



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Not Reportable

Case no: A208/2023

Lower Court Case No: 3/1453/13

In the matter between:

PENELOPE MTYALI

Appellant

And

THE STATE

Respondent

Coram: Justice D Thulare et Acting Justice V Barthus

Heard: 14 August 2026

Delivered: 25 August 2026

Summary: Criminal law — Sentence — Appellate interference — Trespass Act 6 of 1959 — Continued occupation of premises despite valid eviction order.

Constitutional law — Section 26 — Right of access to adequate housing — Eviction order previously granted — Criminal court not empowered to revisit civil eviction proceedings.

Sentence — Suspended sentence — Personal circumstances — Vulnerability — Constitutional context — Deference to trial court's discretion.

ORDER

1. The appeal against sentence is dismissed.
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JUDGMENT

Barthus AJ (Thulare J concurring):

Introduction

[1] This appeal concerns the sentence imposed following the appellant's conviction for contravening the Trespass Act 6 of 1959. The conviction arose from her continued occupation of premises at A[...] Z[...] Street, Khayelitsha, despite a valid eviction order granted in August 2010.

[2] The magistrate imposed a fine of R3 000 or 90 days' imprisonment, wholly suspended for five years on condition that the appellant is not convicted of contravening the Trespass Act 6 of 1959 during the period of suspension.

[3] The appellant contends that the sentence is shockingly inappropriate, constitutionally insensitive, and insufficiently considerate of her personal circumstances. The appeal requires this Court to examine the sentence through the lens of constitutional values, while maintaining the well-established principle of appellate deference to the sentencing court.

Legal principles

[4] The foundational principle governing appellate interference with sentence was articulated in *S v Rabie*¹, where the Appellate Division held that punishment is pre-eminently a matter for the discretion of the trial court. This principle has been reaffirmed consistently. In *S v Malgas*², the Supreme Court of Appeal emphasised that an appellate court may not interfere merely because it would have imposed a

¹ 1975 (4) SA 855 (A) at 857D–F.

² 2001 (1) SACR 469 (SCA) at para 478 par 12.

different sentence. Intervention is justified only where the sentence is vitiated by a material misdirection or is disturbingly inappropriate. *S v Pieters*³ similarly held that interference is warranted only where the sentence induces a sense of shock or reflects a failure to exercise judicial discretion properly.

[5] The courts have repeatedly stressed that the trial court's proximity to the facts demands deference. In *S v Giannoulis*⁴, the Appellate Division observed that the sentencing court's "feel for the case" cannot be replicated on appeal.

[6] *S v Anderson*⁵ similarly underscored that the trial court is uniquely positioned to weigh the personal circumstances of the accused against the gravity of the offence. In *S v Kgosimore*⁶, the Supreme Court of Appeal cautioned that appellate courts must exercise "caution and restraint" when considering whether to interfere with sentence.

The grounds of appeal

[7] The appellant invokes section 26 of the Constitution. The right of access to adequate housing is fundamental, and the Constitutional Court has repeatedly emphasised its centrality to dignity. However, these cases also affirm that constitutional protections operate within the framework of lawful court processes. Once an eviction order has been granted after proper enquiry, the rule of law requires compliance.

[8] The appellant's reliance on section 26 is misplaced. The constitutional enquiry under section 26(3) was conducted in the civil eviction proceedings. The criminal court could not revisit that order.

[9] The magistrate's observation that the appellant had taken no steps to challenge or rescind the eviction order was relevant and appropriate.

[10] The criminal court was not empowered to revisit the correctness of the eviction order. The magistrate correctly confined himself to the enquiry mandated by

³ 1987 (3) SA 717 (A) at 727.

⁴ 1975 (4) SA 867 (A).

⁵ 1964 (3) SA 494 (A).

⁶ 1999 (2) SACR 238 (SCA).

the Trespass Act, namely, whether the appellant unlawfully remained on property without the consent of the lawful owner.

[11] The appellant argues that her age, hearing impairment, pension status, and family responsibilities were insufficiently considered. These factors implicate constitutional values of dignity and vulnerability.

[12] The record shows that the magistrate was acutely aware of these circumstances. His decision to impose a wholly suspended sentence, avoiding direct imprisonment, reflects a careful, compassionate, and constitutionally aligned exercise of discretion.

[13] In *S v Zinn*⁷, the court emphasised the triad of sentencing considerations: the crime, the offender, and the interests of society. The magistrate balanced these factors accurately. His approach also aligns with *S v Holder*⁸, which emphasises that personal circumstances must be weighed but cannot overwhelm the seriousness of the offence.

[14] The argument that the charge should have been framed differently has no bearing on sentence. The appellant was legally represented, understood the nature of the charge, and suffered no prejudice. The conviction is not before this Court.

[15] The appellant contends that the suspension condition duplicates the eviction order. This contention cannot be sustained.

[16] The condition imposed requiring the appellant not to be convicted of contravening the Trespass Act during the suspension period is a standard negative condition under section 297 of the Criminal Procedure Act.

[17] The appellant placed heavy reliance on the *S v Koko*⁹. In this matter the magistrate imposed a suspended sentence on condition that the accused vacate a structure in an informal settlement. Here, the magistrate had effectively ordered a summary eviction without looking at the accused's personal circumstances or the Constitutional protections under Section 26(3). When setting the order aside, the

⁷ 1969 (2) SA 537 (A).

⁸ 1979 (2) SA 70 (A).

⁹ 2006 (1) SACR 15 (C).

court cautioned against using prosecutions under Section 1 of the Trespass Act as a shortcut to circumvent the strict onerous requirements of the PIE Act.

[18] The present matter is clearly distinguishable because there was already an eviction order against the appellant and the suspended condition is confined to deterring future trespassing.

[19] The magistrate approached sentencing with care and proper regard to the constitutional context. He considered the appellant's personal circumstances alongside the seriousness of the offence and the rights of the lawful owner. The sentence reflects a balanced and proportionate exercise of discretion.

[20] The complainant lawfully purchased the property and was deprived of its use and enjoyment for a considerable period. The magistrate was entitled to regard this as serious.

[21] The sentence imposed is proportionate, lenient, and consistent with constitutional values. The appellant has failed to demonstrate any misdirection, irregularity, or constitutional defect in the sentence imposed by the magistrate.

[22] The magistrate's reasoning was coherent, balanced, and firmly grounded in established sentencing principles. His conclusion reflects a proper exercise of discretion and warrants this Court's deference.

[23] The following order is made:

1. The appeal against sentence is dismissed.

V BARTHUS
ACTING JUDGE OF THE HIGH COURT

I agree.

D THULARE
JUDGE OF THE HIGH COURT

Appearances

For Applicant: Adv M Calitz
Instructed by: Legal Aid South Africa

For Respondent: Adv E M Van Wyk
Instructed by: Director of Public Prosecutions: Western Cape