REPORTABLE

CASE NO.: SA 94/2011

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE STATE **APPELLANT**

and

SYLVIA CONDENTIA VAN WYK **RESPONDENT**

Coram:	Shivute CJ, Maritz JA*et* Mainga JA
Heard on:	28/06/2012
Delivered on:	15/11/2012

APPEAL JUDGMENT

MAINGA JA(SHIVUTE CJ AND MARITZ JA CONCURRING)

[1] A sentence of N$20 000.00 or 3 years imprisonment, plus a further 3 years imprisonment wholly suspended for 3 years for the respondent's convictions on 22 counts of fraud in the sum of N$1 223 610.21 perpetrated for over a period of one and a half years,the appellant contends, is so extremely lenient that it induces a sense of shock.In addition,it submits, the sentence is the product of several

misdirections by the trial Judge and, therefore, warrantsit to be set aside on appeal and to be substituted for an appropriate sentence which suits the nature and gravity of the offence, the personal circumstances of the respondent and interests of the society. Whether these contentions are correct, is the question we are saddled with in this appeal. It arose in this way.

[2] On 10 March 2009 the respondent, together with Mr Seth Jacobs Louw, appeared before Parker J in the High Court on 22 counts of fraud in the sum of N$1 223 610,21 to the actual or potential loss or prejudice of Nutrifood and/or Independence Catering and/or Windhoek Mechanised Accounting Service. She pleaded guilty while her co-accused pleaded not guilty. A separation of trials was ordered and she was convicted as charged on her own admissions. On 5 June 2009 she was sentenced to N$20 000.00 or 3 years imprisonment, plus a further 3 years imprisonment which was wholly suspended for 3 years on condition that she would not be convicted of the crime of fraud, committed during the period of suspension.

[3] The respondent was employed as a creditor's clerk by Windhoek Mechanised Accounting Services (Pty) Ltd, a company duly appointed to render accounting services for various companies, inter alia, Nutrifood and Independence Catering (Pty) Ltd.As part of its mandate, it was responsible to see to the day to day accounting requirements of the twocompanies.

[4] Respondent's duties as creditor's clerk included the reconciliation of supply invoices, goods received, vouchers and company orders and, if satisfied that

payment is due, to make out cheques on behalf of Nutrifood or Independence Catering in favour of the suppliers; to take the completed cheques to person(s) authorised to sign the same; and then to effect payment to the creditors concerned. The scope of the supply contracts entailed the issuing of cheques worth millions of dollarsannually.

[5] Manzani Enterprises CC was one of the suppliersof food products to Nutrifood and Independence Catering on a credit basis. Theirs was one of the portfolios handled by the respondent.

[6] The respondent and Mr Seth Jacobus Louw devised a scheme to generate and, thereafter, embezzle and misappropriate duplicate paymentsby Nutrifood and Independence Catering to Manzani. Mr Louw approached the respondent and suggested the scheme. He would use the invoices of Manzani which he would forward to the respondent. Mr Louw had no connection with Manzani. How he got hold of Manzani invoices is not clear from the record. The respondent would duplicate payments to Manzani by causing a genuine payment to be made with Manzani against a specific invoice and thereafter she would make out a second cheque in favour of Manzani against the same invoice and, depending on which company the invoice was addressed to, present it to the authorised person to sign on behalf of Nutrifood or Independence Catering.

[7] After the second cheque had been signed, she would then add the words 'c/o S. Louw' or 'c/o S.J. Louw' thereby altering the wording of the payee to read:'Manzani Enterprises CC c/o S. Louw' or 'Manzani Enterprises CC c/o S.J.

Louw'. Thereafter the respondent would deposit the cheques into the Bank Windhoek account of Mr Louw. Mr Louw, in turn,would deposit half of the deposit received by him into the respondent's Standard Bank account.

[8] The scheme commenced on 28 October 2002 and continued until 28 May 2004 - which is a period of 1 year and 7 months. Nutrifood was defrauded in the amount of N$1 068 80918 while Independence Catering's loss amounted to N$154 801.03, i.e. the sum of N$1 223 610.21. The illicit proceeds of the fraudulent scheme wereshared by the respondent and Mr Louw equally.

The scheme was uncovered during August or November 2004 when the books of Nutrifood were audited. The auditors approached Mr Penderis, the main shareholderand Managing Director of Windhoek Mechanised Accounting Services, and informed him of a duplicatedcheque payment. A further internal investigation was conducted and, within 4 days, they discovered that the scheme had a far deeper impact than initially thought. Mr Penderis and the senior auditor of the firm approached the respondent and she admitted to her participation in the scheme. The respondent purported to give her full co-operation to the investigation.

[9] Windhoek Mechanised Accounting Services resolved to recover the losses from the respondent and Mr Louw. Immovable and movable properties of the respondent, who is married in community of property, were sold in execution and an amount of N$22 187.00 was recovered from her. A further amount of N$850000.00 was recovered from Mr Louw, leaving a balance of N$351 423.21 unrecovered. As a result, the respondent and her husband lost virtually everything

they had owned and, at the time of the hearing of the matter, they were residing in their son's house.

[10] Windhoek Mechanised Accounting Services sought to withdraw the charges laid against respondent in view of her apparent co-operation during the investigation but the Prosecutor-General, acting in the public interest,nevertheless proceeded to arraign her for trial.

[11] That crime does not payis apparent from the consequences which followed the uncovering thereof: therespondent and her family lost almost everything they had worked for during their lives. This much was apparent from the evidence of the respondent and her husband given in mitigation of sentence. Mr Van Wyk was very bitter about what the respondent had done and confirmed that it had affected their marriage detrimentally. Ms Eunice Annatjie Gonzo, a Clinical Psychologist who also testified in mitigation, paints the picture as follows:

> 'What also came out was the husband's passive anger towards his wife, which could be the reason Mrs Van Wyk informed me (in one of our sessions) that since the case started their love life have come to a standstill. From my observation and the interviews conducted it seems the case has shattered the family dynamics in the Van Wyk household amongst others.'

[12] In her view, the respondent had been punished enough, and she made her recommendations as follows:

> 'The … stresses seemed to have shattered Mrs. Van Wyk's basic coping mechanisms, leaving her feeling alienated and distrustful. What is more, because of her religion, she struggled with understanding why she did what she did and

how she could not have foreseen that this will destroy her family thus hurting the same people she vowed to protect. The circumstance of the event thus included feelings of **helplessness, pain, confusion, self-blame** and **loss**.

General deterrence: Mrs. Van Wyk has realized and accepted that what she did was wrong. As said by Mrs. Van Wyk where she aware what helping someone will do to her life (husband, children, family, friends and community) as well as those who trusted her (employer) she would never have done it. No penalty is or will be greater than what she had and is still going through. Every day, for her is a punishment i.e. looking in her family's accusing eyes, bringing receipts home for husband to check whether she had really used the money for what she claimed she will use it for, the constant whispering every time she work past a group of people (in church, neighbourhood, gatherings), every day waking up in her child's house, etc. Consequently, she's unlikely to commit the same or any crime again.

Individual deterrence: From observation and interviews done, it seems like the Van Wyk family needs Mrs. Van Wyk to still raise her two young children especially the boy and continue to look after the family as she has been doing. The children will suffer the most were she to be sentenced to prison.

Protection from public: Looking at her BackgroundHistory as well as Findings of her Personality Tests, Mrs. Van Wyk is no threat to the general public. She even went as far as asking for forgiveness from her previous employer who not only forgave her but also testified on her behalf (see her employer's testimony).

Rehabilitation: In her case the sentence will not change her behaviour nor prevent further offences as there already is a behavioural change in Mrs. Van Wyk. During the interviews what repeatedly came out clearly is that she had learned from her wrongdoings and she's unlikely to engage in such activities again. What helps in her case is her religion, her family and church's support as well as the forgiveness she received from her previous employer. She will, however, benefit from intensive therapy to deal with the shame, self-blame and anger towards herself.

Lastly, Mrs. Van Wyk has seen and experienced the full impact of what she had done wrong. She had and is still punished for that. The question to ask is the

> objective for punishment and more importantly what outcome we want to achieve with the given punishment. This is a first offender, who had admitted guilt to the offence committed and chose not to lie. It is indeed this character trait that indicates that we are dealing with an honest upright member of the public who made a mistake in judgment. She engages in community outreach programmes with her church and is a loving and caring mother to her children. With therapy I trust that she will be ready to return to the world of work and contribute to the economic grow of our country.'

[13] Mr Penderis,the managing director of the complainant who was called to testify in aggravation of sentence, was more of a witness for the respondent than the State. He sought to withdraw the case against the respondent for her co-operation when the fraud came to light. He testified that he would not like to see her in jail, if it was only up to him, he would have had no problem to re-employ her, but he thought it would be uncomfortable for her and her colleagues that are still at the company. For the 7 years she worked for Windhoek Mechanised Accounting Services, she had an impeccable record. The fraud came as a shock to both the management and respondent'scolleagues. He thought the respondent and her family had been through hell since the fraud came to light and that he did not think that it was in respondent's character to do what she had done.

[14] The sentiments of Mr Penderis and the views of the Clinical Psychologist played a significant role in the consideration of sentence. Inasmuch as both Mr Penderis and the Clinical Psychologist acknowledged the wrongfulness of the crime the respondent committed, the evidence of Mr Penderis and the report of the Clinical Psychologist focussed predominantly on the interests of respondent and evidenced scant consideration of the gravity of the crime, the manner and the

period over which it was committed and the need for the sentence imposed to serve as a deterrent to other would be offenders who may harbour similar notions– moreso because the crime of fraud tends to rear its ugly face all too frequently in this country.

[15] The manner in which the trial Judge dealt with these considerations and the degree of emphasis placed on the evidence of Mr Penderis and the Clinical Psychologist is to be gleaned from the following extracts of the judgment.

> '[7] …That may be so, but the fact is irrefragable that the identifiable complainant whose interest the Court must take account of when considering the interests of an amorphous entity, to wit, society has lost virtually nothing in virtue of the crime. …
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> [8] In the same vein, it is significant to note that in view of the complainant company's attitude, as testified to by Mr Penderis, it would not want to see the accused "go to jail". …
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> [9] The last to give evidence was Ms Eunice A. Gonzo, a clinical psychologist, who had earlier filed with the Court, a "Clinical Psychological Report: Pre-Sentencing Report". Resulting from the analysis she conducted on the accused, Ms Gonzo made the following observations and recommendations: (1) No penalty is or will be greater than what she had gone through and is going through as a consequence of the commission of the crime. (2) The children of the family will suffer the most if a custodial sentence is imposed. (3) The accused is no threat to the general public. (4) The accused has learned her lesson from her wrongdoing and so she is unlikely to engage in such criminal activity again. (5) The accused is an honest upright member of the public who "made a mistake in judgment". …
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> [10] The essence of Mr Penderis's evidence should carry a great deal of weight in favour of the accused; for, in considering the interests of society in sentencing, I ought to take into account the overriding interests of those who specifically have

suffered loss as result of the accused's action. (See *The State v Gert Herman Losper* Case No.: CC11/2007 (on sentence)(unreported).)

[11] The crime for which the accused has been convicted is a serious offence; and indeed Mr. Murorua concedes that fact; and I agree with Mr. Marondedze that the reprehension of the crime is brought into sharper focus; considering the fact that the crime was committed over a period of 12 months. This is an aggravating factor that must count against the accused. But there are the above-mentioned weighty mitigating factors, and, in my opinion, they should markedly blunt the seriousness of the offence to the extent that I think I must call into play the fourth element which a court ought to take into account when sentencing, namely, "a measure of mercy".

[12] … On this point, I accept Mr. Murorua's submission that the accused is not a danger to the community or a threat to society. That was also the evidence of Ms Gonzo, which stands unchallenged. From all this, I conclude that the likelihood that she can continue to be useful to her community cannot be ruled out.

[18] It is my opinion that the principle of consistency of sentencing should not be taken too far as to do away with the principle of individualization of punishment, otherwise the system of criminal justice would be unfair and unreasonable. The objective and relevant facts in the instant case are not similar to the facts of any of the cases Mr. Marondedze is so enamoured with. In particular, one must not lose sight of the three superlatively significant distinguishing features of the instant case, sc.: (1) all the amounts involved in the crime have been recovered by the complainant; (2) the complainant, whose interest must be paramount in any consideration of interests of an amorphous entity, i.e. society, had indicated its desire to withdraw all the charges against the complainant and actually took the necessary steps to effectuate its desire; and (3) A representative of the complainant gave evidence in mitigation in favour of the accused in which he pressed on the Court that he didn't think in the circumstances of the case and in the personal circumstances of the accused, the accused should receive a custodial punishment.'

[16] We heed to the admonition that punishment is a matter for the discretion of the trial court when we consider the reasoning of the Court below. *S v Rabie* 1975(4) SA 855 (A) at 857D-E. But a Court of Appeal may interfere with that discretion if the trial court has not exercised its discretion judicially or properly. That occurs if the trial court –

> 'has committed a misdirection of fact or law which by its nature, degree or seriousness is such 'that it shows, directly or inferentially that the Court did not exercise its discretion at all or exercised it improperly or unreasonably' (see *S vPillay* 1977(4) SA 531 (A) at 535E-F); if a material irregularity has occurred in the sentence proceedings (*S v Tjiho* 1991 NR 361 (HC) at 366B); if the sentence is manifestlyinappropriate given the gravity of the offence and induces a sense of shock (*S v Salzwedel and Others* 2000(1) SA 786 (SCA) at 790D-E); or a patent and disturbing disparity exists between the sentence that was imposed and the sentence that the Court of appeal would have imposed had it been the Court of first instance (*S v Van Wyk (supra)* at 447H-448A (NR), at 165d-g (SACR); *S v Petkar* 1988(3) SA 571 (A) at 574D); if there has been an overemphasis of one of the triad of sentencing interests at the expense of another (*S v Zinn* 1969(2) SA 537 (A)at 540F-G; and *S* v *Salzwedel and Others (supra)* at 790D-F); or if there has been such an excessive devotion to further a particular sentencing objective that others are obscured (*S v Maseko* 1982(1) SA 99 (A) at 102F).'[1]

[17] By placing such a degree of emphasis on the evidence of Mr Penderis and the views of the Clinical Psychologist and by attaching so much weight to the personal circumstances of the respondent, it appears to me that the Court belowunderemphasised the other two sentencing guidelines of the triad proposed in *S v Zinn* 1969(2) SA 537 (A) at 540. The need for a balanced approach was emphasised in *S v Nakale and Others* (No 2) 2007(2) NR 427 (HC) at 430D; *S v*

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[1]See also *S v Alexander, (supra)* at 5A-E; *S v Gaseb and Others* 2000 NR 139 (SC) at 167G-I; *S v Shikunga and Others* 1997 NR 156 (SC) at 173B-E.

M 2007(2) NR 434 (HC) at 438F-H and *S v Tjiho* 1991 NR 361 (HC) at 365B-C. I must hasten to add that 'the duty to harmonise and balance does not imply that equal weight or value must be given to the different factors. Situations can arise where it is necessary (indeed it is often unavoidable) to emphasise one at the expense of the other'. Per Ackerman AJA in *S v Van Wyk* 1993 NR 426 (SC) at 448E-F (1992(1) SACR 147 (Nm) at 165i-166a). The application of these factors cannot be subject to rigid rules, since it is obvious that the dynamics are influenced by time and place and because the facts of each case vary ‘infinitely’. See *S v Alexander* 2006(1) NR 1 (SCA) at 8B-D.

[18] The trial Judge misdirected himself on the facts when he stated that 'all the amounts involved in the crime have been recovered by the complainant'and that that the complainant (Windhoek Mechanised Accounting Services (Pty) Ltd)'has lost virtually nothing in virtue of the crime'. It is clear from the evidence that only N$872 187,00 was recovered, leaving an outstanding balance of N$351 434,21 unrecovered.Moreover, the bulk of the amount recovered came from Mr Louw. Only N$22 187,00 was recovered from the respondent. Mr Penderis in his own words stated:'…I think we all focused on getting the money back and that happened to a large degree'. He was asked whether there were hopes of recovering the balance outstanding, his reply was an emphatic 'No' and he continued to say, 'Your Honour we in, I think, March 2005 we discussed this matter with our clients and in view of what Mrs Van Wyk had done, in terms of trying and help in assisting us, in our opinion, we decided that we would withdraw the charges…'. He was specifically asked whether the company had written off the amount of N$350 213,00 and his reply was 'Correct'.

[19] The trial Judge also misdirected himself in law when he failed to accord due weight to the principle of consistency in sentencing. As a general proposition, he correctly held that the principle should not be taken too far as to do away with the principle of individualisation, otherwise the system of criminal justice would become unfair and unreasonable. What was not adequately appreciated is that individualisation cannot be gauged in vacuum; it is best served if it is considered against other sentencing principles, inclusive of those applied in established precedents. This Court had occasion in the matter of *The State v Gerry Wilson Munyama*, Case No. SA 47/2011 delivered on 9 December 2011 unreported, to state thus:

> '[12] Although it is trite that sentences should be individualised, our Courts generally strive for uniformity of sentences in cases where there has been a more or less equal degree of participation in the same offence or offences by participants with roughly comparable personal circumstances. (*S v Goldman,* 1990(1) SACR 1 (A) at 3E). In *S v Strauss* 1990 NR 71, O'Linn J catalogued nineteen similar crimes of theft of rough and uncut diamonds and stated, "clearly indicates the approach of the courts in the past. The Court must obviously attach great weight to this catalogue, while at the same time balancing it against the principle of individualisation. One must look at which circumstances, personal or otherwise, can be taken as distinguishing factors…which would justify a sentence which is out of line with the cases to which the Court has referred." The principle of consistency in sentencing has gained wide acceptance. Its significance lies in the fact that it strives to avert any wide divergence in the sentences imposed in similar cases and should thus appeal to any reasonable person's sense of fairness and justice. One advantage of consistency in sentencing is that it promotes legal certainty and consequently improves respect for the judicial system. (*S v Skrywer,* 2005 NR 289 (HC)*;* SS Terblanche, *The Guide to Sentencing in South Africa*, 1999 at 139).'

[20] Significant disparities in the sentences imposed by different courts or judicial officers on accused convicted for similar crimes committed under similar circumstances do not engender public confidence or cultivate respect in the even-handedness and fairness of our criminal justice system. Even in *S v Van Rooyen and Another* 1992 NR 165 (HC) at 187, a case on which the trial Judge appears to have relied (for other reasons) in arriving at the sentence imposed, the need to avoid disparities in sentencing was acknowledged as a sentencing guideline:

> 'In our endeavours to arrive at an appropriate or proper sentence the Courts follow certain established guidelines:
> ….
> 5. The equal treatment or the co-ordination of sentences imposed for similar offences committed, so that it cannot be said that the one person was punished more severely or more leniently than the other.'

[21] There wereboth factual and legal misdirections by the trial Court in imposing the sentence appealed against and this Court is therefore at liberty to consider the imposition of an appropriate sentence afresh. As Mr Marondedze, counsel for the appellant correctly argued, the sentence imposed by the trial court is lenient, such that it induces a sense of shock; therefore it was inappropriate and disturbingly so. That it was indeed lenient was conceded by Mr Small, counsel for the respondent. It fails utterly to reflect the gravity of the offence and to take account of the prevalence of fraud in this country. It is irreconcilable with other precedents where there has been a more or less equal degree of participation in the same offence or offences by participants with roughly comparable personal circumstances. The fact that Mr Penderis did not want to see the respondent go to

goal or the views of the clinical psychologist that no penalty is or will be greater than what she had gone through and is going through as a consequence of the commission of the crime are clearly important considerations but they should be accorded their relative weight when considered together with all other mitigating and aggravating factors in determining an appropriate sentence and not be allowed to obscure other sentencing objectives.

[22] By its nature, fraud is aserious crime; its deleterious impact upon societies is too obvious to require elaboration (see *S v Gerry Wilson Munyama*, *supra,* para [19]; *S v Sadler* 2000(1) SACR 331 (SCA) at 336A-B). In this instance, its seriousness is aggravated both by the large amount involved and the period of time over which it was repeatedly committed in the execution of a carefully devised scheme of subterfuge. N$1 223 610.21 is, by any measure, a very substantial sum of money and the crime was perpetrated on no less that 22 occasions between 28 October 2002 to 28 May 2004.

[23] It might well be, as the trial Court found on the unchallenged evidence of the clinical psychologist, that the respondent was no longer a danger or threat to society, but it should have been careful not to step into the trap of undue leniency when it comes to the imposition of sentences for a so-called 'white collar crime'. In *S v Sadler, supra,* at 335g – 336a Marais JA, whose sentiments I endorse, put it as follows:

> '[11]… So called ’white-collar’ crime has, I regret to have to say, often been visited in South African courts with penalties which are calculated to make the game seem worth the candle. Justifications often advanced for such inadequate

> penalties are the classification of ’white-collar’ crime as non-violent crime and its perpetrators (where they are first offenders) as not truly being ‘criminals’ or ’prison material’ by reason of their ostensibly respectable histories and backgrounds. Empty generalisations of that kind are of no help in assessing appropriate sentences for ’white-collar’ crime. Their premise is that prison is only a place for those who commit crimes of violence and that it is not a place for people from ’respectable’ backgrounds even if their dishonesty has caused substantial loss, was resorted to for no other reason than self-enrichment, and entailed gross breaches of trust.
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> [12] These are heresies. Nothing will be gained by lending credence to them. Quitethe contrary. The impression that crime of that kind is not regarded by the courts as seriously beyond the pale and will probably not be visited with rigorous punishment will be fostered and more will be tempted to indulge in it.'

[24] The respondent did not commit the crimes out of personal need. We are also not persuaded that she had done so to help a friend who apparently needed money. If she committed the crime for purely altruistic reasons, it does not explain why she required her 'needy' friend to repay her half of the illegitimate proceeds of their fraudulent scheme. Moreover, she did not use the money received from him to address any pressing personal needs but rather to finance lavish holidays and purchases. In my view, the conclusion that her participation in the commission of the crimes was mainly motivated by personal greed is unavoidable.She earned more money than her husband from her employment. She was appointed to a position of trust where she transacted millions of dollars on behalf of her employer’s principals. She betrayed the people who pinned their trust on her and, on all accounts, had treated her exceptionally well. Her husband, for example, testified that, when she travelled to Holland to visit her sister, Mr Penderis, the

Managing Director of her then employer, gratuitously purchased her the flight ticket.

[25] The misdirections committed by the trial Court are of substantial relevance to the determination of an appropriate sentence and in the light thereof this Court is at liberty to consider the imposition of an appropriate sentence afresh. (*S v Pillay, supra*, at 535-E-F; *S v Fazzie* 1964(4) SA 673 (AD) at 684B–C; *S v Pieter Johan Myburgh* (SC), Case No. SA 21/2001 (unreported). The gravity of the crime and the interests of society were unduly underplayed. The misdirectionsare of such a nature, degree or seriousness that they showed inferentially, if not directly, that the sentencing discretion entrusted to the trial Court was improperly exercised. I hold the view that the sentence which this Court would have imposed as a Court of first instance differs so significantly from which the Court below had imposed.

[26] I am satisfied after the consideration of all the evidence,that the circumstances of this case justifythe imposition of direct imprisonment to adequately meet the objectives of sentencing. The disturbingly lenient sentence imposed by the trial Judge cannot be left undisturbed and falls to be set aside.

[27] In considering the appropriate sentence, I am particularly mindful that respondent and her family have lost almost everything that they had worked for thus far. I also considered the evidence of Mr Penderis and the clinical psychologist that expounded on her otherwise good character and the limited need for rehabilitation. As Marais JA in *S v Sadler, supra,* at 337d correctly put it 'one

cannot but feel deeply for them. Regrettably, one cannot allow one's sympathy for them to deter one from imposing the kind of sentence dictated by the interests of justice and society'.

[28] In the result I make the following order.

1. The sentence imposed by the High Court on 5 June 2009 is set asideand the following sentence is substituted:

> 'The accused's convictions are taken together for purposes of sentence and she is sentenced to ten (10) years imprisonment of which five (5) years imprisonment is suspended for a period of five years on condition that the accused is not convicted of the crimes of fraud or theft committed during the period of suspension'.

2. The fine of twenty thousand Namibian Dollars (N$20 000,00) paid in satisfaction of the sentence is ordered refundable to the respondent.

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MAINGA JA

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SHIVUTE CJ

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MARITZ JA

Counsel on behalf of the appellant:	Mr EE Marondedze
Instructed by:	Prosecutor-General
Counsel on behalf of the respondent:	Mr AJB Small
Instructed by:	Directorate of Legal Aid