CASE NO.: CR 95/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

ISMAEL HUSEB

CORAM: Smuts, J ***et*** Miller, AJ

ARGUMENT HEARD ON: 3 October 2011

DELIVERED ON: 21 October 2011

REVIEW JUDGMENT

SMUTS, J [1] The accused in this automatic review was on 19 April 2011 convicted in the Magistrate's Court, Omaruru on a charge of stock theft. The presiding magistrate convicted him after he had pleaded guilty and was questioned under s 112 of the Criminal Procedure Act, 31 of 1977 (the Act). The District Magistrate was correctly satisfied that the accused had admitted the elements of the charge. The accused, who was not represented, was a first offender and was convicted on a charge of slaughtering one goat to the value of N$700.00. Having admitted the value and the elements of the charge, the magistrate proceeded to sentence the accused to two years imprisonment on 11 May 2011.

[2] The presiding magistrate did not however refer the accused for sentencing under s 114 of the Act. This was presumably because the mandatory minimum sentence for the conviction of the offence in question under the Stock Theft Act (where in the case of the value of the stock being N$500.00 or more, a mandatory sentence of not less than 20 years of imprisonment without the option of a fine would apply for a first conviction), had been struck down by this Court 10 March 2011. This mandatory minimum sentence would thus otherwise have applied to the accused. But was it struck down and set aside as being in conflict with the Constitution by the Full Bench of this Court in *Protasius Daniel and Another v The Attorney-General and two others*[1]. As a consequence of the Full Court striking down the minimum sentence as being unconstitutional, the presiding magistrate then imposed a sentence of two years imprisonment after considering the mitigating factors raised by the accused and an address by the public prosecutor on the prevalence of the offence. The prosecutor had proposed that the accused be sentenced to three years imprisonment.

[3] Unbeknown to the Magistrate, the Prosecutor-General, second respondent in the *Protasius Daniel* matter, had on 26 March 2011 however appealed against that judgment of the Full Court which had struck down the mandatory minimum sentences for both first offenders embodied in s 14 (1) (a) (ii) of the Stock Theft Act as well as the mandatory minimum sentence for repeat offenders embodied in s 14 (1) (b). The Attorney-General and the Government of the Republic of Namibia had not opposed the application to strike down those mandatory minimum sentences as unconstitutional. The Prosecutor-General's notice of appeal is against the whole of the judgment and order by the Full Court. This was given prior to the sentencing of the accused by the Magistrate, Omaruru.

[4] The question arises as to whether the sentence imposed by the magistrate was in accordance with the law by reason of the fact that a notice of appeal had been filed

[1] (Case No. A 238/2009 and A 430 /2009) unreported, 10 March 2011

against the judgment of the Full Court. This is because of the common law principle that the noting of an appeal has the effect of suspending the execution or operation of a judgment and order of the Court appealed against.[2] It is well established that this Court has a wide discretion in granting or refusing leave to execute a judgment and order pending an appeal.[3] But no application to execute the judgment pending the determination was brought by the applicants in *Protasius Daniel* matter.

[5] The question accordingly arises as to whether the noting of the appeal in the *Protasius Daniel* matter has suspended the operation of the judgment of the Full Court in respect of the striking down of the mandatory minimum sentences for first offenders. It would appear from the judgment of the Full Court that s14(1)(a)(ii).[4]

[6] The Prosecutor-General did not appear to have placed in issue whether the mandatory minimum for first offender is unconstitutional but differed on the question of remedy by the appellant by proceeding in his application to the Full Court (as opposed to an appeal under the Act). The position of the Prosecutor-General in respect of the mandatory minimum sentence for repeat offenders embodied in s14 (1) (b) was different. The Prosecutor-General denied that s14(1)(b) was unconstitutional. The opposition to the application to strike down the mandatory minimum sentence for first offenders was based upon an argument that it was not the appropriate remedy for that applicant. It was contended that he should instead have appealed against the sentence and that an argument should have been made that there were substantial and compelling circumstances in the appellant's case which would justify a deviation from the mandatory minimum sentence as permitted by s 14 (1) of the Stock Act Theft. This would have rendered it unnecessary to strike down the sub-section. This argument was

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[2] Reid and Another v Godart and Another 1938 (AD) 511 at 513: South Cape Corporation (Pty) Ltd v The Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) at 542

[3] South Cape Co-operation (Pty) Ltd v The Engineering Management Services supra at 545: Wal-Mart Stores Incorporated v Chairperson of the Namibia Competition Commission and three others (HC), unreported, 15 June 2011- Case No: A 61/2011 see also African Personnel Services v Government of the Republic of Namibia (HC) Unreported_______________)

[4] Supra at p6.

dismissed and the Full Court proceeded to strike down both mandatory minimum sentences as being unconstitutional. But, even if a conflict with the Constitution was not then placed in issue by the Prosecutor-General, this would not preclude that office appealing from on that issue.

[7] If the common law rule were to have suspended the operation of the judgment of the Full Court in the *Protasius Daniel* matter, then this would have implications for the legality of the proceedings in this review matter (and for several other matters). If the impugned provisions of the Stock Theft Act remain operative pending the appeal, then the proceedings before the presiding magistrate and in particular the failure to refer the matter to a regional magistrate for sentencing, would be irregular. In view of this consideration, I directed that a letter be addressed to the Prosecutor-General on 29 July 2011, advising that the issue would be set down for oral argument on 3 October 2011. Despite the potential far-reaching implications of appealing against the decision of the Full Court, the appeal itself was surprisingly not prosecuted as a matter of urgency by the Prosecutor-General's office. I would have expected that, particularly in view of the position of Prosecutor-General's office in this application namely that the notice of appeal did stay the effect of the order of the Full Court.

[8] *Amici curiae,* Messrs R Heathcote, SC and Mr D Obbes, were appointed to represent the accused in the argument of this review. Both sets of counsel provided detailed written argument in advance of the hearing. We express our gratitude to counsel for their helpful industry in preparing and presenting argument. *Amicus* counsel raised the fact that the court did not enquire whether the admission as to the value of the stock in question was within the accused's knowledge in view of the judgment in this court in *S v Undari* [5]. In view of the conclusion I reach in this matter, it is not necessary to deal with this particular aspect, save to express my respectful agreement with the approach adopted by the court in that matter.

[5] 2010(2) NR 695 (HC) at 697-698

[9] When the matter was argued, *amicus* counsel contended that the common law rule which serves to suspend the operation of a judgment pending an appeal would not apply in instances of the kind where a competent court has declared legislation unconstitutional in proceedings which were incidental to criminal proceedings (and where an appeal had been noted against declaratory relief striking legislation down as unconstitutional). They correctly pointed out that this common law rule is in any event a general rule which is subject to exceptions[6]. Counsel also referred to Article 25 of the Constitution which, in peremptory terms, precludes parliament from passing any law infringing on the fundamental rights protected under the Constitution. Article 25 further expressly provides that to the extent of a conflict with the Constitution, the law shall be invalid. It was submitted that once a competent court had found s14(1)(a)(ii) to be unconstitutional and invalid, then the common law rule would give way to the declaration of invalidity and could not be relied upon by the State to perpetuate a regime in conflict with the Constitution when noting an appeal. That was the thrust of their argument. Counsel invited us, in line with the approach of the Supreme Court in *Trustco Group International v Shikongo,*[7] to develop the common law to be in harmony with the Constitution.

[10] We requested counsel for the State, Mr Nduna, to address us on this proposition. He essentially confined his submission to a reference to s 307(1) of the Act. It provides that the execution of a sentence would not be suspended by the transmission of, or the obligation to transmit, a record for review unless the court which imposes the sentence releases the person convicted on bail. This was in any event only relied upon by counsel after there was reference to this section by Miller, AJ in a question posed to *amicus* counsel.

[6] South Cape Corporation (Pty) Ltd v Engineering Management Services *supra* at 544

[7] 2010(2) NR 377 (SC) at PAR 34 and 35

[11] When I enquired as to whether there was any authority for the proposition that the common law rule suspending the operation of a judgment pending an appeal would not apply in circumstances such as the present, *amicus* counsel reiterated their reliance on Article 25, submitting that that once a competent court had struck down legislation as unconstitutional and invalid, the common law rule would not apply due to the wording of Article 25 of the Constitution, providing in peremptory terms that any law made by parliament shall to the extent of a conflict with the rights enshrined in chapter 3 be invalid.

[12] At the conclusion of the oral argument, on 3 October 2011, we reserved judgment. On 5 October 2011, *amicus* counsel provided a supplementary note which included further authority. This was done with the consent of the Prosecutor-General's Chambers. In their supplementary note, counsel referred to Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others: In Re Application for declaratory relief[8]. After the *amicus* counsel provided their additional note with the consent of the Prosecutor-General Chambers, an opportunity was provided to the Prosecutor-General's Chambers to file further argument. That office declined to do so.

[13] In the *New Clicks* matter, the Constitutional Court in South Africa made it clear with reference to section 2 of the South African Constitution that any law inconsistent with the Constitution is invalid. It held that:

> "*Any law inconsistent with the Constitution is therefore invalid. When a court considers and upholds a challenge to the validity of a law, it then declares the law to be invalid, but the law's fundamental invalidity flows from its inconsistency with the Constitution, not from the court order. As this Court held in Ferreira v Levin NO:*

[8] 2006(8) BCLR (872) CC

"The Court's order does not invalidate the law; it merely declares it to be invalid. It is very seldom patent, and in most cases is disputed, that pre-constitutional laws are inconsistent with the provisions of the Constitution. It is one of this Court's functions to determine and pronounce on the invalidity of laws, including Acts of Parliament. This does not detract from the reality that pre-existing laws either remained valid or became invalid upon the provisions of the Constitution coming into operation. In this sense laws are objectively valid or invalid depending on whether they are or are not inconsistent with the Constitution. The fact that a dispute concerning inconsistency may only be decided years afterwards, does not affect the objective nature of the invalidity."

[16] The common-law rule that execution of a judgment is suspended pending an appeal has no application to declarations of constitutional invalidity of legislation. If a law is objectively invalid, a declaration of invalidity made by a competent court that is subsequently set aside on appeal does not validate the law. For the same reason, an appeal against a declaration of constitutional invalidity of a law does not breathe life into that law. The objective validity or invalidity of a law will ultimately be determined at the end of the appeal process. That does not mean, however, that courts have no power to temper the effect of orders of constitutional invalidity made pending the finalisation of the appeal process.

[17] The ordinary effect of the constitutional doctrine of objective invalidity would be that a law declared invalid will have been invalid from the date upon which its inconsistency with the Constitution arose. Ordinarily, this would be the date of promulgation of the law, or the date upon which the Constitution came into force".[9]

[9] At paragraph 15-17

That court proceeded to refer to s172 of the South African Constitution which authorizes courts there to ameliorate the effect of invalidity when they consider it just and equitable to do so. Although different in certain respects to Article 25 of the Constitution and more detailed given the different court structures and the powers provided for, the thrust of the court's powers to temper or mediate the effects of an order of invalidity is essentially similar in principle to the fundamental approach underpinning Article 25.

[14] The provisions in the Constitution of Namibia are thus similar in their basic impact, thrust and effect to s 2 read with s 172 of the South African Constitution. Article 25 makes it clear that any law in conflict of the Constitution is to the extent of the conflict invalid in terms of similar to s 2. There are however provisos in Article 25 which empower the court to allow parliament to correct a defect in an impugned law within a specified period subject to conditions specified by the court. Although less detailed than s172, the underlying principle of invalidity to the extent of a conflict is also at the heart of Article 25 and likewise provides ways in which this effect may be ameliorated by a court which makes the declaration of invalidity. As is stressed by the court in the *New Clicks* – matter, that court (making such an order) is best placed to determine what is just and equitable with regard to suspending the order of invalidity and the conditions for doing so. I respectfully agree with that approach and find that it should apply to Namibia. Article 25 thus also expressly vests a competent court (such as a full bench in the *Protasius Daniel* matter), with the power and discretion to make such an order instead of declaring the law to be invalid. It is also best placed to do so. The courts in Namibia have in the past exercised that power[10].

[15] The Full Court in the *Protasius Daniel* matter however elected not to exercise the power to allow parliament to correct the defect in the impugned law but instead struck down the offending provisions as invalid.

[10] Mostert v Minister of Justice 2003 NR 11 (SC)

[16] I find the authority in the *New Clicks* matter to be both instructive and applicable to the position in Namibia in view of the provisions of Article 25. The Full Court decided not to ameliorate the invalidity of the sections which it struck down in accordance with Article 25(1)(a) of the constitution. By doing so, it elected not to temper the effect of the order of constitutional invalidity.

[17] I respectfully agree with the approach of the South African Constitutional Court that an appeal against a declaration of constitutional invalidity of legislation will not breathe new life into that law in the absence of a competent court tempering the effect of the order of constitutional invalidity as contemplated by Article 25(1)(a). It could follow in my view that the common law rule that the execution of a judgment is suspended pending an appeal would likewise have no application to declarations of constitutional invalidity of legislation.

[18] It would follow in circumstances that the appeal against declaration of invalidity of the two subsections in the Stock Theft Act by the Full Court would not have the effect of suspending the operation of that judgment. It follows that the sentence imposed by the Magistrate in this matter was thus valid and competent in the circumstances.

SMUTS, J

I concur

MILLER, AJ

ON BEHALF OF THE STATE **MR. NDUNA**

Instructed by: **OFFICE OF THE PROSECUTOR-GENERAL**

ON BEHALF OF THE ACCUSED	**ADV HEATHCOTE, SC**
Assisted by:	**ADV OBBES**
Instructed by:	***AMICUS CURIAE***