

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Review No.: 308/2004

In the review between:

THE STATE

and

ELIAS MTHEMBU

CORAM: **WRIGHT *et* VAN DER MERWE, JJ**

JUDGMENT BY: **VAN DER MERWE, J**

DELIVERED ON: **13 MAY 2004**

[1] The accused in this matter was charged in the Magistrate's Court for the district of Witsieshoek held at Tseki with failure to comply with a maintenance order dated 31 May 2002, in contravention of section 31(1) of the Maintenance Act, No.99 of 1998. The charge sheet alleged that in terms of the said maintenance order, the accused was ordered to pay R3 000,00 per month towards the maintenance of his two children and that on 6 January 2003 the outstanding amount in terms of the order was R2 400,00.

- [2] The accused pleaded guilty and was thereafter found guilty as charged on 26 January 2003. No questioning took place in terms of section 112(1)(b) of Act 51 of 1977. On the same date the accused was sentenced to a fine of R3 000,00 or three months imprisonment wholly suspended for a period of five years on condition, firstly, that the accused is not convicted of contravention of section 31(1) of Act No.99 of 1998, committed during the period of suspension and, secondly, that he pays the amount of R50,00 per month with effect from 31 January 2003 in respect of the arrear maintenance over and above the payments in terms of the existing maintenance order.
- [3] The record of this matter for purposes of review reached the office of the Registrar of this Court only on 25 February 2004. It can only be assumed that the matter was sent on review when it was discovered that the sentence was incompetent as set out below. Reasons requested on 25 February 2004 reached the office of the Registrar of this Court only on 11 May 2004.
- [4] I am satisfied that the matter should have been dealt with in terms

of the provisions of section 112(1)(a) of the Criminal Procedure Act, No. 51 of 1977. However, in terms of the said section, a fine of not more than R1 500,00 may be imposed. It follows that the sentence is incompetent and must be set aside.

[5] I consider it in the interest of justice not to remit the matter to the Magistrate for sentencing afresh, and that sentence be imposed by this Court. The accused said that he was employed as a taxi driver and earned the amount of R400,00 per month. Nevertheless, he managed to substantially comply with the order to pay the amount of R3 000,00 per month from 31 May 2002, as on 6 January 2003 he was in arrears in the amount of R2 400,00, that is less than a full month's payment. He offered to repay the amount in arrears at the rate of R50,00 per month. He is a first offender.

[6] The sentence is set aside and substituted with a fine of R1 500,00 or 45 days imprisonment, wholly suspended for a period of five years on condition, firstly, that the accused is not convicted of contravention of section 31(1) of Act No.99 of 1998, committed during the period of suspension and, secondly, that he pays the

amount of R50,00 per month with effect from 31 January 2003 in respect of the arrear maintenance over and above the payments in terms of the maintenance order dated 31 May 2002. The sentence must be deemed to have been imposed on 26 January 2003.

C.H.G. VAN DER MERWE, J

I CONCUR

G.F. WRIGHT, J

/scd