

**IN THE HIGH COURT OF SOUTH AFRICA**  
**(ORANGE FREE STATE PROVINCIAL DIVISION)**

Appeal No.: A17/2006

In the appeal between:

**TIM JONILE NTULI**

Appellant

and

**THE STATE**

Respondent

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**CORAM:**

RAMPAI, J *et* VAN ZYL, J

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**JUDGMENT:**

RAMPAI, J

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**HEARD ON:**

23 OCTOBER 2006

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**DELIVERED ON:**

2 NOVEMBER 2006

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[1] The appellant was accused of indecent assault in the Bloemfontein Regional Court where he was found guilty as charged and sentenced. He now comes on appeal, with the leave of the court below, against both the conviction and the sentence.

[2] He initially faced two counts of indecent assault. The first count was that he indecently assaulted Matshediso Mathafeni here in Bloemfontein on the 28<sup>th</sup> October 2004 by touching her breasts. The second count was that he

indecently assaulted the same lady again on 9 December 2004 in the same manner.

- [3] He pleaded not guilty to both of counts of indecent assault. At the end of the state case, the defence applied for his discharge. In terms of section 174, Act No. 51/1977 he was discharged in respect of the first count.
- [4] At the end of the trial the appellant was found guilty in respect of the second count. On the same day the 11<sup>th</sup> April 2006 he was sentenced to 2 years imprisonment of which 6 months was conditionally suspended for 5 years. It is against such conviction and sentence that he came on appeal.
- [5] The version of the prosecution was narrated by 3 witnesses, namely: Ms Matshediso Mathafeni, the victim; Mr. K. A. Mathafeni, her father and Mr. M. Booï, her fellow worker. The victim was the only eye-witness to the incident. I shall briefly recount her testimony.
- [6] She testified that she, the appellant and Booï were on duty on the 9<sup>th</sup> December 2004. They were all doing a night duty at Vodacom Building. She and Booï were employed by Securicor whereas the appellant was employed by another security company, Defensor. At one stage she took a walk to the toilet. On her way she saw the appellant

sitting on a chair in the passage. She was on the verge of passing him when he touched her breasts. She took exception to what he did to her. The appellant's response was that he was merely greeting her. She registered her protest against the alleged way of greeting. She then proceeded to the toilet.

[7] On her way back the appellant was still in the passage. As she was about to pass him, he once again touched her breasts. She again confronted him about his actions. On this second time around the appellant's excuse was that he was merely playing with her. She sternly objected and let him understand in no uncertain terms that she had never played with a male in that way.

[8] The same night she reported the incident to her supervisor, a certain Mr. Meyers. Booi heard when she reported the incident. Early the next morning, accompanied by her father, she reported the incident to the police. Besides Meyers, who did not testify, the other two gentlemen confirmed the victim's report to them.

[9] The version of the defence was narrated by the applicant himself. He testified that he was employed by an enterprise called Defensor (Pty) Ltd as a security guard. On the 9<sup>th</sup> December 2004 he was on duty at Vodacom. He knew the complainant. On the day in question she, like him, was stationed at Vodacom. As far as he was concerned there was no incident. He was sitting on the chair in the corridor a short distance from the toilet. He sat

there because it was cold outside. He chose the particular spot so that his supervisor could readily noticed him. While he was sitting there he saw the complainant. There was an exchange of cordial greetings after which she passed him, walked away and carried on with her patrol duties.

[10] He denied that he touched the complainant's breasts at all. He denied that he subsequently admitted touching her breasts to a certain Mr. Meyers. He denied ever making such an admission to Mr. Mathafeni. He also denied that he offered R500,00 to the complainant in an bid to induce her to drop the charges. But he admitted that he asked her through her father to withdraw the case because they were not sure about the alleged incident.

[11] The magistrate considered the two conflicting versions. He then came to the conclusion on the one hand that the appellant's version was not reasonably and possibly true and thus he rejected it. On the other hand he also came to the conclusion that the version of the victim as supported by the other two witnesses proved beyond reasonable doubt that the appellant was guilty in respect of the second charge.

[12] Mr. Steenkamp, counsel for the appellant, argued that the court *a quo* misdirected itself in reaching the aforesaid conclusion in that it failed to take cognisance of certain aspects of the evidence and in that it did not apply the cautionary rule properly. But Ms. Ferreira, counsel for the state, disagreed. She submitted that the court *a quo* properly considered all the evidence in its totality and that it

correctly applied the cautionary rule.

[13] The first aspect of the critique, Mr. Steenkamp levelled against the complainant relates to her conduct at the time of the incident on the night of Thursday the 9<sup>th</sup> December 2004. He argued that it did not seem that the complainant physically tried to protect herself or physically tried to prevent the appellant from touching her breasts again. Counsel described the complainant's conduct during the incident as a rather mild reaction.

[14] The complainant walked up the stairs inside the building. At the top of the stairs she came into the passage. She was on her way to the ladies bathroom. She turned right towards the bathroom. The appellant was sitting on a chair in the passage. He was largely obstructing the passage. There was no enough space for her to pass him. From her evidence it is clear that she was approaching him from the side; that there was apparently no space behind him for her to pass; that there was some little space in front of him for her to pass; that even there she could hardly pass walking forward in a normal way; that she had to walk sideways but facing him in order to pass him. Behind him there was a wall and behind her there was a wall. Therefore they were facing each other immediately prior to the first touch. She demonstrated all this during her cross-examination.

[15] Initially Mr. Theron, the defence attorney, had suggested to the complainant that it was practically impossible for the appellant to have touched her two breasts with his hands while he was sitting on a chair and she was standing on her feet and passing her on his side. However, after the demonstration the defence attorney, got a vivid picture of

what happened. He realised that she had to slow down, adjust her normal straight forward walking pattern, and adopted a grab-like mode of locomotion until she came face to face with the man who had forced her to walk in such an awkward manner in order to reach the bathroom. Everyone, it seems to me *ex facie* the record realised, after the demonstration that there was nothing impossible about the touching of the complainant's breasts by the appellant in the manner as alleged by the complainant.

[16] Mr. Theron abandoned that line of attack. In throwing in the towel he said to the complainant:

“So you did not pass the accused in his side, you passed in front of the accused?”

The answer to the question was a resounding: “Ja”. There is no evidence on record to suggest that the complainant was so tall, that the appellant's chair was so flat or his arms so short that he simply could not have reached her breasts while he was sitting down and she standing. I can find nothing strange about the appellant's reach in those circumstances.

[17] Mr. Steenkamp found it even more surprising that the appellant could have succeeded in doing it a second time. It must be borne in mind that the second touch of the breasts cannot be isolated from the first. During the first encounter the complainant made it perfectly clear to the

appellant that he should stop greeting her by touching her breasts. She pointed out to him that it had never happened in her past and that it must never happen again in the future. Having made her stance so clear to him, she then proceeded to the bathroom.

[18] I get the impression that she came out of the bathroom without suspicion that the appellant would again touch her breasts. On her way back he was still sitting in an obstructive manner. Perhaps it may be argued that his obstructive stance should have signalled to the complainant that the appellant was still up to his old tricks. However, it must be borne in mind that she had just given the appellant a stern warning that his unbecoming behaviour was absolutely unacceptable to her. Moreover, he had just given her a positive assurance that he would not repeat the objectionable breast touching actions. It seems to me that she expected the obstructive man at least, to keep his word.

[19] In my view, it cannot be seriously contented that she behaved in a very strange manner by failing to prevent the second touching. There appears to be no evidence as to how quickly the breasts touching acts were executed. Since the assault was not imminent the complainant did not really anticipate it. It is therefore perfectly understandable why she did not quickly react to physically repel the attack. She was not in a defensive mode because she did not timeously detect that the appellant was again in an offensive mode. I cannot accept the contention that her alleged rather mild reaction suggested that she must have let the appellant touch her breasts because she welcomed the touching.

The complainant's spontaneous and firm remarks soon afterwards demonstrated that the second touching of her breasts was just as unwelcome as the first. She told the appellant in a firm and disapproving manner that she did not play with men in that fashion.

[20] The magistrate was mindful and alive to the cautionary rule in respect of a single witness. This is borne out by the following passage extracted from his judgment:

“The complainant was as single witness and I have approached her evidence with the caution dictated by that circumstance. The need for question (caution) in assessment of her evidence is heightened by the fact that accused says this a fabrication. I must point out that there is no real criticism as regards the manner in which she testified. Her evidence was good in all material aspects.”

(the bracketed word is mine)

[21] The victim alleged that the appellant did no more than touch her breasts. He did not squeeze them. He did not fondle her. She was irritated but not shocked. She was hurt but not distressed. She did not hysterically have to extricate herself because she was not entangled in his arms. She did not have to run away in tears from the scene down the stairs to the surveillance chamber. The distressed emotional state of the complainant is a factor which can be taken into account in certain circumstances as corroboration of the victim's complaint. **S v HAMMOND** 2004 (2) SACR 303 (SCA) at paragraph 21 per Cloete JA.

In the instant case, however, there was no evidence of the victim's emotional distress. The court *a quo* quite correctly, in my view, did not rely upon her emotional state as a corroborative factor.

[22] In this case a great deal of the critique levelled against the victim's version by the counsel for the appellant concerned the reporting of the complaint. It is so that according to the victim she did not report the incident to Mr. Booi, her colleague, who was doing a night shift with her on the 9<sup>th</sup> December 2004. Quite contrary to this Booi testified that the victim did report the incident to him.

[23] The exchange between the defence and the victim as regards the reporting went like this:

"Booi was working on that specific day, correct? --- Ja, your worship.

You did not report this matter to him, correct? --- I did not.

Why not? --- Because the supervisor came.

And you reported it to him. --- (Not replied, intervenes) Was this the only time you reported to the supervisor these incidents? Was this the first time on the 9<sup>th</sup> of December that you reported it to him? ---- Ja."

[24] Sometimes words may mean different things to different people. In my experience the two verbs "to report" and "to tell" are at times understood by certain witnesses to mean two different concepts. I have on occasions heard victims

in sexual cases saying they did not report a rape incident to their friends or to their mothers but that they reported it to the police. Then the same witnesses would then proceed to say that they did not tell the police about it but that they only told their friends and mothers about it. The word “report” has some official connotations to some people.

- [25] The exchange between Ms. Plaatjies, the prosecutor, and the witness Booï illustrates the point well.

°Can you tell the court about the report the complainant made to you on that day? --- She told me that whilst she was on patrol, and after finishing the patrol, she was on her way to the bathroom and then Tim touched her where he was not supposed to touch her.”

- [26] Now the salient principle of our law is that a complaint pertaining to an incident of a sexual nature must have been made, without undue delay but at the earliest possible opportunity which, in all the circumstances of a particular case, could reasonably be expected to the first person to whom the victim could reasonably be expected to confide in order to be admissible as evidence. **R v C** 1955 (4) SA 40 (NPD) at 40 G – H per Caney J. The learned magistrate correctly applied this principle in my view.

- [27] It is common cause in the instant case that Booï was a security guard just like the victim. Their work designation

was the same. It follows therefore that seeing that the victim's work status was not subordinate to that of Booi, she could not have been reasonably expected by law to have made a sexual complaint to him. It was precisely for this very same reason that she reported the sexual incident to her superior. A man in a position of authority and not to her peer. In my view, nothing significant turns on the victim's alleged failure to report to Booi. Booi himself testified that the victim told him about the incident. The victim never denied that she told Booi she said she did not report to him. It appears therefor that the alleged contradiction was only a storm in a tea-cup.

- [28] The magistrate described the victim as an honest credible and reliable witness. I can find nothing on the recorded evidence to persuade me to differ. I cannot find otherwise. Our courts do not, on appeal, lightly interfere with such findings. **REX v ABELS** 1948 (1) SA 706 (OPD) and **S v FRANCIS** 1991 (1) SACR 198 AD at 204 c – e. The victim made a report to her supervisor that the appellant had touched her breasts in a sexually offensive manner, as one would have expected a woman in similar circumstances to have done. She did so at the first available opportunity which presented itself during the same night.

i°That is a factor which supports the consistency of her evidence and therefore supports her credibility.”

**S v HAMMOND** *supra*, at paragraph 25 on page 313 per

Cloete JA.

[26] Again the magistrate correctly remarked:

“The report itself is not corroboration for the complainant’s evidence, but it is admissible evidence to show that ... (inaudible) in making a report as soon as possible is consistent with the conduct of a female person who has been indecently assaulted.”

Nowhere in the judgment did the magistrate treat the victim’s first complain to her superior as a factor which created a probability in favour of the victim to the detriment of the appellant. In **S v GENTLE** 2005 (1) SACR 420 (SCA) on 431 paragraph 19 Cloete JA observed:

“The complaint cannot be used as creating a probability in favour of the State case, ie it cannot be argued that because the complainant complained shortly after the incident, it is probable that the incident took place without her consent.”

[27] There were three witnesses who testified for the state. However, neither Meyers nor Vusi were amongst them. Since they were not called to testify on behalf of the victim counsel for the appellant submitted that we draw an unfavourable inference from the failure of the state to call the two gentlemen.

[28] Mr. Steenkamp heavily relied on the decision in **STATE v TEIXEIRA** 1980 (3) SA 755 (AD) at 764 A - B where Wessels JA said the following:

“In my opinion, the failure by the State to call Tshabalala to testify as a witness justifies the inference that in counsel's opinion his evidence might possibly give rise to contradictions which could

reflect adversely on Sarah's credibility and reliability as a witness.”

[29] The victim was the sole eye-witness in this case. There was no other known eye-witness. Meyers arrived on the scene *post facto*. He could not, therefore, corroborate the victim's version as regards the forward leg or the return leg of the incident. The point is this: With or without Meyers testimony the victim's status as a single witness would have remained. In **STATE v TEIXEIRA** *supra*, at 763 E Wessels JA said the following about a witness who was never called by the state:

“From Sarah's evidence it appears that Tshabalala was clearly in a position to corroborate her as to what occurred during the second and third incidents and also as to where he was during the fourth incident.”

[30] According to the victim the appellant confessed to Meyers that he did touch her breasts but averred that he did so in the course of an innocent teasing or play. The appellant admitted that Meyers did question him about the victim's accusation but he testified that he denied the accusation. In brief this is the significance of the evidence Meyers would have given had he been called as a witness. The magistrate dealt with this point. He accepted as reasonable the victim's explanation that Meyers did not want to be involved. I am of the view that the prudent party involved in court proceedings, criminal or civil cannot be

expected to call any witness who is hostile and unwilling to testify in favour of the party calling him.

[31] In a civil case of **WEBBRANCHEK v L K JACOBS & CO LTD** 1948 (4) SA 671 (AD) on 682 Van den Heever JA puts it as follows:

;°It would have been natural for plaintiff to think that, somehow, Beretta had conspired with Seef & Co. to intercept the major portion of a commission which should have accrued to him, the plaintiff. It would in the circumstances not have been pure unreason on the part of plaintiff to fear that Beretta, if called, might not be unbiased. Moreover a litigant who calls a witness vouches, as it were, on pain of being discredited himself, for his probity and truthfulness. The potential witness may be untruthfully hostile, he may have a bad memory or an unfortunate presence. After all, plaintiff was entitled to rest his case upon evidence which he considered adequate to discharge the onus which lay upon him. I am not persuaded therefore that, in the circumstances of the present case, an inference against the plaintiff should be drawn from the fact that he did not call Beretta as a witness;...”

It seems to me the trial magistrate was correct in drawing no adverse inference against the decision of the prosecutor on behalf of the state not to call Meyers.

[32] It is not quite apparent to me what evidence Vusi would have given as regards the incident of the 9<sup>th</sup> December 2004. He was not on duty in the Vodacom Building on the night in question. Besides Vusi was employed by a different employer, Defensor (Pty) Ltd. There was apparently no statement obtained from him. There is

nothing to suggest that he was available to testify in a trial which started on the 20<sup>th</sup> September 2005, some eleven months after the first incident, which happened on the 28<sup>th</sup> October 2004. But what is even more important is that it was never suggested to the victim, during cross-examination, that her evidence that she made the complaint to Vusi about the appellant's sexual misconduct was false. On this point alone it must be clear that the need to call Vusi therefore fell away after the cross-examination of the victim. By and large the same applies to Malapo as well. The prosecutor is not obliged to call every Dick, Tom and Harry merely because they witnessed an event. **S v HILDEBRANDT** 1922 (TPD) 99.

[33] Mr. Steenkamp also contended that contrary to the magistrate's finding, the victim was an untruthful witness. He based his submission on the information contained in exhibit "a". The document purports to be the appellant's payslip issued by her employer Defensor Security (Pty) Ltd. It appears *ex facie* the exhibit that the appellant was not on duty on Thursday the 8<sup>th</sup> October 2004. It tends to discredit the victim's version that the appellant was on duty at Vodacom Building patrolling the premises.

[34] In **S v GENTLE** 2005 (1) SACR 420 (SCA) on 428 at paragraph 11 Cloete JA said:

°The form was handed in by the appellant's attorney with the consent of the prosecutor. The medical practitioner was not called to give evidence. The only conclusion which can be drawn from the procedure which was followed at the trial and the magistrate's reliance on the contents of the form is that in consenting that the form be handed in, the prosecutor accepted the correctness of what was stated in it."

[35] In *casu* the magistrate said the following:

"... and must say that there is no evidence here that complainant was telling lies."

Again the magistrate said:

°... that document that was handed in by the state is not a conclusive prove that the accused was not on duty on the 28<sup>th</sup> of October."

[36] Unlike in the case of **S v GENTLE** *supra* in the instant case the document was not directly relevant to the incident the court was grappling with, it was about a different incident eleven days earlier. It was about the appellant's movement and not the victim's appearance, it was handed in by the prosecutor and not the defence attorney, but with the latter's consent. It was written by an anonymous author. It was handed in about six months after the victim testified. The author was not called to give evidence.

[37] I fail to see the significance of the document as far as the defence case is concerned. The uncontested evidence of

the victim was that on Thursday the 28<sup>th</sup> October 2004 the appellant was on night duty at Vodacom Building. He was patrolling the premises. She remembered the day well because it was her first day on duty as an employee of Securicor. On that same day she met the appellant for the very first time. It was never the appellant's defence that he was not on duty or that he was never on the premises of Vodacom at any stage on the day in question.

- [38] On the facts it cannot be deduced that by handing in the document the prosecutor thereby accepted the correctness of what was stated therein. The contrary appears to have been the prosecutor's aim. By handing the document in as she did Ms Plaatjies wanted to demonstrate the fallacy of the appellant's belated alibi. She had requested the defence attorney, Mr. Theron, to provide her with written proof in the form of a duty register at Vodacom signed by the security guards on duty or a leave of absence application document signed by the appellant in support of his belated alibi. Instead the appellant's attorney provided her with a copy of the duty register in respect of a different business enterprise called Fruits and Vegies. The best document that she could get on her own from the applicant's employer was this dubious payslip. It was absolutely unnecessary for the prosecutor to hand such a document. There was no alibi for the state to rebut.

[39] There is no evidence of who was the author of this document or who retrieved it from the computer if it was retrieved from the computer on the 29<sup>th</sup> March 2006. The user-id of the person who created the information on computer is not reflected let alone the user-id of the person who retrieved such information. In my view, the appellant's belated alibi was nothing more than a fishing expedition. An alibi was never the appellant's defence. The court cannot think out defences for an accused. The magistrate clearly failed to appreciate the point which the prosecutor was trying to make, namely to expose the fallacy of the alleged alibi.

[40] The record shows that the defence attorney first intimated to the prosecutor on the 13<sup>th</sup> October 2005 that the appellant was not on duty on the 28<sup>th</sup> October 2004 – vide page 53: 1 - 5 and page 54: 12 – 14 of the record. The appellant was arrested on the 20<sup>th</sup> January 2005. It seems that he never raised such an alibi with the police. He pleaded on the 20<sup>th</sup> September 2005. Again he raised no defence of an alibi in court. His attorney pertinently informed the court on that day that the defence was not going to reveal the basis of the appellant's plea of not guilty. The victim testified on the same day, the 20<sup>th</sup> September 2005. The appellant's alibi was never put to

her during cross-examination. The state case was closed on the 4<sup>th</sup> April 2006. The accused testified on the same day, the 4<sup>th</sup> April 2006. He never denied that he was at Vodacom on the 28<sup>th</sup> October 2004. Since there was virtually no evidence of an alibi the document was not worth the paper it was written on. The unwarranted exhibition of the document only created regrettable bungling which let the appellant off the hook in respect of the first charge.

[41] In **THEBUS AND ANOTHER v S** 2003 (2) BCLR 1100 (CC) at paragraph 67 Moseneke J gave an exposition of the alibi rule. The first aspect of the rule is that the late disclosure of an alibi is but one of the factors to be taken into account in evaluating the evidence of the alleged alibi. The late disclosure standing alone does not conclusively justify the drawing of an unfavourable inference of guilt. The second aspect of the rule is that the late disclosure of an alibi is a factor which is only taken into account in the process of determining the weight to be placed on the evidence of an alibi. At paragraph 68 Moseke DCJ, as he now is, observed:

[68] The failure to disclose an alibi timeously is therefore not a neutral factor. It may have consequences and can legitimately be taken into account in evaluating the evidence as a whole. In deciding what, if any, those consequences are, it is relevant to have regard to the evidence of the accused, taken together with any explanation offered by her or him for failing to disclose the alibi timeously within the factual context of the evidence as a

whole.”

[42] The appellant was also implicated by a very credible witness, the victim’s father. Mr. Steenkamp conceded that Mr. Mathafeni’s testimony was the appellant’s biggest obstacle. This credible witness corroborated the victim’s version that he confronted the appellant about his daughter’s accusations. According to him the appellant confirmed the victim’s accusative complaint as true, begged for forgiveness and pleaded that the victim should drop the case. According to the victim the appellant also offered her an amount of R500,00 in return for the withdrawal of the case. These actions of the appellant subsequent to the incident strengthen the victim’s version. The appellant’s denials were, in my view, correctly rejected as beyond reasonable doubt false.

[43] I deem it unnecessary to deal with all the appellant’s remaining critiques. Suffice to say that the appellant’s claim that the victim was actuated by malice to make up false charges against him has no substance. He and the victim were not employed by the same company. Whether or not he slept on duty would probably not have bothered the victim. The fallacy of this alleged motive is the fact that the victim complained about the appellant’s actions on the very first day of her employment. Indeed if the appellant had the habit of sleeping at work the victim would probably have reported it to the appellant’s supervisor instead of

taking the matter to the police for investigation. It would have ended there. It seems to me the magistrate was correct to find that there was no ulterior motive why the victim implicated the appellant as she did. The queer manner in which the appellant answered his attorney shows just how poor and unimpressive the appellant was as a witness. Asked whether he had admitted to Mr. Mathateni that he did touch the victim's breasts he answered: "It was not me who admitted that." Asked whether he had admitted touching the victim's breasts to Mr. Meyers he answered: "Well, that is not something that was done by me." This is a strange way of answering simple and direct questions.

[44] Having said all this I have come to the conclusion that the magistrate's finding that the accused's version was not reasonably and possibly true was correct. There is no doubt on my mind that the magistrate was also correct in finding that the state had proved its case against the appellant beyond any reasonable doubt. On the merits I can find no misdirection to warrant our interference. Therefore I would confirm the conviction.

[45] As regards sentence, counsel for the state conceded that in the circumstances of this case the sentence imposed was shockingly severe and inappropriate. I share the same view. The court *a quo* exercised its sentencing discretion

improperly. It erred in imposing the said sentence on the appellant who was the first offender, was gainfully employed and was the sole breadwinner. In addition to all this the manner in which the indecent assault was committed does not warrant such a severe sentence.

[46] Having considered all the relevant factors, mitigating as well as aggravating, I am of the view that a substantially shorter and wholly suspended sentence would have been a fitting and appropriate punishment for the appellant. Such a sentence will probably have the desired rehabilitative effects on him.

In view of the misdirection we are entitled to interfere. The sentence has to be set aside.

[47] Accordingly I make the following order:

47.1 The appeal as regards conviction fails. The conviction is confirmed.

47.2 The appeal against the sentence succeeds. The sentence of 2 (two) years imprisonment of which 6 (six) months was conditionally suspended is set aside.

47.3 The previous sentence is substituted with one of 12 (twelve) months imprisonment which is entirely suspended for 3 (three) years on condition the appellant is not convicted of indecent assault committed during the period of suspension.

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**M.H. RAMPAL, J**

I concur.

**C. VAN ZYL, J**

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On behalf of the Appellant: Adv. M. D. J. Steenkamp

Instructed by:

Qwelane Theron Van Niekerk

BLOEMFONTEIN

On behalf of the Respondent:

Adv. A. Ferreira

Instructed by:

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BLOEMFONTEIN