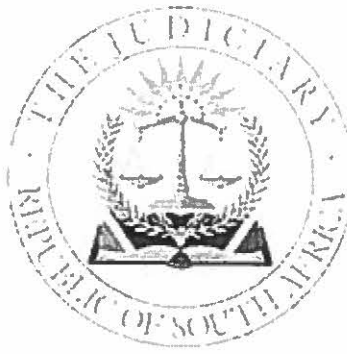




**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: R153/2017

THE STATE

And

PALESA SETHO

Accused 1

MPHO MABOLASEKA

Accused 2

CORAM: RAMPAL J, *et* DANISO, AJ

JUDGMENT BY: DANISO, AJ

DELIVERED ON: 26 OCTOBER 2017

**SPECIAL REVIEW I.T.O SECTION 304 (4) OF ACT NO 51
OF 1977**

[1] This matter was submitted in terms of section 304 (4) of the Criminal Procedure Act 51 of 1977 together with five (5) other matters¹ by the acting senior magistrate for special review. It came from Bloemfontein District Court. All of the six matters were adjudicated by the same magistrate. In this matter, both of the accused persons were legally represented by Mr Tangana. They were convicted after pleading guilty in terms of section 112 (2) of the Act for stealing 2 x Klim milk powder and 4 x 500g tins of Nespray valued at R281.94 from Game Store.

[2] The accused were subsequently sentenced as follows:-

"Accused 1 and accused 2 individually sentenced as follows: each to an amount (sic) of R500.00 (five hundred rand) wholly suspended for a period of 3 (three years) on condition that the accused (sic) not be found guilty of attempted theft/ theft for (sic) the period of suspension-not addressed section 103"(sic).

[3] According to the acting senior magistrate, the contract of the magistrate who presided over this matter was not renewed. As a result, the magistrate's reasons for conviction and sentence cannot be obtained. The acting senior magistrate requested that the conviction and the sentence in respect of both the accused be set aside on the following grounds:-

¹ Review numbers: 12,15,16,18 and 19.

- "4.3.1] The 2nd accused's section 112 (2) statement has no bearing on the charge put to the accused. The charge sheet has different items stolen than what was pleaded to. There is no connection which can be drawn between the charge and the section 112(2) statement.*
- 4.3.2] Furthermore the accused do not admit to being in each other's company and there is no nexus moreover (sic) between the 1st and the 2nd accused in the 112(2) statement. The accused do not acknowledge working together in the execution of the theft and they do not even acknowledge being aware of each other in any manner, or even stealing the same goods. The magistrate could not have found the 2nd accused guilty by applying the doctrine of common purpose and on the face value because of the nature of the statement handed in, there seems to be a misjoinder.*
- 4.3.3] Section 156 of Act 51 of 1977 makes provision for any number of persons to be charged and tried together, on separate offences, however that was not the case in this matter as the 2nd accused was charged on the same offence, but made no admissions to committing the said offence.*
- 4.3.4] The sentence imposed is also irregular as the magistrate imposes (sic) a fine and suspends the payment of the fine, for a period of 2 years on condition the accused are not found guilty of theft, during the period of suspension.*

4.3.5] *A fine can be imposed without the provision of an alternative period of imprisonment. However if a fine is imposed and no alternative of imprisonment is given the question arises whether the payment of the fine can be suspended, indefinitely. However the further problem is also as stated above the Magistrate suspends the sentence on the condition that the accused “not be found guilty of an offence” instead of “not found guilty of an offence committed during the period of suspension”.*

[5] Ms Mabolaseka was convicted on her statement in terms of Section 112(2) wherein she admitted stealing ***Ellis Brown Cream Milk*** whereas the state alleged that she stole the following items, ***2 x Klim milk powder and 4 x 500g Nespray.***

[6] It is trite law² that an accused can only be convicted on the basis of a statement in terms of **Section 112 (2)** if in that statement, the accused admits all the elements of the offence. The specific type of property or item stolen by the accused is one of the elements constituting the offence of theft. In this matter the accused did not admit to stealing the item alleged by the state. Therefore, it cannot be said that the accused was indeed guilty of the offence to which the guilty plea was tendered.

² S v Naidoo 1989(2) 114 (A), Mshengu v the State (446/2008) [2009] ZASCA 65 (29 May 2009)

- [7] The accused were tried together, however there is no indication on the record of the proceedings that the provisions of **section 156** were invoked.³ In that regard, there was indeed a misjoinder in these proceedings. I pause to state that if the correct procedure was followed, the conviction of the accused on the “incorrect” facts would have been avoided. Given the nature of the irregularities in this matter, an order setting aside the convictions is warranted.
- [8] With regard to the sentence, the trial magistrate omitted to state that the condition of suspending the sentence was that the accused should not be convicted for the offence of theft or attempted theft committed during the period of suspension. Furthermore, the sentence is one of a fine without an alternative of imprisonment. The sentence is accordingly not in terms of **section 276 of the Act**.
- [9] On perusal of the record of these proceedings, I also noted another glaring irregularity relating to the application or non-application of the provisions of **section 103**.⁴ The magistrate, though obliged to hold an enquiry to determine the fitness of the accused to possess a firearm after convicting them of theft,⁵ did not do so. Instead she slovenly added the following words to the sentence “*not addressed section 103*”. The magistrate “placed a firearm in the hands” of dishonest people without having held an enquiry to determine their fitness to possess firearms. Having said that, the orders of the magistrate which have the effect of not declaring the accused unfit to possess a firearm are therefore, liable to be set aside.

³ The state must inform the court that evidence admissible at the trial of one of such person will, in his opinion, also be admissible as evidence at the trial of any other such person.

⁴ Firearms Control Act 60 of 2000

⁵ Section 103 (2)(a) *supra* at 3

[10] The simultaneous submission to the high court of 6 (six) cases by the same magistrate for review in itself tends to suggest that the trial magistrate was not constantly monitored which is one of the reasons why the same errors kept on recurring. Had there been regular checks, the trial magistrate would probably not have repeated the same mistakes over and over again. By regular checks we understand constant and educative mentoring of newly appointed or contracted magistrates in order to improve the quality of their performance.

[11] I find it significant to also deal with the acting senior magistrate's referral of these matters for special review. In the covering letter a total of six (6) matters relating to the same magistrate were submitted for special review. The acting senior magistrate states that;-

"the following matters are herewith sent on review in terms of section 304(4) of the Act 51 of 1977 as upon regular checks by the control magistrate irregularities which were detected. These matters have been detected over an extensive period of regular checks in respect of an acting magistrate whose service has been terminated."

[12] In my view, these matters bring to the fore the importance and relevance of training and mentoring of acting magistrates. It is quite clear that the magistrate had no adequate knowledge of the court procedures and the applicable legislations. Having noted the quality assurance assessments reports and the reviewing judges' negative remarks about the standard of the work performed by

some acting magistrates, the Chief Magistrates Forum adopted a policy⁶ with regard to the appointment of acting /contract magistrates. The following are some of the resolutions which were adopted;-

"... It has become necessary to evaluate magistrates appointed on contract in order to prevent negative comments/remarks from the High Court and to deliver quality justice.

The evaluation of magistrates on contract should be done on a continuous basis as in the case of aspirant magistrate. A mentor for a magistrate on contract should be designated to give guidance and assistance. Any shortcomings should be identified and discussed on continuous basis."

[13] It is therefore clear that "*regular checks*" alone are not sufficient as obviously by the time the checks are done the magistrate has already finalized the matter. Mentorship and continuous evaluation is essential. It serves no practically useful purpose for a senior magistrate to merely conduct regular checks of a newly appointed or contracted magistrate who has not been given continuous guidance and assistance by a dedicated mentor. In such circumstances such regular checks become meaningless. The errors keep on recurring, the high court critique mounts and then the frustration of the poor unguided magistrates deepens.

[14] In the light of all the procedural irregularities noted above, I am of the view that the proceedings were not in accordance with justice.

⁶ Performance Standard Policy: Appointment of Acting Magistrates on contract, dated 05 September 2011.

[15] In the circumstances I propose to make the following order:

1. The convictions and the sentences are set aside.
2. The order in terms of **section 103(1)** of the **Firearms Control Act 60 of 2000** is set aside.

[16] A copy of this judgment must be forwarded to the Chief Magistrates Bloemfontein and the Director of Public Prosecutions: Free State, Bloemfontein.



NS DANISO, AJ

I concur and it is so ordered.



M H RAMPAL, J