

In the matter between:

THE STATE

and

ANDA NKALA

Accused

REVIEW JUDGMENT

Bloem J.

[1] The accused was charged in the magistrate's court with fraud. He pleaded guilty but the magistrate was not satisfied that he admitted all the elements of the offence of fraud. The magistrate accordingly recorded a plea of not guilty in terms of section 113 of the Criminal Procedure Act.¹ The prosecutor then led the evidence of Rudi Strydom, the investigating officer, whereafter the state closed its case. The accused did not testify. He also did not call witnesses to testify on his behalf. The magistrate then convicted the accused of fraud and sentenced him to pay a fine of R1 000.00 or to undergo one year's imprisonment, half of which was suspended for three years on condition that he not be convicted of fraud committed during the period of suspension.

[2] In terms of section 303 of the Criminal Procedure Act this matter was placed for

¹ Criminal Procedure Act, 1977 (Act No. 51 of 1977).

consideration before Pickering J who requested the magistrate for his reasons for convicting the accused of fraud instead of theft and why warrant officer Strydom's opinion evidence was admitted and relied upon. The magistrate submitted his response to the above enquiry. On receipt thereof Lowe J requested the Director of Public Prosecutions to comment on whether the conviction was justified and, if a conviction was justified, whether the accused should have been convicted of theft or fraud. Mr Turner from that office promptly provided submissions with which I shall deal hereunder. I thank Mr Turner for his submissions.

- [3] In the handwritten charge sheet it was alleged that between October 2016 and 31 January 2017 the accused had *"been fraudulently defrauding the complainant, Ms Zanele Matshikiza, by borrowing her cellphone pretending that he wanted to use it for facebook purposes. In the process the accused fiddled with the complainant's phone until he managed to transfer monies from the FNB account of the complainant to his phone making an e-wallet for himself, as a result of his actions the complainant suffered prejudice to the amount of R8 000.00, as the accused has unlawfully and intentionally misrepresented himself to FNB to be Ms Zanele Matshikiza."*
- [4] The admissions that the accused made when the magistrate asked him questions in terms of section 112(1)(b) of the Criminal Procedure Act are that during 2016 he managed to get the complainant's PIN number of her banking account which could be accessed through her cellphone, that during the above period he would visit the complainant, his friend, at home when he would have access to her cellphone and that, without her knowledge or consent, he would transfer money from her bank account. He furthermore admitted that *"I was aware that it was against the law but I*

wasn't aware that it was actually fraud that I was committing", that "I thought of it as theft" and "I was aware that theft is a criminal offence". The magistrate then asked him whether he "had the intention of committing such an offence and achieve your target goals" to which he replied "it was not intentionally, Your Worship, it was never my intention to commit it. It was never planned" and "it was not my intention to actually steal from the complainant or defraud her of her assets. She was my friend after all."

- [5] The magistrate recorded a plea of not guilty because he was of the view that the accused did not admit the element of intent to defraud. The state called warrant officer Strydom. The public prosecutor asked him one question which question and the accused's answer are quoted hereunder:

"Sir, now as the police with such years of experience, can you please assist this court in telling us whether when a person, a person is stealing something from any other person, can that person make a mistake? --- No, Your Worship, stealing there was an intention to steal."

- [6] The accused did not have a question for warrant officer Strydom. The magistrate asked him the following question to which warrant officer Strydom responded:

"Now when a person says then after telling the Court that he stole something from a person, but said he had no intentions to do it, is he telling lies? ---Yes, Your Worship".

- [7] In his response to the second issue raised by Pickering J the magistrate acknowledged that warrant officer Strydom's opinion regarding the accused's intention was irrelevant and inadmissible. Mr Turner also submitted that warrant officer Strydom's evidence was of no relevance as to whether the accused had the intention to commit theft or fraud.

- [8] Fraud consists in unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.² The essential elements of fraud are (a) unlawfully; (b) making a misrepresentation; (c) which causes; (d) prejudice to another; (e) with the intent to defraud.³ It is a basic principle of our criminal law that, for it to secure a conviction, the state is required to prove all the elements of the offence beyond reasonable doubt.⁴
- [9] From the above admissions, in my view, there can be no doubt that the accused's conduct was unlawful and that his conduct caused prejudice to the complainant. He admitted that he was aware that his conduct "*was against the law*". The conduct was the withdrawal of money from the complainant's bank account without her knowledge or consent. Furthermore, the complainant suffered prejudice when sums of money were withdrawn from her bank account. The accused's unlawful conduct accordingly caused the complainant and the bank prejudice. What remains to be determined is whether, based on the admissions, it can be said that the accused made a misrepresentation and that he intended to defraud the complainant.
- [10] Mr Turner correctly submitted that the accused knew that what he was doing was wrong and constituted theft. He does not agree with the accused that, although he knew that his conduct constituted theft, he did not realise that it also constituted fraud. Mr Turner submitted that "*the accused defrauded the complainant and the bank by unlawfully transferring moneys to his own account through the unauthorised use of another person's PIN number. He clearly acted fraudulently and did so to the prejudice of both the complainant and the bank.*"

² JRL Milton *South African Law and Procedure – Common Law Crimes* 3rd ed, vol 2 at 702.

³ JRL Milton at 707. See also CR Snyman *Criminal Law* 5th ed at 531.

⁴ *S v Smit* 2007 (2) SACR 335 (T) at 374i.

- [11] The elements of misrepresentation and intent to defraud were dealt with in *S v Mbokazi*.⁵ The accused in that case was the manager at the Madadeni branch of the Ithala Bank where, through an error in the computerised accounting system, the savings account of one Msibi was credited in the sum of R62 500.00. The accused became aware of the error and took advantage of it. Except for other sums that he withdrew from Msibi's account, he also withdrew the sum of R1 000.00. The evidence made no mention that the accused made an express representation which made it possible for him to withdraw the R1 000.00. Thirion J said the following at 77i – 78a about representation:

“Misrepresentation may however take a variety of forms. They may be made by entries in books or records (*R v Heyne and others* 1956 (3) SA 604 (A)) or by conduct or even by silence when there is a duty to speak. It would seem to me that the remarks of Lord Halsbury in *Aaron's Reefs Ltd v Twiss* [1896] AC 273 (HL) which are quoted with approval in *S v Ressel* 1968 (4) SA 224 (AD) are also apposite in the present case:

‘It is said there is no specific allegation of fact which is proved to be false. Again I protest, as I have said, against that being the true test. I should say, taking the whole thing together, was there a false representation? I do not care by what means it is conveyed – by what trick or device or ambiguous language; all those are expedients by which fraudulent people seem to think they can escape from the real substance of the transaction. If by a number of statements you intentionally give a false impression and induce a person to act upon it, it is not the less false, although if one takes each statement by itself there may be a difficulty in showing that any specific statement is untrue.’”

- [12] The learned Judge then dealt with the submission that when the accused withdrew the R1 000.00 from the savings account of Msibi, he made no representation to the bank at all, other than that he was taking the money. It was submitted that the

⁵ *S v Mbokazi* [1998] 2 All SA 72 (N).

accused did not make a representation, orally or otherwise, to the effect that he was entitled to withdraw the money.

[13] Thirion J did not sustain those submissions and dealt with them as follows at 78c-d:

“I do not agree. I think that counsel’s submission ignores the realities of the situation. The accused was an employee of the bank. It was part of his duties to perform the functions of a teller. I think that as such an employee, the accused impliedly represented to the bank, whenever he effected a withdrawal of money from a customer’s account, that the customer had duly authorised the transaction; that the necessary steps had been taken for the due withdrawal of the money standing to the credit of the account. Furthermore the accused, in order to effect the transaction, made certain entries on the computer. Those entries carried with them the implied representation that it was the customer who had withdrawn the money or at least that the customer had authorised him to operate the computer in order to effect the withdrawal of the money.”

[14] Although *S v Mbokazi* has not specifically been approved by the Supreme Court of Appeal, it has been referred to by that court on various occasions, recently in *S v Prinsloo and others*.⁶ In none of the cases in which reference was made to it did the Supreme Court of Appeal criticise the reasoning in *S v Mbokazi*. I have no doubt that the Supreme Court of Appeal would have criticised *S v Mbokazi* by now if such criticism was warranted.

[15] To the extent that the accused in this case was not employed by First National Bank where the complainant’s account was held with the result that he could not make entries on her account, it was distinguishable from *S v Mbokazi* where the accused was employed as branch manager of Ithala Bank where Msibi’s savings account was held. The accused in that case also made certain entries on the computer to

⁶ *S v Prinsloo and others* 2016 (2) SACR 25 (SCA) at 65i.

effect the withdrawal of money. Like in *S v Mbokazi*, when the accused in this case made the transfer from the complainant's bank account, he impliedly represented to the First National Bank that it was the complainant who had withdrawn the money. The accused knew that that representation was false because it was made without the complainant's knowledge or consent. He accordingly misrepresented the situation to First National Bank with the intention to induce the bank to release the money from the complainant's account. The withdrawal of money caused prejudice to the complainant and the bank. In the circumstances, I am satisfied that on the admissions made by him, the accused was correctly convicted of fraud.

[16] The conviction of fraud and the sentence referred to in paragraph 1 above are accordingly confirmed.

G H BLOEM
Judge of the High Court

ROBERSON, J

I agree

J M ROBERSON
Judge of the High Court