

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

REVIEW NUMBER R20/2022

In the review case of:

THE STATE

And

ADRIAAN JACOBUS

CORAM: OPPERMAN, J et I VAN RHYN, J

DELIVERED: 6 JUNE 2022

JUDGMENT BY: I VAN RHYN, J

[1] This is a automatic review in terms of the provisions of section 302 of the Criminal Procedure Act, Act 51 of 1977 ("CPA"). The accused in this matter, Mr. Adriaan Jacobus Kai was arraigned in February 2021 in the Excelsior Magistrate's Court on two charges of contravening section 31(1) of the Maintenance Act 99 of 1998 and a third charge, count 3, of contravening section 39 of the Maintenance Act 99 of 1998 (the "Act").

[2] As per the charge sheet it is alleged that: On 9 November 2015 the accused was ordered by the Magistrates Court, Durban to pay maintenance in respect of his two minor children in the amount of R2 800.00 per month from 25 November 2015. The accused failed to make such payments for the period from August 2018 to

January 2020 in that he paid maintenance in the amount of R25 200 where in fact he ought to have paid the amount of R50 400.00. The arrears amount to R25 200.00. With regard to count 2, the accused was ordered by this court on 27 February 2020, to pay maintenance in the monthly amount of R1000.00 in respect of the complainant, Valdi Heloise Kai (the accused former wife and mother of his two children) and R2 800 in respect of his two children. The amount in arrears regarding count 2 is R 49 400.00. Count 3 relates to the accused's failure to give notice of a change of address of his place of residence or employment as required in terms of the provisions of section 16(4) of the Act.

[3] The accused was arrested on 18 February 2021 and appeared in the Magistrate's Court for the district Excelsior on 22 February 2021 on the above-mentioned charges. The trial commenced on 5 July 2021. The accused appeared in person during the trial. He furthermore elected not to speak during the court proceedings. The accused consulted with an attorney from Legal Aid prior to the commencement of the proceedings who then indicated to the court that the accused understands the court proceedings, and does not want to be represented by an attorney.

[4] When the charges were put to the accused, he failed to respond whereafter the court recorded a plea of not guilty in respect of all the charges against him. The evidence of the complainant was presented during the trial. According to the complainant the parties were married during 2009 and she and the two minor children left the accused during 2014. The complainant obtained maintenance orders in the Magistrates Court at Durban prior to the divorce order being granted by the High Court, Bloemfontein. The complainant furthermore elaborated upon her endeavours to trace the accused in order to assist the members of the South African Police Service to arrest the accused.

[5] The complainant ascertained that, subsequent to the accused losing his employment, he started selling the parties' assets of which she did not receive any reimbursement even though they were married in community of property. Evidence regarding the accused's postings on Facebook, where he advertised his work as a handyman, was delivered by the complainant regarding the accused's income during

the relevant period. The court found that the maintenance orders granted against the accused were not placed in dispute and that the accused failed to comply with such orders. The accused was convicted as charged on all three counts.

[6] An aggravating factor taken into consideration by the presiding magistrate, is a previous conviction relating to his failure to pay maintenance towards his children. On 30 July 2018 the accused was convicted on case number 106/2017, at Excelsior, for contravention of section 31 of the Act and was sentenced to a fine of R3000.00 or six months imprisonment suspended wholly for three years on condition that he is not convicted of contravening section 31(1) read with sections 31(2), 31(3), 31(4) of the Act committed during the period of suspension.

[7] The trial court found that the only payments received by the complainant was at the time when the accused was in the employment of his former employer and payments were made in terms of a garnishing order against him. Since he became self-employed, he failed to adhere to the maintenance orders. On 5 July 2021 the accused was sentenced to two years direct imprisonment on counts 1, 2 and 3, taken together for purposes of sentence.

[8] On 6 July 2021 Magistrate E de Lange, who adjudicated upon this matter during the trial at Excelsior, forwarded the record of proceedings to the Registrar of the High Court, Free State Division at Bloemfontein for purposes of an automatic review. Due to the review file being misplaced in the Registrar's office, the matter was only handed to me on 2 June 2022. In her letter, the Magistrate indicated that section 39 of the Act provides for a penalty clause of a fine or imprisonment for a period not exceeding one year. The sentence on the third count is therefore not a competent sentence.

[9] Section 39 of the Act provides as follows:

“39 Offences relating to notice of change of address

Any person who refuses or fails to give notice of any change of his or her place of residence or employment as required by section 16(4) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year”

[10] In the circumstances the sentence imposed on count 3 exceeds the period of one year and thus the sentence imposed on this count is not in accordance with the law and falls to be set aside. I am of the view that the conviction on all three counts is in accordance with justice.

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

ORDER:

1. The convictions on counts 1, 2 and 3 are confirmed.
2. The sentence imposed on counts 1 and 2 of two years imprisonment on each count, to run concurrently, is confirmed
3. The sentence imposed on count 3 is set aside and the accused is sentenced to one year imprisonment to run concurrently with the sentences imposed on counts 1 and 2.

VAN RHYN, J

I agree and it is so ordered.

OPPERMAN, J