



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case no: 1177/2018

In the matter between:

AQUARIUS PLATINUM (SOUTH AFRICA) (PTY) LTD

APPELLANT

and

BONENE SEBAJOA

1ST RESPONDENT

CHITUMBO. FERNANDO M

2ND RESPONDENT

CUNA, ALCIDO X

3RD RESPONDENT

FEKO, STEPHEN L

4TH RESPONDENT

HENENG JOHN Q

5TH RESPONDENT

HLOAI. MABOBOSANE M

6TH RESPONDENT

KHABO, ALBERT

7TH RESPONDENT

KHOASE, RANTHLOISI

8TH RESPONDENT

KHOBAL, DANIEL S

9TH RESPONDENT

KOTELI, BERINARD M

10TH RESPONDENT

LLTSOANE, KETHANG A

11TH RESPONDENT

MABOTE, THAE30

12TH RESPONDENT

MAGULE, BERNARDO M

13TH RESPONDENT

MAHASE, MAKOMENG P

14TH RESPONDENT

MAKHABENG L

15TH RESPONDENT

MALIBA, STEPHEN M

16TH RESPONDENT

MATELA, MATELA B

17TH RESPONDENT

MATHUNYE, KOSTINA B	18 TH RESPONDENT
MATSOAPE, ALPHONCE T	19 TH RESPONDENT
MOHALE, TLOHANG J	20 TH RESPONDENT
MOHOANG, ZAKARIA M	21 ST RESPONDENT
MOIMA, SEABATA E	22 ND RESPONDENT
MOKHAHLANE. MONTINYANE A	23 RD RESPONDENT
MOKHALI. TSOKELO	24 TH RESPONDENT
MOKOENA, MOLEBATSI M	25 TH RESPONDENT
MOLOMO, NKHETHELENG	26 TH RESPONDENT
MOMOANE, MAPHALE A	27 TH RESPONDENT
MOSHOESHOE, LELINGOANA	28 TH RESPONDENT
MOTABO, MOTLALEPULA	29 TH RESPONDENT
NKHASI, NTJA I	30 TH RESPONDENT
NKOE, NKOEJ	31 ST RESPONDENT
NQHAI, SIMON M	32 ND RESPONDENT
PHAMOTSE, ALFRED B	33 RD RESPONDENT
PHAROE, SIMON T	34 TH RESPONDENT
RAMABELE M	35 TH RESPONDENT
RAMBO, LETEKETO A	36 TH RESPONDENT
RAPOSO, MANUEL B	37 TH RESPONDENT
SEJELAMPENG, MOHLALEFI	38 TH RESPONDENT
SEKETE, THABISO A	39 TH RESPONDENT
SEKOAI, MPHO J	40 TH RESPONDENT
SEKOTOLANE, TIEHO J	41 ST RESPONDENT
SETHELA, PETROSE T	42 ND RESPONDENT
SONDI, SAMUEL S	43 RD RESPONDENT
TEBOHO, L	44 th RESPONDENT
THAABE, EDWIN L	45 TH RESPONDENT
TSOANE, ISHMAEL T	46 TH RESPONDENT
TSOANE, THABO A	47 TH RESPONDENT
BILA, JOSE	48 TH RESPONDENT
BRANTI, TANDEKILEW	49 TH RESPONDENT

CAKATA, BEKIMBEKO	50TH RESPONDENT
CHAMBALE, JOAO	51ST RESPONDENT
DLELAPHANTSI, BUYELEKA YA	52ND RESPONDENT
GAONWE, TSHIRELETSO	53RD RESPONDENT
GAUDA, REENTSENG	54TH RESPONDENT
GWENTSHE, PASCALIS R	55TH RESPONDENT
KOASHE, THAPELO V	56TH RESPONDENT
LESHOBORO, NAMANE	57TH RESPONDENT
MACHOBANE, SEKHONYANA W	58TH RESPONDENT
MADLONGO, MZOLISI A	59TH RESPONDENT
MAGABAVANA, XOLILE L	60TH RESPONDENT
MAKHELE, LEJONE P	61ST RESPONDENT
MALAM BE, ABSALOM A	62ND RESPONDENT
MASOETSA, S	63RD RESPONDENT
MAYILA. MAKABONGWE	64TH RESPONDENT
MKHIZE, JABULANE S	65TH RESPONDENT
MOHALE, LEBUAJOANG P	66TH RESPONDENT
MOSHAPANE, THABANG B	67TH RESPONDENT
MOSOEU, THABISO	68TH RESPONDENT
MOTSEWABANGWE. BALEKANE E	69TH RESPONDENT
MSENA, MOTLATSI	70TH RESPONDENT
NAPE, MOHATO P	71ST RESPONDENT
NDONGENI, RICHARD D	72ND RESPONDENT
NTSINYI. TSIETSI	73RD RESPONDENT
PEDRO, FERNANDO A	74TH RESPONDENT
PETLANE, PETRUS M	75TH RESPONDENT
PHOLO, THASO A	76TH RESPONDENT
RAMAKOA, MASEBO O	77TH RESPONDENT
RAMBO, KGOPOTSO E	78TH RESPONDENT
SETWABA, PINKIE G	79TH RESPONDENT
SIPOMPO, FEZEKILE	80TH RESPONDENT
TINENTE, VICTOR	81ST RESPONDENT

TSENASE, LEKHOOA E	82ND RESPONDENT
TSOANA, MOJALETA	83RD RESPONDENT
BELE, THABANG A	84TH RESPONDENT
KHOSA, SHOKWANA S	85TH RESPONDENT
LETJEBA, NICHOLAS L	86TH RESPONDENT
MABOKA, WRENFORD M	87TH RESPONDENT
MABUZA, JOHANES	88TH RESPONDENT
MACHOCHOKO, JOHANNES L	89TH RESPONDENT
MAHLOMAHOLO, MAULE	90TH RESPONDENT
MALULEKE; BEN R	91ST RESPONDENT
MASSANGO, JOSE O	92ND RESPONDENT
MBHELE, SIPHO C	93RD RESPONDENT
MOKOENANYANE, LOBIEANE I	94TH RESPONDENT
MOLEKO, TANKISO M	95TH RESPONDENT
MONESA, KOPE S	96TH RESPONDENT
MOSO, TSELISO	97TH RESPONDENT
MOTSELEKATSI, MOSIMANEWAKGANG J	98TH RESPONDENT
NGOBENI, MBUSO A	99TH RESPONDENT
NTSIHLELE, SELLO L	100TH RESPONDENT
QHOAI, LEPHOI F	101ST RESPONDENT
SIGAUQUE, MANUEL J	102ND RESPONDENT
TEKANE, THAKAMANG	103RD RESPONDENT
THABANE THABO E	104TH RESPONDENT
KAO, MOTHEOLANE C	105TH RESPONDENT
LENYATSA, NTSAPI	106TH RESPONDENT
LETSOKA, MAKHA THA	107TH RESPONDENT
MONYAKE, RAPU/...E A	108TH RESPONDENT
MOTSEKI, RATAELM	109TH RESPONDENT
MUSSUMBE, BENEDITO A	110TH RESPONDENT
SEMPE, SAMUEL K	111TH RESPONDENT
SETLHAKO, ISAAC M	112TH RESPONDENT
SHANGE, MOSALA	113TH RESPONDENT

DIKILOKHWE, GATERS	114 TH RESPONDENT
FOSA, SIDWELL T	115 TH RESPONDENT
JAKOBO MANGALISO	116 TH RESPONDENT
KOELE, SECHABA E	117 TH RESPONDENT
KUNENE, MOTLATSIE	118 TH RESPONDENT
KWENYELA, DIKOKO	119 TH RESPONDENT
LEKOMOLA, THABO A	120 TH RESPONDENT
LENYETA, MAIWE	121 ST RESPONDENT
LETHIBELANE, EL YUS K	122 ND RESPONDENT
LIKOTSI, BETHUEL	123 RD RESPONDENT
LUSISI, DAVID V	124 TH RESPONDENT
MAHAO, TEBOHO J	125 TH RESPONDENT
MALISE. FRANCIS M	126 TH RESPONDENT
MASOKA, ANTHONY P	127 TH RESPONDENT
MASWELE. EDWARD	128 TH RESPONDENT
MAZIKWANA, AUBERTSON S	129 TH RESPONDENT
MEMANI, BATHATHU A	130 TH RESPONDENT
MKA TSHANE, SIMPHIWE S	131 ST RESPONDENT
MOETA, TEFO S	132 ND RESPONDENT
MOHLOMI, ELIAS P	133 RD RESPONDENT
MOKGARA, JULIUS M	134 TH RESPONDENT
MOKHALI, RAMABANTA J	135 TH RESPONDENT
MOKOENA, LEHLOHONOLO P	136 TH RESPONDENT
MOLELEKOA, LETSOKO	137 TH RESPONDENT
MONESA, LEBOHANG S	138 TH RESPONDENT
MOSESANE, DANIEL S	139 TH RESPONDENT
MOSHE, T	140 TH RESPONDENT
MOTAUNG, MOITHERI E	141 ST RESPONDENT
MPASI, PABALLO	142 ND RESPONDENT
MPHAHLELE, KOKETSO T	143 RD RESPONDENT
NGADA, ROBERT M	144 TH RESPONDENT
NGANGEZWE, MLANGABEZI	145 TH RESPONDENT

NTLAETOA, MOMO	146TH RESPONDENT
NTSOHI, TSEK1S0 E	147TH RESPONDENT
PEYANA, MNTUWOMZI	148TH RESPONDENT
PHAMOTSE. PHILLIP L	149TH RESPONDENT
PHATSISI, TSEBO	150TH RESPONDENT
RABIRI, PTROSE P	151ST RESPONDENT
RAMABELE, SIPHA J	152ND RESPONDENT
RASMENI, LARENG W	153RD RESPONDENT
SEPEAME, EMANUEL M	154TH RESPONDENT
SIMELANE, GERAME A	155TH RESPONDENT
SINDANE, TSIDISO P	156TH RESPONDENT
SITOE, ALCIDIO S	157TH RESPONDENT
SITGE, FILJMAO M	158TH RESPONDENT
TAU, ISAAC M	159TH RESPONDENT
THABO, JOEL	160TH RESPONDENT
TSOLA, PETROS N	161ST RESPONDENT
MOSEBI, SETHASAKELE MATHEWS	162ND RESPONDENT
KOOMA, LEFU	163RD RESPONDENT
MOLOPJ; THABO	164TH RESPONDENT
NTHO, ROBERT	165TH RESPONDENT
NTHOFE: ELA, M	166TH RESPONDENT
SIBIYA, JOSEPH L	167TH RESPONDENT
RUSTENBURG LOCAL MUNICIPALITY	168TH RESPONDENT
THE PROVINCIAL DIRECTOR, DEPARTMENT OF RURAL DEVELOPMENT AND LAND AFFAIRS CIRCLE CATERING AND ACCOMMODATION (PTY) LTD	169TH RESPONDENT
OTTO JOHAN WENHOLD	170TH RESPONDENT
	171ST RESPONDENT

Neutral citation: *Aquarius Platinum (SA) (Pty) v Bonene & others* (1177/2018) [2019] ZASCA 07 (16 March 2020)

Coram: MAYA P, SALDULKER, VAN DER MERWE and MOCUMIE JJA and DOLAMO AJA

Heard: 5 November 2019

Delivered: 16 March 2020

Summary: Land – eviction under Extension of Security of Tenure Act 62 of 1997 (ESTA) – ESTA requires two consecutive steps to be taken before an eviction order may be granted – first, the right of residence of an occupier must be terminated in terms of s 8 – thereafter, a notice of intention to obtain eviction order must be given to the occupier in terms of s 9 – failure to allege and prove termination of right of residence fatal to application for eviction.

ORDER

On appeal from: Land Claims Court, Johannesburg (Ncube AJ sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

The Court:

[1] This is an appeal against an order of the Land Claims Court (the LCC) dismissing an application by the appellant, Aquarius Platinum (South Africa) (Pty) Ltd, for the eviction of the 1st to the 167th respondents (the occupiers) under the Extension of Security of Tenure Act 62 of 1997 (ESTA). The 171st respondent, Mr Otto Johan Wenhold, is the owner of two portions of the farm Kroondal 304, Rustenburg, North West Province (collectively referred to as 'the farm'). Mr Wenhold did not participate in the appeal. Neither did the 168th respondent, the Rustenburg Local Municipality, the 169th respondent, the Provincial Director of the Department of Rural Development and Land Affairs and the 170th respondent, Circle Catering and Accommodation (Pty) Ltd (Circle Catering). The appeal is with the leave of the LCC (Ncube AJ).

[2] The material background facts are not in dispute. The appellant contracted Murray & Roberts Cementation (Pty) Ltd (MRC) to perform mining operations at the Kroondal Platinum Mine on the farm as well as the Marikana Platinum Mine. The occupiers were employed by MRC and resided in hostels situated on the farm and at Marikana Platinum

Mine. During 2009 the occupiers and thousands of their co-workers participated in an unprotected strike. At the conclusion of internal disciplinary proceedings, the occupiers were all dismissed from that employment. They, however, challenged their dismissals through the processes provided under the Labour Relations Act 66 of 1995 (the LRA).

[3] However, on 2 September 2009, the appellant approached the North West Division of the High Court, Mahikeng (the high court) for an order evicting the occupiers from the various hostels. On 8 September 2009 the high court granted the eviction order. Pursuant thereto, the occupiers were evicted from the hostels. After the eviction of the occupiers, these hostels were demolished. The occupiers, however, successfully challenged the high court's order in the LCC. On 20 September 2009, Bam JP ordered the restoration of the occupiers' rights of residence in terms of ESTA. As a result, the occupiers resumed residence in reconstructed hostel facilities on the farm. Circle Catering manages this hostel on behalf of Mr Wenhold.

[4] During 2012 the appellant became the employer of the occupiers by virtue of the provisions of s 197 of the LRA, after determination of the agreement between the applicant and MRC. In continued compliance with Bam JP's order, the appellant entered into a lease agreement in respect of the hostel on the farm with Circle Catering acting on behalf of Mr Wenhold. Thus, the occupiers continued to exercise their rights of residence in terms of ESTA on the farm.

[5] Protracted labour litigation ensued in the meantime. By 2 December 2014, the litigation in respect of the 1st to 113th respondents had been concluded. Their employment

with the appellant had therefore been terminated by 2 December 2014. The litigation in respect of the 114th to 161st respondents was similarly concluded on 13 November 2015 and as of that date they were no more employed by the appellant. The final determination of the litigation in respect of the 162nd respondent, resulting in the termination of his employment with the appellant, took place on 14 April 2016. In respect of the 163rd to 167th respondents, this took place on 26 April 2016.

[6] On 24 and 25 February 2015, the appellant served notices of the intention to obtain an eviction order in terms of s 9(2)(d)(i) of ESTA on the 1st to 161st, the 164th and the 166th to 167th respondents. Similar notices were served on the remaining occupiers (the 162nd, 163rd and 165th respondents) on 3 June 2016. It appears therefore that eviction notices were served on the 114th to 161st, the 164th and the 166th to 167th respondents before the final termination of their employment. The appellant launched its application for the eviction of the occupiers on 20 September 2016.

[7] The LCC decided the matter in favour of the respondents, and dismissed the application for the eviction of the occupiers. It found, after considering both ss 8 and 9 of ESTA, that:

‘[T]ermination of employment does not necessarily and automatically lead to the termination of the occupier’s right of residence. The Act envisages a two-stage procedure before an order of eviction may be granted. The first stage is the giving of a notice of termination of the right of residence in terms of s 8. The manner in which this kind of notice is to be given is not prescribed. The second stage is the giving of a notice of eviction in terms of s 9 (2)(d). The manner in which this second notice is to be given, is prescribed in accordance with s 28(i)(b) of the Act. . . .’

[8] The LCC also held that:

‘[17] [T]he use of the phrase “may be terminated” in section 8(2) postulates a situation where the owner or person in charge has a discretion. In other words, there will be cases where, despite the fact that employment has been terminated, but the owner still in his or her discretion decides to permit the former employee to continue to reside on the premises. Therefore, termination of employment does not automatically lead to termination of the occupier’s right of residence. A separate and specific notice of termination of right of residence is required.’

Thus, the LCC found that the appellant failed to satisfy the first statutory requirement for the granting of an order of eviction. In our view, for the reasons mentioned below, the LCC correctly dismissed the appellant’s application for the eviction of the first to the 167th respondents (the occupiers) for failure to comply with the provisions of s 8 of ESTA.

[9] It is convenient to set out the relevant provisions of ESTA:

‘8 Termination of right of residence

(1) Subject to the provisions of this section, an occupier’s right of residence may be terminated on any lawful ground, provided that such termination is just and equitable, having regard to all relevant factors and in particular to-

- (a) the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies;
- (b) the conduct of the parties giving rise to the termination;
- (c) the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated;

(d) the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the effluxion of its time; and

(e) the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence.

(2) The right of residence of an occupier who is an employee and whose right of residence arises solely from an employment agreement, may be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act.

(3) Any dispute over whether an occupier's employment has terminated as contemplated in subsection (2), shall be dealt with in accordance with the provisions of the Labour Relations Act, and the termination shall take effect when any dispute over the termination has been determined in accordance with that Act.

. . .

9 Limitation on eviction

(1) Notwithstanding the provisions of any other law, an occupier may be evicted only in terms of an order of court issued under this Act.

(2) A court may make an order for the eviction of an occupier if-

(a) the occupier's right of residence has been terminated in terms of section 8;

(b) the occupier has not vacated the land within the period of notice given by the owner or person in charge;

(c) the conditions for an order for eviction in terms of section 10 or 11 have been complied with; and

(d) the owner or person in charge has, after the termination of the right of residence, given-

(i) the occupier;

(ii) the municipality in whose area of jurisdiction the land in question is situated; and

(iii) the head of the relevant provincial office of the Department of Rural Development and Land Reform, for information purposes,

not less than two calendar months' written notice of the intention to obtain an order for eviction, which notice shall contain the prescribed particulars and set out the grounds on which the eviction is based: Provided that if a notice of application to a court has, after the termination of the right of residence, been given to the occupier, the municipality and the head of the relevant provincial office of the Department of Rural Development and Land Reform not less than two months before the date of the commencement of the hearing of the application, this paragraph shall be deemed to have been complied with.'

[10] Both this Court and the Constitutional Court have authoritatively interpreted these provisions. Approximately two decades ago, this Court found in *Mkangeli and Others v Joubert and Others*¹ that there had to be a proper termination of the right of residence. It stated:

'Once an occupier's right to reside has been duly terminated, his refusal to vacate the property is unlawful. Nevertheless, it does not mean that the remedy of eviction will necessarily be available. This remedy is limited by those provisions of ESTA to which I will presently return. On the other hand, ESTA places no limitation on the other remedies attracted by unlawful occupation. It must therefore be accepted, I think, that the other remedies, such as the owner's delictual claim for his patrimonial loss caused by the unlawful occupation of his land (see, for example, *Hefer v Van Greuning* 1979 (4) SA 952 (A)) are still available to him.

As to the remedy of eviction s 9(2) provides that a court may only issue an eviction order if certain conditions are met. The first such condition is that the occupier's right to residence must have been properly terminated under s 8. Other conditions prescribed by s 9(2) include the giving of

¹ *Mkangeli and Others v Joubert and Others* [2002] ZASCA 13; [2002] 2 All SA 473 (A); 2002 (4) SA 36 (SCA) paras 12-13.

two months' notice of the intended eviction application after the right to reside has been terminated under s 8 (s 9(2)(d)). In a case such as the present, where the appellants took occupation of Itsoseng after 4 February 1997, s 11 also finds application. This section provides that a court may only grant an eviction order if it is of the opinion that it is just and equitable to do so. In deciding whether it is just and equitable to grant an eviction order the court must have regard to the considerations listed in s 11(3), but it is not limited to them. Included amongst these is the consideration 'whether suitable alternative accommodation is available to the occupier' (s 11(3)(c)) and 'the balance of the interests of the owner . . . the occupier and the remaining occupiers on the land' (s 11(3)(e)).'

[11] In *Sterklewies*² this Court said the following:

'The Act contemplates two stages before an eviction order can be made. First the occupier's right of residence must be terminated in terms of s 8 of the Act. The manner in which this is to be done is not specified. Once the right of residence has been terminated then, before an eviction order can be sought, not less than two months' notice of the intention to seek the occupier's eviction must be given to the occupier, the local municipality and the head of the relevant provincial office of the Department of Land Affairs in terms of s 9(2)(d) of the Act. That notice is required to be in a form prescribed by regulations made in terms of s 28 of the Act.'

[12] The Constitutional Court said the following in *Snyders*:³

'If a person has a right of residence on someone else's land under ESTA, that person may not be evicted from that land before that right has been terminated. In other words, the owner of land must terminate the person's right of residence first before he or she can seek an order to evict

² *Sterklewies (Pty) Ltd t/a Harrismith Feedlot v Msimanga and Others* [2012] ZASCA 77; 2012 (5) SA 392 (SCA) para 16.

³ *Snyders and Others v De Jager and Others* [2016] ZACC 55; 2017 (3) SA 545 (CC) para 68.

the person. However, it must be borne in mind that the termination of a right of residence is required to be just and equitable in terms of section 8(1) of ESTA. Section 8(2) deals with the right of residence of an occupier who is an employee of the owner of the land or of the person in charge and whose right of residence arises solely from an employment agreement. It provides that such a right of residence may be terminated “if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act.’

And at para 56:

‘Section 8(1) makes it clear that the termination of a right of residence must be just and equitable both at a substantive level as well as at a procedural level. The requirement for the substantive fairness of the termination is captured by the introductory part that requires the termination of a right of residence to be just and equitable. The requirement for procedural fairness is captured in section 8(1)(e).’⁴

And further at para 73:

‘In any event, even if it were to be accepted that Ms de Jager terminated Mr Snyders’ right of residence, she has failed to show, as is required by section 8(1) of ESTA, that there was a lawful ground for that termination and that, in addition, the termination was just and equitable. At best for Ms de Jager, she purported to show no more than that there was a lawful ground for the termination of the right of residence. She did not go beyond that and place before the Magistrate’s Court evidence that showed that the termination of Mr Snyders’ right of residence was just and equitable.’

[13] Thus, both the clear meaning of the language of these sections and their context (the need to protect the rights of residence of vulnerable persons) indicate a two-stage procedure. Section 8 provides for the termination of the right of residence of an occupier,

⁴ *Snyders* fn 4 para 56.

which must be on lawful ground and just and equitable, taking into account, inter alia, the fairness of the procedure followed before the decision was made to terminate the right of residence. Section 8 at least requires that a decision to terminate the right of residence must be communicated to the occupier. Section 9(2) then provides for the power to order eviction if, inter alia, the occupier's right of residence has been terminated in terms of s 8, the occupier nevertheless did not vacate the land and the owner or person in charge has, after the termination of the right of residence, given two months' written notice of the intention to obtain an eviction order. Section 8(2) must of course be read with s 8(1) and provides for a specific instance of what may constitute a just and equitable ground for the termination of a right of residence.

[14] It is common cause that the appellant did not terminate the right of residence of any of the occupiers. It is clear from the papers that the appellant failed to appreciate the need to comply with this legal requirement. In its founding affidavit the appellant, on the one hand, erroneously equated the termination of employment with termination of the right of residence, and on the other, stated that the occupiers' right of residence had to be terminated by the court. In their answering affidavit the occupiers admitted the termination of their employment, but pertinently denied that their rights of residence had been terminated. This elicited the quite untenable response in the replying affidavit that in the light of the admission of the termination of their employment, the occupiers ' . . . have failed to provide reasons why they still have rights in terms of ESTA or in terms of any other law to continue to occupy the hostel'. As we have said, it was for the appellant to allege and prove, in addition to the termination of the employment of the occupiers, that their rights of residence had been terminated.

[15] The appellant only served notices in terms of s 9(2)(d)(i) on the occupiers. And in respect of a substantial number of them (the 114th – 161st, 164th, 166th and 167th respondents), this took place even before their employment was finally terminated.

[16] It follows that the appellant's case for eviction of the occupiers suffered from a fatal defect and therefore the appeal must fail.

[17] In the result we make the following order:

The appeal is dismissed with costs.

M M MAYA
PRESIDENT

H K SALDULKER
JUDGE OF APPEAL

C H G VAN DER MERWE
JUDGE OF APPEAL

B C MOCUMIE
JUDGE OF APPEAL

M J DOLAMO
ACTING JUDGE OF APPEAL

APPEARANCES:

For Appellant: PL Mokoena SC, with him M Majozi and S Kunene

Instructed by: Werksmans Attorneys, Johannesburg
c/o Symington De Kok, Bloemfontein

For 1st to 167th Respondent: JJ Botha

Instructed by: Matshitse Attorneys, Potchefstroom
c/o Bezuidenhout Attorneys, Bloemfontein

For 168th Respondent: No appearance

M E Tlou Attorneys & Associates, Mahikeng
c/o Moroka Attorneys, Bloemfontein