

SOUTH AFRICA / JUDGMENT

S v Moqhoba (R282/2016) [2017] ZAFSHC 10 (5 January 2017)

[2017] ZAFSHC 10

COURT

Free State High Court, Bloemfontein

BEFORE

Daffue, Reinders

CASE / FILE NUMBER

R282/2016

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Reportable: NO

Of

Interest to other Judges: NO

Circulate

to Magistrates: YES

Review

number: R282/2016

In

the matter between:

THE
STATE
and
DAVID
MOAHLOLI MOQHOBA

CORAM:

DAFFUE,
J et
REINDERS, J

JUDGMENT

BY: DAFFUE, J

DELIVERED ON: 5 JANUARY 2017

SPECIAL REVIEW IN TERMS OF SECTION 304(4)

OF THE CRIMINAL PROCEDURE ACT, 51/1977

- [1] This is a special review in terms of s 304 of the Criminal Procedure Act, 51 of 1977.
- [2] Upon his plea of guilty in respect of a count of dealing in dagga in accordance with the provisions of s 5(b) of Act 140 of 1992 ("the Act") the accused was properly convicted by magistrate Mohala in the Ladybrand Magistrates' court and thereupon sentenced to payment of a fine of R6 000 or 12 months' imprisonment, half of the sentence being suspended for three years on condition that the accused is not convicted of contravening s 5(b) of the Act committed during the period of suspension. In terms of s 25 of the Act the dagga was declared forfeited to the State.
- [3] The Judicial head of the Magistrates' court in Ladybrand, magistrate JJ Van Zyl, was of the view that an impermissible sentence was imposed and that the matter should be sent on special review. He relied on the provisions of s 17(e) of the Act which obliges a court to impose direct imprisonment and requested his colleague to address the issue.
- [3] Magistrate Mohala responded as follows and I quote him verbatim:

"I will proceed and respond specifically to issues raised in relation to s 17(e) of Act 140 of 1992.

Without necessarily quoting the relevant proviso, I am of the view that the section empowers the court to impose a term of imprisonment not exceeding 25 years in relation to offence referred to in section 13(f), or to both such an imprisonment and such fine as the court may deem fit to impose. The relevant section is not peremptory and confers wide discretion to the court.

I therefore respectfully hold the view that no other interpretation can be afforded this section as the wording is explicit and literal interpretation of the law should be applicable.

It is further my request that this particular matter should not be sent for a special review, unless reasons other than those interrogated

are brought to my attention as I have only replied specifically to issues raised."

(emphasis added)

- [4] In light of the response of magistrate Mohala I deemed it unnecessary to refer the matter back to him insofar as I'm satisfied that this matter should be dealt with as a special review. I shall consider only the issues raised by the two magistrates.

- [5] Section 5(b) of the Act must be read with ss 13(f) and 17(e) of the Act. Section 17 deals with penalties to be imposed for the various offences created in s 13, read with the particular sections referred to therein. Section 17 reads as follows:

“17. Penalties - Any person who is convicted of an offence under this Act shall be liable –

- (a);
 - (b)
 - (c)
 - (d) and
 - (e) in the case of an offence referred to in section 13(f), to imprisonment for a period not exceeding 25 years, or to both such imprisonment and such fine as the court may deem fit to impose.” (emphasis added)
- [6] Insofar as magistrate Mohala is of the view that no other interpretation could be afforded to the section as the one relied

upon by him, it is necessary to refer to the following summary of the current state of our law regarding the interpretation of documents, including statutes, as summarised by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 SCA at para [18]:

“The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. ... The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

(emphasis added)

- [7] In my view the language used, bearing in mind the ordinary rules of grammar and syntax, is clear. The sentence options are, bearing in mind language, context, the apparent purpose of the provision and the material known to the legislature, i.e. the Criminal Procedure Act as well as the repealed 1971 Act:
1. Imprisonment (not exceeding 25 years);
 2. Imprisonment as in 1 above plus a fine (unlimited in amount);

3. Imprisonment plus a fine (unlimited in amount) with an alternative period of imprisonment in terms of section 287(1) of the Criminal Procedure Act as long as the total period of imprisonment does not exceed 25 years.

No doubt, nothing prevents the sentencing court to suspend either wholly or partially any of the above.

[8] Magistrate Mohala pointed out that s 17(e) is not peremptory and confers a wide discretion on the sentencing court. I do not agree in toto. The use of the word “shall” in s 17 is indicative of a peremptory meaning. Therefore the sentencing court has no choice than to impose one of the three sentencing options referred to supra. The use of the word “or” in ss 17(e) clearly dispels a point of view that the sentencing court has a discretion not to impose direct imprisonment. Direct imprisonment must be imposed, even if it is wholly or partially suspended. The discretion of the sentencing court may be exercised in respect of which sentencing option to be selected, the amount of the fine, the period of imprisonment subject to the prescribed maximum and whether or not the sentence is to be wholly or partially suspended.

[9] Marais, J with whom Borchers, J concurred, summarised the different approaches pertaining to s 17(e) of the Act in *S v Mlambo* 2007 (1) SACR 664 (WLD) and stated as follows at 666d - j:

“On the contrary, the wording of the section leaves no doubt that the opposite is intended and that the court is obliged to impose a sentence of direct imprisonment and, only when it has done so, may it couple a sentence of a fine with an alternative of imprisonment to the sentence of direct imprisonment.”

The first part of the sentencing provision provides only for direct imprisonment ('imprisonment for a period not exceeding 25 years').

The court is then authorised to impose an alternative form of punishment which is 'or to both such imprisonment and such fine as the court may deem fit.' ... To interpret this section as authorising the imposition of any of the bouquet of punishments is to ignore the effect of the words 'both' and 'and'. The Legislature is stating clearly that the only alternative to a sentence of direct imprisonment is the imposition of 'both such imprisonment' and a fine.

My conclusion is underlined by the significantly different penalties provided in s 17(a)(b)(c) and (d) where the wording differs

materially from that of s 17(e). In each previous section the court is authorised to sentence the accused to a 'fine ... or to imprisonment ... or to both such fine and such imprisonment.'

In each case the first sentence option is a fine, and imprisonment is thereafter authorised as an alternative sentence to the imposition of a fine. This difference makes the intention of the legislature in s 17(e) even clearer, as the preceding sections authorise a fine as the first of three options. Section 17(e) signally does not, and only authorises a fine in conjunction with imprisonment.

The change in wording was clearly not accidental.”

[10] In my view the learned Judges’ interpretation of ss 17(a) to

(e) and s 17(e) in particular is in line with the state of the law as expressed by Wallis JA in *Endumeni supra*. The learned judges not only considered the language used in the light of the ordinary rules of grammar and syntax, but also the context in which the provisions appear. They might have referred to the apparent purpose of the penalty provisions with reference to the material known to the Legislature. There is no doubt that a s 5(b) offence is a more serious offence than the offences referred to in ss 13(a) to (e) read with ss 17(a) to (d).

[11] Bertelsmann, J with whom De Vos, J concurred, agreed with Marais, J’s exposition of the law in *S v Madibane* 2014 JDR 0065 (GNP) and I quote from para 9:

“The court is indebted to advocate E Leonard, Deputy Director of Public Prosecutions, North Gauteng, Pretoria, and to State Advocate Coetzer, whose helpful comments were of significant assistance in determining an appropriate sentence. Section 17(e) of Act 140 of 1992 obliges the court upon conviction of an accused of the offence of having contravened section 5(b) of the Act to impose a period of direct imprisonment, which may however be suspended in its entirety, see Marais, J’s thorough discussion of this issue in S v Mlambo 2007 (1) SACR 664 (W).”

(emphasis added)

[12] I agree with the approach in *Mlambo* and *Madibane* and confirm that, in my experience, it has been followed constantly in the Free State Province. I am therefore also in agreement with the approach of magistrate Van Zyl referred to *supra*.

[13] This court cannot now impose direct imprisonment in addition to the sentence imposed, even if such imprisonment is wholly suspended on certain conditions. This would be detrimental to the accused and unfair towards him. The imposed sentence should be set aside and the matter remitted to the trial court to impose sentence afresh, bearing in mind what I have stated *supra*.

[14] Therefore the following orders are made.

1. The conviction is confirmed.
2. The sentence is set aside and the matter is remitted to the trial court to sentence the accused afresh.

JP DAFFUE, J

I concur

C REINDERS, J

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