REPORTABLE
(In relation to paras [1], [15] and [16])
Case No: 29/98

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

T MOOSAJEE **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: SMALBERGER, VIVIER and STREICHER JJA

HEARD: 16 MARCH 1999

DELIVERED: 23 MARCH 1999

JUDGMENT

SMALBERGER JA . . .

SMALBERGER JA:

[1] The appellant, who pleaded guilty, was convicted of two counts of theft in the Magistrate's Court, Johannesburg. She was sentenced to eight and twelve months' imprisonment respectively on the two counts. On appeal against her sentence to the Witwatersrand Local Division she sought condonation for the late filing of both her amended grounds of appeal and her heads of argument. Her application for condonation was refused for want of reasonable prospects of success on appeal. This allowed the appellant to appeal directly to this Court against such refusal in terms of sec 21(1) read with sec 22 of the Supreme Court Act 59 of 1959, no leave to appeal being required (*S v Gopal* 1993(2) SACR 584(A)). The anomaly occasioned by this situation is a matter to which

I shall revert.

[2] The first count of theft involved an amount of R1699,22 cash stolen on 20 October 1995; the second involved the theft of R3320,12 cash on 8 November 1995. Both amounts were stolen from the appellant's employer, Tiger Wheel and Tyre, where she was employed as a credit controller. She had been so employed for about a year preceding the thefts.

[3] The appellant was legally represented at her trial. She elected not to give evidence. The defence called as witnesses Ms Adams, a social worker employed by the Department of Correctional Services, and Ms Fouche, a probation officer from the Department of Social Welfare. Both had previously prepared reports relating to sentence.

[4] The following emerges from the record with regard to the

appellant's personal circumstances at the time of the trial. The appellant was 40 years of age, divorced, with one child aged 20 years who is self-supporting (the one report refers to the child as a son, the other as a daughter!). The appellant shared a home with five of her siblings who were largely dependant upon her for support. The appellant matriculated in 1974 and had for the most part been in permanent employment since then. She lost her employment because of the thefts. At the time she was earning R3700,00 per month. She subsequently managed to obtain similar employment at a slightly higher monthly salary. Her new employer, for whom she was working at the time of the trial, was unaware of the offences that she had committed. The appellant repaid the money she stole within two months of committing the offences.

[5] The appellant has two previous convictions. The first, for fraud

involving a cheque for R41,00, was in January 1982. She was sentenced to a fine of R120,00 or 120 days imprisonment. The second, in December 1991, was for fraud involving forged banknotes to the value of R5600,00. On that occasion she was sentenced to a fine of R5000,00 or 150 days imprisonment.

[6] The only information on record as to why the appellant committed the offences is to be found in the report of Ms Fouche. It appears from her report that one of the appellant's sisters is an epileptic and diabetic. The appellant allegedly required money to bring her sister from East London to Gauteng and for that reason "borrowed" money from her employer intending to pay it back later. According to the report, because of her other family commitments "was daar geen ekstra geld beskikbaar nie en gevolglik het sy nie geld gehad toe haar suster se mediese probleme

in November 1995 opgeduik het nie." The sister in question is now being properly cared for as a hospital outpatient and is receiving free medical treatment. The appellant apparently expressed remorse for what she did.

[7] Both Ms Adams and Ms Fouche considered the appellant to be a suitable candidate for correctional supervision, and both recommended that form of punishment. In sentencing the appellant, the trial magistrate took note of their recommendations. He was of the view that correctional supervision might have been an appropriate sentence had the appellant been a first offender. He concluded, however, mainly because of the appellant's previous convictions, the seriousness of the offences, the prevalence of such offences within his district and the fact that the appellant had abused a position of trust, that, notwithstanding her personal circumstances and other mitigating factors, imprisonment was the only

appropriate sentence in the circumstances. That led him to impose the sentence which he did.

[8] It is trite law that sentencing is pre-eminently a matter for the discretion of the trial court. Interference with a sentence on appeal is not justified in the absence of a material misdirection or irregularity, or the sentence imposed is so startlingly inappropriate as to create a sense of shock.

[9] It was argued on behalf of the appellant that the magistrate had misdirected himself in two respects. In the course of his judgment the magistrate voiced certain doubts as to the reason given by the appellant for stealing the money and whether she had financial difficulties, in the latter instance having regard to the fact that she repaid the amount she had taken within two months. It was contended, with reference to *S v Caleni*

1990(1) SACR 178 (C) at 181a - i, that the magistrate was bound by the undisputed facts and was accordingly not entitled to entertain the doubts he did.

[10] As pointed out by the court *a quo*, the magistrate did not reject any statement of the appellant as false. He merely expressed some doubt as to the veracity of her statements to Ms Fouche. His doubt was not without justification. The appellant elected not to give evidence. Her failure to do so has left a number of unanswered questions. Why if, as she said, "haar suster se mediese probleme in November 1995 opgeduik het" was there a need to steal money in October 1995? Why did she have to steal twice, and why the amount she did? Why did she not try and borrow money from her employer, and how did she manage to pay back the money so soon?

[11] In my view the magistrate's doubts were legitimate ones occasioned by the appellant's failure to take the court into her confidence. In the circumstances I do not consider the magistrate's expression of doubt to have constituted a misdirection. But even if it did, I agree with the court *a quo* that it was clearly not material in the sense that it caused the magistrate not to exercise his discretion at all, or to exercise it improperly or unreasonably (*S v Pillay* 1977(4) SA 531 (A) at 535F).

[12] The other suggested misdirection was that the magistrate failed when sentencing the appellant to have regard to the fact that the previous sentences imposed upon her were probably ineffective in bringing home to her the seriousness of her past conduct. Reliance in this regard was placed on *S v Dreyer* 1990(2) SACR 445 (A) at 448b - c. The facts of that case are clearly distinguishable from the present. The appellant is not

an uneducated or unsophisticated person. The sentence for her second conviction, although it did not involve imprisonment or a suspended sentence, was not insubstantial. Her past brushes with the law must have alerted her to the real possibility of imprisonment for similar conduct in future. There is in my view no basis for holding that the magistrate misdirected himself in this respect.

[13] All that remains is whether the sentences imposed, viewed singly or cumulatively, induce a sense of shock. I have sympathy for the fact that imprisonment will mean that the appellant will lose her current employment and that those who are dependent upon her will suffer as a result. The magistrate had a duty to consider not only the position of the appellant, but the nature of the crimes committed and the wider interests of the community. I agree that the facts of the case coupled with the

appellant's previous convictions render correctional supervision inappropriate. Imprisonment was called for, and having regard mainly to the considerations mentioned in paragraph [7] above it cannot, in my view, be said that the sentences induce a sense of shock.

[14] In the result the court *a quo* was correct in concluding that the appellant did not have reasonable prospects of success on appeal, and the appeal must fail. I would go further and say that if the appeal before us was not only against the refusal to grant condonation, but in respect of the sentence itself, I would have dismissed the appeal. The applications for condonation before this Court for the late filing of (1) the notice of appeal and (2) the record must likewise fail for lack of prospects of success. I propose to make no further order in regard to them.

[15] I return to the anomaly I alluded to in paragraph [1]. In *S v Gopal*

(*supra*) at 585b - e Harms AJA said the following:

> "Hierdie appèl illustreer die ongewenstheid van die (vermoedelik onvoorsiene) teenstrydigheid tussen die bepalings van die Strafproseswet 51 van 1977 ten aansien van appèlle en art 21(1) saamgelees met art 22 van die Wet op die Hooggeregshof 59 van 1959. Meer spesifiek, indien 'n persoon in die landdroshof aan 'n misdryf skuldig bevind en gevonnis word en sy appèl na die Provinsiale (of, indien van toepassing, die Plaaslike) Afdeling van die Hooggeregshof misluk, mag hy alleen met die nodige verlof na hierdie Hof appelleer. As hy egter sou nalaat om sy eerste appèl na behore voort te sit en dit nodig is om kondonasie te verkry (soos bv vir die laat aantekening van appèl) en dié aansoek misluk, het hy 'n outomatiese reg van appèl teen die afwys van sy aansoek na hierdie Hof. Dit geld selfs indien sy aansoek vanweë 'n gebrek aan vooruitsigte op appèl afgewys is. *S v Tsedi* 1984 (1) SA 565 (A); *S v Absalom* 1989 (3) SA 154 (A). En sou hierdie Hof argumentsonthalwe bevind dat die Hof *a quo* verkeerd was in sy beoordeling van die kanse op sukses, en die appèl slaag, moet die strafappèl dan waarskynlik deur daardie Hof bereg word met die wete dat hierdie Hof reeds 'n oordeel, wat nie bindend is nie, oor die meriete uitgespreek het."

(See too *S v N* 1991(2) SACR 10 (A) at 16a - d)

[16] This unfortunate state of affairs, which has the potential to unnecessarily burden this Court by adding to its already heavy workload, has been allowed to persist. It is to be hoped that the Legislature will urgently give its attention to resolving the conflict that exists between the statutory provisions referred to in *Gopal*'s case. In the meantime courts below hearing appeals should bear in mind the consequence of a refusal of condonation, as opposed to the dismissal of an appeal, and deal with matters before them in a manner that will preclude appeals to this Court that are without merit.

[17] The appeal is dismissed.

J W SMALBERGER
JUDGE OF APPEAL

VIVIER JA)Concur
STREICHER JA)