IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

CASE NO A59/2006

In the matter between

ROBERT GABATSWE **APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

VAN OOSTEN J

[1] This is an appeal with leave of this Court, against sentence only. The appellant after a plea of guilty was duly convicted in the Magistrate's Court, Westonaria, of the theft of clothing to the value of R149, 00. In view of his long list of previous convictions sentencing was referred to the Regional Court in terms of s 116 of the Criminal Procedure Act 51 of 1977 (the Act). The Regional Court confirmed the conviction, and a probation officer's report was handed in by consent. In the light of the appellant's previous convictions he was declared a habitual criminal in terms of s 286(1) of the Act, which in effect means a term of imprisonment of not less than 7 years and not more than 15 years (See s 65(4)(*b*)(iv) of the Correctional Services Act 8 of 1959 and *S v Niemand* 2001 (2) SACR 654 (CC) par [3]).

[2] An analysis of the appellant's previous convictions reveals the following: the first conviction is dated 11 May 1984 when the appellant was 17 years of age. Nine further convictions followed in the subsequent 13 years, the last of which is dated 11 December 1997. On this occasion the appellant was warned of the provisions of s 286 of the Act. The offences except for two thereof all involve an element of dishonesty. His record (the SAP 69 form) reflects five previous convictions of theft; two of housebreaking with intent to steal and theft, one of fraud, one of malicious injury to property and one of escaping from custody. The sentences imposed were the following: on four occasions cuts with a light cane; a referral to a reformatory school; one suspended sentence and four sentences of direct imprisonment (*ie* 9 months, 6 months, again 6 months and lastly, 9 years). On the last sentence he was released on parole having served just short of four years of the six year sentence. The offence which is the subject-matter of this case, was committed less than three years later, on 21 September 2004.

[3] Section 286 of the Act empowers "a superior court or a regional court which convicts a person of one or more offences, if it is satisfied that the said person habitually commits offences and that the community should be protected against him" to declare a person an habitual criminal, in lieu of the imposition of any other punishment for the offence or offences of which he is convicted (See *S v Makoula* 1978 (4) SA 763 (SWA) at 768B-E). The court however, retains a discretion "to be exercised in the light of all the relevant circumstances and in accordance with the ordinary principles governing the sentencing of offenders" See *S v Van Eck* 2003 (2) SACR 563 (SCA) at par [9]. The only question for determination on appeal concerns the merits of the declaration. The declaration of a person to an habitual criminal is in the nature of a finding that the usual methods of punishment have ceased to serve any good purpose, and therefore does not *strictu sensu* serve as a punishment for the new offence. In *S v Van Eck supra,* Scott JA put it thus (at par [10]):

> *"Notwithstanding the amelioratory effect of the discretion, s 286*

> *remains a far-reaching provision which emphasises the preventative aspect of punishment and is aimed at punishing an offender for a persistent tendency to commit crime rather than for the crime or crimes of which he or she stands convicted."*

The declaration has the effect of rendering the offender harmless for a substantial period of time to see whether he might not possibly outgrow his criminal habits. It further, as s 286 contemplates, serves the purpose of protecting the community against the offender (cf *S v Nawaseb* 1980 (1) SA 339 (SWA) at 343)**.**

[4] In order to achieve the purpose of a declaration the Court should do a proper investigation into the nature and circumstances of an accused's previous convictions (*Commentary on the Criminal Procedure Act* Du Toit *et al* 28-24; *R v Swarts* 1953 (4) SA 461 (A); *S v Masisi* 1996 (1) SACR 147 (O)). The appellant was legally represented during the proceedings in the Regional Court. Nothing was said, nor was the appellant's evidence led concerning the nature and circumstances surrounding the previous offences. The Court *a quo* relied solely on the probation officer's report. The report regrettably, and for no apparent reason makes mention of only four of the appellant's previous convictions. Be that as it may, I do not think that the duty on a Court to investigate can be classified as absolute. For the Court to conduct such an inquiry may well be impracticable or even prejudicial to the accused (See *S v Stiff* 2000 (2) SACR 430 (NC) at 441*g*-442*a*). Where an accused is legally represented the Court in my view will, save in exceptional circumstances, be entitled to assume that all relevant factors in mitigation of sentence have been placed before it. The appellant, as I have mentioned, had been warned of the provisions of s 286 of the Act when the last sentence was imposed. Had there been any mitigating features in the nature of the previous offences, the appellant's legal representative surely would have put those on record. The Regional Magistrate, in my view was therefore entitled to merely, without further investigation, refer to the appellant's previous convictions as constituting sufficient ground for declaring him to have become an habitual

criminal.

[5] The appellant at the time of the trial was 38 years of age. He is not married and has never been in fixed employment. He comes from an unsophisticated background. He pleaded guilty and showed some form of remorse. The offence he has been convicted of was of a relative trivial nature. The explanation tendered for the theft of the clothing was that he wanted to sell it in order to raise money to buy food. I agree with the Regional Magistrate that a sentence in terms of s 276(1)(*h*) of the Act, as recommended by the probation officer, would, in view of the appellant's history of criminal activities, not be appropriate. The appellant has had the benefit of various forms of punishment aimed at his rehabilitation over an extended period of time which have not had the desired effect. His long term rehabilitation therefore was duly recognised in declaring him an habitual criminal. Counsel for the appellant was unable to point to any misdirections and I can see no reason for interfering with the sentence imposed.

[6] In the result the appeal is dismissed.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree

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P COPPIN
ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR APPELLANT:	***ADV S HLAZO***
COUNSEL FOR RESPONDENT:	***ADV MOTHIBE***
DATE OF JUDGMENT:	***17 JUNE 2008***