

SOUTH AFRICA / JUDGMENT

S v Moore (A912/15, D881/2013, 15/2014, 334/15) [2015] ZAGPPHC 987; 2016 (1) SACR 547 (GP) (14 December 2015)

[2015] ZAGPPHC 987

COURT

North Gauteng High Court, Pretoria

BEFORE

N Ranchod, N.P M Qibisa-Thusi

CASE / FILE NUMBER

A912/15

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

DATE:

14 DECEMBER 2015

CASE

NUMBER: A912/15

REPORTABLE:

OF

INTEREST TO OTHERS JUDGES

MAGISTRATE

WONDERBOOM

Case

No: 0881/2013

Magistrate's

serial no: 15/2014

High

Court Ref No: 334/15

THE

STATE VS JOHN ROBERT MOORE

REVIEW

JUDGMENT

RANCHOD J:

- [1] This matter lay before me as a special review in terms of section 304(4) of the Criminal Procedure Act 51 of 1977 (the CPA).
- [2] The matter involves a failure to pay maintenance. An inquiry was held by a magistrate in terms of section 10 of the Maintenance Act 99 of 1998 (the Act).
- [3] After the inquiry was concluded the learned magistrate pronounced judgement and found the accused guilty of having contravened s31 of the Act. During sentencing proceedings the legal representative of the accused pleaded in mitigation of sentence. A financial statement from the accused was submitted to show that he had a shortfall in his income to the extent that he was unable to pay the monthly amount of maintenance as ordered.

[4] In a short judgement on sentence the magistrate said:

'Now having heard the accused plea in mitigation, that he had compiled a financial statement and there is a shortfall in his finances, the section 41 of the Maintenance Act allows the court that the matter can be converted at any time before sentence. I have convicted you of having failed to comply with the court order, but having heard that there is a shortfall in your monthly finances the court orders that this matter be converted into an enquiry. The matter is in, converted into a maintenance enquiry.' (Quoted as is.)

- [5] Acting Senior Magistrate Wessels referred the matter to this court for special review as he was of the opinion that the matter could not be converted into an enquiry, as the presiding magistrate purported to do, after conviction. He therefore requests that the conviction be set aside and the matter be referred back to the court a quo for an inquiry in terms of section 10 of the Act. The matter was referred to the Director of Public Prosecutions (the DPP) for comment. A helpful memorandum was received from Senior State Advocate J Cronje and Deputy Director of Public Prosecutions K van Rensburg. I am grateful for their extensive input and what follows is based on their submissions, with which I agree. It is their view that it is not entirely clear from a reading of section 41 of the Act that the criminal proceedings can be converted into an inquiry after conviction and request that in the interest of legal certainty and conformity this court should rule on the interpretation of section 41 of the Act.
- [6] A brief background to this matter would be apposite. On 18 April 2011, pending divorce proceedings, this court ordered that the accused, inter-alia, pay a certain amount per month as maintenance to his then wife who is the complainant in this matter before me. The accused and the complainant were divorced on 16 March 2012. The accused failed to pay the full amount of maintenance from March 2012 to August 2012. He had obtained a reduction in the amount of maintenance he had to pay on 23 August 2012. Nevertheless, he did not pay any maintenance at all for the month of September, 2012. It is evident ex facie the case record that the accused, during the evidence that was presented, maintained that he did not

have sufficient funds to pay the maintenance as ordered, inter-alia, due to debt that he had accumulated. It is important to note for purposes of this judgement that the legal representative for the accused also submitted to the court, in argument before conviction that the court should convert the proceedings into a maintenance enquiry in terms of section 41 of the Act. The learned magistrate did not act on this submission at the time.

- [7] The accused testified in mitigation of sentence after his conviction. He handed in a monthly expense account together with payslips and bank statements. These documents showed that he had a shortfall in his monthly income and it was at this point during sentencing that the presiding magistrate ordered that the proceedings be converted into a maintenance enquiry.

Section 41 of the Act provides:

'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) . . .

it appears to the court that it is desirable that a maintenance enquiry be held, or when the public prosecutor so requests, the court shall convert the proceedings into such enquiry.'

- [8] The words 'during the course of the proceedings' is not defined in the Act except insofar as section 41 makes it clear that it refers to criminal proceedings. The section does not prescribe whether the conversion into a maintenance enquiry must take place before conviction or before sentence. Clearly, it cannot occur after a sentence is passed as the proper recourse to an accused would then be a review or an appeal as the sentencing court would be functus officio. The question then is when must such conversion into an enquiry take place?

- [9] In *S v Olivier*¹ at 1900 Erasmus J held with reference to the provisions of section 13 of the Maintenance Act 23 of 1963 that-

'It seems that by virtue of sec. 13 the conversion may take place at any stage of the proceedings and that nothing would stop the accused from placing facts before the court which tend to show that it would be an appropriate matter for investigation in terms of sec. 5.'

- [10] Act 23 of 1963 was repealed in its entirety by the Act. The provisions of section 41 are similar to the provisions of section 13 of the repealed Act and its provisions are peremptory. Although the prosecutor in *casu* did not

request the conversion of the proceedings, the court quite correctly, given the evidence, converted the proceedings into a maintenance enquiry. However, the court should have converted the proceedings before convicting the accused as there was sufficient evidence to warrant a maintenance enquiry. The questions that must be answered though are firstly, whether the proceedings can be converted into a maintenance enquiry after conviction, and secondly, what is to become of the conviction?

[11] The conviction stands and cannot be ignored. It does not automatically fall away as the Act does not make provision for this

procedure. The Act also does not make any provision that enables a magistrate to set aside the conviction where proceedings are

converted into a maintenance enquiry after such conviction. If the intention of the legislature was that the proceedings may be

converted even after conviction, it should have prescribed what was then to be done with the conviction. The conviction can therefore in my view, only be set aside by a court with review or appellate jurisdiction.

[12] The OPP office says that case law on these challenging questions relating to the Act could not be found. A comparative

search yielded a somewhat similar situation regarding the provisions of section 123 of the CPA (as amended) which reads as follows:

'If an attorney-general is of the opinion that it is necessary for the more effective administration of justice-

- (a) that a trial in a superior court be preceded by a preparatory examination in the Magistrate's Court into the allegations against the accused, he may, where he does not follow the procedure under section 119, or, where he does follow it and the proceedings are adjourned under section 121(3) or 122(1) pending the decision of the attorney-general, instruct that a preparatory examination be instituted against the accused;
- (b) that a trial in a magistrate's court or a regional court be converted into a preparatory examination, he may at any stage of the proceedings, but before sentence is passed, instruct that the trial be converted into a preparatory examination.' (My emphasis.)

[13] In *S v Tieties*² a full bench of five judges of the Supreme Court of Appeal grappled with the meaning of the words '... at any stage of the proceedings, but before sentence is passed...'. In that matter the question was whether the attorney-general could convert the original trial into a preparatory examination after the appellant's conviction but before sentence was passed. At 465C-D Smalberger JA said:

The word 'trial' in similarly worded earlier enactments was widely held to mean the proceedings before the pronouncement by the presiding magistrate of his verdict, i.e. before conviction or acquittal. (See *R v Boon* 1912 TPD 1136 at 1138-9; *R v Kissing* 1926 SWA. 61 at 62; *R v Keeves* 1926 AD 410 at

413, 415, 418; *R v Mcingwane* 1930 EDL 244.)'

[14] The court was further of the view that the conviction cannot simply be swept away. The learned judge went on to say:

'Secondly, if section 123(b) authorises the Attorney-General to act after conviction, what is to become of the conviction which has being recorded? A conviction has important consequences for as long as it stands. For one, it precludes a further trial against the person convicted in respect of the same or a similar offence based on substantially the same facts. Furthermore, in the context of the present matter, it would render inoperable or inapplicable many of the provisions relating to preparatory examinations (see section 124 et seq of the Act). Unless specific legislative provision is made for it to be dealt with in some other manner, a conviction stands until set aside by a competent court with review or appellate jurisdiction. If, therefore, the legislature had intended the Attorney-General to have the power to Act under section 123(b) after conviction one would have expected specific provision to have been made for setting aside the conviction. Yet the Act, and particularly section 123(b), is completely silent on the point. It makes no specific provision for the conviction to be set aside either by the authorised act of the presiding magistrate (as was the case previously under the now repealed s93(2) of the Magistrates' Courts Act where the presiding magistrate was authorised after conviction to 'set aside his finding'), or by reference to a Court of review or appellate jurisdiction (as provided for in the case where s116(3)(a) of the Act applies).'

[15] The court of appeal, therefore, gave effect to the intention of the Legislator by reading the words 'before conviction' in the place of the words 'before sentence is passed' into section 123 of the CPA.

[16] In *S v Tieties* supra at 464A-B Smalberger JA went on to hold that:

'It follows from the above principles that, whereas a Court may in appropriate cases depart from the ordinary meaning of the words used in a statute, or even modify or alter such words, it may only do so where this is necessary to give effect to what can with certainty be said to be the true intention of the Legislature. Once such intention has been established the court should not hesitate to give effect thereto.'

[17] In my view, by parity of reasoning, the words 'but before conviction' should be inserted in section 41 of the Act after the words 'If during the course of any proceedings' in order to give effect to the intention of the Legislator. The proper order in this matter before me would be to set aside the conviction and the matter be remitted to the court a quo for continuation of the proceedings.

I accordingly make the following order:

1. The conviction and sentence are set aside.
2. The matter is remitted to the court a quo for the continuation of the proceedings.

N RANCHOD

JUDGE OF THE HIGH COURT

I agree

N.P M QIBISA-THUSI

JUDG OF THE HIGH COURT

1 S v Olivier 1976 (3) SA 186 (O)

2 S v Tieties [1990] ZASCA 4; 1990 (2) SA 461 (A)

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Prepared on 11 October 2026 · Esheria