

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case Nr: 188/2006

Review Nr: 45/2006
Date delivered: 27/10/2006
In the matter:

Section 1.1 The State

versus

Section 1.2 BOOYSEN

Coram: Williams J et Olivier J

JUDGMENT ON REVIEW

OLIVIER J:

1. The accused appeared in the Magistrate's Court, Upington, on a charge of the contravention of the provisions of section 31(1) of the Maintenance Act, 99 of 1998, in that he had allegedly during the period from 31 August 2000 to 2 December 2004 failed to comply with a maintenance order which had been issued on 11 August 2000.
2. Despite his plea of not guilty he was convicted and subsequently sentenced to a period of imprisonment which was conditionally suspended. After having sentenced the accused the magistrate proceeded to convert the proceedings (in terms of section 41 of the Act) into a maintenance enquiry.
3. The matter has now been submitted for a special review by the senior magistrate, Upington, who has suggested that, because the trial magistrate had evidently come to the conclusion that it was "*desirable that a maintenance enquiry be held*" (section 41 of the Maintenance Act), it had not been competent for the magistrate to sentence the accused and that

the sentence should therefore be set aside. No submission was made as regards the merits of the conviction and the trial magistrate, who had been serving in an acting capacity, is no longer available for comment.

4. After having perused the record of the proceedings I am, however, of the view that the conviction itself was not in accordance with justice. The charge against the accused was that he had, as already mentioned, failed to comply with the maintenance order during the period stated in the annexure to the charge sheet and it was alleged that the total amount of the arrear maintenance amounted to R14 800,00. After the accused had pleaded not guilty, the magistrate put the following to him:
 “Not guilty. Okay. Okay, do you make, want to make a statement explaining your Defence? Do you want to make a statement, *sir*?”
5. What the magistrate put to the accused could by no stretch of the imagination be described as a proper explanation of his rights in terms of section 115 of the Criminal Procedure Act, 51 of 1977. It was, **inter alia**, not explained to the accused that he could choose to remain silent.
6. Be that as it may, the accused then explained, apparently, that he had lost his employment in 2003 and that he had not been employed since then.
7. During the course of the further proceedings it appeared that the accused’s case would also be that he had at times prior to having lost his employment not received his salary and that he in any event disputed the allegation that he was in arrears to the amount of R14 800,00.
8. The prosecutor called only the complainant as a witness. She was not able to say when the accused had paid maintenance and when he had failed to do so. She was not even asked about the total amount of the arrears. She admitted that the accused had lost his job in May 2003 and she clearly had no personal knowledge as to whether the accused had been in any employment since then. Although the complainant did at one stage say that the accused had not paid any maintenance during the year 2002, that allegation was inconsistent with her earlier evidence that she was “*not sure*

how many times he paid in ek kan rêrig nie vir jou sê hy het spesifiek vyf keer of sewe keer ingebetaal nie". Whereas the complainant initially stated that the accused had made payments since the issuing of the maintenance order, she later denied having received any maintenance at all since then.

9. I am of the view that the accused has been entitled to apply (in terms of section 174 of the Criminal Procedure Act) for his discharge at the close of the case for the prosecution. The magistrate never explained the provisions of section 174 to the unrepresented accused. Instead, the magistrate asked the accused whether he had heard the evidence against him and put it to him that he had the *"opportunity to put your case before the Court"*. This might have created the impression with the accused that there was indeed a case to answer. In my view the magistrate should, if necessary **mero motu**, have discharged the accused at that stage (see **Commentary on the Criminal Procedure Act**, du Toit **et al**, 22-32H and **S v Lubaxa** 2001 (2) SACR 703 (SCA)).
10. There are, however, also other problems regarding the conviction. Despite the fact that the accused had made it abundantly clear from as early as the beginning of his cross-examination of the complainant that he disputed the arrears amount as alleged, and despite his express and repeated requests that the appropriate records in this regard be made available, this was not done until he himself was under cross-examination.
11. The accused was therefore deprived of the benefit of such records when cross-examining the complainant. That this must have prejudiced him is clear from the fact that the prosecutor, when addressing the magistrate on sentence, apparently conceded that the arrears amount had not been R14 800,00 and stated that it was, instead, R4 000,00 *"as per calculation made by the State ..."*.
12. The records were never proved or handed in as an exhibit. The magistrate would clearly not have been entitled to merely rely on calculations made by the prosecutor. Those calculations would have been made on the basis of records which the magistrate never saw and the magistrate would therefore not have been able to verify any such calculations. Exactly the same would apply to the calculations which the prosecutor had put to the accused in cross-examination.

13. Put simply, even after the accused's evidence the magistrate would in my view not have been able to make a finding, beyond reasonable doubt, on the arrears amount (if any).
14. The accused indicated that he wanted to call a particular witness. When he completed his own evidence he was not given the opportunity to call the witness (or in fact even to close his case). Instead the magistrate proceeded to request the prosecutor to address the Court on the merits. As it turned out the witness was later called on sentence and she then alluded to the fact that the accused was a drug addict and was in need of rehabilitation; evidence which might have had a bearing on his guilt.
15. In my opinion the conviction and sentence should be set aside on these grounds and it is therefore unnecessary to consider whether the magistrate would have been competent to apply the provisions of section 41 of the Maintenance Act after having already sentenced the accused.
16. This also makes it unnecessary to consider in any detail the fact that the magistrate did not administer the oath in the prescribed form before the complainant (or for that matter the accused) testified. Suffice it to say that the words *"Okay. May you swear then before the Court that the evidence which you are going to give, is true but nothing else true?"* would not only have been relatively confusing, but would also not have complied with the provisions of section 162 (1) of the Criminal Procedure Act. These words would not have called upon the complainant's *"understanding of the religious obligation of the oath"* and of the *"religious sanction of the oath"* (see **S v V** 1998 (2) SACR 651 (C) at 652).
17. In the premises the following order is made:
The conviction and sentence are set aside.

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

I concur:

C C WILLIAMS
JUDGE
NORTHERN CAPE DIVISION
(i)