



Reportable:	YES / <u>NO</u>
Circulate to Judges:	<u>YES</u> / NO
Circulate to Magistrates:	<u>YES</u> / NO
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

CASE NO: **CA&R 71/16**
DATE HEARD: **12/09/2016**
DATE DELIVERED: **16/09/2016**

In the matter between:

E. S.

Appellant

and

THE STATE

Respondent

Coram: Olivier J et Mamosebo J

JUDGMENT

Olivier J:

- [1.] After an enquiry as envisaged in section 6(2), read with section 10, of the **Maintenance Act**¹ (*“the Act”*) the appellant, Mrs E S., was ordered to pay maintenance in the amount of R1 050.00 per month to the complainant, Mr E K S., to whom she was married in community of property. The amount represented half of the nett monthly income derived from the renting out of six dwellings on the premises on which the common home was situated. At the time of the enquiry the complainant had already left the common home, after a marriage relationship of 19 years between him and the appellant.
- [2.] Steps were never taken to have the maintenance order set aside or amended and it accordingly remained binding on the appellant². Whether or not it should have been made is therefore not the subject of this appeal.
- [3.] What is relevant, however, for purposes of the present appeal is that the appellant had, in her evidence at the enquiry, adopted the attitude that she would not let the complainant have any part of the rental income, because he was not living at the common home³.
- [4.] Remaining true to her resolve the appellant failed to comply with the maintenance order and in fact never made a single maintenance payment to the complainant. That led to the appellant being charged

¹ 99 of 1998

² Compare **S v Pieterse** 1993 (1) SACR 470 (C)

³ *“I say Your Worship, that he will not get any money because he is not staying there”* (Record: p17/23 – 24)
“I will not say anything else Your Worship. I said that he will not get money, because he is not living there any more” (Record: p19/20 – 22)

with having failed to make payments in accordance with the maintenance order, in contravention of the provisions of section 31(1) of the Act.

[5.] Even before the charge was put to the appellant it was placed on record, on her behalf, that she was not willing to pay the maintenance.

[6.] When the charge was put to her the appellant pleaded not guilty, but admitted having failed to comply with the maintenance order. The complainant then testified that he wanted his *“own share of what (the complainant) (was) getting”*. Although it was in cross-examination put to the complainant that the appellant could not pay the amount of maintenance *“because she has to maintain the yard”*, the appellant never testified and never presented any other evidence. After the appellant’s legal representative had conceded, in address, that the prosecution had proved its case against the appellant, she was convicted as charged.

[7.] In addressing the Magistrate on sentence the appellant’s legal representative stated unequivocally that the appellant was not *“prepared to pay any amount”* towards the arrears, despite having been advised by her representative that she could face a sentence of direct imprisonment.

[8.] At that stage the parties were still married, but were separated. The appellant, whose level of education was only the old standard 8, was

40 years old, and had no previous convictions at all. No children had been born of their marriage. The appellant was unemployed, the rental received in respect of the six dwellings being her only source of income, but it was placed on record on her behalf that she was maintaining her sisters.

- [9.] The appellant's attorney made no submissions regarding what an appropriate sentence would be, choosing to *"leave the possible sentence to the Honourable Court"*.
- [10.] The Magistrate found that the appellant had in effect, rather than offering to pay any part of the arrears, *"opted to go to jail"*⁴.
- [11.] The Magistrate furthermore apparently adopted the attitude that the incarceration of the appellant would place the complainant *"in a position to benefit in retrieving **all** his money from the tenants"*⁵.
- [12.] The appellant was sentenced to 12 months imprisonment, but the Magistrate subsequently granted the appellant leave to appeal against the sentence.
- [13.] It is trite that a court of appeal will only interfere with a sentence where it is shockingly inappropriate or was the result of a material misdirection⁶.

⁴ Record : p 81/17

⁵ Record: p82/22 – 22 (emphasis added)

⁶ Compare **S v Kgosi** 1999 (2) SACR 238 (SCA) para [10]; **S v BF** 2012 (1) SACR 298 (SCA) para [7]

[14.] Mr Barnard, counsel for the respondent, has in the best traditions of the advocates' profession, conceded the existence of misdirections, in that:

14.1 the Magistrate had failed to consider other sentencing options; and

14.2 the Magistrate had failed to consider other ways to recover the arrear maintenance.

[15.] The Magistrate erred in finding that, because the appellant refused to tender payment of any part of the arrears, and in fact adopted the attitude that she would not comply with the maintenance order, she had effectively "*opted*" to be sentenced to direct imprisonment. The appellant's stubborn, and arguably even contemptuous, attitude did not detract from the fact that other sentencing options did indeed, at least theoretically, exist.

[16.] Sentences like, *inter alia*, periodical imprisonment, or even imprisonment in the form of a sentence of correctional supervision in terms of section 276(1)(i) of the **Criminal Procedure Act**⁷ come to mind⁸, both of which would have been less drastic than a sentence of 12 months imprisonment.

⁷ 51 of 1977

⁸ Compare **S v November and Three Similar Cases** 2006 (1) SACR 213 (C) para [11]

- [17.] The absence of “*a proper enquiry... into the (appellant’s) financial circumstances*” resulted in the Magistrate in any event not being able to consider the imposition of a sentence of imprisonment, suspended on condition that the arrears be paid in specified instalments and that the maintenance order be complied with, which would of course at least have afforded the headstrong and obdurate appellant one final opportunity to avoid prison⁹.
- [18.] As regards recovery of the arrear maintenance, the Magistrate seems to have overlooked the mechanism provided in section 40 of the Act, the consideration of which would, however, also have necessitated an enquiry into, *inter alia*, the “*existing and prospective means*” of the appellant.
- [19.] Deliberately placing the complainant in a position where he could in effect intercept the rental payments, and effectively appropriate the appellant’s share of the rental payments in reduction of the arrear maintenance, was also in my view wrong. It would have resulted in the appellant forfeiting the whole of her share of the monthly rental income. It was, as already mentioned, her only source of income at that stage. Her incarceration would not have put a stop to her own normal monthly expenses, *inter alia* in respect of payment of rent, a monthly expense which the complainant conceded the appellant had. It is not inconceivable that, if rent is not paid in respect of the common home during the period of the appellant’s imprisonment,

⁹ *Ibid*, para [12]

she could lose the house, together with not only her only source of income, but also that of the complainant¹⁰.

[20.] Even in the case of a deliberate non-compliance with a maintenance order direct imprisonment would not as a rule be a desirable sanction¹¹.

[21.] The Magistrate should, despite the appellant's refusal to tender any payments towards recovery of the arrear maintenance, have conducted "*a proper enquiry into the (appellant's) financial circumstances in order to ascertain what (she) could reasonably be required to pay in respect of the arrears **rather than what (she) offered to pay...***"¹².

[22.] It follows that I am of the view that the sentence should be set aside. I agree with counsel that, because of the absence of proper information regarding the appellant's financial circumstances, the proper order would be to remit the matter to the Magistrate to reconsider sentence, after a proper enquiry into the financial circumstances of the appellant¹³.

[23.] In the premises the following orders are made:

¹⁰ Compare **R v Becker** 1951 (2) SA 162 (T) at 165A – B; **S v Dadabhai** 1969 (3) SA 520 (N) at 522E – H; **S v Grosch** 1993 (2) SACR 373 (K) at 375b - d

¹¹ Compare **S v Botha** 1988 (4) SA 402 (K) at 406D – H

¹² **Ibid**, paras [8] and [14] (Emphasis added)

¹³ For purposes of an enquiry in terms of section 40 of the Act the financial needs and obligations of the complainant would in fact also be relevant.

1. THE APPEAL IS UPHeld AND THE SENTENCE IS SET ASIDE.
2. THE MATTER IS REMITTED TO THE MAGISTRATE FOR RECONSIDERATION OF SENTENCE, HAVING REGARD TO THE CONTENTS OF THIS JUDGMENT.

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

I concur.

M C MAMOSEBO
JUDGE
NORTHERN CAPE DIVISION

For the Appellant:	Adv V Z Nel (Kimberley Justice Centre, Legal Aid)
For the Respondent:	Adv T E Barnard (Office of the Director of Public Prosecutions, NC)