

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION: BLOEMFONTEIN

Review No.: 53/2015

In the matter between:-

THE STATE

and

JACQUES ETTIENNE VAN WYK

CORAM: DAFFUE, J *et* NAIDOO, J

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 7 APRIL 2016

I INTRODUCTION

- [1] This matter came before the High Court on automatic review in terms of s 304 of the Criminal Procedure Act, 51 of 1977 (“the CPA”).
- [2] The cardinal issues in this review are firstly, whether the court *a quo* abdicated its responsibilities in imposing sentence and secondly, whether the conditions attached to the suspended sentence are clear, precise and unambiguous.

II THE PROCEEDINGS IN THE COURT A QUO

[3] The accused pleaded guilty to a charge of contravening s 59 (4) (a) of the National Road Traffic Act, 93 of 1996 in that on 4 November 2014 he wrongfully and intentionally drove a Mercedes Benz Vito minibus with registration [N.....] at a speed in excess of the general speed limit of 120km/h which apply to the particular road, the N1 north of Bloemfontein, to wit at a speed of 187km/h. He was duly convicted.

[4] The accused indicated in mitigation that he was prepared and able to pay a fine on condition that it is deferred on a basis that he be allowed to pay the fine in instalments of R500,00 per month. Notwithstanding this he was sentenced as follows:

“The accused is sentenced to R10 000,00 (Ten thousand) or 4 (four) months imprisonment which is wholly suspended in terms of section 297(1)(b) of the Criminal Procedure Act, 51 of 1977 for 1 (one) year on condition that the accused

(1) is not again convicted of the contravention of section 59 of the National Road Traffic Act, 93 of 1996 (exceeding the prescribed speed limit), and

(2) which was committed during the period of suspension, and

(3) further that the accused report to the National Institute for Crime Prevention and Re-integration of Offenders, (12 Tannery Road, Hamilton, Bloemfontein, telephone nr 051-4355193) as arranged with Ms Joubert (NICRO) for the commencement of the Non-Custodial Sanction Programme as set out beyond.”

[5] Attached to the order is a document under the respective headings, Community Service, Programmes and General Good Conduct. Ex

facie this annexure read with the sentence, the accused's sentence was suspended on condition that he did community service and underwent certain programmes. The duration and nature of the community service were not prescribed by the court *a quo*, but the accused was ordered to do "community service as prescribed and determined by NICRO/The Correctional Officer, Department of Correctional Services". The nature of such community service, the place where and the times during which such services were to be formed, had to be determined by either the social worker of NICRO or the correctional officer of the Department of Correctional Services. The same applied to the programmes to which the accused had to submit.

[6] Sentence was imposed on 5 December 2014.

III RESERVATIONS IN REGARD TO THE SENTENCE

[7] When I initially received the review I was concerned about the lack of clarity of the imposed sentence and in particular the conditions of suspension. Consequently I requested the learned magistrate to respond to certain questions, bearing in mind my viewpoint that the sentence was not clear and unambiguous and that the court *a quo* had failed to formulate the community service to be undertaken in the court order, particularly pertaining to the nature and duration of the community service and the fact that the community service was to be done under the auspices of either a social worker of NICRO or a correctional officer of the Department of Correctional Services. The English version of my enquiries is as follows:

- “1. Is the learned magistrate aware of the fact that the imposition of community service was taken out of her hands and that no judicial oversight existed over that to be determined and prescribed by NICRO’s social worker?
2. The learned magistrate was required to comment about the possibility that the particular social worker could “force” the unrepresented accused to do community service which was disproportionate to the crime or the interest of the community.
3. She was asked to state whether it was not foreseeable that a dispute could arise in the event of alleged non-compliance, especially when the State intends to take steps to put the suspended sentence into operation.
4. On what basis would it be possible for a court of review or a court of appeal to adjudicate whether a proper sentence has been imposed if the terms of the community service do not form part of the sentence or do not appear from the record?
5. Is the sentence imposed in line with a standard procedure in the Bloemfontein District Court?”

IV RESPONSE OF THE COURT A QUO

- [8] The learned magistrate presented me with a detailed statement of reasons which is much appreciated. She made the following introductory remark:

“It is apposite to from the onset agree with the Honourable Judge of Review that the formulation of the sentence and the evidence on record lack detail for the proper evaluation thereof on review and that on face value create (sic) the impression of the issues referred to by the Honourable Judge.”

She then concluded as follows in paragraph 14.2:

“The prayer to the Court of Review is to confirm the sentence but that the formulation is amended.”

[9] The learned magistrate responded as follows to my enquiries and I quote these *verbatim*.

“13.1 AD: *Sentences must be explicit and possible to execute.*

The sentence is indeed explicit and possible to execute in practice to and for all the immediate participants to the sentence. The period, schedule of service, place of service and nature of service were fixed and controlled. The content of the file of the accused supports this.

The content of the file does not form part of the record of the proceedings and makes adjudication of the sentence impossible.

It did however form part of the information on which the Court *a quo* applied its discretion. There are no statutory prescribed process that demands this evidence to form part of the record such as is the case in sentences of correctional supervision in terms of section 276A(1)(a) of the CPA. These prescriptions have however been complied with in practice. It is submitted that since a review may be considered on additional documents such as the reasons of the judicial officer, it may serve as proof that the sentence is indeed just and the judicial officer applied her mind.

Lower Courts are “courts of record” and evidence must reflect formally. The above lack of recorded evidence may be regarded as a mistake of law; it is however submitted that it is not an irregularity *per se* and does not nullify the sentence automatically. The *extra curial* control over the process and execution of the sentence is attestation of the regularity and legality thereof. The wording of the sentence does indeed call for amendment to satisfy

the reader and adjudicator of the sentence. The Court a quo regrets this and humbly requests an alternatively phrased sentence to serve the process of justice.

13.2 AD: *The annexure to the sentence is ambiguous.*

The annexure is not ambiguous if viewed with the directives, process and resources. It rather serves as assurance of effective control of the sentence. In paragraph three of the sentence the social worker in direct control is appointed. Reference to: “NICRO/The Correctional Officer: Department of Correctional Services” in the rest of the sentence ensures that the supervising social worker may delegate to the Community Corrections Officer and only to this entity. This prevents the calamities that occurred during the sentences in earlier efforts.

13.3 AD: *The imposition of the community service and judicial control thereof might have been, irregularly so, transferred to the NICRO officer.*

The community service was not taken out of the control of the Presiding Officer and the orders in the sentence are also not irregular given the discussion above. The Directives are clear, the nature of the sentence is depicted in the assessment report, the accused is effectively informed, control is maintained and progress reports ensure constant judicial supervision; even after sentence. The social workers are professional, efficient and demonstrated constitutional integrity over the period involved with sentences in the Court. Only two social workers have been identified to implement and monitor the sentences due to their competence. Again; the wording of the sentence and record lack detail and must be amended and regret continues.

13.4 AD: *The point above may put the accused at the mercy of the NICRO officer and cause the community service to be disproportional to the crime or the interest of the community.*

The honourable Judge of Review is respectfully referred to the

discussion above.

13.5 AD: *The possibility of a dispute over the non-compliance to the conditions of the sentence.*

The Honourable Judge of Review is referred to the directives and specifically the control prescribed.

13.6 AD: *The Honourable Court of Review cannot adjudicate the sentence if the terms of the sentence are not depicted in the record.*

This is indeed conceded.

13.7 AD: *Standard practise of sentences of this nature in the Bloemfontein District Courts.*

The sentence is not standard practice in the Bloemfontein District Court and an initiative of this Court.” (emphasis added)

V **LACK OF RECORDED EVIDENCE**

[10] The following documents attached to the court *a quo*’s reasons do not form part of the court record initially sent on review and the transcribed record does not indicate that these documents have been placed before the court *a quo*.

10.1 An alternative sentence assessment report by a social worker, Me M M Joubert of NICRO dated 24 November 2014 (the day before the accused pleaded guilty). She recommended community service of 160 hours to be served at an institution named the Cheetah Experience.

10.2 An assessment report dated 1 December 2014 done by the same social worker.

10.3 A document termed “Agreement: Alternative sentencing” dated 15 December 2014, and attached thereto an indemnity form signed by the accused and a further document indicating that the accused had to serve 160 hours community service at the Cheetah Experience from 15 December 2014 onwards.

- [11] Attached to the court *a quo*’s reasons is also a suggested amended sentence stipulating the period of community service (the hours to be served) and the institution where the service has to be performed. Again reference is made to NICRO and the Correctional Officer: Department of Correctional Services in the alternative.

VI CORRECTIONAL SUPERVISION

- [12] I deem it necessary to deal with correctional supervision in so far as I am of the view that the court *a quo* misdirected itself in considering the role to be played by correctional official in the employ of the Department of Correctional Services in the type of sentence that she had in mind. Although the learned magistrate has to be complimented for the initiative taken to deal with offenders who may be kept within the community whilst serving their sentences, those offenders that do not deserve custodial sentences, she misdirected herself pertaining to the applicable principles relating to sentencing options. As shown *infra* correctional supervision can be imposed as an independent sentence under s 276(1) of the CPA and that it can be used as a condition of suspension of sentence or when a sentence is postponement. Kruger A, Hiemstra’s Criminal Procedure, loose leaf edition at 28-76 records with respect correctly

that there is in practice little difference between correctional supervision as independent punishment or as a condition in terms of s 297. A report of a correctional official should be obtained before sentence is imposed and the same sentencing procedure should be followed. Courts have to determine a period for the correctional supervision as well as the essential components thereof. See also **S v R** 1993 (1) SA 476 (AD) at 492 C – H. In *casu* it is apparent from the court *a quo*'s reasoning and the heading of the annexure to the sentence that she had a sentence of community service in mind and not correctional supervision. The Department of Correctional Services did not and could not play any role whatsoever during the sentencing process and could not be directed to play any role after imposition of the type of sentence that the court *a quo* had in mind.

- [13] Correctional supervision as a sentencing option is available in accordance with the provisions of s 276(1)(h) and s 276(1)(i) of the CPA. It is also available as a condition to the suspension of sentences as is apparent from s 297(1)(b) read with s 297(1)(a)(ccA) of the CPA. The Correctional Services Act, 111 of 1998 defines “community corrections” to mean “all non-custodial measures and forms of supervision applicable to persons who are subject to such measures and supervision in the community and who are under the control of the Department”. The particular department is the Department of Correctional Services. “Correctional supervision” is defined as “a form of community corrections contemplated in Chapter VI (of the Correctional Services Act)”. The Act also defines “community service” as “compulsory work for the community organisation or other compulsory work of value to the community, performed without payment”. See s 1 of the Act.

[14] Section 60 of the Correctional Services Act deals with community service and it reads as follows:

- “(1) Where a condition of community service is set as part of community corrections, it must stipulate the number of hours which the person is required to serve, which shall not be less than 16 hours per month, unless the court otherwise directed.
- (2) (a) The court, Correctional Supervision and Parole Board or other body which has the authority to impose community service may specify where such community service is to be done.
- (b) Such an order may not be changed without the matter being referred back to the court, Board or other body which set the condition unless it provides that the order may be changed by a Supervision Committee.
- (c) If such court, Board or other body does not specify where such community service should be performed, the Supervision Committee must specify the place.” (emphasis added)

Clearly the accused person was not a person subject to community corrections stated in s 51 of the Correctional Services Act and therefore the references by the learned magistrate to s 60 of the particular Act are misplaced.

VII COMMUNITY SERVICE

[15] Community service, or service for the benefit for the community as it

is sometimes called, can be imposed if a sentence is postponed or where a sentence is passed but the operation of the whole or part thereof is suspended on certain conditions including the performance of community service. See s 297(1)(a)cc).

[16] This is a laudable option available to a presiding officer to keep especially first offenders and those that have not committed serious offences out of correctional service centres. Such orders must be practical and their formulation must be set out clearly and unambiguously, particularly with reference to the duration, extent and nature of the community service. See **S v Tsanshana** 1996 (2) SACR 157 (EC) at 160c – 161f.

[17] Pickering J considered the imposition of community service on review as follows in **S v Sikunyana** 1994 (1) SACR 206 (TK) at 212f and further:

“Closely allied to this aspect of the matter are the questions of the nature of the service which an accused will be able to render at that institution; the times at which such service can be performed; and the person or persons under whose supervision such service can be performed. As was stated in **S v Louw** (*supra* at 239D – E), it would obviously be of great assistance to the Court to have the benefit of evidence by an official of NICRO who has already investigated the circumstances of the particular case.”

He continued as follows at 212i:

“It is quite insufficient for a court merely to order that an accused should ‘render service for the benefit of the community ... for a period of three

months'. The conditions must be stated with such precision that the convicted person may understand the ambit thereof. (**R v Cloete** 1950 (4) SA 191E at 234E)." I accept for purposes of this judgment that the learned magistrate was satisfied that the social worker, Ms M Joubert, investigated whether or not the particular institution, Cheetah Experience, was prepared to accept the services of the accused and that he was not, in the words of Pickering J, "foisted upon" the institution "without their prior approval and consent."

[18] In **S v Joseph** 2013 (1) SACR 183 (GSJ) the review court was confronted with a sentence of R8 000.00 or 12 months' imprisonment imposed on the accused for a speeding offence, wholly suspended on certain conditions, *inter alia* that the accused complete 80 hours of community service under the supervision of NICRO. Moshidi J stated that community service on its own is a form of punishment which has all the advantages of a non-custodial sentence meeting most of the purposes of sentence. He reviewed and set aside the sentence of 80 hours community service on the basis that the community service coupled with an excessive suspended fine constituted a possible future unfairness and injustice in that in the event of the accused re-offending within the period of suspension he would automatically become liable to payment of the fine of R8 000.00 imposed in respect of the speeding offence.

[19] In **S v Benn; S v Jordaan; S v Gabriels** 2004 (2) SACR 156 (CPD) three matters came before the court by way of special review. It was emphasised by the review court at page 160h that not only should the suspended conditions have some relation to the crime, but they should be stated with precision. It is really debatable

whether requiring an accused person to work at a Cheetah farm catering for wildlife and Cheetahs in particular is sufficiently related to a speeding offence, but for purposes of this judgment this does not deserve detailed consideration. It is doubtful whether a sales representative and traveller like the accused person would be of any assistance or benefit to an institution like Cheetah Experience which is in the wildlife industry. Also, again beside the point, it might be questioned whether the service required to be rendered at no costs to the community as required by the Act would benefit the institution at all. There was no evidence before the court *a quo* as to whether assistance was required by the particular institution and whether or not the accused person could add any value.

- [20] The **Benn** judgment, like the others judgments quoted above, serves as confirmation that conditions of suspension must be set out in clear, precise and unambiguous terms.

VIII DIRECTIVES RELATING TO COMMUNITY SERVICE

- [21] The learned magistrate should be applauded for the initiatives taken by her in co-operation with the Department of Correctional Services and NICRO. I accept that she had detailed consultations with social workers specialising in the monitoring of sentences to name but one aspect. She acknowledged the complexities of the type of sentences that she would have preferred to impose more regularly. As mentioned practicalities are severe stumbling blocks. The statement of the court *a quo* that without proper legislation and a credible infrastructure a sentence of community service “stands on constitutionally shaky ground” is not without merit. This may indeed be

so if a proper pre-sentence report by an expert, which forms part of the record, and preferably confirmed by *viva voce* evidence, is not obtained. The presiding officer should not venture into an uncertain domain by relying on untested information not forming part of the evidential material before the court. As the court *a quo* correctly pointed out, our courts, including the lower courts, are courts of record and evidence must be reflected formally.

- [22] *Ex facie* the record produced when the matter was sent on review, there can be little doubt that any reasonable reader would accept that the court abdicated its responsibility to determine the duration and nature of the community sentence in favour of a social worker of NICRO, alternatively a correctional officer of the Department of Correctional Services. The alternative sentence assessment report of Me M Joubert prepared and signed a day before the accused actually pleaded guilty, stated that the accused "... will have to complete 160 hours of community service at the Cheetah Experience." That document did not form part of the court record and there is no indication from the record that the court *a quo* was prepared to accept this report and/or that the accused person was confronted with the contents of this report at any stage. I accept that the learned magistrate kept this in a file as stated by her. This is unacceptable. The recommended sentence is in line with the agreement entered into between the social worker and the accused on 15 December 2014, a few days after sentence. It is disconcerting that in imposing sentence the court *a quo* mentioned the following:

"Verder dat die beskuldigde sal rapporteer by NICRO soos ooreengekom

sal word tussen hom en Mev Joubert vir die aanvang van hierdie program. 'n Afskrif van die vonnis gaan aan die beskuldigde oorhandig word, ek gaan net 'n opsomming van die basiese voorwaardes en die belangrike voorwaardes aan hom voorhou. Wat betref gemeenskapsdiens staan dit NICRO vry om enige gemeenskapsdiens aan die beskuldigde voor te skryf." (emphasis added)

This explanation of the court *a quo* is in line with paragraphs 4 and 4.1 of the annexure to the sentence. This prompted me to direct the enquiries mentioned and reinforce my viewpoint that the learned magistrate abdicated her responsibilities in respect of sentence and also, that the community sentence was not imposed in precise terms. I quote the two paragraphs *verbatim*:

- "4. ... : (i)t is further ordered that the accused do community service as prescribed and determined by NICRO/The Correctional Officer: Department of Correctional Services.
- 4.1 The nature of the community service, the place where and the times during which such service is to be confirmed, shall be determined by the social worker ..."

It is also clear from the reasons of the learned magistrate that "NICRO had limited funding for the NCS initiative and it has since been suspended with effect from January 2015". The learned magistrate tried to motivate the reference to a correctional officer in the alternative to NICRO in this regard, but as indicated above, the Department of Correctional Services does not and cannot play a role to monitor community service, unless that community service is set as part of community corrections in terms of s 60 of the Correctional Services Act which was not the case in *casu*.

IX CONCLUSION

- [23] It is not my intention to be prescriptive as sentencing remains the prerogative of the presiding officer who has to impose sentence in his/her discretion after taking into consideration all mitigating and aggravating circumstances. Having said this, and in line with the learned magistrate's suggestions referred to above, the condition to the suspended sentence pertaining to community service should at least include the following: "The accused must perform community service, namely administrative duties to be allocated to him (or whatever duties might be required and duly set out in the court's order), at the Cheetah Experience, Bloemfontein under the control and supervision of a qualified social worker in the employ of NICRO for a period of 160 hours at a minimum of 16 hours per month and which has to be completed within 12 (twelve) months." Refer in general to Terblanche SS, Guide to Sentencing in South Africa, 2nd ed. p 369.
- [24] Due to the time lapse and the fact that the accused would have served the community service imposed upon him by now, it would not serve any purpose to amend the imposed sentence at this stage. It is however reiterated that presiding officers shall always aim at formulating conditions of suspension, as is the case with all other orders and sentences, with such precision that the convicted person as well as the court of review or court of appeal and any court that may be required to put into operation a suspended sentence because of non-compliance with any condition,

understand the ambit thereof.

X ORDER

In light of the fact that the accused has already served his sentence,
that sentence is confirmed.

J. P. DAFFUE, J

I concur.

S. NAIDOO, J

/EB