THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 911/2017

In the matter between:

ANDREW WALTER STOW	**FIRST APPELLANT**
and	
REGIONAL MAGISTRATE, PORT ELIZABETH NO	**FIRST RESPONDENT**
DIRECTOR OF PUBLIC PROSECUTIONS, EASTERN CAPE	**SECOND RESPONDENT**
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**THIRD RESPONDENT**

Case No: 047/2018

And in the matter between:

JACOBUS STEPHANUS MEYER	**FIRST APPELLANT**
and	
KENNY COONEY NO	**FIRST RESPONDENT**
DIRECTOR OF PUBLIC PROSECUTIONS, EASTERN CAPE	**SECOND RESPONDENT**
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**THIRD RESPONDENT**

Neutral citation: *Stow v Regional Magistrate PE NO & others*; *Meyer v Cooney NO & others* (911/2017; 047/2018) [2018] ZASCA 186 (12 December 2018)

Coram: Ponnan, Seriti and Zondi JJA and Nicholls and Carelse AJJA

Heard: 12 November 2018

Delivered: 12 December 2018

Summary: Section 297 of the Criminal Procedure Act 51 of 1977 (CPA) – whether the court a quo was correct in dismissing the review application – whether the decision of the magistrate to put the suspended sentence into operation is appealable in terms s 309(1) of the CPA.

ORDER

On appeal from: Eastern Cape Division of the High Court, Grahamstown (Roberson J and Makaula AJ sitting as court of appeal):

The appeal of each of Mr Stow and Mr Meyer is dismissed.

JUDGMENT

Nicholls and Carelse AJJA (Seriti and Zondi JJA concurring):

[1] Mr Stow and Mr Meyer, the appellants, were charged and convicted in two separate criminal cases of 'white collar crime' in the regional court, Port Elizabeth. In both instances they were sentenced to a five year period of imprisonment, which was wholly suspended in terms of s 297(1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA), on condition that they did not commit similar offences within the five year period and they

repaid the monies to the complainants. In both instances, the appellants failed to make the necessary payments and the suspended sentences were put into operation by the regional court.

[2] Mr Meyer and Mr Stow, aggrieved by the regional courts' decision to put their respective suspended sentences into operation, independently sought to review these decisions before the Eastern Cape Division of the High Court in terms of Rule 53 of the Uniform Rules of Court. At this point they introduced a challenge to the constitutionality of s 297(1)(b) of the CPA read with s 297(1)(a)(i) (aa). The matters were consolidated and one judgment was delivered in respect of both appellants. Each application failed before Roberson J (with Makaula AJ concurring). During the course of argument in this Court, counsel for both appellants expressly abandoned their constitutional challenge. Accordingly, nothing further need be said about that aspect of the case.

[3] The relevant portions of s 297 of the CPA provide:

'**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) . . .

(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) . . .

(7) A court which has-

(a) . . .

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

(c) . . .

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.

(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) . . .

(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.

(b) A person who has been called upon under paragraph (a) (ii) of subsection (1) to appear before the court may, upon the order of the court in question, be arrested and brought before that court, and such court, whether or not constituted differently than it was at the time of the postponement of sentence, may impose upon such person any competent sentence.'

Mr Stow

[4] Mr Stow was previously employed by Volkswagen South Africa (VW). In 2002, he was charged with several counts of defrauding Volkswagen as a result of which he lost his job. The following year Mr Stow started a new transport business, Coastrans CC, (the CC) of which he is the sole member.

[5] Mr Stow failed to pay to the South African Revenue Service (SARS) value added tax (VAT) in terms of the Value Added Tax Act[1] received by the CC in the course of its business. This led to criminal charges being laid against the CC, as accused one, and the appellant, as accused two, of 32 counts of theft and/or the contravention of s 58(d) of the

[1] Value Added Tax Act 89 of 1991 (VAT Act).

VAT Act. At the time the CC owed more than R513 000 (including interest) in VAT to SARS.

[6] On 21 June 2011, Mr Stow pleaded guilty to contravening s 58(d) of the VAT Act and made a statement in terms of s 112 of the CPA. He admitted that the CC was a registered VAT vendor and that he was its representative as envisaged in s 48 of the Act. He further admitted that on 32 occasions he failed to pay over to SARS, VAT totalling R406 018.17 for the period 2004 to 2010.

[7] Mr Stow was convicted on his plea and sentenced to 5 years' imprisonment, wholly suspended for 5 years on the following two conditions:

(a) That he not be convicted of a contravention of s 58(d)(1)(a) and 28(1) and (2) of the VAT Act, or of fraud or any competent verdict committed during the period of suspension.

(b) That the amount of R513 060.77 be repaid to SARS with effect from 1 August 2011 on or before the 15th of every month at a minimum amount of R10 537.43 per month until the full amount has been paid.

[8] From the outset, Mr Stow failed to fully comply with the second condition. By the beginning of November 2011 he had only repaid R20 500. On 11 November 2011, he approached the regional court with the request that the monthly payments be reduced to R6000 per month. The court acceded to this request and an order was made in those terms. The magistrate then warned Mr Stow that a further request would not easily be countenanced.

[9] Notwithstanding the reduction, Mr Stow made only three payments after the new order had been put into operation, namely; R6000 in November 2011, R6 000 in January 2012 and R5 600 in February 2012. Thereafter he made no further payments whatsoever nor did he approach the court in question. In June 2013, the State applied for an order that the suspended sentence be put in operation.

[10] At the hearing, Mr Stow provided an affidavit in which he set out the factors that prevented him from complying with the order. These are, inter alia, that in November 2011 he moved house and had to pay a R13 000 deposit; on 15 November 2011 his truck was involved in an accident and could not be utilised for 2 weeks resulting in a loss of income; he had to pay an excess of R4 800 on the insurance claim; no income could be earned during the December 2011 and January 2012 holiday period; in June 2012 the truck broke down again, it took a month to repair at a cost of R58 000 and he only had one client at that time, which he lost as a result of SARS claiming VAT directly from that client. Mr Stow's suspended sentence was put into operation on 24 June 2013. It is this order that he sought to have reviewed and set aside.

[11] The court a quo, in concluding that the regional court properly exercised its discretion, found that at the time of the original sentence and the later reduction, Mr Stow represented that he had the means to meet the payments. He is a businessperson, who was legally represented and was fully aware of his financial situation and obligations. Although no specific mention was made of s 297(7) in the regional court's judgment, the court a quo held that this did not mean that the section was not considered.

[12] This reasoning cannot be faulted. Mr Stow was made aware at both previous appearances before the regional court that he would be facing a term of imprisonment if he did not comply with the conditions of suspension. On both occasions, he assured the court of his ability to pay. It was on this basis that the regional court initially suspended the custodial sentence. The provisions of s 297(7) and (9) circumscribe the regional court's power – there were two avenues available to it. The court could either further suspend the sentence subject to the same conditions or other conditions that could have been imposed at the time of the original sentence, or to put the sentence into operation.[2] In its discretion, the regional court chose the latter. It believed, with justification, that a further suspension in the circumstances would be pointless.

[2] *Radzilane v S* [2016] ZASCA 64 (16 May 2016).

[13] In declining to interfere with the conclusion of the regional court that the suspended sentence must be put into operation, the court a quo cannot be faulted. It follows that Mr Stow's appeal must accordingly fail.

Mr Meyer

[14] Mr Meyer, the only member of Sunshine Coastal Consultants CC, operated a micro lending business from about 1999 until July 2002. He invited members of the public to invest in the business, with interest to be paid over to them. After his attorney advised him that the business was illegal, he immediately ceased the business operations. In total Mr Meyer received an amount of R28 268 377 from various investors. The amount outstanding to the investors as at the date of sentence was R5 278 569 000.

[15] On 20 April 2006, after entering into a plea and sentence agreement in terms of s 105A of the CPA, Mr Meyer was found guilty on one count of contravening s 11(1), read with 11(2), of the Banks Act 94 of 1990.[3] Mr Meyer was sentenced to a fine of R100 000 or 400 days' imprisonment and a further five years' imprisonment, which was suspended for a period of five years on condition that he paid an amount of approximately R5 300 000 to 116 investors, plus interest at a rate of 1,25 percent per month.

[16] Mr Meyer's first payment in terms of the agreement commenced in June 2006. Some three years later, in 2009, Mr Meyer breached his condition of suspension for the first time by failing to make the requisite payments to the investors. As a result, the State applied for a warrant for his arrest, which was issued and executed on 4 September 2009.

[17] On 29 September 2009 in order to determine whether the suspended sentence should be put into operation in terms of s 297(7) and 297(9)(a)(ii) of the CPA, a hearing was held before the regional court. During the proceedings Mr Meyer, who was legally represented, testified at length that because of changes in the micro lending industry, the

[3] Section 11 provides:
(1) Subject to the provisions of section 18A, no person shall conduct the business of a bank unless such person is a public company and is registered as a bank in terms of this Act.
(2) Any person who contravenes a provision of subsection (1) shall be guilty of an offence.

introduction of the National Credit Act, as well as his desire to repay investors over a shorter period of time, he felt compelled to sell the business. A year after his plea and sentence agreement, according to him, he sold the business to Finbond, which sale included the sale of Maalpit CC, which was owned by Mr Black, Mr Meyer's son in law and Mr Meyer's daughter. The business was sold for the sum of R10 075 913 000. Mr Meyer, testified that he was meant to receive R8 200 000. Finbond paid an initial cash amount of R5 400 000, of which R3 600 000 was paid to Mr Meyer and the balance of R1 800 000 was paid to Mr Black. The outstanding balance was to be paid in Finbond shares.

[18] From the R3 600 000 that Mr Meyer received from the sale of the business, R3 100 000 was repaid to the investors. A dispute arose between Mr Meyer and Finbond which resulted in Mr Meyer failing to meet the terms of the plea and sentence agreement.

[19] Under cross examination Mr Meyer made several concessions. Firstly, Mr Meyer gave no plausible explanation why he did not seek legal advice when he concluded the sale agreement with Finbond. Secondly, the plea agreement in terms of s 105A of the CPA was based on his micro lending business that was clearly profitable and from which he would have been able to repay the investors over a five-year period. Thirdly, he failed to disclose the conclusion of the sale agreement to both the State and the investors and the lapsing of his insurance policies, which were part of the plea agreement. He provided no explanation for this non-disclosure. Importantly, the insurance policies were meant as security in the event of his death prior to full repayment. Mr Meyer's reason for selling the business was that his micro lending business was in decline. However, he conceded that for the period 1 September 2007 until 30 November 2007 the business would have been very profitable.

[20] In the exercise of its judicial discretion, the regional court, after weighing all the evidence and the further submissions on behalf of Mr Meyer, put into operation Mr Meyer's suspended sentence. The court a quo held that the regional court was correct in finding that Mr Meyer's breach of his condition of suspension was not beyond his control, or for any good and sufficient reason.

[21] The court a quo agreed with the regional court's findings that Mr Meyer was reckless when he sold the micro lending business to Finbond under risky terms and conditions. There is no reason warranting interference by this Court with the conclusion by the court a quo. The appeal must accordingly fail.

Appeal or Review

[22] The court a quo dealt with the matter as a review in terms of Rule 53. However, the appellants' complaint was that the respective regional courts had not properly exercised their discretion. In the ordinary course this is not a ground for review, but a ground for appeal. This begs the question – does a litigant wishing to challenge the decision of a court to put a suspended sentence into operation, come by way of review or appeal?

[23] The grounds of review are to be found in s 22 of the Superior Courts Act 10 of 2013, which replaced s 24 of the Supreme Court Act 59 of 1959. The grounds for review in both Acts is, to all intents and purposes, identical. These are:

(a) absence of jurisdiction on the part of the court;

(b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;

(c) gross irregularity in the proceedings; and

(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

[24] No reliance was placed on any of those grounds. No gross irregularity is contended for. The case made out on the papers and in argument is that the respective regional courts did not exercise their discretion judicially when arriving at their decision, which resulted in an irregularity. It is the suitability of the sentence imposed by the regional court that is the cause of complaint rather than any procedural irregularity committed in arriving at the sentence.

[25] It has long been a tenet of our law that an appeal is against the result of the proceedings and a review is an attack on the method of proceedings. If the court has a

discretion, which is wrongly exercised, this is a ground for appeal and not review.[4] An appeal is usually confined to what appears on the record. In a review, the issue is not whether the decision is capable of being justified on the record but whether the judicial officer properly exercised the powers entrusted to him or her. In other words, the focus is on the process which led to the decision which is challenged.[5]

[26] In previous cases the putting into operation of a suspended sentence has generally been challenged by way of review rather than appeal.[6] The rationale for this is to be found in the wording of s 309(1)(a) of the CPA which provides that 'any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any *resultant sentence* or order to the High Court having jurisdiction.' (my emphasis)

[27] In *Gasa v Magistrate for the Regional Division of Natal*[7] the court considered whether the resultant sentence or order could encompass the putting into operation of a suspended sentence and found that it could not. It therefore was not appealable. Nor could any of the allegations in that matter bring the application within the purview of s 24 of the Supreme Court Act 59 of 1959, which was the only avenue available to the applicant.

[28] The issue was similarly dealt with in *S v Helm.*[8] It was held that when a person is given a suspended sentence, it is the original suspended sentence that is the resultant sentence, not the subsequent decision to put the suspended sentence into operation. The court therefore found that the decision was not susceptible to appeal.

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[4] *Modesi v Mosiga* 1927 TPD 150.
[5] *Minister of Environmental Affairs and Tourism & others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism & others v Bato Star Fisheries (Pty) Ltd* 2003 (6) SA 407 SCA para 52; *Rustenburg Platinum Mines Ltd v CCMA* 2007 (1) SA 576 SCA para 30 and 31.
[6] In the following cases it was held that no appeal lies against a decision to put a suspended sentence into operation on the basis that this was not a sentence following upon a conviction: *R v Dunn* 1929 TPD 53; *R v Kalpy* 1958 (1) SA 291 (C); *R v Khan* 1961 (1) SA 282 (N); *S v Van Nieuwenhuizen* 1972 (3) SA 575 (T); *S v Helm* 1980 (3) SA 605 (T).
[7] *Gasa v Magistrate for the Regional Division of Natal* 1979 (4) SA 749 (N).
[8] *S v Helm* 1980 (3) SA 605 (T).

[29] The court in *S v Peskin*[9] re-iterated that an applicant was restricted to the grounds set out in s 24 of the Supreme Court Act. However, in order to set aside the manifestly unfair decision to put the suspended sentence into operation, the court held that the decision was susceptible to review under the high court's inherent common law jurisdiction to correct proceedings of lower courts.[10] In *S v Block*[11] it was held that the review powers of the high court have been extended by the Constitution which allows for greater flexibility in the application of s 24 of the Supreme Court Act. A court would have greater latitude in the event of a failure of justice. The paramount consideration is now fairness and the interests of justice.

[30] In *S v S*[12] Nugent J, at 611G- J said:

'In all those cases the reason for so holding was based upon the wording of what is now s 309(1)(a) of the Act, which provides that any person convicted of any offence by any lower court "may appeal against such conviction and against any such resultant sentence or order". In *S v Helm* and in the cases that preceded it (which dealt with similar wording in earlier statutes) it was held that when a person is first given a suspended sentence, that is the "resultant sentence"' from his conviction, and that a subsequent decision which is made to put that sentence into operation accordingly does not fall within the terms of the section. Those decisions were not based upon a principled objection to the appealability of such a decision, but upon the construction of the wording of the particular section of the Act which allows for appeals at the instance of the accused from decisions made in the lower courts. It is not necessary in the present case to decide whether those decisions ought to be followed in the future.'

[31] In *S v Sekotlong*[13] it was observed that the putting into operation of a suspended sentence was not merely an administrative function but part of a criminal trial. A court determining the issue of a person's liberty was not only entitled to consider an appeal but 'duty bound' to do so. It would be unconscionable if a high court could not provide redress either by way of an appeal or review.

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[9] *S v Peskin* 1997 (2) SACR 240 (C).
[10] Ibid at 464C-D.
[11] *S v Block* (1) SACR 622 Nck para 16-18.
[12] *S v S* 1999 (1) SACR 608 (W).
[13] *S v Sekotlong* 2005 JDR 0190 (T).

[32] The section states that any person may appeal a conviction by the lower court and the ‘resultant sentence’. But this should not be confined to the narrow interpretation adopted in some of the earlier decisions. The original sentence may well be the ‘resultant sentence’ in the strict sense but there is no reason why this phrase should not be more expansively interpreted to encompass the putting into operation of a suspended sentence. It is a consequence of the resultant sentence in the broader sense. Therefore, properly interpreted s 309(1)(a) is not a statutory prohibition to the appealability of a decision to put into operation a suspended sentence.

[33] It follows that the view held in some of the earlier cases is no longer tenable. It is clearly in the interests of justice that a person be afforded the right to challenge a decision to put a suspended sentence into operation. Such challenge is invariably on the basis of a court wrongly exercising its discretion. This can never be a ground for review. An applicant challenging such decision, as in all appeals, is confined to what is stated in the record.

[34] In conclusion, the court a quo correctly dismissed the application for review in respect of both Mr Stow and Mr Meyer.

[35] In the result the following order is made:

The appeal of each of Mr Stow and Mr Meyer is dismissed.

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C H Nicholls
Acting Judge of Appeal

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Z Carelse
Acting Judge of Appeal

Ponnan JA (Seriti and Zondi JJA and Nicholls and Carelse AJJA concurring):

[36] These appeals concern suspended sentences that were put into operation by the magistrates' court. A preliminary issue that occupied much of the debate from the bar in this court is whether or not such an order is appealable. It has been held in various cases that a decision by a magistrate to put a suspended sentence into operation is not capable of being taken on appeal. My colleagues, Nicholls and Carelse AJJA, conclude that 'the view held in [those] cases is no longer tenable'. I write separately in support of that conclusion.

[37] An order putting a suspended sentence into operation was not appealable in terms of the provisions of s 103 of the Magistrates' Court Act 32 of 1944, which read:

'Any person convicted of any offence by the judgment of any magistrate's court . . . may appeal against such conviction and against any sentence or order of the court following thereupon to the provincial division of the Supreme Court.'

The approach of our courts was that the order putting into operation the suspended sentence was not a conviction. Nor was it a sentence or an order following upon a conviction within the meaning of s 103.

[38] Section 103 was repealed and criminal appeals from lower courts came to be regulated by s 309 of the CPA, which provides in subsection 1 that:

'any person convicted of an offence by any lower court . . . may, subject to leave to appeal being granted in terms of s 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction.'

In *Gasa v Regional Magistrate for the Regional Division of Natal* at 731G,[14] Hefer J observed that the new provision is not materially different from s 103, which applied when most of the earlier cases were decided. He added:

'. . . the fact remains that every order of a lower court in a criminal case is not appealable and one still has to turn to s 309(1) in order to discover whether such an order is one of the kind that has been declared to be appealable. As stated before, it is only appealable if it can be

[14] Supra fn 7.

described as a “resultant . . . order”, ie an order made as a result of the conviction. Naturally, it follows upon a conviction, but it is not the result thereof; it is the result of non-compliance with the conditions of suspension . . . and for that reason it is still not appealable’.

[39] It thus came to be accepted even under s 309(1) that when a person is given a suspended sentence that is the ‘resultant sentence’ from his conviction and that a subsequent decision which is made to put that sentence into operation accordingly does not fall within the terms of the section.[15] That approach has not escaped criticism. As Nugent J pointed out in *S v S* at 611J:[16]

‘Those decisions were not based upon a principled objection to the appealability of such a decision, but upon a construction of the wording of the particular section of the Act which allows for appeals at the instance of the accused from the decisions made by the lower courts.’

[40] I must confess to having some difficulty as to why a sentence, when subsequently put into operation, is not to be regarded as a ‘resultant sentence’ within the meaning of that expression. There is no gainsaying that the sentence results from the conviction. That the operation of the sentence is suspended on certain conditions does not alter the fact that it resulted from the conviction. It is so that it only comes to be put into operation as a result of non-compliance with the conditions of suspension, but that hardly alters the fact that the sentence resulted from the conviction. That the sentence only becomes operative upon the breach of a condition and consequently that there is a delay in the implementation of the sentence matters not. But for the conviction there can be no sentence to speak of. The timing of its implementation can hardly alter the essential character of the sentence – properly construed, it follows upon the conviction. Nor does it assist this enquiry to suggest, as *Helm’s case* does, that an accused person has a right to appeal the original sentence. We are not here concerned with the proceedings when the sentence came to be imposed. We are concerned with the subsequent proceedings during which the sentence, which had earlier been fixed by the sentencing court, comes to be put into operation. It is thus no answer to suggest that an appeal avails an accused person in respect of the earlier proceedings. What’s more, there appears to be no reason

[15] *S v Helm* supra fn 8.
[16] Supra fn 12.

in principle or logic why an appeal should avail an accused person when the sentence is imposed and its operation suspended, but not when it is subsequently put into operation.

[41] It needs to be emphasised that if the complaint is against the result of the proceedings of the magistrates' court, ordinarily the appropriate remedy is by way of appeal. If the method of the proceedings is the subject of the attack, the appropriate remedy is a review. Where, however, as frequently occurs in matters of this kind, the result rather than the method is sought to be attacked, a review would be inapposite. For a successful review, an accused person is required to raise such allegations as are necessary to bring him – or her – self within the purview of s 22 of the Superior Courts Act (or s 304(4) of the CPA (*S v S* at 613I-J)). Failure to do so may mean that the high court cannot exercise its powers of review in terms of that section and may decline to entertain the application for review.

[42] To be sure, there will be matters where review would be appropriate. But, for the most part, as one sees, appeals, in truth, have had to be dressed up as reviews. *S v Gasa* illustrates the conundrum for an accused person. Before that court was an appeal and an application for review. The court held that the order was not appealable. It then made short shrift of the review application on the basis that none of the allegations necessary to bring the matter within the purview of s 24 of the Supreme Court Act had been raised. It accordingly held that the court could not exercise its powers of review in terms of that section.

[43] Moreover, there are strong policy considerations in favour of an appeal. A necessary jurisdictional prerequisite for an appeal, which does not obtrude in reviews, is the grant of leave to appeal in terms of sections 309B or C of the CPA. That is an important filter. It serves to weed out matters that are unmeritorious and thus not truly deserving of the attention of higher courts. On the other hand, there may well be a danger that matters that deserve to be heard are stifled because an appeal, on one or more of the traditional grounds, does not avail an accused. As *Gasa's case* illustrates, not allowing an appeal in these circumstances, could leave an accused, in effect, remediless.

[44] In any event, whatever the position might have been at the time those cases were decided, we are now enjoined by s 39(2) of the Constitution to 'promote the spirit, purport and objects of the Bill of Rights'. In terms of s 35(3) thereof every accused person is entitled to a fair trial, which includes the right of 'appeal to, or review by, a higher Court'. In my view, construing the provision as conferring no more than a rather limited review, renders the full realisation of the s 35(3) right illusory. As Nugent J put it in *S v S* at 609D-E:

'In our view it would be a parsimonious construction of the Bill of Rights which confined it only to the immediate consequences of the trial itself. In our view the clear spirit, purport and object of that section is to ensure that no person is condemned to endure a penalty provided for by the criminal law without recourse being had to another court in order to correct any irregularity or injustice which might have occurred in the course of the proceedings which have had that result.'

[45] Taking his lead from *S v S,* in *S v Sekotlong*, Van Rooyen AJ opined:

'[4] I do not have the slightest doubt that this Court is entitled and in fact duty bound to consider the appeal of the appellant. I do not regard the setting into operation of a suspended sentence by a court as a mere administrative or quasi administrative function. Punishment is an inherent element of the criminal process and where a court orders that a suspended sentence be made operational, it assumes the position of a criminal court which punishes the person who has been convicted. It has to have regard to the ordinary principles of punishment and cannot simply have a person imprisoned as would a clerk keeping a register. When the liberty of a person is at stake, grounds must exist before such liberty is taken away. In fact, to my mind, the second court is nothing else than an extension of the trial court when it considers putting a suspended sentence into operation.

[5] Section 35(3) of the Constitution Act 108 of 1996 guarantees a fair trial which included the right of appeal to, or review by, a higher court. The imposition of a sentence is part of a criminal trial and the requirements of a fair trial also apply to this facet of the trial. In deciding whether to order that a suspended sentence should become operational, the court must have regard to the ordinary principles of punishment. Where the appeal court is of the view that it should intervene in accordance with the traditional rules for intervention in punishment by a court of appeal, it should do so and not be limited by the grounds for civil review.'[17]

[17] Supra fn 13.

[46] In my view, s 309(1) of the CPA is quite capable of a construction which includes within its terms a decision by a magistrate to put a suspended sentence into operation and that is the construction that ought to be favoured in order to give proper effect to the spirit, purport and objects of the Bill of Rights. It would be unconscionable if a decision of that nature could be made capriciously, and a higher court could not provide redress by way of appeal. In *S v Z and 23 Similar cases* para 31, Plasket J said '[t]he focus of the Courts should . . . be on the justice of the end result, rather than the technicalities of the process'.[18] In my view, the 'justice of the end result' is better served by construing the provision as permitting a right of appeal, as opposed to denying it.

[47] I must add that even if Messrs Stow and Meyer had proceeded by way of appeal in this matter, as we find they should have, the result would remain unaffected. Each matter, whether by way of review or appeal, is devoid of merit and the court a quo was correct in declining to interfere with the exercise of the regional court's discretion. I accordingly agree with my learned colleagues that both appeals must fail.

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V M Ponnan

Judge of Appeal

APPEARANCES:

[18] *S v Z and 23 Similar cases* 2004 (1) SACR 400.

For the Appellants:	L Crouse SC (with him H Alberts)
Instructed by:	Legal Aid South, Port Elizabeth Justice Centre, Bloemfontein
For the Respondent:	CJ Mouton SC (with him A Rawjee and Desai)
Instructed by:	The State Attorney, Port Elizabeth The State Attorney, Bloemfontein