

SOUTH AFRICA / JUDGMENT

S v Tshefu (33/2019) [2020] ZAECBHC 4; 2020 (1) SACR 525 (ECB) (20 February 2020) [2020] ZAECBHC 4

COURT

Eastern Cape High Court, Bhisho

BEFORE

B Hartle, B R Tokota

CASE / FILE NUMBER

33/2019

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, BHISHO)

Case No. 33/2019

Case reference 1/4/13

THE STATE

and

THOKOZANI TSHEFU

REVIEW

JUDGMENT

HARTLE J

- [1] The accused was convicted in the Zwelitsha Magistrate's Court on two counts of assault common pursuant to which he was sentenced to pay a fine, alternatively serve a period of direct imprisonment. The sentence was wholly suspended for a period of five years on condition that he is not convicted of assault committed during the period of suspension.
- [2] Additionally, and evidently at the prompting of the prosecutor during his address on sentence, the court also made a compensation order pursuant to the provisions of section 300 of the Criminal Procedure Act, No. 51 of 1977 ("CPA") ostensibly aimed at reimbursing one of the complainants for a door that was damaged in the scuffle giving rise to the assault charges.
- [3] The order reads as follows:

“(The accused person is to) pay a fine of R2000-00 (two thousand) or six

(6) months direct imprisonment in default of payment, wholly

suspended for a period of five (5) years on condition that the accused person is not convicted of assault committed during the

period of suspension. In terms of Sec. 300 of the Criminal Procedure Act, No. 51 of 1977, the accused person is ordered to compensate complainant Zikho Nojaholo (in) a sum of R800 for damaged door within 30 days from today payable at the clerk of the court at Zwelitsha Magistrate’s Court.”

[4] All arising from the same incident, the accused had been charged with two counts of assault (counts 2 and 3), and one count of malicious injury to property (count 1). The chief allegation in the latter respect is that he had, with the necessary intent to injure one Bulumko Nojaholo in her property, damaged a kitchen door belonging to her.

[5] Assisted by his legal representative the accused pleaded guilty to the assault charges, but not guilty to the first count of malicious injury to property. In a written statement tendered by his legal representative in terms of the provisions of section 112 (1)(b) of the CPA, he admitted assaulting both women, the complainant in count 2, Ms. Lelethu Nojaholo, with an open hand, and Ms. Zikho Nojaholo, the complainant in count 3, by pushing her. The circumstances under which the offences were said to have been committed are outlined in the statement as follows:

“The offence happened under the following circumstances. On the day in question, I was at the tavern and both complainants were there. I had an argument with the complainant, Lelethu, and out of anger, I slapped her with an open hand. The argument started when I asked her about her ex-boyfriend who was at the tavern. Her cousin intervened, Zikho Nojaholo, and I pushed her and she fell on the door and it broke, and the door broke.”

[6] The state accepted the plea and led no evidence on the charge of malicious injury to property, pursuant to which the accused was correctly acquitted in this respect. The magistrate was however satisfied that a conviction on counts 2 and 3 (assault common) was justified and duly convicted the accused in this respect.

[7] There are no considerations that militate against this finding and it is apposite that these convictions be confirmed.

[8] I also find no basis to interfere with the sentence itself. In pleading the State’s case for aggravation of sentence during the sentence proceedings, the prosecutor correctly highlighted the gravity of domestic violence and the abuse of women generally, ironically in a period leading up to women’s month when traditionally in our country the cause of women to be free from violence is elevated and championed. In my view the sentence imposed by the magistrate on the two counts of assault (taken together for such purposes) is appropriate and reasonable in all the circumstances.

[9] However, it is the adjunct to the sentence constituting the purported compensation order that is clearly not in accordance with justice.[1]

[10] Despite the accused not having been convicted of the first count of malicious injury to property, the prosecutor was insistent on making an issue of the broken door. The following excerpt from his address is of relevance to appreciate the apparent basis upon which he believed a compensation order should additionally be made, evidently on the assumption that there was a connection between one of the assault convictions and the damage to the door at the tavern:[2]

“The accused person, Your Worship, furthermore, as a result of his actions on the day in question; it is correct that I have not led any evidence in respect of the count of malicious injury to property. And I will address the Court and say that in that instance I would have had difficulty proving the intent of the accused person to damage the property, that is the door. However, Your Worship, as a result of the actions of the accused person on the day in question that the door ended up being damaged. Had the accused person not pushed Zikho on the day in question, that door would not have been damaged. The mere name of the charge malicious injury to property, the word malicious indicates a vindictive, intent full and a purposeful,

willful action to maliciously damage something. Something I cannot stand before this Court, and lie and say that it was the

intention of the accused person. The sole intention of the accused person on the day in question was to assault those two

girls.”

(Emphasis added.)

[11] As for the court’s powers in this respect; the basis upon which he believed the compensatory order should be made; and the amount of compensation he thought should be ordered, he made the following submissions:

“I then considered and read the provisions of Section 300, Your Worship, which is a compensatory order that can be granted by the Court. Now a Magistrate’s Court, which is a lower Court, has the right to grant a compensatory order. We have already heard that the applicant or the accused person before Court would be in the position to pay a fine of R500.00. Now the damage to the door, for example, because there are no medical bills, there are no medical costs, for example is in the region of about R800,00, R800,00 to R1 000.00. Now if the Court ... (intervenes)

COURT: How much?

PROSECUTOR: R800.00 to R1 000.00, Your Worship. Should the Court consider this to be a proper sentence, whatever money that the Court, if the Court was going to consider a sentence of a fine with the option of imprisonment, whatever money that the Court would have considered to be suitable for a fine, can in this instance be directed as a compensatory order for the two complainants. And should the Court go the route of a compensatory order, the accused person

can then be given time by which the said payment should be made failing which, imprisonment is an option.”

- [12] Evidently, he appeared to believe that the court’s discretion could be invoked in a vacuum, without regard to the necessary jurisdictional requirements postulated by section 300 (1) of the CPA, alternatively imagined that the grounds put forward by him brought the matter within the purview of the section. It is however a trite principle that the court’s jurisdiction to invoke the section and to exercise the discretion conferred on it thereby arises only if there is a conviction of an offence that causes damage to or loss of property (including money) belonging to some other person (“the injured person”), and that injured person has made application to be compensated for such damage or has instructed the prosecutor to make such application on his behalf.[3] (The latter happenstance should obviously occur first as without a formal application initiating the enquiry under section 300 the question of liability to compensate does not arise.) The court’s discretion to award compensation to the injured person, limited to a sum of R300 000.00 in the magistrate’s court,[4] only comes to the fore once these jurisdictional bases exist.
- [13] Most significantly, the prosecutor made the above submissions ostensibly without the input or support of any of the complainants. There was no introspection into the supposed basis for the accused’s liability to the women he had assaulted to reimburse either of them for damage to a broken door at a tavern (as opposed to the person to whom the damaged door was alleged in the charge sheet to have belonged) arising from his convictions.[5] In reality, the prosecutor failed to even identify an “injured person” in the whole scenario let alone establish a close causal connection between the damage and the offences of which the accused was convicted other than to assert that the “end result of (the accused’s) actions was in a broken door” and the nature of the assaults was “such that even a door is going to get broken in the process”. He appears further to have been under the mistaken impression that it was the accused’s offer to pay a fine which fixed his liability to make restitution on this basis. The extent of the supposed quantum for the damage was reduced to some guesswork and give or take what the accused said he could afford to pay if a fine were imposed. Additionally, by his suggestion that the accused should be given time to pay or failing which imprisonment might then be an option, he appears either to have conflated the concepts of punishment and compensation, or to have misconceived of the true nature of a compensation order which, by virtue of it having the effect of a civil judgment of the magistrate’s court,[6] would certainly not attract imprisonment[7] neither an extended time limit for payment.[8]
- [14] The magistrate should have queried the supposed basis for a compensation order. Instead, and ostensibly without any prior warning that an enquiry under section 300 was now underway or with any real regard to the audi alteram partem principle, which applies just as strongly in a section 300 enquiry as it does in a civil lawsuit,[9] she casually asked the accused’s legal representative to address her with regard to the state’s “application”

(sic) that the court make an order that the accused pay towards the damages of R500.00 or “whatever amount (it would) deem fit for those damages”.^[10] No enquiry was made to establish if the accused accepted or denied liability or if his legal representative recognised that a proper application was before the court. No proof of the damage or the extent thereof was put up. Despite repeating that “the complainant” had previously rejected the accused’s offer of payment for the door during mediation proceedings, and drawing to the attention of the court that the value of replacing the door was unknown to the accused (thus clearly questioning the professed quantum of the damage), he however repeated the accused’s willingness to pay R800.00 provided the latter be allowed time to collect it and pay it over later. Without further ado the compensation order was thereupon granted.

[15] On 27 December 2019^[11] a reviewing judge, relying on the authority of *S v King*,^[12] raised a query whether it was not the prerogative of the complainant rather than the prosecutor to apply for compensation after conviction and pointed out that in this instance the prosecutor had not at any stage suggested that he was acting on the complainant’s

instructions. In response the magistrate conceded that it was inappropriate to have granted the compensation order under those circumstances and that it should be set aside, whilst yet justifying her decision on the basis of the willingness of the accused to pay for the damaged door.

[16] This is however a flawed approach as the accused’s readiness to pay is not what establishes the jurisdictional basis for the court’s discretion to be invoked in terms of the provisions of section 300 of the CPA.^[13]

[17] As indicated above, one of the prerequisites (*sine qua non*) before an award of compensation can be made is that there must be an application after the conviction which emanates from the injured person. Where the prosecutor brings the application, it must be clear that he is acting on the instructions of the injured person.^[14]

[18] This is evident from the express provisions of section 300 (1) of the CPA:

“Where a person is convicted by a superior court, a regional court or a magistrate’s court of an offence which has caused damage to or loss of property (including money) belonging to some other person, the court in question may, upon the application of the injured person or of the prosecutor acting on the instructions of the injured person forthwith award the injured person compensation for such damage or loss ...” (Emphasis added.)

[19] In this instance there was no semblance of any application for compensation by either of the complainants or the woman to whom the

broken door ostensibly belonged. To the contrary, the assault victims had seemingly rejected the notion that some form of

restorative justice as a viable alternative sentencing option was a suitable pursuit of justice for the unwarranted attack upon them, insisting instead on the full might of a criminal prosecution and the penal consequences that would flow therefrom. In such circumstances the prosecutor

could not have claimed to have any instructions from any of them and therefore did not have the authority to ask the court to make a compensation order. The court itself has no powers *mero motu* to make such an order.[15] The magistrate simply did not consider the question whether any jurisdictional basis existed for the court to make the order, and must have realized in any event that the process could not have met with the support of any of the complainants given the information

placed before her that financial restitution was not an option for them. As a result the compensation order was issued arbitrarily and falls to be set aside.

[20] An application for compensation cannot be brought except with the complicity and express authorization of the “injured person”

contemplated in section 300 (1) of the CPA. This is because, under subsection (5), a compensation order affects his/her civil law claim which is exclusively his/hers to pursue in the forum of choice. In terms of subsections 5 (a) and (b), unless such person renounces a compensation award made by the court (even where he/she has asked to be compensated through the medium of the criminal proceedings), the result is that a separate civil suit for that party to recover damages for the injury in respect of which the award was made is precluded. It follows therefore that the injured person’s interests are paramount in a section 300 process lest his/her right to claim damages arising from the injury flowing from the offence of which the accused has been convicted are unwittingly forfeited in terms of subsection 5(b), not immediately, but within sixty days after the date on which the award is granted.[16]

[21] The requirement of a formal “application for compensation” by an “injured person” is also absolutely necessary so that the accused, who stands in the place of a defendant for such purposes, knows that he has a case to meet and what exactly that case is.[17] In this unique scenario, where a determination of liability and compensation intrudes in a criminal court, [18] it is imperative that the accused is advised by the court, after conviction, that it is considering such an order and of the basis

therefor.

[22] In *S v Rensburg*[19] the court explains why this is necessary, and what is required to be conveyed to the convicted accused when a compensation order is under contemplation:

“In the application for compensation for damages in terms of section 357

(1) of the Criminal Procedure Act, 56 of 1955,[20] a magistrate is, according to the wording of the section, dealing with a civil claim in a criminal case. He must decide it

without the usual pleadings. For this reason, it is necessary that a magistrate should indicate that he is considering such an order. The parties must be given the opportunity of addressing him and, should they so desire, of giving evidence relating to the application. The usual assessment of the amount of compensation applies in these cases just as in civil cases.”[21]

- [23] The guidance offered in *S v Van Rensburg*,^[22] underscored by the earlier judgment in *R v Gamiet*,^[23] is that after conviction,^[24] assuming there is a formal application for compensation^[25] and that - at least on the face of it, a proper nexus exists between the offence of which the accused has been convicted and the damage giving rise to the compensation claimed, the court should firstly direct the accused's mind to the question of compensation. Such notice that an award is under consideration must in fairness to the accused be given early enough to enable him to meaningfully defend the injured person's claim.^[26]
- [24] The court is obliged to refer the accused to any evidence on the record that may be relevant to the issues of liability and compensation to be determined by it pursuant to the provisions of section 300 (2) of the CPA.^[27]
- [25] The injured person should be allowed an opportunity to prove his/her damages by further evidence either upon affidavit or given by him/her orally.^[28] The accused should be allowed to interrogate the claim and in the event of oral testimony being adduced to cross examine the applicant or his/her witnesses.^[29]
- [26] The accused must thereupon be given an opportunity to meet or counter the applicant's evidence especially if he/she maintains that the damage is less than that contended for by the latter.
- [27] The accused should also be given an opportunity to address the court before judgment not only on the issues of liability and compensation,
- but also as to his ability or affordability to meet payment of the order that will be taken to be a civil judgment.^[30]
- [28] All relevant facts must be obtained before an award can be made.^[31]
- [29] It would appear from the manner in which the court summarily determined the question of the accused's liability to pay compensation to a complainant (who was not even identified as the "injured person"), and its guestimate of the amount of compensation under the circumstances, that its dealing with the purported civil claim fell woefully short of the established procedures required in a section 300 enquiry. The award is rendered assailable for this reason as well.
- [30] In the result I make the following order:
- The convictions on counts 2 and 3 as well as the sentence imposed (in respect of both charges taken together for purposes of sentencing)
- are confirmed, provided that the adjunct to the order purporting to constitute a compensatory award is set aside.

B HARTLE

JUDGE OF THE HIGH COURT

I AGREE

B R TOKOTA

DATE OF JUDGMENT: 20 February 2020

- [1] A compensation order is a “resultant order” as contemplated in section 309 (1)(a) of the CPA, and is therefore both appealable and subject to review in terms of section 304 (2)(c)(ii) of the CPA.
- [2] Section 300 (1) of the CPA requires that the damage must be caused as a direct result of the commission of the offence of which the accused was convicted. (See also *S v Crane* 1994 (2) SACR 197 (c) at 210 b – h.) The offence of malicious injury to property of which the accused was acquitted would therefore be irrelevant for such purposes. The prosecutor correctly sought to draw a connection between one of the assault convictions and the damaged door, but it appears to have been assumed by the magistrate that Zikho Nojaholo was the “injured person” for purposes of section 300 of the CPA. Without expressing a conclusive opinion on whether another person’s consequential loss, which may have had its origin in one of the offences of which the accused was convicted, or whether Zikho’s loss occasioned by having to compensate another person and causing a loss of patrimony to herself in the process, falls to be covered by the kind of damage or loss of property (including money) contemplated by section 300, it bears noting that this jurisdictional basis for the invocation of the section was not contemplated with much acuity at all in the proceedings under review.
- [3] *S v King* 2014 JDR 2727 (ECG) at paras 6 – 8.
- [4] See section 300 (1)(a) of the CPA read with GNR 62 of 30 January 2013 (GG 36111) regarding the cap on the Magistrate’s Court jurisdiction in respect of the amount of compensation that it can order to be paid.
- [5] One should carefully consider who the “injured person” is as contemplated in section 300. See Hiemstra’s

Criminal Procedure at 29-3.

- [6] See section 300 (3) of the CPA.
- [7] Being in the nature of a civil order, it can only be enforced by levying execution, and not by way of criminal procedure measures,

such as imprisonment. If the payment of compensation (on terms) is ordered in the context of a suspended sentence, however,

and the accused fails to meet a condition of the suspension, he may be incarcerated for failing to pay the compensation timeously or at all in terms of the sentence imposed, but this is not civil imprisonment for debt which the Constitutional Court, in *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, PE Prison, & Others* [1995] ZACC 7; 1995 (4) SA 631 (CC), held to be unconstitutional. See also *S v Medell* 1977

(1) SACR 682 c at 686 f – 687 j.

[8] Time limits are not embedded in civil judgments for debt. Instead they are immediately payable and executable (*S v Medell* supra, at 687 a – b), although in practice extensions for the payment of civil orders of the magistrate's court can and are often given. Such extensions would however have to be with the consent of the injured person (*S v Nyathi* 1978 (4) SA 26 (T) at 27A). Time periods can indeed be imposed in situations where the payment of compensation is a condition of the suspension of a sentence. This is perfectly permissible, but within the context of such a suspended sentence, which is an entirely different kind of situation. (See *S v Tlame* 1982 (4) SA 319 (B) at 320 H – 321 A and *S v Bepela* 1978 (2) SA 22 (B) at 24 G).

[9] *S v Maelane* 1978 (3) SA 528 (T); *S v Msiza* 1979 (4) SA 473 (T) at 475 F – G.

[10] The accused's legal representative ought certainly to have been apprised if there was a proper application for compensation

before the court which it was constrained to consider. In that event he should then have been informed of the exact case the accused had to meet and have been afforded an opportunity to address the court thereon and to lead evidence on the accused's

behalf. The amount of compensation can also only be established through proper evidence and is not something that is

left to the surmise or whim of the court. In *S v Sekhalo* 1999

(1) SACR 67 (W) at 70 d – e, the court correctly observed that when ordering compensation (albeit in that instance as a condition of a suspended sentence), it is necessary that the court establish with “some certainty” the actual amount lost by the

aggrieved person. In *S v Mape* 1972 (1) SA 754 (EC) the court noted at 755 A that the amount to be awarded must be proved on the evidence in the same way as it would have been done in a civil trial claiming such compensation and that the court is concerned with actual, not speculative, losses. The magistrate can in any event only deem “fit” a proven amount assuming a basis exists in the first place for her to determine the compensation as provided for in section 300 (2) of the CPA.

- [11] There is no explanation for the lengthy lapse in-between the date of conviction (1 July 2019) and the review record reaching the Registrar only in December 2019. By this time the accused would no doubt have paid the compensatory award, rendering the value of a review illusory in the circumstances.
- [12] King *supra*, delivered on 11 December 2014 by Brooks AJ as he then was.
- [13] His affordability to immediately pay the award is however an important indicator of whether the court should exercise its discretion to grant such an order should it be asked for. If he cannot, it would render the order futile as the injured person would be unable to forthwith levy execution in respect of the civil judgment. (*S v Bepela supra*; *S v Baloyi* 1981 (2) SA 227 (T) and *Hiemstra supra* at 28-2.)
- [14] *S v King Supra* at para [7]; *R v Mkize* 1961 (2) SA 769 (D); *S v Nkholise* 1967 (3) SA 163 (E); *S v Du Plessis* 1969 (1) SA 72 (N); *S v Fanie* 1970 (2) SA 609 (E); *S v Polman* 1973 (3) SA 21 (C); *S v Dunywa* 1973 (3) SA 869 (E); *S v Claassens en ‘n ander* 1973 (4) SA 300 (O); *S v Makhae en ‘n ander* 1974 (1) SA 578 (O); *S v Vanmali & another* 1975 (1) SA 17 (N); *S v Bepela supra*; *S v Msiza supra* at 475 B - E.
- [15] *S v Medell, supra*, at 685 j; *S v King supra*, at pars 6 – 8; *Hiemstra supra* 29-3; *Du Toit et al Commentary on the Criminal Proceedings Act* 29-2; and *Terblanche’s Guide to Sentencing* at footnote 3, page 462.
- [16] The person in whose favour the award has been made has sixty days in terms of subsection 5 (a) to renounce the award or to repay it if he/she has already received payment thereof, failing which he/she is taken, in terms of subsection 5 (b), to have accepted the civil judgment as constituting the final word on his/her claim for financial restitution.
- [17] An “application” presupposes a formal request to the court for compensation to be paid in terms of section 300 of the CPA.
- [18] The section 300 process has been referred to as a “convenient means of recovering a debt without having to institute a civil

action”. *Stow v Regional Magistrate, Port Elizabeth* 2017 (2) SACR 9ECG) 96 at 115 b. *Terblanche, A Guide to Sentencing in South Africa*, at page 462, observes that during such a procedure, the court should rid itself of its role as criminal court and adopt the role of a civil court. The process is somewhat anomalous

to most prosecutors and judicial officers in the district courts who tend to specialize in criminal procedure. (*Terblanche supra* (at 462) suggests that it is a salutary approach for such officers to avoid this procedure especially since a criminal court is not an ideal forum to resolve potential complications brought about by private law and civil procedure and to rather make use of the option provided by section 297 of the CPA, namely to impose compensation as part of the punishment, as a supplementary condition to the sentence.) This is more so the case where complicated civil law questions are in issue, where pleadings cannot be dispensed with because

the issues require definition or where comprehensive evidence has to be led. (*S v Lombaard* 1997 (1) SACR 80 (T) at 83 g – j. Hiemstra *supra* at 29-3 also observes that a criminal court is not the appropriate forum for the resolution of complicated damage issues. The suggestion is that compensation, whether in terms of section 300 or by means of suspended conditions, should be limited to cases where the determination of damages is “simple, uncontested and relatively clear”.

[19] 1974 (2) SA (T) 243 at 244 G.

[20] This section under the 1955 CPA is similar to section 300 under the present CPA.

[21] This excerpt is extracted from the English headnote of the judgment. See also *S v Majola* [2005] JOL 13633 (E).

[22] *Supra* at 244 H – 245 A.

[23] 1929 K.P.A 540 at 541. See also *S v Baadjies* 1977 (3) SA 61 (E) at 63.

[24] The compensation enquiry only begins after conviction.

[25] This assumes that the injured person has consciously elected to pursue his/her civil claim for compensation through the medium of the criminal proceedings.

[26] *Du Toit supra* at 29-3

[27] If there are already facts in the evidence which are relevant to compensation, there is no need to repeat them, but the accused ought to be made aware of the evidence that tends to support the applicant’s application for compensation as how else will

he/she be able to meaningfully defend the claim without such an indication, absent formal pleadings in which the applicant’s

claim in this respect would customarily be particularized?

[28] Section 300 (2) of the CPA.

[29] Applying the *audi alteram partem* principle, these are rights properly afforded to parties in a civil lawsuit.

[30] This is because a section 300 order proper, being in the nature of a civil judgment, is immediately payable and should not be granted if the accused is not possessed of the means to pay it or does not have sufficient executable assets to cover the damages and costs of execution. (*S v Bepela supra*; *S v Baloyi supra*. Hiemstra *supra* notes at 29-2 that an order which cannot be executed is not only futile but also prejudices the injured person because civil

proceedings are forfeited in terms of section 300 (5)(b) of the CPA.

[31] See the guidelines noted by *Du Toit supra* at 29-3 in this respect.

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Prepared on 9 October 2026 · Esheria