CASE NO.: CR 57/2010

NOT IMPORTANT

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

ERNST WILLIE ANTONIUS HORR

(HIGH COURT REVIEW CASE NO.: 1149/2010)

CORAM: **MULLER, J** *et* **HOFF, J**

Delivered on:

REVIEW JUDGMENT

MULLER, J.: [1] The accused was charged with contravening S 137 (a) of the Insolvency Act, no 24 of 1936 in that he, being an unrehabilitated insolvent, obtained credit in the amount of N$100 000 from a certain Mr Kevin Davidow, on 10 August 2002 without informing him that he is insolvent. He was also charged with committing fraud with an alternative of theft. All these charges related to the same transaction. The accused pleaded not guilty to both charges and the alternative charge.

[2] The matter was postponed on several occasions, mainly at the request of the accused. The absence of the accused's legal representative was the main reason for the requests for postponement. Eventually, after about 11 postponements which delayed the hearing of the case for several years, the Magistrate refused any further postponement and the accused had to conduct his own defence. After pleading not guilty to all the charges, the State presented the evidence of the person who was allegedly mislead by the accused and from whom he obtained N$100 000, Mr Davidow, as well as that of the accused's trustee, Mr Bruni. The accused testified under oath.

[3] At the end of the trial he was only convicted on the first count, namely a contravention of S 137(a) of the Insolvency Act and found not guilty on the second count of fraud, as well as the alternative charge of theft. The accused was sentenced as follows:

> *"Ten (10 months imprisonment of which 3 (three) months are suspended for a period of 5 (five) years on condition accused is not convicted of* ***C/S 136(a)*** *Act 24 of 1936 as amended (obtaining credit during insolvency), committed during the period of suspension".*

(My Emphasis).

[4] A letter by the legal practitioners Kempen-Maske, acting on behalf of the accused, was included in the record as part of the review. In that letter it was pointed out that the wrong section of the Insolvency Act was mentioned in the sentence. The sentence states that it is a condition that the accused should not contravene S 136(a) of the Insolvency Act during the period of suspension. This is an obvious mistake and it should in fact be S 137(a),

namely the contravention of which the accused had been charged and convicted of. It is clear that the said condition has to be altered by deleting the reference to S 136(a) and substituting it with S 137(a). There is no prejudice to the accused if this is done. The said legal practitioner also submitted that the sentence was too harsh, taking into account the age of the accused, namely 70 years, that he is a first offender and was not legally represented in Court. Furthermore, it is pointed out that the hearing had been postponed on several occasions since 2003. The accused is entitled to make submissions to be considered on review. I regard submissions in the letter by Kempen-Maske as such submissions and will consider it when reviewing the matter.

[5] On 2 August 2010 and after perusing the record I requested clarification from the Magistrate on the following:

1. *"Was the accused not prejudiced by conducting the trial without a legal representative, taking into account that he indicated he wanted to be legally represented?*

2. *Several questions were put to the undefended accused by the Court after the State completed its cross-examination (Record: p44-52). Please explain.*

3. *According to the sentence imposed at the end of the trial (Record p 79), the condition of suspension refers to a*

contravention of S 137(a) of the Insolvency Act, no. 24 of 1936, but that differs from the charge sheet and the review form. The letter of Kempen-Maske dated 10 June 2010 also refers to the condition regarding a contravention of S 136(a) of the Act, which section is irrelevant to this conviction. Please explain what was the condition imposed with the sentence and whether that appears on the warrant of detention and other documents.

4. *Why was the sentence only suspended for 3 months? Please explain.*

5. *Was the accused imprisoned? The review form does not contain an indication in this regard.*

6. *Why was this review only been submitted now and not within the time prescribed in the Criminal Procedure Act, namely within 7 days, as indicated on the review form*?"

[6] On 16 August 2010 a reply was received from the Magistrate in which he comprehensively dealt with all my queries. I shall briefly deal with the Magistrate's answers hereinafter, together with my comments thereon.

[7] **Whether the accused was not prejudiced or not by conducting the trial without legal representation.**

The Magistrate pointed out that the trial was postponed on several occasions (about 11), mainly at the request of the accused because his legal representative was not present, available or not ready to proceed. State witnesses had to be warned and later indicated that they are not prepared to make arrangements to be present on a particular date, just to hear that the trial is again postponed. The records of the different hearings bear out the Magistrate's reply in this regard. The Magistrate eventually exercised his discretion to refuse further postponement. The accused then had to conduct his own defence. The Magistrate referred to two unreported cases of this Court, namely *Andries Nowaseb v The State*, case no. CA 93/1995 and *Olavi Mukundi v The State*, case no. 39/2009 in which the factors that a court should take into account in exercising its discretion to grant or refuse a further remand. Such factors include the inconvenience of the state witnesses, the delay of the judicial process and the fault of the accused in causing these. The Magistrate clearly stretched his patience to more than can be reasonably expected. It is evident that the appropriate factors were considered, before the Magistrate eventually exercised his discretion to refuse further remands and ordered that the accused should represent himself. I am satisfied that the Magistrate exercised his discretion judicially and that there is no reason to interfere with that decision of

the Magistrate. That goes also for the submission in this regard by Kempen-Maske. In perusing the record, it appears that the accused, who was aware of all the facts, conducted his defence quite capably and was in some instances assisted by the Magistrate. The facts of what occurred between the accused and the complainant were put before the court and the Magistrate had to decide whether those facts constitute a contravention of S 137(a) of the Insolvency Act. In the light of the accused's concession as confirmed by his trustee, Mr Bruni, to the effect that he was insolvent at the time, only required the Magistrate make a decision on the evidence of the complainant, Mr Davidow, and the accused whether the latter informed the former of his insolvency at the time. In a comprehensive judgment the Magistrate considered all the evidence and only convicted the accused on the charge of contravening S 137(a) of the Act and acquitted him on the charge of fraud and the alternative of theft.

[8] **Questions by the Court**

The Magistrate himself posed certain questions to the accused and replied that those questions were asked to clarify certain issues. I am satisfied that the accused were not prejudiced by it. No reference is made to this issue by Kempen-Maske on behalf of the accused.

[9] **The condition of suspension of sentence – S 137(a) instead of S 136(a).** This discrepancy was pointed out by Kempen-Maske and was conceded by the Magistrate in his reply. It is clearly an error. This Court is entitled to correct the sentence by substituting the wrong provision in the Act by the correct one.

[10] **Period of suspension of the sentence.**

The Magistrate correctly replied that 3 months of the sentence was suspended for 5 years. The Magistrate took all the relevant facts into consideration in arriving at an appropriate sentence. On review I have to consider whether it appears to me that the proceedings were in accordance with justice. I cannot find otherwise. Even if I am of the opinion that the sentence imposed by the Magistrate is not what I would have imposed under the circumstances, this is not the correct forum to consider submissions as made by Kempen-Maske in that regard. The correct forum is a court of appeal.

[11] The last two queries are irrelevant to the review.

[12] In all the circumstances the conviction and sentence are confirmed and the sentence is corrected by deleting “S 136(a)” therein and substituting it with “S 137(a)”.

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MULLER, J

I agree

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HOFF, J