REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT

PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: A565/2011

3/04/2014

In the matter between:

P.M PHAHANE **APPELLANT**

AND

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

03/04/2014 .....

THE STATE **RESPONDENT**

JUDGMENT

BAQWA J; BAM J

[1] The appellant was charged on one count of fraud in the District Court Benoni. She was found guilty and sentenced to serve a term of two (2) years imprisonment.

[2] She was granted leave to appeal against both conviction and sentence by the trial court.

[3] The approach of the court on appeal is summarised in the case of **S v Hadebe and Others 1997(2) SACR 641(SCA) at 645 e-f** where the following was stated:

"In the absence of a demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong."

[4] The background of this case is briefly as follows:

The charge against the appellant was that on 21 December 2010 at Benoni she had falsely and with intent to defraud pretended to Nedbank that she was Vusimuzi Nkosi and that she was entitled to draw the sum of R1,200-00 from Vusimuzi Nkosi's account. She did this whilst knowing that she was not the person entitled to make a withdrawal from Nkosi's account.

[5] It is common cause that complainant, Vusimuzi Nkosi, bought an item from Pep Stores on the date in question and that on that occasion he was attended to by the appellant.

[6] It is also not in dispute that the complainant used a credit card to effect the purchase at the store. Thereafter complainant reported that appellant had not returned his card.

[7] The evidence presented by the State through the complainant, the appellant's store manager and the area manager of Pep Stores Benoni, which included video footage of the area in which appellant worked confirms that complainant's card had remained with the appellant. It was during that period that complainant parted with his credit card after making the purchase that the withdrawal was made from his bank account.

[8] The video footage from the store showed the appellant placing the credit card under the till and thereafter leaving the store for a short while without informing the supervisor about her movements. After connecting the various pieces of evidence, the trial court concluded that the appellant was guilty as charged.

[9] The appellant raised several grounds of appeal namely:

9.1. The State failed to prove the element of misrepresentation due to the fact that appellant allegedly withdrew money from the ATM and not from Nedbank.

9.2. The learned Magistrate improperly introduced new evidence in the form of a Nedbank statement as part of the State case.

9.3. The trial Magistrate failed to apply the cautionary rule against the evidence of Christina Mtwati who was a co-employee of the appellant at Pep Stores.

9.4. That the video footage introduced into the record by Christina Mtwati constituted hearsay and was inadmissible.

9.5. That the trial Magistrate erred in admitting a previous consistent statement of the appellant relating to an admission by the appellant that she had taken complainant's card. The admission had been made after appellant viewed the video footage.

[10] Respondent submits and I accept that the answer to appellant's first ground of appeal is to be found in the judgment of Stegman (J) **S v Van den Berg 1991(1)SACR 104(T) at 106** when he stated as follows:

"From the answers given by the accused to the Magistrate's questions, it would appear to be that she unlawfully credited a particular account in Santam bank with an amount of R800 when the account was not entitled to such credit. This was in my view, a misrepresentation to the bank, and the fact that the misrepresentation was introduced into the computer system electronically differs not to one which the clerk who, with the intention to deceive, makes a false entry with a pen into a ledger account. The account has been falsely credited and in this instance the computer system was the means by which such an entry was made and consequently it is a misrepresentation even though no specific person other than Santam Bank per se was mentioned in the charge sheet, I do not think it matters. Apart from the fact that Santam Bank is a legal person, the provisions of section 103 of Act 51 of 1977 would, it seems to me, make it necessary to refer to a specific person being defrauded."

In casu the ATM was the means utilised to commit the fraud.

[11] Regarding the bank statement, the issue was introduced during cross examination of the complainant by appellant's counsel. The court merely exercised its discretion in terms of section 167 of Act 51 0t 1977 by asking the witness whether he would be able to bring a bank statement which would reflect the amount which seemed to be in dispute. The statement was accordingly received to clarify issues after the cross examination of the complainant by appellant's counsel.

[12] Regarding the evidence of Christinah Mtwati, she was a co-employee of the appellant. She testified that she had a good relationship with appellant prior to

the incident in question. She had played no role in the dismissal of the appellant from Pep Stores and there was accordingly no reason for the court to apply the cautionary rule against her.

[13] Regarding the video recording which was introduced as part of the evidence, the court merely sounded a cautionary note to the prosecutor, that what the witness was told by Mr De Bruin about the video recording would be hearsay and inadmissible. There is accordingly nothing wrong in a court enquiring from a prosecutor whether a particular witness would be called or not.

Christina Mtwati testified about what she saw in the video when it was shown to her and the appellant by De Bruin. De Bruin was called in to testify about what he saw on the video footage. His evidence was direct and original. There was no evidence that the video footage had been interfered with and the recording was faithful and was not shown to be a depiction of any other rendition other than what it showed. In my view therefore if complied with the requirements set out by the Honourable Justice Milne JP in **S v Ramgobin and Others 1986(4) SA 117(N)**.

[14] Regarding the issue of the previous consistent statement made by the appellant it appeared to be a statement made by the appellant prior to the court hearing. De Bruin testified concerning the admission made by the appellant regarding the taking of complainant's card after she was shown the video. The admission was shown to have been made freely and voluntarily by the appellant. It was accordingly not irregularly introduced as part of state evidence.

[15] Reference to the dictum of Malan JA in **R v Mlambo 1957(4) SA 727 (A) at 738A** is appropriate:

"In my opinion, there is no obligation upon the crown to close every avenue of escape which may be said to be open to the accused. It is sufficient of the crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused."

Upon weighing the evidence produced by the state in the court **a quo**, the only reference that could be drawn from the facts is that the appellant is the person who made the withdrawals from Nkosi's account without his consent.

Re: Sentence

[16] Regarding sentence, the powers of an appeal court to interfere were aptly described in the case of **S v Petkar 1998(2) All SA 550(A) at 551** as follows:

"This court's powers to interfere with a sentence on appeal are circumscribed. It may only do so if the sentence is vitiated by (1) irregularity, (2) misdirection, or (3) is one which no reasonable court could have come, in other words, one where there is a striking disparity between the sentence imposed and that which this court considers appropriate."

[17] Whilst the crime committed by the appellant was aggravated by her abuse of a position of trust, where the public had to rely on her to conduct business with them with honesty and integrity, I consider that the court **a quo** ought to have put more weight on the appellant's personal circumstances:

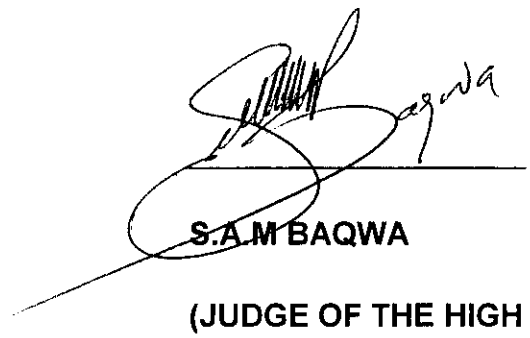
At the time of arrest, appellant was 36 years old, no previous convictions were proved against her. She could therefore not be said to be a person who had a propensity to commit crime. She has two children aged 19 and 10 years old respectively. When she was sentenced on 1 June 2011 she was unemployed.

[18] In the result I propose that the following order be made.

18.1. The appeal against conviction is dismissed.

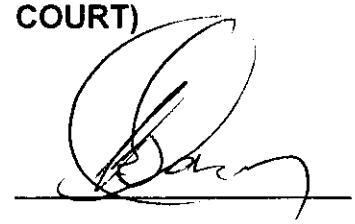
18.2. The appeal against sentence is allowed. The sentence handed down by the District Court Benoni is amended and substituted with the following:

The appellant is sentenced to a term of two(2) years imprisonment 12 months of which is suspended for five(5) years on condition that she is not found guilty of a similar offence during the period of suspension.



S.A.M BAQWA

(JUDGE OF THE HIGH COURT)



A.J BAM

(JUDGE OF THE HIGH COURT)