

*A 133/2012*  
**IN THE NORTH GAUTENG HIGH COURT, PRETORIA  
(REPUBLIC OF SOUTH AFRICA)**

**Case no: A** 303 **2011**  
**Date delivered** 2-3-2012

TO: MAGISTRATE: RITAVI

High court ref no. 1292  
Magistrate serial no. 41/2011  
Case no.A 303 /2011

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE (YES/NO)	
(2) OF INTEREST TO OTHER JUDGES	NO
(3) REVISED	

*2014/04/29*

In the review matter:

STATE v MR MASILODAVID SENYOLA

---

**REVIEW JUDGMENT**

---

**LEGODI J,**

When this matter was initially laid before me on automatic review, I raised the following issues with the Director of Public Prosecutions:

- "1. *The accused appeared in the Magistrate's Court Ritavi charged with contravention of a maintenance order.*
2. *His plea of guilty was changed to that of not guilty,*
3. *The state, after the plea was changed, decided to close its case after having handed in proof of the court order and amount outstanding.*
4. *The state elected to do this, despite the fact that the accused had indicated as a defence that, he had been paying direct to the complainant or beneficiary and that he was made, to believe that the maintenance order would be cancelled or that it would not be acted upon.*
5. *After the state had closed its case, the accused took the witness stand and repeated his defence. He was not cross-examined on his defence, neither did the court cause the complainant or beneficiary to be called.*
6. *Can it be said that the state had proved beyond reasonable doubt that the accused had the necessary intention to disobey a court order?*
7. *It looks like the trial court took a different view, that is, once non-compliance with the court order was proved, no other defence in the circumstances of the case could have been raised. Was this approach correct?"*

I am greatly indebted to the comments made by the Director of Public Prosecutions (DPP) in response to the issues raised above. It is recommended by the DPP that the conviction and

sentence be set aside and the matter be remitted to the Magistrate to convert the proceedings into an enquiry. I agree.

The accused was arraigned in the Magistrate's court for the district of Ritavi on a charge of failure to comply with a maintenance order. The allegations were that from the 29 August 2008 to 8 September 2011, the accused did unlawfully and intentionally fail to comply with a maintenance order dated the 23 August 2008, in terms of which he was ordered to pay R800.00 per month. The accused is said to have been in arrears in the amount of R20 600.00.

The accused whilst seeking to plead guilty to the charge, indicated that the complainant used to receive some money from him and that although he paid some money to the Magistrate's office, he used to support the child without paying directly to the office.

The complainant is said to have told him that she wanted to cancel the maintenance order. Thereafter she sent the child to collect money from him at his place of employment. He did not know that the complainant did not cancel the maintenance order.

His plea of guilt having been changed to that of not guilty, the state closed its case without leading evidence. This was after the prosecutor had handed in proof of the court order.

The latter was never in issue. The accused took the witness stand and repeated what he said during the plea stage. Thereafter, he was convicted as charged and sentenced to one year imprisonment wholly suspended on certain conditions.

I was concerned that not all the elements of the offence have been proved beyond reasonable doubt, and in particular an intention to disobey the maintenance order. Secondly, if indeed the accused had paid certain amounts or money towards maintenance of his child *in lieu* of the court order, that could be an aspect to consider when assessing the arrear amounts of maintenance in terms of the court order.

As also highlighted by the Director of Public Prosecutions, section 31 (2) of the maintenance Act provides that before the defence is raised in any prosecution for an offence under section 31, that any failure to pay maintenance in accordance with a maintenance order was due to lack of means on the part of the person charged, he or she shall not merely on the grounds of such a defence be entitled to an acquittal if it is proved that the failure was due to his or her unwillingness to work or misconduct.

What is provided for under subsection 2 as indicated above, has to be distinguished from the facts of the present case. The accused did not plead inability to pay, but rather that he had been paying direct to the complainant or to the child and that he had

been made to believe that the maintenance order would be cancelled.

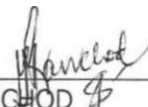
In the circumstances of the defence raised, the proceedings for contempt of court or failure to comply with maintenance order should have been converted into an enquiry.

Consequently, I would make the order as follows:

1. The conviction and sentence herein are set aside.
2. The criminal proceedings are hereby converted into a maintenance enquiry.
3. The matter is hereby remitted to the Magistrate to proceed with a maintenance enquiry as envisaged in paragraph 2 of this order.

  
M F LEGODI  
JUDGE OF THE HIGH COURT

I AGREE; IT IS SO ORDERED

  
N RANGHOD  
JUDGE OF THE HIGH COURT