

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

High Court Ref. No: 16424

Magistrate's Court Case No: 205/16

Magistrate's Court Ref. No.: 26/2016

In the matter between:

THE STATE

And

WERNER LOURENS

Accused

JUDGMENT: 13 MAY 2016

SAVAGE J:

[1] This matter came to this Court by way of review from the Magistrate's Court at Piketberg in terms of section 302 of the Criminal Procedure Act 51 of 1997 ("the CPA"). The accused, Mr Werner Lourens, was convicted of contravening s 65(1) of the National Road Traffic Act 93 of 1996 ("the Act") in that on 17 October 2015 on Asblom Street, a public road in Piketberg, the accused drove a motor vehicle while under the influence of alcohol. The accused pleaded guilty to both the main and the alternative charge under s 65 (2) in which he admitted that the concentration of alcohol in his blood was 0.18/100ml.

[2] Having convicted the accused on the main charge, the presiding magistrate explained the provisions of s 35 of the Act to the accused who testified following his conviction that he is 21 years old, unmarried, has passed matric and that he has been employed for 8 months at Dup Meubels in Piketberg earning R5000 per month. He has held a driving licence for two years and requires his licence at work as he undertakes deliveries. The accused stated that the incident took place at 21h30, that he was alone in the vehicle, the road was quiet with no other vehicle or pedestrians involved and no accident occurred. It was submitted for the state that although the accused was a first offender a serious crime was committed and that the police had been contacted regarding his driving. The accused was a danger to himself and the public and a sentence must be imposed which sends a message and serves to deter the future commission of the offence.

[3] The magistrate sentenced the accused to a fine of R6000 or 12 months imprisonment of which half was suspended for a period of 4 years on condition that the accused was not again convicted of a similar offence during the period of suspension. In addition, the accused's driving licence was suspended for a period of 6 months from 15 March 2016. The matter was thereafter referred to this Court for review in the ordinary course in terms of section 302 of the CPA. Having had regard to the matter, it appeared to this Court in terms of s 304(2)(a) that the proceedings were not in accordance with justice for the reasons which follow, but that it was not necessary to obtain a statement from the judicial officer who presided at the trial setting forth the reasons for the sentence imposed which were self-evident. Furthermore, given the period of suspension of the driving licence imposed, the matter was considered urgent and therefore stood to be determined forthwith.

[4] On review the accused made written submissions to this Court regarding the suspension of his driving licence, which submissions were supported by way of a letter from his employer, Mr Japie du Plessis, the owner of Dup Meubels CC in Piketberg. These submissions confirmed the accused's evidence that he requires his driving licence for purposes of his employment in order that he is able to undertake deliveries for his employer.

[5] Section 35 of the Act, which was amended with effect from 20 November 2010 by Act 64 of 2008, provides that:

- '35(1) Subject to subsection (3), every driving licence or every licence and permit of any person convicted of an offence referred to in -*
- (a) section 61(1)(a), (b) or (c), in the case of the death of or serious injury to a person;*
 - (aA) section 59(4), in the case of a conviction for an offence, where-*
 - (i) a speed in excess of 30 kilometers per hour over the prescribed general speed limit in an urban area was recorded; or*
 - (ii) a speed in excess of 40 kilometers per hour over the prescribed general speed limit outside an urban area or on a freeway was recorded;*
 - (b) section 63(1), if the court finds that the offence was committed by driving recklessly;*
 - (c) section 65(1), (2) or (5), where such person is the holder of a driving licence or a licence and permit, shall be suspended in the case of -*
 - (i) a first offence, for a period of at least six months;*
 - (ii) a second offence, for a period of at least five years; or*
 - (iii) a third or subsequent offence, for a period of at least ten years, calculated from the date of sentence.*
 - (2) Subject to subsection (3), any person who is not the holder of a driving licence or of a licence and permit, shall, on conviction of an offence referred to in subsection (1), be disqualified for the periods mentioned in paragraphs (i) to (iii), inclusive, of subsection (1) calculated from the date of sentence, from obtaining a learner's or driving licence or a licence and permit.*
 - (3) If a court convicting any person of an offence referred to in subsection (1), is satisfied, after the presentation of evidence under oath, that circumstances relating to the offence exist which do not justify the suspension or disqualification referred to in subsection (1) or (2), respectively, the court may, notwithstanding the provisions of those subsections, order that the suspension or disqualification shall not take effect, or shall be for such shorter period as the court may consider fit.'*

[6] Unlike s 35(1)(c) of the Act which provides that a driving licence *'shall be suspended'* where an accused has been convicted in terms of s65(1),(2) or (5), s 34(1) records that the court holds a discretion providing that:

- '34(1) Subject to section 35, a court convicting a person of an offence in terms of this Act, or of an offence at common law, relating to the driving of a motor vehicle may, in addition to imposing a sentence, issue an order, if the person convicted is -*
- (a) the holder of a licence, or of a licence and permit, that such licence or licence and permit be suspended for such period as*

the court may deem fit or that such licence or licence and permit be cancelled...;

- (b) *the holder of a licence, or of a licence and permit, that such licence or licence and permit be cancelled, and that the person convicted be disqualified from obtaining a licence, or a licence and permit, for any class of motor vehicle for such period as the court may deem fit...; or*
- (c) *not the holder of a licence, or of a licence and permit, declaring him or her to be disqualified from obtaining a licence, or a licence and permit, either indefinitely or for such period as the court may deem fit.'*

[7] Section 276 of the CPA details the sentences that may be passed upon a person convicted of an offence. While the suspension or cancellation of a driving licence is not a sentence provided in s 276, in terms of s 35 of the Act it is clearly a punishment imposed consequent to an offence committed under s 65 (as is s 34 in relation to the offences cited in that provision). With sentences often combined by judicial officers in order to arrive at an appropriate punishment,¹ a decision to cancel or suspend a driving licence is integral to such a determination. A suspension or cancellation order is therefore not a purely administrative adjunct to the sentence but constitutes a significant part of the punishment imposed.²

[8] The material amendments made to s 35(3) by Act 64 of 2008 were the inclusion of the words '*after the presentation of evidence under oath*' and '*circumstances relating to the offence exist*'. From a plain reading of the amended provision, s 35(3) authorises the Court '*after the presentation of evidence under oath*' to find that '*circumstances relating to the offence exist*' which justify a decision not to suspend a licence or to suspend it for such shorter period that the Court considers appropriate.

[9] In *Greeff v S*³ Rogers J, with Saldanha J concurring, stated with regards to the amended s 35(3) that –

'...whereas previously there was no limit on the circumstances to which a court could have regard in determining whether a non-suspension order was justified, the lawmaker has now limited the circumstances

¹ Du Toit et al Commentary on the Criminal Procedure Act at 30-12

² *S v Van Rensburg* 1967 (2) SA 291 (C) at 297E-F.

³ 2014 (1) SACR 74 (WCC).

*which may be taken into account to 'circumstances relating to the offence'...Since the suspension of a driving licence in terms of s35(1) serves not only to protect the public but to punish the offender (s v Van Rensburg 1967 (2) SA 291 (C) at 296E-F), the circumstances which - prior to the amendment - could properly be taken into account would have included all the circumstances relevant to the imposition of the sanction of that kind: not only the circumstances of the crime would have been relevant but also the personal circumstances of the accused and interests of the community. That is why one will find, in cases decided prior to the amendment, weight being attached, for example, to the importance to the accused person of having a driving licence for purposes of his work and family commitments, the fact that the accused was a first offender and so forth. It is perfectly clear that the lawmaker, by not confining the relevant circumstances to those 'relating to the offence', has deliberately narrowed the circumstances to which regard may be had. Unless a particular circumstance can properly and rationally be said to relate to the offence, it must be left out of account.'*⁴

[10] It was stated further in *Greeff*:

*'In my view, the fact that the holding of a driving licence is of particular importance to an accused person for work or family reasons is not a circumstance that can properly be said to relate to the offence. The same is true of the fact that the accused might be a first offender. Indeed, s35(1), in setting up the periods of automatic suspension, expressly takes into account whether the accused is a first, second or multiple offender....'*⁵

[11] As with the current matter, it was made clear in *Greeff* that the court was only concerned with suspensions for which s35(1) provides read with s35(3) and not with the court's discretionary power to suspend a licence in terms of s34(1).

[12] It has been stated by our courts prior to the coming into force of the Act and later its subsequent amendment, that the principles which guide a court in deciding whether to endorse, suspend or cancel a driving licence are the same as those which guide a court in determining an appropriate sentence, with the court holding a discretion as to how it should proceed.⁶ In *S v Strydom*⁷ it was emphasised in relation to an offence committed prior to the Act that not only does this require a consideration of the nature and 'gravity of

⁴ At para 8.

⁵ At para 9.

⁶ *S v Dalldorf* 1947 (1) SA 215(E) at 216; *R v Weddy* 1947 (2) SA 892 (E) at 893.

⁷ 1996 (2) SACR 636 (W).

the offence and the degree of the offender's culpability, the court should also bear in mind that to deprive an individual of the right to drive on a public road is a severe punishment and that the suspension or cancellation the driving licence is an even more severe punishment or a person whose livelihood depends on the driving of the vehicle'.

[13] The pre-constitutional era matter of *S v Toms; S v Bruce*⁸ took issue with reducing the court's normal sentencing function to the level of a rubber stamp. It reiterated, with reference to *R v Mapumulo and others*,⁹ that the infliction of punishment is in the first instance pre-eminently a matter for the discretion of the trial court and that courts should, as far as possible, have an unfettered discretion in relation to sentence; and secondly that punishment is to be individualised to entail a proper consideration of the individual circumstances of each accused person.¹⁰ Our courts in cases such as *S v Malgas*¹¹ and *S v Dodo*¹² have had regard to prescribed minimum sentences under our constitutional order. *S v Malgas* made it clear that while the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, the factors traditionally taken into account in sentencing are not to be excluded in the sentencing process; with *S v Dodo* stating that minimum sentences do not compel a sentencing court to act inconsistently with the Constitution.

[14] The court in *Greeff* found that s 35(3) limited the discretion of the sentencing court so as to exclude a consideration of the personal circumstances of the accused or the interests of the community. Having regard to the wording of s35, I am unable to agree that in the consideration of s35(1) read with s 35(3) of the Act '*circumstances relating to the offence*' do not include the personal circumstances of the accused or the interests of the community but are limited only to circumstances related to the commission of the offence itself.

⁸ 1990 (2) SA 802 (A) at 7.

⁹ 1920 AD 56 at 57

¹⁰ With reference to *S v Rabie* 1975(4) SA 855 (A) at 861 D; *S v Scheepers*, 1977(2) SA 154 (A) at 158 F - G

¹¹ 2001 (2) SA 1222 (SCA)

¹² 2001 (3) SA 382 (CC)

[15] Imposing a sentence is an action that requires the court to work purposefully at finding the most appropriate sentence¹³ in a manner which accords with an accused's fair trial right embodied in s35 of the Constitution. Our courts have emphasised repeatedly that a sentence imposed must always be individualised, considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors on the basis that retribution and revenge alone do not drive sentencing.¹⁴ As was stated in *S v Dodo*,¹⁵ in relation to prescribed minimum sentences in terms of s 51(1) of Act 105 of 1997, '*(i) f the sentencing court, in considering the circumstances of the case, is satisfied that these are such as to render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society so that an injustice would be done by imposing that sentence, it may impose a lesser sentence.*'

[16] An interpretation of s 35(3) of the Act that a consideration of the accused's personal circumstances and the interests of the community are to be excluded has the result that the sentence imposed is not appropriately individualised and is not imposed after careful consideration of all relevant factors. A presumption exists in favour of construing legislation in such a manner that rights are not interfered with and courts are to be cautious of unduly extending provisions so as to alter existing law, or to impose burdens that previously did not exist.¹⁶ An interpretation of s35(3) of the Act must occur within the context of the scheme of not only the statute but the appellant's constitutional fair trial right,¹⁷ with statute law interpreted in such a manner that it alters the existing law no more than is necessary.¹⁸ Had the legislature intended that s35(3) of the Act was to remove from the sentencing jurisdiction of the court a consideration of an accused's personal circumstances and the interests of the community, in my mind, this would not only have had to have been made pertinently clear in the provision but the provision would then have had to overcome the impact that the removal of the individualisation of

¹³ SS Terblanche Guide to Sentencing in South Africa, 2nd ed (2007) at 2.

¹⁴ *Mudau v S* (764/12) [2013] ZASCA 56 (9 May 2013).

¹⁵ *Supra* at para 40.

¹⁶ *Pretorius v Transnet Bpk* 1995 (2) SA 309 (A) at 318C.

¹⁷ LAWSA 360.

¹⁸ LAWSA 25 part 1 at 340.

sentence would have on an accused's fair trial right. It does not do so and in my mind the interpretation given to s 35(3) in *Greeff* is incorrect.

[17] A plain reading of the words '*circumstances relating to the offence*' in the amended s 35(3) includes a consideration of the personal circumstances of the offender and the interests of the community so as to allow the sentencing court to impose a sentence dispassionately on consideration of all relevant factors traditionally relevant to sentencing. Punishment should '*...fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances*'.¹⁹ In order that it does so, as was stated decades back in *S v Zinn*,²⁰ the personal circumstances of the appellant are to be considered against society's demand for retribution which must be carefully balanced with the nature and circumstances of the crime. Intrinsic to an offence is an offender whose criminal conduct occurs within the context of the community. To find differently is to unduly insulate the factual circumstances under which an offence is committed when it need hardly be stated that an offence is not capable of commission without an offender who operates within the broader context of his or her community. For all of these reasons, the view I take of the matter is that in considering an appropriate sentence under s 35 consequent to the commission of an offence in terms of s 65(1) an interpretation of the words '*circumstances relating to the offence*' in s 35(3) is to include a consideration of the circumstances of the offender and the interests of the community.

[18] Having explained the provisions of s 35 to the accused, it is clear that the magistrate had regard to the provisions of that section but failed to take account of the personal circumstances of the accused, including that he required a driving licence for his work, that he was a first offender and that there was no injury or accident caused by his offence. Given that the accused is gainfully employed in a position which requires a driving licence he runs the risk that such employment, in difficult economic times, may be terminated were this Court to confirm the suspension of his licence. In this regard, the sentence imposed upon the accused was unduly harsh, was one that was not

¹⁹ *S v Rabie* 1975 (4) SA 855 (A)

²⁰ 1969 (2) SA 537 (A) at 540G-H

in the interests of justice and it warrants the interference of this Court on review. I am satisfied that the relevant circumstances related to the offence exist, as were placed before the presiding magistrate under oath, to justify this Court, in terms of s 304(2)(c)(ii) of the CPA, setting aside only that part of the order of the magistrate which suspends the accused's driving licence.

Order

[19] In the result, I propose the following order:

1. The conviction of the accused for driving a motor vehicle while under the influence of alcohol on a public road in terms of s 65(1) of Act 93 of 1996 is confirmed.
2. The following sentence imposed upon the accused is confirmed on review:
 - '1. *The accused is ordered to pay a fine of R6000-00 or serve a period of 12 months imprisonment, of which one half is suspended for a period of 4 years on condition that the accused is not convicted of an offence in terms of s 65(1) or (2) of Act 93 of 1996 committed during the period of suspension.'*
3. The order of the magistrate in terms of which the accused's driving licence was suspended for a period of 6 months with effect from 15 March 2016 is reviewed and set aside.

KM SAVAGE

JUDGE OF THE HIGH
COURT

I agree and it is so ordered.

RCA HENNEY

JUDGE OF THE HIGH
COURT