

SOUTH AFRICA / JUDGMENT

S v Masemola (CM433/2016) [2017] ZAGPPHC 259 (6 June 2017)

[2017] ZAGPPHC 259

COURT

North Gauteng High Court, Pretoria

BEFORE

DE VOS, VAN DER WESTHUIZEN

CASE / FILE NUMBER

CM433/2016

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

REPORTABLE

HIGH COURT REFERENCE NO.: 62/2017

SPECIAL REVIEW NO.: 01/2017

MAGISTRATE'S SERIAL NO.: 01/2017

CASE NO.: CM 433/2016

6 June 2017

In the matter between:

THE STATE

and

VICTOR MASEMOLA

REVIEW JUDGMENT

DE VOS J:

- [1] This matter came before me as a special review at the request of the Senior Magistrate, Mamelodi. The accused appeared before the court on two counts. Count 1 related to the malicious injury to property, and count 2 was a charge of assault. The accused was found guilty on both counts.

- [2] On count 1 the accused was sentenced to “pay a fine of R2000 (two thousand rand) or in default to undergo a period of 2 (two) months imprisonment wholly suspended for a period of 3 (three) years on condition that the accused compensate complainant’s loss of her property amounting to R3499,99 by paying instalments of R500 (five hundred rand) per month. 1st payment on or before 31 January 2017 and thereafter on or before 28th Feb, 31st March, 30th April, 31 May, 30th June and last one being R499,99 on or before 31 July 2017. (Section 300 of CPA 51 of 1977)”.

On count 2 the accused was sentenced to “pay a fine of R2000 (two thousand rand) or in default to undergo a period of 2 (two) months imprisonment wholly suspended for a period of 3 (three) years on condition that the accused is not convicted of offence of assault to do grievous bodily harm or assault common which offences are committed within the suspension period”.

After these sentences were imposed the Presiding Magistrate further ordered that “both counts are taken together as one for the purpose of sentence”.

- [3] The Senior Magistrate is of the view that the following irregularities concerning sentence occurred:

3.1 In respect of count 1 the suspended condition pertaining to compensation was made in terms of section 300 of Act 51 of 1977.

The inclusion thereof as a suspended condition was therefore irregular.

3.2 The Presiding Magistrate imposed a separate sentence in respect of each of the two counts, but nevertheless ordered that the two counts be taken together for purpose of sentence.

The Presiding Magistrate noted the concerns raised by the Senior Magistrate and indicated that he/she has no additional comments to submit on the issue.

- [4] Collis AJ referred the matter to the Office of the Director of Public Prosecutions for its comment on the issues raised by the Senior Magistrate. The DPP supports the view of the Senior Magistrate. The DPP remarks as follows with regard to the first irregularity, pertaining to the sentence imposed on count 1:

“7.1 There are two methods in which a court can provide compensation to an injured person. The first is a compensatory order made in terms of section 300 of the Criminal Procedure Act 51 of 1977. A section 300 compensation order has the effect of a civil judgment. The second method is a condition of indemnification in a suspended

sentence made in terms of section 297(1)(i)(aa) of the same Act.

7.2 The reference by the magistrate to section 300 of Act 51 of 1977 (inserted in brackets after the sentence in count 1) is rather

unfortunate. The condition of suspension to compensate the complainant was clearly not made in terms of section 300 but in terms of section 297(1)(i)(aa). The complainant was called to testify solely in respect to the injury amount suffered (see p.18-20 of the transcribed record). This evidence was clearly received by the court in terms of section 274(1) of Act 51 of 1977.

7.3 Except for the reference to the wrong section i.e. section 300 instead of section 297(1)(i)(aa), the suspended condition to pay compensation is lawful. It is clear from the judgment that the magistrate's intention was that the accused compensate the victim for her injury rather than the accused paying a fine to the state coffers. Compensation in this form gives a complainant much greater satisfaction than would otherwise occur (see in this regard *S v Charlie* 1976

(2) SA 596 (A) and *S v Benetti* 1975

(3) SA 603 (T)).

7.4 In *S v Tshondeni*; *S v Vilakazi* 1971

(4) SA 79 (T) the applicable general principles were discussed regarding compensation as a condition of suspension. These are, as summarised in Hiemstra's Criminal Procedure at p.28-74, as follows:

"1. The first aim of a condition of suspension is to keep the convicted person out of prison. The court must guard against a sentence which is too light in the circumstances or which becomes too harsh because of the condition.

2. The second aim is to have the convicted person realise more clearly the consequences of his or her irresponsible conduct.
3. The third aim is to compensate the victim for any injury suffered by him or her. The court must guard against the idea that the convicted person pays a fine to the complainant.
4. The court must ensure that the criminal trial does not degenerate into a dispute about quantum. Nevertheless the accused must be aware that the court is busy investigating the extent of the damage caused by his or her offence and must be given the opportunity to attempt to influence the court's determination thereof by means of questions or evidence.
5. The determination of damages takes place after conviction. In this enquiry medical costs and loss of income are in issue, as well as an amount for pain and suffering, which lies within the court's discretion. Other patrimonial loss which the victim suffered can also be taken into account.
6. The amount is not limited to the magistrate's jurisdiction regarding fines (*R v Fourie and Another* 1947 (3) SA 468 (C)). There are indeed limitations in terms of section 300, but they are not applicable here.

7. The ability of the convicted person to pay must be kept in mind. For that reason payment in instalments can be ordered. It is in order to award an amount which is smaller than the true damage, simply because the accused cannot reasonably pay a larger amount and would consequently have to go to prison, with the result that the complainant would get nothing.
8. Although the amount for pain and suffering is discretionary, the record must indicate the basis on which it was calculated. If it appears that the accused and the complainant agreed on an amount, there is no problem, and the sentence can be suspended on condition that the accused honour his or her undertaking within a determined time.
9. It is in order for the court to make only an order, without imposing a fine or other sentence, that the accused pay the victim

compensation under threat of a suspended sentence”.

7.5 It is respectfully submitted that in imposing compensation as a condition of suspension the court a quo complied with the general

principles set out in the matter referred to in paragraph 7.4 supra.

7.6 It is respectfully submitted that the sentence pertaining to count 1 be reviewed and that the reference to section 300 of the Act 51 of 1977 be deleted from the sentence in count 1”.

- [4] With regard to the second irregularity, which relates to the order that counts 1 and 2 be taken together for the purpose of

sentence, the DPP remarks as follows:

“8.1 The magistrate imposed separate sentences in respect to both counts. Although both sentences were wholly suspended the conditions of suspension differ.

8.2 The counts were thus clearly not taken together for purpose of sentence and doing so would in any event be improper given the

different suspended conditions imposed in respect to each count.

8.3 The order that the counts be taken together for purpose of sentence is nonsensical in light thereof that they were not taken

together for that purpose.

8.4 In light thereof that the order has no purpose and was made after the individual sentences were imposed it is respectfully submitted that the order be reviewed and set aside”.

- [5] I agree with the submissions made by the DPP. Accordingly, the sentence on count 1 must be reviewed, as it is clear that the condition of suspension to compensate the complainant was not made in terms of section 300 of Act 51 of 1977, but in terms of section 297(1)(i)(aa) of the same Act. Furthermore, the order that the two convictions be taken together for purpose of sentence stands in direct conflict with the separate sentences imposed on each of the

counts. Having regard to the fact that different conditions of suspension are imposed in respect of each sentence, the counts 1 and 2 cannot be taken together for purpose of sentence. Therefore the order cannot stand and must be set aside.

ACCORDINGLY, I MAKE THE FOLLOWING ORDER:

- a) The reference to section 300 of Act 51 of 1977 is deleted from the sentence imposed on count 1.
- b) The remaining part of the sentence imposed on count 1 is confirmed.
- c) The sentence imposed on count 2 is confirmed.
- d) The order that “both counts are taken as one for the purpose of sentence” is set aside.

DE VOS J

JUDGE OF THE GAUTENG DIVISION

OF THE HIGH COURT OF SOUTH AFRICA

I agree.

VAN DER WESTHUIZEN AJ

ACTING JUDGE OF THE GAUTENG DIVISION

OF THE HIGH COURT OF SOUTH AFRICA

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