

SOUTH AFRICA / JUDGMENT

G.L.R v S (CA&R 41/19) [2020] ZAECGHC 31; 2020 (2) SACR 30 (ECG) (29 April 2020) [2020] ZAECGHC 31

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Rugunanan, S X Mapoma

CASE / FILE NUMBER

CA&R 41/19

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CASE

NO. CA&R 41/19

Date

heard: 04 March 2020

Date

Delivered: 29 April 2020

In

the matter between:

G[...]

L[...] R[...]

Appellant

and

THE

STATE

Respondent

JUDGMENT

RUGUNANAN, J:

- [1] This is an appeal against conviction. The matter was previously struck off the roll of this Court on 13 November 2019 due to the appellant's non-appearance or non-appearance by a legal representative on his behalf. At the resumed hearing of the matter the appellant appeared in person, prior to which he filed a formal application for its re-instatement. On good cause being shown, and there being no opposition to the application, the appeal was re-instated for hearing by this Court.
- [2] On 20 December 2018, in the Magistrates' Court, Humansdorp, the appellant was convicted on a charge of failing to pay maintenance and sentenced to a term of 6 months' imprisonment conditionally suspended for 5 years. The allegation against him was that he contravened the provisions of section 31(1)[1] of the Maintenance Act. [2] The contravention for failure to pay maintenance was alleged to have occurred in the period July 2018 to November 2018 when the appellant did not make monthly payments of R1 350 which accumulated to an arrears amount of R6 750 by the time he stood trial. His sentence incorporated an order that this amount be paid in full on or before 31 January 2019.

BACKGROUND**AND EVIDENCE**

- [3] Only two parties featured in the trial proceedings before the Magistrate, namely, the complainant S[...] M[...] K[...] ("S[...]") who testified on behalf of the State and the appellant who testified in his own defence. The undisputed factual backdrop to the charge is that on 20 April 2016, the appellant consented to a maintenance order (Form J214E) in favour of S[...] for "the minor child" L[...] L[...] R[...], for payment of the aforementioned fixed monthly amount into a banking account in the name of S[...]. [3] Prior to the existence of the maintenance order the appellant was married to S[...]’s daughter C[...]. Through that marriage L[...], was born. The appellant’s marriage ended in 2008 when his wife died in a motor vehicle accident. As a matter of choice
- [4] L[...], who was aged 9 at the time, had since been residing with her grandmother S[...]. S[...] is a pensioner and was appointed co-guardian to L[...] in terms of a High Court order in circumstances and for reasons not germane to this appeal. Their living arrangement culminated in Sh[...] obtaining the maintenance order.
- [4] L[...] was born on 19 December 1998. It was not disputed that at the time of the appellant’s prosecution she had turned 20 years’ of age, [5] was still attending school and residing with S[...]. Also not in issue was that L[...] was not self-supporting and that she had a 3 year old child whose father did not provide financial support due to his whereabouts being unknown. The child lives with S[...] and L[...].

- [5] The appellant was legally unrepresented and pleaded not guilty to the charge. His plea explanation and defence is apparent from the following extracts of the record:

In explanation of plea he stated:

“... 2 jaar terug het ek na hulle toe gegaan ... en ek het verduidelik dat die hofbevel nie meer wettig is nie en dat ek wel aan gaan om die onderhoud te betaal per maand. Ek het so gedoen vir 18 maande ... tot op ‘n punt gekom wat ek dit nie meer verder gedoen het nie.”

In clarification by the Magistrate:

“So met ander woorde u se die rede hoekom u ophou betaal het is omdat u se u dogter is meerderjarig op hierdie stadium?”

He responded:

“Dis korrek”.

And when cross-examining S[...] he put it to her:

(irrelevant wording omitted)

“Ek het vroeër aan die Hof verduidelik hoekom ek opgehou betaal het. Is as gevolg van die ... hofbevel wat tot einde is toe L[...] 18 geword het ... Ek het nog steeds 18 maande daarna betaal, met die het ek gesê dat ek nog steeds gaan aanhou betaal ... as daar geen probleme is nie. Ses maande terug was daar probleme ... ” [6]

- [6] By his own admission the appellant continued making the required monthly maintenance payments for 18 months after L[...] had attained majority status, though he expressed dissatisfaction about the payments being made into a banking account that was not hers.[7] The turning point (“punt”) at which he ceased making payment occurred when L[...] required his financial assistance, for an additional R400 per month, to enable her child to attend play school for a few days extra per week.[8] According to S[...], a heated altercation ensued between the appellant and the adult pair with the appellant protesting that no court would force him to pay maintenance. It is not particularly clear when this altercation occurred, though indications are that it must have been sometime during or perhaps shortly before July 2018. Needless to say the appellant did not deny his outburst, nor did he state whether his protestation meant that he lacked financial means.
- [7] Following the appellant’s failure to have paid maintenance for L[...] in accordance with the maintenance order, S[...] lodged a complaint with the maintenance officer on 13 August 2018. By then the appellant was in arrears for a month [9] and by the time of the trial the arrears accumulated substantially.

THE ISSUES AND APPLICABLE LEGAL PRINCIPLES

- [8] Somewhat candidly (or doggedly) the appellant testified that he ceased maintenance payments on the advice of an unqualified layperson.[10] Because the maintenance order incorporated the words “the minor child”, and did not make further reference to pay maintenance until L[...] was self-supporting (“selfonderhoudend”), he was advised that once L[...] turned 18, S[...]’s right of co-guardianship terminated and the maintenance order lapsed, in effect relieving him of the obligation to continue making payments into S[...]’s bank account.[11] The appellant did not contend that once guardianship terminated, the obligation to pay maintenance was henceforth enforceable only by L[...].
- [9] Understandably, and not surprisingly, the appellant presented no legal argument at the hearing of the appeal save for stating his case on appeal was founded in *Bursey v Bursey*,[12] and in *Gold v Gold*. [13] Relying on *Bursey*, the appellant’s contention is that the express wording of the maintenance order qualified its duration by fixing a time when payment for maintenance should cease, and in holding that the maintenance order had currency the Magistrate misapplied *Bursey* and erred in convicting him. In finding that the maintenance order did not lapse the Magistrate’s judgment indicates that he relied on *Moraitis Investments v Montic Dairy*
- [14] which he found sufficiently persuasive to deduce that the maintenance order had the same standing and qualities as any other order of Court; it could not be disregarded and to ignore it would be inconsistent with the Constitutional decree that a court order is binding on all persons to whom it applies. Although what was stated in *Moraitis* was in the context of a settlement agreement, I doubt if the Magistrate incorrectly applied it to the maintenance order in issue.

His approach, in any event, finds resonance in *Bursey* where it is stated that a maintenance order is not ipso jure varied by changed circumstances but remains fully effective until terminated or varied by the Court.[15]

- [10] Reverting to the matter under consideration, I do not agree that the appellant’s interpretation of *Bursey* applies to the present case. *Bursey* is factually distinct in a somewhat narrow respect.
- [11] A starting point is the injunction under our common law, correctly decreed in *Bursey*, that the duty of support owed by a parent to a child does not terminate when the child reaches a particular age but continues after majority. *Bursey* concerned a divorce order that incorporated an agreement between the parties which provided: (irrelevant wording omitted)
- “The defendant shall pay to the plaintiff, as and for maintenance for the said minor children, the sum of R750 per month per child ... The said maintenance shall be paid until the said children become self-supporting.”*
- [12] In *Bursey*, the appellant contented that on a proper interpretation of the order payment of maintenance to his divorced spouse (i.e. the plaintiff)

ceased once the children attained majority status. In rejecting this contention the Supreme Court of Appeal (SCA) found that the phrase “the said minor children” identified them by reference and could not have been intended to qualify the duration of the order where the express terms as to its duration (signified by the wording “until the said children become self-supporting”) were spelt out. Applying the common law, ancillary to which the order existed, the SCA concluded that the order meant precisely what it said namely, that the appellant was obliged to pay maintenance until the children became self-supporting even if that occurred after they attained majority.[16]

[13] Although the maintenance order relating to L[...] makes no reference to payment of maintenance until she becomes self-supporting (a feature that distinguishes the present case from *Bursey*), parity of reasoning dictates that the wording “the minor child” identifies L[...] by reference and does not have the effect of qualifying the duration of the maintenance order. Considering that it was never disputed by the appellant that L[...] was not self-supporting when she turned 18, or that he had means, the maintenance order in her favour assumes an ancillary existence to the common law that regulates the duty of a parent to provide a child with support after majority.

[14] For the above reasons, I cannot uphold the appellant’s contention that once L[...] attained majority, and co-guardianship had ceased, the maintenance order terminated and he was no longer obliged to make payment to S[...] in accordance therewith.

[15] In heads of argument, the appellant raised the issue that S[...] lacks any form of standing or valid interest in acting for L[...]. In contending as such he does not contest that within the framework of *Bursey* the law recognises a situation in which a person can have standing in respect of another who is a major. He contends however that the courts should not extend locus standi further than necessarily conferred by the terms of a particular order. In my view, the effect of the maintenance order per se is that once L[...] attained majority, the maintenance payable would continue to be paid to her by S[...], who would recover under the maintenance order from payments by the appellant. S[...] is entitled to do this in terms of that order (until such time as she and / or L[...] and / or the appellant approaches the maintenance officer for its variation to effect payment into different bank account[17]). Thus it is the operation of the order that confers S[...] with locus standi or a validly identifiable interest to have initiated the complaint with the maintenance officer. The principle is that the attainment of majority does not per se in all circumstances automatically prevent a parent (or co-guardian, as in this instance) from denying one of them the right to enforce a claim for maintenance. The *Bursey* case serves as authority for this proposition [18] and renders the appellant’s contention abstract and academic.

[16] In the light of the above findings the next issue that requires determination is whether the appellant acted with criminal intent.

The appellant contends that he engendered a bona fide belief that the maintenance order lapsed ipso jure. In raising this contention he relies on the case of *Gold v Gold*. [19] For reasons that follow his reliance thereon is misplaced. The *Gold* case is distinguishable from the present

matter. It concerned an application for a declaration of civil contempt in which a Court is called upon to decide whether a respondent's non-compliance with an order of Court is wilful and mala fide. Once a respondent, as in Gold's case, adduces evidence that establishes that he held a bona fide belief that a maintenance order had ceased to operate, then such evidence constitutes a defence.

[17] In the present case the appellant was prosecuted on a charge of contravening section 31(1) of the Maintenance Act. To establish a contravention of the section, *S v Magagula*

[20] laid down that the State has the burden of proving the following elements:

- (1) A maintenance order directed to the accused;
- (2) A failure by the accused to make a particular payment required by the order;
- (3) (a) that at the time of his default, the accused had the means to comply with the order; or
(b) failing 3(a), and if the accused has raised the defence of lack

of means, that the accused's lack of means was caused by his own unwillingness to work, or by his misconduct; and

- (4) A "guilty mind" on the part of the accused (including knowledge of unlawfulness),

[18] The appellant's prosecution was for a criminal offence under the Maintenance Act. In contrast to civil contempt, the State must prove that he acted with a guilty mind, it being one of the requirements for securing a conviction for contravening section 31(1) per *Magagula supra*. The type of "guilty mind" required for the relevant contravention, includes *dolus* or *culpa*. This is informed by the general aims, objects, purposes and obligations imposed by the Maintenance Act, indicating that the Legislature requires a person against whom a maintenance order is made to exercise a degree of care and circumspection. Hence, where an accused fails to comply with a maintenance order due to ignorance or error, he will only escape liability if such ignorance or error is

found to be reasonable (*Magagula supra* at paragraph [47]).

[19] The foregoing explanation was necessary to clarify that the form of intent in civil contempt proceedings is markedly different from a prosecution under section 31(1) of the Maintenance Act. The nature of the present proceedings, the type of offence in question and particularly the form of intent renders this matter distinguishable from *Gold*.

[20] On the evidence, elements (1), (2) and (3)(a) per *Magagula* are not in issue, and so it remains to consider whether the appellant had a guilty mind. The appellant's assertion of the maintenance order having lapsed *ipso jure* came from advice given to him by a layperson without legal qualification and whose experience is unknown. It is not the appellant's case

that he was misled into accepting such advice or that the person concerned misrepresented the capacity in which the advice was given. On it being put to the appellant that such advice was unsound vis-à-vis the advice proffered by three legally qualified persons, the appellant had no hesitation stating that he preferred the advice as a matter of choice, and not through ignorance (“onkunde”).[21] Undoubtedly, he knew he was acting unlawfully.

[21] A reading of the appellant’s testimony reflects that in accepting the advice of a layperson he consciously exercised a choice

(“keuse”)[22] to suit his own purpose. He did not do so out of ignorance or error.[23] Contrary to what is stated in his heads of argument nowhere did the appellant state that he held the bona fide or reasonable belief that such advice was sound. Indicative from the evidence is that despite competent legal advice from three qualified and experienced persons, the appellant rejected their advice on the pretext that it was forthcoming from persons who were conspiring against him. His preference to accede to the advice of a layperson tells of a failure to have exercised a degree of care and circumspection in weighing up the competing advices. This is evident from his blunted rejoinder to a question posed about the person’s qualifications and experience: “Moet ‘n mens ‘n graad hê on ‘n ‘mechanic’ te wees?”.

[24] The Magistrate correctly found that the appellant did not act out of ignorance or error. In passing, I should mention that of the three legally qualified persons one was an attorney into whose trust account the appellant, at some stage before the trial, paid monies to be appropriated for Lacey’s maintenance in accordance with the order.

[22] In the circumstances the following order issues:

(i) The appeal against conviction is dismissed;

(ii) The sentence imposed by the Magistrate is confirmed;

(iii) The appellant shall within 60 days from the date of this order make payment of the arrears amount of R6 750 (Six thousand seven

hundred and fifty Rand) in accordance with the maintenance order dated 20 April 2016 together with accrued interest at the prescribed

legal rate applicable as at 31 January 2019 calculated to date of payment;

(iv) The order in paragraph (iii) shall have the effect of a civil judgment of this Court and shall be executed in the manner prescribed by the Maintenance Act No. 99 of 1998, as amended.

S. RUGUNANAN

JUDGE OF THE HIGH COURT

I agree. It is so ordered.

S. X. MAPOMA

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Appellant: In person

Tel: 082 928 7913

or Sunet le Roux 072 6909236

For the Respondent: Adv. L. W. Sinclair

Office of the Director of Public Prosecutions

Makhanda / Grahamstown

***NB: Sipho requested to notify parties telephonically due to lockdown

- [1] The section reads: “31 Offences relating to maintenance orders (1) Subject to the provisions of subsection (2), any person who fails to make any particular 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 three years or to such imprisonment without the option of a fine.”
- [2] Act No. 99 of 1998, as amended
- [3] Exhibit “A”, affidavit Steven Schreiber, record page 19
- [4] Record 66:15-19
- [5] Record 52:19-20
- [6] Record 120:20-24; 121:2-6
- [7] Record 53:1-6
- [8] Record 100:20-25; 130:22-24; 131:4-17
- [9] Exhibit “A” page 19 paragraphs 2 and 4
- [10] Mr Paul Hijl who was present during the appeal proceedings
- [11] Record 120:20-24; 121:16-22; and 138:10-139:8; and 145:24-146:13
- [12] 1999 (3) SA 33 (SCA)
- [13] 1975 (4) SA 237 (D&CLD) at 239F
- [14] 2017 (5) SA 508 (SCA)
- [15] At 304

[16] At 38C

[17] Section 19, Maintenance Act No. 99 of 1998, as amended

[18] At 37D

[19] 1975 (4) SA 237 (D&CLD) at 239F

[20] S v Magagula 2001 (2) SACR 123 (T), paragraphs [75] and [105]

[21] Record 139:1-7

[22] Record 139:1-2

[23] S v Magagula supra at paragraph [47]

[24] Record 139:5-9

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Prepared on 11 October 2026 · Esheria