CASE NO.: CR 18/2012

NOT REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

ARTHUR LIBANDA LIBANDA

HIGH COURT REVIEW CASE NO.: 540/2011

CORAM: HOFF, J *et* SIBOLEKA, J

Delivered on: 12 March 2012

SPECIAL REVIEW JUDGMENT

HOFF, J: [1] The accused person appeared in the Windhoek magistrate's court ostensibly on a charge of failing to pay maintenance. The relevant record of the proceedings reads as follows which is quoted *verbatim*:

"PP: Matter is on roll for maintenance.

CRT: Enquiries from accused if he had paid the arrears yet and whether he is employed.
ACC: Yes I am employed but the arrears are not paid off yet.
CRT: Seeing that you are gainfully employed, the court is satisfied that is no factor preventing you from defraying or paying such arrears. In the light the court finds you guilty of failure to pay maintenance and sentenced you to a fine of N$2 300.00 or fine to be converted into maintenance money or 6 months imprisonment.

POSTEA

Coram as before

CRT: Informs accused that he is now recalled and informs accused of provision 298 51/1977 CPA. Do you understand /
ACC: Yes understand.
CRT: Sentence corrected and to read as follows
accused is sentenced to a fine of N$2 300.00 or six months imprisonment."

[2] The Head of Station, Magistrate Shuuveni sent this matter on special review and highlighted a number of irregularities with which I fully agree with.

[3] The accused person appeared on a warrant of arrest for failing to attend an earlier court hearing.

The first irregularity was that the magistrate failed to hold an inquiry in terms of the provisions of s. 170(1) and (2) regarding his failure to appear in court.

In this matter the magistrate should have held a summary enquiry into the reasons for the absence of the accused on the previous court date. The accused bears the onus to satisfy the court that his failure to appear was not due to any fault on his part. This *onus* must be explained to the accused by the magistrate. In order to discharge this *onus* an accused person must be informed by the magistrate that he or she may testify under oath himself or herself and may in addition call witnesses in support of such explanation. This *onus* may be

discharged on a preponderance of probabilities. A failure to inform an accused person of such onus may lead to the reversal of the conviction.

[4] In *S v Bkenlele* 1983 (1) SA 515 (O) the Court referred with approval what was held in *S v Du Plessi*s 1970 (2) SA 562 (ECD) at 564 H – 565 A:

> "In accordance with the well-known principle this *onus* may be discharged on a balance of probabilities. I do not think that at this stage the court is required to be satisfied afresh of the accused's default before he is required to meet the case against him. What justice and common sense require is that the presiding officer should explain to the accused the position in which he finds himself, namely that *prima facie* he is in default, service having been effected properly, and that the onus is upon him to rebut the *prima facie* fact that he is in default or to prove to the court that he has some other reasonable excuse for his failure or evasion as the case may be."

[5] In *S Baloyi* 2000 (1) SACR 81 (CC) this burden of proof was confirmed. This case dealt with the violation of an interdict granted under s. 2(1) of the Prevention of Family Violence Act 133 of 1993 (South African) where Sachs J expressed himself as follows regarding the issue of fairness (at par. 31):

> "Fairness to the complainant in the special circumstances of the case necessitates that the proceedings be summary, that is, that they be speedy and dispense with the normal process of charge and plea. It also requires that they be inquisitorial, that is, that they place the judicial officer in an active role to get at the truth, which usually will be done through questioning the accused. Fairness to the accused, on the other hand dictates that within this format the general protection granted by the CPA should apply in measure similar to that available to a person charged under s. 170. Such a balancing of constitutional concerns leaves the presumption of innocence undisturbed. At most it may affect the right to silence."

[6] The accused in this matter was neither informed of the provisions of section 170 nor of his burden of proof. The conviction and sentence stand to be struck down for this reason alone.

[7] Secondly the first sentence imposed namely a fine of N$2300.00 *converted into maintenance arrears* or 6 months imprisonment is highly irregular.

A Court would under normal procedural practice first enquire into the failure of an accused person to comply with the maintenance order previously imposed by the Court. If there is no lawful excuse by the accused person such an accused person will be convicted of the criminal offence of contravening a statutory provision (failure to pay maintenance) and will thereafter be sentenced. This conviction and sentence has no connection with the question of how the arrears maintenance will be settled. A magistrate thus cannot impose a fine, as was done in this instance, an then appropriate such fine to extinguish the arrear maintenance.

[8] It appears that the magistrate subsequently realised this irregularity and tried to rectify it. It is not clear from the record how much later this sentence was purportedly rectified. Section 298 of Act 51 of 1977 makes provision that a sentence may be corrected when by mistake a wrong sentence is passed. A court may before or immediately after it is recorded amend the sentence. A court is after it has passed a sentence *functus officio* unless it unintentionally pronounced an incorrect sentence and corrects it immediately.

(*See S v Swartz* 1991 (2) SACR 502 (NC).

[9] In any event the attempt by the magistrate to rectify the sentence was an exercise in futility for the reason mentioned in paragraphs 3 to 6. The sentence cannot stand because the conviction was irregular and unlawful.

[10] I shall now highlight another reason why the conviction was unlawful. It is clear from the record of the proceedings that no charge was put to the accused that he was in arrears of paying maintenance.

[11] Section 39(1) and (2) of the Maintenance Act 9 of 2003 provide as follows:

> "Subject to subsection (2) any person who disobeys a court order by failing to make a particular payment in accordance with a maintenance order commits an offence and is liable to a fine which does not exceed N$4 000.00, to be imprisoned for a period which does not exceeds 12 months or to periodical imprisonment in accordance with section 285 of the Criminal Procedure Act, 1977 (Act 51 o f1977).
>
> (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 is not, merely on the grounds of such defence entitled to an acquittal if it is proved that the failure was due to his or her unwillingness to work or to his or her misconduct."

[12] Section 105 of Act 51 of 1977 provides that the charge shall be put to an accused by the prosecutor before the trial and the accused shall be required to plead thereto forthwith in accordance with s. 106.

In this matter under review the prosecutor never put any charges to the accused person.

The provisions of s. 105 are peremptory.

(See *S v Mamose and Others* 2010 (1) SACR 121 (SCA) at par. 7).

Certain legal consequences flow from the fact whether the accused pleaded to a charge and a different legal consequence flow from the fact where an accused failed to plead to a charge.

[13] It is trite law that where an accused person pleads to a charge such accused person is entitled to a judgment.

[14] Where an accused has not pleaded to any charge no *lis* arises between the State and the accused and the accused cannot be convicted.

(*See S v Mbokazi* 1998 (1) SACR 4428 NPD at 442 h – i).

[15] In *S v Sithole and Others* 1999 (1) SACR 227 (TPD) at 230 c – d the Court held as follows:

> "To convict an accused on a charge he was not requested to plead to is in my view such a departure from the rules and principles governing the conduct of criminal proceedings that it cannot be countenanced. It is further a fundamental right in terms of s. 35(3)(a) of our Constitution Act 108 of 1996, that an accused has a right to a fair trial which includes the right to be informed of the charge with sufficient detail to answer it."

[16] Article 12 (1)(a) of the Namibian Constitution provides *inter alia* that all persons shall be entitled to a fair and public hearing by an independent, impartial and competent court .

It should therefore be apparent that the failure by the prosecutor to put a charge to the accused person and the failure by the magistrate to demand that a charge be put to the accused violated the fundamental right of the accused to a fair trial.

[17] Magistrate Shuuveni referred to two further irregularities which I need to mention. However in the light of what was said (*supra)* I do not deem it necessary to analise and comment on those irregularities in much detail.

[18] It is apparent from the record that the magistrate did not explain to the undefended accused person the defence contained in the provisions of section 39(2) of Act 9 of 2003.

This may not be surprising at all since the accused was never asked to plead to any charge. Nevertheless, a magistrate is obliged to explain the existence and meaning of this defence to an undefended accused. Failure to do so could prejudice an accused person resulting in the proceedings being set aside on review or on appeal.

(See *S v Moeti* 1989 (4) SA 1053 (OPD).

The other irregularity referred to was the fact that the magistrate failed to inform the accused person his right to mitigation prior to passing sentence. The failure by the magistrate to inform the accused person that he may address the court as to the appropriate sentence to be passed is not only a denial of an opportunity to do so but also amounts to a gross violation of the accused's fundamental right to a fair trial.

[19] In the circumstances the conviction and sentence cannot stand and must be set aside.

[20] I was informed by Mr Shuuveni that the accused has paid the fine (most probably a part fine) and has been released from prison. The amount of such part fine is however unknown.

[21] In the result the following orders are made:

1. The conviction and sentence are set aside.
2. The clerk of the court is instructed to bring this judgment to the attention of the accused and to assist him in claiming the amount paid by him in respect of such fine, from the Ministry of Justice.

3. This judgment together with a copy of the proceedings must also be brought to the attention of the Acting Chief Magistrate for the purpose of taking appropriate remedial action.
4. In the event that the Prosecutor-General decides to prosecute the accused person afresh for the offence of contravening section 39(1) of Act 9 of 2003, the matter should be heard by a different magistrate.

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HOFF, J

I agree

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SIBOLEKA, J