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

(Coram: Le Grange, J et Henney, J)

High Court Ref No: 325/2022
Magistrate's Case No: 380/2021

In the matter between:

THE STATE

v

TRYMORE MURIDZO

And

High Court Ref No: 324/2022
Magistrate's Case No: 457/2020

THE STATE

V

MAHLOMOLA RAMAFIKENG

JUDGMENT: 20 FEBRUARY 2023

HENNEY, J (Le Grange, J concurring)

Introduction

[1] This is a special review in terms of section 304 (4) of the Criminal Procedure Act 51 of 1977 ("the CPA") transmitted to this court by the senior magistrate of Worcester ("the senior magistrate"), after it was discovered, in an oversight of cases

that was conducted at the Laingsburg Magistrate's Court that in two cases, the trial magistrate committed an error during the sentencing proceedings of the accused, in those cases. The two cases were dealt with by the same magistrate. The two cases are *S v Ramafikeng*, ("the first case") and the case of *S v Trymore Muridzo* ("the second case").

[2] The first case was finalized on 8 December 2021 and the second case was finalised on 25 August 2021 and it seems that the error committed by the magistrate in these that caused these cases to be transmitted for special review was only discovered prior to 8 September 2022, when the senior magistrate's transmitted these two for review, to the high court.

[3] According to the senior magistrate, the sentences imposed on both accused in their respective matters were not in accordance with justice, after being convicted of contravening section 5 (b)[1] of the Drugs and Drug Trafficking Act, 140 of 1992 ("the DDTA") in the two cases.

The first case

[4] In this case the accused was charged with contravening section 5 (b) of the DDTA as well, as a charge relating to the Contravention of Immigration Act, 13 of 2002. This review is not concerned with the proceedings relating to this charge. The accused, a 32-year-old male, a Lesotho national, was arrested on 14 September 2020, at N1 National Road near Laingsburg, after he was stopped by the police, who searched the truck and found 14.2 kg of cannabis, valued at R28,400 that he was transporting.

[5] On 8 December 2021, the accused decided to plead guilty on both charges, after having spent all the time in custody awaiting trial. During the plea proceedings before the magistrate, he was questioned in terms of the provisions section 112(1)(b)

[1] **5. Dealing in drugs.**—No person shall deal in—
(*a*) any dependence producing substance; or
(*b*) any dangerous dependence producing substance or any undesirable dependence producing substance…

of the CPA. The accused admitted that he transported the dagga. He also stated that he was going to use some of it and to sell it. On this charge, he was sentenced to a fine R3000 or 12 months imprisonment and paid the fine immediately on the same day.

The second case

[6] In this case, the accused, a 34-year-old, Zimbabwean National, was arrested with another gentleman. They were arrested on 8 August 2021 and remained in custody awaiting trial until 25 August 2021. Both were charged with contravening section 5(b) of the DDTA as well as contravening the Immigration Act, 13 of 2002. The drug dealing charge was withdrawn against his co –accused. In this case the accused was legally represented. The Immigration Act contravention also does not have any bearing on this review.

[7] On 25 August 2021, he pleaded guilty and a statement in terms of the provisions of section 112 (2) of the CPA was presented to the accused, wherein he admitted his guilt. He was convicted subsequent to the court being satisfied on the basis of this plea that he committed the offence. On this charge, he was sentenced to a fine of R10,000 or three (3) years imprisonment. He also immediately on the same day after having been sentenced paid the fine.

The issue to be considered in this Special Review

[8] The senior magistrate is of the view that the sentence imposed by the presiding magistrate in both cases are not competent sentences and not in compliance with the sentencing provisions of the DDTA. The sentencing provisions for offences committed in terms of the DDTA and in particular section 5(b) thereof are set out in section 17 (e) read with section 13 (f) of the DDTA.

Section 13 of the DDTA states:

13. Offences relating to scheduled substances and drugs—Any person who—

(a) …;

(b) …;

(c) …;

(d) …;

(e) ; or

(f*)* contravenes a provision of section 5 (b), shall be guilty of an offence.
The penalty provision for a contravention of section 13(f) are as follows and is set out in section (17) (e) of the DDTA.

Section 17 states that;—Any person who is convicted of an offence under this Act shall be liable—

(*a*)…;

(*b*)…;

(*c*)…;

(*d*) ; and

(*e*) in the case of an offence referred to in section 13 (f), to imprisonment for a period not exceeding 25 years, or to both such imprisonment and such fine as the court may deem fit to impose.

[9] In both cases, the senior magistrate submits that a person who has been convicted for dealing drugs must be sentenced to a term of direct imprisonment, or at least direct imprisonment which may be suspended on certain conditions. He further submits that in this matter, a fine was imposed with an alternative period of

imprisonment, is an incompetent sentence and not in accordance with section 17 (e) of the DDTA.
This in my view, with respect, reflects the correct position in our law for the past three decades, and has been pronounced on in judgments not only of this court but also in a number of other divisions.

[10] In order to address the concern of the senior magistrate and his colleagues that regularly asses the work of newly appointed and less experienced magistrates, regarding sentencing in cases like this it perhaps necessary to restate the law in this regard.

[11] One of the first cases that dealt with the interpretation of a similar provision like this under the previous Act, the Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971 came this court in the matter of *S v Van Zyl and others 1992 (2) SACR 101 (C)*. In that matter, Selikowitz, J also in a special review dealt with the amended sentencing provision of section 2*(d)*(i) of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971 that was amended by section 1*(a)* of the Abuse of Dependence-producing Substances and Rehabilitation Centres Amendment Act 78 of 1990.

[12] This amendment changed the penalty provisions for dealing in a dependence producing substance to a maximum period of 25 years imprisonment or such imprisonment, as well as any fine, the court might find fit to impose. In *Van Zyl*, the court found that the proper interpretation of that section, which is similar to the current provision as set of section 17 (e) of the DDTA, was that a court is obliged to impose a term of imprisonment (not exceeding 25 years). And furthermore, has the option to impose an additional fine (with an alternative term of imprisonment enforcing such payment in terms of the provisions of section 287 (1)[2] of the CPA.

[2] **287 Imprisonment in default of payment of fine**(1) Whenever a court convicts a person of any offence punishable by a fine (whether with or without any other direct or alternative punishment), it may, in imposing a fine upon such person, impose, as a punishment alternative to such fine, a sentence of imprisonment of any period within the limits of its jurisdiction:
Provided that, subject to the provisions of subsection (3), the period of such alternative sentence of imprisonment shall not, either alone or together with any period of imprisonment imposed as a direct

The court in that case, also made reference to *S v Baliso (1991)(2) SACR 366(T)*, where the court in a previous decision also interpreted the amended sentencing provision of the previous act in a similar manner.

[13] In *S v Mqikela 2005 (2) 397(E)* which is one of the first cases that dealt with the similar provisions under the provisions of the current DDTA as set out section 13(f), Jones J (Leach J, concurring) also in a special review held the following at page 399 A -C:

"*The magistrate has interpreted and applied this section over the years to oblige him to impose a sentence of imprisonment without the option of a fine (which may be fully or partially suspended). He has considered that in addition to this sentence of direct imprisonment, the section allows him to impose a fine, to which he may add an alternative of imprisonment in default of payment in terms of s 287(1) of the Criminal Procedure Act 51 of 1977. This interpretation is correct. The section provides that the court must impose a term of imprisonment, but it does not preclude the total or partial suspension thereof. See S v Van Zyl and Others 1992 (2) SACR 101 (C); S v Mazibuko 1992 (2) SACR 320 (W) at 322j - 323b; S v Mohome 1993 (1) SACR 504 (T); S v Mosolotsane 1993 (1) SACR 502 (O); S v Baliso 1991 (2) SACR 366 (T) at 369h - 370b; S v Zwane 2004 (2) SACR 291 (N); and S v Sivuyile (unreported ECD case No CA&R 141/05, 19/05/05). The plain wording of the section makes provision for a fine in addition to, but not in substitution of, the sentence of imprisonment."*

The same interpretation was followed in S v Mlambo 2007 (2) SACR 664(T) Marais J (Borchers, J concurring) at 666 G- J and 667 A said:

---

punishment, exceed the longest period of imprisonment prescribed by any law as a punishment (whether direct or alternative) for such offence.

"…[T]he wording of the section leaves me in no doubt that the opposite is intended and that the court is obliged to impose a sentence of direct imprisonment and, only when it has done so, may it couple a sentence of a fine with an alternative of imprisonment to the sentence of direct imprisonment.
The first part of the sentencing provision provides only for direct imprisonment ('imprisonment for a period not exceeding 25 years'). The court is then authorised to impose an alternative form of punishment which is 'or to both such imprisonment and such fine as the court may deem fit .'. To interpret this section as authorising the imposition of any of the bouquet of punishments is to ignore the effect of the words 'both' and 'and'. The Legislature is stating clearly that the only alternative to a sentence of direct imprisonment is the imposition of 'both such imprisonment' and a fine.

My conclusion is underlined by the significantly different penalties provided in s 17(a), (b), (c) and (d), where the wording differs materially from that of s 17(e). In each previous section the court is authorised to sentence the accused to a 'fine or to imprisonment, or to both such fine and such imprisonment'.

In each case therefore the first sentence option is a fine, and imprisonment is thereafter authorised as an alternative sentence to the imposition of a fine. This difference makes the intention of the Legislature in s 17(e) even clearer, as the preceding sections authorise a fine as the first of three options. Section 17(e) signally does not, and only authorises a fine in conjunction with imprisonment ('or to both such imprisonment and such fine as the court may deem fit'). (In each case above where there is emphasis, it is my own.)

The change in wording was clearly not accidental, but the change appears to have eluded numerous courts, including those hearing the matters of Mahlangu (and various cases there cited) and Sokweliti. What is apparent from the change in wording is that the Legislature intended that dealing in dagga should be dealt with much more severely than lesser offences such as possession thereof."

[14] In the last reported judgment, S v *Madikane 2014(2) SACR 88 (GP)* the court also confirmed the interpretation of this provision as set out in the cases I referred to. The trial magistrate should either have imposed a sentence of direct imprisonment (wholly or partially suspended), without the option of a fine or to both such sentence of imprisonment coupled with a fine with an alternative of imprisonment enforced in terms of the provisions of section 287(1) of the CPA. It could not ***only*** impose a fine. A court is not empowered ***only***, to impose a fine in terms of section 17(e) of the DDTA which payment is enforced by section 287(1) of the CPA where a period of imprisonment is imposed as an alternative to such a fine, without an additional period of direct imprisonment.

[15] In general, where a penalty provision in a statute make provision for the imposition of a sentence of a fine or imprisonment, a court has a discretion to either impose the fine (with a term of imprisonment as an alternative to such a fine in terms of section 287(1) of the CPA) or a term of imprisonment as prescribed by such a statute. Unless the penalty provision states that a court is empowered to "*impose a fine or imprisonment or both*". The application of statutory provisions that states that the court can impose a fine or imprisonment are usually misunderstood, where a court would use the penal provisions in a statutory offence that grants a court the power to impose a period of imprisonment as alternative to such a fine.

[16] The enforcement of the payment of that fine is not granted by the statutory provision of a specific act, but by the provisions of section 287(1) of the CPA which gives the court the general power to enforce the payment of a fine by imposing a period of imprisonment as an alternative. In this regard, the cases of *S v Mathabela 1986 (4) SA 693 (T)* at *694F* that referred and relied on *S v Nkwane, S v Takwana 1982 (1) SA 230 (Tk)* at *232C-E* and *S v Arends 1988 (4) SA 792 (E)* at *794C* is still good authority on this point. This, it seems happened in this case, where the Magistrate was under the impression that he could only impose a fine and enforce the period of imprisonment as stated in the statutory provisions as an alternative to enforce a fine. The sentencing provisions under section 17(e) of the DDTA does not allow for such an interpretation.

[17] The alternative imprisonment is not a sentence of imprisonment and can never standalone separate from the fine. It is not a substantive sentence. It only becomes so in future if the fine is not paid. See *S v Jeffries 2011(2) SACR 350 (FB)* at 355 h. In this case, the fact that only a fine was imposed without an additional term of imprisonment and not a term of imprisonment renders the sentence either incomplete and incompetent. If only a period of imprisonment (direct or suspended) were imposed, it would have been a competent sentence. It therefore follows that the sentence imposed in both cases were incompetent and there not in accordance with justice and falls to be set aside.

An appropriate order

[18] The procedure and powers of a review court is set out in section 304(2)(c) of the CPA. With regards to sentence in terms of section 304(2) (c) (ii) of the CPA, a review court can confirm, reduce alter or set aside the sentence or any order of the magistrate's court. In terms of section 304(2) (c) (iv), the review court *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 the trial of the case*.(own emphasis)

[19] In terms of section 304(2) (c) (v) of the CPA a review court can also remit the case to the magistrate's court with instructions to deal with any matter such as the provincial or local division may think fit. In cases like this, where a sentence has to be reconsidered after it was referred on review, the usual order of the review court, would be to remit the matter back to the magistrate's court for a reconsideration of the sentence.

[20] This case, however, poses some practical difficulties with regards to what appropriate order should be in terms of the provisions of section 304 (2) (c) of the CPA, especially with regards to whether it should be remitted back to the magistrate's court. It seems that both the accused were undocumented foreign nationals, that entered the country by illegal means. They have since left the jurisdiction of that court or may even have left the country.

[21] In respect of the first accused Mr. Ramafikeng, the accused in the first case, it seems that his address is unknown to the authorities. It was recorded during the proceedings before the magistrate, the court was told that he is a flight risk and that his wife and children stays in Malawi. During the proceedings before the trial magistrate, he also abandoned his bail application and remained in custody until the finalization of the case. It seems at this stage, that this accused's whereabouts is unknown.

[22] In respect of the accused in the second case Mr. Muridzo, the address he gave to the authorities, is in Brakpan in the Gauteng province. And although he had given an address, it seems that in an affidavit given by an official of the Department of Home Affairs that there is no record of the accused in the Republic and no record of any address of the accused. A further problem that the court under review has, is that these cases were sent on review almost a year after it was finalized by the magistrate. Should the court exercise its powers in terms of section 304(2) (c) (iv) of the CPA by imposing such a sentence or make such order as the magistrate's court ought to have given or have imposed, there is a real risk that it may increase sentence, or that such a sentence would be more onerous than the one imposed by the trial court. It seems, however, that the court does not have any option but to follow this route, given the exceptional circumstances of this case.

[23] In the light of these difficulties, I communicated with the senior magistrate to ascertain whether it would be at all possible to have the accused brought before the magistrate court, should the review court be minded to remit both these matters to the magistrate's court for sentence to be reconsidered. In reply to my query he said that it would not be possible. The only remaining option for this court therefore would be to exercise its powers in terms of section 304 (2) (c) (iv) of the CPA and make an order as stated in this subsection. This however, as will be shown below, is not an easy route to follow.

[24] The trial court should either have imposed a sentence of direct imprisonment (direct or wholly or partially suspended) ***alone or in addition to that a fine***. This would mean for all practical purposes if the court on review imposes a sentence that

would be in compliance with the provisions of section 17 (e) of the DDTA, it can either be that the court should impose a period of direct imprisonment on the accused, in their absence, which would be detrimental to such an accused. Such a course of action should be avoided and would be impossible and impractical to implement because of the difficulties in securing the attendance of the accused' before court. On the other hand, the court can impose a period of direct imprisonment that is wholly suspended. In such a case, the sentence would be more onerous, because of the conditions of suspension.

[25] Although the review court can reduce a sentence, it is well established that in terms of section 304 (2) (c) of the CPA, that this provision ordinarily does not allow for an increase in the sentence of an accused. In *Attorney – General, Venda v Maraga 1992 (2) SACR 594(V) 596 a-b* the following was said in this regard … "*It has been held frequently that a competent, but inadequate or too lenient, sentence cannot be increased on review in South Africa. Where a sentence falls squarely within the penal provisions and is therefore regular, the review Court is powerless to interfere, even where it was inadequate". (emphasis added)* In the ordinary course, a very light or lenient sentence can only be increased on appeal[3].

[26] This decision was followed in *S v Greyling 2008(1) SACR 537 (E)*, where the court held that where a sentence might be absurd or illogical, it was neither incompetent or incapable of being understood for it to be implemented. The court held that it is trite that a review court would be reluctant to increase a sentence on review under such circumstances. In *S v Morris 1992 (2) SACR 365 (C)* at *366 H- I* this court held:

"*It is established by now that the powers of this Court on automatic review, which powers are conferred by s 304(2)(a) of Act 51 of 1977, do not include the power to increase a sentence or to make an order more onerous for the accused, where the*

[3] In terms of the provisions of section 309(3) a provisional division or local division of the High Court have the power to increase any sentence on appeal subject to the conditions as set out in this section.

sentence or order was a competent sentence or order of the magistrate's court, nor can this Court on such a review set aside the sentence or order and remit the matter to the magistrate's court for that purpose. R v Froneman and Froneman 1941 TPD 74; R v Fletcher 1941 EDL 255; R v Bornman 1960 (3) SA 87 (E); S v Haasbroek 1969 (1) SA 356 (E); and S v Msindo 1980 (4) SA 263 (B).” (own underlining)

[27] It seems, however that there is an exception to this general principle. It does not find application in cases where the magistrate’s court imposed an irregular or incompetent sentence which obliges the review court to replace that sentence with the correct one. Even if this results in a heavier or more severe sentence, than the initial sentence. In *S v Msindo 1980(4) SA 263 SA (B)* at 266A the court held in a case a where a magistrate imposed an incompetent sentence, a reviewing judge is obliged to impose the correct sentence, even if it should result in an increase in sentence.

[28] This usually happens where the law prescribes a minimum sentence, which the magistrate court did not impose. In such a case the sentence imposed by the magistrate, should be replaced with the minimum prescribed sentence. A sentence can also be increased in a case where the conviction of the magistrate based on the facts results in a more serious conviction. In such a case, the sentence should be altered to bring it in line with the more serious conviction. In that case the court referred to *S v Mbayi 1976 (4) SA 638 (TK)*. This case, given the authorities I referred to, falls within this category of cases.

[29] It seems only in exceptional cases a review court by altering a sentence imposed by a magistrate’s court and replacing it with a competent sentence as required by law, would merely be doing what the magistrate’s court was required to do by law and ought to have done. And it is in cases where the law obliges it to impose a specific or mandated sentence. The imposition of a competent sentence by the review court takes place by the operation of law and it is not a direct interference by the review court such as increasing a light or lenient sentence, and by altering it to a more severe sentence. As stated earlier, only a court of appeal can

do so in terms of the provisions of section 309(3) of the CPA. The court will therefore not be exercising its powers in terms of that section.

[30] The alteration of the sentence is therefore not based on the fact that it is too light or severe, but because by operation of law, it is altered to a competent sentence, which obliges the review court to impose a competent sentence. I am therefore of the view, that given the circumstances of this particular case, it would be appropriate for the court to alter this sentence imposed in both cases to comply with the peremptory sentencing provisions as set out in section 17(e) of the DDTA 140 of 1992.

[31] I would therefore, make the following order:

> "*1. That the sentence of accused, Mahlomola Ramafikeng is hereby set aside and replaced with the following; Six (6) months imprisonment which is suspended for five (5) years on condition that the accused is not convicted of contravening section 4(b) or 5(b) of Act 140 of 1992 and which he committed during the period of suspension, in addition he is sentenced to a fine of R3000 or Twelve (12) months imprisonment.*
>
> *2. That the sentence of accused, Trymore Muridzo is hereby set aside and replaced with the following: Twelve (12) months imprisonment which is suspended for five (5) years on condition that the accused is not convicted of contravening section 4(b) or 5(b) of Act 140 of 1992 and which committed during the period of suspension in addition he is sentenced to a fine of R10 000 or Three (3) years imprisonment.*
>
> *3. The Clerk of the Court, Laingsburg and the South African Police Services, should circulate the outcome of this review order in respect of both these accused under their respective fingerprint and CAS numbers and make an attempt by means thereof to secure the presence of the accused before the magistrate's court, in order for them to be informed about the decision of the review court.*"

R.C.A. HENNEY

Judge of the High Court

I agree, and it is so ordered.

A. LE GRANGE

Judge of the High Court