REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: Rev 47/2024

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO THE JUDGES: YES/~~NO~~
(3) REVISED.

DATE: 28/05/24 SIGNATURE: [redacted]

In the matter between:

THE STATE

And

KAIZER NCHABELENG **ACCUSED**

REVIEW JUDGEMENT

KGANYAGO J

[1] The accused was charged with the offence of contravention of the provisions of section 31(1) of the *Maintenance Act*[1] (the Act) (failure to pay maintenance). On 31st May 2021 he appeared before acting magistrate Nkgapele in Lenyenye magistrate court, and he pleaded guilty to the charge. He was convicted in accordance with his guilty plea and sentenced to R3000.00 or 12 months imprisonment wholly suspended for a period of 24 months on condition that the accused pays extra R200.00 to the existing court order of R1000.00 per month until the arrears were paid off and the accused was not convicted of the offence of contravention of section of section 31(1) of the Act during the suspension period.

[2] The matter was only brought for automatic review before this court during April 2024. In the memo for review, Mr Phakula the head of court Lenyenye magistrate court alleges that during his official routine inspection he found the file of this matter hidden in the filing cabinet in the office used to be occupied by Mr Nkgapele for reasons unknown to him. According to the head of court, during the first week of June 2021 shortly after the matter was finalised, he took the charge sheet and gave it to Mr Nkgapele to liaise with the clerk of the criminal court to have the J4 prepared for the purposes of an automatic review. The J4 was prepared and given to Mr Nkgapele for his signature. The entire documents comprising of the J4, J15, J605 and the transcribed record were not returned to the clerk of court, and were reported to have been misplaced in Mr Nkgapele's office. They were found when they were removing all books from all magistrates' filing cabinets for donations of the books. That is the explanation for the delay in failing to timeously bring this matter for automatic review.

[1] 99 of 1998

[3] According to the head of court in his memo, the accused constitutional right to a fair trial has been violated and the whole proceedings are not in accordance with real and substantial justice. The accused trial was the shortest which the head of court has ever encountered wherein 12 questions run the race in the entire transcribed record. Even though the accused right to legal representation was explained, the accused was not warned of the nature, the seriousness of the offence and the consequences in the event of conviction. The accused has not been warned of the consequences of conducting his own defence that it may lead to undesirable consequences. The charge sheet is defective for lack of the essential elements of the offence. It has not been established if the accused had pleaded guilty freely, voluntarily and without any undue influence, and whether he was in his sound and sober senses. The questioning by the presiding officer was of poor quality that a reasonable court acting carefully could not convict. Both the accused and the prosecutor were not afforded an opportunity to present evidence in mitigation and aggravation of sentence nor an opportunity to address the court on an appropriate sentence. The accused rights to legal representation for an appeal or review procedure after the conviction and sentence were not explained at all. The admissions made by the accused during the plea proceedings do not adequately cover all the essential elements of the offence, and that the accused has been harnessed with an inappropriate, unjustified and unnecessary previous conviction.

[4] The Deputy Director of Public Prosecutions (DDPP) was requested to comment of which they did, and I am indebted to them. According to the DDPP the conviction of the accused was not in accordance with justice, and the reviewing Judge may set aside the proceedings and declare same a nullity.

[5] The head of court had made serious allegations that he found the file hidden in the filing cabinet for reasons unknown to him. By implication it was hidden by Mr Nkgapele instead of submitting the file for automatic review. These are serious allegations which had the potential to destroy the reputation of Mr Nkgapele. The head of court did not give Mr Nkgapele an opportunity to defend himself before coming to that conclusion. It was not sufficient to say that he tried to call Mr Nkgapele and his phone rang unanswered, and he did not return his calls. That was not a ground for him to reach that conclusions which might have far reaching consequences without giving Mr Nkgapele an opportunity to defend himself. He should have taken other reasonable steps to contact Mr Nkgapele, which it seems he did not do. As Mr Nkgapele was acting, the head of court should have known him from somewhere before he called him to act, and it can therefore not be said with certainty that he was untraceable. If indeed Mr Nkgapele had hidden the file, it means he is dishonest and lacks integrity.

[6] It is surprising that the head of court had reached such a conclusion whilst in the same breath he had stated that it was reported that the file had been misplaced in Mr Nkgapele's office, and could not be found after a reasonable and diligent search. It was only found when they remove all the books from every magistrates' filing cabinets. Without Mr Nkgapele's version of events it will be difficult to say with certainty that the file was hidden. It is vital for a party to be given an opportunity to deal with the issues fully, including allowing that party to make all the relevant facts available before an adverse finding is made that a person is dishonest or lacks integrity. (See *National Director of Public Prosecutions v Zuma*[2] *and Motswai v RAF*[3]). In my view, it was unwarranted by

---

[2] 2009 (2) SA 277 (SCA)
[3] 2014 (6) SA 360 (SCA)

the head of court to conclude that the file was hidden with unsubstantiated facts before him.

[7] The head of court in his memo has stated that the charge which the accused is facing was defective for lack of the essential elements of the offence. The charge against accused reads as follows:

"**Failure to pay maintenance**

"That the said accused being the person to whom a court of law, to wit MAGISTRATE COURT LENYENYE on the 28 day of November 2021 has made an order for the periodical payment of the sums of money to wit R1000.00 towards the maintenance of HIS CHILDREN did wrongfully during the period APRIL 2020 TO FEBRUARY 2021 and at LENYENYE in the district of TZANEEN fail to make payments in terms of the said order and that the said accused did thus contravene sections 31(1) of the Maintenance Act 99/1998. And that the said accused is in arrears of R9100.00".

[8] Section 84 of the *Criminal Procedure Act*[4] (CPA) reads as follows:

"[1] Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such a manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

[2] Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state that fact in the charge.

[3] In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient".

[4] 51 of 1977

[9] The purpose of the charge is to inform the accused the case which the State intends to prove against him/her. Sufficient details of the offence should be included in the charge to inform the accused of the allegations levelled against him/her. In *Msimango v S*[5] Bosielo JA said:

> "Section 35(3) falls under chapter 2 of the Constitution under the heading, the Bill of Rights. Section 7 of the Constitution commands the state to respect, protect, promote and fulfil the Rights in the Bill of Rights. However, this is subject to legitimate limits in terms of s 36 of the Constitution. The requirement embodied in s 35(3) is not merely formal but substantive. It goes to the very heart of what a fair trial is. It requires the state to furnish the accused with sufficient details to put him or her in a position where he or she understands what the actual charge is which he or she is facing. In the language of s 35(3)(a), this is intended to enable such an accused person to answer and defend himself in the ensuing trial. Its main purpose is to banish any trial by ambush. This is so because our criminal justice is both adversarial and accusatory".

[10] In the case at hand the manner in which the charge has been formulated, it described the offence which the accused is facing as failure to pay maintenance in terms of section 31(1) of the Act. It further state the place wherein the maintenance order was obtained, and also the amount which the accused was supposed to pay towards the maintenance of his children. It also state the time period in which it is alleged that the accused had failed to pay and the arrear amount for that time period. This is not a complicated case, and the nature of this offence is that the accused is aware that he is or he is not in arrears. If he was not certain about the time period and amount owing as he might have been making sporadic payments, that has been stated.

[11] Section 88 of the CPA provides that a defective charge for want of an averment which is an essential ingredient of the relevant offence may be cured by

---

[5] 2018 (1) SACR 276 (SCA) at para 16

evidence during trial proving the matter which should have been averred. The charge as it has been formulated against the accused, is such that the accused has been informed of the case which the State intends to prove against him, and the details provided in that charge are sufficient to enable the accused to answer and defend himself. Any other issues may be supplemented by evidence during the trial. There is no merit in the submission by the head of court that the charge against the accused is defective.

[12] The accused had pleaded guilty to the charge and during questioning by the court *a quo* in terms of section 112(1)(b) of the CPA, the accused had conceded that he had failed to pay maintenance as per the court order during the period April 2020 and February 2021 as he was having financial problems. Despite the accused having raised the issue that his failure to pay was due to financial problems, the court *a quo* did not consider that as a possible defence and invoke the provisions of section 113 of the CPA.

[13] Section 31(2) of the Act provides as follows:

> "If the defence is raised in any prosecution for an offence under this section that any failure to pay maintenance in accordance with a maintenance order was due to lack of means on the part of the person charged, he or she shall not merely on the grounds of such a defence be entitled to an acquittal if it is proved that the failure was due to his or her unwillingness to work or misconduct".

[14] In terms of the wording of section 31(2) of the Act, lack of means is regarded as a possible defence to the offence which the accused was facing. It was therefore upon the State to prove that his failure to pay was due to his unwillingness to work or misconduct. Therefore, the court *a quo* ought to have invoked the provisions of section 113 of the CPA by changing the plea of guilty

to that of not guilty, and given the prosecution an opportunity to disprove the defence raised by the accused. The court *a quo* has committed a gross irregularity by failing to invoke the provisions of section 113 of the CPA.

[15] After the accused had pleaded guilty to the charge, the entire record of the proceedings read as follows:

"COURT: Are you the person that an order was made against in this maintenance matter?

ACCUSED: Yes

COURT: Did you fail to pay maintenance between April 2020 and February 2021?

ACCUSED: Yes

COURT: Why did you not make payments?

ACCUSED: I caught a financial problem.

COURT: Did you approach the maintenance office to inform them of such?

ACCUSED: No

COURT: Did you know that by not paying maintenance you are contravening a court order?

ACCUSED: Yes

COURT: The court is satisfied that you are acknowledging all the elements of the offence and the court hereby finds you guilty as charged.

PROSECUTOR: We are not in possession of his SAP 69, may he be treated as a first offender?

COURT: The court has already found you guilty as charged. Do you want to give evidence in mitigation of sentence, or you are going to address the court from where you are?

ACCUSED: I intended to settle those arrears your worship.

COURT: How?

ACCUSED: The idea is that on the existing order of R1000.00, I make an additional of R200.00 until the whole arrears is settled your worship.

COURT: When you intending to start paying that?

ACCUSED: Next month, your worship.

COURT: Can I have a new first appearance form?

PROSECUTOR: Your worship?

COURT: I have a first appearance form. The sentence reads like this.

SENTENCE

You are sentenced to a fine of R3000.00 or 12 months imprisonment wholly suspended for a period of 24 months on condition that you pay R200.00 per month extra to the current maintenance order of R1000.00, meaning that you are going to pay R1 200.00 per month until the arrears are paid off and that you are not found guilty of contravening section 31(1) of Act 99, 1998 during the period of suspension.

ACCUSED: Understood.

COURT: Your first instalment will be on 30th June.

ACCUSED: Fine.

COURT: Okay you are excused

COURT ADJOURNS

[16] The main purpose of questioning in terms of section 112(1)(b) is to protect an accused, especially unrepresented accused from pleading guilty whilst they might be having a defence to the offence they are accused of. In *S v Nyanga*[6] Moosa J said:

---

[6] 2004 (1) SACR 198 (C) at 201b-e

> "Section 112(1)(b) questioning has twofold: firstly, to establish the factual basis for the plea of guilty and, secondly to establish the legal basis for such a plea. For the first phase of the enquiry, the admissions made may not be added to by other means such as a process of inferential reasoning...The second phase of the enquiry amounts essentially to a conclusion of law based on the admissions. From the admissions the court must conclude whether the legal requirements for the commission of the offence have been met. They are the questions of unlawfulness, *actus reus* and *mens rea*. These are conclusions of law. If the court is satisfied that the admissions adequately cover all these elements of the offence, the court is entitled to convict the accused on the charge to which he pleaded guilty".

[17] From the questioning by the court *a quo,* the accused did not admit all the elements of the offence he had been convicted of. It does not appear on the transcribed record that the accused had admitted wrongfulness and unlawfulness. The court *a quo* had merely posed leading questions which did not establish any wrongfulness or unlawfulness. Even when the accused raised the issue of been caught in a financial problem, the court *a quo* did not enquire further on that issue. In terms of section 41(a) of the Act if during the proceedings of an offence referred to in section 31(1), it appears to the court that it is desirable that a maintenance enquiry be held, or when the public prosecutor so request, the court shall convert the proceedings into such an enquiry.

[18] With the accused having raised the issue of been caught in a financial problem as the main reason for his failure to maintenance as per the court order, the court *a quo* had two options, to either regard that as defence and invoke the provisions of section 113 of the CPA or convert the proceedings into a maintenance enquiry, and not just ignore it. His failure to act in terms of section 113 of the CPA or converting the proceedings into a maintenance enquiry amount to a gross irregularity.

[19] What is more concerning is the procedure which the court *a quo* had followed after convicting the accused. The court *a quo* had asked the accused whether he wish present mitigating factors from the bar or whether he wishes to testify under oath. The accused seems not have understood that question as his answer was that he intended to settle the arrears without answering the question put to him. The court *a quo* did not explain to the accused what the mitigating factors are, its purpose and importance, and that what he had answered was not what the court was seeking. The court *a quo* only considered the manner in which the accused intends to settle his arrears as mitigating factors and proceeded to sentence the accused without even affording the parties an opportunity to present any evidence in aggravation or mitigation if they so wish, and thereafter for the parties to address the court on the appropriate sentence.

[20] Section 274 of the CPA provides as follows:

> "[1] A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.
>
> [2] The accused may address the court on any evidence received under subsection (1), as well as on the matter of sentence, and thereafter the prosecution may likewise address the court".

[21] Even though as per the wording of section 274 it is not peremptory to present mitigating and aggravating factors, it is of paramount importance and fair to the proper conduct of the trial, that both parties be given an opportunity to place relevant facts before court regarding the proper sentence to be given to the accused. An unrepresented accused should be explained the importance of placing mitigating factors before court, and also be encouraged to do so, and if need be also be assisted in presenting those factors.

[22] In the case at hand the accused personal circumstances have not been placed before court. It is not known whether the accused is employed, and if employed how much is his earning, his debts and monthly expenses. The court *a quo* in my view, had committed gross irregularity in the manner in which it had passed sentence without affording the parties an opportunity to address it on sentence and place relevant facts to enable the court *a quo* to pass a proper sentence on the accused.

[23] Even after the passing of sentence, the accused right to appeal or review has not been explained to him. Since the level of education of the accused has not been placed before court, it will not be known whether the accused was aware of his right to appeal or review. In my view, the manner in which the proceedings were conducted in this matter resulted in grave injustice against the accused and that taints the whole proceedings. The proceedings in this case does not appear to be in accordance with justice and stands to be reviewed and set aside.

[25] In the result the following order is made:

25.1 The conviction and sentence of the accused is reviewed and set aside.

25.2 The matter is remitted back to the magistrate court for a hearing *de novo* before another magistrate if the prosecution still wishes to pursue the charges against the accused.

[redacted]

KGANYAGO J

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

I AGREE

[redacted]

PILLAY AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION POLOKWANE

Date delivered: 28/05/2024