

SOUTH AFRICA / JUDGMENT

Curnow v S (A142/2009) [2011] ZAWCHC 61 (4 March 2011)

[2011] ZAWCHC 61

COURT

Western Cape High Court, Cape Town

BEFORE

Binns-Ward, Jakuja

CASE / FILE NUMBER

A142/2009

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE HIGH COURT, CAPE TOWN)

CASE

NUMBER:

A142/2009

DATE:

4
MARCH 2011

In the matter between:

GEORGE
CURNOW

.....Appellant

and

THE
STATE

.....Respondent

JUDGMENT

BINNS-WARD, J The appellant comes on appeal against his conviction and sentence on a charge of contravening section 31(1) of the Maintenance Act 99 of 1998, in that it was alleged that he had failed to pay periodical maintenance in terms of a court order during the period between November 2002 and September 2007. He was convicted and sentenced to the maximum prescribed period of imprisonment, being imprisonment for 12 months. The appeal is with the leave of the trial court. The accused pleaded guilty and the matter was essentially, despite the plea later having been changed for reasons which are not material to one of not guilty, dealt with

in terms of section 112 of the Criminal Procedure Act. The appellant, who was legally represented, handed in a statement in terms of section 112(2) of the Criminal Procedure Act, which went as follows in the material part: "Ek het gewerk in Lambertsbaai by Alfred's Tavern tot en met 2005, wanneer ek bedank het. Ek het agterstallig geraak omdat ek nie die voile bedrag betaal en sommige maande nie betaal het nie. Ek het by UWK begin studeer in 2006 om Yi beter werk te bekom om onderhoud behoorlik te kan betaal. Ek het bedank omdat ek nou verder studeer." As correctly pointed out by the state, with reference to authority, in particular *S v Nduku* 2000

(2) SACR 382 (Tk), *S v Cloete* 2001

(2) SACR 347 (C) and *S v Maqaqula* 2001

(2) SACR 123 (T) properly construed section 31(1) of the Maintenance Act, read with section 31(2) means that on a charge of a failure to make payments under a maintenance order, the accused, who raises lack of means as a defence, is entitled to an acquittal, unless it is established beyond a reasonable doubt by the prosecution that the lack of means was due to the accused's unwillingness to work or to misconduct. The provision does not require the accused to show that the lack of means was not caused by his or her unwillingness to work or by misconduct, instead it places the onus upon the prosecution to

prove that the lack of means was self-created by the accused, him or herself, in refusing to work or committing misconduct which led to his or her dismissal. The appellant's statement in terms of section 112(2) raised doubts as to what the basis was for his non-payment of maintenance, during at least part of the period subject to the charge, was concerned. In my view that aspect, which of course had a knock-on effect when it came to sentence, should have been examined by the magistrate in greater detail by way of questioning in terms of the Act. It seems to me that had the proper course been taken, the magistrate may well have ascertained that the plea of guilty should have been changed to one of not guilty in terms of section 113 of the Act and the state put to the proof of the charge. The submission by Ms Galloway, who appeared today on behalf of the state, is that this court should deal with the matter in terms of section 312 of the Criminal

Procedure Act and that we should remit the case to the court a quo and direct that court to comply with the provisions of section 112 and 113 in terms of the indications given in our judgment. I am of the view that that submission is well made and that that would be the appropriate order to make. Mr Solomons, who appeared before us on behalf of the appellant, agrees with that approach.

JUDGMENT

BINNS-WARD, J

The appellant comes on appeal against his conviction and sentence on a charge of contravening section 31(1) of the Maintenance Act 99 of 1998, in that it was alleged that he had failed to pay periodical maintenance in terms of a court order during the period between November 2002 and September 2007. He was convicted and sentenced to the maximum prescribed period of imprisonment, being imprisonment for 12 months. The appeal is with the leave of the trial court.

The accused pleaded guilty and the matter was essentially, despite the plea later having been changed for reasons which are not material to one of not guilty, dealt with in terms of section 112 of the Criminal Procedure Act. The appellant, who was legally represented, handed in a statement in terms of section 112(2) of the Criminal Procedure Act, which went as follows in the material part:

"Ek het gewerk in Lambertsbaai by Alfred's Tavern tot en met 2005, wanneer ek bedank het. Ek het agterstallig geraak omdat ek nie die voile bedrag betaal en sommige maande nie betaal het nie. Ek het by UWK begin studeer in 2006 om Yi beter werk te bekom om onderhoud behoorlik te kan betaal. Ek het bedank omdat ek nou verder studeer."

As correctly pointed out by the state, with reference to authority, in particular *S v Nduku* 2000

(2) SACR 382 (Tk), *S v Cloete* 2001

(2) SACR 347 (C) and *S v Maqaqula* 2001

(2) SACR 123 (T) properly construed section 31(1) of the Maintenance Act, read with section 31(2) means that on a charge of a failure to make payments under a maintenance order, the accused, who raises lack of means as a defence, is entitled to an acquittal, unless it is established beyond a reasonable doubt by the prosecution that the lack of means was due to the accused's unwillingness to work or to misconduct. The provision does not require the accused to show that the lack of means was not caused by his or her unwillingness to work or by misconduct, instead it places the onus upon the prosecution to

prove that the lack of means was self-created by the accused, him or herself, in refusing to work or committing misconduct which led to his or her dismissal.

The appellant's statement in terms of section 112(2) raised doubts as to what the basis was for his non-payment of maintenance, during at least part of the period subject to the charge, was concerned. In my view that aspect, which of course had a knock-on effect when it came to sentence, should have been examined by the magistrate in greater detail by way of questioning in terms of the Act. It seems to me that had the proper course been taken, the magistrate may well have ascertained that the plea of guilty should have been changed to one of not guilty in terms of section 113 of the Act and the state put to the proof of the charge.

The submission by Ms Galloway, who appeared today on behalf of the state, is that this court should deal with the matter in terms of section 312 of the Criminal

Procedure Act and that we should remit the case to the court a quo and direct that court to comply with the provisions of section 112 and 113 in terms of the indications given in our judgment. I am of the view that that submission is well made and that that would be the appropriate order to make. Mr Solomons, who appeared before us on behalf of the appellant, agrees with that approach.

I would, therefore, on that basis, uphold the appeal and set aside the conviction and sentence and in terms of section 312 of the Criminal Procedure Act, remit the case to the trial court, directing that court to comply with the provisions of section 112 of the Criminal Procedure Act and if appropriate, to act in terms of section 113 of the Act, as the case may be JAKUJA, AJ: I agree JAKUJA, AJ BINNS-WARD. J: So ordered BINNS-WARD. J

I would, therefore, on that basis, uphold the appeal and set aside the conviction and sentence and in terms of section 312 of the Criminal Procedure Act, remit the case to the trial court, directing that court to comply with the provisions of section 112 of the Criminal Procedure Act and if appropriate, to act in terms of section 113 of the Act, as the case may be

JAKUJA, AJ: I agree

JAKUJA, AJ

BINNS-WARD. J: So ordered

BINNS-WARD. J

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