

SOUTH AFRICA / JUDGMENT

Rapoloti v S (A24/2023) [2024] ZAGPPHC 1233 (28 November 2024)

[2024] ZAGPPHC 1233

COURT

North Gauteng High Court, Pretoria

BEFORE

Du Plessis, Mngqibisa-Thusi

CASE / FILE NUMBER

A24/2023

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: A24/2023

25/10/2024

DPP REF. NUMBER

10/2/5/1/3-SA22/2023

Date: 26 NOVEMBER 2024

In the matter between:

TEBOGO
RICHARD RAPOLOTI
APPELLANT
and
THE
STATE
RESPONDENT

JUDGEMENT

DU PLESSIS, AJ

1.

This is an appeal against the sentence only. The Appellant was convicted on 10 March 2022 in the Oberholzer District Court on one count of contravening Section 5A of the Minerals and Petroleum Resources Development Act, 28 of 2002 as amended (“the MPRDA Act”), in that he, on 9 March 2022 at Driefontein Mine, Number 4 Shaft in Oberholzer, unlawfully prospected for, or removed, mine, conducted technical cooperation, operations, reconnaissance operation, explored for any mineral or petroleum produce, or commenced with any work incidental thereto

on any area without –

1.1. An Environmental Authorisation.

1.2. A Reconnaissance Permission, Prospecting Right, Permission to Remove, Mining Right, Mining Permit, Retention Permit, Technical Cooperation Permit, Reconnaissance Permit, Exploration Right or Production Right, as the case may be and;

1.3. Giving the Landowner or Lawful Occupier of the Land in question at least 21 (twenty-one) days written notice.

2.

The Appellant was legally represented by Counsel in the Court a quo and remained legally represented as such throughout the proceedings. A plea of guilty was tendered by the Appellant's Legal Representative by submitting a Section 112(2) of the Criminal Procedure Act, 51 of 1977, written statement.

3.

The Learned Magistrate convicted the Appellant, apparently on strength of the Section 112(2) statement and sentenced the Appellant to 3 (three) years direct imprisonment without the option of a fine. The Appellant had three previous convictions of contravening Section 5A of the MPRDA, 28 of 2002.

4.

On 2 December 2022, the Appellant applied for and was granted condonation for the late filing of an application for leave to appeal. On the same date, the Appellant applied for and was granted leave to appeal the sentence of three years imprisonment imposed. Nobody appeared for the Appellant. Today in court we were informed by Counsel for the State, Adv Masekameng, that a certain Mr Nel the attorney acting on behalf of the Appellant telephonically informed him that the Appellant terminated his mandate. No practise note and no Heads of Argument were filed by the Appellant's advocate or his Attorney. However given the importance of the matter for the Appellant and the concession by the trial Magistrate that he erred in the sentence he imposed, we agreed that it is in the interest of Justice to proceed with determining the Appeal.

5.

In the Notice of Appeal, the Appellant relies on 3 grounds:

“5.1 It will be submitted that the Learned Magistrate erred in finding that the period of direct imprisonment was the only suitable sentence option.

5.2 It will be submitted that the Learned Magistrate erred in not exercising a judicially sound balance between the seriousness of the offence and the personal circumstances of the Appellant.

5.3 It will respectfully be submitted that reasonable prospect exists in that a different Court may come to a different finding on the sentence imposed.”

6.

Prior to the application for leave to appeal, the matter was sent on automatic review in terms of Section 302 of the Criminal Procedure Act 51 of 1977. On 3 May 2022, the sentence was confirmed on review by a Judge of the High Court of South Africa. However, on scrutiny of the J4 cover sheet of the review, where it appears in the record of the Appeal, the sentence of three years imprisonment was incorrectly recorded as three months imprisonment. On granting leave to appeal, nine months later on 2 December 2022, the Trial Magistrate remarked that:

“I must also say that the sentence prescribed by the act is as submitted by Adv Nel and indeed, I imposed a sentence of three years direct imprisonment and after (indistinct) that I have exceeded the sentence prescribed by the act, I sent this matter on special review. Then the Review Judge confirmed my three years direct imprisonment. Thereafter I did not notice that what the (indistinct) wrote on J4 (indistinct) the sentence of the accused three months and not three years. So, I agree with what Adv Nel has submitted, that another court may arrive at a different sentence altogether.”

Clearly the confirmation of the Appellant’s sentence is incorrect and will in any event now be subject to the outcome of this appeal.

7.

In the reasons for the sentence imposed, the Magistrate in the Court a quo, remarks:

“I must also say that the sentence prescribed [by] the Act is as submitted by Adv Nel and indeed, I imposed a sentence of three years direct imprisonment and after that I have exceeded the sentence prescribed by the Act...”

8.

Counsel on behalf of the State in his written submissions to this Court, suggested that the prescribed penalty:

“....as set out in the charge sheet reads as follows: R 100,000.00 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment. Section 98 and 99 of Act 28 of 2002 are applicable in this regard and therefore the a quo misdirected itself when it imposed a sentence of three years direct imprisonment.”

And in the Heads of Argument :

“Section 5(4) of Act 28 of 2002 has been amended by Act 49 of 2008 by the insertion of Section 5A and therefore the charge sheet is not defective in its formulation.”

9.

The interpretation of the prescribed sentence for a contravention of Section 5A of the MPRDA 28 OF 2002 by the court a quo, the Prosecutor and counsel for the Appellant are wrong and should be dealt with. The contravention of various sections of the MPRDA 28 of 2002 are declared an offence in Section 98 while Section 99 of Act 28 of 2002 prescribes the sentence. Section 98 reads as follows:

“98 Any person is guilty of an offence if he or she –

(a) contravenes or fails to comply with –

(i) Section 5(4)(my emphasis) or 28;

(ii) Section 92, 94 or 95;

(iii) Section 35;

(iv) ...(repealed);

(v) Section 44;

(vi) Any directive, notice, suspension, order, instruction or condition issued, given or determined in terms of this act;

(vii) Any direction contemplated in section 29, or

(viii) Any other provision of this act.”

The reference to section 5(4) in subparagraph (i) above is not a reference to section 5A. Section 5A can only be covered by subsection (viii) for the reasons that follow.

10.

Section 99 of the Act, provides for the following maximum penalties:

“99 Any person convicted of an offence in terms of this act is liable -

(a) in the case of an offence referred to in section 98(a)(i) to a fine not exceeding R 100,000.00 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment;

(b);

(c);

(d);

(e);

(f);

- (g) in the case of any conviction of an offence in terms of this act for which no penalty is expressly determined, to a fine or to imprisonment for a period not exceeding six months or to both a fine

and such imprisonment....”(my emphasis)

Section 98(a)(i) (a contravention of section 5(4)) is provided for in section 99(a). Section 98(a)(viii) (covering for section 5A) can only be provided for in section 99(g);

“...an offence in terms of this act for which no penalty is expressly determined...”

11.

It is common cause that the Appellant pleaded guilty to and was convicted of the contravention of Section 5A of the MRPDA 28 of 2002, and not section 5(4).

12.

The Trial Magistrate, accepted that a conviction of Section 5A of the MPRDA, is a contravention of Section 98(a)(i), warranting the penalty prescribed in Section 99(a) of the MPRDA viz. a fine not exceeding R 100,000.00 or imprisonment for a period not exceeding two years or to both such fine and such imprisonment. This incorrect approach has its origin the amendment of Section 5(4) in 2013.

13.

Section 5(4) of the MPRDA was deleted by Act 49 of 2002 amending the Mineral and Petroleum Resources Development Act (Government Gazette 32151 dated 21 April 2009), effective from 7 June 2013, The same Amendment Act (Act 49 of 2002) deleting Section 5(4), provided for the insertion (my emphasis) of Section 5A of the MPRDA 28 of 2002 with effect from 7 June 2013.

The inserted Section 5A reads nearly identical to the deleted Section 5(4). Section 5(4) before being deleted read:

Legal nature of prospecting right, mining right, exploration right or production right, and rights of holders thereof

5 (4) No person may prospect for or remove, mine, conduct technical co-operation operations, reconnaissance operations, explore for and produce any mineral or petroleum or commence with any work incidental thereto on any area without-

- (a) an approved environmental management programme or approved environmental management plan, as the case may be;
- (b) a reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right or production right, as the case may be; and
- (c) notifying and consulting with the land owner or lawful occupier of the land in question.

Section 5A reads:

5A. Prohibition relating to illegal act

No person may prospect for or remove, mine, conduct technical co-operation operations, reconnaissance operations, explore for and produce any mineral or petroleum or commence with any work incidental thereto on any area without—

(a) an environmental authorisation;

(Commencement date of section 5A(a): 7 December 2014)

(b) a reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right or production right, as the case may be; and

(c) giving the landowner or lawful occupier of the land in question at least 21 days written notice.

(Section 5A inserted by section 5 of Act 49 of 2008 with effect from 7 June 2013)

Although the purpose of the amendment in Act 49 of 2008 might have been to replace Subsection 4 of Section 5 with Section 5A, that purpose was not achieved by deleting paragraph 5(4) and inserting Section 5A as a separate and distinct section .

14.

Section 98(a)(i) still refers to the deleted section 5(4) of the MPRDA and will remain a nullity until it is amended to replace the reference to section 5(4) with a reference to section 5A. Until that happens a contravention of section 5A attracts the offence referred to in Section 98(a)(viii) – “any other provision of this act” , and attracts the sentence in section 99(g) – “conviction of an offence in terms of this act for which no penalty is expressly determined, to a fine or to imprisonment for a period not exceeding six months or to both a fine and such imprisonment”.

15.

It follows that the sentence of three years imposed by the Court a quo stands to be set aside.

16.

When interfering with a sentence on appeal, Maya DP (as she then was) in *S v Hewitt* 2017 (1) SA CR 309 (SCA), held that:

“An appellate court may not interfere with this discretion [the imposition of sentence is the prerogative of the trial court] merely

because it would have imposed a different sentence.... Something more is required; thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it....”

17.

The Court a quo misdirected itself in sentencing the Accused to three years imprisonment, whereas a maximum of six months imprisonment is the prescribed sentence. This misdirection is of sufficient degree and seriousness, that this Court is entitled to interfere with the sentence.

18.

It would serve no purpose to refer the matter back to the Court a quo, as the Appellant already served 17 months of his sentence and was released on bail pending the outcome of this appeal.

19.

The trial Magistrate intended to sentence the Appellant to a term of imprisonment without an option of a fine. Sufficient motivation for this approach exists. The Appellant admitted three similar previous convictions. The maximum term of imprisonment that can be imposed, is six months and this would be appropriate under the circumstances. As the sentence would be made retrospective from the date of his original sentence, no danger exist that he would serve a further term of imprisonment.

20.

Under the circumstances, I make the following order:

20.1. The appeal against sentence is upheld.

20.2. The sentence of three years imprisonment is set aside.

20.3. The Appellant is sentenced to six months imprisonment, the commencement thereof to run from the date of the original sentence viz. 10 March 2022.

DU PLESSIS AJ

I CONCUR

MNGQIBISA-THUSI J (MS)

Judgement

delivered on 28 November 2024.

Counsel for Respondent : Adv Masekameng

State Attorney. Pretoria

Counsel for Appellant : No Appearance

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