

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

Case No: 218/2013

In the matter between:

THE STATE

and

JACOBUS PETRUS VAN DER SANDT

CORAM:

MOLEMELA, J *et* SESELE, AJ

JUDGMENT BY:

SESELE, AJ

DELIVERED ON:

28 NOVEMBER 2013

- [1] This matter was referred for special review in terms of section 304(4) of the Criminal Procedure Act 51 of 1997.
- [2] In her covering letter to the review, the learned Magistrate Virginia, made the following remarks, amongst others:
- 2.1 that the accused was convicted and sentenced in terms of section 31 of the Maintenance Act 99 of 1999 (“the Act”) on 19 April 2013.
- 2.2 that the accused was sentenced to three years imprisonment which was wholly suspended for a period of five years on condition that the accused is not convicted of contravention of

section 31 of the Act committed during the period of suspension.

2.3 that section 31 of the Act prescribes a fine or imprisonment for a period not exceeding one year or imprisonment without the option of a fine.

2.4 that the sentence imposed by the court is irregular in terms of the law.

2.5 that the sentence should be set aside and the matter be referred back to the court to impose a competent sentence, alternatively, that it be substituted with an appropriate sentence.

[3] The matter served before Sepato AJ who then directed the following query to the learned magistrate:

“1. From the plea explanation and throughout the trial, did the magistrate not consider converting the proceedings into an enquiry in terms of section 41(a) of the Act?

2. Upon reading lines 15 – 19 on page 57 of the court’s sentence judgment, it would appear the court intended to make an order regarding the arrear amounts that the accused has been convicted of, as part of the conditions of the suspension of the imprisonment term. However, the eventual order on page 59 does not address the issue of the arrears. Is my assumption correct or not?”

[4] The learned magistrate duly furnished the response which may be summarised as follows:

4.1 that the accused was ordered to pay R3 700,00 per month on 31 January 2009 and the order was never amended.

- 4.2 that the accused was sentenced to imprisonment during 2012 for failure to comply with the order.
- 4.3 that the court did indeed consider to convert the proceedings into the maintenance enquiry in terms of section 42 of the Act.
- 4.4 that the accused appeared not to have corrected his behaviour of non-compliance with the court order granted on 31 January 2009, was subsequently convicted and imprisoned during 2012.
- 4.5 that the accused appears to the learned magistrate, to be unwilling to pay maintenance.
- 4.6 that the accused misled the court by alleging that he had applied for the reduction of the monthly maintenance order.
- 4.7 that the learned magistrate considered the fact that the accused is a former police officer and should have appreciated the consequences of his actions.

[5] The learned magistrate further states:

“Die Hof is jammer vir die oorsig dat die Hof net 12 maande maksimum gevangenis mag oplê volgens die Wet.”

[6] Section 31(1) of the Act provides:

“Subject to the provisions of subsection (2), any person who fails to make any payment in accordance with a maintenance order shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year or to such imprisonment without the option of a fine.”

[7] The sentence imposed by the learned magistrate is clearly in excess of the sentence prescribed in section 31(1) and it is therefore not in the interests of justice.

[8] Section 42 provides:

“If during the course of any, proceedings in a magistrate’s court in respect of:-

(a) an offence referred to in section 31(1), or

(b) the enforcement of any sentence suspended on condition that the convicted person makes periodical payment of sums of money towards the maintenance of any other person it appears to the court that it is desirable that the maintenance enquiry be held, or when the public prosecutor so request, the court shall convert the proceedings into such enquiry.”

[9] Section 42 gives the magistrate a discretion to convert the proceedings into an enquiry. In my view, the learned magistrate has judiciously exercised the discretion and same cannot therefore be interfered with. The learned magistrate correctly stated that section 31 of the Act prescribes a fine or imprisonment for a year not exceeding one year imprisonment without an option of a fine. The sentence he/she imposed is thus incompetent and falls to be set aside.

ORDER:

[10] The sentence imposed by the learned magistrate on 19 April 2013 is hereby set aside and substituted with the following:

- “1. The accused is sentenced to one year imprisonment which is wholly suspended for a period of five (5) years on condition that the accused is not convicted of contravention of section 31 of Act 99 of 1998 during the period of suspension.**
- 2. The sentence is antedated to 19 April 2013.”**

L. M. S. SESELE, AJ

I concur.

M. B. MOLEMELA, J

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