IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO: A2006/409

DPP REF NO: JAP 2006/400

In the matter between:

MAKAMU, MUDUNWAZI SAMUEL Appellant

and

THE STATE Respondent

J U D G M E N T

MOSHIDI, J:

[1] **INTRODUCTION:**

Mr M S Makamu ("**the appellant**"), a Senior Magistrate at Benoni, was charged with fraud and two alternative charges in the Johannesburg Regional

Court. The alternative charges are irrelevant for the purposes of this appeal.

[2] He was legally represented throughout his trial, pleaded not guilty to all the charges, and elected not to disclose his defence at its commencement. However, at the end of the trial, the appellant was convicted on the fraud charge only, and sentenced to a fine of R10 000,00 or 6 months' imprisonment all of which was wholly suspended for a period of 4 years on various conditions. The current appeal, with the leave of this Court, is directed against his conviction only.

[3] As far as the fraud charge was concerned, which is the only subject-matter of this appeal, the charge sheet alleged as follows:

> "**IN THAT during the period of July and August 2002 and at or near Kempton Park in the Regional Division of Gauteng, the accused did unlawfully, falsely and with the intent to defraud and give out to Absa Bankfin that he receives a motor vehicle finance from the Department of Justice and did then and there and by means of the said false pretences induce the said Bankfin to the prejudice or potential prejudice of Bankfin to process such application, and to receive the application in normal course of business. Whereas the accused when he gave out as abovementioned, knew that in truth and in actual fact no such motor vehicle finance is received by him.** "

[4] In seeking to prove the misrepresentation alleged, the State relied on a letter dated 17 July 2002 written by the appellant and handed in at the trial as Exhibit "A". This exhibit was:

a) written on a letterhead of the Department of Justice;

b) emanated from the Magistrate's Office, Benoni;

c) was addressed "**TO WHOM IT MAY CONCERN**";

d) was signed by an administrative officer stationed at the Benoni Magistrate's Court, namely Rajshree Rancharitar, on behalf of the control officer, L Bezuidenhout. Both Rancharitar and Bezuidenhout testified on behalf of the State;

e) contained the heading: "**MOTOR VEHICLE ALLOWANCE FOR SENIOR MAGISTRATES M S MAKAMU**", and the contents thereof read as follows:

> "**It is hereby certified that as from 1st of July 2002 Mr S M Makamu will be entitled to Motor Vehicle Scheme of R80 973,00 per year. The implementation has delayed due to technical problems, however the amount will reflect on his salary as from the 15th of August 2002.**"

At the trial it was common cause that the appellant in fact drafted Exhibit "A". The appellant, initially, denied in evidence that he had transmitted Exhibit "A" to Absa Bankfin ("**the Bank**"). In my view, the court **a quo** clearly and correctly rejected the appellant's version in this regard.

[5] The pertinent issues for consideration in this appeal is whether the elements of misrepresentation and prejudice, actual or potential, were

established by the State.

[6] In C R Snyman **Criminal Law**, 4th edition, at 520, the definition of fraud is given as: "**the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another**". The learned author, J R L Milton, in **South African Criminal Law and Procedure**, Volume II, 3rd edition, at 702, defines fraud as follows: "**Fraud consists in unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another**." This definition was quoted with approval in **Ex Parte Lebowa Development Corporation Ltd**, 1989 (3) SA 71 (T), at 101C-D, and in **S v Van der Berg** 1991 (1) SACR 104 (T) at 106a-b.

[7] During the trial, the State called a total of seven witnesses. The evidence of the final witness, Albertus Uys was, in my view, the most relevant and indeed decisive in resolving the disputed issues **in casu**. However, I first deal with the evidence of the witnesses in the order in which they testified.

[8] J J de Wet Simon, who described himself as the Chief Magistrate performing special duties at the Magistrates' Commission, testified that during the performance of his duties he became aware that the appellant, who was a Senior Magistrate at the Benoni Magistrate's Court, had submitted Exhibit "A"

to the bank in which he claimed that he was the beneficiary of a motor vehicle allowance. According to Simon Exhibit "A" was signed by Ms Rancharitar at the request of the appellant and she handed the letter back to the appellant. His evidence was emphatic that senior magistrates, like the appellant, did not qualify for the motor vehicle allowance at the time. According to Simon, the bank acted on Exhibit "A" by granting a loan to the appellant over certain periods. He indicated that the normal period for repayment of such a loan was 54 months, whilst banks were willing to extend financing up to a period of 60 months where motor vehicle financing benefit schemes were applicable. It is noteworthy that Simon indicated that the Department of Justice did not suffer any loss as a result of the appellant's conduct. In fact the charge sheet did not allege that the Department of Justice suffered any loss, or any potential prejudice. However, at page 8, lines 14-20 of the record, Simon testified as follows:

> "**The Department as a result of this misrepresentation Exhibit 'A' did not suffer any financial loss. The bank would never come back to the Department or the Government requesting in the event that Mr Makamu defaults in his payments for payment of that Motor Benefit Scheme because it is not a guarantee that has been issued. However, we were prejudiced in the good name and standing of the Department and the Government as a whole by the actions of Mr Makamu.** "

[9] Ms Rajshree Rancharitar gave evidence that she was an administration officer at the Benoni Magistrate's Court. On or about 17 July 2002 she was approached by the appellant to sign Exhibit "A", which she did in the absence

of State witness L Bezuidenhout. On page 20, lines 18-21 of the record, Rancharitar continued to testify as follows:

> "**He asked me to sign it as Mrs Bezuidenhout was not in her office. The letter was already written out and I presumed that Mrs Bezuidenhout knew about the letter which I signed and handed to Mr Makamu which he then faxed.** "

[10] Letitia Bezuidenhout testified that she was a "**control officer**" at the Benoni Magistrate's Court. On 19 July 2002 she received a telephone call from an unnamed person who introduced himself as a bank official. The caller wanted confirmation of the applicant's employment and also wanted to confirm the existence of the motor vehicle allowance claimed by the appellant. On page 23, lines 10-18 of the record, Bezuidenhout testified further as follows:

> "**The salary scale I confirmed, years of service I confirmed … and the motor vehicle allowance I would said it is incorrect … No, I said it is incorrect. Mr Makamu does not qualify for a motor allowance.** "

Bezuidenhout then requested the bank official to send her a copy of the letter, Exhibit "A", which copy was faxed through to her on the same day. From the further evidence of Bezuidenhout, it appeared that she later reported the matter to the "**cluster chief**", a Mr Van der Merwe at Kempton Park, which report in all probability set in motion the investigation that led to the prosecution of the appellant.

[11] Kemp van der Westhuizen testified that he was employed by Absa Motor Vehicle Finance which is apparently a division of the bank. During November 2003 he was served with a notice in terms of section 205 of the Criminal Procedure Act, 51 of 1977, in terms of which he made available the documentation which was subsequently admitted into evidence during the trial. The information was first given to Simon. In cross-examination, Van der Westhuizen confirmed that according to the records of the bank, the agreement concluded in respect of the purchase of the Audi motor vehicle which was approved indicated that the account thereof was still current and the appellants' payments perfectly up to date. However, he could not shed any light regarding the actual application for credit or how it was dealt with.

[12] Johan Spammer gave evidence that he too was employed by "**Absa Motor Vehicle Finance**" at the time. Although initially he testified otherwise, it became apparent eventually that he did not directly deal with the approval of the appellant's application for credit. That approval was furnished by Uys. At page 41, line 24 of the record, Spammer testified as follows:

> "**Actually the salary I also see the motor vehicle allowance is not included there but it states that he** (the appellant) **receives a car allowance.**"

In addition, and on page 44, lines 18-23 of the record, Spammer conceded that in a statement to the police, he had made the following important

concession:

> "**Die kliënt Mnr Makamu het genoeg verdien om sonder 'n motortoelaag te kwalifiseer om die genoemde voertuig op huurkoop te koop. Gevolglik het ons hom nie op sterkte van die motorvoertuig goedgekeur vir die finansiering nie.** "

[13] Ruben Mandelstam, a Senior Magistrate at the Johannesburg Magistrate's Court gave evidence that during the period 2000-2002 he initiated and acted as co-ordinator of an attempt to secure motor vehicle allowances for senior magistrates. This continued up to the time when Regional Court magistrates were about to receive motor vehicle allowances. The next stage after the Regional Court magistrates was to negotiate with the authorities to give such allowances to senior magistrates. On 15 May 2002 the Salaries Committee of the Magistrates' Commission, pursuant to a meeting, resolved, **inter alia**, that motor vehicle allowances be granted to senior magistrates. Further, that the appellant was part of the group that was for the motor vehicle allowances. In July 2002 the appellant did not qualify for the motor vehicle allowances. Under cross-examination, Mandelstam testified that when he was asked for a statement in this matter in October 2004, it was conveyed to him that the appellant had alleged that he believed the motor vehicle allowance was imminent. Mandelstam denied that he was present at a meeting attended by the then Minister of Justice and the Director General in April 2002 where the Minister instructed that motor vehicle allowances be made available. The negotiations with the authorities were ongoing.

[14] As stated earlier, the evidence of Uys was crucial and decisive in this appeal. He gave evidence that he was employed by the bank. It appeared that he approved the appellant's motor vehicle finance in respect of an Audi motor vehicle on 25 July 2002. It is significant to note that this was six days after Bezuidenhout had specifically informed the bank's official that there was no motor vehicle allowances in existence in favour of the appellant. It is also significant to note that, Exhibit "G", in respect of the Audi motor vehicle, was in fact an Instalment Sale Agreement, and not a lease agreement, and was signed on 20 August 2002 at Randburg. According to Uys the transaction was approved by him on the basis that the appellant had to provide a 20% deposit and the motor vehicle could be leased over a period of 60 months. It is significant that with reference to the 60 months period, Uys on page 73, lines 18-22 of the record, testified as follows:

> "**According to the information that I had at that stage the client firstly was in a legal profession and in our institution we see a legal occupation that he did fall under one of those and there was stipulated on the application that he did receive a car allowance.** "

However, Uys did not have sight of Exhibit "A" when he approved the application but he only considered what was captured on the data system of the bank. Uys also confirmed that the appellant would have qualified for the finance based, purely on his gross salary, amounting to R18 000,00 per month. During cross-examination of Spammer it was put on behalf of the

appellant that prior to the application for financing in respect of the Audi motor vehicle, the appellant applied for financing for a Mercedes Benz motor vehicle. Thereafter the exchange between the court **a quo** and the defence counsel proceeded on page 47, lines 14-19 of the record, as follows:

> "**COURT: Do I understand you correctly that Exhibit 'A' form part of the application when he was still wanted to finance a Mercedes Benz, did that form part?**
>
> **ADV MUIR: Yes your worship and when he found out subsequently that there is no allowances coming forth, that was then when that application was left and a cheaper vehicle was applied for your worship.**"

During cross-examination of Uys, the defence reverted to the issue of the application for finance by the appellant for the Mercedes Benz motor vehicle. In this regard, and on page 82, lines 12-21 of the record, the version of the appellant was stated as follows:

> "**According to the accused he was under the impression that they would get an allowance and he therefore to buy a Mercedes vehicle right. He then had discussions with a Mercedes dealer. When that however did not come through he decided to go for a cheaper vehicle which was an Audi vehicle and applied for finance. An application form was done by the accused. No mention was made of the allowance. He did not at any stage give to Absa personally, faxed to Absa in any way represent to Absa that he was getting a vehicle allowance when he applied for finance on the Audi vehicle. That was never part of his application. Can you dispute that?**
>
> **UYS: That is very difficult to say. Once again I can only go on the documentation that I have here …**"

Thereafter Uys was cross-examined on Exhibit "G" which revealed that there

was indeed an application by the appellant for finance in respect of the Mercedes Benz motor vehicle. This application was dated 13 May 2002.

[15] **THE VERSION OF THE APPELLANT:**

15.1 The appellant testified as the only witness for the defence. When asked in evidence-in-chief whether he at any stage in the application in respect of the Audi motor vehicle told any person that he received a motor vehicle allowance and provided an amount, the appellant responded as follows:

> "**No but I remember that I was asked a question that in your position are you not receiving car allowance so I said no, not at this stage. But I am aware of the negotiations that are going on and I gave a little bit of details of the negotiations but not the amount. And I did that because I had more information about it because I was in the Executive Committee of UASA dealing with salaries.** " See page 100, line 25 of the record.

15.2 The appellant emphatically denied that he ever intended to defraud the bank. When he purchased the Audi motor vehicle he dealt with somebody from the Audi dealership at The Glen. The appellant confirmed that he entered into an Instalment Sale Agreement, Exhibit "G" with the bank. This agreement was signed on 20 August 2002. He only became aware later that the agreement was over 60 months, as opposed to 54 months,

which made him unhappy. At the time of the trial, the appellant was still in possession of the Audi motor vehicle and the account thereof was not in arrears. There were no complaints at all from the bank. The sales person from the Audi dealership informed him that he qualified for the deal on his salary only and no extra cash was required. Pursuant to a meeting in May 2002 attended by the appellant, the then Minister of Justice and other stakeholders where the motor vehicle allowances and other items were discussed, the appellant believed, and was hopeful that the implementation of the motor vehicle allowances was imminent. The only outstanding issue was accessing the money. In cross-examination it emerged that the appellant had in fact and initially applied for financing of a Mercedes Benz motor vehicle but due to the fact that he could not afford the Mercedes Benz motor vehicle, he decided against its purchase. In this regard, at page 106, lines 20-22 of the record, the appellant testified as follows:

> "**I said I am not interested in a Mercedes Benz anymore. It was a little bit expense and I did not want to suffocate myself with my present salary so in buying that Mercedes Benz.** "

15 .3 The Regional Magistrate thereafter specifically asked the appellant as follows:

> "**<u>COURT</u>: Let us just ask the witness. Did the non-implication of the anticipated car allowance play any role in the decision to cancel the Mercedes Benz deal? … Yes it did. And it was not only because I was told that I could not qualify to buy the Mercedes Benz but just for my own comfort.**"

The appellant, still during cross-examination, continued to testify that he did not even go further to make use of Exhibit "A but he had it signed by Rancharitar as, he at the time, believed that the motor vehicle allowances would materialise. However, after waiting in vain, he abandoned the whole idea. As stated earlier, the court **a quo** correctly rejected the appellant's version regarding the publication of Exhibit "A" to the bank.

[1 6] **<u>MISREPRESENTATION</u>:**

16.1 I now consider the issue of misrepresentation. The evidence in relation thereto was inevitably interwoven with the evidence on prejudice or potential prejudice, which I deal with later. The charge sheet in respect of the fraud count, alleged that the appellant made the fraudulent misrepresentation to the bank as a result whereof the bank was induced to prejudice or potential prejudice to "**process such application, and/or receive the application in normal course of business**".

16.2 The credible evidence was that Exhibit "A", after it was signed by Rancharitar, landed up with the bank. It was common cause that the recipient thereof was never identified nor called to testify. It is also common cause that the bank official that subsequently telephoned Bezuidenhout on 19 July 2002 in order to verify the appellant's details and the existence of motor vehicle allowances, was equally never identified. It is therefore uncertain precisely what the recipient of Exhibit "A" did therewith after receipt thereof. In these circumstances, it cannot reasonably be inferred that the recipient was the same person that later telephoned Bezuidenhout. There was no evidence at all that the recipient of Exhibit "A" communicated with the appellant, or otherwise. To the contrary, the evidence established that a person from the bank telephoned Bezuidenhout on 19 July 2002 during which conversation the bank official was informed in unambiguous terms that the appellant did not have a motor vehicle allowance. This was clearly long before Uys approved the deal. In **South African Criminal Law and Procedure**, **op cit**, at 719, and with reference to **S v Calitz** 1992 (2) SACR 66 (O), the learned author states:

> "**(1) A mere representation does not mean that a person to which it is made has suffered prejudice; in**

> **principle, at least, there must be a causal link between the misrepresentation and the actual or potential prejudice. Certainly there may be cases in which fraud is not committed because the misrepresentation has not caused prejudice – actual or potential – to the victim.** ”

In **S v Calitz, supra,** at 67C it states:

> “**Die feit dat daar ‘n wanvoorstelling aan die klaer gemaak was, beteken nie per se dat die klaer werklike of selfs net potensiële nadeel gely het nie.** ”

16.3 In his judgment at 137, lines 17-25 of the record, the Regional Magistrate states:

> “**It is true as the defence as earlier pointed when they made an application for the discharge of the accused at the close of the State’s case that no witness testified that the accused ever handed in the letter Exhibit ‘A’. The person who assisted the accused in applying for finance were also not called by the State. It is true that the State would have done themselves a favour if they had called those witnesses, but it is a fact that they had not.** ”

16.4 It is clear from the majority of the evidence that the “**application**” for vehicle finance was directly linked to the approved finance in respect of the Audi motor vehicle. The charge sheet did not refer specifically to the Mercedes Benz motor vehicle or the Audi motor vehicle deals. However, the evidence is crystal clear that the alleged prejudice or potential

prejudice was relevant to the Audi motor vehicle deal. Although the court **a quo** found at page 142, lines 2-7 of the record, that:

> "**The defence concentrated a lot on the fact that this was not part of the Audi deal, but the charge sheet does not refer to the one particular deal. It states that during a period of about two months the accused pretended to Absa, Bankfin that he receives a motor vehicle finance and I am satisfied that he indeed did this.** "

However, a few sentences later the magistrate came to the following finding:

> "**The court must find whether the accused had deceived Absa into believing that he received a motor vehicle finance allowance. That he did. That was at least to the potential prejudice of Absa.** " See page 142, lines 15-19 of the record.

The magistrate then proceeded and linked the alleged potential prejudice to the following:

> "**In the end they would allow the accused to purchase the motor vehicle over a period of 60 months instead of 54 to which he would have limited had he only received the salary as he did.** " See record page 142, lines 19-22 of the record.

In other words, the magistrate clearly linked the presentation of Exhibit "A" to the approved finance deal, namely, that of the Audi motor vehicle deal. That being the case , in my view, the

magistrate was clearly wrong when he accepted from the proven facts that Exhibit "A" was intended to defraud the bank with a view on the Audi motor vehicle deal.

16.5 The misrepresentation made by the appellant must have some connection with the alleged prejudice or potential prejudice. The head note in **S v Ostilly and Others** 1977 (2) SA 104 (D.&C.L.D), at 105 is apposite:

> "**The causative link between any misrepresentation and actual or potential result is an important element in the offence of fraud. The test to be applied to determine whether this requirement has in fact been satisfied is that the false statement must be such as to involve some risk of harm, which need not be financial or proprietary, but must not be too remote or fanciful to some person, not necessarily the person to whom it was addressed.** "

In **Standard Bank of South Africa Ltd v Coetsee** 1981 (1) SA 1131 (AD) at 1132D-E the following was said:

> "**In considering whether the damage sustained as a result of a fraudulent or other misrepresentation is too remote for the defendant to be visited with legal liability for the consequent damages, given the fact of relationship between the act complained of and the loss suffered, the ultimate enquiry to be made by the court is whether the conduct complained of, even if unlawful in itself, was unlawful in relation to the loss suffered. This may merely be another way of saying, in effect, that legal liability will arise if the unlawful act complained of was, in the chain of causation, so**

remote from the event which directly brought about the loss that it would be against the policy of the law to visit with legal liability the actor. "

16.6 **In casu**, it is not known who received Exhibit "A at the bank and what such recipient did with the exhibit. The evidence established that eventually, the appellant qualified for the deal in respect of the Audi motor vehicle without the motor vehicle allowances mentioned in Exhibit "A". The appellant testified that he had no intention at all to mislead or defraud the bank. There was no evidence to the contrary. At most for the State, it can be said that Exhibit "A" was intended to be used during the Mercedes Benz motor vehicle deal. In the circumstances, it is reasonably possibly true that the appellant transmitted Exhibit "A" with the view on the Mercedes Benz motor vehicle deal. The charge sheet read with the evidence, which evidence was accepted by the magistrate, clearly related to the Audi motor vehicle deal. In the premises, the appellant may have made a representation in respect of the Mercedes Benz motor vehicle deal but not in respect of the Audi motor vehicle deal.

16.7 To further compound issues, the credit application form in respect of the Audi motor vehicle deal could not be traced. Nobody knew what happened to it. In my view, the magistrate could therefore not conclude that the appellant did in fact make

a representation with a view on the Audi motor vehicle deal. The magistrate therefore, incorrectly came to the conclusion that the appellant made a representation as alleged in the charge sheet.

[1 7] **PREJUDICE OR POTENTIAL PREJUDICE:**

17.1 I now deal with the issue of prejudice or potential prejudice. In this regard the magistrate correctly found that actual prejudice was not required in order to constitute fraud. In **Criminal Law** by C R Snyman **op cit**, at 523, the following is said:

> "**The next general requirement for fraud, namely the requirement that there must be real or potential prejudice, is next considered. The mere telling of a lie is not punishable as fraud. The crime is committed only if the telling of the lie brings about some form of harm to another. For the purposes of this crime the harm is referred to as prejudice.** "

17.2 In **S v Kruger and Another** 1961 (4) SA 816 (AD), at 827-828 the following is stated:

> "**The argument thus advanced on behalf of the appellants rests, in my view, upon too narrow a concept of the element of prejudice as it obtains in the crime of fraud.** "

As was pointed by Schreiner, J.A., in **R v Heyne and Others**,

1956 (3) SA 604 (AD) at 622, there has, through the years, been development and clarification of our law on this question. In order to satisfy the requirement of prejudice, the false statement must, to cite the words of Schreiner, J.A. in Heyne's case (**ibid**):

> "**Be such as to involve some risk of harm, which need not be financial or proprietary but must not be too remote or fanciful, to some person, not necessarily the person to whom it is addressed. The existence or otherwise of the prejudice as thus defined, must be determined as at the time when the representation is made.**"

See also **R v Seabe** 1929 (AD) 28 at 32-34.

17.3 It is sufficient if there is a reasonable possibility that the misrepresentation may prejudice some person who does not necessarily have to be the representee. On the other hand, the risk or possibility of prejudice, must not be too remote or fanciful. See **S v Myeza** 1985 (4) SA 30 (T) at 32B-C; and **R v McLean** 1918 (T) 94 at 97. The test is whether the misrepresentation is such that a reasonable person might (or could), in the ordinary course of events, be deceived. In **S v Huijzers** 1988 (2) SA 503 (AD), it was held that fraud is committed where the complainant is induced to make a loan to the accused by reason of a false representation. The element of prejudice is constituted by the fact that the complainant is induced to exchange his or her

existing right of ownership in his or her money for the right to reclaim the money. The case of **S v Huijzers supra** is clearly distinguishable from the present matter. In the former case, the accused wilfully and repeatedly made false representations; lied about the purpose of the loans, and actually obtained such loans. In the present matter, none of these situations arose. It is common cause that Bezuidenhout immediately informed the bank official that the appellant did not enjoy a motor vehicle allowance. There was therefore no risk or harm directly or potentially to the bank. The evidence of Simon that "**however, we were prejudiced in the good name and standing of the department and the government as a whole by the actions of Mr Makamu**" (see page 8, lines 18-20 of the record), was irrelevant and indeed misplaced. There could hardly be any notion of prejudice or potential prejudice in these circumstances. Moreover, the charge sheet in relation to the fraud count alleged prejudice or potential prejudice to the bank, and the bank only, no one else. Furthermore, in **S v Zhakata** 1975 (1) PH.H 34 it was held, **inter alia**, as follows:

> "**Potential prejudice sufficient to establish fraud must involve direct and substantial inconvenience or risk or harm and not more fanciful possibilities.**

17.4 In the present matter, the evidence is clear that the appellant did

not persuade the bank to grant him the finance on the strength of Exhibit “A”. In the light of the abovementioned authorities, the pertinent question is whether Exhibit “A” had the potential to persuade the bank to grant the financing. There was obviously no such potential. The evidence established that immediately (i.e. on 19-7-2002) upon receipt of Exhibit “A”, an unknown official of the bank contacted Bezuidenhout of the Benoni Magistrate’s Court in order to confirm the veracity of the contents of Exhibit “A”. Bezuidenhout instantly informed the bank that the appellant did not qualify for motor finance allowances. The bank was content. The bank did not press for the prosecution of the appellant. The account of the appellant was paid up-to-date and showed no arrears. In the circumstances, the bank could never have suffered any potential prejudice. Any potential prejudice was so remote and flimsy that it was improbable. The uncontroverted evidence of the appellant was that he never had the intention to defraud the bank.

17.5 The learned magistrate proceeded further to connect the alleged prejudice to the granting of the eventual finance over a period of 60 months as a result of the representation contained in Exhibit “A”. With respect, once more, the magistrate was

incorrect in coming to this conclusion, as the uncontroverted evidence clearly indicated that the appellant, as a legal professional, and according to the bank's own criteria, in fact qualified for the finance agreement on an extended basis. In addition, the evidence of Uys, on page 80, lines 18-24 of the record, was as follows:

> "**My words to him was it is unfortunate that this happened to your client because had he applied for a 54 month Instalment Sale Agreement he has already given a deposit that we called for 20% deposit. He could have gotten the finance there and then so I do not know the reason for why he went for 6 months longer to safe I think it was R180.00 a month on his instalments.** "

The appellant was, therefore, obliged to pay six more instalments of about R5 001,62. The monthly savings amount to about R108 00,00 over the period of 60 months as opposed to the total payment of six months of R5 001,62, amounting to approximately R30 009,72. On these calculations, if anything, the bank was in a far better position when it granted a 60 month agreement as opposed to a 54 month one. The bank also receives far more interest over a period of 60 months as opposed to 54 months. It is apparent therefore that the bank did not suffer any potential prejudice as a result of the decision to grant an agreement for a period of 60 months.

17.6 A further fact, which, in my view, was correctly considered by the magistrate, appears on page 142, lines 10-14 of the record, as follows:

> "**His basic salary alone was sufficient to justify the granting of a loan. So at the end of the day ABSA was not prejudiced and the deal would have gone through nevertheless, even if the information had not being communicated to ABSA** ."

At page 140, lines 7-8 of the record, the magistrate states:

> "**It may be true that this letter was never again raised at the stage when the accused applied for the Audi.** "

The fact that the evidence showed that the bank, in fact granted the loan on the basis of the gross salary of the appellant alone, re-enforces the view that the bank did not suffer potential prejudice. The representation in Exhibit "A" could clearly not have had an influence on the decision of the bank. The appellant did not make a fraudulent misrepresentation to the bank. See in this regard **S v Wannenburg** 2007 (1) SACR 27 (CPD).

17.7 Finally, the charge sheet on the fraud count alleged that:

" … to process the application in the normal course of business … "

There was simply no evidence to suggest that the fact that the appellant published Exhibit "A", caused the bank to "**process the application in the normal course of business**". Instead, it was rather the fact that the appellant initially applied for financing for a Mercedes Benz motor vehicle, and later the Audi motor vehicle, which caused the bank to process the application.

17.8 For all of the aforegoing reasons, I would allow the appeal and set aside the conviction and the sentence imposed.

17.9 In the result, I make the following order:

(a) The appeal against the conviction is upheld;

(b) The conviction and sentence imposed are hereby set aside.

_____

D S S MOSHIDI
JUDGE OF THE HIGH COURT

I concur:

_____

B W BURMAN
ACTING JUDGE OF THE HIGH COURT

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DATE OF HEARING	-	10 MAY 2007
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