

SOUTH AFRICA / JUDGMENT

S v Morake (160/2013) [2013] ZAFSHC 141 (22 August 2013) [2013] ZAFSHC 141

COURT

Free State High Court, Bloemfontein

BEFORE

Lekale, Phalatsi

CASE / FILE NUMBER

160/2013

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FREE

STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC

OF SOUTH AFRICA

Review

No. : 160/2013

In

the review between:

THE
STATE
versus
MATHEWS
MORAKE

CORAM:

LEKALE, J et
PHALATSI, AJ

JUDGMENT

BY: LEKALE, J

DELIVERED ON: 22 AUGUST 2013

- [1] On the 4th December 2012 the accused, who was not legally represented, appeared before the magistrates' court at Welkom

and pleaded guilty to driving whilst the level of alcohol in his blood exceeded the statutory limit of 0,05 gram per 100 ml. He was, thereupon, convicted on his plea and fined R1 500.00 or 10 (ten) months imprisonment.

- [2] He was, however, not advised of his rights with regard to automatic review in terms of section 302 of the Criminal Procedure Act (the CPA). The learned magistrate subsequently became aware of the omission and caused the accused to appear before him on the 14th December 2012 when he was duly advised of such rights and the record was, eventually, purportedly dispatched to the Registrar of this Court for review purposes after a delay occasioned by the need for reconstruction of the same.
- [3] When the matter first served before me I caused a request to be directed for the available record to be placed before me as it was, apparently, inadvertently not enclosed. [4] The record has since been made available and I am grateful to the learned magistrate therefor. In referring the matter the trial magistrate requested that ".....the Honourable Judge rectify, in the best way deemed fit, the anomaly..." and, further, laments that the record, as reconstructed, "is riddled with textual and spelling mistakes." [5] Once judgment is delivered or sentenced is passed in a criminal matter, the court is *functus officio* and cannot reconsider or revisit the same unless it is wrong and was delivered or passed by mistake in which case, the court may amend it before or immediately after it is recorded. (See sections 196 and 298 of CPA.) [6] At common law the court has the power to change, amend or supplement its judgment provided that the substance or tenor of the judgment is neither affected nor violated. (See *S v Wells* 1990 (1) SA 816 (A) at 820C - G.) [7] In the present matter neither the substance of the judgment nor the tenor of the sentence is violated by the subsequent explanation of the accused's rights on automatic review. The judgment and sentence are left intact and the learned magistrate only

supplemented the sentence by indicating that the proceedings are reviewable in the ordinary course in the light of the sentence

imposed and proceeded to advise the accused of his rights in the circumstances. In so doing the trial court, effectively, invoked the common law and supplemented his sentence for the benefit of the accused who appeared in person. To this extent the proceedings

cannot, in my view, be faulted. In fact, the learned magistrate's endeavours in this regard are laudable while the oversight is regrettable. [8] A perusal of the record confirms the learned magistrate's view that the record is riddled with textual and spelling mistakes. The foregoing, however, does not per se mean that the record is such that it is not possible, therefrom, to express an informed opinion on whether or not the proceedings were in accordance with justice. There is no application before us for the correction of the record and, as such, our task is limited to reviewing the proceedings. (See generally *S v Mpostolo Naubeni* Case Number 1962/2002, an unreported decision of the Free State High Court delivered on the 5th September 2002.) [9] The provisions of the Adjustment of Fines Act 101 of 1991 are, however, applicable insofar as the National Road Traffic Act 93 of 1996 in terms of which the accused was convicted and sentenced,

does not stipulate the maximum amount of a fine which may be imposed in the event of a conviction and only prescribes applicable maximum period of imprisonment. The ratio between the fine imposed and the alternative term of imprisonment must, therefore, accord with the prescribed general ratio of 3 : 5 or R60 000.00 : 36 months (See section 1(1)(a) of Adjustment of Fines Act.) [10] In my view the proceedings are not in accordance with justice to the extent that the ratio between the fine imposed and its custodial alternative is disturbingly high with the latter being disproportionately harsh. (Compare *S v Rooi* [2004] ZAWCHC 40.)

[3] When the matter first served before me I caused a request to be directed for the available record to be placed before me as it was, apparently, inadvertently not enclosed.

[4] The record has since been made available and I am grateful to the learned magistrate therefor. In referring the matter the trial magistrate requested that

".....the Honourable Judge rectify, in the best way deemed fit, the anomaly..."

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[6] At common law the court has the power to change, amend or supplement its judgment provided that the substance or tenor of the judgment is neither affected nor violated. (See *S v Wells* 1990 (1) SA 816 (A) at 820C - G.)

[7] In the present matter neither the substance of the judgment nor the tenor of the sentence is violated by the subsequent explanation of the accused's rights on automatic review. The judgment and sentence are left intact and the learned magistrate only

supplemented the sentence by indicating that the proceedings are reviewable in the ordinary course in the light of the sentence

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[8] A perusal of the record confirms the learned magistrate's view that the record is riddled with textual and spelling mistakes. The foregoing, however, does not per se mean that the record is such that it is not possible, therefrom, to express an informed opinion on whether or not the proceedings were in accordance with justice. There is no application before us for the correction of the record and, as such, our task is limited to reviewing the proceedings.

(See generally *S v Mpostolo Naubeni* Case Number 1962/2002, an unreported decision of the Free State High Court delivered on the 5th September 2002.)

[9] The provisions of the Adjustment of Fines Act 101 of 1991 are, however, applicable insofar as the National Road Traffic Act 93 of 1996 in terms of which the accused was convicted and sentenced, does not stipulate the maximum amount of a fine which may be imposed in the event of a conviction and only prescribes applicable maximum period of imprisonment. The ratio between the fine imposed and the alternative term of imprisonment must, therefore, accord with the prescribed general ratio of 3 : 5 or R60 000.00 : 36 months (See section 1(1) (a) of Adjustment of Fines Act.)

[10] In my view the proceedings are not in accordance with justice to the extent that the ratio between the fine imposed and its custodial alternative is disturbingly high with the latter being disproportionately harsh. (Compare *S v Rooi* [2004] ZAWCHC 40.)

ORDER: [11] The conviction is confirmed but the sentence is set aside and in its place and stead is substituted the following: “The accused is fined R1 500.00 or 30 (thirty) days imprisonment.” [12] The foregoing sentence is antedated to the 4th. December 2012. L.J. LEKALE, J I concur. N.W. PHALATSI, AJ

ORDER:

[11] The conviction is confirmed but the sentence is set aside and in its place and stead is substituted the following:

“The accused is fined R1 500.00 or 30 (thirty) days imprisonment.”

[12] The foregoing sentence is antedated to the 4th. December 2012.

L.J. LEKALE, J

I concur.

N.W. PHALATSI, AJ

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Prepared on 10 October 2026 · Esheria