

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION. PRETORIA)

Date: 28 March 2014

Case number: A211/14

Magistrate

Lydenburg

Case number: LB114/2013

High Court reference number: 1096

THE STATE VERSUS S[...] A[...] M[...]

REVIEW JUDGEMENT

Pretori us J

[1] The accused was convicted of contravening section 31(1) of Act 99 of 1998, that he failed to pay maintenance in an amount of R1500.00 per month to his wife. The accused pleaded guilty, but due to his plea explanation the plea was changed to not guilty. Mrs M[...] M[...] testified that there was a maintenance order granted on 2 May 2012, with the accused's consent. The accused failed to pay maintenance at all and was in arrears of R22,500.00. The accused elected not to give evidence or to call witnesses.

[2] At the time of conviction he was employed earning R11,000.00 per month. There was no enquiries from the magistrate to determine the accused's financial position. In **S v M[...] 2001 (2) SACR 123 (TPD)** Stegmann J found at paragraph 91:

“Of course, s 40(2) (a) merely empowers the court to conduct such a summary enquiry: it does not

oblige the court to do so. Nevertheless, the discretion whether to exercise the power or not is one to be exercised judicially. The object of the power to hold a proper summary enquiry into the questions surrounding the payment of arrears of maintenance is to enable the facts relevant to those questions to be brought to light, and thereby to assist the court to do justice, in respect of the question of arrears, between the person with the obligation to maintain a dependant and the dependant who is entitled to be maintained(Court's emphasis)

[3] and at paragraph 93:

“The court can only exercise that discretion in the light of the facts of each particular case that comes before it. Nevertheless, I would suggest that it must be a fair generalisation to say that before any order for the payment of arrears of maintenance is made, such a summary enquiry ought to be held whenever there is room for doubt that the convicted person has the assets from which the arrears, or a substantial part of them, could be recovered by execution in terms of s 40(1) or (2)(b); and whenever there is room for doubt that the convicted person has the surplus income from which payment of the arrears, or a substantial part of them, by regular instalments, could be sustained(Court's emphasis)

[4] The court merely ascertained how much the accused earned and that he had one child. A court has a duty, specially where an accused is unrepresented, to enquire into the financial position of the accused under these circumstances. The court only enquired from the accused how much he could pay as maintenance and for the arrears without considering to invoke the provisions of section 40(2)(a) of the Act. Section 40(2)(a) provides for the court to hold a summary enquiry into the means of the accused and the needs of Ms M[...] and her child. There is no indication on the record at all that the magistrate contemplated holding an enquiry in terms of section 40(2)(a).

[5] I referred the case to the Director of Public Prosecutions for their comment, after I had received the comments from the magistrate on 10 January 2014. The magistrate took a month to reply to the query. In his reply he once more emphasized the interest of the community to such an extent that the accused's interests were not fully considered or no effort was made as to enquire what both the accused's and the complainant's position were.

[6] In this instance it was quite clear from the scant information the magistrate had, that the accused could not pay a fine in these circumstances and that it would inevitably lead to imprisonment as the accused made it clear that he did not have sufficient funds to pay a fine. This court was concerned that in this instance, where the fine imposed was excessive that the accused would be imprisoned.

[7] Due to the fact that accused was sentenced on 2 October 2013 and the review was only received at this office, after the magistrate had replied to the queries on 10 January 2014 and the Director of Public Prosecutions took a further two months until 11 March 2014 to deal with the matter, the six months imposed have already passed. The system had failed the accused and the tardiness by both the magistrate and the director of public prosecutions to deal with these queries expeditiously is not in the interest of justice.

[8] Even if the finding of this court is of academic interest at this stage, the sentence may play a role if the accused is convicted of a similar offence and it will be regarded as a previous conviction.

[9] I make the following order:

1. The sentence imposed on 2 October 2013 is set aside;
2. The accused is sentenced to pay a fine of R10,000.00 (ten thousand rand) or three months imprisonment wholly suspended for a period of 3 years, on condition that the accused is not convicted of contravening section 31(1) of Act 99 of 1998, failure to pay maintenance, committed during the period of suspension.

C. Pretorius

Judge of the High Court

I agree,

T.J. Raulinga

Judge of the High Court