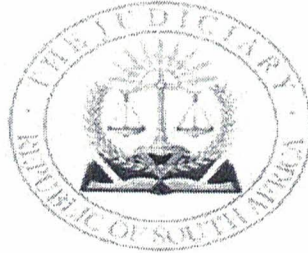


+REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO PROVINCIAL DIVISION, POLOKWANE)

CASE NO: REV 35/2019

(1)	<u>REPORTABLE:</u>
	<u>YES/NO</u>
(2)	<u>OF INTEREST TO</u>
	<u>THE JUDGES:</u>
	<u>YES/NO</u>

20/08/2019
[Signature]

In the matter between:

THE STATE

And

MASETE JEFFREY

JUDGMENT

KGANYAGO J

- [1] The Head of Court Lenyenye Magistrate during his inspection discovered that this matter was reviewable in terms of section 302(1) (a) (i) of the Criminal Procedure Act 51 of 1977 ("the Act") and that the additional sentence imposed on the accused was allegedly incompetent.
- [2] He wrote a memo to the Acting Magistrate who presided over the matter. The Acting Magistrate in response to the memo conceded that the matter was reviewable and that it was an oversight regarding the sentence, and that she will abide by the Judge's decision. The Head of Court then referred this matter for special review.
- [3] I have forwarded the memo of the Head of Court to the Deputy Director of Public Prosecutions ("DDPP") Limpopo, Polokwane for their comments and input. The conclusion of the DDPP is that the Acting Magistrate did not follow the correct procedure in convicting the accused, and that the conviction and sentence should be set aside and matter be referred back to the court *a quo* to proceed *de novo* before another magistrate.

- [4] The background facts are that the accused was charged with failure to pay maintenance. It is alleged that on the 18th September 2014 there was an order made against the accused for monthly payment of R600-00 per month towards the maintenance of his child. There was also an additional order against the accused that he should buy clothes to the value of R4500-00 for the child from June 2016 to December 2018. It is alleged that the accused did not buy the clothes and that he is in arrears with his monthly payments in the sum of R17 100-00. Therefore, his total arrears amounted to R21 600-00.
- [5] The accused appeared in court on the 1st March 2019 and elected to conduct his own defence after his rights to legal representation were explained to him. He pleaded not guilty to the charge. However, strangely the Acting Magistrate questioned him in terms of section 112(1) of the Act as if he had pleaded guilty to the charge. After questioning in terms of section 112(1) of the Act he was found guilty as charged.
- [6] In mitigation of sentence the accused stated that he is married and he is having three children. He is 48 years of age. He is a taxi owner making an income of R8000-00 to R9000-00 per month. He is paying a monthly

instalment of R14500-00 for the car. He is paying R2000-00 for household furniture, and R800-00 school fees for the children.

[7] The trial court sentenced him to a fine of R6000-00 or six months imprisonment. The State Prosecutor applied for a deferred payment on behalf of the accused. The accused was ordered to pay R2000-00 on 1st March 2019 and the remaining balance of R4000-00 to be paid within a period of two months.

[8] Section 115 of the CPA provides a procedure to be followed in case an accused pleads not guilty to the charges. Section 115(1) and (2) read as follows:

"(1) Where an accused at a summary trial pleads not guilty to the offence charged, the presiding Judge, regional magistrate, or magistrate, as the case may be, may ask him whether he wishes to make a statement indicating the basis of his defence.

(2)(a) Where an accused does not make a statement under subsection (1) or does so and it is not clear from the statement to what extent he denies or admits the issues raised by the plea, the court may question the accused in order to establish which allegations in the charge are in dispute.

(b) The court may in its discretion put any question to the accused in order to clarify any matter raised under subsection (1) or this subsection, and shall enquire from the

accused whether an allegation which is not placed in issue by the plea of not guilty, may be recorded as an admission by the accused of that allegation, and if the accused so consents, such admission shall be recorded and shall be deemed to be an admission under section 220."

[9] It is common cause that the accused was unrepresented. In **S v Smith**¹ at para 466h to 467a the court said:

"Du Toit et al Commentary on Criminal Procedure Act states in relation to s 115 that it was designed to give an accused the opportunity to put forward his defence. Judicial impatience should not frustrate this aim (See generally **S v Dannhauser 1993 (2) SACR 398 (0) at 400 h-l.**) The learned authors state further (at 18-7) that *'the procedural rights of an unrepresented accused are safeguarded by the fact that there are several rules of practice in terms of which a presiding officer who conducts an explanation of a plea is compelled to issue certain warnings and give certain explanations to an accused. These warnings and explanations which are only necessary in the case of an accused who has no legal representation may be summarised as follows'*.

The rules are then enumerated and are intended for the guidance of judicial officers."

[10]. This is the extract of how the accused has pleaded to the charge.

"COURT: Mr Masete, how do you plead to the charge?

ACCUSED PLEADS NOT GUILTY

COURT: You plead not guilty?

¹ 2002(2) SACR 464 © AT 466 H TO 476

ACCUSED: Correct. (Inaudible)

COURT: Thank you Mr Masete for your plea of guilty. Now that you have pleaded guilty to the offence that you have been charged with it is the duty of the court sir to proceed asking you questions in terms of section 112(1) (b) of Act 51 of 1977 as amended in order to determine whether you indeed admit all the elements of this offence if the court is satisfied that indeed you admit all the elements of this offence..."

[11] From the transcribed record, it shows that the accused intention was to plead not guilty to the charge. He even confirmed that to the court when asked whether he is pleading not guilty. Since the accused has made it clear to the court that he was pleading not guilty to the charge and since the accused was unrepresented, the court was supposed to have questioned him in terms of section 115 of the Act. That would enable the accused to state his defence, which in turn would have assisted the court in putting his defence to the State witnesses.

[12] It does not appear on the transcribed record the circumstances that led the court to state that the accused has pleaded guilty and question him in terms of section 112(1) (b) of the Act. A presiding officer is required to keep a complete record of the plea and its explanation.

- [13] As the accused has pleaded not guilty, the presiding magistrate was supposed to enquire from the accused the basis of his defence, and whether any allegation not placed in issue may be recorded as an admission. If the accused consented to that, it was sufficient to absolve the State from leading any evidence on that aspect. In **S v Mayedwa**² the court held that meticulous care in recording both such questions and answers will leave no doubt as to what facts have been formally admitted by the accused and what facts still remain to be proved by the leading of evidence.
- [14] In this case as I have already pointed out in para 12 *supra* that it does appear in the transcribed record the circumstances that led to presiding magistrate to question the accused in terms of section 112(1)(b) of the Act despite pleading not guilty. That will lead one to guess what might have transpired. In my view, the defect in the record in relation to that portion of the proceedings is so serious that a proper consideration of the review is not possible, as material evidence is missing from the record. The proper remedy is to set aside the trial proceedings in its entirety. (See **S v Phakane** ³)

² 1978(1) SA 509 (E) at 511 F

³ 2018 (1) SACR 300(CC) at 40-41

[15] The accused in mitigation of sentence has stated that his monthly income was between R8000-00 and R9000-00 per month. His expenses are R14500-00 for the instalment of the car, R2000-00 for household furniture and R800-00 for school fees. It is clear that his monthly expenses far exceeded his income. Despite that the court did not find out from him how he was able to meet these expenses with his low income. The court went on to impose a fine of R6000-00, ordered him to continue paying the R600-00 maintenance order and further that he reduce his arrears in monthly instalments of R600-00. All that was done without conducting a proper enquiry into the financial affairs of the accused. That in my view amounts to a gross irregularity.

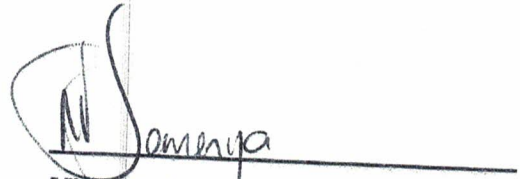
[16] The application for deferred payment was initiated by the State Prosecutor. It seems that during the application, the accused wanted to say something but the record shows that it was inaudible. After that the court said the following:

"COURT: They will not take it Mr Masele, please just make sure that your, just make sure that you pay because the Public Prosecutor has pleaded with you. Otherwise the court will have no option but to go back to R6000-00. That is fair."

- [17] It seems the accused was pleading with the court to pay a lesser deferred payment than the R2000-00, but the court instead of conducting an enquiry into his financial means, opted to instil fear in him by telling him to pay R2000.00 per month or else he will be required to pay R6000.00 at once. That in my view amounted to an irregularity.
- [18] Taking into consideration the record in its totality, the proceedings in my view, are not in accordance with justice. It follows that the proceedings stand to be reviewed and set aside.
- [19] In the result the following order is made:
- 19.1 The conviction and sentence are set aside.
- 19.2 The matter is remitted to the court *a quo* for a trial *de novo* before a different magistrate.


MF KGANYAGO J
JUDGE OF THE HIGH COURT OF
SOUTH AFRICA, LIMPOPO
DIVISION, POLOKWANE

I agree

A handwritten signature in black ink, appearing to read 'M Semanya', is written over a horizontal line. The signature is stylized with a large, looping 'M' and a cursive 'Semanya'.

MV SEMENYA J

**JUDGE OF THE HIGH COURT OF
SOUTH AFRICA, LIMPOPO
DIVISION**