FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Application No. : P130/2012

In the application of:-

RAYMOND DANIEL DE VILLIERS Applicant
(Accused in court *a quo*)

and

THE STATE Respondent

CORAM: DAFFUE, J *et* SNELLENBURG, AJ

HEARD ON: 7 SEPTEMBER 2012

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 14 SEPTEMBER 2012

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[1] On 11 August 2011 applicant was convicted by the Regional Court, Bloemfontein on one count of theft in the amount of R950 000,00. On 29 November 2011 he was sentenced to seven years' imprisonment, three years of which was suspended on certain conditions.

[2] On 11 January 2012 he unsuccessfully applied for leave to appeal against his sentence only. At that stage he was still represented by Advocate J Nel of the local Bar, instructed

by attorney J Kramer.

[3] Hereafter the applicant terminated the mandate of his attorney and counsel and appointed a new legal team. On 5 April 2012 applicant's new team applied to the court *a quo* for leave to appeal against both his conviction and sentence. As the application was filed out of time, an application for condonation was filed as well. Having found no merits in the application for leave to appeal the condonation application was refused.

[4] A petition was addressed to the Judge President of this court who referred it to Snellenburg AJ and myself for adjudication. We considered the petition and refused it on 23 May 2012.

[5] In accordance with the principles laid down in **S v KHOASASA** 2003 (1) SACR 123 (SCA) at para [26] applicant brought an application seeking the following relief:

(a) Leave to appeal against his conviction by the Regional Court Magistrate D M Soomaroo on 11 August 2011;

(b) Leave to appeal against the sentence imposed upon him by the said Regional Court Magistrate;

(c) That his bail be extended pending finalisation of the appeal, alternatively and in the event of a refusal to grant leave to appeal, pending a petition to the Supreme Court of Appeal and the finalisation of such appeal.

[6] In the present application applicant relies on the same factual averments and legal submissions relied upon in the petition which we have refused. These will be dealt with in due course.

[7] The test to be applied in applications for leave to appeal has recently been re-instated by the Supreme Court of Appeal in **S v SMITH** 2012 (1) SACR 567 (SCA) at para [7] as follows:

> "[7] What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince

> this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal. "

In *casu* applicant pleaded guilty in the court *a quo*. Adv. Nel, who appeared for the applicant confirmed that the plea was in accordance with instructions and he proceeded to read out a statement prepared for and on behalf of applicant in accordance with the provisions of section 112(2) of the Criminal Procedure Act, 51 of 1977. On receipt of the statement, the court *a quo* questioned applicant as follows:

> "**COURT:** Accused your attorney (sic) read this out to the court, do you confirm what is included here is the truth, do you agree with it and that you signed it?
>
> **ACCUSED:** Yes I do.
>
> **COURT:** And you are aware that if this court now convicts you that you can face the minimum of 15 years imprisonment?
>
> **ACCUSED:** I understand, Your Worship."

The state accepted the factual basis on which applicant presented his plea and the court *a quo* convicted him accordingly.

[8] Advocate Dörfling SC who appeared for applicant in this application argued that the court *a quo* could not have been satisfied that applicant was guilty of the offence to which he had pleaded guilty and that there was no compliance with the statutory requirements of section 112(2). He submitted that applicant had not admitted all the elements of the crime of theft and the court *a quo* could not have been satisfied that the applicant was indeed guilty. Mr Dörfling did not dispute that the first three elements of the crime of theft had been admitted, to wit (a) an act of appropriation (b) in respect of money (c) which takes place unlawfully. He argued that the fourth element, intentionally, (including the intention to appropriate) had not been dealt with in the statement at all and consequently applicant did not admit that he intended to appropriate the money and thus to permanently deprive complainant thereof. He relied on several passages in C R Snyman, Criminal Law, 5th ed, **R v SIBIYA** 1955 (4) SA 247 AD at 257 B – C, **R v WESSELS**

1933 TPD 313 at 314 and **S v VISAGIE** 1991 (1) SA 177 AD at 183 in support of his submission.

[9] The admissions made by applicant in the section 112(2) statement can be summarised as follows:

Mrs Amanda Wiese, the widow of the deceased, Mr P J Wiese, was appointed as executrix in his estate. She mandated applicant to act as the administrator of the estate on her behalf. On 25 May 2005 applicant obtained an estate PJ Wiese cheque made out in favour of The Taakmeesters Trust which trust was his *alter ego*. His instructions were to invest the money on the money market in favour of the estate. He did not invest the money, but made ten different payments to several individuals, trusts and close corporations which were not creditors of the estate and had nothing to do with the estate. In conclusion he admitted non-compliance with his instructions and that he acted unlawfully whilst he had at all relevant times knowledge of the unlawfulness of his acts ("van die wederregtelikheid daarvan bewus was").

[10] Mr Dörfling argued that applicant admitted one facet of the

element of intention, to wit knowledge of unlawfulness, but the issue of intention to appropriate in the manner that our law requires was not addressed. When asked whether it would make a difference if the money was paid to applicant personally, in stead of the cheque having been made out to his trust, he confirmed that if the money was paid out to applicant personally and given the admissions made by him, he would have been properly found guilty of theft. However, insofar as the cheque was made out to his trust, the mere fact that applicant did not comply with his mandate could not be sufficient for the court *a quo* to find him guilty. Therefore he submitted that a reasonable possibility exists that another court may come to a different conclusion.

[11] Mr Dörfling sought reliance in the **WESSELS** judgment *loc cit* and **SNYMAN** *loc cit* insofar as the existence of a liquid fund can be a defence relied upon by an agent holding money on behalf of his principal, the argument being that if the actual money collected had been used for the purposes of the agent, he could not be found guilty of the offence of theft so long as he had a liquid fund at his disposal on

which he could draw to pay his principal at all times. The defence of a liquid fund was never raised and the court *a quo* had to adjudicate the plea and statement in terms of section 112(2) on the facts presented to it. If **<u>VISAGIE</u>** *loc cit* at 183 D-I is duly considered and especially the *dictum* of Schreiner JA in **<u>R v MILNE AND ERLEIGH (7)</u>** 1951 (1) SA 791 (AD) at 865H relied upon which has found approval numerous times, it is evident that applicant made sufficient averments for the court *a quo* to have been satisfied of his guilt. The *dictum* reads as follows:

> "Where, therefore, a person takes another's money without authority to do so and intending to consume it (actual consumption is, I think, only important as evidence of intention) he commits theft, even if he intends to return other money, if it is proved that he did not, when he took it, believe that he had the right to take it or that the owner, had he been consulted, would have consented to the taking."

Refer also to **<u>SNYMAN</u>** *loc cit* at 504 and further. I am of the view that no reasonable possibility exists that another court may come to a different conclusion as the court *a quo.*

[12] It was submitted by Mr Dörfling that the court *a quo* committed several misdirections and that the sentence was strikingly inappropriate. The main submissions were that applicant, being a fifty year old male with four dependant sons, was regarded a suitable candidate for correctional service, that he paid R50 000,00 to the complainant, that he made an offer two and a half years earlier to pay back the complainant and that during sentencing proceedings he again offered to reimburse complainant over a period of five years. The court *a quo* is accused of not having considered restorative justice properly and did not consider that applicant at all times had the intention to pay back to complainant what he had taken.

[13] It is apparent from the record that applicant has paid an amount of R50 000.00 to complainant. However, over a period of 6 years, from 2005 to 2011 when he was ultimately sentenced, he has made no effort to settle the claim. The interest factor alone on an amount of R950 000.00 over this period is enormous. The impression is created that applicant tried to utilise the court process to get a sentence which would suit him perfectly. Instead of

settling the complainant's claim immediately, he tried to bargain with the state in accordance with the provisions of section 105A of the Criminal Procedure Act. When this failed, he tried to bargain with the court *a quo* not to sentence him to imprisonment. During the sentencing process the complainant who was called to testify was asked whether she would accept payment of R209 302.95 to be made to her the next day together with instalments over five years, but it was made clear that the offer was made on condition that imprisonment was not imposed.

[14] I am of the view that there is no reasonable possibility that another court might come to a different conclusion. The court *a quo* has dealt with all sentencing options properly, has considered all relevant factors, but ultimately came to the conclusion that imprisonment was the only appropriate sentence in *casu*. Applicant made use of his friendship with the complainant and her deceased husband and the trust relationship in which he found himself as administrator of the deceased estate to misappropriate the money entrusted to him and thereby causing the widow severe financial difficulties. The money was earmarked to settle

inter alia estate duty and other estate debts. Complainant had to borrow money to settle the estate debts.

[15] In **S v PRETORIUS**, a judgment of the Free State High Court reported in SAFLII (25/2006) [2007] ZAFSHC 39, and confirmed on appeal by the SCA on 26 November 2008 under case no 145/2008 – neutral citation: **PRETORIUS v THE STATE** (271/2008)[2008] ZASCA 132 (26 November 2008) - the court came out strongly in favour of stricter sentences for white collar crimes and quoted the following from **S v SADLER** 2000 (1) SACR 331 SCA at 335g – 336b:

> "[11] So called 'white-collar' crime has, I regret to have to say, often been visited in South African courts with penalties which are calculated to make the game seem worth the candle.
>
> Justifications often advanced for such inadequate penalties are the classification of 'white-collar' crime as non-violent crime and its perpetrators (where they are first offenders) as not truly being 'criminals' or 'prison material' by reason of their often ostensibly respectable histories and backgrounds. Empty generalisations of

> that kind are of no help in assessing appropriate sentences for 'white-collar' crime. Their premise is that prison is only a place for those who commit crimes of violence and that it is not a place for people from 'respectable' backgrounds even if their dishonesty has caused substantial loss, was resorted to for no other reason than self-enrichment, and entailed gross breaches of trust.
>
> [12] These are heresies. Nothing will be gained by lending credence to them. Quite the contrary. The impression that crime of that kind is not regarded by the courts as seriously beyond the pale and will probably not be visited with rigorous punishment will be fostered and more will be tempted to indulge in it."

Particular attention is directed to the approach of the SCA in paragraphs 4 to 7 and 9 of **PRETORIUS** *loc cit* pertaining to payment by an accused to a complainant to make good losses suffered, correctional supervision and the approach of a court of appeal to a sentence imposed by the court of first instance.

[16] Applicant is an accountant and businessman. He acted as administrator of an estate and was in a position of trust.

His position is no different to that of an attorney dealing with trust moneys and misappropriating same. Our reported judgments are abound of examples where attorneys having been found guilty of theft of even lesser amounts than applicable *in casu*, were sent to prison even though they were first offenders.

[17] There is no merit in the application for leave to appeal against conviction and sentence.

[18] The last aspect to be adjudicated is the application for extension of bail pending a possible petition to the Supreme Court of Appeal. Bail was originally granted to applicant by the Magistrates' Court earlier and applicant at all times complied with his bail conditions. On 14 March 2012 Van Zyl J again granted bail to applicant once his application for leave to appeal was dismissed by the court *a quo.* His bail was extended by Lekale J on 28 May 2012 until applicant's application for leave to appeal against the dismissal of his petition has been decided. It is now necessary to consider whether bail should be extended as requested by applicant.

[19] I requested both counsel to indicate whether they were aware of any case law to the effect that a lighter test should be applied in considering bail pending appeal than the test applicable to applications for leave to appeal. They were unable to assist us.

[20] The applicant's prospects of success on appeal is a consideration which together with other factors may lend to the granting (or extension) of bail pending an appeal. There must at least be a reasonable prospect of success on appeal. However in **S v DE VILLIERS EN 'N ANDER** 1999 (1) SACR 297 (O) at 310c-e it was held that bail pending appeal ought not lightly to be refused on the sole ground of absence of reasonable prospects of success. This judgment was delivered soon after the introduction of an application for leave to appeal procedure in the Magistrates' Courts and must be seen in the appropriate context. The court found that it might be in the interest of justice rather to grant bail pending an appeal - except in the clearest cases - if all the other requirements for bail had been satisfied. See also **S v RICHARDSON** 1992 (2)

SACR 169 (E) at 171j and **<u>S v HUDSON</u>** 1996 (1) SACR 431 (W) at 433 – 434.

[21] In *casu* the court *a quo* has already refused leave to appeal. We have earlier refused applicant's petition and his present application for leave to appeal must fail as well. Although the other factors to be considered in bail applications are in applicant's favour, I am of the view that the further appeal procedure available to applicant is doomed to fail. Consequently the application for extension of applicant's bail should be refused.

[22] Consequently the following orders do issue:

22.1 Applicant's application for leave to appeal against his conviction and sentence in the Regional Court, Bloemfontein is refused;

22.2 Applicant's application for the extension of his bail pending further appeal proceedings is refused.

J. P. DAFFUE, J

I concur.

N. SNELLEBURG, AJ

On behalf of the applicant:	Adv. D Dörfling SC Instructed by: Martins Attorneys BLOEMFONTEIN
On behalf of the respondent:	Adv. V de Bruyn Instructed by: The Director: Public Prosecutions BLOEMFONTEIN

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