IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE Civil Appeal No. 103/2017

In the matter between

NIHON INVESTMENTS (PTY) LTD **APPELLANT**

AND

TILLY S.I. INVESTMENTS (PTY) LTD **RESPONDENT**

Neutral Citation: *Nihon Investments (Pty) Ltd vs Tilly S.I. Investments (Pty) Ltd (103 /2017) [2018] SZSC 42 (30/10/ 2018)*

Coram : **S. P. DLAMINI JA**
M.J. DLAMINI JA
R. J. CLOETE JA

Heard : 13th September 2018

Delivered : 30th October 2018

Summary : *Civil Procedure – Lease agreement and amendment thereof – Summary judgment and principles in relation thereto – Defence against summary judgment – Evidence from the bar by Counsel and the effect thereof – Held that the lease agreement is the only binding agreement between the parties – Held that the Court a quo did not misdirect itself in granting the summary judgment with costs – Held that no bona fide defence was made out in the papers before the Court a quo - Held that there is no legal basis to interfere with the judgment of the Court a quo – Held that judgment of the Court a quo is hereby confirmed – Held that the appeal be and is hereby dismissed with costs.*

S P DLAMINI JA

PARTIES AND ISSUES

This is an appeal against the judgment of the High Court in this matter.

[1] The Parties are fully described in the judgment of the Court a quo. Also, the facts and background to the matter are detailed in the judgment.

[2] The Respondent sued the Appellant by way of summons for arrear rentals in the sum of E102.600.00 based on a written lease agreement entered into by the parties on the 24th October 2016.

[3] The Respondent in the particulars of claim, inter alia, stated that;

" 4. *On the 24th day of October 2016 in Manzini, the parties entered into a written lease agreement for certain property described as Vacant Piece of Land – Portion B on Remainder of Plot 587 Matsapha Industrial Site – Manzini Region. Plaintiff was represented by Iqbal Adams and the defendant represented by Mazoor Amir.*

5. The lease was to endure for a period of 5 years commencing on the 1st day of November 2016 and the defendant was to pay monthly rentals in the sum of E9 000.00 (Nine thousand Emalangeni). To the above end, the Defendant, and on the said date of 1st November 2016, indeed took, alternatively continued occupation of the leased premises and to date, still continues to occupy the same.

6. Amongst the material terms of the parties agreement and or month to month tenancy were that:

6.1.1. Rental shall be paid in advance monthly;

6.1.2 The Defendant shall not sub-let the premises without the plaintiffs consent;

6.1.3 Breach of the lease agreement by the defendant shall entitle the plaintiff to cancel the lease agreement and eject the defendant from the leased premises, and to claim such arrear rentals;

7. The plaintiff complied with its obligations under the lease and handed possession and occupation of the leased premises to the Defendant.

8. Defendant is in breach of the lease agreement in that it has failed to pay rentals as per the lease agreement although it continued to occupy the plaintiff's premises. Since taking occupation the dependant has not paid any rental. The defendant as at the 1st August 2017 and to date is therefore indebted to the plaintiff in the sum of E102 600.00 (one hundred and two thousand six hundred emalangeni) in respect of the said arrear rentals. A copy of the said statement is herein attached.

9. The plaintiff duly on or about the month of September 2017 cancelled the lease. The defendant has as well since also vacated the property. All that remains now is payment of the outstanding arrear rentals."

PLEADINGS

[3] The Appellant entered an appearance to defend the Respondent's suit.

[4] Thereafter, Respondent launched an application for Summary judgment for following relief:

"(a) Payment of the arrear rentals and other charges in the amount of E102 600.00 (one hundred and two thousand six hundred emalangeni);

(b) Interest on the above sum at the rate of 9% per annum calculated from the date of service of the summons on the Defendant to date of payment;

(c) Costs of suit at Attorney and Own Client Scale including collection commission;

(d) Further and/or alternative Relief."

[5] The Appellant then filed an affidavit resisting the Summary Judgment.

[6] In the Affidavit resisting the Summary Judgment the Appellant, inter alia stated that;

"4.1 The defendant never took occupation of the property by virtue of the fact that the property was not accessible as the plaintiff failed to construct a service road to enable defendant and its client's access to the premises;

4.2 The correct position is that the plaintiff and the defendant after signing of the lease agreement entered into a verbal agreement that defendant would only commence payment of rentals once the plaintiffs had constructed a road that would make the premises accessible to the defendant to enable it to conduct business with clients, thus defendant has never enjoyed use and/or benefited from the premises;

4.3 Indeed acting on terms of agreement referred to in paragraph 4.2 herein defendant never took possession of the leased premises whilst awaiting the construction of the service road by plaintiff which it has failed to construct even to date."

[7] The Respondent filed its Replying Affidavit and, inter alia stated that:

"In Limine – The Excepiability of Defence

3. The defence raised by the defendant is very much expiable in law. The plaintiff's cause of action is clearly based on a written agreement between the parties. This was a clear indication in law that the parties intended their agreement (or subsequent amendments thereto) to be in writing. The defendant cannot therefore in terms of the law now plead completely new verbal oral amendments to the party's written memorial;

4. It is therefore stated that, and in terms of the parole evidence rule, the defendant's affidavit is fatally deficient and or discloses no

defence and is bad in law, it is always open the parties to agree that their contract shall be written one; and in that case there will be no binding obligation ***until the terms have been reduced to writing and signed;***

5. ….

6. ….

7. ….

8. ….

9. ….

10. ….

11**.** ….

<u>On the Merits</u>

<u>Ad Paragraph 1 to 3</u>

12. Save to deny the truthfulness of affidavits, the rest of the contents thereof are not in issue for which they are pleaded.

<u>Ad Paragraph 4</u>

13. Contents thereof are denied. I reiterate the contents of my preceding paragraphs above as if specifically pleaded herein as well.

(a) There were never any such oral amendments to the written agreement no does any such (or otherwise) suspensive condition appear on the agreement signed by the parties;

(b) Plaintiff does not construct roads. Plaintiff has no legal authority or technical knowledge to construct roads. The same is the sole prerogative of the relevant Matsapha City Council or Ministry of Works Department under the Swaziland Government in terms of the relevant Country's Law;

(c) The Defendant fails to state when such amendments were made, with whom they were made and where they were made;

(d) The Defendant's allegations in the said respect fly directly in the face of the specific terms of the parties' agreement. Full legal argument will be made on our behalf at hearing thereof"

FINDINGS OF THE HIGH COURT

[8] Upon hearing of the Court *a quo* application for Summary Judgment, the Court *a quo* per Her Lordship Justice Q.M. Mabuza (Principal Judge) granted the relief sought by the Respondent.

[9] In paragraph [26] at paragraphs 12 – 13 of the Judgment, the Learned Judge concluded that:

"[26] It is my considered view that the Defendant has no bona fide defence to the claim. I agree with the Applicant that the notice of intention to defend has been filed solely for the purpose of delay.

[27] In the circumstances the Defendants affidavit resisting summary judgment is hereby dismissed and the application for summary judgment is hereby granted with costs on the attorney client scale."

APPEAL

[10] The Appellant being dissatisfied with the judgment of the High Court it appealed to this Court on the 6th December 2017 on the following two grounds of appeal:

"1. *The Judge erred both in Law and in fact in holding that there subsisted a lease agreement with full force and effect between the parties;*

2. *The Judge erred both in Law and in fact in holding that, as a consequence of the aforesaid Lease Agreement the Appellant was in Law obliged to pay rentals as a tenant to the respondent landlord."*

[11] Prior to the hearing of the matter, Appellant on 5th February 2018 filed a Notice of Amendment of the Notice of Appeal as grounds of appeal annexed to it.

[12] The purported amendment of the Notice of Appeal does not comply with the Rules of this Court. Rule 12 of the Court of Appeal Rules Provides that:

" The Court of Appeal may allow an amendment of the Notice of Appeal and Argument, ……."

[13] My interpretation of Rule 12 is that a litigant seeking to amend a notice of appeal must first seek and be granted leave to amend the notice of appeal by the Court.

[14] Notwithstanding the aforegoing and in view of the fact that the Respondent did not object to purported amendment and in interest of justice, this Court *mero muto* allowed the amendment. This is not to set any future precedent. Compliance with the Rules of the Court is a requirement that litigants must adhere to without fail. The Rules are an integral part in the proper adjudication of matters.

[15] The Appellant's grounds of appeal as per the Notice of Appeal are as follows:

"1. *The Court a quo erred in law and in fact by constituting itself as a trial in that it made findings of credibility without the aid of oral evidence as a trial court would have had such a benefit.*

2. *The Court a quo erred in law and in fact in that it not only wrongly applied the "parol evidence" rule but applied it in circumstances where it ought not to apply.*

3. *The Court a quo erred in law and in fact in not accepting the Appellant's (then Defendant) explaining there was oral variation of the written contract, an issue of fact which would have been dealt with satisfactorily at the trial had the matter gone to trial.*

4. *The Court a quo erred in law allowing the summary judgment application notwithstanding a seriously and inherently convincing defence disclosed by the Appellant.*

5. *The Court a quo erred in law by invoking an inapplicable standard in summary judgment applications by pitching the standard too high as if the matter was already at trial stage."*

APPELLANT'S CASE

[16] The Appellant's arguments as per the Heads of argument are as follows:

16.1 That Summary Judgment is an extra-ordinary remedy hence the Courts must be slow to grant it.

16.2 That the defendant in the application for Summary Judgment was not required to exhaustively deal with the details of the defence. It is contended that it is sufficient for a defendant to "*discuss fully the nature and grounds of his defence and the material facts relied upon."* For this, Appellant relies on the case of **MATER DOLOROSA HIGH SCHOOL vs RMJ STATIONERY (PTY) LTD CIVIL APPEAL NO. 3/2005 SZSC.**

16.3 That the lease agreement was validly amended by the parties and for this argument Appellant relied on the following:

CHRYSAFIS AND OTHERS vs KATSAPAJ 1988 (4) SA 818 (A):

A.J. KERR, PRINCIPLES OF CONTRACT, 6th EDITION, EXIS BUTTERWORTH'S at Page 463 and JOHNSTON V LEAL 1980 (3) SA 927 (A) AT 938

16.4 That notwithstanding the parol Evidence Rule, the Appellant contended that the lease agreement between the parties was never intended to be the exclusive memorial of the whole agreement between the parties.

16.5 That the construction of the road to access the premises was a suspensive condition; and that it was entitled to lead evidence to prove the existence of the oral agreement to constructing the road. The Appellant relied on the following for its argument:

PHILMATT (PTY) LIMITED vs MOSSELBANK DEVELOMENT CC [1996] 1 ALL SA 296 (A), and SWAZILAND DEVELOPMENT AND SAVINGS BANK vs DIVERSA HOLDINGS CORPORATION LTD HIGH COURT CASE 3624/05 at paragraph 27 Per Masuku J.

16.6 That the High Court set a high standard for resisting summary judgment and relied on the case:

FIKILE THALITHA MTHEMBU vs STANDARD BANK LIMITED CIVIL APPEAL NO. 3/09 SZSC.

THE RESPONDENT'S CASE

[17] The Respondent in its Heads of argument raised the following counter arguments:

17.1 The Respondent avers that it complied with its obligations under the lease agreement and "handed possession and occupation" of the leased premises to the Appellant;

17.2 The Respondent contends further that the Appellant was in breach of the lease agreement by not paying the rentals when they became due and payable;

17.3 The Respondent further contends that there was no oral agreement between the parties; and that relationship between parties was solely governed by the lease agreement.

17.4 Finally, Respondent contends that the Appellant's affidavit resisting summary Judgment did not disclose a *bona fide* defence hence the Court *a quo* did not misdirect itself in granting the summary Judgment.

THE LAW AND PRINCIPLES RELATING TO SUMMARY JUDGMENT AND CONTRACTUAL PROVISIONS

[18] In the *locus classicus* matter of **Swaziland Development and Financial Corporation vs Vermaak Stephanus,** High Court unreported Civil Case No. 4021/2007, Masuku J. held as follows;

"It has been repeated over and over that Summary Judgment is an extra-ordinarily, stringent and drastic remedy in that it closes the door in final fashion to the defendant and permits a judgment to be given without trial…it is for that reason that in a number of cases in South Africa, it was held that Summary Judgment would only be granted to a Plaintiff who has an unanswerable case; in more recent cases that test has been expressed as going too far …

The purpose of Summary Judgment is well known. It is aimed at a defendant who, although he has no bona fide defence to an action brought against him, nevertheless gives notice to defend solely in order to delay the grant of Judgment in favour of the plaintiff. It therefore serves a socially and commercially useful purpose, frustrating an unscrupulous litigant seeking only to delay a just claim against him.

However, even though the plaintiff need not have an unanswerable case it is clear that before the Court will close its doors finally to a defendant, it must take care to see to it that the plaintiff's claim is unimpeachable. Because of the drastic consequences of an order granting summary judgment, the Courts must be astute to ensure that the procedure is not abused by a plaintiff who may either to secure, by the procedure, a judgment against a defendant when he knows full well that he would ordinarily not be able to obtain such a judgment without trial or who may use such expedition to try to ascertain prematurely what a defendant's defence is and to commit him to it by having him testify to it on oath."

[19] **WINSEN J** in **GILINKSY AND ANOR v SUPERB LANDERS DRY CLEANERS (PTY) LTD 1978 (30 SA 807 AT 809 TO 810**, postulated the duty imposed upon a defendant by Rule 32 (4) in the following terms:

"The Courts have over a number of years formulated what is required of a defendant in order that his affidavit may comply with the terms of that rule. The defendant must satisfy the Court that he has a defense which, if proved would constitute an answer to the claim and that he is advancing it honestly. The latter part of the rule sets out what must be stated in an

Affidavit to put the Court in the position to satisfy itself whether or not a bona fide defence has been disclosed.

It requires the affidavit to state:

(a) The nature, and
(b) The grounds of the defence, and
(c) The material facts relied upon to establish such a defence and these requirements must be stated fully

It follows therefore, that if the allegation in the defendants affidavit relative to these factors are equivocal or incomplete or open to conjecture, the requirements of the Rule in question have not been complied with…the obligation placed by the rule on defendant to make his disclosure fully has been interpreted to mean that while the defendant need not deal exhaustively with the facts and evidence relied upon to substantiate them, he must at least disclose his defense, and the material fats upon which it is based with sufficient particularity and completeness, to enable the Court to decide whether the affidavit discloses a bona fide defense." (My underlining)

[20] In **JOHNSTON v LEAL 1980 (3) SA 927 AT PAGE 930**, the following was expressed:

"Parties cannot themselves give direct evidence of what their intention was…what is implicit…is that the document itself should contain the only memorial of the transaction between the parties and evidential disputes in regard thereto should be avoided."

And at **Page 943, Corbett JA** stated as follows:

"It is clear to me that the aim and effect of this rule is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way redefine the terms of the contract…

To sum up, therefore, the integration rule prevents a party from altering, by production of extrinsic evidence, the recorded terms of an integrated contract in order to rely upon the contract as altered." (My underlining)

[21] **R.H. CHRISTIE** in **THE LAW OF CONTRACT 4th EDITION LEXIS NEXIS BUTTERWORTHS 2001 AT PAGE 218**, states as follows:

"But despite the difficulties attendant upon it, it serves the vitally important purpose of ensuring that where parties have decided that a contract should be recorded in writing, their decision should be respected and the resulting documents or documents will be accepted as the sole evidence of their contract."

[22] See also **Lowrey v Steedman 1914 AD 532 at 543, Marquard & Co. v Biccard 1921 AD 366 at 373, Union Government vs Vianini Ferro Concrete Pipes (Pty) Limited 1941 AD 43 at 47, Venter vs Birchholtz 1972 (1) SA 276 (A) at 282** and **National Board (Pretoria) (Pty) Limited vs Swanepol 1975 (3) SA 16 (A) 26** all of which confirm the general rule at Common Law that a contract which has been reduced to writing cannot be attacked by verbal evidence.

[23] **Gibson South African Merchantile and Company Law 7th Edition Juta and Company 1997 at Page 51** states the following:

"The general rule is that where a written contract is being interpreted no oral evidence may be received by the Court which tends to contradict, alter add to or vary the written terms."

[24] In **National Motor Company Limited v Moses 1987 – 1995 SLR at 124 Dunn J** held that:

"The defendant's affidavit must condescend upon particulars and should as far as possible deal specifically with the plaintiff's claim and state clearly what the defense is and facts relied upon to support it. It should also state whether the defense goes to the whole or should specify the part." (My underlining)

[25] In **Galp Swaziland (Pty) Limited vs Nur and Sam (Pty) Limited t/a Big Tree and Another Civil Appeal Case 13/2015** their Lordships stated that:

"In our view the maxim caveat subscriptor applies here. A person who signs a contractual document thereby signifies his assent to the contents of the documents and if these subsequently turn out not to be of his liking he has no one to blame but himself. See Burger Vs Central SAR 1903 TS 571 where it was stated that at 578 – it is a sound principle of law that a man, when he signs a contract, he is taken to be bound by the ordinary meaning and effect of the words that appear above his signature."

[26] In **Mater Dolorosa High Court vs RMJ Stationery (Pty) Limited Civil Appeal No. 3/2005 SZSC** the Court stated as follows:

"A defendant (appellant in casu) is not required to deal exhaustively with the details of his defence. It is sufficient for him to disclose fully the nature and grounds of his defence and the material facts relied upon for it.

(My underlining)

[27] As relates to the Law relating to a written agreement being capable of being amended by a subsequent verbal agreement, the Court was referred to **Chrysafis And Others vs Katsapaj 1988 (4) SA 818 (A)** and **A. J. Kerr, Principles of Contract, 6th Edition, Lexis Butterworth's at Page 463 and Johnston v Leal 1980 (3) SA 927 (A) at 938**. It is to be recorded here that all of the above provide for such an eventuality but the overriding principle is that the subsequent verbal agreement complies with all of the required elements of a contract by setting out all of the

necessary required facts and circumstances agreed upon by the parties, which facts and circumstances are not in dispute.

[28] It is necessary to refer to the following specific provisions contained in the written lease agreement which were also referred to by the Court *a quo*:

> *"7. ALTERATIONS*
>
> *The LESSEE is aware of the extent of the LEASED PREMISES and shall not be entitled to make any alterations or additions to the LEASED PREMISES without the prior consent in writing of the LESSOR's agents. Save as specifically provided for hereunder, the LESSOR is not bound to make extension, additions, or alterations to the LEASED PREMISES"* (My underlining)
>
> *8. MAINTENANCE*
>
> *The LESSEE acknowledges having inspected the LEASED PREMISES and is aware of the present condition thereof. Within seven (7) days of taking occupation of the LEASED PREMISES, the LESSES shall furnish the SWAZILAND PROPERTY MARKET (PROPRIETARY) LIMITED with a list in writing of all defects in the LEASED PREMISES including any missing keys, and any defects not listed shall be deemed to have arisen during the currency of this lease, and shall be dealt with as follows…"* (My underlining)

FINDINGS

[29] The most important question to be asked is whether the Appellant satisfied the requirements of the case law relating to the setting out of a plausible and triable defence in its Founding Affidavit, it being trite that a litigant stands or falls on the contents of his or her Founding Affidavit. (I will deal hereunder with the extraordinary situation where the majority of the supposed defences raised by the Appellant were in a form of Counsel attempting to give evidence from the Bar completely outside of what was set out in the Affidavit of the Appellant). The answer to the question

must be the overwhelming view that the Appellant has dismally failed to set out such a triable defence in the Affidavit for, *inter alia*, the following reasons:

1. The Appellants only apparent defence is that it alleges that after the signing of the lease agreement, the parties entered into a verbal agreement allegedly on the basis that rental payments would only commence once a road had been contracted.

2. As found by the Court *a quo*, the bare allegation does not give remotely sufficient detail as is required. Who entered into the alleged verbal contract on behalf of the parties who are corporates and incapable of entering into verbal agreements *per se*?

3. Where and when and on what date was the alleged verbal agreement entered into?

4. What were the precise terms of the alleged verbal agreement? Were these ever reduced to writing?

5. Why did the Appellant then wait for months to raise the issue and not immediately after the alleged verbal agreement was entered into? What kind of road was allegedly to be constructed? Was it a tar road, gravel road or just a track.

6. Why does the Appellant not explain why it did not avail itself to the right contained in Clause 8 of the agreement to specify the issue of the road?

[30] On that basis it cannot be said that the allegations of the Appellant in the Affidavit pass muster or is remotely capable of convincing any Court of the existence of such a verbal agreement and on that basis alone the Court *a quo* correctly found that the Affidavit of the Appellant did not set out a reasonably triable defence and as such correctly dismissed the alleged defence.

[31] At this point it needs to be placed on record that aside from the alleged defence relating to the verbal agreement, the Appellant did not set out any

semblance of any other form of defence and incredibly Counsel for the Appellant in the Court *a quo* raised other spurious defences such as "mistake", the issue of cancellation being unlawful, details relating to the construction of the alleged access road, none of which were contained in the Affidavit of the Appellant. The Court *a quo* dealt with these admirably in referring to them as "afterthoughts". For the purposes of this Judgment, those arguments will be completely ignored as they did not appear from the Affidavit of the Appellant.

[32] Similarly the issue of parole evidence is a red herring. There was no specific finding relating to the parole evidence rule by the Court *a quo* and this belated ground of appeal appears to have arisen out of the cases referred to by the Court *a quo* namely **The Union Government** matter (*supra*) and **Fathoos Investments (Pty) Limited and 2 Others v Misi Adam Ali** (43/12)[2012]n SZHC 70.

[33] The Appellant itself raised the dictum in the **Mater Dolorosa** matter to the extent that *"It is sufficient for him to disclose fully the nature and grounds of his defence and the material facts relied upon for it"* (My underlining)

[34] That a written contract can be varied by a verbal agreement under our Common Law is indeed correct. However, the alleged verbal contract must be undisputed and pass the muster of a fully binding and uncontroverted agreement which clearly provides for all the elements, facts and matters agreed upon. In the current matter, the alleged verbal agreement cannot remotely be said to pass such muster in that the Affidavit of the Appellant does not adequately or even remotely make a Court believe that such a verbal agreement was ever entered into.

[35] Therefore, in my view the Appellant failed to raise a triable defence and the Court *a quo* was accordingly correct in its finding in that regard. Furthermore, the Appellant did not abide by the provisions of the lease agreement between it and the Respondent and as such the Respondent was perfectly entitled, as found by the Court *a quo,* to cancel the said

agreement and claim the outstanding rentals and as such I agree with the Judgment of the Court *a quo* in its entirety.

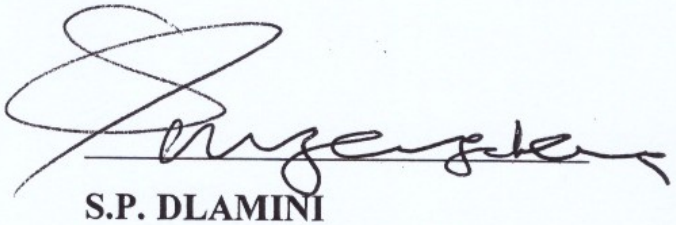
[36] As regards costs, the Court *a quo* awarded Attorney and client costs and that will not be interfered with. However, in this matter, the Respondent did not seek an order for punitive costs and as such costs are awarded on the ordinary scale.

JUDGMENT

[37] Accordingly, the judgment of this Court is that;

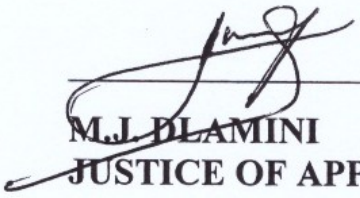
1. The Appeal of the Appellant is dismissed and the Judgment of the Court *a quo* upheld.

2. The Appellant is ordered to bear the costs of this Appeal.



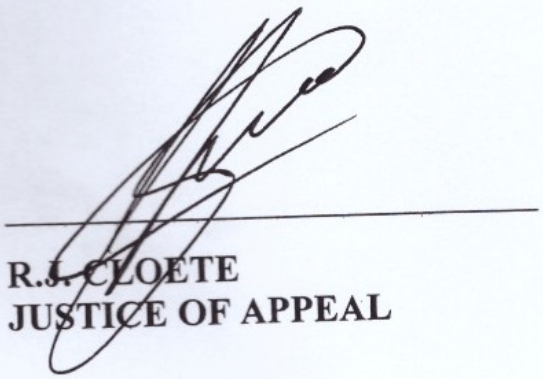
S.P. DLAMINI
JUSTICE OF APPEAL

I agree



M.J. DLAMINI
JUSTICE OF APPEAL

I agree



R.J. CLOETE
JUSTICE OF APPEAL

For Appellant : A. Hlatjwako

For Respondent : M. T. M. Ndlovu