

SOUTH AFRICA / JUDGMENT

S v Tseko (04/2022) [2023] ZANWHC 195; 2024 (1) SACR 208 (NWM) (25 October 2023) [2023] ZANWHC 195

COURT

North West High Court, Mafikeng

BEFORE

A H Petersen, J T Djaje

CASE / FILE NUMBER

04/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

HIGH

COURT REFERENCE NUMBER: 04/2022

MAGISTRATES'

SERIAL NUMBER: 03/2021

MAGISTRATE'S

CASE NUMBER: KLD 435/2020

Reportable:	YES Circulate
to Judges:	NO Circulate
to Magistrates:	YES Circulate
to Regional Magistrates:	YES In
the review matter between:	THE STATE and THABISO TSEKO Accused

CORAM:	DJAJE AJP; PETERSEN ADJP DATE OF JUDGMENT: 25 OCTOBER 2023
Summary:	Criminal Law and Procedure – Special Review – sentencing limits relevant to the penalty for contravening section 49(1)(a) of the Immigration Act 13 of 2002 – Adjustment of Fines Act 101 of 1991 - formulation of suspended sentence -- sentence set aside in its present form – formulation of sentence corrected and the period of suspension of the sentence reduced. ORDER 1. The proceedings are in accordance with justice, save for the formulation of the suspended sentence and the period of suspension. 2. The sentence in its present form is set aside and formulated as follows: “One Thousand Eight Hundred Rand (R1800) or Ninety (90) days imprisonment, of which One Thousand Two Hundred Rand (R1200) or sixty (60) days imprisonment is suspended for a period of two (2) years on condition that the accused is not convicted of contravening the provisions of section 49(1)(a) of the Immigration Act 13 of 2002, which contravention occurs during the period of suspension.” 3. The sentence is ante-dated to 20 May 2021. REVIEW

JUDGMENT

PETERSEN ADJP

Introduction

- [1] This matter was initially placed before me as a special review on 03 August 2022, at the behest of the Magistrate, Klerksdorp (L J Maleka), on which date I directed a query to the Magistrate. The matter was placed before Judge Reid more than one year later, in reply to the query. The matter consequently made its way back to me on 12 October 2023, at the request of Judge Reid. The query I directed to the Magistrate was done on the basis that I anticipated writing a judgment on the concerns raised in the said query. For this reason, I attended to penning the present judgment.

- [2] In the letter accompanying the request for special review dated 27 July 2022, the Magistrate records the reason for the request as follows:

“1. In the above matter accused was convicted and sentenced as per attached records.

2. It later emerged the sentence imposed may be irregular as it may entail two sentences for one charge.
3. Thus it is the request of the Magistrate for this matter to be reviewed on a special basis and the Honourable Judge to provide guidance in this respect.”

- [3] The matter was returned to the Magistrate on 03 August 2022 with the following query:

“[1] The learned Magistrate is kindly requested to submit a Memorandum, explaining, inter alia:-

- (i) When it emerged that the sentence may be irregular, considering the fact that the accused was convicted and sentenced as far back as 20 May 2021, and why the matter has only been sent on Special Review on 27 July 2022;
- (ii) Why the view is held that the sentence imposed may be irregular?

(Please substantiate with reference to the Criminal Procedure Act 51 of 1977 and case law).

- [2] The Memorandum is to be returned to the Registrar of the High Court, within 30 days of date of this query.”
- [4] This Court must raise its discontent with the binding of the record since its return to the Registrar of this Honourable Court, following the query of 3 August 2022. There is no logical filing of the papers which requires a wading through the papers to make sense of the inordinate delay and the response to the query.
- [5] This Court finds itself engaging in an act of supererogation. In *S v PM (Review) (02/2023)* [2023] ZANWHC 184 (5 October 2023), concerns were raised about the conduct of Ms van der Westhuizen, the Clerk of Court responsible for dealing with review matters at Klerksdorp Magistrates Court. The following was said paragraphs 10 and 11 of the judgment:

“[10] Ms van der Westhuizen would do well to either remind herself of her duties or re-acquaint herself with the Justice Codified Instructions Code: Clerks of the Criminal Court and Child Justice[1] (“Code: Clerk of Courts”), issued by the Branch: Court Services of the Department of Justice and Constitutional Development. Chapter 12 of the Code: Clerk of Courts is instructive on the duties of the Clerk of Court in respect of Reviews...

- [11] The review query of Reddy AJ was clearly received back at the Klerksdorp Magistrates Court, within one day of being returned by the Registrar of this Court. For a period of one month and a further two months thereafter, when Ms van der Westhuizen was on sick leave, the review record with the query, received no attention from any Clerk of Court. It is most disconcerting that no other Clerk was assigned to attend to the duties of Ms van der Westhuizen in her absence. It is equally disconcerting that the review query was not brought

to the attention of Ms van der Westhuizen upon receipt from the High Court. This unacceptable handling of review queries and reviews in general requires serious and urgent attention by the Court Manager, who needs to conscientize the Clerks about their specific duties set out in Item 217(b)(i) of the Code: Clerk of Courts, which emphasizes the

urgency of review queries as follows:

“(b)(i) When a review case is returned to the office with a query from the reviewing judge, the clerk of the court must without delay submit the review case to the judicial officer for his attention.”

(ii) On receipt of the response on the query from the judicial officer the clerk of the court, shall immediately submit the review case and the response to the registrar of the High court.”

[6] In the present review, a document purporting to be an affidavit by Ms van der Westhuizen, which is not commissioned seeks to relay that Ms van der Westhuizen received the review on 1 September 2023 and realised that the response by the Magistrate to the query of 3 August 2022 was incomplete. This is said to have been brought to the attention of the Magistrate on 6 September 2023 to rectify, which he duly attended to on even date. Several documents including e-mail correspondence between Ms van der Westhuizen and Ms Pearl Ntono, a Registrar of this Honourable Court (using the mail address of Patrick Sepeko), between 11 July 2023 and 12 July 2023 contradicts the statement of Ms van Westhuizen as aforesaid, as the issue of the incomplete response was already known in July 2023.

[7] The inexplicable delay from 3 August 2023 is exacerbated by a letter dated 28 June 2023 directed by Ms van der Westhuizen to the Registrar, bearing a date stamp of Administration at the Klerksdorp Magistrates Court of 5 July 2023. In this letter, the Registrar is requested to return the review to Ms van der Westhuizen, who claims that the review query was responded to, but was not received back from the High Court. Reference is then made to a memorandum sent on 13 July 2022, the relevance of which is not known because the matter was only transmitted on review on 27 July 2022. There is simply no cogent explanation for the failure to comply with Item 217(b)(i) of the Code: Clerk of Courts supra.

[8] The response by the Magistrate to the query of 3 August 2022 which appears to have been drafted on 22 August 2022 and is incomplete; and only re-drafted in haste on 6 September 2023, is unhelpful. Having been drafted in haste, it does not accord with accepted practice for responding to queries raised by a Reviewing

Judge. I must add that it is in stark contrast to the incomplete response dated 22 August 2022, which follows known practice. The response reads as follows:

“RESPONSE TO QUERY BY REVIEWING JUDGE

1. The matter was sent on special review late as the question of the possibility of the sentence being irregular came to the attention of the Senior Magistrate late and she raised it with me and thus when a decision to take it on special review was taken and same is required.

2. The Presiding Magistrate holds a different view from that of the Senior Magistrate pertaining to the fact that the sentence passed as (sic) irregular or not.
3. The Senior Magistrate holds the view that the sentence is irregular. The reason being that it has two sentences in one and thus does not comply with the provision of Section 49(1)A of the Immigration Act 13 of (sic) 2002 which provides that anyone who enters or remains in or departs from the Republic in contravention of this Act shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding two years.
4. As accused was convicted and sentenced for committing (sic) statutory offence, the sentence was as per the said statute and not Criminal Procedure Act 51 of 1977 and I unfortunately have no case law to either support nor say the sentence is irregular at this stage.

The Director (sic) in this regard is humbly requested from the reviewing judge.”

- [9] Even more disconcerting is the lack of effort on the part of the Magistrate to justify the dissenting view he holds from that of the Senior Magistrate that the sentenced imposed is not irregular. This despite the invitation extended by this Court to the Magistrate to justify the dissenting view with reference to case law and the Criminal Procedure Act, Act 51 of 1977 (“the CPA”). To defer the duty to research this issue to the Reviewing Judge cannot be countenanced. The intention behind the review process is the opportunity to learn through research and to justify the reasoning for a particular decision, and not to leave same to a Reviewing Judge to give direction. If this Court finds that the sentence is not competent, its duty and powers is clear, but all role players should play their part in assisting the Judge of Review.
- [10] The accused was duly represented by a legal practitioner (attorney) from Legal Aid South Africa. The matter therefore was not reviewable in the ordinary course in terms of section 302 of the CPA. The High Court is vested with inherent powers to review and correct errors in proceedings in the Lower Courts. In addition to the inherent powers of the High Court, section 22 of the Superior Courts Act 10 of 2013 which provides that:

“22 Grounds for review of proceedings of Magistrates’ Court

- (1) The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are-
 - (a) absence of jurisdiction on the part of the court;
 - (b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
 - (c) gross irregularity in the proceedings; and
 - (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.
- (2) This section does not affect the provisions of any other law relating

to the review of proceedings in Magistrates' Courts."

[11] The essence of the request to review the sentence imposed by the Magistrate is predicated on an impasse between the Senior Magistrate and the Magistrate on whether "the sentence imposed may be irregular as it may entail two sentences for one charge." This question implicates the penalty clause in the Immigration Act and the interplay with the CPA. In my view, the period of suspension of the sentence imposed also merits scrutiny having due regard to the peculiar facts which underscore the conviction of the accused in terms of the Immigration Act. >

[12] Before turning the issues as aforesaid, it would be apposite to revisit some basic principles applicable to the imposition of fines which are not prescribed in statute, relative to prescribed terms of imprisonment which are stipulated in the statute.

[13] Section 49(1)(a) of the Immigration Act provides for a fine or imprisonment not exceeding two years. The amount of the fine is not prescribed in section 49(1)(a) and is therefore to be determined in accordance with the Adjustment of Fines Act 101 of 1991 (AFA). Section 1 of the AFA provides that:

"1 Calculation of maximum fine

(1) (a) If any law provides that any person on conviction of an offence may be sentenced to pay a fine the maximum amount of which is not prescribed or, in the alternative, to undergo a prescribed maximum period of imprisonment, and there is no indication to the contrary, the amount of the maximum fine which may be imposed shall, subject to section 4, be an amount which in relation to the said period of imprisonment is in the same ratio as the ratio between the amount of the fine which the Minister of Justice may from time to time determine in terms of section 92 (1) (b) of the Magistrates' Courts Act, 1944 (Act 32 of 1944), and the period of imprisonment as determined in section 92 (1)(a) of the said Act, where the court is not a court of a regional division.

(b) For the purposes of paragraph (a) a fine as well as imprisonment may be imposed."

(emphasis added)

[14] Section 92(1)(b) of the Magistrates' Court Act 32 of 1944 (MCA) referred to in section 1(a) of the AFA provides as follows in respect of fines that may be imposed by a Magistrate:

"92 Limits of jurisdiction in the matter of punishments

(1)

Save as otherwise in this Act or in any other law specially provided, the court, whenever it may punish a person for an offence—

(a)

by imprisonment, may impose a sentence of imprisonment for a period not exceeding three years, where the court is not the court of a regional division, or not exceeding 15 years, where the court is the court of a regional division;

(b)

by fine, may impose a fine not exceeding the amount determined by the Minister from time to time by notice in the Gazette for the respective courts referred to in paragraph (a);

(emphasis added)

[15] The amount in section 92(1)(b) determined by the Minister of Justice and Correctional Services is presently R120 000 where the court is not the court of a regional division, and R600 000 where the court is a court of a regional division (GN 217 of 27 March 2014 (GG 37477 of 27 March 2014)).

[16] The effect of the section 92(1)(b) of the MCA read with section 1(a) of the AFA is as follows. The maximum amount of the fine is not prescribed in section 49(1)(a) of the Immigration Act, but a prescribed maximum term of imprisonment of two years is provided in section 49(1)(a). In terms of section 92(1)(b) of the MCA, the maximum fine which a District Court may impose is R120 000. The maximum amount of the fine that may be imposed in terms of section 49(1)(a) of the Immigration Act, is therefore to be calculated according to a determinable ratio, using the period of imprisonment referred to in section 49(1)(a) of the Immigration Act.

[18] Turning to the main issues alluded to above, the impasse between the Senior Magistrate and the Magistrate who imposed the sentence, in my view, turns on the formulation of the sentence, as will be demonstrated. Words provide context. The omission of a word or phrase can change the context of what a writer intends to convey, and the use of certain words read in context (as a whole), will convey to the reader the true intention of the writer.

[19] On a reading of the sentence imposed by the Magistrate, it is clear that the intention behind the sentence was a fine of R600 which the accused was required to pay or in default thereof to undergo 30 days imprisonment. Both the fine of R600 (which is less than R80 000) and the 30 days imprisonment (which is less than two years), fall within the sentencing jurisdiction of the Magistrate as highlighted above.

[20] The Magistrate added the following words after the fine of Six Hundred Rand (R600) or thirty (30) days imprisonment,

“and a further One Thousand Two Hundred Rand (R1,200.00) or sixty (60) days imprisonment...”. The further R1200 and 60 days imprisonment, together with the R600 or 30 days imprisonment, similarly falls within the sentencing jurisdiction of the Magistrate.

[21] The question is whether the splitting of the sentence into two different components with the same effect is competent. It is trite in our law in an analogous scenario, that when a fine is imposed with an alternative of imprisonment, the imprisonment part of the sentence cannot be suspended on its own. If part of the imprisonment is suspended so too should part of the fine. In *R v Geyser* 1960 (3) SA 431 (N), Milne JP (Broome J concurring), said the following in this regard:

“BROOME, J.P.: The accused was convicted of contravening sec. 110 (1) (a) of Ord. 26 of 1956 by driving a motor-car on a public road while under the influence of liquor. The conviction is in order and is confirmed. The sentence is recorded as a fine of £50 ‘or 5 months’ imprisonment of which 4 months is suspended . . .”

While it is quite in order to suspend a portion of a sentence, it is undesirable, and indeed impracticable, to suspend a portion, or even the whole, of a sentence of imprisonment which is alternative to a fine. See *R v Nkosi*, 1958

(3) SA 799 (T). This case is exactly in point though the head-note does not correctly reflect the judgment.

The sentence is therefore set aside and the case is remitted to the magistrate to impose sentence afresh.”

See too: *S v Moyi* 1994 (2) SACR 408 (T).

[22] The sentence imposed by the Magistrate does not exceed the applicable sentencing jurisdiction in the Immigration Act, as shown above. The formulation of the sentence, however, is as the view is held by the Senior Magistrate, not competent. In particular, the employment of the words “and a further”, which resulted in a second fine with an alternative of imprisonment is not competent. What the Magistrate in essence did was split one fine with an alternative of imprisonment into two. Logically, only one fine with the alternative of imprisonment should have been imposed. Having regard to the amounts considered by the Magistrate, the sentence could have been formulated as follows:

“One Thousand Eight Hundred Rand (R1800) or Ninety (90) days imprisonment, of which One Thousand Two Hundred Rand (R1200) or sixty

(60) days imprisonment is suspended for a period of five (5) years on condition that the accused is not convicted of contravening the provisions of section 49(1)(a) of the Immigration Act 13 of 2002, which contravention occurs during the period of suspension.”

[23] As indicated above the term of suspension merits scrutiny. In respect of the period or term of suspension, section 297(1)(b) of the CPA provides that:

“(1) Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion —

...

- (b) pass sentence but order the operation of the whole or any part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a)(i) which the court may specify in the order;..”

[24] A court convicting a person of any offence (which includes a statutory offence), where no minimum punishment is prescribed by law, may in terms of section 297(1)(b) pass sentence, if determined by statute, in accordance with the limit provided by the statute, and suspend that sentence or any part thereof, for a period not exceeding five (5) years. Whether or not the maximum period of suspension of 5 years should be imposed must be considered relative to the fine and/or imprisonment which is to be suspended. In the present matter, the period of five years may be considered disproportionate to the fine with alternative of imprisonment imposed, having regard to the fine with alternative imprisonment imposed.

[25] It is prudent as a reminder, that the salutary approach proposed by Kreigler AJA (as he then was) in *S v Ndaba* 1993 (2) SACR 633 (A), be highlighted (loosely translated from Afrikaans):

“Besides it is undesirable to regard the maximum term of suspension provided by section 297(1)(b) of the CPA, as a rule. Shortly after the coming into operation of the present CPA, which increased the erstwhile maximum term of three years to five years, a warning was extended in S v Nabote 1978

(1) SA 648 (O) op 650H, that the new maximum should be chosen indiscriminately. Since then numerous warnings have been extended, for example *S v Nkokoto en Andere* 1978

(2) SA 534 (O); *S v Van Rensburg* 1978

(4) SA 481 (T) op 484A; *S v Motelele* 1981

(3) SA 1029 (O) op 1032A-B; *S v Setnoboko* (supra); en *S v Paulse* 1990

(1) SACR 341 (W) op 345h...

Notwithstanding, it would appear that a term of five years is often determined indiscriminately. Therefore it must be emphasized that the determination of a term of suspension forms part of the sentencing officer’s evaluation of sentence and merits the same attention as the other aspects of sentence:

‘[I]t is still necessary for the court in each case to give consideration to what period to choose.’ (Per Fieldsend HR in *S v Wakiri* 1981

(2) SA 527 (ZA) at 530F.)”

[26] In *S v Bagadi* 2008 (2) SACR 400 (T), Ledwada J (as he then was), with reference to *Ndaba* said the following in considering conditions of a suspended sentence:

“[11] It is trite that conditions of suspension of a sentence have a crucial role to play in the administration of justice. Inter alia, conditions serve to deter and dissuade an accused from committing similar offences in future because the breach of such conditions could trigger the operation of the suspended sentence; see S v Ndaba 1993

(2) SACR 633 (A) at 640H.

[12] It is desirable and in the interests of justice that a condition or conditions upon which a sentence is suspended should be just and have a deterrent and a reformatory effect on the accused. Importantly, in my view, such conditions should be related to the offence upon which the accused is convicted. The failure to properly have the conditions of suspension tailored or linked to the offence for which an accused is convicted, may widen up the net of potential offences which an accused may commit unreasonably, thus creating a trap for the unwary.” (emphasis added)

[27] Section 297(1)(b) of the CPA applies to section 49(1)(a) of the Immigration Act, when any sentence imposed in terms of the Immigration Act is suspended. Therefore, any sentence imposed within the limits of section 49(1)(a) may be suspended for any period, subject to that period, not exceeding five years. In the present matter, when regard is had to the sentence imposed, the maximum term of suspension is clearly disproportionate to the fines and alternative imprisonment imposed. A shorter term of suspension, reasonably being two years, should have been considered by the Magistrate relative to the maximum term of imprisonment provided for in section 49(1)(a) of the Immigration Act and the peculiar facts of the matter which underscore the conviction of the accused.

Order

[28] Consequently, the following order is made:

1. The proceedings are in accordance with justice, save for the formulation of the suspended sentence and the period of suspension.
2. The sentence in its present form is set aside and formulated as follows:

“One Thousand Eight Hundred Rand (R1800) or Ninety (90) days imprisonment, of which One Thousand Two Hundred Rand (R1200) or sixty

(60) days imprisonment is suspended for a period of two (2) years on condition that the accused is not convicted of contravening the provisions of section 49(1)(a) of the Immigration Act 13 of 2002, which contravention occurs during the period of suspension.”

3. The sentence is ante-dated to 20 May 2021.

A H PETERSEN

ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA, NORTH WEST DIVISION, MAHIKENG

I agree.

J T DJAJE

ACTING JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

- [1] Chapter 1: Part I 1. Appointments 1.2 (b) Any Assistant Registrar or Clerk of the Court performing duties as a DCRS Clerk as provided for in Rule 66 (2), must take the prescribed oath/affirmation as provided for in Rule 30 (5) (a) before commencement of such duties.
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