

REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, PORT ELIZABETH**

**CA&R:
Review No: 120119
Date delivered:17.9.2012**

In the matter between:

THE STATE

VS

LORRAINE BOTHA

REVIEW JUDGMENT

SUMMARY: Accused herein was convicted by the Port Elizabeth Magistrate's Court of a contravention of section 65(2)(a) of the National Road Traffic Act 93 of 1996 (the Act). She was legally represented by an advocate. During the proceedings in terms of section 35(1) of the Act and having been advised of all her rights in terms of the Act she elected not to testify as is required by section 35(3) of the Act. Despite her not having complied with the provisions of section 35(3) of the Act, the presiding magistrate found that the provisions of section 35(1) shall not take effect.

On review the Court ruled that no Court can force the accused to testify but in the event of her electing not to testify the Court cannot make an order that the provisions of section 35(1) shall not take effect. This is so in view of the peremptory nature of the provisions of section 35(1)(2) and (3) of the Act. On a proper interpretation of section 35(3) the Court can only deviate from the requirement to suspend the licence if it is satisfied, after presentation of evidence under oath, that circumstances relating to the offence exist which do not justify the suspension. (My emphasis)

TSHIKI J:

[1] In this case the accused, who was a 33 year old female at the time of the offence and was legally represented throughout the trial proceedings, pleaded guilty

and was convicted of a contravention of section 65(2)(a) of the National Road Traffic Act 93, of 1996 (as amended) (the Act). In her statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 (the CPA) she admitted, *inter alia*, that at the time she was driving the motor vehicle on a public road her blood alcohol concentration exceeded the legal limit and was 0.18 grams per 100 millilitres of blood. She was sentenced to pay a fine of R5 000.00 (five thousand rand) or in default of such payment to undergo five (5) months imprisonment. Half of her sentence was suspended for five (5) years on appropriate conditions. Of note and more importantly for the purposes of this judgment, the Court ordered that circumstances existed which justified the departure from the provisions of section 35(1) of the Act, which prescribes for the automatic suspension of licences and permits.

[2] During the stage of sentence proceedings the presiding magistrate had to consider, *inter alia*, the application or otherwise of section 35(1) of the Act with regard to the automatic suspension of the accused's driving licence, subject to the provisions of section 35(3) of the Act which deals with the oath opportunity to present evidence regarding circumstances under which a court would not order such a suspension. The accused's legal representative informed the Court that she is aware of all the provisions of section 35 of the Act but that she nonetheless elected not to testify. Thereafter, her legal representative addressed the Court from the bar both in respect of mitigating factors, as well as in respect of the application of the provisions of section 35(1) of the Act. The presiding magistrate then ordered that provisions of section 35(1) (suspension of her driver's licence) shall not take effect.

A senior magistrate had noticed the apparent irregularity in the application of section 35 of the Act, and referred the presiding magistrate to the judgment in **S v Ngqabuko** (2012) JOL 28816 (ECG) and instructed him to send the proceedings to this Court by way of special review with the purpose of having the proceedings relating to section 35 of the Act set aside and for an appropriate order to be made.

[3] Section 35 of the Act provides:

“35 On conviction of certain offences licence and permit shall be suspended for minimum period and learner’s or driving licence may not be obtained

- (1) Subject to subsection (3), every driving licence or every licence and permit of any person convicted of an offence referred to in –
 - (a) section 61 (1)(a), (b), or (c), in the case of the death of or serious injury to a person;
 - (aA) section 59 (4), in the case of a conviction for an offence, where-
 - (i) A speed in excess of 30 kilometres per hour over the prescribed general speed limit in an urban area was recorded; or
 - (ii) A speed in excess of 40 kilometres per hour over the prescribed general speed limit outside an urban area or on a freeway was recorded;
 - (b) section 63 (1), if the court finds that the offence was committed by driving recklessly;
 - (c) section 65 (1), (2) or (5), where such person is the holder of a driving licence or a licence and permit, shall be suspended in the case of –
 - (i) a first offence, for a period of at least six months;
 - (ii) a second offence, for a period of at least five years; or
 - (iii) a third or subsequent offence, for a period of at least ten years, calculated from the date of sentence.
- (2) Subject to subsection (3), any person who is not the holder of a driving licence or of a licence and permit, shall, on conviction of an offence referred to in subsection (1), be disqualified for the periods mentioned in paragraphs (i) to (iii), inclusive, of subsection (1) calculated from the

date of sentence, from obtaining a learner's or driving licence or a licence and permit.

- (3) If a court convicting any person of an offence referred to in subsection (1), is satisfied, after the presentation of evidence under oath, that circumstances relating to the offence exist which do not justify the suspension or disqualification referred to in subsection (1) or (2), respectively, the court may, notwithstanding the provisions of those subsections, order that the suspension or disqualification shall not take effect, or shall be for such shorter period as the court may consider fit.
- (4) A court convicting any person of an offence referred to in subsection (1) shall, before imposing sentence, bring the provisions of subsection (1) or (2), as the case may be, and of subsection (3) to the notice of such person.
- (5) ...”

[4] In his reasons for judgment, which accompanied the record, the presiding magistrate herein seems to agree, and correctly in my view, that the provisions of section 35(3) of the Act are peremptory in nature in that they require the convicted person to present evidence under oath if he or she intends to persuade the Court that the provisions of subsection (1) or (2), as the case may be, should not take effect.

[5] Consequently, where an accused person is convicted of contravening any of the specified offences, the conviction triggers the automatic suspension of the licence or permit in the case of a holder thereof, or where the person who drove without a licence, disqualification from obtaining one, as the case may be. It is clear from the language used in section 35(3), of the Act that only persuasive facts which are adduced by way of evidence under oath may persuade the Court from granting

an order in terms of the provisions of section 35(1) or (2). (*S v Van Rooyen* 2012 (2) SACR 141 at 146 para [6]).

[6] In other words, if the Court has only heard submissions from the bar, there has been no enquiry in accordance with section 35(3) of the Act. Consequently, the Court is precluded from making any order, other than suspending the licence or disqualifying the person from obtaining one, as provided for in section 35(1) and (2) of the Act. An accused person, as in the present case, who elects not to testify, cannot be held to have persuaded the Court not to order the suspension of her driver's licence if the accused willingly elected not to give evidence under oath. Evidence on oath is a jurisdictional requirement before a Court may even consider whether or not to deviate from applying the peremptory provisions of section 35(1) of the Act.

[7] In my view, the wording of section 35(3) of the Act envisages a hearing in compliance with the constitutional provisions, before the convicted person's right to keep or obtain his or her licence can be taken away by operation of law. It is for this reason that the Court, in terms of section 35(4) of the Act, has to advise the convicted person of the provisions of sections 35(1)-(3) of the Act before the imposition of sentence. Sentencing in the sense used in section 35(4) of the Act, includes the suspension of a licence or disqualification to obtain one, as the case may be.

[8] Another concern raised by the presiding magistrate, was the fact that the accused in this case was aware of all the provisions of section 35 of the Act, because she was represented by her legal counsel who also informed the Court of her awareness of her rights in terms of the provisions of section 35 of the Act. However, the accused elected not to testify on oath in terms of the provisions of section 35(3) of the Act, but to proceed by way of submissions from the bar. My view is that the provisions of section 35(1)-(4) of the Act do not undermine a convicted person's right to silence. The Act does not compel such an accused to testify, but the consequences of electing not to testify, will not favour an accused convicted of any of the specified offences, because the Court in that situation has no discretion which it can exercise in terms of section 35(3) of the Act, if there is no evidence on oath. The court is bound to apply the peremptory provisions of section 35(1) or (2) of the Act in the absence of evidence on oath.

[9] The Court in the present circumstances, should have invoked the provisions of section 35(1), because there were no existing circumstances placed before it on oath which justified a decision not to impose the suspension of the accused driving licence. I say so, *inter alia*, because on page 15 of the record, and after the accused had been informed by her counsel of her rights in terms of section 35(3), there is evidence to show that she was aware of the consequences of her election. Furthermore, on page 18 lines 5-10 the following discussion is reflected on the record:

“Court : Thank you. Of course your client understands that by refusing to testify or by electing not to testify, runs a risk that her driving licence may be cancelled, endorsed or suspended? She is acutely aware of that?”

Van Der Spuy : She is aware of that Your Worship.”

[10] An accused person who is legally represented is assumed to have been fully and adequately informed by his or her legal representative of his or her rights which pertain to the merits and demerits of the case he or she is facing in Court. The common law principle is that for the duration of his or her mandate, the legal representative is in control of the manner of presentation of the defence of his or her client. Ordinarily the Court should not likely interfere with such relationship unless there are apparent indications that a failure of justice or illegality may occur. In this case, the presiding magistrate pertinently enquired from accused's counsel if his client understood the consequences of exercising her rights to remain silent and the answer was in the affirmative. (**S v Matonsi** 1958 (2) SA 450 (AD), **S v Mvelase** 2004 (2) SACR 531 (W) at 536h-537a).

[11] Every accused person has the right to elect not to testify in Court. That the consequences of such an election may at a later stage prove not to be beneficial, does not assist the accused. That is the inevitable risk involved in choosing not to testify. Up to the stage when the present accused's legal representative confirmed his client's awareness of her rights in terms of section 35 of the Act, there was no irregularity in the proceedings. The only irregularity committed by the Court was ordering that the provisions of section 35(1) shall not take effect.

[12] The trial Court was not empowered to deviate from the provisions of section 35(1) which are peremptory in nature. The deviation, in the absence of

evidence under oath regarding circumstances which would justify it, was a reviewable irregularity.

[13] As provided for in section 35(1) of the Act, the Court ought to have suspended the accused's driver's licence for the prescribed period of six months (the minimum period) for a first offender such as the accused was. The magistrate's failure to do so, warrants the setting aside of his order and substituting it with one imposing the suspension of the accused's driver's licence for the reasons set out above.

[14] In the result I make the following order:

[14.1] The conviction and sentence of the accused are hereby confirmed.

[14.2] The magistrate's failure to order the suspension of the accused driver's licence in terms of section 35(1)(c) of the National Road Traffic Act 93 of 1996 is hereby set aside and is substituted with the following order:

“In terms of section 35(1)(c)(i) of the National Road Traffic Act 93 of 1996, the accused's driver's licence is hereby suspended for a period of six months calculated from the date on which the accused is made aware of the provisions of this order. The magistrate is directed to inform the accused of the contents of this order.”

PW TSHIKI
JUDGE OF THE HIGH COURT

Revelas J: I agree

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JUDGE OF THE HIGH COURT