**IN THE HIGH COURT OF SOUTH AFRICA**

**KWAZULU NATAL DIVISION, DURBAN**

CASE NO. AR233/05

22 March 2017

In the matter between:

**THE STATE**

**and**

**I S**

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**JUDGMENT ON SENTENCE**

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**STEYN J**

[1] The accused a former attorney was convicted on a count of theft by general deficiency of R5 728 310.75 on 4 August 2016. During the time when the offence was committed he practiced as an attorney for his own account under the name of S. and Company, La Lucia Ridge.

[2] The sentencing phase of a trial is the most difficult phase for any presiding officer. This case is no different, mainly because the focus now shifts from the merits of the case to factors which are irrelevant to the merits, such as the motive for the crime, the personal circumstances of the accused, the impact of the crime on the victims and society's interest. One of the reasons for this difficulty is that there is no universal formula to apply to each and every case that results in an appropriate sentence.

[3] In deciding upon an appropriate sentence, it is expected of me to have regard to the purpose of sentencing, which would be deterrent, reformative and retributive. To achieve it, I should have regard to the accused's personal circumstances and needs, the nature of the crime and the interests of society. None of these factors must be over or under emphasised. An appropriate sentence is one which gives a balanced consideration to the offender, the crime and society. A value judgment has to be made taking into account the aims of punishment and to keep in mind the triad factors as stated in *S v Zinn.*[1] Recently it is expected of a presiding officer to be mindful of the obligations posed by the Constitution[2] whence sentencing. In this case the constitutional obligation is to consider the interests of the accused's child and that of his wife, since he is the primary caregiver of both.

[4] In consideration of the constitutional imperatives when sentencing a primary caregiver, I am obligated to consider s 28(2) of the Constitution and the jurisprudence that developed over the years (see *S v M* 2007 (2) SACR 539 (CC); *S v Chetty* 2013 (2) SACR 143 (SCA); *MS v S* 2011 (2) SACR 88 (CC); and *S v De*

[1] 1969 (2) SA 537 (A) at 540G.
[2] The Constitution of the Republic of South Africa, 1996.

*Villiers* 2016 (1) SACR 148 (SCA)). The importance of *M supra* is that a court in sentencing a primary caregiver, should consider the child's interest as one of the factors in addition to the *Zinn* triad. At 562a-c Sachs J concluded:

> 'Sentencing officers cannot always protect the children from these consequences. They can, however, pay appropriate attention to them and take reasonable steps to minimise damage. The paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely, the interests of children who may be concerned.'

[5] It is common cause that the Criminal Law Amendment Act 105 of 1997 finds application and that the matter falls within the purview of Part 2 of Schedule 2 of the Act. In terms of s 51(2)(a)(i) the legislature has prescribed 15 years' imprisonment for a first offender found guilty of an offence of this kind, unless substantial and compelling circumstances exist which would justify the imposition of a lesser sentence.

[6] I will take due cognisance of the Supreme Court of Appeal's approach and the Constitutional Court when deciding upon the circumstances of the accused and whether it constitutes substantial and compelling circumstances (See *S v Malgas* 2001 (1) SACR 469 (SCA) and *S v Dodo* 2001 (1) SACR 594 (CC) at 602-603 and *S v Blignaut* 2008 (1) SACR 78 (SCA) para 3 and *S v Nkunkuma & others* 2014 (2) SACR 168 (SCA) paras 9 and 10.)

[7] In a number of sentencing judgments little more than lip service has been paid to *Malgas*. It is therefore necessary to deal with the judgments of the Supreme Court of Appeal and High Courts where *Malgas* was discussed and followed before I come to an ultimate conclusion. I align myself with the words of Ponnan JA (para 23) in *S v Matyityi* 2011(1) SACR 40 (SCA):

> 'As *Malgas* makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and like other arms of state owe their

> fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of State. Here Parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as "relative youthfulness" or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order.'

[8] The following personal circumstances of Mr S. will be taken into account:

He is 51 years of age, married with two children. He earns an income of between R80 000 – R100 000 per month. His income is derived from conducting a legal consulting business called Advanced Legal Services (Pty) Ltd and Advanced Consumer Protection Services. He is the primary caregiver of his daughter T. and his wife C. who is presently being treated at the Waynol Anti-Narcotics Christian Manor at ±R6 500.00 per month. His daughter is 16 years old, diagnosed with dyscalculia, a condition whereby she finds it challenging to process numerical data. Mr S. suffers from epilepsy, and is a first offender. Most of the accused's and his family's circumstances were dealt with in detail in exhibits "WWW", "YYY" and "ZZZ".

[9] The following witnesses testified in mitigation of sentence:

(i) The accused;

(ii) Mr Mack, an educational psychologist;

(iii) Mrs Purchase, a family friend;

(iv) Ms Phillipa Styles, a clinical psychologist; and

(v) Ms Amanda Randle, a liquidator, employed by Manci Knoop.

[10] In aggravation of sentence the State called the following witnesses:

(i) Mr Ernest Tshedzumba, a forensic investigator employed by the Fidelity Fund; and

(ii) Mr Clive Willows, a clinical psychologist.

[11] Ms Styles' evidence and her report focussed mainly on the accused's personal circumstances. As much as she collected information from various sources, it cannot be overlooked that she ignored the findings of this court regarding the credibility of the accused. According to her she did not understand the nuances of the judgment. An objective analysis of her report shows that she placed more reliance on the accused's views than the court findings. Throughout her report and her evidence, the denial of the accused that he had stolen any money was repeated. She stated categorically that the accused is remorseful despite the fact that he denied any wrongdoing. According to him he caused his friends financial losses and harm but he never intended stealing any money. Ms Styles recommended a non-custodial sentence for the accused. Mr Mack's evidence confirmed the fact that Mr S. is a primary caregiver and that T. is a special needs child. Ms Randle's evidence served little purpose since the liquidation is not finalised and the likelihood exists that creditors may challenge the final account.

[12] Mr Willows, the psychologist that was called by the State, explained in his report that he used the judgment on merits and the findings of this court that the accused had acted purposefully and with the necessary intent, as one version. The accused was not prepared to admit guilt. The accused's conduct was described as follows by Mr Willows:

> 'He accepts responsibility for losing money that was entrusted to him. He maintains that he never intended to steal or to act illegally, but accepts that it was his poor management that resulted in this loss.'

On page 6 of the Willows report the accused, however, views himself as being unfairly victimised and having suffered considerable consequences, as a result of a perceived relentless pursuit of this case by his former friends and colleagues. His

intention, according to him, was to enrich others based on his knowledge, expertise and generosity.

[13] All of the evidence presented would be considered in determining remorse. The accused's conduct post-conviction would be analysed so as to not merely accept the *ipsi dixit* of the accused that he is remorseful.

Mr Howse in his address on remorse placed *inter alia* reliance on *Hewitt v The State* (637/2015) [2016] ZASCA 100 (9 June 2016) and *S v Pistorius* (CC113/2013) [2016] ZAGPPHC 724 (6 July 2016) as well as the comments by the authors Du Toit *et al* 'Commentary on the Criminal Procedure Act' at 28-6J-3-4. He asked that the accused's circumstances be regarded as substantial and compelling and that the accused as the primary caregiver be given a non-custodial sentence.

[14] The case of *Pistorius* was cited by Mr Howse because Mr Pistorius, like Mr S., attempted to ask for the forgiveness of the Steenkamp family. I have great difficulty in comparing the conduct of Mr S. with that of Pistorius who failed in his attempt to apologise to the Steenkamp family. Masipa J in Pistorius's case referred to the fact that the accused had publicly apologised to the parents of the deceased. At no time when witnesses like Mr O'Connor testified were they offered a public apology in court. At best it can be accepted that the accused at the time of being a fugitive, tendered an apology, to Messrs Sevel and O'Connor. It has to be borne in mind that his call to Mr O'Connor lasted 20 seconds when he attempted to apologise. I have been informed that the accused during an adjournment to the trial sought permission from the State to apologise to Mr O'Connor. In my view the appropriate time to tender such would have been after conviction, and it would require a genuine apology, i.e. accepting the responsibility of his wrongdoing. I agree, as I should, with the Supreme Court of Appeal's decision in *Hewitt* para 16, that it is indeed correct that a lack of remorse is not an aggravating factor. On the other end of the scale it is true that remorse cannot be taken into account as a mitigating factor if it is not genuine and not displayed in the conduct of the accused.

[15] Remorse has been aptly described by Ponnan JA in *S v Matyityi supra* para 13:

> 'Remorse was said to be manifested in him pleading guilty and apologising, through his counsel (who did so on his behalf from the bar) to both Ms KD and Mr Cannon. It has been held, quite correctly, that a plea of guilty in the face of an open and shut case against an accused person is a neutral factor. The evidence linking the respondent to the crimes was overwhelming. In addition to the stolen items found at the home of his girlfriend, there was DNA evidence linking him to the crime scene, pointings-out made by him, and his positive identification at an identification parade. There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions. There is no indication that any of this, all of which was peculiarly within the respondent's knowledge, was explored in this case.'

(Footnotes omitted.)

[16] Whether an accused professes remorse is not the test. The penitence must be sincere and an offender should take the court into his confidence. As can be seen from the accused's own evidence and the experts, he considers himself not guilty. Whilst it is acknowledged that he as of right may challenge any conviction, it cannot be found, given the circumstances and facts of this case, that the accused is remorseful.

[17] Mr Truter, on behalf of the State, has argued that the circumstances presented by the accused do not on any level constitute substantial and compelling circumstances and accordingly asked that the accused receive the prescribed

sentence of 15 years' imprisonment. Mr Truter also argued that the accused's lack of remorse and the fact that he abused his position of trust should serve as aggravating factors. The State argued that the accused had failed to take the court into his confidence. Throughout the trial he tried to rationalise his conduct and in the end engineered a defence.

[18] In my view the crime of which the accused has been convicted is undoubtedly a serious one. He betrayed the trust that the public in general should have in officers of the court. The attorneys' profession is a noble profession and it plays a vital role in the administration of justice. Over time it has been shown that attorneys are held in high esteem by members of society and that society places trust in them. It is this trust that the accused betrayed. He brought the profession into disrepute. Evidence was placed before me by the Attorneys Fidelity Fund that shows that the Fund in the past fifteen years has been exposed to various claims arising out of theft of trust money. In the 2015 financial year it reached R120 million. The accused also betrayed the trust of his best friend, Mr Garth O'Connor.

[19] The trial was delayed for a number of reasons, shortly after the theft was discovered he left the country and became a fugitive. At this time he abandoned his heavily pregnant wife and his practice in order to evade justice. The accused was only extradited in 2004, whereafter he appeared before the magistrates' court on charges of theft and fraud. Subsequent to the extradition he challenged the authority of the State to charge him with offences in respect of which he was not extradited and the Supreme Court of Appeal delivered judgment on 30 May 2008. He also applied for a permanent stay of prosecution, which was unsuccessful and judgment was delivered on 21 January 2007. The first witness in his trial was only called on 7 August 2014. The sentencing proceedings commenced on 26 October 2016 and were finalised on 14 March 2017. In addition, the amount that he stole by far exceeds the amount of R500 000 in respect of which the legislature prescribed a sentence of 15 years' imprisonment.

[20] Despite these factors it cannot be overlooked that the accused suffers from epilepsy and is the primary caregiver of a special needs daughter and a wife who has serious psychological problems. At present his wife is institutionalised at the Waylon Centre. I am persuaded that his health, his primary caregiver status and being a first offender, viewed cumulatively constitute substantial and compelling circumstances to deviate from the prescribed minimum sentence.

[21] What follows is a synopsis of sentences imposed by our courts for similar offences. What would be considered in referencing to these cases is not factual similarities but the principles followed in these cases.

In *S v Sinden* 1995 (2) SACR 704 (A) the Appellate court confirmed a custodial sentence in circumstances wherein the accused showed no sign of true remorse and persistently and deliberately betrayed the trust of her employer.

In *S v Sadler* 2000 (1) SACR 331 (SCA) paras 11 to 12:

> '[11] I am satisfied that the circumstances of this case call for the imposition of a period of direct imprisonment and that the interests of justice will not be adequately served by leaving the sentence imposed by Squires J undisturbed. 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.'

In *S v Brown* 2015 (1) SACR 211 (SCA) the court at para 121 stated as follows:

> '[121] In my view the sentence imposed by the court below tends toward bringing the administration of justice into disrepute. Less privileged people who were convicted of theft of items of minimal value have had custodial sentences imposed. We must

guard against creating the impression that there are two streams of justice, one for the rich and one for the poor.'

(Footnote omitted.)

[22] In my view a non-custodial sentence would over-emphasise the personal circumstances of the accused and under-emphasise the nature of the crime and the interests of society. I align myself with the views of Alexander J in *S v Nathan* 1992 (1) SACR 467 (N) at 471j-472b:

> 'While every case must be decided according to its own facts it is nevertheless quite evident that this is a serious matter exacerbated by the fact that it is committed by a person who is supposed to maintain the highest professional standards of integrity. In convincing yourself by your actions you debase your own profession. That is something which the Court cannot lightly disregard. This is a case where it could well be said that the public is entitled to expect a punishment which would reflect its indignation that such a state of affairs could have been allowed to continue for as long as it did. This is the element of retribution which is often mentioned as one of the factors in punishment. It also goes hand in hand with the element of deterrence in the sense that the severity of a retributive sentence may well deter others who would be minded to follow the dishonest path. Those are the factors I must bear in mind and balance them against the personal factors which stand to your credit.'[3]

[23] If I was solely guided by the accused's individual circumstances then correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act 51 of 1977 would have suited his needs. The aforesaid section however provides for a sentence not exceeding 3 years' imprisonment. It is expected of me not to find a sentence that fits the needs of the accused. The sentence should also be in the interests of society and serve as a deterrent to prevent other professionals from doing the same when entrusted with clients' money. Of course there is also s 276(1)(i) of the Criminal Procedure Act which would result in the sentence being custodial in part. A sentence in terms of the aforesaid provision should however be imposed if the offence does not warrant a term of imprisonment exceeding 5 years. An objective determination of the circumstances and facts of this case warrant a period of imprisonment that exceeds 5 years in my view. The accused is not remorseful, he was in a position of trust. Further to this, he never divorced himself

[3] See *S v Vorster* 2007 (2) SACR 283 (E) at 290h-j.

from his income to compensate any of the complainants. It has been a theme throughout the sentencing phase that the accused is not a criminal in the true sense of the word. In my view this notion is misplaced. Every person convicted of a crime is a criminal.

[24] The theft, albeit theft by deficiency, was committed whilst he was an attorney. As has been said in cases like *De Villiers,* society must be assured that persons who abuse positions of trust would be punished appropriately.

[25] I am also mindful of what has been said by our Supreme Court of Appeal in *S v Abrahams* 2002 (1) SACR 116 (SCA), where Cameron JA at 126 stated:

> 'Even when substantial and compelling circumstances are found to exist, the fact that the Legislature has set a high prescribed sentence as "ordinarily appropriate" is a consideration that the courts are "to respect and not merely pay lip service to". When sentence is ultimately imposed due regard must therefore be paid to what the Legislature has set as the bench mark.'

(Footnotes omitted.)

[26] I do not consider, having balanced all the circumstances placed before me, that it would be objectively offensive to justice to impose a custodial sentence for the crime committed. A custodial sentence is neither disproportionate to the serious nature of the crime nor is it startlingly inappropriate. I have reached this conclusion after having weighed all the facts and circumstances placed before me that in mitigation of sentence and in aggravation of sentence I impose the following sentence having due regard to all the facts.

[27] It is expected of me not to ignore the fate of those you care for. I will not. T., however, has a grandmother, an older brother and uncles who can step in and care for her should her extended family find it in their hearts to do so. Neither she nor her mother are left without any family to care for them. Whilst they may not maintain the

same lifestyle as they had up until now, that is not the test. In passing sentence I will not ignore their rights.

[28] **Sentence**

[28.1] The accused is sentenced to 12 years' imprisonment of which 6 years' imprisonment is suspended for 5 years on the condition that the accused is not convicted of an offence of theft or any offence that is a competent verdict on a charge of theft committed during the period of suspension.

[28.2] The Registrar of this court is ordered to immediately direct the Department of Social Development to do the following:

(a) The Department must appoint a designated social worker as contemplated by the Children's Act 38 of 2005 to investigate in terms of ss 47(1) and 155(2) of the Act, whether T. S. is a minor child in need of care. The Department must do this without delay and take all steps necessary to ensure that:

(i) she is properly cared for in all respects;

(ii) she remains in contact with the accused during this period of imprisonment, and has contact with him insofar as it is permitted by the Department of Correctional Services; and

(iii) she receives the necessary educational support given her required special needs.

(b) The Department of Social Development and Health must investigate the medical circumstances of the accused's wife, C. S., without delay and take all steps necessary to assist in her psychiatric evaluation, and, if required, to facilitate her voluntary admission to the Ekuhlengeni Care Centre or any other appropriate institution qualified to deal with her mental condition.