

**S v Mhlanga (A221/06) [2006]
ZAGPHC 18 (27 February 2006)**
[2006] ZAGPHC 18

the court is indebted), has correctly pointed out, the trial court failed to inform the accused of the opportunity of paying a fine in instalments, or to request a deferment of payment of the fine. The accused has a right to be informed of these sentencing options, and the failure to bring these possibilities to the accused's attention may amount to the trial being unfair. Compare in this regard *S v Dandiso* 1995(2) SACR 573 (W); *S v Maluleke* 2002(1) SACR 260 (T). See further *S v Lekgwabe* 1992(2) SACR 219 (T). As was pointed out by DE VILLIERS J in *S v Maluleke*, supra, the problem is not a new one. As the learned judge says on p262i: "Die Hooggeregshof poog sedert ongeveer 1987 byna vrugtelos om die landdroshoe te beweeg om aan beskuldigdes wat boetes opgelis, mee te deel dat hulle geregtig is om aansoek te doen om uitstel van betaling. Kyk bv *S v Kwetana* 1987 2 SA 500(K); *S v Mosia* 1988 2 SA 730(T) en *S v Molala*, *S v Mogora* 1988 2 SA 97(T)." Again, this court lamented in *S v Zitha* 2003(1) SACR 628 (T) through BOSIELO J, with whom SHONGWE J (as he then was) concurred, at 630c: "I still cannot understand why magistrates persistently ignore what the law requires them to do, ie to make proper enquiries regarding the means of the accused and his ability to pay a fine either at once or by instalments. If for any good reason, the magistrate wishes to see the accused serving imprisonment, he must have the courage to sentence the accused to imprisonment. It is unacceptable that the magistrate must disguise the term of imprisonment under the guise of a fine, which he knows the accused will not be able to pay. Clearly the conduct of the magistrate in casu is seriously deplorable." To these considerations another one must now be added. It has become trite that South Africa's prisons are seriously and chronically overcrowded. The result is that short term sentences, particularly when imposed on first offenders, do more harm than good. There is no prospect of rehabilitation during a period of a few months that the accused is herded together with others into a cell that is by virtue of its overcrowded, cramped and unhygienic conditions, hardly fit for human habitation. The fundamental human rights of prisoners who are held in these conditions are seriously impaired. It is the duty of every presiding officer who is faced with matters of this nature, particularly offences by first offenders, to investigate every single other avenue in an attempt to find an effective sentence before sending such an offender to jail. Under no circumstances must the imposition of a term of imprisonment be administered routinely without a thought being given to the possibility of an alternative sentence. Consideration must be given to the possibility of imposing a fine that is within reasonable reach of the accused's means, allowing payment of such fine to be deferred, or ordering payment thereof in instalments, to the possibility of community service, and of restoring or repairing the damage caused by the crime before direct imprisonment is decreed. In the present instance, the magistrate failed in his duty to investigate the circumstances of the accused properly. The possibility that the accused might have been able to pay the unsuspended portion of the fine in instalments cannot be excluded. Unfortunately, and because of the magistrate's failure to properly appreciate his function, the accused has by now served the better part of the unsuspended sentence and may in fact have been released already. This leaves the court with little option but to confirm the sentence. This is not done because justice has prevailed but because the accused would be faced with more prejudice if the sentence were to be set aside and the matter remitted to the magistrate to consider proper punishment afresh. The sentence is confirmed in the interests of the accused. This is not to be regarded as an approval of the manner in which this matter was

dealt with. E BERTELSMANN JUDGE OF THE HIGH COURT I agree C P RABIE JUDGE OF THE HIGH COURT A298-2005

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IN THE HIGH COURT OF SOUTH AFRICA (TRANSVAAL PROVINCIAL DIVISION)

IN THE HIGH COURT OF

SOUTH AFRICA

TRANSVAAL

PROVINCIAL DIVISION

THE STATE v AKANI MHLANGA

REVIEW JUDGMENT

BERTELSMANN, J

The accused was found guilty in the magistrate's court for the district of Malamulele of theft of a Panasonic car cassette radio player and a JVC speaker valued at R1 071,00. The conviction is in order. The accused was a first offender. When questioned about his personal circumstances, he placed on record that he is unmarried, but has two children, whom he can hardly support because he earns a meagre living by doing odd jobs such as the chopping of firewood. He had R100,00 available for the payment of a fine. The magistrate made no further enquiries but imposed a fine of R2 000,00 or eight months imprisonment of which R500,00 or two months imprisonment was suspended for three years on condition that the accused was not convicted of theft committed during the period of suspension. On review, the magistrate was asked why a fine had been imposed which the accused clearly was not able to pay. In reply, the magistrate pointed out that, although the purpose of the fine was to keep the accused out of jail if possible, this did not necessarily mean that a fine could not be imposed that was beyond the means of the accused, precisely because of the high prevalence of theft in the area of the court's jurisdiction, and the obvious profit motive with which the crime was committed. As the Office of the Director of Public Prosecutions through Mr V L N Davhana, senior state advocate, and Mr M I Thenga, Deputy Director of Public Prosecutions Transvaal, (to whom the court is indebted), has correctly pointed out, the trial court failed to inform the accused of the opportunity of paying a fine in instalments, or to request a deferment of payment of the fine. The accused has a right to be informed of these sentencing options, and the failure to bring these possibilities to the accused's attention may amount to the trial being unfair. Compare in this regard *S v Dandiso* 1995(2) SACR 573 (W); *S v Maluleke* 2002(1) SACR 260 (T). See further *S v Lekgwabe* 1992(2) SACR 219 (T). As was pointed out by DE VILLIERS J in *S v Maluleke*, supra, the problem is not a new one. As the learned judge says on p262i:

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S v Dandiso

S v Maluleke

S v Lekgwabe

S v Maluleke, supra

"Die Hooggeregshof poog sedert ongeveer 1987 byna vrugtelos om die landdroshoe te beweeg om aan beskuldigdes wat boetes opgelis, mee te deel dat hulle geregtig is om aansoek te doen om uitstel van betaling. Kyk bv S v Kwetana 1987 2 SA 500(K); S v Mosia 1988 2 SA 730(T) en S v Molala, S v Mogora 1988 2 SA 97(T)."

S v Kwetana

1987 2 SA 500

S v Mosia

1988 2 SA 730

S v Molala, S v Mogora

1988 2 SA 97

Again, this court lamented in S v Zitha 2003(1) SACR 628 (T) through BOSIELO J, with whom SHONGWE J (as he then was) concurred, at 630c:

S v Zitha

"I still cannot understand why magistrates persistently ignore what the law requires them to do, ie to make proper enquiries regarding the means of the accused and his ability to pay a fine either at once or by instalments. If for any good reason, the magistrate wishes to see the accused serving imprisonment, he must have the courage to sentence the accused to imprisonment. It is unacceptable that the magistrate must disguise the term of imprisonment under the guise of a fine, which he knows the accused will not be able to pay. Clearly the conduct of the magistrate in casu is seriously deplorable."

in casu

To these considerations another one must now be added. It has become trite that South Africa's prisons are seriously and chronically overcrowded. The result is that short term sentences, particularly when imposed on first offenders, do more harm than good. There is no prospect of rehabilitation during a period of a few months that the accused is herded together with others into a cell that is by virtue of its overcrowded, cramped and unhygienic conditions, hardly fit for human habitation. The fundamental human rights of prisoners who are held in these conditions are seriously impaired. It is the duty of every presiding officer who is faced with matters of this nature, particularly offences by first offenders, to investigate every single other avenue in an

attempt to find an effective sentence before sending such an offender to jail. Under no circumstances must the imposition of a term of imprisonment be administered routinely without a thought being given to the possibility of an alternative sentence. Consideration must be given to the possibility of imposing a fine that is within reasonable reach of the accused's means, allowing payment of such fine to be deferred, or ordering payment thereof in instalments, to the possibility of community service, and of restoring or repairing the damage caused by the crime before direct imprisonment is decreed. In the present instance, the magistrate failed in his duty to investigate the circumstances of the accused properly. The possibility that the accused might have been able to pay the unsuspended portion of the fine in instalments cannot be excluded. Unfortunately, and because of the magistrate's failure to properly appreciate his function, the accused has by now served the better part of the unsuspended sentence and may in fact have been released already. This leaves the court with little option but to confirm the sentence. This is not done because justice has prevailed but because the accused would be faced with more prejudice if the sentence were to be set aside and the matter remitted to the magistrate to consider proper punishment afresh. The sentence is confirmed in the interests of the accused. This is not to be regarded as an approval of the manner in which this matter was dealt with.

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