IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION **Case No. CA&R 206/07**

In the matter between

EUGENE PEFFER **Appellant**

and

THE STATE **Respondent**

JUDGMENT

Froneman J.

[1] This is an appeal against a sentence of six years' imprisonment (of which two years were conditionally suspended) imposed in the Specialized Commercial Crimes Court, Port Elizabeth upon the appellant, an attorney who was convicted of stealing trust money in the total amount of R215776,00 during the period from July 2003 to March 2005. The main ground of appeal relied upon during argument was that the regional magistrate misdirected herself in her judgment on sentence by finding that the appellant had a "propensity in being involved in offences involving dishonesty", a submission which will be dealt with more fully later in this judgment.

[2] The appellant pleaded guilty to the main count of theft and submitted a statement in terms of section 112 (2) of the Criminal Procedure Act 51 of 1977 in elaboration of his plea. The state accepted the plea and its factual basis and after further questioning by the magistrate the appellant was convicted on an acceptance of this plea. In the

sentence proceedings the evidence of a correctional supervision officer, Mrs. Nyoka, was presented as well as that of a professional colleague of the appellant and his brother. From this evidence it emerged that the appellant is considered to be a suitable candidate for correctional supervision, that he had a reputation for integrity as a professional colleague in the courts, and that he came from a respected family in the community. From his own evidence it appeared that after teaching for a few years he qualified as an attorney and ran a respected and apparently fairly successful professional practice for more than twenty years. During that time he also did community work, was a founding member of the National Association of Democratic Lawyers (Nadel) and also participated in what may loosely be described as *pro bono* work on behalf of needy individuals. He is 57 years old, has been married to his wife, a teacher, for some 34 years, has two independent daughters (one in her early thirties and the other in her twenties) and by all accounts lives within a stable and loving family environment.

[3] What accounted for the appellant's fall from grace were mounting debts and a diminishing income from his practice. As stated earlier, his use of trust funds to deal with these problems started in mid 2003 and continued until March 2005. During that period the appellant also lectured at the then University of Port Elizabeth, but his testimony was that this additional income was used in the main to pay back what he owed the receiver of revenue, both for outstanding income tax and for fines imposed in relation to his convictions under the Income Tax Act 58 of 1962. Realising that his troubles were not going to disappear he resigned from his lecturing post in order to save the university any embarrassment. One of his clients insisted on repayment of

R75000,00 owed to him. The appellant managed to borrow this money and paid it over, but the matter was then reported to the police.

[4] Once that happened the appellant gave his full co-operation to the police and prosecuting authorities. The Law Society brought an application to court for his suspension from practice in 2005. Since then he had been employed in different capacities, but at the time of the compilation of the correctional supervision report he was unemployed. His wife still works as a teacher and it appears that she is the current mainstay in the support of the family. The clients from whom the appellant stole the money have been reimbursed from the Attorneys Fidelity Fund. On appeal it was common cause that the appellant's house will be sold in terms of asset forfeiture legislation and that it is anticipated that the proceeds will be used to repay the Fund.

[5] Mr. Wessels, who appeared for the appellant on appeal (but not at the trial), submitted that the magistrate wrongly assumed that the appellant's previous convictions under the Income Tax Act 58 of 1962 involved dishonesty on his part. The SAP 69 merely reflects convictions under "Act/Ord 58 of 1962" as "general offences" committed on 25 August 1997. There are, nevertheless, an impressive number of previous convictions, namely six of them involving some 87 counts. The sentences imposed range from R6000,00 (or three years imprisonment) to R80000,00 or 48 months imprisonment, and all but one of them were either wholly or partially suspended on conditions relating to the future non-contravention of various aspects of the Income Tax Act, the VAT Act and the Skills Development Act. The submission advanced by Mr. Wessels was that the reference to these different provisions did not justify any inference of a propensity of dishonesty on the part of the appellant.

[6] In my judgment the attack on the magistrate's judgment in this regard does not properly take into account the context in which the passage appears in her judgment. The reference to "offences involving dishonesty" follows upon a discussion not only of the Income Tax Act offences, but also the fact that the appellant committed the offences in this particular matter over a sustained period of time and that he did not in detail account for what he did with the money he stole. In addition, what is overlooked is that the appellant himself conceded that he was not acting dishonestly for the first time in the following passage when questioned by the magistrate:

"You would further appreciated at the time of the commission of the offence, that it was not for your first time to act in a very dishonest way, seeing that you had been convicted in the SARS matters ? --- Yes, Your Worship."

[12] Even accepting Mr. Wessels's submission that the previous convictions as recorded on the SAP 69 do not in themselves justify an inference of dishonesty in their commission, the appellant's own admission does. And what else does the fact that the appellant, very soon after the commission of the tax offences, embarked on a prolonged endeavour of stealing trust money from clients show other than sustained dishonesty? He did not stop until the matter was reported to the police and at no stage voluntarily attempted to recompense the persons who suffered as a result of his actions. His property was seized by the asset forfeiture unit, not offered by him for sale for the benefit of those who suffered from his theft.

[13] I can also find no fault in the magistrate's criticism of the appellant's failure to explain in more detail what he did with the money he stole. The magistrate accepted

that he did not use it to luxuriously enrich himself, but neither is there any convincing explanation why he could not have attempted to make good some of the deficit at an earlier stage, before he was caught.

[14] It was also submitted that the magistrate erred in her conclusion that no form of correctional supervision was a suitable sentence option. I do not agree. The appellant has been convicted of a very serious offence. His conduct, over an extended period of time, has done irretrievable harm to the profession he practised (*S v Vorster* 2007 (2) SACR 283 (E) at 289h- 290j). Persons in similar, and perhaps even much more deserving circumstances, have been held not to be suitable persons for correctional supervision (compare *S v Elliot* 1996 (2) SACR 531 (E)). The sentence imposed is also not in my view shockingly inappropriate or disproportionate.

[15] The appeal against sentence is dismissed.

J.C.Froneman 24/10/07

Judge of the High Court.

I agree.

C.M.Plasket

Judge of the High Court.