IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

Case Numbers: 16996/2017

In the matter between:

NEVILLE COOPER Applicant

and

MAGISTRATE MHLANGA Respondent

JUDGMENT DELIVERED 24 NOVEMBER 2017

Andrews AJ

Introduction

[1] This is a review application for the setting aside of the conviction and sentence of the Applicant under case number 24/1270/2016 in the Cape Town District Court., in terms whereof, Respondent convicted Appellant of contravening the provisions of Section 55 (1) of the Criminal Procedure Act[1], as amended and subsequently sentenced him to pay a fine of R3 000.00 (three thousand rand) or three (3) months imprisonment. The matter was argued on 23 November 2017. The Respondent is not opposing the application and has filed a notice to abide.

[1] 51 of 1977.

Factual Background

[2] The salient features of the factual matrix as set out by Applicant in his supporting affidavit and gleaned from the court record, can in brief be summarised as follows. The Applicant was arraigned on a charge of contravening the provisions of Section 305 (1)(q), read with section 1 and section 305 (6) of the Children's Act[2]. His first appearance was indicated on the summons as 28 July 2016. On 13 December 2016, the matter was postponed to 1 March 2017.

[3] Applicant avers that he had been experiencing chest pains since 28 February 2017 which necessitated that he attend at Tableview Medicross early on the morning of 1 March 2017 to consult with a doctor. Applicant further avers that he informed his attorney, Mr Arnold, that he would not be able to attend court because he was unwell and was advised to obtain a medical certificate from the doctor, which he duly did.

[4] The Applicant further avers that he contacted his legal representative later that morning to enquire about his matter and was informed by Mr Arnold that the trial had been postponed to 10 March 2017. According to Applicant, he was unaware that a warrant of arrest had been authorised in his absence. On 10 March 2017, Applicant attended at court together with his legal representative. According to Applicant, the Respondent, who ignored the presence of Applicant's legal representative, immediately called him into the witness box and conducted a warrant enquiry as to his absence form court on 1 March 2017. Applicant was subsequently

[2] 38 of 2005.

found guilty and sentenced for failure to attend court, which fine was immediately paid by Applicant.

Grounds for Review

[5] Applicant contends that the proceedings were irregular and that his constitutional rights to a fair trial as enshrined in section 35 (3) of the Constitution of the Republic of South Africa[3] were infringed. Furthermore it is contended that the jurisdiction of section 55 (2) of the Criminal Procedure Act was exceeded. Applicant further avers that Respondent acted unreasonably in rejecting his explanation

Legal Principles

[6] It is trite that an accused person's rights are enshrined in the Constitution and in this regard, section 35 (3) of Act 108 of 1996 states that *'Every accused has a right to a fair trial, which includes the right - (a) to be informed of the charge with sufficient detail to answer it; (b) to have adequate time and facilities to prepare a defence…(h) to be presumed innocent, to remain silent, and not to testify during the proceedings; (i) to adduce and challenge evidence…'* In addition, everyone, including an accused person has the inherent right to dignity.[4]

[7] Section 170 of Act 51 of 1977, is applicable in circumstances when an accused fails to appear in court after a matter has been adjourned. The provisions of section 170 is as follows:

> ***'170 Failure of accused to appear after adjournment or to remain in attendance***

[3] Act 108 of 1996.

[4] Section 10 of At 108 of 1996 *'Everyone has inherent dignity and the right to have their dignity respected and protected'.*

(1) An accused at criminal proceedings who is not in custody and who has not been released on bail, and who fails to appear at the place and on the date and at the time to which such proceedings may be adjourned or who fails to remain in attendance at such proceedings as so adjourned, shall be guilty of an offence and liable to the punishment prescribed under subsection (2).

(2) The court may, if satisfied that an accused referred to in subsection (1) has failed to appear at the place and on the date and at the time to which the proceedings in question were adjourned or has failed to remain in attendance at such proceedings as so adjourned, 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 court that his failure was not due to fault on his part, convict him of the offence referred to in subsection (1) and sentence him to a dine not exceeding R300 or to imprisonment for a period not exceeding three months.'

[8] This section corresponds with section 55(3) and 72 (4) in cases where persons have been summoned or warned to appear in court and who subsequently fail to do so. It is trite that the court has the same powers in a section 170 (1) enquiry as conferred on it through these provisions save that in the section 170 (1) enquiry the provision is wide and without qualification.[5] *'Where the court holds a summary enquiry in terms of sub-s (2) into a failure to attend, considerations of justice and common sense demand that the court must inform the accused that there is an onus on him to tender a reasonable excuse – in the unlikely event, that is, that this reverse*

[5] Hiemstra's Criminal Procedure (LexisNexis) 22-67.

onus passes constitutional muster[6]*…The accused must also be advised that he may call witnesses and give evidence himself*[7][8]

[9] At the summary enquiry, it is trite that the accused bears the onus of explaining his or her failure to attend court, which is to be conveyed to him through the Presiding Officer. The matter of ***S v Chaplin***[9] is provides guidelines in respect of the enquiry. In this regard, Scott J stated as follows:

> *'What this section contemplates is that the mere failure to appear will justify a conviction in the absence of an explanation. In other words, what is presumed is that the failure to appear was wilful in the sense that it was due to the fault of the accused person. It follows that an accused person must be informed of the onus upon him, otherwise he might be justified in tendering no explanation, in the belief that his mere failure to appear did not in itself indicate that he was at fault and that the State had failed to establish fault on his part. …Wilfulness will be presumed in the absence of an explanation by the respondent. In such circumstances, that is to say where wilfulness is to be presumed, justice and common sense require that that the presiding officer should inform the respondent that in the absence of an explanation he will be presumed to have acted wilfully.'*[10]

[10] It is incumbent on the presiding officer to actively attempt to determine the truth and maintain a balance in fairness to the accused.[11]

[11] As previously stated, there is conformity between this enquiry and section 72 (4). In light hereof, the matter of ***S v Singo***[12] has relevance. In this regard, Ngcobo J stated that, in answer to the question '*[d]oes the phrase "unless such*

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[6] *S v Ngubeni* [2009] 1 All SA 185 (T) at [15].
[7] *S v Bkenlele* 1983 (1) SA 515 (O) and *S v Du Plessis* 1970 (2) SA 562 (E) at 564-5.
[8] Du Toit et el *'Commentary on the Criminal Procedure Act'* (Juta) 22-105.
[9] 1995 (2) SACR 490 (C) at 494d-j.
[10] See also *S v Baloyi* 2000 (1) SACR 81 (CC) at [29].
[11] *Ibid* at [31].
[12] 2002 (2) SACR 160 (CC).

person satisfies the court that his failure was not due to fault on his part" limit the right to be presumed innocent and the right to remain silent?' stated that:

> *'[25] This court has on several occasions considered provisions in statutes that impose a legal burden, which has now become known as a reverse onus. A legal burden requires an accused to disprove on a balance of probabilities an essential element of an offence and not merely to raise reasonable doubt. It is by now axiomatic that a provision in a statute that impose a legal burden upon the accused limits the right to be presumed innocent and to remain silent.*
> *[26] A provision which imposes a legal burden on the accused constitutes a radical departure from our law, which requires the State to establish the guilt of the accused and not the accused to establish his or her innocence. That fundamental principle of our law is now firmly entrenched in section 35(3)(h) of the Constitution which provides that an accused person has the right to be presumed innocent. What makes the provision which imposes a legal burden constitutionally objectionable is that it permits an accused to be convicted in spite of the existence of a reasonable doubt….'*

Discussion

[12] From the record of proceedings it is clear that the Applicant's legal representative attempted to explain the absence of the Applicant. The legal representative requested that the court hold over the warrant of arrest based on the explanation tendered for Applicant's absence from court. The court found, *'no sufficient reasons justifying hold over w/a (sic)'*[13] . What follows on the record is *'w/a held over'.* The word '*not'* appears to have been inserted between the words '*w/a and held'* and then deleted again. As it stands, the record reflects that the warrant of arrest was held over. When the amendment was effected has not been indicated as the amendment was neither initialled nor dated. If the warrant of arrest was held over, then it follow that there would have been no need for an enquiry to be held.

[13] Record of proceeding page 36.

[13] Based on the further conduct of the matter, it is evident that the warrant of arrest had to have been authorised to justify the holding of an enquiry. I pause here to mention that the warrant of arrest was authorised in terms of section 55 of Act 51 of 1977. This is evidently incorrect as the Applicant was previously warned to be at court on 1 March 2017. Section 55 only finds application where a person appears in court on a summons. Consequently, a person after receiving a summons will thereafter appear in court in accordance with a warning under section 72.[14] It therefore flows that the warrant of arrest should have been authorised in terms of Section 170 of Act 51 of 1977.

[14] The Appellant avers that his legal representative failed to inform him that his failure to attend court resulted in a warrant of arrest having been authorised. The Applicant states in his affidavit that he presented at court on 10 March 2017. When his case was called, his legal representative placed it on record that he was present and was absent from court on the previously date because he had been ill. The attorney proceeded to hand up the medical certificate to Respondent who summarily called Applicant to the witness box where he was interrogated about his absence, the chest pains he had suffered and the manner in which he had travelled to hospital. According to the Applicant, Respondent appeared to take issue with the certificate of the doctor. Respondent also questioned Applicant about the medical tests which were run. As Applicant was not in a position to expound on the medical intricacies, he proposed to Respondent that the doctor be called to give evidence in

[14] Section 55 (2) of Act 51 of 1977. '*…Provided that where a warrant is issued for the arrest of an accused who has failed to appear in answer to the summons, the person executing the warrant – (a) may, where it appears to him that the accused received the summons in question and that the accused will appear in court in accordance with a warning under section 72..'*

this regard and according Applicant, Respondent ignored the suggestion. According to the Applicant, Respondent not being satisfied with his explanation remarked that if Applicant was well enough to drive to Medicross on the morning of 1 March 2017, then he could have come to court whereafter Applicant was found guilty and sentenced.[15]

[15] The record of proceedings provides a clear exposition the enquiry. What is evident is that Applicant conceded that there was no reason that he could not attend the hospital during the evening. Appellant also conceded that he could have phoned his attorney earlier. The record does not reflect the reasons given by Respondent for the verdict which followed.[16] In this regard, Applicant contends that this is indicative of the fact that the Respondent did not apply his mind.

[16] According to Applicant, he was not informed of the charge, the nature of the proceedings nor was he informed of his rights. In this regard, it is alleged that Respondent did not make it clear to Applicant that he was being charged with a criminal offence, and the commensurate penalty provisions upon conviction. Respondent failed to afford Applicant a fair opportunity to prepare for the hearing, present a defence and or call witnesses and failed to explain and apply the correct onus at the enquiry.

[17] The Applicant refutes the accuracy of the information reflected *pro forma* form indicated that his rights to appeal and to legal representations were explained and that he elected to conduct his own defence. Applicant contends that this was never canvassed with him. In fact, it is argued that it made no sense for him

[15] Paragraphs 15 and 16 of Applicant's founding affidavit.
[16] See typed record of enquiry on page 43.

to have elected to conduct his own enquiry as his legal representative who was being paid to represent him at court was present in court. In this regard, Applicant further contends that it would have been unwise of him to have done so. [17]

Conclusion

[18] Based on the exposition of events it is evident that a number of procedural irregularities were highlighted. In addition, a myriad of Applicant's constitutionally entrenched rights were infringed. Applicant's version in this regard is undisputed by Respondent. It is incumbent on the court to advise the accused of the burden of proof and ask the accused whether he wishes to testify and or call witnesses. Failure to do so constitutes a material error in law.

[19] It is common cause that Applicant presented the court with a medical certificate. If Respondent had any reservations as to the veracity or authenticity of the medical certificate presented in court, the author thereof could have been called as a witness to clarify any aspects for the benefit of the court to enable the court formulate an appropriate finding which would ultimately be in the interest of justice and in accordance with justice. An accused has the right to be treated with dignity and respect and the robust manner in which the inquiry was conducted suggests that Respondent was not alive to these basic and fundamental human rights firmly entrenched in South Africa's constitutional democracy.

[20] I am furthermore of the view that the manner in which the inquiry into the Appellant's failure to attend court was conducted amounted to a substantial injustice as it infringed on his constitutionally entrenched rights to a fair trial. His right

[17] See page 2 of Applicant's supplementary affidavit – page 45 of record.

to access to justice was curtailed when his legal representative was ignored and presence not acknowledged during the enquiry. It is of concern that Respondent, who his called upon in the exercise of his judicial function to administer the law without fear, favour or prejudice; had a complete disregard to the rights of the accused. In addition, the legal principles pertaining to the enquiry were misapplied to the prejudice of the Applicant. In this regard, I am in agreement with the Applicant that the summary hearing was irregular and that Respondent materially misdirected himself by applying the reverse onus. I furthermore find that Respondent incorrectly found the Applicant guilty of contravening the provisions of section 55 of Act 51 of 1977 instead of section 170(1) of Act 51 of 1977. In the circumstances, and having regard to all these glaring irregularities, I am of the view that the proceedings conducted on 10 March 2017 were not in accordance with justice and falls to be set aside.

[21] Turning to the sentencing component of the enquiry, Section 1 of the Adjustment of Fines Act 101 of 1991[18] has relevance and can be applied to Section 170 (2). In this regard, the maximum fine imposed can be adjusted upwards. I am of

[18] *'(1) (a) If any law provides that any person on conviction of an offence may be sentenced to pay a fine the maximum amount of which is not prescribed or, in the alternative, to undergo a prescribed maximum period of imprisonment, and there is no indication to the contrary, the amount of the maximum fine which may be imposed shall, subject to section 4, be an amount which in relation to the said period of imprisonment is in the same ratio as the ratio between the amount of the fine which the Minister of Justice may from time to time determine in terms of section 92 (1) (b) of the Magistrates' Courts Act, 1944 (Act 32 of 1944), and the period of imprisonment as determined in section 92 (1) (a) of the said Act, where the court is not a court of a regional division....*
(2) If any law (irrespective of whether such law came into operation prior to or after the commencement of this Act) provides that any person may upon conviction of an offence be sentenced to pay a fine of a prescribed maximum amount or a maximum amount which may be determined by a Minister or, in the alternative, to undergo a prescribed maximum period of imprisonment, or be sentenced to such a fine and such imprisonment, the amount of the maximum fine which may be imposed shall, notwithstanding the said penalty clause, but subject to section 4, be an amount calculated in accordance with the ratio referred to in subsection (1) (a): Provided that this provision shall not apply if the maximum amount of the fine prescribed in the law or determined by the Minister exceeds the maximum amount calculated in accordance with the ratio referred to in subsection (1)(a).'

the view, in applying the Adjustment of Fines Act that the amount payable in respect of the fine imposed is not an incompetent sentence. However, seen in the totality of the evidence, a finding in this regard will be moot as the proceedings were already found to be irregular.

[22] In the result I would make the following order:

(a) The conviction and sentence imposed of the Applicant under case number 24/1270/2016 in the Cape Town District Court on 10 March is set aside, as per the draft order marked “X” annexed hereto.

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ANDREWS, AJ

I agree and it is so ordered.

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BAARTMAN, J

Appearances:

Counsel for Applicant:	Adv M Ipser
Instructed by:	Arnold & Associates
For Respondent:	State Advocate – LM Gava