

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSCAPE PROVINCIAL DIVISION)

Case number: A946/2006

In the matter between:

and

THEMBA MSANDENI TSHABALALA

APPELLANT

JUDGMENT

TERBLANCHE AJ:

1 The Appellant was charged with robbery with aggravating circumstances in the Regional Court for the Regional Division of Southern Gauteng. The State alleged that the Appellant unlawfully assaulted one Peter Mkhwebani by pointing a firearm at him and by taking with force and violence out of his possession a cell phone and R1 005.00 cash.

2 The Appellant was convicted as charged and the regional magistrate imposed a sentence of 20 years imprisonment.

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THE STATE

RESPONDENT

- 3 The Appellant appeals against his sentence with leave granted by this
Court.
- 4 The complainant testified that on the day in question the Appellant and
another man approached him. The other man pointed a firearm at the
complainant. The Appellant then approached the complainant, searched
him and took his cell phone and cash. The Appellant and the other person
left and the complainant went home and informed his parents of the
incident. The complainant and his friend looked for the Appellant a few
days later, saw him in a group of persons, thereafter went to his parental
home and wrote down his address and then laid a charge with the police.
The Appellant was known to the complainant.
- 5 The learned magistrate accepted the complainant's version and, in my
view, quite correctly convicted the Appellant as charged.
- 6 With regard to sentence the learned Magistrate took into account the
Appellant's personal circumstances, in particular his previous conviction
for a similar offence involving violence and held that there were no
substantial and compelling circumstances justifying the imposition of a
sentence other than the minimum prescribed sentence. The Magistrate
held that as a second offender the minimum prescribed sentence to be

imposed was 20 years imprisonment and such a sentence was imposed. The learned Magistrate further declared the Appellant unfit to possess a firearm.

7 In argument before us Mr Manzini for the Appellant submitted that the Appellant was not warned of the applicability of the minimum sentence at the beginning of the proceedings and that in the light of the judgment in **S v Ndlovu 2003 (1) SACR 331 (SCA)** Appellant did not have a fair trial and therefore could not be sentenced in terms of the Criminal Law Amendment Act 105 of 1997 (*"the Act"*).

8 The further point raised by Mr Manzini is whether the Magistrate was entitled in terms of section 51 (2)(a)(ii) of the Act to impose a sentence of 20 years imprisonment. Mr Manzini submitted that there was no basis upon which the learned Magistrate could have sentenced the Appellant to 20 years. He submitted that it appears from the record that the learned Magistrate misinterpreted the provisions of section 51 (2)(a)(ii) of the Act in that the words *"any such offence"*, the aforementioned section, do not encompass assault in the case of robbery with aggravating circumstances.

9 Section 51 (2)(a)(ii) of the Act provides as follows:

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"Notwithstanding any other law but subject to subsections (3) and (6) a Regional Court or a High Court, including a High Court to which a matter has been referred under section 52(1) for sentence shall in respect of a person who has been convicted of an offence referred to in -

- (a) Part II of Schedule 2, sentenced a person, in the case of-
- (i) a first offender, to imprisonment of a period not less than 15 years;
 - (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
 - (iii) a third or subsequent offender of any such offence to imprisonment for a period not less than 25 years." [my underlining]

10 The prosecutor in his address to the Court *a quo* that the Appellant had a previous conviction of assault with the intent to do grievous bodily harm and the minimum sentence of 20 years imprisonment prescribed by section 51 (2)(a)(ii) had to be imposed. The learned magistrate regarded the Appellant as a person with "relevant previous convictions" and regarded the Appellant as a second offender in terms of section 51 (2)(a) (ii) of the Act.

- 11 In my view there are two reasons why the learned magistrate's reasoning cannot be sustained, the first being that there is no reference to assault with intent to do grievous bodily harm in Part II of Schedule 2 of the said Act and the second being that the words "such offence" in section 51 (2)(a)(ii) refer not to a conviction of any offence mentioned in Part II of Schedule 2 but rather to a second conviction of the same offence as the offence the accused is convicted of, *in casu* with aggravating circumstances.
- 12 For the aforesaid reasons I am of the view that the learned magistrate erred in regarding the Appellant as a second offender and that the applicable section would have been section 51 (2)(a)(i) which prescribes imprisonment for a period not less than 15 years.
- 13 That brings me back to Mr Manzini's first point, i.e that the Appellant was not warned of the applicability of the minimum sentence at the beginning of the proceedings and that he accordingly did not have a fair trial and could not have been sentenced in terms of the Act. It is clear that no such warning was given to the Appellant or his attorney.
- 14 At the trial before the Court *quo* Appellant was duly represented by Ms Nqonqo, an attorney employed by or instructed by the Legal Aid

Board, just like Mr Manzini. It appears from the record that she put up an able defence on behalf of the Appellant but I cannot say whether she would not have approached the matter in a different way had the implications of the minimum sentence prescribed by the Act been explained to her and the accused at the outset. It further appears that Ms Nqonqo first addressed the Court in respect of sentence, although her address has not been transcribed because it was inaudible. Thereafter the prosecutor addressed the Court and he mentioned the minimum sentence prescribed by the Act for the first time. It is therefore not clear from the record whether Ms Nqonqo in fact had regard to the provisions of the Act when she addressed the Court *a quo*. *S v Ndlovu* 2003 (1) SACR 331 (SCA) Mpati JA set aside the minimum sentence imposed where a legally represented Appellant had not been pertinently alerted to the fact that he stood in peril of the sentencing regime of the Act being applied if he was convicted. Mpati JA pointed out at p 337 that the enquiry is, whether, on a vigilant examination of the relevant circumstances, it can be said that an accused had a fair trial. That the State intends to rely upon the sentencing regime created by the Act a fair trial will generally demand that its intention pertinently be brought to the attention of the accused at the outset of the trial. Mpati JA did not decide whether, on what circumstances, it might suffice if it is brought to the attention of the accused only during the course of the trial. See also *S v Legoa* 2003 (1) SACR 13 (SCA). In *S v Mseleku*

(2) SACR 574 (D) it was held that the competence of legal representatives could not be assumed; it was not unusual to find inexperienced counsel representing accused persons in such cases, and judges were frequently required to play an active roll in assisting counsel in order to ensure a fair trial. To assume that counsel was competent entailed the risk that an accused could end up spending a lifetime in prison. In any event, it was not possible for a Court to assess the competence of counsel at the pleading stage, especially where the Court had no prior knowledge of counsel's competence. It was a relatively easy matter for the prosecution to make it known in clear terms in the indictment that it would rely on the minimum sentence. It was not sufficient for the indictment to mention facts that ought to alert legal representatives to the sentencing provisions. In *S v Makatu* 2006 (2) SACR 582 (SCA) it was held that it was incumbent on the State to specify the case to be met in such a way that the accused person would appreciate properly not only the charges, but also the consequences thereof. See also: *S v Ncheche* 2005 (2) SACR 386 (W) at p 388 par 3E - F; *S v Kimberly and Another* 2004 (2) SACR 38 (E); *Rammoko v The Director of Public Prosecutions* 2003 (1) SACR 200 (SCA), *S v Mbambo* 1999 (2) SACR 421 (W); *S v Ndlovu* 2001 (1) SACR 204 (W); *S v Tshidiso* 2002 (1) SACR 207 (W); *S v Tshabalala* 2006 (1) SACR 328 (N),
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15 Whilst it appears from the record as if Ms Nqonqo put up a spirited defence on behalf of the Appellant, one cannot tell from the record whether she was an experienced practitioner or not. It is also not possible to tell from the record whether she was alive to the fact that the State would rely on the sentencing regime in the Act and whether she at all dealt with the consequences of the sentencing regime of the Act in her defence of the Appellant. It therefore follows that by invoking the provisions of the Act without it having been brought pertinently to the Appellant's attention that this would be done, rendered the trial in that respect substantially unfair. In my view it therefore follows that, as in the case of **S v Ndlovu** *supra*, omission constituted a substantial and compelling reason why the prescribed sentence ought not to have been imposed. A fresh sentence therefore has to be imposed.

16 I have considered imposing a sentence but unfortunately as a result of Ms Nqonqo address to the Court a *quo* having been transcribed, we do not have any information relating to the Appellant's personal circumstances before us. Nothing in this regard appears from the learned magistrate's judgment on sentence. He simply referred to the address by Ms Nqonqo, which we unfortunately do not have before us.

- 17 In the circumstances we have no option but to remit the matter to the magistrate for the imposition of an appropriate sentence.
- 18 I regret that I must record that my labours in this matter have been conducted without the full and proper professional assistance of the legal representatives of the Appellant and the Director of Public Prosecutions. Whilst Mr Manzini referred me to the **Ndlovu** in his heads of argument, he did not have a copy of the law report with him in Court and was completely unable to meaningfully address us on the point raised by him with regard to the magistrate's failure to warn the Appellant of the application and implication of the Act. Counsel for the Director of Public Prosecutions, Mr Viviers, similarly did not have the law report with him and was quite unable to assist us in this regard. He also did not even deal with this point in his heads of argument. Mr Manzini failed to draw the Court's attention to the fact that assault with intent to do grievous bodily harm was not an offence listed in Part II of Schedule 2 of the Act. Mr Viviers compounded the problem when he assured us that assault with the intent to do grievously bodily harm indeed was an offence referred to in Part II of Schedule 2. When questioned on this point, he admitted that he did not have a copy of the Act with him and when a copy was made available to him by the Court, he had to concede that assault with the intent to do grievous bodily harm was not offence referred to in Part II of Schedule 2. This is most

disturbing. It is incomprehensible that counsel could come to court unprepared and then to make reckless misstatements in argument before the Court. Furthermore both Mr Manzini and Mr Viviers delivered heads of argument wherein they dealt with both the conviction and the sentence imposed by the learned magistrate where it quite clearly appears from the record (p 59) that leave to appeal was granted only in respect of the sentence. It is regrettable that the level of assistance that the Court can expect from counsel appearing in these criminal appeals has declined to such a level where the Court can hardly rely on counsel for assistance. Mr Viviers in fact referred the Court to no authorities whatsoever in his heads of argument and with regard to the imposition of the prescribed minimum sentence only made a startlingly incorrect submission to the effect that the Magistrate was entitled in terms of section 52(1)(ii) of the Act to impose a sentence of 20 years imprisonment for a second offender, which submission he was obliged to withdraw in court. As appears from what I have stated above, this submission is incorrect on at least two bases and counsel did not refer to the relevant authorities, did not read the Act or the schedule and clearly did not apply his mind to the issues at hand. He was clearly unaware of the provisions of the Act and the impact of the relevant authorities. He did not even deal with this point in his heads of argument. Mr Manzini, save for raising the important point relating to the magistrate's failure to warn the Appellant and for at least referring

the Court to the Ndlovu judgment, did not take the matter any further and was quite unable to be of any meaningful assistance of the Court. The two counsel also caused the Court to spend a lot of unnecessary time in considering the conviction of the Appellant where there was in fact no appeal against the conviction. I have discussed this issue with a number of colleagues who have presided in these special criminal appeals in the recent past and all of them have experienced a serious lack of application by the legal practitioners appearing before them. The heads of argument are often of little assistance and counsel, as well as the attorneys instructed by the Legal Aid Board generally, obviously with a number of exceptions, approach these appeals in a lackadaisical manner which is not becoming of counsel appearing in matters where long term prison sentences have become the order of the day. This cannot be tolerated. I accordingly propose to order, as was done in **Mdlulu v Delarey and Others [1998] (1) All SA 343 (W)**, that neither counsel is permitted to recover any fees in respect of his appearance in this Court on Monday 27 August 2007.

19 I accordingly make the following order:

1. The Appellant's sentence of 20 years imprisonment is set aside;

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2.The matter is remitted back to the magistrate for sentence to be considered and imposed afresh, with due regard to the provisions of section 51 (2) of the Criminal Law Amendment Act 105 of 1997;

4.The case is postponed to 24 September 2007 to the Regional Court for the Regional Division of Southern Gauteng held at Benoni for sentence;

5.The Appellant remains in custody;

5.The Registrar of this Court and the Director of Public Prosecutions are requested to bring this judgment to the attention of the relevant Clerk of the Court and the Presiding Magistrate Mr Harichand and to request the Clerk of the Court and the Honourable Magistrate to ensure that the matter is concluded expeditiously;

6.The legal representatives for the Appellant and the State are not entitled to recover any fees in respect of their appearance before this Court on Monday 27

June 2007;

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7. This judgment should be brought to the attention of the Legal Aid Board, the Director of Public Prosecutions, the Pretoria Bar Council and the Law Society of the Northern Provinces.

FH TERBLANCHE AJ
I agree

BP GEACH AJ
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