REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO.: A207/2016

DELETE WHICHEVER IS NOT APPLICABLE
1. REPORTABLE: YES
2. OF INTEREST TO OTHER JUDGES: YES
3. REVISED: YES
DATE: 26 June 2018 SIGNATURE:

In the matter between:

THE STATE Appellant

and

NGWAKO HERALD NDEBELE Respondent

JUDGMENT

MALUNGANA AJ

BACKGROUND

[1] This is an appeal in terms of section 310 (1) of the Criminal Procedure Act 51 of 1977 (the CPA) by the appellant, relating to a question of law, against the judgment handed down by the Regional Court Magistrate, Johannesburg.

[2] The respondent, Harold Ngwako Ndebele, was indicted in the Regional Court, Johannesburg, and charged with rape of a 7 year old schoolchild in contravention of section 3 read with sections 1, 55, 56 (1), 57, 58, 59, 60 and 61 of the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007, read with the provisions of section 51 (1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended. The respondent, who was legally represented throughout the trial, pleaded not guilty and was subsequently acquitted of the charge of rape on 27 January 2015.

QUESTION OF LAW

[3] Aggrieved by the acquittal of the respondent, the appellant lodged an application to appeal the said judgment, on the basis of a question of law formulated as follows:

3.1. Whether the trial court was correct in applying the principles governing the cautionary rule to the evidence of a single witness, notwithstanding the fact that the witness is a child or a victim of a sexual offence.

3.2. Whether the court a quo should have weighed all the evidence before it, and then decided if the state has succeeded in proving the guilt of the respondent beyond a reasonable doubt.

3.3. Whether the court a quo was correct in finding that there was no corroboration for the evidence of the complainant victim as the medical evidence was compromised by the examination of S, her aunt.

3.4. Should the court not have found that corroboration may be found in independent evidence.

3.5. Should the court a quo not have found that the evidence of the complainant was not that of a single witness when independent corroboration was found in the evidence of Dr Babar and the photo identity parade compiled by the defence.

3.6. Whether the trial court adhered to the prescripts of section 59 of the Sexual Offences and Related Matters Act 32 of 2007 (the Sexual Offences Act) when it found that the complainant never reported the fact that the respondent had raped her.

EVIDENCE

[4] The complainant testified that at about 13:00, and at the complainant's school premises, the respondent entered the complainant's classroom while she was waiting for her grandmother to pick her up. According to the complainant, the respondent took her behind some boxes, pushed her to the floor, opened her dress, put his fingers into her vagina, and then had sexual intercourse with her without her consent. They both quickly dressed up and stood at the back of the table when her grandmother arrived. In cross examination she denied the respondent's version that she was picking up papers and was on her way to throw them into the dustbin when

her grandmother came to fetch her. She further testified under cross examination that when they arrived home, her grandmother instructed S to check her private parts during which she revealed to her that the respondent was the one responsible for the injuries sustained by her. She was subsequently taken to the doctor by her mother for medical examination. Whilst at the doctor's room she told him that the respondent touched her body and put his private part into hers. She denied that she was mistaking the respondent for another person. It is common cause that the defence requested a photo ID parade. The complainant identified the respondent from the 5 photos shown to her. The complainant used anatomically correct dolls to demonstrate exactly what the respondent did to her.

[5] The complainant's grandmother, L (L) testified that she arrived at the school to pick up the complainant at about 1:00 in the afternoon. She could not find the complainant at the usual spot where she usually picks her up. This prompted her to look for her around the school premises. Eventually she went to her classroom. The door was closed. The complainant was in the classroom with the respondent standing behind a table. The minor child looked shaky and scared. She noticed that there were cardboard boxes piled up and behind them was a blanket. At that stage the respondent gave the complainant a dustbin to go and empty outside the classroom. She asked the respondent what he was doing with the minor child alone in the classroom. His response was: "*what do you think I could be doing with K?*" Unsatisfied with his response she proceeded to look for the school principal. One of the teachers informed her that the principal was not present at school. She told the teacher about her encounter in the classroom and left for home with the complainant. On her way home, she noticed the complainant's movements seemed strange. On her arrival at home she instructed her daughter, S, to check what was wrong with the

complainant. On examining the complainant, S found some whitish or cream substance on her vagina. She used toilet paper to wipe it. Thereafter the complainant went with her mother to the police station and Hillbrow clinic. She refuted the respondent's entire version about the incident and the meeting with her at the gate. Instead she reiterated that she found the respondent with the minor child in the classroom, and that she does not normally wait for the minor child outside the premises as asserted by the respondent.

[6] The complainant's mother, M (M) testified that she met with her mother and the complainant at Alexander clinic. She proceeded to the police station and took the child to Hillbrow medical legal clinic. At the clinic, the child was examined and some whitish substance was found in the child's private parts. When asked about what happened to the child's underwear, M replied that it was placed into a box which was used during the examination. She also gave the tissue with the whitish substance to the investigating officer who put it into the said box, from where it was taken to the lab.

[7] She testified that she went with the child to school with several police officers. The child was asked to identify the respondent because there were several groundsmen working there. He could not be found that day. The following day they went back. They waited for a while because the respondent was not yet there, and as soon as he arrived the child pointed him out.

[8] Under cross examination, she revealed that the child was crying and told her that the respondent said he was going to kill her if she tells anybody about what had happened. She testified further that the child was the one who told the doctor about what the respondent did to her, and that fact that it had happened before. She also

testified that the complainant's grades had dropped dramatically and that she hardly ate, without an explanation.

[9] Dr Mohammed Babar testified that he was on duty on 20 June 2013 at Hillbrow Health Clinic. According to him, the complainant came to the clinic in the company of her mother and the SAPS. The complainant told him that a known male undressed her in a classroom, touched her body and then put something in her vagina. She further disclosed to him that the same man did this to her many times in the past. During the examination, the child seemed afraid and was crying. He reported that the complainant's orifice was swollen, the hymen was con probation and oval shaped. There were bumps at four, seven and ten o'clock. There were bruises at six o'clock. The vaginal examination revealed a whitish discharge. The cervix was not examined due to the age of the child. He took samples and sealed them with the seal number 07D7AA1992XX. Clinical examination indicated vaginal penetration by a blunt object multiple times. When asked what could have caused the swelling, he replied that it could be a trauma or infection. He testified that the bumps in the hymen are caused by repeated blunt force trauma. The bruising was caused by a recent trauma. He postulated that the vaginal infection may be caused by poor hygiene, but most probably by a blunt object because of the repeated vaginal penetration. He remarked on the report that the complainant's hygiene was good. When asked to give an example of what a blunt object could be, he replied that it can include a finger, penis or stick.

[10] When asked whether the complainant had mentioned the name of the respondent, his reply was that they do not write the name on the J88, and if she did name him, he would write it in the clinic file. He further explained that the sister on duty takes the history, then the doctor on call would write down the results of his

examination. He further testified that the bruising, at number nineteen was called a fresh injury. He took the swabs and sent it for DNA testing.

[11] The respondent, in his evidence, denied the charge of rape. His testimony, to some extent, differed with the version which his legal representative had put to the state witnesses. He testified that he was busy chatting with a teacher, Ms Moodley, about the manner in which the children were cleaning the classroom. Whilst he was busy sweeping the floor, a child came in and said he was being called. He saw an old lady outside the school fence. She asked him who was responsible for cleaning the classroom. He responded that he was the one. He testified that he is not sure if it was the same grandmother who was in court. The grandmother confronted him and demanded to know why he was allowed to work with young girls in the classroom. She also told him that he is one of the people who would one day rape their children. She then started shouting at the children demanding to know who the respondent was. She grabbed two children and went to the class of Ms N. The respondent proceeded to the same class and explained to Ms N what the grandmother had said to him. Regarding his arrest, he testified that the police officer arrested him after the complainant pointed at him. He was then taken to the Alexander clinic where his blood was drawn.

[12] He testified that the children at school called him ‘uncle Harold’, others call him ‘Pappa N’, because he also has a child, N, who attends the same school. He testified that the school employed about eight female and eight male cleaners, all of whom are black. It was put to him that during the child’s testimony, his attorney stated that he would testify that the complainant was seen going to empty the bin. He replied ‘yes’. He later stated that he knew nothing about the dustbin.

[13] Caroline Mbetse (Mbetse) employed by the SAPS forensic science laboratory was called by the defence. She testified that she was called to evaluate and compile the DNA report. After receiving a sexual assault kit containing the swabs and the panties as well as the tissue, she examined the items. The swabs and panties tested positive for semen. After the results were evaluated, no DNA result was obtained from the items. She explained that it could be because there was not enough male DNA from the samples, alternatively the male could have been sperming, in which case semen would be present, but sperm would not.

[14] In cross examination, she was asked whether the fact that no male DNA could be found, would exclude rape. Her answer was that it does not exclude rape. Perhaps the victim urinated or washed or there was drainage, while the child was walking.

[15] On the respondent's version, the complainant's version was a complete fabrication. In his evidence in chief he denied that he knew the girl because there were so many children at the school. Insofar as the probabilities are concerned, if the respondent's version is true, then the complainant's version was a fabrication. It should be observed that in this case no motive to fabricate the story was disclosed by the respondent during the trial.

EVALUATION

[16] The complainant was subjected to extensive cross examination concerning the identity of the respondent. Few stones were left unturned in the effort to discredit her. The complainant was asked about how she was raped and she explained this in graphic detail with reference to anatomically correct dolls. She also identified the

respondent in the photo ID parade. No inconsistencies were revealed throughout this extensive cross examination. She was unwavering and stuck to her version.

[17] L explained how she found the complainant with the respondent in the classroom. Her evidence is consistent with the complainant's testimony that she was found in the classroom with the respondent standing at the back of the table. The grandmother was justifiably upset when she could not be offered a reasonable explanation as to what the respondent was doing with the child alone in the classroom, behind a closed door. Her evidence accords with that of the complainant in all material respects.

[18] The respondent's attorney put the respondent's version to the complainant. The respondent would tell the court that the complainant was on her way to empty the dustbin when her grandmother came. In this regard, the complainant's grandmother testified that the respondent sent the complainant to empty the dustbin after she caught them in the classroom. Regrettably, the magistrate did not deal sufficiently with the shortcomings of the respondent's evidence in this regard.

[19] The only aspect where the complainant, on the one hand, and grandmother and mother on the other hand, differed was that the grandmother and mother testified that the complainant told her that she was afraid to report the respondent because he threatened to kill her. The complainant did not state this in her evidence. I do not, however, find any material contradiction between the grandmother's and mother's evidence and that of the minor child. There is rather, corroboration of the complainant's version as to the precise location where the grandmother found the respondent and the complainant.

[20] Her mother's evidence confirms what Dr Babar found on examination of the complainant. She also confirmed that the complainant identified the respondent, by name, as the "known person" who raped her. The strongest evidence that supports the complainant's reliability is that of Dr Babar. He testified that the complainant told him that someone known to her undressed her in the classroom, touched her body and put something in her vagina. His findings that the urethral orifice was swollen, that fresh bruising was present, that there were bumps at four, seven and ten o'clock was consistent with the recent repeated vaginal penetration by a blunt object, probably a penis. This supports the version of the complainant that she was raped.

QUESTIONS OF LAW

[21] The evidence above contrasts with the magistrate's finding that there is no medical corroboration for what the complainant alleges. It is difficult, in my view to imagine how a person of the complainant's age, who has been raped would be able to give accurate evidence and have perfect recollection of what happened to her. Despite this, the evidence of the complainant was given in a detailed and precise manner, which evidence was corroborated by her grandmother, her mother and Dr Babar in the material respects required.

[22] In handing down the judgment, the court a quo cautioned itself on the evidence of a single witness. It then came to the conclusion that the DNA did not link the respondent to the rape. The magistrate also found that there was a contradiction between the complainant's testimony in relation to what she told her grandmother and what she testified, in relation to whether she told her grandmother that the respondent would kill her if she reported him. He therefore came to the conclusion that the complainant was a single witness whose evidence was uncorroborated.

[23] The judicial approach to contradictions between two witnesses, and contradictions between the versions of the same witness, is, in principle, identical. In neither case is the aim to prove which of the versions is correct, but the aim is to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. See *S v Malafadiso en Andere* 2003 (1) SACR 583 (SCA). It seems clear from the judgment that the magistrate did not find that the complainant was dishonest.

[24] The trial court in evaluating the evidence of the present case, did not expressly state that it was applying the cautionary rule in relation to sexual offences. It stated that it did so as the child was a single witness, whose evidence was uncorroborated. However, the magistrate, in fact applied such rule in relation to a sexual offence, due to the fact that he found that there was no corroboration of the complainant's version. Although not expressly stated, the magistrate, in fact, applied the cautionary rule to three issues, i.e. the fact that the complainant was a single, young witness, in a sexually related matter. He was wrong in all three instances.

[25] It is settled in our law that in evaluating evidence, all the trial court has to ask itself is whether the evidence presented to it by a young witness is trustworthy. For the evidence of such a witness to be trustworthy would depend on a number of factors such as the child's power of observation, recollection and the power of narration of the specific events at hand. See ***Woji v Santam Insurance*** **1981 (1) SA 1020**.

[26] It is also trite that an accused can only be convicted if the evidence of identity establishes his guilt beyond a reasonable doubt. See ***S v Van der Meyden*** **1999 (1) SACR 447 at 450 A-B**. Although this case involves the identity of the respondent,

the magistrate did not find that the complainant's identification was the reason for the acquittal.

[27] In my view, the reasoning underpinning the judgment of the court below reveals a fundamental misconception as to the proper test that finds application when a trial court evaluates the evidence at the end of the trial.

[28] There is sufficient evidence in corroboration of the complainant's version. The complainant was able to identify the respondent with a degree of exactitude. In her own testimony she told her grandmother, S, her mother and Dr Babar that the respondent had interfered with her sexually. On the date of the respondent's arrest, she also identified the respondent after waiting at the school for his arrival. Dr Babar's conclusion was that there was recent repeated vaginal penetration by a blunt object such as a penis and that it appeared not to be the first time. Ms Mbetse also explained why the male DNA was not identified, but said that the presumptive tests showed signs of semen. The complainant has identified no other person besides the respondent who had sexual intercourse with her. The appellant's counsel submitted that the learned magistrate totally disregarded the evidence of Dr Babar and concluded that the findings of the doctor were compromised by the examination of the complainant by S. Counsel for the appellant argued that there was no basis for such conclusion, and a statement to that effect was never put to Dr Babar during his testimony.

[29] The respondent's counsel embraced the judgment of the trial court and agreed with the learned magistrate that the complainant was a single witness, whose evidence was not corroborated. He also pointed out contradiction between the grandmother and the complainant as highlighted in the judgment of the court a quo. He submitted that an adverse inference should be drawn as the State did not call S.

He argued that the State did not prove that it was 'uncle Harold' who put his private part into her vagina. He further submitted that none of the DNA could be linked to the respondent. In my view the contentions advanced by the respondent's counsel are unsustainable in the context of the present case.

[30] It is trite that a court is entitled to treat a single and/or child witness with a certain amount of caution. This does not elevate the position to that of applying the cautionary rule. See ***S v M*** **1992 (2) SACR 548**. The court need only to find that the evidence was trustworthy and that the truth has been told. See ***S v Sauls and Others*** **1981 (3) SA 172 (A)** where it was held that:

"*There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness. The trial judge will weigh his evidence, will consider its merits and demerits and, having done so will decide whether it is trustworthy, and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony he is satisfied that the truth has been told… The presiding officer when evaluating the evidence of a single witness should not allow the exercise of caution to displace the exercise of common sense.*"

[31] In ***DPP v S*** **2000 (2) SA 711 (T)**, it was found that it cannot be said that the evidence of children in sexual and other cases where there are single witnesses obliges the court to apply the cautionary rules before a conviction can take place. The Court held that "*It is so that children lack the attributes of adults and the younger they are, the more it would be so. However, it cannot be said that this consideration requires that the court should apply the cautionary rule as a matter of rote*".

[32] The only requirement placed on the State is that the guilt of the accused should be proven beyond a reasonable doubt. In ***S v Artman and another*** **1968 (3)**

SA 339 (A), Holmes JA held at page 341B "*She was however a single witness in the implication of the appellants. The fact does not require the existence of implicatory corroboration: indeed in that event she would not be a single witness. What was required was that her testimony should be clear and satisfactory in all material respects*".

[33] In ***S v Jackson* 1998 (1) SACR 470 (SCA)** at 477C-D, the SCA adopted the guidelines laid down by Lord Taylor in *R v Makanjoula* 1995 3 All ER 730 CA when dealing with sexual offence cases, the third of which is particularly important. It reads as follows: "*In some cases, it may be appropriate for the judge … to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross-examining counsel.*"

[34] The SCA held at page 476E "*In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt – no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule*."

[35] In ***S v Jackson*** supra at page 476G and 477A-E, the court stated that "*In formulating this approach to the cautionary rule under discussion I respectfully endorse the guidance provided by the Court of Appeal in* R v Makanjuola R v Easton [1995] 3 All ER 730 (CA)*, a decision given after the legislative abrogation of the*

cautionary rule in England. Although the guidelines in that judgment were developed with a jury system in mind, the same approach, mutatis mutandis, is applicable to our law. At p 732 f to 733 a Lord Taylor CJ stated:

'Given that the requirement of a corroboration direction is abrogated in the terms of s 32(1), we have been invited to give guidance as to the circumstances in which, as a matter of discretion, a judge ought in summing up to a jury to urge caution in regard to a particular witness and the terms in which that should be done. The circumstances and evidence in criminal cases are infinitely variable and it is impossible to categorise how a judge should deal with them. But it is clear that to carry on giving 'discretionary' warnings generally and in the same terms as were previously obligatory would be contrary to the policy and purpose of the 1994 Act. Whether, as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised.

The judge will often consider that no special warning is required at all. Where, however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence. We stress that these observations are merely illustrative of some, not all, of the factors which judges may take into account in measuring where a witness stands in the scale of reliability and what response they should make at that level in their directions to the jury. We also stress that judges are not required to conform to any formula and this court would be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of a witness's evidence as well as its content.'

Lord Taylor CJ then formulated eight guidelines, the third of which is particularly important for our purposes. It reads as follows (see p 733 c-d):

'(3) In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. <u>There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross-examining counsel</u>.' (My emphasis.)"

[36] In ***S v Mahlangu* 2011 (2) SACR 164 (SCA)**, at 171B-C the court said the following: "*The court can base its findings on the evidence of a single witness, as long as such evidence is substantially satisfactory in every material respect <u>or</u> if there is corroboration. The said corroboration need not necessarily link the accused to the crime*".

[37] Section 59 of the Sexual Offence Act provides: "*In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of the delay between the allege commission of such offence and the reporting hereof*".

[38] The magistrate was accordingly wring in his judgment in finding that the child had failed to tell anybody of the incident.

CONCLUSION ON QUESTIONS OF LAW

[39] In my view, the respondent's guilt was established by the evidence of the complainant supported by that of the other State witnesses. Therefore, the complainant was not a single witness whose evidence was uncorroborated by independent evidence. Dr Babar's evidence corroborated that the complainant was

raped. In the context of the court a quo's failure to correctly apply the principle of the cautionary rule in respect of the complainant's evidence, the judgment of the court below cannot stand. It is self-evident on a holistic and dispassionate reading of the judgment of the court below that the court a quo adopted the wrong test, hence its erroneous judgment. It is beyond question that the court below committed a serious misdiscretion in evaluating the evidence which amounts to an error of law.

SECTION 322 OF THE CPA

[40] In terms of section 322 1) of the CPA, this court is entitled to set aside the judgment of a trial court on the ground of a wrong decision on any question of law or on the ground that there was a failure of justice. Such a failure should be the result of an irregularity which led to the judgment being set aside. Section 322 provides:

"***322. Powers of court of appeal***

(1) In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may—

(a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; or

(b) such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or

(c) make such other order as justice may require:

Provided that, notwithstanding that the court of appeal is of opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or

proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect.

…..

(4) Where a question of law has been reserved on the application of a prosecutor in the case of an acquittal, and the court of appeal has given a decision in favour of the prosecutor, the court of appeal may order that such of the steps referred to in section 324 be taken as the court may direct."

[41] In ***DPP v Pistorius* 2016 (2) SA 317 (SCA)** at paragraph 44, it was held that the decision to reserve a question of law should not be an academic one but should have a practical effect on the conviction of the accused, "*Under s 324 of the CPA, referred to in s 322(4), where there has been a misdirection of law, as has occurred in this case, proceedings in respect to the same offence may again be instituted before another judge and assessors. Accordingly, it is a permissible option for this court to set aside the conviction of culpable homicide on count one of the indictment and order that the accused be tried* de novo *on that count. <u>However, given the protracted nature of the trial that has already taken place, the issues that were involved, the time that has already elapsed and the unfairness that may result if witnesses have once again to testify, it would seem to me to be wholly impracticable and not in the public interest to follow that course</u>*." [My emphasis]

[42] In Court, in *Pistorius*, thus felt that for those reasons, it was in a position to uphold the appeal and give such judgment as it deemed appropriate, and not refer it back to start *de novo*.

[43] The Court finds that, following the dictum in *Pistorius*, it would not be in the public interest to remit the matter back. The Court will therefore adopt the

permissible option of setting aside the order of the court a quo and replacing it with this Court's order.

[44] In the circumstances, the following order is made:

1. The appeal is upheld in respect of the questions of law relied upon by the appellant.
2. The order of the court below is set aside, and replaced with the following order:
   2.1. The respondent is found guilty of rape in terms of section 3 (rape) of Act 32 of 2007.
   2.2. The matter is remitted to the regional magistrate for the imposition of the appropriate sentence.
3. The respondent is ordered to appear on 9 July 2018, in Court 13 at the Johannesburg Magistrate's Court at 09H00, for that court to determine the further proceedings.

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P H MALUNGUNA
Acting Judge of the High Court, Gauteng Local Division

I agree

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WEINER J
Judge of the High Court, Gauteng Local Division

Heard on: 14 June 2018

Delivered on:	26 June 2018

APPEARANCES:

Counsel for the Appellant:	Adv. JG Wassermann
Instructing by:	NPA
Counsel for the Respondent:	WB Ndlovu
Instructing by:	Ndlovu Attorneys