

SOUTH AFRICA / JUDGMENT

T.M v S (A199/2022) [2023] ZAGPPHC 699 (16 August 2023)

[2023] ZAGPPHC 699

COURT

North Gauteng High Court, Pretoria

BEFORE

Labuschagne, Neukircher

CASE / FILE NUMBER

A199/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO A199/2022

REPORTABLE: NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

YES

DATE:

16/8/2023

T[...]

M[...]

Appellant

And

THE

STATE

Respondent

JUDGMENT

Labuschagne AJ (Neukircher J concurring):

- [1] The appellant appeals against conviction and sentence on a contravention of a protection order, issued in terms of the Domestic Violence Act 116 of 1998, and one count of assault. This is an appeal against the whole of the judgment and order granted by the court a quo on 21 October 2020.
- [2] Despite the ongoing and very acrimonious divorce proceedings between the appellant and his wife[1], they lived in the same house. The complainant sought a protection order against the appellant which was granted by the court a quo on 18 July 2018 in the following terms: that the appellant was prohibited from accessing the upper level of their home[2] and that he was only allowed access to the lower level of the communal home at 5[...] W[...] View Estate. It is clear from the evidence, that this was not the first time the complainant had sought, and been granted, a protection order against the appellant.
- [3] The appellant however allegedly failed to comply with the order of 18 July 2018 and as a result he was criminally charged with acting in breach of it in that he entered into the upper level of the dwelling on 19 July 2018[3]. He was further accused of assaulting the complainant on 21 July 2018 by pushing her and she fell on the staircase, as a result[4].

Evidence for the prosecution

- [4] The protection order that was issued on 18 July 2018 was issued in the presence of the appellant in court. Despite this, and knowing the terms of the order, he slept upstairs on the 19th of July 2018. The Police attended at the premises on 20 July 2018 to remove him from the upper floor of the dwelling. They assisted in moving his private belongings as well.
- [5] When the appellant again tried to go to the upper floor on 21 July 2018, the complainant stood on the staircase and told him not to come upstairs because there is a court order in place and the Police had already told him that he could not do so. He became verbally abusive and pushed her to get her out of the way. She fell backwards onto the edge of the staircase and injured her back. She received medical treatment from her general practitioner, Dr Minette Nel, on 23 July 2018.
- [6] During the proceedings, the medical report of Dr Minette Nel was introduced as a J88, together with a s 212 certification. Dr Nel noted that there was a small abrasion of about 1 cm on the lower part of the complainant's back, near her coccyx. The J88 was introduced into evidence without objection from the defence, and without requesting that the doctor be called to testify. In fact, cross-examination of the complainant followed based on the J88. As there was no challenge to the introduction of the J88, case law suggesting that it remains impermissible hearsay unless confirmed by viva voce evidence, is distinguishable in these circumstances.[5]

- [7] The complainant contends that the healing process took a few weeks, but psychologically she is still in the process of healing.
- [8] In cross-examination it was put to the complainant that the appellant needed boxes and time to remove his clothes and belongings downstairs and that he had informed the court a quo of this. According to the appellant, he was thus under the impression that he had until the weekend to do so. The complainant confirms that, when the Police arrived on 20 July 2018, they told him to move all his things from the upper dwelling, which he did.
- [9] It was then put that the appellant had to go upstairs to get the shower fixed, as it was winter. There is a bedroom on the ground floor with a bathroom which had a gas system for heating of water.
- [10] The appellant also contended that he had gone to a supply shop to buy cables to connect the DStv upstairs for the children. When he arrived back home on 21 July 2018, he went upstairs to connect the DStv[6]. It is then that the State witness stopped him on the stairs, and she was pushed onto the stairs. The appellant contends that he then asked one of the children to assist to connect the cables upstairs as he was not allowed to go upstairs.
- [11] The complainant's affidavit did not state at what time of day the assault occurred on the stairs. She blocked her fall with her hands but there were no visible injuries on her hands. That is why, according to the complainant the J88 filled in by Dr Nel did not refer to visible injuries of her hands. The injury to the hand was however minimal according to the complainant.
- [12] The complainant contends that she had a previous protection order against the appellant in 2011 and she was also assaulted in 2018 by the appellant when he knocked her out cold. The 2018 protection order is clearly in substitution of the previous order.
- [13] According to the complainant, the appellant went upstairs many times thereafter, so much so that she and her children had to leave the family home in January 2019.

The defence

- [14] During his evidence the appellant contended that, at the hearing of the domestic violence complaint on 18 July 2018, the Magistrate had suggested that the appellant live downstairs and his wife upstairs. He contended that he needed time to move his belongings downstairs which included items such as his clothes, the TV and audio equipment plus his sporting gear, photographic equipment and other possessions like company files, documents and jewellery. He also contended that

the downstairs geyser was not working reliably because it is a gas geyser, and he would have to have it checked and repaired so that he would have hot water while it is the middle of winter. He said the most convenient time to move downstairs would be over the weekend, three days later.

[15] According to him, he explained this to the Magistrate who seemed to agree and thus he was under the impression that any order granted would provide him with this opportunity.

[16] Although the parties employ a domestic worker, she only moved his shirts downstairs on 20 July 2018 as she was too busy. He testified that on 20 July 2018 Police officers arrived at the home, contending that he was acting in breach of the protection order. They told him to move downstairs immediately. He did not object and went upstairs

and started packing his clothes. He then disconnected the TV, DStv, audio equipment and gathered all his sporting equipment, photographic

equipment and personal possessions and the Police helped him carry everything downstairs.

[17] On 21 July 2018 he was summoned to the Police station where he signed a warning statement at 10:30. The officer to whom he made the statement contended that there was no breach and that he would go to the Magistrates' Court on the Tuesday thereafter to obtain a nolle prosequi. The appellant then went to a plumbing store to buy an O-Ring for the tap and to Ellies to buy DStv cables and connectors. He got home at around 13:30 and started making up the cables for the DStv. He then walked upstairs with his two daughters. He had cables in his hand together with connectors and pliers when the complainant started yelling and shouting and verbally abusing him not to come upstairs because he is not allowed to. He then explained that he only wanted to extend the DStv cable. She then came running

down the stairs and started pushing him down the stairs. He showed her the cables and the equipment, and he told her that all he wants to do is to connect the cables so that the girls could watch TV. He walked downstairs and sat on the couch with his daughters for about 5 minutes. He then asked one of his daughters if she would be able to go upstairs and connect the cables (if he passed the cables to her from the stairs). He then passed her the cables as she walked up the stairs. He explained to her what to do. She was struggling and the complainant then went over, bent down to the floor, and assisted their daughter to connect the cable. The appellant then helped to route the cables around the balustrades and dropped them down so that the appellant could be connected to the DStv on the ground floor. They then connected the DStv and watched TV downstairs.

[18] The appellant contended that he did not receive a copy of the protection order although he was at court and that it was only in October 2018, when the Station Commander of Lyttleton called the appellant in, that the order was read out and explained to him.

[19] The appellant read from a warning statement that he had written himself. He wrote:

"I deny the allegation against me. I explained to the Magistrate I needed time to move my personal belongings from upstairs to downstairs. I intended to do this over the weekend as I have to source boxes to keep my clothes. I occupied almost 2,5 x 2,7 metres of cupboard space upstairs. Now I only have 0,9 x 2, 7 metres of cupboard space, so I need boxes to store my stuff. Furthermore, the gas-based shower downstairs needs to be repaired or serviced. From 21 July 2018 I should be settled downstairs and there would be no need to go upstairs, except in the case

of emergency.”

[20] The appellant admits that he went upstairs on the 18th, the 19th and the 20th[7] but contends that he was not aware about the exact date on which the order became effective. However, he confirms that he was in court when the order was granted and admitted that the contents were explained to him correctly. The exact exchange in the record was the following:

"PROSECUTOR: Sir, you were there when the order was issued there at Visagie. Is that correct?

ACCUSED: Yes, but I also told the magistrate that ...[intervenes} PROSECUTOR: You were there.

ACCUSED: Ja, I was there but I also ...[intervenes} PROSECUTOR: And the contents was explained to you correctly?

ACCUSED: Yes, Your Worship.”

[21] The appellant denies that he pushed the complainant. The appellant pointed out the discrepancy in the complainant's evidence, where she contended that the pushing and shoving took place in the morning, while he had only returned home at 13:30 in the afternoon. He contends that his hands were full when he went up the stairs and denies pushing Complainant.

JUDGMENT

A QUO

[22] In the course of the judgment the Magistrate acknowledged the need to treat the evidence of a single witness with caution.[8] The court found that the complainant was reliable and that discrepancies in her evidence were not material. The court accepted that, in all fairness, the appellant needed time to pack his stuff. However, the court found that on 18 July 2018, he did not only go upstairs to pack his belongings - he remained there fully knowing that he is not supposed to enter and remain upstairs. All his possessions were moved, with the assistance of the police, on 20 July

2018. The court found that the reason why he went upstairs on the 21st is not because the geyser downstairs was defective as it was only in September 2018 that he complained that the geyser was not properly

working, ie some time after the incident in question.

[23] The court accepted the evidence in the J88 that the complainant had been injured and found her injuries to be consistent with her evidence that the appellant had pushed her on the stairs on 21 July 2018.

[24] As a result, the appellant was convicted on both charges. Insofar as sentence is concerned, a pre-sentence report as well as a correctional services report were received into evidence in which the sentencing options included imprisonment, a suspended sentence or correctional supervision.

[25] All the personal circumstances of the appellant were taken into account, including that the appellant was a first time offender. The court *inter alia* adopted a recommendation for correctional supervision and handed down the following order:

- (a) the appellant was sentenced to 36 month's imprisonment, which is wholly suspended for a period of 5 years on condition that:
 - (i) the appellant is not convicted of an offence of contravening the provisions of Section 17 of the Domestic Violence Act, 116 of 1998; assault with intent to do grievous bodily harm; assault common, committed during the period of suspension;

(b)

the appellant is further sentenced to correctional supervision in terms of Section 276(1)(h) of Act 51 of 1977 for a period of 36 months with the following sentencing conditions in respect of the house arrest:

"House arrest at her home at residence 5[...] W[...] View, Rietvalleirand in Elarduspark, to such and extent that he can be controlled and therefore, as far as possible, not be of any danger to the community, provided that, depending on his behaviour, the condition of house arrest can be relieved to some extent, but the house arrest will apply for the full duration of the sentence.

1. From 19h30 to 05h00 on workdays and from 17h00 to 05h00 on days when he is not working.

Provided that the house arrest will not be applicable during the following:

- i) Community service: Will consist of cleaning at Garsfontein Police Station on Saturdays from 08h00 until 16h00; and
- ii) Programmes: This will be self-image, behavioural conduct relating to responsibility and acceptance programme is recommended.

1.2 Community service: That the accused will perform 16 hours of community service for every month of the sentence to comply with the community's expectations and terms of retribution and compensation of the crimes with the provision that a part (maximum a third) could be suspended if he gives his cooperation and if his behaviour justifies it.

Furthermore, that the Commissioner may give him one-hour additional community service for every hour that he fails to do community service.

The content of the community service(s) and the place where community service is to be performed is left to the discretion of Correctional Services.

1.3 That the accused will subject himself to treatment programmes as determined by the Commissioner of Correctional Services, which are applicable to his specific needs and problems, with the aim of rehabilitating the accused and to better prepare him to accept his responsibilities as a member of the community. The accused may not change his residential address or leave the magisterial district without prior notification and approval of the Commissioner. The accused shall for the full duration of the sentence refrain from the abuse or use of alcohol or drugs other than on prescription by a medical practitioner. To control and discourage chemical dependency, the accused must declare himself to be willing to undergo tests at own costs if at all possible. The accused shall refrain from committing any other criminal offences. The accused shall refrain from visiting undesirable places such as bars, casinos and clubs. The accused shall refrain from threatening a person(s) by word or action. The accused shall subject himself to the monitoring by the Correctional or appointed volunteers by means of unannounced visits at his home, including after hours, compulsory visits to the community's Correction Office for consultation purposes. He shall comply with any reasonable instruction given by the court regarding administration of and compliance with said conditions. The accused is declared unfit to possess a firearm in terms of section 103A(60) of 2000.

The accused must report on 9 December 2020 at or before 16h00 at the offices of Correctional Services, which is situated at corner WF Nkomo and Sophie de Bruyn Streets, 124 Poyntons Building, Pretoria Central."

APPEAL AGAINST THE CONVICTION

- [26] It is trite law that a court of appeal may only interfere with a court a quo's findings in the event of a material misdirection. The test in respect of a departure from the sentence imposed is that it invokes a sense of shock or is startlingly inappropriate.[9]
- [27] The appellant has argued that the State failed to prove the requisite element of mens rea when he went upstairs on 19 July 2018 or 21 July 2018. The argument is based on the appellant's evidence that he was not aware of the terms of the order as it was not handed down in court and it was also never served on him. This argument is however dispelled by the exchange during the appellant's cross-examination which is set out in paragraph 20 supra. The evidence thus establishes that the appellant was well aware of the terms of the court order on the day the order was granted and that he understood its terms. At the very least, and on his own version, when the Police arrived on 19 July 2018, he was told he cannot go to the upper level of the dwelling, on 21 July 2018 the complainant told him there was a court order and he may not come upstairs and he had signed a warning statement at the Police Station that very day. He was thus very well aware of the fact that there was a Protection Order and what its terms were.[10] It is also clear from all the evidence that he was well aware of the order and its terms from 18 July 2018 when it was issued.
- [28] The purpose of the order was to create a safe haven for the spouse of the appellant against the backdrop of domestic violence. The order prohibiting the appellant from entering the upper level was clear in this regard. The appellant's attempt to "buy some time" before the

order became effective is unpersuasive. While he might have conveyed his sentiments to the sentencing magistrate, the terms of the order are clear and there is nothing in the order itself to indicate that the Magistrate had intended to give the appellant time to move his belongings downstairs. In any event, the evidence is not simply that the appellant entered the upper level of the home to remove his belongings - the evidence is that on the very night the order was issued, he slept there. This is a clear indication of his mens rea and his lack of respect for the court order - it is provocative conduct and is inconsistent with his protestations of innocence. The point is further that his possessions were removed with the assistance of the Police, on 20 July 2018. Despite that, he again tried to enter the upper level, but was barred by the complainant. The argument on this was that the appellant was only on the staircase and not upstairs. The point is that the altercation between him and the complainant took place there because he was attempting to go to the upstairs level despite the police warning him the night before not to do so. The fact that he never put his foot on the upstairs level is simply semantics as he was clearly acting with the intention of defying the court order. Thus, there is no real dispute on whether the appellant went upstairs in breach of the protection order.

- [29] As to the appellant's denial of assault: the objective evidence recorded by Dr Nel two days later of a 1 cm abrasion on the complainant's lower back confirms that she had fallen. There is no other explanation for this injury other than that she had fallen backwards on the stairs. The appellant would have the court believe that he had merely turned around and waited downstairs for his daughter to try and reconnect the DStv without reacting to his wife's conduct. In the light of the existence of a previous protection order being granted and an uncontested assault on the appellant's wife during 2018, when she was allegedly knocked out cold, this version is not reasonably possibly true.
- [30] I am thus of the view that on the appellant's own evidence, Counts 1 and 2 of were proven and that the court a quo was correct in convicting the appellant as charged. The appeal against conviction therefore fails.

APPEAL AGAINST SENTENCE

- [31] The sentence imposed consists of both a suspended sentence of imprisonment for 36 months and an order for house arrest for 36 months.
- [32] In my view, the Court a quo misdirected itself in imposing a sentence which is startlingly inappropriate. Thus, the assault, its consequences, the interests of the appellant vis-a-vis those of the public and law and order were not properly balanced.
- [33] The conditions imposed on the house arrest component of the sentence leave hardly any time for the appellant to maintain a proper relationship with his minor children. The house arrest hours imposed upon him are such that, if his children were to visit him for any meaningful time, this would be limited to a Sunday before 17:00.

[34] The sentencing conditions will permit the appellant to notionally continue his business activities, but he will be unable to attend any after-hours meetings pertaining to his business or to travel outside

the magisterial district. In particular, he will not be able to have direct contact with his children after hours during the week or even on Saturdays. The entire Saturday would be taken up by cleaning the Police Station at Garsfontein and thereafter house arrest would set in at 17:00. In addition, the appellant has to attend courses.

[35] During sentencing proceedings, the sentencing court received evidence that the appellant is 47-years old, is self-employed and is a director of TMI Dynamics. He has staff working for him and has special police clearance to perform his duties. He works with several State Departments and abroad. He is an expert witness for the NPA and deals with matters where prisoners have passed away while in Police custody. He is involved pro bona in the Ahmed Timol matter, the Neil Agget matter and the Dr Mohammed Ajafi matter, all who died in custody. He is thus clearly a sought after expert in his field.

[36] He pays approximately R25 000.00 in maintenance per month. His job requires him to travel throughout the country and to attend meetings in cities like Durban and Cape Town. The effect of house arrest is to

curtail his movements to such a degree that he is hamstrung in his business, which will have a serious and potentially debilitating

effect on his ability to provide maintenance to his wife and children.

[37] The interests of the complainant must also be considered in this matter. The scourge of domestic violence is to be curbed wherever it rears its ugly head and our courts have insisted on sending a powerful message to all offenders that this conduct will no longer be tolerated. In order to protect the victim, a sentence reflecting the

risk of incarceration, if violent conduct were to be repeated, would serve as a mighty deterrent. Here, one must further take into account that the spouse and her minor children moved out of the common home six months after the event on the stairs and therefore these parties are no longer exposed to one another on a daily basis. The risk of physical contact has thereby been curtailed. Thus house arrest would truly serve no purpose other than to pose a risk to the appellant's business activities which would then potentially have a knock-on effect on his ability to maintain his family and curtail the bond between parent and children.

[38] The regime of house arrest is inappropriate for a number of reasons:

38.1 It threatens the family structure by making it almost impossible for the appellant to maintain sufficient meaningful contact with his children before house arrest sets in during the week. The children are being punished in effect;

38.2 The imposition of house arrest makes it impossible for the appellant to travel for business purposes to generate the income

necessary for him to maintain his family;

38.3 The imposition of community service in addition to house arrest has removed what family time may remain over a weekend, particularly on every Saturday, and

38.4 House arrest does not prevent the mischief that gave rise to the conviction - the threat of incarceration would suffice in this regard.

[39] As a result, the interests of the minor children are best served by retaining contact with their father in a manner which can foster normal family relations and allowing him to continue with his business affairs.

[40] In the light of the above, the correctional supervision order is not only inappropriate, but draconian.[11] The sentencing court clearly misdirected itself in imposing such a harsh order in circumstances where it is counterproductive and where a suspended sentence would serve the interests of all parties involved in the triad of considerations on sentence. [12]

[41] In the premises, the appeal against sentence succeeds.

THE ORDER

[42] The following order is made:

1. The appeal against conviction is dismissed.
2. The appeal against sentence succeeds.
3. The sentence imposed by the court a quo is set aside and the following sentence is imposed:

3.1 The accused is sentenced to 12 month's Imprisonment, wholly suspended for a period of 5 years on condition that the accused is not convicted of an offence of contravening the provisions of Section 17 of the Domestic Violence Act, 116 of 1998, assault with intent to do grievous bodily harm or common assault, committed during the period of suspension.

EC LABUSCHANGNE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree

B NEUKIRCHER

JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected, and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 16 August 2023.

Appearances: On behalf of Appellant Adv Collingwood Instructed by Dukhi Attorneys On behalf of Respondent Adv More Instructed by National Director of Public Prosecutions Heard on 27 July 2023

- [1] The complainant
- [2] Also called "the dwelling" in this judgment
- [3] Count 1
- [4] Count 2
- [5] S v Hlongwa 2002 (2) SACR 37 (TPD)
- [6] An issue was made in cross examination of whether this took place in the morning or later after the appellant had return to work, but nothing turns on this other than an issue of credibilty
- [7] In his evidence he states: / did go, I did, I did go upstairs on the 18th and 19th and 20th... "
- [8] Section 208 of the Criminal Procedure Act; State v Digha 2010(1) SACR 78 at par [6]
- [9] S v Kgosimore 1999
- (2) SACR 238;
- [10] See the terms of his warning statement in paragraph 19 supra
- [11] State v Rabie [1975] 4 All SA 723 (A) at 724
- [12] S v Zinn [1969] 3 All SA 57 (A) at 61.

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Prepared on 11 October 2026 · Esheria