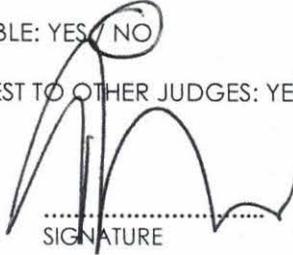


delivered 04/10/17
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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA



(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
29/9/2017	
DATE	SIGNATURE

Date of submission: 31 August 2017

Date of judgment: 29 September 2017

In the matter between:

Case number 3/2017

Case number court a quo B134/2016

THE STATE

Applicant

versus

FREDERICK EVERT SMITH

Respondent

JUDGMENT

BRENNER, AJ:

1. This case was transmitted to this court by the Chief Magistrate of the Emfuleni magistrates' court for special review, in terms of section 304(4) of the Criminal Procedure Act, 51 of 1977 ("the CPA"). This section vests the high court with the same powers as those accorded to it under section 304(1), (2), and (3). Section 304 accords it the power to determine whether the proceedings in the magistrates' court were in accordance with justice.
2. The accused, Frederick Evert Smith ("Smith"), was formerly in a relationship with Yvonne Taljaard ("Taljaard"). On 3 January 1999, they had a son, Frik Taljaard, ("Frik"). Frik turned eighteen on 3 January 2015.
3. It is unclear when the parties' relationship broke down and when they parted ways. Hereafter, several maintenance orders were granted in Taljaard's favour, for the support of Frik. Taljaard testified at the trial that the first order was granted in about 2003. The record contains copies of only two of the orders granted in October 2013 and October 2015.
4. On 17 October 2013, a consent order was granted for Smith to pay the sum of R1 000,00 per month, from 1 November 2013 ("the October 2013 order"). A note on the order records that the arrear maintenance was then R126 655,50, and that this sum would be recovered after Frik had become self-supporting.
5. It is common cause that, during June or July 2015, Frik left Taljaard to live with Smith.
6. In 2015, Smith applied for the discharge of the October 2013 order, owing to Frik's decision to live with him. On 6 October 2015, another order was made, with Smith's consent, substituting the October 2013 order ("the October 2015 order"). Taljaard, legally represented, agreed to the discharge of the October 2013 in the future. But the arrears remained a live issue.

7. Under the October 2015 order, Smith was directed to pay the sum of R500,00 per month from 7 November 2015, in respect of arrear maintenance of R126 655,00, which sum would increase annually on the anniversary of the first payment, by 10%. The record reveals that Smith appeared in person, and was unrepresented, but that he had said that he willingly consented to this order.
8. In September 2016, at the behest of Taljaard, as complainant, Smith was charged in the Emfuleni magistrates' court, at VanderBijlpark, with failure to pay arrear maintenance in the sum of R5 000,00. This was the amount owing as at 27 September 2016, in contravention of the October 2015 order, which had obliged him to pay a monthly amount of R500,00 to Taljaard.
9. Smith was charged in terms of section 31(1) of the Maintenance Act, 99 of 1998, ("the Maintenance Act"). He pleaded not guilty. He was legally represented throughout the trial.
10. At commencement of the hearing, Smith's attorney informed the trial court that his defence was lack of means. At this juncture, no intimation was made that the trial should be converted to an enquiry.
11. The State proceeded with its case by calling Taljaard to testify. The October 2015 order was addressed, and Taljaard stated that only one payment had been made by Smith, in November 2015. She testified that Smith had given her no explanation for non-payment.
12. When Taljaard's evidence in chief was concluded, Smith's attorney asked the court to consider the conversion of the criminal trial to an enquiry, in terms of section 41 of the Maintenance Act. The attorney mentioned that the burden of proof was on the State to prove that Smith had the means to pay. The prosecutor objected on the ground that Smith had given no letter or documents to the State to substantiate his defence of lack of means. He argued that, in the absence of documents and in the light of the existing order, Smith was "*deemed*" to have the ability to pay.

13. Smith's attorney addressed legal argument to motivate the request, during the course of which she cited the cases of **State v Magagula 2001(2) SACR 123 TPD**, in support of the point that the State bore the burden to disprove lack of means, and **State v Pieterse 1993(1) SACR 470 C**, in which it was held that the trial court could mero motu convert criminal proceedings into an enquiry.
14. Without calling on the prosecutor to address it on the subject, the trial court ruled that the duty rested on Smith to prove lack of means, and for this reason, it refused the application.
15. In cross-examination of Taljaard, the following evidence emerged. She confirmed that she had deprived Smith of contact rights to Frik for a period of time, and averred that this was attributable to Smith's drinking problem. Several maintenance orders had been granted against Smith since about 2003. At maintenance hearings, Smith would bring proof of his expenses but never proof of income. Taljaard had continued, up to the date of trial, to pay for Frik's medical aid premiums, and a cell-phone contract for him, and had bought winter and summer clothes for him after he had turned eighteen.
16. Taljaard knew that Smith ran his business as a mechanic from home and was not occupying a separate workshop. She pointed out that he had previously operated several workshops. She could not contest that Smith's reason for working from home was his inability to pay rent for a separate workshop. Taljaard could not dispute that Smith earned an average income of R17 000,00 per month, and that his monthly expenses exceeded R19 000,00.
17. After the State had closed its case, Smith's attorney applied for his discharge under section 174 of the CPA, relying primarily on the case of **Magagula**. The prosecutor secured a postponement to prepare an answering address. The trial resumed on 14 November 2016, but the record contains no address.

18. The court refused the discharge. It relied on the fact that there was a court order in place, that the court order had not been honoured, and that Smith's attorney had recorded his income as being R17 000,00 per month. The court made no mention of the submission by Smith's attorney that his monthly expenses were R19 000,00 and that this amount exceeded his income. In the court's view, the duty rested on Smith to prove why he had failed to pay.
19. At this juncture, Smith's attorney informed the prosecutor that Smith's bank statements and invoice books were available, to enable him to address the documents under cross-examination, but told him that she did not intend to hand them into court as evidence.
20. Smith proceeded to testify. Since leaving the services of the SAPS, after five years in the force, he had run an auto service business for the past eighteen years, and was currently operating his business from his home. He had stopped running two or three workshops from other premises because he could not afford the rent. He had employed employees in the past but could no longer afford to employ them. He could not even afford to employ Frik in his business. Frik was instead performing piece-jobs. He had tried to apply for work elsewhere but his age (he was 45) counted against him.
21. After Frik had come to live with Smith, Smith said he had applied for a maintenance order against Taljaard for her to contribute towards Frik's support, but the application was aborted because he had failed to produce proof of his income.
22. Smith said he earned between R17 000,00 and R18 000,00 per month. He did not own the property he lived in, and paid rent of R7 500,00 per month. He did not own a motor car, although his partner had one. Sometimes he fell into arrears with the rent. The property accommodated five people, including his common law partner of sixteen years, Frik, and Smith's two minor daughters aged five and twelve. His partner was employed at Vereeniging Trust, earning about R11 500,00 per month.

23. Smith's other monthly expenses were as follows. Electricity consumption was R1 200,00. The school fees for one daughter were R1 300,00 and R1 400,00 for the other. The amount of R30 000,00, not paid by the medical aid scheme, was payable for cosmetic repairs to his elder daughter's teeth, and was being repaid at R750,00 per month. His cell phone cost him R1 000,00, petrol cost him R1 000,00 and groceries cost R4 000,00. These expenses total R18 150,00 in the aggregate. Smith still owed arrear rent of R15 000,00 for rent for a former workshop. Smith said his partner bought their daughters' clothes and school clothes. She paid for the medical aid for their family, the domestic servant and gardener and contributed towards the groceries and meat.

24. Smith testified that he did not have any disposable income to honour the October 2015 order. He said that the arrears had accumulated over the seven year period during which Taljaard had allegedly "disappeared" with Frik. He testified that as soon as Frik was self-supporting, he could start to repay the arrears, and that this understanding had been mentioned in the October 2013 order. Frik was due to start an apprenticeship in March 2017. He said he might be able to pay R150,00 towards the arrears until Frik had secured employment.

25. On 23 February 2017, Smith was convicted of contravening section 31(1) of the Maintenance Act, for failing to pay arrear maintenance. On the same date, he was sentenced to eight months' imprisonment. This was wholly suspended for five years, on three conditions, namely that he:

- a. is not convicted of contravening section 31(1) for five years;
- b. should pay the complainant the sum of R7 500,00 for the arrears before 3 March 2017;
- c. should resume payment of the sum of R500,00 per month in terms of the October 2015 court order.

this is now indeed the case, then Smith would be expected to honour his undertaking.

31. A duty of support as a result of a second relationship during which further children were born is not in itself proof of lack of means. Vide **State v Walraven 1975(4) SA 348 T**. Nevertheless, what stood uncontroverted were the following material undisputed facts which served to support Smith's defence: he had three children, including Frik, he owned no movable or immovable property of any significant value, he had to work from home and could not afford to employ anyone to help him, he had several debts, his partner of sixteen years worked, and her salary was also required to help to support a family of five, which now included Frik. He had taken Frik into his home while Frik was unemployed and without any monetary payment being made by Taljaard towards Frik's support, albeit that Taljaard continued to pay for Frik's medical aid, cell-phone and clothes. On a prima facie basis, on the totality of facts, Smith provided sufficient grounds for an enquiry.

32. The conversion procedure, set out in section 41 of the Maintenance Act, provides:

"41 Conversion of criminal proceedings into maintenance enquiry

If during the course of any proceeding in a magistrates court in respect of-

(a) an offence referred to in section 31(1); or

(b) the enforcement of any sentence suspended on condition that the convicted person make periodical payments of sums of money towards the maintenance of any other person,

it appears to the court that it is desirable that a maintenance enquiry be held, or when the public prosecutor so requests, the court shall convert the proceedings into such enquiry."

33. Conversion may occur at any time, even at the time between conviction and sentence. Vide **State v Vermeulen 1981(2) SA 486 E**.

34. In this case, the trial court could have ruled for a conversion at, inter alia, any of the following stages, namely:

- a. at inception of the proceedings, when the court was apprised of the defence of lack of means, at which stage the court had the opportunity to pose relevant questions, in explanation of the plea;
- b. when Smith's attorney made application for conversion, this after Taljaard's evidence in chief was concluded;
- c. after Taljaard's cross-examination had been completed, when Smith's income and expenses were unchallenged, and after Taljaard had confirmed that Frik had left her to live with Smith, creating an additional financial burden on Smith, all of which resulted in proof of a prima facie case that the October 2015 order might be susceptible to review;
- d. after Smith had testified and had provided the details of his income and expenses, lack of assets of any significance, and of the need to support two other children, and his testimony had indicated, prima facie, that he had a lack of means and that his lack of means was not attributable to an unwillingness to work or to misconduct, all of which resulted in proof of a prima facie case that the October 2015 order might be susceptible to review.

35. In **Magagula**, the high court set aside a conviction based on failure to pay arrear maintenance, and converted the trial into an enquiry. A maintenance order was granted for payment of child support of R200,00 per month. Magagula was criminally prosecuted for failure to honour the order for some 29 months. He was not legally represented and pleaded guilty.

36. In his plea explanation he said he was earning a low salary and could therefore not pay. The plea was converted to one of not guilty, but thereafter, the prosecutor managed to extract some admissions from the accused, namely that he failed to pay because he had clothing accounts and loans, that these debts had been incurred after the date of the court order, at a time when he knew he had maintenance obligations. Without

further ado, after recording the admissions, the State's case was closed. The accused was convicted.

37. In mitigation, it emerged that the accused earned R800,00 per month, and was married with four other children, and was unable to afford a fine. He was sentenced to a fine of R1 000,00 or 10 months in prison, wholly suspended for five years on terms similar to those imposed in casu. On automatic review to the High Court, the conviction and sentence were set aside, and the matter remitted back to the magistrates court for the hearing of an enquiry.

38. Reading from the headnote of **Magagula** at page 126 g to i, the following is pertinent, (my emphasis included):

"If the prosecution establishes beyond reasonable doubt that the accused had the means with which to comply with the maintenance order, wholly or to a greater extent than he did, but that he nevertheless failed to do so with the necessary guilty mind, the accused will generally be convicted and no conversion of the trial into a maintenance enquiry will take place. But if the evidence leaves open as a reasonable possibility that the accused complied with the maintenance order to the best of his ability but lacked the means to comply to a greater extent than he did or at all and if it fails to show that his lack of means was his own fault and if it fails to show that his lack of means was merely temporary and that he would shortly be in a position to resume payments in terms of a maintenance order, the trial should be converted in terms of section 41 into a maintenance inquiry."

39. Regarding the burden of proof, in **Magagula**, the court held that the State could discharge its burden of proof in one of three ways, namely by proving that:

- a. at the time of the alleged offence, the accused had the means with which to comply with the maintenance order; or
- b. in terms of section 31(2), the accused's failure to comply with the order was attributable to the accused's unwillingness to work; or
- c. in terms of section 31(2), the accused's failure to comply with the order was attributable to the accused's misconduct.

40. The State failed to advance evidence to discharge its burden of proving any one of the above requirements. There was inadequate information at the disposal of the State to disprove lack of means, whether viva voce or of a documentary nature. From Smith's ipse dixit, he was willing to work, having been gainfully employed, as a self-employed mechanic for sixteen years. No misconduct in the nature of conduct committed with the intention of evading the maintenance order was proved.
41. The proceedings against Smith before the trial court were not in accordance with justice and should be set aside. The trial court misdirected itself on the following grounds, namely:
- a. it failed to exercise the judicial discretion accorded to it under section 41 of the Maintenance Act, namely to convert the criminal trial into a maintenance enquiry; and
 - b. it failed to appreciate that, where an accused raises lack of means as a defence, the burden of proof rests on the State to disprove the defence, beyond a reasonable doubt.
42. Notwithstanding the order which follows, it should be borne in mind that the culture of impunity which prevails amongst recalcitrant maintenance defaulters must be discouraged with the full force of the law. Non-payment of maintenance detrimentally and unlawfully depletes the patrimony of the claimant parent, who is, more often than not, the mother. In the result, the minor child's interests are also prejudiced. It creates an intolerable state of disequilibrium in the claimant's financial affairs, and household. This state of affairs should not be countenanced.
43. It is trite that a claim to maintenance cannot be negated by the inability to exercise contact rights to the child. However, it is a known fact that the deprivation of rights of contact commonly creates a disincentive towards the discharge of maintenance obligations, and causes parental alienation, which is often irreparable. Following divorce, a healthy relationship between the child and both of its parents should be cultivated, where practicable. This serves the best interests of the child, and it encourages

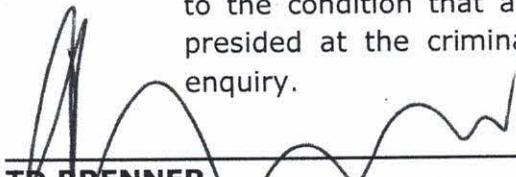
the maintenance obligant to demonstrate goodwill in the discharge of maintenance payments.

44. There is a panoply of mechanisms provided for in the Maintenance Act to address maintenance claims, both past and present. Proactive steps need to be taken to ensure that maintenance courts are equipped with enough resources and personnel to facilitate efficient processes in the collection of maintenance debts. I fully subscribe to the comments in **Bannatyne v Bannatyne and another 2003(2) SA 363 CC, at paragraph 27:**

"27. Systemic failures to enforce maintenance orders have a negative impact on the rule of law. The courts are there to ensure that the rights of all are protected. The judiciary must endeavour to secure for vulnerable children and disempowered women their small but life-sustaining legal entitlements. If court orders are habitually evaded and defied with relative impunity, the justice system is discredited and the constitutional promise of human dignity and equality is seriously compromised for those most dependant on the law.

45. The following order is granted, namely:

- a. the conviction and sentence of the accused is set aside;
- b. in terms of section 41 of the Maintenance Act, 99 of 1998, read with section 304(2)(c)(iv) of the Criminal Procedure Act, 51 of 1977, ("the CPA"), the criminal trial is hereby converted to a maintenance enquiry;
- c. in terms of section 304(2)(c)(v) of the CPA, the case is remitted to the magistrates' court to conduct the maintenance enquiry, subject to the condition that a Magistrate other than the Magistrate who presided at the criminal trial should preside at the maintenance enquiry.


 T.D. BRENNER
 ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
 GAUTENG DIVISION, PRETORIA

I concur


 R. MOKGOATLHENG
 JUDGE OF THE HIGH COURT OF SOUTH AFRICA
 GAUTENG DIVISION, JOHANNESBURG