"SPECIAL INTEREST"

CASE NO.: CA 37/2006

SUMMARY

JULIUS GAWESEB **versus** THE STATE

DAMASEB, JP

26/07/2006

MAINTENANCE ACT, 9 OF 2003

- Contravention of s39(1) of the Act – disobeying order to pay maintenance. Court *a quo* imposing the maximum fine when evidence showed appellant could not afford – sentence improper and set aside. Although Magistrate who heard case *a quo* no longer available, Court declining to impose sentence afresh and remits matter to district court to impose sentence afresh according to law: warning issued against lenient sentences for those failing to pay maintenance. Full range of sentencing powers in Maintenance Act should, in the best interests of children, always be considered.

- Court *a quo* also ordering payment of arrear maintenance in terms of s33(1) of Act in absence of 'an application by public prosecutor' – such *ultra vires* and therefore set aside.

"SPECIAL INTEREST"

CASE NO. CA 37/2006

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JULIUS GAWESEB

and

THE STATE

CORAM: DAMASEB, J.P.

Heard on: 2006.07.21
Delivered on: 2006.07.26

JUDGMENT

[1] **DAMASEB, J.P.:** The appellant appeared in the Magistrate's Court for the District of Windhoek on 30th August 2004, charged with a contravention of s39 (1) of the Maintenance Act, Act 9 of 2003 (the Act). This was a sequel to a maintenance order (following divorce) made against the appellant on 4th December 1992 in terms whereof he was ordered by the High Court to make periodical payments of N$350.00 for the maintenance of his two minor children.

[2] The charge sheet alleged that the appellant had run up a debt of N$49 000.00 in arrear maintenance for the period 7 January 1993 to 30 August 2004 as he only paid an amount of N$500.00 during that period. All told, he was in arrear with about a hundred and thirty eight (138) instalments, according to the charge sheet. He pleaded not guilty relying on ss(2) of s39 of the Act. The appellant was however found guilty and sentenced to the maximum fine of N$4 000.00 or fourteen months imprisonment.

[3] In addition to the fine of N$4 000.00, the learned magistrate made a further order in terms of s33(1) of the Act. ss1 of s33 provides:

> "Where a Magistrate's Court has convicted a defendant of an offence under Section 39 (1) the Court 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 defendant of any amount he or she has failed to pay in accordance with the Maintenance Order together with any interest thereon. And the order so granted has the effect of a civil judgment of that Court, and that order may subject to subsection 2, be executed in the same way as a Maintenance Order made under this Act may be executed." (underlining is mine for emphasis)

[4] The court *a quo* ordered the appellant to pay an amount of N$10 000.00 towards the arrears on or before 15th October 2004 and thereafter the amount of N$1 000.00 per month for 39 (thirty nine) months commencing on 31st October, and thereafter on or before the 7th day of every subsequent month. It is clear what the learned magistrate sought to do: She wanted to make sure the appellant pays off the arrear maintenance of N$49 000.00. The magistrate also confirmed the existing maintenance order of N$350.00. I am not sure if it was necessary for that order remained in force unless lawfully recalled. I do not understand that the proceedings *a quo* were concerned with whether or not the existing maintenance order should cease.

[5] The appellant appealed: firstly on the ground that a fine of N$4 000.00 is excessive as the appellant, as the evidence stood then, was not in a position to pay a fine of N$4 000.00. The argument goes that as the matter stood at the time, there was no evidence before Court that the appellant possessed readily realisable assets he could sell to afford paying the fine. He also had no other means to do so, it is said. The fine imposed being beyond the capacity of the appellant, he was, in effect, not given the option of a fine, the

argument concludes. Correctly in my view, the State concedes this point. The only issue

here really is what this Court must do. I will revert to this matter presently.

[6] The second ground of appeal is directed at the order made by the court *a quo* in terms of s33(1). It is conceded by the State-it being common ground that the order was not preceded by an *'application of a public prosecutor'* - that the order is *ultra vires* the powers of the magistrate who imposed it and thus liable to be set aside. This concession too is properly made.

[7] I am therefore only left to consider what to do upon setting aside the sentence imposed by the court *a quo* in respect of the s39 (1) contravention.

[8] Both counsel take the view that this Court must sentence the appellant afresh and not remit the matter to the court *a quo* for the purpose of considering the sentence afresh, because the magistrate who presided over the proceedings below has since resigned.

[9] Although tempted to follow the course suggested by counsel, I have come to the conclusion that the evidence on record of the appellant's means to pay a fine (and if appropriate be saddled with an order for payment of arrear maintenance) is not of the nature that

makes me confident of making an order on sentence that will do justice both to the minor children and the appellant.

[10] I have therefore reluctantly come to the conclusion that the matter must be remitted to the court *a quo* in terms of s275 of the Criminal Procedure Act for sentencing afresh. I do so because if I impose a sentence today it will affect the appellant based on his circumstances today. The evidence on record shows that at the time that he appeared in the Court below, his situation was fluid: His income was uncertain and was expected to change even after the proceedings in that Court had completed. It is therefore in the interests of justice that the appellant's financial circumstances be gone into thoroughly as they are today; not as they stood then.

[11] I need to make a further observation: it behoves courts, and especially public prosecutors, to take seriously the views expressed by Bozalek, J (Motalla J concurring) in *S v November* and Three Similar Cases 2006 (1) SACR 213 (C) at [para (10)] referring to the

case of *Bannatyne v Bannatyne* (Commission for Gender Equality, as A*micus Curiae*) 2003 (2) SA 363 CC, where Mokgoro, J, speaking for a unanimous Court, stated as follows:

> "Systemic failures to enforce maintenance orders have a negative impact on the rule of law. The courts are there to ensure that the rights of all are protected. The judiciary must endeavour to secure for vulnerable children and disempowered women their small but life sustaining legal entitlements. If court orders are habitually evaded and defied with relative impunity the justice system is discredited and the constitutional promise of human dignity and equality is seriously compromised for those dependent on the law. It is a function of the State not only to provide a good legal framework but to put in place systems that will enable these frameworks to operate effectively. Our maintenance courts and the laws that they implement are important mechanisms to give effect to the rights of children protected by s28 of the Constitution. Failure to ensure their effective operation amounts to a failure to protect children against those who take advantage of the weaknesses of the system."

[12] That statement of the legal position could not have been more apt in the present circumstances - where the appellant is in arrear with 138 instalments.

[13] Having cited the judgment in *Bannatyne,* Bozalek, J continued, (at paragraph 11):

> "In order to do so it is necessary for prosecutors (as maintenance officers) and magistrates sitting in such matters to inform themselves of the range of available sentencing options such as correctional supervision in terms of
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> Section 276 (1)(h) and (i) of the Criminal Procedure Act 51 of 1977 or periodical imprisonment in terms of s285 thereof. Equally important is that officials inform themselves of the comprehensive range of tools and procedures available in the Act to ensure that the best interests of children are protected by the proper enforcement of maintenance orders".

[14] I just need to mention that s33 of the our Maintenance Act *supra* is one such provision. The purpose of maintenance orders is to help children with day-to-day necessities. If the sentence is to be imposed which makes sure that an errant parent does not default again and/or one which seeks to recover arrear payments, it must be given serious and careful consideration, based, of course, on the facts of each case before Court.

[15] Accordingly I make the following order:

1. The conviction of the appellant for contravening s39 (1) of the Maintenance Act, Act No. 9 of 2003 is confirmed.

2. The sentence imposed by the court *a quo* in respect of the conviction aforesaid is set aside, and the matter is remitted to the Magistrate's Court for the district of Windhoek in order for a magistrate of that court to impose a sentence afresh against the appellant for his contravention of s39 (1) the Act.

   Without prejudice to the generality of the aforegoing, it is directed that the magistrate hearing the matter conduct proceedings afresh in respect of sentence only, and to deal with the matter according to law.

3. The order of the court *a quo* in terms of Section 33 (1) of the Act is hereby set aside.

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DAMASEB, J.P.

ON BEHALF OF THE APPELLANT **Mr Dos Santos**

Instructed by: **Dos Santos & Co**

ON BEHALF OF THE RESPONDENT **Ms Rakow**

Instructed by: **Office of the Prosecutor-General**