
SOUTH AFRICA / JUDGMENT

Papers v S (KAP 17/18) [2019] ZANCHC 41; 2019 (2) SACR 638 (NCK) (30 August 2019) [2019] ZANCHC 41

COURT

Northern Cape High Court, Kimberley

BEFORE

Pakati, Phatshoane

CASE / FILE NUMBER

KAP 17/18

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IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE HIGH COURT, KIMBERLEY)

Case No: KAP 17/18

Heard On: 06/05/2019

Delivered: 30/08/2019

In the matter between:

REGINALD PAPERS

Appellant

AND

THE STATE Respondent

Coram: Phatshoane J et Pakati J

JUDGMENT ON APPEAL

PAKATI J

[1] The appellant, Mr Reginald Papers, appeared before Magistrate JAJ Fourie, in the Douglas Magistrates Court on a charge of contravention of section 31(1) of the Maintenance Act (the Act)[1] for failure to pay maintenance in accordance with the maintenance order dated 26 January 2016. It was alleged that he was in arrears of R11 000. He pleaded guilty to the charge and was thereupon sentenced to undergo thirty months imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act (the CPA)[2]. He was neither ordered to repay the arrear amount of R11 000 nor blacklisted for failure to pay maintenance. He was also not declared unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act[3].

[2] On 26 February 2018 the appellant was granted bail of R500 by the Magistrate, pending an application for leave to appeal his sentence. The application was granted on 12 April 2018. On 30 August 2018 the appellant applied for leave to appeal against his conviction as well as condonation for the late launch of the application. The Magistrate refused the application. On 13 February 2019 this Court granted condonation for the late filing of the petition

and leave to appeal his conviction after petitioning the Judge President.

[3] In his application for leave to appeal the appellant listed two grounds, summarised as follows:

[3.1] that the trial Court erred in finding that he admitted all the elements of the offence in his statement in terms of section 112(2) of the CPA; and

[3.2] that the court a quo erred in not entering a plea of not guilty in terms of section 113 of the CPA after the disclosure of a valid defence in mitigation of sentence.

[4] In his statement deposed to in terms of section 112(2) the appellant recorded:

“I, the undersigned, Reginald Ricardo Papers, hereby declare as follows:

1. I am the accused in this matter and make this statement freely and voluntarily, in my sound and sober senses, without undue influence.
2. I understand the charge against me and I wish to plead guilty to the charge of failure to pay maintenance.
3. During the period February 2016 and February 2018, in the district of the above Honourable Court, I unlawfully and intentionally failed to make payments of R11 000 (Eleven Thousand Rand) as required by a maintenance order issued in favour of the complainant namely, Marie Barends.
4. I admit that on the 29th February 2016 I had consented to an amount of R500 (Five Hundred Rand) maintenance payable per month to the complainant for our minor child namely, Remano Barends.

5. I further admit that during the above-mentioned period I had failed to make regular payments as required by the maintenance order. The total amount due being R11 000 (Eleven Thousand Rand).
6. I also admit that my actions of failing to make the said payments were unlawful and punishable in law.
7. I further admit that I had no right to act as aforesaid. I humbly apologise for my actions and plead to this [H]onourable [C]ourt for leniency when sentencing me”.
- [5] After conviction, Mr Tsuma, who appeared on behalf of the appellant before the court a quo, addressed the Court in mitigation of sentence and, inter alia, stated:

”Your worship, it is our respectful submission your worship, that one of the reasons the accused is convicted today your worship, was due to the loss of his permanent employment, your worship when the maintenance order was granted your worship he was gainfully employed, your worship”. (Own emphasis)

- [6] Mr Tsuma added that the appellant was in good health and that he was unemployed but received some income from his wife, who worked at Geelhuis. He did odd jobs for the past two months and attended school up to standard 8 (grade 10 in today’s terms). He does welding and carpentry. Mr Tsuma indicated that he had no full instructions regarding the arrear amount because the appellant had no fixed income. The appellant was looking for permanent employment but could not find it. He requested the Court to impose a suspended sentence.
- [7] The complainant, Ms Marie Barends, testified that when the order was made the appellant complied with the maintenance order until April 2016, and thereafter made one payment in July 2017. She also confirmed that “Die beskuldigde het gewerk, hy het nou November maand het hy die werk gelos”[4]. It is not clear which year she referred to.
- [8] In sentencing the appellant, the Magistrate considered the following personal circumstances as placed on record by Mr Tsuma:
 - [8.1] he was 31 years old, married and with five children, whose ages were undisclosed;
 - [8.2] he did odd jobs from time to time and earned R150 per day, from which he attempted to make payments towards maintenance of the minor child;
 - [8.3] when the maintenance order was made he was gainfully employed until November;
 - [8.4] when being convicted and sentenced he had been unemployed; and
 - [8.5] importantly, he was a first offender.

[9] The Magistrate also found that the appellant made irregular payments and that according to the complainant “he did not lose his job but just left his job.” He remarked that the offence was serious as the children suffered the most. He stated that although the appellant was a first offender “the court is of the opinion that due to the huge amount in which he is in arrears that he did not qualify for a suspended sentence.”

[10] Regarding conviction, two issues, as can be gleaned from the grounds of appeal, arise. Firstly, whether or not the court a quo did not commit a misdirection when it found that the appellant admitted all the elements of the offence on the strength of the statement in terms of section 112(2) and, secondly, whether or not the trial Court erred when it did not record a plea of not guilty in terms of section 113 of the CPA, and instead allowed the prosecutor to proceed with the prosecution after a valid defence had been disclosed during mitigation of sentence.

[11] It is important to establish whether the elements of failing to comply with a maintenance order in contravention of section 31(1) of the Act had been proved by the State and whether, in this instance, the name of the accused against whom the maintenance order had been made corresponds substantially to the name of the particular person who was being prosecuted for an offence under section 31(1) of the Act.

[12] Section 31(3) provides:

“(3) If the name of a person stated in a maintenance order as the person against whom the maintenance order has been made corresponds substantially to the name of the particular person prosecuted for an offence under this section, any copy of the maintenance order certified as true copy by a person who purports to be the registrar or clerk of the court or other officer having the custody of the records of the court in the Republic where the maintenance order was made, shall on its production be prima facie proof of the fact that the maintenance order was made against the person so prosecuted.”

[13] In casu it is evident from the record that at no stage did the court a quo request production of a certified copy of the order by the clerk of the court as prima facie proof that the maintenance order had been made against the appellant. When there is an allegation of failure to pay maintenance and the person responsible to pay deposits money via the Magistrates office, it is easy to keep track of the amounts paid and when payment was made. If the money is paid through the complainant’s bank account, production of the bank statements also makes it easy to verify the payments. Both instances

result in the proper and accurate calculation of the arrear amount.

[14] The court a quo relied on the appellant’s admission that there was a maintenance order against him and that he did not make regular payments. The periods in respect of which he was found guilty are not articulated in the judgment. The Court did not have any facts at its disposal to enable it to determine how much arrears had to be paid taking into account the charges put to him and the admission he made regarding the different dates.

[15] One must also consider failure to make payments as required by the maintenance order. In Magagula the court dealt with this in the following terms:

“(a) Whether or not at the time of his default he had means to comply with the maintenance order; or

(b) Failing (a) above and if he has raised the defence of lack of means, that the said lack of means was caused by his own unwillingness to work, or his misconduct; and [11.4] A guilty mind on the part of the accused (including knowledge of unlawfulness), whether such guilty mind takes the form of a wilful intention not to comply with the maintenance order, or a constructive intention to the same effect, or a negligent failure to comply with it. It may be proved that his lack of means was caused by his unwillingness to work, in which event it is immaterial which of these forms of guilty mind underlay his unwillingness to work.”[5]

[16] The appellant pleaded guilty and Mr Tsuma, on his behalf, handed in a statement in terms of section 112(2) of the CPA. The section provides:

“(2) If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1) (b), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.” (Own emphasis)

[17] No questioning in terms of section 112(1)(b) of the CPA was conducted by the Magistrate. The following are the main factors that were admitted by the appellant in his section 112(2) statement:

[17.1] that the maintenance order was granted against him on 29 February 2016 obliging him to pay R500 per month towards maintenance of his minor child;

[17.2] that during the period between May 2016 to February 2018 he failed to comply with the maintenance order dated 26 January 2016 as a result of which he fell into arrears of R11 000,[6]

[17.3] that the appellant had said: “I also admit that my actions of failing to make the said payments were unlawful and punishable in law,”[7] and

[17.4] that the appellant raised a defence of lack of means, as contemplated in section 31(2) of the Act, as Mr Tsuma had submitted that the reason why the appellant could not comply with the order was due to loss of his permanent employment, yet, the Magistrate indicated that he was satisfied that the appellant admitted the allegations in the charge sheet and found him guilty as charged.

[18] In *S v Mshengu*, Jafta JA (Ponnan JA and Mhlantla JA concurring) stated that:

“Section 112(2) requires that the statement must set out the facts which he admits and on which he has pleaded guilty. Legal conclusions will not suffice. The presiding officer can only convict if he or she is satisfied that the accused is indeed guilty of the offence to which a guilty plea has been tendered. If not, the provisions of s[ection] 113 must be invoked”[8].

[19] The court a quo did not enquire from the appellant whether during the period mentioned in the charge sheet he had the means with which to pay each

unpaid instalment. In this instance when he raised the defence of lack of means, no enquiry was held to establish whether or not it was due to his unwillingness to work or his conduct.[9]

However, there was no evidence that the lack of means was attributed to unwillingness to work or some other misconduct which would render him guilty of the offence. The section 112(2) statement is also unavailing in this regard. The State also did not prove that his lack of means was as a result of his unwillingness to work or any misconduct on his part.

[20] In mitigation of sentence it was stated that the appellant did odd jobs and earned R150 per day as indicated earlier. No detail was furnished as to whether or not he did the odd jobs throughout the period during which he was not permanently employed and how much he contributed towards maintenance during that period. These issues were not fully interrogated and ventilated to substantiate a finding that the appellant was guilty. What is evident from the record is that he lost his job

in November and made one payment in July 2017 as alluded to earlier. This information was mentioned for the first time in mitigation of sentence and by the complainant just before sentence was passed.

[21] The learned Judge went on to state the following in Magagula:

“The next question is whether element (4) of the offence was established. I have already pointed out that the accused’s admission of his knowledge that it was unlawful to fail to comply with a maintenance order, although it established a necessary part of the element of a guilty mind, was not sufficient to establish the whole of that element. What remained lacking, despite the accused’s so-called ‘admissions’, was an admission, or evidence, that:

- (a) the accused had had the intention, wilful or constructive, to fail to comply with the maintenance order; or
- (b) that the accused’s lack of means, and his failure to comply with the maintenance order, had been caused by negligence on his part; or
- (c) that the accused’s lack of means had been caused by unwillingness on his part to work.

Therefore element (4) of the offence was not established...”[10]

[22] In *S v Lebokeng*[11] the Court held that the presiding officer should be satisfied not only that the accused committed the act but that he committed it unlawfully and with the necessary mens rea. In the instant case, same cannot be said in the absence of a proper investigation of the appellant's circumstances regarding his ability to pay. In my view, it cannot be said that the State had established a guilty mind on the part of the appellant as he did not know that failing to pay maintenance was unlawful and punishable in law.

[23] Section 113(1) of the CPA provides:

” (1) If the court at any stage of the proceedings under section 112 (1) (a) or (b) or 112 (2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has

pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge or if the court is of the opinion for any other reason that the accused's plea of guilty should not stand, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation”.

[24] In casu it is clear that the appellant's statement did not set out facts which the appellant admitted and on which he pleaded guilty. The statement lacked factual basis to substantiate the admissions tendered. Undoubtedly, the enquiry in terms of section 112(2) of the CPA was not properly conducted. The court a quo ought to have recorded a plea of not guilty in terms of section 113 of the CPA and proceeded with the trial.

[25] Section 113 can be invoked notwithstanding the fact that the accused enjoys legal representation.[12] However, an appeal Court that is asked to rule that the court should have invoked section 113 may, where appropriate, take into account that the appellant had legal representation at the relevant time.[13]

[26] Southwood J in *Mokonoto and Others v Reynolds NO and Another*[14] remarked thus:

”As it now reads [section 113(1) of the Criminal Procedure Act], the section provides for eight distinct situations in which the court is required to correct a plea of guilty (shall record a plea of not guilty). They are—

- (1) where the court is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty;
- (2) if it is alleged to the court that the accused does not admit an allegation in the charge sheet;
- (3) if it appears to the court that the accused does not admit an allegation in the charge-sheet;
- (4) if it is alleged to the court that the accused has incorrectly admitted any such allegation;

- (5) if it appears to the court that the accused has incorrectly admitted any such allegation;
- (6) if it is alleged to the court that the accused has a valid defence to the charge;
- (7) if it appears to the court that the accused has a valid defence to the charge;
- (8) If the court is of the opinion or any other reason that the accused's plea of guilty should not stand."

[27] In *S v Morekhure Hartzenberg J* stated:

"...If it appears that the accused did earn an income but that there was a drastic change in his income it may very well be that an accused, although he is able to pay some maintenance, is unable to pay the full amount of a court order. Those are the circumstances where a magistrate is to convert the proceedings into an enquiry in terms of s[ection] 41 of the Act. It is clear that where an accused person raises the defence of inability to pay, his circumstances must be investigated. The presiding officer must determine if the accused had the means to pay or not. Three possible situations may arise:

1. The accused had the means to pay. If his failure to pay cannot be justified on the basis that he was prevented from paying through circumstances over which he had no control he is guilty of the offence.
2. The accused had means to pay a portion of the maintenance but did not have means to pay all the maintenance. If the prospects are that his circumstances will not improve the trial must be converted to a maintenance enquiry in terms of s[ection] 41 of the Act. If the prospects are that his circumstances will improve to such an extent that in future he will be able to comply with the order there is no need to convert the proceedings to a maintenance enquiry. It must however be determined what amount the accused ought to have paid. He will be guilty of the offence in respect of that amount. If and when the amount of arrear maintenance in terms of s[ection] 40 of the Act is determined it must not be fixed in an amount higher than what the accused ought to have paid.
3. The accused did not have means to pay maintenance at all. If the accused cannot be blamed for his lack of means he is entitled to an acquittal. If it appears that the lack of means is to be attributed to unwillingness to work or some other misconduct he is obviously guilty of the offence.

In this matter there was not a proper investigation of the accused's ability to have paid maintenance during the time when he failed to do so. It is also not clear what the circumstances were when he was previously found guilty of the same offence. I am satisfied that the enquiry in terms of s[ection] 112 of Act 51 of 1977 was not a proper one and that the accused should not have been found guilty. It is also clear that there ought to have been an entry of a plea of not guilty in terms of s[ection] 113 when he gave evidence in mitigation and that there should have been a proper investigation at that stage. I am therefore satisfied that the conviction cannot stand." [15] (Own emphasis).

[28] Regarding the defence disclosed by Mr Tsuma, in mitigation of sentence, it is undisputed that the appellant was unemployed when he was convicted and therefore unable to comply with the maintenance order. There is no detail as to how much he paid in July 2017 or any other time considering what he said that he tried to pay maintenance from time to time when he did odd jobs.

[29] Section 31(1) and (2) of the Act provides:

”(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) 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 defence be entitled to an acquittal if it is proved that the failure was due to his or her unwillingness to work or misconduct.”

[30] In the instant case I am satisfied that there was no proper investigation of the accused's ability to pay maintenance during the time when he failed to do so. The complainant's evidence confirmed that the appellant complied with the maintenance order until April 2016 and made one payment in July 2017. Moreover, the fact that he was unemployed when he failed to comply with his obligation constituted a valid defence to the offence in contravention of section 31(2) of the Act. I am therefore satisfied that the conviction cannot stand; if he could not be blamed for his lack of means he is entitled to an acquittal.

[31] It is pertinent to also refer to section 41 of the Act. This section provides:

”41 Conversion of criminal proceedings into maintenance enquiry

If during the course of any proceedings in a magistrate's court in respect of-

- (a) an offence referred to in section 31 (1); or
- (b) the enforcement of any sentence suspended on condition that the convicted person make periodical payments of sums of money towards the maintenance of any other person,

It appears on good cause shown that it is desirable that a maintenance enquiry be held, the court may, of its own accord or at the request of the public prosecutor, convert the proceedings into such enquiry”.

[32] Regarding conversion into an enquiry in terms of section 41 of the Act, it is a matter of discretion of the trial Court on the facts of each individual case. This discretion must be exercised judiciously. In this case I consider that the appellant did not have means to pay at all. It was not appropriate for the Magistrate to exercise his discretion in the manner he did, i.e. not converting the plea to one of not guilty and conducting the proceedings accordingly.

There was no evidence that the appellant was able to pay some maintenance and unable to pay the full amount.

[33] If evidence is given by or on behalf of an accused for purposes of sentencing, which is in conflict with an admission made during the section 112 proceedings, there is an implied withdrawal of the admission concerned.[16] In this regard I take into account the evidence of the complainant that the appellant left his job.

[34] In my view, the Magistrate misdirected himself when he did not record a plea of not guilty in terms of section 113 of the CPA in both instances, and for that reason the appeal against the conviction ought to be upheld. As the conviction must be set aside, the sentence must also be set aside.

[35] In the circumstances I grant the following order:

The appeal against conviction and sentence is upheld.

B.M. PAKATI

JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION, KIMBERLEY

I concur.

MV Phatshoane

For the Appellant: Mr Steynberg

Instructed by: LEGAL AID SOUTH AFRICA, KIMBERLEY

For the Respondent: Adv Mxabo

Instructed by: OFFICE OF DIRECTOR OF PUBLIC

PROSECUTIONS

[1] Maintenance Act, 99 of 1998.

[2] Criminal Procedure Act, 51 of 1977.

[3] Firearms Control Act, 60 of 2000.

[4] English translation: “[t]he appellant was employed and he left his job in the month of November.”

[5] S v Magagula 2001 (2) SACR 123 (TPD) at 171a – c (Magagula).

[6] Notably, in his section 112(2) statement the appellant admitted having failed to make payments for the period February 2016 to February 2018.

- [7] Compare Magagula, where at paragraph 108 it was held: “With regard to element (4), the admission of having had knowledge of the unlawfulness of a failure to comply with a maintenance order was not enough to

establish the necessary guilty mind. What an admission in this form failed to establish were the other aspects of a guilty mind. In particular, such an admission failed to establish that the accused's lack of means had been caused by unwillingness to work; or that he had a wilful, or a constructive, intention not to pay the unpaid instalments; or that he had been negligent in failing to pay them. Knowledge of unlawfulness was necessary, but not sufficient, to establish a guilty mind. It left open the possibility that the accused might have made that admission because he was unaware that a mere failure to comply with a maintenance order was not unlawful and punishable unless it was accompanied by a guilty mind in the form of a wilful or constructive intention not to comply, or in the form of a negligent failure to comply; or unless his lack of means had been caused by an unwillingness on his part to work.”

- [7] Compare Magagula, where at paragraph 108 it was held:

“With regard to element (4), the admission of having had knowledge of the unlawfulness of a failure to comply with a maintenance order was not enough to

establish the necessary guilty mind. What an admission in this form failed to establish were the other aspects of a guilty mind. In particular, such an admission failed to establish that the accused's lack of means had been caused by unwillingness to work; or that he had a wilful, or a constructive, intention not to pay the unpaid instalments; or that he had been negligent in failing to pay them. Knowledge of unlawfulness was necessary, but not sufficient, to establish a guilty mind. It left open the possibility that the accused might have made that admission because he was unaware that a mere failure to comply with a maintenance order was not unlawful and punishable unless it was accompanied by a guilty mind in the form of a wilful or constructive intention not to comply, or in the form of a negligent failure to comply; or unless his lack of means had been caused by an unwillingness on his part to work.”

- [8] S v Mshengu 2009

- (2) SACR 316 (SCA) at para 7.

- [9] S v Pieterse 1993 (1) SASV 470 (K); S v Sohlezi 2000

- (2) SACR 231 (NC).

- [10] Magagula above on 5 at para 120.

- [11] S v Lebokeng en ‘n ander 1978

- (2) SA 674 (O).

- [12] See S v D en ‘n Ander 1998 (1) SASV 33 (T).

- [13] S v Mbuyisa 2012

(1) SACR 571 (SCA) at para 8.

[14] Mokonoto and others v Reynolds NO and another 2009

(1) SACR 311 (T) 318g – 319a at para 18.

[15] S v Morekhure 2000 (2) SACR 730 (TPD) at 733b-i.

[16] Naidoo and another v De Freitas and others 2013 (1) SACR 284 (KZP) at para 11; see also S v Nixon 2000 (2) SACR 79 (W) at 87I-J.

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