

**REPORTABLE
IN THE SOUTH GAUTENG HIGH COURT (JOHANNESBURG)**

High Court Ref No: 131/2010

Magistrate's Court Ref No: 22/2010

Case Number: 61/0960/2009

DATE: 20/10/2010

In the matter between:

THE STATE

And

NOSIPHO PRECIOUS KHOZA

The Accused

REVIEW JUDGMENT

C. J. CLAASSEN J:

- [1] The accused was arraigned in the Magistrate's Court for the district of Johannesburg on a charge of theft before magistrate Ms A. Africa. According to the charge sheet the accused stole R35 000.00 in cash from her employer.
- [2] The accused, who was represented by Mr Retief, pleaded not guilty to the abovementioned charge on 8 December 2009, whereafter the trial commenced with the evidence of the complainant. The matter was later postponed to 25 January 2010 for further evidence by the complainant.

[3] On 25 January 2010 the accused made formal admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977 (hereinafter referred to as “the Act”), whereafter the State closed its case without leading further evidence. The Court then proceeded to convict the accused as charged, on the basis of the admissions made by the accused in terms of section 220 of the Act.

[4] The accused was thereafter sentenced to a fine of R10 000.00 or 36 months’ imprisonment which the Court suspended for a period of five years on condition that the accused is not convicted of theft or attempted theft, committed during the period of suspension. The Court further made a compensation order in terms of section 300 of the Act, ordering the accused to pay the amount of R20 000.00 as follows:

- “a) The amount of **R2000.00** (two thousand) is payable today (**25/1/2010**).
- b) The balance is payable in instalments of **R500.00** (five hundred) at the **end of each month**, until the balance is paid in full.
- c) The next payment of R500 (five hundred) is due at the end of February 2010.”

[5] It further appears that an agreement was reached between the prosecutor and defence counsel that an amount of R2000.00 would be payable immediately and an amount of R500.00 would be payable monthly thereafter until a total of R20 000.00 was paid. The agreement would therefore not compensate the complainant in full as the damage suffered by the complainant was for an amount of R35 000.00. The complainant was, however, never called to testify whether or not this agreement was acceptable and whether she was prepared to accept an amount less than her actual damages.¹

[6] The matter was thereafter referred on Special Review by the learned Senior Magistrate, N Jadezweni, as the accused did not comply with the

¹ See Record p 24 lines 9 – 19 and p 26 lines 20 – 24.

compensation order, in that she only paid an amount of R2000.00 on 25 January 2010. The learned senior magistrate argues that the compensation order was inappropriate as it was not made a condition of the suspended sentence ² and that the trial magistrate did not follow the “correct procedure”. It was requested that the sentence should be replaced with an appropriate and competent sentence.

[7] This matter came before me, and I referred the matter for comment to the Director of Public Prosecutions on the following:

- “1. Was the procedure followed by the Magistrate unlawful?
2. If so, what would have been the correct procedure?
3. What is the proper remedy to rectify the situation?”

The office of the Director of Public Prosecutions has submitted a helpful report for which I express my gratitude.

[8] There are two ways in which a Court can provide compensation to a complainant who suffered a loss or damage to property, due to the actions of an accused in a criminal matter:

1. The Court may make a compensation order as part of the suspensive conditions to a sentence in terms of section 297 of the Act ³, or
2. The Court may make a compensation order in terms of section 300 of the Act, which order has the effect of a civil judgment. ⁴

² The court may not lay down a date before which compensation should be paid, unless it is a condition of suspension. See **State v Nyati** 1978 (4) SA 26 (T) at 27C – E

³ Section 297(1)(a)(i)(aa) of the Criminal Procedure Act 51 of 1977 which reads as follows:

“297 Conditional or unconditional postponement or suspension of sentence, and caution or reprimand

(1) Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion –

- (a) postpone for a period not exceeding five years the passing of sentence and release the person concerned –
 - (i) on one or more conditions, whether as to –
 - (aa) compensation;”

⁴ Section 300 of the Criminal Procedure Act 51 of 1977 reads as follows:

“300 Court may award compensation where offence causes damage to or loss of property

(1) Where a person is convicted by a superior court, a regional court or a magistrate’s court of an offence which has caused damage to or loss of property (including money)

Both methods are discretionary and depend on the conviction of an accused for an offence that caused damage.

- [9] An order in terms of section 300 of the Act would only be appropriate where the accused has sufficient money or executable assets to compensate the complainant in full or to a large extent. Where an accused is unable to compensate the complainant in full, an order in terms of this section should not be made. If an accused is employed and able to repay in instalments, it would be more appropriate and practical to impose a sentence suspended on condition of periodical repayments.⁵
- [10] Compensation as a condition of a suspended sentence is too often not considered. A condition of suspension is more flexible as it can be judicially adapted in the case of failure to pay without the complainant having to incur the costs and bother of execution. Therefore courts should rather make use of section 297 opportunities to impose compensation as a suspensive condition of the sentence.⁶ *In casu* it appears from the record that the prosecutor received instructions from the complainant to request the Court to make a compensatory order against the accused in terms of section 300 of the Act.⁷

belonging to some other person, the court in question may, upon the application of the injured person or of the prosecutor acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss: Provided that –

(a) a regional court or a magistrate's court shall not make any such award if the compensation applied for exceeds the amount determined from time to time by the Minister by notice in the Gazette in respect of the respective counts.

(b) ...

- (2) For the purposes of determining the amount of the compensation or the liability of the convicted person therefor, the court may refer to the evidence and the proceedings at the trial or hear further evidence either upon affidavit or orally.

- (3) (a) An award made under this section –

(i) by a magistrate's court, shall have the effect of a civil judgment of that court;

(ii) by a regional court, shall have the effect of a civil judgment of the magistrate's court of the district in which the relevant trial took place.

(b) ...”

⁵ See **State v Baloyi** 1981 (2) SA 227 (T) at 229E – H

⁶ See Terblanche, “Guide to Sentencing in South Africa” Second Edition, p 405

⁷ See Record p 24 lines 6 – 13

[11] It appears from the record that the accused was unemployed as she had lost her employment due to the fact that she had committed the offence against the complainant, who was her employer. It further appears from the prosecutor's address in aggravation of sentence that there was a possibility of the accused being re-employed by the complainant, in order for her to be able to comply with a compensation order. As the complainant was never called to testify during the sentencing phase of the trial, the issue of the possible re-employment of the accused was never confirmed. Thus, there is no evidence to indicate whether or not the accused would have been able to afford it to comply with the compensation order under consideration, especially in light of her being unemployed with only a vague possibility of being re-employed by the complainant.⁸

[12] Although the learned magistrate was entitled to make a compensation order in terms of section 300 of the Act, more could, and should, have been done to establish:

1. Whether or not the accused would be able to comply with such an order in light of her unemployment;
2. Whether or not the complainant was prepared to accept an amount in compensation that would be substantially less than her actual loss or damage;
3. Whether or not there was a real possibility of the complainant re-employing the accused in order for her to comply with the compensation order.

[13] The proceedings *in casu* were not in accordance with justice and the sentence imposed and the compensation order in terms of section 300 of the Act should be set aside. The following order is made:

1. The conviction is confirmed.

⁸ See Record p 24 lines 22 – 24 and p 27 lines 1 – 7

2. The sentence is set aside including the compensation order issued in terms of section 300 of the Criminal Procedure Act 51 of 1977.
3. The matter is referred back to the magistrate who convicted the accused to sentence her afresh.
4. The magistrate is to conduct a proper enquiry as to whether section 297 or section 300 of the Criminal Procedure Act 51 of 1977 is most suitable for purposes of a compensation order in this case, taking into consideration the matters referred to in paragraph [12] above.

DATED THE _____ DAY OF _____ 2010 AT
JOHANNESBURG

C. J. CLAASSEN
JUDGE OF THE HIGH COURT

I agree

R. MOKGOATLHENG
JUDGE OF THE HIGH COURT