IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: **A209/2023**

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
	DATE: 13 May 2024
	SIGNATURE: **MNCUBE AJ**

In the matter between:

CLEMENT ONTHUSITSE SEOTHAENG APPLICANT

Versus

THE STATE RESPONDENT

JUDGMENT

MNCUBE, AJ (JANSE VAN NIEUWENHUIZEN, J Concurring):

[1] The Appellant was convicted in the Regional Court Pretoria North on 26 January 2022 for extortion and malicious injury to property. He was sentenced to an effective fifteen (15) years imprisonment in respect of both offences. The Court a quo did not order that the sentence should run concurrently and refused the Appellant's application for leave to appeal. The

Appellant petitioned the Judge President in terms of section 309C of the Criminal Procedure Act 51 of 1977 (the CPA) as amended which petition was granted on 8 June 2023.

[2] The salient facts giving rise to the conviction and sentencing of the Appellant are that on 23 September 2017, Mr M. Miyela who is a Risk Manager for Mc Donald South Africa received a report from Zambezi Mc Donald restaurant about a threat. The threat was a video clip depicting someone wearing a Mc Donald uniform spitting on an ice cream cup and placing hands on a cooldrink that it would be circulated on the social media unless certain amount of money was paid within two days. As a result, the restaurant was closed. This video was followed by a threatening text message. The threat was also escalated to Mc Donald CEO. Investigations were conducted which revealed that the threat was made by the Appellant who was an employee at Zambezi Mc Donald restaurant. Contact was made with the Appellant who initially distanced himself from the threat. A second meeting was arranged with the Appellant who conceded that he made the threat because he was angry with Mc Donald.

[3] This eventually led to the arrest of the Appellant who was arraigned for extortion and malicious injury to property. On 8 June 2021 the Appellant initially pleaded not guilty to the charges before making admissions in terms of section 220 of the CPA. He was convicted and sentenced to ten (10) years imprisonment for extortion and five (5) years imprisonment for malicious injury to property.

[4] The issue for determination is whether the Court a quo misdirected itself in the sentence it imposed on the Appellant.

[5] The Appellant challenges the sentence imposed on him by the Court a quo on the following grounds-

1) That the Court a quo overemphasized the seriousness of the two offences.
2) That the sentence imposed is disturbingly in appropriate or sufficiently disparate and warrants for the intervention.
3) That the sentence imposed is totally out of proportion to the gravity or magnitude of the offences that the sentence evokes a feeling of shock or outrage as it is grossly excessive.
4) That the Court a quo failed to take into account the cumulative effect of the sentences and misdirected itself.

5) That the Court a quo misdirected itself by treating the offences as separate offences disregarding the intentions of the Appellant.
6) That the Court a quo ignored the element of mercy in meting out the sentence.

[6] The Counsel for Appellant reiterates in his written heads of argument the personal circumstances of the apellant as well as to recognise that sentencing falls within the discretion of the trial court. Reference to various cases including **S v PB 2013 (2) SACR 533 (SCA**) is made. The submission is that the Court a quo committed a misdirection by overemphasising the offence and failing to have regard to the cumulative effect of the sentence. A concession is made both in the heads of argument as well as during the hearing that the offences are serious. The oral submission made by Counsel is that the Court a quo misdirected itself in taking as an aggravating circumstance the fact that Mc Donald had instructed attorneys on watching brief. The contention further is that this was a neutral factor which signified that Mc Donald did not have faith in the system. It was furthermore, submitted, that there are good prospects that the Appellant may be rehabilitated.

[7] In opposing this application, the Respondent contends in its written heads of argument that Appellant was convicted of serious offences and that his actions were premeditated.The contention is that the Appellant's conduct had the potential to cause dire consequences on the brand of Mc Donald which is a multi-million rand business. The contention is that even after he was detected, the Appellant still demanded money. Due to the conduct of the Appellant, Mc Donald had to incur costs in employing consultants to monitor social media as well as instructing attorneys. The Respondent submits that the appeal should fail and places reliance on **S v Sadler (57/1999) [2000] ZASCA 13 (28 March 2000)** and **S v Mcasa and Another 2005(1) SACR 388 (SCA).** In his oral submission, Counsel for the Respondent emphasised that the Appellant enjoyed a relationship with his employed which was based on trust and that he breached. it The contention is that this offence was pre-planned and it exhibits a measure of intelligence on the part of the Appellant to come up with the plan to extort money. The submission is that there was actual loss suffered by Mc Donald in employing people to monitor social media and in instructing attorneys.

[8] Sentencing falls within the discretion of the trial Court.[1] The trial court exercises a wide direction in deciding which factors should be allowed to influence the determination of an appropriate punishment[2]. A Court exercising appellant jurisdiction cannot interfere with the

[1]See S v Mokela 2012 (1) SACR 431 (SCA) para [9].
[2]See S v Kibido 1998 (2) SACR 213 (SCA) at 216 G-J.

discretion unless it was not judicially exercised, meaning that the sentence is vitiated by an irregularity or material misdirection, or the sentence is so severe that no reasonable Court could have imposed it[3]. It is therefore trite that a Court of Appeal cannot interfere in the sentence in the absence of material misdirection by the trial Court and substitute the sentence because it prefers it.[4]

[9] In **S v Bogaards 2013 (1) SACR 1 (CC)** at para [14] it was held *'Ordinarily, sentence is within the discretion of the trial court. An appellate court's power to interfere with sentence imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice: the court below misdirected itself to such an extent that its decision on sentence is vitiated or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.'*

[10] I proceed to deal with each of the grounds for appeal. The first ground which is that the Court a quo overemphasized the seriousness of the two offences is interlinked with two other grounds: that the sentence is totally out of proportion to the gravity or magnitude of the offences and that the sentence evokes a feeling of shock or outrage. I deem it necessary to assess these grounds simultaneously. The initial contention by the Appellant in its written heads of argument was that the suspension of the sentence or a fine would have served all the purposes of sentencing. Counsel for the Appellant correctly conceded in my view that direct imprisonment is an appropriate sentence in view of the seriousness of the charges.

[11] The contention by the Appellant that the offence was motivated by anger towards his employer does not reduce the moral blameworthiness of his conduct. As correctly argued by Counsel for the Respondent this offence was planned and the appellant had an opportunity to calm down and change his mind. I am not persuaded that there was misdirection by the Court a quo to the extent that it warrants an interference. In relation to the offence of extortion Mr Ntswane concedes that the offence is serious and cannot offer any justification for the conduct of the Appellant. I am therefore not persuaded that the sentence of ten years for extortion evokes a feeling of shock or outrage.

[12] It is important to have regard to the context as correctly argued on behalf of the Respondent that the Appellant enjoyed a trust relationship with Mc Donald as an employee. By extorting one hundred thousand rand (R100 000) from his employer, the Appellant broke the

[3]See S v De Jager 1965 (2) SA 616 (A) at 629.
[4]See S v Malgas 2001 (2) SA 1222 (SCA) at para [12].

trust which must be viewed in a serious light[5]. I am of the view that to interfere with the sentence that was imposed by the Court a quo will send a wrong message and negate the seriousness of this kind of offence. It follows that for the offence for extortion we are not persuaded that there is merit and these grounds in so far as that offence is concerned must fail.

[13] On the ground the Court a quo failed to take into account the cumulative effect of the sentences is also interlinked with the ground that the Court a quo misdirected itself by treating the offences as separate offences disregarding the intentions of the Appellant. Both Counsels concede that the offence is one continuous incident. On assessing the totality of the facts, I are persuaded that the malicious injury to property was committed with the expressed intention to extort money. It is trite that in instances where the offence constitutes of one continuous incident, that an order that the sentence should run concurrently be made[6]. See **S v Mokela** supra para [11] which held that sentences are to run concurrently where the evidence shows that the offences are inextricably linked with one common intent. It follows that the Court a quo by treating the offences as separate rather than as one incident committed a misdirection justifying the order for concurrency.

[14] By ordering the sentences to run concurrently, the cumulative effect of the sentence is considered. The order for concurrency in turn filters in the element of mercy which was lacking in the sentence passed by the Court a quo. After all mercy is the cornerstone of a just penal system. It follows that the appeal succeeds.

<u>Order:</u>

[15] In the circumstances the following order is made:

1. The appeal is upheld.
2. The sentence imposed by the trial court is set aside and replaced as follows-

   2.1Count 1 (Extortion) the Appellant is sentenced to ten (10 years) imprisonment.

   2.2 Count 2 (Malicious injury to property) the Appellant is sentenced to five (5) years imprisonment.

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[5]See S v Barnard (469/02) [2003] ZASCA 65 (30 May 2003) para [15].
[6]See S v Rabie1975 (4) SA 855 (AD) at 862D-F.

2.3 Two years of Count 2 to run concurrently with the sentence Imposed on count 1 in terms of section 280 (2) of the Criminal Procedure Act, 51 of 1977.

2.4. The accused is declared unfit to possess a firearm.

3. The sentence is back-dated to 28 March 2022.

MNCUBE, AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I concur.

JANSE VAN NIEUWENHUIZEN, J
JUDGE OF THE HIGHT COURT
GAUTENG DIVISION, PRETORIA

Appearances:

On behalf of the Applicant	: Adv. R.T. Ntswane
Instructed by	: Phothoane Attorneys
	: 74 Meyer Street, Roodepoort
On behalf of the Respondent	: Adv. L.A. More
	: DPP Pretoria,
	: 28 Church Square, Prudential Building
	: Pretoria
Date of Hearing	: 9 May 2024
Date of Judgment	:13 May 2024