IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

REPORTABLE

CASE NO:2320/2013/
3986/2009
DATE HEARD: 10/11/2016
DATE DELIVERED: 09/02/2017

In the matter between

ANDREW WALTER STOW **APPLICANT**

and

REGIONAL MAGISTRATE, PE N.O. **1ST RESPONDENT**

DIRECTOR OF PUBLIC PROSECUTIONS, EASTERN CAPE **2ND RESPONDENT**

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **3RD RESPONDENT**

and in the matter between

JACOBUS STEPHANUS MEYER **APPLICANT**

and

KENNY COONEY N.O. **1ST RESPONDENT**

DIRECTOR OF PUBLIC PROSECUTIONS, EASTERN CAPE **2ND RESPONDENT**

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **3RD RESPONDENT**

JUDGMENT

ROBERSON J:-

[1] Both the applicants in the above matters have applied in terms of Rule 53 of the Uniform Rules for the review and setting aside of the orders of the first respondent in each matter that the applicants' suspended sentences be put into operation, in terms of s 297 (9) (a) (ii) of the Criminal Procedure Act 51 of 1977 (the CPA). The applicant Meyer also applied for the review and setting aside of one of the conditions of suspension of his sentence. Both applicants have further applied for an order declaring s 297 (1) (b) read with s 297 (1) (a) (i) (aa) of the CPA unconstitutional. The first respondent in each matter abides the decision of the court. The second and third respondents opposed the applications.

[2] The relevant portions of s 297 of the CPA are as follows:

> **"297 Conditional or unconditional postponement or suspension of sentence, and caution or reprimand**
>
> (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-
>
> (a) postpone for a period not exceeding five years the passing of sentence and release the person concerned-
>
> (i) on one or more conditions, whether as to-
>
> (aa) compensation;
>
> (bb) the rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss;
>
> (cc) the performance without remuneration and outside the prison of some service for the benefit of the community under the supervision or

control of an organization or institution which, or person who, in the opinion of the court, promotes the interests of the community (in this section referred to as community service);

(ccA) submission to correctional supervision;

(dd) submission to instruction or treatment;

(ee) submission to the supervision or control (including control over the earnings or other income of the person concerned) of a probation officer as defined in the Probation Services Act, 1991 (Act 116 of 1991);

(ff) the compulsory attendance or residence at some specified centre for a specified purpose;

(gg) good conduct;

(hh) any other matter,

and order such person to appear before the court at the expiration of the relevant period; or

(ii) ……

(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; or

(c) ……

(2) ……..

(3) ……..

(4) ……..

(5) ……..

(6) ……..

(7) A court which has-

(a) postponed the passing of sentence under paragraph (a) (i) of subsection (1);

(b) suspended the operation of a sentence under subsection (1) *(b)* or (4); or

(c) suspended the payment of a fine under subsection (5),

whether differently constituted or not, or any court of equal or superior jurisdiction may, if satisfied that the person concerned has through circumstances beyond his control been unable to comply with any relevant condition, or for any other good and sufficient reason, further postpone the passing of sentence or further suspend the operation of a sentence or the payment of a fine, as the case may be, subject to any existing condition or such further conditions as could have been imposed at the time of such postponement or suspension.

(8) …….

(9) (a) If any condition imposed under this section is not complied with, the person concerned may upon the order of any court, or if it appears from information under oath that the person concerned has failed to comply with such condition, upon the order of any magistrate, regional magistrate or judge, as the case may be, be arrested or detained and, where the condition in question-

(i) was imposed under paragraph *(a)* (i) of subsection (1), be brought before the court which postponed the passing of sentence or before any court of equal or superior jurisdiction; or

(ii) was imposed under subsection (1) *(b)*, (4) or (5), be brought before the court which suspended the operation of the sentence or, as the case may be, the payment of the fine, or any court of equal or superior jurisdiction,

and such court, whether or not it is, in the case of a court other than a court of equal or superior jurisdiction, constituted differently than it was at the time of such postponement or suspension, may then, in the case of subparagraph (i), impose any competent sentence or, in the case of subparagraph (ii), put into operation the sentence which was suspended."

[3] It is convenient to deal with both matters in one judgment because of the constitutional challenge. However I shall first deal separately with the applicants' respective applications to review and set aside the first respondents' orders. In both matters the review was brought on the basis that the first respondents had failed to exercise their discretion judicially. Section 22 (1) (c) of the Superior Courts Act 10 of 2013 provides:

"22 Grounds for review of proceedings of Magistrates' Court

(1) The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are-

(a) ……..

(b) ……..

(c) gross irregularity in the proceedings; and

(d) ……."

[4] With specific regard to the exercise of a discretion in deciding whether or not to order that a suspended sentence be put into operation, the following *dictum* from *Callaghan v Klackers NO and another* 1975 (2) SA 258 (E) at 259G-H is of application:

> "In terms of sec. 352 (6) *(b)* of Act 56 of 1955 the magistrate has a discretion to make an order further suspending such a sentence for good and sufficient reasons. In considering whether to apply the conditions of the suspended sentence or not, therefore, the magistrate is called upon to exercise his discretion in a judicial manner, after hearing argument and considering all the aspects of the case as they affect the applicant and as they affect the community. This discretion must be a judicial discretion; and this Court will not lightly interfere with the exercise of that discretion on review, unless it is of the view that that discretion was so badly exercised as to amount to a gross irregularity - in other words, that it was a grossly unreasonable exercise of the discretion."

STOW

[5] Stow was charged together with Coastrans CC (the CC), of which he was the sole member, with 32 counts of contravening s 58 (d) read with ss 1, 28 (1) and 28 (2) of the Value Added Tax Act 89 of 1991 (the VAT Act), in that they failed to pay over to the South African Revenue Services (SARS) value added tax (VAT) which had been collected. Stow pleaded guilty on behalf of himself and the CC and both he and the CC were convicted. In his statement in terms of s 112 (2) of the CPA he admitted that the CC was a registered VAT vendor and that he was a representative of the CC as envisaged in s 48 of the VAT Act. He admitted that on 32 occasions over a period from 2004 to 2010 he and the CC failed to pay over to SARS VAT which had been collected, in the total sum of R406 018.17. On 21 June 2011 Stow was sentenced to 5 years' imprisonment (the counts were treated as one for the purpose of sentence), wholly suspended for 5 years on condition that (i) he was not convicted of a contravention of certain sections of the VAT Act, fraud or a competent

verdict committed during the period of suspension, and (ii) that he was to repay the sum of R513 606.77 to SARS with effect from 1 August 2011 by way of payments of not less than R10 537.43 per month on the 15th day of each month until the full amount was extinguished. The amount of R513 606.77 included interest.

[6] In mitigation Stow's attorney placed certain information before the court. Stow was a first offender, 51 years old, and married with two adult children, one of whom was still dependent on him and his wife. The VAT which had not been paid over to SARS had been put back into the CC in order to keep the CC operational. Stow had submitted all VAT returns on time with the correct amounts reflected in them. The schedule of payments reflected in the condition of suspension had been agreed upon with SARS officials. The attorney requested the first respondent to sentence Stow to a term of imprisonment but to suspend the sentence on condition that Stow paid SARS in accordance with the schedule. The first respondent asked Stow's attorney if he could meet the payments and the attorney responded that he could, that SARS officials had evaluated Stow's financial position, and that Stow had told the SARS officials that he could meet the payments. The first respondent asked Stow directly if he could meet the payments and warned him that if he failed to meet the payments he could not come back and say that he was never in a position to meet the payments. Stow told the first respondent that it was "going to be extremely difficult but obviously I have to meet it. I have got no alternative but to meet it."

[7] In sentencing Stow, the first respondent *inter alia* said that if it was not for Stow's willingness to pay SARS the VAT which he had failed to pay, he would have considered direct imprisonment without the option of a fine because of the

seriousness of the offence. He referred to the judgment in *S v Saeed* [2006] ZASCA 45. In that matter the appellant had been convicted of fraud in that he had submitted false VAT returns and fraudulently claimed VAT refunds. The first respondent also remarked that Stow had stolen money from SARS. The first respondent again warned Stow that he did not want him to come back to court and say that he could not meet the payments.

[8] Stow did come back to court, on his own initiative, on 11 November 2011. His attorney requested a "conversion" of the sentence on the grounds that Stow did not have the financial means to comply with the condition of suspension. The attorney disclosed that Stow was struggling to maintain current VAT payments. He was running his transport and courier business with one vehicle. He did not have the money to repair a second vehicle. If the monthly payments were reduced he could afford to repair the vehicle and accordingly earn more income. He asked that the monthly repayments be reduced to R6 000.00 for six months.

[9] A schedule of payments made since sentence and further VAT payments which had not been made to SARS was submitted. It reflected that payments totalling R20 500.00 had been made (R10 500.00 in August, R5 000.00 in September, and R5 000.00 in October 2011) and that further unpaid VAT amounted to R50 871.00.

[10] The first respondent acceded to the request for a reduced monthly payment. He told Stow that he had on that day sentenced someone to imprisonment for theft of VAT monies and said that the only difference between the cases was that Stow

had offered to pay what was due. He warned Stow that in future the court would not easily entertain any further rearrangement of the condition of suspension. The condition of suspension was altered to payment of R6 000.00 per month until 15 April 2012 and thereafter was to revert to the initial payment schedule.

[11] On 24 June 2013 the State applied for an order for the suspended sentence to be put into operation. An affidavit by Stow was admitted. In his affidavit he explained his financial situation. During November 2011 he moved to new accommodation and had to pay two months' rent as a deposit. In the same month his truck was damaged causing a loss of income of about R70 000.00. There was no additional work during the annual shutdown in December 2011 and January 2012 and he experienced a serious cash flow shortage. His overdraft facility was reduced from R100 000.00 to R80 000.00 during January 2012. A general decline in the building business caused a reduction of turnover and this situation endured throughout 2012. In June 2012 his truck broke down necessitating costly repairs and causing a loss of working days. During October 2012 his major client informed him that it had received a letter of demand from SARS requesting immediate payment of R271 000.00 for VAT arrears.[1] An amount of R14 556.66 due to him was instead paid by the client to SARS. As a result of the SARS action the client terminated their contract. His truck was repossessed in January 2013, causing a loss of income. As a result of lack of income from October 2012 he and his family were evicted from their home during March 2013. He was unable to meet any of his financial commitments.

[1] The letter from SARS addressed to the client indicated that the client was appointed as a third party in terms of the Tax Administration Act 28 of 2011. Section 179 of that Act provides that a senior SARS official may, by notice to a person who holds or owes money for or to a taxpayer, require the person to pay the money to SARS in satisfaction of the taxpayer's outstanding debt. According to the notice which was annexed to the founding affidavit the total amount due by the client was R247 105.84.

[12] A further schedule reflected payments by Stow of R6 000.00 in November 2011, R6 000.00 in January 2012, and R5 600.00 in February 2012. No further payments were made.

[13] Stow's attorney submitted that the sentence should not be put into operation for the simple reason that SARS' conduct had made it impossible for Stow to comply with the condition of suspension. The loss of his major client had made it impossible to obtain further work. The first respondent asked Stow's attorney if there was any prospect that Stow would in the near future earn enough to maintain himself and meet his obligations. The attorney replied that Stow could scarcely maintain himself.

[14] In his judgment ordering that the suspended sentence be put into operation, the first respondent said the following:

> "Mr Stow, as you recall initially I have informed you that the only reason you are kept out of prison is because of the fact that you can repay the amount of R513.606,77 to SARS. You have approached the court again in November that year with several problems you experienced at that stage. The court has also bent over backwards to try and keep you out of jail by altering the order for the repayment of this amount.
>
> Sir, I have perused Exhibit D[2]. Firstly it is not in dispute that you are in arrears with the repayment. You furnished a number of reasons why you are in arrears. The long and the short of this is that there is no reasonable foreseeability that you can repay this amount. Secondly, that your financial position is of such a nature that you can barely maintain yourself. On that basis I'm not willing to suspend the sentence any further or to stay the sentence any further. The suspended sentence imposed on the 21st day of June 2011 is put into operation."

[15] In his judgment refusing bail pending the review application[3], the first respondent referred to Stow's reasons for not maintaining payments after the

[2] Stow's affidavit.

[3] Bail was granted on appeal to this court.

sentence had been further suspended in November 2011. He remarked that no payments were made from February to June 2012 despite the fact that Stow did not refer to a specific financial problem for that period. He also noted that the major client only terminated business with Stow in October 2012 and that Stow had an income from February to October 2012.

[16] In his founding affidavit in the present application Stow repeated the reasons for non-payment which were contained in his affidavit submitted at the hearing on 24 June 2013. He also referred to a prosecution for alleged fraud arising from his employment with Volkswagen SA as a result of which, some 10 years ago, he lost his employment. Thereafter he started his transport business but suffered financial difficulties. His expenses were higher than expected, he lacked administrative and financial resources, and he fell behind with his VAT payments.

[17] Stow maintained that the first respondent should have sought further information in exercising his discretion in deciding whether or not to put the suspended sentence into operation, and that the first respondent did not consider imposing another condition of suspension as he was obliged to do in exercising his discretion.

[18] The answering affidavit was deposed to by Mr Mtutuzeli Rangula, a senior State advocate, who was also the prosecutor at the trial. He submitted that the sentence imposed for the offences was in the spirit of a reformative justice system. He too referred to the lack of an explanation for the lack of payments between February and October 2012, with the exception of June 2012.

[19] Although the application was not in respect of the original sentence, it was submitted on behalf of Stow that the first respondent's reference to *S v Saeed* (*supra*) and his remark that Stow had stolen from SARS were misdirections which might have influenced him in ordering the sentence to be put into operation. As already mentioned, *Saeed's* case involved the submission of false returns and fraudulent claims for refunds. In *DPP v Parker* 2015 (4) SA 28 (SCA) at para [17] it was held that a VAT vendor who has misappropriated an amount of VAT which it has collected on behalf of SARS cannot be charged with the common law offence of theft.

[20] It was submitted that the first respondent misdirected himself in not determining whether Stow was unable to comply with the condition of suspension through circumstances beyond his control. Had he done so, so it was submitted, he would have found that non-compliance with the condition was through circumstances beyond Stow's control. Reference was made to the various financial factors mentioned by Stow in his affidavit submitted at the hearing.

[21] It was further submitted that the first respondent misdirected himself in not considering whether there was any other good and sufficient reason for a further suspension of the sentence. In particular in this regard it was submitted that Stow was now poor and had no money to pay compensation, and it would be unfair to send a poor person to prison.

[22] While the first respondent did not refer to the explicit wording of s 297 (7) of the CPA, I am not convinced that he did not consider all the circumstances which were presented to him. He accepted that at that stage Stow could barely support himself and could therefore no longer afford to pay SARS. He referred to the initial reason for suspending the sentence and the warning he had given Stow at that stage. He was clearly of the view that because there was no prospect of further payments to SARS, the sentence should not be further suspended. In that sense he considered whether or not to suspend the sentence further and in the exercise of his discretion afforded by s 297 (7) of the CPA decided not to do so.

[23] I can find no misdirection committed by the first respondent, let alone a gross irregularity, which vitiated the entire proceedings. Stow had the opportunity to be heard and to present evidence. The sentence which the first respondent originally imposed served not only the interests of Stow but also the interests of the complainant, SARS, and the interests of society. The first respondent made it clear at the outset that if it was not for the offer of payment, he would have imposed direct imprisonment. The payments contained in the condition of suspension were agreed to and when the sentence was further suspended the payment of R6 000.00 per month was offered by Stow. It was not long after each suspension of the sentence that Stow defaulted. The prospects of him ever paying in accordance with the agreed amounts or his own requested amount were in all probability slim from the outset, to the extent that not long after sentence he again did not pay over VAT to SARS. Further, and as the first respondent commented in his judgment refusing bail pending this review, Stow did not list any specific financial problems for the period from February until June 2012 and his major client terminated its business only in

October 2012. This remark indicates that the first respondent was not satisfied that Stow had shown that the failure to meet the payments, at least between February and October 2012, was through circumstances beyond his control.

[24] In his discussion on compensation as a condition of suspension, Terblanche *Guide to Sentencing in South Africa* 2nd edition at 362 said that such a condition "fits in well with the idea of restorative justice". Terblanche further at 364 referred to *S v Tshondeni* 1971 (4) SA 79 (T) and said that in that case "the court identified three purposes of compensation as a suspensive condition: to keep the offender out of prison, to assist the offender to realise the consequences of her actions, and to compensate the victim for her loss".

[25] In the present matter this latter purpose was not achieved and it was accepted that it could not be achieved. I do not think that the first respondent misdirected himself in not imposing further conditions of suspension. He regarded the offences as serious and made it clear that Stow avoided direct imprisonment because of his offer to pay SARS. The condition was imposed in direct relation to the offences. I do not think that the first respondent misdirected himself in not further suspending the sentence because Stow was now a poor person. It would have been appropriate to take such a factor into account at the time of sentencing in determining Stow's ability to pay compensation and the suitability of such a condition. When the sentence was imposed he had financial means and represented that he could pay compensation. His poor financial situation when the sentence was put into operation was but one factor to be taken into account in the exercise of the court's discretion. The first

respondent was entitled, in the exercise of his discretion, not to accord Stow's lack of means significant weight, when considered in the context of all the circumstances.

[26] I also do not agree with the submission that the sentencing procedure, and the procedure when the sentence was put into operation, were flawed because there was no proper investigation into Stow's financial circumstances and his ability to make repayments, and consequently his right to a fair trial was violated. The first respondent sought assurance that Stow could meet the payments. Stow and his attorney told the first respondent that he could meet the initial repayments. Stow himself offered R6 000.00 per month when the sentence was further suspended. Stow was legally represented on both occasions and was also a businessman. The first respondent was entitled to rely on the information presented on his behalf.

[27] Lastly, although the first respondent did misdirect himself in his reference to *S v Saeed* and theft from SARS, I can find no trace in his judgment that these factors played a part in ordering the sentence to be put into operation. He focused on the reason why he had not imposed direct imprisonment in the first place, namely the offer of compensation, and the fact that Stow could no longer comply with that condition of suspension.

[28] It follows from the above reasons that the application to review and set aside the first respondent's order that the suspended sentence be put into operation should not succeed.

MEYER

[29] Meyer was charged with a contravention of s 11 (1) read with s 11 (2) of the Banks Act 94 of 1990 in that during the period 1999 to June 2002 he conducted the business of a bank, when such business was not a public company nor was it registered as a bank. The penalty clause for such an offence prescribes a sentence of a fine or imprisonment for a period not exceeding 10 years or to both a fine and such imprisonment.

[30] Meyer entered into a plea and sentence agreement with the State, in terms of s 105A of the CPA. This agreement revealed details of the offence. Meyer invited members of the public to invest sums of money with him on the basis that such monies would be utilised in a micro-lending business, with interest to be paid to the investors. Meyer was unaware of the provisions of the Banks Act but acknowledged that he was negligent in not making sufficient enquiries about the legality of his conduct. During July 2002 Meyer was advised by his attorney that he was contravening s 11 of the Banks Act and immediately ceased such business. The total amount Meyer received during the period that he conducted the business was R28 268 377.00 and as at the date of the plea and sentence agreement, 19 April 2006, capital of R5 278 569.00 was owed to the investors.

[31] The agreement recorded Meyer's personal circumstances: he was 58 years old and a first offender; he had no dependent children; he was divorced and paid maintenance of R10 000.00 per month to his ex-wife; he ran a micro-lending business, Sunshine Coast Consultants CC (the CC) which, so it was stated, enabled him to repay the investments and interest over a period of time. Meyer had a number of life policies on his own life, some of which had been ceded to the CC. In

the event of these policies being paid out, the proceeds would be used to extinguish any balance still owing to the investors, in accordance with the condition of suspension of the sentence relating to payment to the investors. The agreement further recorded that most of the investors had been repaid and there were 116 investors who were still owed money.

[32] The sentence agreed upon was a fine of R100 000.00 or 400 days imprisonment and 5 years' imprisonment wholly suspended for 5 years on condition that Meyer was not convicted of a contravention of s 11 of the Banks Act committed during the period of suspension, and that he repaid the investors over a period of 5 years in instalments made up of capital and interest at the rate of 1.25% per month. The monthly instalments of capital and interest were set out in a schedule. The five year period commenced in June 2006.

[33] Meyer, who was represented by counsel, appeared before the first respondent on 20 April 2006. The first respondent convicted and sentenced Meyer in accordance with the plea and sentence agreement.

[34] On 11 September 2009 Meyer, now represented by an attorney, appeared before the first respondent, a warrant for his arrest having been issued for a breach of the condition of suspension relating to repayment to the investors. The matter was postponed from time to time and was eventually heard on 29 September 2009. Meyer had been released on bail.

[35] Meyer testified that after he had been sentenced, he became concerned about the profitability of the micro-lending market because commercial banks were

now entering the market. As a result of the National Credit Act 34 of 2005 there was a marked reduction in the amount of interest which could be charged on a loan to a client. Meyer was worried that he would not be able to repay the investors. Following an enquiry, he was contacted by one Buys who said he was interested in buying the CC's business for R10 million. Buys was actually representing Finbond to whom he had sold his own business and by whom he was now employed. Meyer was satisfied that Finbond was a sound and established concern. He believed that R10 million was sufficient to pay his investors in full before 2011.

[36] On 21 September 2007 an agreement was concluded which reflected Bondmaster Group (Pty) Ltd (Bondmaster) as the purchaser, Meyer, Johan Black, Marissa Black as the sellers, and Sunshine Coast Consultants trading as EP Financial Services and a CC known as Maalpit each as "the company". Johan Black is Meyer's son-in-law and Marissa Black is his daughter. It was a condition of Bondmaster that Black should also sell his business to it and it would employ him for three years. In terms of the agreement the sellers and the company sold the businesses to Bondmaster for the sum of R10 075 913.00. The price was to be paid by way of R5 400 000.00 in cash, the procurement for Meyer of a renounceable letter of allocation which when renounced would entitle the holder to Finbond shares equal in value to R3 325 220, and the procurement for J Black and M Black of a combined shareholding of 12.5% in the EP Financial Services Group and Maalpit Group. The procurement of these shareholdings was subject to clause 10 of the agreement which provided that the purchase price was subject to increase or reduction if the consolidated net profit after tax (NPAT) of the company for the target period 1 September 2007 to 31 August 2008 was respectively more or less than a

warranted amount of R2 518 978.00. If the NPAT was less than the warranted amount the purchase price would be reduced by R4.00 for every R1.00 by which the NPAT was less than the warranted amount. If the NPAT was more than the warranted amount, the purchase price would be increased by R4.00 for every R1.00 by which the NPAT exceeded the warranted amount. The total purchase price was capped at R12 150 000.00.

[37] The agreement was prepared by Finbond and Meyer did not take legal advice before signing it. He and Johan Black had worked through the agreement with Finbond officials and he was satisfied that it was an acceptable agreement and that he would be able to repay the investors.

[38] During December 2007 Meyer received R3.6 million of the cash portion of the purchase price. R1.8 million was paid to J Black. Meyer used R3.1 million to pay the investors. As at January 2009 he was up to date with his payments to the investors of the capital and as at March 2009 he was up to date with the interest payments. In total Meyer was to receive R8,2 million from the sale. According to Meyer the balance after payment of the R3.6 million was to be paid with effect from 1 December 2008 by the allocation of 1.4 million Finbond shares which he would sell monthly in order to pay the investors. He reached the amount of 1.4 million shares by dividing the balance of the purchase price by R2.25 which was the share price at the time the agreement was concluded.

[39] The shares were not allocated on 1 December 2008 because according to the auditor’s report the net profit of the business was R1.9 million. Meyer did not agree

with the calculation but had to accept it. When he entered into the agreement he did not realise that, whereas there was a maximum cap to the purchase price, there was no minimum cap. He also did not think that the business would become less profitable than it had been prior to the sale. He thought the business would achieve its targets and that is why he did not object to clause 10.

[40] Meyer subsequently obtained legal advice to the effect that he had entered into a bad deal. Efforts to resolve the situation with Bondmaster came to nought. At the time he testified the 1.4 million shares he expected to receive had dropped in price to R0.40 a share. He had instructed attorneys to recover the balance of the purchase price and was awaiting the auditor's report which would determine the actual profit which the business had made. Bondmaster was supposed to have been responsible for obtaining the audit but had failed to do so. Once the audit was available, Bondmaster would then have to allocate the shares to him and he would then sell them.

[41] An affidavit by Attorney Alick Brewis was admitted by agreement. He stated that on 14 September 2009 he had received instructions from Meyer to recover the balance of the purchase price owing in terms of the agreement with Bondmaster. He was of the opinion that the agreement was enforceable at the instance of Meyer. According to correspondence between the sellers and Bondmaster, Bondmaster had resisted payment of the balance of the purchase price, claiming that the net profit after tax of the company was approximately R1 400 000.00 less than the warranted amount as contained in clause 10 of the agreement. Brewis had advised Meyer to instruct a firm of auditors to conduct an audit of the financial records of the business,

to determine whether the method of calculation used by Bondmaster to determine the net profit after tax was in accordance with the criteria set out in the agreement. Once the report of the auditors was received, Brewis would advise the sellers on the prospect of recovering the balance of the purchase price. According to the auditors, their report was expected to be completed during December 2009. If the report supported Meyer's contention that the balance of the purchase price was due, the dispute would be referred to arbitration, as provided for in the agreement. That process might take up to two years.

[42] Meyer said that he had not entered into the agreement with the intention of prejudicing the investors and that his priority had always been to please the people who had helped him build his business.

[43] Meyer agreed that the sentence was agreed upon on the basis that he would earn enough from the CC to be able to repay the investors over 5 years. He accepted that the sale of the business affected the basis of the agreement he had reached with the State, but he thought he would be able to pay the investors over a shorter period, which was a better option for him and the investors. Even if he had not sold the business, he would not have been able to meet the payments because of the changes in the micro-lending market.

[44] At the time of testifying Meyer was employed in a micro-lending business owned by a doctor and his wife and earned R6 000.00 per month. The life policies had all lapsed.

[45] In his judgment the first respondent considered the provisions of s 297 (7) of the CPA, namely whether the failure to pay the investors was through circumstances beyond Meyer's control and whether or not there was any other good and sufficient reason to suspend the sentence further. He took into account that the balance of the purchase price according to the sale agreement, namely shares to the value of R3 325 220.00 was already less than the amount still due to the investors. He found it was clear that Meyer had estimated that the business would achieve a net profit of R2.5 million which would have been more than enough to comply with the condition of suspension. Meyer, however, without informing the investors, decided rather to sell the business, on conditions dependent on the uncertainty of the market. The business would also now be under different management. Meyer therefore, so the first respondent reasoned, had abdicated control of the business and could not guarantee that the net profit would achieve the warranted amount. If it did not equal the warranted amount or was less than that amount, a substantial reduction in the purchase price would ensue (R4.00 for every R1.00 less than the warranted amount.) Meyer had taken a conscious decision to sell, in spite of his obligation to the State and in spite of the foundation for the undertaking which prevented him from going to prison. Central to the plea and sentence agreement, so the first respondent found, was Meyer's obligation to continue to run the business so that he could compensate the investors. The compensation of the investors played a role in the court's acceptance of the plea and sentence agreement. Meyer had, by selling the business on the terms contained in the sale agreement, placed himself in a different position from the one he had presented at the time of the plea and sentence agreement. The first respondent was of the view that Meyer had been reckless towards the State and the investors, and reckless in relation to the suspended

sentence. The first respondent was not convinced that the failure to comply with the condition of suspension was through circumstances beyond Meyer's control and was of the view that he had recklessly placed himself in the position he now found himself. The first respondent accordingly ordered that the suspended sentence be put into operation.

[46] The founding affidavit in the review application was deposed to by Attorney Johannes Gouws, who represented Meyer subsequent to his conviction and sentence. In referring to the background leading up to the trial, he mentioned that after Meyer had ceased taking investments in July 2002, he continued to pay capital and interest to the existing investors. Gouws maintained that the agreement relating to the conditions of suspension gave effect to illegal transactions which were unenforceable. Because the agreements between Meyer and the investors amounted to a contravention of the Banks Act, for Meyer to continue to pay interest meant that he was paying interest on illegal deposits to persons who were party to the contravention of the Banks Act. It also meant that Meyer would be paying interest on such deposits when the capital had already been repaid in full by the time payments were due to commence in terms of the condition of suspension . On this basis, taking into account what had already been paid to the investors, they had in fact been overpaid. Had the first respondent been aware of the full facts and the correct amounts, he would not, so it was submitted, have imposed the condition relating to repayment.

[47] Meyer deposed to a confirmatory affidavit.

[48] The answering affidavit was deposed to by State Advocate Theunis Goosen, who was the prosecutor at all relevant times. He disagreed that the investors had participated in illegal transactions and indicated that if it had been Meyer's contention at the time of sentencing that the investors were not entitled to interest he would not have agreed to a suspended sentence. He said that he had learned from Meyer's legal representatives that after Meyer ceased taking investments in July 2002 he had entered into compromise agreements with some of the investors, which included payment of interest. He further disagreed that at the time of sentencing the capital had been repaid in full and said that it was the amount of R5 278 569.00. As at January 2009 the total capital still owing was R3 342 671.00.

[49] It was submitted on behalf of Meyer that the circumstances were beyond his control and that the first respondent committed a misdirection in finding that Meyer had acted recklessly in selling the business. Meyer thought that his micro-lending business was in jeopardy because of the banks' involvement in the market and he believed that the balance of the purchase price would be paid. In exercising his discretion the first respondent, so it was submitted, should have taken these factors into account in Meyer's favour as well as the fact that it was not Meyer's fault that the balance of the purchase price had not been paid, and that Meyer had continued to pay the investors for as long as he could. The first respondent should also have had regard to Meyer's financial position and other personal circumstances.

[50] I do not think that the first respondent misdirected himself in finding that Meyer had acted recklessly in selling the business on the terms which he did. It is important, as the first respondent emphasised, that Meyer anticipated a good net

profit from the business at the time he entered into the sale agreement. Yet he took a conscious decision to sell the business on risky terms, when he knew what his obligations to the investors were in terms of the condition of suspension. Clause 10 of the sale agreement warned of a drastic reduction of the purchase price if the net profit fell short of the warranted amount. Even if Meyer had received the shares, as was submitted on behalf of the second respondent, he could not be sure that they could be sold at the value contained in the sale agreement. I am also of the view that Meyer's concerns about the effect on the micro-lending industry by the banks' entry into the market and the reduction in interest rates brought about by the National Credit Act were based on speculation and not actual experience. There was no concrete evidence that his business would have suffered a loss. I agree with the first respondent that continued operation of the business was foundational to the plea and sentence agreement. That was the source of compensation for investors, offered by Meyer himself. The first respondent properly and fairly considered all the circumstances within the framework of the provisions of s 297 (7) of the CPA. I agree with his finding that Meyer acted recklessly and consequently that the failure to meet the condition of suspension was not through circumstances beyond his control. I can find no grounds for interfering with the exercise of the first respondent's discretion.

[51] The contention that the condition of suspension amounted to enforcement of an illegal transaction was not pursued, correctly so in my view. I do not regard the investors as having been *in pari delicto* with Meyer. There was no evidence that the investors were aware that Meyer was contravening the Banks Act and that they were

benefiting from an illegal scheme. There was consequently no evidence that they were equally morally guilty.

[52] Meyer's application to review and set aside the first respondent's decision can also not succeed.

CONSTITUTIONAL CHALLENGE

[53] As indicated above this challenge specifically relates to the condition of suspension of sentence that the sentenced person is to pay compensation. It was submitted that the imposition of such a condition violated a person's rights to equality, a fair trial, the freedom and security of person, dignity, and freedom from servitude.

[54] There were three main bases for this submission. The first was that there is no legislative requirement to determine whether an accused person has the necessary financial resources to fulfil the order of compensation. Consequently, and as happened in the case of Stow, a person is sent to prison without proof of wilful disobedience of a court order and because of his inability to pay whatever amount is outstanding. Therefore such a person is discriminated against because he is poor.

[55] I do not agree with this reasoning. The sentencing court has a discretion in deciding what condition of suspension to impose, and is given a wide range of conditions which it may impose. Terblanche *op cit* at 358-362, with reference to a number of authorities, deals with the requirements for conditions, namely: the

condition must be related to the crime; it must be clearly set out so that the accused person can understand what future conduct is prohibited or required; it must be reasonable and not cause unfairness or injustice; and it should not violate an accused's person's constitutional rights. Should a sentencing court transgress any of these requirements, the accused person has recourse to an appeal or a review. There are many reported cases where the conditions of suspension have been interfered with on one or other ground. In this regard see the authorities referred to by Du Toit *et al Commentary on the Criminal Procedure Act* 28-48A – 28-48D.

[56] With particular regard to compensation as a condition of suspension, although there is no specific requirement in the section that a financial enquiry must be held before imposing such a condition, there is the safeguard that a condition should not be imposed which is unreasonable and will lead to injustice or unfairness. Guidance was given in *S v Tshondeni* (*supra*) at 84 B-D:

> "Die betaalvermoë van die veroordeelde moet in hierdie opsig nie uit die oog verloor word nie. In die verlede het Howe dikwels gesê dat waar 'n regterlike amptenaar besluit om aan 'n veroordeelde die keuse van 'n boete te gee, die boete nie so hoog moet wees dat hy dit nie kan betaal nie, want daardeur sou die hof sy doel, om die veroordeelde uit die gevangenis te hou, verydel. In hierdie verband moet in gedagte gehou word dat die voorwaarde betaling by wyse van paaiemente mag insluit en dan sou die bedrag makliker deur 'n veroordeelde gevind kon word. Die landdros sal ook in gedagte moet hou - alvorens hy hierdie voorwaarde stel - dat hy die veroordeelde miskien heeltemal uit die gevangenis wou gehou het, en dat hy andersins sy vonnis slegs op die gewone voorwaarde moes opgeskort het. As hy dus nie die bedrae kan betaal nie sou dit beteken dat hy om daardie rede wel na die gevangenis moet gaan, terwyl die doel was hy nie gevangenisstraf moet uitdien nie."

[57] If the amount of compensation ordered is beyond the means of the accused so that the effect is that he does not get the intended benefit of a suspended

sentence, a higher court can interfere with such a condition. *S v Jackson* 1976 (1) SA 437 (A) provides an example. The condition of suspension that the appellant should repay the State the value of rough and uncut diamonds which he had purchased and which were lost, was deleted. There had been no financial enquiry into his means to pay this amount and he would have had to serve the full sentence solely because he did not have the means to compensate the State (the other condition of suspension was that he was not convicted of the same offence).

[58] It is therefore in my view not inherent in the power to impose such a condition that a violation of any of the constitutional rights mentioned would as a matter of course result. Considered in the light of the discretion of a sentencing court, the guiding principles for deciding on an appropriate condition of suspension, and the safeguard of an appeal or a review, I do not regard this provision as unconstitutional.

[59] Such a condition is a very valuable one, when one considers its purpose and, as Terblanche observed, its compatibility with the idea of restorative justice. In my view, if it was not available as a condition of suspension, an aspect of sentencing which would benefit both accused, victim, and society would be lost. The desirability of such a condition has been emphasised. For example in *S v Charlie* 1976 (2) SA 596 (A) at 599A-B Corbett JA (as he then was) said:

> "It seems to be eminently desirable that where it is possible for a complainant to be compensated in this manner and at the same time for an appropriate sentence to be imposed upon the wrongdoer, this course should be followed. And in deciding upon a sentence account may be taken of the extent of the restitution undertaken by the wrongdoer."

[60] The second ground for the constitutional challenge was that there are no legislative requirements for determining when either compensation as a condition of

suspension should be imposed or an order in terms of s 300 of the CPA should be made. Section 300 of the CPA provides:

> **"300 Court may award compensation where offence causes damage to or loss of property**
>
> (1) Where a person is convicted by a superior court, a regional court or a magistrate's court of an offence which has caused damage to or loss of property (including money) belonging to some other person, the court in question may, upon the application of the injured person or of the prosecutor acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss: Provided that-
>
> (a) a regional court or a magistrate's court shall not make any such award if the compensation applied for exceeds the amount determined by the Minister from time to time by notice in the *Gazette* in respect of the respective courts.
>
> (b) .....
>
> (2) For the purposes of determining the amount of the compensation or the liability of the convicted person therefor, the court may refer to the evidence and the proceedings at the trial or hear further evidence either upon affidavit or orally.
>
> (3) (a) An award made under this section-
>
> (i) by a magistrate's court, shall have the effect of a civil judgment of that court;
>
> (ii) by a regional court, shall have the effect of a civil judgment of the magistrate's court of the district in which the relevant trial took place.
>
> (b) Where a superior court makes an award under this section, the registrar of the court shall forward a certified copy of the award to the clerk of the magistrate's court designated by the presiding judge or, if no such court is designated, to the clerk of the magistrate's court in whose area of jurisdiction the offence in question was committed, and thereupon such award shall have the effect of a civil judgment of that magistrate's court.
>
> (4) Where money of the person convicted is taken from him upon his arrest, the court may order that payment be made forthwith from such money in satisfaction or on account of the award.
>
> (5) (a) A person in whose favour an award has been made under this section may within sixty days after the date on which the award was made, in writing renounce the award by lodging with the registrar or clerk of the court in question a document of renunciation and, where applicable, by making a repayment of any moneys paid under subsection (4).

> (b) Where the person concerned does not renounce an award under paragraph (a) within the period of sixty days, no person against whom the award was made shall be liable at the suit of the person concerned to any other civil proceedings in respect of the injury for which the award was made."

[61] The argument was to the effect that, in the case of Stow, if a s 300 order had been made there would have been no threat of imprisonment because a person cannot be imprisoned for a civil debt. This difference was discriminatory. Reference was made to the judgment in *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) which was concerned with the constitutional validity of certain sections of the Magistrates' Courts Act 32 of 1944 which provided for imprisonment of a judgment debtor who has not paid his debt. Kriegler J at para [12] accepted that the goal of the provisions was to provide a mechanism for the enforcement of judgment debts and that it was a legitimate and reasonable governmental objective. However he concluded that the means to achieve that goal were not reasonable. At para [13] he said the following:

> "The fundamental reason why the means are not reasonable is because the provisions are overbroad. The sanction of imprisonment is ostensibly aimed at the debtor who will not pay. But it is unreasonable in that it also strikes at those who cannot pay and simply fail to prove this at a hearing, often due to negative circumstances created by the provisions themselves."

[62] Kriegler J went on to list seven reasons why the provisions were indefensible, one of which was:

> " ……. It is hardly defensible to treat a civil judgment debtor more harshly than a criminal. The latter is entitled in terms of s 25 (3) of the Constitution to a fair trial with procedural safeguards, including the right to legal assistance at public expense if justice so requires. The debtors, who face months of imprisonment, must fend for themselves as best they can."

[63] It must be remembered that *Coetzee* involved legislation applicable to a civil judgment debtor. Compensation as a condition of suspension and s 300 of the CPA

are both utilised when a crime has been committed and there is someone who may be entitled to compensation as a result of the crime.

[64] I do not agree that the different consequences flowing from compensation as a condition of suspension and compensation in terms of s 300 result in discrimination. Compensation as a condition of suspension is an integral part of the sentence which has its purpose as described in *S v Tshondeni* (*supra*). It is a flexible condition which can be adapted to a person's means and the length of time it will take to make full restitution. Its imposition is subject to the safeguards mentioned above. Section 300 on the other hand is a convenient means of recovering a debt without having to institute a civil action. The order will be made for the full amount determined as compensation for the damage or loss and would be executable for the full amount. Section 300 can only be utilised if the victim or the State applies for such an order. The victim can renounce the order, which impacts on the effectiveness of the order, whereas compensation as a condition of suspension remains the prerogative of the court and will serve a more meaningful purpose in the sentencing process. Section 300 is therefore only available in restricted circumstances, and lacks the flexibility which can be used in shaping a suitable sentence. If it was the only means of ordering compensation, a valuable sentencing option would be lost.

[65] Under this second ground of the constitutional challenge, reference was also made to the matter of *Bearden v Georgia* [1983] USSC 96. I quote from the syllabus (headnote) as follows:

> "Held: a sentencing court cannot properly revoke a defendant's probation for failure to pay a fine and make restitution, absent evidence and findings

> that he was somehow responsible for the failure or that alternative forms of punishment were inadequate to meet the State's interest in punishment and deterrence, and hence, here the trial court erred in automatically revoking petitioner's probation and turning the fine into a prison sentence without making such a determination.
>
> (a) If a State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay. Williams v. Illinois, 399 U.S. 235; Tate v. Short, 401 U.S. 395. If the probationer has wilfully refused to pay the fine or restitution when he has the resources to pay or has failed to make sufficient bona fide efforts to seek employment or borrow money to pay, the State is justified in using imprisonment as a sanction to enforce collection. But if the probationer has made all reasonable bona fide efforts to pay the fine and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the probationer are available to meet the State's interest in punishment and deterrence.
> (b) The State may not use as the sole justification for imprisonment the poverty or inability of the probationer to pay the fine and to make restitution if he has demonstrated sufficient bona fide efforts to do so.
> (c) Only if alternative measure of punishment are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay the fine. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment."

[66] In my view the provisions of s 297 (7) of the CPA contain sufficient safeguards against the violations referred to in *Bearden v Georgia*. The court has a discretion in deciding whether or not to suspend the sentence further, including on further conditions, or to order that it be put into operation. Provision is made for the situation where the failure to comply with a condition is through circumstances beyond the accused's control, and the court may consider any other good and sufficient reason. A sentence is not automatically put into operation when a breach occurs. There must be a hearing where the accused is given an opportunity to be heard on why the sentence should be further suspended. A breach of a condition of

compensation will be considered like any other breach and any number of factors could be taken into account in determining whether the breach was through circumstances beyond the accused's control or whether there are good and sufficient reasons to suspend the sentence further. In *S v Hoffman* 1992 (2) SACR 56 (C) at 63b-c Selikowitz J said that in the exercise of a court's discretion in considering whether or not to put a suspended sentence into operation:

> "……. the court is engaged in a sentencing process and must consider and apply all the necessary principles which it would apply if it was imposing an original sentence."

And if the discretion was exercised in a grossly unreasonable manner, the accused person could seek relief on review.

[67] With all these procedures in place and the safeguards which are available in the event of a grossly unreasonable exercise of discretion, I am of the view that the legislation in question and its application as developed through the cases, affords sufficient protection of the various constitutional rights claimed to be violated.

[68] The third ground for the constitutional challenge was that there was no provision for recognition to be taken of partial fulfilment of a condition of compensation, and a court is bound to put the whole of the suspended sentence into operation. The sentence is "cast in stone". This, so it was submitted, results in unfairness.

[69] I am of the view that here too there are sufficient safeguards in s 297 (7) of the CPA. Payment by an accused of a portion of the compensation may be taken into account as good and sufficient reason for suspending the sentence further,

perhaps on further conditions, or deletion of the condition, depending on all the circumstances, including the reason for not paying the full amount of compensation. Failure to pay anything more may well be through circumstances beyond the accused's control, which will be taken into account in the exercise of the court's discretion. There could be a variety of circumstances. An accused may have paid a large portion or a small portion of the compensation. His failure to pay the full amount could be in bad faith or wilful so that it may be appropriate for him to serve the sentence. The seriousness of the offence and the appropriateness of the sentence are other factors. All the factors would have to be considered as a whole, in the exercise of the court's discretion.

[70] An example of the flexibility of the discretion contained in 297 (7) of the CPA is *Radzilane v S* [2016] ZASCA 64. In this matter the applicant for special leave to appeal had been convicted by the Regional Court of theft and sentenced to 7 years' imprisonment, wholly suspended on condition that he repaid the stolen amount in specified instalments. He repaid almost half of the stolen amount then ceased payments. The State applied for an order putting the suspended sentence into operation. The trial court took into account that the applicant had repaid a substantial amount and, irregularly, sentenced him to 3 years' imprisonment in terms of s 276 (1) (i) of the CPA. The applicant served that sentence in full. The State successfully appealed to the High Court against the trial court's decision to impose the new sentence. The High Court set aside the new sentence and remitted the matter to the trial court to consider afresh the application to put the suspended sentence into operation. The applicant applied to the Supreme Court of Appeal for special leave to appeal against the High Court's decision. Special leave was granted

but the appeal was dismissed. The applicant contended that because he had already served the new sentence, which had not been set aside, it would be just and equitable to impose a lesser sentence. Baartman AJA noted that the CPA does not make provision for the trial court to impose a lesser sentence. She went on to say at paras [10], [11] and [12]:

> "[10] However, the trial court will be at liberty to consider the deplorable delay in bringing this matter to finality and how it has prejudiced the applicant. …… Although the trial court found 'no good and sufficient reason' to further suspend the suspended sentence, it found good grounds to impose a lesser sentence. The applicant has served the lesser sentence. The applicant made it clear when the respondent applied to put the suspended sentence into operation that he is unable to make any further payments to the complainant.
>
> [11] It follows that putting the suspended sentence into operation will result in a harsher sentence than originally imposed or intended when the trial court imposed the new sentence. These are factors the trial court will take into account in deciding whether to effect the suspended sentence or further suspend it on the same or other appropriate conditions.
>
> [12] It is so that the applicant has already served a period of imprisonment and that it would be patently unfair if he were to serve a further seven years' imprisonment. Although I am reluctant to make any suggestion that may appear to fetter the trial court's discretion, as it seems clear that the applicant is unable to further compensate the complainant, I consider it appropriate to express the view that the trial court should consider further suspending the sentence for a period of five years, on condition that the applicant is not convicted of theft or any crime entailing dishonestly during the period of suspension for which he has been sentenced to a period of imprisonment exceeding three years without the option of a fine."

A further application for leave to appeal to the Constitutional Court was dismissed.

[71] I am therefore of the view that the lack of a provision allowing a court to reduce a sentence where there has been partial compliance with the conditions of suspension, is not inconsistent with a person's right to a fair trial.

[72] The applicants also relied on United Kingdom, Australian and Canadian legislation providing for the reduction of the original sentence in the event of a breach of conditions. While this may be so, I remain of the view that the South African legislation in question sufficiently guards against unfairness.

Costs

[73] The applicants, although unsuccessful, raised *inter alia* a constitutional matter which was in my view not based on spurious or frivolous grounds. They should therefore not be ordered to pay the costs of the applications.

[74] The following orders will issue:

[74.1] STOW

The application is dismissed.

[74.2] MEYER

The application is dismissed.

_____

J M ROBERSON
JUDGE OF THE HIGH COURT

MAKAULA J:-

I agree

_____
M MAKAULA
JUDGE OF THE HIGH COURT

Appearances:

Stow

For the Applicant: Adv E Crouse, with Adv H L Alberts, instructed by Grahamstown Justice Centre

For the 2nd & 3rd Respondents Adv C Mouton S C with Adv A Rawjee, instructed by Yokwana Attorneys , Grahamstown

Meyer

For the Applicant: Adv E Crouse with Adv H L Alberts instructed by Grahamstown Justice Centre

For the 2nd Respondent: Adv U de Klerk, instructed by Whitesides, Grahamstown, Grahamstown

For 3rd Respondent: Adv C Mouton SC with Adv A Rawjee, instructed by Whitesides, Grahamstown