

A343/08

IN THE HIGH COURT OF SOUTH-AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE

DATE : 29 April 2008

Magistrate

Eerstehoek

Case Nr.

8214/2007

Magistrate' Serial No.

12/07

High Court Case No.

1650/2007

The STATE versus FANBOY SIMON NKOSI

REVIEW JUDGMENT

R D CLAASSEN, J

The accused in this matter stood trial in the Magistrates Court, District Eerstehoek and was convicted of failing to comply with a maintenance order.

The accused pleaded not guilty to the charge and was convicted on the 20th of April 2007. He was sentenced to twelve (12) months imprisonment wholly suspended for a period of three years on the condition that the accused starts paying the amount of five hundred rand (R 500-00c) per month as per the order dated 16 February 2006 as well as a further five hundred rand (R 500-00c) per month towards the outstanding amount of eight thousand and seventy five rand (R 8075-00) arrears as from 30 April 2007. An emoluments attachment order was made against Oosthuizen Transport.

The main point of concern for this court is whether the amount of eight thousand and seventy five rand (R 8075-00) that the court a quo found to be the amount owing was correctly calculated, in view of the evidence lead before the learned magistrate.

At this point it should be mentioned that the court has no problem in the mathematical manner in which the amount was calculated. The court does, however, differ from the conclusion reached by the court a quo on the evidence led in front of it that led to the amounts used to calculate the outstanding amount. I will now continue to

1.3

2

highlight these points where this court differs from the conclusion reached by the court a quo

1.1

The complainant, Miss Rebecca Hlatshwayo, testified that she did in fact receive periodical payments from the accused. During cross-examination by the accused he put it to the witness that during the period of February 2006 when he was

supposed to pay the amount of five hundred rand (R 500-00c) he in fact did pay maintenance every month but that it was only an amount of three hundred rand (R 300-00c) and not the full amount of five hundred rand (R 500-00c) because he could not afford to pay the full amount. In her answer the witness concedes that he did in fact pay some months but not every month. It is this court's view that this statement alone should have made a difference in the amount the court a quo found to be outstanding.

The accused also put it to the witness that there were some months when he could not personally deliver the money to her, but that he sent his cousin during those months (this statement would also later be corroborated by the accused's cousin). The witness did also concede to this statement. This statement should also have made a difference in the amount the court a quo found to be outstanding.

1.2

During the evidence of the second state witness, miss Siphiwe Emma Masima, employed in the account's office at the magistrates court Eerstehoek as an accounts clerk, the accused told the court that he has got receipts for some of the month's the witness testified the accounts office did not receive any payments from the accused for maintenance, but that the receipts are at his home. The court then told the accused that, at the previous postponement, he was told by the court to bring all relevant documentation to court and that these document's, though not specifically mentioned by the court, included any receipts as well. The matter was left there and the case was continued. It is the view of this court that, in light of the fact that the accused was not represented, he should have been granted an opportunity by the court to go home and collect the receipts because they could not only have had a bearing on the trustworthiness of the witness but could also have made a difference in the amount the court a quo found to be outstanding.

During the evidence of the first defence witness, Mr. David Dladla, he states that he did in fact on occasions receive money from the defendant which he personally handed over to the complainant, her mother or her sister, depending on who was home at the stage. The prosecutor then asked the witness during cross-examination how many times this happened and the witness replied that it happened eleven times. The prosecutor also asked him what the amount was each time he paid it over and the witness replied that it was an amount of three hundred rand (R 300-00c). The court then asked the witness how he knows that it was eleven times and the witness replied that he did this from January 2005 to November 2005.

1.4 3

During the judgment of the learned magistrate the evidence given by Mr. Dladla was found to be untrustworthy and dismissed as being not reasonably possibly true. The court, however, does not give any reason for this finding. In light of the fact that the evidence of mr. Dladla was not materially tested by the state this court does not see how the learned magistrate could have come to this conclusion and that these amounts allegedly paid could also have made a difference in the amount the court a quo found to be outstanding.

The accused then comes and testified that he did, at first, pay the maintenance money over to the accounts office at the magistrates court Eerstehoek. When he was unable to do so he gave it to his cousin, who confirmed that he paid the money over to the complainant, her mother or her sister. He then told the court that he lost his employment and during this period of five months conceded that he did not pay any maintenance. He told the court that he did, however, start paying again as soon as he was re-employed by a different company as a driver. He also testified that he sometimes gave people he worked with the money to pay over to the accounts office at the magistrates court Eerstehoek and that those people always gave him a receipt and that he has the receipts at home. The court however did not give the accused an opportunity to produce these receipts and in my view the receipts could have made a major difference in the amount the court a quo found to be outstanding.

It is this court's view that the above misdirections cast serious doubt on the conviction and sentence of the accused, to the extent they cannot stand, and have to be set aside.

I therefore make the following order

(1) (2)

The conviction and sentence are hereby set aside.

The emoluments attachment order made against Oosthuizen Transport is cancelled.

The matter is referred back to the Director of Public Prosecutions to decide whether to proceed with a new trial or not.

(3)

R.D. CLAASSEN
JUDGE OF THE HIGH COURT

'

4
I Agree.

"
'
D A BASSON
JUDGE OF THE HIGH COURT