IN THE HIGH COURT, BLOEMFONTEIN
FREE STATE DIVISION, BLOEMFONTEIN

Appeal No.: 144/2014

In the appeal between:

PETRUS JOHANNES LODEWIKUS NEL Appellant

and

THE STATE Respondent

CORAM: RAMPAI, AJP *et* TSATSI, AJ

JUDGEMENT: RAMPAI, AJP

HEARD ON: 1 DECEMBER 2014

DELIVERED ON: 29 JANUARY 2015

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[1] These were appeal proceedings. The appellant was convicted and sentenced in the district court. He was aggrieved by the verdict and the punishment. He came to us on appeal with the leave of this court which was granted on petition. The respondent opposed the appeal and supported the conviction and the sentence but not the compensation order.

[2] An incident occurred at Bethlehem on Saturday 2 February 2008. The scene of the incident was on a farm called

Goedehoop Farm situated in the magisterial district. The incident took place between 20:00 and 22:30. There were two men physically involved in the incident, namely: Mr PJ Nel, a commercial farmer and proprietor of the farm and Mr TS Mokoena, a resident of Giyani Section Bohlokong, Bethlehem.

[3] The incident gave rise to two criminal charges. Firstly, the prosecution alleged that Mr Nel, the appellant, unlawfully and intentionally assaulted Mr Mokoena, the complainant at Bethlehem on 2 February 2008, by punching him with clenched fists.

Secondly, the prosecution alleged that the appellant contravened Section 120(6) of the Firearms Control Act 60 of 2000 read with related provisions of the statute and schedule 4 thereto, by unlawfully and intentionally pointing a firearm at the complainant at the same place and time as mentioned in the first charge. The firearm was described as a Mossberg Shotgun.

[4] The appellant was summoned. He first appeared in court on 12 May 2011. He was tried in Bethlehem District Court. On 12 July 2011 he pleaded not guilty to both charges. He was legally represented.

[5] Notwithstanding his plea of not guilty, he was convicted as charges on 28 November 2011. The case was then postponed to 30 November 2011 for sentence.

[6] On 30 November 2011 the court a quo handed down the sentence. The two offences were taken together as one for the purpose of sentencing. The appellant was sentenced to six months imprisonment which was wholly but conditionally suspended for four years. The condition was that the appellant should not again be convicted of assault or contravention of the aforesaid section committed during the period of suspension. In addition to the criminal sanction, the appellant was ordered to pay ten thousand rand (R10 000.00) civil compensation to the complainant before 1 December 2011.

[7] The appellant was aggrieved by the conviction, the sentence as well as the compensation order. He unsuccessfully applied for leave to appeal. The refusal by the court *a quo* to let him come here on appeal, prompted him to come on petition. CJ Musi J et Naidoo J granted his petition for leave to appeal on 09 June 2014.

[8] As regards conviction, the appellant relied on twenty grounds of appeal. Among others, the appellant contended that:

> "1. Sy Agbare Landdros het fouteer deur die getuienis van die klaer in sy geheel te aanvaar, spesifiek deur nie al die onwaarskynlikhede van die klaer se getuienis in ag te neem nie.
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> 2. Sy Agbare Landdros het foutreer deur die getuienis van die tweede staatsgetuie in sy geheel te aanvaar, spesifiek deur nie

al die onwaarskynlikhede van die tweede staatsgetuie in ag te neem nie.

…

4. Sy Agbare Landdros het fouteer deur nie die weergawe van die beskuldigde en sy vrou, Maria, as redelik moontlik waar te aanvaar nie, en gevolglik foutiewelik te min waarde geheg het aan die getuienis van die beskuldigde en sy vrou."

[9] The version of the prosecution was narrated by four witnesses, namely:

9.1 Mr Tsebetse Simon Mokoena, the complainant;

9.2 Mr Paul Mission Mokoena, the complainant's son;

9.3 Dr Moeti Abel Motloung, the complainant's doctor;

9.4 Mr Thapelo Petrus Tsotestsi, the investigating officer.

[10] The version of the complainant was that he lived at Giyani. His son lived in Pretoria. He had a relative, Mr Radebe, who lived on the appellant's farm. He had been to the farm on three or so previous occasions. On Saturday 2 February 2008 he and his son drove to the appellant's farm. The purpose of their visit was to pick up Mr Radebe. They travelled by a light delivery van. Its loading compartment was covered with a detachable canvass. The silver van belonged to his son. It was registered in Gauteng Province. It was driven by his son. He was the only passenger. They, together with their relative, were supposed to attend a church service on a certain farm in the vicinity of the appellant's farm.

[11] The complainant did not make an appointment with the appellant. Since he did not notify the appellant of his intention

to visit his farm, he did not have the appellant's consent to enter his farm. Nonetheless they entered the farm. They proceeded towards the homestead. On the way they passed stores. There he saw some farming implements. He knew where his relative lived. Before they reached the relative's dwelling, they stopped. At the homestead he saw the neighbours of his relative. He ascertained from them that his relative was not home. There and then they turned back to depart from the farm. It was about 20:00. As the van was moving towards the gate, he saw another motor vehicle approaching them from the front. The oncoming motor vehicle stopped and blocked their way. His son approached and also stopped in front of the stationary motor vehicle. He and his son remained in the van.

[12] Then the appellant got out of his vehicle, a Land Cruiser, and walked straight to him. He was armed with a rifle. Firstly, the appellant demanded that he open the passenger's window of the van. His son obliged. The appellant pointed a rifle at him. With a firearm in his left hand the appellant repeatedly punched him with his right fist. Secondly, in the process of the assault, the appellant demanded, that he open the glove compartment of the van. However, he could not, because it was locked. Since he could not, the appellant intensified the assault. Again his son obliged. The assault ceased. The appellant searched the glove compartment but found nothing worth mentioning. Thirdly, the appellant demanded that his son open the loading compartment of the van. Yet again his son obliged. His son alighted from the van for the first time

and lifted the canvass. Once again the appellant found nothing sinister at the back of the van. The appellant warned them that the farm belonged to him and not Mbeki. On that warning the confrontation ended. The appellant gave way and they left his farm.

[13] The appellant's punches landed on his face, neck, upper arm and shoulder-all on the left aspect of his body. His left ear was so badly affected that he was still receiving medical treatment as on 12 July 2011 being the date on which he testified about the incident of 2 February 2008. His doctor, Dr MA Motloung, advised him that his eardrum had been perforated. Prior to the assault he had a pre-existent pathology in respect of both ears. Both were surgically operated by a certain specialist in Bloemfontein. The version of the complainant was broadly supported by his son.

[14] The version of the defence was narrated by two witnesses:

14.1 Mr Petrus Johannes Lodewikus Nel, the appellant;

14.2 Ms Maria Nel, the appellant's wife

The version of the appellant was that on Saturday 2 February 2008 he was on his farm. He, his wife and his sister-in-law occupied the farmhouse. His son and others occupied a cottage near the shed. The route from the farm gate forked into two: the one route led to the farmhouse and the other to the shed and the homestead beyond. In the evening of that particular day, he entertained guests on his farm. They left at 21:00. He and his family went to sleep. He woke up when his dogs started barking. He got out of bed, peeped through

the window and saw a motor vehicle moving towards the cottage of his son. His son was not home. He had driven to town to attend a social function that evening. He initially thought the late visitors were friends of his son.

[15] Using his wife's cellular handset, he called his son to enquire whether he was expecting visitors. His son's reply was negative. He confirmed that he and his friend(s) were still in town at Bethlehem. The call was made at 22:26 according to the specified cellular statement wife of his wife – see item 20, exhibit g.

He kept his eyes on the vehicle. He saw it stop behind the workshop and switch off its lights. He decided to go out in order to investigate who the intruders were. He armed himself with a rifle and a headlamp and stepped out together with his wife. They used his Land Cruiser and drove out. His sister remained behind in order to seek help. Should they need help, they arranged that they would call her.

[16] The couple was already on the way when they noticed that the lights of the suspicious motor vehicle were on again and that it was on its way back. He brought his motor vehicle to a standstill on the road in an obstructive position. The suspicious motor vehicle was forced to stop. He then alighted from the motor vehicle and walked to the other motor vehicle. He was armed with a rifle. He was holding its butt in his left hand. Its barrel was facing up. The rifle was vertically resting on his shoulder. In his right hand he had a headlamp. He

spotted two persons in the stationary van. Its driver alighted and stood on the ground behind the driver's door.

[17] He neared the driver and enquired what they were doing on the farm. The driver answered that they were looking for someone. He was no longer certain of the name of the person mentioned by the driver but thought it could have been Radebe. The driver admitted he did not know the farm well. However, he could not explain why he entered the farm if he did not know it well. Moreover, he could not say what they were doing at his workshop.

[18] He then turned to the passenger. He asked him to open the glove compartment. He found nothing of significance in there and in the cabin as a whole. He used his headlamp to search the cabin.

[19] Once again he turned to the driver. He ordered him to open the back loading compartment of the van. The driver obliged. The canvass was unhooked. He lit the compartment by means of the headlamp in order to search the loading compartment. He saw a small bench and a briefcase.

[20] He then warned the driver that should they again enter his farm without his consent he would lock up the farm gate, call the police, have them arrested and prosecuted for trespass. He then moved out of the way to let the van leave the farm. The van drove off. He and his wife drove back home.

[21] In the morning of Sunday 3 February 2008 he enquired from his farmworkers about the visit of the complainant and his son. Nobody had a relative by the name of Radebe. He added that no one of his employees was expecting visitors the previous night or evening. None of them was aware that there were strangers on the farm the previous evening looking for a farm dweller by that name. He denied the allegations that he assaulted the complainant and that he pointed a firearm at him as alleged or in any other way whatsoever. The version of the appellant was confirmed by his wife.

[22] The trial court principally found that the version of the appellant was not reasonably possible. The finding that his version was not reasonably possible was based on the following grounds, among others:

22.1 That the complainant sustained an injury to his left ear in the form of a perforated eardrum and that he fingered the appellant out as the villain;

22.2 that the appellant could give no sound reason as to why the complainant blamed him and nobody else for the aforesaid injury;

22.3 that there were no contradictions between the complainant's account of events and that of his son.

22.4 that the complainant had no motive to falsely incriminate the appellant;

22.5 that the appellant had a motive to aggressively treat the complainant on account of his frustrations occasioned by previous acts of criminals against him in particular and against the farming communities in general;

[23] The decisive conclusion of the trial court was, of course, that the state had proved the guilt of the appellant beyond a reasonable doubt. Such a conclusion entailed the acceptance by the trial court that the evidence justified the following rulings:

23.1 that the complainant while on his way to a night church service elsewhere, took a turn on the appellant's farm at +/-20:00 to pick up his relative;

23.2 that the appellant started punching him while he was still pointing the firearm at him.

[24] On behalf of the appellant Mr Snellenburg submitted that the trial court erred in finally concluding that the version of the appellant was not reasonably true and secondly in concluding that the respondent had established the guilt of the appellant beyond reasonable doubt.

[25] The trial court had found that the version of the appellant was corroborated by the evidence of his wife in all respects. No serious critique could be levelled against the version of the

defence. Although the trial court could find no unfavourable aspects which seriously tarnished the version of the appellant and warranted its rejection, it nonetheless rejected his version, on the ground that the appellant had failed to indicate a sound reason as to why the opposing witnesses would go out of their way to falsely accuse him of crimes he did not commit.

[26] In **S v Lesito** 1996 (2) SACR 682 (O) at 687i – 688a Howitz AJ held:

> "Waar dit slegs bewys word dat 'n afleiding wat 'n person maak verkeerd is, soner dat die feite waarop sy afleiding berus as vals bestempel kan word, is daar nie dieselfde ruimte om al sy getuienis as vals te verwerp nie. **Daar moet ook daarteen gewaak word om sondermeer op 'n beskuldigde 'n las te plaas om 'n verduideliking te vestrek waarom 'n getuie namens die Staat sou lieg**. Waarom juis moet 'n beskuldigde weet om welke rede 'n getuie leuenagtige teen hom lewer? Hy mag dink dat dit om 'n bepaalde rede is, terwyl die getuie om 'n geheel en al ander rede 'n grief teen die beskuldigde koester. Sien R v Roga 1935 TPD 101 R v Ntembu 1956 (4) SA 334 (T) op 335H."

[27] In **S v M** 1979 (2) SA 25 (AD) at 27F-G the court held per Diemont JA that:

> "Again the cross-examination related only to the question whether the appellant was present or absent at the relevant time. The only witness for the defence was the appellant, who told the court that he was nowhere near the place where the complainant alleged she had been sworn at and that he only returned to the shop at 5.45

pm. The cross-examination threw singularly little light on the matter. **The hackneyed question "Do you say that the State witnesses are lying?" seldom produces results.**"

[28] In **S v MB** 2014 (2) SACR 24 (SCA) par [19] the court held per Wallis JA::

"[19] **The prosecutor's approach was wrong. Regrettably, the error was compounded by the fact that it found favour with both the magistrate and the court below.** The magistrate summarised the evidence of the state witnesses, and held that they were all satisfactory. She had the following to say about Mr BM:

'The accused testified in a vague and unconvincing fashion. He was evasive about the bad blood between him and the second state witness and finally after much probing by the public prosecutor ha said no bad blood was between them. **He was unable to commit himself to any clear answer as to why the complainant would falsely implicate him in such a serious matter. Further no reason was in fact given either by the complainant or the defence why the complainant would want to lie against the accused.** It is highly improbable that the second state witness would involve her daughter in a process like this simply because she does not like the accused.'

The magistrate went on to explain that, because the relationship between the families was good, it was improbable that SM would have upset it by making up these allegations against Mr BM. For those reasons she held that the probabilities weighed heavily in favour of the state's case."

[29] It follows, then, that the trial court materially erred in expecting the appellant to provide a reason why the opposite witnesses would falsely accuse him. Doing so was tantamount to calling

upon an accused person to prove his innocence, something which is constitutionally tabooed.

[30] The test to be applied when assessing an explanation given by an accused in any case is that, where the state bears the onus of proof, there is no obligation which rests upon an accused person to convince the court of the truth of his explanation. If his version is reasonably true, he is entitled to his acquittal even though his explanation is improbable. The court is not entitled to convict unless it is satisfied, not only that the accused person's explanation is improbable, but that it is beyond reasonable doubt false. It is permissible to look at the probabilities of the case in order to determine whether the version of an accused person is reasonably true. However, whether one subjectively believes him is not the test. The test is whether there is a reasonable possibility that his evidence may be true.

S v Mafiri 2003 (2) SACR 121 (SCA) at 125;
S v V 2000 (1) SACR 453 (SCA) at 455;
S v Shackle 2001 (2) SACR 185 (SCA) par [30];
S v BM 2014 (2) SACR 23 (SCA).

[31] It would appear that the trial court shifted the onus from the respondent and placed it on the appellant. The salient principle remains operative. No onus whatsoever rests on the appellant to prove his innocence. Moreover, the evidence of the appellant was not improbable. It was more probable than not that a man who set out of his house on a farm, and not in a city with glittering lights all around, would take a torch to

enable him to identify an intruder in the dark and to facilitate the searching of an intruder and his motor vehicle.

[32] The impression I gained after reading the judgment, was that the theme of the trial magistrate's reasoning was that the verdict that the appellant was guilty was largely informed or premised on his failure to speculatively advance cogent reason as to why the complainant and his witness falsely accused him. During the course of his judgment the trial court repeatedly reverted to that theme time after time. I have to mention that the appellant was confronted with that question by the prosecutor. His answer was that he did not know why the opposite witnesses falsely incriminated him.

[33] A similar situation arose in **S v BM** 2014 (2) SACR 23 (SCA). At par [22] the court ,per Wallis JA said:

> "[22] That brings me to the issue of cross-examination that askes the witness to speculate. **I have quoted the passage from the cross-examination of Mr BM, in which the prosecutor demanded to know why SM should lie in her evidence. That is a question that is frequently asked in cases such as this. It is not a proper question because**, as Mr BM quite correctly pointed out, **it calls upon witnesses to speculate about matters, in respect of which they can have no knowledge.** Later in his evidence, in response to another similar question requires the witness to express an opinion about the conjecture and as such the answer is irrelevant and inadmissible. **It follows that questions directed at eliciting this type of evidence are impermissible and should be disallowed.**"

[34] At par [23] the court went on to say:

> "[23] This was not a case where the accused had, in evidence-in-chief, expressed a belief that the case against him had been fabricated for a particular reason, the validity of which might have been the proper subject of cross-examination. Instead the prosecutor was the one who asked Mr BM to say why SM would make false allegations against him. The question was asked on the postulate that he was being falsely accused. Accepting that postulate, **it was unfair to expect him to speculate on the matter**. That was especially so in the environment of a court where he was being pressed for an answer under cross-examination. The natural human inclination in that situation is to provide some answer, however speculative or far-fetched, which may then be used to attack one's credibility. **That is what happened here. Magistrates and judges must be alert to disallow such cross-examination. An accused person who claims to have been falsely accused is under no obligation to explain the motives of the accuser and should not be asked to do so.**"

[35] At par [24] the court held:

> "[24] **Instead of disallowing the cross-examination, the magistrate elevated Mr BM's perceived inability, to provide a plausible reason for SM to fabricate these allegations against him, to the major reason for convicting him, as appears from the passage from her judgment quoted in para [19].** She returned to this theme later in the judgment when she said:

> 'The court finds that there is no motive for the complainant to falsely implicate the accused. The accused's evidence is not compatible with the general circumstances of the case, as reflected and facts which are common cause."
>
> However, as there had been no prior analysis of the 'general circumstances of the case', the latter statement added nothing to the magistrate's reasons."

[36] In **S v Ipelegeng** 1993 (2) SACR 185 (T) at 189c-d Mahomed J grappled with the confusion that an accused person must necessarily be regarded as guilty because a complainant had no apparent motive to falsely implicate him and because the accused person was unable to suggest one probable motive. The judge spelled out why such an approach was flawed an fraught with danger.

> "**It is dangerous to convict an accused person on the basis that he cannot advance any reasons why the State witnesses would falsely implicate him. The accused has no onus to provide any such explanation.** The true reason why a State witness seeks to give the testimony he does is often unknown to the accused and sometimes unknowable. Many factors influence prosecution witnesses in insidious ways. They often seek to curry favour with their supervisors; they sometimes need to placate and impress police officers, and on other occasions they nurse secret ambitions and grudges unknown to the accused. **It is for these reasons that the Courts have repeatedly warned against the danger of the approach which asks: Why should the State witnesses have falsely implicated the accused.**"

[37] I revert to **S v BM** *supra* at par [26]:

"[26] There will be circumstances in which the absence of any apparent reason for the prosecution witnesses to fabricate a case against the accused is a relevant factor for the court to take into account in the overall assessment of the evidence. However, on its own, where no other circumstances are present pointing towards the guilt of the accused, it is not a proper or sufficient basis for a conviction."

[38] At par [27] Wallis JA went on:

"[27] **In this case both the magistrate and the court below adopted an incorrect approach to the consideration of the evidence. In effect they held that the inability of Mr BM, to advance a plausible reason for SM fabricating these allegations, meant that her evidence had to be accepted and his rejected. That was incorrect and came close to placing an onus on Mr BM to prove his innocence. The proper approach was to evaluate both versions against the inherent probabilities, taking account of all the evidence. If, after undertaking that exercise, it appeared that his version could reasonably possibly be true, even if it were improbable or in some respects untruthful, he was entitled to be acquitted.**"

See **R v Mtembu** 1956 (4) SA 334 (T) at 336 A-B;
S v Makobe 1991 (2) SACR 456 (W).

[39] The particular aspect clearly became a dominant theme of the trial magistrate's judgment. It was quite apparent that undue onus was erroneously placed on the appellant. The law did not require him to prove his innocence. Moreover, his evidence was not blemished by disturbingly unfavourable

features which rendered it unsatisfactory and improbable. However, the same could not be said about the complainant's version.

[40] There were certain troubling and unfavourable features which had an adverse impact on the veracity of the evidence given by the complainant and his son. Neither the father nor the son knew the first name of their relative, Mr Radebe. They never reached their relative's home. According to the father, the relative's neighbour told them that he was not home. According to the son, some children in the homestead told them so. According to the father the church was supposed to start at 19:00. According to the son the church service was supposed to start at 20:00. According to the father they could not have been on the farm at 22"26 because by then the church service would have ended. According to the son the church service ended the next morning at 04:00. According to the father the appellant aggressively demanded that he open the passenger window. According to the son he opened the passenger window on his own before the appellant had hardly said a word and waited for the appellant to get nearer.

[41] Those contradictions could not be ignored **S v Scott-Crossley** 2008 (1) SACR 223 (SCA) par [18]. In this instance they were. Consequent the finding by the trial court that there were no contradictions between the evidence of the complainant and his son was not supported by the evidence. In my view those contradictions and inconsistencies were telling against the version tendered in support of the

prosecution case. Since the evidence of the appellant and his wife concerning the call he made to his son was not challenged by the prosecutor, its value could not be subsequently watered down. The importance of that cellular evidence was that it tended to enhance probative value of appellant's version. Conversely it also tended to diminish the probative value of the complainant's version as regards the time of the encounter. That evidence had to be considered together with the evidence tendered by the prosecution concerning the time of the encounter. I have already outlined serious contradictions and inconsistencies which inevitably raised questions about the purpose of their stated visit to the farm. To make matters worse, their relative, a resident worker on the farm, was never called to testify notwithstanding the fact that the appellant disputed his alleged existence. His evidence would have been relevant to the purpose of the night visit to the farm.

[42] Where the two conflicting versions are comparatively and objectively scrutinized and analysed, the versions of the defence emerged more probable, credible and reliable than that of the prosecution. Accepting that as sound propositions implies that the appellant's averments that he approached the suspicious van carrying a rifle in the one hand and a headlamp in the other, was reasonably true and that the complainant's denial that the appellant also carried a headlamp or a torch was probably untrue. With a rifle in the

one hand and a torch in another, it becomes difficult to imagine how the punching could practically have taken place.

[43] It must also be accepted, as reasonably true, that the appellant did call his son when he saw the vehicle in the vicinity of his cottage. The objective cellular data suggested that there was cellular contact between the cell 082 […] and cell 082 4[…] at 22:26:50 on 2 February 2008.

[44] Mr Snellenburg submitted:

> "Die oproep is nie ontken tydens die appellant en sy eggenote se getuienis en kruisverhoor nie en dit is by ooreenkoms as bewysstuk ingedien deur die appellant se verteenwoordiger. Natuurlik het die klaer en Paul die tyd ontken. Die staat toon die oproep en die tyd en gevolglik objektiewe getuienis vir die tyd waarop die voertuig deur die appellant op die plaas opgemerk is.
>
> Dit plaas onmiddelik die getuienis vir die feit dat die klaer en sy seun nie tot by die werkers se wonings gery het, en ter verduideliking. Dit is onwaarskynlik dat kinders in die donker half elf in die aand buite sal speel en dat vir hulle gevra sou word of ene Radebe daar is, al dan nie." Die verhoorhof se bevinding dat die klaer en sy seun mekaar glad nie werspreek het nie, is eenvoudig vekeerd. Daar is op die volgende ondergemelde aspekte, wat wesenlik is, weersprekings."

[45] Contrary to the finding of the trial court, the evidence of the prosecution witnesses was not without contradictions, inconsistencies and unsatisfactory aspects. What could not be denied was that the complainant and his son entered the

appellant's farm at an awkward hour of the night without his prior consent; that they were stopped by the appellant and that their van was searched by the appellant; that he was entitled to do so in those prevailing circumstances and that the complainant subsequently left the farm with his son. It was his farm, his private road, his right to restrict entry and his right to confront night intruders in order to protect himself, his family and his property.

[46] The version of the appellant, as corroborated by his wife, was reasonably true. It was not as suspect as that of the complainant and his son. The finding that the appellant's version was not possibly true, in the light of the version of the prosecution as a whole, was one which I, on appeal, cannot support.

[47] It is my respectful view, that the trial court committed material misdirection in rejecting the version of the appellant. I was not persuaded that the guilt of the appellant was proven beyond reasonable doubt. It is my considered view that there was no probably credible and reliable evidence to sustain such a conclusion. The appellant was entitled to be acquitted. In view of the material misdirection, appellate interference is justified. I would, therefore, uphold the appeal in respect of both convictions as well as the compensation order.

[48] Accordingly I make the following order:

48.1 The appeal succeeds;

48.2 The convictions in respect of charges 1 and 2 are set aside;

48.3 The compensation order is likewise set aside.

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M. H. RAMPAI, AJP

I concur**.**

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E.K. TSATSI, AJ

On behalf of the appellant:	Adv. N. Snellenburg Instructed by: Honey Attorneys BLOEMFONTEIN
On behalf of the first respondent:	Adv. M.M.M. Moroka Instructed by: Director of Public Prosecutions BLOEMFONTEIN