

SOUTH AFRICA / JUDGMENT

P.M v S (CA 43/22) [2025] ZANWHC 46; [2025] 2 All SA 514 (NWM) (5 March 2025)

[2025] ZANWHC 46

COURT

North West High Court, Mafikeng

BEFORE

Reddy, Makoti

CASE / FILE NUMBER

CA43/22

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION –

MAHIKENG

Case no: CA43/22

Reportable:

YES/NO

Circulate

to Judges: YES/NO

Circulate

to Magistrates: YES/NO

Circulate

to Regional Magistrates: YES/NO

In the matter between:-

P[...] Y[...]

M[...]

APPELLANT

AND

THE

STATE

RESPONDENT

This

judgment was handed down electronically by circulation to the
parties' representatives via email and released to SAFLII.

The
date and time for hand-down is deemed to be 05
March 2025 at 16h00.

ORDER

The
conviction and sentence are set aside.

JUDGMENT

REDDY J (MAKOTI AJ CONCURRING)

[1] The appellant was charged before the Wolmaransstad District Court (the court a quo) on one count of contravening the provisions of section 31 (1) of the Maintenance Act 99 of 1998 (failure to pay maintenance). The State contended that the appellant was in arrears in the sum of R61 000.00 for the period April 2016 to 20 July 2020.

[2] The appellant enjoined representation at the trial. He pleaded not guilty to the charge proffered and elected to exercise his right to remain silent as provided for in section 35 (3) (h) of the Constitution of the Republic of South Africa, 1996. He was duly convicted as charged. On 29 March 2021 the appellant was sentenced as follows:

“ 12 months imprisonment which was wholly suspended for a period of five years on condition:

[1] Accused to pay the sum of R 3000 per month to the complainant, BM in respect of arrear maintenance in the amount of R61 000.

[2] Accused to pay the sum of R1000 maintenance in respect of one minor child into the banking account of BM and or if the amount is varied to continue with such payments unless the variation order stipulates otherwise. Failure to comply will result in the suspended portion of the sentence being put into operation if committed during the period of suspension.”

[3] On 8 April 2021, the Magistrate submitted the record of proceedings under Case No: Review 01/2021, (Magistrates Court Case No :359/2019) on special review, wherein it was requested that a rectification of the sentence imposed by the Magistrate be reconsidered to include a condition that the appellant should not be convicted of contravening s31 (1) of the MA committed during the period of suspension.

[4] On 20 April 2021 aggrieved by the above outcome, the appellant applied for leave to appeal against both the conviction and the sentence.

[5] On 24 June 2021, unbeknown to the appellant at the request of the Magistrate the sentence imposed was corrected on special review by Hendricks DJP(as he then was) and Petersen AJ (as he then was) to read twelve (12) months imprisonment which was wholly conditionally suspended for a period of five years. Peculiarly, on 21 October 2021, the appellant received notification that leave to appeal had been granted.

- [6] The appellant sets out in detail the reasons for non-compliance with the Magistrates Court Rules, the Uniform Rules of Court, and the Practice Directives of this Court; and provided a full and detailed explanation for the delay in prosecution of the appeal. See *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC)[2007] ZACC 24; , 2008
- (4) BCLR 442 (CC) at para 20; *Grootboom v National Prosecuting Authority* [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014
- (1) BCLR 65 (CC) at para 22.
- [7] The appellant also met the watermark governing reinstatement of a criminal appeal. See *Bunze v S* (CA19/2022) [2024] ZANWHC 276 (5 November 2024) at para 13, *David Ngotao and Another v S* (Case CA 10/2016) at para 11. The respondent did not oppose the reinstatement application. Accordingly, the appeal was reinstated.
- [8] The appellant assails his conviction on the following grounds:
- (i) The Magistrate erred in finding that the respondent had proved all the elements of the offence under section 31 of the Maintenance Act 98 of 1999 ('the MA') read with *S v Magagula* 2001 (2) SACR 123 (T) at paragraph 47.
- (ii) The Magistrate erred in failing to convert the criminal proceedings into an inquiry in terms of section 5 of the MA. Moreover, the Magistrate failed to allow admissible evidence in the form of the children and the maintenance officer, resultantly discounting section 41 of the MA.
- [9] The appeal is opposed by the respondent. Both parties acquiesced to the hearing of the appeal as ensconced in section 19(a) of the Superior Courts Act 13 of 2013.

The State case

- [10] On 20 July 2020, when the complainant testified, the children of the complainant and the plaintiff, LM and SM (initials used to protect the identity of the children) were twenty (20) and thirteen (13) years old respectively. The delineation of the ages of LM and SM are crucial to the proffered version of the State as it pertains to the calculation of the arrear maintenance.

The bonds of marriage between the parties were dissolved by order of court dated 24 February 2011, incorporating a settlement agreement. The salient terms of the settlement agreement as it pertains to these proceedings are as follows: The appellant was to pay maintenance in the sum of R1000-00 for each of the two minor children. Additionally, he was to pay all medical, dental, prescribed pharmacist, hospital, eye care, orthodontist, scholastic expenses and tertiary education expenses. Moreover, the appellant also undertook to pay for the residential and municipal expenses as well as fifty per cent (50%) of their day to day expenses and fifty per cent (50%) of their transport costs, should they reside in a different town than where the appellant lived. This order remains extant and has not been the subject of any amendment.

[11] The fulcrum of the failure of the appellant to have acquiesced to the order of court is best extrapolated from the transcribed record. It reads as follows:

‘PROSECUTOR: Now Ma’am if I can help you with a breakdown of the complainant you only lay charges for failing to pay maintenance for the two children from April 2016 to date?’

ME M[...]: Yes.

PROSECUTOR: And April 2016 to March 2017 for two children a R1000.00 a month that is 24 months R24 000.00.

PROSECUTOR: April 2017 to March 2018 because L... has turned 18 by then it is for the 12 months for the one child an amount of R12 000.00 for the year 2017 April to March 2018.

ME M[...]: Mhu I am [intervened]

PROSECUTOR: R1000.00 per month for one child.

PROSECUTOR: For 12 months.

PROSECUTOR: Is R 12 000.00.

ME M[...]: Is R12 000.00 yes.

PROSECUTOR: Thank you. April 2017 to December 2017 for the one child the youngest ### is nine months for the elder child, sorry Your Worship,

who turned 18 December 2017 that is nine months that is

Rule 9 000.00.

COURT: Have you gone through these amounts with the complainant?

PROSECUTOR: Yes Your Worship I am just refreshing her memory.

COURT: Oh good so the Prosecutor has been through these amounts with you?

ME M[...]: Yes we did check it Your Honour.

COURT: Alright good.

PROSECUTOR : And then April 2018 to October 2019 it is for, it is actual from April 2018 to July 2020 which is today that gives us 16 months Ma’am and amount of R16 000.00.

PROSECUTOR: The total months 61 months an amount of R 61 000.00 until to date.

ME M[...]: For S... yes.

PROSECUTOR: Do you confirm Ma’am that this amount does not include the eldest child of 18 years for the period after he turned 18?

ME M[...]: Yes.

PROSECUTOR: And intervened.

COURT: So it is only for the minor child?

PROSECUTOR: It is for both children up to the time [intervened].

COURT: Up till the time when he turned 18.

PROSECUTOR: When he turned 18.

COURT: Okay.

PROSECUTOR: And what is S currently doing now?

ME M[...]: He is doing Grade 8.

PROSECUTOR: The elder child.

ME M[...]: No the little one.

PROSECUTOR: The little one.

ME M[...]: The little one is doing Grade

8. The eldest one is doing his second, third year in the University of Free State.

PROSECUTOR: So he is over 18 years and he has made arrangement for his university fees and this Court proceedings does not involve him except for the time when he was under 18.

[12] The complainant contended that since the dissolution of the marriage the appellant had been employed, primarily as an optometrist, who dabbled in several subsidiary businesses. All of which was largely unsubstantiated. The appellant's ownership of a farm was founded on utterances that were made by the children. Furthermore, it was averred that the appellant was the owner of D[...] P[...] (Pty) Ltd. This conclusion was founded on a bank statement that was produced in May 2019. Finally, the appellant is the owner of five motor vehicles of relevance is a Toyota Corolla registered in this Province, which LM was given.

[13] The immovable property that formed part of the joint estate, it was agreed, would be sold according to the complainant 'within six months and whoever remained in that property was supposed to maintain it and keep it on the standard that it was'. Notwithstanding this agreement, same was not sold. Six years after the disposal of the divorce action the appellant still resided in a portion of same, the remainder of which was being rented.

[14] In 2017 or late 2018, he moved out. The keys were then left with the complainant with a directive that she was to see as to what was to be done with the house. The property was vandalized. Additionally, it was about to be auctioned. To circumvent this a credit plan for repayments of the bond was negotiated with the bondholder, namely Absa. This allowed for the rental of the property. Gradually the renovation of the property gained momentum. Rental was being received from this property. Significantly, there was no arrangement that the accrued rental was to be used as a substitute for the maintenance payment. Civil

litigation instituted by the appellant in respect for repayment of exorbitant sums of money did not reach any finality. The dispute over the immovable property is independent of the maintenance order.

- [15] In April 2016, the appellant had not adhered with the periodical payments of maintenance as ordered. Resultantly, a report was made at the maintenance section. During an inquiry that followed in the maintenance office the appellant asserted that he would rather reside with the children in lieu of paying maintenance. From this point the appellant made no payments.
- [16] Further inquiries did not result in the appellant being swayed from his misconceived notion that he had no duty to conform with his legal obligation to cohere with the payment of maintenance. At this point, both children had their primary residence with the complainant. From September 2016 to June 2017, LM primarily resided with the appellant. The complainant conceded that she had been influential in the change of where LM would reside given the appellant's stance that he preferred if the children had resided with him. To make short shrift of the matter, the appellant stopped adhering to the maintenance order in April 2016.
- [17] On occasions when there would be sporting activities, and a shortfall was encountered to cover the costs of same, the appellant would assist with funds upon request. These monies would be withdrawn via E-Wallet.
- [18] In April or May 2019, the appellant averred that he made available a bank card from First National Bank. To this end, he was transferring money into same which SM was accessing. This account was only accessed by SM. Notwithstanding, SM's unilateral control of the account, SM did on one occasion allow funds to be used for the purchases of food at the initial stages of the Covid-19 lockdown. Other attempts by the complainant to use the funds in this account were unsuccessful with SM retorting that 'this money is meant for me for my trips dad said it is for my pocket money and for my trips'.
- [19] The calculated amount of arrears did not refer to any school fees. The following extract from the transcribed record concluded the evidence of the complainant:

'COURT: What the Prosecutor wants to know is so previously that he was paying it was only in 2016 that you discovered that he stopped paying?

ME M[...]: Completely yes.

COURT: Good thank you Ma'am.

PROSECUTOR : Thank you Your Worship. When you, did you talk to him about the money that he stopped to pay?

ME M[...] : Yes I did because the time I indicated to him that if you are not willing to do this I am going to take you to court for maintenance and he said ja you can go ahead. By that time that is when I realized that we were always having, it more like when we talk we would not agree on anything. So I realised let me allow the law to handle this part. And then I did not want to ask for anything anymore going forward.

PROSECUTOR : According to your knowledge Ma'am the time from 2016 to date is he still working and able to pay maintenance?

ME M[...] : He is working and able to pay maintenance.

PROSECUTOR : Why do you say that?

ME M[...] : He is I do not see why I would say he is not able to pay while he is living his life. He manages to build the house, complete the house that he is staying in, And he is able to sometimes takes the kids for whatever the fun that they can have with him. So I believe he is able to pay.

PROSECUTOR : So he is still living in a house that he completed after you got divorced. He is still having the optometrist business. He is still paying for the education of the eldest at university?

ME M[...] : Yes

The version of the appellant

[20] The appellant took no issue of the extant and specificity of the order for the payment of maintenance. He amplified that the account that was provided for the payment of maintenance money was initially functional but later had inherent issues. Amongst others, the appellant bemoaned that letters of demand were issued against same. Resulting from the inability to properly communicate on issues with the complainant, the maintenance money according the appellant 'was paid direct to the children via e-wallet and the bank account that my son had, some of the monies were paid into their account to e-wallet bank account and cash'.

[21] The appellant elucidated on this cessation (which had not been resuscitated) of bilateral communication as follows:

"She blocked me from calling because she did not want me to talk about the challenges that we had on the family. I tried to call on the families together so that we can solve the issue of the outstanding problem that I had of which at the moment was the property. So I think she totally stopped me from communicating with her. She blocked me on WhatsUp, calls were blocked and completely shut down. I called uncle. She could not listen to anyone. The advises and the from the families they all failed. I will even as we speak quote M[...] M[...] as the person I spoke to, his elder brother to say please let them cover so that we can discuss this thing so that we can sort it out.

So after having such kind of problems and messages that were saying she is owing and blah-blah-blah with accounts that is why I said okay the best way for me to deal with this situation is to use that method until she comes to me and then so that we can sort it out because she complained also about the monies getting into the.....

Yes I was blocked in any way of contacting and it worsened, the situation worsened. I did not want calls because of the incident that happened in the property where I was blocked and a case was opened against me of assault. So that made me not to trigger a lot trying to push to communicate with her because the more I pushed then she was going to open maybe another case for me.'

- [22] Given the impediments that the appellant encountered with the original account, he submitted that there was another account that 'she introduced for the child and then I, they also had a problem with that account that she opened for it because they said they could not access the money the same time'. As a result, the appellant devised a more conventional way to efficiently get the maintenance money paid. To this end, the appellant contended that the probabilities favoured the complainant being aware of these payments.
- [23] Given the complete breakdown in communication, when LM pursued university education, LM was the means of communication. Moreover, the appellant asserted that his contribution to the payment of maintenance exceeded the R1000.00 per month. Appositely, the appellant underscored that 'I was using LM as a base of communication where monies and everything can be exchanged there because I could not access the mother like...'. Relevantly, the appellant declared that 'that was a known thing. If he can come, he would say to you that if I need to get something small, I had to tell LM to tell me that this, to tell his mom that this is happening then it worked like that. Then when LM went to university the communication has to come from me to LM to her mom so that we can go. I paid almost everything by that method because the channel with her mom is closed'.
- [24] The appellant reiterated that he did not default on any maintenance payments. His regular payments were in the sum of R1000.00 for each child. The excess which was paid he could not quantify.

Submissions by appellant

- [25] In the heads of argument prepared for the appellant, Adv Makgatho contended that the respondent bears the onus of tendering evidence that proves beyond a reasonable doubt that the appellant failed to comply with the order relating to his maintenance contributions during the default period. This contention developed that a lack of means defence as outlined in section 31(2) will not avail the appellant if the respondent can prove beyond a reasonable doubt that the non-compliance with the order was due to the appellant's unwillingness to work or misconduct.

[26] In Magagula, alluded to in the grounds of appeal supra, Adv Makgatho submits, an additional requirement was inserted to prove a contravention of section 31(1) of the MA. To secure a conviction proof of the following peremptory elements were required:

(i) A maintenance order that came to the knowledge of the accused.

(ii) A failure by the accused to make payments in terms of the order, which must include that at the time of the default the accused had the means to comply with the maintenance order; or in the case of lack of means, the lack should have not been caused by the accused's unwillingness to work or misconduct.

(iii) There was a guilty mind on the part of the accused (knowledge of unlawfulness or mens rea)

[27] Against these settled principles, Adv Makgatho submits that the finding by the court a quo that the respondent had proven all the elements of section 31(1) of the MA was flawed. This assertion hinged on documentary evidence that was not considered by the court a quo as demonstrated in the judgment. In this regard Adv Makgatho points out in her written heads that:

"18.2 A bank statement (exhibit E) was submitted by the appellant which showed payments amounting to Two Thousand Five hundred Rands

(R2500.00) on the 07th and 17th June 2016, into Sihle's Absa bank account opened by the complainant since her bank account had debit orders.

18.3. Another bank statement (exhibit C) proved that on 02nd July 2016, per arrangement, the complainant received partial maintenance of Five Hundred Rands (R500.00) through her FNB e-wallet account (0829722407) from the appellant since Sihle's Absa Bank account delayed payment. Further evidence was presented of other partial payments between the period of July 2017 and April 2019 into Sihle's account.

18.4. Despite the exhibits been uncontested by the respondent, the court a quo failed to consider nor mention these maintenance payments in its judgment. This is a material misdirection, because there is a reasonable doubt that the default was for the entire period at issue, which calls for interference by this honourable court."

[28] Adv Makgatho further charges that the court a quo erred in finding that the monies paid into the children's bank account was pocket money and not for maintenance, which finding is in stark contrast with the concession made by the complainant that in March 2020, she accessed and used same to maintain the children. According to Adv Makgatho this concession would have become more profound had the children testified and explicated the way the monies received were utilised. What is significant, Adv Makgatho asserted, is that the court a quo was not seized with any evidence to make a factual finding that the children enjoyed an affluent lifestyle, therefore amounts deposited into the accounts of the children were for their pocket money and not maintenance payments.

- [29] Adv Makgatho submits as to the financial means of the appellant that, importantly, the appellant was not a person of means during the period between April 2016 – July 2020, in contrast to the court a quo’s finding. Documentation in the form of medical records were introduced demonstrating that the appellant was seriously ill between 2014 – 2015. Inevitably, the business of the appellant suffered, and he only convalesced in 2019. To this end, in August 2016 the appellant took the initiative and informed the Maintenance Officer of his financial challenges. It is for this reason that the evidence of the Maintenance Officer remained relevant and admissible and should not have been excluded.
- [30] What stands out, so the argument progressed, was that there had never been a complaint of non-compliance with the maintenance order between April 2016 to March 2019. The latter complaint was purposely aerated in reprisal to an action which called for the division of their joint estate.
- [31] Notably, Adv Makgatho contended that the appellant lacked the necessary mens rea to commit an offence since the appellant verily believed that all payments, he had made into the children’s bank accounts as pre-arranged, were maintenance payments.
- [32] Finally, Adv Makgatho contends, that given the mosaic of facts before the court a quo the provisions of section 41 of the MA should have been invoked converting the criminal proceedings into an enquiry. The failure of the court a quo to do so resulted in an improper exercise of a judicial discretion.

Submissions

by respondent

- [33] In the heads of argument prepared for the respondent, Adv Molefe contends that the appellant had been correctly convicted and elucidated as follows to reinforce this submission. The appellant had

conceded that the order of court dated 24 February 2011 remained extant. Simply put, the appellant was aware and conceded in cross

examination ‘that the order that was made in respect of payments was that payment be made to the complainant and not children’.

- [34] In addition, the appellant was still running three of his businesses and there were monies paid into the accounts of the said businesses. It follows, so Adv Molefe asserted that the appellant had the means to maintain his children and adhere to the court order. To underscore this, Adv Molefe placed much store on S v Morekhure 2000 (2) SACR 730 (TPD) where the court held that:

“... if it appears that the accused did earn 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 maintenance, is unable to pay the full amount of a court order. Those are circumstances where a magistrate

is to convert the proceedings into an enquiry in terms of section 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’.

[35] Adv Molefe contends that Morekhure proposed three possible scenarios in determining whether the appellant had the means to pay or not. First, the appellant has 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. Second, the appellant had the 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 section 41 of the MA. 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 into a maintenance enquiry. It must however be determined what amount the appellant ought to have paid. It follows that the appellant would be guilty of that amount. Third, the appellant did not have means to pay maintenance at all. If the appellant 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, then the appellant is obviously guilty of the offence.

[36] In respect of section 41 of the MA, Adv Molefe proposes that the discretion was that of the presiding officer to determine if a criminal trial should be converted into a maintenance enquiry. To emphasize the existence of this discretion, she referred this Court to Magagula *supra*.

Discussion

[37] Apart from the verbiage, this appeal is determined on the appellant’s right to a fair trial. This is intertwined with the conduct of the Magistrate. The transcribed record is an objective indicator that the accused had not been afforded a fair trial as will become apparent *infra*.

[38] There is no underscoring that prosecutions involving children are paramount to the best interests of the children. The Magistrate was alive to this. To this end, the record provides:

‘COURT: Understand that maintenance is very sensitive issue it is also something that is very preferent so I am not going to, if he is not paying I am not going paying to...’

[39] And regarding the averment that there had been perpetual non-compliance with the maintenance order the Magistrate retorted:

‘COURT:

But this should have been dealt with right at the beginning. What is, what seems to be the problem I mean maintenance is vitally important and this goes against the grain of the rights of children in terms of the Constitution.'

[40] Notwithstanding the Magistrate's laudable comments, the record reinforces the haste in which the matter was sought to be concluded. The following exchange explicates the motive:

'COURT: Okay.

ACCUSED: Of doing things.

COURT: Okay. All right. Okay. Any further questions Mr Botman.

MR BOTMAN: I beg yours Your Worship?

COURT: Any further questions?

MR BOTMAN: No Your Worship I believe we covered [intervenes]

COURT: Thank you. Mam do you think you are gonna be done in 15 minutes with your cross-examination?

PROSECUTOR: No Your Worship I have lots of questions.

COURT: Can we take a lunch adjournment now and come back at 14h00?

PROSECUTOR: Suitable Your Worship.

COURT: But unfortunately I can only be in court for an hour. I am busy on a course, an online course. I am busy with an online with on an online course which starts very early.

PROSECUTOR: If the defence can maybe indicate how many witnesses they intend to call and if they are here your worship?

MR BOTMAN: They are not here Your Worship but we intend to call other witnesses.

COURT: How long do you think you will take with your cross-examination Mam? One hour?

PROSECUTOR: Not more than that Your Worship.

COURT: From about 02h00 to 03h00?

PROSECUTOR: Yes I will be done by then.

COURT: All right good. So let us resume quarter to 02h00 and then we will try and finish with the cross-examination. This matter is going on very long. So it is only this witness that you are calling?

MR BOTMAN: Correct.

COURT: So if we can finish that and finish with the re-examination I would like heads of arguments because I know you are not based here.

PROSECUTOR: If,if I understand the Defence correctly Your Worship they previously told me that they still intend to call three other witnesses except this witness.

MR BOTMAN: No Your Worship I, I, I think we will be calling two witnesses if not one.

COURT: Two witnesses, another witness?

MR BOTMAN: Yes.

COURT: Who would that be?

MR BOTMAN: In fact it should be one, the eldest child Your Worship.

COURT: I think you know what instead of dragging children into this, this kind of thing ,I have listened to the evidence of both the parties. I would like you to probably give me comprehensive heads of argument. If the court needs clarity then the court will call anyone else as witness.

MR BOTMAN: No that is, that is fine Your Worship.

COURT: Because.

MR BOTMAN: I understand what the court, where the court is going.

COURT: Because we do not want a dispute.

MR BOTMAN: [Intervenes]

COURT: Between the mother and father.

MR BOTMAN: Involves children.

COURT: To start now involving the children.

MR BOTMAN: Ja.

COURT: It, it is it makes for living with parents very difficult.

MR BOTMAN: I am with the court Your Worship I understand clearly specifically when Court says that it had been listening to the evidence.

COURT: Yes. So Mam there will only be one witness and thereafter comprehensive heads of arguments.

COURT: And then we can take it from there. Good Court will adjourn we shall resume at 02h00.Please note that you are still under oath sir.

ACCUSED: Thank you.

[41] In *Diniso v S* (CA14/22) [2023] ZANWHC 11 (7 February 2023), the Court as per Petersen J and Reddy AJ (as he was then) postulated the following regarding the role of a judicial officer:

‘The role and duties of judicial officers

[13] In terms of section 165 of the Constitution the judicial authority of the Republic is vested in the courts. Section 165(2) of the Constitution provides that "The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice." A Magistrate's Court is given constitutional recognition as part of the hierarchy of courts. Section 165(2) of the Constitution speaks to the accountability of judicial officers. The accountability of judicial officers extends to all those who fall under the protection and umbrella of the Constitution. Judicial officers are subservient to the Constitution and the law. The constitutional injunction of accountability must be executed without fear, favour or prejudice.

[14] In *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa intervening)* 2002

(5) SA 246 (CC) at page 268C-269C, the Constitutional Court provided the following interpretation of section 165:

"[18] The Constitution thus not only recognizes that courts are independent and impartial but also provides important institutional protection for courts. The provisions of section 165, forming part of the Constitution that is the supreme law, apply to all courts and judicial officers, including magistrates' courts and magistrates. These provisions bind the Judiciary and the government and are enforceable by the Superior Courts, including this Court. It is in this context that the issues raised in the present matter must be decided.

[19] In *De Lange v Smuts NO and Others*, Ackerman J referred to the views of the Canadian Supreme Court in *The Queen in Right of Canada v Beauregard*, *Valente v The Queen* and *R v Genereux* on the question of what constitutes an independent and impartial court, describing them as being 'instructive'. In this context, he mentioned the following summary of the essence of judicial independence given by Dickson CJC in *Beauregard's* case:

Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual Judges to hear and decide cases that come before them: no outsider- be it government pressure group, individual, or even another Judge-should interfere in fact attempt to interfere, with the way in which a Judge conducts his or her case and makes his or her decision. The core continues to be central to the principle of judicial independence.

[20] This requires judicial officers to act independently and impartially in dealing with cases that come before them, and at an institutional level it requires structures to protect courts and judicial officers against external interference.

(our emphasis)

[15] Judicial officers are the gate keepers of all rights entrenched in the Constitution. Judicial officers in the Lower Courts are at the coalface of justice. It is therefore imperative that they be seen to be impartial and independent. (*Van Rooyen and Others supra* at 271-272).

[16] The Bangalore Principles of Judicial Conduct ("the Bangalore Principles") provide that:

"[a] Judge shall exercise the judicial function independently on the basis of the Judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference direct or indirect from any quarter or for any reason... Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made. A Judge shall ensure his or her conduct is above reproach in the view of a reasonable observer... The behaviour and conduct of a Judge must reaffirm the peoples' faith in the integrity of the judicial. Justice must not merely be done but must also be seen to be done... A Judge shall in his or her personal relations with individual members of the legal profession who practice regularly in the Judge's court, avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality. "

[17] The Bangalore Principles are incorporated in the Regulations for Judicial Officers in the Lower Courts, 1993 in Schedule E titled "CODE OF JUDICIAL CONDUCT FOR MAGISTRATES IN TERMS OF SECTION 16(1) OF THE MAGISTRATES ACT, 1993 (ACT NO. 90 OF 1993) AND REGULATION 54A OF THE REGULATIONS FOR JUDICIAL OFFICERS IN THE LOWER COURTS, 1993". In the Preamble of the Code, the provisions of section 174(8) of the Constitution is re-iterated, which provides that:

.before judicial officers begin to perform their functions, they must take an oath, or affirm, in accordance with paragraph 6(1) of Schedule 2, that they "will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike, without fear, favour or prejudice, in accordance with the Constitution and the law'.

[18] The following Articles in the Code are of particular relevance to the present appeal:

"Article 5: To act honourably

- (1) A magistrate must always, and not only in the discharge of official duties, act honourably and in a manner befitting judicial office.

Article 7: Equality

A magistrate must at all times—

...

- (b) in court and in chambers act courteously and respect the dignity of others; (c) in conducting judicial proceedings, give special attention to the right to equality before the law and the right of equal protection and benefit of the law; and (d) in the performance of judicial duties refrain from being biased or prejudiced.

Notes:

Note 7(i): These provisions are aimed at promoting courtesy and ensuring a degree of decorum.

Article 9: Fair trial

A magistrate must—

- (a) resolve disputes by making findings of fact and applying the appropriate law in a fair hearing, which includes the duty to —
 - (i) observe the letter and spirit of the audi alteram partem rule;
 - (ii) remain manifestly impartial; and
 - (iii) give adequate reasons for any decision;
- (b) in conducting judicial proceedings— (i) maintain order; (ii) act in accordance with commonly accepted decorum; and (iii) remain patient and courteous to legal practitioners, parties and the public, and require them to act likewise;

[19] It should be clear that both independence and impartiality are fundamental principles in order to attain justice in a particular case. Justice, must be done to all individuals and at the same time, must inspire public confidence, in the administration of justice. Without the confidence of the public, the justice system will be devoid of respect, which is essential to the administration of justice. It is therefore critical to the effective and efficient administration of justice that courts are, perceived to be impartial and independent. (Van Rooyen and Others *supra*.)

[42] The impatience of the Magistrate is palpable. What stood out was that the Magistrate was in great haste to attend online training and lost focus on the arduous duty that she so eloquently paid lip service to, namely the best interests of the children as espoused in section 28(2) of the Constitution 1996. To this end, the Magistrate's mind became clouded and could not see the wood from the trees.

[43] It is noticeable that the Magistrate lacked an understanding of what a fair trial entails. In our legal ecosystem fairness dictates a level playing field for the appellant, the State and those directly affected by the non-compliance of the order of court. In *S v Jaipal* [2005] ZACC 1, 2005 (1) SACR 215 (CC) at para 29, the apex court observed that the right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State. It must instill confidence in the criminal justice system with the public, including those close to the accused as well as those distressed by the audacity and horror of crime.

[44] The Magistrate initially attempted to dictate to the respondent the timelines for the cross examination of the appellant and attempted to place a fifteen-minute time bar for the same to be concluded. On realizing that the respondent did not acquiesce to her inquisitorial stance, the Magistrate changed tack and dissuaded the appellant from calling any witnesses under the ruse that this would result in dragging children into the matter.

- [45] What the Magistrate clearly lost sight of was that the appellant intended to call LM, his eldest son who was twenty years old at the time of the trial. Moreover, the evidence of LM was crucial to the case of the appellant. The appellant unreservedly had a right to call witnesses for the just decision of the matter.
- [46] The Magistrate unilaterally decided that the appellant should not call any witnesses and if witnesses were necessary, the Magistrate was at liberty to adduce same. In terms of section 35(3)(i) of the Constitution the appellant has a right to a fair trial, which encompassed the right to adduce and challenge evidence.
- [47] To state as a fact that the Magistrate could call witnesses to ‘clarify’ is a legal misnomer. The law of general application which empowers a court to call a witness is codified in s186 of the Criminal Procedure Act 51 of 1977 which reads:

“The court may at any stage of the criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if such witness appears to be essential to the just decision of the case.” (my emphasis)

The right of a presiding (trial) judicial officer to call witnesses for the just decision of the matter is very limited. There would have been no need for the Magistrate to invoke section 186 of the CPA, in any event, since the appellant was intent on calling LM as a witness.

- [48] Undoubtedly what was unfolding was detrimental to the principles of fairness and justice, as the exchange amongst the various role players was taking place in the presence of the appellant who had not yet been cross examined. Notwithstanding the incomplete cross-examination, the Magistrate was confident that she listened to the evidence of both parties, which at its lowest is inconceivable. To pacify the appellant from intentionally trampling of his right to call witnesses, the Magistrate broadly remarked that “if the court needs clarity then the court will call anyone else as witness”. The Magistrate seems to have conflated a criminal trial (which was before her), with an enquiry in terms of section 41 of the MA.
- [49] In a criminal trial the State bears the onus to prove the guilt of an accused beyond a reasonable doubt. There is no onus on the accused to prove his or her innocence or convince the court of the truthfulness of any explanation that he or she proffers. See *S v Jochems* 1991 (1) SACR (A) at 211 E-G, *S v V* 2000(1) SACR 453 (A) para 3.
- [50] Fundamentally, the Magistrate was incorrect on two scores: first, all the evidence had not been presented before her; and second, the Magistrate was not enjoined with a statutory discretion to call a witness/es to clarify issues. See *Basson v S* 2007 (1) SACR 566(CC), *S v Helm* 2015 (1) SACR 550 (WCC).
- [51] Fair trial rights will be rendered nugatory if the conduct of the Magistrate is endorsed and will set an irregular precedent. The conduct of the Magistrate vitiates the proceedings. Resultantly, the conviction and sentence fall to be set aside.

Order

[52] In the premises, I make the following order:

The conviction and sentence are set aside.

A REDDY

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION MAHIKENG

I agree.

M. Z. MAKOTI

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION

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Judgment

reserved: 2 August 2024

Judgment

handed down: 5 March 2025

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