IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**YES**
Circulate to Magistrates:	**YES**

Special Review no: **R19/2022**
Hertzogville Case no**:** **A162/2021**

In the special review between:

THE STATE

and

TEKO WHITE Accused

CORAM: DAFFUE J et MOLITSOANE J

JUDGMENT BY: DAFFUE J

DELIVERED ON: 17 JUNE 2022

SPECIAL REVIEW IN TERMS OF SECTION 304
OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977

I INTRODUCTION

[1] The accused was arraigned in the Hertzogville Magistrates' Court on a charge of contravening s 1(1)(a) of the Intimidation Act.[1] He pleaded guilty and was sentenced to payment of a fine in the amount of R1000.00 (One thousand Rand) or 6 (six) months' imprisonment, wholly suspended for a period of 5 (five) years on condition that he is not found guilty of contravention of section 2 and 3 of Act 72 of 1982, committed during the period of suspension. The Senior Magistrate of Welkom sent the matter to

[1] 72 of 1982

the High Court as a special review in terms of s 304(4) of the Criminal Procedure Act[2] ("the CPA"). I shall deal with the Senior Magistrate's concerns under the next heading where after I shall consider the factual background.

II THE GROUNDS FOR REVIEW

[2] The Senior Magistrate confirmed that the accused was legally represented, that he pleaded guilty on a charge of contravening s 1(1)(a) of the Intimidation Act, that his statement in terms of s 112(2) of the CPA was handed in where after he was convicted and sentenced.

[3] The Senior Magistrate referred to *S v Motshari*[3] and stated that:

"…the offence created in section 1(1)(b) of the Act (the Intimidation Act) was discussed as well as the specific purpose why this offence was enacted. The view was expressed that in matters involving private quarrels the prosecution should rather charge the accused person with an offence such as assault where fear was induced. It appears that the ambit of the offences created in the Act is very wide."

The Senior Magistrate clearly suggested, although not expressly conveyed, that this court should consider interfering with the conviction on review and continued as follows:

"Should the Honourable Judge however be satisfied with the conviction, the aspect of the sentence imposed needs to be addressed."

The suspension condition refers to ss 2 and 3 of the Intimidation Act which is clearly incorrect insofar as these two sections deal with the repeal of laws and the short title of the Act. The Senior Magistrate had referred the matter to the trial magistrate before sending the matter on review who confirmed in writing that she made an error in referring to ss 2 and 3 instead of s 1(1)(a) of the Intimidation Act. The review court was requested to make an appropriate order.

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[2] 51 of 1977
[3] 2001 (1) SACR 550 (NC)

[4] I agree that an obvious error has been made and that the sentence should be reviewed and corrected as suggested. The more important question is whether this court should interfere with the conviction. This will be dealt with once some case law and legal articles have been considered hereunder. Before then, I am constrained to deal with the factual matrix first. The Senior Magistrate did not deal with the aspects to be mentioned and the trial magistrate's input was also not obtained. But the facts speak for themselves.

III FACTUAL BACKGROUND

[5] The charge sheet which I quote *verbatim* reads as follows:

"THAT the accused is/are guilty of the crime of contravening the provisions of Section 1(1)(a) read with Sections 2 and 3 of the Intimidation Act No 72 of 1982 – Intimidation

IN THAT on or about 10/12/2021 and at or near Hertzogville in the District of Boshof the accused did unlawfully and with intend to compel or induce any person(s), namely Tebogo Seboka to do or to abstain from doing any act or to assume or abandon any standpoint, to wit not to date Palesa Dichakane by assaulting, injuring or causing damage to such person(s) or threatening to kill, assault, injure or cause damage to such person(s)."

[6] The accused appeared in court on 20 January 2022. The typed record indicates that the prosecutor put the charge to him and the operative part thereof reads as follows:

"Intimidation: in that upon or about 10 December 2021 and at or near Hertzogville in the district of Boshoff the accused did unlawfully with the intent to compel or induce any person namely, Tebogo Seboka to do or abstain from do any act or to assume or abandon any standpoint to wit not to date or speak to Palesa Dichakane by threatening to kill said Tebogo Seboka."

If the charge sheet and the record are compared, the prosecutor intended to delete the words "assaulting, injuring or causing damage" as well as the words "assault, injure or cause damage" as they appear on the charge sheet. This was not done. As strange as it may appear, the words "or threatening to kill" were underlined. This is confusing. A prosecutor should ensure that charge

sheets are properly prepared. Those words that did not apply should have been deleted. More importantly, the prosecutor failed to apply his/her mind to the facts of the case and ensure that the statutory provisions are properly recorded. The operative part of the charge sheet should have read as follows:

"….the accused did unlawfully and with intent to compel Tebogo Seboka to abstain from dating Palesa Dichakane by threatening to kill him."

The words "to do" and "to abstain from doing" an act are opposites. The same applies to the words "to assume" and "abandon" any standpoint. It must be either the one or the other. In any event, no "standpoint" is applicable *in casu*. Matters got worse. In court the same mistake was made when the charge sheet was read out, but the prosecutor also added the word "speak." Therefore, it was alleged that the accused threatened to kill the complainant, not only for dating Palesa Dichakane, but also speaking to her.

[7] The accused pleaded guilty. His legal representative prepared a statement in terms of s 112(2) of the CPA. He regurgitated the wording of the charge sheet to a certain extent. I quote from paragraph 3.2:

"I did unlawfully and with intent to compel or induce the complainant namely, T.S. Seboka to abstain from <u>not</u> dating Palesa Dichakane or he will kill him by assaulting, injuring or causing damage to such person or threatening to kill him."

Does this make sense? Certainly not. The accused also stated the following:

"2.1 On the 10/12/2021 I was hiking to Bloemfontein.

2.2 I met the complainant and we had argument and I told him that I will kill him.

2.3 ……

2.4 When I had argument with the complainant, I was very angry and told him that I will kill him because he interferes in the relationship affairs of the girlfriend."

[8] The accused was convicted based on his plea of guilty and sentenced to payment of a fine of R1000.00 or six months' imprisonment, wholly suspended for a period of five years on condition that he is not found guilty of contravening ss 2 and 3 of Act 72 of 1982 committed during the period of suspension. As mentioned, the Senior Magistrate of Welkom sent the matter to the High Court on review and pointed out that the suspension condition

was incorrectly worded. He also raised a concern about the statutory offence with which the accused was charged and the consequent conviction. I shall now refer to authorities in order to consider the applicability of s 1(1)(a) in somewhat trivial matters and/or where a common law offence is applicable.

IV LEGAL PRINCIPLES

[9] I shall explain later herein that s 1(1)(b) of the Intimidation Act has been declared unconstitutional, but it is apposite to quote s 1(1) in full. It reads as follows:

"**1 Prohibition of and penalties for certain forms of intimidation**

(1) Any person who-

(a) without lawful reason and with intent to compel or induce any person or persons of a particular nature, class or kind or persons in general to do or to abstain from doing any act or to assume or to abandon a particular standpoint-

(i) assaults, injures or causes damage to any person; or

(ii) in any manner threatens to kill, assault, injure or cause damage to any person or persons of a particular nature, class or kind; or

(b) acts or conducts himself in such a manner or utters or publishes such words that it has or they have the effect, or that it might reasonably be expected that the natural and probable consequences thereof would be, that a person perceiving the act, conduct, utterance or publication-

(i) fears for his own safety or the safety of his property or the security of his livelihood, or for the safety of any other person or the safety of the property of any other person or the security of the livelihood of any other person; and

(ii) .....

shall be guilty of an offence and liable on conviction to a fine not exceeding R40 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment."

[10] In *S v Motshari*, the judgment referred to by the Senior Magistrate, the accused was charged with contravention of s 1(1)(b) of the Intimidation Act. It should immediately be recognised that the accused was not charged with contravening this sub-section, but it is worthwhile to consider what was stated in this regard. Notwithstanding the accused's plea of not guilty in *Motshari*, he was convicted and sentenced to three years' imprisonment. In

that case it was alleged that the accused threatened to kill his girlfriend. On review, the review court was concerned that the charge was triggered by a "domestic quarrel between live-in-lovers which took place within the confines of their dwelling." The court contrasted the facts in that case with a case involving "riotous behaviour pertaining to an assembly of people or a security situation or some industrial action."[4]

[11] Kgomo J with whom Hefer AJ concurred, held in *Motshari* that the Intimidation Act had its genesis in the Riotous Assemblies and Criminal Law Amendment Act,[5] that s 1(1)(b) of the Intimidation Act was introduced through the Internal Security and Intimidation Amendment Act,[6] that the draconian penal provisions strongly militate against trivial and ordinary run-of-the-mill cases having been within the contemplation of the Legislature, that the provisions of the Intimidation Act were not applicable to the accused's case, that the common law sanctions should have been resorted to and that the case could in any event have been dealt with under the broad provisions of the Domestic Violence Act.[7]

[12] Wallis JA, the scribe of the majority judgment in *Moyo and another v Minister of Justice and Constitutional Development and others,*[8] dealt with the offence of intimidation. He held that intimidation was a single offence which may occur in various ways, but it did not detract from the fact that all of its manifestations under both ss 1(1)(a) and (b) deal with intimidation and therefore the penalties for offences under either sub-section (a) or (b) are the same.[9]

[13] Although the majority held in *Moyo* that s 1(1)(b) was not unconstitutional, this judgment has been overruled by the Constitutional Court. That court declared s 1(1)(b) unconstitutional and invalid.[10] The Constitutional Court

[4] *Motshari loc cit* at 551 F - G
[5] 27 of 1914
[6] 138 of 1991
[7] 116 of 1998 and see paras 3, 6, 7, 8 & 13 on pp 551(i) – 556(c) of the judgment
[8] 2018 (2) SACR 313 (SCA)
[9] *Ibid* para 93
[10] *Moyo & Another v Minister of Police & Others*; *Sonti & Another v Minister of Police & Others*; 2020 (1) SACR 373 CC (22 October 2019) at para 81

was not called upon to consider the constitutionality of s 1(1)(a) and consequently merely referred to this sub-section in one sentence. I quote:[11]

"The context of the provision (s 1(1)(b)) lends even less support to the notion of an "imminent harm" qualification. In the legislative scheme itself, harm seems to be accounted for in s 1(1)(a). There the specific classes of physical harm of death, injury or damage are listed."

[14] In *S v Holbrook*[12] Leach J commented (Jennett J concurring) as follows, again pertaining to s 1(1)(b), although two decades prior to the *Moyo* judgment:

"This section is so widely couched that it may well be construed that the person who throws a cat into a swimming pool may well be guilty of an offence if the owner of the cat or any other person, pre-viewing the event, would fear for the cat's safety."

The learned judge emphasised his viewpoint in the following words: "It certainly seems that relatively trivial cases may easily fall foul of the provisions of the sections, and more than ten years ago the late Prof Matthews warned of the danger of that occurring – see AS Matthews *Freedom, State Security and Rule of La*w at 56 – 59. Moreover, as was remarked by Plaskett and Spoor in their article *The New Offence of Intimidation* (1991) 12 *ILJ* 747 at 750, the section may potentially impact on normal and acceptable political campaigning and debate, labour relations and everyday life. For what it is worth, our prima facie view is that the section is an unnecessary burden on our statute books and its objectives could probably be attained by the enforcement of common-law sanctions."

[15] I agree with the general tenor of the *dicta in Holbrook.* It is not necessary to completely do away with sub-section 1(1)(a), but it should be utilised in line with the purpose of the Legislature, bearing in mind the long title of the Intimidation Act, that is to prohibit certain forms of intimidation, the extreme sentences that may be imposed, the context in which the Act was promulgated, and the language used. There is certainly a place for it, but to use it in trivial matters as *in casu* is unimaginable.

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[11] *Ibid* para 68
[12] [1998] 3 All SA 597 (E) at 601c

[16] The authors of *South African Criminal Law and Procedure*[13] point out, approving the comments of the late Prof Mathews, that the offence created by s 1(1)(a) covers a "spectrum of human activity ranging from relatively innocuous conduct at one end to serious behaviour at the other" and that much of the conduct falling within the ambit of the offence is already subject to common law crimes such as assault, extortion and malicious injury to property.

[17] Prof CR Snyman[14] makes the point that it is well known that intimidation is rife in South Africa. According to him it is a pity that very few people seem to be prosecuted for the crimes created in the Intimidation Act. He suggests that "one of the reasons for this is that many people who would have been subjected to intimidation are, precisely because of the intimidation, afraid of laying criminal charges of intimidation or of testifying about the commission of the crime in a court."

When one considers Prof Snyman's discussion on the subject, one cannot, but think that the crime of intimidation was never intended to be applicable to the usual threats that appear every day between members of the public, but with no real consequences or harm. According to Prof Snyman the purpose of the crimes of intimidation "is to punish people who intimidate others to conduct themselves in a certain manner, such as not to give evidence in a court, not to support a certain political organisation, not to pay their municipal accounts or to support a strike action." If one considers the examples given by the learned author, he also has in mind serious issues and not the normal run-of-the mill threats.

[18] The dearth of reported cases pertaining to s 1(1)(a) is indicative of the approach by the prosecution not to use the Intimidation Act to charge an accused if any of the common law offences such as assault, extortion or malicious damage to property apply to the unlawful actions of an accused person. Such an approach would be correct. One does not need a 10 kg sledgehammer to kill a fly. If the prosecution is allowed to charge all persons in terms of the Intimidation Act instead of with appropriate common law

[13] South African Criminal law and Procedure, vol III: Statutory Offences, Jutastat e-publications, chapter HA1, pp 1 - 4
[14] Criminal Law 6th ed at p 455

offences, these common law offences may just as well be done away with. There is no reason at all for this.

[19] The only other reported case dealing with s 1(1)(a) is *S v Ipeleng.*[15] It was not necessary to deal with the purpose of s 1(1)(a) in this case, although the enquiry was whether the State had proven beyond reasonable doubt that the appellant threatened to kill, assault, injure or cause damage to the complainants with the intention to subject them to a stay-away action on the mine. The majority found that the State did not prove its case and consequently, the purposes and rationale of the sub-section was not discussed. Notwithstanding the acquittal, there can be little doubt that the action allegedly taken, but not proven, was sufficiently serious to warrant prosecution in terms of s 1(1)(a).

V A FINAL WORD ON THE EVIDENCE AND LEGAL PRINCIPLES

[20] In his address in mitigation of sentence the accused's attorney placed on record that the complainant wanted to withdraw the complaint as he and the accused, apparently co-employees on a farm at the time, had made peace.

[21] I explained the broad ambit of s 1(1)(a) above and opined that the sub-section should be used in deservingly serious matters only. Although a person's threat to kill another if he does not abstain from dating his girlfriend falls strictly speaking within the broad ambit of s 1(1)(a), the wording of the section may cause problems to the prosecution wishing to rely on this statutory offence. This is exactly what happened *in casu*. I quoted the charge sheet, the s 112(2) statement and the *viva voce* version in court and pointed out the discrepancies. These will not be repeated, save to mention the following: the charge sheet is confusing and incorrectly worded insofar as its effect is that the complainant should abstain from <u>not</u> dating Palesa Dichakane. There is no indication in the s 112(2) statement that the complainant was compelled or induced to abstain from doing an act, to wit to date Palesa Dichakane. Again, the word "not" appears in paragraph 3.2 of

[15] 1993 (2) SACR 185 (T)

the statement which was repeated when it was read into the record, making the same mistake as contained in the charge sheet. One should perhaps not be too pedantic about errors as detected, but the seriousness of a conviction in terms of the Intimidation Act cannot be ignored. If the prosecution wants to rely on statutory offences, they should ensure proper compliance with the particular statute.

[22] A final word should be expressed. It does not appear as if English is the mother tongue of any of the role players in the court proceedings. If simple mistakes could be made as pointed out, there was ample opportunity for not only confusion about language, but more importantly, legal principles such as whether the accused really understood what the offence of intimidation entailed.

[23] In the circumstances I am satisfied that the proceedings before the *court a quo* were not in accordance with justice and need to be set aside on review. The conviction is so clearly not in accordance with justice that the review court may deal with the matter without obtaining a response from the trial magistrate as provided for in s 304(2)(a).

VI ORDERS

[24] Consequently the following orders are issued:

1. The proceedings in the Hertzogville Magistrate's Court under case A162/2021 are reviewed and set aside.
2. The conviction and sentence are set aside.

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J.P. DAFFUE J

I concur

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P.E. MOLITSOANE J