

REPUBLIC OF NAMIBIA

NOT REPORTABLE



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

CR No: 43/2017

In the matter between:

THE STATE

and

PAUL GURUNAB

HIGH COURT MD REVIEW CASE NO 1005/2017

Neutral citation: *S v Gurunab* (CR 43/2017) [2017] NAHCMD 211 (07 August 2017)

CORAM: LIEBENBERG J et SHIVUTE J

DELIVERED: 07 August 2017

Flynote: Criminal procedure – Plea – Plea of guilty in terms of s 112 (1) (a) of the Criminal Procedure Act 51 of 1977 as amended – Magistrates cannot invoke s 112 (1) (a) for the sake of disposing of cases expeditiously without fully enquiring into the details of the offence.

Maintenance Act – Accused in arrears in substantial amount – Penalty provision – Substantial fine and periodical imprisonment – Offence in terms of s 39 of the Act not ‘minor’ or ‘trivial’ – Court not exercising its discretion judiciously when invoking s 112 (1) (a).

Maintenance Act – Subsection 39 (2) provides for the defence of lack of means – Accused raised defence when informing court in mitigation of sentence that he was unemployed – Failure to record plea of not guilty – Misdirection – Conviction and sentence set aside.

ORDER

1. The conviction and sentence are set aside.
2. The matter is remitted to the trial court in terms of s 312 (1) of Act 51 of 1977 with the direction to enter a plea of not guilty in terms of s 113 and to bring proceedings to its natural conclusion.

JUDGMENT

LIEBENBERG J: (Concurring SHIVUTE J)

[1] In this case the accused appeared in the magistrate's court for the district of Keetmanshoop on a charge of contravening s 11 (1) of the Maintenance Act 9 of 2003, failing to pay maintenance as per an order of court.¹ He pleaded guilty to the charge and was convicted in terms of s 112 (1)(a) of the Criminal Procedure Act 51 of 1977. The accused was sentenced to a fine of N\$2 000 or 6 months' imprisonment, wholly suspended on condition of good behaviour, and that he henceforth settles the amount in arrears in payments of N\$500 per month.

[2] The accused when testifying in mitigation of sentence started off by informing the court that he was unemployed and therefore unable to pay maintenance. From the court's questioning it emerged that he irregularly does casual work from which he earns N\$70 per week, and that he actually depends on his mother. In view thereof he urged the court to suspend sentencing until such time that he is permanently employed. The court notwithstanding, finalised the case.

[3] When the matter came on review I directed a query to the magistrate enquiring whether (a) this is the type of case that should have been disposed of in terms of s 112 (1) (a) of the CPA, and (b) whether the accused did not raise a defence as provided for in the Maintenance Act.

[4] The magistrate in response states that the court exercised its judicial discretion when invoking the provisions of s 112 (1)(a) as it was of the view that the amount in arrears is not high. As regards (b) it is conceded that the accused's unemployment could be a defence raised by him.

[5] This court in *S v Onesmus*; *S v Amukoto*; *S v Mweshipange*² extensively discussed the untenable situation brought about when presiding officers wrongly invoke the

¹ See para 6 below.

² 2011 (2) NR 461 (HC).

provisions of s 112 (1) (a) in order to swiftly dispose of cases without having proper regard to the *nature* of the offence and the *particulars of the charge*. It was pointed out that although the presiding officer has a discretion to invoke the provisions of s 112 (1) (a) or (b), that discretion must still be exercised judiciously during which the court will be guided by factors such as (i) the nature and the seriousness of the offence; (ii) the possibility of compulsory sentences; and (iii) the particulars of the charge. It is trite that only relatively 'minor' or 'trivial' or 'not serious' offences should be disposed of under s 112 (1) (a).

[6] In the present matter the accused was wrongly charged with a contravention of s 11 (1) of the Maintenance Act, in that this section provides for the examination of persons by the maintenance officer, and not offences relating to maintenance orders as set out in s 39 of the Act. The relevant part of s 39 reads:

'39 Offences relating to maintenance orders

(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.

(3)'

(Emphasis provided)

[7] The particulars of the charge however relate to failure on the part of the accused to comply with an order issued by the Maintenance Court at Keetmanshoop on 27 April 2012, according to which the accused had to pay maintenance in the amount of N\$200 per month, but has fallen in arrears in the amount of N\$10 000. Though the wrong 'label' was given to the offence charged, I am satisfied that the accused, when required to plead, was properly informed of the particulars of the charge he was facing and as such, suffered no prejudice as a result thereof.

[8] In view of the penalty provision applicable to an offence under s 39 and the substantial amount the accused had fallen in arrears, the court's decision to swiftly dispose of the matter in terms of s 112 (1) (a) fell significantly short of having exercised its discretion judiciously. The offence is anything but 'minor' or 'trivial' and besides providing for the imposition of a substantial fine, the court may also impose a sentence of periodical imprisonment which, obviously, would not be possible if the accused is convicted on his mere plea of guilty. The trial court in my view did not exercise its discretion judiciously when disposing of the matter as it did and should have questioned the accused in terms of s 112 (1)(b) of the CPA.

[9] Section 39 (2) makes plain that the accused is entitled to an acquittal if failure to pay maintenance was due to lack of means on the part of the accused and if it has been proved that such failure was not due to the accused's unwillingness to work, or as a result of misconduct. The accused in this case in mitigation of sentence clearly raised the defence of lack of means due to unemployment whereupon the court ought to have noted a plea of not guilty and ordered the matter to proceed to trial. From the accused's testimony it must have been clear to the trial court that the accused was unable to comply with the maintenance order of payment of N\$200 per month when he receives an irregular income of N\$70 per week, if and when he finds casual work to do. How the court in these circumstances could convict and sentence the accused to a suspended sentence on condition that he complies with the maintenance order plus pay an additional N\$500 per month towards the amount in arrears, is beyond comprehension.

The trial court in this regard clearly misdirected itself and the conviction and sentence fall to be set aside.

[10] In view of the accused's current situation of alleged unemployment and the court in the end being satisfied that the accused is unable to comply with the original maintenance order issued by that court, the court may decide to convert the criminal proceedings into a maintenance enquiry as provided for in s 34 of the Act. Obviously this will depend on the facts emerging from the trial.

[11] In the result, it is ordered:

1. The conviction and sentence are set aside.
2. The matter is remitted to the trial court in terms of s 312 (1) of Act 51 of 1977 with the direction to enter a plea of not guilty in terms of s 113 and to bring proceedings to its natural conclusion.

J C LIEBENBERG

JUDGE

N N SHIVUTE
JUDGE