REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

Case No: **A439/09 & A354/06**

In the matter between:

RUDOLF MARTINUS DRIESCHER Appellant

vs

THE STATE Respondent

JUDGMENT DELIVERED ON 20 NOVEMBER 2009

YEKISO, J

[1] The appellant was summoned to appear in the Magistrate's Court, Knysna on a charge of contravening the provisions of section 11(1) of the Maintenance Act, 23 of 1963. The charge arose out of the order of the Southern Divorce Court, sitting at Bredasdorp when, on 2 June 2005, the Divorce Court ordered the appellant to pay maintenance in respect of the complainant, one Jeanette Driescher, in an amount of R5,500.00 per month with effect from 1 July 2005. Payment of maintenance was conditional

upon the appointment of a receiver to the parties' joint estate who were, prior to the dissolution of the marriage, married to each other in community of property, and on an equitable distribution of the parties' joint assets to the parties themselves. It was anticipated that once the parties' joint assets were equitably distributed amongst them, the appellant's obligation to pay maintenance would lapse. In terms of the consent paper entered into between the parties, which was subsequently made an order of court, a receiver to the parties' joint estate would have had to be appointed as soon as possible. No receiver was appointed until the appellant was summoned to appear in court to answer a charge of failing to pay maintenance in contravention of the maintenance order. The appellant was required to appear in court on 21 May 2006. As at date of his appearance in court on 21 May 2006, almost a year after the order was made, the appellant had made payments totalling an amount of R8,000.00 and the arrears allegedly due were in an amount of R59,175.00.

[2] The proceedings on 21 May 2006 appear to have been recorded in long hand. On the basis of the summons requiring the appellant to appear in court, the appellant is alleged to have contravened the provisions of section 11(1) of the Maintenance Act, 23 of 1963. The whole of the

Maintenance Act, 1963 was repealed by subsequent legislation in the form of the Maintenance Act, 99 of 1998. The appellant was thus required to appear in court to answer a charge on the basis of legislation that no longer was in existence. The corresponding provision in the Maintenance Act, 1998 which creates an offence for failure to pay maintenance in contravention of a maintenance order is section 31(1) of the Maintenance Act, 1998. There is no indication on record whether the appellant was required to plead either to a contravention of section 11(1) of the old Maintenance Act, 1963 or section 31(1) of the Maintenance Act, 1998. To the extent that there is no indication on record that the appellant was required to plead to any of the aforementioned pieces of legislation, it would appear that the record of the proceedings in the court *a quo* is incomplete. The charge sheet only records that the appellant pleaded not guilty, otherwise there is no indication as regards in contravention of which piece of legislation the appellant tendered a plea of not guilty.

[3] On a recorded plea explanation in terms of section 115 of the Criminal Procedure Act, 51 of 1977 the appellant is recorded to have had this to say, amongst other things:

> "- Die egskeidingsbevel sê ek betaal R5,500.00 onderhoud tot sekere goed gedoen moet word.

- Hulle moes dit doen.
- Ek het gesê ek is bekommerd daaroor en kan net vir tydperk betaal daarvoor.
- Ek het twee maande betaal en niemand het na my teruggekom om die waarde te bepaal."

Amongst the admissions made in terms of section 220 of the Criminal Procedure Act, the appellant had this further to say:

> "Ek het twee maande onderhoud betaal. Ek erken nie ek moet die onderhoud betaal nie, maar as die hof dit so bevind is die bedrag nie in geskil."

[4] The consent paper entered into between the appellant and the complainant was admitted as exhibit "B" in the record of the proceedings in the court *a quo.* The said consent paper is the most unprofessionally drawn document that I have ever come across in the whole of my legal career spanning over 35 years. It is illegible and so difficult to decipher except, of course, the words "A receiver shall be appointed as soon as possible with the following powers". Otherwise, apart from this portion of the consent paper, the rest of the document is illegible.

[5] It further would appear that the parties were not fully apprised on the implementation of the terms of the consent paper. This is evidenced by a reference by each one of the parties to the "Receiver of Revenue" on each

occasion a reference is made to the receiver of the parties' joint estate. Indeed, the appellant says it in so many words in his evidence that he had stopped paying maintenance as he had been waiting to hear from the Receiver of Revenue. It is thus not clear on the basis of the consent paper as regards whose initiative it was to have the receiver to the parties' joint estate appointed, that is, whether the receiver ought to have been appointed at the initiative of the plaintiff in the divorce proceedings (the complainant) or that of the defendant (the appellant). The initiative which appears to have been taken by the appellant is what appears to have been a futile attempt to have the maintenance order rescinded as appears at pp 46 and 47 of the record. It is noteworthy that the appellant states the following at p 47 of the record, as a reason for rescission of the maintenance order: "(1) Klaagster kom die voorwaardes wat vasgevat is in die bevel nie na nie. (2) Klaagster sloer en verontagsaam die bevel (samewerking met wat ooreengestem het is) opsetlik (met opset) (3) Klaagster verskaf geen inligting of korrespondeer geensins nie."

[6] All that the appellant says in his evidence as regards his obligation to pay maintenance is that during the negotiation stage of the consent paper, it was said to him that the receiver would be appointed within a period of three months of the date of the maintenance order and presumably his

obligation to pay maintenance would be limited to that period. But what is of critical importance, in my view, is the appellant's contention, within the context of the admissions made in terms of section 220 of the Criminal Procedure Act, to the effect that: "Ek erken nie ek moet die onderhoud betaal nie." Thus a possibility may not be excluded that the appellant may have thought that his obligations arising from the consent paper to pay maintenance may have lapsed.

[7] The concerns raised in this judgment do not constitute a defence on the part of the appellant to a charge of failing to comply with a maintenance order, whether looked at individually or cumulatively. The only defence available to a person charged with failing to pay maintenance in terms of the maintenance order, both in terms of the then Maintenance Act, 1963 and the Maintenance Act, 1998 is incapacity to pay due to lack of means provided always that such incapacity is not due to unwillingness on the part of the accused person to find employment. The appellant did not raise incapacity to pay as a defence and, in fact, nowhere in his evidence at trial did the appellant refer to any incapacity to pay. But what the appellant did say, though, in his evidence is, ostensibly because of the failure to have the receiver appointed, that he no longer considered himself under obligation to

pay maintenance as ordered: "Ek erken nie ek moet die onderhoud betaal nie." Once the appellant had made this statement, coupled with the fact that no receiver to the parties' joint estate was appointed almost a year down the line, coupled with what clearly was lack of proper advice with regards to how the terms of the consent paper were to be implemented, and added to this the contention by the appellant that the complainant, soon after the Divorce Order was granted, removed and disposed of some of the assets of the joint estate, the magistrate ought to and should have invoked the provisions of section 41 of the Maintenance Act, 1998. The provisions of section 41 of the Maintenance Act, 1998 provide for the conversion of criminal proceedings into a maintenance enquiry if it appears to the court that it is desirable that an enquiry be held. The circumstances of this matter, in my view, justify the holding of such an enquiry. (See *S v Pieterse* 1993(3) SA 275 (C).)

[8] We did not consider the merits of this appeal. Any consideration of the merits of the appeal itself, in the light of the concerns raised in this judgment, would have been a perpetuation of what appears to have been an unfair trial right from the inception of the proceedings in the court *a quo.* In our view, justice would be better served by ordering the conversion of the

proceedings into an enquiry as opposed to the consideration of the merits of the appeal.

[9] In the result I would propose the following order:

[9.1.] That the conviction of the accused and the subsequent sentence imposed for contravening the provisions of section 31(1) of the Maintenance Act, 1998 be and are hereby set aside.

[9.2.] The matter is remitted to the Magistrate, Knysna, for an enquiry to be held in terms of section 10 of the Maintenance Act, 1998 provided that such an enquiry shall not be held by the magistrate who presided at the trial.

N J Yekiso, J

I agree.

RT Williams, AJ

It is so ordered.