In the High Court of South Africa
(Western Cape Division, Cape Town)

REPORTABLE

Case No: A 236/2020

In the matter between:

SELWIN PEDRO **APPELLANT**

And

THE STATE **RESPONDENT**

Bench: Gamble, J and Lekhuleni, AJ.

Heard: 19 March 2021

Delivered: 15 April 2021

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down isdeemed to be 15 April 2021 at 10h00.

JUDGMENT

LEKHULENI AJ:

INTRODUCTION

[1] This matter came to this court by way of an appeal from the decision of the Magistrate's Court, Oudtshoorn. The appellant, Mr Selwin Pedro was convicted of contravening section 65(2)(a) of the National Road Traffic Act 93 of 1996 *("the NR TA")* in that on 22 November 2018 and at or near Dysselsdorp on a public road in the district of Oudtshoorn he drove a motor vehicle, namely a BMW bearing registration number FFY […] while the concentration of alcohol in his blood was 0,19 g per 100 ml

in excess of the limit of 0,05 per 100 ml as stated in section 65(2)(a) of NRTA.

FACTUAL BACKGROUND

[2] The matter served before the court below on 25 July 2019. The appellant was legally represented by Ms. L. Prinsloo, a local attorney. After the charge was put to him, the appellant pleaded guilty. A statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 *("the* CPA ") was read into the record and was handed in as an Exhibit. The said statement was confirmed by the appellant. As usual, the State accepted the appellant's plea. The appellant was subsequently convicted as charged.

[3] The State proved a number of previous convictions against the appellant including a previous conviction for drunken driving in terms of section 65(1)(a) committed on 30 November 2015. Ms Prinsloo made substantive submissions regarding the appellant's personal circumstances and even called the appellant to testify in mitigation of sentence in terms of section 35(3) of the NRTA on why the court should not suspend his drivers' licence.

[4] In his testimony, the appellant informed the court that he had held the driving licence for 21 years and he required his licence for work and also for personal use. He testified that he needed his licence to travel from Belhar, Cape Town where he lived to Dysselsdorp where he worked and also to Port Elizabeth where his daughter was based. On being questioned by the court, he stated that quite often he worked after hours and if there was something that happened on site after hours, he was called to attend to it and to give a report to the employer. He also testified that when he was required to visit the site after hours, there was no public transport available at that time.

[5] What could be gleaned from the statement in terms of section 212(2) of the CPA are the facts relating to the offence. A day before he was arrested, the appellant drank a few beers with his friends at his house. His neighbour asked him to fetch her husband who was standing next to a clinic. It was during the night at 23h00. The neighbour informed him that it was dangerous for her husband to walk at that time of the day and the appellant then drove to fetch his neighbour. After he picked him up, and on his way home, the appellant heard the siren of a police vehicle driving behind him. He was stopped and the police observed that he was drunk and they arrested him. He was then taken to the hospital where a blood sample was extracted from him. He was then arrested and charged with drunken driving.

[6] In mitigation of sentence, Ms Prinsloo addressed the court *ex parte* and advised the court that the appellant was 51 years old and was divorced. She informed the court that the appellant had a girlfriend with whom he was in a relationship for the past three years. She also stated that the appellant had three children from his marriage. Two of them were 26 years old and the last born daughter was 20 years old and studied in Port Elizabeth. The daughter was dependent upon him. The appellant passed matric and has a diploma. He had been employed at that time at Grinaker-LTA as a Safety Officer for the previous thirteen years and earned a gross income of R21000 per month.

[7] The magistrate sentenced the appellant to a fine of R12000 or 18 months imprisonment of which R6000 or nine months' imprisonment was suspended for a period of five years on condition that the appellant was not found guilty of contravening section 65(1) and 65(2) of the NRTA committed during the period of suspension. In

addition, the appellant's driver's licence was suspended for a period of five years as from 25 July 2019. In terms of section 103 of the Firearms Control Act 60 of 2000, the court did not declare the appellant unfit to possess a firearm.

[8] The appellant applied in the court a *quo* for leave to appeal only against that part of the sentence which related to the suspension of his driving licence. The application for leave to appeal was refused by the magistrate. However, on 17 August 2020 this court on petition (per Bozalek and Francis AJ) granted leave to appeal on that aspect. In granting leave to appeal, the court noted that there were conflicting decisions in this division on the interpretation of section 35 of the NRTA. The court also proposed that a full bench of three judges be constituted to hear the appeal. In essence, it is this order that the appellant seeks to impugn. The sentiments that were raised by the court that granted the petition will be addressed later in our judgment.

PRINCIPAL SUBMISSIONS BY THE PARTIES

[9] At the hearing of this appeal, Adv. C. Prinsloo appeared pro bono on behalf of the appellant and the court would like to thank him in this regard. He contended on behalf of the appellant that the magistrate erred in failing to consider the personal circumstances of the accused together with the circumstances relating to the offence when he made the licence suspension order. He argued that the court a quo overlooked the decision of this court in *State v Lourens* 2016 (2) SACR 624 (WCC) in which it was held that in considering a suspension order in terms of section 35 of the NRTA the court has to give sufficient weight to the elements of the well-known triad principle as stated in *S v Zinn* 1969 (2) SA 537 (A). Counsel pointed out to this Court that pursuant to the suspension of his licence, the appellant had lost his employment.

[10] Ms Van Wyk, who appeared for the State, argued that the appellant was not a

first offender. She submitted that the appellant was convicted of drunken driving in 2015 and that the court a quo was correct in its order suspending the appellant's licence. She implored the court to dismiss the appeal and to confirm the order of the trial court.

APPLICABLE LEGAL PRINCIPLES AND DISCUSSION

[11] Section 35 of the NRTA was among other provisions of the NRTA that were amended with effect from 20 November 2010 by the National Road Traffic Amendment Act 64 of 2008. The amendment of section 35 reads as follows:

> *"(1) Subject to subsection 3, every driving licence or every licence and permit of any person convicted of an offence referred to in -*
>
> *(a) section 61(1)(a),(b) or (c), in the case of the death of or serious injury to* a
>
> *person;*
>
> *(aA) section 59(4), in the case of* a *conviction for an offence, where-*
>
> *(i)* a *speed in excess of 30 kilometres per hour over the prescribed general speed limit in an urban area was recorded; or*
>
> *(ii)* a *speed in excess of 40 kilometres per hour over the prescribed general speed limit outside an urban area or on* a *freeway was recorded;*
>
> *(b) section 63(1), if the court finds that the offence was committed by driving recklessly;*
>
> *(c) section 65(1), (2) or (5),*
>
> *where such person is the holder of* a *driving licence or* a *licence and permit, shall be suspended in the case of -*
>
> *(i)* a *first offence, for* a *period of at least six months;*
>
> *(ii)* a *second offence, for* a *period of at least five years;*
>
> *(iii)* a *third or subsequent offence, for* a *period of at least ten years,*

calculatedfrom the date of the sentence.

(2) Subject to subsection (3), any person who is not the holder of a *driving licence or of* a *licence and permit, shall, on conviction of an offence referred to in subsection (1), be disqualified for the period mentioned in paragraphs (i) to (iii), inclusive, of subsection*
(1) calculated from the date of the sentence, from obtaining a *learner's licence or driving licence or* a *licence and permit.*

(3) If a *court convicting any person of an offence referred to in subsection (1), is satisfied, after the presentation of evidence under oath, that circumstances relating to the offence exist which do not justify the suspension or disqualification referred to in subsection (1) or (2), respectively the court may, notwithstanding the provisions of those subsections, order that the suspension or disqualification shall not take effect, or shall be for such shorter period as the court may consider fit.*

(4) A court convicting any person of an offence referred to in subsection (1) shall, before imposing sentence, bring the provisions of subsection (1) or (2), as the case may be, and of subsection (3), to the notice of such person.

(5) The provisions of section 36 shall with the necessary changes apply to the suspension of a driving licence or a licence and permit in terms of this section

[12] As it will appear more fully hereunder, this section has been the subject of considerable debate in this court. The debate can roughly be divided into two schools of thought, both in terms of the reasoning and the outcome. The one school adopts what I would term a more literal and a narrow interpretation of section 35(3) to the effect that in determining whether a non-suspension order was justified, the law-maker has now limited factors which may be taken into account exclusively to 'circumstances relating to the offence'. This is typified by the following passage in *S v Greet* 2014 (1)

SACR 74 (WCC) at para 11 where Rogers J (Saldanha J concurring) stated:

"There was evidence in the present matter that the appellant required his

driving licence for work purposes and might lose his job if the licence was suspended. He had a four year old child in respect of whom he paid maintenance of R500 per month. He also testified that he drank only on weekends and that subsequent to the incident he had given up alcohol altogether. He was, furthermore, a first offender. Whatever the relevance of these circumstances might be, if the court were considering a suspension in terms of section 34(1), they cannot in my view be regarded as circumstances relating to the offence as contemplated in the amended section 35(3), i.e. circumstances relating to the fact that on 30 July 2011 the appellant drove a vehicle in Church Street, Vanrhynsdorp, at a time when the alcohol in the blood exceeded the limit specified ins 65(2}(a)."

[13] The very same court adopted an identical approach in *State v De Bruin* WCHC Ref 141270 (Unreported judgment of 29 January 2015). In that case, the court went on to say that the amendments made to section 35 of the NRTA with effect from 20 November 2010 have the consequence that, whereas previously there was no limit on the circumstances to be taken into account, they are now restricted to those relating to the offence itself, and unless a particular circumstance can properly and rationally be said to relate to the offence, it must be left out of account. In S *v Tokhwe* [2017] ZAWCHC 26 (22 March 2017) Rogers J, in a matter which came before the court by way of automatic review, acknowledged the difference of opinion on this section in this Division and stated that he adhered to the views he expressed in the two cases discussed above. The Presiding Judge in this matter (who agreed with Rogers J in the *Tokhwe* matter) expressly declined to deal with the difference of opinion as the issue had not been argued before that

court.

[14] The second school of thought in this Division adopts a wider interpretation of the section and applies a purposive approach to sentencing. This school has observed that both the circumstances pertaining to the commission of the offence as well as the factors relevant to the sentence, both mitigating and aggravating, must be considered conjunctively when a suspension order is considered. This is the approach adopted in *Lourens (supra)* by Savage J (Henney J concurring) who opined that imposing a sentence is an action that requires the court to work purposively at finding the most appropriate sentence in a manner which accords with an accused's fair trial rights embodied in section 35 of the Constitution.

[15] Her Ladyship reasoned that this approach is buttressed by the views expressed decades ago in *State v Zinn (supra)* at 540G, that in sentencing the personal circumstances of the accused are to be considered together with, inter alia, society's demand for retribution, which must be carefully balanced. Her Ladyship went on to state that:

> "[17] For all of these reasons, the view I take of the matter is that, in considering an appropriate sentence under section 35 consequent to the commission of an offence in terms of s 65(1), an interpretation of the words 'circumstances relating to the offence' in section 35(3) is to include a consideration of the circumstances of the offender and the interests of the community."

[16] It must be stressed that a number of subsequent Full Court decisions pronounced

in this division have disagreed with the narrow approach adopted in *S v Greet* and *S v De Bruin* and supported the view expressed in *Lourens.* For instance, in *S v Muller* (Case A241/18 - Unreported Judgment of 16 November 2018) Cloete J (Parker J concurring) agreed with the reasoning and finding of the Full Court in *Lourens.* In that court's view, the section 35(3) enquiry indeed forms an integral part of the determination of an appropriate sentence

[17] However , Cloete J lamented the uncertainty on the difference of opinion that has led to the most unsatisfactory result that lower courts are left in the dark as to which authority they are bound by. Meanwhile in *S v Brink* 2018 (2) SACR 6 (WCC) Davis AJ (Allie J concurring) and in *S v Stockenstroom* Case no. A24/2018 (Unreported decision of 09 March 2018) Thulare AJ (Bozalek J concurring) found that the circumstances relating to the offence in terms of section 35 are not limited in this manner but include traditional sentencing factors, such as the personal circumstances of the accused.

[18] In my view, this difference of opinion is caused by the interpretation of section 35(3) of the NRTA, in particular whether this section limits the power of the court to only consider the circumstances relating to the offence or to consider the triad applicable in sentencing proceedings when giving consideration to an order of suspension in terms of section 35(3). In my opinion, the appropriate place to begin with is giving content and meaning to this provision, and for this court to consider the constitutional and jurisprudential principles that govern the task of statutory interpretation.

[19] Our Constitution requires a purposive approach to statutory interpretation - See *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs*

and Others 2000 (1) BCLR 39 (CC) at para 24; *Daniels v Campbell NO and Others* 2004 (7) BCLR 735 (CC) at paras 22-23. The starting point should be section 39(2) of the Constitution which provides that:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[20] In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2000 (10) BCLR 1079* (CC) at para 22, the Constitutional Court interpreted this provision to mean, *inter alia,* that the Constitution requires judicial officers to read legislation, where possible, in ways which give effect to its fundamental values and in conformity with the Constitution.

[21] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR 687 (CC) at para 91, Ngcobo J stated:

> "The technique of paying attention to context in statutory construction is now required by the Constitution, in particular, s 39(2). As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the 'spirit, purport and objects of the Bill of Rights."

[22] A contextual or purposive reading of a statute must remain faithful to the actual wording of the statute. A contextual interpretation must be sufficiently clear to accord with the rule of law. The purpose of a statute plays an important role in

establishing a context that clarifies the scope and intended effect of a law - *See Bertie van Zyl (Pty) Ltd and Another v Minister of Safety and Security* 2010 (2) SA 181 (CC) at para 22. Mindful of the imperative to read and interpret legislation purposively in conformity with section 39(2) of the Constitution, I turn to consider the question whether, properly construed, section 35(3) of the NRTA limits the power of the court when considering a cancellation or a suspension order in terms of section 35(1) of the NRTA to confine itself exclusively to the circumstances pertaining to the offence to the exclusion of other factors relevant in sentencing

[23] In my view, the provisions of section 35(3) of the NRTA must be examined together with the other subsections of section 35 and not in isolation. Section 35(1) lists various offences under the Act which attract a mandatory minimum sentence of six months in the case of a first offence, five years in the case of a second offence, and ten years in the case of a third or subsequent offence. When one considers all the offences listed in the NRTA it is apparent that the offences listed in section 35(1) are the most serious offences - See S *v Brink* 2018 (2) SACR 6 (WCC) at para 32. In the absence of circumstances mentioned in section 35(3) the court is bound to impose the minimum licence suspension envisaged in that section. Section 35(4) makes it mandatory for a court convicting any person of an offence referred to in subsection (1) before imposing sentence, to bring the provisions of subsection (1) or (2) (i.e. the possibility of a suspension of licence as the case may be), to the attention of the accused. *("emphasis added ")*

[24] Gleaned from the plain reading of this section in its entirety, it is clear that the imposition of sentence and the order of cancellation or suspension of a driving licence must be considered together. This view is supported by the fact that the suspension

of a driving licence is punitive in nature. The sentence that a court may impose in terms of section 276 of the CPA must have due regard to the punitive nature of a suspension order that may be ordered as a result of an offence committed under section 65 of the NRTA.

[25] In other words, in imposing an appropriate sentence for a contravention of section 65(1) or (2) of the NRTA, the court must give sufficient weight to all relevant circumstances including aggravating and mitigating factors as well the circumstances relating to the offence envisaged in section 35(3) of the NRTA. Accordingly, the court may, having regard to the nature of the offence, the public interest, the personal circumstance of the accused as well as the effect of the suspension order on the offender, decide on the appropriate sentence and the period of suspension (if necessary), of the driving licence.

[26] In my opinion, this is what is intended by section 35(3) and (4). However, before a sentence is imposed, the accused must be informed of the right to present evidence under oath as to why the suspension order in terms of section 35(1) should not take effect. In my considered view, this is a procedural requirement that this Court may not overlook. More importantly, in considering the cancellation or suspension of a driver's licence, a court enjoys an unfettered discretion and should apply the facts before it in conformity with what the section stipulates.

[27] The presentation of evidence in mitigationof sentence envisaged by section 274 of the CPA and the presentation of evidence in terms of section 35(3) are intended to arm a court with sufficient information in respect of the offence and the offender so as to enable it to exercise the sentence discretion properly. In the exercise of that

discretion, the court is bound by the general principles of sentencing as enunciated in *S v Samuels* 2011 (1) SACR 9 (SCA) where the Supreme Court of Appeal stated:

> '[91] It is trite that the determination of an appropriate sentence requires that proper regard be had to the well-known triad of the crime, the offender and the interests of society. After all, any sentence must be individualised and each matter must be dealt with on its own peculiar facts. It must in fitting cases be tempered with mercy. Circumstances vary and punishment must ultimately fit the true seriousness of the crime. The interests of society are never served by too harsh or too lenient a sentence.·

[28] Furthermore, it is well established in our law that a provision such as section 35 of the NRTA which provides for the suspension of a driving licence serves two purposes, namely, to punish the offender and to protect the public. See *S v Van Rensburg* 1967 (2) SA 291 (C) and *S v Markman* 1972 (3) SA 650 (AD) at 6550 . The cancellation or the suspension of a driver's licence has far reaching consequences inter alia, the deprivation of an individual of the right to drive on a public road.

[29] In my judgment, it must be assumed that when the legislature introduced the amendment of section 35(3) in terms of the NRTA, the legislature was aware of the general principles of sentencing espoused above as well as the dual purpose of section 35. The legislature must at least *prima facie* be taken to have intended that an order of suspension or cancellation was to serve the purpose indicated in this decision, namely, that of protecting the public and of punishment. Furthermore, the legislature must have been aware that it is trite that courts have to consider the triad

and the applicable principles of sentencing when imposing a punishment. In my view, if the legislature intended the courts to consider the circumstances relating to the offence as the sole consideration for the cancellation or suspension order, the legislature would have expressly stated so.

[30] It is worth noting that from the reading of section 35(4), a court is bound to inform an accused person before the imposition of sentence of the possibility of a suspension order being made. In my opinion, it is obvious from this provision that the general principles applicable in sentence proceedings find application in cases involving a contravention of section 65(1) or 65(2). In addition, the factors that the court has to consider in passing sentence and in making the punitive suspension order in terms of section 35(3) are so inextricably imbricated that they cannot be separated ordealt with disjunctively.

[31] One of the noticeable innovations of the 2010 amendment of section 35(3) of the NRTA is the presentation of evidence under oath in order to determine if circumstances relating to the offence exist which do not justify the suspension of a driving licence. The court can only consider these circumstances after convicting an offender and during sentence proceedings. The evidence in terms of section 35(3) of the NRTA must be presented during the presentation of evidence in mitigation of sentence. In my view, the evidence in terms of section 35(3) cannot be heard disjunctively with the evidence in mitigation of sentence in terms of section 274 of the

CPA.

[32] Section 274 provides that a court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be

passed.

Section 274(2) provides that the accused may address the court on any evidence received under subsection (1), as well as on the matter of the sentence, and thereafter the prosecution may likewise address the court. The circumstance relating to the offence as well as all relevant factors that have been placed before the court must be considered by the court conjunctively after the presentation of evidence in terms of section 35(3) of the NRTA read with section 274 of the CPA in determining whether an order of suspension or cancellation has to be ordered.

[33] It must be stressed that the introduction of section 35(3) in my view was intended to test under oath and through cross-examination the veracity of the circumstances relating to the offence during evidence in respect of sentence. It was not intended to be considered in isolation or on a piecemeal basis in passing sentence This provision was introduced so that the court can be placed in a better position to make an informed decision whether a suspension order is appropriate or not.

[34] In my view, therefore, the suggestion that the introduction of section 35(3) was aimed at limiting the unfettered discretion of the court to the factors relating to the offence when considering an order in terms of section 35(3) is, with respect, incorrect and in conflict with the plain reading of the Act, in particular the provisions of section 35(4).

[35] More importantly, if one has regard to the unfettered discretion conferred upon a court by section 35(3) as to the length of time for which a court can suspend the licence, it becomes apparent that the discretion of the court is not limited to

the circumstance relating to the offence. It is also apparent that the court's discretion is not restrained by the circumstances relating to the offence in determining the period of suspension. For instance, a court may convict an accused person for a contravention of section 65(1) or (2) of the NRTA and still find that notwithstanding the fact that the accused is not a first offender, his/her personal circumstances justify that a shorter period of suspension should be ordered.

[36] In other words, the court must of necessity not lose sight of the effect a suspension order may in certain circumstances have on the offender. In doing so, it must consider the personal circumstances of the accused. The court cannot therefore look at the circumstances relating to the offence in isolation and turn a blind eye to the personal circumstances of the accused. Such an approach, with respect, would mostlikely lead to a failure or a miscarriage of justice.

[37] Sentencing is about achieving the right balance between the crime, the offender and the interests of the community - S *v Zinn (supra)* at 540 G-H. In *S v Banda* 1991 (2) SA 352 (BG) at 355A Friedman J, as he then was, noted with admirable brevity that 'the elements of the triad contain an equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others.' In my opinion, a suspension or a cancellation order constitutes a significant part of punishment and it is obligatory for a court to consider all relevant facts before it makes such an order.

[38] If I correctly understand the approach of the first school of thought that professes the narrow interpretation of section 35(3), it suggests that a court should only consider the circumstances relating to the offence and simply ignore the severity and the adverse effect of the order of suspension on the offender. From a contextual reading of section 35 it cannot be said that this was the intention of the legislature. Inmy view, this approach is with respect erroneous.

[39] In *S v Markman (supra)* at 656A-B, the Appellate Division, as it then was, found that the suspension or cancellation of a driver's licence for negligent driving, even where the driving of vehicles is not the accused's vocation, can in itself cause appreciable, sometimes even severe hardship, since the motor car has become an essential part of our modern way of living. The court noted that ordinarily, therefore, it ought not to be lightly ordered, and that it should not be ordered without prior enquiry by the court into how it will affect the accused in his or her particular circumstances. I am aware that this case was decided before the 2010 amendments. However in my view, the principle enunciated in this decision holds sway to date.

[40] The enquiry as to how the suspension of the licence would affect the offender cannot be diligently conducted unless all the personal circumstances of the accused are placed before court for consideration. The court would not be in a position to know the impact of a suspension order on the offender if the enquiry is only limited to the circumstances relating to the offence. In other words, a suspension of a driving licence is an ingredient which has to be taken into account by a court when imposing sentence. It must not be dissociated from all the other factors and dealt with in isolation or on a piecemeal basis. As this very

case demonstrates, the taking away of an accused's driving licence is a severe punishment that quite often impacts on his livelihood and that of his family and dependants.

[41] To this end, I respectfully agree with the views expressed by Savage J in S *v Lourens* that a plain reading of the words 'circumstances relating to the offence' in the amended section 35(3) includes a consideration of the personal circumstances of the offender and the interest of the community so as to allow the sentencing court to impose a sentence dispassionately on consideration of all relevant factors traditionally relevant to sentencing.

[42] In conclusion on this point, I take the view that for all intents and purposes, in considering a suspension order under section 35 based on the conviction for an offence in terms of section 65(1) and (2), an interpretation of the words 'circumstances relating to the offence' in section 35(3), should include a consideration of the circumstances of the offender and the interest of the community as was stated in the *Zinn* case. I also find that the narrow interpretation accorded by the court in S *v Greef* and S *v De Bruin* is likely to lead to an injustice and is in conflict with the long established sentencing principles entrenched in our law discussed above.

[43] Reverting to the present matter, it is evident that the trial court considered the provisions of section 35(3) and applied the narrow approach applied in the *Greef* matter. The magistrate failed to take into account the personal circumstances of the accused at all. The trial court failed to consider the fact that the accused often worked late and that he required his driver's licence for his

work.

[44] As I have said, at the hearing of this appeal, the Court was informed that pursuant to the impugned suspension order, the appellant lost his employment. It is indubitable that the suspension of the appellant's driving licence has had a deleterious effect on the appellant and his livelihood. The trial court failed to take into account the fact that the appellant was not involved in an accident. The trial court failed to consider the fact that the appellant had few drinks with his friend and his neighbour asked him to fetch her husband who was at a corner next to a clinic nearby. It was unsafe for the husband of the neighbour to walk home. The road was not busy and it was late at night in a remote country town.

[45] In my view, the court a *quo* over-emphasized the fact that the appellant was a second offender and that he did not learn from his previous indiscretions. This is borne out by the interaction between the appellant and the court during the section 35(3) enquiry. On a conspectus of all the evidence, I am of the opinion that a suspension of the appellant's driving licence for a period of five years under these circumstances was grossly disproportionate to what could be considered fair and reasonable in the circumstances of this case. In my judgment, a suspension order for a shorter period should have been ordered.

ORDER

[46] In the result, I would propose that the appeal be upheld and the order suspending the appellant's driving licence for five years be set aside and be replacedwith the following order:

"In terms of section 35(3) of the NRTA, the accused's driving licence is

suspended for a period of eighteen months. The period of suspension will be antedated from the date of sentence, 25 July 2019".

Lekhuleni AJ
Acting Judge of the High Court

GAMBLE, J:

[47] I have read the judgment of my Acting Colleague, Lekhuleni AJ, with which I fully agree.

[48] In paragraph 13 of his judgment, Lekhuleni AJ refers to the matter of S v Tokhwe, a matter which came before Rogers J and myself in March 2017 as an automatic review in the ordinary course under s 302 of the CPA. We considered the sentence imposed by the magistrate excessive and interfered without more.

[49] The issue of the automatic suspension of the accused's driver's licence was dealt with by Rogers J *en passant* in the course of his judgment. I regarded the point as an *obiter dictum* for the purposes of the automatic review and did not consider it necessary to enter into the debate regarding the two schools of thought with which my Acting Colleague has dealt so extensively in his judgment above. My position was articulated thus in Tohkwe -

"[16] I do not express an opinion on the difference of judicial opinion reflected in *Greeff* and *Lourens.* I was not party to either of these decisions and the matter has not been argued."

[50] The matter having now been fully ventilated in this appeal, I am satisfied that the purposive interpretation preferred by my Acting Colleague, which accords with the approach adopted in Lourens, and in subsequent similar matters by the majority of

judges in this Division, is the correct one.

[51] There will accordingly be an order in the terms proposed by Lekhuleni AJ.

GAMBLE J

JUDGE OF THE HIGH COURT