

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: REV67/2024

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE... 22/7/25 ... SIGNATURE... [REDACTED]	

In the matter between:

THE STATE

v

TIAAN FRANCOIS BESTBIER

REVIEW JUDGMENT

MULLER J:

[1] This is a special review in terms of section 304(4) of the Criminal Procedure Act¹ pursuant to an order made by the learned Judge President revoking a certificate issued on 23 May 2024 which had certified that the proceedings appear to be in accordance with justice.

[2] Briefly, the accused, Tiaan Bestbier, was arrested on 5 October 2023 for being in unlawful possession of a substance suspected to be "CAT" in contravention of section 5(b) of the Drugs and Drug Trafficking Act.² He was issued with a written notice in terms of section 56 to appear in court on 17 November 2023. The notice indicated that the accused contravened section 5(b) of the Drugs and Drug Trafficking Act on the ground that he was found in possession of drugs suspected to be "CAT."³

[3] The admission of guilt fine was set at an amount of R1,000.00 payable immediately or before 24 October 2023 without the need to appear in court on the date of trial, if paid on time. The accused was cautioned by a stipulation in the notice that he may consult with a legal representative or may approach Legal Aid South Africa for assistance. He promptly paid the admission of guilt on 5 October 2023 at the Modimolle Police station.⁴

[4] Subsection 57(6) and (7) of the CPA provides:

"(6) An admission of guilt paid at a police station or a local authority in terms of subsection (1) and the summons or, as the case may be, the written notice surrendered under subsection (3), shall as soon as is expedient, be forwarded to the clerk of the magistrate's court which has jurisdiction, and such clerk of the court shall thereafter, as soon as expedient, enter the essential particulars of such summons or, as the case may be, such written notice and of any summons or written notice

¹ Act 51 of 1977 (Hereinafter called "the CPA").

² Act 140 of 1992.

³ Section 5(b) deals with dealing in drugs.

⁴ Receipt (J70) 182920 dated 5 October 2023.

surrendered to the clerk of the court under subsection (3), in the criminal record book for admissions of guilt, whereupon the accused concerned shall, subject to the provisions of subsection (7), be deemed to have been convicted and sentenced by the court in respect of the offence in question.

- (7) The judicial officer presiding at the court in question shall examine the documents and if it appears to him that a conviction or sentence under subsection (6) is not in accordance with justice or that any such sentence, except as provided in subsection (4), is not in accordance with a determination made by the magistrate under subsection (5) or, where the determination under that subsection has not been made by the magistrate, that the sentence is not adequate, such judicial officer may set aside the conviction and sentence and direct that the accused be prosecuted in the ordinary course, whereupon the accused may be summoned to answer such charge as the public prosecutor may deem fit to prefer: Provide that where the admission of guilt fine which has been paid exceeds the amount determined by the magistrate under subsection (5), the said judicial officer may, in lieu of setting aside the conviction and sentence in question, direct that the amount by which the said admission of guilt fine exceeds the said determination be refunded to the accused concerned."

[5] The documents were duly forwarded to the clerk of the court Modimolle who entered the essential particulars in the appropriate criminal record book for admissions of guilt. The result of so entering the particulars into the relevant criminal record book is that the accused is deemed to be convicted and sentenced by the court in respect of the offence in question, subject to the provisions of subsection 57(7). A judicial officer examined the documents on 11 October 2023 and elected not to take any of the steps envisaged by the subsection (7).

[6] This record was placed before a judge for review by virtue of an affidavit dated 31 January 2024 filed with the magistrate Modimolle. The reviewing judge issued the required customary certificate confirming that the proceedings were in accordance with justice and returned the record.

[7] On 8 April 2025 attorneys acting on behalf of the accused addressed a letter to the registrar and the deputy-director of public prosecutions at Polokwane with a request that the Judge President refers the case to two judges or to open court for re-consideration.⁵ The Judge President revoked the certificate. In *S v Nkosi; S v Mchunu*⁶ it was reaffirmed that such certificate may be revoked in appropriate circumstances, as it does not amount to a rescission of the judgment.⁷

[8] Section 304(4) of the CPA provides:

"If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section."

[9] The withdrawal of the certificate caused the matter to be placed before this court for special review in terms of section 304(4) of the CPA.

[10] There is a need for a speedy and inexpensive procedural mechanism to conclude a prosecution by paying a fine for offences which are not regarded as serious without the need to appear in court. The provisions of section 56 and 57 of the CPA provide for such a procedural mechanism. It is appropriate for a proper understanding of the provisions of

⁵ A letter was also addressed to the Judge President in which it is stated that the judge did not consider the merits properly when the certificate was issued.

⁶ 1984 (4) SA 94 (T).

⁷ *S v Pirison* 1959 (1) SA 102 (N) 102H.

⁷ 1984 (4) SA 94 (T).

section 57(6) and (7) to have regard to the interpretation given to the sections by various divisions of the high court.

[11] The Transvaal Provincial Division, in *S v Hoema*⁸ held that a magistrate is *functus officio* after he has examined the documents. The court accepted that magistrate exercised a judicial function by examination of the papers.

[12] The Natal Provincial Division, in *S v Mahabeer*⁹ following *S v Hartley*¹⁰ held that a magistrate who examined the papers in terms of section 57(7) is not *functus officio* if he/she has refrained from taking any action after examination of the papers.

[13] The full bench of the Natal Division, in *S v Shange*, after reviewing the divergent decisions, concluded that *S v Mahabeer supra* was correctly decided. It held that a magistrate may consider representations made by an accused person even after examination of the documents. It held that the magistrate under section 57(6) was not required to confirm the conviction and sentence since the accused is deemed to be convicted and sentenced. It was only required from the magistrate, whenever he examines the papers, to take steps if he is of the view that the conviction and sentence is not in accordance with justice.

[14] Following, the above judgment a full bench of the Transvaal Division held in *S v Marion*¹¹ that a magistrate had to apply his /her mind in each case placed before him/her to reach the conclusion whether the deemed conviction and sentence should be set aside or not. The magistrate is *functus officio* when he has done so.

⁸ 1978 (2) SA 703 (T) 704H.

⁹ 1980 (4) SA 492 (N) F-H.

¹⁰ Unreported review case 3248/1979.

¹¹ 1981 (1) SA 1216 (T) 1218H-1219A; *S v Kubheka* 1999 (1) SACR 65 (W) 66c-e; *S v Coetzer* 2002 (1) SACR 174 (T) 176b.

[15] The Free State Provincial Division, in *S v Miller*¹² remarked that a magistrate may not review the conviction and sentence after same have been confirmed by him. The Northern Cape Division, in *S v Makhele*¹³ also followed the decision in *S v Marion supra*.

[16] The full bench of the Cape Division, in *S v Louw*¹⁴ disagreed with *S v Mahabeer supra* on the basis that the judicial officer is to consider the documents and information referred to in subsection (6) and is therefore precluded from considering any other document and that the election of the judicial officer not to act is a decision which he cannot later be altered.

[17] It seems appropriate that this division also deal with the fundamental issue whether a magistrate who examined the papers is *functus officio* and therefore unable to reconsider representations made by the accused, after he/she had done so. There are other issues flowing from what is required when a notice in terms of section 56 (or summons in terms of section 54) is issued that must also be considered.

[18] Judicial officers (magistrates, additional magistrates, assistant magistrates as well as acting magistrates, additional and assistant magistrates)¹⁵ are appointed in terms of section 9 of the Magistrate's Courts Act.¹⁶ They are authorized to hold court.¹⁷ They also possess the powers and perform the duties conferred or imposed upon them by any law, for the time being, in force in the province wherein their district is situated.¹⁸ Magistrates have jurisdiction

¹² 1981 (3) SA 560 (O) 562B.

¹³ 1981 (4) SA 956 (NC) 958A.

¹⁴ 1982 (4) SA 556 (C); *S v Tenga* 2007 (1) SACR 138 (C).

¹⁵ Hereinafter called "magistrates." See also *Nkabinde v Judicial Services Commission* 2016 (4) SA 1 (SCA) par 108-110.

¹⁶ Act 32 of 1944.

¹⁷ Section 8 of the Magistrate's Courts Act. In terms of section 1 "'Court' means a magistrate's court for any district or for any regional division."

¹⁸ Section 12 of the Magistrate's Courts Act.

over all offences except treason, murder, rape as contemplated by section 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.¹⁹

[19] A clerk of the court, appointed for a magistrate's court for a district is not a judicial officer.²⁰ It is the function of the clerk of the court to enter the particulars of an accused from the notice to appear in court (or summons) in the criminal record book for admission of guilt fines. It is administrative action which is equated with a judicial decision by a court by means of a deeming provision contained in subsection (6).

[20] It was held in *S v Rosenthal*²¹ that a deeming provision is to be construed that:

"The words "shall be deemed" ("word geag" in the signed, Afrikaans text) are a familiar and useful expression often used in legislation in order to predicate that a certain subject-matter, eg a person, thing, situation, or matter, shall be regarded or accepted for the purposes of the statute in question as being of a particular, specified kind whether or not the subject-matter is ordinarily of that kind. The ascertained from its context and the ordinary canons of construction."²²

[21] The intention of a deeming provision was explained in the case of *Mouton v Boland Bank Ltd*.²³ Citing Bennion *Statutory Interpretation* 3rded (1997) 736, the court stated that purpose is:

"The intention of a deeming provision, in laying down an hypothesis, is that the hypothesis shall be carried as far as necessary to achieve the legislative purpose, but no further."²⁴

¹⁹ Section 89(1) of the Magistrate's Courts Act.

²⁰ Section 13(2) of the Magistrate's Courts Act. The refusal of the clerk of the court to perform any act he/she is by law empowered to do is reviewable by the magistrate's court on application either *ex parte* or on notice. See *Nelson Mandela Bay Metropolitan Municipality v Nobumba and Others* 2010 (1) SA 579 (ECG) par 5.

²¹ 1980 (1) SA 65 (A).

²² 75G-H.

²³ 2001 (3) SA 877 (SCA).

²⁴ Par 13.

Bennion *Statutory Interpretation supra* 735 was recently referred to with approval in *Eastern Cape Parks and Tourism Agency v Medbury (Pty) Ltd t/a Crown River Safari*:²⁵

“Deeming provisions in Acts often deem things to be what they are not. In construing a deeming provision it is necessary to bear in mind the legislative purpose.”²⁶

[22] The purpose of the deeming provision, in the context of section 57, is to elevate a non-judicial administrative function of the clerk of the court, who is only required to enter the essential particulars of the written notice (or summons) in the criminal record book for admission of guilt fines, to be what it is not, namely, a conviction and sentence by the relevant magistrate's court. The administrative action by the clerk of the court is not a judicial act. The entry of the particulars of the notice (or summons) in the criminal record book, together with the documents are a record of having been convicted and sentenced by a magistrate's court for that district, in respect of the offence(s) stated in the notice (summons). The deemed conviction is actualized *ex lege* by the recording of the information.

[23] The aim and objective of the legislative provisions are to provide a simple and relatively speedy mechanism for an accused person to admit his/her guilt by signing the relevant part of the notice as proof that he/her understood that he/she is guilty of the offence referred to in the notice in respect of which the admission of guilt fine is paid without the need to appear in court on the date of trial.

[24] The powers of the judicial officer who examines the documents are circumscribed by section 57 of the CPA. Section 57(7) provides that a judicial officer appointed for that court

²⁵ 2018 (4) SA 206 (SCA).

²⁶ Par 29; See also *Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics* 1911 AD 13, 33.

must examine the documents (the notice and the control document of the notice). If it appears to him/her, when doing so:

- (a) that the conviction or sentence is not in accordance with justice; or
- (b) that any such sentence is not in accordance with a determination made by the magistrate; or
- (c) where a determination has not been made by the magistrate, that the sentence is not adequate such judicial officer may set aside the conviction and sentence and direct that the accused be prosecuted in the ordinary course; or
- (d) where the amount of the fine paid exceeded the determination by the magistrate, the judicial officer may direct that the portion of the amount that exceeds the determination be refunded to the accused in lieu of setting the conviction and sentence.

[25] The next question to be answered is whether the examination of the documents by the judicial officer, the particulars of which have been recorded in the relevant criminal record book, is a judicial function. It is a requirement that a judicial officer, in the first place, must satisfy himself/herself that the essential particulars of the notice (summons) have been correctly recorded in the relevant criminal record book which is purely administrative. Secondly, to be satisfied that the conviction and sentence is in accordance with justice is, in my view, a judicial decision. It would, from a practical point of view, entail that the judicial officer must be satisfied that the conviction is in order, ie that an offence has indeed been committed and that the sentence accords with the determination by the magistrate, and, if no determination has been made by the magistrate in respect of the particular offence, that the sentence is adequate if regard is had to the prevalence and seriousness of the particular offence in the district. If the judicial officer concluded that the sentence exceeded the determination made by the magistrate, he/she may direct (the

clerk of the court) to refund the accused or may set the conviction and sentence aside and direct the public prosecutor to prosecute the accused in the ordinary course.

[26] Notably, subsection (7) provides for judicial oversight whereby the mere entry in a criminal record book that brought about a legal fiction that an accused is deemed to be convicted and sentenced by a court, is judicially reviewed by a judicial officer. The documents that are presented to a particular judicial officer for examination may (or may not) be accompanied by a representation by an accused. It was held in *S v Louw*²⁷ that:

"As appears from s 57 (7) the judicial officer is charged with the duty of examining "the documents", ie the documents referred to in the preceding subsection, viz the summons or written notice which has been issued or handed to the accused containing the "admission of guilt" form completed by him, evidence of the payment by him of the fine, the duplicate of the summons or written notice marked "beheerstuk-control document" and the criminal record book for admission of guilt wherein the essential particulars have been entered by the clerk of the court. All that the judicial officer is entitled to consider is these documents and any additional information referred to in the section to which he is obliged to have regard for the proper carrying out of his functions under the section, eg information as to the amount determined in terms of section 57(5). He is not entitled to have regard to extraneous matter, eg representations by or on behalf of the accused. The fact that nowhere in the section is provision made (as was the case in s 351 (2) of the repealed Act 56 of 1955) for written representations to be laid before the magistrate, strengthens this view. Consequently the magistrate cannot set aside a conviction or sentence as a result of such extraneous information coming to his knowledge, he feels that action is called for in respect of either the conviction or the sentence, the judicial officer must submit the matter for review by this Court."²⁸

²⁷ 1982 (4) SA 556 (C).

²⁸ 558C-G.

[27] I, with respect, do not share the view that subsection (7) precludes the judicial officer from considering representations made by an accused. The reference to "documents" in subsection (7) may very well include a written representation which the accused has submitted with the original notice (or summons) when the admission of guilt fine was paid. It seems absurd that the judicial officer is obliged to ignore such a representation for purposes of review under section 57. It defeats the very object of the review by a judicial officer under the broad rubric that the deemed conviction and sentence is in accordance with justice.

[28] It was held in *S v Eglin*²⁹ that section 57 is a mechanism in terms whereof arrest and prosecution may be avoided. I disagree. If a peace officer after the arrest of an accused is of the opinion that a magistrate's court will not impose a fine exceeding an amount determined by the minister, he may hand him a written notice which *inter alia* must contain an endorsement in terms of section 57.³⁰ Section 56(1)(a) to (d) provides that the written notice shall:

- "(a) specify the name, the residential address and the occupation or status of the accused;
- (b) call upon the accused to appear at a place and on a date and at a time specified in the written notice to answer to a charge of having committed the offence in question;
- (c) contain an endorsement in terms of section 57 that the accused may admit his guilt in respect thereof without appearing in court; and
- (d) contain a certificate under the hand of the peace officer that he has handed the original of such written notice to the accused and that he has explained to the accused the import thereof."

²⁹ 2022 (1) SACR 325 (WCC) par 17-18.

³⁰ Section 56(1) and 56(1)(c) of the CPA.

[29] It does not mean that the accused is not prosecuted when he is handed a notice in terms of section 56(1). On the contrary, the accused is prosecuted when the written notice in terms of section 56(1) is issued and handed to him.

[30] Section 341, on the other hand, provides for compounding certain offences referred to in Schedule 3 of the CPA. Such offences are offences under by-laws or regulations made by or for local authorities and also certain offences involving motor vehicles, by payment of a fine.³¹ Section 341(1) and (2) provides:

"(1) If a person receives from any peace officer a notification in writing alleging that such person has committed, at a place and upon a date and at a time or during a period specified in the notification, any offence likewise specified, of any class mentioned in Schedule 3, and setting forth the amount of the fine which a court trying such person for such offence would probably impose upon him, such person may within thirty days after receipt of the notification deliver or transmit the notification, together with a sum of money equal to the said amount, to the magistrate of the district or area wherein the offence is alleged to have been committed, and thereupon such person shall not be prosecuted for having committed such offence.

(2)(a) Where a notification referred to in subsection (1) is issued by a peace officer in the service of a local authority in respect of an offence committed within the area of jurisdiction of such local authority, any person receiving such notification may deliver or transmit it together with a sum of money equal to the amount specified therein to such local authority.

(b) Any sum of money paid to a local authority as provided in paragraph (a) shall be deemed to be a fine imposed in respect of the offence in question.

³¹ "Afkoopboete" in Afrikaans.

- (c) Not later than seven days after receipt of any sum of money as provided in paragraph (a), the local authority concerned shall forward to the magistrate of the district or area wherein the offence is alleged to have been committed a copy of the notification relating to the payment in question.
- (d) If the magistrate finds that the amount specified in the notification exceeds the amount determined in terms of subsection (5) in respect of the offence in question, he shall notify the local authority of the amount specified in the notification exceeds the amount so determined and the local authority concerned shall immediately refund the amount of such excess to the person concerned.
- (e)"

[31] In respect of offences referred to in Schedule 3, section 341 only requires that the offender be informed of the date, place and time and of the offence allegedly committed and also that if the stipulated amount is paid within thirty days he/she will not be prosecuted. The said notice neither requires, as section 56(1) demands, that the offender be informed of a date specified in the notice to appear in court to answer a charge of having committed the offence in question nor that should the admission of guilt fine endorsed on the notice be paid before the specified court date that the offender need not appear in court on the said date.

[32] The purpose of a notice issued in terms of section 341 is to invite an agreement not to be prosecuted for a specified less serious offence in return for consideration.³² It stands to reason that a fine paid pursuant to a section 341 notice cannot be regarded as a previous conviction. The position is different where accused persons are charged and prosecuted by means of notices in terms of section 56.

³² Section 341(5) provides that the amounts specified in any notification under section 341 which a court would probably impose in respect of any offence, may differ from admission of guilt fines determined under section 57(5)(a) for the same offence.

[33] I am, therefore, unable to agree with the reasoning in *S v Madhina*³³ that a conviction and sentence under section 57(6) is not to be regarded as a previous conviction. There may be instances where an accused person is prosecuted for a less serious offence mentioned in Schedule 3 and an admission of guilt fine is paid which would constitute a conviction and sentence in terms of section 57(6). It is better left for the legislature to determine whether such convictions and sentences should not constitute previous convictions.

[34] In the present matter, the accused submitted an affidavit to the magistrate Modimolle in terms whereof he explained what caused him to be arrested and why he paid an admission of guilt fine for being in unlawful possession of a suspected drug called "CAT." Also included is an affidavit by the investigating officer and certain documents from the police docket. The affidavit of the investigating officer sets out that the accused was observed hiding something in his trousers when he was stopped. He was searched and a drug called "CAT" was discovered in his trousers. The investigating officer also stated in his affidavit that:

"I read and explain the constitutional rights from SAPS 14(a) in English and he understood. I issued him J 534 for R1000. He paid and was released without injury."

[35] Rogers J in *S v Houtzamer*³⁴ observed, correctly in my view, that a peace officer is not entitled to require from an accused to admit his guilt and pay an admission of guilt fine prior to releasing him. An accused is entitled to be released immediately when the written notice is issued and handed to him. Lip service was paid to the provisions of section 56(2) in present case.

³³ 2019 (1) SA 297 (WCC) par 44.

³⁴ [2015] ZAWCHC 25 (10 March 2015) par 26-27.

[36] The version proffered by the accused generally in his affidavit seems suspect. The accused is not an uneducated individual who can barely read or write. I do not believe that he was unable to read the documents which he signed at the police station or understand what transpired. According to the police documents he elected to remain silent after his rights were explained to him when he was afforded the opportunity to explain how he came to be in possession of the drug. The fact that the wrong section of the Drugs and Drug Trafficking Act was quoted is neither here nor there. The explanation in the notice that he was in unlawful possession of a drug called "CAT" was sufficient to have informed the accused of the charge against him.

[37] Unsurprisingly, the accused elected to call his girlfriend to come to his rescue. A week after the fine was paid, he was confronted with the conviction and sentence by the principal of the school where he is employed as a teacher. An informal investigation was very properly launched into his suitability as a teacher. No explanation is offered by him why it took the best part of four months for him to have taken any steps to set the conviction and sentence aside. On the probabilities he acted only after he obtained legal advice when his employer investigated his conduct.

[38] The accused, furthermore, makes very serious allegations against police officers. He admitted paying a police officer a R1,000.00 to be released from custody over and above the admission of guilt fine of R1,000.00 that he paid. His conduct *prima facie* constitutes an offence in terms of section 4(b) of the Prevention and Combating of Corrupt Activities Act.³⁵

[39] The Deputy Director of Public Prosecutions agrees with the submissions made by the accused and proposed that the conviction and sentence be set aside.

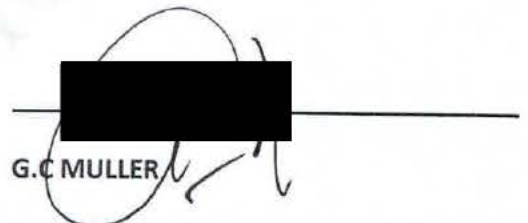
³⁵ Act 12 of 2004.

[40] The conviction and the sentence in my judgment, must be set aside and the accused is to be prosecuted in the ordinary course.

ORDER

- 1. The conviction and sentence are set aside.**
- 2. The Deputy Director of Public Prosecutions: Limpopo Division is directed to prosecute the accused in the ordinary course.**

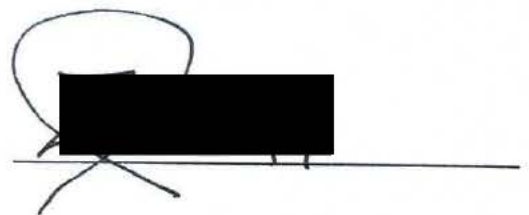
I, Concur



G.C MULLER

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE



M.Z MAKOTI

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE