

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case Title: The State v Herold Hermanus Plaatjie	Case No: CR 132/2022
High Court MD Review No: 1681/2022	Division of Court: Main Division
Heard before: January J et Claasen J	Delivered on: 2 December 2022
Neutral citation: <i>S v Plaatjie</i> (CR 132/2022) [2022] NAHCMD 653 (2 December 2022)	
The order: The conviction and sentence are set aside.	
Reasons for order: CLAASEN J (concurring JANUARY J) [1] The accused was charged with one count of failure to pay maintenance, thereby contravening s 39(1) of the Maintenance Act, 9 of 2003 (the Act). He pleaded guilty and was convicted in terms of s 112(1)(b) of the Criminal Procedure Act (the CPA). The accused was thereafter sentenced to a fine of N\$3000 or 8 months imprisonment wholly suspended for a period of 10 months, on condition that he settles the arrears of N\$2050 on or before 31 July 2023. [2] Upon receipt of the record on review, I directed the following query to the magistrate:	

'Has the magistrate explained the defense of lack of means contained in s 39(2) of Act 9 of 2003 to the accused prior to the plea? If not, what is the consequence thereof? The magistrate is advised to look at case law in this regard before answering this question.'

[3] In his response to the query, the magistrate conceded that he did not explain the defence of lack of means as per s 39(2) of the Act and acknowledged that the consequences of such failure renders the proceedings irregular as it prejudices the accused. The magistrate further referred to the case of *Aukongo v S* (HC-NLD-CRI-APP-CAL-2017/0007) [2018] NAHCNLD 9 (06 February 2018) and requested this court to set aside both the conviction and sentence in light of his failure to explain the defense.

[4] S 39 of the Act provides as follows:

'(1) 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, to be imprisoned for a period which does not exceed 12 months or to periodical imprisonment in accordance with section 285 of the Criminal Procedure Act, 1977 (Act 51 of 1977).

(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] The court in *S v Moeti* 1989 (4) SA 1053 (OPD) held as follows:

'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.

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.' (My emphasis)

[6] This court is of the opinion that, had the accused been informed about the provisions

of s 39(2) of the Act, he may have advanced a defence. As clearly stated in *Aukongo v S* (supra), an accused must be informed of the provisions of s 39(2) before he/she pleads to the charge. 'Common sense dictates that an irregularity at the commencement of the proceedings will therefore influence the entire proceedings.'¹ The concession made by the learned magistrate is therefore properly made and the conviction and sentence stand to be set aside.

[7] In the result, the following order is made:

The conviction and sentence are set aside.

C M CLAASEN JUDGE	H JANUARY JUDGE

¹ *Aukongo v S* (HC-NLD-CRI-APP-CAL-2017/0007) [2018] NAHCNLD 9 (06 February 2018), par.15.