

Reportable:	<b>NO</b>
Circulate to Judges:	<b>NO</b>
Circulate to Magistrates:	<b>YES</b>
Circulate to Regional Magistrates:	<b>YES</b>



**IN THE HIGH COURT OF SOUTH AFRICA  
NORTHWEST DIVISION, MAHIKENG**

**HIGH COURT REF: HC 01 /2023**

**MAGISTRATE'S COURT CASE NO: B1187/2016**

**In the matter between:-**

**THE STATE**

**AND**

**FIONA NCUBE**

**Accused**

**Coram:** PETERSEN ADJP, MFENYANA J

**Received:** 12 September 2023

**Delivered:** 22 September 2023

**Summary:** Criminal law and procedure – application to put into operation a suspended sentence – section 297(7) and 297(9) of the Criminal Procedure Act 51 of 1977 providing only two avenues – sentence may be further suspended subject to the same conditions or other conditions that could have been imposed at the time of the original sentence or to put the sentence into operation.

**ORDER**

**On review from:** District Court, Rustenburg, North West Province.

- (i) The proceedings held on 20 July 2023 under case number B1187/2016 are reviewed and set aside.**
  
- (ii) The Registrar of this Court is directed to bring this judgment to the attention of the Chief Magistrate, North West Province and the Regional Court President, North West Division for circulation.**

## REVIEW JUDGMENT

### Mfenyana J

- [1] This matter was brought before me as a special review on **12 September 2023**.
- [2] The Senior Magistrate, Rustenburg referred the matter to this Court, with the following comments:

***“RE: SPECIAL REVIEW: CASE: B 1187 / 2016 STATE V FIONA NCUBE***

1. *Case B1187/2016 was placed before the magistrate and the request was for the magistrate to consider putting the suspended sentence into operation. Case C380/2020 was the contravening of the suspended sentence which is also attached.*
2. *The record of proceedings in the court is attached. The magistrate denied the application to put the suspended sentence into operation.*

3. **Section 297** make provision the magistrate may further suspended the operation of a sentence or the court can put into operation the sentence which was suspended.
4. I believe the act does not make provision for a magistrate to deny the application to put the suspended sentence into operation.

*The request is therefore that in terms of **Section 304 of act 51 of 1977** the court must set aside the proceedings of the magistrate court with instructions to deal with the matter.”*

- [3] It appears from the record that on **14 September 2016**, the accused was convicted of theft, having pleaded guilty to the charge. **On 21 September 2016** she was sentenced to a fine of R1 500.00 or three months imprisonment, wholly suspended for a period of 5 years, on condition that the accused was not found guilty of theft, attempted theft, fraud, robbery, committed during the period of suspension.
- [4] On **28 March 2020** the accused was again charged with theft. She was convicted on **25 January 2021** following a plea of guilty. She was sentenced on **31 March 2021** to three years' imprisonment. When the accused was sentenced in **2021**, no application was made for the earlier sentence, imposed in **2016**, to be put into operation. By **31 March 2021**, a period of 4 years and 4 months of the 5 year term of the suspended sentence imposed on **21 September 2016**,

had elapsed. The suspended sentence previously imposed, had therefore not lapsed.

- [5] A period of some 2 years and 4 months later, on **20 July 2023**, the State applied for the sentence imposed in 2016 to be put into operation. The Magistrate who presided over the application, dismissed the application, on the basis that it would be unfair to put the suspended sentence into operation, in consideration of the period that had already lapsed. The record of the proceedings leaves much to be desired in respect of the procedure adopted during the hearing of the application. It reads as follows:

“PROCEEDINGS HELD ON 20 JULY 2023

*PROSECUTOR: B1187/2016, State versus Fiona Dube. As it pleases the Honourable Court, Your Worship. The accused person apparently was sentenced, Your Worship, whereby the Court imposed a fine of 1 500 or three months imprisonment, which was wholly suspended for a period of five years, Your Worship. The accused person was found guilty on 31 March 2021, Your Worship, whereby she contravened or infringed the conditions which were imposed in 2016, Your Worship, of five year suspended, Your Worship.*

COURT: So the sentence was in 2016?

PROSECUTOR: In 2016, Your Worship.

COURT: So between 2016 and 2022, how many years?

PROSECUTOR: It marks four years and a half.

COURT: How do they want to put in operation?

PROSECUTOR: I do not know, Your Worship.

COURT: You do not know?

PROSECUTOR: Those were my instructions. May it be put into operation [indistinct....]? As the Court please.

COURT: The sentence was imposed by one Ms Mothobi [?]. And this sentence, where was it? Is it from Phokeng? Tlhabane Magistrate Court.

PROSECUTOR: Rustenburg, Your Worship, all of them.

COURT: No, it cannot be. It is Tlhabane. It is not this court's jurisdiction. I see he was sentenced on 31 March. Is he still serving that sentence?

PROSECUTOR: Indeed, Your Worship. I believe, Your Worship, because of she emerges from [indistinct 02:48] and she was brought by the members of the correctional services.

COURT: Do you have anything to say, ma'am, regarding this? They have made an application that a suspended sentence be put into operation.

INTERPRETER: 2026, Your Worship?

COURT: 2016.

ACCUSED: Well, Your Worship, I finished my sentence last year September and I had 10 months on top of that. So my question before the Court today was... I was actually waiting for document from the Court, which shows that I have four months left to be served from the previous conviction or from the previous sentence, rather.

.....

RULING

COURT: After having considered the period that has lapsed between the previous sentence and the present sentence, it is almost four and a half. The Court is of an opinion that thus will be unfair if it puts the suspended sentence into operation. Application by the State to put the suspended sentence into operation is hereby denied. It is dismissed.

PROSECUTOR: As the Court pleases, Your Worship.

ACCUSED: Understood, Your Worship.

COURT: Thank you, ma'am.

**COURT ADJOURNS**"

- [6] The above extract represents the entire record of proceedings in respect of the application to put the suspended sentence into operation.
- [7] In a letter addressed to the Senior Magistrate, the Senior Prosecutor states that the Magistrate's refusal to put the application into operation "seems to be an irregularity/error in law", as section 297(9) of the Criminal Procedure Act 51 of 1977 ("the CPA") indicates what options a magistrate has in those circumstances. The Senior Prosecutor goes further to request that the matter be sent on special review in terms of section 304 of the CPA.
- [8] It is worth noting that the putting into operation of a suspended sentence as alluded to by the Senior Prosecutor, to which request the Senior Magistrate acceded, is not reviewable in terms of section 304 of the CPA read with section 303 of the CPA.
- [9] The request may however, be reviewed in terms of section 22 of the Superior Courts Act 10 of 2013 ("the SCA"), on one or more of the grounds stipulated in the section. The High Court may also, by virtue



of its inherent jurisdiction in terms of the common law, correct or set aside the proceedings of lower courts on grounds of irregularity<sup>1</sup>.

Section 22 of the SCA provides:

**“22      *Grounds for review of proceedings of Magistrates’ Court***

*(1) The grounds upon which the proceedings of any Magistrates’ Court may be brought under review before a court of a Division are-*

- (a) absence of jurisdiction on the part of the court;*
- (b) interest in the cause, bias, malice or corruption on the part of the judicial officer;*
- (c) gross irregularity in the proceedings; and*
- (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.*

*(2) This section does not affect the provisions of any other law relating to the review of proceedings in Magistrates’ Courts.”*

[10] Discernible from section 22(c) of the SCA, is that this Court is at large to set aside the proceedings of the court *a quo* should it be found that a gross irregularity in the proceedings has occurred. This begs the question whether a gross irregularity has occurred in the proceedings relevant to the application by the prosecutor, to put the suspended sentence into operation.

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<sup>1</sup> *S v Peskin 1997 (2) SACR 460 (C)*

[11] Section 297 of the CPA deals, *inter alia*, with suspended sentences.

The relevant portions applicable to the present review provide:

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

(1) *Where a court convicts a person of any offence...., the court may in its discretion-*

(a)...

(b) *pass sentence but order the operation of the whole or any part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a) (i) which the court may specify in the order;*

Subsection (9) further provides:

(9) (a) *If any condition imposed under this section is not complied with, the person concerned may upon the order of any court, or if it appears from information under oath that the person concerned has failed to comply with such condition, upon the order of any magistrate, regional magistrate or judge, as the*

*case may be, be arrested or detained and, where the condition in question-*

*(i)...*

*(ii) was imposed under subsection (1) (b), (4) or (5), be brought before the court which suspended the operation of the sentence or, as the case may be, the payment of the fine, or any court of equal or superior jurisdiction,*

*and such court, whether or not it is, in the case of a court other than a court of equal or superior jurisdiction, constituted differently than it was at the time of such postponement or suspension, may then, in the case of subparagraph (i), impose any competent sentence or, in the case of subparagraph (ii), **put into operation the sentence which was suspended.***

[12] The power of a court in terms of section 297(9)(a)(ii) of the CPA is circumscribed, in that it may put into operation the sentence which was suspended or further suspend the sentence imposed subject to the same conditions or other conditions that could have been imposed at the time of the original sentence. This was affirmed in **Stow v Regional Magistrate, Port Elizabeth NO & others 2019**

(1) **SACR 487 (SCA)** where the Supreme Court of Appeal at paragraph [12], held that the provisions of **section 297(7)** and **section 297(9)** create two avenues:

*'The court could either further suspend the sentence subject to the same conditions or other conditions that could have been imposed at the time of the original sentence, or to put the sentence into operation.'*

[13] Part 32 of the Policy Manual of the National Prosecuting Authority of South Africa provides guidelines to prosecutors in dealing with suspended sentences. First, it requires that the application be dealt with on the record of the suspended sentence case, as the application is a continuation of the initial proceedings under that case number. Second, the prosecutor must then ascertain whether the condition has been breached and whether or not the time limit has expired. In this regard, a meticulous determination of the period concerned is required.

[14] As to the duty of the Magistrate *in casu*, and in general, it is trite that the Magistrate should enquire into all the facts which must be present before the sentence is put into operation. These include

requiring the accused person to either admit or deny the allegations against him/her. The nature and purpose of the application must be explained to the accused. These are in my view, preconditions for putting a suspended sentence into operation, and are apparent from Section 297. These guidelines were not followed in the proceedings of **20 July 2023**. As is evident from the extract of the transcription *supra*, there was no attempt to follow these guidelines or meaningfully consider the requirements of the CPA. This constitutes a gross irregularity, and a violation of **section 35(3) of the Constitution**<sup>2</sup>, which guarantees every accused person a right to a fair trial. A further irregularity in the proceedings is evident in the failure of the Magistrate to apprise the accused of her rights to legal representation.

[15] I associate myself with the *dictum* in **S v Sekotlong 2005 JDR 0190 (T)**, where Van Rooyen AJ stated that “a court which orders that a suspended sentence be made operational”, is not performing a mere administrative or quasi-administrative function. “(I)t assumes the position of a criminal court which punishes the person who has been convicted. It has to have regard to the ordinary principles of

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<sup>2</sup> Constitution of the Republic of South Africa, 1996.

punishment...” Likewise, a court tasked with an application to put a suspended sentence into operation, should consider the same, and cannot merely deal with such as a mere administrative function. This, is regardless of the outcome of such application. It thus does not alter the situation that in the final analysis, the suspended sentence was not put into operation.

[16] In addition to the glaring procedural irregularities evidenced by the record of proceedings, it was not open to the magistrate to dismiss the application to put the suspended sentence into operation, as section 297(9) does not clothe the court with the power to do so. In so doing, the Magistrate exceeded his powers. This constitutes a further gross irregularity in the proceedings.

[17] The time lapse between the time when the sentence was breached and the bringing of the application, is also worrisome. No explanation was proffered by the prosecutor for the undue delay. While no timeframe is prescribed for bringing such application, this must preferably be done swiftly. The sentiments in **S v Hoffman 1992(2) SACR 56 (C)** are apposite:

*“Where a condition of suspension is breached it is in the interests of the administration of justice, the accused and society that the*

*consequences of the breach be acted upon and that, where it is decided that the sentence should be put into operation that is done expeditiously.”<sup>3</sup>*

[18] The proceedings relevant to the application to put the suspended sentence into operation are flawed in many respects, grossly irregular and therefore not in accordance with justice. The proceedings accordingly fall to be set aside.

[19] The Senior Magistrate seeks an order setting the proceedings aside, with directions to be furnished on how to deal with the matter further. Save for the sentiments expressed at paragraphs [13] and [14] *supra*, nothing more need be said. It is not for this Court to provide directives on the application of section 297 in circumstances where the Magistrate should be fully acquainted with his powers in this regard.

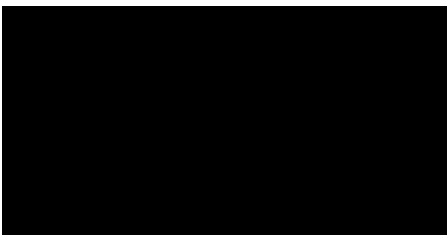
[20] In the result, the following order is made:

- (i) The proceedings held on 20 July 2023 under case number B1187/2016 are reviewed and set aside.**

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<sup>3</sup> At paragraph 65a.

**(ii) The Registrar of this Court is directed to bring this judgment to the attention of the Chief Magistrate, North West Province and the Regional Court President, North West Division for circulation.**

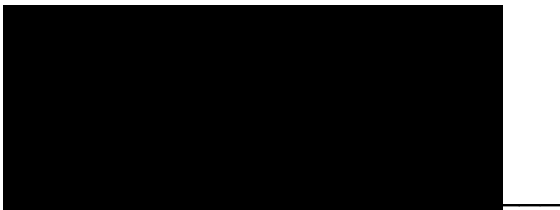


**S MFENYANA**

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**

**NORTHWEST DIVISION, MAHIKENG**

I agree and it is so ordered.



**A H PETERSEN**

**ACTING DEPUTY JUDGE PRESIDENT**

**OF THE HIGH COURT OF SOUTH AFRICA**

**NORTHWEST DIVISION, MAHIKENG**