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Yes / No

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# **IN THE HIGH COURT OF SOUTH AFRICA**

(Northern Cape Division)

High Court Review Case No: 84\06

Magistrate Case No: OH 742\05

Date delivered: 2006-06-02

In the review matter of:

**THE STATE**

*versus*

**BOY MADITLHABA**

**ACCUSED**

Coram: MAJIEDT J *et* Tlaletsi J

## **JUDGEMENT ON SPECIAL REVIEW**

**MAJIEDT J:**

1. This matter has been submitted on special review by the acting chief magistrate of Kimberley. The accused had been convicted on 12 January 2006 on a contravention of section 31(1) of the Maintenance Act, 99 of 1998. The matter was thereafter

postponed for sentence until 21 February 2006. The magistrate who had presided in the matter until conviction stage, had however, resigned shortly thereafter and the matter came before another magistrate on 21 February 2006 for sentencing. Having listened to the mechanically recorded proceedings, the latter magistrate was not satisfied with the conviction and requested that the proceedings be reviewed. It was forwarded to this Court on special review.

2. The first aspect which requires consideration is the fact that the accused was not asked to explain his plea of not guilty in terms of section 115 of the Criminal Procedure Act, 51 of 1977. This is, however, not irregular, since a court is not obliged to question an accused person who has pleaded not guilty, given the fact that section 115 is framed in permissive terms. See in this regard:

**S v Shikongo and others 2000(1) SACR 190 (NmS) at 196 e-j.**

While the provisions contained in section 115 of the Criminal Procedure Act do not make it peremptory to question an accused who has pleaded not guilty, it is advisable to make use of the procedure contained therein in the case of an unrepresented accused. See in this regard, generally the discussion in:

**S v Smith 2002(2) SACR 464 (C) at 466 h – 467 c.**

3. A more serious problem is the fact that, after the magistrate had explained to the accused his rights, it does not appear clearly from the record whether the accused had in fact understood the

explanation. The following is what had happened at that stage after the State had established a *prima facie* case to the effect that there was a valid maintenance order from the Maintenance Court in operation against the accused and that the accused had *prima facie* wilfully disobeyed the said order in respect of his maintenance payments:

“PRESIDING OFFICER. It is the State case (inaudible). Mr Maditlhaba you do not have to embarrass your daughter. I mean she demands which is due to her. By virtue of her birth. And circumstances surrounding that. It is a State case Sir, what it means is that the Public Prosecutor is no longer going to call witnesses who will testify against you Sir. So, now you have the right to state your case before the Court. You can elect to come. under oath and testify under oath, and if you elect to come under oath bear in mind that you will be subjected to cross-examination by the Public Prosecutor. And the Court may even ask you some other questions if there are some other issues that need to be considered. You also have the right of calling another, a witness who can come and testify under oath on your behalf Sir. Bear in mind that what we have said, at the beginning of the trial, it is not an oath because it is not tested by a cross-examination and it was never been done under oath. Do you understand this (inaudible).

BESKULDIGDE: Ja.

PRESIDING OFFICER. What do you elect to do Sir?

BESKULDIGDE: Ek dink ek moet maar net hoor eintlik met hoeveel is ek agterstallig (onhoorbaar). Wil nou nie eintlik (onhoorbaar).

PRESIDING OFFICER. Would you like to testify under oath or you do not want to, you want to remain silent?

BESKULDIGDE: Ek wil maar net stilbly maar.

PRESIDING OFFICER. So bear in mind that if you remain silent then you do not have any evidence before the Court, but the only evidence that is before the Court it is that of the witness. You do not have evidence because you have never give testimony under oath. Do you understand Sir?

BESKULDIGDE: Ek verstaan ja.

PRESIDING OFFICER. So you, you still elect to remain silent?

BESKULDIGDE: Ja. Ek het nie gepraat (onhoorbaar) ek het nie geluister nie.

PRESIDING OFFICER. Ja, well. Thank you. That is your case.”

4. It seems to me that, *ex facie* the aforequoted *verbatim* extract from the record, that the accused's reply namely "*Ja. Ek het nie gepraat (onhoorbaar) ek het nie geluister nie*" can be interpreted that the accused did not fully understand the explanation of his rights, since he did not listen properly to the magistrate's explanation. I concur with the acting chief magistrate that in the circumstances, there is considerable doubt as to whether the accused did in fact take a fully informed decision to close his case in the face of the strong *prima facie* case which the State had made out against him. It seems to me that in this matter one would rather err on the side of caution in setting aside the conviction, given this considerable amount of doubt.

5. In the premises the following order is issued:

**5.1 The accused's conviction is set aside.**

**5.2 The matter is remitted to the magistrates' court for a trial *de novo*.**

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**SA MAJIEDT  
JUDGE**

**I concur.**

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**PL TLALETSI  
JUDGE**