

dealt with all the queries that I raised. The office of the Director of Public Prosecutions (DPP) in their unanimous memorandum supports the conviction of accused one and two only. They conceded, correctly in my view, that there was no evidence to convict accused four. However the Director of Public Prosecutions is of the view that the sentence imposed on the two accused is startlingly inappropriate.

- [3] Having had the benefit of the comprehensive reasons advanced by the magistrate and the memorandum from the Director of Public Prosecutions, I am satisfied that the conviction of accused one and two are in accordance with justice and has to be confirmed. However insofar as accused four is concerned I agree with the Director of Public Prosecutions that there is virtually no scintilla of admissible evidence linking him in the commission of the offence. In terms of *S v Legote en 'n Andere* 2001(2) SACR 179 (SCA) and *S v Lubaxa* 2001 (2) SACR 703 (SCA) the magistrate was obliged, mero motu, to discharge him in terms of section 174 of the Criminal Procedure Act 51/1977. Regrettably a failure by the magistrate to act pro-actively to discharge accused four has resulted in a failure of justice.
- [4] Reverting to the facts of this case, both accused one and two were found in possession of meat belonging to Pick 'n Pay. They had no right to possess same. Six packets were discovered hidden beneath the driver's seat of their delivery vehicle whilst the seventh packet was on the side of the passenger seat. At some stage accused one had one packet of meat hidden under his armpit. The cumulative *effect* of the entire proven evidence justify, as the only reasonable

inference to be drawn from the proven facts, the inference that accused one and two took the meat with a theftous intent (*animus furandi*) R v Blom 1939 AD 188 and S v Reddy & Others 1996 (2) SACR 1 (A). The conviction of accused one and two is confirmed as being in accordance with the law.

- [4] Concerning sentence the office of the Director of Public Prosecutions is of the view that the sentence imposed on the accused is inappropriate. They recommend that they be sentenced to R 2000-00 (two thousand rand) or four (4) months imprisonment each. This attitude is motivated by the cogent facts that both accused have clean criminal records and further that all the stolen meat was recovered. Accused one is 40 years old and has three dependants. He is employed and earns R 350-00 (three hundred and fifty rand) per week. Except for the fact that accused two was never asked if he has any dependants, his personal circumstances are similar to those of accused one. However he is 29 years old. Undoubtedly the fact that the accused stole the same meat which they had to deliver to Pick 'n Pay on behalf of their employer. Sparta Beef is a seriously aggravating feature. However the importance of this fact should not be over-exaggerated at the expense of other relevant considerations
- [5] Although sentencing lies pre-eminently within the discretion of the court a quo, I agree with the Director of Public Prosecutions that the sentence imposed *in casu* is disturbingly harsh. It is patently clear from the personal particulars of both accused, particularly their financial means, that a fine of R 3000-00 is well beyond their means. I am of the view that the circumstances of this case as fully set out

above, warrant that I interfere with the sentence imposed on the accused.

For the foregoing reasons, I make the following order:

1. The conviction and sentence in respect of accused four are set aside.
2. The conviction of accused one and two is confirmed.
4. The sentence imposed on accused one and two is set aside and replaced with the following:

"Both accused one and two are each sentenced to a fine of R 1000-00 (one thousand rand) or 5 (five) months imprisonment. "

4. The clerk of the court, Springs is hereby ordered to refund to accused one and two any amount in excess of R 1000-00 (one-thousand) already paid by either accused one and two.

L O BOSIELO
JUDGE OF THE HIGH COURT

I agree.

J B SHONGWE
JUDGE OF THE HIGH COURT