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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

High Court reference number: 339/15

Case number: A401/14

Magistrate's serial number: 06/15

18/8/2015

In the matter between:

THE STATE

and

THABO NICODEMUS SESEANE

REVIEW JUDGMENT

Bagwa J

[1] This matter has been brought by way of special review in terms of Section 304 (4) of The Criminal Procedure Act 51 of 1997 after it was discovered that

the recording of the sentence did not accurately reflect the correct legal position in terms of the law.

[2] The facts are briefly as follows. The accused was charged for contravening

Section 31(1) of the Maintenance Act 99 of 1998 in that the accused being a person against whom a court of law, namely the Transvaal Provincial Division

of the High Court, made a maintenance order as part of the divorce order on 18 September 2002 as follows:

- 1) The amount of maintenance of R11 000.00 per month calculated as follows: R4 000.00 per month in respect of the minor child M S; R6 000.00 in respect of the complainant K L S and R1 100.00 towards the medical aid expenses of the complainant K L S.
- 2) The accused was to keep the minor child M S registered in his medical aid and settle any shortfall in respect thereof.
- 3) The accused had to pay all the reasonable and necessary, dental, opthalmic, pharmaceutical expenses incurred for and on behalf of M S.
- 4) The accused had to pay for all reasonable school expenses incurred by M S to attend a private school which **inter alia** include costs of school fees, uniform, extramural and extra lessons; all payments were to be effected before or on the first day of every month.

[3] The accused had wrongfully and unlawfully failed during the period July 2003 to May 2014 to comply with the Court order and had accumulated arrears the first amount being R435 200.00 for the period 29 July 2006 to June 2011 and the second amount being R138 600.00, for the period December 2011 to May 2014. The total outstanding was R573 800.00.

[4] The accused pleaded not guilty but was subsequently convicted and sentenced as follows:

"The court orders that the following monies should be attached and paid to the complainant immediately, namely:

1. *An amount of R182 827.69 from Momentum Policy number [...]*
2. *The amount of R33 874.83 from Momentum Policy number [...]. The policies that relates (sic) to the life cover incorporating the insurance on property together with the insurance on the child's education will not be part of this sentence, but the above amounts that I mentioned with specific policy numbers, the amount of R182 827.69; R33 874.83 from Momentum Policy (sic) should be attached and paid directly to the complainant.*

3. *Over and above the existing order of R11 500. 00, the accused is ordered to pay a sum of R4 000.00 to reduce the outstanding arrears of maintenance.*

The first payment to be effected from the 28th of February 2015 and not later than the 7th of each and every month subsequently.

4. *Should accused fail to comply with the above orders, the accused shall serve an effective 18 months imprisonment."*

[5] The accused was legally represented during the court proceedings and did not note an appeal.

[6] Section 40 (1) of Act 99 of 1998 reads as follows:

"40 (1) A court with civil jurisdiction convicting any person of an offence under Section 31 (1) may, on the application of the public prosecutor and in addition to or in lieu of any penalty which the court may impose in respect of that offence, grant an order for the recovery from the convicted person of any amount he or she has failed to pay in accordance with the maintenance order, together with any interest thereon, whereupon the order so granted shall have the effect of a civil judgment of the court and shall, subject to Subsection (2), be executed in the prescribed manner....

(4) Notwithstanding anything to the contrary contained in any law, any pension, annuity, gratuity or compassionate allowance or other similar benefit shall be liable to be attached or subjected to execution under an order granted under this section."

[7] Paragraphs 1 and 2 of the sentence referred to above do not indicate that the order made therein is made over and above a penalty made in terms of Section 40 (1) of Act 99 of 1998. Further, the order does not specify to whom the monies are to be paid.

[8] Further, Section 297 (1)(b) of Act 51 of 1977 reads as follows:

"297. Conditional or unconditional postponement or suspension of sentence, and caution or reprimand

(1) Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion –

(b) pass sentence but order the operation of the whole or any part thereof to

be suspended for a period not exceeding five years on any condition referred to in paragraph (a)(i) which the court may specify in the order;"

- [9] Paragraph 3 and 4 of the sentence imposed do not read as prescribed in terms of Section 297 (1)(b) of Act 51 of 1977 in that they do not specify the suspension, the length of suspension and the conditions on which the sentence is suspended.
- [10] In the circumstances, it would appear that the sentence imposed as presently phrased is not in accordance with the law in that the terms thereof are not sufficiently explicit to the accused and all concerned. Paragraphs 1 and 2 thereof involves compliance by a third party, Momentum Insurance Company, which is not in the powers of the accused to control. The amounts specified in these paragraphs are to be attached from specified policies and these amounts will form part of the total amount the accused was found to be in arrears. Therefore, the total amount referred to in paragraphs 1 and 2 should then refer to the outstanding balance to be paid off by the accused over and above the existing maintenance order.
- [11] Further in order to comply with Section 297 (1)(b) of the Criminal Procedure Act a condition ought to be included to the suspension of sentence for the accused not to be found in contravention of Section 31 (1) of At 99 of 1998 during the stipulated period of suspension.
- [12] Due to the aforementioned shortcomings and having considered the comments of the Judicial Quality Control Magistrate I have come to the conclusion that the manner in which the sentence was phrased is not in accordance with justice.
- [13] In the result the sentence imposed by the Magistrate, Benoni is reviewed and set aside and the following sentence is substituted:
The accused is sentenced to 18 months imprisonment which is suspended for five (5) years subject to the following conditions:
- (i) That the accused pay the amount of R4 000.00 per month over and above the existing maintenance order of R11 000.00 per month to Mrs K L S, until the amount of R148 952.86 being part of the total amount in arrears has been paid in full. The first payment is to be made on or before the h day of the first month following the date of sentence and thereafter on or before the 1st day of each succeeding

month. Payment must be effected in accordance with the payment method of the existing maintenance order;

- (ii) and that the accused is not convicted of contravening Section 31 (1) of Act 99 of 1998 which offence is committed during the period of suspension.
- (iii) Further, in terms of Section 40 (1) of Act 99 of 1998, an order is made for the attachment of the following amounts of money due by Momentum Insurance Company to the accused :
 - (a) R182 827.69 from Momentum Policy Number [...] and
 - (b) R33 874.83 from Momentum Policy Number [...].

Payment of the said amounts must be made directly to Mrs K L S.

S A M BAQWA
GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.

N RANCHOD JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA