IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

Reportable

Case no: CA & R 90/2025

In the matter between:

KWEZI RISK SOLUTIONS CC First Appellant

PHILLIP MILES DIBAKOANE Second Appellant

and

THE STATE Respondent

JUDGMENT

Appels AJ

Introduction

[1] The first appellant is a close corporation and registered Value Added Tax ('VAT') vendor in terms of the VAT Act 89 of 1991. It is also registered with the South African Revenue Service ('SARS') for Corporate Income Tax. The second appellant

is the sole member of the first appellant and is by virtue thereof both the representative VAT vendor and the representative taxpayer of the first appellant.

[2] This is an appeal against the conviction of the appellants of theft of the amount of R 1 086 279.00 in the East London Magistrates' Court on 1 July 2024. The magistrate granted leave to appeal on 7 March 2025.

[3] Despite their conviction of theft, the appellants were not charged with the offence of theft, either as a main count or as an alternative count. Instead, they were charged with fifteen counts of fraud and, in the alternative, with fifteen counts of contraventions of section 235(1)(a) of the Tax Administration Act 28 of 2011 ('the TAA'). Their conviction was predicated on the magistrate's understanding that theft is a competent verdict in respect of the offence of fraud. Indeed, in the order convicting the appellants, the magistrate stipulated that the appellants are 'convicted on a competent verdict of theft', Notably, the verdict did not specify the particular count in respect of which the competent verdict was pronounced.

[4] The appellants rely on the following grounds of appeal:

a) Theft is not a competent verdict on a charge of fraud and accordingly it was not competent for the magistrate to convict the appellants of theft.

b) The magistrate erred in: i) not specifying the counts in respect of which she convicted the appellants; and ii) not pronouncing a verdict in respect of each count on which the appellants have tendered a plea.

c) The magistrate erred in finding that it is not reasonably possibly true that SARS would pay money owed by the municipality to the appellants and in rejecting the second appellant's version as unreasonable and improbable.

[5] It should be noted that, even though the magistrate did not pronounce a verdict on each count, it is common cause that the appellants were acquitted of all

counts of fraud. A conviction on a competent verdict is regarded as an acquittal in respect of the main count.[1]

[6] Therefore, if the first ground of appeal is determined in favour of the appellants, it is dispositive of all the issues on appeal. There would be no need to enquire whether the evidence established the guilt of the appellants beyond reasonable doubt.

[7] Accordingly, the main issue which arises in this appeal is whether theft is a competent verdict on a charge of fraud, i.e. whether it was competent for the magistrate to convict the appellants of the offence of theft.

Proceedings in the Magistrate's Court

The Charge Sheet

[8] The appellants were charged with fifteen main counts of fraud. The allegations in the charge sheet concern the conduct and statutory obligations of the appellants in relation to the VAT Act, the Income Tax Act 58 of 1962 and the TAA. These allegations broadly relate to false information that was allegedly contained in tax returns submitted to SARS on behalf of the first appellant.

[9] In this regard, the preamble of the charge sheet sets out allegations pertaining to the corporate identity of the first appellant; the status of the first appellant as a VAT vendor in terms of the VAT Act and its registration for Corporate Income Tax. It further sets out the status of the second appellant as a representative VAT vendor and taxpayer of the first appellant, by virtue of being its sole member.

[10] Furthermore, the preamble contains allegations pertaining to the appellants' registered accountant and tax practitioner, Mrs Duduzile Felistas Ndlovu and of her assistant and husband, Mr Richard Ndlovu ('the Ndlovus') and their dealings with the second appellant. More particularly, details are set out about a plan that was allegedly devised and agreed upon between the second appellant and the Ndlovus to under declare income and over state expenses in tax returns submitted to SARS.

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[1] *Director of Public Prosecutions, Gauteng v Pistorius* 2016(1) SACR 431 (SCA) at para 9 where the court held that: 'It is after all somewhat artificial to regard an accused found guilty of the lesser offence of culpable homicide not to have been acquitted of the more serious charge of murder.'

[11] It is alleged that tax returns were submitted by Mr Richard Ndlovu ('Mr Ndlovu') on behalf of the appellants through the e-filing account. The tax returns so submitted, contained the above-mentioned under declaration of income and over statement of expenses. As a result, a tax refund of R 1 086 729.00 was allegedly paid to the appellants.

[12] The preamble further sets out various audit findings made by a SARS auditor, who audited the tax returns so submitted and concluded that the first appellant's income was under-declared, that its expenses were overstated and that the appellants were not entitled to the tax refund it had received.

[13] The gist of the allegations in charge sheet as set out in counts 1 to 15, is that the appellants a) falsely, and with the intent to defraud SARS, pretended that the information contained in the tax returns submitted was true and correct; and b) induced SARS, to its actual or potential prejudice, to accept that the above-mentioned pretences were true and correct. Each count of fraud was linked to a tax return submitted for the specific tax periods as set out in the schedules to the charge sheet.[2]

The Plea

[14] The appellants pleaded not guilty to all fifteen main counts of fraud and to the alternative counts. Notably, when the charges were put to the appellants, they were not informed that theft is a competent verdict in respect of the offences with which they have been charged.

[15] A short, written plea explanation in terms of section 115 of the Criminal Procedure Act 51 of 1997 ('the CPA') was read into the record and handed up to the court. In the plea explanation, the appellants denied that they committed the acts as set out in the charge sheet.

[16] The plea explanation also included admissions in terms of section 220 of the CPA. The appellants admitted (*inter alia*) that: a) the first appellant is a duly

[2] Counts 1 to 12 relate to VAT returns submitted in respect of 12 different tax periods as set out in column 2 of Schedule A. Counts 13 to 15 relate to Income Tax returns submitted for 3 different tax periods as set out in column 2 of Schedule B attached to the Charge Sheet.

registered close corporation of which the second appellant is the sole member; b) the first appellant was registered for VAT and corporate income tax; c) the second appellant is the representative VAT vendor and the representative taxpayer of the first appellant.

The Evidence

[17] The State led the evidence of two witnesses. The first witness was Mr Ndlovu. The second witness for the State was Ms Brenda Tayitayi (‘Ms Tayitayi’), who is an investigator employed by SARS in its Criminal Investigation Division. The second appellant and his wife, Mrs Pearl Dibakoane were called to give evidence on behalf of the appellants.

[18] In addition to the oral evidence, documentary evidence comprising of various exhibits were admitted into evidence. These documents relate to *inter alia* written instructions provided to the Ndlovus by the appellants, the various VAT and Income Tax returns that were the subject matter of the charges and bank statements of the appellants.

[19] It was common cause that during or about June 2017, the second appellant approached D.F. Ndlovu Accounting Services and procured its services to attend to the tax affairs of the first appellant. The appellants required assistance to obtain a tax clearance certificate from SARS and to recover a payment due to the first appellant by Elundini Municipality (‘the municipality’) for services rendered. They were unable to obtain the tax clearance certificate because a tax debt in respect of VAT in the amount of R 8 102 302.03 was raised against the appellants following an assessment by SARS.

[20] The evidence led by the State mostly focussed on a VAT return submitted in June 2017, which is referred to count no. 8 of the charge sheet. In this regard, Ms Tayitayi testified that, in June 2017, a VAT return was submitted on behalf of the appellants by Mr Ndlovu, claiming that the first appellant incurred expenses in the amount of R 8 950 000. The VAT refund so claimed was off-set against the tax debt of R 8 102 302.03, and as a result an amount of R 847 678.97 together with interest in the amount of R 239 805.14 was reflected as due and owing to the appellants.

Consequently, an amount of R 1 087 485.11 was paid to the appellants in December 2017.[3]

[21] After making the payment of R 1 087 485.11 to the appellants, SARS called on the appellants to submit supporting documents to substantiate the claim for a VAT refund of R 8 950 000 that was submitted with the VAT return in June 2017. When no substantiating documents were submitted, the auditing division of SARS referred the matter to Ms Tayitayi for investigation.

[22] Ms Tayitayi reviewed the appellants' bank accounts and noted that the appellants received income which was not reflected in the VAT return. Furthermore, the expenses entered on the VAT return were not reflected in the bank statements. She therefore concluded that the VAT return submitted on behalf of the appellants in June 2017 understated their income and overstated their expenses.

[23] Mr Ndlovu testified that he submitted the VAT return in 2017 which showed that a refund was due to the appellants, in order to off-set the tax debt that was due and payable by the appellants to SARS. He admitted that the claim for a refund was false and that he was not provided with any supporting documents to substantiate such a claim. According to Mr Ndlovu, the second appellant was aware that a false claim for a refund was included in the VAT return.

[24] The second appellant denied that he was aware of – or that he agreed to submit – a false claim for a VAT refund. According to the appellants' version, they mandated the Ndlovus to attend to the tax affairs of the first appellant in order to obtain a tax clearance certificate from SARS and to ensure that money that was withheld by the municipality was recovered.

[25] It was the appellants' version that the municipality was a withholding agent as contemplated in section 156 of the TAA.[4] Payment was withheld by the municipality,

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[3] There is a discrepancy between what is contained in the preamble of the charge sheet and what was contained in the evidence with regards to the amount refunded by SARS into the bank account of the appellants. According to the preamble of the charge sheet, the amount paid by SARS to the appellants was R 1 086 729.11, while in the evidence it was stated that an amount of R 1 087 485 was paid.

[4] Section 156 of the Tax Administration Act 28 of 2011 defines a withholding agent as 'a person who must under a tax Act withhold an amount of tax and pay it to SARS'.

on instruction from SARS, and would only be released if the appellants obtained a tax clearance certificate.

[26] The second appellant admitted receipt of the tax refund in the amount of R 1 087 485.11 but stated that he assumed that the amount so received was the money that was due and owing to the appellants by the municipality.

Section 174 Application

[27] At the end of the state's case, the appellants applied to be acquitted on all charges in terms of section 174 of the CPA. After hearing oral argument, the magistrate's ruling was reserved. When the ruling was handed down, the appellants were acquitted only on count 13 and the application was dismissed in respect of counts 1 to 12 and counts 14 and 15.

Magistrate's Judgment

[28] The magistrate found that the state failed to prove beyond reasonable doubt that the appellants had a common purpose to defraud SARS. She however found that the appellants unlawfully appropriated the amount of R 1 086 279.00[5] paid by SARS as a tax refund and convicted the appellant on 'a competent verdict of theft'.

[29] Notably, no specific provision in the CPA was invoked by the magistrate in pronouncing the conviction of theft as a competent verdict.[6] Furthermore, she did not pronounce a verdict in respect of each count in the charge sheet, nor did she specify in respect of which count in the charge sheet she convicted the appellants of theft.

Leave to Appeal

[30] The magistrate granted leave to appeal on 7 March 2025. In a judgment granting leave to appeal, she acknowledged that she failed to give a verdict in respect of the various counts in the charge sheet and that her failure in this regard ought to be corrected by an appeal court.

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[5] According to the evidence, an amount of R 1 087 485.11 was paid to the appellants and not R 1 086 279.00. The preamble of the charge sheet refers to an amount of R 1 086 729.00 that was paid to the appellants as a tax refund.

[6] Competent verdicts are dealt with in Chapter 26 of the CPA.

Analysis

Is theft a competent verdict on a charge of fraud?

[31] The main issue that arises in this appeal is whether theft is a competent verdict on a charge of fraud. Competent verdicts refer to the principle in terms of which a court is permitted to convict an accused of a lesser offence than the offence reflected in the charge sheet, provided that the evidence proves the lesser offence.[7] A court should only resort to convicting an accused on a competent verdict if the evidence does not prove the offence the accused has been charged with.[8]

[32] Sections 256 to 269A of the CPA specifies a list of offences and competent verdicts. Section 270 applies to offences not specified in sections 256 to 269A and stipulates as follows:

'If the evidence on a charge for any offence not referred to in the preceding sections of this Chapter does not prove the commission of *the offence so charged* but proves the commission of an offence which by reason of the essential elements of that offence is included *in the offence so charged*, the accused may be found guilty of the offence so proved.' [my emphasis]

[33] Therefore, to convict an accused on a competent verdict: a) the offence which the person has been convicted of must be a competent verdict in terms of sections 256 to 269A or in terms of section 270 of the CPA; and b) the evidence must prove that the person is guilty of that offence beyond reasonable doubt.

[34] Notably, fraud is not specified in section 256 to 269A. The question which arises therefore is whether theft is competent verdict for fraud in terms of section 270 of the CPA.

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[7] *Phakane v S* 2018 (1) SACR 300 (CC) at para 55.
[8] See: Joubert (ed) *Criminal Procedure Handbook* 10 ed (as cited in *Phakane v S, supra)* at para 55 and footnote 22:
'It is possible that the evidence might fall short of proving the crime charged, but nevertheless succeeds in proving beyond reasonable doubt the commission of some other offence not specifically formulated as an alternative charge… to the charge in the indictment or charge-sheet, as the case may be. This type of situation is governed by the statutory rules pertaining to so-called competent verdicts, that is, the unexpressed or latent or implied charges which only surface once the crime charged is not proved but some other crime, which is normally lesser than or akin to the crime charged, is proved.'

[35] Two different approaches have developed in the interpretation of section 270. The first approach is based on a wide interpretation of section 270 and entails an analysis of the essential elements of the offence the accused has been charged with and any additional factual allegations set out in the charge sheet to determine if the elements of the lesser offence are included therein. Therefore, in deciding whether section 270 should be invoked, the particular facts of the commission of the offence as set out in the charge sheet are considered, in addition to the elements of the offence according to its definition.[9]

[36] If the afore-mentioned wide interpretation is applied, the question is not whether theft is a competent verdict in respect of the offence of fraud, but rather whether theft is a competent verdict in respect of the particular fraud committed by an accused according to the factual allegations set out in the charge sheet. This in essence means that the answer to the question whether any particular offence is a competent verdict in terms of section 270 will differ from case to case, depending on the particular allegations set out in the charge sheet.

[37] The second approach is based on a narrow interpretation of section 270 and requires an analysis of the essential elements of the offence with which the accused was charged without any reference to any additional allegations contained in the charge sheet. Only the essential elements of the offence, in accordance with its definition, are considered for the purposes of the analysis. In other words, the substantial elements of the two offences are compared to determine whether the accused may be found guilty of the lesser offence. The focus is therefore only on the definition of the offences and on their essential elements, and not how a particular offence might have been described by a prosecutor in a particular charge sheet.[10]

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[9] In *S v Mavundla* 1980 (4) SA 187 (T) at p191A, the court held that the analysis of whether an offence is a competent verdict involves a two-step enquiry: firstly, the essential elements of the lesser offence should be considered and secondly, it should be determined whether those elements are included in the offence which the accused has been charged with. The second step requires a consideration of the charge sheet which applies in each particular matter. ('. . . . dit verg die oorweging van die opgestelde aanklag wat in die besondere geval betrekking het.')

[10] Watney, M (2015). Formulation of charges in a criminal trial: Imprecision of language leads to imprecision of thought. *Tydskrif vir die Suid-Afrikaanse Reg, (3)* 640-652.

[38] The narrow interpretation was followed by the court in *S v Mbata*,[11] where it was held that the criterion under section 270 is 'to be found exclusively in the essential elements of the offence charged, irrespective of any additional allegations which may have been embodied in the charge'.

[39] In contrast, the wide interpretation of section 270 has been followed by our courts in various matters, including *S v Mavundla*,[12] *S v Mei*,[13] and more recently in *Kok v S*.[14]

[40] In *S v Mei*,[15] Viljoen AJ specifically noted a disagreement with *Hiemstra*, the author of *Suid-Afrikaanse Strafproses*, who in earlier editions preferred the narrow interpretation of section 270, and maintained that *S* v *Mavundla*[16] had been wrongly decided. In this regard, the learned judge held that:

'I am inclined to disagree with the learned author of Suid-Afrikaanse Strafproses that the wording of section 270 makes it clear that a finding of guilt on a lesser crime can only be brought in if the definition of the crime charged encompasses the lesser crime. It seems to me that there is much to be said for the view that the wording of the new section bears the meaning that, as long as the "essential elements" of the lesser offence are included "in the offence so charged", i.e. *in the charge sheet*, not the legal definition of the crime, a finding of guilt on the lesser crime is competent.'[17] [my emphasis]

[41] What is immediately apparent from the above passage is that the learned judge read in the words 'charge sheet' into the wording of the section. It must however be noted that there is no reference in section 270 to the 'charge sheet' or to how the offence has been described in the charge sheet.

[42] It is evident that the approach preferred by the court in *S v Mei* was based on the wording and interpretation of the predecessor of section 270, i.e. section 204 of the (repealed) Criminal Procedure and Evidence Act 56 of 1955.[18]

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[11] *S v Mbata* 1982 (2) SA 145 N at 147D-E.
[12] *S* v *Mavundla* 1980 (4) SA 187 (T) at 191A.
[13] *S v Mei* 1982(1) SA 299 (O) at p303.
[14] *Kok v S* 2015 (2) SACR 637 (WCC) at paras 18 – 20.
[15] *S v Mei, supra*.
[16] *S* v *Mavundla*, supra.
[17] *S v Mei*, supra at p303.
[18] *S v Mei, supra* at p 303E-F.

[43] In this regard, section 204 stipulated as follows:

'If in any other case not hereinbefore specified the commission of the offence with which the accused is charged as defined in the law creating the offence *or as set forth in the charge* includes the commission of any other offence, the accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved.' [my emphasis]

[44] There was therefore a specific reference in section 204 to how the offence had been 'set forth in the charge'. This allowed for an interpretation which included the analysis of the additional allegations relating to the offence as set out in the charge sheet.

[45] For the reasons set out below, I respectfully disagree with the manner in which section 270 was interpreted by the court in *S v Mavundla*, *S v Mei* and *Kok v S*.

[46] The ordinary meaning of the words of the statute is the departure point when interpreting the provisions of a statute in its wider context, ambit and purpose. More particularly, it has been held in *Cool Ideas 1186 CC v Hubbard and Another*:[19]

'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:(a) that statutory provisions should always be interpreted purposively;(b) the relevant statutory provision must be properly contextualised; and (c) all statutes must be construed consistently with the Constitution . . . '

[47] Having regard to the ordinary grammatical meaning of section 270, there is in my view no scope for giving the section a wide interpretation which includes reference to additional allegations contained in the charge sheet. Whilst section 204 referred specifically to how the offence has been 'set forth in the charge', section 270 of the CPA contains no specific reference to the charge sheet or to how the offence has been formulated in the charge sheet. The phrase 'the offence so charged' is a

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[19] *Cool Ideas 1186 CC v Hubbard and another* 2014 (4) SA 474 (CC) at para 28.

reference to *the offence* an accused has been charged with and does not refer to the charge sheet or how the allegations have been 'set forth in the charge'.[20]

[48] The narrow interpretation of section 270 leads to certainty in the application of the section as only the legal definition and essential elements of the offences will be the determining factor in deciding whether convicting an accused of a particular offence is a competent verdict.[21]

[49] The issue of certainty is an important consideration when it comes to an accused's right to a fair trial as enshrined in section 35(3)(a) of the Constitution. The right to a fair trial includes the right to be informed of the charge with sufficient detail to be able to formulate a defence. An approach based on the essential elements of an offence creates certainty, in that the competent verdicts in respect of a particular offence will not differ from case to case based on how the charge sheet has been formulated or how it will be interpreted by a particular presiding officer.[22]

[50] Therefore, in order to interpret section 270 in a manner which is consistent with section 35(3) of the Constitution, a narrow interpretation of section 270 is required to ensure that an accused charged with a particular offence would know upfront, without analysis of the particular facts appearing in the charge sheet, what the competent verdicts are of which he may be convicted. In this regard, in *Mashinini and Another v S*,[23] the Supreme Court of Appeal held as follows:

'Section 35(3)(a) of the Constitution provides that every accused person has a right to a fair trial which, inter alia, includes the right to be informed of the charge with sufficient detail to answer it. This section appears to me to be central to the notion of a fair trial. It requires in clear terms that, before a trial can start, every accused person must be fully and clearly

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[20] The difference in the wording between sections 270 and its predecessor, and the difference in interpretation that must accordingly follow, was pointed out by the court in *S v Mbata*, *supra* at para 147A-D.

[21] See: Whatney, M, *supra* where the learned author states: *"If anything, the provisions of section 270 are clearer and more restricted in approach than its predecessors and allows for a competent verdict if the essential elements of that offence are included in the offence originally charged. Such interpretation of section 270 will narrow the possibility of a conviction on a competent verdict, but ensures greater legal certainty in the application of the section as the essential elements of the respective offences, and not the factual allegations and/or drafting skills of the prosecutor (which may differ from case to case), will be the determining factor in deciding whether an offence is a competent verdict."*

[22] See: Whatney, M, *supra*.

[23] *Mashinini and Another v S* 2012(1) SACR 604 (SCA).

informed of the specific charge(s) which he or she faces. Evidently, this would also include all competent verdicts. The clear objective is to ensure that the charge(s) is sufficiently detailed and clear to an extent where an accused person is able to respond and importantly to defend himself or herself. In my view, this is intended to avoid trials by ambush.'

[51] The narrow interpretation is therefore to be preferred. Section 270 should be applied by analysing the essential elements of the lesser offence and comparing it to the essential elements of the offence the accused was charged with to determine if the lesser offence is included in the offence the accused was charged with. This analysis should be done without reference to any additional factual allegations in the charge sheet.

[52] The essential elements of theft are a) the unlawful; b) intentional; c) appropriation of property, d) which belong to and is in the possession of another, e) with the intention to deprive the person entitled to possession of the property of such property.[24] In contrast, fraud is per definition a) the unlawful b) intentional c) making of a misrepresentation d) which causes actual or potential prejudice.[25]

[53] It is evident that the elements of theft are not included in the offence of fraud, in that there is no intentional act of appropriation of property in the definition of the latter. [26] Therefore, based on a narrow interpretation of section 270, which in my view is the preferred approach, theft is not a competent verdict on a charge of fraud.

[54] It is important to note that even if the wide interpretation of section 270 was applied to the facts of this matter, one must conclude that the essential elements of theft were not included in the offence of fraud as set out in the allegations contained in the charge sheet. More particularly, an analysis of the charge sheet reveals that there was no allegation, in respect of any of the counts, that the appellants intentionally appropriated the amount of R 1 086 729.00 with the intention to permanently deprive SARS thereof. In fact, the only reference to the amount of R 1

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[24] Burchell, J. (2013) *Principles of Criminal Law*. Fourth Edition at p675. See also p685 for the discussion of *R v Sibiya* 1955 (4) SA 247 (A).
[25] Burchell, supra at p723.
[26] Miller, M (2014) Is theft a competent verdict on fraud? *De Rebus* (available online at: *www.derebus.org.za/theft-competent-verdict-charge-fraud/)*

086 729.00 was found in the preamble of the charge sheet in which it was alleged that:

‘SARS had then first, set off the refund of [sic] claimed on behalf of Accused No. 1 against the debt of R8 102 320.03 owed by Accused No.1 to SARS and then paid [sic] balance of R 1 086 729.00 which was made up of R 847 729.97 which was the difference between the amount of R 8 950 050.00 and the amount of R8 102 320.03 and the R239 000.00 interest accumulated in favour of Accused No.1 in the Absa bank account number 9200334212 held by Accused No. 2 on behalf of Accused No.1.’

[55] In other words, it was alleged only in the preamble (and not in relation to any of the specific counts of fraud), that SARS paid an amount of R1 086 729.00 held by the second appellant on behalf of the first appellant. It was, however, not alleged anywhere in the charge sheet that the amount so paid as a refund was intentionally and unlawfully appropriated by the appellants; nor was it alleged that there was an intention to permanently deprive SARS of that amount.

[56] It follows therefore that, in this matter, whether the narrow or wide interpretation is applied, theft was not a competent verdict on the offence set out in the charge sheet and the magistrate was not permitted in terms of section 270, or any other provision of the CPA, to convict the appellants of theft.

Failure to Pronounce a Verdict on each Count

[57] It is common cause that the appellants were acquitted on all fifteen counts of fraud. In this regard it should be noted that conviction on a competent verdict is regarded as an acquittal on the main counts.[27]

[58] Save for count 13, in respect of which the appellants were acquitted in terms of Section 174, the magistrate did not pronounce a verdict in respect of each count. Instead, she convicted the appellants of theft without specifying the count on the charge sheet to which the verdict related. The magistrate was, however, obliged to pronounce a verdict of not guilty in respect of each count of fraud. In this regard, section 106(4) of the CPA stipulates as follows:

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[27] *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (1) SACR 431 (SCA) at paras 7-9.

‘An accused who pleads to a charge, other than a plea that the court has no jurisdiction to try the offence, or an accused on behalf of whom a plea of not guilty is entered by the court, shall, save as is otherwise expressly provided by this Act or any other law, be entitled to demand that he be acquitted or be convicted.’

[59] In *S v Sithole and Others*[28] it was held, with reference to section 106(4), that:

‘The language used in the section is clearly peremptory. It therefore follows that all the accused who had pleaded to certain charges but in respect of which no judgment was given by the magistrate should be acquitted on all those charges.’

[60] The magistrate, therefore, in not pronouncing a verdict in respect of any of the charges reflected in the charge sheet, committed an irregularity, which should be corrected. Having regard to the fact that a conviction in respect of a competent verdict is regarded as an acquittal on the main counts, and having found that theft is not a competent verdict, the order of the magistrate should be corrected by replacing it with an order acquitting the appellants of all fifteen counts.

Conclusion

[61] In the circumstances, the appeal should be upheld, and the conviction and sentence of the appellants should be set aside. The orders of the Magistrates’ Court should be replaced with an order acquitting the appellants on all fifteen counts.

Order

[62] In the result, the following order shall issue:

1. The appeal is upheld and the conviction and sentence of the appellants are set aside.

2. The verdict and orders issued by the East London Magistrates’ Court under case no. RC 5/15/2022 are replaced with an order in the following terms:

   ‘Accused no.1 and accused no. 2 are found not guilty and are acquitted on all 15 counts of fraud.’

[28] *S v Sithole and Others* 1999 (1) SACR 227 TPD at 229h-j.

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G APPELS

ACTING JUDGE OF THE HIGH COURT

I agree.

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A GOVINDJEE
JUDGE OF THE HIGH COURT

APPEARANCES:

For the Appellants:	Mr A Hattingh
Instructed by:	Z M Matiwane 26 Eden Street QUEENSTOWN

For the Respondent:	Mr L. Stungu
Instructed by:	The Director of Public Prosecutions MAKHANDA

Heard:	19 November 2025
Delivered:	24 February 2026