

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL, PIETERMARITZBURG**

Case No.: AR215/08

In the matter between:

HOPEWELL NYAMAKAZI

APPLICANT

and

**THE DIRECTOR OF PUBLIC
PROSECUTIONS KWAZULU-NATAL**

FIRST RESPONDENT

**OOSTHUIZEN N.O. (ACTING REGIONAL
COURT MAGISTRATE FOR THE REGIONAL
DIVISION OF KWAZULU-NATAL**

SECOND RESPONDENT

JUDGMENT

Delivered on:

SISHI J

- [1] The Applicant in this matter appeared in the Regional Court, Durban, charged with 34 counts altogether. Counts 1 to 17 related to offences of contravening section 86(4) read with sections 1, 85 and 89(2) of the Electronic Communications and Transactions Act 25 of 2002 and counts 18 to 34 related to fraud. The Applicant, who was legally represented in the Regional Court, pleaded guilty to all the charges. In respect of counts 1 to 17, he was
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sentenced to 5 years' imprisonment and in respect of counts 18 to 34, he was sentenced to 7 years' imprisonment. Counts 1 to 17 were taken together as 1(one) for the purposes of sentence. The same applies to counts 18 to 34 and the two sets of sentences were allowed to run concurrently, so that the effective term is one of seven (7) years imprisonment.

[2] The Applicant has brought this application for the review and the setting aside the said convictions and sentences. The application is opposed by the Respondents.

[3] After tendering a plea of guilty to all counts, the Applicant's legal representative handed in a statement in terms of section 112(2) of Act 51 of 1977 as amended (the Act). The content of the statement is quoted verbatim in order to adequately deal with the Applicant's challenges. The statement reads as follows:

"I the undersigned

HOPEWELL NYAMAKAZI

Do hereby plead as follows:

1.

I have heard the charges levelled against me. I understand same and it is my intention to plead guilty to same. I have chosen to plead guilty of my own free will and volition without any person having promised me anything in exchange for a guilty plea.

2.

AD COUNTS 1 TO 17

- 2.1 *I admit that between the period August 2006 and September 2006 I was at or near Durban in the Regional Division of KwaZulu-Natal.*
- 2.2 *This Honourable Court therefore has jurisdiction to hear the matter.*
- 2.3 *I admit that whilst acting in common purpose with other persons I did unlawfully and intentionally utilize a device or computer programme in order to unlawfully overcome security measures designed to protect data or access to data, to wit an electronic card reader commonly known as a "Skimming Device", in order to gain unauthorized access to account information encoded on the magnetic strips as set on column 3 of schedule "A" of the charge sheet.*
- 2.4 *My purpose for the use of the computer device or skimming device was to duplicate cards both debit and credit for my own use.*
- 2.5 *I therefore plead guilty to having contravened the relevant laws governing the Electronic Communications and Transactions Act.*

AD COUNTS 18 TO 20

- 2.6 *I admit that during the period August to September 2006 and at Durban having duplicated the cards with the skimming device as in Counts 1 to 17, I committed the crime of fraud in concert with others by having performed the transactions set out in Schedule "B" to the charge sheet.*
- 2.7 *My actions therefore caused actual prejudice in the amount of R12 100-00 of the Ninian and Lester Factory shop and or Wanda de Jager and or Ms G.E. Adams and or N.I. Constantinou and or Standard Bank.*

- 2.8 *At the time of performing the transactions set out in schedule "B" I knew that my actions were wrongful and unlawful in that I knew that the cards which I had presented for payment were duplicated or cloned and that the lawful card holders had never at any stage presented the lawful cards for payment.*
- 2.9 *My actions were designed for the purpose of self enrichment of myself and those with whom I acted in concert.*
- 2.10 *Once more, I plead guilty as charged.*

AD COUNTS 21 TO 34

- 2.11 *I admit that during the period August to September 2006 and having duplicated the cards as in counts 1 to 17, I committed the crime of fraud this time by myself by having performed the transactions set out in schedule "C" of the charge sheet.*
- 2.12 *I admit that with the duplicated or cloned cards I attended the institutions set out in column 3 of schedule "C" and withdrew the amounts set out in column 4 of schedule "C" thereby causing actual prejudice to the account holders, in total amount to R10 750-00.*
- 2.13 *At the time of having performed the transactions as set out in schedule "C", I knew that my actions were wrongful and unlawful in that the cards I had used to withdraw the amounts set out in schedule "C" were duplicated or cloned and that the lawful card holders had never used their lawful cards to withdraw the said funds.*
- 2.14 *My actions were designed for the purpose of self enrichment and I therefore plead guilty as charged.*
- 2.15 *Finally I wish to say that I have no lawful defence to any charge mentioned in the charge sheet.*

Dated at DURBAN on this the 01 DECEMBER 2006

[4] In respect of counts 1 to 17, the Applicant alleges that the pleas which he tendered did not state that he had knowledge of the unlawfulness of the said offences. He alleges that the element of intent is lacking.

[5] In respect of counts 18 to 20, the Applicant alleges that there is no reference to the year in which the offences were committed, nor does it set out how the offences were committed. He also alleges that the statement does not spell out to whom and how the misrepresentation was made. He alleges that the essential elements of fraud were not admitted.

I must point out from the onset that the period and the year in which the offences were committed is clearly set out in the first sentence of paragraph 2.6 of the section 112(2) statement as follows: “... **during the period August to September 2006...**” The allegation that the year is not stated is unfounded.

[6] In respect of counts 21 to 34, he alleges that there was no *lis* between him and the State and that he did not set out in the statement how he performed the transactions as set out in schedule “C” to the charge sheet. He also alleges that the elements of fraud were not alleged and admitted in the statement.

- [7] Counsel for the Applicant submitted that looking at the totality of the shortcomings in the proceedings, the plea statement did not meet the threshold required by a section 112(2) statement, and that it was not sufficient to satisfy the Court that the Applicant pleaded guilty.
- [8] Counsel for the Respondent submitted that on the reading of the record together with the plea tendered by the Applicant in terms of section 112(2), that indeed the Applicant was correctly convicted, and that the application should accordingly be dismissed.
- [9] Counsel for the Applicant submitted that in respect of counts 1 to 17, the Applicant in his section 112(2) statement did not specifically plead to the specific transgression of section 86(4) of the Electronic Communications and Transactions Act 2002 as alleged in the charge sheet. He pleaded guilty to having contravened the (relevant laws) governing the Electronic Communications and Transactions Act which was very vague and wide. He submitted that the failure to cause the Applicant to plead to specific charges shows that no *lis* was created between him and the State thereby making a verdict of guilt incompetent in the circumstances. He referred to the case of ***S v Mbokazi 1998(1) SACR 438(N) at 439a (Thirion J at page 442 g-i)***.
- [10] He also submitted that looking at the statement itself it is clear that it does not set out the facts as required by section 112(2) but it regurgitates the charge

sheet. He submits that the statement does not tell the Court how the offences were committed, makes no reference to column 2 of schedule “A” and to the circumstances under which the offences were committed. Column 2 of schedule “A” is very pertinent to have been pleaded because it is an essential ingredient of the charges alleged in counts 1 to 17. He submits that the Applicant did not set out the facts exhibiting that he knew that his conduct was unlawful, but instead he pleaded the law. Counsel then referred to the following cases: ***S v B 1991(1) SACR 405(N) @ 406 B-C “lines 12-13”*** where the following is stated:

“... it is clear that this section also required not only a series of admissions but the facts upon which these admissions are based ...”

S v Moya 2004(2) SACR 257(W) @ 268, where the following is stated:

“... the written statement is intended to be accepted in lieu of questioning by the Court in terms of section 112(1), but obviously it has to achieve the same purpose, namely, to satisfy the court that the accused admits the facts of the case which underlines the criminal charges ...”

See also, ***S v Chetty 2008(2) SACR 157(WLD)***

In a subsequent supplementary affidavit filed by the Applicant after the first hearing, he states that by pleading guilty to have contravened the relevant laws of the Electronic Communications Act, he had in mind access to account information referred in paragraph 2.3 of his section 112(2) statement, and nothing else, he knew nothing about other laws of the Act. In his statement he made reference to column 2 of schedule “A”, because he had no

knowledge of it and thereby placing it in dispute. He expected the Court to question him about it.

[11] The Applicant was legally represented when he tendered pleas of guilty to all 34 counts. He was specifically requested by the court *a quo* whether he consulted with his attorney about what it was about, whether he understood the charges. The Applicant confirmed all this, and stated that he was guilty in all 34 counts. Mr Kader who represented the Applicant in the court *a quo* confirmed that the Applicant's pleas of guilty to all 34 counts were in accordance with his instructions. He also confirmed that he had prepared a statement in terms of section 112(2) of the Act as read into the record. The Applicant stated that he was familiar with the contents of the statement and he confirmed the correctness thereof. The statement is also signed by the Applicant.

[12] Counsel for the Respondents submitted that from a reading of the record it is clear that what was intended from the beginning was a plea of guilty. He submits that what is now being contended for is that there should have been further enquiries from the Magistrate. However, even after the supplementary affidavit was filed, there is still no allegation by the Applicant that he did not intend to plead guilty.

[13] Counsel for the Respondents then referred to paragraph 6 of the supplementary affidavit where he says:

“ ... I was wrongly convicted and should this matter be remitted to the court a quo, I will still place the above aspects in issue until they are proved by the state”.

Both in the Founding Affidavit and the Supplementary Affidavit, he sets out the grounds upon which he alleges that he was wrongly convicted, all of which relates to whether he referred to the applicable laws, or what he referred to. On reading the section 112(2) statement, together with the charge sheet and the annexures to the charge sheet, it is clear that he is pleading to those specific unlawful acts. The section 112(2) statement refers to the Electronic Communications and Transactions Act and paragraph 2.5 thereof reads, as follows:

“I therefore plead guilty to having contravened the relevant laws governing the Electronic Communications and Transactions Act”.

This paragraph of the section 112(2) statement makes it clear that there is no dispute as to which Act and legislation he is referring to. The first two lines of counts 1 to 17 are clear and unambiguous and read as follows:

“That the accused is guilty of contravening section 86(4) read with sections 1, 85 and 89(2) of the Electronic Communications and Transactions Act 25 of 2002 ...”

- [14] Counsel for the Applicant argued that the Applicant should have pleaded facts to demonstrate that his issue is in line with the cases of ***S v B***, ***S v Moya*** and ***S v Chetty, supra***, referred to by Counsel for the Applicant.

[15] As correctly submitted by the Counsel for the Respondents, in his plea explanation the Applicant has indeed in paragraph 2.3 pleaded facts to demonstrate that he was in fact guilty of contravening the relevant provisions.

Paragraph 2.3 of the statement reads as follows:

*“I admit that whilst acting in common purpose with other persons, I did unlawfully and intentionally utilise a devise or computer programme in order to unlawfully overcome security measures designed to protect data or access to data, to wit an electronic card reader, commonly known as a **“Skimming device”** in order to gain unauthorised access to account information encoded on the magnetic strips as set out in column 3 of schedule “A” of the charge sheet”.*

[16] In paragraph 2.4 of the section 112(2) statement he goes on to say **“my purpose for the use of the computer device or skimming device was to duplicate cards, both debit and credit for my own use”**. The Applicant did not only plead guilty to relevant charges, but he actually referred to the contraventions relevant to that specific Act and that is what is referred to in the charge sheet. In respect of counts 1 to 17, as indicated in paragraph 13 above, the charge sheet specifically refers to the contravention of section 86(4), read with sections 1, 85 and 89 (2) of the Electronic Communications and Transactions Act 25 of 2002. It is also clear from the reading of the charge sheet and paragraph 2.5 of the section 112(2) statement that the Applicant was referring to the provisions of Act 25 of 2002.

[17] On the proper analysis of the plea explanation and the charge sheet in respect of counts 1 to 17 and the basic elements of the offences there are sufficient basis to justify the conclusion which the Magistrate came to when he indicated that he was satisfied with the plea explanation. The Magistrate's conclusion is confirmed by paragraph 2.15 of the plea explanation of the statement in terms of section 112(2) where he says"

"Finally, I wish to say that I have no lawful defence to any charge mentioned in the charge sheet".

[18] In my view, it is not even necessary to look at what he said during the bail application to determine the issue. This can be determined on the basis of the charge sheet, together with the plea explanation. When the Applicant was asked in the court a quo whether the charges needed to be read out to him, he stated that he was familiar with the charges and that the court could dispense with that.

[19] In the result and in respect of counts 1 to 17, I find that the Applicant's submission that he did not set out facts demonstrating that he knew that his conduct was unlawful, but instead that he merely pleaded the law, is entirely unfounded and is rejected. In my view all the elements of the offences are sufficiently admitted in his plea explanation.

[20] In respect of count 18 to 20, which are counts of fraud, the Applicant alleges that the intention to defraud was not admitted and that he does not say to whom and how the misrepresentations were made. These are set out in schedule "B" of the charge sheet. Schedule "B", column 1, sets out the account numbers, column 2, sets out the card numbers, and column 3 the amounts involved. In respect of these counts, he admitted in paragraph 2.6 of the section 112(2) statement that, during the period August to September 2006 and having duplicated the cards with the skimming device as per counts 1 to 17, he committed the crimes of fraud in concert with others, by having performed the transactions as set out in schedule "B" to the charge sheet.

[21] In paragraph 2.7 of section 112 (2) statement, the Applicant admits that his actions caused actual prejudice in the amount of R12 100-00 to the Ninian and Lester Factory shop and/or Wanda de Jager and/or Ms G.E. Adams and/or N.I. Constantiou and/or Standard Bank. In paragraph 2.8 of the statement in terms of section 112(2), he states that at the time of performing the transactions set out in schedule "B" that he knew his actions were wrongful and unlawful in that he knew that the cards which he had presented for payment were duplicated or cloned and that the lawful card holders had never at any stage presented the lawful cards for payment. In paragraph 2.9 of the same statement, he states that his actions were designed for the purpose of self enrichment of himself and those with whom he acted in concert.

[22] Counsel for the Respondents submitted, correctly in my view, that what the Applicant admitted was that he committed the acts referred to in the charge sheet and that those were for self enrichment, that he acted unlawfully and intentionally and that there was actual prejudice. In his Supplementary Affidavit it is alleged that he made these admissions to shorten the proceedings. But if his admissions were made to shorten the proceedings, Counsel for the Respondents submitted that he would then not have pleaded guilty. Once again, it is to be noted that in both in his founding affidavit and supplementary affidavit, the Applicant does not state that he actually had not intended pleading guilty. Despite this he now purports to raise the new defence that this was done merely in order to shorten the proceedings.

[23] Counsel for the Respondents submitted that the same arguments apply in respect of counts of 21 to 34. These are also counts of fraud. Both counts 18 to 20 and counts 21 to 34 are categories of fraud that flow from the contraventions referred in counts 1 to 17.

[24] In respect of counts 21 to 34 the Applicant also alleges that the elements of falsity and misrepresentation are not admitted in his plea statement. In the plea explanation he admitted that he used cloned cards, that he performed the transactions as set out in schedule "C", that they were presented to the institution as set out in column 3 of schedule "C", that the amounts were withdrawn, that there was actual prejudice and he goes on to say in paragraph 2.13 of the statement:

“I knew that my actions were wrongful and unlawful in that the cards I used to withdraw the amounts set out in schedule “C” were duplicated or cloned and that the lawful card holders had never used their lawful cards to withdraw the said funds”.

Even in the Supplementary Affidavit there is still no allegation that the Applicant intended pleading not guilty in respect of these counts.

[25] In the light of the above, I find that the elements of falsity and misrepresentation are included in the section 112(2) statement. The Applicant’s submission that they are not included is therefore unfounded and is rejected.

[26] Considering the requirements in respect of section 112(2) statement as set out in the cases ***S v B, S v Moya and S v Chetty supra***, I am satisfied that the court a quo was correct in allowing the statement made by the Applicant to pass without further questioning, and that the convictions of the Applicant are proper and were based on his plea and the section 112(2) statement.

[27] The court a quo did not commit any error or irregularity in not questioning the Applicant on the statement handed in, in convicting him on his plea. There is therefore no reason why this court should interfere with the conviction and sentence of the Applicant in this matter.

[28] But even if I were wrong in my conclusions aforementioned and the plea statement did indeed fall materially short of what was necessary to underpin the elements of the charges and thereby to satisfy the Magistrate that the applicant was indeed guilty of the offences to which he tendered pleas of guilty, then these shortcomings in compliance with the provisions of s 112(1) (b) and s 112(2) of the Act are not necessarily decisive of the review application. It remains necessary to determine whether or not, in all the circumstances of the particular matter, they constituted a procedural irregularity, sufficiently material, so that a failure of justice has resulted. In the circumstances I am far from persuaded that the alleged irregularities, such as may have resulted from non-compliance with the provisions of s 112(2) of the Act, also resulted in a failure of justice. (See : **S v Carter 2007 (2) SACR 415 (SCA)**).

[29] In the result, I propose the following order:

1. The application is dismissed.
2. The convictions and sentences of the Applicant by the court a quo are confirmed.

SISHI J

I AGREE AND IT IS SO ORDERED

VAN ZYL J

DATE OF HEARING : 16 & 25 September 2008

DATE OF JUDGEMENT : June 2009

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