REPORTABLE

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

CASE NO: AR 931/2004

In the matter between:

SAYED IMITIAZ AHMED ESSOP Appellant

and

THE STATE Respondent

JUDGMENT

GORVEN J

[1] The appellant confronted 69 charges of fraud in the regional court, Durban. These arose out of his employment as the shipping manager at Non-Ferrous Metal Works SA (Pty) Ltd (NFM) over a period stretching from 2 December 1994 to 6 February 1998. The charge sheet read as follows:

'GENERAL PREAMBLE:

WHEREAS at all relevant times:

1. The Accused was employed by NON-FERROUS METAL WORKS SA (PTY) LTD ("the Complainant") at Jacobs, Durban, KwaZulu-Natal;
2. He was the shipping manager in charge of all managerial duties relating to the transportation of goods imported to and exported from the Complainant, including the authorisation of cheque requisitions for payments to be made by

the Complainant in respect of freight charges, documentation charges and value added tax (V.A.T) payable on imported goods;

3. Cheques were duly issued by the Complainant in accordance with the cheque requisitions authorised by the Accused;

4. The amounts for which the aforementioned cheques were issued by the Accused were in fact not owed by the Complainant to "Overseas Freight Carriers".

Therefore,

The Accused is guilty of the crime of FRAUD, in that on or about the date, as mentioned in column 1 of Schedule 'A' and at or near Jacobs in the Regional Division of KwaZulu Natal the Accused did wrongfully, unlawfully and with intent to defraud, misrepresent to the persons mentioned in column 5 and/or NON-FERROUS METAL WORKS SA (PTY) LTD, that the amount of moneys in column 2 of Schedule 'A', was due and payable to "Overseas Freight Carriers" and did then and thereby induce the said persons mentioned in column 5 of Schedule 'A' and/or F MAHOMED and/or NON-FERROUS METAL WORKS SA (PTY) LTD, to draw cheques as described in column 4 for the amounts as mentioned in column 2 of Schedule 'A' in favour of "Overseas Freight Carriers".

WHEREAS when he made the said misrepresentations, the Accused well knew that the said amounts described in column 2 were not due and payable to "Overseas Freight Carriers" and/or that, no such company existed, and that such cheques were going to be paid into an account number 5000 026 816 held at First National Bank, Smith Street East Branch, in the name of "Overseas Freight Carriers", of which business the accused was allegedly the sole proprietor and he accordingly had signing powers for the said account and did thereby commit the crime of FRAUD.'

A schedule was annexed to the charge sheet in table form reflecting the 69 counts with the information referred to in the above charge sheet. The total amount involved was R837 049.95.

[2] The appellant, who was represented initially by senior counsel and subsequently by junior counsel, pleaded not guilty to all the counts. He was found guilty as charged and sentenced to a period of five years'

imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act 51 of 1977 (the Act). All the counts were taken together for the purposes of sentence.

[3] Pursuant to his not guilty plea, the appellant put up a statement in terms of s 115(1) of the Act. The statement reads as follows:

'1. The accused admits that:

1.1 He was employed by NON-FERROUS METAL WORKS SA (PTY) LTD ("the Complainant") at Jacobs, Durban, KwaZulu Natal;

1.2 He was the Shipping Manager in charge of all managerial duties relating to the transportation of goods imported to an expert or to from the Complainant including presentation of cheque requisitions for payments to be made by the Complainant in respect of freight charges, documentation charges and Value Added Tax payable on imported goods;

1.3 Cheques were duly issued by the Complainant in accordance with the cheque requisition presented by the accused;

1.4 The said cheques were those outlined in column 4 of the annexure to the charge sheet;

1.5 The said cheques as shown in column 4 correctly reflect:

1.5.1 dates as set out in column 1;

1.5.2 the amounts as set out in column 2;

1.5.3 the ship number and description as set out in column 3; and

1.5.4 the signatures purporting to be of the persons set out in column 5.

1.6 The said cheques were drawn in favour of Overseas Freight Carriers by the complainant, Non-Ferrous Metal Works SA (Pty) Limited.

1.7 The said Overseas Freight Carriers is not a Close Corporation nor a company, but a name for a banking account opened by the accused at First National Bank, Smith Street, Durban.

1.8 The sole signatory to the said account is the accused.

2. The accused denies that:

2.1 Such presentation of cheque requisitions was an authorisation;

2.2 Such presentation was without the knowledge of the complainant.

3. Accordingly the accused denies that he misrepresented to the complainant in the manner alleged in the charge sheet or at all and accordingly denies that he wrongfully and unlawfully committed the crime of fraud.'

Paragraphs 1.1 to 1.8 were recorded as admissions under s 115(2)(b) of the Act and are therefore deemed to be admissions under s 220.

[4] In essence, therefore, the case reflected in the charge sheet was that the cheque requisitions presented by the appellant to NFM for cheques to be drawn in favour of the account of Overseas Freight Carriers (the non-existent entity) resulted in NFM making out cheques which were deposited to that account. Since there was no such entity, which the appellant admitted when he said that Overseas Freight Carriers was simply a name for a bank account opened by the appellant, monies could not have been due to it and payments were made to that account by NFM without there being any basis for them to be made.

[5] I have set out fully the contents of the charge sheet and the statement in terms of s 115 put up by the appellant. This is because the appellant submitted in his heads of argument and at the appeal hearing that the charge sheet lacked an essential averment for the crime of fraud. The essential averment which he claimed was lacking is that NFM suffered actual or potential prejudice when it acted on the misrepresentation of the appellant. In response to this submission, counsel for the State applied to amend the charge sheet to include an express averment of prejudice.

[6] It is settled law that actual or potential prejudice is an essential averment for a charge of fraud. In the absence of such an averment, the

indictment discloses no offence. This was dealt with in *R v Jones and More*[1] by Solomon JA as follows:

'[I]t is necessary to allege in the indictment that there has been prejudice, and in the absence of such an allegation the indictment would disclose no offence.'

[7] It is so that there is no express averment of prejudice in the charge sheet. This is what the appellant has seized upon. However, in *Jones and More*, Solomon JA held that an express averment to that effect was not necessary:

['T]he indictment must contain an allegation, either express or implied, that there has been prejudice, and the absence of such an allegation would constitute a fatal defect in the indictment, for it would not disclose an offence.'[2]

This means that, whilst an averment of prejudice is necessary, it does not have to be an express averment. Solomon JA went on to hold that if, 'from the facts set forth in [the] indictment, an inference can fairly be drawn that the complainants must have been prejudiced', the indictment is not open to objection.[3] In summary, therefore, the position set out in *Jones and More* is that first, an averment concerning prejudice is necessary. Secondly, that averment may be made expressly or by implication. Thirdly, where there is no express averment, the averment is implied if, from the facts set out in the indictment, an inference can fairly be drawn that there has been prejudice.

[8] As far as I am aware, this approach has not been overruled or restated in any way so as to exclude the sufficiency of an implied averment concerning prejudice. We were also not referred to any such cases. If the law remains as so stated, it means that, even though no express averment is made in the present charge sheet, the averment may still be present in

[1] 1926 AD 350 at 355.
[2] *Ibid* at 354. This approach was followed in *R v Wood* 1927 AD 19 at 20.
[3] *Ibid* at 355.

implied form. As regards the present charge sheet, if the inference can fairly be drawn that NFM must have been prejudiced, the averment is present. In such a case, the charge sheet would not be open to objection on that score and no amendment would be necessary.

[9] This much was accepted in argument by the appellant's counsel. However, he submitted that, in the light of *R v Alexander & others*,[4] the approach in *Jones and More* must be taken to have been overruled. *Alexander* held that an indictment must 'inform the accused in clear and unmistakable language what the charge is or what the charges are which he has to meet'.[5] This *dictum* is, of course, unobjectionable. In order to evaluate whether this overrules *Jones and More*, the context of the dictum should be considered. The full *dictum* of Wessels CJ in *Alexander* was to the following effect:

'What is the object of an indictment? Its real purpose is to inform the accused in clear and unmistakable language what the charge is or what the charges are which he has to meet. It must not be framed in such a way that an accused person has to guess or puzzle out by piecing sections of the indictment or portions of sections together what the real charge is which the Crown intends to lay against him. These remarks particularly apply to charges under the *crimen falsi* especially since that *crimen* has been assimilated to the *crimen stellionatus* of the Roman law. In the case before us the charge could easily have been laid in the alternative as a fraud based on a mandate by the Company or as a fraud based on a bribe by Lichtenstein to the directors to induce the Company to buy the options. There is nothing set out in the indictment that resembles the allegation of a bribe, whereas almost every section implies a mandate and nothing else.'[6]

[10] This *dictum* casts a very different light on the submission. It does not deal with an averment concerning prejudice. It is general and concerns

[4] 1936 AD 445.
[5] *Ibid* at 457.
[6] *Ibid* at 457-458.

clarity in an indictment. What emerges unmistakably from the *dictum* and a careful reading of the case is that fraud based on a mandate was not expressly stated but was found to be implied in the indictment. The court also considered whether or not the indictment contained an implied averment concerning bribery. It could not find any 'clear and pertinent suggestion in the indictment' of bribery as an alternative to fraud by mandate. In other words, an averment of bribery could not reasonably be implied. This is the corollary of the finding concerning fraud by mandate. The Crown had abandoned the case based on fraud by mandate, and sought to rely on a case based on fraud by bribery alone. Because fraud by mandate was held to be implied and fraud by bribery was held not to be implied, the court found that the accused had been found 'guilty of a charge not formulated in the indictment' and upheld the appeal. The case is clearly not authority for the proposition that the dictum in *Jones and More* has been either overruled or even questioned. It is consistent with that approach.

[11] In response to an invitation from the bench to consider the impact of the Constitution of the Republic of South Africa, 1996 (the Constitution), counsel for the appellant submitted that this must be taken to have overruled the approach in *Jones and More*. In other words, it was submitted that the Constitution requires that the averment concerning prejudice must be an express one. Section 8(1) of the Constitution provides that the 'Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.' Section 39(2) provides that 'when developing the common law… every court… must promote the spirit, purport and objects of the Bill of Rights'. Section 173 provides that the 'Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to…develop the

common law, taking into account the interests of justice'.[7] It has long been settled that these provisions imply that 'where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation'.[8]

[12] Section 35(3) of the Constitution accords to every accused person a right to a fair trial. An integral part of this, spelt out in s 35(3)(a), is the right to be informed of the charge with sufficient detail to answer it. This is not too different from the requirement of 'clear and unmistakeable language' in *Alexander*. The difference is that s 35(3)(a) deals with the kind of detail required rather than the clarity of the language required in formulating the charge. Does that mean that s 35(3)(a) requires an express averment of prejudice and rules out an implied averment (if an implied averment is present)? If not, does it change the test for implying an averment set out in *Jones and More*? Neither counsel referred to any direct authority on the point. Nor could I find any.

[13] The matter of *Savoi & others v National Director of Public Prosecutions & another*[9] concerned the issue, inter alia, whether the definitions of 'pattern of racketeering activity' and 'enterprise' in s 1 of the Prevention of Organised Crime Act 121 of 1998 (POCA), and s 2(1)(a) to (g) of POCA which, in creating certain offences, relies on these definitions, are void for vagueness and thus unconstitutional. This was not dealt with under s 35 of the Constitution but under whether these definitions and, thus offences, complied with the clarity requirement of the rule of law.

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[7] The full text of the s 173 is as follows: 'The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

[8] *Carmichele* v *Minister of Safety and Security & another (Centre for Applied Legal Studies Intervening*) 2001 (4) SA 938 (CC) para 33.

[9] [2014] ZACC 5 (20 March 2014).

[14] In finding that the definition and the offences did not offend the rule of law by way of lack of clarity, the court approached the matter as follows. It reiterated the approach previously set out in *Affordable Medicines Trust & others v Minister of Health & others*[10] that the rule of law 'requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.'[11] The court went on to quote with approval the following passage from De Wet and Swanepoel:[12]

'I wish to agree with the view that knowledge of wrongfulness is an *elementum essentiale* of intention. A person only acts *dolo malo* when he acts unlawfully with full knowledge that he is doing so. This does not mean the wrongdoer must know that he is contravening section W of Act X of 19YZ, or that the wrongdoer must know that what he intends doing is punishable with this or that punishment, but only that he must be aware of the fact that what he intends doing is *unlawful*. This does also not mean that the wrongdoer must know for sure that what he intends doing is unlawful, but only that he must have realised that what he intends doing could *possibly* be unlawful and that he has reconciled himself with this possibility.'[13] (Emphasis in original.)

[15] The question in *Savoi* was, therefore, whether the definitions and the offences which were created in reliance on them, were sufficiently clear that people could regulate their conduct so as not to act unlawfully. The question under s 35(3) of the Constitution is whether a necessary averment in a charge can be implied in such a way that it can be said that the accused person has been informed of the charge with sufficient detail to answer it. To my mind, the answer is in the affirmative. Is there sufficient detail? If, indeed, 'from the facts set forth in [the] indictment, an

[10] 2006 (3) SA 247 (CC).
[11] *Ibid* para 108; *Savoi* para 16.
[12] The translation comes from *S v De Blom* 1977 (3) SA 513 (A) at 530A-B.
[13] *Strafreg* 3ed (LexisNexis Butterworths, Durban 1992) at 140.

inference can fairly be drawn that the complainants must have been prejudiced' it seems to me that this provides sufficient detail for an accused person to be able to answer the charge. Put in the light of the dictum from *Affordable Medicines* referred to above and relied on in *Savoi*, the question is whether the averment is implied 'with reasonable certainty'.[14] This approach is no bar to an implied averment. I do not see how s 35(3) or anything else in the Constitution changes the approach set out in *Jones and More* when it comes to an implied averment concerning prejudice.

[16] It remains, then, to assess whether or not the necessary averment of prejudice is implied in the present charge sheet. What is clear is that the State alleges that, as a result of misrepresentations made by the appellant, when he presented the requisitions for cheques to be drawn in favour of the non-existent entity, NFM drew cheques in favour of an entity to which it owed no money which were deposited into the account of this non-existent entity. In other words, sums of money rightfully belonging to NFM were paid, without any basis for such payments, into the account of a non-existent entity. I can see no way of avoiding the inference of prejudice to NFM in these circumstances. How can NFM not have been prejudiced in paying money which was not due? In my view, accordingly, the necessary averment of prejudice appears in an implied form in the charge sheet. It amply meets the tests of being implied with reasonable certainty and of having sufficient detail to be answered. It is therefore implied. There is accordingly no need for an amendment to the charge sheet. It discloses an offence, contains all the necessary elements (including an implied averment of prejudice) and is not open to objection.

[14] See above note 11 para 108.

[17] The merits of the matter must therefore be considered. The admissions made by the appellant stop short of admitting that the cheques in question, issued in accordance with the cheque requisitions presented by the appellant, were deposited into the account of the non-existent entity. This was dealt with, without challenge, in the evidence of Ms Leibowitz, the financial executive of NFM.

[18] The evidence given by her, also without challenge, was that the requisitions related to two types of transactions. This was later challenged in cross-examination of Mr Sydney Lazarus, the joint managing director of NFM but Ms Leibowitz was not recalled for that purpose. The first type of transaction mentioned by Ms Leibowitz was where the requisition represented that the payment of monies to the non-existent entity was for freight charges. This evidence was correct. The evidence of the appellant was that documents were manufactured showing that the non-existent entity had freighted goods for NFM when this did not take place. The detail is not material. The non-existent entity did not freight goods at all. In the words of the appellant, Overseas Freight Services 'wasn't a company. It was a bank account'. As such, it could perform no services and no legitimate payments could be made to it. The second type of transaction mentioned by Ms Leibowitz related to Value Added Tax (VAT). The customs authorities were induced to release imported goods on the basis of documentation claiming that NFM had paid VAT on the imports. The appellant's department used proof of VAT payments for other imports to create documents which fraudulently indicated that VAT had been paid by NFM on the imports in question when this was not the case. VAT was never paid to SARS on those imports. This meant that the books of NFM would not reflect a VAT payment for them. A requisition was prepared by the appellant's department for payment to the non-existent entity of the

amount of VAT which should have been paid to SARS. This payment was used to claim input tax from SARS on the basis that VAT had been paid on the imports. Apart from the fraud on SARS, this meant that VAT remained due to SARS for the imports in question. NFM therefore attracted liability for interest and penalties in addition to the VAT payable.

[19] When Ms Leibowitz noticed in the books that NFM was paying amounts due for VAT to the non-existent entity (before she came to know that this was a non-existent entity) she asked the appellant why this was so. He told her that 'the company', by which he meant the non-existent entity, was paying the VAT to SARS on behalf of NFM. Her evidence to this effect was never challenged by the appellant in cross-examination or in his evidence. It was clearly an untruthful explanation because he has admitted that there was no such entity; all that existed was a bank account in the name of Overseas Freight Carriers. In fact, according to his evidence, 'NFM needed an invoice or receipt in order to claim the VAT back, and that's where the problem was, because we weren't paying the VAT and they were claiming the VAT'. In response to the proposition that he knew that the opening of the account was to cover the fact that no VAT had been paid to customs, he answered, 'That's correct'. This aspect of the evidence clearly has a strong bearing on the credibility of the appellant, to which I will return later in this judgment.

[20] It will be recalled that, in paragraph 2 of the s 115 statement put up by the appellant, he denied that the presentation of cheque requisitions to the directors for signature amounted to an authorisation. The defence, as it emerged at the trial and in the appeal, was actually that the presentation to authorised signatories did not amount to a representation to NFM. This, it was submitted, is because, on his version, NFM was aware of the scheme.

Strictly speaking this would amount to a defence that the presentation did not induce NFM to issue the cheques. His evidence in support of this defence was to the effect that some of the directors knew that this was happening. In fact, he said, he had been instructed by one or more directors of NFM to open the fictitious account in the name of the non-existent entity and to present such requisitions.

[21] Assuming for the sake of argument that the evidence of the appellant as to the actions and knowledge of one or more of the directors is to be believed, this argument is fatally flawed. A company is an artificial person with a separate identity from that of the directors. Because it is an artificial person, it is trite that a company can act only through natural persons. Companies therefore authorise natural persons to perform certain actions on their behalf. This authorisation can be contained in the Memorandum of Incorporation of a company or be given by resolution of the board of directors. Not even directors can act without authorisation. It is not competent for a company to pay monies without there being a lawful basis for payment. Such a practice would amount to a fraud on the creditors or members of a company. A company can therefore also not authorise, let alone instruct, a natural person to do so on its behalf. This means that, even if there was a board resolution to this effect, it would be *contra bonos mores* and void. In this regard, s 76(3) and (4) of the Companies Act 71 of 2008 provide that a director must 'exercise the powers and perform the functions of director…in good faith and for a proper purpose…in the best interests of the company'. A resolution to deprive a company of its property without lawful cause is a contradiction in terms.

[22] Turning to the present matter, the evidence stops far short of claiming that there was a board resolution setting up or authorising the payment of money to the non-existent entity without any lawful basis. Based on what is set out above, this means that none of the actions of the appellant were authorised by NFM. NFM could not resolve to pay monies not due to the non-existent entity. NFM could also not authorise or instruct the appellant to set up a scheme to do so. Even if the board of directors so resolved, this could never be a resolution of NFM.

[23] The board of directors of a company is obliged to put in place procedures and policies which prevent the company from making unauthorised payments and payments for which there is no lawful basis. NFM did this by setting up the system of requisitions. It required the shipping department to prepare requisitions for cheque payments based on documents referring to actual transactions. The requisitions had to be presented to two persons who were authorised by NFM to sign cheques. Without such presentation, no cheques could or would be drawn. In other words, NFM could not draw a cheque unless a requisition was presented to it which showed that monies were due by NFM to the entity mentioned in the requisition. This is because, unless a requisition was presented which showed that there was a lawful basis to pay monies to the named entity in the requisition, a cheque could not be authorised. This is precisely why, on the version of the appellant, he was needed. Before the signatories could sign cheques, NFM required a requisition for a cheque in favour of the named payee based on supporting documents in a file which could be called for by the signatories. The appellant was needed because his department generated documents relating to freight charges and VAT obligations for imports. His department therefore had to complete

requisitions and have supporting documentation in a file before a cheque could be issued by NFM in favour of the payee named in the requisition.

[24] What did the requisitions in question say? They said that monies were due to the non-existent entity. The representations were made to NFM. The fact that natural persons were involved and may have known that the requisitions were false does not mean that the representations were made to them and not to NFM. They were only involved because NFM could not act without them. They were the hands and mind of NFM, not of themselves, when they received the requisitions and acted on them. They were only authorised to act if the procedures put in place by NFM were adhered to. The presentation of the requisitions therefore amounted to a representation to NFM that monies were due to the non-existent entity. The appellant's admission is that all of the cheques listed in the annexure to the charge sheet were issued in accordance with cheque requisitions presented by the appellant. This can only mean that NFM acted on the representation as to the state of affairs contained in the requisitions. Each time that NFM drew a cheque in favour of the non-existent entity which was subsequently deposited into the said account, it acted on a misrepresentation arising from the presentation of a requisition. As a result, money not due by NFM was paid to the non-existent entity and prejudice to NFM resulted as a consequence of the misrepresentations of the appellant.

[25] All of the above is premised on the acceptability of the version of the appellant. It remains to evaluate whether his version is acceptable. His evidence need only be reasonably possibly true in order to create a reasonable doubt.

[26] The appellant's counsel submitted that it had not been proved that the appellant was aware that he was signing fictitious requisitions. The appellant, who is the only person who could give any evidence that he was unaware of this, failed to do so. What he knew, it is clear from his admissions and evidence, is that the non-existent entity did not exist and was only the name of a bank account. He nowhere stated that he did not read any of the requisitions in question. He testified that he had been told to create false documentation to support the requisitions for payments to the non-existent entity of amounts due to SARS for VAT. He also testified that he found out soon after joining NFM that false documents were created in his department supporting payments to the non-existent entity for freight charges when it had not (and could not have) shipped freight. When Ms Leibowitz queried why VAT was being paid to the non-existent entity, at a time when she was unaware that it did not exist but thought that Overseas Freight Carriers was a business entity, the appellant told her that Overseas Freight Carriers was like another company to whom VAT was paid in order for it to pay SARS on behalf of NFM. If he did not know that the requisitions he was presenting for the VAT amounts were false, why would he give this answer? It was clearly untruthful. He knew that it was only a bank account and not a company. He knew it had been set up to conceal that VAT was not being paid to SARS on some imports. The submission that he did not know that he was presenting and / or signing fictitious requisitions carries no weight whatsoever and must be rejected.

[27] His evidence was shot through with inconsistencies, evasiveness and improbabilities. I will set out only a few examples. He was inconsistent as to whether he knew that he was doing anything wrong. As mentioned above, he admitted that he knew that the account was opened in order to cover up non-payment to SARS of VAT. He claimed in his

evidence in chief that he did not believe that he was doing anything wrong. The following excerpts from his cross-examination are illustrative:

'Why don't you look at the conduct as it is. Was it lawful or unlawful? --- It was incorrect…

So, from your experience, involved in the shipping department, what was happening at Non-Ferrous was unlawful, isn't it? --- It was incorrect.…'

Later in cross-examination, the following exchange took place:

'What did you think about that scheme of opening that account to cover this VAT? What did you think about that? Right or not? --- I beg your pardon?

What did you think about the scheme of opening … [intervention] --- It was their scheme and I accepted what they did.

Although you felt that it was not right? --- I beg your pardon?

Although you felt it was … [intervention] --- I didn't think at the time it wasn't right. I mean it wasn't my responsibility.'

And later:

'You knew that that was a scheme to cover whatever VAT that had not been paid to customs, isn't it. You knew about that? That the reason for opening of this account is to cover that no VAT has been paid to the customs excise, isn't it? --- That's correct.

Ja. So you knew that that scheme was wrong to open that account? --- It wasn't my responsibility to know whether it was right or wrong. It was … [intervention]

I understand that, but you knew that it was wrong? --- Yes.'

After he was asked if he would steal if instructed to do so and said that he would not do so because it is an offence and that what he was doing was authorised by NFM, the following exchange took place:

'But authorise an unlawful activity which is a crime? What difference does it make, because if he says go and steal there, he's giving you authority to do something which is unlawful. What difference does it make from what they were doing? Because what they were authorising you was more-or-less the same as theft, because it was an unlawful authority, it was fraud, because they were defrauding the Receiver of

Revenue of that payment. Do you understand my point? --- I understand what you're saying to me, sir.

You're okay? So what are you going to do about it if he said, "I'm going to fire you. Go and steal that thing, I need it"? --- Nothing. If it had anything to do with the shipping department, I would do what I'm instructed.

No, no, no, it has nothing to do with shipping department. He's telling you, "It doesn't fall within the shipping department, but I'm instructing you to go and steal that thing, I need it. That's the instructions I'm giving you. I you don't I'll fire you." What are you going to do about it? --- I wouldn't do it.

Why? --- Because it's not part of my job.

Was it part of your job … [intervention] --- Property isn't my job. I'm a shipping manager.

What wasn't – was it part of your job to defraud VAT? Was it part of your job to defraud VAT? --- I was following … [intervention]

Is that what you're saying? --- I was following instructions.

No, no, no, the question is, are you saying that was it your part of your job to defraud VAT or Receiver of Revenue? --- I was following instructions.

Do you understand the question? --- I understand your question.

So what – answer the question then? Answer the questions then? --- I'm answering it. I was following my directors' instructions.

But that was not the question. It's not the question. --- I think my counsel has already dressed that issue with you.

I'm asking you. --- I mean it is … [intervention]

You don't want to answer this question? --- I'm not saying I don't want to answer the question.

Please answer the question then. --- I think you are asking the same question in a different manner.

You have to answer the question then. --- I was following instructions of my directors.

Mr Essop, for the last time, that's not the question that I put to you. The question that I put to you is that was it part of your duties to defraud the Receiver of Revenue? That was my question. --- No.

No? --- No.

So why did you do it if it was not part of your duties? --- Because I was following instructions.

So how – that's the problem I'm having, because how different to go and steal from a company? How it's different from what you did. From those instructions that Mr Lazarus tell you, "Go and steal from company, because if you don't do I'll fire you." What difference does it make from what you did? It doesn't make a difference, do you agree with me? --- Yes.'

It can be seen that his answers were highly evasive and inconsistent.

[28] There were other contradictions and improbabilities. It was put to Ms Leibowitz that the appellant had wanted Sydney Lazarus, the joint managing director of NFM, to be present at his disciplinary enquiry. When Sydney Lazarus gave evidence and said that he had been present during the disciplinary proceedings against the appellant, it was put to him that he was present when the appellant was charged but not at the enquiry proper. The reason given for wanting Sydney Lazarus present is that the appellant wanted to confront him as being the one who had authorised the appellant to act as he had. The problem with this version is threefold. When the appellant gave evidence he gave no evidence that Sydney Lazarus was present at all. He also gave no reason for not having confronted Sydney Lazarus at the time he was charged. Finally, the evidence of Ms Leibowitz that the appellant did not even mention the knowledge of Sydney Lazarus at his enquiry was uncontested. If, indeed, Sydney Lazarus had instructed the appellant to do what he did, and NFM was threatening to dismiss the appellant, it is inconceivable that, whether Sydney Lazarus was present or not, the appellant would not have raised at the enquiry that he believed he had been given an instruction to act in this fashion by the joint managing director. No reason was given by the appellant for not raising this at his disciplinary enquiry. The further evidence of the appellant adds to the inconsistencies. He testified that when he was charged, he asked Bernard

Lazarus, another director of NFM, for a meeting with Sydney Lazarus. He was told that Sydney Lazarus was away. He was then asked whether, after Sydney Lazarus had returned, he phoned or contacted him and said that he had not done so. When pressed on the point, he claimed to have 'contacted Sydney Lazarus by telephone and he requested that I come to his office'. He said that a meeting for that purpose was convened with Sydney, Bernard and Ronald Lazarus and, when he asked Sydney Lazarus why he was being charged, Sydney Lazarus said that he would check and get back to the appellant but that he never did so. None of this version was put to Sydney Lazarus when he gave evidence. This evidence emerged only when he was pressed as to why, if Sydney Lazarus had instructed him to do what he did, he had not confronted him with the situation and got him to persuade the board of directors not to proceed with the case.

[29] A further instance bears mention. The appellant also testified that he was in Sydney Lazarus's office when a phone call was received from one Brivik. The phone was put on speaker phone and, after the call, Sydney Lazarus told the appellant to do for transactions with Brivik what he was doing with the other false documents. Once again, none of this was put to Sydney Lazarus.

[30] Possibly the most significant unchallenged evidence was given by Mr Ferose Mahomed. He said that he was instructed by the appellant to take all cheques made out by NFM in favour of the non-existent entity only to the appellant himself or to one Bev at the bank in a sealed envelope. No other cheques were treated like this. No reason was given as to why cheques made out to the non-existent entity were to be treated differently to other cheques. All that was asked of him in cross-examination on this

aspect was whether it is necessarily sinister to take cheques to the bank in a sealed envelope.

[31] A further contradiction is that it was pertinently put to Ms Leibowitz that all the persons who were involved in the processing of the fictitious documents, 'were beneficiaries of this particular so-called entity'. The appellant was admittedly involved. This was contradicted by the appellant in two respects in his evidence. He claimed to not know of what happened to any withdrawals made or cheques drawn on that account, to which he had sole signing rights and therefore contradicted the positive assertion put on his behalf. He also denied having benefitted. The appellant was quite clearly and simply an appalling witness. For these and numerous other aspects of his evidence, it is appropriate that it be rejected as false beyond reasonable doubt.

[32] The evidence of Ms Leibowitz was criticised as being incorrect and her credibility impugned. For example, she said that the appellant had signed all the requisitions on which the charges were based when a number were clearly not signed by him. In the first place, she answered a leading question as to whether the appellant had signed all the requisitions. Unlike in the case of Mr Mahomed, however, her evidence to this effect was never challenged. The law in this regard was clearly stated in *President of the Republic of South Africa & others v South African Rugby Football Union & others* to the following effect:[15]

'The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving

[15] 2000 (1) SA 1 (CC) para 61.

any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct.'

If the evidence of Ms Leibowitz had been challenged in cross-examination, and she was shown requisitions without the appellant's signature, she could hardly have failed to correct this overbroad statement. It was challenged only when Sydney Lazarus was cross-examined. Counsel who came into the matter, despite having a transcript of her evidence, at no stage applied for her to be recalled for further cross-examination. One must also examine what effect this inaccuracy has on her evidence. She was giving evidence in the context of an admission by the appellant that he submitted all the requisitions. He was the manager of the department. It emerged that he was the person who ordinarily signed all the requisitions. What benefit could she derive from telling a manifest untruth which could be demonstrated to be such by reference to the documentation? In my view this in no way affects her credibility on the principle set out above and on the facts. She was also criticised for saying that the documentation demonstrated a duplication of freight payments. It was submitted that this was shown to be incorrect during cross-examination of Sydney Lazarus in that in no instance was there a duplication of the monetary amount alleged. Whilst she did use the words 'duplicate freight payments', this does not necessarily mean that the exact amount is duplicated. She gave no such evidence and nor was it put to her that this is what must be meant by the phrase. The same principle applies. Her evidence, with reference to EXP5566, was that that requisition meant that 'two lots of freight were paid on one shipment. In other words, it was shipped twice, which is not – it can't have been shipped twice, it was shipped only once.' She did not say that the payments were in the identical amount. The criticism is without foundation. It was submitted that she was dishonest because she

said that all requisitions had to be authorised by the appellant when one Dawood's signature appears on a requisition which resulted in her signing a cheque. This is another example where she was not confronted with the inaccuracy. Without her being given an opportunity to deal with this, again with reference to documentation which can demonstrate its inaccuracy, no inference of dishonesty, or even unreliability, can be drawn. The criticisms of the evidence of Mr Mahomed are to similar effect. It was clear that when he was shown documents which contradicted his overbroad statements, he readily corrected himself. No lack of reliability emerges from the record.

[33] Criticisms were also levelled at the evidence of Sydney Lazarus. The magistrate was alive to these and had reservations about his evidence, accepting it only where there was some corroboration. In my view, any basis for criticism arises largely from cross-examination of him on matters testified to by Ms Leibowitz where she was herself not challenged. The difficulties in his evidence also largely emerged in areas which fall more within her sphere of expertise than that of Sydney Lazarus. Details were put to him on issues concerning documentation where no adequate foundation was laid that he had, or should have had, knowledge.

[34] I can find no basis to interfere with the finding of the learned magistrate that the appellant was guilty of the 69 counts of fraud with which he was charged. It was submitted in argument that the evidence disclosed that the appellant did not sign all of the requisitions. His formal admission recorded in terms of s 220 of the Act was that he presented them. It is also so that, whether or not he signed the requisitions, it is the presentation of the requisitions to the signatories that amounted to the misrepresentation. The respondent has conceded in supplementary heads of

argument that, because it was not proved that the appellant signed the requisitions in counts 5, 6, 19, 34, 36, 37, 46, 48, 49, 63, 64, 66, 67 and 68, the convictions in respect of those counts should be set aside. The State was not obliged to prove that the appellant presented all of the requisitions. This was admitted. Section 220 provides that an admission under that section shall be sufficient proof of the admitted facts. It can hardly be said that, in the face of an admission, the State is still put to the proof of the facts admitted. The concession was incorrectly made and the convictions on those counts must stand.

[35] In the result, the order I would propose is that the appeal be dismissed.

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GORVEN J

DATE OF HEARING:	7 March 2014
DATE OF JUDGMENT:	23 May 2014
FOR THE APPELLANTS:	J Wolmarans instructed by V Chetty Inc.
FOR THE RESPONDENT:	I Cooke instructed by The Director of Public Prosecutions for KwaZulu-Natal.