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| <p>Case Title: <i>The State v Erick Henonga</i></p> | <p>Case No: CR 72/2018</p> |
| <p>Heard before: Honourable Mr Justice Liebenberg et Honourable Ms Justice Ndauendapo</p> | <p>Division of Court: Main Division</p> |
| <p>Neutral citation: <i>S v Henonga</i> (CR 72/2018) [2018] NAHCMD 301 (26 September 2018)</p> | |
| <p>The order:</p> <p>(a) The conviction and sentence are confirmed.</p> <p>(b) The order in terms of the provisions of section 51 of the Road Traffic and Transportation Act 22 of 1999 is set aside, and the matter remitted to the magistrate with the direction to proceed with the proceedings after explaining the provisions of section 51 to the accused and then bring proceedings to its natural conclusion.</p> | |
| <p>Reasons for order:</p> | |
| <p>LIEBENBERG J (concurring NDAUENDAPO J)</p> <ol style="list-style-type: none"> Magistrates, as legally trained minds, are required to act with the utmost diligence in the exercise of their judicial function. The requirement of diligence imposes a duty on judicial officers to thoroughly read through records, which shall be transmitted to the reviewing judge, before appending his/her signature on the review cover sheet to certify that the proceedings are in accordance with justice. With that said, the <u>charge sheet</u> in this case reflects that the accused was charged with <u>housebreaking with intent to steal and theft</u> and that the matter was finalised in terms of s 112(1)(a) of Act 51 of 1977. The defect in the review record is further exacerbated in that the <u>review cover sheet</u> reads that the accused was convicted of driving with an excessive <u>blood alcohol level</u>, which is not the case in the former or the latter. To this end, the review court dispatched a query to the magistrate enquiring whether the charges were consistent with the matter tried. The magistrate replied, unapologetically, | |

by stating that he wasn't the magistrate who checked and sent the record on review. However, be it as it may, magistrates have a duty to be diligent in going through the typed record and verify its correctness before dispatching same to the registrar.

3. With this stated, the accused was convicted for contravening s 82(1)(b) r/w ss 1,86,89(1) and 89(4) of the Road Traffic and Transportation Act 22 of 1999 (the Act) for driving with an excessive breath alcohol level. He was thereafter sentenced to pay a fine of N\$10 000.00 alternatively, in default of payment, 15 (Fifteen) months' imprisonment. Coupled with this sentence the magistrate applied the provisions of s 51 of the Act and ordered that the accused's licence be suspended for a period of three months.
4. When the matter came on review a query was sent to the magistrate enquiring why the provisions of sections 50 and 51 of the Act were not explained to the accused, and why he was not afforded the opportunity to make representations prior to the suspension of his driver's licence.
5. The magistrate conceded his error and stated that in the past he suspended accused persons' licences which had been confirmed on review without invoking the said sections prior thereto. In view thereof, he now asks for guidance as to the correct approach. All that needs to be said in this regard is that, though similar misdirections might have been overlooked in other review cases in the past, it remains a misdirection which must be addressed when discovered by the reviewing judge. (As the adage says: 'Two wrongs doesn't make one right').
6. The relevant part of section 51 of the Act reads as follows:

'51 Suspension of licence upon conviction of certain offences

- (1) Where a person who is the holder of a driving licence is convicted by a court of an offence-
 - (a) under section 78(1)(a), (b) or (c) in the case of an accident which resulted in the death or injury of a person;
 - (b) under section 80(1) of driving a vehicle recklessly; or
 - (c) under section 82(1).(2),(5) or (9),

the court shall, apart from imposing a sentence and except if the court under section 50(1)(a) issues an order for the cancellation of the licence, issue an order whereby every

driving licence held by such person is suspended in accordance with the provisions of subsection (2).

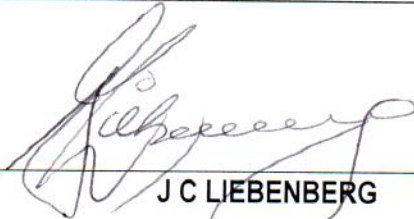
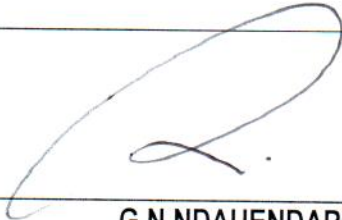
- (2) An order of suspension pursuant to subsection (1), shall be made for such period as the court may determine, but which shall not be less than-
- (a) three months, in the case of a first conviction;
 - (b) one year, in the case of a second conviction; and
 - (c) five years, in the case of a third or subsequent conviction.'

(Emphasis provided)

7. In *The State v Japhet Nekaya* (CR 19/2017) [2017] NAHCMD 70 (10 March 2017) (unreported), this court observed the following:

'[3] The provisions of s 51 must first be explained to accused where after he be afforded the opportunity to lead evidence and/or address the court as to the period for which his licence should be suspended.'

8. When a trial court is compelled to invoke the provisions of the Act upon the conviction of an accused person in terms of the applicable offences in terms of the Act, it must after conviction but before mitigation of sentence, read and explain the import of the provisions of section 51 of the Road Traffic Act to the accused person and invite his/her comment or representation thereon.
9. As appears from the record the accused was not afforded this opportunity.
10. In the result it is ordered:
- (c) The conviction and sentence are confirmed.
 - (d) The order in terms of the provisions of section 51 of the Road Traffic and Transportation Act 22 of 1999 is set aside, and the matter remitted to the magistrate with the direction to proceed with the proceedings after explaining the provisions of section 51 to the accused and then bring proceedings to its natural conclusion.

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| <p>J C LIEBENBERG JUDGE</p> | <p>G N NDAUENDAPO JUDGE</p> |