

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

Case No.: SHO93/2013
Review Case number: 41/2014

In the matter between:

THE STATE

and

TAPIWE SITHOLE
LOVEMORE MHLANGA MAJONI)

CORAM: MOLOI , J

DELIVERED ON: 27 February 2014

REVIEW JUDGMENT

- [1] This is a review in terms of section 304(4) of the Criminal Procedure Act No. 51 of 1977, as amended.

- [2] The two accused appeared before the Regional Court at Odendaalsrus on two counts, viz count 1 was contravention of section 143 of Act 20 of 1967 being in unlawful possession of unwrought precious metal to wit gold and count 2 was contravention of section 49(1)(a) of Act 13 of 2002 (the Immigration Act) being illegally in the Republic of South Africa. Both accused were legally represented and pleaded guilty to both offences. Section 112(2) of the Criminal Procedure Act No 51 of 1977 was applied and a written statement was read into the record and handed in.
- [2] Both the accused were each sentenced as follows: On count 1 each accused was sentenced to Ten Thousand Rand (R10 000.00) or Three (3) years imprisonment. The accused were further sentenced to Three (3) years imprisonment, which was wholly suspended for a period of Five (5) years on condition that they not be convicted of contravening section 143(3) of Act 20 of 1967 committed during the period of suspension. On count 2 they were each sentenced to Three (3) months imprisonment wholly suspended for a period of Five (5) years on condition that they were not convicted of contravening section 49(1) (b) of Act 13 of 2002 committed during the period of suspension.
- [3] Only after the convictions and sentences the magistrate, prosecutor and defence lawyer realised that in as far as count 1 was concerned, Act 20 of 1967 under which the accused were charged had been

repealed by section 24 (1) of Act 37 of 2005, upon this realisation the magistrate referred this matter to this court with the request that:

“I therefore humbly request the Honourable Judge dealing with reviews to set aside the conviction and sentence on count 1 and to order that the accused be correctly prosecuted *de novo* or make any other order in this regard which he/she may deem fit (Section 270 of the Criminal Procedure Act, Act 51 of 1977).”

- [4] In terms of Section 304(4) of the Criminal Procedure Act, No. 51 of 1977 as amended, when it is brought to the attention of this court that the proceedings in which the sentence was imposed were not in accordance with justice, this court is empowered to set aside such proceedings. Clearly the sentence imposed in respect of count 1 cannot be in accordance with justice as the offence charged did not exist in law as the Act under which they were charged had been repealed.
- [5] The court is asked by the magistrate to set aside the conviction and sentences on count 1. That request is within the powers of the court. The court is, however, not prepared to order the reinstatement of the charges under the correct and current Act because this court cannot be prescriptive to the prosecution it being *dominis litis* and the court must observe the doctrine of separation of powers. In my view Section 270 of Act 51 of 1977 is not applicable in this matter as it relates to a completely different issue.

[6] As a consequence the following order is made:

The conviction of both accused in count 1, viz contravention of section 143(3) of Act 20 of 1967 and the sentence of Ten Thousand Rand (R10 000.00) or Three years imprisonment plus a further Three (3) years imprisonment suspended for Five (5) years on condition that the accused are not found guilty of contravention of section 143(3) of Act 20 of 1967 committed during the period of suspension are hereby set aside.

K. J. MOLOI, J