IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

High Court Ref No: 983/05
Magistrate's Serial No: 102/2005
Review Case No: D1487/2005

10 March 2006

Magistrate
RANDBURG

THE STATE v COLLARD, MATT

J U D G M E N T

MOSHIDI, J:

[1] This matter was originally placed before me on ordinary automatic review in terms of section 303 of the Criminal Procedure Act, Act 51 of 1977 (the Act). As the proceedings appeared to be in accordance with justice , I at that stage, accordingly endorsed the certificate as such.

[2] However, the matter has now been placed before me on special review

in terms of section 304(4) of the Act which provides as follows:

> "**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 shall 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**."

[3] *In casu*, I have been requested by the magistrate to review the conditions only of the sentences imposed by him in the circumstances which follow hereafter. The instant recommendations of the magistrate are also supported by the Senior Public Prosecutor at the Randburg Magistrate's Court, as will appear later.

[4] In this matter, the accused faced three (3) counts of theft under case number D1487/2004 in the Randburg Magistrate's Court (the first case). The accused also faced two (2) additional counts of fraud under case number 6/675/2005 in the same court (the second case). In both the cases, the complainant was the same employer of the accused. In the first case the value of the goods stolen by the accused from the complainant was about R137 763,27, whilst in the second case such value was the sum of R18 000,00. When the accused appeared in the magistrate's court in the first case on 28 February 2005, he pleaded guilty to all three counts of theft. The accused was out on bail of R3 000,00 and legally represented. On the basis

of the accused's written statement in terms of section 112(2) of the Act, the accused was found guilty as charged on 3 August 2005 and was sentenced to a fine of R60 000,00 or 3 years' imprisonment which was wholly suspended for 5 years on certain conditions. One of such conditions, which is the subject of this review, was that the accused repays to the complainant (his employer) in full the some of R137 763,27 on or before 3 August 2010 (five (5) years later) without failure. The accused offered R1 000,00 per month immediately to be increased to R3 000,00 per month after four (4) months. The offer was not acceptable to the complainant. In the second case, the accused under similar circumstances as the first case, pleaded guilty and was convicted as charged. The amount occasioned by the accused's fraudulent conduct was the sum of R18 000,00. On 3 August 2005 the accused was fined R18 000,00 or 1 month imprisonment which was once more wholly suspended for a period of five (5) years on certain conditions including the condition that the accused repays to the complainant the sum of R18 000,00 on or before 3 August 2010. The total amount of the repayment by the accused in favour of the complainant was therefore the amount of R155 763,22 on or before the year 2010. Clearly lacking in the repayment conditions of the suspended sentence, was any immediate or reasonably eminent obligation on the accused to commence the repayment. The consequence and effect of this condition of the suspended sentence was indeed inevitable. The accused would similarly do nothing and wait until 3 August 2010 to effect any payment towards the full amount to evade imprisonment. The complainant was

unhappy. On 29 August 2005, the complainant addressed the magistrate, *inter alia*, as follows:

> " … **The impression received by the undersigned, was that the accused was instructed to pay the full amount over a period of five (5) years in equal installments (sic), interest free, and should an installment (sic) not be honoured then recourse through your court would be implemented. Correctional Services, when approached for clarification on your worship's instructions, seemed confused as they interpreted your instructions to be that the accused need only pay the full amount at the end of his five years sentence. We feel that this interpretation made by Correctional Services is incorrect as this would have been unfair to our company …**"

[5] This, no doubt prompted the magistrate in the instant special review, to address the Registrar of this Court, *inter alia*, as follows:

> "**On closer scrutiny, I realized that the sentences as they stand are impractical. I reached this conclusion after realizing, that the complainant would have to wait until 3 August 2010 before he could have any form of recourse should the accused not reimburse him at all. This would give a false sense of comfort for the accused who might hide behind the wording of the sentences and not commence monthly repayments in favour of the complainant, as intended by the court a quo. It was never the intention of the court a quo to impose a sentence that would leave the complainant in the same position he found himself before approaching the court …**"

[6] The magistrate then recommended that the repayment conditions of the suspended sentences imposed by him in the first case be deleted and

replaced with the following:

> "**That the accused repays to the complainant, Brian Arthur Huskisson the amount of R137 763,27 in 59 equal monthly payments of R2 322,00 and a final payment of R764,95. The first payment must be made on or before 3 October 2005 and thereafter on or before the 3rd of each succeeding month until the full amount has been paid without default in payment**."

[7] The other conditions of the suspended sentences to remain unaltered.

In respect of the second case, the magistrate similarly, recommended that the repayment conditions of the suspended sentences only imposed by him be deleted and replaced with the following:

> "**That the accused repays to the complainant, Brian Arthur Huskisson the amount of R18 000,00 in 60 equal monthly payments of R300,00. The first payment must be made on or before 3 October 2005 and thereafter on or before the 3rd day of each succeeding month until the full amount has been paid without default in payment**."

[8] The above recommendations by the magistrate were supported by the Senior Public Prosecutor stationed at the Randburg Magistrate's Court in a rather helpful written memorandum dated 13 September 2005.

[9] The more pertinent question that needs resolution in this matter is whether this court on review, may amend the conditions of the suspended sentences to ameliorate the situation of the complainant and in doing so, without any or further reference to the accused. Put differently, whether the

accused will be prejudiced by such amendment. Most cases on review deal with the situation of an accused and not that of a complainant in a criminal trial. In *S v Van Wyk* 2000 (1) SACR 590 (TPD) there was an attempt by the magistrate to have a condition and sentence reviewed to the advantage of the complainant. At 591d-e the learned Motata J said:

> "**I doubt whether this court, without affording the accused an opportunity to be heard, will set aside a conviction and sentence in order for the State to prosecute the accused on a more serious charge. I need not decide the point as I am satisfied that the proceedings in this case were in accordance with justice**."

In *S v Morris* 1992 (2) SACR 365 (C) the court held:

> "**Where the correction of an error in a sentence would entail increasing the sentence which was passed and recorded or altering the conditions of suspension so as to make them more onerous for the accused, the Supreme Court has no power on review to do so. The fact that the error was inadvertent and could have been corrected in the presence of the accused in terms of section 298 of the Criminal Procedure Act cannot confer on the reviewing court the power which it does not have to increase a sentence**."

[10] In the instant matter it is not the convictions or the sentences *per se* that the review is aimed at. The convictions are in fact in order. The sentences imposed in both cases were otherwise competent. The accused in terms of the sentences imposed, remains liable to the complainant for the full amount he was ordered to repay. What needs to be reviewed as

recommended by the magistrate are the terms and conditions of such repayment. The motivation for the recommendation is that the sentences are impractical and detrimental to the complainant who would have to wait until 3 August 2010 for any repayment to occur by the accused. In my view, the accused can hardly be said to be prejudiced. His burden is not increased. He is merely called upon to make some immediate commitment towards reducing his original liability. The sentences essentially remain unchanged but seek to introduce some monthly repayments by the accused. He offered to repay the complainant although in smaller instalments. There is indeed no evidence on record that the accused has effected any repayments since the sentences were passed on him.

[11] In the case of *S v Grobler* 1992 (1) SACR 184 (C) the court on review, adopted the magistrate's recommendation to set aside the conditions of a suspended sentence on the grounds that they were unduly onerous and that it was not reasonably possible for the accused to comply with such conditions. The conditions had become impractical to comply with. See also in this regard *S v Mahlangu* 2000 (2) SACR 210 (TPD).

[12] As stated earlier, most of the review cases concerned the position of an accused, for the better or worse. There should be no reason not to extend such review, where there was no actual prejudice to the accused, to a complainant in a criminal case. In *S v Kubheka* 1999 (1) SACR 65 (WLD) at 66f Blieden J said:

> "… In review cases there is a line of judgments which suggest that strict adherence to the law is not the ultimate goal, but rather that real and substantial justice must be achieved. **R v Harmer 1906 TS 50 at**

> **51; S v Zulu 1967 (4) SA 499 (T) at 502 and S v Ndlovu 1998 (1) SACR 599 (W). I am in respectful agreement with this dictum as reflected these judgments**."

[13] In addition, the complainant also has rights in terms of the Constitution of the Republic of South Africa. In particular in terms of section 173 of the Constitution of the Republic of South Africa Act, 108 of 1996 provides as follows:

> "**The … High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice**."

[14] In the instant matter, although I am prepared to accept the magistrate's recommendations, it seems to me that it would be unfair to order that the accused effect any repayments retrospectively. There were indeed unavoidable delays since the recommendations were made and the finalisation of this matter. It will be just and equitable that the accused be ordered to make future payments only from the date of this judgment.

[15] In these circumstances, I propose to confirm the proceedings as being in accordance with justice save for the conditions of repayment as indicated below. I accordingly, make the following order:

1. The convictions in both cases, i.e. case numbers D1487/2004 and 6/675/2005 are hereby confirmed;
2. The sentences imposed in both cases i.e. case numbers 1487/2004 and 6/675/2005 are hereby confirmed likewise, subject however, that the conditions of repayment imposed by the magistrate in both cases are hereby deleted *in toto* and replaced with the following respectively:

    2.1 In the case number D1487/2004 as follows:

"*That the accused should repay to the complainant, Brian Arthur Huskisson or his successor-in-title or assignee, the sum of R137 763,27 (One Hundred and Thirty Seven Thousand Seven Hundred and Sixty Three Rand Twenty Seven Cents Only) in 59 equal instalments of R2 322,00 (Two Thousand Three Hundred and Twenty Two Rand Only) and a final instalment of R764,95 (Seven Hundred and Sixty Four Rands and Ninety Five Cents Only) the first such instalment should be made on or before 3 May 2006 and thereafter on or before the 3rd day of each and every succeeding month until the full amount owing has been repaid.*"

2.2 In the second case number 6/675/2005 as follows:

"*That the accused repays to the complainant, Brian Arthur Huskisson or his successor-in-title or assignee, the sum of R18 000,00 (Eighteen Thousand Rand Only) in equal monthly instalments of R300, 00 (Three Hundred Rands Only). The first such payment should be made on or before 3 May 2006 and thereafter on or before the 3rd day of each and every succeeding month until the full amount due has been repaid.*"

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D S S MOSHIDI
JUDGE OF THE HIGH COURT

I agree:

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M JAJBHAY

JUDGE OF THE HIGH COURT