



**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

High Court Ref No:
Special Review Number: 63/2017
Magistrate Ref No: 14/1654/16

In the matter between:

THE STATE

V

DONOVAN CHRISTOPHER VAN DER MERWE

REVIEW JUDGMENT 20 SEPTEMBER 2017

KUSEVITSKY AJ

[1] This matter comes before me by way of a Special Review in terms of Section 304(4) Act 51 of 1977 ("the CPA"). It was referred to the High Court under cover of a note by Senior Magistrate Maku, who had expressed reservations about the correctness of a sentence imposed on an accused who had been charged with an offence of theft and pleaded guilty in terms of section 112 (2) of the CPA.

[2] On the 29 March 2017, the accused was accordingly sentenced as follows:

"In terms of section 297(1) (a) (i) (ff) Act 51 of 1977 the sentence is postponed subjected to the following conditions:

- 1.1 That the accused submits him to treatment at the in-patient drug rehabilitation program as arranged at De Novo Rehab Centre for compulsory treatment.
- 1.2 That the accused reports to FK Wakefield (or any other Probation Officer assigned to the case at the time) when informed to do so for his admission to the head of the De Novo Rehab Centre.
- 1.3 That as aforementioned in (1.2 supra) the Probation Officer Mr F K Wakefield of the Department of Social Development (or any other Probation Officer assigned to the case at the time) is ordered to ~~accompany the accused to the De Novo Rehab Centre as aforesaid~~ (1.2 supra) for his admission to the facility"

DECISION TO SEND ON SPECIAL REVIEW

[3] Senior Magistrate Maku relied on an opinion provided by Magistrate Louw with regard to the apparent shortcomings of the imposed sentence. In his opinion, Magistrate Louw noted that in handing down the sentence, the court *a quo* considered that the legislative framework of both the Criminal Procedure Act and the Prevention and Treatment of Substance Abuse Act, 70 of 2008 ("the Substance Abuse Act") were the parameters within which Magistrates are confined to apply their discretion. He also agreed that the Substance Abuse Act was one of the correct avenues in which an accused person could be sent to a rehabilitation centre. Magistrate Louw, however, differed with the judgment wherein the Magistrate concluded that:

"The objects of the Prevention and Treatment of Substance abuse act as set out in section 2(c) and (d) in the courts view would have been defeated had the court applied sentencing in terms of section 296 and 297(1)(b); the accused being a voluntary participant who wish to proceed to rehab..." ("my emphasis")

[4] According to him, the court *a quo* was not correct in considering the accused as a *voluntary service user*, as defined in the Substance Abuse Act.

THE LEGISLATIVE FRAMEWORK OF THE PREVENTION OF AND TREATMENT FOR SUBSTANCE ABUSE ACT 70 OF 2008 IN RESPECT OF SENTENCED PERSONS

[5] According to Magistrate Louw, any person entering a registered rehabilitation centre can only do so in terms of the Substance Abuse Act and by no other means. The admission of a person into any rehabilitation centre is highly regulated.

[6] Persons can enter a registered rehabilitation centre either as a Voluntary Service User under section 32 of the Substance Abuse Act or Involuntary Service User under section 35 of the Substance Abuse Act. An admission to a public treatment centre of either Service User can only occur in terms of this Act and in no other way.

[7] If the accused is considered a Voluntary Service User, section 32 provides the following: -

“Admission of voluntary service user to treatment centre

32. (1) an application for admission as a voluntary service user to a treatment centre must be made in the prescribed manner by –
- (a) the voluntary service user;
 - (b) any person acting on behalf of the voluntary service user; or
 - (c) a parent or guardian of that child, if the voluntary service user is a child.”

[8] Section 35 of the Substance Abuse Act deals with the committal of a person to a treatment centre after an enquiry is held by the court to investigate whether the person is a person as contemplated in section 33 of the Substance Abuse Act - in other words, an *involuntary service user*.

[9] Section 36 (1) of the Substance Abuse Act deals with the committal of a person to a treatment centre after conviction. Section 36(1) provides as follows:

~~"A court convicting a person of any offence may in addition or in lieu of any sentence in respect of such offence order that such person be committed to a treatment centre if the court is satisfied that such person is a person contemplated in section 33(1) and such order, for the purposes".~~

[10] Section 33 (1) in turn, refers to the Admission of an Involuntary Service User to a treatment centre and thereafter lists the requirements of such an admission.

[11] From the above, it is therefore clear that a section 36 committal after a court has convicted an accused can only apply to a person designated as an *involuntary service user* as contemplated in Section 33 (1).

[12] Further support of this is found in the 'Definitions' section of the Act which provides that an:

"involuntary service user" – means a person who has been admitted to a treatment centre upon being –

- (a) **Convicted of an offence** and has in addition to or *in lieu* of any sentence in respect of such offence, been committed to a treatment centre or community based treatment service by a court;

....

[13] Thus if one has regard to the wording of section 33 of the Substance Abuse Act and its reference to section 36, it is clear that the committal under section 36 of the Substance Abuse Act is only applicable to *Involuntary Service Users* and not Voluntary Service Users as was held by the court *a quo*.

[14] Furthermore, if and when the court is satisfied under section 36 that the ~~accused is a person as contemplated in section 33(1) of the Act, the court may~~ order the committal of such a person to a treatment centre and such order must be regarded as having been made in terms of section 35, and as stated, section 35 only deals with Involuntary Service Users.

SYNERGY WITH THE CRIMINAL PROCEDURE ACT

[15] It was Magistrate Louw's further view that if a magistrate *in lieu* of any sentence or in addition to any sentence, wished to refer a person to a rehabilitation centre, he or she could do so by applying Section 296 of the CPA. This section will automatically lead the magistrate to section 36 of the Substance Abuse Act. The latter section would then be the dominating section which has to be followed.

[16] If the magistrate, however, did not want to make use of section 296 of the CPA he or she could impose any other available sentence which would allow for rehabilitation treatment, such as the provisions contained in section 276 (1) (e) of the CPA. If the magistrate decided to impose any other available

'rehabilitation' sentence, the only route the magistrate is compelled to follow is section 36 of the Substance Abuse Act. Thus, whatever sentence the magistrate eventually imposes and that sentence is designed to commit an accused to a rehabilitation centre, the only gateway to such centre is through the Substance Abuse Act.

[17] If the magistrate wished to impose another sentence unrelated to rehabilitation, the magistrate may in addition thereto impose rehabilitation in terms of the Substance Abuse Act, provided that the first mentioned sentence does not negate or stand in the way of rehabilitation.

[18] Magistrate Louw was of the view that the court *a quo* imposed a postponed sentence in terms of section 297 of the CPA which was subject to the Substance Abuse Act and not a postponement of an order as contemplated in section 39 of the Substance Abuse Act. This assumption, it was said, was strengthened by the reference to the De Novo Rehabilitation Centre, a public treatment Centre, as opposed to a private treatment centre.

[19] Magistrate Louw was also of the view that the court considered the accused as a *voluntary service user* because of the frequent reference thereto in its judgment. He stated that if the court considered the accused a *voluntary service user* the only way an accused could enter the rehabilitation Centre would be *via* section 32 of the Substance Abuse Act. However, he said that it was clear that this route prescribed by section 32 was never followed by the accused or the court as there was no indication in the judgment that the accused applied

for or was going to apply for admission to De Novo. From paragraph 1.1 of the postponed sentence imposed by the magistrate, it is clear that a section 32 admission was never intended by the court.

[20] According to Magistrate Louw, the view of the court that the accused was willing to undergo rehabilitation treatment did not change his status from an *involuntary service* user to a voluntary service user. An accused person always *is and remains an involuntary service user.*

[21] There was also no indication that the court *a quo* found that the court was satisfied that the accused was a person as contemplated in section 33 (1) of the Substance Abuse Act. A finding in this regard is a prerequisite for a committal to a rehabilitation center under the Substance Abuse Act.

THE CRITICISM OF THE SENTENCE IMPOSED

[22] According to Magistrate Louw, the magistrate chose to impose a postponed sentence in terms of section 297(1)b)(i)(ff) of the CPA. This is a 'sentence' directed to the accused. We were told that the problem with this sentence is that it does not contain any order directed to the De Novo Rehabilitation Centre. It would therefore be impermissible for De Novo to consider the imposed postponed sentence as an order contemplated in section 36 of the Substance Abuse Act.

[23] The postponed sentence by the magistrate is the first leg of the sentence

and is only applicable to the accused and has no legal implications for De Novo.

In addition to the postponed sentence, the magistrate should have made a transition to the Substance Abuse Act and then make an additional order authorizing De Novo to admit the accused to their institution.

[24] As was stated, the imposed postponed sentence is an order directed to the accused and no one else. The postponed sentence does not contain any ~~order authorizing De Novo to detain the accused. If the postponed sentence had~~ contained a condition in terms of which De Novo was authorized or ordered to detain or admit the accused, it would have been a flawed sentence because a postponed sentence can never include an order directed at a third party as a condition of a sentence to an accused. It is the accused that was 'sentenced' not De Novo.

[25] For this very same reason we were told the imposed postponed sentence of the accused was inherently flawed in that one of the conditions in paragraph 1.3 of the sentence was directed at the probation officer and an order to a probation officer can never be contained in a condition of a sentence directed at the accused.

[26] It was stated that given the interpretation of the current sentence, the accused's admittance to De Novo is based outside the scope of the Substance Abuse Act and rests purely on a private arrangement or agreement between the accused and the De Novo institution. There was no order issued compelling De Novo to admit the accused. If the magistrate intended that the accused should

undergo rehabilitation at De Novo in terms of a private arrangement between them, the imposed sentence certainly does not display any such intention.

[27] If a magistrate feels that good reason exists to divert from section 296 procedures and that the section 297 postponed sentence should be imposed, the court is still compelled to apply all prescriptions of the Substance Abuse Act. De Novo can only admit the accused in terms of a court order, and a postponed sentence to an accused person can never be a substitute for such court order.

[28] In other words, in addition to the postponed sentence imposed by the magistrate, the magistrate had to make a section 36 order authorizing De Novo to admit the accused in terms of the provisions of the Substance Abuse Act.

PROPOSED SENTENCE

[29] Taking the above into account, it was suggested by Senior Magistrate Maku that the sentence of the accused on 29 March 2017 by the court *a quo* be set aside and substituted with the following proposal:

"In terms of section 297(1)(a)(i)(ff) Act 51 of 1977 the sentence is postponed for a period of three (3) years subject to the following conditions: -

1. That the accused submits him to treatment and rehabilitation at De Novo a public Treatment Centre as indicated below.
2. That the accused surrender him on the date, time and at the place directed by the Probation Officer in order to take up residence in the aforementioned treatment centre.

[30] It was also suggested that the following order is made:

"WHEREAS the court is satisfied that the accused is a person contemplated in section 33(1) of the **PREVENTION OF AN TREATMENT FOR SUBSTANCE ABUSE ACT, 70 OF 2008**,– **THEREFORE** the terms of section 36(1) of the said **ACT 70 of 2008** it is ordered that the accused is committed to a treatment centre designated by the Director-General to that the accused is committed to a treatment centre designated by the Director-General to receive the necessary treatment, rehabilitation and skills development for a period not exceeding 12 months calculated from date of admission."

[32] I fully agree with the sentiments of the learned Magistrates' Louw and Maku. In the circumstances, the following order is made:

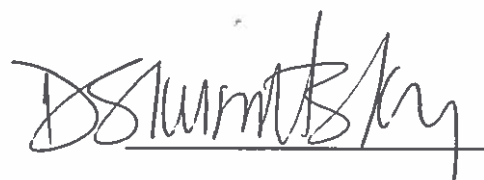
ORDER

1. The Order with regard to the sentence imposed on 29 March 2017 is hereby set aside and substituted with the following order:
2. **WHEREAS** the court is satisfied that the accused is a person contemplated in section 33(1) of the **PREVENTION OF AN TREATMENT FOR SUBSTANCE ABUSE ACT 70 OF 2008**, **THEREFORE** in terms of **section 36(1)** of the said **ACT 70 of 2008** it is ordered that the accused is committed to a treatment Centre designated by the Director-General in that the accused is committed to a treatment Centre designated by the Director-General to receive the necessary treatment, rehabilitation and skills development for a period not exceeding 12 months calculated from date of admission.

3. In terms of section 297(1)(a)(i)(ff) Act 51 of 1977 the sentence is postponed for a period of three (3) years subject to the following conditions: -

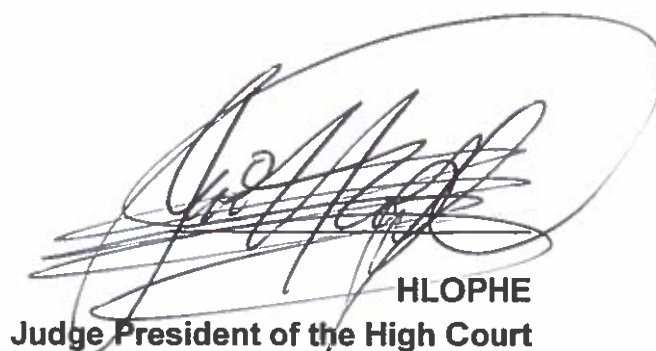
3.1 That the accused submits him to treatment and rehabilitation at De Novo a public Treatment Centre as indicated in 3.2 below.

3.2 That the accused surrender himself on the date, time and at the place directed by the Probation Officer in order to take up residence in the aforementioned treatment centre.



KUSEVITSKY
Acting Judge of the High Court

I agree



HLOPHE
Judge President of the High Court