



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

(Coram: Dolamo, J *et* Andrews, AJ)

REPORTABLE

High Court Ref No : 18352  
Magistrate serial no : 13/18  
Case No : 117/18

STATE

V

VERNON KAROLUS

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REVIEW JUDGMENT: 29 May 2018

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Andrews AJ

**Introduction**

[1] This is a Review in terms of the provisions of Section 302 of the Criminal Procedure Act 51 of 1977 ("the Act"). This matter was remitted to the High Court in April 2018 in the ordinary course pursuant to the court *a quo* imposing a reviewable sentence.

[2] The accused in this matter was arraigned in February 2018 in the Piketberg Magistrate's Court on a charge of contravening section 31(1) of the Maintenance Act 99 of 1998. According to the charge sheet it is alleged that:

- (a) A maintenance order was made on 29 May 2008 in terms of which the accused was ordered to make periodical payments of R300 per month towards the maintenance of Danlin Daniels;
- (b) The said amount would increase at the rate of 10% annually;
- (c) The maintenance payments were to be made at the Magistrate's Court in the district of Piketberg in favour of Zetrie Daniels;
- (d) The accused wrongfully and unlawfully during the period 30 June 2008 to 12 February 2018 failed to make payments in terms of the said order; and
- (e) Is in arrears in the amount of R44270.12

[3] The accused appeared in person on 26 February 2018 and pleaded not guilty to the charge. The basis of his defence in terms of section 115(1) of Act 51 of 1977 was recorded by the presiding magistrate as follows:

*'The grandmother came to fetch the money and used it to consume liquor. I told complainant I will pay money through money market. I paid her every week.'*

[4] At the trial, the prosecutor read a statement in terms of section 212 of Act 51 of 1977 as deposed to by Corinna Smit<sup>1</sup> into the record. According to the statement, the accused failed to comply with the maintenance order. The accused should have paid an amount of R53 430.12, but only paid an amount of R9 160.12. Accordingly,

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<sup>1</sup> A person in the employ of the Department of Justice and Constitutional Development of the Republic of South Africa and staff member at the Magistrate's Court of Piketberg.

the accused is in arrears in the amount of R44 270.12 as at 12 February 2018. The statement forms part of the record of proceedings and was marked as Exhibit "A".

[5] The state led the evidence of Zetrie Daniels who testified that the accused made two payments of R100 each through the money market. She denied receiving any direct cash payments from the accused. She stated that the money that the accused paid was paid into her account. During cross-examination, the accused put it to Ms Daniels that in 2017 he was incarcerated. Ms Daniels indicated that she was unaware of that.

[6] The state's case was thereafter closed, whereafter the accused testified. He narrated that he has not been consistently employed. He explained that he worked on a farm and work opportunities were seasonal. The accused stated that he has another sickly child to support and was incarcerated for a period of three months. At the time of testifying he acquired permanent employment as construction worker in Citrusdal.

[7] During cross-examination it came to light that the duration of seasonal work would be approximately three months. He confirmed that on 5 September 2016 he worked at De Tuin where he earned R650 per week. At that time the accused offered to pay an amount of R200 per week. The accused articulated that shortly after he made the offer the season finished and because he was employed as a casual worker the employment opportunity was not further extended. According to the accused, he worked at De Tuin for about four or five months. The accused conceded that when he was employed during this time, he did not pay maintenance but could not provide a reason why he did not do so. Furthermore, the accused confirmed that

on 16 February 2016 he made an arrangement with the maintenance officer that he would pay an amount of R584 towards his maintenance obligation. At that time he was employed at a farm called Saluka as a peach picker. The accused indicated that he wasn't able to afford the amount and only worked there for a period of three months. It was also during this time that his other child was born. The accused was unable to explain why he did not comply with his maintenance obligation as ordered. He confirmed that at some point he was employed at Sipo Constructions. He confirmed that an emoluments attachment order was granted in the amount of R500 at the time when he was employed at Denne Farm and could not offer an explanation as to why he did not pay. The accused also narrated that the medical needs of his other child were prioritised.

[8] The Magistrate proceeded to convict the accused as charged and proceeded to sentence the accused to a period of 12 months' imprisonment.

[9] Apposite from the Magistrate's judgment was the following:

- (a) That the accused was not truthful about him paying maintenance into the money market account on a weekly basis;
- (b) That the accused had made numerous arrangements to pay, but failed to do so;
- (c) That the accused failed to pay even during the times when he was gainfully employed;
- (d) That the accused was unable to offer any defence as to why he failed to pay in accordance with his maintenance obligations; and

- (e) That the accused was, in the words of the Magistrate, *'simply unwilling to pay and are now grasping at excuses for your failure. You are unable to offer any explanation.'*

[10] When this review came before me I directed a query to the Magistrate pertaining to both conviction and sentence. The pivotal consideration was whether the accused was correctly convicted and sentenced in accordance with justice.

### Legal Principals

[11] It is trite that the institution of automatic review, which is unique to South African criminal procedure, fulfils an important function as it aims to ensure the validity and fairness of the convictions and sentence in certain categories of lower-court proceedings.<sup>2</sup> It is also a developed principle in our law that a reviewing judge is not limited to the investigation of irregularities but may also devote attention to all matters which are subject to appeal.<sup>3</sup>

[12] The powers of the High Court to review proceedings of the Magistrate's court are set out in section 304(2) (c) of the Act.<sup>4</sup> These powers include, the power to:

'...

- (i) *confirm, alter or quash the conviction, and in the event of the conviction being quashed where the accused was convicted on one of two or more alternative*

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<sup>2</sup> Du Toit et al 'Commentary on the Criminal Procedure Act' (Juta) [SERVICE 58, 2017] at 30-8.

<sup>3</sup> *ibid.*

<sup>4</sup> *Ibid* at 30-16 "Section 304 not only lays down the procedures to be followed in regard to automatic review. It also establishes independent review opportunities, together with its own procedure for submission, besides the institution of automatic review. But whether the case comes before a judge via the institution of automatic review or whether it reaches him by way of the special review ground and procedures in s 304(4), the reviewing court has the same power. In addition, s 304 makes provision for the review of proceedings which until recently were dealt with by superior courts, pursuant to their inherent powers of review."; See also *Walhaus and Others v Additional Magistrate Johannesburg and Another* 1959 (3) SA 113 (A), with regards to the High Court's inherent powers of review.

*charges, convict the accused on the other alternative charge or on one or other of the alternative charges;*

- (ii) confirm, reduce, alter or set aside the sentence or any order of the magistrate's court;*
- (iii) set aside or correct the proceedings of the magistrate's court;*
- (iv) generally give such judgment or impose such sentence or make such order as the magistrate's court ought to have given, impose or made on any matter which was before it at the trial of the case in question; or remit the case to the magistrate's court with instructions to deal with any matter in such manner as the provincial or local division may think fit; and*
- (v) remit the case to the magistrate's court with instructions to deal with any matter in such manner as the provincial or local division may think fit; and*
- (vi) make any such order in regard to the suspension of the execution of any sentence against the person convicted or the admission of such person to bail, or, generally, in regard to any matter or thing connected with such person or proceedings in regard to such person as to the court seems likely to promote the ends of justice.'*

[13] The first issue for determination is whether the state succeeded in discharging the burden of proof pertaining to the offence with which the accused had been charged. In this regard, Section 31 of the Maintenance Act 99 of 1998 provides as follows:

*'(1) Subject to the provisions of subsection (2), any person who fails to make any particular payment in accordance with a maintenance order shall be guilty and liable on conviction to a fine for a period not exceeding three years or such imprisonment without the option of a fine.*

*(2) If a defence is raised in any prosecution for an offence under this section 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.'*

[14] In **S v Chabalala**,<sup>5</sup> the Supreme Court of Appeal held that in evaluating evidence before court the correct approach is to weigh up all the elements which points towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt to the accused's guilt.

## Evaluation

[15] It is trite that no onus rests on the accused to convince the court that any explanation is beyond any reasonable doubt. If there is any reasonable possibility of his explanation being true, then he is entitled to be acquitted.<sup>6</sup>

[16] Based on this principle I raised the question whether there was any onus on the accused to offer "any defence", in light of the Magistrate's finding when he stated '*you are unable to offer any defence for why you have failed to pay your maintenance.*' The Magistrate agreed that there was no onus and indicated that because the accused failed to challenge the evidence it held certain consequences

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<sup>5</sup> 2003 (1) SACR 134 (SCA) at 139I-140B.

<sup>6</sup> *R v Difford* 1937 AD at 373: 'It is not disputed on behalf of the defence, that in the absence of some explanation, the court would be entitled to convict the accused. It is not a question of throwing any onus on the accused, but in these circumstances, it would be a conclusion which the court would draw, if no explanation were given. It is equally clear, that no onus rest on the accused to convince the court of any explanation to be improbable, the court is not entitled to convict, unless it is satisfied, not only, that the explanation is improbable, but beyond any reasonable doubt, it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to be acquitted.' See also *S v V* 2000(1) SACR 453 (SCA) at 455A-C where it was held that '[i]t is trite that there is no obligation upon an accused person, where the state bears the onus, to convince the court. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict, unless it is satisfied not only that the explanation is improbable, but beyond any reasonable doubt, it is false. It is permissible, to look at the probabilities of reasonably possibly true, but whether one subjectively believes him is not the test.'

for the accused. In this regard he referred to the matter of **S v Boesak**<sup>7</sup> where the following was stated:

*'It is trite law that a court is entitled to find the State has proved a fact beyond reasonable doubt if a prima facie case has been established and the accused fails to gainsay it...'*

*Of course, a prima facie inference does not necessarily mean that, if no rebuttal is forthcoming, the onus will have been satisfied. But one of the main and acknowledged instances where it can be said that a prima facie case becomes conclusive in the absence of rebuttal is where it lies exclusively within the power of the other party to show what the true facts were and he or she fails to give an explanation...'*

*The state is not required to plug every loophole, counter every speculative argument and parry every defence which can be conceived by imaginative counsel without a scrap of evidence to substantiate it.'*

[17] I was also referred to **S v Cloete**<sup>8</sup> where the following was stated:

*'Hierdie subartikel verwys na twee aspekte van die verweer. Die eerste is "n gebrek aan vermoëns". Die tweede is die bestaan van "onwilligheid om te werk of wangedrag". Wat die tweede aspek aanbetref is dit myns insiens nou duidelik dat die bewyslas hier op die Staat rus...'*

*Die kwessie van die ligging van bewyslas ten opsigte van die eerste aspek is egter nie duidelik nie. Aangesien die feite ten opsigte van so 'n verweer normaalweg byna uitsluitlik in die kennisveld van die beskuldigde val, sou dit sin maak indien hy ook hier met die bewyslas opgesaai word.'*

[18] The Magistrate went on to amplify the reasons why he convicted the accused. He penned the following response to my query:

*'In the Cloete case it is clear that the Honourable Judge was unsure whether the accused should be burdened with an onus of prove (sic). I think it is now clear that the*

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<sup>7</sup> 2000 (3) SA 381 (SCA) at 396D-I.

<sup>8</sup> 2001 (2) SACR 347 (C) at 352A-B.



*accused does not carry any burden. The court, however, made it clear that a defence of a lack of means to pay maintenance will normally fall within the exclusive knowledge of the accused, if an accused then fail to give an explanation for his failure to pay, the principles, as lay (sic) down in the Boesak case comes in (sic) play. In other words the prima facie evidence becomes conclusive evidence.*

*The accused gave different versions for his failure to make regular maintenance payments. In his plea he said that he made payments every week. That was clearly not true. He only paid R200.00 into the money market. Then he said he only had work during the different seasons. When he was confronted with the fact that he came to make arrangements, he said that he cannot forward any explanation and he has no excuse. Then again he said that he has a son who had to go to hospital for a head injury. He cannot explain when and in what way he had to contribute to any expenses. He even went so far to say that the child is not well looked after. This was also never put to the complainant why he did not pay, he only raised one excuse. He said he was in prison. He never explained to the complainant that he had a sick child or that he had a problem with work. As it was stated in Boesak, it is not required from the state to counter every possible defence. In the light of his own evidence that he did not have an excuse for his failure to pay maintenance and the fact that he lied about the fact that he paid maintenance every week, I came to the conclusion that the accused had no valid defence for not paying maintenance. As I said in my judgment, it is clear that the accused is simply unwilling to pay and now grasping for excuses (sic).*

*Accused said that he was in prison. Again he did not say when, but he testified that he was in prison for 3 months. It is tried (sic) law that it is not misconduct if a person fails to pay maintenance due to incarceration. See S v Jnquandela 1979 (2) SA 565 (C). I did take the fact of his imprisonment into account. I said in my judgment that it was apparent that there was a substantial period that accused was in a position to pay and yet failed. The period of 3 months that he was in prison is such an insignificant period if one look at the fact that the accused is in arrears with more than R49 000.00.*

*For the above reasons I convicted the accused.'*

[19] It is trite the state bears the onus to prove the guilt of the accused beyond reasonable doubt and that an accused must be convicted only if the evidence establishes his guilt beyond reasonable doubt. He must otherwise be acquitted if his

version is reasonably possibly true.<sup>9</sup> In arriving at the decision all the evidence must have been taken into account.

[20] The evidence presented by the state consists of the section 212 statement and the *viva voce* evidence of Ms Daniels. It is trite that the Section 212 statement serves as *prima facie* proof of the contents. According to the section 212 statement, the arrear amount is calculated at R44 270.12. Of seminal importance is the fact that payments totalling R9160 were made by the accused. The details of these payments were never canvassed with the complainant or the accused. The *viva voce* evidence of Ms Daniels only deals with the payments she received via the money market. The inferential reasoning, although not expressly stated appear to have been aimed at challenging the veracity of the accused's defence which he disclosed in terms of section 115 of Act 51 of 1977.

[21] The Magistrate fails to deal in his judgment with what the complainant articulated when she presented her evidence in chief to a question posed by the prosecutor. In this regard Ms Daniels was asked who usually collected the money or whether it was paid into an account, to which she responded that *'it was paid into an account'*. Which was followed by the question: *"So you draw the money, the maintenance money"*, to which there was no response. Although the transcription is not very clear, it seems that the complainant confirmed that she received no payments during 2017.

[22] This evidence cannot be viewed in isolation but should be evaluated on a conspectus of all the evidence, which includes that which emanated from the cross-

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<sup>9</sup> *S v Van Aswegen* 2001 (2) SACR 97 (SCA).

examination. It is evident that Ms Daniels could not refute that the accused was incarcerated.

[23] The *Boesak* case is however clear that a *prima facie* case becomes conclusive in the absence of a rebuttal or where no explanation is forthcoming. I do not agree with the Magistrate that the accused provided no defence or explanation as to why he did not pay maintenance. In my view, being incarcerated and not being employed for a continuous period provides an explanation for the accused's inability to pay.

[24] I am however mindful of the fact that lack of means is but one component of the test to be applied. As for the second consideration being unwillingness to work or misconduct I am in agreement with the Magistrate's inferential reasoning that the accused could have made payment when he was earning and on his own version failed to do so.

[25] Even if the accused was dishonest about him paying maintenance on a weekly basis as he claimed to do in his section 115 proceedings, it remains the duty of the state to discharge the onus; which in maintenance matters is not without difficulty. It however remains trite that the state has to prove each and every element of the offence with which an accused person is charged. The process is often painstaking and laborious and it is for this reason that more time should be devoted to methodically and thoroughly ploughing through the period of non-compliance; which may encompass a day by day; week by week and/or month by month interrogation of the accused ability and/or inability to pay in order to establish

whether he/she had means to comply and/or was unwilling to work and/or is guilty of misconduct.

[26] The way that this matter was dealt with from start to finish appears to have lacked sufficient ventilation of the unknown facts for the Magistrate to come to the conclusion that the accused was guilty as charged. On the facts presented, this could never be, given that the accused did make payments at some point totalling in excess of R9000; that the accused had unforeseen medical expenses and was not gainfully employed for the full duration in relation to the period over which he had been charged. Additionally, the Magistrate acknowledges that he took into account the fact that the accused was incarcerated. The accused also testified that he did not pay as *per* his undertaking because his employment contract was already nearing the end at the time when he signed the undertaking. I am of the view that the Magistrate's conclusion that the accused was simply unwilling to pay and grasping for excuses cannot be sustained as the accused provided a reason why he was unable to make payments at that time. Unfortunately this point, as with many other aspects, was not fully interrogated and/or ventilate for the Magistrate to unequivocally make this finding.

[27] In the circumstances the Magistrate should not have found the accused guilty for the full arrear amount as alleged in the charge sheet and should have adjusted the arrears accordingly. Moreover, the period(s) for which he found the accused guilty should also have been clearly articulated in the judgment and the finding in this regard should be recorded on the charge sheet in order to circumvent any future uncertainty. The Magistrate's failure to do so constitutes a material error in law.

[28] Additionally I am of the view that the Magistrate materially misdirected himself by applying a reverse onus. It is not for the accused to prove his innocence. The failure of the accused to challenge evidence should also be viewed in the light of the fact that he was unrepresented and clearly appeared to not fully understand what relevant questions to put to the complainant. The accused should not be penalised for his ability or failure to do so. In considering the conspectus of the evidence I find that the conviction was not in accordance with justice and falls to be set aside.

[29] I raised a number of concerns in my query to the Magistrate in relation to the sentence which was imposed. It was for this reason that I felt it prudent to issue a warrant of liberation on 18 April 2018 ordering the immediate release of the accused who was at that time incarcerated since 6 March 2018. However, in light of the conclusion to which I have come, it will not be necessary to deal with it for the purposes of this judgment.

[30] In the result, I would make the following order:

- (a) The conviction and sentence of 6 March 2018 is set aside.
- (b) The matter is remitted back to the Piketberg Magistrate's Court for the proceedings to start *de novo* before a different Presiding Officer.

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**ANDREWS, AJ**  
Acting Judge of the High Court

I agree, it is so ordered.

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**DOLAMO, J**  
Judge of the High Court