38/90

N v H

In the matters between:

	139/89
IVAN PETER TOMS	Appellant
and	
THE STATE	Respondent

and

	289/89
ROBERT DAVID BRUCE	Appellant
and	
THE STATE	Respondent

SMALBERGER, JA -

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matters between:

139/89

IVAN PETER TOMS Appellant

and

THE STATE Respondent

and

289/89

ROBERT DAVID BRUCE Appellant

and

THE STATE Respondent

CORAM: CORBETT, CJ, BOTHA, SMALBERGER, KUMLEBEN, JJA, et NICHOLAS, AJA

HEARD: 27 FEBRUARY 1990

DELIVERED: 30 MARCH 1990

J U D G M E N T

SMALBERGER,JA

This judgment concerns two appeals, those of Ivan Peter Toms ("Toms") and Robert David Bruce ("Bruce"). They were heard together for the sake of convenience. Both appeals turn upon the proper interpretation of s 126 A(1)(a) of the Defence Act 44 of 1957 ("the Act"). The subsection reads:

> "(1) Any person liable to render service in terms of section 22 or 44 who when called up -
>
> (a) refuses to render such service in the South African Defence Force, shall be guilty of an offence and liable on conviction to imprisonment for a period one-and-a-half times as long as the aggregate of the maximum of all periods of service mentioned in section 22(3) or 44(3), as the case may be, during which he could otherwise, in terms of those sections, still have been compelled to render service, or for a period of 18 months, whichever is the longer...."

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Toms was convicted on 1 March 1988 in the Regional Court at Wynberg of contravening the provisions of the above section. He is a medical doctor, having completed his studies at the University of Cape Town in 1976. At the time of his trial he was engaged full time in community health work in the Black townships of Khayelitsha and New Crossroads. He had some years previously completed his basic military training and had risen to the rank of first lieutenant. His conviction arose from his steadfast refusal to render any further periods of service on the grounds of conscience. Considerable evidence was led in mitigation of sentence. The presiding magistrate held, however, that he had no discretion in regard to sentence. Applying what he conceived to be the mandatory provisions of s 126 A(1)(a) he sentenced Toms to imprisonment for a period of 630 days. An appeal

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to the Cape of Good Hope Provincial Division was noted. That court, on 17 November 1988, upheld the magistrate's finding that the sentence to which Toms was liable was a mandatory one. It held further that no portion of the sentence could be suspended. It found , however, that the outstanding period of service Toms was still compelled to render under the Act had been miscalculated. The upshot was a reduction of Toms' sentence to one of 18 months' imprisonment. Leave to appeal was granted to this Court. At about the same time Toms was released on bail pending the hearing of the appeal. By that time he had served just more than 9 months of his sentence. The judgment of the court a quo is reported in 1989(2) SA 567 (C).

Bruce was convicted on 20 July 1988 in the Magistrate's Court, Johannesburg, of the same offence as Toms. He had graduated at the end of 1987 with a

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BA degree from the University of Witwatersrand. He had refused to do his basic period of training on the grounds of conscience. The presiding magistrate arrived at the same conclusion as his counterpart in the Toms case, and applying the formula laid down in s 126 A(1)(a) sentenced Bruce to 6 years imprisonment. Bruce appealed to the Witwatersrand Local Division. That Court upheld the magistrate's finding that the section provided for the imposition of a mandatory sentence, and that no portion thereof could be suspended. It found, however, that there had been an error in the computation of Bruce's sentence in accordance with the provisions of the section, and reduced the sentence from 6 years to 2176 days. It too granted leave to appeal to this Court. Bruce is currently serving the sentence imposed upon him.

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The issues in the present appeal are two-fold: (1) does s 126 A(1)(a) provide for a mandatory sentence on conviction and, if so, (2) is the court competent to suspend the whole or portion of such sentence? The answers to these questions lie in the proper interpretation of the relevant provisions of the Act. Before considering those provisions, and the principles of interpretation which govern their meaning, it would be appropriate to stress certain fundamental principles of which cognisance must be taken when assessing the respective contentions of the parties - that the provisions of s 126 A(1)(a) preserve a judicial discretion in relation to sentence on the one hand, and that they prescribe a mandatory sentence on the other.

The first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court (cf. R v Mapumulo and Others 1920

AD 56 at 57). That courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition. Such a discretion permits of balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat related principle, is that of the individualization of punishment, which requires proper consideration of the individual circumstances of each accused person. This principle too is firmly entrenched in our law (S v Rabie 1975(4) SA 855 (A) at 861 D; S v Scheepers 1977(2) SA 154 (A) at 158 F - G).

A mandatory sentence runs counter to these principles. (I use the term "mandatory sentence" in the sense of a sentence prescribed by the legislature which leaves the court with no discretion at all -

either in respect of the kind of sentence to be imposed or, in the case of imprisonment, the period thereof.) It reduces the court's normal sentencing function to the level of a rubber stamp. It negates the ideal of individualization. The morally just and the morally reprehensible are treated alike. Extenuating and aggravating factors both count for nothing. No consideration, no matter how valid or compelling, can affect the question of sentence. As HOLMES, JA, pointed out in S v Gibson 1974(4) SA 478 (A) at 482 A, a mandatory sentence

> "unduly puts all the emphasis on the punitive and deterrent factors of sentence, and precludes the traditional consideration of subjective factors relating to the convicted person".

Harsh and inequitable results inevitably flow from such a situation. Consequently judicial policy is opposed to mandatory sentences (cf. S v Mpetha 1985(3)

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SA 702 (A) at 710 E), as they are detrimental to the proper administration of justice and the image and standing of the courts.

The legislature must be presumed to be aware of these principles, and would normally have regard to them. There is a strong presumption against legislative interference with the Court's jurisdiction - see Lenz Township Co (Pty) Ltd v Lorentz N O en Andere 1961(2) SA 450 (A) at 455 B. Although this was said in Lenz's case in a somewhat different context, the principle would apply equally to the court's jurisdiction in relation to the matter of sentence. By the same token the legislature must be presumed not to intend its enactments to have harsh and inequitable results (cf. S v Moroney 1978(4) SA 389 (A) at 405 C - D). The legislature is of course at liberty to

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subjugate these principles to its sovereign will and decree a mandatory sentence which the courts in turn will be obliged to impose. To do so, however, the legislature must express itself in clear and unmistakable terms (S v Nel 1987(4) SA 950 (W) at 961 B). Courts will not be astute to find that a mandatory sentence has been prescribed. This, however, does not mean that they will disregard relevant principles of statutory interpretation. The warning echoed in Principal Immigration Officer v Bhula 1931 AD 323 at 336 (quoting from Maxwell : 3rd Ed p 299) that "a sense of the possible injustice of an interpretation ought not to induce judges to do violence to well-settled rules of construction" must not go unheeded.

The primary rule in the construction of statutory provisions is to ascertain the intention of the legislature. One does so by attributing to the

words of a statute their ordinary, literal, grammatical meaning. Where the language of a statute, so viewed, is clear and unambiguous effect must be given thereto, unless to do so "would lead to absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the Court is justified in taking into account ....." (per INNES, CJ, in Venter v R 1907 TS 910 at 915). (See also Shenker v The Master and Another 1936 AD 136 at 142; Summit Industrial Corporation v Claimants Against the Fund Comprising the Proceeds of the Sale of the MV Jade Transporter 1987(2) SA 583 (A) at 596 G - H.) The words used in an Act must therefore be viewed in the broader context of such Act as a whole (STEYN: Die Uitleg van Wette : 5th Ed, p 137; Jaga v Dönges NO and

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Another 1950(4) SA 653 (A) at 662 G). When the language of a statute is not clear and unambiguous one may resort to other canons of construction in order to determine the legislature's intention. One such is that in the case of penal provisions a strict construction is applicable (Steyn op cit at 111-112). The construction of criminal and penal statutes was discussed in R v Milne and Erleigh (7) 1951(1) SA 791 (A) at 823 B - E, in which was adopted the general rule of construction recognised in England (see Remmington v Larchin 1921(3) KB 404 (CA) at 408) that when dealing with a penal section, if there are two reasonably possible meanings, the court should adopt the more lenient one.

The Act, according to its preamble, provides for the defence of the Republic and for matters incidental thereto. It makes provision, inter alia,

for the conscription or compulsory service in its armed forces of male citizens between the ages of 18 and 65. The South African Defence Force consists of the Permanent Force, the Citizen Force and the Commandos. Every male citizen of prescribed age must, at the times fixed by the Act, apply for registration and, unless exempted from military service on one or other of the very limited grounds recognised by the Act, he is allotted to either the Citizen Force or the Commandos, and required to render service or undergo training therein.

Service in the Citizen Force is regulated by s 22 of the Act; service in the Commandos by s 44. Section 22(4) provides for liability to serve over a period of 14 years from the date of commencement of service or training. Section 22(3) provides that service shall be completed in:

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"(a) a first period of service not exceeding 24 months;

(b) subsequent periods of service during six cycles of two years each of which none shall exceed 90 days and which shall per cycle not exceed 120 days in the aggregate."

Any male citizen who refuses to render service or fails to report therefor becomes liable to the penalties prescribed by s 126 A(1) which provides the teeth to ensure the effectiveness of the system of compulsory military service. From the provisions of the Act it can safely be assumed that one of the objects of the Act is to compel male citizens (between the prescribed ages) to perform military service.

The Act recognises what it terms "religious objectors", who must fall into one of three carefully defined classes. Depending on their respective classifications, religious objectors are required to render service or undergo training in a non-combatant

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capacity in the Defence Force; or to render service by performing prescribed maintenance tasks of a non-combatant nature; or to render "community service" as laid down in the Act. No provision is made in the Act for respecting the position of "conscientious objectors" other than those classified as religious objectors. A conscientious objector has been defined as

> "One who opposes bearing arms or who objects to any type of military training and service. Some conscientious objectors refuse to submit to any of the procedures of compulsory conscription. Although all objectors take their position on the basis of conscience, they may have varying religious, philosophical, or political reasons for their belief"
> (The New Encyclopaedia Britannica (1980) Vol III p 923.)

The two appellants are both conscientious objectors. Their refusal to render military service is based not on religious principles but on other principles -

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principles they hold no less sincerely, tenaciously and resolutely. It was this attitude which brought them into collision with the State and ultimately led to their prosecution.

It will be convenient at this stage to quote s 126 A of the Act omitting only subsections (4), (5) and (8) which have no direct or indirect bearing on the issues in the present appeal. Section 126 A(1)(a), which has previously been quoted is repeated in order to facilitate reading of the section. The section thus truncated, reads:-

> "(1) Any person liable to render service in terms of section 22 or 44 who when called up -
>
> (a) refuses to render such service in the South African Defence Force, shall be guilty of an offence and liable on conviction to imprisonment for a period one-and-a-half times as long as the aggregate of the maximum of all periods of service mentioned in section 22(3) or 44(3), as the case

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may be, during which he could otherwise, in terms of those sections, still have been compelled to render service, or for a period of 18 months, whichever is the longer; or

(b) fails to report therefor, shall be guilty of an offence and liable on conviction only to imprisonment or detention for a period not exceeding eighteen months, irrespective of his rank, or a fine as may be imposed upon him by a court martial in terms of the provisions of the First Schedule.

(2) Any person liable in terms of any other provision of this Act to render service or undergo training, other than a liability to render service in terms of Chapter X, and who when called up -

(a) refuses to render service or to undergo training in the South African Defence Force, shall be guilty of an offence and liable on conviction to imprisonment for a period of 18 months;

(b) fails to report therefor, shall be guilty of an offence and liable on conviction only to imprisonment or detention for a period not exceeding eighteen months, irrespective of his rank, or such fine as may be imposed upon him by

a court martial in terms of the provisions of the First Schedule.

(3) Notwithstanding anything to the contrary contained in any law -

(a) a magistrate's court and an ordinary court martial shall, if they otherwise have jurisdiction, have jurisdiction to impose the sentences provided for in this section;

(b) at the imposition in terms of this section of any sentence of -

(i) imprisonment or detention which has not been suspended in full; or

(ii) a fine by a magistrate's court at the non-payment of which imprisonment must be served, where, due to such non-payment, imprisonment is served,

the commission of an officer shall be deemed to have been cancelled and a warrant officer or a non-commissioned officer shall be deemed to have been sentenced to reduction to the ranks.

(4) .....

(5) .....

(6) Any person who has served the full period of imprisonment imposed upon him in terms of subsection (1)(a) or (2)(a), shall be exempt

from his liability to render service in terms of this Act.

(7) Any person convicted in terms of subsection (1)(a) or (2)(a) who, before the expiry of the term of imprisonment which he is serving, in a notice signed by him and directed to the Adjutant-General states that he is willing to render service or to undergo training in terms of the Act, shall be exempted from serving the remaining portion of his sentence of imprisonment provided he renders the service or undergoes the training for which he is liable in terms of the Act: Provided that if that person should at any time thereafter refuse to render any service or undergo any training for which he is liable in terms of the Act, he shall serve the said remaining portion of his term of imprisonment: Provided further that the Minister may determine that any part of the period of imprisonment which that person has served shall be regarded as service or training which he has to render or to undergo.

(8) ....."

As, on the arguments advanced on appeal, s 72I has relevance to the interpretation of s 126 A(1)(a) I set out its provisions as well, omitting subsections (4)

and (6) which are not of any present significance. The section, with these omissions, reads:

> "(1) Any person referred to in section 72E (2) who refuses or fails to render the service which he is liable to render in terms of that section, shall be guilty of an offence and liable on conviction to imprisonment for a period which is equal to the period of service which he is liable to render in terms of that section.
>
> (2) Any person referred to in section 72E (3) who -
>
> (a) refuses or fails to render community service shall be guilty of an offence and liable on conviction to detention for a period which is equal to the period of community service which he still had to render at the time of such refusal or failure;
>
> (b) refuses or fails to comply with or carry out any order or duty in relation to community service shall be guilty of an offence and liable on conviction to a fine not exceeding R500 or imprisonment for a period not exceeding six months or to both such fine and such imprisonment.
>
> (3) (a) Any person who has served imprisonment or detention pursuant to a sentence in terms of subsection (1) or (2) (a) in full or who, after he has been

sentenced in terms of subsection (2)(a) and has been released on parole, has complied with the conditions of parole, shall be exempted from his liability to render the particular service or community service in terms of section 72E (2) or 72E (3), as the case may be.

(b) If any person who was released on parole while serving a sentence of detention in terms of subsection (2)(a), is found by the court which imposed the sentence or another competent court to have acted in conflict with the conditions of parole, such court shall order that such person undergo imprisonment in a prison referred to in section 1 of the Prisons Act, 1959 (Act No 8 of 1959), for a period equal to the unexpired portion of such detention.

(4) .....

(5) Any court which sentences any person to imprisonment or detention in terms of subsection (1) or (2)(a), may suspend the operation thereof only if the conditions of suspension provide that the service referred to in section 72E (2) or the community service, as the case may be, shall be rendered by that person in accordance with this Act: Provided that the operation of a sentence imposed in terms of subsection (2)(a) which is thus suspended shall, notwithstanding anything to the contrary in

any law contained, not be suspended for a period which is shorter than the remaining period of community service still to be rendered by the person concerned.

(6) ....."

I turn now to consider the meaning of s 126 A(1)(a). In doing so I bear in mind the remarks of SCHREINER, JA, in Jaga v Dönges NO and Another (supra) at 662 G - 664 F with regard to the lines of approach that may be followed in order to ascertain the intention of the legislature. (See also Stellenbosch Farmer's Winery Ltd v Distillers Corporation (SA) Ltd and Another 1962(1) SA 458 (A) at 474.) When considering the meaning of s 126 A(1)(a) in its immediate context i e, standing alone, I am not closing my eyes to the broader context within which interpretation must, in the final result, take place. Section 126 A(1)(a) is an unusual penalty provision. Ordinarily when a statute prescribes imprisonment as

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punishment for an offence, it provides a stated period of imprisonment. Section 126 A(1)(a) provides not only that but also a formula for the calculation of an alternative period of imprisonment. Thus, a person who refuses to render military service shall, in terms of the subsection, be "liable on conviction to" the longer of one of two alternative periods of imprisonment - the one such period being stipulated in the subsection, the other calculable in terms of the stated formula. If, applying the formula, a period in excess of 18 months is arrived at, the person concerned is "liable to" imprisonment for such period. If not, the upper limit of imprisonment he is "liable to" is 18 months. There is, in my view, nothing in the wording of the subsection which compels the conclusion, either from the words themselves or by necessary implication, that the legislature intended the imposition of a mandatory

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sentence. On the contrary, as I shall endeavour in due course to show, the provisions of the subsection are entirely consistent with an intention on the part of the legislature not to interfere with the courts' discretion in regard to sentence.

In the Bruce matter the court a quo, in concluding that 126 A(1)(a) provided for a mandatory sentence, set great store by the words "whichever is the longer". In the course of his judgment J H COETZEE, J, (with whom M J STRYDOM, J, concurred) said the following:

> "These words are clear and unambiguous. In my view the language of this section clearly shows that only one of two periods of imprisonment can be imposed by a court. Either 18 months when the computation of one-and-a-half times the total periods as the case may be is less than 18 months or that longer computed period. These words make it absolutely clear that in respect of sentence no discretion whatsoever remains with the presiding judicial officer."

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(See also the remarks of FOXCROFT, J, in the Toms case at 570 C to E.)

With great respect to the learned judges I am constrained to disagree. The words "whichever is the longer" are in my view only relevant to determine, in any given case, the upper limit of the court's punitive jurisdiction - 18 months or, if the formula provides for a longer period, such longer period. The moment alternative periods of sentence were provided there was need for qualification in the interests of clarity; - was the person "liable to" be sentenced to the greater or the lesser period? The words, however, have no bearing on the question whether the court is compelled to impose the higher of the two sentences.

In passing it should be mentioned that if the legislature had intended a mandatory sentence it could, with relative ease, have made its intention entirely

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clear. Instead of using the words "liable on conviction to" it could simply have used the words "shall be sentenced to". Such usage would have permitted of no doubt that the legislature intended a mandatory sentence. In Toms case (at 570 D) the court a quo stated that if a maximum period of imprisonment was intended and not a mandatory period it would have been a simple matter for the legislature to have added or inserted appropriate words to make its intention clear. This is not the correct approach. The converse is true. In the absence of clear words that a mandatory sentence was intended it must be inferred that the legislature intended the court to retain its discretion as to sentence. It is not without significance that in other instances where the legislature has intended to impose a mandatory or a minimum sentence it has made its intention quite clear

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by using appropriate language - see e g the provisions of s 277(1)(a) of the Criminal Procedure Act 51 of 1977 in relation to the sentence of death in the case of murder; s 329(2)(a) of the now repealed Criminal Procedure Act 56 of 1955 which provided for a compulsory whipping upon conviction of certain offences; s 2(1) and s 3 of the old Terrorism Act 83 of 1967 (which provided for minimum sentences); and the repealed sentence provisions (s 2(ii) and s 2(iv)) of the Abuse of Dependence - Producing Substances and Rehabilitation Centres Act 41 of 1971 (which also provided for mimimum sentences). In the Act itself there are instances of injunctions to the court being couched in clearly imperative language - see e g s 72I (3)(b) and (5). Interestingly enough, if the respondent's argument that s 126 A(1)(a) prescribes a mandatory sentence of imprisonment is correct it would

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seem to be the only instance of its kind - a prescriptive sentence of imprisonment which provides no limits of punishment, and which at one and the same time is in effect both a minimum and a maximum sentence. Counsel were not able to refer us to any other instances of such a sentence, nor am I aware of any. (As appears more fully below, a mandatory sentence of imprisonment appears to be something unknown in our law.) The very uniqueness of the situation if the sentence were mandatory may point against its being so. At least in the case of minimum sentences there is a range between the prescribed minimum sentence and the discretionary maximum sentence which may provide for some, albeit limited, degree of individualization.

The proper interpretation of s 126 A(1)(a) in its immediate context lies in the meaning of the words

"liable to" in the phrase "liable on conviction to". The word "liable" is capable of various shades of meaning. The meaning to be attributed to it in any particular case depends on the context in which it is used (cf. Fairlands (Pty) Ltd v Inter-Continental Motors (Pty) Ltd 1972(2) SA 270 (A) at 276 A - B.) The Afrikaans text uses the words "strafbaar met". The Afrikaans text is the signed text. However, Act 34 of 1983, which substituted the present s 126 A was signed in English. Nothing would seem to turn on this, however, as the parties are ad idem that the words "liable to" and "strafbaar met" are synonymous with each other (cf. S v Nshangase 1963(4) SA 345 (N) at 347 A). I shall concern myself with the meaning of the words "liable to", but it is interesting to note that in S v Nel (supra) VAN DER WALT, J, said (at 958 E), with reference to the use of the words "strafbaar met" in a penal provision, that

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> "(n)a my mening, vir enigeen met 'n aanvoeling vir Afrikaans is dit nie 'n gebiedende bepaling nie maar slegs 'n magtigende bepaling".

The Shorter Oxford English Dictionary gives, inter alia, the following meanings of the word "liable":

> "1 Law. Bound or obliged by law or equity; answerable (for, also to); legally subject or amenable to. 2.a. Exposed or subject to or likely to suffer from (something prejudicial) ..... b. Const. inf. Subject to the possibility of (doing or undergoing something undesirable)".

Wests Legal Thesaurus/Dictionary defines "liable" (when not used in relation to an obligation) as, inter alia:

> "2. Susceptible (liable to be burned). Exposed, likely to happen, prone, tending, in danger of, ripe for, vulnerable ....."

In Black's Law Dictionary its meaning is given, inter alia, as:

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> "Exposed or subject to a given contingency, risk or casualty, which is more or less probable ..... Exposed, as to damage, penalty, expense, burden or anything unpleasant or dangerous"

Having regard to these definitions I agree with the contention advanced on behalf of the appellants that the words "liable to" in a provision such as the one under consideration would normally denote a susceptibility to a burden of punishment and not that the burden in question is mandatory or compulsory : the actual incidence and extent of the burden must still be determined. This is supported by judicial authority. In Words and Phrases Legally Defined (2nd Ed, Vol 3, sv "liable") reference is made to the Australian case (unfortunately not available to me) of O'Keefe v Calwell (1949) A L R 381, where at p 401 it was stated that:

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"The ordinary natural grammatical meaning of a person being liable to some penalty or prohibition is that the event has occurred which will enable the penalty or prohibition to be enforced, but that it still lies within the discretion of some authorised person to decide whether or not to proceed with the enforcement". In Squibb United Kingdom Staff Association v Certification Officer (1979) 2 All E R 452 (C A) the court was concerned with the meaning of the words "liable to interference"in s 30(1)(b) of the Trade Union and Labour Relations Act 1974. Lord Denning, MR was of the view that the word "liable" is "a very vague and indefinite word" (at 458 c) but held that the phrase referred to meant "vulnerable to interference" or "exposed to the risk of interference". SHAW, LJ, expressed a more definite view. According to him "(t)he phrase 'liable to' when used otherwise than

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in relation to legal obligations has an ordinary and well-understood meaning, namely 'subject to the possibility of'" (at 459 h).

South African cases dealing with the meaning and effect of the phrase "liable to" have not been harmonious. Its meaning has been considered mainly in the context of s 37(1) of Act 62 of 1955. That section provides that any person who receives into his possession stolen goods without having reasonable cause for believing that such goods are the property of the person from whom he receives them "shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of receiving stolen property knowing it to have been stolen". (My underlining - the words used are identical with those in s 126 A(1)(a)). One of the penalties previously prescribed in terms of s 329(2) of Act 56 of 1955 read

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with Part II of the Third Schedule thereto for receiving stolen property was a compulsory whipping. The question arose whether the words "liable to" rendered the accused subject to such compulsory whipping. In R v Hlongwene 1956(4) SA 160 (T) it was held that s 37(1) prescribed only the maximum penalty to which an offender is subject, and did not impose upon a court the obligation of imposing the same penalty which it would have had to impose in the case of a conviction for receiving. Hlongwene's case was followed in the Orange Free State in R v Jeje 1958(4) SA 662 (O) and in the Cape Province in R v Cupido 1961(1) SA 200 (C). The Natal courts, however, came to a different conclusion and held that a whipping was compulsory also in the case of a conviction for statutory receiving - see R v Ndhlovu 1956(4) 309 (N); R v Kalna 1958(3) SA 123 (N); S v Nshangase, (supra).

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It is not necessary to debate the merits of the opposing views expressed in these judgments. Suffice it to say that the line of reasoning in Hlongwene's case, and those cases that followed it, is in my view to be preferred to the views adopted by the Natal courts.

Having regard to the language used in s 126 A(1)(a), and the other considerations to which I have alluded, I am of the view that in their immediate context the words "shall be ..... liable on conviction to ....." in s 126 A(1)(a) merely denote a susceptibility to the longer of the two alternative periods of imprisonment provided for in the section and do not preclude a court, in the exercise of its discretion, from imposing a lesser sentence.

Is there anything within the broader context of the Act which could sufficiently disturb this

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conclusion so as to lead to a different result? This brings me immediately to s 126 A(1)(b). This subsection, it will be recalled, provides that where a person liable to render service fails to report for such service he shall be liable on conviction "only to imprisonment or detention for a period not exceeding eighteen months". The words "not exceeding" postulate a maximum sentence, and exclude a mandatory sentence. Their effect is to build into the provision in which they are used a judicial discretion to impose a lesser sentence than the prescribed maximum. Does the inclusion of these words in s 126 A(1)(b), and their omission from s 126 A(1)(a), necessarily signify that whereas the court's discretion in relation to punishment has been retained in s 126 A(1)(b), it has been taken away in 126 A(1)(a)? Having regard at this stage only to the provisions of s

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126 A(1)(a) and (b) I do not believe this to be so. The omission of the words "not exceeding" from s 126 A(1)(a) cannot per se justify such a conclusion where the subsection is otherwise couched in language which would normally permit of a discretion. In addition, to have included the phrase "not exceeding" in s 126 A(1)(a) would in my view have been inappropriate to the language of the subsection. The phrase "not exceeding" is a limiting provision whereas the phrase "whichever is the longer" has the opposite effect. There would be some incongruity in language in providing, in the same provision, for a sentence not exceeding 18 months yet at the same time authorising a maximum sentence which could, applying the formula laid down, be in excess thereof. For this reason too the omission of the words "not exceeding" from s 126 A(1)(a) cannot necessarily justify the

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inference that its provisions are mandatory. There is a further consideration. Section 126 A(1)(a) provides for two alternative maximum sentences, one of which bears a direct relationship to the period of service which the offender is still compelled to render. The period calculated according to the prescribed formula, as has been observed, could be higher than 18 months. The words "only to imprisonment or detention for a period not exceeding eighteen months" in s 126 A(1)(b), if due consideration is given to the word "only", may have been intended to indicate that of the two alternative maximum punishments provided for in s 126 A(1)(a) only one, namely, imprisonment up to a maximum of 18 months (and not the formula, the application of which might have provided for a longer period) would apply in the case of a failure to report. In this

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sense the words "not exceeding" may merely have been intended to emphasize the limitation imposed by the word "only".

The words "not exceeding" appear in a number of penal provisions throughout the Act. Their presence clearly signifies, in respect of those provisions, a discretion as to punishment. Their omission from s 126 A(1)(a), if for other than linguistic reasons, assumes significance, particularly when one has regard to s 126 A(2). One finds, as between s 126 A(2)(a) and (b) the same essential difference in wording apparent between s 126 A(1)(a) and (b). The words "not exceeding" appear in s 126 A(2)(b) which deals with a failure to report for service, but not in s 126 A(2)(a) which deals with a refusal to render service. It was argued that when s 126 A(1) and (2) are read together a pattern emerges indicative of the legislative intent. The pattern is

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this : The legislature has drawn a clear distinction between a refusal to render service on the one hand, and a failure to report therefor on the other. For obvious reasons it regards the former (which involves a wilful act) in a far more serious light than the latter (which involves mere culpability). For this reason it has distinguished between the sentences in the two types of cases. In the case of failure, by providing for a period of imprisonment "not exceeding" 18 months it has left the court's discretion unfettered; in the case of refusal, by the omission of such words, it has provided for a mandatory sentence.

The argument that there exists such a discernible pattern indicative of the legislative intent based on the distinction between refusal and failure loses its impact, however, when regard is had to certain of the provisions of s 72I of the Act. No

distinction is drawn, in relation to the question of sentence, between a refusal and a failure to render either service in terms of s 72E (2) (s 72I (1)) or to render community service (s 72I (2)(a)). Refusal and failure are simply lumped together, and both made punishable with the same penalty - this notwithstanding that a wilful refusal would normally be far more serious than a culpable failure (which can cover a wide range of culpability from minimal to gross). There is a significant degree of correspondence between the provisions of s 72I (1) and (2)(a), and s 126 A(1)(a). In substance they are couched in the same language. If the provisions of s 126 A(1)(a) are mandatory in respect of sentence, then those of s 72I (1) and (2)(a) must be as well. Yet if the mandatory sentence in s 126 A(1)(a) is premised on the clear distinction drawn by the legislature between refusal and failure, could

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the legislature ever have intended that a mere failure to render the service referred to in s 72I (1) and (2)(a) should be visited with a mandatory sentence? I believe not. (In this respect I disagree with the conclusion reached in S v Lewis en h Ander 1985(4) SA 26 (T) that s 72I (2)(a) does provide for a mandatory sentence - a conclusion reached in a review matter without the benefit of full argument and without apparent regard to the principles and considerations referred to in this judgment.) This shows how difficult it is to discern a logical and clear pattern indicative of the legislative intent. One is left in doubt as to what the legislature precisely had in mind, and one cannot necessarily infer that its intention was different from that which the words of s 126 A(1)(a), in their primary sense, signify. One must heed the warning sounded by CORBETT, JA, in the Summit

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Industrial Corporation case (supra) at 596 J - 597 B that "it is dangerous to speculate on the intention of the Legislature (see eg the reference in Savage v Commissioner for Inland Revenue 1951(4) SA 400 (A) at 409 A) and the Court should be cautious about thus departing from the literal meaning of the words of a statute (see remarks of Solomon JA in Dadoo Ltd and Others v Krugersdorp Municipal Council 1920 AD 530 at 554-5). It should only do so where the contrary legislative intent is clear and indubitable (see Du Plessis v Joubert 1968(1) SA 585 at 594-5)."

To sum up thus far. The provisions of s 126 A(1)(a), taken on their own, prima facie do not prescribe a mandatory sentence. The use of the words "not exceeding" in s 126 A(1)(b) does not necessarily detract from this conclusion. Their use also in s 126 A(2)(b), and elsewhere in the Act, is an indication

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that the legislature may have intended that in the penal provisions in which the words were used the court would retain a discretion in relation to punishment, whereas in the instances where they were omitted it would not. The distinction in wording might suggest that the legislature intended that a refusal to perform military or other prescribed service would be punishable with a mandatory sentence, whereas in the case of a failure to do so the court would retain its discretion in relation to punishment (up to the stipulated maximum). Doubt, however, as to whether the legislature intended such a distinction is created by the wording of s 72I (1) and (2)(a) of the Act. In the end result, whatever the legislature may have intended, it has failed to make its intention sufficiently clear to justify a departure from the prima facie meaning of s 126 A(1)(a). In arriving at

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this conclusion due regard has been had to the fundamental principles and other relevant considerations expounded earlier in this judgment.

One of the objects of the Act, as I have previously mentioned, is to coerce male citizens between the ages of 18 to 65 to do military service. To enforce and effectively achieve this object adequate sanctions and penal provisions were introduced to induce such persons to opt for military service, and to deter would-be dissenters. The provision in s 126 A(1)(a) for a sentence of up to one-and-a-half times the period of outstanding military service was no doubt intended to impress upon those who refuse to do military service that the game may not be worth the candle. In this respect the legislature appears to have regarded it as appropriate that the prospective period of imprisonment should bear some correlation to

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the period of military service it was sought to avoid. It was argued on behalf of the respondent that this object would be thwarted or defeated if s 126 A(1)(a) conferred a discretion and inadequate sentences were passed. It was also contended that it would be contrary to the spirit and ambit of the Act to confer such a discretion. The legislature must accordingly be taken to have stipulated a mandatory sentence to achieve its object. Reliance was also placed on s 126 A(6) as being inconsistent with anything other than the imposition of a mandatory sentence, inter alia because it exempts someone who has served his sentence in full from further liability to render military service in terms of the Act. It was contended that unless there was a prescribed mandatory sentence, the provisions of s 126 A(6) could operate unfairly and result in inequality of treatment if

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disparate sentences were imposed.

I am not impressed by these arguments. The potential punishment provided for in s 126 A(1)(a) does not depend for its effectiveness on whether the sentence is mandatory or discretionary. The prospect of imprisonment - for up to one-and-a-half times the period of military service outstanding (or 18 months) - is a sufficient deterrent in itself. No matter how unpleasant the thought of military service may be, for most people the prospect of imprisonment would be worse. It is not necessary or desirable for achieving the purpose of the Act that every person convicted under s 126 A(1)(a) should be subjected to the full rigour of a draconian provision, without individualisation or consideration by the court of the relevant circumstances (which would be the case if the subsection prescribed a mandatory sentence). The

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system of compulsory military service will not be undermined if a period of imprisonment is imposed which is not equal to one-and-a-half times the aggregate of all periods of service such person is still obliged to render (or is less than 18 months), but is otherwise an adequately coercive sentence. It is fallacious to assume that only a mandatory sentence can have the required effect or achieve the desired result. Rigorous and harsh sentences do not necessarily effect their purpose and they are out of tune with a just society. Furthermore, it is undesirable to substitute an arbitrary rule for the exercise of a balanced and humane judgment. Nor is it proper to take the view that unless provision is made for a mandatory sentence lenient sentences may be imposed which would defeat the object of the legislature. This is founded on the unjustified premise that the presiding judicial officer

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will not properly exercise his discretion as to punishment. In imposing sentence proper regard will have to be had to, inter alia, the object of the legislation; the penalties prescribed; that the sentence should bear some correlation to the period of military service it has been sought to avoid; that if the sentence imposed is served in full the person concerned will be exempt from liability to render service in future (s 126 A(6)); and the fact that the offender can at any time thereafter elect to render military service or undergo training in which case he would be exempt from serving further imprisonment (s 126 A(7)). This will enable a proper sentence to be arrived at, with due regard as well to the individual circumstances of each offender. No doubt there is the risk of an inadequate sentence being passed, and the object of the legislature being thereby defeated, but

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such risk is no greater than in any other case. And if this gives rise to inequality of treatment, or inequities result therefrom, they must inevitably be less than those that flow from the imposition of mandatory sentences.

Dealing specifically with s 126 A(6), I do not find its provisions inconsistent with the notion that s 126 A(1)(a) permits of a discretion in relation to sentence. It is worth noting that the words "the full period of imprisonment imposed upon him in terms of subsection (1)(a) or (2)(a)" do not, at least with reference to subsection (1)(a), necessarily exclude a sentence of less than the two alternate maximum sentences for which provision is made. If s 126 A(1)(a) prescribed a mandatory sentence, and ss 6

intended to refer thereto, one would have expected more appropriate language - such as the words "prescribed by" instead of "imposed upon him". Nor does the fact that the sentence imposed, if served in full, will exempt the person concerned from liability to render further service detract from a discretionary sentence. I find nothing illogical or untenable in the notion that the legislature intended that once a court, after due consideration of all relevant considerations, including those I have mentioned, as well as personal factors, arrives at an appropriate sentence, and such sentence is served in full, exemption from liability to render further service should follow.

It was also argued on behalf of the respondent that, in effect, the Act requires that the correlation between the maximum period of imprisonment and the military service which the convicted person is

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still liable to render must be preserved at all times; if it is to be preserved then ss (6) en (7) are unworkable unless the term of imprisonment imposed by the court is the maximum. It must follow that such maximum is a mandatory sentence. I can see no reason in logic or policy why where should be imputed to the legislature an intention to maintain the correlation in all circumstanes. A day in the army is not at all comparable with one-and-a-half days in prison. (If it were, the coercive object of the Act could never be achieved.) Moreover military service is performed at intervals over a period of 14 years, so that there is a reduced interference with a man's domestic life, his social relations, and his vocation. Service in prison is over a continuous period with resulting disruption of his whole existence, including possible destruction of his domestic life and the ruin of his career. And,

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as I have mentioned, there is no logical reason why, if a convicted person has served his term of imprisonment (provided it is adequate), he should not be exempted under ss (6) from his liability to render service in terms of the Act. Similarly in regard to the proviso to ss (7).

In argument reference was also made to the history of s 126 A. I do not propose to traverse the history thereof. Suffice it to say that such history (assuming that regard may be had thereto) is not in my view of material assistance in arriving at a decision one way or another in this matter.

In the result I am of the view that s 126 A(1)(a) did not prescribe a mandatory sentence, and it was open to the magistrates in both the Toms and Bruce cases to impose a sentence less than the higher of the two alternative maximum sentences provided for

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in the section.

The same conclusion can be reached by adopting a somewhat different approach. I have previously mentioned that where a prescribed period of imprisonment is qualified by words such as "not exceeding" the effect is to build into the provision a judicial discretion to impose a lesser sentence. But even where the prescribed period is not so qualified, the court has a discretion under s 283 of the Criminal Procedure Act 51 of 1977. This section provides:

> "(1) A person liable to a sentence of imprisonment for life or for any period, may be sentenced to imprisonment for any shorter period, and a person liable to a sentence of a fine of any amount may be sentenced to a fine of any lesser amount.
>
> (2) The provisions of subsection (1) shall not apply with reference to any offence for which a minimum penalty is prescribed in the law creating the offence or prescribing a penalty therefor."

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The question arises whether s 283(1) is inapplicable because "a minimum penalty is prescribed" in s 126 A(1)(a)? The subsection does not in terms prescribe a minimum penalty. Its effect is certainly to prescribe a maximum penalty, but does it prescribe a mandatory one? This expression (or a similar one) is not used in the Criminal Procedure Act. Hiemstra: Suid Afrikaanse Strafproses; 3rd Ed, p 650 states:

> "Die verskil tussen die minimum straf en 'n voorgeskrewe straf wat verpligtend is, is soos volg: By 'n minimum straf is net die minimum verpligtend. Die hof kan na goeddunke ook meer oplê. In die geval van 'n verpligte voorgeskrewe straf kan die hof nie meer of minder as die voorgeskrewe straf oplê nie."

The learned author quotes no authority for the use of the expression, and gives no examples of such a punishment. Du Toit: Straf in Suid-Afrika states (at 384):

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> "(a) In die geval van 'n voorgeskrewe, verpligte straf, mag die verhoorhof slegs daardie straf en niks anders nie, oplê."

In a footnote he says

> "Soos bv in oortredings van die Drankwet waar bepaal word dat tweede oortreders bepaalde, uitdruklik - voorgeskrewe strawwe opgelê moet word. Slegs daardie straf - en geen ander nie - mag opgelê word"

but gives no reference to the Liquor Act to which he refers (Act 87 of 1977 - now Act 27 of 1989) and no other examples. (I am not satisfied from a perusal of the Liquor Act that it makes provision for mandatory sentences in the sense in which I have used that term. Nor, as I have indicated, were counsel able to direct our intention to any.) Neither Snyman and Morkel: Strafprosesreg, nor Ferreira: Strafprosesreg in die Laer Howe: 2nd Ed, make any mention of a mandatory sentence of imprisonment as distinct from a minimum sentence. And the fact that s 283(2) of the Criminal

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Procedure Act does not mention such a sentence suggests that it is unknown to the legislature. Plainly if it is not mythical, it is avis rarissima.

There is no reason why the legislature should not impose such a sentence if it wishes to do so. The sentence would be at the same time a maximum and minimum - no greater and no lesser sentence would be imposable. However, such a sentence is not to be found expresse et totidem verbis in s 126 A(1)(a). If then it is to be found at all, it can only be by way of implication.

Craies on Statute Law: 7th Ed, deals at pp 109-122 with "construction by implication". The learned author says (at p 109):

> "If the meaning of the statute is not plain, it is permissible in certain cases to have recourse to a construction by implication, and to draw inference or supply obvious omissions. But the general rule is 'not to import into statutes words which are not to

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> be found there', and there are particular purposes for which express language is absolutely indispensable. 'Words plainly should not be added by implication into the language of statute unless it is necessary to do so to give the paragraph sense and meaning in its context.'"

(See also Steyn op cit at 60, 64.)

In the Toms case the court found support in s 126 A (2)(a) and (b) for the conclusion that the sentence prescribed by s 126 A(1)(a) was a mandatory sentence. It will be recalled that ss (2)(a) provides for "imprisonment for a period of 18 months", while ss (2)(b) provides for "imprisonment or detention for a period not exceeding 18 months". FOXCROFT, J, considered (at 570 C - E) that the phrase "not exceeding 18 months" was used to cover a situation where some lesser period of sentence was permitted. Aliter where the expression used was "a period of 18 months" without qualification. The inference was that

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the latter was a fixed period. Similarly, ss (1)(b) provides for imprisonment and detention for a period not exceeding 18 months, while ss (1)(a) provides for a period of imprisonment without qualification. The inference it was considered should be drawn was that the period in ss (1)(a) was compulsory and the trial court had no discretion.

The legislature, it may be presumed, had something in contemplation when it used different wording in ss (2)(a) and (b), but it is by no means clear that one should infer that the intention in ss (1)(a) was to prescribe a mandatory sentence. In the first place, this would be an extremely obscure and oblique way of indicating an intention which, affecting as it does the liberty of the subject one could legitimately expect to be stated in clear and unmistakable terms. In the second place, it is

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unlikely that the legislature could have intended in this indirect way to specify a type of sentence which, if it was not without precedent, would be extremely unusual. Moreover an intention to circumscribe the discretion of the court in a matter of punishment is not readily to be inferred. For reasons which have already been mentioned, the words "whichever is the longer" in s 126 A(1)(a) do not support the conclusion that the subsection prescribes a mandatory sentence. In the result, while s 126 A(1)(a) prescribes a maximum period of imprisonment, there is no sufficiently cogent reason to infer that it was the intention of the legislature that that should also be the minimum period. There being no prescribed minimum sentence the provisions of s 283(1) of the Criminal Procedure Act are of application. It follows that s 126 A(1)(a) of the Act has not deprived the court of its discretion

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to impose an appropriate sentence.

In terms of s 297 (1)(b) of the Criminal Procedure Act, where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion suspend the whole or any part of any sentence imposed by it. As s 126 A(1)(a) of the Act does not, in my view, prescribe a minimum sentence the provisions of s 297(1)(b) of the Criminal Procedure Act are applicable to both matters under consideration. There are no provisions in the Act which either expressly or by necessary implication (assuming this to be possible) exclude the provisions of s 297(1)(b). In determining whether or not it would be appropriate to suspend the whole or any portion of a sentence the court would need to have regard, inter alia, to the relevant considerations affecting sentence to which I

have already referred, save that s 126 A(6) would not apply. That section is only of application where the full period of any sentence of imprisonment which has been imposed, has been served. A wholly or partially suspended sentence will not exempt the person concerned from liability to render service in terms of the Act. There is nothing in the wording of s 126 A(7) which precludes suspension. That section presupposes that the person concerned is serving some period of imprisonment. Its provisions will apply to a partially suspended sentence, but are clearly not of application in the case of a totally suspended sentence. Where a sentence, or part thereof, is suspended, great care will have to be taken when formulating the conditions of suspension, lest inappropriate conditions defeat the very purpose of suspension. Where a person steadfastly refuses to

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render military service on the grounds of conscience, and is prepared to undergo incarceration for the sake of his convictions, a condition of suspension (assuming suspension to be appropriate in such circumstances) that he renders military service or does not again contravene s 126 A(1)(a) of the Act would serve no purpose. These would be usual conditions of suspension, but the fact that they are inappropriate would not per se render suspension impermissible. The court could suspend any sentence, or part thereof, on other appropriate conditions, including the condition that the person concerned renders community service.

In view of the conclusion to which I have come that s 126 A(1)(a) does not prescribe a mandatory sentence it is not necessary for me to consider whether, if it did, it would have been competent to suspend such sentence or any portion thereof.

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In the result, both appeals must succeed. The sentences imposed upon Toms and Bruce accordingly fall to be reconsidered in the light of the judicial discretion which exists in regard to the imposition of sentence. In the case of Bruce, his counsel requested that in the event of his appeal being successful, his sentence should be set aside and the matter remitted to the trial magistrate to reconsider his sentence afresh. In my view this would be the appropriate course to follow. In the case of Toms, his counsel suggested that this Court should determine an appropriate sentence. The evidence reveals Toms to be a highly principled man of impressive qualities, not least of which is his sensitivity to the suffering of his fellow man, in whose service he so resolutely and compassionately stands. Because he has already served 9 months' imprisonment, and because he clearly does not

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merit imprisonment in excess of that period, I agree with his counsel's suggestion that his sentence should be reduced to that period. From this it must not be inferred that I consider 9 months' imprisonment to have been the appropriate sentence for Toms. It is merely the sentence which the exigencies of the situation dictate. A lesser sentence may well have sufficed had the trial magistrate been appreciative of the fact that he had a discretion in regard to sentence. I express no firm view on the matter.

The appeals succeed. The following orders are made:

1) In the case of Toms, his sentence is set aside, and there is substituted in its stead a sentence of 9 months' imprisonment;

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2) In the case of Bruce, his sentence is set aside, and the matter is remitted to the trial court to reconsider afresh the question of an appropriate sentence.

J W SMALBERGER

JUDGE OF APPEAL

NICHOLAS, AJA - concurs

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matters of:

139/89

IVAN PETER TOMS..... Appellant

and

THE STATE..... Respondent

and

289/89

ROBERT DAVID BRUCE..... Appellant

and

THE STATE..... Respondent

CORAM: CORBETT CJ, BOTHA, SMALBERGER, KUMLEBEN JJA et NICHOLAS AJA.

HEARD: 27 February 1990

DATE OF JUDGMENT: 30 March 1990

J U D G M E N T

CORBETT CJ:

I have had the opportunity of reading the judgments prepared in this matter by my Brothers Botha and Smalberger. As the divergent views expressed in those judgments indicate, the issue as to whether or not sec 126A(1)(a) of the Defence Act 44 of 1957 prescribes a mandatory sentence of imprisonment is a difficult and finely balanced one. After careful and anxious consideration, and not without some hesitation, I have come to the conclusion, broadly for the reasons stated by Smalberger JA, that it does not.

Such a mandatory sentence of imprisonment would, I believe, be unique in the annals of the administration of criminal justice in this country. There is, of course, precedent for the statutory imposition of minimum prison sentences - in his judgment Smalberger JA refers to a number of these - but in these instances there is provision also

for a maximum and within the range created by the minimum and maximum the Court retains to a certain extent a sentencing discretion. Even so the imposition of a mandatory minimum prison sentence has always been regarded as an undesirable intrusion by the Legislature upon the jurisdiction of the courts to determine the punishment to be meted out to persons convicted of statutory offences and as the kind of enactment that is calculated in certain instances to produce grave injustice (see eg S v Mpetha 1985 (3) SA 702 (A) at 706 D - G). How much more repugnant to principle and justice would not a mandatory prison sentence be: one which was both a maximum and a minimum sentence; one which allowed of no exercise of the judicial discretion; and one which had to be imposed willy-nilly, irrespective of the circumstances, the age, personality or character of the accused and irrespective of what justice required?

The Courts have many times in the past called

attention to the undesirability of mandatory minimum sentences and Parliament has often responded by subsequently eliminating them. When the form of punishment now under consideration was first introduced into sec 126A(1)(a) by sec 16 of Act 34 of 1983 (sec 2 of Act 45 of 1987 merely changed the wording in respects which are not material for present purposes) Parliament must have been aware of these matters. In the circumstances had it intended nevertheless to introduce the novelty of a mandatory prison sentence, a maximum and at the same time a minimum sentence, thus reducing the sentencing role of the Court, as it has been put, to that of a rubber stamp, I would have expected it to have done so in clearer language.

The phrase "liable to" in statutory provisions relating to sentence is a standard one, invariably used where no minimum punishment is intended and where the court is given a discretion as to sentence, subject to a statutory

maximum, usually indicated by a stipulated sentence preceded by words such as "not exceeding" or "not more than". Here the words "liable to" indicate that the accused, upon conviction, becomes exposed to the possibility of any sentence within the range of the court's competence. In other words, he becomes the subject of the court's permitted discretion in regard to punishment. The phrase "liable to" is also used in sentencing provisions which lay down a minimum sentence or both a maximum and a minimum sentence, the latter being indicated usually by a stipulated sentence, preceded by words such as "not less than". Here again the words "liable to" would indicate the accused's exposure to any sentence within the range defined by the minimum sentence and the maximum sentence, if any. This accords with my understanding of the ordinary meaning of the words "liable to", discussed in the judgment of my Brother Smalberger. And I do not think that the use of the phrase

"strafbaar met" in the Afrikaans text leads one to any different conclusion.

It follows from this that a statutory provision to the effect that an accused on conviction is "liable to" a specified punishment, without there being any indication whether this was a maximum or a minimum sentence, should be interpreted as giving the court the discretion to impose any sentence up to that specified; and this position is of course reinforced by the provisions of sec 283(1) of the Criminal Procedure Act 51 of 1977. Thus had sec 126A(1)(a) provided that a person was liable on conviction to a sentence of 5 years imprisonment, then it seems to me that the natural meaning of that provision would be that the Court could impose a sentence of imprisonment ranging up to 5 years; and in principle the fact that instead of 5 years the subsection lays down a formula for the calculation of the prison sentence specified does not appear to make any

difference.

In all the circumstances had the Legislature intended a mandatory sentence, calculated in accordance with the formula and otherwise invariable, I would have expected it to discard the words "liable to" and used a phrase such as "shall be sentenced to". It is true that in sec 126A(1)(b) and (2)(b), which deal with the offences of failing to report for different types of military service, the specified punishment of imprisonment or detention, as the case may be, is preceded by the words "not exceeding"; and it is primarily the absence of these words in sec 126A(1)(a) which has led my Brother Botha to the conclusion that this subsection provides for a mandatory sentence. While recognising the force of the arguments marshalled in his judgment, I am nevertheless of the view that the presence of these words in the other subsections referred to and their absence in sec 126A(1)(a) is not a sufficiently

clear indication of the Legislative intent to outweigh the factors mentioned in this judgment and in the judgment of my Brother Smalberger which point to the sentence not being a mandatory one.

As regards the power to suspend a sentence imposed under sec 126A(1)(a), I agree with Smalberger JA that the power accorded to the court by sec 297(1)(b) of Act 51 of 1977 has not been excluded. I have nothing to add to what he has said about this.

I accordingly concur in the judgment of Smalberger JA and in the orders made by him.

CORBETT CJ

LL

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matters between:

1. Case No 139/1989

IVAN PETER TOMS Appellant

and

THE STATE Respondent

2. Case No 289/1989

ROBERT DAVID BRUCE Appellant

and

THE STATE Respondent

CORAM: CORBETT CJ, BOTHA, SMALBERGER, KUMLEBEN JJA et NICHOLAS AJA

HEARD: 27 FEBRUARY 1990

DELIVERED: 30 MARCH 1990

JUDGMENT

BOTHA JA:-

I have had the advantage of pondering the judgment of my Brother SMALBERGER. With respect, I am constrained to disagree with him. In my judgment the appeals must fail.

The relevant provisions of the Defence Act (44 of 1957) are quoted in the judgment of my Colleague. I do not propose to repeat them here.

The main question to be decided is whether the Legislature intended to preclude a court sentencing a person convicted under section 126A(1)(a) of the Act from exercising a discretion to impose a sentence of imprisonment for a period which is less than the longer of the two alternative periods of imprisonment provided for in the section. After anxious deliberation, there is no doubt in my mind that the Legislature did so intend.

The intention of the Legislature to prescribe a mandatory sentence in section 126A(1)(a) is manifested by the absence of the words "not exceeding"

before the periods of imprisonment provided for, in striking contrast with the presence of those words before the period of imprisonment prescribed in section 126A(1)(b), a contrast which is rendered the more conspicuous by its repetition in paragraphs (a) and (b) of section 126A(2), and which I would say becomes glaring when it is found reflected yet again in sections 72I(1) and (2)(a), as opposed to section 72I(2)(b). The sections mentioned all have this in common, that they lay down the punishment applicable in respect of various kinds of non-performance of the different kinds of compulsory service provided for in the Act. On that score, the recurring contrast between sentences of imprisonment or detention for a period "not exceeding" a stated duration, and sentences of imprisonment or detention for a stated period which is not qualified by those words, leads inexorably to the conclusion that in those instances where the words "not exceeding" do not appear, they were omitted

deliberately by the Legislature, in order to achieve some particular object.

It is to be observed that in my view of the matter the pattern discernible in the provisions mentioned above, which evinces a particular intention on the part of the Legislature, exists solely in relation to the presence or the absence of the words "not exceeding". It is not related to the kind of non-performance of service which is involved. It so happens that in paragraphs (a) and (b) of both subsections (1) and (2) of section 126A a distinction is made between a refusal to render service and a failure to report therefor, which coincides in each case with the absence and the presence of the words "not exceeding", but on my approach to the matter that distinction is neither here nor there. The compelling index to the Legislature's intention consists in the mere contrasting of the omission of the words "not exceeding" in subsections (1)(a) and (2)(a) with their

inclusion in subsections (1)(b) and (2)(b). On that basis, the impact of the contrast is not detracted from at all by the lumping together of a refusal and a failure to render service, or to comply with an order or duty in relation thereto, in sections 72I(1) and (2)(a) and (b). On the contrary, the repetition of the contrast in the last-mentioned provisions serves to fortify, conclusively, its impact.

If it is clear, then, as I consider it to be, that the Legislature deliberately omitted the words "not exceeding" from section 126A(1)(a), with what object did it do so? The answer is surely obvious. When the Legislature prescribes punishment in the form of imprisonment, the use of the words "not exceeding" in relation to a particular period of imprisonment mentioned connotes not only that the stated period shall be the maximum that may be imposed, but also, as an implicit corollary, that the sentencing court shall have the power, in its discretion, to impose any lesser

period of imprisonment than the stated maximum. Therefore, when the Legislature in its formulation of a prescribed punishment of imprisonment deliberately excises from it the words "not exceeding" in relation to the stated period of imprisonment, it must necessarily intend to deprive the sentencing court of the power and of any discretion to impose a period of imprisonment which is less than the period stated. To my mind this conclusion is a matter of simple logic which is so compelling that there is no escape from it.

It was nevertheless argued on behalf of the appellants that there were other possible explanations for the omission of the words "not exceeding" from section 126A(1)(a). So, it was suggested that the section was merely "n voorbeeld van onbeholpe wetsopstelling" (per HOEXTER JA in Boland Bank Bpk v Picfoods Bpk en andere 1987 (4) SA 615(A) at 632B/C). This suggestion must be rejected as fanciful, in view of the pattern of contrasts pointed out above: it is

quite inconceivable that bad draftsmanship could have resulted by coincidence in a series of provisions each containing the antithesis in question. Next, it was suggested that the Legislature's intention was merely to emphasize that the offence under paragraph (a) of section 126A(1) was much more serious than the one under paragraph (b), and that the same applied to paragraphs (a) and (b) of section 126A(2) (and presumably also to sections 72I(1) and (2)(a) as cpposed to section 72I(2)(b)). Of this suggestion I propose to say no more than that it is so fanciful as to be wholly without merit.

Then it was contended that the inclusion of the words "not exceeding" in section 126A(1)(a) would have resulted in an awkwardness of language, which the Legislature presumably wished to avoid. I do not agree. In my opinion the words "not exceeding" could be inserted in the two places where they would be appropriate in the section, without any difficulty and

without causing any straining of, or awkwardness in, the language as it stands. Nor am I able to perceive any incongruity in language in the use together of the phrases "not exceeding" and "whichever is the longer". If there were any incongruity, it would be notional, rather than linguistic, and on that footing it would militate against the argument advanced on behalf of the appellants, not in favour of it. Indeed it would be supportive of the reliance placed in the reasoning of the Courts a quo on the words "whichever is the longer". In my view, however, nothing turns on the words "whichever is the longer", nor on the word "only" where it occurs in paragraph (b) of section 126A(1). (It may be mentioned in passing, though, that the word "only" in paragraph (b) of subsection (1) might well gain greater significance as a factor militating against the argument for the appellants, when it is considered in conjunction with its counterpart, the word "only" in paragraph (b) of subsection (2), having

regard to the less complex context of the latter subsection. It is not necessary for my purposes, however, to pursue this line of thought.)

In argument on behalf of the appellants much was made of what was termed the ordinary and literal meaning of the words of section 126A(1)(a) in their immediate context. One must tread warily here, in order not to confuse the concepts of language, context, and interpretation. As a matter of language, the only words in the section calling for attention are the words "liable to". Linguistically, as the dictionaries show, when it is said that a person is "liable to" something, the phrase "liable to" is colourless, or neutral, as to the question whether the thing to which it is coupled is to follow necessarily, or merely as a possibility. In ordinary parlance, when a person is said to be "liable to" punishment, the question is left open whether he is susceptible to punishment as a possibility, or whether he will

necessarily suffer punishment. The position is no different, in a linguistic sense, when the punishment concerned happens to be of the kind that is meted out in a court of law. Consequently, a statement that a person is "liable to" imprisonment for a stated period provides no clue, purely as a matter of language, as to whether the stated period of imprisonment is intended to be a mandatory sentence or a discretionary sentence.

It follows, in my view, that there is no room in the present case, with reference to section 126A(1)(a), for invoking the rule of interpretation that the words of a statute are to be given their ordinary and literal meaning, unless sound reason appears to the contrary. The truth is that the ordinary and literal meaning of the words, as such, does not furnish any answer to the question which falls for decision. Accordingly, the statement that the words "liable to" in the section would normally denote a burden of punishment and not that the burden is

mandatory or compulsory, cannot, in my respectful opinion, be founded on mere linguistic treatment of the section; nor can it properly be said, with respect, that such statement is in conformity with what the words of the section, in their primary sense, signify, or with the prima facie meaning of the section. The statement in question, as I see it, can rest only on a process of reasoning which has already left the linguistic treatment of the section behind, and which has in fact proceeded two steps beyond it. The first step is to take into account the immediate context in which the words "liable to" appear, viz in conjunction with imprisonment for a stated period, and the second step, which, I consider, must needs be taken simultaneously with the first, is to superimpose on the words as read in their context two rules of interpretation in aid of the result arrived at, the first being the presumption against legislative interference with the cherished principle of the

unfettered discretion of the courts in relation to sentence, and the second being the canon of strict construction of penal provisions.

The considerations mentioned in the preceding paragraph may be further illustrated as follows. The words "liable to", in relation to criminal punishment, are not inappropriate to a form of punishment which is mandatory. So, it is not inept to say that a person over the age of 18 years, who has been convicted of murder without extenuating circumstances, is "liable to" be sentenced to death. The Afrikaans word "strafbaar" is frequently used in the same way; the person in my example is "strafbaar met die dood". On the other hand, "liable to" may also denote a discretionary form of criminal punishment, as in relation to imprisonment for a period not exceeding a stated duration. And the same applies to the Afrikaans "strafbaar met", e g "gevangenisstraf vir 'n tydperk van hoogstens .....". When VAN DER WALT J, in

S v Nel 1987 (4) SA 950(W) at 958E, said that "straf-baar met" connoted an empowering provision and not a mandatory one, he could not, with respect, have intended to lay down a definition of the meaning of the words as a generalization, divorced from the context in which he was considering them; and when he referred to "enigeen met 'n aanvoeling vir Afrikaans" he must have had in mind such a person who was also au fait with the rules of interpretation relating to the courts' discretion in the matter of punishment and to penal provisions. In other words, he was dealing, not simply with the meaning of the language, but, via context, with the interpretation of it, in the light of well-known canons of construction.

In the present case, the most important feature of the wording of section 126A(1)(a), in my view, is the omission from it of the words "not exceeding". For the reasons already given, I have found that the omission was deliberate. That being

so, the only importance of the words actually used in the section is that, in their ordinary and literal meaning, they are apt to give expression to the notion of a mandatory sentence of imprisonment for the longer of the two alternative periods stated. It is not possible to imagine that the Legislature had any other object in mind when it deliberately omitted the words "not exceeding" from the section. In consequence, there is simply no room for subjecting the words of the section to a process of interpretation by means of applying the rules of interpretation relating to the courts' discretion in respect of sentencing, penal provisions, or the like.

On this approach, I do not, with respect, agree with the reasoning that, because a mandatory sentence is not provided for expresse et totidem verbis (as it is said), therefore it can only be found in the section by means of interpretation by implication. The words used are, in their ordinary and literal meaning,

capable of denoting either a discretionary or a mandatory sentence. Accordingly, one might as well say that, because a discretionary sentence was not expressly provided for, therefore it can only be found there by way of implying, notionally if not literally, the words "not exceeding" in the section. But those are the very words which, as I have found, have been omitted with deliberate intention. One would therefore be putting back what the Legislature has chosen to leave out. On my approach, one would simply select from the two possible meanings available, that one which is in conformity with the pointers to the Legislature's intention, with which I have already dealt. A contrary result can only be achieved by ignoring such pointers and by subjecting the section, in isolation, to a process of interpretation, invoking in aid various canons of construction.

In my view it would be wrong to take section 126A(1)(a) as a starting point, standing by itself, to

assign a meaning to it by invoking the aid of rules of interpretation, and then to consider whether the result arrived at is negatived by sufficiently cogent indicia to the contrary elsewhere in the Act. To take such a course, in the search for the intention of the Legislature, is to enter upon a cul-de-sac, for it in fact fails to reach a point where the intention of the Legislature is made to appear. In this regard I am obliged to point out, with respect, that in the judgment of SMALBERGER JA it is held, with reference to section 126A(1)(a), that it does not provide for a mandatory sentence, "whatever the legislature may have intended"; and it is said, with reference to subsections (2)(a) and (b), that "(t)he legislature, it may be presumed, had something in contemplation when it used different wording", but that it did not intend to prescribe a mandatory sentence. In this way the vital question as to the intention of the Legislature in deliberately using different wording in subsections

(2)(a) and (b), is, with respect, simply not addressed and left in the air. In this way, too, a doubt is conjured up in regard to the Legislature's intention which, with respect, appears to me to be wholly contrived and artificial. It can only exist in a vacuum which is created by first interpreting section 126A(1)(a) in a certain way, namely as providing for a discretionary sentence. It disappears at once if, on taking a global view of all the relevant provisions, it is found that section 126A(1)(a) prescribes a mandatory sentence.

In support of the postulate of a doubt as to the intention of the Legislature, reliance is placed on the provisions of sections 72I(1) and (2)(a). It is said that, because a refusal and a mere failure to render the service involved are lumped together in those subsections, the Legislature would not have intended the sentences prescribed to be mandatory. With respect, I do not agree. As pointed out earlier,

those subsections display the same conspicuous absence of the words "not exceeding", which do appear in subsection (2)(b), as is the case with paragraphs (a) and (b) of sections 126A(1) and (2). That the Legislature contemplated mandatory sentences in the context of the provisions of section 72I is abundantly clear from the explicit provisions of section 72I(3)(b). The ostensible anomaly of treating a refusal and a failure to render service together in sections 72I(1) and (2)(a) is not, in my opinion, of any real significance. In the first place, the distinction which is to be found in paragraphs (a) and (b) of section 126A(1) and (2) is not simply between a refusal and a failure to render service; it is between a refusal "to render ..... service" when called up and a failure "to report therefor"; obviously the latter offence is of far less gravity than the former. By contrast, sections 72I(1) and (2)(a) both deal with a refusal or a failure "to render the service" concerned;

the two kinds of offences are accordingly much more closely allied to each other. In the second place, there is no provision in section 126A for the suspension of any part of a sentence imposed under subsections (1)(a) or (2)(a) (cf section 126A(7)), a matter to which I shall return presently. By contrast, section 72I(5) makes express provision for the suspension of sentences imposed under subsections (1) and (2)(a), so that the possibility of more lenient treatment of an offender in respect of a failure of lesser seriousness is adequately catered for. In these circumstances I find no warrant in sections 72I(1) and (2)(a) for casting doubt on the intention of the Legislature. On the contrary, such intention, as I stated earlier, I consider to be fortified by those sections, when read with the contrasting wording of section 72I(2)(b).

Some other points were raised in argument on behalf of the appellants, with which I do not consider

it necessary to deal in detail. For instance, reference was made to section 37(1) of Act 62 of 1955, the history of conflicting interpretations of it, and the manner in which the Legislature intervened by means of section 31 of Act 80 of 1964. Suffice it to say that I can find nothing in those considerations which can serve to detract from the views I have expressed above regarding the intention of the Legislature as manifested in the Act which is under scrutiny here.

It is said that a mandatory sentence of the kind in question here is extremely unusual, if not unique. I agree. In my judgment, however, the indications that the Legislature intended to provide for just such a sentence are so compelling, and indeed overwhelming, that I can see no avenue of escape, other than to rewrite the Act, which, unfortunately, it is not within my power to do.

I turn now to section 283 of the Criminal Procedure Act 51 of 1977, which is quoted in the

judgment of my Brother SMALBERGER. In my view section 283 cannot be made to apply to a mandatory sentence of the kind in question here, at all. To begin with section 283(2): it excludes from the operation of subsection (1) "any offence for which a minimum penalty is prescribed.....". In my opinion, a provision for a mandatory sentence does not fall within the ambit of these words. When the Legislature provides, in terms which are found to be peremptory, that an offender is to be sentenced to imprisonment for a stated period, no more and no less, it is not prescribing "a minimum penalty". To be sure, the effect of providing for a compulsory sentence will be imprisonment for a period which can, in a sense, be regarded as a minimum, but that relates only to the effect of the provision, and, what is more, only to one half of its effect. It is simultaneously a provision for a maximum sentence. To my mind it would be a misnomer to call a mandatory or compulsory sentence of a fixed period of imprisonment a

minimum penalty, just as it would be a misnomer to call it a maximum penalty. When section 283(2) refers to "a minimum penalty", it implicitly presupposes that a heavier penalty is possible, but in the case of mandatory sentence no such possibility exists. Because a mandatory sentence precludes anything more than what is prescribed, it cannot be brought home within the words "a minimum penalty is prescribed". Proceeding, then, to subsection (1): its provision that a person liable to a sentence of imprisonment for a period may be sentenced to imprisonment for any shorter period, is couched in very general terms. Consequently, in accordance with established principle, it cannot be invoked to override the specific provisions of a particular statute to the contrary. To illustrate the point: assuming that subsection (2) had not been included after subsection (1), the latter could not have been made to apply to a particular statutory provision prescribing a minimum sentence for a specific

offence. The fact that the Legislature saw fit in subsection (2) expressly to exclude from the operation of subsection (1) the case of a minimum penalty, does not entail, however, that subsection (1) applies to other instances of a specific provision which in a different form is in conflict with its general provisions. Any specific provision which runs counter to the general provision of subsection (1) must override the latter. It follows, therefore, that section 283(1) cannot be made to apply to the case of a mandatory sentence such as that contained in section 126A(1)(a). The fact that the words of section 126A(1)(a), "liable ..... to imprisonment for a period ....." happen to coincide largely with the words of section 283(1), "liable to a sentence of imprisonment ..... for any period .....", is not of any consequence, for, on my finding as to the intention of the Legislature in regard to section 126A(1)(a), the words I have quoted must be taken to convey imprisonment "for

a period which shall be (neither more nor less than) .....", and that effectively excludes the operation of section 283(1).

It remains to deal with the subsidiary question to be decided: whether it is competent for a court sentencing an offender under section 126A(1)(a) to suspend any part of the sentence. In my judgment the answer must be in the negative. The object of the Legislature is to coerce compliance with the provisions of the Act relating to compulsory service of the various kinds dealt with. That object could be achieved effectively, if suspension were possible, only if it were made the primary condition of suspension that the offender should render the service in question. But for such a situation the Legislature has already made express provision in section 126A(7). The effect of section 126A(7) is to create a procedure by which it is made possible for the offender himself to bring about the suspension of his sentence; he can do

so simply by signing the prescribed notice directed to the Adjudant-General, stating that he is willing to render service, and there is no reason why he should not do so, if he is so minded, immediately on sentence being passed. It is thus for the offender himself at any stage to procure, in effect, the suspension of his sentence. By expressly creating this unusual procedure the Legislature has, in my view, made it perfectly plain that the sentencing court shall not be empowered to suspend any part of the sentence. This conclusion is in no way detracted from by the reference in section 126A(3)(b)(i) to a sentence of imprisonment which has not been suspended in full; obviously that provision would apply where it is possible to do so, viz in relation to sections 126A(1)(b) and 126A(2)(b), but it cannot negative the clear effect of sections 126A(1)(a) and 126A(2)(a) read with section 126A(7).

It was suggested in argument that a sentence under section 126A(1)(a) could be suspended on

conditions other than the rendering of military service, such as that the offender should perform community service of some kind. I cannot agree. Such a possibility flies in the face of the clear intention of the Legislature as reflected in section 126A(7). Moreover, in the case of religious objectors the Legislature has, in section 72E, created an elaborate machinery for alternative kinds of service, including community service, and has expressly provided, in section 72I(5), for the suspension of sentences imposed under sections 72I(1) or (2)(a) on condition that such service be rendered. In view of the Legislature's much harsher treatment of conscientious objectors, it is inconceivable, in my view, that it would have countenanced the rendering of community service, in their case, as a means of avoiding military service. Accordingly such a possibility has been excluded by the clearest necessary implication.

In regard to the suspension of sentences

under section 126A(1)(a), reliance was placed, on behalf of the appellants, on the provisions of section 297 of the Criminal Procedure Act 51 of 1977. In my judgment section 297 cannot be made to apply to a mandatory sentence such as is provided for in section 126A(1)(a). My reasoning in this regard is the same as that set out above in respect of section 283 of the Criminal Procedure Act. I do not propose to repeat it. In brief: the expression "an offence in respect of which any law prescribes a minimum punishment", where it occurs in sections 297(1) and (4), does not embrace a mandatory sentence of the kind provided for in section 126A(1)(a); and the general provisions contained in section 297(1)(b) must be considered to be overridden by the specific provisions of section 126A(1)(a).

Finally: I have reached the conclusions stated in this judgment with profound regret. On the view I have taken as to the intention of the

Legislature, I agree fully with the description of my Brother SMALBERGER of section 126A(1)(a) as a draconian provision which is not necessary or desirable for achieving the purpose of the Act. Unlike my Colleague, however, I have found myself compelled to accept that the Legislature's intention was as I have stated it to be, for the reasons I have given. But I wish to make it clear that I subscribe fully to what SMALBERGER JA has said generally in regard to the cherished principle that the discretion of the courts in the matter of sentence should not be encroached upon, and that the individualization of punishment should not be rendered nugatory. I agree, also, that on the view I have taken of the effect of section 126A(1)(a), it must inevitably lead to harsh and inequitable results. It is not for me to comment on the policy of the Legislature, when once I have found an unavoidably clear expression of it in the Act. But I am qualified, entitled and obliged to speak my mind on the effect of that policy on the

administration of justice in the courts of the country, which is the sphere in which I function. And on that level I find a legislative provision like section 126A(1)(a), which reduces a sentencing court to a mere rubber stamp, to be wholly repugnant.

I would dismiss both the appeals.

A.S. BOTHA JA

/mb

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matters between:

1. Case No 139/1989

IVAN PETER TOMS Appellant

and

THE STATE Respondent

2. Case No 289/1989

ROBERT DAVID BRUCE Appellant

and

THE STATE Respondent

CORAM: CORBETT CJ, BOTHA, SMALBERGER, KUMLEBEN JJA et NICHOLAS AJA

HEARD: 27 FEBRUARY 1990

DELIVERED: 30 MARCH 1990

J U D G M E N T

KUMLEBEN JA/...

KUMLEBEN JA:

I agree with my Brother Botha that the sentence laid down in s 126A(1)(a) is a mandatory one. I do so with all the reluctance and disquiet expressed in his dissenting judgment. I do not, however, share the view that such sentence cannot be suspended.

S 297 of the Criminal Procedure Act 51 of 1977 ("the Criminal Code") provides for the suspension of a sentence. The two subsections which are for present purposes material, read as follows:

> "(1) Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion
>
> (b) pass sentence but order the operation of the whole or any part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a)(i)

which the court may specify in the order;"

and

"(4) Where a court convicts a person of an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion pass sentence but order the operation of a part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a)(i) of subsection (1)."

In paragraph (a)(i) of ss (1) the nature of the conditions which may be imposed are set out and include: (aa) the payment of compensation, (cc) "the performance without remuneration and outside the prison of some service for the benefit of the community", (gg) "good conduct" and (hh) a condition relating to "any other matter".

The fact that a mandatory punishment has been prescribed in s 126A(1)(a) of the Defence Act 44 of

1957 ("the Act") does not in itself in any way preclude the operation of sec 297(1) or 297(4): in terms they provide for suspension of the sentence imposed on a person convicted of "any offence". Whether a sentence may be wholly or only partially suspended depends upon whether a "minimum punishment" has been laid down in the enactment creating the offence. (One notes though, in passing, that in practice the distinction between these two forms of suspension need not be a substantial one : cf S v Hartmann, 1975(3) S.A. 532 (C) 537 G - H).

A minimum punishment and a mandatory one (in the sense that but one punishment is prescribed) are by definition two different things: the exercise of a discretion - albeit a restricted one - is implicit in the former, but prohibited by the latter. It is so

that in effect a mandatory sentence may be regarded as both a maximum and a minimum sentence but it is, in my view, more correct to describe it as neither. And I do not consider that the reference to a "minimum punishment" in ss (1) and (4) of s 297 is to be taken - contrary to the ordinary meaning of the phrase - to include a mandatory sentence.

S 352(1)(b) of Act 56 of 1955 ("the 1955 Criminal Code"), which existed unamended until its repeal and replacement in 1977 by s 297 of the Criminal Code, authorised the suspension of the whole or part of a sentence save in the case of a conviction of "an offence specified in the Fourth Schedule or an offence in respect of which the imposition of a prescribed punishment on the person convicted thereof is compulsory" and the Fourth Schedule included "any

offence in respect of which any law imposes a minimum punishment". (In the case of offences falling within these two categories provision was made for partial suspension - see s 352(2)(a)(i).) Thus, at the time s 352(1)(b) was enacted - and thereafter until it was repealed - a distinction between a "prescribed punishment" and a "minimum punishment" was recognised and drawn. All the indications are that at the time s 297 was enacted, and the language changed to omit any reference to a "prescribed punishment", no such mandatory punishment existed, or was envisaged in the future. S 329(2)(a) of the 1955 Criminal Code, which provided for compulsory whipping in the case of a conviction of certain offences, was replaced by s 292(1) of the Criminal Code, which made the imposition of the sentence of whipping discretionary. And, as pointed out in the judgment of Smalberger JA, no

instances of a prescribed sentence of imprisonment appear to have existed at the time s 297 was enacted and, it is fair to assume, none was contemplated. (The death penalty, though mandatory in certain instances, is self-evidently not a punishment susceptible to suspension and as obviously could never be described as a "minimum punishment".)

It thus appears that the reference to a "prescribed punishment" was omitted from s 297 not per incuriam, but advisedly. It is anomalous that such a punishment should in the result be capable of total suspension (unless prohibited by the enactment concerned) whereas a minimum punishment may be only partially suspended. However, this incongruity does not arise from a casus omissus in the Criminal Code but, as I have said, from the fact that a form of

punishment subsequently came into being which was not contemplated at the time the Criminal Code was enacted. In the circumstances, if this is seen to be a defect which is to be cured, it is for the Legislature to do so.

Thus, if the sentence in the instant case is capable of suspension, it can, in my opinion, be wholly suspended.

There is nothing said in s 126A(1), or elsewhere in the Act, which expressly precludes the right to suspend conferred in s 297. The critical question is whether the provisions of the Act impliedly do so. As the extract from Craies on Statute Law, cited in the judgment of my Brother Smalberger indicates:

"'Words plainly should not be added by

> implication into the language of a statute unless it is necessary to do so to give the paragraph sense and meaning in its context.'"

Similarly Van Winsen J in S. v Van Rensburg 1967(2) S.A. 291 (C) 294 D held that:

> "(The) implication must be a necessary one in the sense that without it effect cannot be given to the statute as it stands."

(See too Taj Properties (Pty) Ltd v Bobat 1952 (1) S.A. 723 (N) 729 G.)

At the time the sentence for a contravention of s 126A(1)(a) was decided upon, one may readily assume that the Legislature was aware of the provisions of s 297 and that, in the absence of exclusion, it would apply to the mandatory sentence imposed. Moreover, in the very compilation of this section, attention was given to the question of suspension: S 126A(3)(b)(i) provides that "at the imposition in terms of this section of any sentence of imprisonment or

detention which has not been suspended in full; ...." (My emphasis). Had it been the intention that a sentence imposed in terms of s 126A(1)(a) should not be capable of suspension, it is, to my mind, highly improbable - in fact virtually inconceivable - that there would not have been an express exclusionary provision or, at the very least, that s 126A(3)(b)(i) would not have made the implied intention plain by restricting its provisions to convictions of offences created in s 126A other than those set out in ss (1)(a) and ss (2)(a).

In the past, when it was intended that a sentence should not be capable of suspension, saying so in express terms presented no problem. Thus, for instance, s 2(1) of the Terrorism Act 83 of 1967 created the offence of "participation in

terroristic activities" carrying a compulsory minimum prison sentence. In the realisation that, in the absence of any exclusionary provision, this sentence could be partially suspended in terms of s 352(2)(i) of the 1955 Criminal Code, the right to suspend was expressly excluded in terms of s 5(d) of the Terrorism Act. Similarly, when the statutory offence of sabotage was first enacted in terms of s 21(1) of the General Law Amendment Act 76 of 1962 and a compulsory minimum prison sentence laid down, its partial suspension was expressly prohibited by s 21(4)(f) of that Act. (S 21 of the General Law Amendment Act and the Terrorism Act have been repealed by s 73 of the Internal Security Act, 74 of 1982.)

In the light of s 297 of the Criminal Code, which in express terms authorises suspension, and the

past practice of excluding suspension in so many words in the case of a compulsory sentence, when such was the intention, the inference is, to my mind, a strong one that a mandatory sentence imposed in terms of s 126A (1)(a) can be suspended.

There are further considerations which lend support to this conclusion.

In the other judgments of this court in this matter the manifest purpose of s 126 A(1)(a) has been stressed. Its terms, aptly described as draconian, were intended as a far-reaching and effective deterrent against a refusal to do military service. The acknowledgment that such a sentence may be suspended does - or rather may - ameliorate the harshness of this punishment and pro tanto reduce its

coercive effect. But in my view certainly not to the extent that it can be said that, by implication, suspension was prohibited. Though capable of suspension, it remains a drastic punishment and a substantial deterrent. A would-be objector would inevitably realise that there could be no assurance that the compulsory sentence would in fact be suspended wholly or partly; would have no certainty as to the nature, duration or rigour of the conditions of suspension which may be decided upon; and would know that non-compliance with any of them could result in the full period of compulsory imprisonment having to be served. Viewed more positively and humanely, there appear to be no good reasons for supposing that the Legislature did not appreciate that in a fitting case the suspension of the sentence, subject to appropriate conditions, would be in the interests of the offender

and of the community and thus conform to accepted standards of justice and fairness.

Mr Viljoen, who appeared for the respondent in the Toms appeal, pointed out in argument that ordinarily a condition of suspension is that the offence be not repeated and that such a condition in the present context would not be appropriate. This fact, so it was submitted, is an indication that suspension was precluded. But, as appears from the nature of the conditions of suspension foreshadowed in s 297(1)(a), a court has been given a wide discretion to impose "one or more" conditions, "service for the benefit of the community" and "good conduct" being two of those mentioned. To argue that because one such condition is inappropriate, suspension was not contemplated - in fact excluded - does not appear to me to be sound reasoning. In the ordinary run of

convictions for common law offences instances arise where there is no need for a "deterrent condition" (though one is often added for good measure) but good cause exists for the imposition of a condition of some other kind, for instance, payment of compensation or community service. This serves to confirm that a "deterrent condition", though a frequent condition of suspension, is not an essential one. Finally, in this regard, it should be mentioned that the amelioration of the harshness of a sentence is one of the recognized and important purposes of suspension of a sentence (cf Du Toit "Straf in Suid-Afrika" 363).

Mr Viljoen further relied on s 126A(7), arguing that it afforded an offender the opportunity of avoiding the consequences of the mandatory prison

sentence, and that for this reason provision in addition for the suspension of such is unnecessary and out of place. I fail to see how this subsection bears upon the question. It applies to an objector who is actually serving a prison sentence and confers upon him the option of terminating its operation by substituting military service. The question of suspension is a separate and anterior one to be decided by the judicial officer concerned and not by the sentenced offender. S 126A(6) is likewise of no assistance to the respondent. As pointed out in the judgment of Smalberger J.A., an objector, whether he receives a wholly or partially suspended sentence, will not have "served the full period imposed" and would therefore not be exempt from liability to render military service in terms of the Act.

S 72 I, which was inserted in the Act by s 9

of Act 34 of 1983, introduced a new dispensation for persons objecting to military service on religious grounds. Should the board of exemption decide to grant such dispensation,the objector is to be classified within one of the three categories referred to in s 72 D, the third of which makes provision for community, in lieu of military, service. This form of substituted service applying to one group of religious objectors corresponds to a condition of suspension which, one may suppose, would be a most appropriate one, assuming suspension to be permitted. This, so the argument runs, is a reason for concluding that a sentence imposed in terms of s 126A(1)(a), by implication, may not be suspended. Had s 72 I been initially included in the Act, this would have been a consideration - not necessarily an important or decisive one - to be taken into account in deciding whether suspension is prohibited. But the fact that it was subsequently

introduced robs this submission of what weight it might otherwise have had. In Kent, N.O. v South African Railways and Another, 1946 A.D. 398 at 405, this court held:

> "... that Statutes must be read together and the later one must not be so construed as to repeal the provisions of an earlier one, or to take away rights conferred by an earlier one unless the later Statute expressly alters the provisions of the earlier one in that respect or such alteration is a necessary inference from the terms of the later Statute. The inference must be a necessary one and not merely a possible one. In Maxwell's Interpretation of Statutes, the principle is, stated as follows (4th ed., p. 233):-
>
> > 'The language of every enactment must be so construed as far as possible as to be consistent with every other which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a Statute by construction when the words may have their proper operation without it.'"

This dictum is in point: it applies a fortiori to an amending statute of the nature of the one in question. If it is borne in mind that the provisions of s 72 I

were subsequently introduced, it follows that the position was not that the Legislature initially intended harsher treatment of conscientious objectors but that it subsequently saw the merit of other alternatives - perhaps, though not necessarily, more lenient ones - in the case of religious objectors.

In the majority judgment certain principles relating to the interpretation of statutes, and some important presumptions, applicable in case of doubt or ambiguity are comprehensively discussed. I refer particularly to the presumption that the Legislature did not intend harsh and inequitable results or an interference with the court's jurisdiction: in casu the latter would apply to the jurisdiction conferred on a court by sec 297 to suspend all sentences. If one supposes in favour of the respondent - contrary to the

view I hold - that doubt exists as to whether suspension was impliedly prohibited, certain of these principles and presumptions would serve to decide the issue in favour of the appellants.

In the result I consider that a sentence imposed in terms of s 126A(1)(a) may be wholly suspended and to that extent I would allow the appeals. However, in the light of the decision of the majority of the court, it would serve no purpose for me to discuss the order to be made in each on the basis of my conclusion.

M E KUMLEBEN JA