

**IN THE COURT OF APPEAL OF LESOTHO**

**Held at Maseru**

**C of A (CRI) NO. 1/2016**

**In the matter between:**

**THE CROWN**

**APPELLANT**

and

**TIMOTHY THAHANE**

**RESPONDENT**

**CORAM** : FARLAM, A.P.  
DR MUSONDA, A.J.A.  
CHINHENGO, A.J.A.

**HEARD** : 24 APRIL 2017

**DELIVERED:** 12 MAY 2017

## **SUMMARY**

*Criminal Procedure – discharge at the end of Crown case – test for-whether satisfied.*

## **JUDGMENT**

### **FARLAM A.P:**

[1] The respondent in this case, the Hon Timothy Thahane, a former Minister of Finance and Development Planning, was indicted in the High Court on two counts of fraud. At the close of the Crown's case the trial judge, **Monapathi J**, acquitted him on both accounts in terms of section 175 (3) of the Criminal Procedure and Evidence Act of 1981. That section provides that the court may acquit an accused at the close of the prosecution's case if it considers that *'there is no evidence that the accused committed the offence charged in the charge.'* The accepted test to be applied is *'whether there is evidence on which a reasonable court might, not ought to, convict'*, see **R v Manyeli** LAC (2007-2008) 377 at 383 G-H (para [15]).

The indictment read as follows:

### INDICTMENT

'A. **PARTICULARS OF ACCUSED**

1. *The Accused is Timothy Thahane, an adult male, of Maseru, Lesotho.*

B. **PREAMBLE TO THE CHARGES**

2. *Whereas at all relevant times:*

- 2.1. *the Accused was the Minister of Finance and Development Planning of Lesotho;*
- 2.2. *the Government of Lesotho (“the Government”) had in place a block farming policy to assist certain categories of farmers, either individual farmers or farmers who had formed themselves into farming associations (“the block farming policy”);*
- 2.3. *the block farming policy was intended to cover seeds and other input costs such as fertiliser, but not capital expenditure or vegetable farming;*
- 2.4. *Standard Lesotho Bank Limited (“Standard Bank”) was furnished with a demand guarantee by the Government in terms of which Standard Bank paid out to farmers or farming associations claims qualifying in terms of the said policy;*
- 2.5. *Temo-‘Moho, Mpharane Agricultural Association of Leribe (“Temo-‘Moho”) was one such farming association;*
- 2.6. *Omnia Fertiliser Limited (“Omnia”) was a dealer in fertiliser, of Ladybrand in South Africa.*
- 2.7. *Matete Construction (Proprietary) Limited (“Matete Construction”) was a construction company of Pitseng.*

C. **CROWN’S SUMMARY OF SUBSTANTIAL FACTS**

3. *On 6 June 2008 the Accused wrote to Standard Bank indicating that henceforth the block farming policy would also cover vegetable farming, in that this had the endorsement of the Prime Minister and also that he, the Accused, would obtain the support [therefore] from the Minister of Agriculture and Food Security.*
4. *This letter was false in that the extension of the block farming policy to vegetable farming did not have the support of the Prime Minister, and also the Accused when he wrote the letter had no intention of obtaining the said Minister’s support [therefor], which support he in any event did not obtain.*
5. *Relying on this letter Standard Bank thereafter funded vegetable farming in terms of the block farming policy which it would not otherwise have done, to the prejudice of the Government.*

6. *In 2010 Omnia identified an opportunity at Temo-'Moho to erect a storage shed for the distribution by Omnia of its fertilisers in the Leribe area, which would be to the benefits of both Omnia and the local community. The Accused introduced Matete Construction to Omnia and directed that Matete Construction would erect the storage shed. This was then done.*
7. *The agreement was that Omnia would fund the erection of such storage shed. Pursuant to such agreement Matete Construction forwarded the invoices in respect thereof to Temo-'Moho who in turn invoiced Omnia. The invoices, in the amounts of M1888990.34 and M87400.00 were then paid by Omnia.*
8. *At the same time however Temo-'Moho forwarded both these claims to Standard Bank to be paid in terms of the block farming policy, and the Accused, well knowing of the aforesaid arrangement with Omnia, associated himself with and supported such claims, whereupon Standard Bank paid out the said claims to Matete Construction.*

*Now therefore the Accused is guilty of the charges as set out hereinafter.*

D. **THE CHARGES**

9. **Count 1: Fraud, alternatively Fraud in contravention of section 68 (1) of the Penal code Act 2010.**

*The Accused is guilty of the crime of Fraud, alternatively Fraud in contravention of section 68 (1) of the Penal Code Act 2010, in that:*

*On or about 6 June 2008 and at Maseru the Accused, wrongfully, unlawfully and with the intention to defraud, held out and pretended to Standard Bank that the block farming policy would henceforth also be applicable to vegetable farmers, in that such application had the endorsement of the Prime Minister of Lesotho, and also that he would seek the endorsement [therefor] by the Minister of Agriculture and Food Security of Lesotho, thereby causing Standard Bank, to the prejudice of Standard Bank and the Government, to pay out sums totalling M18 092 587.05 in respect of vegetable farmers, whereas in truth and in fact the Accused knew when making such representations that the Prime Minister had not endorsed the extension of the block farming policy in this manner and also that he had no intention of seeking the endorsement [therefor] by the Minister of Agriculture and Food Security.*

10. **Count 2: Fraud, alternatively Fraud in contravention of section 68 (1) of the Penal Code Act 2010.**

*The accused is guilty of the crime of Fraud, alternatively Fraud in contravention of section 68 (1) of the Penal Code Act 2010, in that:*

*On the dates set out hereunder and at Maseru the Accused, wrongfully, unlawfully and with the intention to defraud, held out and pretended to Standard Bank that the amounts set out hereunder were due and payable by Standard Bank to Matete Construction in respect of a storage shed built by the said Matete Construction for the benefit of Temo-'Moho and pursuant to the block farming policy, thereby inducing the said Standard Bank, to the prejudice of Standard Bank and the Government, to pay the said amounts to Matete Construction, whereas in truth and in fact, and to the knowledge of the Accused, such amounts were not due and payable to Matete Construction by Standard Bank in that Omnia had agreed with Temo-'Moho to pay such amounts to Temo-'Moho in order for the latter to in turn pay them over to Matete Construction.*

<i>15/12/2010</i>	<i>Matete Construction</i>	<i>M188 990.34</i>
<i>25/03/2011</i>	<i>Matete Construction</i>	<i>M87 400.00'</i>

(As the alleged offences were committed before the Penal Code Act 2010 was passed or came into operation it has no application in this case and the references to it can be ignored.)

[2] The letter referred to in paragraphs 3 to 5 of the Substantial Facts was sent by the respondent to the Standard Lesotho Bank Ltd on the date mentioned in the indictment, 6 June 2008. It reads as follows:

***'SUPPORT FOR VEGETABLE GROWERS FROM THE GOVERNMENT GUARANTEED LOAN FOR BLOCK FARMING***

*Let me acknowledge with appreciation the excellent manner in which your bank has administered the above loan under Programmes I, II, and III. The crops appeared good in the fields and we look forward to better yields and repayment by the farmers as the planning for the next*

circle continues. We also look forward to the introduction of diversification of crops by adding high value cash crops, poultry, and piggery in order to reduce dependence on drought – prone maize production.

The difficulty which the farmers currently face is to harvest their crops on time and at reasonable costs. Hopefully, the Ministry of Agriculture and Food Security will once again come through.

To provide resources for pilot the introduction of vegetable farming, I will propose to my colleague, Hon. Lesole Mokoma, Minister of Agriculture and Food Security, that we set aside from the remaining balance of the loan about M5 Million that would provide loans to vegetable farmers. Unlike block farmers, vegetable farmers must possess three things:

- (a) assured purchaser or market of produce;
- (b) irrigable land; and,
- (c) a sound Business Plan that will show the project cashflows.

The Right Hon. Prime Minister suggested the above approach when he visited Programmes I, II and III in the North of the country – Tsikoane, Mpharane and Kolojane. I expect Hon. Mokoma to agree with me in the approach which has also been endorsed by the Right Honourable Prime Minister.

In the meantime, I suggest that you process any applications that may be referred to you in the coming days for vegetable farming as long as they meet the above criteria. You may also make them sign the same or slightly modified agreements as are signed by Block Leaders.

Hon. Mokoma and I will meet with you in the coming weeks to further formalize the above arrangements and expand the programme throughout the country. Given the current high cost of food it is urgent that farmers plant crops and poultry that will give them quick income.

With best regards,

Yours sincerely

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**TIMOTHY THAHANE**  
**MINISTER OF FINANCE AND**  
**DEVELOPMENT PLANNING'**

As Regards Court 1:

[3] As appears from paragraph 3 of the Substantial Facts and paragraph 9 of the charges the misrepresentation which the Crown alleged was made by the respondent was to the effect *‘that [1] the block farming policy would henceforth also be applicable to vegetable farmers, in that this had [2] the endorsement of the Prime Minister of Lesotho and also [3] that he would seek the endorsement [therefor] by the Minister of Agriculture and Food Security.’*

[4] The first part of the presentation alleged, *viz* that the policy **‘would [my emphasis] henceforth be applicable to vegetable farmers’**

is not contained in the letter. On the contrary the letter said that the respondent *‘will propose’* to the Minister of Agriculture and Food Security that they, he and the minister, set aside the remaining balance of the loan, about M5 million, to provide loans to vegetable farmers, that the respondent expected the minister to agree and that the minister and he would meet with the bank’s officials in the coming weeks *‘to further formalize the above arrangements’*.

[5] Two further parts of the representation **were** made, *viz* that the Prime Minister endorsed the proposal and that the respondent would seek the endorsement of the Minister of Agriculture and Food Security. But were these parts of the representation false?

[6] As far as the allegation that the respondent when he wrote letter '*had no intention of obtaining the minister's support [therefor]*' is concerned no evidence was led to support this allegation and the Crown does not in its Notice of Appeal attack the judgment of the court a quo on this point.

[7] That leaves the alleged misrepresentation regarding the Prime Minister. In his evidence in chief the Prime Minister spoke about a visit he made to the Temo-Moho Mpharane block farming project.

[8] The respondent was the local MP and as such the mentor in respect of the block farming policy as it was to be applied in the constituency. He said that there was a discussion about various agriculture issues, in the course of which they discussed the possibility of the project (which was restricted to grain planting) being diversified to include vegetable production. He testified that he had said that it was a prospect that could be pursued. He denied that he gave it his endorsement and stated that he had no power to endorse the suggested extension: that could only come about if a proposal to that effect were adopted by the cabinet.

[9] It was put to him in cross-examination that when the possibility of diversifying the project to include vegetable farming was raised, the farmers present said, '*What about vegetables? We need Government Assistance for vegetable farming*' and he replied: '*I do not see why it should not happen.*' He was then



asked: *‘Could you have said that?’* His reply was: *‘I could have but I don’t remember saying it.’*

[10] In view of that answer, which effectively nullified what he had said in chief on the point, it is clear that the judge correctly discharged the respondent on this count at the end of the Crown case.

As regards count 2:

[11] On this count the Crown relied on the evidence of Mr Janus van der Westhuizen, who was employed by Omnia Fertiliser Ltd (which I shall call in what follows ‘Omnia’) when a storage shed was erected at the premises of Temo-‘Moho, as well as a number of documents, which were part of a bundle put before the judge and his assessors at the trial.

[12] In support of their contention that the respondent was entitled to be discharged at the close of the Crown case on this count also, his counsel contended that Mr Van der Westhuizen’s evidence was hearsay evidence and as such inadmissible. They also submitted that the Crown was not entitled to rely on documents in the bundle without calling any witness to testify regarding the documents on which it sought to rely.

[13] While it is clear that some of the evidence given by Mr Van der Westhuizen was hearsay there are portions of his evidence which are not hearsay and are accordingly admissible. As far as the documents relied on by the Crown are concerned, I

do not agree that they had to be proved by witnesses before they could be relied on. Before the respondent pleaded to the indictment there was a discussion between the judge and Counsel for the Crown and the respondent in which the basis on which the documents in the bundle would be dealt with was covered. Senior counsel for the respondent said.

*‘Our attitude is that my Learned Friend is entitled to introduce those documents which he wants to introduce: we are going to simply be reserving our rights to argue points as they arise.’*

[14] Counsel for the Crown then said:

*‘My Lord I just want to clarify, I placed the documents before my Lord in terms of the arrangement that we previously had: the documents that are placed before My Lord in this form are what they purport to be .... and they don’t need to be proved my Lord.’*

[15] After the respondent pleaded counsel, in the course of his opening address before evidence was led, dealt again with the documents in the bundle and said:

*‘What is important is that the need to call evidence with regard to documentary evidence as I [pointed] out to My Lord at the Pre-Trial conference there is no need for that. The documents are before your Lordship as what they purport to be: if that’s an invoice, it is an invoice, if it is a signature, it’s the signature of whom it purports to be and so on. And in that sense the documents are before the Court and the Crown witnesses will largely testify to these documents.’*

[16] As neither of these statements was contradicted by counsel for the respondent I am satisfied that the contention advanced on the respondent’s behalf that the documents on

which the Crown seeks to rely cannot be looked at because no witnesses were called to *'prove'* them cannot be upheld.

[17] It follows that the question as to whether the respondent was correctly discharged on this count can only be answered after the admissible evidence given by Mr Van der Westhuizen and the documents on which the Crown seeks to rely have been considered.

[18] Mr Van der Westhuizen (PW4) testified that it was agreed between Omnia and Temo-‘Moho that a storage shed would be erected on Temo-‘Moho’s premises to be used in summer as a depot from which Omnia could distribute fertilizer and in winter as a store from which Temo-‘Moho could distribute maize or for the harvest or to store the tractors. He said that the store was to be financed partly by Omnia and partly by Temo-‘Moho. It is not entirely clear what precisely Omnia was to pay for (because part of his answer on the point was not transcribed, being described as *'inaudible'*), but what is clear is that Omnia was going to pay for the steel and the erection of the store.

19. Originally Omnia intended to have the work done by SSK Steelworks, which supplied the steel for which Omnia paid but the witness said that when he telephoned the respondent and told him that Omnia was ready to start erecting the store the respondent said that it should rather be done by Matete Construction (Pty) Ltd, which is what was eventually happened.

As the witness said that this conversation took place between himself and the respondent, his evidence was clearly not hearsay.

[20] The witness also said that when Omnia received two invoices from Matete Construction (Pty) for the work it had done, his superiors asked for invoices in Temo-‘Moho’s name, and not which it in due course received. They were both dated 20 September 2011. One was for M188 990.34 *‘for Columns at Mpharane Warehouse’*. The other was for M87 400 for ‘erection and roofing of steel structure, transport of roof sheeting from Maseru to Mpherane [clearly Mpharane was meant] and hire of excavation (sic) for lifting structure for 3 days’. On 13 October 2011 Omnia issued its cheque for M276 390 34 (i.e., R188 990.34 plus R87 400.00) in favour of Temo-‘Moho and this cheque was paid on 7 November 2011.

[21] Under cross-examination Mr Van der Westhuizen said that his father represented Omnia in concluding the agreement between Temo-‘Moho and Omnia relating to the construction of the storage shed and what he knew about it he got from his father. He also said that he did not know what he called the original agreements between his father and Temo-‘Moho were.

[22] A question asked by counsel for the Crown as to what the agreement was that was in place in 2010 when he was dealing with the construction of the structure was disallowed by the judge.

[23] The documents in the bundle which are of relevance in the context of this count are the following:

1. A letter dated 15 July 2010 sent by Temo-‘Moho to the Managing Director of the Standard Lesotho Bank, which was headed ‘Update on Consolidation Plans and Additional Asset Purchases.’

[24] This letter was signed by the Chairman, the secretary and the respondent.

[25] In a paragraph on ‘*Sites Developments*’ under the heading ‘*Future Plans*’, appears the following:

*(d) Constitution of Warehouse/Shed (40m x 25m): Omnia Fertilizer Company has agreed to construct for us a Storage Shed for Fertilizers, seeds and outputs on one of our sites which has been surveyed and is in the process of registration for lease. It will need fencing later.*

*Omnia has engaged Matete Construction to put up the shed and do the landscaping.’*

2. A letter dated 23 September 2010 sent by Temo-‘Moho to the Managing Director of the Standard Lesotho Bank, which was headed ‘*Temo-‘Moho Mpharane Payment for Clearance of Topsoil and Reinforcement for Columns for Warehouse/Shed – M40 x 24m*’ and which read as follows:

*‘As reported in our letter of 15 July, 2010 updating the Bank in our activities and plans for the coming season (par. 6 (d)), attached is a*

*Bill from Matete Construction (Pty) Ltd for M58,000.00 for clearing Top Soil from the site where Omnia Fertilizer Company is constructing a Warehouse/Storage Shed.*

*Kindly pay Matete Construction (Pty) and transfer the funds to their account at Nedbank Lesotho Ltd.'*

The letter was signed by the chairman, the secretary and the respondent.

3. An invoice from Matete Construction Pty Ltd, dated 21<sup>st</sup> September 2010, addressed to Temo-'Moho, for M58 000.00 for '*Top Soil cleared from site*'. Included in the amount of M58 000 00 was an amount of M11 000.00 for '*Reinforcement for Columns*'. The invoice was marked '*Approved for Payment*' and signed by the respondent on 23 September 2010.
4. A document from Matete Construction (Pty) Ltd, dated 22 November 2010, headed '*Quotation for Columns at Mpharane Warehouse*'. The quotation is for M1888 990.34 It contains a note addressed to the managing director of the Standard Lesotho Bank, signed by the respondent, reading: '*This is the bill for excavation for the steel columns.*'
5. A similarly worded document, this time headed '*Invoice: 01 92 for Columns at Mpharane Warehouse*'. It is marked '*Approved*' and signed by the respondent on 13 December 2010.

6. A bank statement for the Block Farming Project, issued by Standard Lesotho Bank. It reflects a payment of M188 990.34 to '*Matete Construction*' on 15 December 2010.
  
7. An invoice, dated 23<sup>rd</sup> March 2011, sent by Matete Construction (Pty) Ltd to Temo-'Moho, for an amount of M87 400.00, for '*Erection and Roofing of Steel Structure, Transport of Roof Sheeting from Maseru to Mpharane (and) Hire of Excavator for Lifting Structure for 3 days*'. It has an illegible stamp and a signature (which does not appear to be that of the respondent) and is not marked '*approved.*'
  
8. A Nedbank Lesotho statement, reflecting payment of a cheque for M87 400.00, deposited to the account on 25 March 2011. Although it is not clear the account covered by the statement is presumably that of Matete Construction (Pty) Ltd, whose bank account according to its invoices was with Nedbank Lesotho.

[26] It is clear from document 1, which must have been written after the telephone conversation between Mr Van der Westhuizen and the respondent, that the respondent knew that Omnia had agreed to construct the storage shed and had engaged Matete Construction (Pty) Ltd to put up the shed and do the landscaping.

[27] It is also clear from documents 2 and 3 that Mr Van der Westhuizen's evidence that Omnia was to pay part of the costs and Temo-'Moho the rest is correct because these documents tell us that the cost of clearing the topsoil and re-inforcing for the columns was paid by Standard Lesotho Bank after the account had been approved by the respondent. The Crown does not allege that there was anything wrong with this payment.

[28] The next three documents, 4,5 and 6, deal with the payment of M188 990.34, which was paid for columns for the warehouse on 15 December 2010 and which was approved by the respondent on 13 December 2010.

[29] I think it can be accepted that the Crown established *prima facie* that Omnia agreed, at some point, to pay this amount to Temo-'Moho because this amount was ultimately paid by Omnia on 7 November 2011. But did the respondent know when he approved the invoice for payment almost eleven months earlier that Omnia had agreed to pay this amount to Temo-'Moho? Was he in fact aware that Omnia had requested that it receive Temo-'Moho's invoices for the amounts due to Matete Construction (Pty) Ltd and that the amounts for which Omnia would be liable would not be dealt with in invoices sent directly to Omnia by Matete Construction Pty Ltd? The evidence is silent on the point and Mr Van der Westhuizen could in any event, as he conceded, not tell the court what the original terms of the agreement between Omnia and Temo-'Moho were.



[30] Counsel for the Crown sought to deal with this point by referring to the following passage in Mr Van der Westhuizen evidence.

‘CC: *Matete Construction, that is the company that actually did the building and they sent you two invoices 188,990 and 87,400? That was for the actual work that they did?*

PW4: *Yes.*

CC: *And that was the agreement that you would also fund that? You would pay for that?*

PW4: *Yes, that was the agreement.*

CC: *And was also that the agreement that you discussed with the Minister?*

PW4: *Yes.*

CC: *Mr Thahane?*

PW4: *Yes.’*

[31] I do not think that this evidence goes far enough to provide, even *prima facie*, the answers to the questions I have posed. The witness does not say what exactly the discussion to which he referred covered.

[32] The Crown has a further problem in relation to this invoice. It will be recalled that the misrepresentation alleged in respect of this invoice was that the amount of M188 990.34 was ‘*due and payable by Standard Bank to Matete Construction*’.

[33] The evidence led did not establish the misrepresentation alleged. The word ‘*Approved*’ did not indicate

that the amount concerned was due and payable by the bank to Matete Construction (Pty) Ltd but was an instruction to the bank to debit its customer Temo-‘Moho’s account with this amount and to pay it to Matete Construction (Pty) Ltd.

[34] In view of the arrangement between Omnia and Temo-‘Moho that Matete Construction (Pty) Ltd was to be requested to send its invoice to Temo-‘Moho and that Omnia would be liable to Temo-‘Moho for the amount covered by the invoice the legal position was that Matete Construction (Pty) Ltd.’s claim for the construction costs lay against Temo-‘Moho, which would have had no defence to the claim if Omnia had not paid it.

[35] Once Omnia, eleven months afterwards, paid this amount to Temo-‘Moho, Temo-‘Moho was clearly obliged to reimburse the Government but there is no evidence to suggest that the respondent had anything to do with or even knew of the Temo-‘Moho’s failure to do so (if it did in fact omit to reimburse the Government in this regard). A failure to reimburse would in any event not have amounted to a crime but would have been a breach of a civil obligation.

[36] In all circumstances I am of the view that the Crown did not establish a prima facie case against the respondent in respect of this payment.

[37] I turn now to deal with the second payment which is the subject of count 2, the amount of M87 400.00, paid for

*'Erection and Roofing of Steel Structure, Transport to Mpharane and Hire of Excavator, for Lifting Structure for 3 days'*. Once again we can accept that the Crown established *prima facie* at least that at some stage Omnia agreed to pay for this work but as regards this payment the Crown has the difficulty that there is no evidence that the respondent authorised it.

[38] Even if there was *prima facie* evidence that he was aware that this part of the costs of the erection of the storage shed was for Omnia's account (a point on which I make no finding), it is clear that in absence of any evidence that he authorised the payment it is not possible to set aside the respondent's discharge in respect of this payment.

[39] Counsel for the respondent submitted that the court should in the exercise of its discretion order the Crown to pay the costs of the appeal.

[40] Part of the basis for the order sought was the fact that, as it was put, respondent *'was surprised at every turn with bundles of documents that would be sprung on him, in the depth of which lurked phrases on which the Crown would later seek, without more, to rely as "proof" of the charges against him, on the basis that there had been a so-called agreement at the beginning of the trial that documents purported to be what they were, or the other way round.'* This point was raised in particular in relation to the manner in which the Crown set about endeavouring to prove count 2.

[41] Regard being had to the nature of the factual allegations in the two counts in indictment I do not think it is accurate to say that phrases which could be used to prove the Crown's case against the respondent '*lurked*' in the Crown's bundle. It is not suggested that the respondent and his defence team would not fairly easily have been able to see which documents were relevant. I have given my reasons for accepting counsel for the Crown's contention that the agreement relating to the documents was not a '*so-called*' one but was actually made.

[42] It is true that the trial court did criticise the way the prosecution was being conducted but I do not think that it is possible or indeed appropriate for this court to make a finding on the record that the prosecution was guilty of malice.

[43] In view of the fact that the result of the appeal is in favour of the respondent, it will be open to him, if so advised, to institute proceedings for malicious prosecution and if he is able to establish the essentials for such an action he will be able to recover damages, including his costs.

[44] In circumstances I do not think that this court should, even if it has the discretion to do so, make a costs order against the Crown in this case.

[45] I make the following order:

The appeal fails and the order made by the court a quo to acquit the respondent at the close of the Crown case is confirmed.

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**I.G. FARLAM  
ACTING PRESIDENT**

I agree:

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**DR P. MUSONDA  
ACTING JUSTICE OF APPEAL**

I agree:

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**M. H. CHINHENGO  
ACTING JUSTICE OF APPEAL**

**For Appellants** : Adv D B Ntsebeza SC and  
Adv M Qofa

**For Respondents** : Adv G. H. Penzhorn SC