

SOUTH AFRICA / JUDGMENT

S v Khumalo (138/2011) [2011] ZAFSHC 80 (26 May 2011)

[2011] ZAFSHC 80

COURT

Free State High Court, Bloemfontein

BEFORE

C J Musi, Kruger

CASE / FILE NUMBER

138/2011

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Review No: 138/2011

In matter between:

THE STATE

VS

MTHETHO JOSEPH KHUMALOAccused

CORAM: KRUGER et C.J. MUSI, JJ

JUDGMENT BY: C.J. MUSI, J

DELIVERED ON: 26 MAY 2011

- [1] This matter came before me by way of special review. The magistrate requests that his orders pertaining to the endorsement of the accused's driver's licence and the declaration of the accused as being unfit to possess a firearm be set aside.
- [2] The accused was charged with contravening section 65 (1) of the National Road Traffic Act 93 of 1996 (the NRTA) viz driving a motor vehicle while under the influence of alcohol.
- [3] The accused, who was legally represented, pleaded guilty and was properly convicted. He was sentenced as follows:

“24 Months imprisonment or R8000.00 8 months to be suspended or R2000.00 to be suspended for 3 years on condition that accused is not convicted of contravention of section 63 (2) of Act 93 of 1996 to be committed during a period of suspension.

Accused driver’s licence is endorsed for 5 years. In terms of section 103 (1) (a) accused is declared unfit to possess a firearm Act 60 of 2000.” Quoted without emendation.

[4] According to the magistrate, it was brought to his attention that the endorsement of the accused driver’s licence for five years is not permissible for a first offender and that section 103 of the Firearms Control Act 60 of 2000 (FCA) should not have been applied.

[5] Sections 34 and 35 of the NRTA govern the suspension, cancellation, disqualification and endorsement of licences and/or permits.

[6] Sections 34 and 35 read as follows:

“ (1) Subject to section 35, a court convicting a person of an offence in terms of this Act, or of an offence at common law, relating to the driving of a motor vehicle may, in addition to imposing a sentence, issue an order, if the person convicted is –

the holder of a licence, or of a licence and permit, that such licence or licence and permit be suspended for such period as the court may deem fit or that such licence or licence and permit to be cancelled, and any such licence shall be dealt with as provided in subsection (3);

the holder of a licence, or of a licence and permit, such licence or licence and permit be cancelled, and that the person convicted be disqualified from obtaining a licence, or licence and permit, for any class of motor vehicle for such period as the court may deem fit, and any such licence shall be dealt with as provided in subsection (3); or

Not the holder of a licence, or of a licence and permit, declaring him or her to be disqualified from obtaining a licence, or a licence and permit, either indefinitely or for such period as the court may deem fit.

The making of an endorsement in terms of subsection (3) may be postponed by the court issuing the order until any appeal against the conviction or sentence or both has been disposed of.

Where a court has issued an order under subsection (1) (a) or (b) the registrar or clerk of the court shall, subject to subsection (2), in the case where the licence –

is contained in an identity document, endorse such licence accordingly and return the identity document to the holder thereof; or

is not contained in an identity document, retain such licence and deal with it in the prescribed manner.

35. (1) Subject to subsection (3), every driving licence or every licence and permit of any person convicted of an offence referred to in –

- (a) section 61 (1) (a), (b) or (c), in the case of the death of or serious injury to a person;
- (b) section 63 (1), if the court finds that the offence was committed by driving recklessly;
- (c) section 65 (1), (2) or (5),

where such person is the holder of a driving licence or a licence permit, shall be suspended in the case of –

a first offence, for a period of at least six months;

a second offence, for a period of at least five years; or

a third or subsequent offence, for a period of at least ten years,

calculated from the date of sentence”

- [7] It is clear from section 34 (1) (a) and (b) read with section 35 (1) that the court may – after convicting a person of contravening section 65 (1) of the NRTA (drunken driving) and that person is a first offender – suspend such person’s licence for a period of at least six months or order that the licence be cancelled. If the court orders cancellation it may also order that the convicted person be disqualified from obtaining a licence for such period as the court deems fit.
- [8] It is only after the court has made an order of suspension, cancellation or cancellation and disqualification that the licence of the convicted person may be endorsed. It is not necessary for the court to order such endorsement. It happens ex lege. The endorsement is triggered by an order of suspension or cancellation and when such order is made the clerk of the court or registrar must automatically endorse the licence. Endorsement cannot stand alone. In this matter no order triggering the endorsement of the accused’s driver’s licence was made. The magistrate could therefore not order the endorsement of the driver’s licence.
- [9] I initially thought that the magistrate intended ordering the suspension of the accused’s driver’s licence. The record however puts the matter beyond doubt. After the magistrate had imposed sentence the following exchange between him and Mr Bruintjies, on behalf of the accused, is recorded:

“The court is mindful that both parties had addressed the court in terms of the endorsement of the licence of the accused. However, before the court makes such a finding, is the defence going to call the accused into the witness-stand to testify regarding his driver’s licence?”

Mr Bruintjies: The defence is not going to call the (indistinct) your worship.

Court: Thank you sir. An order in respect of the driver’s licence of the accused is as follows. After careful consideration of the accused on the date in question, the harm caused, the risk imposed or posed by the accused to the general public the consequence thereof the court finds no reason why the accused’s driver’s licence should not be endorsed. And the court, accordingly, endorses the driver’s licence of the accused...”

[10] Under previous legislation endorsement was a substantive sanction which a court had the power to order irrespective of whether

suspension or cancellation was ordered.¹ Suspension and cancellation of licences were dealt with in section 146 (b) of Ordinance 21 of 1966 which provided that the order of suspension or cancellation had to be endorsed on the licence. After the repeal of the Ordinance, section 55(1)(a) of the Road Traffic Act 29 of 1989 stipulated that “a court convicting a person of an offence under this Act, or of an offence at common law, relating to the driving of a motor vehicle or a failure to stop after or report an accident, may, in addition to imposing a sentence, issue an order, if the person is the holder of a licence, that particulars of the conviction, sentence and any other order of the court consequent thereupon be endorsed on such licence, and the registrar or clerk of such court concerned shall endorse such licence accordingly;”

[11] It is clear that the magistrate thought that he could order the endorsement of the licence with the particulars of the conviction and sentence. He did not intend to order the suspension of the licence. In his letter which accompanied the record on review he does not state that he mistakenly ordered endorsement instead of suspension. He just requests that the order of endorsement be set aside. The accused will in any event be prejudiced if the order of endorsement is set aside and replaced by an order of suspension without him being heard. The order of endorsement ought to be set aside.

[12] The request that the order in terms of section 103 of the FCA be set aside is problematic. The magistrate does not give any reasons why the order should be set aside other than that it was brought to his attention that the section is not applicable in this case.

[13] Section 103 (1) (j) reads as follows:

“Unless the court determines otherwise, a person becomes unfit to possess a firearm if convicted of the offence involving the abuse of alcohol or drugs.”

[14] In *S v Lukwe Borchers J* said:

“It is clear from the wide reach of section 103 (1) that the legislation intended that unfitness to possess a firearm should automatically follow on a conviction of most serious offences. However, section 103 (1) also encompasses offences which may not be serious. A petty theft which is sentenced by imprisonment without the option of a fine springs to mind, so, too a minor contravention of the laws relating to the driving of a vehicle whilst under the influence of alcohol (section 103 (1) (j)).”²

[15] I agree. Moreover all contraventions of subsection (1) or (2) of section 1 of Act 1 of 1988, where alcohol was consumed, will involve the abuse of alcohol.³ Such conviction can follow after the convicted person has committed a relatively minor act (trespassing) or a serious act (murder). Those convictions will all fall within the scope of section 103(1) (j). There is nothing in the FCA or section 103 that indicates that section 103(1) (j) should be interpreted restrictively to exclude driving while under the influence of alcohol.

- [16] Abuse is defined in the New Shorter Oxford English Dictionary 4th Edition, 1993, as “An improper usage; a corrupt practice, improper use;...misuse; make bad use of; wrongfully take advantage of. Take (a drug) for a purpose other than therapeutic one...”
- [17] The consumption of alcohol (moderate or excessive) is not an offence. Driving a motor vehicle after consuming alcohol is also not an offence. It is only when a person, other than a professional driver, drives a vehicle or occupies the driver’s seat thereof whilst the engine is running and the concentration of alcohol in any specimen of blood taken from any part of that person’s body is not less than 0, 05 grams per 100 millilitres or when the driver’s faculties are impaired by the consumption of alcohol that an offence is committed.⁴
- [18] In both instances the offence involves the use of alcohol and driving of a motor vehicle after such use. It has been said that a driver who moderately consumes alcohol and thereafter drives a motor vehicle while the alcohol concentration in his or her blood is more than 0, 05 grams per 100 millilitres can not be said to have abused alcohol. See *S v Moeketsi Se Josing*.⁵ For a contrary view see *S v Agrippa Lucas Ngema*.⁶ I disagree with the conclusion in the *Se Josing*-matter, that contravening section 65 (5) of the NRTA does “not involve the abuse [or even the use] of alcohol.” This conclusion is at variance with the learned judge’s own observation in the same matter to the effect that “The offence of which a person is convicted in terms of section 65 (5) of the National Road Traffic Act 93 of 1996 is dependent on an accused having consumed alcohol at some stage prior to the driving of the motor vehicle concerned and possibly a number of hours before.” The crime is explicitly linked to alcohol use. In my view it does at the very least involve the use of alcohol.
- [19] I don’t have to decide whether a conviction of contravening section 65 (5) of the NRTA is an offence that involves the abuse of alcohol.
- [20] Driving a motor vehicle while under the influence of alcohol is a different kettle of fish. It entails driving a motor vehicle while a person’s faculties are impaired by the consumption of alcohol. The person’s judgment and skill are affected because he or she consumed too much alcohol. It is clear from the definition of abuse that there need not be a pattern of alcohol abuse for it to constitute an abuse. A person does not have to be an alcoholic in order to commit an offence involving the abuse of alcohol. One incident of excessive drinking which impairs the driver’s judgment and skill and thereafter driving a motor vehicle is sufficient.
- [21] This offence involves the abuse of alcohol because the person engages in excessive drinking of alcohol to the extent that his or her faculties are impaired and then takes the dangerous risk of driving a motor vehicle whilst in such state. When a person drives a vehicle while in such a state, that person is in my view abusing alcohol.
- [22] My view is fortified by what Nicholas AJA said in *S v Schwegmann*, albeit in an obiter dictum, that “for offences involving abuse of alcohol (e.g. driving under the influence of liquor) the courts have often been encouraged to make use of periodical imprisonment.”⁷ In *S v Marius Stemmet Cleaver J*, correctly in my view, found that drunken driving is an offence involving the abuse of alcohol⁸. I find that driving a motor vehicle while under the influence

of alcohol is an offence which involves the abuse of alcohol. That being the case the provisions of section 103 (1) (j) of the FCA had to be applied.

- [23] The magistrate gave the accused's legal representative an opportunity to address him on this issue whereafter he made the following order:

"In terms of section 103 (2) of Act 60 of 2000 the accused is declared unfit to possess a firearm."

- [24] This order is clearly wrong. The magistrate was not supposed to declare the accused unfit to possess a firearm. He should have made no order of determination in terms of section 103 (1) of the FCA and the accused would therefore automatically become unfit to possess a firearm. The reference to section 103 (2) of the FCA is also wrong⁹. The magistrate's order should be corrected.
- [25] The magistrate's sentence is not a model of clarity. It is difficult to comprehend and should be clarified. The alternative imprisonment is disproportionately long in relation to the fine. It should also be adjusted downward.
- [26] Although the accused was convicted of contravening section 65 (1) of the NRTA the sentence was suspended on condition that he is not convicted of contravening section 63 (2) of the NRTA committed during the period of suspension. Section 63 (2) of the NRTA does not create an offence, It reads as follows:

"Without restricting the ordinary meaning of the word "reckless" any person who drives a vehicle in wilful or wanton disregard for the safety of persons or property shall be deemed to drive that vehicle recklessly."

The offence is created by section 63 (1) of the NRTA which reads as follows:

"No person shall drive a vehicle on a public road recklessly or negligently."

- [27] The magistrate indicates that he made a bona fide mistake. He intended to state that the accused should not be convicted of contravening section 65 (1) of the NRTA committed during the period of suspension. The magistrate requests that this part of this sentence be corrected. The sentence was suspended on condition that the accused does not contravene a section that does not create an offence. In my view the sentence should be corrected as requested by the magistrate.
- [28] The sentencing stage is a very important part of a criminal trial. The sentence should be clear and understandable. The accused should know exactly what his/her sentence is. Where a suspended sentence is imposed it is of extreme importance that the accused knows exactly what the conditions of such suspension are.
- [29] Orders pertaining to the suspension and cancellation of the accused's driver's licence and orders in terms of section 103 of the FCA should not be made glibly. The magistrate must apply his/her mind before making such orders. He/she must exercise his/her discretion judicially after considering all the facts and circumstances of the case including the relevant

prescripts of the NRTA and the FCA. Had the magistrate applied his mind in this matter and if he took some time to look at the relevant provisions of the NRTA and the FCA he would in all probability not have made the orders that he did.

[30] The accused does not know on which conditions his sentence was suspended. This judgment must be brought to his attention.

[31] I accordingly make the following order:

- a) The conviction is confirmed.
- b) The sentence and orders are set aside and replaced by the following:
 - (i) R8000-00 or six (6) months imprisonment of which R2000-00 or two (2) months imprisonment is suspended for three (3) years on condition that the accused is not convicted of contravening section 65 (1) of Act 93 of 1996 committed during the period of suspension.
 - (ii) No order of determination in terms of section 103 (1) of Act 60 of 2000 is made.
 - (iii) The clerk of the court must ensure that this judgment is brought to the accused's attention.

C. J. MUSI, J

I agree.

KRUGER, J

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1Section 146 (a) of Ordinance 21 of 1966 of the four provinces which existed at the time. See W.E. Cooper, Law (1982) volume one, p 30-32, 614.

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(2) SACR 578 (WLD) at 580 f-g

3Subsections

- (1) and (2) of section 1 read as follows: "1. Acts committed under influence of certain substances to be punishable. - (1) Any person who consumes or uses any substance which impairs his or her faculties to appreciate the wrongfulness of his or her acts or to act in accordance with that appreciation, while knowing that such substance has that effect, and who while such faculties are thus impaired commits any act prohibited by law under any penalty, but is not criminally liable because his or her faculties were impaired as aforesaid, shall be guilty of an offence and shall be liable on conviction to the penalty which may be imposed in respect of the commission of that Act. (2) If in any prosecution for any offence it

is found that the accused is not criminally liable for the offence charged on account of the fact that his faculties referred to in subsection (1) were impaired by the consumption or use of any substance, such accused may be found guilty of a contravention of subsection (1), if the evidence proves the commission of such contravention.”

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(2) If in any prosecution for any offence it is found that the accused is not criminally liable for the offence charged on account of the fact that his faculties referred to in subsection (1) were impaired by the consumption or use of any substance, such accused may be found guilty of a contravention of subsection (1), if the evidence proves the commission of such contravention.”

4For professional drivers the concentration of alcohol in the blood limit is not less than 0,02grams per 100 millilitres. In the case of breath specimens a person may not drive a vehicle or occupy the driver’s seat thereof whilst the engine is running, the concentration of alcohol in any specimen of breath exhaled by such person is not less than 0, 24 milligrams per 1000 millilitres, or in the case of professional driver, not less than 0, 10 milligrams per 1000 millilitres.

5Case number R719/09 KwaZulu-Natal High Court, Pietermaritzburg delivered on 21 May 2009.

6Case number DR 29/09 KwaZulu-Natal High Court, Durban delivered during June 2009 (precise date not indicated).

7 (1989) ZA SCA 116 case number 117/89 delivered on 26 September 1989.

8Case number A503/2008 Western Cape High Court delivered on 13 February 2009

9Section 103(2) reads as follows: “A court which convicts a person of a crime or offence referred to in Schedule 2 and which is not a crime or offence contemplated in subsection (1), must enquire and determine whether that person is unfit to possess a firearm.”

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