

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case no: CA & R 22/25

In the matter between:

THE STATE

and

CLEMENT MOTHOB

Case no: CA & R 23/25

In the matter between:

THE STATE

and

LEBOGANG MOTLHALE

Neutral citation: *S v Mothobi* (Case no CA&R22/25);
 S v Motlhale (Case no CA&R23/25).

Coram: Tlaletsi JP & Stanton J

Delivered: 22 August 2025.

Summary: *Special review in terms of s 304(4) of the Criminal Procedure Act 51 of 1977 – Sentence of imprisonment – Conditions of suspension of sentence to be not wider than offence of which accused is convicted – Accused convicted of theft – Not competent for court to include offence of robbery in conditions of suspension in S v Mothobi – Competent for court to include offence of housebreaking with intent to steal and theft in S v Motlhale – Conditions of suspension further qualified in S v Motlhale to where accused sentenced to direct imprisonment without the option of a fine – Conditions of suspension accordingly substituted.*

ORDER

The sentence in *S v Mothobi* (CA/R 22/25) is substituted as follows:

1. The accused is hereby sentenced to Twelve (12) months imprisonment, which is wholly suspended for a period of Four (4) years on condition that the accused is not convicted for the offence of Theft committed during the period of suspension and for which the accused is sentenced to direct imprisonment without the option of a fine.
2. In terms of section 103 of the Firearms Control Act 60 of 2000, the accused has previously been declared unfit to possess a firearm.

The sentence in *S v Motlhale* (CA/R 23/25) is substituted as follows:

1. The accused is hereby sentenced to Twelve (12) months imprisonment, which is wholly suspended for a period of Four (4) years on condition that the accused is not convicted for the offence of Housebreaking with intent to steal and theft; or Theft committed during the period of suspension and for which he is sentenced to direct imprisonment without the option of a fine.

2. In terms of section 103 of the Firearms Control Act 60 of 2000, the accused is declared unfit to possess a firearm.

REVIEW JUDGMENT

Tlaletsi JP

- [1] The records in the two matters were referred to this Court by the Chief Magistrate, Kimberley, for Special Review in terms of section 304(4) of the Criminal Procedure Act, 51 of 1977 (the Act). The learned Chief Magistrate is of the opinion that the sentences imposed by the presiding Magistrate in the two matters are incompetent. This is the view shared by the Acting Senior Magistrate, who identified the two matters during her routine judicial quality assessment of finalized cases. An opinion was obtained from the Office of the Director of Public Prosecutions as it has an interest in the matter. I wish to express my appreciation for the insightful opinion provided by that office.
- [2] In the matter of *S v Mothobi*, the accused was charged with theft of chocolate. He was convicted on his plea of guilty and sentenced as follows:
- "1. Accused is hereby sentenced to Twelve months imprisonment, which is wholly suspended for a period of Four (4) years on condition that the accused not be convicted for the offence of Theft or Robbery committed during the period of suspension and for which the accused is sentence to direct imprisonment without the option of a fine.
 2. In terms of Section 103 of the Firearms Control Act 60 of 2000, the accused Has previously been declared unfit to possess a firearm." (*sic*)

[3] In the matter of *S v Motlhale*, the accused appeared before the same Magistrate on a charge of theft of “zinc plates”. He was convicted despite his plea of not guilty pursuant to a brief trial in which one witness testified for the State. The accused also testified in his defense. He was sentenced as follows:

- “1) Accused is hereby sentenced to Twelve (12) months imprisonment wholly suspended for a period of Four (4) years on condition that the accused not be convicted for the offence of Housebreaking with intent to steal and theft or Theft committed during the period of suspension.
- 2) In terms of Section 103 of the Firearms Control Act 60 of 2000, the accused is declared unfit to possess a firearm.” (*sic*)

[4] The Acting Senior Magistrate pointed out to the presiding Magistrate that the suspensive condition that the “accused not be convicted for the offence of theft or robbery” is an incompetent condition as robbery was not the charge put to the accused, Mr Mothobi. She further mentioned that robbery is also not a competent verdict of theft in terms of section 264 of the Act. In Mr Motlhale’s case, the Acting Senior Magistrate also pointed out to the presiding Magistrate that housebreaking is not a charge that was put to him and that including it as part of the suspensive condition of the sentence made the sentence incompetent.

[5] In both instances, the presiding Magistrate had a different view. In the *Mothobi* matter, he pointed out, relying on *R v Cloete* 1950 (4) SA 191 (E), that:

- “9. I am of the opinion that although the accused was not charged with robbery that due to the nature of the offence of theft and robbery that a relationship, how slight it might be, does exist between these two offences. Both robbery and theft are offences that require the unlawful intentional appropriation of the

movable property of one person by another person. Albeit one with force and the other without force.

10. Both offences, at least in the District Court, carry the same penalty and the inclusion of Robbery therefore does not expose the accused to a more severe penalty regime, in the event of a breach of the suspended sentence for which the accused is sentenced to direct imprisonment.
11. Furthermore, the accused in this matter have two previous convictions of robbery and therefore this sentence also serve as a motivation to the accused not to commit either offence.” (*sic*)

- [6] In the matter of Mr Motlhale, we do not have a written response from the presiding Magistrate. However, the Chief Magistrate pointed out that the reasoning of the presiding Magistrate is the same as in the *Mothobi* matter since the query raised is the same in both matters.
- [7] The issue to be determined is whether the inclusion of robbery in the case of Mr Mothobi, and housebreaking in the case of Mr Motlhale, as conditions for the suspension of their term of imprisonment by the presiding Magistrate, were competent.
- [8] Section 297(1)(b) of the Act empowers a court that convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, in its discretion, to pass a sentence but order the operation of the whole or any part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a)(i) which the court may specify in the order. For purposes of these two matters, the condition applicable will be (*hh*), which provides for “*any other matter*”.¹ It is indeed so that there is no express provision in the Act for the “standard” (negative) condition of suspended sentences, namely that the accused’s

¹ The conditions stated in section 297(1)(a) (i) relate to: Compensation, Rendering a benefit or service to the aggrieved party, Community service, Submission to instruction or treatment, Submission to supervision or control of a probation officer, Attendance of or residence at a specified centre, Good conduct, and Any other matter.

sentence is suspended for a specific period of time, on condition that the accused is not convicted of a specified offence committed during the period of suspension. The court in *S v Malgas*² held that such conditions are related to “good conduct”. This Court accepts that such conditions also fall within the ambit of “*any other matter*”.³

- [9] The *locus classicus* on the condition of the suspension of sentence is *R v Cloete*⁴ where the court interpreted section 360(b) of the Criminal Procedure and Evidence Act 31 of 1917 to mean:

“While the words of sec. 360 (b) of Act 31 of 1917 are wide and the discretion of the judicial officer should not be lightly interfered with, it does seem that two principles at least should be observed in the imposition of the conditions. The first is that the condition imposed should bear at least some relationship to the circumstances of the crime which is being punished by the imposition of the suspended sentence. It need not be closely related but it should be related to it in some degree at least, even though slightly related, and not divorced from it, or remote from it. The second is that the condition be stated with such precision that the convicted person may understand the ambit of the condition. . . . It, however, does appear from [decided cases] that the conditions “should be associated in some manner with some circumstances of the present offence’.”

- [10] In *S v Van Den Berg*,⁵ having referred with approval to the *dictum* in *R v Cloete* above, the Court opined that in the consideration of the nature of the conditions of suspension of sentence to be imposed, the offender, his or her character, past, and weaknesses should not be lost sight of. The Court held further that it is undesirable to include a large number of offences, even if there is a relationship between them, in the condition of suspension.

² 1979 (3) SA 178 (A) at 181F; [1979] 4 All SA 223 (AD) at 224.

³ See Du Toit (*et al*): *Commentary on the Criminal Procedure Act*, (Jutastat e-publications, RS 74, 2025) ch28-p56C.

⁴ 1950 (4) SA 191 (E) at 192F-H.

⁵ 1976 (2) SA 232 (TPD) at 234E-H.

[11] In *S v Benn*; *S v Jordaan*; *S v Gabriels*⁶ Bozalek J persuasively held that:

"In addition to these two requirements, a third has developed over the years, namely that the suspending condition has to be reasonable. Thus, where it was found that a condition was unduly onerous for the accused and it was not reasonably possible for the accused to comply therewith, such a condition was set aside. In *S v Grobler*⁷ and so too in *S v Titus*⁸ it was held that conditions of suspension ought to be formulated in such a way that they do not cause future unfairness or injustice. Courts have also held that conditions of suspension must also be framed in such a way that they take account of human fallibility.⁹

To these requirements there can, in my view, be added a further one – that no conditions should unjustifiably infringe upon an accused's basic human rights. It is possible, of course, to view this requirement as falling under the rubric of reasonableness but, in my view, using the prism of a human rights perspective facilitates an evaluation of a doubtful or disputed condition of suspension."

[12] The condition of suspension in the *Mothobi* matter is, in my view, too wide and bears no real relationship between the stealing of some chocolates and appropriating the property of someone else through violence. The effect of the suspension is that, should Mr Mothobi be convicted on a charge of robbery during the period of suspension, he will have a period of twelve months' imprisonment for theft of chocolate imposed before or in addition to the sentence for the conviction of robbery. The imposition of the suspended sentence will take place despite the facts and circumstances of the robbery being materially different from the facts in the theft of the chocolate incident. The imposition of the suspended sentence will, in such circumstances, be unfair to Mr Mothobi as the theft of chocolate might be

⁶ 2004 (2) SACR 156 (CPD) at 160H-161C.

⁷ 1992 (1) SACR 184 (C).

⁸ 1996 (1) SACR 540 (C).

⁹ See *S v Allart* 1984 (2) SA 731 (T) and *S v Herold* 1992 (2) SACR 195 (W) at 198J.

far unrelated to the robbery, which has violence as an element. Notably, there is not even an option of a fine to pay to avoid serving twelve months imprisonment for stealing a chocolate!

- [13] In *S v Martin*¹⁰ the Court emphasized that section 297 of the Act must be interpreted in line with section 35(3) of the Constitution, which guarantees an accused person's right to a fair trial. The Court correctly held that:

"In my view, the offences which are set as conditions that an accused may not commit, without him being exposed to the putting into operation of the suspended sentence, must be fair and reasonable and must not be wider than the offence of which the accused has been convicted. A derogation from this well-established principle in my view offends against the accused's right to a fair trial enshrined in s 35(3) of the Constitution. I appreciate the fact that there has to be a measure of kinship between the offences set as a condition and the offence of which the offender was convicted, as was recently restated by Henny J in S v Killian 2021 (2) SACR 371 (WCC) para 5; however in my considered view, offences set as conditions must not be more onerous and serious than the offence of which the accused was convicted." (Emphasis added.)

- [14] It is also important to point out that it does not mean that the current conviction will not play any role in the future. Should Mr Mothobi be convicted of robbery during the period of suspension of the sentence or any time thereafter, the current conviction will be considered as part of his previous convictions, and an appropriate sentence would be imposed, considering the circumstances of the robbery. By 'circumstances', I refer to the factual matrix supporting the commission of the offence.

- [15] The situation is somewhat different in the *Motlhale* matter, in which housebreaking is included as a condition for the suspension of the sentence of twelve months imprisonment for theft. The facts of the case that form the

¹⁰ [2021] ZAWCHC 229; 2022 (1) SACR 421 (WCC) para 11.

basis of the conviction are that Mr Motlhale removed the zinc plates from a Transnet storeroom at the train station with the intention of stealing. His conduct is closely related to housebreaking with intent to steal and theft. The inclusion of housebreaking in the condition for suspension of his sentence is neither unreasonable nor unfair.

- [16] The only problem I have is the formulation of the suspension. It is not qualified and this means that the severe sentence of twelve months imprisonment would be put in operation even for a petty crime of theft. To avoid this problem, a qualification that the suspended sentence be in operation where the accused is sentenced to an unsuspended term of imprisonment without the option of a fine, is necessary.¹¹
- [17] In the light of the fact that the actual sentences are not tempered with but only the conditions of the suspension of the sentences, this Court is in as good a position to amend the sentences without referring the matters back to the trial court for that purpose. Doing so will spare the already burdened trial court from more work and save valuable time. Furthermore, in his response, the trial Magistrate has indicated that he will abide by the decision of the review court.
- [18] What this Court will do in the circumstances is to amend the sentence in the *Mothobi* matter by deleting the robbery as part of the conditions of suspension; and qualify the conditions of suspension in the *Motlhale* matter by adding the words “and for which he is sentenced to direct imprisonment without the option of a fine”.
- [19] In the result, the following order is made:

¹¹ See *S v Allart* 1984 (2) SA 731 (T); *S v Ntele en 'n Ander* 1986 (2) SA 405 (NC); *S v Tsanshana* 1996 (2) SACR 157 (EC).

19.1 The sentence in *S v Mothobi* (CA/R 22/25) is substituted as follows:

- “1. The accused is hereby sentenced to Twelve (12) months imprisonment, which is wholly suspended for a period of Four (4) years on condition that the accused is not convicted for the offence of Theft committed during the period of suspension and for which the accused is sentenced to direct imprisonment without the option of a fine.
2. In terms of section 103 of the Firearms Control Act 60 of 2000, the accused has previously been declared unfit to possess a firearm.”

19.2 The sentence in *S v Motlhole* (CA/R 23/25) is substituted as follows:

- “1. The accused is hereby sentenced to Twelve (12) months imprisonment, which is wholly suspended for a period of Four (4) years on condition that the accused is not convicted for the offence of Housebreaking with intent to steal and theft; or Theft committed during the period of suspension and for which he is sentenced to direct imprisonment without the option of a fine.
2. In terms of section 103 of the Firearms Control Act 60 of 2000, the accused is declared unfit to possess a firearm.”



LP TLALETSI
JUDGE PRESIDENT
NORTHERN CAPE DIVISION

I concur

A large black rectangular box redacting the signature of the judge.

Stanton J

JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION