Reportable:	YES/**NO**
Circulate to Judges:	YES/**NO**
Circulate to Magistrates:	YES/**NO**
Circulate to Regional Magistrates:	YES/**NO**

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION - MAHIKENG

CASE NO : CA47/2020

RC CASE NO: RC2/73/2019

In the matter between:

ITUMELENG MODISADIFE **Appellant**

and

THE STATE **Respondent**

Coram: **Reddy AJ & Roux AJ**

Heard: **01 December 2023**

Handed down: **08 March 2024**

ORDER

(i) The appeal in respect of the conviction is dismissed.

(ii) The appeal against sentence is upheld and the sentence of the court *a quo* is set aside.

(iii) The matter is remitted to the court *a quo* for reconsideration of the sentence to be imposed.

(iv) The appellant shall remain in custody, pending the outcome of such reconsideration.

JUDGMENT

REDDY AJ

Introduction

[1] The appellant was charged with the contravention of section 3 read with section 1, 56(1) 57 58 59 and 60 of the, Criminal Law

(Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("SORMA"), read with the provisions of section 51(1) and Schedule 2 of the Criminal Law Amendment Act, (the CLAA") 107 of 1997, as amended as well as read with the provisions of section 94 of the Criminal Procedure Act, ("the CPA"), 51 of 1977, in that on or about 01 December 2018, the appellant did unlawfully and intentionally commit an act of sexual penetration with KM (nine(9) years old) by inserting his penis into or beyond the genitals of KM without her consent.

[2] Enjoined with legal representation, the appellant pleaded not guilty. On 26 November 2019, the appellant was convicted of the offence so charged. The court *a quo* having found that no substantial and compelling circumstances existed that warranted a departure from the minimum sentence of life imprisonment and imposed same. In terms of section 309(1) of the CPA the appellant is enjoined with the automatic right of appeal**,** which the appellant now exercises. The appellant assails the conviction and sentence.

The state case in the court *a quo*

[3] On the day in question KM resided in Extension 13. She however decided to visit her aunt in Extension 21. In the afternoon on the day in question KM, went upon receiving money from her aunt to a shop. The appellant emerged staggering under the influence of alcohol from a tavern, near Cell C. He requested that KM go with him to his mother's house in Skierlik. KM indicated that she would have to return because she had to go home to Extension 13. On

arriving at Skierlik, KM and the appellant entered the one room informal dwelling.

[4] The appellant then undressed KM of all her clothing, resulting in her being naked. He then carried her and placed her on top of the bed causing KM to be on her back. Thereafter the appellant had sexual intercourse with KM by inserting his private part into hers. At some point the appellant with the use of a knife attempted to have KM perform *fellatio* on him, which KM did not acquiesce to. Whilst the appellant was engaging in sexual intercourse, his mother walked in.

[5] Kebitsamang Modisadife(“Modisadife”), the, mother of the appellant, confirmed KM is her niece and that the appellant is her biological son. On the day in issue KM was together with her at the dwelling of her boyfriend one Shemange in Extension 21, Alabama. Modisadife had given KM fifty cents to go and by simba chips for herself at the spaza shop. Given the passage of time since the departure of KM, Modisadife became concerned of the whereabouts of KM. With the implicit knowledge that KM was not acquainted with anyone in Extension 21, Modisadife suspected that KM may have returned to Skierlik where Modisadife resided.

[6] On arriving at her dwelling, Modisadife found that the door to her home was opened. On entering Modisadife found KM and the appellant standing next to the bed. KM was naked from the waist down, but wearing a t-shirt that covered her upper body. The appellant was buckling the belt of his trouser, with his upper body being naked. Modisadife enquired from the appellant as what was

he doing. The response was mute. The absence of a response caused Modisadife to start screaming for her younger sister Modimang. On responding to the screams of Modisadife, Modimang found her on the ground. The prime reason for her falling to the ground was the shock of what she had observed with KM and the appellant. To her mind, she concluded that the appellant had raped KM. On finding Modisadife on the ground, Modimang called for the neighbors who in turn summoned the South African Police Services ("the SAPS"). On arrival of the SAPS, the appellant was again interviewed but his perpetual silence continued. KM however in the presence of Modisadife disclosed to the SAPS that the appellant had climbed on top of her. The appellant was arrested.

[7] On the evening of 1 December 2018 at 19h55, at the Tshepong Hospital Complex, KM was examined by Dr Mohapi. The gynaecological examination found that there was a discharge on the external part of the genital area with fresh tears of the posterior fourchette with increased friability around the posterior fourchette. The hymen was recorded as being open although no digital examination was conducted. Further the cervix was not visualized. Dr Mohapi concluded that there was evidence of a discharge and tears on the posterior fourchette which was most probably caused by penetration. The examination was concluded by the collection of samples of the genital area in a pediatric evidence collection kit. Much store cannot be placed on the evidence collected as it did lead to a positive finding.

[8] The appellant elected to remain silent.

[9] The Regional Magistrate evaluated the credibility of witnesses and found that notwithstanding the fact that KM was a single witness as well as a child witness, KM was found to be a credible witness. The Regional Magistrate further found that there had been other evidence which corroborated the evidence of KM. The Regional Magistrate correctly assessed the appellant's election to remain silent. In the final analysis the Regional Magistrate found that the guilt of the accused had been proved beyond a reasonable doubt. Accordingly the appellant was convicted as charged.

The grounds of appeal against conviction

[10] The appellant assails his conviction on the following grounds:

(i) that the state proved the guilt beyond a reasonable doubt

(ii) that there are no improbabilities in the state's version.

(iii) that the state witnesses had given evidence in a satisfactory manner.

Discretion of an appeal court on the evaluation

[11] A Court of Appeal will not easily interfere with the trial court's factual findings unless such findings are clearly wrong. It is also well established that the guilt of the appellant must be proved beyond a reasonable doubt in order to secure a conviction.

[12] In *S v Francis* 1991 (1) SACR 198 (A) at 198j-199a it was held that:

> "The powers of a court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court's conclusion, including its acceptance of a witness' evidence is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness' evidence - a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional circumstances that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony."

Evaluation of conviction

[13] The basic principles of criminal law and the law of evidence that applies in this matter are trite. The first principle is that in criminal proceedings, the state bears the onus to prove the accused's guilt beyond reasonable doubt: *S v Mbuli* 2003 (1) SACR 97 (SCA) at 110D-F; *S v Jackson* 1998(1) SACR 470 (SCA) and *S v Schackell* 2001 (4) SACR 279 (SCA). No onus rests on the accused to prove his or her innocence: *S v Combrinck* 2012 (1) SACR 93 (SCA) at para 15. The accused's version cannot be rejected only on the basis that it is improbable, but only once the trial court has found, on credible evidence, that the explanation is false beyond a reasonable doubt: *S v V* 2000 (1) SACR 453 (SCA) at 455B. The corollary is that, if the accused's version is reasonably possibly true, the accused is entitled to an acquittal. Equally trite is that the appellant's conviction can only be sustained

if, after consideration of all the evidence, his version of events is found to be false: *S v Sithole and Others* 1999 (1) SACR 585 at 590.

[14] It is well-established in our law that the evidence of children and single witnesses should be approached with caution. In *Woji v Santam Insurance Company Ltd* 1981(1) SA 1020 (A) at 1021, the Court held:

> " The question which the trial Court must ask itself is whether the young witness' evidence is trustworthy. Trustworthiness, as is pointed out by Wigmore in his Code of Evidence para 568 at 128, depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears "intelligent enough to observe". Whether he has the capacity of recollection will again depend on whether he as sufficient years of discretion " to remember what occurs" while the capacity of narration or communication raises the question whether the child has " the capacity to understand the questions put, and to frame and express intelligent answers"(Wigmore on Evidence vol II para 506 at 596). There are other factors as well which the Court will take into account in assessing the child's trustworthiness in the witness box. Does he appear to be honest is there a consciousness of the duty to speak the truth?"

[15] *S v Vilakazi* 2014 (1) SACR 29 (SCA) at para [24] Nugent JA posited the following in respect of the arduous duty that all role-player's are enjoined in rape matters:

> "From prosecutors it calls for thoughtful preparation, patient, and sensitive presentation of all the available evidence, and meticulous attention to detail. From Judicial officers who try such cases it calls for the accurate understanding and careful analysis of all the evidence."

[16] It is so that KM was a child. The appellant admitted that on the day in question he was alone in the company of KM and that he had attempted to kiss her in the home of his mother. Moreover, it is incontrovertible that KM was a single witness as to what precisely had occurred while alone with the appellant. The law of general application in respect of a single witness is ensconced in section 208 of the CPA. Within the subset of section 208, provision is made that an accused may be convicted of any offence on the single evidence of any competent witness.In the determination of the competency alluded to in section 208 of the CPA and its predecessor the case law is replete with jurisprudential authority on the approach to the assessment of the evidence of a competent witness.

[17] In *S v Stevens* (417/03) 2005 1 All SA 1(SCA) the SCA condensed the law on the approach to dealing with the evidence of a single witness:

> "[1] Courts in civil or criminal cases faced with the legitimate complaints of persons who are victims of sexually inappropriate behavior are obliged in terms of the Constitution to respond in a manner that affords the appropriate redress and protection. Vulnerable sections of the community, who often fall prey to such behavior, are entitled to expect no less from the judiciary. However, in considering whether or not claims are justified, care should be taken to ensure that evidentiary rules and procedural safeguards are properly applied and adhered to.
>
> [17] As indicated above, each of the complainants was a single witness in respect of the alleged indecent assault upon her. In terms of section 208 of the Criminal Procedure Act an accused can be convicted of any offence on the single evidence of any competent witness. It is, however well-established

judicial practice that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility (see for example S v Webber 1971 (3) SA 754 (A) at 758G-H). The correct approach to the application of this so called “cautionary rule” was set out by Diemont JA in S v Sauls and Others 1981 (3) SA 172(A) at 180 E-G as follows:

“There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in S v Webber…) The trial judge will weigh his evidence, will consider its merits and demerits and having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932[in R v Mokoena 1932 OPD at 80] may be a guide to a right decision but that does not mean “that the appeal must succeed if any criticism if however slender, of the witnesses evidence were well founded”(per Schreiner JA in R v Nhlapo (AD 10 November 1952) quoted in R v Bellingham 1955(2) SA 566(A) at 569.) It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.”

[18] In *State v V* 2002 (1) SACR 453 SA 454 (2), Zulman JA, addressed the issue of corroboration in the assessment of the evidence of a child witness:

“in view of the nature of the charges and the ages of the complainants its is well to remind oneself at the outset that while there is no statutory requirement that the child’s evidence must be corroborated it has long been accepted that the evidence of young children should be treated with caution and the evidence in a particular case involving sexual conduct may call for a cautionary approach.”

[19] Notwithstanding a contraction between KM and the mother of the appellant as to exactly what the appellant was doing on his mother entering the room where KM and the appellant where, the evidence presented against the appellant was overwhelming. The law on contractions is trite. The appellant admitted to being in the room with KM and conceded to attempting to kiss her. The evidence of the mother of the appellant was damning on two scores. Firstly she was the mother of the appellant. Secondly, she walked in and found the appellant busy buckling his trousers with his upper body naked and KM naked from the waist down whilst clothed with a t-shirt on her upper body.

[20] In the face of this *prima facie* evidence the appellant exercised his right to remain silent. Before the advent of the Constitution, the Appellate Division expressed itself as follows as regards the right to remain silent in *S v Mthetwa* 1972 (3) SA 766 (A) at 768. which was quoted with approval in *S v Chabalala* 2003 (1) SACR 134 (SCA) at para 20 :

"Where . . . there is a direct *prima facie* evidence implicating the accused in the commission of the offence, his failure to give evidence, *whatever his reason may be* for such failure, in general, *ipso facto* tends to strengthen the State's case, because there is nothing to gainsay it, and therefore less reason for doubting its credibility or reliability."

[21] In *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC), the apex Court, stated that an accused person who chooses to remain silent in the face of evidence calling for an explanation runs the risk that the court may well be entitled to conclude that the evidence is sufficient for a finding of guilt,

whether such a conclusion is justified will depend on the weight of the evidence.

[22] The right to a fair trial includes the right "to be presumed innocent, to remain silent, and not to testify during the proceedings". See Section 35(3)(h) of the Constitution of the Republic of South Africa, Act 108 of 1996. The election to remain silent is a constitutional narrative. No negative inference may be drawn from this election. In appropriate circumstances an accused's election to remain silent could expose the accused to leaving the state evidence unrebutted. However, "[t]he failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt". *Osman v Attorney-General, Transvaal* [1998] ZACC 14; 1998 (4) SA 1224 (CC); 1998 (11) BCLR 1362 (CC) at paragraph [22].

[23] In *S v Hlongwa* 2002 (2) SACR 37 (T) at paragraph [45] it was held that "the accused's silence adds nothing to the strength of the prosecution case. What it does is no more than to leave the prosecution case undisturbed by any evidence that either challenges it or explains it away."

[24] On an assessment of the evidence, there is no merit in the grounds of appeal. The appellant's failure to testify in the face of the *prima facie* evidence against him, led that evidence to be proof beyond a reasonable doubt. It follows that the grounds of appeal have no merit. The appeal against the conviction must accordingly fail. Therefore the appeal against the conviction be dismissed.

Appeal against sentence

[25] It is trite that an appeal court can only interfere with a sentence imposed if there is a material misdirection by the trial court or if there is such a grave disparity between the sentence imposed by the trial court and the sentence which the appeal court would have imposed if it were the trial court. It is also trite that the disparity should be shocking or disturbingly inappropriate or vitiated by irregularity, to justify interference. *S v Malgas* 2001 (2) SA 1222 (SCA); [2001] 3 All SA 220 (A) para 12, *S v Bogaards* [2012] ZACC 23; 2013 (1) SACR 1 (CC) para 41.

[26] The appellant asserts that the Regional Magistrate erred in finding that there were no substantial and compelling circumstances present when sentencing the appellant. The fulcrum of this contention was that the personal circumstances of the appellant was not properly weighed. Due cognizance was not taken of the absence of the previous convictions, appellant's age, and the rehabilitation element of punishment. To this end, the Regional Magistrate over emphasized the interests of society.

[27] The introduction of minimum sentencing legislation into our law altered the sentencing landscape. The Court must now be alive to the sentencing regime that now exists, and that the legislature has ordained a particular sentence for such an offence and that there must be truly convincing reasons to depart therefrom. These truly convincing reasons have been blanketed as substantial and compelling reasons, notwithstanding the absence of an all-embracing decision of what the pure meaning of this legal concept

is. For substantial and compelling circumstances to be found does require that these circumstances must be exceptional. See: *S v Vilakazi* 2009(1) SACR 552(SCA). What however is established law is that on this path to determining the presence of substantial and compelling circumstances, a sentencing court is duty bound to assess the conspectus of the evidence inclusive of mitigating and aggravating factors in ascertaining whether the litmus test of substantial and compelling circumstances find application.

[28] What is apparent to me is that the sentencing process before the Regional Magistrate was no more than a routine exercise. If truth be told, the prosecution and the representative for the appellant did little to place factors before the Regional Magistrate for there to be a proper appraisal of the factors that formed the tried thereby, giving substance to the principle of proportionality in our sentencing the process. The principle of proportionality is entwined with the term substantial and compelling circumstances. Had the Regional Magistrate concluded that she had been jettisoned by the other role players as far as sentence legislation provisions empowering the inquisitorial powers that the Regional Magistrate was empowered, should have been considered.

[29] In *Olivier v S*, [2010] JOL 25319 (SCA), the sentencing phrase of a trial was succinctly described as follows:

> "…It is trite that during the sentencing phase, formalism takes a back seat and a more inquisitorial approach, aimed at collating all relevant information, is adopted. The object of the exercise is to place before the court as much information as possible regarding the perpetrator, the circumstances of the

commission of the offence and the victim's circumstances, including the impact which the commission of the offence had on the victim. The prosecutor, defence counsel and the presiding officer all have a duty to complete the picture as far as possible at sentencing stage. Material factual averments made during this phase of the trial ought, as a general proposition, to be proved on oath."

[30] The imposition of a life sentence demanded quality evidence in aggravation and mitigation be placed before the court *a quo*. The terse information that can be gleamed from the record falls gravely shy of what is required. In *Rammmoko v Director of Public Prosecutions*, [2002] JOL 10353 (SCA) where Mpati JA indicated that:

'…Life imprisonment is the heaviest sentence a person can be legally obliged to serve. Accordingly, where section 51(1) applies, an accused must not be subjected to the risk that substantial and compelling circumstances are, on inadequate evidence, held to be absent. At the same time the community is entitled to expect that an offender will not escape life imprisonment- which has been prescribed for a very specific reason- simply because such circumstances are, unwarrantedly, held to be present. In the present matter evidence relating to the extent to which the complainant has been affected by the rape and will be affected in future is relevant, and indeed important. Such evidence could have been led from the complainant's mother, her school teacher or a psychologist. No attempt was made to do so.

…And the placing of this important information before the sentencing court is not the responsibility of State counsel alone. The presiding officer, who must satisfy himself before imposing the prescribed sentence that no substantial and compelling circumstances are present, also bears some responsibility. Van der Walt J, in *S v Dlamini* 2000 (2) SACR 266 (T), correctly sums up the position, when he says (at 268d-e):

"The Court that imposes sentence in a criminal case plays an active role in the trial and does not sit by passively when evidence is led. Indeed, section 186 of the Criminal Procedure Act 51 of 1977 provides that the court can at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings and the court shall in this manner cause a witness to be subpoenaed if the evidence of such witness appears to the court necessary for the fair adjudication of the case. In the present case nothing prevented the court *a quo* from directing, for example, that the complainant be interviewed by a psychologist or other appropriately qualified or trained person to establish the effects of the rape on her, present and future."

[31] The appellant faced the sentence of life imprisonment. This is the ultimate sanction that can be imposed in our law. It was therefore imperative for the court *a quo* to have been satisfied that the offence was indeed proportionate to the crime. In this regard Ackerman J in *S v Dodo* [2001] ZACC 16; 2001 (5) BCLR 423 (CC) posited the following:

. "…The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading, particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue. This was recognized in *S v Makwanyane*. Section 12(1)(a) [of the Constitution] guarantees, amongst others, the right "not to be deprived of freedom… without just cause." The "cause" justifying penal incarceration and thus the deprivation of the offender's freedom, is the offence committed. "Offence", as used throughout in the present context, consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender. In order to justify the deprivation of an offender's freedom it must be shown that it is reasonably necessary to curb the offence

and punish the offender. Thus the length of punishment must be proportionate to the offence.

…To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence (in the sense defined in paragraph 37 above) the offender is being used essentially as a means to another end and the offender's dignity assailed. So too where the reformative effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity.'

[32] The crime for which the appellant was convicted remains heinous. This should not translate to an expedited sentence process.
In *Vilakazi* the following was held :

"…The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. For it is in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone. In those circumstances each detail can be vitally

important. From those who are called upon to sentence convicted offenders such cases call for considerable reflection. Custodial sentences are not merely numbers. And familiarity with the sentence of life imprisonment must never blunt one to the fact that its consequences are profound."

[33] In *Ndou v S*, [2012] JOL 29522 (SCA), the following was stated

"…Trial courts take months, and in some instances years, dealing with evidence and principles of law to establish the guilt or innocence of an accused person. However, my observation is that when it comes to the sentencing stage, that process usually happens very quickly and often immediately after conviction. Sentencing is the most difficult stage of a criminal trial, in my view. Courts should take care to elicit the necessary information to put them in a position to exercise their sentencing discretion properly. In rape cases, for instance, where a minor is a victim, more information on the mental effect of the rape on the victim should be required, perhaps in the form of calling for a report from a social worker. This is especially so in cases where it is clear that life imprisonment is being considered to be an appropriate sentence. Life imprisonment is the ultimate and most severe sentence that our courts may impose; therefore a sentencing court should be seen to have sufficient information before it to justify that sentence…"

[34] The sentence proceedings before the court a *quo* was wholly inadequate. There was no pre-sentence or probation officers' report. Whilst I accept this essential information could have been directly accessed from the appellant, it is common cause that this was not done. There was no victim impact report. The aunt of the victim nor the mother of the appellant who was present during the sentence proceedings was not given a voice, more pertinently as this rape was committed within the fabric of a family.

[35] Order:

Consequently, the following order is made:

(i) The appeal in respect of the conviction is dismissed.

(ii) The appeal against sentence is upheld and the sentence of the court *a quo* is set aside.

(iii) The matter is remitted to the court *a quo* for reconsideration of the sentence to be imposed.

(iv) The appellant shall remain in custody, pending the outcome of such reconsideration.

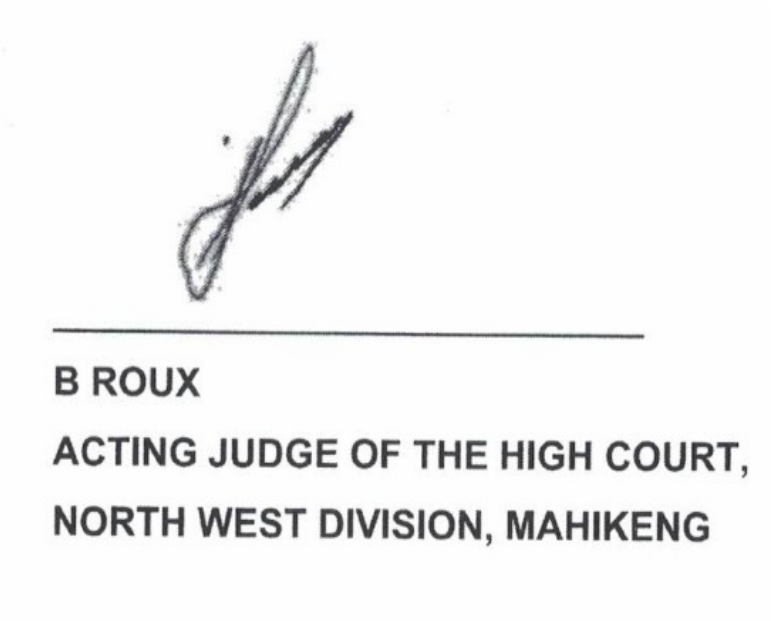
_____

A REDDY

ACTING JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

I agree.



B ROUX
ACTING JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG

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Date of Hearing : 30 November 2023

Date handed down: 08 March 2024