THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

[Reportable]
High Court Ref. No. : 14552
Case No. : WRC 85/2009

In the matter between:

ANTHONY KOK Applicant

And

THE STATE
Respondent

REVIEW JUDGMENT: 2 JULY 2014

Background:

[1] This is a Special Review in terms of the provisions of Section 304(4) of the Criminal Procedure Act 51 of 1977 ("the Act"). This matter was referred to the High Court directly by the accused who was incarcerated in the Worcester Correctional Services Centre. He was convicted on a charge of theft of R98 668,98[1] on 20 June 2012 and was sentenced on 10 August 2012 to a period of five (5) years imprisonment that was further suspended for a period of 5 years on condition that, he is not convicted of an offence of theft, or any offence involving an element of dishonesty during the period of

[1] The accused admitted an amount of R98 663,45. See paragraph 10 infra.

suspension. The accused was furthermore ordered to pay the complainant, the entire amount of R98 682,98 by the 31 July 2013.

[2] On 1 August 2013, the accused was arrested and brought before the Regional Court in Worcester due to his failure to adhere to the condition of suspension that he pay the amount of R98 682,98 by 31 July 2013. The State brought an application in terms of the provisions of Section 297 (9)(a) of the Act for the suspended sentence to be put into operation. This resulted in the court putting the suspended sentence into operation, and the accused was sentenced to undergo a term of imprisonment of five (5) years.

[3] The accused thereafter on 27 November 2013 applied for leave to appeal against the original sentenced imposed to the court a quo, such leave was refused. On petition to this court leave was granted by Goliath J and Schippers J on 25 February 2014. Before the matter was set down for the appeal to be heard, the accused in a letter dated 23 May 2014 to the Registrar, requested that this matter be placed for consideration on review on 29 May 2014.

[4] Attached to his review documents he filed an affidavit in which he stated that during the sentencing proceedings in the Regional Court, after he pleaded guilty to theft, his attorney tendered a document on his behalf that he repay the amount stolen of R98 682,98 in instalment. According to the Appellant, the Regional Magistrate interrupted his attorney and informed him, that in terms of the Public Finance Management Act, No.1 of 1999 ("PFMA") money due to the State must be paid within a year. This prompted the Magistrate to impose as a condition of his suspended sentence, that he repays this money within a year. The accused was unable to pay this amount in a year because of financial difficulties, and this resulted in him being in breach of the condition of suspension. As a result of his failure to pay this amount the suspended sentence was imposed.

[5] After a perusal of the record, the allegation made by the accused proved to be correct. As a result of this, an order was issued on 13 June 2014 by myself that the accused be released forthwith, unless there are other reasons for his further incarceration. Upon a further perusal of the record of the proceedings in the Regional Court, I am of the

view that the conviction of the accused by the Regional Magistrate on the charge of theft needs to be reconsidered.

[6] The Proceedings in the court a quo, prior to conviction

The accused was charged in the Regional Court in Worcester on one count of fraud in that, or during March 2008 in Adderley Street, Worcester he unlawfully and falsely gave out to the GEPF, the SAPS, and the High Court of South Africa, that he was entitled to receive an amount of R98 682,98 from the GEPF or the South African Police Services and therefore, by means of the said false pretences induced the GEPF and, or High Court of South Africa and the South African Police Services to pay out an amount of R98 682,98. Whereas, in fact, he knew that he was not entitled to receive the amount of R98 682,98 from the said GEPF or SAPS. The accused was not charged in the alternative of theft of the amount of R98 682,98.

[7] The Prosecutor, however before the accused was asked to plead, requested the court to confirm from Mr Maritz the attorney of the accused whether the provisions of Section 256 of the Act in the words of the prosecutor at page 51 – 52 where he said … "regarding the competent verdict … as well as the common law offence of theft which is also a competent verdict", to which the Magistrate reacted as follows: "Mr Maritz, did you explain to your client that he can also be found, if not found on the main count, he can also be found guilty on the competent verdict", to which Mr Maritz replied that he did. The accused pleaded not guilty to the charge and did not tender any explanation of plea.

[8] The allegations upon which the fraud charge is based is, that the accused after he was dismissed from the South African Police Services (SAPS), was indebted to the SAPS in an amount of R100 352,34. The SAPS requested the Government Employee Pension Fund (GEPF) to deduct the amount of R100 352,34 indebted to it by the accused from his pension benefit due to him. The accused launched an application to the High Court to interdict the GEPF and or the SAPS from deducting the said amount from his pension. This application was dismissed. The gist of the allegations is that the accused fraudulently and without the knowledge of the SAPS obtained an order from the High

Court which stated that the SAPS had no claim against his pension benefit. According to this alleged false order the GEPF was ordered to pay out the pension benefit in full to the accused, whereupon an amount of R98 687,98 was paid out fraudulently to the accused according to the State.

[9] In order to prove these allegations, the trial proceeded and a number of witnesses testified for the State. At some stage, Mr Maritz, who appeared on behalf of the accused withdrew as attorney of record. The accused conducted his own defence for a while and on 20 June 2012, the accused required the services of Mr Kroukam. Mr Kroukam informed the court that the accused wanted to make admissions in terms of the provisions of Section 220 of the Act. He however maintained that he did not commit the offence of fraud, and that he did not make any false representations to the complainants. He further conveyed to the court that he had reconsidered the facts and said (sic) … "do I admit that I am guilty of the competent verdict toward theft".

[10] Although he was no party thereto, he admitted that the GEPF had paid the amount of R98 663,45 into his bank account. He further admitted, that he used the money for his own purposes, and thereby committed the offence of theft. He further tendered to repay this amount to the State by means of instalments.

[11] The Conviction and Sentence

In this Special Review the main complaint of the accused against the proceedings before the Regional Court was as follows:

1) He committed a material error in law, which constituted a gross irregularity as envisaged in section 24 of the Supreme Court Act, 59 of 1959, alternatively the common law, when he held that the money due to the State must be repaid within one year (twelve months) in terms of the Public Finance Management Act, 1 of 1999, as amended "the PFMA"). The Public Finance Management Act does not contain such a provision.

2) According to the accused, the assertion made by the learned Magistrate tainted the entire sentencing procedure as he relied on "a provision of law that does not exist" on 8 August 2012 when he imposed the sentence and held that he must repay the money to the complainant on or before 31 July 2013. He submitted that there is a direct nexus between the sentence handed down on 8 August 2012 and 2 August 2013, when the suspended sentence were put into operation, and therefore submitted that neither the sentence on 8 August 2012 nor 2 August 2013 was in accordance with justice, and is reviewable in terms of section 304(4) of the Criminal Procedure Act, 51 of 1977 as amended.

[12] From this, it is clear that the accused complained, that the condition of suspension that he pay the amount of R98 682,98 by 31 July 2013 was according to him unfair and unreasonable. He said that the Regional Magistrate limited the period of repayment of this amount due to his (Magistrate) belief that in terms of the provisions of the PFMA all monies due to the State must be repaid within a year. This fact is borne out by the record at page 404 and page 405 as set out hereunder where the Regional Magistrate after the legal representative of the accused, Mr Kroukam made a tender that the accused pay an amount of R1 700,00 per month within a 5 year period.

MR KROUKAM: "Your Worship, at a R1 700,00 a month it would fall within any five year suspension term, Your Worship. When we spoke about this he said a R1 000,00 to a R1 500,00 and I made the calculations and told him that the court will not be able to make such a repayment order because it will extend beyond five years and the repayment period will have to be within five years, because it will have to be within the, if Your Worship considers a sentence like that obviously, within that five year suspension and a R1 700,00 per month will do that in that period, Your Worship".
COURT: "But if you can have a look at the State Finance Regulations, Treasury Instructions, Public Finance Management, at anybody who owes money to the State must pay back that money within one financial year".

COURT: "And then it is up to him how much he pay per month or the court can say he must pay back this money within 12 months, but not prescribed to him how much he must pay per month, because the Public Finance Management Act and other treasury

instructions need State money to be paid back within a. In fact I think it's even less than that, within one financial year, if at all the accused cannot pay it within one month, because usually here if you owe the State you have been overpaid by any amount the next month you wouldn't get your pay. The whole amount by which you owe the State is deducted from your salary as a whole".

COURT: "That's how we do that. He should know as an ex …. (inaudible). Five years is going to be too long. We are bound here by other instruments of the State, within what time must a person pay back what is due to the State".

[13] Evaluation

A suspended sentence is a useful tool in the arsenal of a judicial officer in order to achieve the aims and objectives of sentence, especially to deter offenders from committing similar offences in future. The other purpose of a suspended sentence is set out in the provisions of Section 297 (1)(a)(i). This includes compensation of the victim, rendering of community service, and rehabilitation. One of the aims of the sentence imposed was for the accused to compensate the State for the money that was stolen. This was framed as a condition of the suspended sentence.

[14] The Regional Magistrate clearly limited the accused's ability to repay the amount owed to the State due to his belief that in terms of the PFMA all monies due to the State should be repaid within one year. For this reason the accused alleges that he could not abide with the conditions of suspension that he repay the amount he admitted he stole. Whilst I agree that a condition of suspended sentence should not be merely for the benefit, or convenience of an accused person, it should however give him or her a realistic opportunity to avoid incarceration. This court in S v Grobler 1992 (1) SACR 184 (C) held that a condition of suspension should not be unduly onerous and should be reasonably possible for the accused to comply with. It must also not be such that it can be breached by some occurrence outside the control of the accused.

[15] A court will in general, when as a condition of suspension, it orders the payment of compensation, make an order of payment that an accused person is able to afford. A

court may, however, also order that an accused pay more than he or she is able to afford. See S v Mpofu 1985 (4) SA 322 (ZHC) at 329I – 330C. The Regional Magistrate did not specifically refer to the provisions he relied on in the Public Finance Management Act 1 of 1999 to conclude that he is unable to extend the period of repayment to more than one year.

[16] In the time I had at my disposal, I was unable to find such a provision in the PFMA. Even if there was such a provision, the Regional Magistrate clearly misdirected himself by relying on such a provision to limit the period of repayment of the amount owed by the accused.

[17] As a result of this, the condition of suspension that the accused pay off the amount owed to the State in one year was unduly onerous and it was not reasonably possible for the accused to comply with this condition of suspension. For this reason, the sentence imposed as well as the subsequent putting into operation thereof falls to be set aside.

[18] Although not specifically called upon to consider, the conviction in my view needs to be reconsidered. The powers of the High Court to review proceedings of the Magistrate's court is set out in section 304(2)(c) of the Act. Du Toit, De Jager, Paizes, Skeen and Van Der Merwe – Commentary on the Criminal Procedure Act [Service 51, 2013] at 30 – 12 'A'.

> "Section 304 not only lays down the procedures to be followed in regard to automatic review. It also establishes independent review opportunities, together with its own procedure for submission, besides the institution of automatic review. But whether the case comes before a judge via the institution of automatic review or whether it reaches him by way of the special review ground and procedures in s 304(4), the reviewing court has the same power. In addition, s 304 makes provision for the review of proceedings which until recently were dealt with by superior courts, pursuant to their inherent powers of review."[2]

[2] With regard to the High Court's inherent powers of Review. See *Walhaus and Others v Additional Magistrate Johannesburg and Another 1959 (3) SA 113 (A)*.

[19] In terms of Section 304(2)(c)(i) may confirm, alter or squash a conviction and in terms of ss (iii) it may also set aside, or correct the proceedings in the Magistrate's Court. Furthermore, in terms of ss (iv) it may generally give such judgment, or impose such sentence, or make such order as the Magistrate's Court ought to have given, imposed, or made on any matter which was before it at a trial in question.

[20] The conviction was based on the fact that the Regional Magistrate was of the view that theft is a competent verdict on a charge of fraud. The prosecutor, defence attorney as well as the Regional Magistrate before whom the accused was asked to plead, were under the mistaken belief that in terms of the provision of section 256 of the Act, that Theft is a competent verdict on a charge of fraud.

[21] What is of grave concern is how the Regional Magistrate as well as the prosecutor and attorney could have believed, firstly that theft is a competent verdict on a charge of fraud, and secondly, how the provisions of Section 256 of the Act which deals with the fact that attempt to commit an offence is a competent verdict on any charge where the completed crime cannot be proven. There is no provision in Chapter 26 of the Act dealing with competent verdicts, that theft is a competent verdict on a charge of fraud.

It is for this reason why prosecutors would usually add an alternative charge of theft on a charge of fraud. The provision of Section 256 of the Act clearly does not find any application in this case. This mistaken and erroneous belief upon which the Regional Magistrate convicted the accused was a clear misdirection.

[22] I am of the view however, that it does not vitiate the proceedings. In my view this is a case where the court on review may either alter, correct and give such judgment as the Magistrate ought to have given. I state this for the following reasons; The conviction of theft in my view is a competent verdict in terms of the provisions of Section 270 of the Act. The charge of fraud is not "an offence referred to in any" of the preceding sections of Chapter 26. "Section 270 reads as follows, "Offences not specified in this Chapter

If the evidence on a charge for any offence not referred to in the preceding sections of this Chapter does not prove the commission of the offence so charged but proves the

commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved." (own emphasis)

Although the offence of theft is specified in this Chapter, under section 264 of the Act, Section 270 refers to evidence on a charge for any offence not referred in the preceding sections.

[23] In this matter, the accused was charged for an offence of fraud which is not referred to in the preceding sections of Chapter 26. In S v Mavundla 1980 (4) SA 187 (T) the accused was charged with public violence, an offence that is not mentioned in any of the preceding sections of Chapter 26, but was convicted on a charge of assault with intent to do grievous bodily harm, an offence referred to in the previous sections (section 266). Similarly in S v Masita 2005 (1) SACR 272 (C) the accused was charged with contravening Section 17(1) of the Domestic Violence Act 116 of 1998 and the court found that assault with the intent to do grievous bodily harm was a competent verdict. In Mavundla (supra) as well as Masita (supra) it was held as in this case that if the essential elements of the lesser charge are contained in the offence charged, a competent verdict in terms of Section 270 would be permissible. In S v Mei 1982(1) SA (O) at 299 the learned Judge agreed with the Mavundla decision and also disagreed with Heimstra - Suid-Afrikaanse Strafproses view at that time, that in terms of the wording of Section 270 a finding of guilt on a lesser crime is permissible even if the definition of the crime charged does not encompass the lesser crime. The court further held at 303 F – G:

> "It seems to me that there is much to be said for the view that the wording of the new section bears the meaning that, as long as the "essential elements" of the lesser offence are included "in the offence so charged", ie in the charge sheet, not the legal definition of the crime, a finding of guilt on the lesser crime is competent".

Where the essential elements on which the accused is convicted, is however not contained in the offence charged, Section 270 finds no application. In this regard, see S v Malapane [2011] JOL 27840 (GSJ). In this case under review, the accused admitted to

the essential elements of theft by unlawfully appropriating the money which did not belong to him. On the fraud charge it was alleged that the accused by fraudulent means, appropriated the sum of R98 682,98 which was subsequently paid into his banking account and at a later stage, he unlawfully appropriated this money for himself by using it whilst knowing that he was entitled to it. On the theft charge, he admitted that he unlawfully appropriated the sum of R98 663,45 after it was deposited into his banking account and he later unlawfully used that money for whilst knowing that it was not due to him and that he was not entitled to use it. These elements were contained in the charge of fraud which is not an offence referred to in the preceding sections of Chapter 26.

[24] Furthermore, the conviction of the accused in this particular matter was not based on evidence that was presented by the State which he disputed but, on admissions he made during the course of the trial in terms of Section 220, wherein he admitted his guilt on a charge of theft. These admissions constituted proof of the commission of the offence of theft which by reason of the essential elements thereof, was included in the offence of fraud. The accused also wanted to plead guilty to the crime of theft.

[25] In applying the provisions of Section 304(2)(c)(iv), the judgment, the Regional Court ought to have given was that the accused is guilty on the competent verdict of theft of R98 663,45 (admitted by the accused as accepted by the State) by virtue of the provisions of Section 270 of the Act. The facts of this case justify such a conclusion and the conviction therefore in my view, so corrected, is in accordance with the law.

[26] In the result therefore, I make the following order:

1. That the conviction on the charge of theft of R98 663,45 follows upon the application of Section 270 of the Criminal Procedure Act 51 of 1977, and it is so confirmed.

2. That the matter is remitted back to the Regional Court for sentence to be considered afresh before another Regional Magistrate in terms of the provisions of Section 275 of the Act.

_____

HENNEY, J

Judge of the High Court

I agree, it is so ordered.

_____

LE GRANGE, J

Judge of the High Court