



**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED.

SIGNATURE

DATE: 21 April 2022

**Case No: 25/2022**

In the matter between:

**THE STATE**

and

**FITWELL SIPHOESIHLE MOYO**

Accused

CORAM: ISMAIL J and WILSON AJ

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**JUDGMENT**

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**WILSON AJ:**

- 1 The District Court convicted the accused person, Ms. Moyo, of fraud. The conviction was returned on Ms. Moyo's guilty plea. The District Court sentenced Ms. Moyo to 18 months' imprisonment, with the option of a fine of R1800. The District Court also imposed a further 18 months' imprisonment

wholly suspended on condition that Ms. Moyo is not convicted again of the crime of fraud, attempted fraud, theft or attempted theft during the period of suspension.

- 2 The Acting Senior Magistrate placed the conviction and sentence before us on special review, in terms of section 304 (4) of the Criminal Procedure Act 51 of 1977 ("the Act"). The Acting Senior Magistrate drew our attention to the sentence imposed. He suggested that the first term of 18 months' imprisonment imposed ought to have been expressed as an alternative to the fine, and not the other way around; that the R1800 fine was incommensurate with the term of imprisonment; and that the condition on which the District Court suspended the second term of 18 months' imprisonment was so wide as to be prejudicial.
- 3 I accept that the Acting Senior Magistrate's concerns are well-founded, but I consider that the difficulties that arise in this case go far deeper than the terms of the sentence imposed.

### **The guilty plea**

- 4 The substrate of Ms. Moyo's guilty plea was a written statement handed-in under section 112 (2) of the Act. That statement was, in my view, woefully inadequate to support a guilty plea on a charge of fraud.
- 5 The first part of the statement does little more than repeat the elements of the offence. Ms. Moyo admits that she "unlawfully and falsely, with the intent to defraud, and to the potential prejudice of Jet store, gave out and pretended to

one Asnath Sherinda that [she] was authorised to use” a Jet store card to purchase a cell phone worth just under R5000.

- 6 It is trite that a plea explanation under section 112 (2) of the Act must do more than recite the elements of the offence (*S v Chetty* 2008 SACR 157 (W) at 160i-j). Factual averments that “adequately support” a conviction on the charge are required (*S v Shiburi* 2018 (2) SACR 485 (SCA) at paragraph 19). “Adequate support” means nothing less than the admission of facts which leave the court in no reasonable doubt that the accused person has committed the offence on which they stand charged. Those facts must address both the accused person’s acts and their state of mind.
- 7 The second part of Ms. Moyo’s statement, in which a narration of that sort is attempted, does not meet the requirements of section 112 (2). Ms. Moyo says that she “was approached by two of [her] neighbours who tasked [her] to assist them in buying a cell phone”. They promised to give Ms. Moyo R500 for her help. Despite being “suspicious as the card was not signed at the back”, Ms. Moyo agreed to do as she was asked because she “needed money to survive as [she was] not employed”. Ms. Moyo went to the Jet store in Cresta, and presented the card she had been given to purchase the cell phone. The cashier (presumably Ms. Sherinda) saw that the card was not signed on the back and asked whether the card belonged to Ms. Moyo. Ms. Moyo said that it did not belong to her. She said that she had been sent by her neighbours to buy the cell phone with it.



- 8        These are the material admissions on which the District Court accepted Ms. Moyo's plea. As should be plain, they do not amount to an admission that Ms. Moyo committed fraud.

### **The nature of fraud**

- 9        Fraud is the unlawful making of a misrepresentation, with the intent to defraud, which causes actual or potential prejudice to the representee or some other person (see JRL Milton *South African Criminal Law and Procedure* Volume 2 3rd edition at page 707). It is not clear to me from Ms. Moyo's statement either that she made a misrepresentation, or that she intended to defraud. When asked whether the card was hers, Ms. Moyo said that it was not. She said that she had been sent by her neighbours to purchase a cell phone with it. She did not say whether it belonged to her neighbours. She said simply that it was not hers.
- 10       Ms. Moyo does not confirm that she knew that the card did not belong to her neighbours, or that she had any knowledge – rather than suspicions – of their reasons for sending her to buy the phone. There was, in fact, nothing before the District Court that established to whom the card actually belonged. I am accordingly unable to see, from her statement, at what point Ms. Moyo misrepresented anything. It is true that the mere presentation of the card in the knowledge that it was not hers might have counted as a misrepresentation, had Ms. Moyo not immediately clarified that the card belonged to someone else. I am unable to locate any authority on which the mere purchase of goods with the card of another is an act of fraud. If it is, then that offence must be committed thousands of times a day.

11 It is possible, of course, to read-in to Ms. Moyo's statement that the Jet card did not belong to her neighbours, and that she knew that they were using it to obtain the cell phone fraudulently. But that is not enough. A conviction must be based on fact, not innuendo. Ms. Moyo's statement leaves a wide array of other possibilities open. For example, the statement does not exclude the possibility that the Jet card belonged to one of Ms. Moyo's two neighbours, and that she used it with their permission. In that event, no crime has been committed at all.

12 Plainly, Ms. Moyo's statement did not "adequately support" her guilty plea. That being so, the District Court was not entitled, without more, to accept that plea. The District Court ought to have questioned Ms. Moyo on the statement, with the aim of satisfying itself that she really was guilty of fraud. That is what section 112 (2) of the Act requires if the statement handed up leaves any room for reasonable doubt of an accused person's guilt. In this case Ms. Moyo's statement plainly left a great deal of room to doubt her guilt. Accordingly, neither her conviction nor her sentence can stand.

#### **Further requirements for accepting a guilty plea**

13 On setting aside Ms. Moyo's conviction and sentence, section 312 (1) of the Act requires us to remit the matter to the District Court and direct it to comply with section 112 (2). Given that this is the statutorily prescribed remedy, it may be of assistance to restate the further requirements for accepting a plea of guilty. Apart from the failure of the statement handed up to adequately support Ms. Moyo's guilty plea, I am not satisfied on the record before me that these further requirements were fully complied with either.

- 14 A court must, as I have said, be satisfied that a statement handed up under section 112 (2) of the Act leaves no room for reasonable doubt as to the accused person's guilt as charged. If these facts do not appear from the statement, then the Court must establish whether they exist by questioning the accused appropriately on the statement.
- 15 However, a court must also be satisfied that the accused person understands that each admission made in the statement is conclusive proof of the allegation admitted, and that the court may convict them on those admissions if they establish the accused person's guilt as charged; that the statement was made freely and voluntarily, in the absence of any undue influence; that the accused person has read and understood each admission contained in the statement; that the statement correctly records the facts that the accused person wishes to admit; and that the accused person is fully informed of the constitutional rights waived by a guilty plea. It must appear on the record that these requirements have been met (see *S v Sellars* [1991] 3 All SA 28 (N) at page 29).
- 16 It appears that the relevant authorities have until now only stated these requirements in matters where an accused person is unrepresented. However, I do not see why they should not also apply when an accused person has legal representation. Depending on the facts, it may be sufficient if an accused person's legal representative confirms on the record that the requirements I have set out are met. It may also – conceivably – be sufficient if the written statement handed up under section 112 (2) confirms that they are met, is signed by the accused person, and counter-signed by their legal



representative. Although the way the requirements are met might change when an accused person is legally represented, those requirements cannot as, a matter of law, apply any differently, or any less stringently.

### **Ms. Moyo's children**

17 Finally, since Ms. Moyo is the primary caregiver to three children, the youngest of which was 2 at the time sentence was passed, it is striking that the District Court had no regard at all to the decision of the Constitutional Court in *S v M* 2008 (3) SA 232 (CC). That decision requires a careful and sensitive inquiry into Ms. Moyo's children's best interests, and how they would be affected by any term of imprisonment that might be imposed. If the matter in future progresses to the sentencing stage, the repetition of that error ought to be avoided.

18 For all these reasons, I propose the following order –

18.1 Ms. Moyo's conviction and sentence are reviewed and set aside. In the event that Ms. Moyo is in custody, she is to be released forthwith, and is directed to appear again before the District Court when summoned.

18.2 The matter is remitted to the District Court. The District Court is directed to comply with section 112 (2) of the Act in further proceedings consistent with this judgment.



**S D J WILSON**  
Acting Judge of the High Court

**ISMAIL J:**

19 I agree and it is so ordered.

A handwritten signature in black ink, appearing to read 'M Ismail', with a horizontal line drawn underneath it.

**M ISMAIL**  
Judge of the High Court

RECEIVED ON: 16 March 2022

DECIDED ON: 21 April 2022

No appearances