THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1171/2023

In the matter between:

GIANMARCO LORENZI **APPLICANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Lorenzi v The State* (1171/2023) [2025] ZASCA 58 (13 May 2025)

Coram: MOCUMIE, KGOELE and COPPIN JJA

Heard: 3 March 2025

Delivery: 13 May 2025

Summary: Practice and procedure – special leave to appeal -refusal by two judges of the Supreme Court of Appeal (SCA) – s 17(2)*(f)* of the Superior Courts Act 10 of 2013 – referral of order refusing special leave to appeal for reconsideration and, if necessary, variation. Appeal – application for special leave to appeal to the SCA – requirements for grant thereof – test not satisfied by establishing existence of only reasonable prospects of success but existence of exceptional circumstances also

required – sentence – whether discretion exercised judicially – exceptional circumstances not proven – custodial sentence appropriate.

ORDER

On application for reconsideration: referred by Molemela P in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013:

The application for reconsideration and, if necessary, variation of the order of this Court, granted on 19 October 2023, dismissing the applicant's application for special leave to appeal, is dismissed.

JUDGMENT

Kgoele JA (Mocumie JA concurring)

[1] This is the reconsideration of the petition order granted by two judges of this Court on 19 October 2023, in terms of which the application for leave to appeal sought by the applicant, Mr Gianmarco Lorenzi (Mr Lorenzi), was dismissed. Mr Lorenzi bemoaned the custodial sentence imposed against him on 13 December 2022 by the specialised commercial crime court sitting in the Regional Court of the Regional Division of the Western Cape, Belville (the trial court). Aggrieved by the dismissal, Mr Lorenzi petitioned the President of this Court, who, on 25 March 2024, referred the application for reconsideration and, if necessary, variation as contemplated in s 17(2)*(f)* of the Superior Courts Act (the Act).[1] The parties were also warned to be prepared to present oral argument in terms of 17(2)*(d)* of the Act, if called upon.

[1] The Superior Courts Act 10 of 2013 (the Act). Section 17(2)(*f*) of the Act was amended by s 28 of the Judicial Matters Amendment Act 15 of 2023 which came into effect on 3 April 2024. The effect of the amendment is to alter the standard for referral from exceptional circumstances to the following test: 'where a grave failure of justice would otherwise result or the administration of justice may be brought into disrepute. . . '. The change of standard is not applicable to this matter, and does not however change the essential question before this Court.

[2] The factual background leading to his conviction is briefly as follows: Cleardata (Pty) Ltd (Cleardata) is a document destruction specialist company based in Cape Town and a subsidiary of Metrofile Holdings Ltd (Metrofile), a global leader in records and information management. Mr Lorenzi established Cleardata in 2005, at which time only the L-Cubed Trust and the Lorenzi Family Trust owned shares. He also served as the sole trustee for both trusts. In 2009, Metrofile acquired 55 percent of Cleardata's shares, leaving L-Cubed Trust with 45 percent. Mr Lorenzi and Mr McGowan were appointed as co-directors of Cleardata, with Mr Lorenzi primarily responsible for the day-to-day operations in Cape Town, while Mr McGowan managed the affairs in Johannesburg. He received a monthly salary of R71,000 from 1 January 2011 until September 2017.

[3] Metrofile increased its shareholding in Cleardata to 70 percent in 2012, while L-Cubed Trust retained 30 percent. Mr Lorenzi resigned from Cleardata on 12 September 2017, upon realising that the offenses for which he was eventually convicted had been detected. On 13 November 2017, Metrofile and Mr Lorenzi finalised a settlement agreement concerning the stolen money, resulting in Metrofile acquiring all of L-Cubed's shares (the 30 percent) in Cleardata for the nominal amount of R144.

[4] On 3 November 2022, Mr Lorenzi pleaded guilty to and was convicted of 18 counts of theft totaling R4.6 million, and eight counts of forgery. Only three of the theft counts were subject to a minimum sentence in terms of s 51(2) of the Criminal Law Amendment Act 105 of 1997 (minimum sentence legislation).[2]

[2] Section 51(2)*(a)* of the Criminal Law Amendment Act 105 of 1997 provides:
'(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-
(a) Part II of Schedule 2, in the case of-

During sentencing, the trial court found substantial and compelling circumstances that justified a deviation from imposing the minimum sentences on the three counts. He was consequently sentenced as follows:

4.1 Seven years of direct imprisonment for the convictions on the three counts of theft i.t.o s 276(1)*(b)* of the Criminal Procedure Act 51 of 1977 (the CPA). All the counts were taken together for the purposes of the sentencing;

4.2 Seven years of direct imprisonment in respect of the convictions on the remaining 15 counts i.t.o s 276 (1)*(b)* of the CPA. All those counts were taken together for purposes of sentencing and were ordered to run concurrently with the sentences imposed on the three counts of theft referred to in para 4.1;

4.3 Four years of direct imprisonment for the convictions on the eight counts of forgery i.t.o s 276 (1)*(b)* of the CPA. All of those counts were also taken together for the purposes of sentencing, and two years of the sentence was suspended for five years on certain conditions.

The total effective term of imprisonment imposed on Mr Lorenzi in respect of all the counts was thus nine years.

[5] Of material relevance to this appeal is the fact that the offences occurred between 2014 and 2016, when Mr Lorenzi served as the managing director of Cleardata. In breach of his fiduciary duties, Mr Lorenzi unlawfully transferred a total of R4.6 million from Cleardata's banking portal to his personal bank account and to various service providers who did not provide services to Cleardata, but rather to him. He claimed that the funds were primarily used for renovating his house for his son's enjoyment and to cover the fees related to his contentious divorce proceedings.

(i) a first offender, to imprisonment for a period not less than 15 years;
(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years.'

[6] Mr Lorenzi's evidence in mitigation of the sentence was that the forgery counts were committed over one night at the end of July or the beginning of August 2017. His *modus operandi* involved amending several invoices and altering bank statements to justify the amounts misappropriated during the 2017 financial year for audit purposes. He maintained that the forged documents were never uttered, as he placed them in an envelope in his desk drawer, where they remained until he left the business. In his petition, and in his application for reconsideration of the refusal of that petition, he criticised the trial court for not considering this as a mitigating factor.

[7] Mr Lorenzi primarily attributed his financial difficulties in 2013, to running out of money during the construction of a house. He also mentioned that he used the remaining amount to settle an acrimonious divorce against his wife that dragged on for several years.

[8] In mitigation of sentence, Mr Lorenzi further indicated that he was suspended and subsequently resigned from Cleardata after the Chief Executive Officer and Chief Financial Officer of Metrofile informed him that they had information suggesting he had misappropriated Cleardata's funds. According to Mr Lorenzi, Metrofile insisted that in order to settle the matter amicably and avoid any civil actions between the parties, Mr Lorenzi's trust was to transfer its shares to Metrofile for a nominal consideration, which he did. He contended that he, therefore, repaid the stolen money.

[9] The State, as the respondent in this appeal, did not present any evidence during the sentencing proceedings. As previously noted, Mr Lorenzi was sentenced to custodial imprisonment by the trial court. Counsel representing Mr Lorenzi

primarily criticised the following findings made by the trial court during sentencing: that the settlement agreement with Cleardata and Metrofile was illegal because it seemed to indemnify the appellant from criminal prosecution; Mr Lorenzi failed to provide supporting documents to substantiate his claims about how he spent the misappropriated funds; he committed the theft out of greed; he did not show remorse; and the decision not to impose a correctional supervision sentence is prohibited by s 276(3)*(b)* of the Criminal Procedure Act 51 of 1977 (the CPA). His counsel argued that these findings indicate that the trial court relied on incorrect facts and misdirected itself by failing to order all the sentences to run concurrently.

[10] *Liesching and Others v S* (*Liesching I)*[3] is essential for the following reason. There the Constitutional Court held that s 17(2)*(f)* of the Act applies once special leave has been refused, which implies that the applicant must demonstrate something beyond the requirements for special leave. It held:

'The proviso in section 17(2)(f) is very broad. It keeps the door of justice ajar in order to cure errors or mistakes and for the consideration of a circumstance, which, if it was known at the time of the consideration of the petition might have yielded a different outcome. It is therefore a means of preventing an injustice. This would include new or further evidence that has come to light or became known after the petition had been considered and determined.'

[11] In *Anvit v First Rand Bank Ltd* (*Anvit),*[4] Mpati P emphasised:

'In the context of s 17(2)*(f),* the President will need to be satisfied that the circumstances are truly exceptional before referring the considered view of two judges of this court to the court for reconsideration. I emphasise that the section is not intended to afford disappointed litigants a further attempt to procure relief that has already been refused. It is intended to enable the President of this Court to deal with a situation where otherwise injustice might result. An application that

[3] *Liesching and Others v* S [2016] ZACC 41; 2017 (4) BCLR 454 (CC); 2017 (2) SACR 193 (CC) (*Liesching I*) para 54.
[4] *Anvit v First Rand Bank Ltd* [2014] ZASCA 132 (*Anvit*) para 6.

merely rehearses the arguments that have already been made, considered and rejected will not succeed, unless it is strongly arguable that justice will be denied unless the possibility of an appeal can be pursued. A case such as *Van der Walt* may, but not necessarily will, warrant the exercise of the power. In such a case the President may hold the view that the grant of leave to appeal in the other case was inappropriate.'

[12] Unterhalter JA in *Bidvest Protea Coin Security (Pty) Ltd v Mandla Wellem Mabena (Bidvest)*,[5] confirmed the ruling by Ponnan JA in *Motsoeneng*[6] that 'exceptional circumstances' is a jurisdictional fact that must be met first. More recently, Smith JA in *Tarentaal Centre Investments (Pty) Ltd v Beneficio Developments*,[7] aptly summarised the jurisprudence of both this Court and the Constitutional Court in regard to the application of s 17(2)*(f)*, as follows:

'When the President referred the matter for reconsideration, the jurisdictional requirement for the exercise of her discretion in terms of s 17(2)(*f*) was the existence of 'exceptional circumstances'. That section was subsequently amended by s 28 of the Judicial Matters Amendment Act 15 of 2023, which came into operation on 3 April 2024. In terms of the amended section the jurisdictional facts for the exercise for the President's discretion are, 'circumstances where a grave failure of justice would otherwise result or the administration of justice may be brought into disrepute.' The amendment did not alter the nature of the President's discretion in any way since the Constitutional Court in *S v Liesching and Others* (*Liesching*) – which was decided before the amendment - held that the phrase 'exceptional circumstances' encompasses the aforementioned jurisdictional factors.

In *Motsoeneng v South Africa Broadcasting Corporation Soc Ltd and Others*, this Court held that, "[t]he necessary prerequisite for the exercise of the President's discretion is the existence of "exceptional circumstances". If the circumstances are not truly exceptional, that is the end of the matter. The application under subsection (2)(*f*) must fail and falls to be dismissed." Once the President has referred the decision of the two judges refusing leave to appeal for reconsideration,

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[5] *Bidvest Protea Coin Security (Pty) Ltd v Mandla Wellem Mabena* [2025] ZASCA 23 para 12.
[6] *Motsoeneng v South African Broerdering Corporation Soc Ltd and Others* [2024] ZASCA 80 para 19. See also *Doorware CC v Mercury Fittings CC* [2025] ZASCA 25; 2025 JDR 1340 (SCA) para 11 and *Tyte Security Services CC v Western Cape Provincial Government and Others* [2024] ZASCA 88; 2024 (6) SA 175 (SCA) para 11.
[7] *Tarentaal Centre Investments (Pty) Ltd v Beneficio Developments* [2025] ZASCA 38 paras 4-7.

the court effectively steps into the shoes of the two judges' and may. upon reconsideration, grant or refuse the application.

The question whether we are entitled, or for that matter obligated, to consider first whether exceptional circumstances warranted the exercise of the President's powers in terms of s 17(2)(*f*) did not arise in this appeal, nor was any argument presented to us in this regard. This was because in argument before us, the applicants' counsel accepted that they bore the onus of establishing exceptional circumstances, either in the sense of a probability of a grave failure of justice or the administration of justice being brought into disrepute. In this regard counsel submitted that a failure to reconsider the decision refusing leave to appeal will result in a 'grave injustice'.

The Constitutional Court cautioned in *Liesching* that s 17(2)(*f*) is not intended to afford litigants a further attempt at procuring relief that has already been refused. It is instead "intended to enable the President to deal with a situation where an injustice might otherwise result. It does not afford litigants a parallel appeal process in order to pursue additional bites at the proverbial cherry".'

[13] It is also trite that the imposition of a sentence in a criminal matter is primarily a matter for the discretion of the trial court. Therefore, a court of appeal will not interfere lightly with the exercise of that discretion.

[14] The first criticism of the sentence imposed by the trial court was that it relied on an incorrect finding regarding the settlement agreement, which constituted another criminal offence committed by Mr Lorenzi as it sought to indemnify him from criminal prosecution. Unfortunately, the finding in question is not a finding, much less a fact, but rather an *obiter dictum* expressed by the trial court. Whether it is right or wrong, it remains a neutral factor. Its significance, if any, fades into the background in this appeal when weighed against the undisputed facts of this matter.

[15] It is important to note that, despite Mr Lorenzi conceding to the commission of these offenses and concluding the settlement agreement, the facts indicate that Cleardata, regardless of the settlement, pursued a charge against Mr Lorenzi because

his conduct alone constituted a crime. Specific emphasis should be placed on the fact that he did not report the matter to the police before they could take action, and there is no evidence suggesting he intended to do so. Why should this then, count in his favour? The reality is that it is a settlement resolving a civil suit. It did not extinguish the criminal aspect of the offense. The trial court could not overlook these undisputed facts. The argument that he made good the loss suffered by entering into a settlement agreement lacks merit. This is so because he did not repay the stolen money in cash, and this fact alone, cannot salvage Mr Lorenzi's case.

[16] The second finding that was criticised pertains to Mr Lorenzi's remorse. This criticism lacks any basis. Mr Lorenzi committed the offenses over, not just one, but several years, providing him ample opportunity to end the unlawful and dishonest conduct he knew was criminal. He continued unabated until he was caught. The offences were also carefully planned. In his evidence for sentencing, he indicated that he was aware that another individual had defrauded Cleardata. Nevertheless, he was not willing to identify the person, let alone report it. This behaviour does not reflect someone who shows contrition for his actions. At any rate, the trial court considered the guilty plea as one of the substantial and compelling circumstances that justified deviating from imposing the minimum sentence prescribed for the theft charges. Therefore, it cannot play a role in further reducing the sentence.

[17] The criticism relating to the finding that the trial court regarded direct imprisonment as the only appropriate sentence, along with its refusal to impose correctional supervision, will be analysed together due to their interconnectedness. The submission presented in this context was that the trial court misdirected itself on the application of the law by relying on the case of *Seedat v S (Seedat)*,[8] when it

[8] *Seedat v S* [2016] ZASCA 153; 2017 (1) SACR 141 (SCA) para 36.

found that 'after substantial and compelling circumstances [are] found to exist which justify a deviation the trial court does not have unfettered discretion to impose any other sentence after the Zinn triad was considered . . . the trial court was not at large to impose . . . any sentence'. The argument was that the trial court's interpretation of *Seedat* and s 276(3)[9] of the CPA was incorrect.

[18] To bolster this argument, counsel representing Mr Lorenzi submitted that on a proper interpretation of s 276(3)*(b)* of the CPA, a court is only precluded from imposing a sentence of correctional supervision where it is obliged to sentence an accused to a minimum sentence. If substantial and compelling circumstances are found to be present, a court is no longer obliged to impose a prescribed minimum sentence, and correctional supervision becomes a valid sentencing option. In light of the aforementioned, his legal representative argued, on this basis alone, it would serve the interest of justice to grant Mr Lorenzi leave to appeal on this issue. He made it clear that this argument was not based on s 276(1)*(h)*,[10] but on s 276(1)*(i)*.[11]

[19] Even though Mr Lorenzi's legal representative provided a sound interpretation of s 276(1), it does not matter which sub-section he relies on; the crux

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[9] Section 276(3) of the Criminal Procedure Act 51 of 1977 (the CPA) provides:
'(3) Notwithstanding anything to the contrary in any law contained, other than the Criminal Law Amendment Act, 1997 (Act 105 of 1997), the provisions of subsection (1) shall not be construed as prohibiting the court-
(a) from imposing imprisonment together with correctional supervision; or
(b) from imposing the punishment referred to in subsection (1) *(h)* or *(i)* in respect of any offence, whether under the common law or a statutory provision, irrespective of whether the law in question provides for such or any other punishment: Provided that any punishment contemplated in this paragraph may not be imposed in any case where the court is obliged to impose a sentence contemplated in section 51 (1) or (2), read with section 52, of the Criminal Law Amendment Act, 1997.'

[10] Section 276(1)*(h)* of the CPA provides:
'(1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely-
(h) correctional supervision.'

[11] Section 276(1)*(i)* of the CPA provides:
'(1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely-
(i) imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board.'

of the matter is that the trial court delivered a clear judgment on the sentence. In my view, the sentences imposed based on the facts of this case are appropriate. It cannot be said that they are sentences that no other court could have imposed. Firstly, all available sentencing options were considered, and reasons were given why certain choices were made, or not made. Secondly, in addition to finding exceptional and substantial circumstances, the trial court considered all similar offences together for sentencing purposes, with others being partially suspended. Furthermore, multiple sentences on different counts were ordered to run concurrently, mitigating the severity of the overall sentences. These factors indicate that the trial court leaned significantly towards mercy in reducing the cumulative effect of the sentences, exemplifying mercy at its finest. Thirdly, Mr Lorenzi's personal circumstances were ordinary, which is why they were not mentioned by his legal representative in this appeal.

[20] In my view, the trial court properly balanced the interest of the society and those of Mr Lorenzi when it refused to accept both the recommended s 276(1)*(h)* and 276(1)*(i)* and correctly articulated its views as enunciated by this Court in *S v Sinden*,[12] that:

'He eventually concluded that correctional supervision would cater for the criminal but not the crime nor the interests of society: "it would most certainly not have sufficient general deterrence".'

[21] The final criticism directed at the trial court's finding - that it did not consider the fact that the forgery counts were not uttered as mitigating - lacks merit as well. Considering that Mr Lorenzi, with his chartered accounting skills, meticulously planned and executed white–collar crimes repeatedly over three years while enjoying a good salary as the managing director of the same company, there is little

[12] *S v Sinden* 1995 (2) SACR 704 (A) at 707F.

room to conclude that another court would find that the trial court did not exercise its discretion judiciously. Furthermore, granting leave to appeal would not serve the interests of justice. This is a typical case where, if leave is granted, it may result in injustice. He owed Cleardata a fiduciary duty, which he breached.

[22] Consequently, Mr Lorenzi failed to demonstrate that exceptional circumstances exist and that justice would be denied unless leave for an appeal is granted. His legal representative merely restated the argument previously made before the trial court in a restructured manner and did not meet the required threshold.

[23] Accordingly, the substance of the reasoning underpinning the judgment of the regional court can hardly be faulted. The inevitable consequence of this conclusion is that the order of this Court granted on 19 October 2023, in terms of which the applicant's application for special leave to appeal against that judgment was refused, was correct.

[24] As a result, the following order is made:

The application for reconsideration and, if necessary, variation of the order of this Court, granted on 19 October 2023, dismissing the applicant's application for special leave to appeal, is dismissed.

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A M KGOELE

JUDGE OF APPEAL

Coppin JA

[25] I have read the judgment of my colleague Kgoele JA. I agree with the order that the application be dismissed. The application for leave to appeal was refused by the two judges of this Court, whose decision we have been asked to reconsider. There is no reasonable prospect of success, nor any other reason contemplated in s 17(1)*(a)* of the Act, which justifies the grant of the leave to appeal sought by Mr Lorenzi.

[26] With due respect, I do not agree with the correctness of the conclusion that in this application for reconsideration, proof of 'exceptional circumstances' is 'a jurisdictional fact that must be met first'. Therefore, this short judgment. While I do not consider that conclusion of the legal position to be correct, I do accept that this Court, because of its composition, is bound thereto by virtue of the doctrine of *stare decisis*.

[27] This Court has jurisdiction to reconsider the decision previously arrived at in respect of Mr Lorenzi's application for leave to appeal, not because he has shown, or ought to show 'exceptional circumstances', but because the President of this Court, having been satisfied that there were 'exceptional circumstances', referred the decision of the two judges refusing the applicant leave to appeal to this Court for reconsideration. The existence of 'exceptional circumstances' is a jurisdictional fact for the exercise by the President of her discretion to refer the matter for reconsideration. And the decision of the President to refer this matter to this Court for reconsideration, is not on appeal before us, and neither do we have the power to review that decision of the President.

[28] Section 17(2)*(f)* of the Act vests the President of this Court with the discretionary power to refer the decision of the two judges refusing an applicant leave to appeal to this Court for reconsideration, and if necessary, for variation. The section itself is free of ambiguity, and clear. It reads as follows:

'[T]he President of the Supreme Court of Appeal may, in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, *refer the decision to refuse an application for leave to appeal to the court for reconsideration and, if necessary, variation.'* (Emphasis added.)

[29] The referral for the reconsideration (or variation) is therefore dependent on the existence of 'exceptional circumstances'. Thus, if the President is of the view that there are 'exceptional circumstances' she may refer the decision for reconsideration or variation. This decision of the President need not be prompted by an application from an unsuccessful applicant for leave. The President may exercise the discretion 'of his or her own accord'. Irrespective of the source of the prompting, there must be 'exceptional circumstances' present justifying the referral for reconsideration and if necessary, variation. Therefore, that is a jurisdictional fact at that juncture.

[30] In *Anvit*, Mpati P writing for the court said the following about the exercise of this power by the President:

'In the context of section 17(2)*(f), the President will need to be satisfied that the circumstances are truly exceptional before referring the considered view of two judges of this court to the court for reconsideration.'*[13] (Emphasis added)

[31] It is therefore for the President to satisfy herself, that there are 'exceptional circumstances' before referring the matter for reconsideration (or variation). Of

[13] *Anvit* para 6.

importance is the following – what is referred for reconsideration is not the exercise by the President of her discretion, but the refusal by the two judges of this Court to grant the applicant the leave that is being sought. The President's decision to send the matter for reconsideration is not itself up for reconsideration, or review, by this Court.

[32] In *Liesching I* the Constitutional Court dealt with the rationale behind s 17(2)(*f*). It held that the section:

'…keeps the door of justice ajar in order to cure errors or mistakes and for the consideration of a circumstance, which, if it was known at the time of the consideration of the petition might have yielded a different outcome. It is therefore a means of preventing an injustice. This would include new or further evidence that has come to light or become known after the petition had been considered and determined.'[14]

[33] Having said all of that, I am by no means suggesting that the circumstances which motivated the President of this Court to exercise her discretion to refer the matter for reconsideration by this Court, are irrelevant. They are not. The quote from *Liesching I*[15] underscores the conclusion. It is necessary for this Court to look at all the facts, including the circumstances that prompted the referral, and to determine whether, taking all of those into account, the two judges of this Court, who refused the applicant leave, did so rightly or wrongly, or whether it is necessary to vary their decision or order. This Court is not deciding whether to refer that order to someone else for reconsideration and therefore does not need to be satisfied that there are 'exceptional circumstances' present. Their existence does not imply that leave to appeal ought to be, or ought to have been, granted. The test is still as postulated in s 17(1)*(a)* of the Act, namely, whether: (i) there is a reasonable prospect of success

[14] *Liesching I* para 54.
[15] Ibid.

on appeal, or (ii) there is some other compelling reason why leave to appeal should be granted.

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JUDGE OF APPEAL

Appearances

For the applicant:	F van Zyl SC with M van der Merwe
Instructed by:	Primerio Law Incorporated, Johannesburg
	McIntyre van der Post Inc, Bloemfontein
For the respondent:	M Z Seroto
Instructed by:	Director of Public Prosecution, Cape Town
	Director of Public Prosecution, Bloemfontein.