THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
CASE NO: 361/2003

In the matter between

GIDEON JOHAN VISSER **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: ***Farlam, Navsa JJA and Van Heerden AJA***

HEARD: ***20 NOVEMBER 2003***

DELIVERED: ***1 DECEMBER 2003***

Summary: Maintenance – deliberate failure to comply with maintenance order – partially suspended sentence of periodical imprisonment appropriate on facts of case

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JUDGMENT

VAN HEERDEN AJA

[1] The appellant was charged in the Stellenbosch Magistrates' Court with contravening s 11(1) of the Maintenance Act 23 of 1963[8] in that he had allegedly failed to comply with a maintenance order over the period between 17 November 1998 and 5 July 1999 and was in arrears to the tune of R38 500. He pleaded not guilty but, on 18 February 2000, he was convicted as charged. On 26 June 2000, he was sentenced to 1 440 hours of periodical imprisonment in terms of s 285(1) of the Criminal Procedure Act 51 of 1977. In imposing this sentence, the magistrate made two recommendations to the Department of Correctional Services, firstly that the periodical imprisonment should be served over weekends (from 18h00 on Fridays to 18h00 on Sundays), and secondly –

'... dat in oorleg met die Departement Korrektiewe Dienste die aantal ure periodieke gevangenisstraf deur die Departement Korrektiewe Dienste verminder kan word met 15 uur vir elke R500 deur die gevangene afbetaal op die agterstallige

[8] The Act was subsequently repealed in its entirety by the Maintenance Act 99 of 1998, which came into operation on 26 November 1999.

onderhoudsbedrag van R38 500. Alle betalings gemaak te word in die bankrekening van mev Merle Visser.'

(Mrs Merle Visser, the appellant's former wife, was the complainant.)

[2] On appeal to the Cape Provincial Division against both conviction and sentence, Thring J (with whom Fourie AJ concurred) struck the appeal against conviction off the roll for reasons which are at this stage not necessary to record. The appeal against sentence was dismissed and the sentences confirmed,[2] Thring J remarking as follows:

'Die vonnis wat die landdros opgelê het, is wel ietwat buitengewoon, maar hierdie is myns insiens 'n buitengewone geval. In die eerste plek is die bedrag van die agterstallige onderhoud betreklik groot. Tweedens, die appellant het moedswillig versuim om te voldoen aan die onderhoudsbevel ... Ek dink nie dat die vonnis wat die landdros opgelê het in die omstandighede van hierdie geval onvanpas is of dat dit buitensporig is nie; inteendeel ek kry die indruk dat die enigste wyse waarop die appellant gedwing sal kan word om onderhoud aan die klaagster te betaal, soos hy

[2] The judgment of the Cape Provincial Division is reported as *S v Visser* 2002 (1) SACR 50 (C).

belowe het en beveel is om te doen, is deur hom in die skaduwee van die gevangenis se deure te plaas. Dit blyk al taal te wees wat hy verstaan. Die vonnis wat die landdros opgelê het het daardie gewenste uitwerking en wel op ‘n baie meer direkte en onmiddellike manier as ‘n tydperk van opgeskorte gevangenisstraf. Dit het ook die voordeel dat die rompslomp van die inwerkingstelling van ‘n opgeskorte vonnis daardeur vermy word. Daarbenewens, en omdat die vonnis in alle waarskynlikheid slegs oor naweke uitgedien sal word, behoort dit geen noemenswaardige nadelige uitwerking op die appellant se verdienvermoë te hê nie.’[3]

[3] With the leave of the court *a quo*, the appellant again appeals against the sentence. The lengthy delay between the granting of leave to appeal to this Court (on 28 September 2001), and the hearing of the appeal, was due to the appellant’s failure to take the necessary steps to prosecute the appeal for nearly two years. This failure was allegedly because of a misunderstanding between the appellant’s legal

[3] Above 55f-56a.

representatives. At the outset of the hearing before us, the appellant's application for condonation in this regard was granted.

[4] Prior to the hearing before this Court, counsel for both the appellant and the State were requested to deal with, *inter alia*, the powers of officials of the Department of Correctional Services to reduce the period of periodical imprisonment in accordance with the recommendation made by the trial court, whence such powers (if any) are derived and whether guidelines exist as to the exercise thereof. Supplementary heads of argument were filed by both counsel in this regard.

[5] Counsel agreed that the second recommendation made by the magistrate, as set out above, could not legally be implemented by the relevant officials of the Department of Correctional Services. To my mind, this view is correct. In terms of s 285 (1) of Act 51 of 1977, a court may sentence a person convicted of any offence, other than an

offence for which a minimum punishment is prescribed, to undergo periodical imprisonment 'in accordance with the laws relating to prisons'. These 'laws relating to prisons' are at present to be found in the Correctional Services Act 8 of 1959 (the Act) and in the regulations made in terms of such Act, published under Government Notice R2080 in Government *Gazette* No. 1326 of 31 December 1965 (the Regulations).

[6] Section 65(4)(*b*) of the Act, as amended, provides that:

'A person who has under any law been sentenced to –

(i) periodical imprisonment, shall be detained periodically in a prison in the manner prescribed by regulation'.

[7] The only regulation dealing with periodical imprisonment is regulation 140, the relevant parts of which for present purposes read as follows:

'(1) A person sentenced to periodical imprisonment…shall serve such sentence in uninterrupted periods of not less than twenty-four hours at a time as

determined, with due regard to the circumstances of such person's employment, by the head of the prison at which the person surrenders himself to undergo such imprisonment: Provided that any period thus determined may be less than twenty-four hours, if –

(a) on the strength of the written application of such person's employer, the head of the prison decides that, in the special circumstances of such person's employment a shorter period is justified, or

(b) any unexpired portion of the sentence of periodical imprisonment is less than 24 hours.'

[8] As regards the 'duties of correctional officials in relation to the reception of prisoners and the carrying out of sentences in prisons' (set out in Chapter III of the Act), s 31 provides that:

'Subject to the provisions of this Act, every correctional official who is in charge of any prison and every other correctional official who is in charge of prisoners shall cause every prisoner who has been sentenced by any court, to undergo that sentence in the manner directed in the warrant by the court …and for so doing the warrant…or a certified copy thereof, shall be sufficient authority to every correctional official.'

[9] In terms of s 33(2) of the Act, a period of imprisonment which is imposed by a court 'in default of payment of a fine' must be reduced in proportion to the portion of the fine which is paid or lawfully levied. The relevant paragraph of the subsection reads as follows:

'(*a)* If any part of a fine is paid or levied before the expiry of any imprisonment such as referred to in subsection (1), the period of imprisonment shall be reduced by a number of days bearing as nearly as possible the same proportion of the period of imprisonment as the sum so paid and levied bears to the amount of the fine.'

[10] The sentence imposed on the appellant in the present case cannot, however, be regarded as imprisonment 'imposed in default of payment of a fine.' Nowhere in the Act or in the Regulations is there to be found any provision empowering either the Commissioner of Correctional Services or any other official of the Department of Correctional Services to reduce the number of hours of periodical imprisonment imposed on a

maintenance defaulter in proportion to amounts of arrear maintenance paid by or on behalf of such defaulter. It thus follows that the second recommendation made by the magistrate, innovative and imaginative as it may be, cannot legally be carried out by the relevant department. It is however, clear from the magistrate's judgment on sentence that this recommendation was intended to be an integral part of the sentence imposed by him. In my view, therefore, as the recommendation cannot legally be implemented, the sentence envisaged by the magistrate cannot properly be given effect to and this court is at large to consider the sentence afresh.

[**11**] The thrust of the appellant's argument on appeal was that, although the imposition of 1440 hours of periodical imprisonment was not *per se* an inappropriate sentence in the circumstances of this case, the magistrate erred by not suspending the *whole* period of such imprisonment on condition that the appellant pay off the arrears in fixed monthly

'instalments.' Counsel for the appellant argued that suspension of only a portion of the period - even of the greater portion thereof - would not give the appellant an 'incentive' to pay off the arrears and that having to serve even a portion of the period imposed would be unduly harsh on the appellant.

[12] I disagree. While it is true that not suspending *any* portion of the period of imprisonment imposed would result in an unduly harsh punishment for the appellant – particularly in view of the fact that he is a first offender – a suspension of the *whole* period would, on the other hand, on the facts of this case, fail to give proper effect to several of the purposes of sentencing.

[13] The appellant is a qualified architect who was practising as such when he and the complainant were divorced on 17 November 1998. In terms of the deed of settlement entered into by the parties and made an order of court on that date, the appellant (the plaintiff in the divorce

action) undertook to pay maintenance for the two minor children in the amount of R2500 per month per child, which amount was to be increased annually in accordance with the increase in the Consumer Price Index. In addition, the appellant undertook to pay maintenance for the complainant in the sum of R500 per month until her death or remarriage. From the date of the divorce until the date of commencement of the trial in the magistrate's court, the appellant made only two payments of maintenance, amounting in total to R10 500, i.e. less than two months' worth of the amounts stipulated in the deed of settlement. It was common cause before us that the total arrear amount owing by the appellant at the commencement of the trial (on 16 September 1999) was R 44 500.

[14] In the meantime, in February 1999, the appellant resigned from the firm of architects by whom he was employed. On his own evidence he received a payment of R400 000 from this firm on the day before his divorce. He allegedly used about R100 000 of this money to pay legal

costs and also incurred certain other expenses, but was unable (or unwilling) to explain to the magistrate what he had done with the balance of the amount of R400 000. In March 1999 he went on an overseas trip with his current wife, whom he married on 8 May 1999 at Lanzerac Hotel in Stellenbosch. Although he was ordered by the magistrate during the course of the trial to produce certain documentation relating to his financial affairs, he only complied with this order in part and, in particular, he failed to produce a statement detailing how he had spent the R400 000 ─ despite offering to do so. As was pointed out by the magistrate and by Thring J in the court *a quo*, the appellant's failure to pay maintenance for the complainant and the minor children appeared to be both deliberate and recalcitrant. He went so far as to state during the trial that the minor children 'is nie my kinders nie…dit is aangenome kinders wat my vrou op aangedring het om aan te neem' – this notwithstanding the fact that he and the complainant had jointly adopted

the two boys. I agree fully with the following comment made by the court *a quo*:

'Dit is duidelik uit die rekord van sy getuienis dat hy op slinkse wyse allerhande skelmsreke uitgevoer het om die waarheid voor die landdros te probeer verduister en van hom weg to hou'.[4]

To my mind, the magistrate was entirely justified in describing the appellant as ''n skelm, wat doelbewus nie onderhoud betaal nie.'

[15] In the light of the above, a suspension of the entire period of periodical imprisonment would not serve as adequate punishment for this appellant. Nor would it serve the deterrent purpose of sentencing, either as regards the appellant or as regards other potential maintenance defaulters.

[16] In the recent judgment of the Constitutional Court in *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)*[5],

[4] Above 55g-h.
[5] 2003 (2) SA 363 (CC)

Mokgoro J, writing for a unanimous court, approached the issue of maintenance in the light of the paramount criterion of the best interests of the child, as entrenched in s 28(2) of the Constitution, holding that, while the primary duty to ensure proper care for children rests on their parents, there is nevertheless an obligation on the State to create the necessary environment for parents to fulfil this duty.[6]

The evidence given by the Commission for Gender Equality in its capacity as *amicus curiae* in that case clearly illustrates the difficulties with the operation of the maintenance system in this country, showing vividly that this system – which imposes disproportionately heavy burdens on mothers – undermines the achievement of the foundational value of gender equality in South Africa.[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

[6] Above para [24] at 375B-376A.
[7] Above paras [28]-[30] at 377D-378B.

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.

[17] Counsel for the appellant indicated that the appellant's financial position is such that he is able to pay R2000 per month by way of arrears, over and above the reduced amount of R2000 per month which he is now obliged (in terms of an order of the maintenance court made subsequent to the trial) to pay as maintenance for the two minor children. Both counsel were in agreement that any sentence which this Court may impose should be based on outstanding arrear maintenance in the amount of R44 500.

[18] The magistrate's innovative approach towards appropriate sentence for a maintenance defaulter like the appellant is a commendable

one and has been recognised as such.[8] However, because of the problems with the second recommendation made by the magistrate discussed above, the sentence must be reformulated.

[19] The appeal therefore succeeds. The sentence is set aside and replaced with the following:

One thousand four hundred and forty (1440) hours of periodical imprisonment in terms of section 285(1) of the Criminal Procedure Act 51 of 1977, one thousand one hundred and sixty (1160) hours of which are suspended for five (5) years on condition that:

(1) the accused not be convicted of failure to comply with any maintenance order against him during the period of suspension: and

(2) the accused pay the arrear maintenance in the total amount of forty-four thousand five hundred rand (R44 500) by way of monthly payments of two thousand rand (R2000), the first such payment to be made by 7

[8] See *S v Cummings* (Case No. 031209, unreported review judgment of the Cape Provincial dated 30 May 2003) and *S v Moshidi* (Case No. 033774, unreported review judgment of the Cape Provincial Division dated 11 September 2003).

December 2003 and thereafter by the seventh day of every consecutive month. All payments are to be made into the bank account specified by the complainant.

It is recommended that the Department of Correctional Services permit the accused to serve his periodical imprisonment over weekends.

VAN HEERDEN AJA

CONCUR:

FARLAM JA
NAVSA JA