

IN THE SUPREME COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A67/2008

DATE: 10 OCTOBER 2008

5 In the matter between:

THE STATE

versus

VICTOR MODISE

10 JUDGMENT

THRING, J

15 The appellant in this matter was personally served with a summons. It called on him to appear on the 18th April, 2007 in a magistrate's court sitting at the City Hall, Cape Town, to answer two charges of contravening regulation 18, read with section 89(1) and 89(6) of the National Road Traffic Act, No 93 of 1996, inasmuch as he was alleged first to have failed to
20 licence a certain motor vehicle of which he was the owner, and, secondly, to have failed to display an appropriate licence disc on the windscreen of the said motor vehicle.

On the appointed date the appellant failed to appear in the said court in answer to the summons, and a warrant for his arrest was duly issued.

5 On the 24th May, 2007 he appeared in the magistrate's court unrepresented for the purposes of a summary enquiry into his failure to appear. The two charges against him under the National Road Traffic Act were withdrawn. The enquiry was held in terms of section 55(2) of the Criminal Procedure Act,
10 No. 51 of 1977, the relevant position of which reads as follows:-

15 "The court may, if satisfied from the return of service referred to in paragraph (b) of section 54(2) that the summons was served on the accused in terms of paragraph (a) of that section and that the accused has failed to appear at the place and on the date and at the time specified in the summons, or of satisfied that the accused has failed to remain
20 in attendance at the proceedings in question, issue a warrant for his arrest and, when he is brought before the court, in a summary manner enquire into his failure so to appear or so to remain in attendance and unless the accused satisfies the
25 court that his failure was not due to any fault on his

part, convict him of the offence referred to in sub-section (1) and sentence him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months...”

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No evidence was led at this enquiry, but the appellant made an unsworn statement to the Court in explanation of his failure to appear, to which I shall turn presently. However, the statement was apparently insufficient to satisfy the magistrate
10 and she found as follows:

“Die Hof is oortuig dat die genoemde persoon se versuim om te verskyn en aanwesig te bly aan skuld van genoemde persoon se kant te wyte was.”

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The appellant was thereupon presumably convicted by the magistrate of a contravention of section 55(1) of the Criminal Procedure Act in that, having been duly summoned to appear at criminal proceedings, he had failed to do so. The fact of
20 this conviction is not stated anywhere in the record in so many words: but be that as it may, the appellant was thereupon sentenced to pay a fine of R300,00, the maximum fine sanctioned by the relevant statutory provision, or to undergo imprisonment for ten days, the whole of which sentence was
25 conditionally suspended for five years.

With the leave of the magistrate, the appellant appeals to this Court against both his conviction and sentence.

The appellant's unsworn explanation to the magistrate for his
5 failure to appear was recorded by the magistrate in longhand
as follows:

10 "A few days before trial date, I wrote a letter to
Traffic Department and was told by them
telephonically that this would be sufficient."

In her reasons for conviction and sentence, which, for some
reason, were furnished by the magistrate only about 11 months
after she had presided over the enquiry into the appellant's
15 failure to appear, she said the following:

20 "On 18/04/2007 the accused failed to appear at
court despite the summons having been properly
served on him. The accused wrote a letter to the
Traffic Department and did not appear in court as
he believed that the issue was resolved. No
response to the letter was given to the accused by
the Traffic Department prior to the trial date...

25 ...Charges against the accused in respect of the
traffic offence has only been withdrawn against him

by the state on 24/05/2007 when he appeared on the said warrant of arrest. In this matter accused was served with a summons and failed to appear. The accused ought to have come to court in the absence of an answer from the Traffic Department. Even though the Court accepts the reason advanced by the accused for not having come to court, the accused's failure to do so cannot be excused and amounts to the offence in question."

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The magistrate has misdirected herself in a fundamental respect. She approached the enquiry on the basis that, according to the appellant, in response to his letter to the Traffic Department, there was an "absence of an answer from the Traffic Department". This is not so, according to the appellant's unsworn explanation for his failure to appear. He said in his explanation that he:

"...was told by them telephonically that this would be sufficient,"

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i.e. that his letter would be sufficient. Presumably he meant by that that some official at the Traffic Department had told him that, because his letter was sufficient, he need not appear in court. Certainly his statement is capable of bearing that

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meaning. If the magistrate was in doubt as to the appellant's meaning, she should have questioned him so as to clear the matter up. However, she did not do so. At no stage in the proceedings was the appellant's explanation challenged, disputed or denied by the state, nor, as I have said, was any evidence led by the prosecution to rebut any aspect of it. In the circumstances, the truth and correctness of his explanation ought to have been accepted by the magistrate *in toto*. The fact that the appellant's explanation was not given on oath does not derogate from what I have said. See S v Singo, 2002(1) SACR 576 (VHC) at 578f to 579g. The magistrate convicted the appellant on the basis of only part of his explanation, without having regard to the rest of it, which was, of course, the most important part. Although the explanation furnished by the appellant was not under oath, there is, as I have said, no evidence from the state to suggest that what he told the magistrate was not true. Nor did the magistrate reject the appellant's explanation on the contrary, she appears to have accepted "the reason advanced by the accused for not having come to court."

It must be accepted, then, that he was informed by an official of the Traffic Department that his letter was sufficient and, by implication, that he need not appear at court. That, to my mind, was a satisfactory explanation which ought to have

satisfied the magistrate that the appellant's failure to appear was not due to any fault on his part.

For these reasons I am of the view that the magistrate erred in
5 convicting and sentencing the appellant.

In passing, it must also be said, I think, that the magistrate failed in her reasons for judgment to understand properly the authority to which she refers, namely S v Singo, 2002(4) SA
10 858 (CC). She refers to a passage at page 866e to 868g, and attempts to summarise the conclusion reached by the Constitutional Court in that case. In doing so, it seems to me that she has failed entirely to understand the finding to which the Court came in that case. However, in the light of the
15 other misdirection to which I have referred, it is not necessary for this Court to deal further with that aspect.

It is disappointing to see how fundamentally the magistrate has erred, especially in misdirecting herself on the content of the
20 appellant's explanation. The matter was a very simple one. It ought not to have been difficult for the magistrate to get it right. Instead, when coming to her decision, she seems to have already forgotten, or at least to have overlooked, the very terms of the appellant's explanation, which was both short and
25 simple, and which she herself had just recorded on the record

in her own hand. Taxpayers are surely entitled to a higher standard of adjudication of their matters than this.

5 The misdirection to which I have referred relating to the accused's explanation was not relied on by him in his notice of appeal, it would seem. Nevertheless, in the exercise of this Court's inherent review jurisdiction, as also that conferred by section 304(4) of the Criminal Procedure Act, the conviction and sentence of the appellant will be SET ASIDE on review.

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THRING, J

I agree.

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AK BLOMMAERT, A J