



**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION: MTHATHA]**

REF NO. 217700

Delivery date: 08/09/2022

In the matter between:

THE STATE

VS

XOLISA MNDELA

Accused

REVIEW JUDGMENT

JOLWANA J:

[1] The accused appeared in the magistrate's court for the district of Flagstaff in Flagstaff case no. 489A/2021 on a charge of contravening the provisions of section 31 of the Maintenance Act 99 of 1998 for his failure to pay maintenance in compliance with a maintenance order. At the time the accused appeared in court the arrears had accumulated to R86 500.00.

[2] However, instead of putting charges to the accused, the prosecutor made an impromptu application to put into operation a suspended sentence arising from a previous conviction of a failure to pay maintenance. The said previous conviction for which the accused was sentenced and the said sentence suspended was in respect of a different case being case no.313A/2020. The accused's legal representative

argued that it was premature for the State to make such application for putting into operation of the suspended sentence before the accused was convicted. The presiding magistrate found in favour of the accused and dismissed the application on the basis of the prematurity of the application.

[3] The senior public prosecutor was dissatisfied with the ruling of the magistrate and requested that the matter be referred to this Court for review. It appears from the senior public prosecutor's covering letter that the reason for his request for the matter to be submitted for review is that the decision of the magistrate is wrong in law. This appears to be on the basis that the accused does not have to be convicted several times before the State can be entitled to apply for the putting into operation of a suspended sentence.

[4] Before I deal with the merits of the matter and the issue raised, I consider it necessary to first deal with whether the proceedings are in any event reviewable. Generally speaking, proceedings in the magistrate's court are reviewable by a Judge in chambers in terms of sections 304 and 304A of the Criminal Procedure Act 51 of 1977 in respect of concluded proceedings and before sentence respectively. However, in this case both sections 304 and 304A are not applicable. Therefore, the only basis on which this matter can be subjected to review is in terms of section 21 (1) (b) of the Superior Courts Act 10 of 2013 which reads:

“(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes of action and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power–

- (a) to hear and determine appeals from all Magistrates' Courts within its area of jurisdiction;
- (b) to review the proceedings of all such courts;”

[5] The grounds for the review of proceedings in the magistrates' court are provided for in section 22 of the Superior Courts Act. They, *inter alia*, include gross irregularity in the proceedings which is what seems to be the issue in this matter. I understand the issue raised by the senior public prosecutor in his request for the referral for review of those proceedings by this Court to be whether or not as a matter of law an application cannot be made for the putting into operation of a suspended sentence where there has been only one breach of the condition for the suspension of the sentence. The answer is obviously in the affirmative. A prosecutor needs no more than one breach of the condition for the suspension of the sentence to be entitled to make the application to court for the suspended sentence to be operationalised.

[6] The senior public prosecutor's dissatisfaction and his framing of the referral issue seems to be informed by how the ruling on the issue was couched. To contextualise the subject matter of review, a brief summary of the facts is apposite. On 6 May 2020 Mr Mandela was convicted of failure to pay maintenance in case number 313A/2020 and sentenced to pay a fine of R5000.00 or to 90 days imprisonment. That sentence was wholly suspended for three years on condition that he was not convicted of a failure to pay maintenance committed during the period of suspension.

[7] On 22 July 2021 Mr Mandela was again convicted of a failure to pay maintenance in respect of another matter being case number 671A/2020. He was thereupon sentenced to pay a fine of R10 000.00 or to undergo imprisonment for four months. That sentence was also wholly suspended for three years on condition that he was not convicted of a failure to pay maintenance committed during the period of suspension. After this conviction no application for the putting into operation of the sentence that was conditionally suspended in case no. 313A/2020 was instituted. It

is not clear why the said application was not made. Presumably the failure to pay maintenance in respect of case no. 671A/2020 predated the conviction in case no. 313A/2020. This is the only reason I can think of why the said application could not be made following the completion of the proceedings in case number 671A/2020.

[8] The ruling of the magistrate in respect of the application made in the proceedings under case number 489A/2021 which was a new matter on which there was no conviction yet was that the application for the putting into operation of the suspended sentence was premature. When the court made the said ruling it made it clear that in that matter being case number 489A/2021, Mr Mandela had not yet been convicted, being the matter for which he had been arraigned.

[9] This ruling is correct subject to the caveat that the prosecutor could have brought and would have been entitled to bring the same application under case number 313A/2020 by summoning the accused after the conviction in case number 671A/2020. This of course would be if the proceedings in case number 671A/2020 were not only completed but also if the period for instituting appeal proceedings or automatic review processes where applicable had lapsed by effluxion of time. Putting into operation a suspended sentence is not as easy as it may sound. It is subject to suitable procedures to avoid the inevitable prejudice to the accused which may easily occur with grave consequences if it is not dealt with appropriately and with due care.

[10] Some of the applicable considerations in the operationalisation of a suspended sentence were spelt out by Selikowitz J in *S v Hoffman* 1992 (2) SACR 56 (C) at 63 c-g. I quote copiously from the sentiments expressed therein where the learned Judge stated the legal position as follows:

“If the court is asked to put a sentence into operation where the breach has resulted in a subsequent conviction, the court hearing the application ought, in my view, to know what sentence has been imposed in the later trial before it orders that the earlier suspended sentence be put into operation. Furthermore, it is both impractical and potentially prejudicial to the accused to put the suspended sentence into operation in a case which is subject to automatic review in terms of s 302 or even 304A of the Act until the conviction and sentence have been confirmed. Where a suspended sentence is put into operation the decision so to do is not subject to automatic review nor is it appealable. The only way that the decision can be struck down is on review. Thus the accused who is imprisoned as a result of the putting into effect of a suspended sentence has himself to move the Court in time – consuming and costly proceedings if he wishes to have the putting into effect of his suspended sentences set aside. The putting into effect of the sentence is a proceeding in the original case where the suspended sentence was imposed and the Court dealing the review of the subsequent conviction will usually not be aware that the suspended sentence has been put into operation. It is thus, in my view, undesirable that a suspended sentence be put into operation until the subsequent sentence has been imposed and proceedings have been confirmed on review – where this is required – and also the time for the accused to lodge an appeal against his subsequent conviction and/or sentence has expired without any notice of appeal having been given. The putting into operation of a sentence before these stages have been reached is not in the interests of the administration of justice.”

[11] The presiding magistrate was clearly correct in his ruling that the application for the putting into operation of a suspended sentence in proceedings which had not reached any of the milestones mentioned in *Hoffman* was premature. The prosecutor should not have made the application when she did, certainly not at the stage at which she did. The correct procedure, as I said before, would have been for the accused to be summonsed before court under case number 313A/2020 for the application for the putting into operation of the sentence that was suspended in that case. The correct stage for that application would have been after the conviction and sentence in case under 617A/2020 or after the conviction and sentence in case

number 489A/2021 once the applicable appeal or review period would have lapsed or such proceedings concluded.

[12] In the result the following order shall issue:

1. The ruling of the magistrate in case no.489A/2021, dismissing the application for the putting into operation of the sentence that was conditionally suspended in case number 313A/2020 is confirmed.
2. The matter is remitted back to the magistrate's court and the prosecutor is granted leave to make the application for the putting into operation of the sentence that was suspended in case no.313A/2020 if so advised subject to the considerations mentioned in this judgment.

M.S. JOLWANA
JUDGE OF THE HIGH COURT

I agree and it is so ordered:

R.W.N. BROOKS
JUDGE OF THE HIGH COURT