



**HIGH COURT OF NAMIBIA, MAIN DIVISION
JUDGMENT**

CR No: 42/2017

In the matter between:

THE STATE

and

FRITZ GUIBEB

HIGH COURT MD REVIEW CASE NO 829/2017

Neutral citation: *S v Guibeb* (CR 42/2017) [2017] NAHCMD 210 (07 August 2017)

CORAM: NDAUENDAPO et LIEBENBERG J

DELIVERED: 07 August 2017

Flynote: Criminal Procedure – Maintenance Act 9 of 2003 – Plea of guilty in terms of s 112 (1) (b) on a charge of failing to pay maintenance – Accused raised defence in terms of s 39 (2) of the Act – Trial court convicting on plea of guilty – Plea of not guilty should have been noted – At sentencing the court *mero motu* suspended maintenance

order – Maintenance Court first to hold an enquiry in terms of s17 of the Act before suspending an existing maintenance order – Trial court to convert criminal proceedings into a maintenance enquiry in terms of s 34 of the Act to enquire into the accused's means – Failure to hold an enquiry in terms of s 17 and 34 of the Act constituted misdirection – Conviction and sentence set aside.

Summary: This is a review judgment in which the trial court convicted the accused in terms of s 112 (1)(b) of the Criminal Procedure Act 51 of 1977 of a contravention of s 39 (1) of the Maintenance Act 9 of 2003, for failing to pay maintenance. The accused fell in arrears on the order made by the Maintenance Court where after the accused was informally told (by the maintenance officer) to pay a lesser amount without an enquiry being held in terms of s 17 of the Act. This informal arrangement was in conflict with the maintenance order and therefore invalid. When charged accused pleaded guilty and gave the reason for failing to comply with the maintenance order that he was unemployed. The court notwithstanding convicted. In sentencing, the court *mero motu* suspended the maintenance order until such time the amount in arrears had been settled in full.

Held, the Maintenance Court must first conduct an enquiry in terms of s 17 of the Maintenance Act before suspending an existing maintenance order.

Held further, where a defence of lack of means is raised in light of s 39 (2) of the Act, the court must note a plea of not guilty and hear evidence to decide whether the accused satisfies the requirements of s 39 (2). When the court is satisfied that the accused is without means to comply with the maintenance order, the criminal proceedings must be converted in terms of s 34 of the Maintenance Act into an enquiry in order to establish whether the existing order must be amended, suspended or set aside.

ORDER

1. The conviction and sentence are set aside.
2. In terms of s 312 (1) of the Criminal Procedure Act 51 of 1977 the matter is remitted to the trial court with the direction to enter a plea of not guilty and to bring proceedings to its natural conclusion.

JUDGMENT

LIEBENBERG J: (Concurring NDAUENDAPO J)

[1] The accused appeared in the magistrate's court for the district of Keetmanshoop on a charge in contravention of s 39 (1) of the Maintenance Act 9 of 2003 (Failure to pay maintenance) and, having pleaded guilty, was convicted as charged. He was sentenced to payment of a fine of N\$4 000 or 10 months' imprisonment, wholly suspended on conditions of good behaviour and making periodical payments of N\$600 per month towards the maintenance amount in arrears. The court further ordered the maintenance order suspended until such time the amount of N\$33 600 in arrears has been paid in full.

[2] The particulars of the charge to which the accused pleaded guilty reads that the Maintenance Court on 05 June 2009 made an order according to which the accused

must pay N\$400 per month maintenance towards his two children and that he was in arrears in the amount of N\$33 700.¹ Having pleaded guilty, the court invoked the provisions of s 112 (1)(b) of the Criminal Procedure Act 51 of 1977 and questioned the accused on the allegations contained in the charge.

[3] Though admitting the amount in arrears, the accused explained that the construction company he had been working for during the relevant period failed to pay its employees since 2010. It however seems that he was paid between N\$500 – N\$600 per month during the troubled period. In view thereof it was ‘agreed at court’ that he henceforth should only pay N\$250 towards maintenance. It is not clear from the accused’s answers with whom the arrangement was made and whether it was made an order of court, though. Until 2016 when he again took up employment with the same company he was unemployed and only did casual work.

[4] Notwithstanding the defence of unemployment raised by the accused, the court proceeded to quote s 39 (2) of the Maintenance Act before convicting. Section 39 (2) reads:

‘(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.’

[5] When the matter came on review a query was directed to the presiding magistrate enquiring whether the accused did not raise the defence of unemployment and whereas the accused did not admit the allegations contained in the charge, what satisfied the court that the accused was guilty as charged.

¹ During the proceedings the amount was reduced to N\$33 600.

[6] In the replying statement the magistrate concedes that the court could not have been satisfied that the accused was guilty of the offence charged. It is further explained that for the period the accused was unemployed and only did casual work, the court found the reason for not paying maintenance, was due to the accused's unwillingness to work. The magistrate then seeks the indulgence from the reviewing judge to explain the meaning of the phrase 'unwilling to work' and what constitutes 'misconduct' in the context of s 39 (2) of the Maintenance Act (the Act).

[7] Whereas the meaning of these words are not defined in s 1 of the Act, it must be given its ordinary meaning when read in context with s 39 which regulates offences relating to maintenance orders. What is essentially required from the trier of fact is to decide on the strength of evidence adduced whether it could be inferred that the reason why the accused failed to comply with the court order, was due to his unwillingness to work, or that he stood reckless towards his employment which was terminated or suspended without remuneration as a result of misconduct on his part. Logic dictates that it would require the presentation of evidence by either the State or the defence from which the court, by way of inferential reasoning, may draw inferences favourable or otherwise to the accused person.

[8] Where the accused, as in the present instance, pleaded guilty but later raises a defence, the court should not have continued with the questioning but ought to have noted a plea of not guilty. The accused explained the reason for his failure to comply with the maintenance order being due to unemployment. There was accordingly no basis for the court's finding that this was brought about due to his unwillingness to work. On the contrary, the fact that the accused managed to do casual work during the period of unemployment seems to me indicative of a person who is willing to work and make an honest living. The conclusion reached that the accused's inability to comply with the

maintenance order was due to his unwillingness to work, was unjustified and constitutes a misdirection. The conviction and sentence accordingly fall to be set aside.

[9] From the accused's answers it is evident that when his financial position changed, he went to the court where after it was decided that he should only pay N\$250 instead of N\$400 per month as per the order. An informal arrangement of this nature is against the order of court and therefore invalid. What should have happened was to bring the accused before the Maintenance Court for an enquiry in terms of s 17 and, pending on the circumstances, to make the appropriate order in terms of s 17 (1)(b)(i) of the Act. Until such time that the maintenance order has been substituted, discharged or suspended, the order remains in force.

[10] The court *a quo*, as a condition of sentence, ordered a suspension of the maintenance order until such time the amount in arrears is paid in full. This was obviously done without the court first holding an enquiry in terms of s 17 and, when considered together with the reasons set out herein before, the court clearly acted outside its powers when *mero motu* suspending the maintenance order. The court was under a duty to first hold an enquiry as provided for in s 17 and afford the State as well as the accused the opportunity to lead evidence and/or make submissions before issuing an order that suspends the maintenance order. The approach adopted by the court *a quo* was therefore irregular. If the court was of the view that, on the facts before the court, there is reason to believe that the accused did not have the means to comply with the maintenance order, it should have converted the criminal proceedings into a maintenance enquiry in terms of s 34 of the Act and enquire into the accused's means where after it could make the appropriate order. This it failed to do.

[11] In the result, it is ordered:

1. The conviction and sentence are set aside.
2. In terms of s 312 (1) of the Criminal Procedure Act 51 of 1977 the matter is remitted to the trial court with the direction to enter a plea of not guilty and to bring proceedings to its natural conclusion.

J C LIEBENBERG

JUDGE

G N NDAUENDAPO

JUDGE