

SOUTH AFRICA / JUDGMENT

Masobelele v S (CAF 3/2011)

[2011] ZANWHC 22 (24 May 2011)

[2011] ZANWHC 22**COURT**

North West High Court, Mafikeng

BEFORE

Kgoele, Hendricks, Gura

CASE / FILE NUMBER

CAF 3/2011

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Source record**NORTH WEST****HIGH COURT, MAFIKENG****CAF****3/2011****In**

the matter between:

JOHANNES

MALOSE MASOBELELE

.....Appellant

and

THE

STATE

.....Respondent

CRIMINAL

APPEAL

FULL

BENCH

HENDRICKS

J, GURA J, KGoeLE J.

DATE

OF HEARING : 18 March 2011

DATE

OF JUDGMENT : 24 May 2011

COUNSEL

FOR APPELLANT : Adv. Senatle

COUNSEL

FOR RESPONDENT : Adv. Jacobs

JUDGMENT

KGOELE J:

A.

INTRODUCTION

The appellant pleaded guilty to a charge of fraud before the Regional Magistrate Mogwase. He was found guilty by the trial court on his plea only and was sentenced as follows:-

R5000 (five thousand rand) or 2 (two) years imprisonment and another 5 (five) years imprisonment which is wholly suspended for a period of 5 (five) years on the following conditions:-

Firstly, the accused should not be convicted of fraud committed during the period of suspension.

Secondly that his suspended sentence is that if he compensate the complainant Raphael Boningo to the amount of R61 800-00, which has to be paid to the Clerk of the Court, Magistrate's Office Mogwase at the rate of R10 300-00 per month with effect from February 2005 until July

2005. The compensation is made in terms of Section 300, Act 51 of 1977 which means that it has an effect of a civil judgment against him."

[2] The appellant paid the fine but failed to compensate the complainant in terms of the trial court's order. After the expiration of the period in which the compensation was to be made, the appellant was brought before the trial court for having failed to compensate the complainant.

[3] The trial court, without holding an inquiry, committed the appellant to imprisonment for a period of five (5) years, thereby putting the suspended sentence of five (5) years into operation.

[4] The appellant appealed against the putting into operation of the suspended sentence to this Court. The appeal came before Justice

Landman and Madame Acting Justice Nobanda of this division. They could not reach any consensus with regard to the outcome of the

matter. The Honourable Madame Judge President referred the matter to this Court sitting as a Full Bench of this division.

B. ISSUES

[5] The main crux of the issues before this Court is to the effect that the trial court misdirected itself by putting the suspended sentence into operation without conducting an inquiry about his failure to comply with the order to compensate the complainant. Mr Senatle on behalf of the appellant argued that the procedure when a suspended sentence is put into operation is normally that:-

the audi alteram partem rule should be adhered to;

constitutional rights of the accused person should not be infringed so that he can receive a fair trial

In terms of Section 297 (6) (b) of the Criminal Procedure Act (The Act) the court hearing the application is having a discretion to either put the sentence into operation or further suspend the suspended sentence, which discretion must be exercised judiciously.

[6] According to Mr Senatle, failure to adhere to these principles amounts to a gross irregularity which justifies the setting aside of the order of the trial court. The respondent's counsel Mr Jacobs conceded, correctly so, to all of the above mentioned submissions made on behalf of the appellant.

[7] Section

(297) of the Act provides:-

A court which has –

.....

Suspended the operation of a sentence under subsection (1) (b) or (4); or

Suspended the payment of a fine under subsection (5), whether differently constituted or not, or any court of equal or superior jurisdiction may, if satisfied that the person concerned has through circumstances beyond his control been unable to comply with any relevant condition, or for any other good and sufficient reason, Further suspend the operation of a sentence or the payment of a fine, as the case may be, subject to any existing condition or such further condition as could have been

imposed at the time of such suspension”.

[8] The most obvious requirement the above quoted subsection provides for is the fact that there must have been a failure or inability to comply with an imposed condition. Secondly, the court must satisfy itself whether the person concerned has through circumstances beyond his/her control been unable to comply with the condition(s), or there exist any other good and sufficient reason that the court may further suspend, amend or substitute the sentence. The determination is a question of fact which presupposes that an inquiry or a hearing should be held by the court.

- [9] Various High Court decisions are ad idem that the hearing, although not a criminal trial, has to be conducted in a manner similar to that of a criminal trial. The presiding officer has to provide the offender with every opportunity to address the court and to present evidence on whether the relevant condition has been complied with or not, whether the suspended sentence should be put into operation, and any other relevant information the offender has to offer. If the offender is undefended the court should inform him/her of the nature and purpose of the hearing. In other words, the court should make a full enquiry into and consider all the circumstances of the case.

See : “Guide to sentencing in S.A.”: 2nd Edition by S S Terblanche page 376 par. 2.9.4 and all the cases that have been quoted in the footnotes in this paragraph.

- [10] When perusing the record of the proceedings in the court a quo, it is quite evident that no hearing was conducted. The trial court just informed the appellant that he had failed to comply with the suspended part of the sentence and that it (the trial court) does not have any option but to commit the appellant to prison for a period of five (5) years.
- [11] The audi alteram partem rule which is a cornerstone of our law was not complied with. The trial court did not exercise the discretion empowered on it judicially as there were no facts before it to enable it to arrive at a just decision. I fully agree with counsel for the appellant that such failure by the trial court amounts to a gross irregularity which warrants this court to interfere with the order putting into operation the suspended sentence.

C. WORDING OF THE CONDITION ATTACHED TO A SUSPENDED SENTENCE

- [12] Various High Court divisions have stressed the point that magistrates should take care in formulating conditions attached to suspended sentences. In *S v Louw* 1992 (1) SACR 688 (N), the magistrate omitted the word “suspended” in the condition rendering the sentence futile. It was rectified on review but with the Judge remarking as follows:-

“Magistrates really must take more care when formulating conditions attached to suspended sentences. The cavalier attitude of some when dealing with such matters imposes an unnecessary and tiresome burden on the review system”.

The same sentiments are equally apposite and echoed in this judgment.

- [13] The trial court made the compensation in this matter i.t.o. section 297 of the Act (as part of the suspended conditions). The last part of the wording of the second condition which reads “The compensation is made in terms of section 300, Act 51 of 1977 which means that it has an effect of a civil judgment against you” is misplaced and misleading.

[14] An order made in terms of section 300 of the Criminal Procedure Act is a stand alone order. It is not made part of a condition of a suspended sentence. A thorough analysis of the case law of various High Courts and well known authorities used by our courts including the “Commentary on the Criminal Procedure Act”, Du Toit and others, page 292 reveal that there are several requirements that needs to be considered first before the order i.t.o this section can be granted. This was not the case in this matter.

See amongst others the following:-

S v Tlame 1982 (4) SA 319 (B)

S v Nyati 1962 (1) SA 6 (T)

S v Mape & Another 19722 (1) SA 754 (E), 754 H – 755 A

S v Van Rensburg 1974 (2) SA 243 (T) 244 h – 245

S v Luthuli 1972 (4) SA 463 (H)

[15] In this matter it is quite clear that the trial court did not understand the difference between the two sections. It is also clear that the compensation order which is the subject matter of the appeal here is the one provided for by section 297 of the Act.

[16] Under the circumstances the last part of the wording of the suspended sentence need to be deleted.

[17] The following order is thus made:-

The putting into operation of the suspended sentence by the trial court (committing the appellant to serve five (5) years imprisonment) is hereby set aside.

The matter is remitted back to the office of the Magistrate Mogwase for a consideration, before a different magistrate, as to whether the suspended sentence should be put into operation or not.

The sentence of the trial court is confirmed but the following words are deleted there from:-

“The compensation is made in terms of section 300, Act 51 of 1977 which means that it has an effect of a civil judgment against you”.

A.M. KGOELE

JUDGE OF THE HIGH COURT

I agree

R.D. HENDRICKS

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