

SOUTH AFRICA / JUDGMENT

S v Chake (130/2014; 19/860/10) [2015] ZAFSHC 185; 2016 (2) SACR 309 (FB) (12 October 2015)

[2015] ZAFSHC 185

COURT

Free State High Court, Bloemfontein

BEFORE

Van Zyl, Murray

CASE / FILE NUMBER

130/2014; 19/860/10

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Review

Number: 130/2014

Magistrates'

Court Case Number: 19/860/10

In

the matter between:

THE
STATE
and
VUYISILE
CHAKE

CORAM:

VAN
ZYL J et
MURRAY,
AJ

JUDGMENT

BY: MURRAY, AJ

DELIVERED ON: 12 OCTOBER 2015

[1] This matter came before this Court from the District Court, Bloemfontein, as a Special Review in terms of s 304(4) of the Criminal Procedure Act, Act 51 of 1977 (“the CPA”)[1].

[2] THE BASIS FOR THE SPECIAL REVIEW:

2.1 In 2010 at the age of 18 the accused was sentenced to one year’s imprisonment, which sentence was wholly suspended for five years in terms of s 297(1)(b) [2] of the CPA. In 2014 the District Court: Bloemfontein (“the Court a quo”) put into operation the suspended sentence in terms of s 297(9)(a)(ii), and, due to the specific circumstances of the case,

decided to apply s 280(2)[3] to order the sentence to run concurrently with the sentence that caused the suspended sentence to be put into operation.

2.2 The s 280(2) order created a jurisdictional issue, however. The District Court is a “creature of statute” and subject to precedent and the said order is in conflict with, inter alia, the judgments in *S v Mawatla*[4], *S v Osborne*[5], *S v Mothibi*[6], *S v Govender*[7], *S v Chabalala*[8], *S v Breytenbach*[9], *S v Hoffman*[10], (“the pre-constitutional cases”) and *S v Brand*[11].

2.3 The common factor and the precedent set in the abovementioned list of judgments, is that they held, with reference to the interpretation of s 280(2), that a court which brings into operation an earlier suspended sentence is not empowered to order that sentence to run concurrently with a new or any other sentence. In direct contrast therewith, however, a ‘trial court’ which convicts the accused of a subsequent offence which invokes the enforcement of a previously suspended sentence, may order its sentence to run concurrently with the previously suspended sentence. It is at this anomaly that the Special Review is directed.

2.4 In casu the relevant magistrate submitted her decision to invoke Section 280(2) to order concurrency for this Special Review with a submission that the premises for the conclusions in the quoted case law, namely that the CPA makes no provision for a court’s competence to order concurrency outside of s 280, is wrong, and that the narrow interpretation of the ‘court’ referred to in s 280 as ‘the trial court’ brings about unfair and unconstitutional consequences for the accused. She therefore requested this Court to revisit the

issue in law.

2.5 The magistrate submitted, furthermore, that although s 304(4) determines that a matter is to be sent on review when the “proceedings were not in accordance with justice”, in the present instance that principle was not applicable since the proceedings were in accordance with justice but not in accordance with the law. In her submission the application of the law in the present case would have caused an injustice, wherefore she requested this court to “ponder the creation of a new or revised interpretation of the law”.

[3] THE FACTS OF THE PRESENT CASE:

The accused, Mr Vuyisile Chake, who is currently 24 years old, on two separate occasions, in 2010 and 2011, smashed a window to gain entrance into a building. In both instances he was prevented from stealing anything or getting away with any stolen property.

3.1 Case number 19/860/10 (The First Case):

3.1.1 On 14 May 2010, when he was just 18 years old, Mr Chake was convicted in the District Court of Bloemfontein of attempted housebreaking with intent to steal for the crime which was committed on 26 April 2010.

3.1.2 He pleaded guilty in terms of s 112(2) of the CPA and was accordingly convicted and in terms of s 276(1)(b) was sentenced to one year’s imprisonment. In terms of s 297(1)(b) his sentence was wholly suspended for five years on condition that he not be convicted of housebreaking with intent to steal committed within the period of suspension.

3.2 Case number 17/933/11 (The Second Case):

3.2.1 On 23 February 2012, about two years after the first sentence, he was convicted in the Regional Court of the Free State, sitting in Bloemfontein, of housebreaking with intent to steal and theft for the crime perpetrated on 31 May 2011. The conviction again followed upon a plea of guilty in terms of Section 112(2). On 14 March 2012 he was sentenced to five years’ imprisonment in terms of Section 276(1)(b).

3.3 Since the second offence was committed during the five-year suspension of his one-year term of imprisonment for the first conviction, it called for the putting into operation of the suspended sentence. The State only brought the s 297(9)(a)(ii) application to do so two years later, in 2014, however.

3.4 The magistrate, in putting the suspended sentence into operation, applied s 280(2) to order the concurrent running of the newly enforced suspended first sentence with the second sentence, contrary to the precedent set by the list of cases above, and so initiated this Special Review.

[4] THE PRECEDENT v THE PURPOSE OF SECTION 280:

4.1 To determine whether the precedent indeed results in injustice and unconstitutionality by constraining or curbing the power of the court which puts into operation the suspended sentence, it is necessary to examine the origin, interpretation and present application of s 280 in view of the Constitution and the need for interaction between s 280 and other provisions of the CPA, such as s 297 and s 275.

4.2 Terblanche[12] described the purpose of Section 280 as that of preventing a too severe cumulative effect where more than one sentence is imposed. He described it as follows:

“When a sentence is imposed for each offence, a cumulative effect may develop. In other words, the combined punishments may become too severe. This was well explained by Reynolds J in S v Mpofu[13]:

‘[i]n all multiple crime cases the courts pay regard to what Thomas describes as ‘the totality principle’. (The Court) must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences.’ ... In effect, the accused normally receives a ‘discount’ for bulk offending, particularly where the various counts are similar in nature, for the imposition of a separate and consecutive sentence for each individual charge would result in a very high aggregate penalty which would be disproportionate to the moral blameworthiness of the accused having regard to his line of conduct as a whole.”

4.3 S 280(1) determines that:

“When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.”

4.4 S 280(2), in turn, determines that:

“Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.”

4.5 The precedent, namely that only the ‘trial court’ has jurisdiction to order concurrency, appears to have its origin in S v STRYDOM[14] in which Caney J, in holding that s 333(2),[15] the predecessor of s 280(2), empowered “the court” to direct that sentences run concurrently, stated that[16]:

“this court in that sub-section is without doubt the court referred to in sub-section (1), that is to say, the trial court passing sentence at the conclusion of the trial.”

4.6 That remark led subsequent courts to hold that the ‘trial court’ which Caney referred to, with reference to s 333(1) (and presently to s 280(1)), was the court which convicted the accused of breaching the suspending condition. And to hold that only that court was competent to order concurrent running. And that that court was empowered only to order the concurrent running of its own sentence with the newly put into operation or soon to be put into operation suspended sentence, not vice versa (“the precedent”).

4.7 But that is not what Caney J said. One needs to read that pronouncement in the context of the facts of the case and his further remarks.

4.8 The facts of that case were that a regional magistrate in Johannesburg in January 1964 sentenced the accused to fifteen months’ imprisonment (first sentence), wholly suspended for three years on condition that he not be convicted during that period of any offence involving dishonesty. However, on 16 September 1966 he was sentenced in East London to imprisonment for fraud (second sentence), and on November 1966 he was again convicted and sentenced to imprisonment for fraud in Wentworth (Natal) (third sentence).

4.9 The State only applied (in Durban) in December 1966 for the suspended sentence to be put into operation. The accused asked that magistrate to order his suspended sentence (imposed in 1964 by the regional magistrate in Johannesburg) to run concurrently with the two later sentences imposed in East London and Wentworth. The magistrate refused to do so, stating that he was not empowered to make such an order. Caney J held that to be correct.

4.10 He then added that^[17]:

“The only court (other than a Court sitting on appeal from the sentence of the trial court) competent to make that order ... was the regional magistrate who sentenced him in Johannesburg on 30th January, 1964, and the time for doing so was when he passed that sentence. It would have been competent for the court at East London and the court at Wentworth to have made such orders under s 333(2) relating in each instance, to the sentences passed by them – but the Johannesburg sentence was not then in operation.”

4.11 On his version therefore, at least two courts were competent to order concurrency in terms of s 280(2), namely the court a quo which originally imposed the suspended sentence, at the time he imposed and suspended it; and the court(s) convicting and sentencing the accused for the breach of the suspending condition. In his view, each of them could only order concurrent running of its own sentence with the other court’s sentence. Caney J therefore made it clear that the court putting the suspended sentence into operation is not competent to make a concurrency order.

4.12 That ‘precedent’ has caused the setting aside of numerous concurrency orders issued pursuant to the enforcement of suspended sentences.

4.13 It is in view of that decision that Flemming J in *S v MAWATLA*^[18] held that :

“No authorisation exists outside of s 280 for a court without inherent jurisdiction to order concurrency of sentences ... No

authorisation in s 280 or any other provision allows an institution, person or a court which is not the trial court, to order concurrency.”[19]

4.14 And that is the view which is ‘under attack’ in the present case as too narrow and restrictive to allow for the proper application of the constitutional requirements for sentencing.

[5] THE SUBSEQUENT CASE LAW:

5.1 Caney’s strict interpretation of ‘the court’ in s 280 as ‘only the trial court’, caused confusion in subsequent cases. To put it mildly, as per Kruger J in *S v JEFFRIES*[20]: “The interpretation given by various courts to s 280(2) have not been harmonious.” Yet numerous review courts unquestioningly applied and even expanded on his interpretation.

5.2 In *S v Mawatla*[21] Flemming J highlighted what appeared to be the rationale behind Caney’s interpretation: namely that s 280(1) primarily functioned as a jurisdictional provision to ensure that the trial court’s power was neither curtailed nor affected by a sentence which had been or might be imposed on the accused in the same or another trial, or in a previous case.

5.3 He held that s 280(1) itself did not deal with concurrency (See also: *Du Toit*[22] and *Hiemstra*[23]), but was only linked to the concurrent running of sentences by the reference in s 280 (2) to “such punishments”, which phrase was replaced in 1993 with “such sentences of imprisonment”. [24]

5.4 Flemming J explained that the ‘punishments’ which would justify, in instances other than conviction of multiple offences in a single trial, [25] the reference in s 280(2) to “punishments” [i.e. “sentences”] in the plural, would be the sentence which the trial court imposed, on the one hand, and the sentence which had already been imposed or might still be imposed because of another conviction.

5.5 Even at that time he emphasised the need for a court’s power to order concurrency for the sake of fair and just adjudication. In order to facilitate such power, he proposed in *S v Mawatla*[26] a special interpretation of the wording of s 280(1), namely to read the phrase “someone under sentence” in a wide sense to refer to “someone who has been sentenced but whose sentence has not yet been completed”.

5.6 The courts, inter alia in *S v HOFFMAN*, [27] confirmed s 280(2) to be the provision that determines whether sentences are to be served cumulatively or concurrently, and if the former, in what order they are to be served.

5.7 In *S v GOVENDER*[28] it was held, with reference to *S v Strydom*, that:

“... s 280 (2) in common with its predecessor, s 333(2) of Act 56 of 1955, “empowers the court” to direct that sentences run concurrently and this court is without doubt the court referred to in ss(1), that is to say, “the trial court passing sentence at the conclusion of the trial”.

5.8 The court added, still with reference to Caney's view, as expressed in, inter alia, S v Osborne, S v Mothibi, S v Nkosi and S v Johnston, that:

"whilst that court is thus empowered to direct that its sentence should run concurrently with an earlier suspended sentence which it brings into operation, it is not empowered to order such suspended sentence to run concurrently with its new or any other sentence."[29]

And stated (with reference to S v Delport alias Boucher[30]) that:

"it is clear that the putting into operation of a suspended sentence cannot be regarded as a sentence which follows upon conviction."

5.9 Hiemstra explained[31] that the only remedy for an accused on whom a new sentence had already been imposed when another court was asked to put into operation a suspended sentence, would be to approach a competent court, in other words a court of equal or higher jurisdiction than the one which had originally imposed the suspended sentence, to order the further suspension of his suspended sentence.

5.10 The Court in S v OSBORNE proposed, furthermore, that where the subsequent court orders concurrency of the newly imposed sentence with the previously suspended sentence, such order needs to be made conditional upon the accused actually serving the previously imposed, suspended imprisonment.[32] This was reiterated in S v HOFFMAN[33] and in S v JOHNSON[34], in both of which the precedent was followed.

5.11 Steenkamp J in S v MOTHIBI[35] added that the court which imposes the new sentence can order it to run concurrently with the suspended sentence which it is about to put into operation or which is about to be put into operation by another court.

5.12 This approach was also followed in S v CHABALALA,[36] a case which demonstrates the extremely narrow view that pre-constitutional courts took of this issue compared to the many requirements for the consideration of putting into operation a suspended sentence today. In finding the trial court to be the only court competent to order concurrency of its sentence with the newly enforced suspended sentence, the Court stated that because of that:

"the only information that the court needs when an application is brought to put into operation a suspended sentence, is the information upon which the court can find that the accused breached the conditions of suspension which allows the court to enforce the suspended sentence. There is no reason, however, why during the application to put into operation the suspended sentence any information needs to be supplied that the presiding officer in the case in which the accused had already been convicted and sentenced and as a result of which he had breached the suspensive conditions, had taken into consideration when he imposed sentence the possibility that the accused might now also have to serve the suspended sentence if it should be enforced."

5.13 In S v NHLAPO[37] it was held that the court's options upon considering the putting into operation of a suspended sentence in terms of s 297(7) and 297(9) are (1) to further suspend the sentence with or without additional conditions,

- (2) to make no order regarding putting it into operation or (3) to put the sentence into operation.

5.14 The magistrate in *S v Govender*,^[38] as in casu, had put a suspended sentence into operation and ordered it, in terms of s 280, to run concurrently with ‘the present term of imprisonment that the accused is serving’.^[39] The magistrate maintained that it had been entitled to make such order since it was “of the opinion that the cumulative effect of the two sentences would place a very heavy burden on the accused”.

5.15 The review court, however, simply followed the Attorney-General’s conclusion reached after merely reiterating the principles set out in *Hiemstra*, *S v Strydom*, *S v Osborne*, and *S v Mothibi*, and with reference to *S v Delport alias Boucher*,^[40] to state that the putting into operation of a suspended sentence could not be regarded as a sentence which follows on conviction and to find that the magistrate’s order was therefore incompetent. Again, no attempt was made to investigate the reasonableness of the issue or to interpret the law.

5.16 Based on the above-mentioned cases, *Hiemstra* and *Du Toit* reiterated that the putting into operation of a suspended sentence cannot be regarded as a sentence which follows on conviction, wherefore the court which puts the suspended sentence into operation cannot be regarded as a trial court^[41]. Accordingly, such court in their view is not empowered to order an earlier suspended sentence which it brings into operation to run concurrently with its new or any other sentence.^[42]

5.17 In *S v BRAND*,^[43] too, the review Court^[44] held that the magistrate’s directive when putting the suspended sentence into operation [namely that the enforced suspended sentence should run concurrently with the two year jail term which had triggered the enforcement and which the accused was by then already serving], was an irregularity and therefore incompetent.

5.18 In coming to this decision, the review Court simply accepted as law the ‘principle’ that the power to make a direction of concurrency ‘is the absolute prerogative of the court imposing the ‘second sentence’ (the triggering sentence) and that the power of the court granting the enforcement order was ‘strictly confined to making such an order and nothing more’.

5.19 Such a limitation on the enforcing court’s power might, in my view, still be appropriate when the accused had already been convicted of, but not yet sentenced for, a subsequent crime which breached the suspensive condition and which conviction triggered the need to put into operation the suspended

sentence. In such a scenario the sentencing court could still follow the steps proposed in *S v Brand*^[45] and either attend to the putting into operation of the suspended sentence itself or wait for the enforcing court to put the suspended sentence into operation or not. Only then would the ‘sentencing court’ truly be able to consider all the circumstances of the case pertinent at that point in time and make an informed decision as to whether it would be in the interests of justice to apply s 280(2) and order concurrency with that suspended sentence, or not.

5.20 This view was echoed in *S v MOTLOUNG*[46] in which Spilg J held that the power to direct the concurrent running of a sentence with one which was subject to parole or suspension was expressly conferred on the court by s 280. Furthermore, that the court which sentenced the accused for the subsequent offence had the power and responsibility to take into account the overall impact of the enforcement of the unexpired portion of the earlier sentence on the overall sentence. He also based this view about the appropriate court to order concurrence on *S v Mawatla*, *S v Govender* and *S v Hoffman*.

5.21 I have not been able to find any case in which the reasonableness of the curtailment of the sentencing court's power (namely to only be allowed to order the concurrent running of its sentence with the newly enforced or soon to be enforced suspended sentence, but not the other way round) was addressed. That curtailment seems illogical.

5.22 That the enforcing court is prohibited from ordering its newly enforced sentence to run concurrently with an already imposed triggering sentence seems equally, if not even more, illogical. In such an instance the enforcing court is the one which is last to impose its sentence and is the court which needs to consider all the prevailing circumstances and currently relevant factors and the cumulative effect of the enforced sentence with the already existing sentences if concurrency has not been ordered.

5.23 That the court which puts the suspended sentence into operation needs to have the discretion to order concurrency, is in my view not only reasonable but also vital, especially in instances like the present case in which the triggering sentence was imposed in 2012 and the application to enforce the suspended sentence was only brought two years later, in 2014. The same applies to a case like *S v Brand* where the suspended sentence was only put into operation six months after the triggering sentence had already been imposed.

5.24 In my view, therefore, if the subsequent sentences have already been imposed without the concurrency of the suspended sentence having been addressed, there can be no question of the subsequent court's discretion being fettered by the order of concurrency made by the court putting into operation the suspended sentence after having conducted a full enquiry into the present circumstances of the specific case.

[6] S 297: The ENFORCING COURT as a 'TRIAL COURT'?

6.1 What needs to be examined, therefore, is whether it is correct to say, especially in this Constitutional era, that the court which puts into operation a suspended sentence does not function as and therefore should not have the same power to order concurrency as a sentencing or 'trial court' as defined in *S v Strydom* and the pre-constitutional cases which all stemmed from the putting into operation of a suspended sentence. The magistrate in *casu* submits that it cannot be correct, and I agree, for the reasons set out below.

6.2 S 297 is the section which provides for the suspension of sentences. The court in *S v BREYTENBACH*[47] referred to s 297 as a provision on which a court which tries an accused for an offence which amounts to a breach of the suspensive

condition, may rely to assist it to impose a proportional sentence. Spilg J's reference in *S v Motlounq*, (with reference to *S v Coales*[48] and *S v Cele*,[49]) to the fundamental principle of sentencing, namely that the cumulative effect of several custodial sentences is to be taken into account when determining an appropriate period of imprisonment, is particularly apposite.

6.3 S 297(1) determines that, where a court convicts a person of any offence other than one for which the law prescribes a minimum punishment, the court may in its discretion:

“(a) ...

- (b) pass sentence but order the operation of the whole or any part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a)(i) which the court may specify in the order.”

6.4 Section 297(9) determines that:

“(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) ...

(ii) was imposed under subsection (1)(b), [as in casu], or subsection (4) or (5), be brought before the court which suspended the operation of the sentence 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 ...sub-paragraph (ii), put into operation the sentence which was suspended.” [my emphasis]

6.5 In *S v HOFFMAN*[50] Selikowitz J stated that the CPA (s 297(9)) provides the court which has to adjudicate a breach of the suspensive conditions, with a discretion as to whether or not to put into operation the suspended sentence. Should it decide not to put the sentence into operation and to suspend it further, it may impose such conditions as could have been imposed when the sentence was originally imposed.

6.6 He stated, furthermore, that where the trial court itself has the jurisdiction to consider the putting into operation of the suspended sentence,

“It should use its power in terms of s 297(7) or 297(9) to initiate mero motu the proceedings to put the suspended sentence into operation.”

6.7 Where the condition for a suspended sentence was not complied with, the court which postponed the sentence, or a court of equal or higher jurisdiction may put the sentence into operation in terms of s

297(9)(a)(ii). If the sentence is put into operation by a court which does not have the necessary jurisdiction, however, an irregularity is committed.[51] As is clear from the quoted cases, on the basis of *S v Strydom*, presently if the enforcing court orders concurrency, it is deemed not to have had the jurisdiction to make such order; an irregularity is deemed to have been committed; and the concurrency order is set aside.

6.8 In *S v MASETI*,[52] in compliance with Caney J's view in *S v Strydom*, for instance, the court a quo imposed a sentence of 18 months' imprisonment wholly suspended for five years and also directed that, if the suspended sentence were ever put into operation, it could '[n]ot run concurrently with any [other] sentence imposed'. But the review court held that the wording of s 297 does not permit a sentencing court that imposed a suspended sentence to give directions or to impose conditions on how in future the sentence was to be brought into operation, i.e. to impose this type of condition, and stated:

"that a direction or condition like this impermissibly and irregularly interferes with the duty of the subsequent court to exercise its sentencing discretion in a judicial manner".[53]

6.9 I agree with that view, despite what Caney J stated in *S v Strydom*. Should the original sentencing court be allowed to make such an order, at the time of imposing the suspended sentence, it would certainly fetter the sentencing discretion of the court that needs to consider the cumulative effect of the multiple sentences, whether that be the 'trial court' which sentences the accused for breaching the suspensive condition, or the court which now, some time after the suspended sentence was imposed, needs to put it into operation after conducting a full judicial enquiry into the current circumstances of the accused. It may be the same court which originally imposed the suspended sentence or it may be another court of equal or higher jurisdiction. That court needs to keep in mind the cumulative effect of the multiple sentences involved and to have the discretion to prevent the cumulative effect.

6.10 The enforcement hearing may occur up to five years down the line, when circumstances have changed since the suspended sentence was imposed, as in *casu*, and when it would be essential for the enforcing court to have the discretion to order concurrency if the cumulative effect proves to be disproportionate to the crime and the 'trial court' has not exercised its discretion in terms of s 280(2) to order concurrency.

6.11 I agree with the magistrate in the present case that S 297(9) triggers the circumstances described in s 280 (1) and that the provisions of s 297 provides the enforcing court with the same jurisdiction as the s 280 (1) court to impose a competent punishment

in the appropriate circumstances. I am of the view that "the court" in s 280 (2) therefore refers not only to the 'trial court' which imposes the triggering sentence, but also to the court which subsequently puts the suspended sentence into operation if the trial court failed to apply s 280(2). This view is reinforced by the principles set out below.

[7] PRINCIPLES APPLICABLE TO SECTION 297 PROCEEDINGS:

7.1 The magistrate submitted that the principles which a trial court needs to apply after conviction to impose sentence are similar to those to be applied during the s 297-proceedings.[54] I agree.

7.2 The hearing during an application for the enforcement of the suspended sentence has to be conducted in a manner similar to that of a criminal trial and is considered to be a full judicial process.[55]

7.3 As stated in *S v PESKIN*[56] the court hearing the application for putting the suspended sentence into operation has a discretion and is not bound upon a breach of the conditions of suspension, to grant the application. But, such an application necessitates a full enquiry into and consideration of the relevant circumstances.

7.4 One relevant factor is the reasonableness of the suspended sentence. Another is the circumstances of the offence committed in breach of the conditions of suspension. Throughout, the court also needs to keep in mind the purpose of suspending a sentence: namely to serve as a deterrent to discourage the accused from repeating the same criminal behaviour, while at the same time giving him an opportunity to rehabilitate himself. It seems to be the rule rather than the exception, however, that a suspended sentence will be put into operation at some stage.[57] The sentence as well as the condition of suspension must therefore be reasonable.

7.5 The reasonableness of the condition of suspension must be therefore be assessed by the enforcing court, especially in the light of events since its imposition. Should it appear that additional punishment would no longer serve rehabilitative or deterrent purpose, or that the original condition of suspension was unreasonable, the sentence should generally not be put into operation.[58]

7.6 But where the circumstances justify the enforcement of the suspended sentence, as in *casu*, the court must be able to put it into operation without having to fear that the cumulative effect will be excessive or even disproportionate

to the crime because the second or even third court did not take the relevant circumstances into account and failed to order concurrency

where the cumulative effect justifies such order.

7.7 Even though it might normally primarily be the trial court's responsibility to prevent such result by ordering concurrency of its newly imposed sentence with the suspended sentence, there is no guarantee that such court will indeed take the cumulative effect into consideration or will even be able to do so, as is evident from the numerous cases in which the 'triggering sentence' was imposed by the trial court without knowledge of the suspended sentence or long before the application for putting into operation the suspended sentence was even brought.

7.8 The overly rigid approach to the competency to order concurrency would indeed in the present case result in an injustice to the accused. It is evident that provision needs to be made for the 297(9)(a)(ii) court which puts into operation a suspended sentence where a second court had already put into operation the triggering sentence without considering or ordering concurrency, to be allowed to make such an order. This is where the principle that each case must be judged on its own facts and circumstances is clearly illustrated.

7.9 The discretion of the Court during the s 297 process has added directives in any case.[59] Before a suspended sentence is put into operation, the person concerned ‘must be afforded the opportunity to address the court and to lead evidence’[60]. That person must also be aware of the possibility of further suspension and his rights in that regard and the court itself must always consider that possibility.

7.10 It is the duty of the court hearing an application for the putting into operation of a suspended sentence to consider, inter alia, the accused’s record of imprisonment (including any sentence currently being served) and to weigh the effect on the accused of the potential enforcement of the suspended sentence.

7.11 The implementation of a suspended sentence therefore requires even more careful consideration than the original imposition of a sentence directly after conviction. It may also be more onerous.

7.12 One should keep in mind, throughout, that it is highly unlikely that the purpose of s 280 could ever have been to curtail the jurisdiction of courts acting in terms of provisions such as s 275 or s 297 to apply s 280. It was obviously introduced to regulate the imposition of several punishments (s 280(1)) and to address the cumulative effect during punishment (s 280(2)).

7.13 The words “trial court” should therefore always be read in context and be considered in perspective, that is in the context of the constitutional requirements for sentencing, in view, especially, of the accused’s right to a fair trial.

7.14 Selikowitz J in *S v Hoffman* went as far as to state that:

“When a court considers whether or not to put a suspended sentence into operation, it is required to exercise a judicial discretion.

The accused has to be apprised of his right to lead evidence and to advance argument to the court with a view to resisting the putting into operation of the suspended sentence or to advance reasons for a further suspension of the sentence ... In the exercising of its discretion the court is engaged in a sentencing process and must consider and apply all the necessary principles which it would apply if it was imposing an original sentence.”[61] [my emphasis]

7.15 Terblanche made it clear, furthermore, that:

“Reducing the cumulative effect is part of the sentencing decision as a whole, which is determined by the sentence discretion, based on all circumstances of the case. The mere fact that there is more than one offence does not mean that the court has to impose lesser sentences. The sentencing officer should consider all the circumstances, look at the totality of the criminal behaviour and determine how the cumulative effect should be prevented.” [my emphasis]

7.16 All of the above form part of the s 297 court’s duties when it considers the putting into operation of the suspended sentence. These duties are equally applicable when a ‘trial court’ imposes sentence after conviction of an offence that breached the suspensive conditions. In fact, the conviction by the trial court is the sine qua non not only for the trial court’s own sentence, but also for the s 297 court’s putting into operation of the suspended sentence.

7.17 In that sense, then, the s 297(9) court’s ‘sentence’ or punishment (the putting into operation of the suspended sentence) can in my view also be widely interpreted to be a ‘sentence following upon conviction’.

7.18 The practical consequences of the ‘sentencing’ action performed by both courts based on that same conviction, are identical: imprisonment and the creation of multiple sentences. In both instances, therefore, whichever court is

the last one to apply its sentencing discretion, needs to keep the ‘cumulative effect’ or ‘totality principle’

in mind, for unless concurrency is ordered, the formerly suspended sentence will be tagged onto the end of the triggering sentence and may result in disproportionate punishment. For that reason, it is, in my view vital that “the court” in s 280 needs to include an enforcing court (s 297) and a substituting court (s 275).

[8] CONSTITUTIONAL SENTENCING REQUIREMENTS

8.1 The paramount constitutional objective is the protection of the accused’s right to a fair trial. Whether it be during sentencing after a trial, or during punishment for breaching the suspensive conditions, the accused needs to be protected against the cumulative effect of the enforcement of the suspended sentence. That means that he should have the same right to the judicial exercising of the relevant court’s discretion to ensure a fair trial, regardless of whether he is being imprisoned after conviction by the trial court or whether he is being imprisoned as a result of the putting into operation of his previously suspended sentence by the enforcing court.

8.2 In *S v MADIKANE* [62] the court aptly stated that ‘the value of human dignity lies at the heart of the requirement that a sentence must be proportionate to the offence’.

It has been said that: “there is no principle which could justify, for the sake of deterrence, a sentence clearly in excess of what all the relevant circumstances

require in respect of the individual offender.” (See: *S v Collett*[63] and *S v Maseko*[64]).

8.3 As Mullins J held in *S v LABUSCHAGNE*,^[65] the sentence passed for a particular offence ‘consists of both the unsuspended and the suspended portions thereof, and such total sentence must not only be a competent sentence, but must be appropriate for the offence for which the offender is being punished’.

8.4 And, as the court in *S v ROOI*^[66] said: ‘the fact remains that the sentence may at a later stage be carried into effect, and it must therefore be appropriate, having regard to all the circumstances of the case, regardless of the fact that it is suspended.’

8.5 In my view, where a suspended sentence is to be put into operation, there are potentially at least two courts the curtailment of whose discretion to order concurrency and prevent the cumulative effect may

be at stake: that of the trial court imposing the triggering conviction and the resulting sentence, or, if that court did not exercise its discretion while imposing the said sentence, that of the subsequent enforcing court.

8.6 In order to meet the accused’s right to a fair trial, the enforcing court’s discretion to order concurrency needs to be available at the point in time when all the current circumstances and

the extent of all the sentences are known. It is indeed so that the core purpose of s 280 is to protect human dignity by applying the “totality principle” referred to above. Disregard of this principle may lead to inhumane and unfair sentences which could never have been the intention of the Legislature to cause by denying any sentencing court, whether it be the trial court, the enforcing court or the substituting court, the jurisdiction to order concurrency.

8.7 I agree with the magistrate in the present case that the s 297 court is as suitable as, if not more suitable than the “trial court” to order concurrency in terms of s 280, and that the s 297 court is legislatively and substantively fit to be defined as a “trial court” or a “sentencing court”.

8.8 S 280 (1) specifies that if the offender is sentenced to two or more sentences the court may sentence him to such sentence(s) as the court is competent to impose. In my view the enforcement of the suspended sentence in terms of s 297(9) creates the circumstances described in s 280(1), namely the presence of multiple sentences, which therefore activates the applicable court’s jurisdiction to apply s 280(2).

8.9 As is evident, therefore, in my view the current strict interpretation of ‘the court’ as only ‘the trial court’ which imposed sentence after conviction of the triggering offence, is erroneous and does lead to unconstitutional results. Each provision in the CPA has its own character and purpose, which is why the core purpose of s 280 needs to be emphasised in the proposed multi-principle approach.

[9] AN INTEGRATED APPROACH:

9.1 In revisiting the interpretation of the law by the pre-constitutional courts with reference to s 280, one needs to keep in mind the constant development of the law since the advent of the Constitution.

9.2 Constitutional norms have added an entirely new dimension to debates about punishment. They address, in the first instance, the question of whether the legislative framework of the sentencing system is constitutionally valid.

9.3 In case like *S v Dzukuda & Others*; *S v Tsilo*, for instance, the Constitutional Court stressed the constitutional importance of the right to a fair trial. The court held that, ‘the right to a fair trial is, amongst other things, “a procedure which does not prevent any factor which is relevant to the sentencing process and which could have a mitigating effect on the punishment to be imposed, from being considered by the sentencing court.”’

9.4 Modern sentencing policy consequently reflects a combination of several or all of the aims of retribution, deterrence, reformation or integrative theories.[67] In *S v RO*[68], for instance, Heher JA stated that ‘Sentencing is about achieving the right balance ... or ... proportionality’. All the provisions of Chapter 28 of the CPA should therefore be considered in context since they all endeavour to create the ‘perfect’ sentence.

9.5 The court in *S v WILLIAMS*,[69] furthermore, indicated a shift in emphasis from retribution to rehabilitation and, as held in *S v MASWANGANYI*,[70] in the case of a youthful ... offender, as in casu, the prospects of rehabilitation is a major consideration. That is where an order for the concurrent running of multiple

sentences caused by the application of s 297 has a vital role to play.

9.6 The CPA has over the years been supplemented via case law with, for example the triad of Zinn and the Principles of Sentencing: Punishment, Prevention, Rehabilitation and Retribution. The Constitution has obviously contributed to the variety of directives. So has the Child Justice Act, Act 75 of 2008, which was enacted on 1 April 2010 and which changed the dynamics for sentencing of juvenile and young offenders which is very relevant in this case.[71]

9.7 I therefore agree with the magistrate in the present case that sentencing cannot and should not happen in a vacuum. That is why the entire Chapter 28 of the CPA is devoted to various aspects of sentencing and why s 280 is to be regarded as but one of the many provisions in that chapter to deal with sentencing, and why it needs to be interpreted in the context of the modern objectives of sentencing and the constitutional principles involved.

9.8 In my view the particular circumstances of the present case clearly illustrate that s 280 cannot be interpreted and rigidly applied to all sentencing situations on the basis of a pre-constitutional precedent which undeniably affects the accused’s right to be able to rely on a court’s unfettered discretion to order concurrency where needed.

9.9 Courts are frequently reminded not to lose sight of the individualised nature of sentencing which invariably gives rise to the need for a wide discretion in sentencing and which discretion has to be exercised judicially. The current narrow and restrictive interpretation and application of the s 280 power in s 297 cases may potentially also restrict the courts' powers in other provisions such as s 275.

9.10 In applying s 280, therefore, all the applicable legislation in Chapter 28 of the CPA, such as, amongst others, s 297(7), s 297(9) and s 275, should be taken into consideration to devise the 'perfect sentence' for the particular circumstances by making it possible to meet the accused's right to a fair trial and to a proportional sentence.

9.11 Consequently, both procedural and substantive sentencing practices need to be measured against such general constitutional standards as legality, equality, proportionality and the protection of human dignity.”[72]

9.12 I agree with the magistrate in *casu*'s submission that the interpretation of the law in the cases following upon *S v Strydom* resulted in findings which do not comply with general constitutional standards of legality, equality, proportionality and the protection of human dignity. The consequences of the rigid, narrow interpretation of the law and the too literal application of the precedent in my view negate the accused's right to an unfettered discretion of the enforcing court to impose a proportional punishment suited to the current circumstances of that particular case.

9.13 S 297 undoubtedly grants the enforcing court the jurisdiction of a s 280 'trial court' to adjudicate the consequences of non-compliance with the suspensive condition. The courts' failure to have regard to other applicable legislation and important principles of law which regulate the issue, resulted in their not paying any regard to the provisions in s 297 which, in my view, allow an enforcing court to function as a sentencing court with the same jurisdiction as a trial court.

9.14 Even in later cases like *S v Brand*, the rationale for the literal interpretation and rigid application of the pre-constitutional interpretation of s 280 was neither revisited, nor discussed. The real purpose of s 280, read with the fair trial principle, should have led to a constitutional interpretation of the provision. But, because of a lack of regard for the principles of equality and proportionality, disproportional and inappropriate sentences could and did result from the total prohibition of an order of concurrency by the enforcing court.

9.15 In my view the Legislation should be extended to make express provision for the jurisdiction of s 297 and s 275 courts to apply s 280(2) in appropriate circumstances. That would prevent the present confusion and unconstitutional results caused by the pre-constitutional interpretation of s 280.

[10] THE CONCURRENCY ORDER in *casu*:

10.1 The court in *S v MASETI*[73] held that, in considering whether to apply the conditions of the suspended sentence or not,

“the court is called upon to exercise its discretion in a judicial manner, after hearing argument and considering all the aspects of the case as they affect the accused and as they affect the community. It follows that whether or not to put a suspended sentence into operation and conditions attendant thereon are matters of discretion which must be exercised judicially. If, therefore, a court would be bound by the order of the sentencing court that imposed the conditions upon which the suspended sentence should operate, it would amount to defeating the purpose of having a discretion.”

10.2 I am satisfied that the court which put the suspended sentence into operation in the present case, two years after the imposition of the triggering sentence, exercised her discretion judicially. In her reasons, she examined all the factors to be considered during a s 297(9)(a)(ii) application. She found that in this case the 2-year delay between the imposition of the five-year second sentence which triggered the need to consider enforcement and the State’s application to do so, prejudiced the accused. By the time the application to put the suspended sentence into operation was brought, he had already spent two-and-a half years in jail. He has since been released on parole.

10.3 The magistrate considered it necessary to put the sentence into operation rather than to order further suspension or to make no order. The accused started his “criminal career” at the age of 14 already. Her purpose, as explained, was to show the accused that a breach of his conditions is and will indeed be met with dire consequences. After all, as stated in *S v NKAMBULE*[74] and *S v MAKWANYANE & ANOTHER*[75] the certainty of punishment rather than the extent thereof is probably the better deterrent.

10.4 But because the court also found that since his imprisonment in 2012, the accused had “grown into an adult that regrets the errors of his youth and has paid for it,” she considered it just and justifiable to order his sentence to run concurrently with the one imposed by the trial court two years earlier. More so because by that time the accused “had made a definite effort to improve himself”, “had proved that he has undergone rehabilitation,” was on the brink of being released on parole, and knew that he would be monitored for the remainder of his sentence. She therefore considered further suspension to be unfair in the prevailing circumstances of the case and a decision to make no order, to be counter-productive.

10.5 The magistrate argued that imprisonment after conviction and imprisonment after a suspended sentence was put into operation

yielded the same grave result: direct incarceration. She emphasised that a person being sentenced under a suspended sentence

must in all aspects of the law be treated equally to a person sentenced after conviction. I fully agree that in order

for his right to a fair trial to be realised, to deprive an accused of the right to have access to an order for concurrency of sentences just because the Legislature did not expressly provide for such an option in the relevant sections of the CPA (s 280 and s 297) or because the wording is pre-constitutional and open to different interpretations, is unacceptable.

10.6 I find Van den Heever JA's remark in *S v D*[76] that "[D]ecided cases on sentence provide guidelines not straightjackets" particularly apposite in the circumstances of the present case and the present application of the view propagated by Caney in *S v Strydom* even though in *S v D* it referred to the length of sentences imposed for particular crimes.

10.7 As stated in *Du Toit*[77]

"Relevant precedents can provide a fair measure of predictability and can promote equality and enhance general consistency and uniformity, but can never displace the fundamental principle that there must be individualisation in the sentencing process which –

though subject to precedents embodying legal principles – remains a matter inevitably dominated by the peculiar facts of each case and the duty of the court to exercise its discretion in such a manner that the constitutional fair trial right, which also covers the sentencing process, remains intact ... it is guided by broad foundational principles and demands a balancing exercise of all relevant facts, factors and considerations."

10.8 But in the interpretation and application of s 280 in s 297 cases, the courts should not lose sight of Patel J's remark in *S v MAAKE*[78] that:

"What is required in sentencing an offender is an informed and balanced approach to determine a just and fair sentence."

[11]

CONCLUSION

11.1 I am of the view, therefore, that the putting into operation of a suspended sentence can be regarded as a procedure which follows on conviction as demanded in s 280(1) because s 297 grants the enforcing court such jurisdiction.

11.2 Consequently, in my view, a s 297(9)(a)(ii), or for that matter, a s 275 court which imposes sentence in the absence of the relevant court, is empowered to order than an earlier suspended sentence which it brings into operation is to run concurrently with a new or any other sentence because its implementation complies both procedurally and substantively with general constitutional standards such as legality, equality, proportionality and the protection of human dignity.

11.3 The six-year sentence which would follow if the suspended sentence is not ordered to run concurrently with the five year terms already being served, would be shockingly inappropriate in the circumstances of this case. The accused was, after all, in both instances prevented from stealing anything. He was only 18 years old when the suspended sentence was imposed in 2010. His incarceration has already borne fruit and has led to rehabilitation.

11.3 I therefore agree with the magistrate that the proceedings were in accordance with justice and that the application of the rigid, literal interpretation of the law would have led to unfair, unconstitutional and unjust consequences and a disproportionate

sentence. Had the constraint on the discretion of the s 297(9) court to order concurrency in the circumstances of this case been blindly and rigidly enforced, the accused would not have had a 'fair trial' as far as the putting into operation of the suspended sentences was concerned.

WHEREFORE THE FOLLOWING ORDER IS MADE:

1. The order in terms of s 297(9)(a)(ii) of the Criminal Procedure Act, Act 51 of 1977, to put the suspended sentence into operation is confirmed.
2. The order in terms of s 280(2) of the Criminal Procedure Act, Act 51 of 1977, that the sentence of one year's imprisonment imposed in case 19/860/10 (Dated 14 May 2010) shall run concurrently with the sentence imposed in case 17/933/11 (Dated 14 March

2012) is confirmed.

H MURRAY, AJ

I concur.

C VAN ZYL, J.

- [1] Unless otherwise indicated, all provisions referred to herein are sections of the Criminal Procedure Act, Act 51 of 1997.
- [2] Section 297(9) determines as follows: (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 – (ii) was imposed under subsection (1)(b), as in casu, or subsection (4) or (5) be brought before the court which suspended the operation of the sentence 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 ...sub-paragraph (ii), put into operation the sentence which was suspended.

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(ii) was imposed under subsection (1)(b), as in casu, or subsection (4) or (5) be brought before the court which suspended the operation of the sentence 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 ...sub-paragraph (ii), put into operation the sentence which was suspended.

[3] Section 280(2) determines as follows: “Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently”.

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[4] 1979(2) SA 839 (O).

[5] 1981 (3) SA 645 (C).

[6] 1982(4) SA 49 NCD.

[7] 1986(4) SA 972 (N).

[8] 1988 (1) SACR 203 (OPD).

[9] 1988 (4) SA 486 (T).

[10] 1992(2) SACR 56 (C).

[11] Unreported case no. 343/2010, Free State High Court: Judgment on 29 July 2010.

[12] 2013: The Guide to Sentencing in South Africa, Chapter 7 at para 2.2.1

[13] 1985 (4) SA 322 (ZHC) at 324 G.

[14] 1967(2) SA 386 (N)

[15] The Criminal Procedure Act 56 of 1955..

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- [16] Supra, at 387 C – F.
- [17] Supra, at 387 C – F.
- [18] 1979(2) SA 839 (OPD) at 842 C – D.
- [19] Supra, at 842 A – B. Yet
- [20] Supra, at [6]
- [21] Supra, at 841B – C.
- [22] Du Toit et al: Commentary on the Criminal Procedure Act
- [23] Hiemstra's Criminal Procedure
- [24] S v Jeffries 2011(2) SACR 580 (FB) at [8].
- [25] Supra, at 841A - B.
- [26] Supra, at 842 E
- F
- [27] 1992(22) SACR 56 © at 58e-f
- [28] 1986(4) SA 972 (NPD) at 973H - J
- [29] See also S v Osborne, 1981(3) SA 645 (KPA)
- [30] 1984 (1) SA 511 (O) at 515H
- [31] At 502
- [32] State v Johnson, supra, at 650D – E.
- [33] 1992(2) SACR 56 (C)
- [34] Supra, at 650
- [35] 1982(4) SA 49 (NC) at 51B – C, in agreement with S v Strydom, S v Johnson & S v Osborne .
- [36] 1998 (1) SACR 203 (OPD) at
- [37] 2003 (1) SACR 220 (T) at 222i. See also the CPA, s 297 (7), (8) and (9).
- [38] 1986(4) SA 972 (NPD)
- [39] Supra, at 973 A – B.
- [40] 198(1) SA 511 (O) at 515H
- [41] S v Mawatla

- [42] Du Toit et al, Commentary on the Criminal Procedure Act, at 28-20E. Hiemstra: Criminal Procedure, 2013 at 28-38 to 28-42.
- [43] Supra, at [18]
- [44] With reference to S v Chabalala, S v Mothibi, & S v Breytenbach
- [45] Supra, at [14]
- [46] 2015(1) SACR 310 (GJ) at [20] and [29] –
- [31] at 317i – 318e.
- [47] 1988(4) SA 286 (TPD)
- [48] 1995 (1) SACR 33 (A) at 37a-d
- [49] 1991 (2) SACR 246 (A) at 248j.
- [50] 1992(2) SACR 56 (C)
- [51] Du Toit, supra, at 28-51
- [52] 2014(2) SACR 621 (ECG)
- [53] Supra, at [5] at 622f-i and [6]
- [54] Hiemstra 2013: Criminal Procedure, at 28-86 to 28-89.
- [55] Terblanche 2013: The Guide to Sentencing in South Africa, Chapter 14 at para 2.9.4.
- [56] 1997 (2) SACR 460 (C)
- [57] Hiemstra 2013: Criminal Procedure 28088
- [58] S v Hendricks, 1991 (2) SACR 341 (C); Du Toit, supra, at 28-52.
- [59] Hiemstra 2013: Criminal Procedure, at 28-88.
- [60] Du Toit, at 399.
- [61] Supra, at 63a-d
- [62] 2011 (2) SACR 11 (ECG)
- [63] 1990 (1) SACR 465 (A)
- [64] 1982 (1) SA 99 (A).
- [65] 1990(1) SACR 313 € at 315F
- [66] 2007(1) SACR 668 (C) at 671b-c
- [67] Du Toit, Criminal Procedure, supra, at 28-10.

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- [68] 2010 (2) SACR 248 (SCA) at [30]
- [69] 1995 (2) SACR 251 (CC)
- [70] 2014 (1) SACR 622 (GP) at [28]
- [71] The accused started his life of crime at the age of about 14 years old. He is currently 24 years old and has been incarcerated since 2012.
- [72] Woolman et al 2013, Constitutional Law of South Africa, Second Edition: 49-3.
- [73] 2014(2) SACR 621 (ECG)
- [74] 1993(1) SACR 136 (A)
- [75] 1995(2) SACR 1(CC)
- [76] 1995(1) SACR 259 (A) at 260e
- [77] 2015, at 28-10B-12
- [78] 2007(1) SACR 403 (T) at [7]
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