

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No.: 559/2009

In the case between:

THE STATE

and

MOSES MATHABELA

CORAM: MOLEMELA *et* MOLOI, JJ

JUDGMENT: MOLEMELA, J

DELIVERED ON: 19 NOVEMBER 2009

[1] This is a special review as contemplated in the provisions of section 304(4) of the Criminal Procedure Act 51 of 1977.

[2] The eight accused persons, all being adult males, were charged with contravention of section 1(1) read with sections 1(1A), 1(2) and 2 of the Trespass Act 6 of 1959 ("the Act") and further read with section 250(1)(d) of the Criminal Procedure Act 51 of 1977 (trespassing). They all pleaded guilty and averred that they had entered the

President Steyn Mine with the intention of engaging in illegal activities. They were found guilty as charged and sentenced to 28 months' imprisonment wholly suspended for 5 years.

- [3] The presiding magistrate thereafter referred the matter to the High Court on special review with the request that the sentence be set aside. The magistrate based this request on the following:

"I noticed that I acted ultra vires since the Act only empowers me to impose a maximum of 24 months imprisonment. I humbly request that the sentences of 28 months' imprisonment be set aside and be replaced with the one of 24 months imprisonment which is wholly suspended for 5 years on the same conditions. It would however serve no purpose to revert the matter back to me for sentencing, since it will be difficult to trace the accused because some of them are foreigners and might have returned to their countries of origin."

[4] I agree with the magistrate that she acted *ultra vires* by imposing a heavier sentence than the maximum sentence contemplated in the Act. The said sentence is consequently not a competent sentence and falls to be set aside.

[5] I accordingly make the following order:

ORDER:

- 1. The conviction of the accused is confirmed.**
- 2. The sentence is set aside and replaced with the following:**

24 months imprisonment wholly suspended for 5 years on condition that the accused is not convicted of contravention of section 1(1) read with sections 1(1A), 1(2) and 2 of the Trespass Act 6 of 1959 committed during the period of suspension.

I concur.

M. B. MOLEMELA, J

/EM

K. J. MOLOI, J