

SOUTH AFRICA / JUDGMENT

Moroe v Director of Public Prosecutions, Free State and Another (4506/2020) [2021] ZAFSHC 54; 2022 (1) SACR 264 (FB) (10 March 2021) [2021] ZAFSHC 54

COURT

Free State High Court, Bloemfontein

BEFORE

C.J. Musi, M. Opperman

CASE / FILE NUMBER

4506/2020

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION,

BLOEMFONTEIN

Case No.: 4506/2020

In the matter

between: -

MMONI

MOSES

MOROE

Applicant

and

THE

DIRECTOR OF PUBLIC PROSECUTIONS, FREE STATE

1st

Respondent

REGIONAL

MAGISTRATE M DAYA

2nd

Respondent

CORUM:

C. J. MUSI,

JP et

M. OPPERMAN, J

JUDGMENT

BY: M. OPPERMAN, J

HEARD ON:

08 MARCH 2021

DELIVERED ON: 10 MARCH 2021

Summary: Review – process putting into operation of suspended sentence

INTRODUCTION

[1] This is an unopposed review in terms of section 22[1] of the Superior Courts Act 10 of 2013 (SCAct) read with Rule 53 of the Uniform Rules of the High Court. Reliance is placed on a gross irregularity in the proceedings in terms of section 22(1)(c) of the SCAct.

[2] The Applicant was sentenced by the Regional Magistrate Bloemfontein on 10 October 2017 to:

‘8 (eight) years imprisonment that is suspended for five years on condition:

1. The accused is not convicted of fraud or theft committed during the period of suspension
2. The accused pay ABSA Regional Office and/or their representative the cash amount of R167 912.58 on or before 02/07/2018. The full details of the Bank Account to be provided to the accused by Captain Martin Barker.

The accused is further warned that should he fail to pay the money by the 2/7/18 then the suspended portion of the sentence will be put into operation.’

[3] He did not comply with the second condition of suspension. On 5 October 2020 the suspended sentence was put into operation.

FACTS

[4] The Applicant stood trial in the Regional Court, Bloemfontein charged with 359 counts of fraud, alternatively theft, involving a total amount of R366 060.00.

[5] On 10 October 2017 he pleaded guilty to the fraud charges. He was legally represented during the plea and sentencing proceedings in the Regional Court.

[6] He repaid some of the monies, but was unable to repay the full amount of compensation within the eight months. He was not employed and was reliant on the assistance of family members. He was brought back to court on 17 September 2018 where he appeared in person. He requested additional time to pay the compensation amount.

This was allowed. The matter was postponed to 18 September 2018. He was represented, on that day, and the matter was struck off the roll.

[7] On 28 November 2018 he entered into an agreement with ABSA. An amount of R148 412.58 was still outstanding. He signed an acknowledgment of debt to pay a monthly instalment of R6 200.00 and thus repay the balance of the compensation over a period of 24 months commencing on 1 December 2018. He did not adhere to the payment conditions set out in the acknowledgment of debt.

[8] Subsequent to noncompliance with the court order and the acknowledgment of debt the Regional Magistrate issued an order of apprehension. The Applicant appeared in court and was ultimately represented by Mr. Giorgi. Mr. Giorgi requested a postponement to pay the outstanding balance. The Applicant did not pay the outstanding balance.

[9] On 5 October 2020 Mr. Giorgi placed the following facts and circumstances on record:

9.1 R70 000.00 of the initial compensation ordered had been paid;

9.2 R97 000.00 was outstanding;

9.3 R40 000.00 was to be paid on that day;

9.4 The balance of R57 000.00 would be paid off monthly within the next 24 months;

9.5 Mr Giorgi requested the Regional Magistrate to remand the matter for one day so that proof of payment of R40 000.00 may be presented to court and in order for him to then address the Regional Magistrate on the outstanding amount.

9.6 It was specifically placed on record that the Covid-19 pandemic and the resultant hardships directly contributed to the non-payment during the period since January 2020;

9.7 The submission was that at no time did the Applicant wilfully or negligently fail to comply with the conditions of suspension relating to compensation.

[10] The grounds of review are in essence that the Regional Magistrate failed to appreciate that he was essentially engaging in a sentencing process which should be conducted according to the principles relevant to a fair trial. He misconceived the nature of the process and/or his duties in connection therewith. Thus, he committed a reviewable irregularity.

[11] During the hearing we were informed that an amount of R45 000.00 was available in his legal representative's trust account to pay towards the outstanding amount. We were subsequently informed that the aforementioned amount was paid into the complainant's Bank Account, which brings the outstanding amount to R52 786.58. Some of the Applicant's family members were in court and indicated via his counsel that R3 500.00 a month would be available to liquidate the arrear amount.

THE LAW

[12] The Supreme Court of Appeal[2] declared on 12 December 2018 that the putting into operation of a suspended sentence is an inherent element of the criminal process and where a court orders that a suspended sentence be made operational, it assumes the position of a criminal court which punishes the person who has been convicted. It has to have regard to the ordinary principles of punishment and cannot simply have a person imprisoned as would a clerk keeping a register. When the liberty of a person is at stake, grounds must exist before such liberty is taken away. In fact, the second court is nothing else but an extension of the trial court when it considers putting a suspended sentence into operation.

[13] Section 297(7) of the Criminal Procedure Act 51 of 1977 reads:

‘A court which has—

- (a) postponed the passing of sentence under paragraph
- (a) (i) of subsection (1);
- (b) suspended the operation of a sentence under subsection (1)(b) or (4); or
- (c) 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 postpone the passing of sentence or 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 conditions as could have been imposed at the time of such postponement or suspension.’(Accentuation added)

[14] Section 297(9) prescribes:

‘(a) If any condition imposed under this section is not complied with, the person concerned may upon the order of any court, or if it appears from information under oath that the person concerned has failed to comply with such condition, upon the order of any magistrate, regional magistrate or judge, as the case may be, be arrested or detained and, where the condition in question—

- (i) was imposed under paragraph (a) (i) of subsection (1), be brought before the court which postponed the passing of sentence or before any court of equal or superior jurisdiction; or
- (ii) was imposed under subsection (1) (b), (4) or (5), be brought before the court which suspended the operation of the sentence or, as the case may be, the payment of the fine, or any court of equal or superior jurisdiction, and such court, whether or not it is, in the case of a court other than a court of equal or superior jurisdiction, constituted differently than it was at the time of such postponement or suspension, may then, in the case of subparagraph (i), impose any competent sentence or, in the case of subparagraph (ii), put into operation the sentence which was suspended.

- (b) A person who has been called upon under paragraph (a) (ii) of subsection (1) to appear before the court may, upon the order of the court in question, be arrested and brought before that court, and such court, whether or not constituted differently than it was at the time of the postponement of sentence, may impose upon such person any competent sentence.’

PROCEEDINGS IN TERMS OF SECTION 297 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977:
PUTTING INTO OPERATION OF A SUSPENDED SENTENCE

[15] The judgment shows that the Regional Magistrate did not apply his mind to the sentence. It reads, all in all, that:

‘Mr Moroe the Court sentenced you on this matter on the 10th of October 2017, its three years ago. Then Ms Sipato adjourned the matter on the 4th of August, it was two months ago.

You have run out of time. Unfortunately, I have granted you too much leeway in this matter. This matter is long outstanding.

The deal was that you would have paid the complainant initially by the 2nd July 2018, 2019, 2020 – two years. It’s just delayed unnecessarily over and over and over again. It stops today.

I cannot grant you any more latitude or any more delays in the matter and it’s for that reason that the eight years imprisonment is now put into place, you understand?

Due to the accused’s non-compliance with the suspended sentence imposed on the 10th of October 2017 in case number 17/35/2017 the suspended sentence imposed on the 10th October is now put into operation due to the accused’s non-compliance which is one of EIGHT YEARS IMPRISONMENT.’[3]

[16] The Regional Magistrate did not follow a proper process before putting the suspended sentence into operation. The correct process would have been for him to apply his discretion judicially in accordance with the law. He should have considered the following factors.[4]

16.1 The first aim of a condition of suspension is to keep the convicted person out of prison.

16.2 An application for putting into operation a suspended sentence is not a mere formality but entails a fully-fledged exercise of judicial discretion. It requires as much consideration and judicial discretion as the imposition of sentence.

16.3 In certain respects, the consideration of implementation requires even more careful consideration than the original imposition of sentence. In the first place, the original trial and the reasonableness of the relevant condition of suspension, which possibly was imposed by another judicial officer of equal status, must be assessed afresh. If the condition was ab initio unreasonable, the sentence should not be put into operation.

16.4 The circumstances of the precipitating non-compliance must be considered. If it was, for instance, a trivial or merely technical breach, a heavy suspended sentence should not be put into operation because of it.

16.5 The condition must be assessed in the light of events since its imposition. If implementation will no longer serve any substantial deterrent or reformatory purpose, it should not be ordered (*S v Hendricks* 1991 (2) SACR 341 (C) at 346d–g).

16.6 The court is at all times obliged to consider judicially the issues listed in subsections (7) and (9) respectively. In *S v Paulse* 1990 (1) SACR 341 (W) the court emphasized that there is no justification for thinking away the time that has lapsed since the original sentence. The putting into operation of a suspended sentence does not follow automatically and remains a matter for careful judicial consideration.

[17] The Regional Magistrate did not record the factors he considered before putting the suspended sentence into operation. He did not enquire from the Applicant's legal representative what exactly the changed circumstances were. The Applicant was gainfully employed but this did not receive proper consideration. The Regional Magistrate did not grant a one-day postponement to enable the Applicant to pay in a substantial amount (R40 000) of the arrears. It is clear that the Regional Magistrate did not exercise his discretion judicially. He was irritated and impatient. One can understand his frustration due to the noncompliance with the court order but that is no reason to act capriciously. The Regional Magistrate's order ought to be set aside. He should have suspended the sentence further, in light of all the facts and circumstances before him.

[18] The Regional Magistrate has in the meantime been transferred to another province. It would be impractical to remit the matter to him to reconsider the issue, because he would not be able to urgently deal with the matter. The Applicant is in custody. This matter must be disposed of as soon as possible. We are in a position to reconsider the sentence because we have all the facts before us.

[19] ORDER

In result it is ordered that:

1. The order made by the Regional Magistrate on 5 October 2020 under Regional Court case number 17/35/17, putting into operation the suspended sentence of eight years' imprisonment, is reviewed and set aside and replaced with the following:

'The sentence of eight (8) years' imprisonment suspended for five (5) years on certain conditions imposed on 10 October 2017 under case number 17/35/17 is further suspended for two (2) years on condition that:

- 1.1 The accused is not convicted of fraud or theft committed during the period of suspension; and

1.2 The accused to pay into ABSA Bank Office Account number 4050003165 the amount of R52 786.58 (Fifty-two thousand seven hundred and sixty-eight Rands and fifty-eight cents) in instalments of R3500.00 (Three thousand five hundred Rands) per month. The first instalment to be paid on or before the 1st of May 2021 and thereafter on or before the 7th of each succeeding month until the total amount is settled.’

2. No order as to costs is made.

M. OPPERMAN, J

I concur.

C.J. MUSI, JP

Appearances:

For the Applicant:

Adv. G.J.M. Wright

Instructed by Giorgi Gerber Attorneys Inc.

Bloemfontein

[1] Section 22 of the Superior Courts Act 10 of 2013: ‘Grounds for review of proceedings of Magistrates’ Court.—(1) The grounds upon which the proceedings of any Magistrates’

Court may be brought under review before a court of a Division are— (a) absence of jurisdiction on the part of the court; (b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer; (c) gross irregularity in the proceedings; and (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence. (2) This section does not affect the provisions of any other law relating to the review of proceedings in Magistrates’ Courts.’

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- (b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
- (c) gross irregularity in the proceedings; and
- (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

- (2) This section does not affect the provisions of any other law relating to the review of proceedings in Magistrates' Courts.'
- [2] Stow v Regional Magistrate, Port Elizabeth NO and Others 2019 (1) SACR 487 (SCA) at paragraph 45.
- [3] Record page 66 at line 6 and further.
- [4] Hiemstra's Criminal Procedure, *supra* at Page 28–85.
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