

SOUTH AFRICA / JUDGMENT

Mong v Director of Public Prosecutions and Another (17593/2018) [2019] ZAWCHC 106; [2019] 4 All SA 447 (WCC) (23 August 2019) [2019] ZAWCHC 106

COURT

Western Cape High Court, Cape Town

BEFORE

R.C.A. Henney, M.I. Samela

CASE / FILE NUMBER

17593/2018

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

(Coram: Samela, J et Henney, J)

[REPORTABLE]

Case No: 17593/2018

In the matter between:

HANO MONG Applicant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS First Respondent

THE MINISTER OF POLICE Second Respondent

JUDGMENT:

23 AUGUST 2019

Henney, J

Introduction

[1] The applicant in this matter, by way of Notice of Motion, brought an application for an order in the following terms:

- 1) that the particulars relating to an admission of guilt (“the AOG”) fine paid by the applicant on 2 October 2015, at Darling, under SAPS reference number CAS 07/10/2015, be expunged from the register of his previous convictions; and
- 2) that the AOG in the amount of R500 be refunded to the applicant by the respondent[1].

The applicant is represented by Adv. A. Heunis, the first respondent by Adv. S. Galloway and the second respondent by Adv. G. Ndozondo SC and Adv. H. Roux.

- [2] The applicant only cited the Director of Public Prosecutions (“the DPP”) as a respondent, who initially abided with any decision of this court, and still does. This court, however, requested the DPP as well as the Minister of Police (“the Minister”) to make submissions regarding the issues raised by the applicant. The Minister, at a later stage, requested leave to be joined in these proceedings, on the basis that the conduct of police officers in terms of section 56 and section 57 of the Criminal Procedure Act, 51 of 1977 (“the CPA”) forms the subject of this review application. And the judgment will not only affect the police officers concerned in this matter, but will also influence and affect the consequences of the conduct of all police officers who act in terms of these provisions.
- [3] They further argued that the judgment will have a practical effect on the South African Police Services, insofar as it may inform police officers about the duties and obligations in terms of these sections and how they are expected to go about in carrying out these obligations. More, especially, the practical result contemplated by the sections, which would be that a conviction and sentence would be recorded as a previous conviction on an accused persons’ Criminal Record. Lastly, the Minister also required an opportunity to state its case concerning the proper interpretation and legal effect of section 57, based on the recent matter of *S v Lloyd Madhina* 2019 (1) SACR 297 (WCC), where the court held, per Thulare AJ, without affording the Minister an opportunity to be heard, that the payment of an AOG pursuant to the provisions of section 57 does not amount to a conviction in terms of section 271 of the CPA and should not be entered onto the Criminal Record System of the South African Police Services.
- [4] There was never any doubt in this court’s mind, right from the outset, and there was also no argument to the contrary from the applicant or the DPP, that the Minister has a real and substantial interest in this case and needs to be joined. Therefore, the application for the Minister to be joined was granted. The court also wants to express its appreciation to all counsel for their invaluable heads of argument, and inputs during the hearing of this matter.

Background

- [5] The applicant, on 1 October 2015, together with two friends, attended the annual “Rocking the Daisies Festival” just outside Darling, with thousands of other young people, when he was arrested for being in possession of dagga. In these proceedings the applicant, under oath, denied that he was ever in possession of this dagga, or that he admitted that it was his dagga. He admitted, however, that he paid the fine and said that he had not known that by

paying the fine he would acquire a criminal record. Although he admitted paying the AOG, he had no recollection of signing any document. He was still under arrest when he was given the option to pay the AOG fine and when he did so.

- [6] It was further not explained to him that he had an option to be released on warning or that bail could be paid. And further

that he did not have to pay the AOG fine immediately. The Minister, in an Answering Affidavit filed on behalf of both itself as well as the DPP, deposed to by Emile Boumeester, a Sergeant in the South African Police Services who had been on duty on the night in question, denied that the facts as alleged by the applicant were true and correct in all respects. According to him, they found the applicant and two other persons in a tent or gazebo. This was after they followed a strong smell of dagga, coming from the tent/gazebo.

- [7] Upon entering this tent/gazebo, they introduced themselves as policemen and asked permission to search the tent/gazebo, and after conducting a search, they found a packet of loose dagga under a table. They enquired from the applicant and the two other male persons about the owner of the dagga, and they did not respond. The applicant and his two male friends then proceeded to discuss the matter amongst themselves, and the two male persons later indicated that it belonged to the applicant. The applicant had not denied or disputed this accusation and he was then accordingly, arrested and taken to the Police Station at Darling. There his constitutional rights were fully explained to him, as is set out in the standard form SAP 14A, which was signed by the applicant.

- [8] His complaint raised in his founding papers, that his constitutional rights were not explained, was not correct. The applicant also subsequently admitted that the dagga belonged to him. The nature and the consequences of the applicant paying an AOG fine were fully explained to him, and it was read out to him as contained in the annexure to the J534 form, which the applicant signed. He, furthermore, had no reason to believe that the applicant had not understood the contents of the J534 form and the annexure thereto. In terms of the annexure to the J534 form, the applicant acknowledged that he had been given the opportunity to decide if he wanted to pay an admission of guilt fine or not and whether he wanted to appear in court to dispute the allegations against him.

- [9] It is not necessary for this court to deal with these two opposing versions to dispose of this matter, even though we are dealing with Motion proceedings, where the rule laid down in the case of *Plascon-Evans Paints v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634 H – I would be applicable. What is important however, is that the applicant was arrested and at a later stage paid an AOG fine, in the amount of R500, for the offence of contravening section 4 (b) of the Drugs and Drugs Trafficking Act 140 of 1992, for allegedly being in possession of dagga. What this court needs to be concerned with in these proceedings, is the legal effect and the consequences of the payment of that AOG, which is important not only for the applicant, but also for the DPP, the Minister and the public at large.

[10] Before dealing with the respective arguments from the different parties, it would be prudent once again to have a look at the legal framework under which AOG fines are paid in our law. In this regard, the provisions of section 57 of the CPA, in particular

subsections (5), (6) and (7) should be noted:

“(5) (a) An admission of guilt fine stipulated in respect of a summons or a written notice shall be in accordance with a determination which the magistrate of the district or area in question may from time to time make in respect of any offence or, if the magistrate has not made such a determination, in accordance with an amount determined in respect of any particular summons or any particular written notice by either a public prosecutor attached to the court of such magistrate or a police official of or above the rank of non-commissioned officer attached to a police station within the magisterial district or area in question or, in the absence of such a police official at any such police station, by the senior police official then in charge at such police station.

- (b) An admission of guilt fine determined under paragraph (a) shall not exceed the maximum of the fine prescribed in respect of the offence in question or the amount determined by the Minister from time to time by notice in the Gazette, whichever is the lesser.
- (6) An admission of guilt fine paid at a police station or a local authority in terms of subsection (1) and the summons or, as the case may be, the written notice surrendered under subsection (3), shall, as soon as is expedient, be forwarded to the clerk of the magistrate's court which has jurisdiction, and such clerk of the court shall thereafter, as soon as is expedient, enter the essential particulars of such summons or, as the case may be, such written notice and of any summons or written notice surrendered to the clerk of the court under subsection (3), in the criminal record book for admissions of guilt, whereupon the accused concerned shall, subject to the provisions of subsection (7), be deemed to have been convicted and sentenced by the court in respect of the offence in question.
- (7) The judicial officer presiding at the court in question shall examine the documents and if it appears to him that a conviction or sentence under subsection (6) is not in accordance with justice or that any such sentence, except as provided in subsection (4), is not in accordance with a determination made by the magistrate under subsection (5) or, where the determination under that subsection has not been made by the magistrate, that the sentence is not adequate, such judicial officer may set aside the conviction and sentence and direct that the accused be prosecuted in the ordinary course, whereupon the accused may be summoned to answer such charge as the public prosecutor may deem fit to prefer: Provided that where the admission of guilt fine which has been paid exceeds the amount determined by the magistrate under subsection (5), the said judicial officer may, in lieu of setting aside the conviction and sentence in question, direct that the amount by which the said admission of guilt fine exceeds the said

determination

be refunded to the accused concerned.”

The Arguments

Applicant's version

- [11] The applicant's main submission is that section 57 (6) requires a judicial officer presiding at the court in question, to examine the documents and confirm the conviction and/or sentence under subsection 6 of the Act, prior to it being entered into the Criminal Record Book for admissions of guilt. He bases this argument on the fact that subsection 6 states that it is subject to subsection 7, which states the examination "shall" be done.
- [12] From the contents of the docket which was attached to the founding affidavit, as well as the papers filed of record and attached to the second respondent's answering affidavit, it would appear that in this matter section 57 (7) was not complied with and therefore the Clerk of the Court should never have entered the AOG fine in the Criminal Record Book for admissions of guilt. The main thrust of his argument was that the Magistrate never confirmed that the information in the document was correct, as the document was not signed by a Magistrate or even stamped, as the stamp depicted thereon is that of the Clerk of the Court.
- [13] The Magistrate did not make a determination whether the AOG fine was in accordance with the prescripts as set out in subsection 7, to conclude whether it was in accordance with justice. He further argued that in order for an AOG fine, notwithstanding the provisions of subsection 6, to be considered as a conviction and sentence, it was subject to the provisions of subsection 7, which obliges a judicial officer to examine the documents to conclude that the conviction and sentence under subsection 6 is in accordance with justice. This did not happen in this case, as is evident from the papers filed of record, and if the documents on which the AOG was based, which resulted in a conviction and sentence, were not placed before a judicial officer it cannot be regarded as such. Only once it has been placed before a judicial officer in terms of subsection 7, to conclude that it was in accordance with justice, can it be regarded as a conviction and sentence, and only then can such conviction and sentence be entered into a Criminal Record Book for admissions of guilt.
- [14] He submitted that the power that the Clerk of the Court has in terms of section 57 (6), which is the entering of the essential particulars of the Summons, or written notice, after it had been surrendered to him/her, in a Criminal Record book for admissions of guilt, is subject to the provisions of subsection 7, before it can be deemed to have been a conviction and sentence by the court in respect of the offence in question, and this did not happen in this case and therefore there cannot be a conviction and sentence of the court in respect of the offence in question.

- [15] The applicant further submitted that based on his version,[2] he was not told of the consequences that would flow from his payment of the AOG fine whilst he was still under arrest at that time. In this regard, he relies on the judgments of this court of *S v Parsons* 2013 (1) SACR 38 (WCC) and *S v Tong* 2013 (1) SACR 346 (WCC), where it was held that where conviction is based on the AOG fine which resulted in a previous conviction, he should have been fully informed about the consequences of the payment of such a fine.
- [16] He furthermore submitted that just as in the Tong matter, the police immediately enforced the payment of the AOG instead of explaining to him that he could be warned or that he has to appear upon being released on bail, in which instance he would have had time to consider and obtained advice whether or not to pay the AOG fine. In this regard the applicant relies on the matter of *S v Houtzamer* 2015 JDR 0424 (WCC), where this court held that it is an undesirable practice that admissions of guilt should be paid while the accused is still in custody.

The DPP's submissions

- [17] Adv. Galloway, on behalf of the DPP, submitted that there are only two ways in which an accused person can find him or herself in a situation of having a previous conviction. These are by either pleading guilty, which would result in a subsequent conviction by a court of law, or after pleading not guilty, resulting in a trial which may result in a conviction by a court of law. As a consequence of this, the conviction is then recorded on the accused's Criminal Record.
- [18] The prescribed procedure in terms of the CPA, in the case where an accused admits his or her guilt in a court of law, is determined by the provisions of section 112 (1) (a) and 112 (1) (b), or, in the case where the accused is legally represented, in terms of section 112 (2) of the CPA. The DPP contends that the provisions of sections 112 (1) (a) and section 105A of the CPA, are particularly relevant to these proceedings. In terms of the section 112 (1)
- (a) an accused person can admit guilt and subsequently be convicted without being questioned by the court.
- [19] According to the DPP this is similar to section 57 of the CPA, because both of these provisions of the Act are applicable in
- instances where the offences are considered to be minor, where it has been said that an accused is thus convicted on his own opinion on the matter.
- [20] The DPP further submits that our criminal justice system recognises the concept of a conviction based on the accused on admissions. And in this instance cites section 112 (2) is an example where an accused may be convicted on the strength of his or her admissions without further questioning.

[21] The DPP also submits that indirect admissions[3] in the plea explanation, when pleading not guilty, can form the basis of a conviction of an accused person. Section 57 of the CPA, therefore, makes provision for an accused who readily admits his or her guilt on a minor charge by paying an AOG, who then doesn't have to appear in court.

[22] In this regard the DPP submits that the purpose of section 57 of the CPA is to save an already overburdened court from unnecessary

appearances, and an accused person from incurring costs related to legal representation when they readily admit guilt. It cannot therefore be said to be unfair or unjust that should an accused be of the view that he or she is indeed guilty, that he or she can admit his or her guilt by way of an AOG in terms of the provisions of section 57 of the CPA. It should then, therefore, follow that the payment of an AOG be recorded against the accused, in the Criminal Record.

[23] The DPP disagrees with the interpretation of the court in the Madhinja case, where at paragraph 15 it is stated that: "The conviction and sentence of an accused in terms of s 57 (6) is sui generis. It is not a verdict. It is not even a pronouncement by the clerk of the court. It is an automatic consequence of an administrative act performed by a member of the court's support services. It automatically follows on the clerk of the court performing his or her clerical duties..."

[24] Section 57 (7) of the CPA determines that the presiding Magistrate shall examine the documents and, should it appear to him or her that it is not in accordance with justice, or that the said fine is not in accordance with the prescribed AOG fine for the relevant jurisdiction or, if no such determination of AOG has been made in the jurisdiction, or that the sentence is not adequate, he may set aside the conviction and sentence of the accused, who may be summoned to appear.

[25] The DPP submits that this implies that should the Magistrate be of the view that the papers are in accordance with justice, or that the sentence is in accordance with the prescribed AOG fine for the relevant jurisdiction, or if no such determination of AOG fine has been made in the jurisdiction, though the sentence is adequate, he would confirm the acceptance of the AOG fine by the Clerk of the Court.

[26] The DPP further submits that in order for the Magistrate to either set the conviction and sentence aside or not, he or she has to apply his or her mind. This is an act which amount to the execution of a judicial discretion[4]. The DPP therefore submits as such, that the confirmation by the presiding Magistrate is a decision by a court. In this regard the DPP refers to the unreported decision of this court of S v Karan

(18808) [2019] ZAWCHC 33 (26 March 2019), where it was confirmed that after the payment of an AOG fine, when a notice was forwarded to the Clerk of the Court to enter the particulars in the Criminal Record Book for admissions of guilt and accused is deemed to have been convicted and sentenced of the offence, subject section 57 (7) of the CPA.

[27] The DPP further submits that it is this confirmation, in terms of the provisions of section 57 (7) of the CPA, that causes the payment of the AOG to be a conviction and sentence. This fact, according to the DPP, is illustrated by the fact that once the acceptance of an AOG fine is confirmed by the Magistrate, he or she is *functus officio*. Such Magistrate would have no further power to adjudicate over the matter and should any further facts become apparent, which would lead such Magistrate to believe that the conviction and sentence based on the AOG fine paid is not in accordance with justice, the case should then be referred to the High Court for a special review in terms of the provisions of section 304 (4) of the CPA.

[28] The DPP further submits that this concept of a court confirming a plea of guilty and a sentence agreed on prior to the Magistrate

entering into the proceedings, is determined by the provisions of section 105A of the CPA, which makes provision for an accused person who readily admits his or her guilt on any charge, to reach an agreement with the state, not only on the terms of the plea of guilty, but also on what is considered a just sentence. The DPP therefore submits that in terms of the provisions of subsections (4)

- (9) of section 105A of the CPA, a court, upon being tasked to consider the terms of the plea and sentence agreement, has a similar duty to that of the Magistrate in terms of the provisions of section 57 (7) of the CPA.

[29] With respect to the judgment in *Madhinja*, the DPP submits that this judgment is clearly wrong and in conflict with prior authority, particularly of this division of the High Court, to the extent that the court in that matter found that the payment of an AOG cannot be regarded as a conviction.

The Minister's Arguments

[30] The Minister submitted that the legal relief sought by the applicant seems to have as its objective the reversal of the legal consequences following the payment of an AOG fine. In particular, where such payment of the AOG fine was recorded as a previous conviction on the South African Police Services Criminal Record System. However, as the Minister submits, it is significant that the applicant does not seek an order declaring that the AOG fine did not trigger the deeming provision contained in section 57 (6) of the CPA, which states that upon entry of the particulars of an AOG fine into the Criminal Record Book for admissions of guilt, the applicant is deemed to have been convicted and sentenced by a court.

[31] The Minister further submits that it is also significant that no order is sought to set aside the conviction and sentence that has taken place pursuant to the provisions contained in section 57 (6) of the CPA. And the applicant's decision not to challenge the fact that he admitted guilt with regard to the statutory offence of possession of dagga, and paid the fine in the amount of R500, raises the legal question whether a court may reverse the legal consequence of such a fact where such a fact is not challenged and it is not sought to be set aside.

- [32] The Minister submitted that if it is assumed that the applicant failed to challenge the full legal effect on the basis and strength of the decision of Madhinja, where the court held that a conviction of an accused in terms of section 57
- (6) of the CPA is not a conviction as contemplated in terms of section 271 of the CPA, then accordingly, it was not a conviction and sentence that had to be entered into the South African Police Services Criminal Record System.[5] According to the Minister, although the court in Madhinja found that the payment of an AOG fine pursuant to section 57 (6) of the CPA constituted a conviction, it limited the legal effect and consequences of such conviction, in the sense that it held that the conviction did not qualify as a previous conviction for the purposes of section 271 of the CPA.
- [33] The Minister further submits that based on the Madhinja case, the operation of section 271 is limited to proving previous convictions for the purpose of imposing sentence on an accused person who has subsequently been convicted of another offence, and accordingly apart from the aforesaid limitation the court did not in any other way limit the legal effect of the payment of an AOG fine in terms of section 57 (6) of the CPA. Therefore, it was accepted that the payment of an AOG fine amounted to a conviction and sentence.
- [34] The Minister further submitted that, apart from the decision in Madhinja, our courts have consistently held that an AOG fine, duly entered into the Criminal Record Book for admissions of guilt, was deemed to be a conviction and sentence by a court. And it is for those reasons that section 304 (4) of the CPA was considered applicable for the review of such convictions and/or sentences.
- [35] According to the Minister, it is a legal fact that the applicant was convicted of possession of dagga and sentenced to a fine of R500. This, the Minister submits, is the legal fact that is not challenged and is not sought to be set aside. In this regard the Minister submits that even if an unlawful act is not void or non-existent, but exists as a fact and has legal consequences, it must be complied with or acted upon[6]. Therefore, in the absence of a challenge to set aside the conviction and sentence for the statutory offence of possession of dagga, it would be legally impermissible, and an anomaly, to reverse or set aside the legal effect and consequences of such conviction and sentence.
- [36] The Minister further submits that the court, in Madhinja, did not make any order against the Minister of Police prohibiting its Criminal Record Centre Division from recording an AOG fine in the Criminal Record of a particular accused. To the contrary, the court held that the Director of Public Prosecutions, for purposes of section 271 of the CPA, should not include an AOG fine on an accused's Criminal Record, for the purpose of sentencing proceedings, as contemplated in section 271 of the CPA.

- [37] The Minister contends that it was not a party to the aforesaid case, and in the absence of an express wording to that effect, it should not be assumed that the court would make an order in the absence of a party. And on a proper reading of the case, the finding in Madhinha was limited to the use of an AOG fine as a previous conviction in terms of section 271 of the CPA. Accordingly, the decision in Madhinha does not support the relief requested by the applicant and the application falls to be dismissed on this ground.
- [38] At best for the applicant, and only in the event of the reasoning in Madhinha being endorsed by this court, the Minister submits that the applicant may seek limited legal relief, namely that the applicant's AOG fine may not be used as a previous conviction for the purposes of section 271 of the CPA. Such relief, however, will be of academic importance, having regard to the facts on which applicant relies.
- [39] The Minister further submits that even if the decision in Madhinha was correct, it is of no assistance to the applicant, because the decision in Madhinha did not overturn the long list of authorities that all interpreted section 57 of the CPA to mean that upon entry of the particulars of an AOG fine in the Criminal Record Book for admissions of guilt, an accused is deemed to have been convicted and sentenced by a court.
- [40] According to the Minister, the question that requires to be answered is whether the decision in Madhinha, to the effect that a conviction pursuant to section 57 (6) of the CPA may not be used as a previous conviction in terms of section 271 of the CPA, formed part of the decision of the court so that it is therefore binding on subsequent courts. Given the facts of Madhinha, where the applicant paid an AOG fine in respect of the common law offence of assault; the applicant alleged that he was arrested and detained and paid the fine to obtain his release; he was not advised of his rights, in particular his right to defend himself in a court of law and to be released on warning; that he denied that he committed the offence of assault; that many years after paying the AOG fine the applicant requested the police clearance certificate in order to qualify as a taxi driver and it was only upon making the said request that he learned that the AOG fine was recorded as a previous conviction and that he had a Criminal Record. Based on these facts, the court in Madhinha was not required to consider whether a conviction and sentence pursuant to an AOG fine could be proved as a previous conviction in terms of section 271 of the CPA, and accordingly the court's finding that such a conviction could not be used for the purpose of proving a previous conviction in terms of section 271 of the CPA did not form part of the decision of the court and is not binding on subsequent courts. According to the Minister, this finding was obiter dictum.
- [41] In this current matter, the factual basis on which the applicant's application is premised is also unrelated to the application of section 271 of the CPA, in that the applicant approached the court on the basis that he required a clean Criminal Record in order to avoid having to disclose his past misdemeanour to potential employers. He has further not been convicted of another offence and is not seeking to prohibit the use of his past conviction for the purpose of sentence in terms of section 271 of the CPA.

[42] The Minister accordingly submits, that the Madhinha case is not binding authority in support for a general proposition that an AOG fine may not be entered into the registrar of the South African Police Services Criminal Record System, or on a so-called register for previous convictions.

[43] The Minister contends that, in any event, the act of removing the entry of the particulars of an AOG fine as a conviction and sentence is carried out in the normal course of business by the South African Police Services. The Minister, just as the DPP, disagrees with the interpretation of section 57 referred to in the case of Madhinha. I also agree with the Minister's, as well as the DPP's, criticism of this case, which I will discuss later in the course of this judgement.

[44] Issues for consideration

- 1) whether an entry made into the Criminal Record book by the Clerk of the Court of an admission of guilt in terms of section 57 (6) would amount to a conviction and sentence; and
- 2) if so, would it then amount to a previous conviction that would be entered into the Criminal Record book of the South African Police

Services; and

- 3) whether it would only amount to a conviction and sentence, after a judicial officer presiding at the court in question has determined, in terms of the provisions of section 57 (7), that such conviction

and sentence is in accordance with justice, which would amount to a criminal record entered into the Criminal Record book of the South African Police Services.

Discussion

[45] One of the questions to consider in this matter, is whether an AOG fine paid at the police station, or local authority as the case may be, in a case where the Summons or written notice had only been forwarded to the Clerk of the Court, who entered the essential

particulars of such summons or written notice as the case may be into the Criminal Record Book for admissions of guilt would have the effect, that the accused person shall be deemed to have been convicted and sentenced by the court in respect of the offence in question, as provided for in section 57 (6) of the CPA. That is, if the documents upon which the admission of guilt fine was paid, were not examined by a judicial officer presiding at the court in question in terms of the provision of section 57 (7) of the CPA.

- [46] The further question to consider is whether the deemed conviction and sentence, as contemplated in section 57 (6), which is subject to the provisions of subsection (7), can be considered as a conviction and sentence if there was non-compliance with the provisions of subsection (7). Put differently whether the deemed conviction and sentence can still be regarded as such if it had not been examined by a judicial officer presiding at the court in question.
- [47] The approach a court should follow in interpreting a statute was set out in the judgment of Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18. In that matter it was stated that interpretation is the process of attributing meaning to the words in the document, be it legislation or some other statutory instrument or contract. And that the process of interpretation requires consideration of the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears and the apparent purpose to which it is directed. It is further established law that an interpretation which renders the meaning or use of some words and phrases meaningless is to be avoided.
- [48] It is clear that the conviction and sentence in terms of section 57
- (6) is based on a so-called deeming provision. In this regard, this deeming provision has a specific purpose, which is the recording of a conviction and sentence based on the payment of an AOG fine, in order to avoid the person accused of those crimes, having to appear in court. The deeming provision as set out in section 57 (6) of the CPA does not operate beyond its specific purpose as referred to above. In the case of *Lawyers for Human Rights and Another v Minister of Home Affairs Director-General: and Another* 2003 JDR 0283 (T) it was held that where a constitutional obligation or function, like the detention of an illegal foreigner, which are usually performed by a state functionary, is deemed to be performed by some other person in terms of legislation, the deeming provision does not shift the constitutional obligation of the state onto a non-state functionary.
- [49] The court held, at pages 27-28, that “[a] deeming provision is just that: It deems, for a specific purpose, something that may not be a fact to be a fact, sometimes until the contrary is proved and sometimes finally. A deeming provision does not operate beyond its specific purpose. Deeming provisions have no uniform meaning. Their meaning must in each instance be determined in accordance with the ordinary canons of construction (*S v Rosenthal* 1980 (1) SA 65 (A.D.). at 76 and 77.)”
- [50] In *S v Rosenthal* (supra) it was held, at pages 75 F-H and 76 A-B that “[t]he words ‘shall be deemed’ ... are a familiar and useful expression often used in legislation in order to predicate

that a certain subject-matter, e.g. a person, thing, situation, or matter, shall be regarded or accepted for the purposes of the statute in question as being of a particular, specified kind whether or not the subject-matter is ordinarily of that kind. The expression has no technical or uniform connotation. Its precise meaning, and especially its effect, must be ascertained from its context and the ordinary canons of construction. Some of the usual meanings and effect it can have are the following. That which is deemed shall be regarded or accepted (i) as being exhaustive of the subject-matter in question and thus excluding what would or might otherwise have been included therein but for the deeming, or (ii) in contradistinction thereto, as being merely supplementary, i.e. extending and not curtailing what the subject-matter includes, or (iii) as being conclusive or irrebuttable, or (iv) contrary thereto, as being merely prima facie or rebuttable. I should add that, in the absence of any indication in the statute to the contrary, a deeming that is exhaustive is also usually conclusive, and one which is merely prima facie or rebuttable is likely to be supplementary and not exhaustive.”

- [51] The court in Rosenthal relied heavily on the dictum in *R v Haffjee and Another* 1945 A.D. 345, in dealing with the question as to how a deeming provision should be interpreted, and at page 77 A-B says the following: “Hence, Haffjee’s case is sound authority for the proposition that the words ‘shall be deemed’ in the appropriate context can have the last meaning and effect mentioned above, namely, that the deeming is merely prima facie or rebuttable, even in the absence of any express qualification to that effect”.
- [52] The erstwhile Appeal Court of South Africa, in dealing with a similar deeming provision in the previous Criminal Procedure Act, Act 56 of 1955, which dealt with admissions of guilt fines paid in terms of section 351 of that Act, in the matter of *NGJ Trading Stores (Pty) Ltd v Guerreiro* 1974 (4) SA 738 (A) also relied heavily on the decision of Watermeyer CJ in *Haffjee* (supra), where Holmes JA, at 744, held that in interpreting this deeming provision one must examine the aim, scope and object of the legislative enactment in order to determine the sense of its provisions, which is in line with what is proposed in Natal Joint Municipal Pension Fund.
- [53] The court in *NGJ Trading Stores* (supra), having had regard to the deeming provision relating to admissions of guilt in that particular act, concluded that although

the word “convicted” ordinarily means “adjudged to be guilty by a court”, that does not imply, if regard is to be had to other provisions of that act, that “adjudged to be guilty” needs to be done, for example, by a weighing up of evidence. “Adjudged to be guilty” or “convicted” shall be interpreted by an examination of the aim, scope and object of the Criminal Code.[7] In this regard, the court referred to section 258 (1) (a) of the Criminal Code, where there is no question of adjudging the accused to be guilty, in the sense that it has to weigh up evidence of an offence to which an accused pleads guilty. And in such cases an accused person is found guilty and sentenced without any evidence being led. Similarly, in certain minor cases, as in the case of section 112 (1) (a), and more serious cases in the case of 112 (1) (b), 112 (2) and 105A of the current CPA, an accused person is also found guilty without being adjudged in the ordinary course.

[54] The court went into on to say, at 745 para C-D: “Similarly, when the clerk of the court has entered the document of admission of guilt in the criminal record book of the court under sec. 351 (5) and the court is passing sentence, there is no issue between the State and the accused in the matter of conviction.”

[55] The Appeal Court further stated, at page 745 para G – H: “Returning to sec.351, the words ‘deemed to be convicted’ in sub-sec. (5) seem to me to be appropriate in relation to this procedure designed for the convenience of the accused and the celerity of the administration of justice. First, the accused, having filed a signed admission of guilt and deposited the estimated sum towards a fine, is not required to appear in court.

Second, there is no formal plea of guilty in court. Third, he is not present to hear a verdict. Fourth, after the deemed conviction the door is left open for the court or the Attorney General to send the case to trial. It is only when the court has finally exercised its judicial discretion in deciding the amount of the fine that the proceedings are complete. By this time there is no question of a statutory deeming. There is a conviction and a sentence. Sentence postulates conviction. This is confirmed by the fact that the accused cannot thereafter be charged for the same offence: the plea of *autrefois* convict would be available to him.” (Emphasis added.)

The court then goes on to say, at 746 A: “Moreover, the conviction counts as a previous conviction, as counsel for the respondent rightly conceded.” (Emphasis added.)

[56] It is therefore clear that the deemed conviction is subject to the provisions of subsection (7). It is a deemed conviction subject to judicial imprimatur. Put differently, it is a deeming provision which is regarded as a conviction and sentence, and the proceedings are only complete after a judicial officer has exercised its judicial discretion in terms of subsection (7).

[57] The legislature had to make a choice by either providing a procedure in terms whereof the payment of an AOG fine would have the effect of a conviction and sentence by a court, or not. In this context the legislature would have been mindful of the fact that the conviction and sentencing of an accused falls within the exclusive domain of our courts, which is an important pillar of the doctrine of separation of powers.

[58] In my view, such an interpretation is consistent with the presumption that “statute law does not interfere with or oust the jurisdiction of the courts”. In this regard, I make reference to LAWSA Vol. 25 (1) para 337 at page 332 – 333, where it is said that: “The object of this presumption is to vouch for the horizontal division of powers (or *trias politica*) and, in particular, for the independence of the judiciary, and to ensure access for individuals to the courts and to adjudicative procedures. The Constitution has fundamentally affected this presumption and it is arguable that it has become superfluous.” (Footnotes omitted.)

[59] The authors of LAWSA further submit on page 333: “It is submitted that the common-law presumption against interference with or an ousting of the jurisdiction of the court has largely been subsumed under the Constitution. Section 165 of the Constitution provides for the independence of the judiciary in no

uncertain terms and section 34 entrenches the fundamental right of access to adjudication process. Other provisions of the

Constitution also demand deference to judicial authority. Section 35, for instance, explicitly involves courts at all the various stages of the criminal process...”

[60] As referred to earlier, the deeming provision in section 57 (6) of the CPA is for a specific purpose, which is to facilitate the recording of the particulars of summons or notice in the Criminal Record Book for admissions of guilt, which would be deemed to be a conviction and sentence by a court. It does just what it says: it deems, for a specific purpose, something that may not be a fact, to be a fact, either until the contrary is proved or sometimes finally. It cannot operate beyond its specific purpose, which is merely the recording of such particulars in the Criminal Record Book, deemed to be a conviction and sentence of the court, which would in the ordinary course be the function of a Magistrate or judicial officer. The subsection does not deem that the Clerk of the Court actually convicted and sentenced the person to pay the AOG fine. It is a deemed conviction and sentence of the court.

[61] The purpose is not to imbue the Clerk of the Court with the powers of a Magistrate or judicial officer, which would be contrary to the constitutional injunction as set out in section 165 of the Constitution, which is that the judicial authority is vested in the courts and not a person that has not been appointed as a judicial officer.

[62] It is clear that the decision of this court in the case of Madhinja, besides the fact that it is clearly wrong, will have, as a consequence, a disastrous effect on our criminal justice system, especially when it relates to the payment and the legal effect of an AOG fine for certain offences.

[63] The court in that case, with the greatest respect, clearly and demonstrably misinterpreted the law regarding this aspect. It

clearly failed to interpret the provisions of section 57 of the CPA while having regard to the aim, scope and object of the Criminal Procedure Act, the rules of interpretation as well as the Constitution. The court clearly did not have regard to the fact that the deemed conviction in terms of section 57 (6) is just what it says. And it is not a conviction and sentence by the Clerk of the Court, but by a judicial officer or Magistrate of that court. The conviction and sentence is based on a deeming provision which only becomes complete after judicial imprimatur had been given thereto in terms of section 57 (7).

[64] It is clearly at odds with what the erstwhile Appellate Division said in NGJ Trading Stores, which is still binding authority and which states that it is only when the court has finally exercised its judicial discretion, which includes whether the fine paid for the offence is in

accordance with a determination by the Magistrate under subsection 5, or whether a determination for the payment of such a fine on the charge for which the accused has been charged has not been made, or whether the sentence is not adequate, and lastly, whether the admission of guilt fine paid does not exceed the amount determined by the Magistrate under subsection 5.

- [65] Only after a judicial officer, in terms of subsection (7), is satisfied that the proceedings are in accordance with justice, based on these requirements, and after having exercise his or her judicial discretion, have the proceedings been completed. By which time there is no question of a statutory deeming and there is no conviction and sentence by the Clerk of the Court, because there never was, but rather by the judicial officer presiding at the court. This will amount to a conviction and sentence of that court, even though there was no formal court hearing or appearance of the accused before a Magistrate.
- [66] The court in Madhinja simply failed to examine the aim and purpose of the proviso in subsection (7) of section 57, and regarded the deeming provision in terms of section 57 (6) not as such, but as an actual conviction, which it mistakenly characterised as a sui generis one. If that had been the case, the legislature would not have made the deemed conviction and sentence subject to the provisions of subsection (7), which entails judicial oversight over the payment of the AOG which resulted in the conviction and sentence.
- [67] It would therefore have been a superfluous or meaningless provision. And it would not have been regarded as a deemed conviction and sentence, but as an actual conviction and sentence, which would have been constitutionally impermissible, because only a judicial officer has the power in terms of our law and especially our Constitution (section 165) to pronounce on the innocence or guilt of a person who has committed a criminal offence and impose a subsequent sentence.
- [68] Furthermore, as pointed out by the Minister, if the payment of an AOG fine would not result in a conviction and sentence, it may result in a situation where a person who pays an AOG fine would be treated differently to one who chose not to pay an AOG fine at the police station for the very same offence, and where both are liable to pay the same fine. It would then seem that the person who exercises his or her right to be presumed innocent, the right to confront his or her accusers, the right to testify in open court, the right to call witnesses, and the right to be convicted only upon proof beyond reasonable doubt that he or she committed the offence in question and the right to present evidence in mitigation of sentence, would be in a much more prejudicial position than a person who chose not to exercise those rights when such a person pays an AOG. Such a person, based on the reasoning and logic of the court in Madhinja, would, in contradistinction to the person that paid the AOG fine, be “properly” convicted and such conviction and sentence would be regarded as a previous conviction, merely because he or she chose to exercise his or her fair trial rights in terms of section 35 of the Constitution.

[69] Conversely, it would also have deleterious and far reaching consequences for society where, for example, an abusive partner would regularly commit a relatively serious violent offence, like common assault, on his or her partner, would choose to pay an AOG fine and would then not attract a previous conviction. And based on the decision of Madhinha, he or she would then remain “under the radar” because the police would not have a record of the offence, and even if they had a record of the offence it cannot be regarded as a previous conviction. Such a person, even if he or she had had committed numerous assaults and paid an AOG, would therefore be able to apply for a firearm licence because such “convictions and sentence would not be regarded as previous convictions”. The police and prosecution authorities would then be failing in their duty to protect the public, whereas, as pointed out by the Minister, the police would be liable for the negligent breach of a legal duty by granting a firearm licence to an unfit person[8].

[70] Prosecutors may be reluctant to agree to a situation where people can admit guilt by means of the payment of an AOG fine, if such a conviction and sentence will not be regarded as a previous conviction. And will rather prosecute people in the ordinary

course through the formal court process. It would have a negative impact on an already over-burdened court system which is

exactly what section 57 seeks to prevent, and it will undermine the very aim and purpose of that section.

[71] The court in Madhinha either was not aware of the long line of cases in this and other divisions[9], and especially the binding authority of the NGJ Trading Stores case, or chose not to follow the settled law in this regard, which held that the payment of an AOG fine for certain cases[10] would result in a conviction and sentence which would be considered as a previous conviction.

[72] I, with the greatest of respect, fail to follow the reasoning and logic of the court in Madhinha, where it held that a conviction and sentence in terms of section 57

(6) cannot result in a previous conviction for the purposes of section 271 of the CPA. And that the other courts[11], without having decided the issue, merely accepted that a conviction in terms of section 57 (6) was a previous conviction, and as such a previous conviction to be entered on the Criminal Record. This cannot be correct for the following reasons. Firstly, it is settled law based on the NGJ Trading Stores decision that a conviction and sentence based on an AOG fine, not in terms of section 57 (6) but in terms of section 57 (7), would amount to a previous conviction. There was therefore, no need for the other courts to consider it. Secondly, as pointed out, that if regard is to be had to the proper interpretation thereof, it is a conviction and sentence in terms of the CPA in terms of the provisions of section 57

(7) and not section 57 (6), as pointed out in NGJ Trading Stores. Thirdly, there is no other provision in our law which provides for the proof of previous convictions, other than section 271 of the CPA. Fourthly, the CPA does not distinguish between previous convictions

acquired for a crime based on the payment of an AOG fine and previous convictions based on a conviction which is based on any other provision of the Act. It is immaterial for the purposes of section 271 in what manner a person who has been convicted of a criminal offence, whether such conviction was by means of a payment of an AOG or by means of the formal court process. If that was the intention of the legislature, it would have done so.

[73] In NGJ Trading Stores (*supra*), it was argued that for the purposes of the nonfulfilment of the condition of the lease agreement, the previous conviction

acquired after an AOG fine had been paid, cannot be taken into consideration for the purposes of the non-fulfilment of a contractual

condition, but can only be regarded as a previous conviction in terms of the previous Criminal Procedure Act in operation at that time. Holmes JA, in answer to this, said the following at 746 E-G: “As to that, it seems to me that it counts for the purposes of all offences, whether under statutes, ordinances, bylaws, regulations or the common law. In respect of all such alleged criminal offences sec.351 provides the machinery for a ready dispensation of the law, leading to the sentence if the accused admits his guilt ... It is difficult to understand how the procedure under sec.351 can be excluded from the meaning of their language.”

(Emphasis added.)

[74] The court in Madhinha relied on the case of *S v Smullion* (Sullivan) 1977 (3) SA 1001 (RA) to conclude that because there was no verdict pronounced in a court of law, a conviction based on the payment of an AOG cannot be regarded as a previous conviction in terms of Section 271 of the CPA. This case, in my view, cannot be regarded as authority for the proposition that a previous conviction based on the payment of an AOG fine cannot be regarded as such. I say this for the following reasons. Firstly, it dealt with the question whether a person who had been convicted on two counts of drunken driving in a single indictment on the same day, and who was subsequently convicted again on another occasion, whether the later conviction should be regarded as a third conviction which would justify a person's driver's licence being suspended for life in terms of the relevant traffic legislation. It did not deal with a conviction based on the payment of an AOG. Secondly, the court in Madhinha did not consider, or it seems was not even aware of, what the appeal court had said decisively in the NGJ Trading Stores case, about the interpretation and meaning to be accorded to a conviction and sentence based on the payment of an AOG fine, and wrongly interpreted the law.

[75] The court in Madhinha, based on the *stare decisis* principle, had to follow the decisions of the erstwhile Appellate Division in NGJ Trading Stores (*supra*) as a court of higher instance. It was bound by that decision, which, in fact, as said earlier, the court did not even refer or have regard to. It did not state that it was not bound to follow the decisions of this court, as well as the courts in the other divisions, because they were clearly wrong. The decision in Madhinha, if left unattended, would have an undesirable effect on our law relating to this subject. In this regard, as mentioned earlier, the Minister submitted that the impact of such

an interpretation of the provisions of section 56 and 57 will influence and affect the function of the South African Police Services and have consequences for all police officers who must act in terms of the provisions of these sections.

[76] Furthermore, that it will have a practical effect on the South African Police Services insofar as it may inform police officers

about the duties and obligations in terms of these provisions, and how they are expected to go about in carrying out same to achieve the practical result contemplated by the sections, namely a conviction and sentence which is recorded as a previous conviction on an accused's Criminal Record, and that the upkeep and maintenance of an accurate and complete Criminal Record System is of vital importance to the criminal justice system as a whole.

[77] The Minister was not provided with an opportunity to be heard before the decision in Madhinja was handed down. And I agree that it has always been accepted and understood by the South African Police Services that admissions

of guilt are of the same effect as a conviction and sentence by a court of law and entered into a Criminal Record System.

[78] I also agree with the Minister that the AOG fine system includes a number of statutory and common law offences, records of which not only provide an input to a presiding officer in passing sentence, but also serves much broader interest, including interests relating to the grant or refusal of a firearm licence and even the private the interests of employers and contracting parties. I am of the view, that the greater public interest, the interests of justice, and implications that this judgment has on the broader criminal justice system as pointed out earlier, requires a reaffirmation of the correct legal position.

[79] Given these concerns of the Minister, it is once again helpful to restate the importance and benefits of the stare decisis principle, as was explained by Hahlo and Khan: *The South African Legal System and its Background* (1968,) at 214, where the author said the following: "The advantages of a principle of stare decisis are many. It enables the citizen, if necessary with the aid of practising lawyers, to plan his private and professional activities with some degree of assurance as to their legal effects; it prevents the dislocation of rights, particularly contractual and proprietary ones, created in the belief of an existing rule of law; it cuts down the prospect of litigation; it keeps the weaker judge along right and rational paths, drastically limiting the play allowed to partiality, caprice or prejudice, thereby not only securing justice in the instance but also retaining public confidence in the judicial machine through like being dealt with alike ... Certainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of stare decisis." (Footnotes omitted.)

[80] This rule was confirmed by the Constitutional Court in the matter of *Ex Parte Minister of Safety and Security and Others: In re S v Walters and Another* [2002] ZACC 6; 2002 (4) SA 613 (CC), at para 61, where it was held: "It follows that the trial Court in the instant matter was

bound by the interpretation put on s 49 by the SCA in Govender. The Judge was obliged to approach the case before him on the basis that such interpretation was correct, however much he may personally have had his misgivings about it. High Courts are obliged to follow legal interpretations of the SCA, whether they relate to constitutional issues or to other issues, and remain so obliged unless and until the SCA itself decides otherwise or this Court does so in respect of a constitutional issue.”

This rule was once again emphasised in the matter of Afrox Healthcare Bpk v Strydom 2002 (6) SA 21 (SCA).

[81] It seems that the court in Madhinja did not follow, firstly, the settled law as pronounced in the NGJ Trading Stores case of the erstwhile Appellate Division, and secondly, three decisions of this court, as well as the decisions of the courts in other divisions of equal tier. In Camps Bay Ratepayers’ and Residents’ Association and Another v Harrison and Another 2011

(4) SA 42 (CC) the Constitutional Court, at page 56 A-B, held: “The doctrine of precedent not only binds lower courts, but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. Stare decisis is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos.” (Footnote omitted.)

[82] It is with the greatest of regret, for the reasons as mentioned, that I find that the decision in Madhinja is manifestly wrong and should not be followed, because it is in conflict with a long line of decisions on the interpretation and

legal effect and consequences of section 57 of the CPA. It was wrong in concluding that the payment of an AOG would amount to a sui generis conviction and sentence by the Clerk of the Court in terms of the provisions of section 57 (6), upon entering the particulars of the Summons or the notice in a Criminal Record Book.

[83] It was further wrong not to interpret the deemed conviction and sentence in terms of section 57 (6) as a conviction without having regard to the provisions of section 57 (7). It was, furthermore, wrong to conclude that such conviction and sentence

cannot be regarded as a conviction and sentence that can be entered onto the Criminal Record Book for the purposes of a previous

conviction in terms of section 271 of the CPA.

[84] In coming back to this case, it seems that based on the evidence of the documents presented, the deemed conviction and sentence, after it had been entered into the Criminal Record Book by the Clerk of the Court, was never placed before the judicial officer of the court for the district of Malmesbury.[12] Therefore, based on the decision of NGJ Trading

Stores, the process which would make the deemed conviction and sentence a final one has not been completed, because there is no evidence that the Magistrate has exercised his or her judicial discretion as required by section 57 (7) of the CPA. The appellant was therefore not properly convicted and sentenced.

[85] In the result therefore, the entry of the conviction and sentence onto the Criminal Record Book and into the register of criminal

convictions of the South African Police Services, falls to be set aside. As to the question of costs, in my view, this is not a matter, although brought on motion, where the process was strictly adversarial. These types of cases are usually brought on review in terms of section 304 (4) of the CPA. The applicant however, could not follow this route, because it was not a decision of a Magistrate or a Magistrate's Court, but of some other functionary. Neither the respondents are to be blamed nor were aware of the fact that the process was not completed as envisaged in section 57 (7) of the CPA. It would therefore be unfair to grant a cost order against them. It is also a matter of great public importance, where the DPP had to give an input and the Minister had to oppose the application; and especially, where the Minister had to reaffirm its interest in the integrity of the system of payment of AOG fines, and the important role the South African Police Services plays in the system of AOG fines and the entry of convictions into the National Criminal Record System for persons convicted of a criminal offence.

[86] In the result therefore, I would make the following order:

- 1) that the entry of the conviction and sentence into the Criminal Record Book under Darling CAS 07/10/2015 and into the register of criminal convictions of the South African Police Services is set aside;
- 2) that the previous conviction under Darling CAS 07/10/2015 based on such entry in the Criminal Record Book, incurred by the applicant, be removed from such Criminal Record Book;
- 3) the payment of the admission of guilt fine of R500, be paid back to the Applicant;
- 4) that the First Respondent make a decision whether to prosecute the Applicant afresh;
- 5) I make no order as to costs.

R.C.A. Henney

Judge of the High Court

I agree.

M. I. Samela

[1] At that stage, reference was made to the DPP as respondent.

[2]The version of the second respondent is in conflict with that of the applicant in this regard.

[3]In this regard DPP relies S v Mjoli and Another 1981 (3) SA 1233 (A).

[4]In this regard he relies on the decision of S v Louw 1982 (4) SA 556 (C).

[5]In this regard the Minister refers to paragraph 44 of Madhinja.

[6]With reference to Economic Freedom Fighters v Speaker, National Assembly and Others 2016 (3) SA 580 (CC) at para 74; Merafong City v Anglo Gold Ashanti 2017 (2) SA 211 (CC) at para 36.

[7]At page 745 paragraphs A-G.

[8]See in this regard Carmichele v Minister of Safety and Security and Another [2001] ZACC 22; 2001 (4) SA 938 (CC); Minister of Safety and Security v Hamilton 2004 (2) SA 216 (SCA).

9 S v Parsons 2013 (1) SACR 38 (WCC); S v Tong 2013 (1) SACR 346 (WCC); S v Houtzamer 2015 JDR 0424(WCC); S v Rademeyer (A186/17)

[2017] ZAGPPHP 175 (12 April 2017); S v Mutobvu 2013 (2) SACR 366 (GNP).

[10]Except if such an offence had been compounded in terms of section 341 of the CPA in the case of minor offences; such offences are listed in schedule 3 of the CPA and are usually in relation to contraventions of bylaws of the municipality or certain specified offences in terms of the road traffic act.

[11]Referred to above in fn.7.

[12]See record pages 62 and 63.

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