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S v MSIZA

(TRANSVAAL PROVINCIAL DIVISION)

1979 June 12 HUMAN J and KRIEGLER AJ

*Criminal procedure—Compensation to complainant—Award of by a magistrate's court under s 300 of Criminal Procedure Act 51 of 1977—Imprisonment as an alternative to compensation cannot be imposed—Application for must be made by prejudiced person and accused must be given an opportunity to give evidence or to make representations regarding the amount of the damages—Audi alteram*

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*rule applicable.*

The *audi alteram* rule is applicable before a compensation order in favour of a complainant can be made by a magistrate's court under s 300 of the Criminal Procedure Act 51 of 1977.

The appellant had been convicted of a contravention of s 140 (1) (a) of the Lebowa Road Traffic Act 8 of 1973 (L) and had been ordered, in terms of the provisions of s 300 of the Criminal Procedure Act, to pay an amount of R625 to the complainant as compensation, or, on default, to undergo a further 100 days' imprisonment. It appeared that the complainant had not applied for the award of compensation to him, that there was insufficient evidence from the complainant to prove the amount of his damages, and that at no stage had the appellant been given an opportunity to give evidence or to make representations regarding the amount of the damages. In an appeal, *Held*, that the magistrate had not been authorised by any law to impose imprisonment as an alternative for the payment of compensation.

*Held*, further, that the compensation order also had to be set aside because the complainant had not made application nor given evidence regarding his damages, and also because the *audi alteram* rule had not been applied by giving the appellant an opportunity to lead evidence or make representations regarding the amount of the damages.

Appeal against an order for compensation. The facts appear from the judgment.

*L R Kotzé* for the appellant.

*J H Dreyer* for the State.

HUMAN J: The appellant was convicted of a contravention of s 140 (1) (a) of Act 8 of 1973 (L), that is the Lebowa Road Traffic Act, and sentenced to a fine of R90 or 90 days' imprisonment of which R45 or 45 days' imprisonment were suspended for five years on condition that the accused was not again convicted of a contravention of s 140 of Act 8 of 1973 during the period of suspension. In terms of the provisions of

s 300 of the Criminal Procedure Act 51 of 1977 a compensation order was made against the appellant in terms of which he had to pay an amount of R625 to the complainant on or before 1 June 1979 and in default of payment had to undergo a further 100 days' imprisonment.

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The appeal was not against the conviction and the sentence in respect of the contravention of s 140 (1) (a) but against the order which the magistrate made in terms of the provisions of s 300 of Act 51 of 1977.

It is perfectly clear that the magistrate, if he was entitled to order that accused should pay the amount of R625 to the complainant as compensation, was not entitled to order that he should undergo a further 100 days' imprisonment in default of payment in terms of any Act. But there are numerous defects in connection with this order. Section 300 of Act 51 of 1977, the relevant portion reads as follows:

"Where a person is convicted . . . by a magistrate's court of an offence which has caused damage to or loss of property (including money) 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."

An award which is made in terms of this section by a magistrate's court has the effect of a civil judgment in that Court. From the evidence it appears that there was no application by the injured person, the complainant, Joel Motsogi, for the award of compensation to him. It is true that during evidence he said: "....."

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Thereafter the case continued and the appellant was convicted. There was no application after the close of the State's and defence cases on the merits by the complainant or the public prosecutor on behalf of him for damages. This is already a defect in this case and the order of the magistrate on this ground alone cannot stand.

But there are further defects. At no stage before the magistrate made this order did he give the accused an opportunity to give evidence or address the court on the amount of the compensation. It is also clear that complainant did not give sufficient evidence to prove that his damage to this vehicle amounted to R625. According to decided cases it is essential that before such an order is made the accused must be given the opportunity to make representations or adduce evidence why an order to this effect should not be made. The accused was never given the opportunity to adduce evidence or make representations in this regard. It is unnecessary to refer to all the decided cases, but the State referred to the following cases: *S v Nquli en Andere* 1973 (4) SA 556 (C) at 557; *S v Rensburg* 1974 (2) SA 243 (T) at 244; *S v Baadjies* 1977 (3) SA 61 (E) at 62. There are still other cases.

It is abundantly clear that the *audi alteram* rule is also applicable here before an order in terms of the provisions of s 300 of the Criminal Procedure Act can be made. In the circumstances the State agrees that the order of the magistrate, that the accused had to pay R625 on or before

1 June to complainant and that in default of payment he had to undergo 100 days' imprisonment, must be deleted. Otherwise the proceedings are confirmed.

KRIEGLER AJ concurred.

Appellant's Attorneys: *Steyn & Esterhuysen.*

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