REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: A33/2019

DPP REF: 10/2/5/1(2019/36)

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

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SIGNATURE

23/8/2021
.....
DATE

In the matter between:

POTGIETER, ANDREI **Applicant**

And

THE STATE **Respondent**

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform. The date for hand-down is deemed to be 23 August 2021.

Summary: Application for bail pending a petition to the Supreme Court of Appeal against the dismissal of an appeal against sentence. Principles governing bail after conviction and sentence restated.

JUDGMENT

WINDELL J (MOLAHLEHI J CONCURRING)

INTRODUCTION

[1] On 12 August 2021, the full bench of this Division, per Windell J and Mohlahehi J, dismissed the applicant's appeal against sentence imposed by the district court of the Krugersdorp Magistrate's Court (the court *a quo*), and made the following order:

> 2. *Mr Potgieter is ordered to submit himself to the Krugersdorp Correctional Centre within 5 (five) days from the date that this order is served on him.*
> 3. *In the event Mr Potgieter does not submit himself to the Krugersdorp Correctional Centre as ordered in paragraph 2 (two) above the South African Police Service must within 3 (three) days of the expiry of the date in paragraph 2 (two) take all the necessary and permissible steps in law to ensure that Mr Potgieter is delivered to the Correctional Centre in Krugersdorp in order for him to commence serving his sentence.*

[2] It is common cause that the applicant did not submit himself to the Krugersdorp Correctional Centre as ordered and that his bail lapsed on 17 August 2021.

[3] This is a renewed application for bail in terms of section 60 of the Criminal Procedure Act 51 of 1977 ("the CPA"). The applicant states that he wants to lodge a petition to the Supreme Court of Appeal ("SCA") against the dismissal of his appeal against sentence, and that pending such an application, he should be released on bail.

[4] At the time of the hearing of this application, (20 August 2021), the applicant has not yet filed his petition at the SCA and although he states that he has *"every intention to file the aforesaid as soon as practicable"*, it is unclear from his application and the submissions made on his behalf when he intends on doing so.

BACKGROUND FACTS

[5] The applicant was found guilty in the court *a quo* on two counts of contravening the provisions of section 31(1) of the Maintenance Act, 99 of 1998. It is common cause that the appellant failed to comply with a court order in that he failed to pay maintenance for his erstwhile wife and his sons in the amount of R1 226 869.90 over a period of approximately four years.

[6] On 30 July 2018, the applicant was sentenced as follows: count one: three years' imprisonment; count two: three years' imprisonment. The court *a quo* ordered that half of the sentence in count two was to run concurrently with the sentence in count one. The appellant was therefore effectively sentenced to four and half years' imprisonment.

[7] Aggrieved by the above outcome, the applicant applied for leave to appeal against both the conviction and the sentence. He was unsuccessful and accordingly petitioned the Judge President, Gauteng Local Division in Johannesburg, for leave to appeal in respect of both conviction and sentence. On 20 November 2018, the applicant was granted leave to appeal against the sentence, however, leave to appeal on conviction was refused. The applicant, having previously been denied bail pending his appeal by the court *a quo*, was granted bail by the High Court pending the outcome of his appeal against sentence.

[8] The appeal against the sentence first served before this court on 27 February 2020. On the day of the hearing the applicant was granted a postponement to approach the SCA in terms of section 16(1)(b) of the Superior Courts Act 10 of 2013, in respect of his conviction. The applicant was granted the postponement of the appeal hearing *sine die*

with specific conditions as to time frames that he had to adhere to.[1] He failed to comply with the conditions set by this court, and the appeal in respect of the sentence was again enrolled for hearing on 21 May 2021.

[9] On the date of the hearing of the appeal, the applicant applied for a further postponement. The application was opposed. The applicant stated that he had complied with this court's order of 27 February 2020, but that the petition to the SCA was returned to him due to non-compliance with the Rules of Court. He stated that he had subsequently complied with the Rules and the petition against conviction was now pending before the SCA. It was submitted that this court should therefore first wait for the outcome of the petition against the conviction before proceeding with the appeal against sentence.

[10] It was clear from the correspondence and the documents provided that after receipt of the returned application from the SCA, the applicant did nothing to prosecute his appeal against conviction for about fifteen months. It was only after receipt of the notice of set down on 13 May 2021 that the applicant took steps to progress his petition before the SCA. The application for further postponement was refused and this court proceeded to hear the appeal against sentence.

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[1] The order made by this court read as follows:

> (a) The application for leave to appeal is postponed *sine die*.
> (b) The applicant is ordered to file his petition with the Supreme Court of Appeal within two weeks of the date of today.
> (c) As soon as the outcome of the petition proceedings is made available to the appellant, he will approach this court within one week in order to arrange a date for this matter to the head.
> (d) Both parties may approach the court for a date.

[11] The two main grounds upon which the applicant sought leave to appeal were: (a) the alleged failure by the court *a quo* to convert the criminal trial into a maintenance inquiry as provided for in section 41 of the Maintenance Act, and (b) that the sentence was shockingly inappropriate or was vitiated by misdirection.

[12] In a judgment dated 12 August 2021,[2] this court dismissed both grounds of appeal. As far as the first ground was concerned it was held that in light of the court a *quo's* finding that the non-payment of maintenance was wilful, and that the applicant had sufficient means to comply with the maintenance order, that there was no good cause for the court *a quo* to convert the trial into a maintenance inquiry.

[13] As far as the second ground was concerned: the maximum sentence to impose in a case of failure to pay maintenance is governed by the provisions of section 31 of the Maintenance Act which provides for a fine or imprisonment for a period not exceeding three years, or to such imprisonment without the option of a fine. We were satisfied that the court *a quo* exercised its discretion properly and did not misdirect itself when it sentenced the applicant to the maximum period of imprisonment. The view that the sentence was fair was further reinforced by the order that one of the counts for which the applicant had been found guilty should run concurrently with the other. We were further alive to the fact that an appeal court may interfere with the sentence of the trial court when there is a disparity between the sentence the appeal court would have imposed and that imposed by the trial court and this, in general, is when the sentence can be described as

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[2] Unreported Judgment of Gauteng Local Division by Mohlahlehi J (Windell J concurring). Case number A33/2019 Potgieter v The State (12 August 2021).

'shocking,' 'startling' or 'disturbingly inappropriate.'[3] Although the applicant's counsel contended that the sentence was excessive, he conceded that a custodial sentence was appropriate. He, however, claimed that the most appropriate sentence would have been one month's imprisonment.

[14] In *Director of Public Prosecutions Kwa-Zulu Natal v Ncobo and Others*,[4] the court reiterated that the traditional objectives of sentencing include retribution, deterrence and rehabilitation and that it does not necessarily follow that a shorter sentence will always have a greater rehabilitative effect. Furthermore, the rehabilitation of the offender is but one of the considerations when the sentence is being imposed, and the nature of the offence related to the personality of the offender, the justifiable expectations of the community and the effect of a sentence on both the offender and society are all part of the equation. We were satisfied that the specific circumstances of this case was serious; that the applicant showed no remorse; had no intention to repay the monies owed and that the impact his actions had on his erstwhile wife and son warranted a lengthy period of direct imprisonment.

[15] In conclusion, this court was satisfied that there was no evidence on record to suggest that the court *a quo* committed an irregularity or misdirected itself in imposing the custodial sentence on the applicant. In the circumstances the sentence imposed on the applicant

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[3] *S v Malgas* (117/2000) [2001] ZASCA 30; See also *S v Pillay* [1977] 4 All SA 713 (A) 717; 1977 (4) SA 531 (A) 535E-G, *wherein the court held that : "As the essential enquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the court in imposing it exercised its discretion properly or judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree of seriousness that it shows directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the court's decision on sentence."*

[4] 2009 (2) SACR 361 [SCA] at paragraph 22.

was not inappropriate and shocking to justify interference by this court. Accordingly, the applicant's appeal was dismissed.

[16] The order and judgment was served on the applicant on 12 August 2021. In terms of the court order he had to submit himself to the Krugersdorp Correctional Centre within 5 days of the order. The 5 days expired on 17 August 2021.

[17] On 18 August 2021 the applicant approached the urgent motion court of the High Court Gauteng Local Division, in terms of Rule 45A of the Uniform Rules of Court, seeking an order that paragraph 2 of this court's order be suspended until 17 September 2021. The urgent application was removed from the roll at the request of the applicant. The applicant now approaches this court seeking his release on bail.

POINT *IN LIMINE* – APPLICANT NOT IN CUSTODY

[18] The respondent contends that the applicant's bail had lapsed on 17 August 2021 and he is therefore a "fugitive from justice" and has come to court with "dirty hands". It is further submitted that, in addition, the provisions of Section 60 of the CPA[5] must be considered which specifically states that it is only *"an accused who is in custody"* that is entitled to be released on bail. Although it is accepted by the respondent that a High Court has a common law power to release a "would-be appellant"[6] and that section 60 is also applicable to a person already convicted and sentenced to be released on bail if certain

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[5] *Section 60(1) "An accused who is in custody in respect of an offence shall, subject to the provisions of section 50(6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit."*

[6] *S v Hlongwane* 1989 (4) SA 79 (T) at 102A-G

requirements are met, it is submitted that the applicant is not in custody and does not fall within the category of persons eligible for release on bail.

[19] It is common cause that the applicant was admitted to hospital on 16 August 2021 as a result of experiencing side effects from COVID-19 which he contracted in December 2020. It is accepted in favour of the applicant that he was unable to submit himself to the authorities because he is currently in hospital. Although the applicant has not been taken into custody, his bail has however lapsed and he is entitled to apply for his bail to be reinstated.

THE STANDARD TO BE MET TO BE RELEASED ON BAIL AFTER CONVICTION

[20] It is trite that there is a different emphasis in respect of bail pending finalisation of a trial as against bail pending finalisation of an appeal or special leave to appeal. The difference is that when bail is considered pending finalisation of a trial, a presumption of innocence operates in favour of an accused person until his guilt has been established in court. In *S v Masoanganye and Another,*[7] Harms AP stated the following in relation to the *onus* on a convicted person when applying for bail pending an appeal:

> *"Since an appeal requires leave to appeal which, in turn, implies the fact that there are reasonable chances of success on appeal is on its own not sufficient to entitle a convicted person to bail pending appeal... What is of more importance is the seriousness of the crime, the risk of flight, real prospects of success on conviction, and real prospects that a non-custodial sentence might be imposed."*

[7] 2012(1) SACR 292 (SCA) at paragraph 14

[21] Recently in *S v Rohde,*[8] Nicholls JA summarised the approach to bail pending an appeal as follows:

> *"[5] The next difficulty for the appellant is his changed status. The stark reality that the presumption of innocence no longer operates in his favour. As stated by the Court a quo:*
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> > *'Pretrial release allows a man accused of crime to keep the fabric of his life intact, to maintain employment and family ties in the event he is acquitted or given a suspended sentence or probation. It spares his family the hardship and indignity of welfare and enforced separation. It permits the accused to take an active part in planning his defence with his counsel, locating witnesses, and proving his capability of staying free in the community without getting into trouble. This would include earning an income to maintain his financial needs, as well as funding his legal expenses incurred in consequence of the trial. Underlying this important rationale is the fact that the accused enjoys the fundamental right of being presumed innocent.'*
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> *[6] On conviction, other considerations come to the fore. An increased risk of abscondment once a person has been convicted and sentenced to a lengthy term of imprisonment is inevitable. The severity of the sentence imposed will be a decisive factor in the court's exercise of its discretion whether or not to grant bail."*

[22] It is common cause that the applicant was convicted of a schedule 1 offence. Even though the merits of *S v Masoanganye and Another* and *S v Rohde* relate to schedule 6 and schedule 5 offences respectively, the principles are equally applicable to the application at hand.

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[8] 2020 (1) SACR 329 (SCA)

[23] This court must therefore be satisfied that the applicant has a real prospect that the SCA would not only interfere with the sentence confirmed by this court, but further that there is a real likelihood that a non-custodial sentence would be imposed. As alluded to earlier it was conceded during the hearing of the appeal that the only suitable sentence is a custodial sentence. In the bail application the applicant failed to address this aspect at all and merely states that his release would be in the interests of justice. Moreover, the applicant had received the outcome of its petition to the SCA on conviction, but failed to disclose this important factor in his application. It was only after this court enquired about the position during this application and the matter stood down that we were informed that his petition against conviction was refused by the SCA on 12 August 2021.

[24] The prospects of success are relevant in an assessment of whether to release the applicant pending finalisation of an application for leave to appeal.[9] There has to be a real prospect on appeal in that a non-custodial sentence might be imposed, such that any further period of detention before the appeal is heard would be unjustified.[10] The offence for which the applicant was convicted is not only serious but prevalent. In *S v Visser,*[11] the court held that:

> "*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 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.*"

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[9] *Hlongwane* at 102D-G
[10] *R v Mthembu* 1961 (3) SA 468 (D) and *S v Scott-Crossley* 2007 (2) SACR 470 (SCA)
[11] 2004 [1] SA CR 393 [SCA] at 399 E – F.

[25] It is trite that where offences are not only serious but prevalent the personal circumstances of an offender play a less significant role as compared to the interests of the community. The circumstances of this case justified a lengthy period of imprisonment.

[26] We have come to the conclusion that there are no prospects of success on appeal. It is accordingly not in the interests of justice that the applicant be released on bail, pending the application for special leave to appeal the sentence. The application should, for this reason alone, be refused.

THE APPLICANT'S MEDICAL CONDITION

[27] The applicant alleges that he requires medical treatment and that he should be released on bail. He stated that on 13 August 2021, a day after the order of this court was served on the applicant, he consulted a doctor complaining of chest pain, palpitations and shortness of breath. The doctor was concerned that it might be consequences of COVID -19, that the applicant contracted in December 2020. On 16 August 2021 he was admitted to hospital for "*further investigation and treatment including a coronary angiogram*". No further medical reports were filed.

[28] In *S v Van Wyk,*[12] a case dealing with an accused person who had not been found guilty yet, the SCA stated that insofar as an accused does not receive proper medical attention whilst in detention, she or he has other legal remedies at her or his disposal and, in general, bail is not the remedy for the actions and omissions of the prison authorities. The court stated that what remains important is the fact that the restrictions of her or his detention and **attendance at the trial is not ideal for a person in a weak physical**

[12] 2005 (1) SACR 41 (SCA) at paragraph [9] at 45*h* - *j*.)

condition. The court held that the interference with her or his freedom is an important factor which has to be given much weight when deciding on the interests of justice, but the medical condition of the accused must be weighed against the other factors and must not be considered in isolation. (Emphasis added)

[29] In *S v Rudolph* [13]the SCA reaffirmed this principle and stated that an arrested person is entitled *'to conditions that are consistent with human dignity, including at least exercise and the provision, at State expense, of adequate accommodation, nutrition, reading material and medical treatment;…".* The facts of *Rudolph* are also distinguishable from the facts *in casu* as it dealt with the rights of an accused person still standing trial, and who's guilt has not yet been established.

[30] The applicant has been found guilty and his appeal against sentence and his petition to the SCA against the conviction has been dismissed. The applicant's required medical attention on its own, does not warrant his release on bail. Should the applicant not be granted the required nutrition and medical treatment he requires; he would have various legal remedies available to him in this regard.

CONCLUSION

[31] It is not in the interests of justice that the applicant be released on bail pending his petition in terms of section 16(1)(b) of the Superior Courts Act 10 of 2013. In the circumstances, the following order is made:

1. The application is dismissed.

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[13] 2010(1) SACR 262 (SCA) at paragraph 11.

L.WINDELL
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

P.P. **E.M MOLAHLEHI**
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG.

APPEARANCES

For the applicant:	Advocate R. van Schalkwyk
Instructed by:	Muthray & Associates Incorporated
For the respondent:	Advocate S.H. Rubin
Instructed by:	Office of the Director of Public Prosecutions, Johannesburg
Date of hearing:	20 August 2021
Date of judgment:	23 August 2021