

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

REPORTABLE
Case No: CA&R 90/2022

In the matter between:

ANNE JOHANNA MARIA SWANEPOEL

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT ON APPEAL

Rugunanan J

[1] On 10 September 2021 the appellant, a former practising attorney aged 47, was convicted in the Regional Court, Port Elizabeth (now Gqeberha) on eleven counts - five of them related to fraud, another five concerned contempt of court and last, a single count of theft.

Overview

[2] The charges against the appellant emanated from several counts of fraud alternatively contraventions of the Attorneys Act 53 of 1979 in the period October 2015 to March 2018 when the appellant receipted funds from various persons without disclosing that she had been struck off the attorneys' roll. In the same period the appellant rendered herself guilty of theft of money in the amount of R56 000 and contempt of court when she purported to represent various clients by unlawfully and intentionally providing professional services as a practising attorney notwithstanding that she had previously been struck off the roll and interdicted from legal practise.

[3] With all counts taken together for the purpose of sentence, the appellant was sentenced to 15 years' imprisonment, 5 years of which were suspended for 5 years on condition that she is not convicted of any offence involving theft, fraud, or contempt of court.

[4] The effective term of imprisonment to be served by the appellant is therefore 10 years.

[5] Leave to appeal against conviction on all counts and sentences imposed was refused by the trial court but on petition to this Court, leave was granted only against sentence on 5 August 2022.

[6] The background to the matter is that the appellant was a practising attorney of approximately 15 years standing before she was struck off the roll on 27 August 2015.¹ The striking off occurred consequent to her conviction in 2012 for theft of trust funds and three counts for having contravened the Attorneys Act. On the theft count she was convicted on 7 July 2011 and on 2 February 2012 sentenced to 3 years' imprisonment wholly suspended for 5 years on condition that she is not again convicted of the same offence committed during the period of suspension. The record indicates that there was an additional 3 year component of correctional supervision included in the sentence necessitating that the appellant renders 16 hours community service for the first 12 months of the sentence.

[7] The theft of R56 000 for which the appellant was convicted in the Regional Court was committed during the aforementioned period of suspension.

[8] Within that period, the appellant did not cease practising and continued to render professional legal services to members of the public, ostensibly as a legal advisor in return for a fee. She solicited new clients by distributing business cards in her name bearing the designation 'legal advisor' and by displaying similar signage outside business premises from which she operated. She also maintained receipt books in her name albeit that the word 'attorney' was effaced with correction fluid.

¹ *Law Society of the Cape of Good Hope v Swanepoel* [2015] ZAECHC 82.

Regarding court appearances, she outsourced these to another legal firm while retaining her own client base. For purposes of sentence, the appellant's modus operandi is indicative of a level of premeditation and deceit.

[9] The appellant continued to operate in the manner in which she did until or about 2017. In August 2018 she appeared in court on charges relating to the eleven counts mentioned earlier. Bail was fixed subject to various conditions, the most significant of which included a condition that expressly prohibited her from rendering any legal services for a fee, gain or reward.

[10] On 9 December 2021, the regional magistrate before whom the appellant was sentenced cancelled the appellant's bail for breach of the abovementioned condition. The appellant has since been in custody and is presently serving her sentence aforementioned.

The procedural context for determination of the appeal

[11] The record on appeal comprises of 18 volumes with a total number of pages exceeding 4000. An appeal does not necessarily require consideration of the record of the entire proceedings in the trial court, but merely such part thereof as may be required to enable the court of appeal to properly consider the particular issue/son appeal in the context of the trial proceedings.² Given that the appeal is limited to sentence, this Court issued directives requiring counsel to submit written argument³ indicating the portions of the record which are necessary for the determination of the matter with reference to the specific pages and paragraphs of relevance where applicable.

[12] We are grateful to counsel for their considered efforts and assistance in this regard.

[13] Immediately upon being sentenced, the record indicates that the appellant instructed her legal representative to move an application for leave to appeal. The

² *S v Zondi* 2003 (2) SACR 227 (W) para 9.

³ As distinct from rule 8(d)(i) of the Joint Rules of Practice for the Eastern Cape Division applicable to heads of argument, the directive was that written argument shall incorporate an elaboration of the necessary parts of the substantive issues raised in argument.

magistrate enquired from the State whether the operation of the suspended sentence ought to have been considered. The State indicated that the inquiry for putting into operation the suspended sentence may only be proceeded with once the appellant has exhausted her appeal rights.

[14] Whether it was an irregularity or misdirection not to have put into operation the suspended sentence of 3 years and whether its pending operation precluded the hearing of the appeal were issues preliminarily raised with both counsel prior to the commencement of argument in the appeal.

[15] The procedure for putting into operation of a suspended sentence ordinarily commences with an application by the State. This appears to be the case even where the trial court itself *mero motu* raises the question of implementing the operation of a suspended sentence provided that a pre-selected date is chosen to allow the prosecution to make the necessary application.⁴ In either instance, the State must move the court to put the sentence into operation. The rationale therefor appears to be that the accused has to be appraised of his right to lead evidence and be given the opportunity to advance argument with a view to resisting the implementation of the suspended sentence or to advance any other good and sufficient reason for a further suspension thereof.⁵ Where such an application has not been forthcoming - and by implication the accused not having been afforded opportunity - it would be prejudicial to the appellant if a court of appeal were to raise the issue⁶ and decline to deal with the appeal. We were in any event informed by the State that the proceedings for putting into operation the suspended sentence are expected to be initiated upon finalisation of the appeal. The upshot is that there was no misdirection by the sentencing court, and no reason existed for precluding this Court from hearing the appeal. We are unreservedly in agreement with this approach and are indebted to counsel for their assistance.

The appropriate test and the appellant's approach on appeal relevant to her status as primary caregiver and the interests of her minor child

⁴ *S v Hoffman* 1992 (2) SACR 56 (CPD) at 64f.

⁵ *S v Hoffman* supra at 63b. The prerogative to advance good and sufficient reason stems from a reading of section 297(7) of the Criminal Procedure Act 51 of 1977.

⁶ Compare *S v Hoffman* supra at 62h-j and 63d; *S v Kumede* 1988 (4) SA 553 (O).

[16] Appellate jurisdiction to interfere with a sentence imposed by a trial court is not discretionary. On the contrary, it is limited by principle. Marais JA in *S v Malgas*⁷ observed that:

'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate". It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.'

[17] These formulations, however crafted, are aimed at determining the same thing; namely, whether there was a proper and reasonable exercise of discretion bestowed upon the court that imposed the sentence. That, in the ultimate analysis, is the true enquiry. Either the discretion was properly exercised or it was not. If it was, a court of appeal has no power to interfere - if it was not, it may do so.⁸

⁷ *S v Malgas* 2001 (1) SACR 469 (SCA) para 12; *S v De Jager and Another* 1965 (2) SA 616 (A) at 628H-629A; *S v Packereysammy* 2004 (2) SACR 169 (SCA) para 7.

⁸ *S v Kgosimore* 1999 (2) SACR 238 (SCA) at 241e-g.

[18] In her written and oral submissions, the misdirection contended for by the appellant is that the sentencing court failed to establish that she is a primary caregiver to her minor child 'RO', an autistic boy aged 9, with the result that the sentence imposed paid insufficient regard to his best interests as contemplated in section 28 of the Constitution.

[19] Tritely, where a person convicted of an offence is the primary caregiver of minor children their best interests are of paramount importance in every matter concerning them. The measure of the best interests principle has never been given definitive content but it is necessary that the standard be flexible as the circumstances of each case may determine.⁹ In that regard it has been held that when considering the best interests of children a court must consider evidence as to their current position to determine what their best interests require¹⁰ including evidence on the quality of their care.¹¹ The paramountcy principle does not lay down that in all cases the direct or indirect impact of a measure or action on children must oust, override or unrealistically trump all other considerations.¹² It simply requires that the interests of children who stand to be affected be given due consideration.¹³

[20] What constitutes a primary caregiver is the following:

'Simply put, a primary caregiver is the person with whom the child lives and who performs everyday tasks like ensuring that the child is fed and looked after and that the child attends school regularly. This is consonant with the expressly protected right of a child to parental care under section 28(1)(b) [of the Constitution].'¹⁴

[21] The operational thrust is that the caregiver must be, 'almost totally responsible' for the care of the child. ¹⁵

⁹ *S v M* (Centre for Child Law as Amicus Curiae) [2007] ZACC 18; 2008 (3) SA 232 (CC) at 248F.

¹⁰ *NDV v S* [2015] JOL 33914 (SCA) paras 11 & 27.

¹¹ *MS v S* (Centre for Child Law as Amicus Curiae) 2011 (2) SACR 88 (CC) at 96e.

¹² *S v M supra* at 249C-E.

¹³ *S v M supra* at 255A.

¹⁴ *S v M supra* at 250D.

¹⁵ *MS v S supra* at 107e.

[22] The guidelines to be adopted by a court when sentencing a primary caregiver are set out in *S v M* as follows:¹⁶

'(a) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.

(b) ... The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered.

(c) If on the *Zinn*-triad approach the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.

(d) If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.

(e) Finally, if there is a range of appropriate sentences on the *Zinn* approach, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose.'

[23] Relying on *S v M*¹⁷, the appellant argues that she ought to have been spared a prison sentence, and that interference on appeal would favour a sentence of correctional supervision in terms of section 276(1)(h) alternatively section 276(1)(i) of the Criminal Procedure Act 51 of 1977 in recognition of RO's best interests where she is his primary caregiver.

[24] The essential difference between the two sub-sections is that the former ((h)) permits a court to impose a sentence of house arrest and community service once a report of a correctional official or probation officer has been placed before the court and for a fixed period of three years (section 276A(1)). The latter ((i)) entails direct imprisonment, a portion of which the offender may serve under correctional

¹⁶ *S v M supra* para 36; also *MS v S supra* para 34.

¹⁷ Full citation above n 9.

supervision in the discretion of a parole board or the Commissioner of Correctional Services, and may be for a period not exceeding five years (section 276A(2)).¹⁸

[25] The State opposes the appeal.

[26] It contends that the appellant is not the sole caregiver of RO, and that the regional magistrate's carefully considered sentence - on the facts - achieved a judicious counterbalance between what is known as the *Zinn*¹⁹ triad and the interests of the minor child, considered independently.²⁰

The evidence, arguments and approach by the sentencing court

[27] Much of the evidence before the court in relation to sentencing concerned the personal circumstances of the appellant and her child RO, the appellant's background and history, and generally her family circumstances prior to sentencing. In that regard the sentencing court had before it the evidence and pre-sentence report of Ms Jolene Petersen, a probation officer, Ms Sandra Dunston the manager of 'Sinako' - a centre for persons requiring special needs, and the appellant's mother Mrs Francina Swanepoel.

[28] The appellant did not testify, preferring instead that *ex parte* statements in mitigation be made from the bar by her legal representative. Without intending criticism - that was her choice, but it is not without consequence. Statements from the bar are no substitute for evidence given under oath or affirmation.²¹ Evidence adduced in that manner carries more weight.²² The general approach is that, though no more than argument, to exclude them entirely from consideration would not attract a fair result.²³

[29] Ms Petersen was requested by the presiding magistrate to prepare a report in order to determine the appellant's family background, her general socio-economic

¹⁸ *NDV v S supra* para 9.

¹⁹ *S v Zinn* 1969 (2) SA 537 (A) at 540G-H.

²⁰ *NDV v S supra* paras 28-32; *MS v S supra* at 107c.

²¹ S S Terblanche Guide to Sentencing in South Africa 2 ed (2007) at 98, para 4.3.4 & 203-204 para 7.3.17.

²² *S v Khumalo* 2013 (1) SACR 96 (KZP) para 15.

²³ They cannot simply be ignored-*S v Pieter* 2013 (2) SACR 254 (GNP) para 18.

circumstances, the needs of the minor child, and possible sentencing options. Evidence as to the circumstances and needs of the child was similarly elicited from Ms Dunston and Mrs Swanepoel.

[30] In the enquiry into whether the appellant is the primary caregiver, the evidence indicates that it is not the case. Ms Petersen is clearly of the view that there is no primary caregiver for the child- the appellant is a partial caregiver.

[31] There exists a family support structure pivotal to which are the appellant's parents Mr and Mrs Swanepoel who are both elderly persons over 70 years of age. Since the birth of the child, the appellant and the child have been residing with them. Despite episodes of turbulence between Mr Swanepoel and the appellant due to her conduct and attitude, all indications from the testimony of Ms Petersen are that both grandparents, even though advanced in age and at times subjected to stress, are physically active and capable of looking after themselves and the child. Mrs Swanepoel, reportedly rises early each day. She prepares the child's lunch and gets him ready for school. Mr Swanepoel is able to drive a motor vehicle. He transports the child to school and to hospitals for consulting with specialists and clinicians. In heads of argument, it is mentioned that the appellant takes the child to a neurologist - it is not clear if the appellant drives the child by herself. Presumably, Mr Swanepoel drives and she accompanies the child during sessions.

[32] The appellant informed Ms Petersen that she feeds the child, bathes him and assists him when he uses the toilet. As for the latter, Ms Petersen commented that the child is able to perform his routine on his own considering that he does so at school. Ms Petersen testified that the appellant frequently absents herself from home over weekends and at times during the week to visit her boyfriend (Ms Dunston, who portrayed the appellant somewhat propitiously was unaware of this as also the appellant's previous history). On the occasions of the appellant's absence, the child is left in the care of Mr and Mrs Swanepoel. The appellant's absences from home were confirmed by Mrs Swanepoel from whom evidence was led by the State.

[33] Testifying as to their level of commitment and love for the child, Mrs Swanepoel stated that both she and her husband are fully capable of looking after their grandchild and have been doing so for the past nine years.

[34] Ms Dunstan testified on behalf of the appellant. Her testimony dealt with the child's schooling, the cost of which is borne from a state funded disability grant which is paid directly into the school's banking account.

[35] She observed on most occasions that the child would be brought to school by his grandparents accompanied by the appellant. He would sometimes throw a tantrum when the appellant is not present to usher him into the school premises. She believes that the child's grandparents are not strict enough to discipline him. She described the appellant as a 'disciplinarian' who has better control over RO and whose role in the child's life is indispensable.

[36] She conceded however that she never met the grandparents and that the view she expressed about them was without having raised the issue of the child's discipline with them. Obvious from Ms Dunstan's testimony was that she had no contact with the child's grandparents but that she interacted with the appellant and was a lot more familiar with her. It is therefore not surprising that Ms Dunstan, in general, portrayed the appellant in a positive light. She expressed the view that the child has a strong bond with the appellant and that it was reported to her that the appellant plays a major role in his life. Ms Dunstan did not disclose the source of this information, nor did she elaborate on what she meant by it except for stating that the child expresses excitement when the appellant fetches him from school. Whether the excitement is attributed to the presence of the appellant or perhaps the school day being over, is unclear.

[37] When confronted in cross-examination about the appellant's criminal history, it emerged that Ms Dunstan had no knowledge thereof. It was also put to her in cross-examination that the appellant entertains suicidal thoughts and is on prescribed antidepressant medication. Her response was that she had never before seen the appellant in circumstances that would have led her to notice that the appellant was 'high' or 'in a trance or under the influence of any substance'.

[38] Further aspects of Ms Dunston's evidence dealt with describing RO as a 'classic autistic' with signs of attention deficit hyperactivity disorder (ADHD) and Asperger syndrome. This information came to her from discussions with psychiatrists. In cross-examination she retracted reference to Asperger syndrome stating that she had as yet not received a medical report to that effect.

[39] Her testimony indicates that the school is also aware of RO's medication regime and the schedule for its administration. RO's teacher monitors his homework and behaviour. There are what Ms Dunston described as 'meltdowns' but these are not anything violent. She believes that he merely 'acts out' to seek attention.

[40] On the whole, there is no indication that the school is unable to manage RO - he is able to communicate to a certain degree, and follow instructions. In this regard Ms Dunston gave the example of the children lining up to visit the toilet.

[41] When asked about the relationship between the appellant and RO being severed, Ms Dunston stated that the child would regress. Whether this related to the child's mental, physical or developmental status is unclear, though she was candid enough to concede that she is not medically qualified to have expressed views on these aspects, save that she could only rely on her years' of experience in having worked with children requiring special needs.

[42] There are, in addition, several noteworthy aspects of the report by Ms Petersen which are worth recapitulating for purposes of the outcome of this appeal.

[43] Relevant to the appellant's financial circumstances, Ms Petersen's report indicates that the appellant is unemployed (though at the time of sentencing it was mentioned that the appellant earned a monthly income of R2 500 as a hawker and by running errands to fetch medication for elderly persons). In either instance, she is not the sole breadwinner. Her parents are pensioners. They have a house of their own and provide a living space for the appellant and food for her and the child. The report notes that the appellant receives R2 000 a month from a man 'R', also believed to be the child's father. This aspect of the evidence was not fully dealt with in the report nor

ventilated during trial. According to the report the appellant informed Ms Petersen that her fiancé (whom the appellant claims is the child's father and whom she married before being sentenced but whose relationship with the child's grandparents is obscure) assists where needed in taking the child on outings and in buying clothing for the child. The alleged outings with the child stands contrary to what emerged during the testimony of Ms Petersen and Mrs Swanepoel.

[44] Indications in the report are that the appellant medicates and receives psychological treatment for anxiety and depression. On occasion she becomes suicidal because of the impact of the criminal proceedings on her mental stability.

[45] Ms Petersen noted that the appellant felt comfortable that her biological parents should take care of the child in the event that she was sentenced to prison. This disclosure undeniably assumes relevance in determining the best interests issue.

[46] The appellant has a brother Francisco who is self-employed. He indicated to Ms Petersen that he would assist with the driving of the child and by providing care when needed. He stressed that the child should not be separated from the grandparents because it is the only environment that the child is familiar with. For this reason, he is not in a position to assume custody of the child.

[47] The report also documents a victim impact assessment. One of the victims indicated that she did not wish to open old wounds by discussing the appellant. Another victim indicated that the appellant's conduct (from which she suffered financial loss of R56 000) destroyed her dreams in acquiring a house of her own and that it is because of the appellant that she is still homeless. She is afflicted by anxiety and depression and informed Ms Petersen that she is unable to come to terms with what the appellant had done and hopes that justice will prevail.

[48] Where the appellant did not testify in mitigation the tart assertion put to Ms Petersen in cross-examination by her legal representative that the R56 000 will be repaid rings hollow. Ms Petersen comments that the victims put their trust in the appellant not being aware that she was not permitted to practice; that they came to

the appellant innocently for assistance and were misled with no conclusion or finality to their cases. To this end the appellant violated the trust of innocent people and should be held accountable for her actions. Ms Petersen was unable to interview any of the other complainant victims who dealt with the appellant and who were affected by her conduct.

[49] The appellant's disavowal of her conduct (insisting that she was assisting persons in need) was noted by Ms Petersen as a failure by the appellant to take responsibility for her criminal conduct and a failure to reconcile herself with the outcome. The appellant is recorded as having denied the role that she played in some instances. This, in the opinion of Ms Petersen, indicates that she did not want to be held accountable for her conduct and raises doubt about her capability for being rehabilitated.

[50] As for the minor child, there is no suggestion in Ms Petersen's report that his care and fundamental needs are inadequate or that Mr and Mrs Swanepoel, despite their age, are incapable in any material respect, or that the child will be neglected in the event of the appellant's incarceration. Ms Petersen acknowledges that it will not be easy for the child to adapt to change in the event that the appellant is separated from him. She considers this a normal stage in a child's development that helps them to understand relationships and come to terms with their environment in changed circumstances.

[51] As for possible sentencing options, Ms Petersen made an assessment *inter alia* of direct imprisonment on the one hand and correctional supervision on the other, but recommended that the sentence issue be left in the discretion of the sentencing court.

[52] In heads of argument, the appellant makes the submission that the sentencing court disregarded the recommendation by Ms Petersen where she conceded that the appellant is a suitable candidate for correctional supervision regard being had to her previous sentence in terms of which she complied with the stipulated conditions and processes. Ms Petersen's concession is not a standalone

viewpoint in the appellant's favour and must be weighed in the context of her explicitly leaving the sentence issue open for determination by the trial court.

[53] It is acknowledged that probation officers perform a valuable task of huge assistance to judicial officers²⁴ but it must be stressed that a court is not slavishly bound by a recommendation since sentence is a judicial function that cannot be abdicated to another authority and must be performed by the courts only.²⁵

[54] Moreover, it is not sufficient to contend that correctional supervision will assist in the appellant's rehabilitation where she ostensibly assumes responsibility for one count (albeit unspecified) positing that she was negligent in the commission of the offence. Each of the offences relating to fraud or contempt of court has an element attributed to a specific mental state indicating that the offences were calculated and deliberate. To posit negligence for acknowledging responsibility is disingenuous. It disguises the deception of people who trusted the appellant and either detracts from or significantly diminishes her capacity for rehabilitation.

[55] In *S v Flanagan*²⁶ a sentence of 7 years' imprisonment for fraud was reduced on appeal to 4 years' imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act in the case of an offender who had a previous conviction for theft. The appellant contends that she is not excluded from correctional supervision because of her previous conviction. Flanagan was an employee in the banking sector. The offence for which she was convicted had been committed largely as a result of threats made by her husband. This is not the case here since the appellant's *modus operandi* speaks for itself.

[56] The conclusion arrived at by the magistrate that the appellant's previous exposure to correctional supervision had no rehabilitative impact is not anything farfetched. Community resources were expended without moral success. The brusque statement to the appellant that 'you have learnt absolutely nothing from that sentence' cannot be faulted in the light of the appellant's *modus operandi* doubtlessly

²⁴ *S v Trichart* 2014 (2) SACR 245 (GJ) para 10.

²⁵ *S v K.D* [2021] ZAWCHC 10; 2021 (I) SACR 675 (WCC) para 11.

²⁶ *S v Flanagan* 1995 (1) SASV 13 (A).

in the full knowledge of the impact of her supercilious and callous attitude upon her child.

[57] The high-water mark of the evidential matrix is that the appellant is not the primary caregiver of the minor child. She is not 'almost totally responsible' for his care. The current position is that child is cared for in a secure environment by adults, though elderly, whom it has not been shown are incapable of looking after him, nor are there indications that the quality of their care is unsatisfactory, or in some way harmful or detrimental to his best interests, or that they are morally unfit. Although not articulated in these terms, the magistrate's judgment on sentence indicates that the interests of the minor child were given independent consideration and weighed against the traditional factors in the *Zinn* triad.

[58] The magistrate, in addition, had regard to the guidelines in *S v M*. As to the effect of a custodial sentence on the child, she took cognisance of evidence indicating the appellant's frequent absences from home. She acknowledged that the child would be affected by the appellant's absence but at the same time drew on the fact that children ought to be raised in an environment that teaches them that immoral choices do not escape accountability in life. Having considered the child's interests independently of the *Zinn* formulation, all indications in the evidence are that the child is adequately cared for by his grandparents. This factor clearly pre-occupied the mind of the court when consideration was given to the imposition of a custodial sentence. Being of the view that there were no other sentencing options, the magistrate was fully cognisant of the fact that the interests of the child should not unreasonably permit the avoidance of an appropriate punishment for the appellant.

[59] The fraud committed by the appellant by misleading unsuspecting members of the public that she was in a position of trust is not anything to be taken lightly. Sentencing courts have in several cases taken judicial notice of the disturbing increase in the incidence of the type of white-collar crime such as fraud and theft committed by persons in a position of trust. It can admit of no doubt that these are serious offences.²⁷ The appellant's previous brush with the law for convictions in

²⁷ *S v M supra* at 281A.

.February 2012 had not taught her a lesson and society must be assured that persons such as her will not profit from improper gains and be allowed to walk free.

Conclusion and order

[60] Regard being had to the testimony of the witnesses and the gamut of the evidence, the magistrate's judgment on sentence was delivered *ex tempore*. Ordinarily, the degree of emphasis of any relevant factor is a matter of judicial discretion²⁸ and it does not necessarily follow that because something has not been mentioned it has not been considered.²⁹ The detail in the judgment indicates throughout that the interests of the minor child were judiciously approached with care and objectivity and so too were the appellant's personal circumstances along with factors informing the interests of the community and the gravity of the offences. The measure of leniency extended to the appellant is underpinned by the suspended component of the sentence which in our view gives adequate recognition to each of these considerations. The effective sentence ensures that the appellant does not allow her child to be used as an excuse for escaping the consequences of her unlawful conduct. In the result, there was no misdirection by the sentencing court in its factual findings, nor any misdirection in determining the length of the sentence - the consequence in either instance does not necessitate interference on appeal.

[61] This case, without question, involved highly competitive interests.³⁰ In recognition of Mr and Mrs Swanepoel's advanced ages and to moderate any negative impact or hardship on the minor child as much as possible during the appellant's incarceration, this Court may permissibly resort to its inherent jurisdiction as upper guardian to fulfil that duty through an appropriate order.³¹ It is considered pragmatic, as was done by Cameron J in *MS v S*,³² to order the Department of Correctional Services to ensure visitation by a social worker and that he or she provides the department with reports on the child's well-being during his mother's absence.

²⁸ *S v Rabie* 1975 (4) SA 855 (A) at 864F-G; *S v Lister* 1993 (2) SACR 228 (A) at 232g-h.

²⁹ *Rex v Dhlumayo and Another* 1948 (2) SA 677 (A) at 678.

³⁰ In the words of Madala J in *S v M supra* at 282D.

³¹ *S v M supra* at 257B; *TC v SC* [2018] ZAWCHC 46; 2018 (4) SA 530 (WCC) paras 44-45.

³² *MS v S supra* para 68.

[62] For the above reasons the appeal must fail.

[63] The following order is made:

1. The appeal against sentence is dismissed.
2. The National Commissioner for Correctional Services is directed to ensure that a social worker in the employ of the Department of Correctional Services visits the child of the appellant at least once every two months during her incarceration and submits a report to the office of the National Commissioner as to whether the child is in need of care and protection as envisaged in section 150 of the Children's Act 38 of 2005 and, if so, to take the steps required by that provision.

MS RUGUNANAN
JUDGE OF THE HIGH COURT

I agree.

MJLOWE
JUDGE OF THE HIGH COURT

Appearances

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Date heard: 1 March 2023

Date delivered: 27 June 2023