THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 251/10

In the matter between:

BRUCE SABELO MPUMELELO RAMOKOLO **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Ramokolo v The State* (251/10) [2011] ZASCA 77 (26 May 2011)

Coram: PONNAN, MAYA JJA and PETSE AJA

Heard: 17 March 2011

Delivered: 26 May 2011

Summary: Criminal law – extortion – s 156 of the Transkei Penal Code, Act 9 of 1983 – consulting engineer responsible for facilitating payment to building contractor in a state road construction project coercing the contractor to give him monies not legally due from proceeds thereof – held to have committed extortion – sentence – seriousness of offence discussed – appropriate sentence custodial sentence.

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ORDER

On appeal from: Eastern Cape High Court (Mthatha) (Alkema and Dawood JJ sitting as court of appeal):

1. The appeal against conviction is dismissed.

2. The appeal against sentence is upheld. The sentence imposed by the high court is set aside. The following sentence is substituted:

'The accused is sentenced to undergo four years imprisonment of which two years is suspended for five years on condition that he is not convicted of extortion, committed during the period of suspension.'

JUDGMENT

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MAYA JA (Ponnan JA and Petse AJA concurring):

[1] The appellant was indicted in the Mthatha Regional Court (N Conjwa) on two counts of extortion. Despite his plea of not guilty, he was convicted as charged. The magistrate, taking both counts together, sentenced him as follows:

'… that the accused be sentenced to pay a fine of FIFTY THOUSAND RAND (R50 000,00) or in default of payment to undergo TWO (2) YEARS IMPRISONMENT. The accused is further sentenced to undergo THREE (3) YEARS IMPRISONMENT, which is wholly suspended for a period of five years on the following condition, that the accused is not convicted of an offence, an element of which is dishonesty committed during period of suspension or sentence and for which he is sentenced to an effective term of imprisonment. And further, that the accused repays the amount of R187 000,00 to the complainants in the matter on or before 30 December noon, in the year 2010.'

On appeal to the high court (per Alkema J, Dawood J concurring) the conviction on the first count was overturned. The sentence was also set aside and substituted as follows:

'The sentence imposed by the court *a quo* in respect of count 2 is set aside, and is replaced by the following sentence:

"The accused is sentenced to four years imprisonment; of which two years is suspended for five years on condition that the accused is not convicted of a crime of which dishonesty is an element, committed during the period of suspension." '[1]

The appeal, which is against both conviction and sentence, is with the leave of the court below.

[2] The witnesses who testified in the trial – Ms Vatiswa Poswa (Poswa), the complainant, Ms Uchell Althea Jones, an official of the Mthatha branch of the First National Bank (FNB), and Mr Zwelabantu Arnold Makwabe, a director in the Eastern Cape Department of Public Works (the Department) – were all called by the state. The appellant did not testify or lead any evidence. It appears from the evidence of Poswa and, to a limited extent, Makwabe, that the fount of the dispute is the award, by the Department, of a tender valued at R2 932 575,05 for the upgrading, rehabilitation and improvement of certain urban roads in Ngangelizwe, Mthatha in October 2003, to Mageba Construction (Pty) Ltd (Mageba), in which Poswa and her brother, Mr Sakhiwo Poswa, were joint directors and shareholders. A consulting civil, structural and development engineering company, Manong & Associates (Pty) Ltd (Manong), was appointed as the consulting engineer on the project. Its role was mainly to ensure that Mageba performed the construction work properly and the appellant, a professional engineer, was one of its directors and its manager on the project.

[1] Prior to the hearing of the appeal the parties had been given an opportunity to file submissions as to why the

[3] In terms of the construction contract Mageba was required to submit monthly payment certificates to Manong in respect of work done. Thereafter, the appellant would conduct a site inspection to assess the quality of such work and measure it to verify the amount claimed. Mageba had been granted bridging finance to undertake the project by the Eastern Cape Development Corporation (ECDC) to which as security for the discharge of its obligations, it then ceded its claim to payment under the contract. Thus the Department would pay the certified amounts to ECDC which, in turn, made partial payments to Mageba and paid the latter's suppliers.

[4] Construction operations began shortly after the award of the tender and the site handover in November 2003. Pursuant to payment certificates issued by Mageba, sums of R1 466 241,27, R1 170 784,59 and R146 854,19 were paid by the Department to ECDC on 2 February 2004, 1 March 2004 and 11 March 2004, respectively. There was a later variation order in the sum of R274 978,42 by which the original contract amount had purportedly been exceeded. However, no payment certificate seems to have been issued in respect of this amount. This document constitutes a significant part of the controversy as will appear later in the judgment. From February 2004, at Mageba's instance and flowing from ECDC's delay in paying Mageba and its suppliers, ECDC was required to pay the entire amounts received from the Department into a special banking account in Manong's name. This account would be administered by the appellant who would then make the necessary disbursements on Mageba's behalf.

[5] Things started going awry in the middle of March 2004. Mageba had not been paid for a while and had complained to the appellant as it was battling to meet its overheads and had to use funds from other projects to sustain the contract. On 17

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sentence imposed by the Magistrate should not be increased.

March the appellant arrived at Mageba's site and, after driving around the site without taking any measurements, gave Poswa and her brother a cheque in the sum of R300 000. This was payment for work done made at the appellant's discretion as no payment certificate in that amount had been issued. Mageba nonetheless continued to issue payment certificates in the prescribed manner thereafter. But the appellant did not conduct any proper site inspections or verify its payment certificates again. Thus, the subsequent payments of R500 000 and R55 000 which it received on 4 May and 24 August 2004 were fixed by the appellant at his discretion.

[6] The charges preferred against the appellant relate to two separate incidents. The first one occurred in the early stages of the project, on 15 December 2003 and is the subject of count 1. As I have already stated, the appeal to the court below succeeded to the extent that the conviction on that charge was quashed. It accordingly warrants no further consideration in this judgment.

[7] The events upon which count 2 was based took place in early May 2004, as Poswa testified. The appellant visited Mageba's building site. He asked to meet Poswa and her brother alone.They requested their secretary to leave. He then told Poswa and her brother that according to calculations that he had performed on a certain computer programme Mageba had been overpaid by a sum of R600 000 which would have to be returned to the Department. An argument ensued between them. Poswa and her brother were of the view that the quantities to which the appellant referred in his calculations were less, and not more, than those onsite as the appellant claimed. The appellant however maintained that his computer programme was foolproof and would not budge.

[8] The appellant said that he had very recently, in similar circumstances, returned

to the Department a sum of R1,2 million in respect of another project in that area which was conducted by another entity. He then suggested that the only way he could avoid returning the money in their case would be if he took a portion of it – by making out a cheque to them for R180 000, which Poswa would then cash and give him the proceeds thereof. He would thereafter make out another cheque to Mageba in the sum of R500 000 for the work that it had done. After enough pressure, as Poswa put it, she and her brother finally agreed to the scheme. The appellant drew a FNB cheque in Mageba's name in the sum of R180 000 which Poswa subsequently attempted to cash without success as Mageba no longer had an account with that institution. Poswa then called the appellant on his cellular phone and informed him about the problem. The appellant promptly came to the bank and drew a cheque in Poswa's name in the same amount.

[9] The bank required identification from the appellant as the drawer of the cheque and Poswa as the payee thereof. Once this was verified a cash sum of R180 000 contained in money bags was paid to Poswa. She handed the entire amount to the appellant outside the bank, in her brother's presence. They parted thereafter. Poswa's evidence was not elucidated during the trial about the timing of this event but it appears that after the handing over of the R180 000, the appellant gave them a R500 000 cheque drawn in Mageba's favour which Poswa deposited into Mageba's banking account on the following day and was duly paid by the bank.

[10] The relationship between the appellant and the Poswa siblings soured dramatically after this incident. About two days later the appellant accused Mageba of poor workmanship. He ordered it to cease operations and threatened to cancel the contract. Mageba was left with no choice but to seek the Department's intervention and report the whole episode to its attorney and the Joint Anti-Corruption Task Team

of the Special Investigating Unit in East London. Mageba, through its attorneys, demanded the return of the sum of R180 000 from the appellant. In response to the demand, the appellant telephoned Poswa's brother. Poswa was present during the call and the phone was put on speaker mode. The two men argued and the exchange ended without resolution.

[11] Sometime later, the appellant telephoned the siblings in a state of panic after he had been contacted by the Department and removed from the project. He said that he had formulated a strategy to refund the R180 000 and asked to meet them to discuss the issue. They agreed to meet him in East London at a car park in Vincent Park. The Poswas reported the planned meeting to the police. A police trap was set and members of the Joint Anti-Corruption Team would be present in the vicinity of the meeting which subsequently took place in a car at the car park as arranged. There, the appellant reported on the plan that he had formulated to recover the R180 000. He said that it could be recovered from the earthwork quantities because nobody would go and dig up the road to measure it as it was already covered with asphalt. To that end, he would submit a variation order in the sum of R274 978,42 which he said was ready and approved as he had previously discussed the matter with Makwabe. Only Poswa's signature was outstanding and he was available to submit the document in Bisho on the following day. Poswa asked to make a copy of the variation order and, as she left the car, the police pounced and seized the document. Mageba never recovered the monies which Poswa gave to the appellant.

[12] The gist of the testimony of the FNB official, Jones, was that she had served Poswa, who was accompanied by the appellant, when she presented the R180 000 cheque at the bank and that they had both produced their identity documents and were positively identified by the bank as the drawer and payee of the said cheque.

The cheque had to be verified with the bank's Port Elizabeth branch, from which it originated, and then authorised by her supervisor. The appellant remained with Poswa throughout that process. He was still present when she counted the money, bagged it and handed it to Poswa and she saw them leave the bank together at about 17h00. She estimated that the transaction had taken about one and a half hours as Poswa had initially arrived at the bank shortly before it closed to the public at 15h30.

[13] Nothing much turns on Makwabe's brief evidence which dealt mainly with the manner in which the respective parties performed under the contract and the details of the payments made by the Department to Mageba. His version was largely consonant with Poswa's evidence on the relevant aspects although he mentioned, albeit briefly, that there were certain problems with the construction but that the work was done well and the project ultimately completed. More important is his assertion that it was impermissible for payment to a contractor to be effected without the foundation of a payment certificate and that he had not been aware of the appellant's alleged conduct in this regard.

[14] This was the conspectus of the state case and, as mentioned , the only evidence that adduced in the trial as the appellant closed his case without leading any evidence. The magistrate acknowledged that Poswa was a single witness in so far as the events relevant to the commission of the offence were concerned and found that there were flaws in her evidence.

[15] The magistrate nevertheless concluded that such flaws as existed 'did not vitiate the whole of the State's case'. In her view, the contradictions were not unexpected in the light of the considerable lapse between the commission of the crimes and the trial, and the gruelling cross-examination, which took over a week, to

which Poswa was subjected. In the event, the magistrate found Poswa to be a reliable witness. She concluded that

'Although the complainant stands as a single witness in as far as the events relevant to the charges are concerned, the Court is convinced beyond a reasonable doubt that a case has been established against the accused. The evidence pointing towards the commission of the offence is not only convincing but overwhelming. Just as the Courts are enjoined to exercise caution when dealing with the evidence of a single witness, caution should not be allowed to displace reason. The accused had elected, in the exercise of his rights, not to refute the State's case. The State's case therefore remains unchallenged.'

In arriving at that conclusion the magistrate relied on *S v Boesak* 2001 (1) SA 912 (CC) and *Osman and another v A G Transvaal* 1998 (4) SA 1224 (CC) which held that once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case runs a risk as the court may well be entitled to conclude that such evidence is sufficient to found a conviction.

[16] On appeal, the court below found that the magistrate had misdirected herself in certain respects. But nonetheless confirmed the conviction in respect of the second count although it found that the case had been 'poorly prosecuted by the State' and that Poswa's evidence remained unsatisfactory in certain respects. The court found that despite the flaws and the state's inexplicable failure to call Poswa's brother and the police who partook in the sting operation in Vincent Park as witnesses, the state had nonetheless established a prima facie case. Poswa's evidence, it held, was 'not totally uncorroborated' and demanded an explanation from the appellant. The court drew an adverse inference from the appellant's failure to testify when his counsel had put to state witnesses that he would do so and said that this suggested that 'he changed his mind because he had something to hide'. The court concluded that Poswa's evidence clearly established an express and unlawful threat by the appellant

to prevent any further payments to Mageba if he was not paid R180 000 and that his conviction was therefore proper. The court below however found that the sentence imposed by the magistrate was shockingly disproportionate to the seriousness and prevalence of the crime of extortion and corruption and substituted it with one of direct imprisonment.

[17] The matter fell to be decided under the provisions of the Transkei Penal Code, Act 9 of 1983 (the Penal Code) which was applicable in the area of jurisdiction in which the offences were alleged to have been committed. Extortion is dealt with in s 156 of the Penal Code which provides:

'Any person who takes from another some advantage by intentionally and unlawfully subjecting such other person to pressure which induces him to submit to that taking shall be guilty of an offence.'

[18] The requirements of extortion under the Penal Code are no different from those of the offence under the common law. Both versions of the offence consist 'in obtaining from another some advantage by unlawfully and intentionally subjecting him to pressure that induces him to submit to the taking'.[2] The element of 'unlawfully subjecting another to pressure' implicitly requires a threat to be used to apply such pressure. And it is that threat and the purpose for which it was used that the court will consider when deciding whether a person was subjected to unlawful pressure.[3]

[19] State counsel correctly conceded that the state case could have been better presented. I respectfully agree with the court below that Poswa's evidence was not entirely satisfactory in parts. This, it appears to me, was largely due to the manner in

[2] Jonathan Burchell *Principles of the Criminal Law* 3ed 174.
[3] Ibid 174 -175.

which her evidence was led; her examination-in-chief was cursory at best and it is mostly in cross-examination that most of the material issues she raised were explained. Further, there seems no reason on the face of it why Poswa's brother who was said to have been present when the offences were committed and the police who were involved in the sting operation were not called as witnesses. But, having said that, it must be considered that the state has an unfettered discretion in its choice of witnesses[4] and that the failure by a litigant to call a witness in support of his case does not necessarily warrant the drawing of an inference adverse thereto if such case may have been sufficiently presented without the witness.[5]

[20] I agree with the defence counsel that Poswa's evidence must be carefully viewed against the probabilities as she was a single witness in relation to the events giving rise to the offence. That the trial court and the court below did. Both subjected her evidence to careful scrutiny. I accept as both courts did, that her evidence is not without its blemish but I can find no warrant for rejecting her evidence in its entirety as submitted by counsel. Her evidence, it must be added, did not stand in isolation. There was much in the documetary exhibits and the evidence of the other state witnesses that afforded material corroboration for her version. The documentary evidence consisted of the appellant's and Manong's bank statements reflecting the changing of hands of the sum of R180 000; the bank cheques of R300 000 and R500 000 paid by the appellant to Mageba without the basis of payment certificates in contravention of the relevant requirements and the variation order which was similarly unaccompanied by a payment certificate.

[21] It was contended on the appellant's behalf that Poswa's evidence was unreliable, inconsistent and inherently improbable and that there was no reason for

[4] *S v Kelly* 1980 (3) SA 301 (A).

[5] *S v Ramroop* 1991 (1) SACR 555 (N) at 559d-e.

him to testify when it was seriously doubtful on the State's own version that he had committed the offences. I do not agree. By the end of the state case it had become either common or undisputed that:

(a) On 3 May the appellant had issued two cheques in the sums of R180 000 and R500 000 dated 3 and 4 May, respectively.

(b) The appellant had gone to the bank on 3 May to confirm the authenticity of the cheque for R180 000 and verify his identity as the drawer of the cheque.

(c) At the bank the appellant met Poswa and after a protracted wait the cheque was cashed by Ms Jones, an employee of the bank.

(d) The appellant left the bank together with Poswa, who was possessed of the cash.

(e) The next day the other cheque for R500 000 was presented for payment by Poswa and met.

(f) The Poswas thereafter sought, through their attorneys, to recover the sum of R180 000 from the appellant.

(g) The Poswas reported the matter to the police and a trap was set for the appellant.

(h)The appellant met with the Poswas in Vincent Park in East London some two to three months later and when he so met with them he was possessed of a variation order that he proposed should be submitted to the Department.

These facts plainly called for a rebuttal from the appellant and it was inconceivable that if an innocent explanation was available to him he would have elected not to testify nor to adduce any evidence in his defence.

[22] I find the appellant's decision to wait at the FNB with Poswa until she received the money perplexing. It seems to me highly unusual that a busy professional would continue waiting idly in a bank as the appellant did long after he had fulfilled what was required of him to have the cheque authorised, which also took time, unless he had an interest in the proceeds. There appears no reason

whatsoever on the evidence for him to have kept Poswa company when her brother waited for her outside the bank. The same may be said for his agreeing to meet the Poswas in Vincent Park after their relationship had obviously soured. This conduct also called for an explanation. And it needs to be asked why Mageba's directors would initiate the drastic steps of reporting the appellant to the police when this would expose their own complicity in serious acts of dishonesty if he had done nothing untoward. But most compelling is Poswa's assertion, which remains uncontested, that the appellant threatened to cut Mageba's lifeblood by not paying it further for its services unless he was given a portion of the available project funds.

[23] Both courts below were thus fully justified in drawing an adverse inference from the appellant's failure to testify. In those circumstances they were entitled to conclude that the evidence was sufficient in the absence of any explanation from the appellant to rebut the accusations levelled against him. It follows that the appellant's conviction cannot be faulted and must be confirmed.

[24] Turning to the question of sentence: The approach to be adopted by an appellate court to an appeal against sentence is trite. It is that punishment is pre-eminently a matter for the discretion of the trial court and that a court sitting on appeal will interfere only if such discretion is not judiciously and properly exercised ie where the sentence is vitiated by misdirection or is disturbingly inappropriate.[6] Thus, an appellate court may not interfere merely because it would have imposed a heavier or lighter sentence and will do so only if there is a striking or startling or disturbing disparity between the trial court's sentence and that which it would have

[6] *S v Rabie* 1975 (4) SA 855 (A) at 875 D-F.

imposed.[7]

[25] Counsel for the appellant submitted that the court below had misdirected itself in certain material respects when altering the sentence imposed by the magistrate. The first is that the appellant manipulated state funds to be paid into Manong's bank account. In arriving at that conclusion the court misconstrued the evidence. The second was that the prejudice he suffered as a result of a provisional restraint order granted against him in proceedings for a confiscation order under the Prevention of Organised Crime Act 121 of 1998, and the likely censure by the professional bodies to which he belongs as a result of the case was deemed irrelevant. To my mind, these factors are relevant in the determination of an appropriate sentence. I am thus willing to accept that the court below did indeed misdirect itself.

[26] But I agree entirely with the court below that the sentence imposed by the magistrate was too lenient and did not adequately address the seriousness of the offence committed by the appellant and its prevalence. For decades the courts have lamented the ever-increasing scourge of crimes involving dishonesty such as corruption, fraud and extortion. The devastating effect of these offences is articulately described by this court in *S v Shaik and others* where it said:[8]

'The seriousness of the offence of corruption cannot be overemphasised. It offends against the rule of law and the principles of good governance. It lowers the moral tone of a nation and negatively affects development and the promotion of human rights. As a country we have travelled a long and tortuous road to achieve democracy. Corruption threatens our constitutional order. We must make every effort to ensure that corruption with its putrefying effects is halted. Courts must send out an unequivocal message that corruption will not be tolerated and that punishment will be appropriately

[7] *S v Sadler* 2000 (1) SACR 331 (SCA) para 8.
[8] *S v Shaik and others* 2007 (1) SA 240 (SCA) para 223.

severe. In our view, the trial Judge was correct not only in viewing the offence of corruption as serious, but also in describing it as follows:

"It is plainly a pervasive and insidious evil, and the interests of a democratic people and their government require at least its rigorous suppression, even if total eradication is something of a dream."

It is thus not an exaggeration to say that corruption of the kind in question eats away at the very fabric of our society and is the scourge of modern democracies. However, each case depends on its own facts and the personal circumstances and interests of the accused must always be balanced against the seriousness of the offence and societal interests in accordance with well-established sentencing principles.'

[27] In *South African Association of Personal Injury Lawyers v Heath*,[9] the Constitutional Court, dealing with a matter involving corruption, said:

'Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State.'

[28] The circumstances of this case undoubtedly demand a custodial sentence. As pointed out by Marais JA in *S v Sadler*,[10] the view that perpetrators of white-collar crime are not true criminals and do not belong in jail because it is non-violent and the perpetrators are usually first offenders with ostensibly respectable backgrounds is a dangerous fallacy in view of the corrosive impact upon society of such crime. This view results in sentences which send out a message that it pays to commit these types of crime. There is absolutely nothing respectable about a white-collar criminal and the effect of his actions may be as devastating as those of a violent crime.

[9] *South African Association of Personal Injury Lawyers v Heath* 2001(1) SA 883 (CC) para 4.
[10] Ibid fn 9 para 11.

[29] The appellant was tasked by the state to oversee a critical developmental project which would ensure the betterment of a poor area. Indications are that Mageba was a small, emerging building contractor, struggling to establish itself in the market whiltst obviously providing much-needed employment in the area. The appellant was placed in a position of trust which required the utmost integrity and care. But he abused it by deliberately devising a scheme by which to fleece the very state which
provided him with a means of income and the contractor he was expected to monitor to satisfy his avarice, placing the whole project in jeopardy. One would have expected that Poswa's refusal to acquiesce to his vile scheme would stir his conscience. Instead, it propelled him to devise a further, elaborate plot to defraud the state to buy her silence.

[30] That said however, the appellant's personal circumstances and interests must be balanced against the seriousness of the offence he committed and societal interests as enjoined in *S v Shaik*. He was 38 years of age when he committed the offences. He is a first offender with two minor children whom he maintains. His highly successful career seems to have been peaking when the sky fell on him and he must indeed have suffered considerably in many ways as a result of this case. In addition to the trauma
and shame he, and probably his family, must daily endure from his fall from grace, he has for many years had to live with the anxiety and stress of the criminal proceedings which started in July 2005.

[31] As I have said, it is a relevant factor that the appellant's troubles and punishment have not been confined to this case and he has had to contend with other litigation under which a significant portion of his assets were frozen and may very

well be impeded in future from effectively practising his profession. He was a productive member of society until his lapse and contributed materially in the building of national infrastructure by his involvement in various vital development projects. Although I do not agree with his counsel that his conduct was impulsive, I nonetheless accept that that his lapse was an isolated breach and that no pattern of wrongdoing was established.

[32] Approaching the question of sentence afresh, as I am obliged to, I remain unpersuaded that any warrant exists for interfering with the sentence imposed by the court below. If anything, on the view that I take of the matter, the sentence errs on the side of leniency, not severity.[11]

[33] There remains one aspect, namely, the condition of suspension stipulated by the court below. Conditions must be clearly set out and must leave the accused in no doubt as to what conduct is prohibited or required. Clarity in the condition will also make it easier for any court which has to consider an alleged violation of any condition. It is thus not advisable to refer to groups of crimes in the condition such as 'crimes of which dishonesty is an element' as occurred here.[12] It is not necessary, it seems to me, to further qualify the condition of suspension in an attempt to avoid the risk of the sentence being put into operation for relatively minor contraventions.[13]

[34] In the result the words 'a crime of which dishonesty is an element' falls to be deleted from the condition of suspension to be replaced with 'extortion, corruption, forgery and uttering, fraud or theft'. The sentence will thus read

'The accused is sentenced to four years imprisonment of which two years is suspended for five

[11] Compare *De Sousa v The State* (626/2007) [2008] ZASCA 93 (12 September 2008).

[12] SS Terblanche *Guide to Sentencing in South Africa* 2ed p359.

[13] See *S v Mnguni & others* 1985 (2) SA 448 (N).

years on condition that the accused is not convicted of extortion committed during the period of suspension.'

Save to that extent, the appeal against conviction and sentence fails and it is accordingly dismissed.

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MML Maya
Judge of Appeal

APPEARANCES

APPELLANT:	A Schippers SC (with him T Masuku)
	Nongogo, Nuku Inc., Cape Town
	EG Cooper Majiedt Inc., Bloemfontein
RESPONDENT:	JMK Joubert
	Director of Public Prosecutions, Mthatha
	Director of Public Prosecutions, Bloemfontein