REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case number A33/2019

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.

12/08/21

In the matter between:

POTGIETER ANDREI **APPELLANT**

AND

THE STATE **RESPONDENT**

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform. The date for hand-down is deemed to be 11 August 2021.

Summary: Appeal against the sentence imposed for failing to pay spousal and child maintenance. Contravention of section 31(1) of the Maintenance Act. Principles governing interference on appeal with the trial court's decision restated.

JUDGMENT

Introduction

[1] The appellant, Mr Potgieter, was arraigned before the Krugersdorp District Court (the court *a quo*) on two counts of contravening the provisions of section 31 (1) of the Maintenance Act, 99 of 1998 (failure to pay maintenance).

[2] The appellant was legally represented at the trial wherein he pleaded not guilty to the charges proffered against him. He was found guilty and sentenced on 30 July 2018 as follows:

(a) count one: three years' imprisonment.

(b) count two: three years' imprisonment.

[3] The court *a quo* ordered that the half of the sentence in count two was to run concurrently with the sentence in count one. The appellant was therefore effectively sentenced to four and half years' imprisonment.

[4] Aggrieved by the above outcome, the appellant applied for leave to appeal against both the conviction and the sentence. He was unsuccessful and accordingly petitioned the Judge President, Gauteng Local division in Johannesburg, for leave to appeal in respect of both conviction and sentence. The application for leave to appeal

against the sentence was successful, however, leave to appeal on conviction was refused.

[5] The appeal against the sentence served before this court on 27 February 2020. He successfully applied for a postponement of the hearing so as to approach the Supreme Court of Appeal (SCA) in terms of section 16, (1) of the Superior Courts Act,[1] in respect of his conviction.

[6] The appellant, who is out on bail, was granted the postponement of the appeal hearing *sine die* with the specific time frames to adhere to concerning his approach to the SCA. The order made by this court reads as follows:

> (a) The application for leave to appeal is postponed *sine die.*
>
> (b) The applicant is ordered to file his petition with the Supreme Court of Appeal within two weeks of the date of today.
>
> (c) As soon as the outcome of the petition proceedings is made available to the appellant, he will approach this court within one week in order to arrange a date for this matter to the head.
>
> (d) Both parties may approach the court for a date.

[7] The appellant's petition to the SCA was returned to him due to noncompliance with the rules. After receipt of the returned application from the SCA, the appellant did nothing to prosecute his appeal for about fifteen months. It is apparent from the correspondence that the shortcomings in the application to the SCA were brought to the

appellant's attention during June 2020. It is also apparent that the appellant took no steps to move forward with his application in the SCA.

[8] It was only after receipt of the notice of set down on 13 May 2021 that the appellant took steps to progress his petition before the SCA.

The background facts.

[9] The parties were married to each other in 1992 and stayed in a house belonging to the complainant's mother and later registered in the complainant's name. The parties have two biological children, namely Keagan and Kyle.

[10] The applicant was a business entrepreneur who, between 1993 to 1998, purchased and later sold a number of Spur franchise businesses. During 2002 he operated a restaurant, which he converted into RJ's Steak House and later developed it into an RJ franchise.

[11] The parties successfully conducted the RJ's steakhouse business until 2009, when the appellant instituted divorce proceedings against the complainant. The divorce proceedings were acrimonious, with the parties instituting various court proceedings against each other. The appellant gained control of the business following the outcome of the litigation to the exclusion of the complainant.

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[1] Act number 10 of 2013,

[12] In August 2012, the parties concluded a settlement agreement, in which the complainant donated half share of her assets in the joint estate to the applicant in return for spousal and children maintenance by the appellant.

[13] Although the settlement agreement was not made an order of the court, the principles contained therein were incorporated into the divorce order, particularly the spousal and children maintenance, including parental rights and responsibilities.

[14] It is common cause that the appellant failed to comply with the court order in as far as the payment of maintenance was concerned. As a result, he was charged with the failure to pay maintenance. It was alleged that he was in arrears in the following amounts:

(a) in respect of the children Kyle and Keagan – R242 864.90 and,

(b) for the complainant R984 000.00

[15] During the trial, the essence of the appellant's defence was that he could not afford to pay maintenance because he had sold his business. He sold his business to his fiancée and living-in-partner, Charlene De Bruyn, for R 6 million. He testified that after the sale of the business, he was employed by his fiancée at a monthly salary of R25,000 per month, which was later increased to R 30,000.

The grounds of appeal

[16] The applicant contended that the court *a quo* erred in imposing direct imprisonment and that the four and half years' imprisonment sentence was excessive.

He further argued that the court *a quo* erred in not converting the trial into an inquiry under section 41 of the Maintenance Act.

The legal principles

[17] The extent of the appeal court's powers to interfere with the sentence imposed by the trial court are circumscribed and limited to those instances where it has been shown that the trial court materially misdirected itself in the manner it dealt with the issue of the sentence.[2]

[18] In S v Malgas,[3] the court held, that an appeal court may interfere with the sentence of the trial court when there is a disparity between the sentence the appeal court would have imposed and that imposed by the trial court and this, in general, is when the sentence can be described as 'shocking,' 'startling' or 'disturbingly inappropriate.'

[19] In dealing with the issue of appeal against sentence, the court in *S v Pillay,*[4] *said:*

> "As the essential enquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the court in imposing it exercised its discretion properly or judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree of seriousness

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[2] See Director of Public Prosecutions v Mngoma (404/08) [2009] ZASCA 170; 2010 (1) SACR 427 (SCA) ; [2010] 2 All SA 456 (SCA) (1 December 2009).

[3] (117/2000) [2001] ZASCA 30; [2001] 3 All SA 220 (A) (19 March 2001).

[4] *[1977] 4 All SA 713 (A) 717; 1977 (4) SA 531 (A) 535E-G.*

that it shows directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the court's decision on sentence."

[20] The above principle is based upon the consideration that sentencing is pre-eminently within the trial court's discretion.

Evaluation

[21] The two main grounds upon which the appellant sought leave to appeal is based on are: (a) the alleged failure by the court a quo to convert the trial into a maintenance inquiry, and (b) that the sentence was shockingly inappropriate or was vitiated by misdirection.

[22] The main reasons for the contention that the court *a quo* ought to have converted the trial into an inquiry were that:

(a) lack of means on the part of the appellant was raised during the trial,

(b) the company Diamond CC was insolvent.

(c) The evidence of the accountant that the business of the appellant was insolvent was conclusive that the applicant will not be able to pay for the maintenance of his erstwhile wife and his child.

[23] The approach to adopt when dealing with the first ground of appeal, namely whether to convert a criminal trial into a maintenance inquiry is governed by section 41 of the Maintenance Act 99 of 1998, which provides as follows:

"If during the course of any proceedings in a magistrate's 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 on good cause shown that it is desirable that a maintenance enquiry be held, the court may, of its own accord or at the request of the public prosecutor, convert the proceedings into such enquiry."

[24] During argument before this court, the appellant's Counsel relied heavily on the court *a quo's* alleged failure to convert the trial into an inquiry. It is submitted that there was no valid reason why, specifically in light of a comment made by the court *a quo* during sentence, that the trial was not converted into an inquiry in terms of section 41 of the Maintenance Act. The court *a quo* made the following comment during the sentencing judgment when it said:

"I should have interjected at the time, but having understood that section 41 allowed for the prosecutor and for the defence to ask for the conversion of this matter at any stage, I did not intervene and say, you know what I think this is unfair. It is unfair to expert the witness to accept this, or unfair on the witness to be battered in this way. But the . . . she stood her ground and placed her faith in the process she set in motion."[5]

[25] Firstly, it is apparent from the reading of the judgment that the court *quo* rejected the appellant's version that he could not afford to pay maintenance. This means that the issue of converting the trial at the level of sentencing into an inquiry did not arise.

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[5] See page 1019 – line 17 of the Record.

In other words, there was no basis for converting the proceedings into a maintenance inquiry after conviction.

[26] Secondly, there is nothing in the reading of the judgment upon which it can be discerned that the court *a quo* formed a view that 'good cause' existed to convert the trial into a maintenance inquiry. In fact, the magistrate's comment referred to above, when read in context, related to his decision to allow certain questions that would ordinarily be excluded.

[27] Thirdly, the contention that the court *a quo* should have considered the conversion is further unsustainable when regard is had to the finding that the non-payment of maintenance was wilful on the part of the appellant. The court *a quo* found that the appellant did not even attempt to make payment for the amount he could afford.

[28] In conclusion, as a result of the court *a quo's* factual findings, the question whether or not the court should exercise its power to convert the criminal trial into a maintenance enquiry, never arose.

Was the sentence inappropriate or vitiated by misdirection?

[29] The maximum sentence to impose in a case of failure to pay maintenance is governed by the provisions of section 31 of the Maintenance Act, which reads as follows:

> "(1) Subject to the provisions of subsection (2), any person who fails to make any particular payment in accordance with a maintenance order shall be guilty of an offence

and liable on conviction to a fine or to imprisonment for a period not exceeding three years or to such imprisonment without the option of a fine."

[30] As indicated earlier, the appellant was charged with two counts of contravention of section 31 of the Maintenance Act relating to failure to pay maintenance for both his erstwhile wife and the child. The appellant was found to have failed to pay the maintenance in the amount of R1 226869.90 over approximately four years.

[31] It is apparent from the reading of the judgment that the court *a quo* took into account the sentencing guidelines set out in S v Zinn,[6] which is, the personal circumstances of the appellant, the seriousness of the offences and the interest of society.

[32] The court *a quo* took into account the circumstances of the appellant when imposing the sentence. He was 53 years old and resided with his fiancée Ms. De Bruyn. At the time of his arrest, Ms. De Bruyn was pregnant with his other child, who was born whilst he was in prison.

[33] The court *a quo* also took into consideration that the failure to pay maintenance affects the most vulnerable members of the community, namely women and children, and that the rights of children are specifically protected by section 28(1)(e) of the Constitution which guarantees the rights of the child to, *inter alia*, be 'protected from maltreatment, neglect, abuse and degradation'.

[34] Both children, Kyle and Keagan, were the subject of the maintenance order. In considering the impact of the offence on Keagan the court *a quo* found that he was

treated differently from Kyle. Consequent to the failure to pay maintenance, Keagan had to move from place to place looking for accommodation from the age of 13 years. The appellant was further aware that his failure to pay maintenance had resulted in the complainant and Keagan going without food and electricity. On the other hand, Kyle enjoyed overseas trips to celebrate his birthday.

[35] The court *a quo* took into account that the appellant stopped complying with the maintenance order only after a few months of that order. The decision to stop payment of the maintenance was found to be wilful and well-orchestrated. The court *a quo* further took into account the threats and underhanded methods used by the appellant in an attempt to force the complainant to accept a settlement offer lower than that she was entitled to in terms of the maintenance order.

[36] The court *a quo* also noted that the appellant spent money on non-essential things, instead of abiding by the maintenance order. He made no attempt to contribute to the outstanding maintenance whilst maintaining a luxurious life for himself. The court stated that the appellant had several opportunities to rectify the situation he had created, but failed to do so.

[37] These findings referred to above, support the view that the only appropriate sentence under the circumstances was a custodial sentence. The court *a quo* imposed the maximum sentence, namely six years. Although the applicant's Counsel contended that the sentence was excessive, he conceded that custodial sentence was appropriate.

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[5] 1969 (2) SA537 (A) at 537-540G.

He however claimed that the most appropriate sentence would have been one month's imprisonment. I do not agree with that proposition for the reasons set out above, including the following.

[38] The offence committed and the specific circumstances of this case is serious and thus warranted the sentence imposed. As alluded to earlier, the applicant's conduct drove his child and erstwhile wife into poverty. This is in the context where he had agreed and obtained an order to the effect that he would pay maintenance for the complainant and his child. The appellant's case is aggravated by the fact that throughout the proceedings, including after conviction, he showed no remorse. As stated in S v Visser:[7]

> "Effective enforcement of maintenance payments is necessary not only to secure the rights of children, but also to uphold the dignity of women and promote the constitutional ideals of achieving substantive gender equality. It is therefore important that courts regard deliberate failures to comply with maintenance orders as serious offences and punish such failures accordingly."

[39] It was further argued on behalf of the appellant that at some stage the court *a quo* had restorative sentence in mind. I do not agree with this proposition. It is apparent that the comment made about restorative sentence was simply part of the consideration of assessing an appropriate sentence to impose.

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[7] 2004 [1] SA CR 393 [SCA] at 399 E – F.

[40] The view that the sentence was fair is further reinforced by the order that one of the counts for which the appellant had been found guilty should run concurrently with the other.

Conclusion

[41] In Director of Public Prosecutions KwaZulu Natal v NCOBO and others,[8] the court said:

> "[22] Traditional objectives of sentencing include retribution, deterrence and rehabilitation. It does not necessarily follow that a shorter sentence will always have a greater rehabilitative effect. Furthermore, the rehabilitation of the offender is but one of the considerations when the sentence is being imposed. Surely, the nature of the offence related to the personality of the offender, the justifiable expectations of the community and the effect of a sentence on both the offender and society are all part of the equation? Pre and post Malgas, the essential question is whether the sentence imposed is in all the circumstances, just."

[42] The appellant has failed to make out a case that the sentence imposed on him was inappropriate and shocking to justify interference by this court. There is no evidence on the record to suggest that the court *a quo* committed an irregularity or misdirected in imposing the custodial sentence on the applicant. In the circumstances the sentence imposed on the appellant was is fair and appropriate. Accordingly, the appellant's appeal stands to fail.

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[8] 2009 [2] SA. R. CR 361 [SCA] at paragraph 22.

Order

[43] In the circumstances, the following order is made:

1. Mr Potgieter's appeal is dismissed.
2. Mr Potgieter is ordered to submit himself to the Krugersdorp Correctional Centre within 5 (five) days from the date that this order is served on him.
3. In the event Mr Potgieter does not submit himself to the Krugersdorp Correctional Centre as ordered in paragraph 2 (two) above the South African Police Service must within 3 (three) days of the expiry of the date in paragraph 2 (two) take all the necessary and permissible steps in law to ensure that Mr Potgieter is delivered to the Correctional Centre in Krugersdorp in order for him to commence serving his sentence.

E MOLAHLEHI

Judge of the High Court,

Gauteng Local Division, Johannesburg

I agree

L WINDELL

Judge of the High Court,

Gauteng Local Division, Johannesburg

Representatives:

For the appellant:	Adv Schalk van Der Sandt
Instructed by:	GM Parker Gibbens Attorneys
For the respondent:	Adv SH Rubin for the NPA.
Date of hearing:	21 May 2021
Date of delivery:	12 ~~11~~ August 2021