

SENTENCING

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Principles Applicable to Environmental Matters

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A few interesting aspects about penalty clauses

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- For example: Regulation 96 applicable to the Marine Living Resources Act, Act 18 of 1998, before being revised, read as follows:
- "Any person who contravenes or fails to comply with any provision of these regulations shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years".

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- In a case like this the prosecutor will have to look at the Adjustment of Fines Act, Act 101 of 1991. **Section 1 (1) (a) stipulates that when the maximum amount of a fine is not stipulated in a penalty clause, the maximum amount is the amount stipulated in section 92(1)(a) of the Magistrates Court Act, Act 32 of 1944, which at the time was R20 000,00 per one year of imprisonment.**

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- Regulation 96 was amended on 8 October 2003 to read as follows:
- "Any person who contravenes or fails to comply with any provision of these regulations, shall be guilty of an offence and liable on conviction to a fine not exceeding R800 000,00 or to imprisonment not exceeding two years".

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- **Can the court impose a sentence of correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act, Act 51 of 1977 for a statutory offence, if the statute creating the offence did not provide for such a sentence but only for a fine or imprisonment?**

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- **The factors to consider when imposing an appropriate sentence have been set out and confirmed in a number of cases. One of the best known is S v Zinn 1969 (2) SA 537 A, in which they were confirmed to be the following:**

- 1) The personal circumstances of the accused;
- 2) The seriousness of the offence;
- 3) The interests of society.

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- **Apart from these factors, one also needs to consider the aims of sentencing before an appropriate sentence can be imposed. The sentence must have the following aims:**

- 1) Serve as a deterrent;
- 2) Be preventative;
- 3) Be retributive;
- 4) Be reformative.

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1 The personal circumstances of the accused

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Forfeiture

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The property or items subject to an order of forfeiture

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- The forfeiture of exhibits that were handed in at court during the trial whether a conviction was obtained or not (Section 34 of Act 51/77) and;

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- The forfeiture of an article to the State after a conviction was obtained. (Section 35 of Act 51/77)

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- "Any weapon, instrument or other article by means whereof the offence in question was committed or which was used in the commissioning of such an offence."

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- Firstly the aims of forfeiture. They are:
 - i. Removing the incentives to commit crime;
 - ii. Deterring persons from using property to commit crime;
 - iii. Neutralising property previously used to commit crime;
 - iv. Advancing the ends of justice by depriving those involved in crime of the use of that property.

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- In achieving these objectives, the focus is:
 - not on the guilty state of mind of the wrongdoer but on the role played by the property in the commission of the crime;
 - the question is whether a functional relationship has been established between the property and the crime.

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- There is however another example of asset forfeiture in terms of The Prevention of Organised Crime Act, Act 121 of 1998.

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What are the aims of asset forfeiture in terms of this Act?

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Who does it?

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How does it work?

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Criminal forfeiture

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Civil forfeiture

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Further examples of the active role played by prosecutors during sentencing:

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- "Any person convicted of an offence under this ordinance shall, subject to the provisions of subsection 2, be liable in the case of –
- (a) a contravention of section 29 or 44(1) involving an endangered wild animal, section 63(1) involving endangered flora to a fine not exceeding R100 000,00 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment, and to a fine not exceeding three times the commercial value of any endangered wild animal or carcass thereof or any endangered flora in respect of which the offence was committed".

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2. The seriousness of the offence

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Statistics

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- There are, however, numerous difficulties with regard to these statistics:

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The benefits of correctly kept and presented statistics are the following:

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Evidence about potential damage to the environment

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- 34(1): "Whenever any person is convicted of an offence under any provision listed in Schedule 3 and it appears that such person has by that offence caused loss or damage to any organ of state or other person, including the cost incurred or likely to be incurred by an organ of state in rehabilitating the environment or preventing damage to the environment, the court may in the same proceedings at the written request of the Minister or other organ of state or other person concerned, and in the presence of convicted person, inquire summarily and without pleadings into the amount of the loss or the damage caused.
- 34(2): Upon proof of such amount, the court may give judgement therefore in favour of the organ of state or other person concerned against the convicted person, and such judgement shall be of the same force and effect and be executable in the same manner as if it had been given in a civil action duly instituted before a competent court".

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- 34(3): "Whenever any person is convicted of an offence under any provision listed in Schedule 3, the court convicting such person may summarily enquire into and assess the monetary value of any advantage gained or likely to be gained by such person in consequence of that offence and, in addition to any other punishment imposed in respect of that offence, the court may order the award of damages or compensation or a fine equal to the amount so assessed".

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- 34(4): "Whenever any person is convicted of an offence under any provision listed in Schedule 3, the court convicting such person may, upon application by the public prosecutor or another organ of state, order such person to pay reasonable costs incurred by the public prosecutor or another organ of state, order such person to pay reasonable costs incurred by the public prosecutor and the organ of state concerned in the investigation and prosecution of the offence".

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3. The interests of society

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Aims of sentencing

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How to present a section 105 A plea and sentence agreement in court

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- The court must then ask questions to satisfy itself that the agreement was reached after:
 - i. consultation with the person in charge of the investigation (sec 105 (4) (ii));
 - ii the complainant was afforded the opportunity to make representations should the complainant be dissatisfied with the contents of the agreement or any condition relating to compensation or the rendering of a specific benefit to the complainant (sec 105 A (4)(ii)).
- The consultation with the investigating officer may be dispensed with if the prosecutor is satisfied that such a consultation could –
 - (a) cause substantial prejudice to the prosecution, the accused or the complainant;
 - (b) adversely affect the administration of justice.

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- **“If the court is satisfied that the agreement complies with the requirements of subsections (1)(i) and (1)(b)(iii), the court shall require the accused to plead to the charge and order that the contents of the agreement be disclosed in court”.**

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- **After the agreement has been disclosed, the court shall question the accused to determine whether : (section 105 A (6)(a)**
 - i. he or she confirms the terms of the agreement and the admissions made in the agreement;
 - ii. he or she admits the alleged facts;
 - iii. the agreement was entered into freely and voluntarily without any undue influence.

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- **The contents of the 105 A agreement. There is no prescribed form for the agreement but it must contain the following:**
 - i. the charge;
 - ii. the admissions by the accused;
 - iii. the facts agreed upon;
 - iv. aggravating and mitigating factors;
 - v. the personal circumstances of the accused as well as previous convictions, if any;
 - vi. the sentence
 - vii. any property to be forfeited must be dealt with as well.

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