



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CR 93/2012

In the matter between:

THE STATE

and

KALUNDU JAMES KALUNDU

(HIGH COURT MAIN DIVISION REVIEW REF NO 1945/2012)

Neutral citation: *S v Kalundu* (CR 93-2012) [2012] NAHCMD 92 (30 November 2012)

Coram: HOFF J and VAN NIEKERK J

Delivered: 30 November 2012

Flynote: **Practice** – Review – Of interim order made by agreement after voluntary offer by represented accused by criminal court to make certain payments towards arrear maintenance – Such order made before conviction and sentence – not reviewable under Criminal Procedure Act, 51 of 1977 – Only conceivable basis for review is under section 20(1)(c) of High Court Act, 16 of 1990 – Order causing no prejudice – No gross irregularity vitiating proceedings – Court declined to review and set aside order

Summary: The accused appeared in the magistrate's court on a charge of c/section 39(1) of the Maintenance Act, 9 of 2003, in that he failed to make payments in terms of a maintenance order. Before the trial started, his lawyer indicated that the amount in arrears is in dispute. The matter was to be postponed for 4 months as time had run out. The accused voluntarily offered to pay N\$300 per month towards the arrears. The court made an interim order to this effect and also ordered the accused to keep up payments in accordance with the existing maintenance order. On the next hearing date the proceedings were converted into a maintenance enquiry. The maintenance magistrate was of the view that the interim order was improperly made as there had been no enquiry in terms of section 39. She referred it for special review.

The matter was not reviewable under the Criminal Procedure Act, 51 of 1977 as there was no conviction and sentence. Conceivably the order could be reviewed under section 20(1)(c) of the High Court Act, 16 of 1990. Normally this would require a rule 53 application with notice to interested parties.

Section 39 of the Maintenance Act does not provide for an enquiry. It was assumed that the maintenance magistrate referred to an enquiry under section 33, which may only be done after conviction of a c/section 39 offence. *In casu* the accused was not convicted, therefore the criminal court could not act in terms of section 33. The interim order was in effect made by agreement and prejudiced no-one. If the order could be said to be an irregularity it was not 'gross' and caused no injustice which vitiated the proceedings. It posed no obstacle to the maintenance court. The Court declined to review and set the interim order aside.

ORDER

The Court declines to review and set aside the order made by the criminal court on 30 January 2012.

SPECIAL REVIEW JUDGMENT

VAN NIEKERK J (HOFF J concurring):

[1] Mr Kalundu initially appeared before the Magistrate's Court at Windhoek on a charge of a contravention of section 39(1) of the Maintenance Act, 2003 (Act 9 of 2003) in that he allegedly disobeyed a court order by failing to make payments in accordance with a maintenance order. He was represented by a legal practitioner. It was placed on record that the accused disputes the amount in arrears and that the State intended proving the amount. The matter was postponed twice. At the third appearance on 30 January 2012 the amount in arrears was still in issue. It seems from the record that time had run out and that the matter had to be postponed to 31 May 2012. The complainant placed certain facts on record. At that stage the accused offered to pay N\$300 per month towards the arrears. As I understand it, the order regarding the arrears was meant to have effect until 31 May 2012.

[2] On that date the criminal proceedings were converted to a maintenance enquiry upon application by the prosecutor under section 34(a). The matter was called later that day in the maintenance court. The legal practitioner for the defendant *inter alia* explained that the previous order regarding the arrears was merely provisional to cover the period between 31 January and 31 May 2012. She applied for a new maintenance order of N\$700 per month and N\$500 per month towards the arrears. The complainant agreed that the order of 31 January regarding the arrears was an interim order effective until 31 May 2012.

[3] The maintenance magistrate made a ruling in which she stated the following:

'I do agree with the Criminal Maintenance court of today, that is, 31/5/2012 why it refer this case back to us in terms of Section 34 of Act 9 of 2003.

Because the court of the 30/01/2012 made an order in respect arrears without conducting a proper enquiry in terms of section 39 as required. It is too difficult now for the Criminal Maintenance court to do an enquiry on arrears because there is an order already.

This court too is not in the position to overrule the order of the previous court and it is also not in a position to do anything with the case today.

If this was an application in terms of Section 9(2)(b) this court was supposed to go ahead and hear the financial status of the problem of both parties.

However, if the parties want to peruse [pursue?] the arrears, and the defendant want (*sic*) Section 39 to be explained to him though I can see that it is not really necessary because he is defended.

My suggestion is for the order of the 30/01/2012 to be set aside first then if the parties want to peruse[pursue?] the arrears the case will be referred to the Criminal Court Maintenance before this court entertain (*sic*) the defendant's application for decrease to be done in terms of Section 9(2)(b) of Act 9 of 2003.

Today this court "make (*sic*) no order" and refer the case to the Head of Office to send the case to the High Court for Special Review for the order of the 30/01/12 to be set aside first."

[4] From this extract it is clear that the maintenance magistrate requests that the order made in the criminal court be reviewed and set aside. The Criminal Procedure Act, 1977 (Act 51 of 1977) ("the CPA"), does not provide for such a procedure. Sections 302 and 304(4) are the only provisions in the CPA which provide for review by this Court and they contemplate that there must have been a conviction and that sentence must have been passed. This did not occur in this case. I assume that this is why the maintenance magistrate called for a 'special review'. I note that the

person designated as Head of Office indicated uncertainty in correspondence attached to the record as to the authority upon which the matter is to be forwarded for 'special review.'

[5] The only basis upon which the matter can conceivably be reviewed is by relying on section 20(1)(c) of the High Court Act, 1990 (Act 16 of 1990), which provides that the proceedings of any lower court may be brought under review before the High Court because of a gross irregularity in the proceedings. This would normally require an application to be drawn up in terms of rule 53 of the rules of this Court with notice to any party with an interest in the matter. This Court has on occasion not required compliance with rule 53 in cases where it came to this Court's attention that a gross irregularity occurred during the course of criminal proceedings which caused prejudice or served to vitiate the proceedings. However, this power is sparingly exercised.

[6] In this case one of the maintenance magistrate's complaints is that the criminal court made an order about the arrears without conducting a 'proper enquiry' in terms of section 39 of the Maintenance Act. I pause here to point out that section 39 does not contemplate any enquiry. It deals with offences relating to maintenance orders and provides, *inter alia*, that a person who disobeys a court order by failing to make a particular payment in accordance with a maintenance order commits an offence. It contemplates, at most, a criminal trial. I assume that the maintenance magistrate is referring to the procedure provided for in section 33(1) of the Maintenance Act, which states that a magistrate's court which has convicted an accused of an offence under section 39(1) may, on the application of the public prosecutor, in addition to the penalty which the court may impose in respect of that offence, grant an order for the recovery from the accused of any amount he or she has failed to pay in accordance with the maintenance order, together with any interest thereon. Section 33(2) provides that the criminal court, in considering the granting of an order for recovery of arrears, may in a summary manner enquire into certain circumstances set out in section 33(3), including the existing and prospective

means of the accused and the financial needs and obligations of, or in respect of, the beneficiary.

[7] In this case the defendant was not convicted. The criminal court could therefore not act in terms of section 33. However, it appears from the record that the accused voluntarily offered to pay towards the arrears in the interim until the dispute regarding the amount in arrears could be resolved at the next hearing date. This was certainly in the interests of the complainant. The defendant was represented by a lawyer who did not object. Neither did the prosecutor. The order was, in effect, made by agreement between the parties, including the complainant. There was no prejudice to anyone. If the order could be said to amount to an irregularity which occurred during criminal proceedings because there is no statutory provision expressly or impliedly providing for such an order to be made, this irregularity is not material or 'gross' and certainly did not cause any injustice whereby the proceedings were vitiated. Furthermore, the order does not pose an obstacle to the maintenance court as it was only an interim order intended to be effective until 31 May 2012. I do not see any reason why it should be reviewed and set aside.

[8] It appears from the maintenance magistrate's ruling that she is of the view that the arrear maintenance can only be recovered by means of the process provided for in section 33. I do not agree. Where the criminal proceedings have been converted to a maintenance enquiry I can see no reason why the maintenance court cannot include the issue of any payment towards the arrears when it conducts the enquiry into whether the existing maintenance order should be substituted.

[9] The result is that I decline to review and set aside the order made by the criminal court on 30 January 2012.

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K van Niekerk
Judge

E P B Hoff
Judge