REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

High Court Case No: A130//21
Magistrate Serial Number: SH/29/2020

In the matter between:

GIANMARCO LORENZI **Appellant**

And

THE STATE **Respondent**

Heard: 15 August 2024

Delivered Electronically: 29 August 2024

JUDGMENT ON BAIL APPEAL

LEKHULENI J

Introduction

[1] This is an appeal that the appellant lodged in terms of section 65(1)(a) of the Criminal Procedure Act 51 of 1977 *('the CPA')* against the refusal of bail by the Belville Specialised Commercial Crimes Court. The appeal was lodged pending the hearing of the appellant's application for reconsideration for leave to appeal in the Supreme Court of Appeal under section 17(2)(f) of the Superior Courts Act 10 of 2013 *('the Superior Courts Act')*.

The Factual Matrix

[2] In November 2020, the appellant was formally charged with 3 counts of theft read with section 51(2) of the Criminal Law Amendment Act 105 of 1997 *('the Minimum Sentences Act')* and 15 counts of theft in which the Minimum Sentences Act was not applicable. The appellant was also charged with 8 counts of forgery. The total sum misappropriated by the appellant is the sum 4.6 million. The appellant appeared at the Bellville Specialised Commercial Crimes Court and was subsequently released on warning and thereafter attended all court proceedings on his own recognisance.

[3] On 3 November 2022, the appellant pleaded guilty to all the charges levelled against him in terms of section 112(2) of the CPA. The appellant was subsequently convicted of 18 counts of theft, of which three counts fell within the purview of section 51(2) of the Criminal Law Amendment Act. The appellant was also convicted of 8 counts of forgery. After his conviction, the appellant's legal representative applied for the appellant to be released on warning pending the sentencing proceedings. The State did not oppose the application, and accordingly, the appellant was released on warning pending the finalisation of the sentencing proceedings. On 2 December 2022, after all the evidence was led in mitigation and aggravation of the sentence, the trial court *mero motu* cancelled the appellant's release on warning and ordered that the appellant be kept in custody until 13 December 2022, on which date the sentence was to be handed down.

[4] On 13 December 2022, the court found that there were substantial and compelling circumstances, departed from the prescribed minimum sentence and sentenced the appellant as follows: seven years direct imprisonment in respect of the three theft counts that fell within the ambit of the Minimum Sentences Act. The trial court also sentenced the appellant to seven years imprisonment in respect of the remaining theft charges (where the Minimum Sentences Act was not applicable). The court ordered that the sentences of seven years, respectively, run concurrently.

[5] The court also took the 8 forgery charges together for purposes of sentence and sentenced the appellant to 4 years direct imprisonment of which two years was suspended on certain specific conditions. The sentence in respect of the forgery

convictions was not ordered to run concurrently with the sentences in respect of the theft charges. The appellant was accordingly sentenced to an effective (9) nine years imprisonment.

[6] The appellant considered this sentence to be excessively harsh and shockingly inappropriate and subsequently instructed his legal representative to institute an appeal against the sentence. Indeed, the appellant applied for leave to appeal against his sentence, and the court *a quo* heard the application on 27 February 2023. The trial court refused the applicant's application. Subsequent thereto, the appellant petitioned the Western Cape High Court against the trial court's refusal to grant him leave to appeal. On 07 July 2023, this court considered the appellant's petition and accordingly refused leave to appeal.

[7] Convinced of his position, the appellant petitioned the Supreme Court of Appeal *('SCA')* on 16 August 2023 for special leave to appeal his sentence. The SCA similarly dismissed the appellant's application. Accordingly, on 20 November 2023, the appellant applied to the President of the SCA in terms of section 17(2)(f) of the Superior Courts Act to refer his application for special leave to appeal back to the SCA for reconsideration and variation. In that application, the appellant contended that the trial court misdirected itself on the facts when imposing sentence and, as such, could not have exercised its discretion judicially when doing so. Had the trial court established the correct facts, so the argument proceeded, the trial court would have found that the appellant had repaid the money misappropriated pursuant to a valid and legal settlement agreement concluded with the complainant. As a result thereof, the appellant contended that the trial court could have imposed a far lesser sentence, more specifically, a sentence in terms of section 276(1)(h) of the CPA, which the Department of Correctional Services proposed.

[8] The President of the SCA granted the appellant's application in terms of section 17(2)(f) on 25 March 2024. According to the appellant, the President found that exceptional circumstances existed in his matter; hence, she granted his application. The appellant further asserted that when the President of the SCA considered his application in terms of section 17(2)(f), the President must have considered that the appellant had reasonable prospects to appeal against his

sentence successfully. Hence, the President granted the application in terms of section 17(2)(f).

[9] The application for reconsideration is still pending in the SCA, and it is expected that it will be heard in the first term of 2025. At the hearing of this appeal, the court was informed that the appellant had filed his heads of argument with the SCA on 07 August 2024. If his application at the SCA is successful in early 2025, it is expected that the appellant will be granted leave to appeal his sentence to the Western Cape High Court.

[10] Pursuant to the finding of the President of the SCA, on 17 May 2024, the appellant brought an application in terms of section 60(11)(b) of the CPA to be released on bail before the trial court in Belville Specialised Commercial Crimes Court. The appellant submitted an affidavit in support of his application and contended that, taking into consideration all the facts set out in his affidavit, it would be in the interest of justice that he be granted bail.

[11] Furthermore, the application was predicated on the grounds that when the President of the SCA granted the appellant's application in terms of section 17(2)(f) of the Superior Courts Act, the President considered the relief sought by the appellant in his application and had regard to the likelihood of such relief being granted. The appellant contended that he has reasonable prospects of success in his application for leave to appeal his sentence and his appeal against the sentence.

[12] In addition, the appellant asserted in his affidavit that an order that all the sentences run concurrently coupled with the twenty-four months special remission which he received on 11 August 2023, would see him being eligible at the date of the bail application to apply for the conversion of his sentence under section 276A(3) of the CPA to correctional supervision. According to the appellant, this means that if it is ordered that the sentences run concurrently, the appellant will spend time in prison, which he should not have.

[13] The respondent, on the other hand, opposed the application and filed an affidavit from the investigating officer, Warrant Officer Voux, in opposition to the bail

application. In his affidavit, Mr Voux stated that the matter was serious and warrants direct imprisonment and that there were no real prospects that the court might impose a non-custodial sentence. Warrant Officer Voux also stated that the appellant was an Italian national with a passport. However, during the proceedings, the respondent's legal Counsel confirmed that the appellant's South African and Italian passports were in the Investigating Officer's possession. Warrant Officer Voux asserted that, in his opinion, the appellant was a flight risk, particularly considering the porous nature of our South African Borders. Furthermore, Mr Voux contended that the appellant showed no remorse for the crimes he committed.

[14] The magistrate considered the appellant's application and dismissed it. Amongst others, the magistrate found that the appellant is currently serving a sentence after he was correctly convicted of crimes where the Criminal Law Amendment Act 105 of 1997 applied to more than one count. The trial court concluded that the appellant was a flight risk and that it was not in the interest of justice to release the appellant on bail at this stage. As a result, the court *a quo* dismissed his application.

Grounds for the Bail Appeal

[15] The grounds of appeal as contained in the appellant’s notice of appeal dated 04 June 2024 are essentially that the magistrate erred in her finding in that the magistrate failed to consider the personal circumstances of the appellant specifically that the appellant is a South African citizen and that he has two immovable properties in the Western Cape, one of which is his fixed address. The appellant further asserted that the court *a quo* erred by failing to consider that by way of a High Court order, the appellant was declared the primary carer of his minor son in 2016, and that physical custody of the said child was equally shared with the mother prior to his incarceration.

[16] The appellant further stated in his grounds of appeal that the magistrate erred in ignoring that the appellant was a South African Citizen by birth and overemphasised the appellant's ancestral Italian citizenship. In addition, it was asserted that the court *a quo* erred in finding that as the appellant experienced a

sentence of imprisonment, he would, in all probability, not report for further incarceration when no such evidence was placed before the court. The appellant also contended that the court *a quo* erred by failing to consider at all any bail conditions that would have mitigated the court's concerns regarding the appellant absconding and not serving the remainder of his sentence if he is unsuccessful with his application for leave to appeal and the appeal.

The Issues

[17] The crisp question to be determined in this appeal is whether the appellant has discharged the burden placed on him by section 60(11)(b) of the CPA to be admitted to bail and whether the magistrate has indeed erred by refusing to grant the appellant bail.

Principal submissions by the parties

[18] At the hearing of this appeal, Mr Van der Merwe, Counsel for the appellant, argued that had the trial court exercised its discretion judicially, the trial court would have imposed a lesser sentence, more specifically, a sentence in terms of section 276(1)(h) of the CPA or would have ordered that the sentences run concurrently. Counsel submitted that the court a *quo* was wrong in finding that the appellant faced long-term imprisonment. Mr Van der Merwe contended that the trial court was wrong in finding that the appellant was a flight risk.

[19] It was Mr Van der Merwe's submission that the magistrate's finding that since the appellant has already experienced prison, he would not want to return to prison is mistaken as there was no evidence to support that finding. According to Counsel, this was never asserted in the respondent's affidavit. It was argued on behalf of the appellant that there is no reason for the appellant to abscond because there is a likelihood that the relief he seeks at the SCA will be granted and there is a likelihood that he will ask that his sentence be converted. According to Mr Van der Merwe, no evidence was placed before court that the appellant was a flight risk.

[20] Even if it can be suggested that the appellant may be unsuccessful with his application for leave to appeal, Counsel submitted that the appellant's conduct in the past must be considered. According to Mr Van der Merwe, the appellant knew of the sentence that may be imposed against him even before he pleaded guilty. Notwithstanding that he was released on warning, he attended court punctiliously over the duration of his trial. Counsel further submitted that the finding of the President of the SCA indicates that there is a likelihood that the prospects of success are good in the application for leave to appeal. Mr Van der Merwe implored the court to uphold the appeal and grant the appellant bail.

[21] While on the other hand, Mr Seroto submitted that public confidence in the criminal justice system is of critical importance. Counsel submitted that the Specialised Commercial Crimes Courts have been established to ensure that the effective prosecution of fraud, forgery, theft and corruption are dealt with effectively and efficiently. Counsel suggested that in this case, it is not a matter of whether harm was done, but the appellant misappropriated 4.6 million.

[22] Mr Seroto submitted that the appellant pleaded guilty before the court *a quo* fully aware that the minimum sentence legislation was applicable regarding the three counts of theft. Counsel submitted that the trial court indeed deviated from the prescribed minimum sentence. It was Counsel's submission that the trial court balanced all relevant factors, being the personal circumstances of the appellant, the nature of the crimes committed by the appellant and the interests of society. Counsel further argued that the onus to prove that the magistrate erred in law or fact to refuse the appellant bail rested with the appellant.

[23] Mr Seroto further contended that the mere fact that the President of the SCA referred the matter for reconsideration is not a ground for bail to be granted. In other words, by referring the matter for reconsideration of the appellant's application for leave to appeal, it cannot be suggested that a non-custodial sentence will be imposed. Mr Seroto emphasised that in three of the sentences the trial court imposed, the minimum sentence was applicable, and it is unlikely that a non-custodial sentence would be imposed on appeal. Counsel contended further that there is no evidence before this court that the magistrate committed an error of fact

or law when she refused to admit the appellant to bail. As a result, the respondent's Counsel prayed the court to dismiss the appeal.

Applicable Legal Principles and Analysis

[24] It is trite that a court hearing an appeal in terms of section 65(4) of the CPA shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court shall give the decision which in its opinion the lower court should have given. Kriegler J, as he then was, made the following remarks in *S v Dlamini: Sv Dladla and Others; S v Joubert: S v Schietekat* 1999 (2) SACR 51 (CC) at para 74:

> "What is of importance is that the grant or refusal of bail is under judicial control, and judicial officers have the ultimate decision as to whether or not, in the circumstances of a particular case, bail should be granted".

[25] The decision whether to grant bail is one entrusted to the trial court because it is the court best equipped to deal with the issue having been steeped in the atmosphere of the case. (*S v Masoanganye* 2012 (1) SACR 292 (SCA) at para 15). It is well-established in our law that the powers of this court are largely limited where the matter comes before it on appeal and not as a substantive application. For the appellant to succeed, this court must be persuaded that the magistrate exercised her discretion wrongly before it can disturb the trial court's findings.

[26] Against this backdrop, I turn to consider the question whether the lower court erred in refusing to admit the appellant to bail. In my view, the point of departure in addressing the issues before this court should be the Constitution. Section 35(1)(f) of the Bill of Rights provides that everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interest of justice permits, subject to reasonable conditions. From the reading of this constitutional provision, it is abundantly clear that it is not absolute, but the interest of justice circumscribes its ambit. The court must be satisfied that the interest of justice warrants the release of the accused form detention. If facts indispensable for establishing that the interests

of justice permit the appellant's release are not established, the appellant is not entitled to the remedy under the subsection.

[27] The bail application before the trial court was governed by section 60(11)(b) of the CPA. Section 60(11)(b) of the CPA provides as follows:

> "In Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release."

[28] This section required the appellant to adduce evidence which satisfied the trial court that the interest of justice permits his release on bail pending the finalisation of the appellant's bail appeal against his sentence. The appellant had to satisfy the trial court on a balance of probabilities that it was in the interest of justice that he be released on bail.

[29] The appellant's application before the trial court was essentially predicated on the decision made by the President of the SCA. The President granted the appellant's application in terms of section 17(2)(f) of the Superior Courts Act for the court to reconsider the appellant's application for leave to appeal. The President of the SCA found that exceptional circumstances existed in this matter, as envisaged in the section and referred the matter to the SCA for reconsideration. Based on that finding, the appellant brought this application to be released on bail, which the trial court refused.

[30] As stated previously, in terms of section 60(11)(b) of the CPA, the appellant bore the evidential burden to prove that it was in the interest of justice that he be released on bail. Moreover, this is because he was convicted of Schedule 5 offences which requires an accused person to persuade the court that it is in the interest of justice to permit his release on bail. Section 60(4) sets out the circumstances where the interest of justice does not permit the granting of bail, including the likelihood of the appellant evading his sentence. While on the other hand, section 60(5)-(9)

elaborates on factors a court should heed when considering the grounds in section 60(4).

[31] I must stress that different considerations arise in granting bail after conviction from those relevant to granting bail pending trial. The bar has been raised relatively high for an appellant for bail pending appeal. (*S v Williams* 1981 (1) SA 1170 (ZA) at 1172H). Recently, in *S v Obiwiru* (A216/23)[2024 ZAWCHC 181 (16 July 2024) at para 40, Nziweni J, after reviewing several cases, concluded that the existence of a stringent test in applications of bail pending appeal is a theme that runs throughout case law.

[32] In the present matter, it is common cause that the appellant's application for the reconsideration of the application for leave to appeal in terms of section 17(2)(f) was granted by the President of the SCA on 25 May 2024. This prompted the appellant to bring his application to be released on bail pending the outcome of the appeal process. In preparation of this judgment, I could not find authorities dealing with an application for bail pending a reconsideration application after an application in terms of section 17(2)(f) was granted by the President of the SCA, nor was I referred to any by both Counsels. Mr Seroto relied on *S v Oosthuizen and Another* 2018 (2) SACR 237 (SCA), which involved an appeal against the refusal of bail to the Supreme Court of Appeal after leave to appeal was granted.

[33] Notwithstanding, I am of the view that the test applicable in applications for bail pending appeal where leave to appeal has been granted applies with equal force in matters involving section 17(2)(f) of the Superior Courts Act. The SCA has, in several cases, found that the granting of an application for leave to appeal does not, per se, entitle a person to be released on bail. In *S v Scott-Crossley* 2007 (2) SACR 470 (SCA) at para 6, the court noted that the legislature's approach to bail pending appeal had become less lenient as reflected in the Judicial Amendment Act 34 of 1998. The court observed that because of this legislation, the approach to bail pending appeal in respect of certain serious offences has become less lenient and less liberty orientated.

[34] I accept that an appellant in this matter had ostensibly shown exceptional circumstances before President of the SCA, which led to the granting of his application in terms of section 17(2)(f). However, I must mention that a different test applies when it comes to bail pending appeal. The granting of an order in terms of section 17(2)(f) without more does not *per se* necessitate the granting of bail pending appeal. What is more important is the seriousness of the crime, the risk of flight, real prospects of success on appeal and real prospects that a non-custodial sentence might be imposed such that any further period of detention before the appeal is heard would be unjustified. (*S v Masoanganye and Another* 2012 (1) SACR 292 (SCA) para 14).

[35] In *S v De Beer* 1986 (1) SA 307 at 309, the court found that 'in an application for bail pending an appeal against sentence only (the sentence being one of unsuspended or partially suspended imprisonment), one of the decisive principles is whether there are reasonable prospects of success on appeal, that is, whether there are reasonable prospects that a sentence other than imprisonment will be imposed, or that a wholly suspended sentence will be imposed, or that the sentence of imprisonment will be reduced to such an extent that the accused would be prejudiced if it is expected of him to commence serving his sentence pending appeal because any reduced sentence will have expired before the appeal is disposed of.

[36] The appellant is only appealing against his sentence in this matter. In summary, the appellant's appeal is primarily premised on the fact that his application for reconsideration in terms of section 17(2)(f) was granted. That there is a probability that the SCA may impose a non-custodial sentence and that the appellant wants to spend time with his son. In addition, the appellant contends that he is not a flight risk and will return to serve the remainder of his sentence if his appeal is unsuccessful.

[37] Undoubtedly, the appellant was convicted of very serious charges often referred to as 'white-collar' crimes. Three of the theft counts attracted the minimum sentence in terms of the Criminal Law Amendment Act 105 of 1997. The appellant was a director of the Company and had an overarching and paramount fiduciary duty to exercise his powers in good faith and in the Company's best interest. Instead, the

appellant betrayed that trust repeatedly and on a large scale. The appellant defrauded the said Company, where he held a position of trust. He embezzled 4.6 million over a period of four years.

[38] Without delving into the merits of the appeal, the exclusive reserve of the appeal court, and having due regard to the seriousness of the charges admittedly committed by the appellant, I firmly believe that a probable outcome of the appeal on sentence will attract a significant custodial sentence. In my view, it is unlikely that an appeal court would grant a wholly suspended sentence or a sentence of correctional supervision, considering the seriousness of the charges that the appellant was convicted of. This finding, in my view, is underpinned by the fact that the SCA has more than once expressed its view that offences involving dishonesty must be viewed in a serious light. The approach of the SCA to sentencing 'white-collar' crimes is well established. Direct imprisonment is not uncommon, even for first offenders. (See *S v Olivier* 2010 (2) SACR 178 SCA at para 24). In *S v Sadler* 2000 (1) SACR 331, at para 13, the court stated that it is unnecessary to repeat yet again what it had said in the past about crimes like corruption, forgery and uttering, and fraud. The court observed that these offences are serious crimes the corrosive impact of offence upon society is too obvious to require elaboration.

[39] In *S v Blank* 1995 (1) SACR 62 (A), a case strikingly comparable to the present matter, the appellant was convicted in a Local Division of 48 counts of fraud involving an amount of R9,75 million. The accused pleaded guilty to the charges, and the trial court took the counts together for the purpose of sentence and imposed a sentence of eight years' direct imprisonment. In an appeal against the sentence the appellant contended that the trial court had committed several misdirection. However, the appeal court dismissed the appeal and upheld the trial court's finding. Crucially, the court upheld the trial court's finding where it stated:

> ‘In view of all these facts, I feel fully justified in imposing a sentence which will deter not only the accused and other stockbrokers from committing crimes similar to those of which the accused has been convicted, but also others involved in business who may be tempted to indulge in larger-scale crimes of dishonesty. The time has already arrived when the severity of punishments

> imposed for this sort of crime while of course taking the personal circumstances of a particular accused into account, should proclaim that society has had enough and that the courts, who are the mouthpiece of society, will not tolerate such crimes and will severely punish offenders: cf *S v Zinn* 1969 (2) SA 837 (A) at 542D-E.'

[40] In view of the above, the likelihood that a non-custodial sentence might be imposed on appeal in this case is non-existent. I am of the firm view that a significant custodial sentence is probable.

[41] Another pertinent question to be considered is whether the appellant is a flight risk. The court *a quo* found that the appellant was a flight risk and dismissed his application. This finding, in my view, was based on solid grounds. The fact that there is a likelihood that the appellant faces a long-term imprisonment if his appeal fails is an incentive for the applicant to abscond. It is not in dispute that the appellant has the means and resources to flee the Country. The appellant holds dual citizenship, being both a South African and an Italian citizen. He has travelled to Italy on several occasions. The appellant also has family ties in Italy. Whilst I accept that the appellant is settled in South Africa and has a life partner and a dependent child, I believe that the risk of abscondment to his ancestral land is real if his appeal is dismissed.

[42] The appellant has been granted a reduction in his sentence by two years due to special remission. However, if his appeal is rejected, he will still be required to serve a substantial portion of the original nine-year sentence that was passed by the trial court. The knowledge that the appellant must stay a period of more than six years in custody if his appeal is unsuccessful may undoubtedly motivate the appellant to abscond. This is a critical factor which weighs heavily against the granting of bail.

[43] In my opinion, the trial court was correct in dismissing the appellant's application on the basis that there is a likelihood that should the appellant be released on bail, he might flee the country as envisaged in section 60(4)(b) read with section 60(6) of the CPA. It was not established that the court *a quo* erred either in

law or, in fact when it dismissed the appellant's appeal. In my view, it is not in the interest of justice that the appellant be released on bail pending the hearing of his application for reconsideration and possible appeal on the merits.

Order

[44] Consequently, given all these considerations, the following order is granted:

44.1 The appeal is dismissed.

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LEKHULENI JD
JUDGE OF THE HIGH COURT

APPEARANCES

For the State: Adv Seroto
Instructed by: Director of Public Prosecutions
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For the Appellant: Adv Van der Merwe
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