the latter was a fixed period. Similarly, ss (1)(b) provides for imprisonment and detention for a period not exceeding 18 months, while ss (1)(a) provides for a period of imprisonment without qualification. The inference it was considered should be drawn was that the period in ss (1)(a) was compulsory and the trial court had no discretion.

The legislature, it may be presumed, had something in contemplation when it used different wording in ss (2)(a) and (b), but it is by no means clear that one should infer that the intention in ss (1)(a) was to prescribe a mandatory sentence. In the first place, this would be an extremely obscure and oblique way of indicating an intention which, affecting as it does the liberty of the subject one could legitimately expect to be stated in clear and unmistakable terms. In the second place, it is

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unlikely that the legislature could have intended in this indirect way to specify a type of sentence which, if it was not without precedent, would be extremely unusual. Moreover an intention to circumscribe the discretion of the court in a matter of punishment is not readily to be inferred. For reasons which have already been mentioned, the words "whichever is the longer" in s 126 A(1)(a) do not support the conclusion that the subsection prescribes a mandatory sentence. In the result, while s 126 A(1)(a) prescribes a maximum period of imprisonment, there is no sufficiently cogent reason to infer that it was the intention of the legislature that that should also be the minimum period. There being no prescribed minimum sentence the provisions of s 283(1) of the Criminal Procedure Act are of application. It follows that s 126 A(1)(a) of the Act has not deprived the court of its discretion

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to impose an appropriate sentence.

In terms of s 297 (1)(b) of the Criminal Procedure Act, 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 suspend the whole or any part of any sentence imposed by it. As s 126 A(1)(a) of the Act does not, in my view, prescribe a minimum sentence the provisions of s 297(1)(b) of the Criminal Procedure Act are applicable to both matters under consideration. There are no provisions in the Act which either expressly or by necessary implication (assuming this to be possible) exclude the provisions of s 297(1)(b). In determining whether or not it would be appropriate to suspend the whole or any portion of a sentence the court would need to have regard, inter alia, to the relevant considerations affecting sentence to which I

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have already referred, save that s 126 A(6) would not apply. That section is only of application where the full period of any sentence of imprisonment which has been imposed, has been served. A wholly or partially suspended sentence will not exempt the person concerned from liability to render service in terms of the Act. There is nothing in the wording of s 126 A(7) which precludes suspension. That section presupposes that the person concerned is serving some period of imprisonment. Its provisions will apply to a partially suspended sentence, but are clearly not of application in the case of a totally suspended sentence. Where a sentence, or part thereof, is suspended, great care will have to be taken when formulating the conditions of suspension, lest inappropriate conditions defeat the very purpose of suspension. Where a person steadfastly refuses to

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render military service on the grounds of conscience, and is prepared to undergo incarceration for the sake of his convictions, a condition of suspension (assuming suspension to be appropriate in such circumstances) that he renders military service or does not again contravene s 126 A(1)(a) of the Act would serve no purpose. These would be usual conditions of suspension, but the fact that they are inappropriate would not per se render suspension impermissible. The court could suspend any sentence, or part thereof, on other appropriate conditions, including the condition that the person concerned renders community service.

In view of the conclusion to which I have come that s 126 A(1)(a) does not prescribe a mandatory sentence it is not necessary for me to consider whether, if it did, it would have been competent to suspend such sentence or any portion thereof.

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In the result, both appeals must succeed. The sentences imposed upon Toms and Bruce accordingly fall to be reconsidered in the light of the judicial discretion which exists in regard to the imposition of sentence. In the case of Bruce, his counsel requested that in the event of his appeal being successful, his sentence should be set aside and the matter remitted to the trial magistrate to reconsider his sentence afresh. In my view this would be the appropriate course to follow. In the case of Toms, his counsel suggested that this Court should determine an appropriate sentence. The evidence reveals Toms to be a highly principled man of impressive qualities, not least of which is his sensitivity to the suffering of his fellow man, in whose service he so resolutely and compassionately stands. Because he has already served 9 months' imprisonment, and because he clearly does not

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merit imprisonment in excess of that period, I agree with his counsel's suggestion that his sentence should be reduced to that period. From this it must not be inferred that I consider 9 months' imprisonment to have been the appropriate sentence for Toms. It is merely the sentence which the exigencies of the situation dictate. A lesser sentence may well have sufficed had the trial magistrate been appreciative of the fact that he had a discretion in regard to sentence. I express no firm view on the matter.

The appeals succeed. The following orders are made:

1) In the case of Toms, his sentence is set aside, and there is substituted in its stead a sentence of 9 months' imprisonment;

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2) In the case of Bruce, his sentence is set aside, and the matter is remitted to the trial court to reconsider afresh the question of an appropriate sentence.

J W SMALBERGER

JUDGE OF APPEAL

NICHOLAS, AJA - concurs

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matters of:

139/89

IVAN PETER TOMS..... Appellant

and

THE STATE..... Respondent

and

289/89

ROBERT DAVID BRUCE..... Appellant

and

THE STATE..... Respondent

CORAM: CORBETT CJ, BOTHA, SMALBERGER, KUMLEBEN JJA et NICHOLAS AJA.

HEARD: 27 February 1990

DATE OF JUDGMENT: 30 March 1990

J U D G M E N T

Corbett.

CORBETT CJ:

I have had the opportunity of reading the judgments prepared in this matter by my Brothers Botha and Smalberger. As the divergent views expressed in those judgments indicate, the issue as to whether or not sec 126A(1)(a) of the Defence Act 44 of 1957 prescribes a mandatory sentence of imprisonment is a difficult and finely balanced one. After careful and anxious consideration, and not without some hesitation, I have come to the conclusion, broadly for the reasons stated by Smalberger JA, that it does not.

Such a mandatory sentence of imprisonment would, I believe, be unique in the annals of the administration of criminal justice in this country. There is, of course, precedent for the statutory imposition of minimum prison sentences - in his judgment Smalberger JA refers to a number of these - but in these instances there is provision also

for a maximum and within the range created by the minimum and maximum the Court retains to a certain extent a sentencing discretion. Even so the imposition of a mandatory minimum prison sentence has always been regarded as an undesirable intrusion by the Legislature upon the jurisdiction of the courts to determine the punishment to be meted out to persons convicted of statutory offences and as the kind of enactment that is calculated in certain instances to produce grave injustice (see eg S v Mpetha 1985 (3) SA 702 (A) at 706 D - G). How much more repugnant to principle and justice would not a mandatory prison sentence be: one which was both a maximum and a minimum sentence; one which allowed of no exercise of the judicial discretic and one which had to be imposed willy-nilly, irrespective of the circumstances, the age, personality or character of the accused and irrespective of what justice required?

The Courts have many times in the past called

attention to the undesirability of mandatory minimum sentences and Parliament has often responded by subsequently eliminating them. When the form of punishment now under consideration was first introduced into sec 126A(1)(a) by sec 16 of Act 34 of 1983 (sec 2 of Act 45 of 1987 merely changed the wording in respects which are not material for present purposes) Parliament must have been aware of these matters. In the circumstances had it intended nevertheless to introduce the novelty of a mandatory prison sentence, a maximum and at the same time a minimum sentence, thus reducing the sentencing role of the Court, as it has been put, to that of a rubber stamp, I would have expected it to have done so in clearer language.

The phrase "liable to" in statutory provisions relating to sentence is a standard one, invariably used where no minimum punishment is intended and where the court is given a discretion as to sentence, subject to a statutory

maximum, usually indicated by a stipulated sentence preceded by words such as "not exceeding" or "not more than". Here the words "liable to" indicate that the accused, upon conviction, becomes exposed to the possibility of any sentence within the range of the court's competence. In other words, he becomes the subject of the court's permitted discretion in regard to punishment. The phrase "liable to' is also used in sentencing provisions which lay down a minimum sentence or both a maximum and a minimum sentence, the latter being indicated usually by a stipulated sentence, preceded by words such as "not less than". Here again the words "liable to" would indicate the accused's exposure to any sentence within the range defined by the minimu sentence and the maximum sentence, if any. This accords with my understanding of the ordinary meaning of the words "liable to", discussed in the judgment of my Brother Smalberger. And I do not think that the use of the phrase

"strafbaar met" in the Afrikaans text leads one to any different conclusion.

It follows from this that a statutory provision to the effect that an accused on conviction is "liable to" a specified punishment, without there being any indication whether this was a maximum or a minimum sentence, should be interpreted as giving the court the discretion to impose a sentence up to that specified; and this position is of course reinforced by the provisions of sec 283(1) of the Criminal Procedure Act 51 of 1977. Thus had sec 126A(1)(a) provided that a person was liable on conviction to a sentence of 5 years imprisonment, then it seems to me that the natural meaning of that provision would be that the Court could impose a sentence of imprisonment ranging up to 5 years; and in principle the fact that instead of 5 years the subsection lays down a formula for the calculation of the prison sentence specified does not appear to make any

difference.

In all the circumstances had the Legislature intended a mandatory sentence, calculated in accordance with the formula and otherwise invariable, I would have expected it to discard the words "liable to" and used a phrase such as "shall be sentenced to". It is true that in sec 126A(1)(b) and (2)(b), which deal with the offences of failing to report for different types of military service, the specified punishment of imprisonment or detention, as the case may be, is preceded by the words "not exceeding"; and it is primarily the absence of these words in sec 126A(1)(a) which has led my Brother Botha to the conclusion that this subsection provides for a mandatory sentence. While recognising the force of the arguments marshalled in his judgment, I am nevertheless of the view that the presence of these words in the other subsections referred to and their absence in sec 126A(1)(a) is not a sufficiently

clear indication of the Legislative intent to outweigh the factors mentioned in this judgment and in the judgment of my Brother Smalberger which point to the sentence not being a mandatory one.

As regards the power to suspend a sentence imposed under sec 126A(1)(a), I agree with Smalberger JA that the power accorded to the court by sec 297(1)(b) of Act 51 of 1977 has not been excluded. I have nothing to add to what he has said about this.

I accordingly concur in the judgment of Smalberger JA and in the orders made by him.

CORBETT CJ

/mb

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matters between:

1. Case No 139/1989

IVAN PETER TOMS Appellant

and

THE STATE Respondent

2. Case No 289/1989

ROBERT DAVID BRUCE Appellant

and

THE STATE Respondent

CORAM: CORBETT CJ, BOTHA, SMALBERGER, KUMLEBEN JJA et NICHOLAS AJA

HEARD: 27 FEBRUARY 1990

DELIVERED: 30 MARCH 1990

J U D G M E N T

KUMLEBEN JA/...

KUMLEBEN JA:

I agree with my Brother Botha that the sentence laid down in s 126A(1)(a) is a mandatory one. I do so with all the reluctance and disquiet expressed in his dissenting judgment. I do not, however, share the view that such sentence cannot be suspended.

S 297 of the Criminal Procedure Act 51 of 1977 ("the Criminal Code") provides for the suspension of a sentence. The two subsections which are for present purposes material, read as follows:

> "(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
>
> (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;"

and

"(4) Where a court convicts a person of an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion pass sentence but order the operation of a part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a)(i) of subsection (1)."

In paragraph (a)(i) of ss (1) the nature of the conditions which may be imposed are set out and include: (aa) the payment of compensation, (cc) "the performance without remuneration and outside the prison of some service for the benefit of the community", (gg) "good conduct" and (hh) a condition relating to "any other matter".

The fact that a mandatory punishment has been prescribed in s 126A(1)(a) of the Defence Act 44 of

1957 ("the Act") does not in itself in any way preclude the operation of sec 297(1) or 297(4): in terms they provide for suspension of the sentence imposed on a person convicted of "any offence". Whether a sentence may be wholly or only partially suspended depends upon whether a "minimum punishment" has been laid down in the enactment creating the offence. (One notes though, in passing, that in practice the distinction between these two forms of suspension need not be a substantial one : cf S v Hartmann, 1975(3) S.A. 532 (C) 537 G - H).

A minimum punishment and a mandatory one (in the sense that but one punishment is prescribed) are by definition two different things: the exercise of a discretion - albeit a restricted one - is implicit in the former, but prohibited by the latter. It is so

that in effect a mandatory sentence may be regarded as both a maximum and a minimum sentence but it is, in my view, more correct to describe it as neither. And I do not consider that the reference to a "minimum punishment" in ss (1) and (4) of s 297 is to be taken - contrary to the ordinary meaning of the phrase - to include a mandatory sentence.

S 352(1)(b) of Act 56 of 1955 ("the 1955 Criminal Code"), which existed unamended until its repeal and replacement in 1977 by s 297 of the Criminal Code, authorised the suspension of the whole or part of a sentence save in the case of a conviction of "an offence specified in the Fourth Schedule or an offence in respect of which the imposition of a prescribed punishment on the person convicted thereof is compulsory" and the Fourth Schedule included "any

offence in respect of which any law imposes a minimum punishment". (In the case of offences falling within these two categories provision was made for partial suspension - see s 352(2)(a)(i).) Thus, at the time s 352(1)(b) was enacted - and thereafter until it was repealed - a distinction between a "prescribed punishment" and a "minimum punishment" was recognised and drawn. All the indications are that at the time s 297 was enacted, and the language changed to omit any reference to a "prescribed punishment", no such mandatory punishment existed, or was envisaged in the future. S 329(2)(a) of the 1955 Criminal Code, which provided for compulsory whipping in the case of a conviction of certain offences, was replaced by s 292(1) of the Criminal Code, which made the imposition of the sentence of whipping discretionary. And, as pointed out in the judgment of Smalberger JA, no

instances of a prescribed sentence of imprisonment appear to have existed at the time s 297 was enacted and, it is fair to assume, none was contemplated. (The death penalty, though mandatory in certain instances, is self-evidently not a punishment susceptible to suspension and as obviously could never be described as a "minimum punishment".)

It thus appears that the reference to a "prescribed punishment" was omitted from s 297 not per incuriam, but advisedly. It is anomalous that such a punishment should in the result be capable of total suspension (unless prohibited by the enactment concerned) whereas a minimum punishment may be only partially suspended. However, this incongruity does not arise from a casus omissus in the Criminal Code but, as I have said, from the fact that a form of

punishment subsequently came into being which was not contemplated at the time the Criminal Code was enacted. In the circumstances, if this is seen to be a defect which is to be cured, it is for the Legislature to do so.

Thus, if the sentence in the instant case is capable of suspension, it can, in my opinion, be wholly suspended.

There is nothing said in s 126A(1), or elsewhere in the Act, which expressly precludes the right to suspend conferred in s 297. The critical question is whether the provisions of the Act impliedly do so. As the extract from Craies on Statute Law, cited in the judgment of my Brother Smalberger indicates:

"'Words plainly should not be added by

implication into the language of a statute unless it is necessary to do so to give the paragraph sense and meaning in its context.'"

Similarly Van Winsen J in S v Van Rensburg 1967(2) S.A. 291 (C) 294 D held that:

"(The) implication must be a necessary one in the sense that without it effect cannot be given to the statute as it stands."

(See too Taj Properties (Pty) Ltd v Bobat 1952 (1) S.A. 723 (N) 729 G.)

At the time the sentence for a contravention of s 126A(1)(a) was decided upon, one may readily assume that the Legislature was aware of the provisions of s 297 and that, in the absence of exclusion, it would apply to the mandatory sentence imposed. Moreover, in the very compilation of this section, attention was given to the question of suspension: S 126A(3)(b)(i) provides that "at the imposition in terms of this section of any sentence of imprisonment or

detention which has not been suspended in full; ...." (My emphasis). Had it been the intention that a sentence imposed in terms of s 126A(1)(a) should not be capable of suspension, it is, to my mind, highly improbable - in fact virtually inconceivable - that there would not have been an express exclusionary provision or, at the very least, that s 126A(3)(b)(i) would not have made the implied intention plain by restricting its provisions to convictions of offences created in s 126A other than those set out in ss (1)(a) and ss (2)(a).

In the past, when it was intended that a sentence should not be capable of suspension, saying so in express terms presented no problem. Thus, for instance, s 2(1) of the Terrorism Act 83 of 1967 created the offence of "participation in

terroristic activities" carrying a compulsory minimum prison sentence. In the realisation that, in the absence of any exclusionary provision, this sentence could be partially suspended in terms of s 352(2)(i) of the 1955 Criminal Code, the right to suspend was expressly excluded in terms of s 5(d) of the Terrorism Act. Similarly, when the statutory offence of sabotage was first enacted in terms of s 21(1) of the General Law Amendment Act 76 of 1962 and a compulsory minimum prison sentence laid down, its partial suspension was expressly prohibited by s 21(4)(f) of that Act. (S 21 of the General Law Amendment Act and the Terrorism Act have been repealed by s 73 of the Internal Security Act, 74 of 1982.)

In the light of s 297 of the Criminal Code, which in express terms authorises suspension, and the

past practice of excluding suspension in so many words in the case of a compulsory sentence, when such was the intention, the inference is, to my mind, a strong one that a mandatory sentence imposed in terms of s 126A (1)(a) can be suspended.

There are further considerations which lend support to this conclusion.

In the other judgments of this court in this matter the manifest purpose of s 126 A(1)(a) has been stressed. Its terms, aptly described as draconian, were intended as a far-reaching and effective deterrent against a refusal to do military service. The acknowledgment that such a sentence may be suspended does - or rather may - ameliorate the harshness of this punishment and pro tanto reduce its

coercive effect. But in my view certainly not to the extent that it can be said that, by implication, suspension was prohibited. Though capable of suspension, it remains a drastic punishment and a substantial deterrent. A would-be objector would inevitably realise that there could be no assurance that the compulsory sentence would in fact be suspended wholly or partly; would have no certainty as to the nature, duration or rigour of the conditions of suspension which may be decided upon; and would know that non-compliance with any of them could result in the full period of compulsory imprisonment having to be served. Viewed more positively and humanely, there appear to be no good reasons for supposing that the Legislature did not appreciate that in a fitting case the suspension of the sentence, subject to appropriate conditions, would be in the interests of the offender

and of the community and thus conform to accepted standards of justice and fairness.

Mr Viljoen, who appeared for the respondent in the Toms appeal, pointed out in argument that ordinarily a condition of suspension is that the offence be not repeated and that such a condition in the present context would not be appropriate. This fact, so it was submitted, is an indication that suspension was precluded. But, as appears from the nature of the conditions of suspension foreshadowed in s 297(1)(a), a court has been given a wide discretion to impose "one or more" conditions, "service for the benefit of the community" and "good conduct" being two of those mentioned. To argue that because one such condition is inappropriate, suspension was not contemplated - in fact excluded - does not appear to me to be sound reasoning. In the ordinary run of

convictions for common law offences instances arise where there is no need for a "deterrent condition" (though one is often added for good measure) but good cause exists for the imposition of a condition of some other kind, for instance, payment of compensation or community service. This serves to confirm that a "deterrent condition", though a frequent condition of suspension, is not an essential one. Finally, in this regard, it should be mentioned that the amelioration of the harshness of a sentence is one of the recognized and important purposes of suspension of a sentence (cf Du Toit "Straf in Suid-Afrika" 363).

Mr Viljoen further relied on s 126A(7), arguing that it afforded an offender the opportunity of avoiding the consequences of the mandatory prison

sentence, and that for this reason provision in addition for the suspension of such is unnecessary and out of place. I fail to see how this subsection bears upon the question. It applies to an objector who is actually serving a prison sentence and confers upon him the option of terminating its operation by substituting military service. The question of suspension is a separate and anterior one to be decided by the judicial officer concerned and not by the sentenced offender. S 126A(6) is likewise of no assistance to the respondent. As pointed out in the judgment of Smalberger J.A., an objector, whether he receives a wholly or partially suspended sentence, will not have "served the full period imposed" and would therefore not be exempt from liability to render military service in terms of the Act.

S 72 I, which was inserted in the Act by s 9

of Act 34 of 1983, introduced a new dispensation for persons objecting to military service on religious grounds. Should the board of exemption decide to grant such dispensation,the objector is to be classified within one of the three categories referred to in s 72 D, the third of which makes provision for community, in lieu of military, service. This form of substituted service applying to one group of religious objectors corresponds to a condition of suspension which, one may suppose, would be a most appropriate one, assuming suspension to be permitted. This, so the argument runs, is a reason for concluding that a sentence imposed in terms of s 126A(1)(a), by implication, may not be suspended. Had s 72 I been initially included in the Act, this would have been a consideration - not necessarily an important or decisive one - to be taken into account in deciding whether suspension is prohibited. But the fact that it was subsequently

introduced robs this submission of what weight it might otherwise have had. In Kent, N.O. v South African Railways and Another, 1946 A.D. 398 at 405, this court held:

> ".... that Statutes must be read together and the later one must not be so construed as to repeal the provisions of an earlier one, or to take away rights conferred by an earlier one unless the later Statute expressly alters the provisions of the earlier one in that respect or such alteration is a necessary inference from the terms of the later Statute. The inference must be a necessary one and not merely a possible one. In Maxwell's Interpretation of Statutes, the principle is, stated as follows (4th ed., p. 233):-
>
> > 'The language of every enactment must be so construed as far as possible as to be consistent with every other which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a Statute by construction when the words may have their proper operation without it.'"

This dictum is in point: it applies a fortiori to an amending statute of the nature of the one in question. If it is borne in mind that the provisions of s 72 I

were subsequently introduced, it follows that the position was not that the Legislature initially intended harsher treatment of conscientious objectors but that it subsequently saw the merit of other alternatives - perhaps, though not necessarily, more lenient ones - in the case of religious objectors.

In the majority judgment certain principles relating to the interpretation of statutes, and some important presumptions, applicable in case of doubt or ambiguity are comprehensively discussed. I refer particularly to the presumption that the Legislature did not intend harsh and inequitable results or an interference with the court's jurisdiction: in casu the latter would apply to the jurisdiction conferred on a court by sec 297 to suspend all sentences. If one supposes in favour of the respondent - contrary to the

view I hold - that doubt exists as to whether suspension was impliedly prohibited, certain of these principles and presumptions would serve to decide the issue in favour of the appellants.

In the result I consider that a sentence imposed in terms of s 126A(1)(a) may be wholly suspended and to that extent I would allow the appeals. However, in the light of the decision of the majority of the court, it would serve no purpose for me to discuss the order to be made in each on the basis of my conclusion.

M E KUMLEBEN JA

LL

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matters between:

1. Case No 139/1989

IVAN PETER TOMS Appellant

and

THE STATE Respondent

2. Case No 289/1989

ROBERT DAVID BRUCE Appellant

and

THE STATE Respondent

CORAM: CORBETT CJ, BOTHA, SMALBERGER, KUMLEBEN JJA et NICHOLAS AJA

HEARD: 27 FEBRUARY 1990

DELIVERED: 30 MARCH 1990

JUDGMENT

BOTHA JA:-

I have had the advantage of pondering the judgment of my Brother SMALBERGER. With respect, I am constrained to disagree with him. In my judgment the appeals must fail.

The relevant provisions of the Defence Act (44 of 1957) are quoted in the judgment of my Colleague. I do not propose to repeat them here.

The main question to be decided is whether the Legislature intended to preclude a court sentencing a person convicted under section 126A(1)(a) of the Act from exercising a discretion to impose a sentence of imprisonment for a period which is less than the longer of the two alternative periods of imprisonment provided for in the section. After anxious deliberation, there is no doubt in my mind that the Legislature did so intend.

The intention of the Legislature to prescribe a mandatory sentence in section 126A(1)(a) is manifested by the absence of the words "not exceeding"

before the periods of imprisonment provided for, in striking contrast with the presence of those words before the period of imprisonment prescribed in section 126A(1)(b), a contrast which is rendered the more conspicuous by its repetition in paragraphs (a) and (b) of section 126A(2), and which I would say becomes glaring when it is found reflected yet again in sections 72I(1) and (2)(a), as opposed to section 72I(2)(b). The sections mentioned all have this in common, that they lay down the punishment applicable in respect of various kinds of non-performance of the different kinds of compulsory service provided for in the Act. On that score, the recurring contrast between sentences of imprisonment or detention for a period "not exceeding" a stated duration, and sentences of imprisonment or detention for a stated period which is not qualified by those words, leads inexorably to the conclusion that in those instances where the words "not exceeding" do not appear, they were omitted

deliberately by the Legislature, in order to achieve some particular object.

It is to be observed that in my view of the matter the pattern discernible in the provisions mentioned above, which evinces a particular intention on the part of the Legislature, exists solely in relation to the presence or the absence of the words "not exceeding". It is not related to the kind of non-performance of service which is involved. It so happens that in paragraphs (a) and (b) of both subsections (1) and (2) of section 126A a distinction is made between a refusal to render service and a failure to report therefor, which coincides in each case with the absence and the presence of the words "not exceeding", but on my approach to the matter that distinction is neither here nor there. The compelling index to the Legislature's intention consists in the mere contrasting of the omission of the words "not exceeding" in subsections (1)(a) and (2)(a) with their

inclusion in subsections (1)(b) and (2)(b). On that basis, the impact of the contrast is not detracted from at all by the lumping together of a refusal and a failure to render service, or to comply with an order or duty in relation thereto, in sections 72I(1) and (2)(a) and (b). On the contrary, the repetition of the contrast in the last-mentioned provisions serves to fortify, conclusively, its impact.

If it is clear, then, as I consider it to be, that the Legislature deliberately omitted the words "not exceeding" from section 126A(1)(a), with what object did it do so? The answer is surely obvious. When the Legislature prescribes punishment in the form of imprisonment, the use of the words "not exceeding" in relation to a particular period of imprisonment mentioned connotes not only that the stated period shall be the maximum that may be imposed, but also, as an implicit corollary, that the sentencing court shall have the power, in its discretion, to impose any lesser

period of imprisonment than the stated maximum. **Therefore, when the Legislature in its formulation of a** prescribed punishment of imprisonment deliberately excises from it the words "not exceeding" in relation to the stated period of imprisonment, it must necessarily intend to deprive the sentencing court of the power and of any discretion to impose a period of imprisonment which is less than the period stated. To my mind this conclusion is a matter of simple logic which is so compelling that there is no escape from it.

It was nevertheless argued on behalf of the appellants that there were other possible explanations for the omission of the words "not exceeding" from section 126A(1)(a). So, it was suggested that the section was merely "n voorbeeld van onbeholpe wetsopstelling" (per HOEXTER JA in Boland Bank Bpk v Picfoods Bpk en andere 1987 (4) SA 615(A) at 632B/C). This suggestion must be rejected as fanciful, in view of the pattern of contrasts pointed out above: it is

quite inconceivable that bad draftsmanship could have resulted by coincidence in a series of provisions each containing the antithesis in question. Next, it was suggested that the Legislature's intention was merely to emphasize that the offence under paragraph (a) of section 126A(1) was much more serious than the one under paragraph (b), and that the same applied to paragraphs (a) and (b) of section 126A(2) (and presumably also to sections 72I(1) and (2)(a) as opposed to section 72I(2)(b)). Of this suggestion I propose to say no more than that it is so fanciful as to be wholly without merit.

Then it was contended that the inclusion of the words "not exceeding" in section 126A(1)(a) would have resulted in an awkwardness of language, which the Legislature presumably wished to avoid. I do not agree. In my opinion the words "not exceeding" could be inserted in the two places where they would be appropriate in the section, without any difficulty and

without causing any straining of, or awkwardness in, the language as it stands. Nor am I able to perceive any incongruity in language in the use together of the phrases "not exceeding" and "whichever is the longer". If there were any incongruity, it would be notional, rather than linguistic, and on that footing it would militate against the argument advanced on behalf of the appellants, not in favour of it. Indeed it would be supportive of the reliance placed in the reasoning of the Courts a quo on the words "whichever is the longer". In my view, however, nothing turns on the words "whichever is the longer", nor on the word "only" where it occurs in paragraph (b) of section 126A(1). (It may be mentioned in passing, though, that the word "only" in paragraph (b) of subsection (1) might well gain greater significance as a factor militating against the argument for the appellants, when it is considered in conjunction with its counterpart, the word "only" in paragraph (b) of subsection (2), having

regard to the less complex context of the latter subsection. It is not necessary for my purposes, however, to pursue this line of thought.)

In argument on behalf of the appellants much was made of what was termed the ordinary and literal meaning of the words of section 126A(1)(a) in their immediate context. One must tread warily here, in order not to confuse the concepts of language, context, and interpretation. As a matter of language, the only words in the section calling for attention are the words "liable to". Linguistically, as the dictionaries show, when it is said that a person is "liable to" something, the phrase "liable to" is colourless, or neutral, as to the question whether the thing to which it is coupled is to follow necessarily, or merely as a possibility. In ordinary parlance, when a person is said to be "liable to" punishment, the question is left open whether he is susceptible to punishment as a possibility, or whether he will

necessarily suffer punishment. The position is no different, in a linguistic sense, when the punishment concerned happens to be of the kind that is meted out in a court of law. Consequently, a statement that a person is "liable to" imprisonment for a stated period provides no clue, purely as a matter of language, as to whether the stated period of imprisonment is intended to be a mandatory sentence or a discretionary sentence.

It follows, in my view, that there is no room in the present case, with reference to section 126A(1)(a), for invoking the rule of interpretation that the words of a statute are to be given their ordinary and literal meaning, unless sound reason appears to the contrary. The truth is that the ordinary and literal meaning of the words, as such, does not furnish any answer to the question which falls for decision. Accordingly, the statement that the words "liable to" in the section would normally denote a burden of punishment and not that the burden is

mandatory or compulsory, cannot, in my respectful opinion, be founded on mere linguistic treatment of the section; nor can it properly be said, with respect, that such statement is in conformity with what the words of the section, in their primary sense, signify, or with the prima facie meaning of the section. The statement in question, as I see it, can rest only on a process of reasoning which has already left the linguistic treatment of the section behind, and which has in fact proceeded two steps beyond it. The first step is to take into account the immediate context in which the words "liable to" appear, viz in conjunction with imprisonment for a stated period, and the second step, which, I consider, must needs be taken simultaneously with the first, is to superimpose on the words as read in their context two rules of interpretation in aid of the result arrived at, the first being the presumption against legislative interference with the cherished principle of the

unfettered discretion of the courts in relation to sentence, and the second being the canon of strict construction of penal provisions.

The considerations mentioned in the preceding paragraph may be further illustrated as follows. The words "liable to", in relation to criminal punishment, are not inappropriate to a form of punishment which is mandatory. So, it is not inept to say that a person over the age of 18 years, who has been convicted of murder without extenuating circumstances, is "liable to" be sentenced to death. The Afrikaans word "strafbaar" is frequently used in the same way; the person in my example is "strafbaar met die dood". On the other hand, "liable to" may also denote a discretionary form of criminal punishment, as in relation to imprisonment for a period not exceeding a stated duration. And the same applies to the Afrikaans "strafbaar met", e g "gevangenisstraf vir 'n tydperk van hoogstens .....". When VAN DER WALT J, in

S v Nel 1987 (4) SA 950(W) at 958E, said that "straf-baar met" connoted an empowering provision and not a mandatory one, he could not, with respect, have intended to lay down a definition of the meaning of the words as a generalization, divorced from the context in which he was considering them; and when he referred to "enigeen met 'n aanvoeling vir Afrikaans" he must have had in mind such a person who was also au fait with the rules of interpretation relating to the courts' discretion in the matter of punishment and to penal provisions. In other words, he was dealing, not simply with the meaning of the language, but, via context, with the interpretation of it, in the light of well-known canons of construction.

In the present case, the most important feature of the wording of section 126A(1)(a), in my view, is the omission from it of the words "not exceeding". For the reasons already given, I have found that the omission was deliberate. That being

so, the only importance of the words actually used in the section is that, in their ordinary and literal meaning, they are apt to give expression to the notion of a mandatory sentence of imprisonment for the longer of the two alternative periods stated. It is not possible to imagine that the Legislature had any other object in mind when it deliberately omitted the words "not exceeding" from the section. In consequence, there is simply no room for subjecting the words of the section to a process of interpretation by means of applying the rules of interpretation relating to the courts' discretion in respect of sentencing, penal provisions, or the like.

On this approach, I do not, with respect, agree with the reasoning that, because a mandatory sentence is not provided for expresse et totidem verbis (as it is said), therefore it can only be found in the section by means of interpretation by implication. The words used are, in their ordinary and literal meaning,

capable of denoting either a discretionary or a mandatory sentence. Accordingly, one might as well say that, because a discretionary sentence was not expressly provided for, therefore it can only be found there by way of implying, notionally if not literally, the words "not exceeding" in the section. But those are the very words which, as I have found, have been omitted with deliberate intention. One would therefore be putting back what the Legislature has chosen to leave out. On my approach, one would simply select from the two possible meanings available, that one which is in conformity with the pointers to the Legislature's intention, with which I have already dealt. A contrary result can only be achieved by ignoring such pointers and by subjecting the section, in isolation, to a process of interpretation, invoking in aid various canons of construction.

In my view it would be wrong to take section 126A(1)(a) as a starting point, standing by itself, to

assign a meaning to it by invoking the aid of rules of interpretation, and then to consider whether the result arrived at is negatived by sufficiently cogent indicia to the contrary elsewhere in the Act. To take such a course, in the search for the intention of the Legislature, is to enter upon a cul-de-sac, for it in fact fails to reach a point where the intention of the Legislature is made to appear. In this regard I am obliged to point out, with respect, that in the judgment of SMALBERGER JA it is held, with reference to section 126A(1)(a), that it does not provide for a mandatory sentence, "whatever the legislature may have intended"; and it is said, with reference to subsections (2)(a) and (b), that "(t)he legislature, it may be presumed, had something in contemplation when it used different wording", but that it did not intend to prescribe a mandatory sentence. In this way the vital question as to the intention of the Legislature in deliberately using different wording in subsections

(2)(a) and (b), is, with respect, simply not addressed and left in the air. In this way, too, a doubt is conjured up in regard to the Legislature's intention which, with respect, appears to me to be wholly contrived and artificial. It can only exist in a vacuum which is created by first interpreting section 126A(1)(a) in a certain way, namely as providing for a discretionary sentence. It disappears at once if, on taking a global view of all the relevant provisions, it is found that section 126A(1)(a) prescribes a mandatory sentence.

In support of the postulate of a doubt as to the intention of the Legislature, reliance is placed on the provisions of sections 72I(1) and (2)(a). It is said that, because a refusal and a mere failure to render the service involved are lumped together in those subsections, the Legislature would not have intended the sentences prescribed to be mandatory. With respect, I do not agree. As pointed out earlier,

those subsections display the same conspicuous absence of the words "not exceeding", which do appear in subsection (2)(b), as is the case with paragraphs (a) and (b) of sections 126A(1) and (2). That the Legislature contemplated mandatory sentences in the context of the provisions of section 72I is abundantly clear from the explicit provisions of section 72I(3)(b). The ostensible anomaly of treating a refusal and a failure to render service together in sections 72I(1) and (2)(a) is not, in my opinion, of any real significance. In the first place, the distinction which is to be found in paragraphs (a) and (b) of section 126A(1) and (2) is not simply between a refusal and a failure to render service; it is between a refusal "to render ..... service" when called up and a failure "to report therefor"; obviously the latter offence is of far less gravity than the former. By contrast, sections 72I(1) and (2)(a) both deal with a refusal or a failure "to render the service" concerned;

the two kinds of offences are accordingly much more closely allied to each other. In the second place, there is no provision in section 126A for the suspension of any part of a sentence imposed under subsections (1)(a) or (2)(a) (cf section 126A(7)), a matter to which I shall return presently. By contrast, section 72I(5) makes express provision for the suspension of sentences imposed under subsections (1) and (2)(a), so that the possibility of more lenient treatment of an offender in respect of a failure of lesser seriousness is adequately catered for. In these circumstances I find no warrant in sections 72I(1) and (2)(a) for casting doubt on the intention of the Legislature. On the contrary, such intention, as I stated earlier, I consider to be fortified by those sections, when read with the contrasting wording of section 72I(2)(b).

Some other points were raised in argument on behalf of the appellants, with which I do not consider