold shipped out of the mine;
- Would they, after bringing it up to the surface, have stockpiled or stashed it on the mine property knowing all too well that the security control measures were so tight that permanently removing it from the mine would be almost an impossible task?

[62] Section 13 Precious Metals Act 37/2005 provides:

"Transportation and conveyance of precious metals

A person may not transport or in any manner convey any semi-fabricated or unwrought precious metal outside the boundaries of any mine, works or other property or place where such metal is mined, refined or worked with, unless he or she is in possession of the prescribed documentation."

- [63] Indeed the respondent produced no evidence showing that any suspect in this case was arrested outside the boundaries of shaft 5 of Masimong Gold Mine. Similarly, the respondent did not produce evidence of physical transportation of ore outside the boundaries of the shaft by any suspect. By virtue of such lack of evidence, the appellants contended that their prosecution was fatally futile. Let me put it differently. They contended that proper interpretation of the section means they could only have been successfully prosecuted if gold had been found in their possession outside the boundaries of the mine.
- [64] The interpretation of the section by the appellants is flawed. Such a construction can lead to absurd consequences. It would mean that a legal mine worker can carry up unwrought precious metal, in this instance ore, from any level underground to any spot on surface such as his dormitory at the hostel without any fear of prosecution or dismissal because his dormitory is not outside the boundary of the mine where (s)he is employed. It is unthinkable to argue that the lawmaker could ever have contemplated such a situation.
- [65] I think the legislative purpose for the enactment of section 23 was to prohibit the shipment of the precious metal from any place whatsoever, not only outside the boundaries of the mine but even inside such boundaries, in other words on the premises of the mine, to any other place, be it on or off the property of the mine, unless the possessor is lawfully authorized by way of prescribed documentation to transport or to convey it in any other manner. The phrase "outside the boundaries of any..." is generic. It applies to the boundaries of "any works" on the mine, to the boundaries of

"any property" on the mine, to the boundaries of "any place" on the mine where precious metal is "mined", to the boundaries of "any place" on the mine where such metal is "refined" or to the boundaries of "any place" on the mine where such metal is "worked with". That is just how strict precious metals are protected by statute. And for obvious reasons. I am afraid, the interpretation of the section by the appellants would certainly defeat that very legislative purpose.

- [66] It is quite apparent that any unauthorized possession of a precious metal outside the boundaries of any place, say a refinery plant for instance, is prohibited. It follows, therefore, that even a lawfully employed miner who dares carry gold or ore from a place where it is mined underground to any other place, say a mine captain's office or car on surface, contravenes the section unless his possession of such precious metal is duly authorized in terms of the section.
- [67] The phrase, "outside the boundaries," cannot be restricted to the external geographical boundaries of the mine property only. Such a restrictive interpretation, which the appellants seek to place on the phrase, would defeat the purpose of this section. The generic interpretation, which I think has to be placed on the phrase, is in keeping with the legislative purpose of the enactment. Letting legal miners ship gold right up to the surface from the level deep down where it is mined would be very unbusiness-like. In such an event the security of precious metals which is envisaged in the section would be drastically weakened or compromised.

- [68] The court *a quo* summarized the matter at para 189 of the judgment. At para 191 the trial judge had this to say about the transportation of gold:

"As indicated under count 298, Ackerman calculated that the total value of the gold lost to Harmony Mine was R125 884 303. He arrived at this figure after a detailed process of calculations, and was not seriously challenged on this. It is also not in dispute that a large quantity was stolen from the mine. Ms Patrinos' criticism was that the date reflected on the table compiled by Ackerman was after the date of commission cited in the indictment. The table was therefore not an accurate reflection of gold recovered or lost to the mine. The amount is of academic importance. The more important issue is that a large quantity of gold and gold bearing material was stolen from the mine through a pattern of racketeering activity by an enterprise that all the accused had been shown to be associated with. I am of the view that with regard to this count the state has proved its case beyond reasonable doubt."

(my emphasis)

I am in respectful agreement.

- [69] In light of the above considerations, I am not persuaded that the appeal can be upheld on the basis of this particular ground or contention.
- [70] In the third place, the ground of the appeal pertaining to the identity of the perpetrators. This is the main ground of the appeal, that counsel for the appellants hinted up front in his opening address. The question before us on appeal is whether the evidence as a whole established beyond reasonable doubt that the

appellants were involved in the racketeering enterprise in general. To determine the issue, it is imperative that we take a closer look at the circumstances in which the illegal mining and related organized criminal activities were committed.

[71] On the one hand, Mr Nel argued, on the strength of what he perceived as questionable and unfavourable aspects of the prosecution case, that the court *a quo* erred in accepting the evidence through which the appellants were identified as the racketeers. Counsel submitted that the issue of identity has to be decided in favour of the appellants. Consequently, counsel urged us to uphold the appeal and to reverse the verdict in respect of all the appellants.

[72] On the other hand, Mr De Nysschen disagreed. He argued that the critique levelled against the prosecution witnesses was unfounded. He added that the court *a quo* was so impressed by the evidence of Ackerman and Oosthuizen that the trial judge hardly mentioned a single point of criticism against any of them. Therefore, counsel submitted that the issue of identity was correctly determined in favour of the prosecution. Consequently, counsel implored us to dismiss the appeal and to confirm the verdict in respect of each and every appellant.

[73] The evidence adduced by the prosecution contained certain features favourable to the defence. I deem it necessary to mention some of those favourable features.

- The mine was equipped with an electronic system called biometric database;

- By means of biometric database system, access to the shaft was monitored, controlled and regulated;
- The system recognizes and identifies *bona fide* miners by way of their bar-coded clocking identity cards;
- The system detects anyone who attempts to gain access to the shaft without a valid bar-coded clocking identity card and alerts the mine security agency.

[74] Although Masimong Gold Mine was isolated from the other mines in its immediate proximity, its number 5 shaft was linked to its number 4 shaft by way of underground tunnels.

- The mine security agency, Bidvest Protea Coin, launched a clean-up operation on 10 April 2014;
- The purpose of the operation was to flush illegal miners out of number 5 shaft.

[75] The evidence adduced by the prosecution also contained further features favourable to the defence. None of the appellants:

- was found anywhere in the shaft;
- was found actually mining gold;
- was found with gold in his possession;
- was found with any property stolen from the mine, save accused 18;
- was found with money in his possession, save accused 18;
- was found with explosives in his possession.

[76] The unfavourable features of the evidence were, among others, the following:

- They were all arrested after the operation;
- they were arrested on the mine property save appellant 22;
- they were arrested between 15 April 2014 and 15 July 2014;
- the majority of them were not citizens of the country;
- the foreigners who were illegal in the country, hailed from Zimbabwe and Mozambique;
- one of them, namely appellant 18, was found with a safety hat owned by the mine;
- the same appellant 18 was found with cash in his possession;
- during the operation, all transaction notes, drawings, list of names, letters received, house floor plans and photographs were discovered;
- a place where persons slept was discovered;
- a place where gold was mined was discovered;
- several places (gold refinery plants) were discovered where ore was processed;
- large quantity of ore ready to be refined was discovered at one of those gold processing plants.

[77] The above pieces of circumstantial evidence found at level 1810 of shaft 5 are very significant. Their significance is inextricably intertwined with the evidence of the circumstances in which the

majority of the appellants were arrested. The evidence of Oosthuizen was that 20 of them were arrested on surface as they were stepping out of the cage elevator of the shaft from underground. The witness was corroborated by numerous witnesses. Among others, Binneman as well as other members of the security personnel who made the arrests gave highly incriminating evidence against the appellants. The golden thread that runs through their various accounts of the arrests was that the appellants were arrested as they were stepping out of the shaft cage elevator. They added that the appellants could not identify themselves by means of the official biometric clocking identity cards.

[78] The above incriminating evidence adduced by the prosecution witnesses such as Oosthuizen, Binneman and other security guards who were intimately involved in the arrests, must be assessed, considered and weighed up against the exculpatory evidence adduced by the appellants. All of them, with the exception of two, denied the allegations that they were ever in the shaft cage elevator and that they were arrested as they were emerging on surface from underground. They all averred that they were arrested elsewhere far from the cage elevator of shaft 5. Although they admitted that they were not lawfully employed by the mine and that they were arrested on the mine property, they pertinently denied any participative involvement in the alleged illegal mining activities and discoveries made during the operation clean-up.

[79] The versions of most of the appellants were substantially the same. Almost every one of them testified that he was on the mine property

for one or other innocent purpose such as to salvage some scrap metals. All of them stated that the various mine security guards gave untrue evidence concerning the precise locations of the various arrests.

[80] The court *a quo* was not impressed by any of them. Mr De Nysschen ventured so far as to say that describing all of the appellants as extremely poor witnesses was an understatement. To the extent that their versions were inconsistent with the versions of the prosecution witnesses, the court *a quo* rejected such versions as being false beyond a reasonable doubt. That finding is one I cannot hold to be wrong.

[81] The court *a quo* found that the incriminating evidence indicated that each of the appellants was, to a greater or lesser extent, connected to the racketeering enterprise; that each of them associated himself with its objectives; that together they were joined by a common purpose to promote its aims and objectives and that, through an organized pattern of racketeering activity, they unlawfully accessed the levels of shaft 5 where they illegally mined and sold gold. The evidence, direct and circumstantial, justified those findings. The appellants failed to give a reasonably innocent explanation for their presence not just on the surface of the mine but deep down in its shaft. There can be no innocent explanation for their underground stay other than that they were prompted to do so by their determination to illegally mine and steal the precious metal.

[82] The evidence by the prosecution witnesses concerning the precise place of the various arrests was telling against the appellants. Not

much was made by the appellants in their attempts to destroy or to neutralize the evidence of numerous accounts pertaining to the arrests. There is a whole lot more than meets the eye in the evidence of those various and consistent accounts. The precise places where the different appellants were arrested, the nature of the goods, articles or items actually found in their possession at the time of the arrests, the mere physical appearance of some of them, the inconsistencies between the spontaneous versions on the mine and the subsequent versions in court - were all objective pointers of their active association and participative involvement in the organized illegal activities in the shaft.

- [83] Among others, hard safety heads, new protectors, and cap lamps - all ordinarily used by miners - were found in the possession of some of the appellants. The physical conditions of some of them virtually resembled that of an underground miner. Some of the names appearing on the name list found underground matched the names of some of the appellants. Although the names of some of the appellants did not tally with the names on the list, it was not unthinkable that some of them had adopted nicknames or fake names in order to confuse the enemy. It is also significant to keep in mind that some of them admitted that the true images were reflected on the photographs taken underground while others simply disputed the images in the photographs which are obviously the true images captured by the camera underground. Those who denied their own images went so far as to dispute even the background scene of the photographs notwithstanding the fact that the name Masimong Mine was depicted on the photographs. Moreover, one of the appellants was found wounded underground where he was

arrested. All these aspects of the evidence strengthen the evidence of Verster but weakened that of the appellants.

[84] Before the trial, the appellants were incarcerated at Hennenman Correctional Centre. They were appalled by the conditions at the centre. They decided to complain to the Director: Public Prosecutions: Free State Province. They caused their complaint to be written down. The letter to that effect was addressed and mailed to the director.

[85] Upon receipt of the letter, "exi s", the director dispatched an envoy to Hennenman to investigate the complaint. The envoy, Mr Pretorius, held a discussion with accused 1, now the appellant 1. He reckoned that appellant 1 was the author of the letter. However, at the trial, appellant 1 denied the allegation that he was the *de facto* author thereof. Instead he averred that he did not personally do the writing; that he merely dictated the contents thereof to one gentleman by the name of Willson Katambo who actually wrote it.

[86] A handwriting expert, Brigadier Hattingh, testified as a prosecution witness. According to him, "exi s" was written by the same writer who wrote, among others, certain letters discovered by the police during the raid of the house of Mphezi. He used the letter "exi s" as a given specimen. The witness did not personally obtain a handwritten specimen from appellant 1.

[87] The exculpatory evidence of appellant 1 had to be weighed against the incriminating evidence of the prosecution witness. Although he

was a relatively intelligent man, on this point, he attempted to protect himself. In a rather cunning sort of way, he projected the appearance of an illiterate man who could hardly write. The trial judge was not deceived by his deceptive demeanour in the witness box. It is quite obvious that he was the *de facto* writer of the highly incriminating letter, that he was the driving force of the complaint and that the group regarded him as their preferred spokesperson. These and other aspects of the evidence substantially compelled the conclusion that he was the ring leader of the pack, so to speak. And that puts him squarely within the ambit of section 2(1)(a). The cap of a manager of a racketeering criminal enterprise perfectly fits him. He and not the alleged Wilson Katambo had discussions with the director's envoy, Adv Pretorius. All along, right from the beginning right up to the end of the discussion, it never occurred to him that appellant 1 was not the actual writer of the letter, "exi s". The trial judge was in a privileged position to hear appellant 1 testify and to observe his demeanour.

- [88] In the end, the trial judge was not impressed by his performance and rejected his evidence as untrue. Before convicting the appellant 1, the trial court made certain factual findings against him. On appeal before us, I could find no sound basis for interfering with those factual findings. An appeal court can only interfere with the factual findings made by the trial court in very rare cases where it is shown that the trial court was clearly wrong on the facts. *R v Dhlumayo and Another* 1948 (2) SA 677 AD on 705-6.

- [89] The prosecution witness, Pretorius, travelled from Bloemfontein all the way to Hennenman to discuss the grievances of the appellants. He, appellant 1, participated in those discussions not only in his personal capacity but also in his representative capacity as the spokesperson for the group. He did not solicit the assistance of the alleged Wilson Katambo. I hasten to point out the obvious. Among the appellants, no one goes by the name Wilson Katambo. This fictitious character was obviously created as a ploy in a desperate attempt to bail appellant 1 out of trouble. It is quite obvious, *ex facie* the letter, that it was written by Lovemore Chaba, appellant 1. And so the court *a quo* found.
- [90] I am satisfied therefore, that his evidence in connection with the authenticity of "exi s" was correctly rejected. He was, without any doubt, the author of the letter written at the correctional centre as well as the incriminating letters discovered on surface as well as documents discovered underground. Above all these considerations, the entire spectrum of the evidence justified the finding that he was the ringleader of the criminal enterprise exposed at Masimong Gold Mine.
- [91] The complaint of appellant 1 was that the court *a quo* failed to evaluate the evidence of Pretorius, Oosthuizen and Hattingh properly. Other than that, it was not suggested on his behalf that the court *a quo* misdirected itself in any material respect. In the absence of any material misdirection on this particular point, the conclusion reached by the court *a quo*, including its acceptance of the evidence now under attack, is presumed to be correct. The trial

judge found, on the facts, that he was the actual writer of the letter in question.

[92] Because we are sitting as a court with appellate jurisdiction, our powers to interfere with such a factual finding on appeal are restricted. In order to interfere with that factual finding on appeal, appellant 1 had to convince us, on adequate grounds, that the trial court was clearly wrong in accepting the evidence which another court would have rejected. Mere reasonable doubt will not suffice to justify appellate interference with the factual finding made by the trial court. **S v Dhlumayo**, *supra*.

[93] In **S v Francis 1991 (1) SACR 198 (A)** at 204e, Smalburger JA said, in pretty much the same vein:

"Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness it is only in exceptional cases that this court will be entitled to interfere with a trial court's evaluation of oral testimony (S v Robinson and Others 1968 (1) SA 666 (A) at 675G-H"
(my emphasis)

In the instant appeal, no adequate grounds were advanced to convince us that the court *a quo* was wrong. Consequently, we cannot interfere with the factual finding that appellant 1 was the author or writer of "exi s" – see p4775, Volume 21 of the record. The court *a quo* was impressed by Brigadier Hattingh.

[94] I deem it apposite to quote Naidoo, J. At para 88 of the judgment, the trial judge said:

"I found nothing improbable in the evidence of Daniel Pretorius of the DPP's office. He was in possession of a letter written by Lovemore Chaba and met him to discuss the allegations in the letter. The entire tone of the meeting suggested to him that accused 1 was the author of the letter and he had no reason to believe otherwise. When his evidence is considered with that of Hattingh it is clear that accused 1 was the author of the letter, Chaba 0001. If regard is had to accused 1's version that the author of that letter was his former employee, Wilson Katambo then his version makes no sense at all. According to him Katambo worked in accused 1's shop while he (accused 1) was in custody. Katambo was never underground but he could explain how Katambo would write letters to Nobuhle Mphezi or mention the names of his wife, son and the name Cleo in many of the documents. Hattingh's evidence that letter 4/70b is a copy of letter 4/70a, which was found in Nobuhle Mphezi's house, indicates a very strong probability that accused 1 is the author of that letter. Nobuhle's evidence is that the child she had with accused 1 is a boy called Gift. The name 'Gift' as well as letters addressed 'Mai Gift' feature regularly in the exhibits that were recovered. We heard that 'Mai' means mother, so that can only be a reference to Nobuhle."

(my emphasis)

This summary of the evidence is very important. It completely destroys the edifice of the evidence given by appellant 1. Wilson Katambo never really existed. The character was really a figment of appellant 1's overheated imagination. In truth and in reality Wilson Katambo and Lovemore Chaba were one and the same person – appellant 1- nothing more nothing less.

[95] Ms Nobuhle Mphezi was called as a prosecution witness. Among others, she testified that once upon a time she was in an intimate relationship with Lovemore Chaba; that she had last seen him in 2008; that he did not know that Gift, her son born on 26 December 2008, was his son; that she had no idea as to who Mlambo or Melikhaya was; that appellant 1 knew her by name Beauty Nago; that appellant 1 was not the biological father of her daughter, Nasi; that the police raided the house, seized copies of her birth certificate, her son's birth certificate and certain pictures but not letters; that she did not understand Shona language; that she did not say anything about the alleged letters found in her house in her witness statement to the police; that she merely signed the statement on 3 October 2014 as the police requested her to do; that she did so without reading it first and that it was not read back to her.

[96] On behalf of appellant 1, Mr. Nel submitted that because the above aspects of Ms Mphezi's evidence were uncontested the court *a quo* was bound to accept her evidence and that the court *a quo* erred by rejecting such an uncontested evidence.

[97] The appellants, in particular appellant 1, placed a great deal of emphasis on what they regarded as the uncontested evidence of Ms Mphezi. He heavily relied on those specific aspects of the evidence to which I have alluded at para 95 above. Was the witness's evidence really uncontested? To that question I turn now.

- [98] Firstly, her evidence was at odds with that of Shuping. He was a member of the police investigation team. He testified that he was present when the police visited, raided and searched Ms Mphezi's house; that the police spotted a black box on top of the wardrobe; that they retrieved it; that it contained letters and certificates and that they seized the certificates together with the letters from Ms Mphezi's house. Shuping's evidence, clearly contradicted Ms Mphezi's evidence that the incriminating letters did not originate from her house. See "exi ww" for Shuping's witness statement.
- [99] Secondly, Ms Mphezi's evidence was also at odds with that of another police witness, Mokhoee. This particular witness testified that he interviewed Ms Mphezi and took down her statement on 3 October 2014; that her evidence that he distorted the contents of her statement was untrue; that her evidence concerning the alleged irregularities was untrue and that all the documents seized from her house were photographed.
- [100] Constable Mokhoee's evidence, also clearly contradicted Ms Mphezi's. The photographs taken during the search and seizure of Mphezi's house were telling against her credibility. These photographs provided objective proof that the disputed letters were found in her house. They objectively bolstered the prosecution case against lady's man, appellant 1. Ms Mphezi's evidence was partially true and partially untrue. Mr De Nysschen wisely chose not to have the witness declared a hostile witness as that would have nullified her entire evidence, something which would not have been to the advantage of the prosecution case. Therefore, the correct factual position is that the state did not accept the whole of her

evidence which was why Warrant Officer Shuping and Constable Mokhoee were called to set the record straight by refuting the untrue aspects of her evidence. By comparison those 2 police witnesses were more impressive, credible and reliable witnesses than Ms Mphezi.

[101] To the extent that her evidence deflected from the evidence of credible and reliable prosecution witnesses, it was correctly rejected by the court *a quo*. It follows, therefore, that the contention of the gentleman - appellant 1, that the evidence of Ms Mphezi was uncontested and that the court *a quo* should have accepted such uncontested evidence - cannot be sustained on appeal. The lady witness tried her best to protect appellant 1. Unlike the two police witnesses, she had a real interest in the outcome of the trial. Her interest was underlined by the intimate relationship she and appellant 1 had. It was precisely that intimate bond which induced her to become an ambivalent witness.

[102] In the disputed letters, the writer refers to Ms Mphezi, her son and her daughter in very affectionate terms. From all these, it can be deduced, with a very high degree of certainty, that the writer thereof, one Melikhaya Pere, was just a pseudonym for Lovemore Chaba. Ms Mphezi's denial was a desperate and belated attempt to distance appellant 1 from the inevitable repercussions of the highly incriminating letters.

[103] In view of all these considerations, I am not persuaded that the court *a quo* committed any material misdirection as regards the identity of any of the appellants as the racketeers who jointly

participated in the organized criminal activities which were discovered underground at shaft 5 of Masimong Gold Mine. It being the case, the appeal cannot succeed based on this particular ground of appeal. The evidence as a whole established certainty beyond reasonable doubt that the appellants had everything to do with all the organized crimes we are here concerned with.

[104] In the fourth place, I deal with the ground of appeal concerning the doctrine of common purpose. The appellants contended that no evidence was adduced to sustain the finding of the court *a quo* that they acted with a common purpose. The contention was premised on the undisputed fact that no letter, note, list or any other document whatsoever containing the names of all of the appellants, was discovered and exhibited in court during the course of the trial.

[105] I am of the view that the above argument was very thin. The doctrine of common purpose does not necessarily depend on any list of names or any other written instrument for that matter. The author, **Snyman: Criminal Law**, 5th Ed, 2008 on 265 comments that the crucial requisite of the doctrine of common purpose is that it has to be proven that the accused persons must all have had the intention to commit the offence and to assist one another in order to attain that particular criminal objective. The basis upon which the doctrine operates, is the individual accused's active association with the common purpose of the group. See **Snyman: op cit** 267.

[106] I hasten to add that the elementary requisite of active association, through which an individual may be ensnared, is the secondary dimension of the doctrine. It applies to latecomers. The primary

dimension of the doctrine is the existence of a prior mutual agreement to commit a crime. Such primary dimension of the doctrine applies to the originators, in other words the founding members of a criminal venture. Those are individuals who first came together and mutually conspired to form a group whose common purpose is to attain a specific goal by unlawful means. The racketeering enterprise is their brain child. It is usually more difficult to prove such prior agreement than to prove active association.

- [107] This case was no exception to that general practical problem. The prosecution did not have direct evidence to prove the alleged common purpose by virtue of prior mutual agreement. Where, as in this instance, common purpose cannot be proven by way of mutual agreement, its existence can be proven by way of active association. The secondary dimension of the doctrine was the basis upon which the appellants were convicted. The evidence revealed that appellant 1 unlawfully occupied the shaft for years; that at times he used a fake name, Mlambo; that he inhabited the shaft with other unlawful occupiers; that many names were mentioned in many letters, notes, lists and other documents discovered at or in the proximity of such underground dwelling; that such names were most probably fake names of those who, like appellant 1, unlawfully occupied or inhabited the shaft; that almost all of the appellants were arrested as they were exiting the shaft; and that illegal mining had been carried out on a large scale in the tunnels of the particular shaft.

- [108] In view of those circumstances that were prevailing down in the shaft before the arrests of the appellants, inferences were drawn that the appellants were, for some time, in an unlawful occupation of the shaft; that they did not certainly go down the deep shaft of the gold mine just to have a picnic down there; that they ventured to breach security measures as well as safety measures to get underground at all costs; that there was a whole lot more in the joint venture, if not for the appellants then for some powerful syndicates, than we can ever imagine; that a group rather than an individual must have been certainly involved in the organized illegal mining operations discovered underground; that the determination of each individual who went down was a manifestation of his professed intention to become part of the organized criminal enterprise; that irrespective of where and when the group was formed, all those who went down, occupied the mine, mined the ore, extracted amalgam from the ore, should have shipped such gold out for commercial sale and that they thereby actively associated themselves with the prime objective of the organized criminal enterprise, the stealing of the precious metal.
- [109] It is practically very difficult, if not almost impossible, for one or two persons to successfully conduct elaborate and arduous activities of illegal mining of gold deep underground. Plain common sense dictates that only a group of those who are in it together, who share the same vision, who embrace the same goals and who dedicate themselves to the ultimate attainment thereof can collectively embark upon such a course. I am of the view, and it is a very firm view, that all these were legitimate inferences to be drawn. They are all justified by the objective facts. I am convinced that all the

appellants were, by a process of inferential reasoning, correctly identified as illegal miners or "kansvaters" or "zama zamas" as some would colloquially prefer to label them. There was overwhelming circumstantial evidence against all of them.

[110] In **S v De Villiers 1944 AD 493 on 508-9** the court said the following about the cumulative effects of circumstantial evidence:

"The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence"
(my emphasis)

[111] Accordingly, I am not persuaded by the contention of the appellants that there was insufficient evidence to prove that they acted with a common purpose. In my view, there was no other reasonably possible inference that could be drawn from the proven objective facts other than that the appellants, acting in concert with one another, unlawfully colonised and occupied the shaft for the sole purpose of mining and stealing gold. The court *a quo* correctly found that they worked together in order to make a success of the illegal endeavours and to survive in the most unforgiving of

circumstances. I am, therefore, of the firm view that the appeal cannot be upheld on this ground either.

[112] In the fifth place, I turn to the ground of appeal pertaining to money laundering. Now, this is the last mile of the road. Here the contention of the appellants was that there was no evidence adduced to prove that they committed the offence of money laundering.

[113] Elsewhere in this judgment, I have earlier found that the versions of the appellants were beyond reasonable doubt false as the court *a quo* found. The allegations that, at best for the state, they were trespassing - was far-fetched and ridiculous. This was not the case of a group of men walking from farm "X" unlawfully across farm "Y" in order to get to farm "Z" without any criminal intent to commit any crime on farm "Y". Here we have a group of foreign people who lived underground on a semi-permanent basis. The cost of living there was prohibitively high but living there they did. Certainly something must have prompted them to do so. It is ridiculous to suggest that they were merely trespassing. By any stretch of imagination that allegation was far from the truth.

[114] In the sixth place, I deal with the ground of appeal relative to participation in criminal gang activities. In this regard, the appellants contended that no evidence was adduced to prove that they participated in criminal gang activities or that they wilfully

aided and abetted any criminal activity in contravention of Sec 9(1) Act No. 171/1998.

[115] The point does not need to detain us longer than it is necessary. It is unclear why it is raised at all on appeal. The appellants were not indicted for any contravention of section 9. That is a fact, plain and simple. Needless to say, there is no arguable point here which requires our consideration on appeal.

[116] On appeal, the appellants abandoned certain grounds of their appeal and the corresponding submissions made in support of their appeal. The submissions related to the argument in support of the following contentions:

- that the ownership of the gold bearing material rests in the state and not the mine;
- that the gold bearing material was incapable of being stolen because, as they contended, level 1810 had been abandoned by Harmony Gold Mine (Pty) Limited and had thus become *res derelictae*;
- that Lovemore Chaba, appellant 1, was not an illegal immigrant;
- that evidence pertaining to the arrests of the appellants was of no evidential significance seeing that none of them was arrested on or near the crime scenes either at level 1750 or level 1810;
- that the decision in **S v Litako and Others 2014 (2) SACR 431 (SCA)** at par [68-1] was authority for the proposition that evidence by one accused against

another given during the course of earlier bail application proceedings was inadmissible as regards such co-accused.

This completes my consideration of all the grounds of the appeal.

[117] In view of the peculiar circumstances of this particular case, I am not persuaded that the court *a quo* committed any material misdirection on any ground whatsoever to warrant any appellate interference. In the absence of any such misdirection we are not at liberty to interfere. I would, therefore, confirm the conviction of each appellant.

[118] Now I turn to **the sentence component of the appeal**. The powers we have as a court with appellate jurisdiction are limited. Sitting as a court of appeal, we can only interfere with the sentence imposed if the trial court unreasonably or improperly exercised the sentencing discretion primarily entrusted to it or if the sentence imposed by the trial court is disturbingly disproportionate to persons of the appellants, the gravity of the crime and the interest of justice. **S v Giannoulis 1975 (4) SA 867 (AD)** and **S v Pieters 1987 (3) SA 717 (AD)**.

[119] In a case where the prescribed minimum sentence is applicable in terms of section 51 Criminal Law Amendment Act 105/1997, the legal position was outlined as follows in **S v Malgas 2001 (1) SACR 469 at 481 para [25]**:

"Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts".

There may, of course, be differences between the personal circumstances of co-offenders sometimes. Such marginal differences in the degrees of participation by co-offenders which might ordinarily justify sentencing differentiation between co-offenders are not, without more, justification for departure from the prescribed minimum sentence. **S v Malgas**, *supra*, at para [48].

[120] In aggravation of sentence, the respondent led the evidence of Ernest Edward Janse van Rensburg. His evidence gave the court *a quo* an overview of the menace of illegal mining in the Free State Goldfields. What is abundantly clear from the witness's evidence is that the adverse impact of illegal mining is enormous and that the mines, the law enforcement agencies, both public and private, are hopelessly fighting a losing battle. The menace posed by this criminal enterprise has become extremely serious.

[121] The central legislature views organized crime in such a serious light that it ordained that life imprisonment be imposed in appropriate cases, for racketeering. Theft of precious metals such as gold, is also viewed in a very serious light since millions of rands are often involved in such economic crimes. Moreover, the financial implications of an attempt to curb, let alone to eradicate, the organized crimes of illegal mining of gold are extremely enormous and, therefore, prohibitive.

- [122] The court *a quo* properly considered all the factors relevant to sentencing. The personal circumstances of each individual offender, the gravity of the crimes committed and the interests of the community offended were evenly considered and balanced sentences imposed on each offender in respect of each crime for which (s)he has been convicted.
- [123] It is so that some of the sentences imposed on some of the appellants are indeed stiff sentences. However, I am not persuaded that it can be said that they were disturbingly disproportionate to the magnitude of the organized crimes they committed. In **S v Pillay 1977 (4) SA 531 (AD)** at 535 E-F the court, per Trollip JA, reminds us that in an appeal against sentence, the essential inquiry is not whether the sentence was right or wrong, but whether in imposing it, the court *a quo* exercised its sentencing discretion properly and judiciously; that the mere misdirection is not, by itself, sufficient to entitle the court with appellate jurisdiction to interfere with the sentence; that a misdirection complained of must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the court *a quo* did not exercise its sentencing discretion at all or that it exercised it improperly or unreasonably.
- [124] Applying those salient principles of law to the individual profiles of all the appellants, I am not persuaded that the court *a quo* committed any misdirection, of the type usually and conveniently described, as one that vitiates the decision of the trial court on sentence. There being no materially appealable misdirection either

on a question of law or on a matter of fact, the dictates of justice preclude us from considering any sentence afresh. Consequently, I am inclined to dismiss all the appeals and to confirm all the sentences. In all the circumstances, I do not think that any sentence imposed on any of the appellants was disturbingly disproportionate and thus inappropriate.

[125] In the circumstances, I make the following order in respect of each of the 22 appellants:

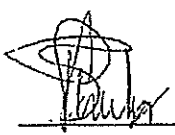
- 125.1. The appeal fails in toto;
- 125.2. The conviction and sentence are confirmed.


MH RAMPAI, ADJP

I concur,


MA MATHEBULA, J

I also concur,


PJ LOUBSER, J

On behalf of appellants:

Instructed by:

Adv. PW Nel

Legal Aid SA

Bloemfontein

On behalf of respondent:

Instructed by:

Adv. JM de Nysschen

Director: Public Prosecutions:

Free State Province

Bloemfontein