REPORTABLE.

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO. : A414/10

Date Delivered: 3rd December 2010

In the matter between:

NKOSANA GARETH VAVEKI **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

MATTHEE AJ :

[1] Appellant was convicted on 10th June 2008 of one count of theft of trust money in the amount of R656 500 – 35 (read with section 100 of the Criminal Procedure Act 51 of 1977, hereafter the Act). On 31st July 2008 Appellant was sentenced to:

"1. To pay a fine of R100 000 – 00 (one hundred thousand

rand) and in default of payment to undergo a period of 3 (three) years of imprisonment.

A further 5 (five) years imprisonment is suspended for a period of 5 (five) years on conditions that:

1.1 the accused is not again convicted of theft/fraud or an attempt to commit either of these offences, and in respect of which conviction the accused is sentenced to a term of imprisonment without the option of a fine, committed during the period of suspension.

1.2 The accused pays the sum of R656 500 – 00 (six hundred and fifty six thousand five hundred rand) to the Attorneys Fidelity Fund by no later than 31/12/2008.

2. In terms of Section 103(1) of the Firearms Control Act 60 of 2000 – Accused not declared unfit to possess a firearm."

[2] The payment of the fine was deferred and was subsequently paid by Appellant during 2008.

[3] Appellant did not comply with the condition of payment of the R656 500 – 00 and on 4 December 2009 the suspended sentence was put into operation and Appellant was committed to prison to serve the 5 year sentence.

[4] On 28th January 2010 Appellant unsuccessfully applied to the court *a quo* for Condonation of the late filing of The Application For Leave To Appeal and for Leave To Appeal against sentence.

[5] Thereafter Appellant petitioned this Court for Condonation of the late filing of The Application For Leave To Appeal and for Appeal against sentence. On 9th June 2010 this Court granted Leave To Appeal. On the same day Appellant was granted bail pending the outcome of his Appeal. Appellant accordingly spent some 6 months in prison.

[6] At his trial Appellant initially pleaded not guilty. He chose not to reveal the basis of his defence to the court. After two witnesses testified on behalf of the state, Appellant changed his plea and made admissions in terms of section 220 of the Act. In the admissions Appellant set out the circumstances of the theft of the trust money in the amount of

R656 500 – 35. In essence Appellant admitted that during the period January 2003 to April 2005 he appropriated an amount of R656 500 – 35 from his Trust Account, money which had been entrusted to him by members of the public, pending the finalisation of their matters by his firm. These admissions were accepted by the state and Appellant was duly convicted as charged.

[7] The matter was postponed for a correctional supervision officer's report and thereafter Appellant was sentenced as set out above.

[8] In sentencing Appellant the court *a quo* sought to balance the competing interests when it comes to sentencing. In this regard, both from what he stated at the trial and from the design of the sentence, it is clear that the magistrate decided that in principle it should be made possible for Appellant to avoid an effective term of imprisonment and that by doing so all the competing interests of sentencing can adequately be met. Also of great import to the magistrate was that the victim receive compensation for its loss. In this regard the magistrate stated as follows:

"... this court is of the view that what is important in this instance is that the monies that you have removed from the trust account and which then has been funded by the attorneys fidelity fund, need to be repaid by you... this court is going to give you the opportunity to stay out of jail because you have the means to earn sufficient to repay these monies and that is the only reason that you are being allowed to stay out of prison, but conditions are going to be imposed that will ensure you make the payment, because if you fail to do it, then the alternative is a term in prison.... This court is giving you the opportunity to stay out of jail and you need...to take this opportunity with both hands...."

[9] At the hearing on 4th December 2009 for the execution of the suspended sentence Appellant did not complain about the sentence or request that the conditions attached by the magistrate be deferred, he merely asked that the court show him mercy. The magistrate ordered that in terms of section 297(9) (a) (ii) of the Act Appellant's suspended sentence be put into operation forthwith.

[10] Appellant's application for Condonation and for Leave To Appeal in the magistrate's court was filed some eighteen

months after judgment and sentence were handed down by the court *a quo.*

[11] In essence the only reason forwarded by Appellant in seeking condonation for this long delay was that he "put all my efforts to ensuring that I place myself in a position (financially) to meet the conditions of sentence and was a month away at the time of the arrest of realising the fruits of my efforts."

[12] In his condonation application Appellant for the first time indicates that he was not satisfied with the sentence when first imposed in July 2008. He proffers no acceptable reason or explanation for failing to act on this dissatisfaction for eighteen months. Nor does he give any reason for his failure to apply to the court *a quo* during this period for an amendment to the conditions imposed by the court *a quo*, especially in the light of his alleged change of personal circumstances subsequent to the sentence being imposed highlighted by him in his application for condonation.

[13] In Appellant's Petition For Condonation to this Court, in substance he takes the matter no further. If anything he

exacerbates his failure to act timeously by trying to argue that as a "conveyancing/commercial law practitioner, my criminal law was suspect" and that it was only when he was incarcerated that he established that his sentence was harsh and/or unfair. If one has regard to *inter alia* that Appellant holds an LLM, was admitted as an Attorney, Notary and Conveyancer in 1998, had his own practice since 1998, was a member of a committee of the Law Society, had acted as a magistrate in the Cape Town Magistrate's Court prior to his trial and conviction and was legally represented at his trial, this argument of Appellant must be rejected.

[14] In my view Appellant has given no explanation whatsoever for the long delay in seeking leave to appeal.

[15] This raises the issue of whether or not in such a case a court should even consider the prospects of success of Appellant.

[16] In *S v Van Der Westhuizen* 2009(2) SACR 350 (SCA) at page 353 paragraphs [4] and [5] Snyders JA states:

"[4] When an application for condonation is considered the

court has to exercise a judicial discretion upon a consideration of all the relevant facts. Factors such as the degree of non-compliance, the explanation for the delay, the prospects of success, the importance of the case, the nature of the relief, the interests in finality, the convenience of the court, the avoidance of unnecessary delay in the administration of justice and the degree of negligence of the persons responsible for non-compliance are taken into account. These factors are interrelated, for example, good prospects of success on appeal may compensate for a bad explanation for the delay.

[5] This court is only entitled to interfere with the discretion exercised by the court a quo if it was done capriciously or upon a wrong principle, if it has not brought an unbiased judgment to bear on the question or has not acted for substantial reasons."

[17] In this matter Snyders JA found at page 355 paragraph [14] that "The Appellant's explanation for the non-compliance with the rules amounts to no explanation at all."

[18] Having found this Snyders JA nevertheless proceeds to

examine the prospects of success on appeal of the appellant in that matter. It is my respectful view that this approach of Snyders JA supports the conclusion that even where there is "no explanation at all" for non-compliance by an appellant, the facts and circumstances of a particular matter, not least of all the prospects of success on appeal, may still override this absence of an explanation.

[19] Furthermore, I am of the opinion that in terms of the oath I have taken to uphold the Constitution, not only am I duty bound to uphold and promote the constitutional rights of all when approached by someone to do this, but I am also duty bound to act *mero motu* when it is required, especially where a person's dignity and liberty are at stake, as is the case where a person faces the prospect of imprisonment.

[20] A court always will have to be mindful of the constraints imposed on it by the record before it when it seeks to fulfil the duty on it to protect and promote the rights in the Constitution. However such constraints must not be allowed to prevent a court from fulfilling the said duty on it. As regards the approach to this duty on a court, I respectfully associate myself with the sentiments of Froneman J in the

matter of *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 (1) SA 141 at 152 (16), whilst recognizing that this judgment may not specifically address my finding that I am duty bound to act *mero motu* when required. This duty on me must inform every action and decision of mine as a judge, and I cannot permit an injustice to be perpetrated on an accused even if the accused is the author of or is partly to blame for such an injustice on himself. The oath compels me to be an active participant in the quest for justice for accused people (and litigants) and not merely an umpire or referee.

[21] Mindful of my constitutional duty and that in a condonation application the strength of an applicant's case can trump the absence of an explanation, I now turn to the merits of Appellant's case. (As regards my interpretation of Van Der Westhuizen *supra,* if it is incorrect, I am then of the view that the common law must be developed in this regard to make it conform to the constitutional duty on judges as set out above.)

[22] At the hearing of this appeal Ms Kloppers, who appeared for Appellant, *inter alia* argued that the court *a quo* over-emphasized the interests of the community at the expense of the personal circumstances of Appellant. She also argued that

the cumulative effect of the sentence resulted in a sentence which induced a sense of shock and that it not blended with an element of mercy.

[23] In my opinion these arguments have no merit. If anything, if one has regard to the nature of the crime, the various positions of trust and responsibility Appellant occupied at the time of the commission of the crime and the sentences imposed on other attorneys convicted of a similar crime, Appellant can count himself extremely fortunate that the magistrate decided to impose a sentence which in principle allowed him the option of serving no effective term of imprisonment.

[24] However an argument raised by Appellant which requires further attention is that when the court *a quo* imposed the sentence it did not adequately apply its mind to whether or not Appellant reasonably would be in a position to pay the two sums timeously so as to comply with the conditions of the sentence.

[25] In this regard the magistrate stated as follows:

" This court is going to give you the opportunity to stay out of jail because you have the means to earn sufficient to repay these monies and that is the only reason that you are being allowed to stay out of prison, but conditions are going to be imposed that will ensure you make the payment, because if you fail to do it, then the alternative is a term in prison....This court is giving you the opportunity to stay out of jail and you need, Mr Vaveki, to take this opportunity with both hands and make sure that you comply with each and every condition of the conditions of suspension because the conditions (are) going to be stringent so that all of the (objectives) of sentencing that were outlined to you at the beginning must be ensured, and this court will seek to uphold those objectives."

[26] In his judgment in Appellant's condonation application the magistrate reasoned as follows:

" ...the Court considered the circumstances of Mr Vaveki, took particular cognisance of the plea by the defence at the time that a non-custodial sentence, or rather a sentence that gives the accused an option to stay out of jail, could possibly be exercised for the reason that payment, or rather that compensation to the victim was eminently possible. The court

was informed at the time that the accused was in the process of selling a dwelling house that he owned and that the proceeds after the bond had been settled, would be more than sufficient to meet the amount of the compensatory order, and therefore the Court gave the accused the opportunity to stay out of jail by imposing a fine as an alternative to a term of imprisonment and a further suspended term of imprisonment on condition that compensation was paid to the complainant."

[27] Two things clearly emerge in the above extracts from the *court a quo*. Firstly, the magistrate was convinced that Appellant, with the necessary application, was in a position to pay the two amounts within the time period given by him. Secondly, he had decided that in the circumstances of the present matter it was appropriate to give Appellant an opportunity to raise the money so that there would be no effective term of imprisonment. As already indicated, as regards the latter Appellant can count himself extremely fortunate that the magistrate decided to use his sentencing discretion in such a merciful manner. Had he simply imposed an effective term of imprisonment, in my view no court would have interfered with such a sentence. Be that as it may, for purposes of this judgment it is important to remember that the

magistrate's aim when imposing sentence was to allow Appellant an opportunity to escape an effective term of imprisonment.

[28] Thus central to the conditions the magistrate imposed was his belief that according to Appellant himself, Appellant was able timeously to raise the two sums of money. In this regard the record does not support this view of the magistrate.

[29] During the sentencing stage of the trial, at one point Appellant's legal representative informed the court *a quo* that if Appellant sold his immovable property his proposed repayment time table could be greatly reduced. This after indicating that Appellant would be able to pay R10 000 – 00 per month for the first six months after sentence, R15 000 – 00 for the following six months and thereafter Appellant would endeavour to pay off the balance on the amount stolen, the proceeds from the possible sale of the said immovable property obviously being pivotal to this line of thinking.

[30] These submissions are not sufficient to support the magistrate's view that it had been informed at the time of

sentencing "that the accused was in the process of selling a dwelling house that he owned and that the proceeds after the bond had been settled, would be more than sufficient to meet the amount of the compensatory order."

[31] In any event the evidence of the claims director of the Attorneys Fidelity Fund, Mr du Plessis, clearly contradicts this conclusion of the magistrate. When asked by the state whether the Law Society had as yet initiated proceedings against Appellant to recover the stolen money he answered as follows:

"It was not done in this case your worship as funds indications were that it would not be worthwhile economically to act against Mr Vaveki. We became aware at a certain stage that he possessed a house, (immovable) property, but the property was bonded to such an extent that at the time it was decided not to take any action against Mr Vaveki for recovery."

[32] The principles applicable to an appeal against sentence are set out in *S v Malgas* 2001 (SACR) 469 SCA where Marais JA states as follows at 478 d – h:

"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate Court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'. It must be emphasised that in the latter situation the appellate Court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute a sentence which it thinks inappropriate

merely because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation."

[33] In the present matter I am of the opinion that the incorrect interpretation of the evidence concerning whether or not Appellant reasonably could be expected to meet the conditions of the payment of the fine and the repayment of the money stolen by Appellant, was a material misdirection by the magistrate. I conclude this as his sentence was premised on this wrong interpretation.

[34] Furthermore I am of the opinion that this misdirection arose, or is closely linked to, a further misdirection by the court *a quo*.

[35] Reynolds J in the matter of *Rex v Mashabane* 1950(4) SA 191 (EDLD) at page 192 F-G states:

"...it does seem that two principles at least should be observed in the imposition of the conditions. The first is that the condition imposed should bear at least some relationship

to the circumstances of the crime which is being punished by the imposition of the suspended sentence. ...The second is that the condition be stated with such precision that the convicted person may understand the ambit of the condition."

[36] In *S v Benn; S v Jordaan; S v Gabriels* 2004 (2) SACR 156 (CPD) at page 161a Bozalek J, referring to Reynolds J's two principles, states:

"In addition to these two requirements, a third has developed over the years, namely that the suspending condition has to be reasonable. Thus where it was found that a condition was unduly onerous for the accused and it was not reasonably possible for the accused to comply therewith, such a condition was set aside."

[37] In *S v Koko* 2006 (1) SACR 15 (CPD) at page 21 paragraph [21] Van Reenen J said that the purpose of suspending a sentence is two-fold: "The first is to avoid a repetition in the future of the criminal conduct of which an accused has been found guilty and the second is to obviate the deleterious consequences that direct imprisonment may have."

[38] I am in respectful agreement with these judgments.

[39] Having decided that he wanted to impose a sentence which made it possible for Appellant to avoid an effective period of imprisonment the court *a quo* ought to have made a more thorough investigation of Appellant's financial circumstances before he decided on the terms of the conditions he attached to the sentence. Had he done this he would have realised that his first impression of the evidence as regards Appellant's house was not correct. His failure to do this led him to impose an unreasonable condition on Appellant as far as the repayment of the stolen money was concerned, especially when combined with the fine Appellant also had to pay. In doing this he undermined one of the main purposes of a conditional sentence, "to obviate the deleterious consequences that direct imprisonment may have." (Koko *supra*). This failure to do a thorough investigation before imposing the conditions also amounts to a material misdirection.

[40] Accordingly this court would be entitled to consider the question of sentence afresh, if condonation was granted.

[41] Thus whilst no adequate explanation has been given for the delay, the merits of Appellant's appeal are sound. Furthermore, as already stated, my constitutional duty set out above compels me to intervene in the sentence of the court *a quo,* even if Appellant has failed in his responsibility to furnish the court with a reasonable explanation for his long delay and for his failure to seek an amendment to the conditions of the sentence imposed by the magistrate.

[42] In any event one of the main reasons for the court *a quo* not granting condonation was its incorrect interpretation of the evidence before it concerning the ability of Appellant to comply with the conditions of the sentence. For this reason alone, the magistrate cannot be said to have "acted for substantial reasons"(*Van Der Westhuizen supra*) when he refused condonation.

[43] I am of the opinion that in such circumstances it would be remiss of this court not to grant condonation to Appellant.

[44] Having found on the merits of the appeal that this court would be entitled to consider the question of sentence afresh, I now turn to the issue of an appropriate sentence.

[45] As is apparent from this judgment so far, I am of a view that the sentence imposed was not too severe and that Appellant can count himself very fortunate that the magistrate decided to try and keep him out of prison. However, although this court can consider the question of sentence afresh, in the absence of any notice to Appellant of a possible increase in his sentence, it would be improper for this court to impose a sentence more severe than that imposed by the magistrate. It also would be inappropriate for this Court to impose a suspended sentence with conditions which Appellant reasonably could not meet. The most obvious such condition being requiring Appellant to pay a fine and repay the money stolen within a certain time frame whilst this court is not in a position to decide on whether or not Appellant reasonably can be expected to meet such conditions.

[46] Another consideration of this Court must be the need to compensate the victim, quite correctly highlighted by the magistrate. In this regard, the victim must be placed in the same position it would have been was it not for the theft by Appellant. Consequently it would be appropriate if Appellant is held liable for the capital sum and any interest accrued on

it.

[47] As is obvious from what already has been stated in this judgment, an important question is whether Appellant reasonably is in a position to pay a large fine and compensate the victim within a time period stipulated by this court. In this regard, as highlighted above, where a court has decided that it wants to give a person the opportunity to avoid effective imprisonment by ordering a fine and/or a compensation order as an alternative or as a condition, it must endeavour as best possible to establish whether such person is in fact in a position to pay such amounts at all and/or within the time frames stipulated.

[48] If this is not done there is the ever present danger of favouring the rich over the poor which will be in conflict at least with section 9 (1) of the Constitution. Thus for example in the present matter the indications are that Appellant's resources outside of his own immediate resources were either very limited or non existent. The realities of South Africa include that the probabilities are that had the same sentence been imposed on an attorney who for many years had been part of a privileged community, such attorney would have

been able to access the amount of money involved and so prevent an effective period of imprisonment.

[49] It is thus important, to give effect and real content to the equality provision in the Constitution, for a court to be aware of the immediate and wider financial circumstances and history of an accused person where it decides to impose a fine or make a compensation order in terms of section 297.

[50] As I see it such an approach would be consistent with the decision in *Minister of Finance v Van Heerden* 2004(6) SA 121 (CC) as regards substantive equality.

At paragraph [26] thereof Moseneke J (as he then was) states:

"The jurisprudence of this Court makes plain that the proper reach of the equality right must be determined by reference to our history and the underlying values of the Constitution. As we have seen a major constitutional object is the creation of a non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights. From there emerges a conception of equality that goes beyond mere formal equality and mere non-discrimination

which requires identical treatment, whatever the starting point or impact."

At paragraph [27] he continues:

"This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution."

[51] There are obvious problems and dangers attached to applying such an approach to a practical situation such as the present one, not least of all trying to answer the question of how thorough an investigation into the personal and other financial resources of an accused must be to comply with the

substantive approach to the equality provision. In my view the use of section 300 of the Act can go a long way to address these problems and dangers. Where a section 300 award has been made there are then other procedures which can be followed by the parties which allows for a thorough investigation into the wider financial circumstances of the accused, the obvious procedure being a section 65 investigation in terms of the Magistrates' Courts Act 32 of 1944. In the present matter, if an order is made in terms of section 300 of the Act, the Law Society and Appellant would have the civil mechanisms in place to ensure that their respective rights are protected. (In my view the approach to substantive equality set out by Moseneke J must impact on all procedures and practices in our courts, which obviously will include a process such as a section 65 investigation.)

[52] The section 300 route also is better suited to addressing the main mischief a sentencing officer is seeking to address with a compensation order, namely that the victim be compensated. If a compensation order is made in terms of section 297 and made a condition of suspension of a prison sentence, as in the present matter, and the accused cannot meet the condition timeously, by going to prison the chances

of the accused ever compensating the victim become less than if the accused was kept out of prison and remained free to try and raise the money to pay the compensation awarded. The facts of the present matter clearly illustrate this.

[53] In the present matter there is sufficient information at this Court's disposal to make a decision about an appropriate amount for a fine. However it does not have sufficient information at its disposal properly to give effect to the need highlighted by the magistrate to compensate the victim by using section 297 of the Act without making the same error as the court *a quo* as regards the ability of Appellant to meet any conditions imposed by this court.

[54] An option open to this Court in this regard is to refer the matter back to the court *a quo*. For purposes of finality I am of the view that it would be unsatisfactory to further delay this matter by referring it back to the court *a quo.* Furthermore, given the sentence I have in mind and the amount of money stolen, the jurisdictional limits on the magistrates' court as far as the amount of compensation which a magistrate can award in terms of section 300 also precludes me from referring this matter back to the court *a quo.* (In this regard,

to facilitate a more creative and frequent use of section 300 of the Act by magistrates it might be prudent for parliament to consider amending the requisite legislation to remove the said jurisdictional limits when it comes to using section 300 of the Act. This could be seen as complementary to the efforts of the Department of Justice to train lower court magistrates so that they are equipped to fulfil their new civil law duties.)

[55] With this in mind, and accepting that on the issue of compensation section 300 of the Act would be a more appropriate vehicle in the present matter than using section 297 of the Act, I now turn to an appropriate sentence in the present matter.

[56] Section 300 states that after conviction of an offence which has caused damage to some person and "upon the application of the injured person or of the prosecutor acting on the instructions of the injured person" a court can make an award in terms of this section. Although not apparent in a single structured application in the record, I am satisfied that when the entire record is taken into account this requirement of section 300 of the Act is met. Similarly I am satisfied that all the other requirements of section 300 are also present in

the record as a whole.

[57] Having made this finding in the present matter, I would emphasize that it is not ideal for a court to have to read a record as a whole to decide whether or not the various requirements of section 300 have been met. It would be prudent for presiding officers to be more structured and disciplined in their approach when a compensation order in terms of section 300 of the Act presents itself as an option for sentence.

[58] In Du Toit *et al's Commentary On The Criminal Procedure Act,* there is a useful discussion at pages 29-2 and 29-3 on *inter alia* what such a more structured and disciplined approach would include. At page 29-3 the authors write:

> ***"(11) Practical guidelines have been laid down:***
>
> ***a) The court must obtain all relevant facts before making an award and especially as far as the following aspects are concerned:***
>
> - ***the amount of damages suffered, through proper evidence (SvJoxo & others...(1964(1) SA 368(E))369A-B; S v Mape & another 1972(1) SA 754 (E) 754H-755A; S v Msiza 1979(4) SA***

473 (T)475);

- *it must be clear that the damages were caused by the offence...;*
- *it must be clear who the injured person is...;*
- *that a proper application has been lodged by the injured person (S v Sion 1975(2) SA 184 (NC) 186A-B);*
- *that the prosecutor, where he brings the application, received proper instructions from the injured person....*

b) All relevant facts must be recorded (S v Claassens en 'n ander 1973(4) SA 300 (O) 301E).

c) The court must give early notice to the parties that an award may be considered (S v Van Rensburg 1974(2) SA 243 (T) 244H-245; S v Baadjies 1977(3) SA 61 (E) 63; ...).

d) The accused must be afforded the opportunity to address the court on the matter and to lead evidence (S v Maelane 1978(3) SA 528 (T); S v Msiza (supra) 475F-G).

e) The attention of the injured person (complainant) should be drawn to this section....

f) The court may not lay down a date before which

compensation should take place,...(...S v Tlame 1982(4) SA 319 (B)).

g) No alternative imprisonment in the event of non-payment of the compensation is possible (S v Luthuli 1972(4) SA 463 (N); S v Msiza (supra) 474-5; S v N & others 1980(3) SA 529 (Tk)).

h) An order to compensate in the event of culpa and traffic offences is not desirable (S v Du Plessis 1969(1) SA 72 (N); S v Dunywa 1973(3) SA 869 (E)). See also generally S v Mgabhi 2008 (2) SACR 377 (D).

i) Where the accused is to be sent to prison for a substantial period of time and has no assets, an order under s300 is usually inappropriate (S v Baloyi 1981(2) SA 227 (T)).

j) In S v Medell 1997(1) SACR 682 (C) a compensatory order under s300 was combined with a sentence of correctional supervision. The court held that as the accused did not have the means to comply with the compensatory order the trial magistrate should not have made the order. It was also held that a compensatory order was not a form of correctional supervision and that a failure to comply therewith did not entitle a court to reconsider or impose any other

punishment.

(12) If applicable, an award for compensation can form part of a plea and sentence agreement as provided for in terms of s105A. See also s105A(1)(a)(ii)(dd)."

Whilst the said discussion is useful, the approach in certain of the pre 1994 authorities cited must be weighed against the approach required by the Constitution as already dealt with in this judgment.

[59] Furthermore, for reasons already expounded upon in this judgment, I would disagree with the reservation expressed therein at the foot of page 29-3 with reference to the view of the author Terblanche that "a criminal court is not an ideal forum to resolve private law issues and that 'courts should rather make use of the opportunities provided by s 297 [of the Act], namely to impose compensation as part of the punishment as a suspensive condition to the sentence' ".

[60] I am of the view that section 300 needs to be used far more often and creatively than it is being used at the moment. The underlying concern of the reservation of Terblanche can be dealt with by a more structured and disciplined approach by the courts.

[61] Returning to the matter at hand, the assessment of what a court considers an appropriate sentence is always a difficult matter and this particular case is no exception.

[62] I have weighed up the various factors pertinent to sentence and have had specific regard to the magistrate's view that in the present matter Appellant should be given an opportunity to avoid an effective term of imprisonment and compensate the victim of his crime. In this regard I once again emphasize that Appellant must count himself very fortunate that the magistrate adopted this view. It also must be emphasized that it would be disingenuous of any practitioner in the future to use the sentence I am going to impose on Appellant as a precedent for similar offences. Any reliance on this judgment must take cognisance of the full judgment. In this regard it must also be noted that in arriving at a sentence I have been mindful of the fact that Appellant has spent about 6 months in prison.

[63] Accordingly I would allow the appeal and make the following order:

1. The sentence imposed by the Magistrate on Appellant is set aside and substituted by the following:

a. Appellant is to pay a fine of R100 000 – 00 (one hundred thousand rand) and in default of payment to undergo a period of 3 (three) years of imprisonment.

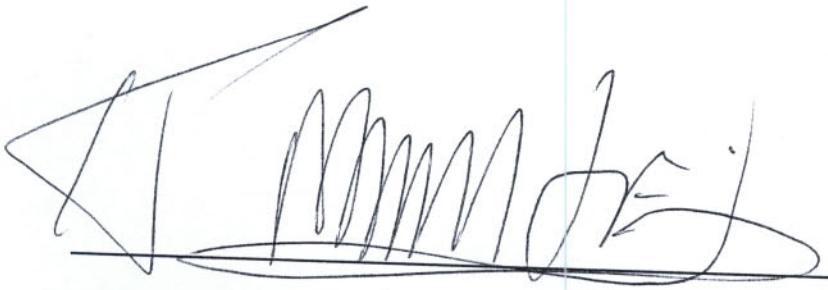
b. A further 5 (five) years imprisonment is suspended for a period of 5 (five) years on condition that the accused is not again convicted of theft or fraud or an attempt to commit either of these offences, and in respect of which conviction the accused is sentenced to a term of imprisonment without the option of a fine, committed during the period of suspension.

c. In terms of section 300 of Act 51 of 1977, the Attorneys Fidelity Fund is awarded compensation in the sum of R656 500 – 00 (six hundred and fifty six thousand five hundred rand), such compensatory award being against Appellant in favour of the Attorneys Fidelity Fund.

d. Appellant is further ordered to pay the Attorneys Fidelity Fund interest on R656 500 - 00, calculated at the legal rate

from the date of conviction to the date of payment of the R656 500 - 00.

e. In terms of Section 103(1) of the Firearms Control Act 60 of 2000 Appellant is not declared unfit to possess a firearm.



K MATTHEE

ACTING JUDGE OF THE HIGH COURT

ERASMUS, J

I agree, it is so ordered.

N ERASMUS

JUDGE OF THE HIGH COURT