

**CREDIT CARD FRAUD: A CHALLENGE TO THE NAMIBIAN LEGAL
SYSTEM**

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<u>TABLE OF CONTENTS</u>	<u>PAGE</u>
DECLARATION	4
ACKNOWLEDGEMENTS	5
ABSTRACT	6
Statement of the Problem	8
Background	10
Research Methodology	12
CHAPTER 1	
History and forms of Credit cards	13
Types of Credit cards	14
Credit Fraud and Schemes	16
Common Schemes	17
Conclusion	19
CHAPTER 2	
Fraud and the Element of Misrepresentation	20
Forgery and other offences	25
Draft Bill on Electronic and Communication Transaction of	28
Conclusion	29
CHAPTER 3	
Credit card fraud in other Jurisdictions and initiatives	
South Africa	30
Canada	33
United States	34
Australia	35
Namibia	36
Analysis and Conclusion	38
Bibliography	40
References	41

DECLARATION

“ I HELENA N IIPINGE, the undersigned hereby declare that the work contained in this dissertation for the purpose of obtaining my Degree of LLB is my work and that I have not used any other source than those listed in the bibliography and quote in the references”.

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SUPERVISOR CERTIFICATE

I “Nico Horn” the undersigned do hereby certify that the research and writing of this dissertation was carried out under my supervision”

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ABSTRACT

Today, the world over, one is presented with a credit card when one opens an account with the Bank, building society, post office or other financial institution. This may be a debit or a credit card and its limits, benefits and entitlements will be dependent upon the arrangement or rather the contractual agreement between the client or cardholder and the Bank.

The credit card being a modern invention has without a doubt created convenience in the financial sector. It has made the provision of financial and bank related services much faster in that one no longer need to queue to withdraw or deposit money and even pay bills, all this is done by way of credit cards and internet banking.

The credit card is so efficient that one no longer need to carry cash around and risk being robbed or losing large amounts of money at once. Certain credit cards even enable one to purchase goods despite the fact that there may be insufficient funds on one's bank account and replace the loaned amount at a different time¹. It then goes without saying that the credit card is a very indispensable and useful item to have as opposed to not having it.

The introduction of the credit card method of financial transaction attracted a criminal element as well that were aimed at undermining this invention, finding loopholes and flaws in the invention and the operation thereof and maximising on these loopholes for financial gain at the expense of the card and account holders and that ushered in the era of credit card abuses eventually the offence of credit card fraud emerged.²

This dissertation focuses on the issue of credit card fraud in Namibia and deals primarily with the laws in the country pertaining to credit card fraud. It attempts to determine whether the old age traditional common law offence of fraud will cover these schemes that are at times complex and technical. It deals primarily with the issue of misrepresentation as an element of fraud and attempts to answer the question of who the misrepresentation is made to in cases of credit fraud.

The dissertation also refers to foreign legislation and tries to uncover the manner in which foreign states deal with issues of fraud, i.e whether there is specialised offences created or whether they also treat fraud especially the fraud associated with credit cards under their

¹ lipinge H. 2010. July 20 [Interview with Mr. Naukushu, First National Bank] Windhoek

² D/Insp Tsuseb, Sgt Lilungwe.2010. *Fraud by Credit Card, Traveller's Cheque and Money Laundering*. Paper presented at the Commercial Fraud Workshop. 7-9 April 2010.Oshakati

common law offences and if so what the challenges are that they encounter and what initiatives they have put into place to curb the offence.

This dissertation will also look at the initiatives that the different institutions and offices in Namibia who are affected by this offence have put into place to curb and minimise incidences and the offence itself.

Statement of the Problem

Credit cards and various other forms of payment have existed in as long as banks and other financial institutions have existed. Several methods of payment are in place to create convenience and protect the consumer. The purpose of the credit card is to serve as a method of payment apart from cash but cash based in that the card is linked to the owner's bank account in which his money is kept safely.³

According to Tileni Monghudi, a senior journalist working for The Namibian, one of the heavily reported and shocking cases of card fraud took place in early 2009 when a Portuguese couple visited Namibia and their card was cloned and an amount of 8000 Euros (the equivalence of N\$96000) withdrawn from it without their knowledge. He states further that another incident in the same year involved the theft of 700 Euros in the same manner from a German tourist who also visited the country. In both cases there were no arrests made or leads for the police to follow up on. He states that incidences of card fraud are on the increase and despite the fact that these two are known because of the amount involved, he states that incidences are many, some may not make it to the media but are reported to police.

It is without a doubt the introduction of credit cards have brought convenience, quick and easier access to money and fast and effective business transactions and has aided the advancement of globalisation and integration of financial institutions internationally, regionally and locally. However it is also a fact that crime is also plaguing this invention. The forging of bank cards, the copying and subsequent use of personal information stored on the magnetic strip of the card, identity theft, schemes such as phishing, skimming and doctored cards go hand in hand with the use of credit cards and will be discussed later in the dissertation.

Namibia as a developing country has like other African countries fallen prey to these scams and offences. At present the Namibian Prosecution charges offenders of offences relating to credit card fraud under either the common law offence of fraud, forgery and uttering as well as theft where appropriate⁴. Furthermore conspiracy to commit an offence under the Rioter's Assembly Act may be considered where it fits the circumstances.⁵

³ lipinge, H.2010 July [Interview with S Naukushu, First National Bank] Windhoek

⁴ lipinge, H.2010 July [Interview with Adv A Lategan, Head :Fraud Division, Prosecutor –General's Office] Windhoek

⁵Lategan (2010)

Arguably the definition of fraud, which will be discussed later in the dissertation in detail, has an element of 'misrepresentation' that needs to be proven for it to suffice. In particular, according to the definition of fraud,' fraud consists in the unlawful making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another'.⁶

From the above, a question arises as to whom the misrepresentation is made to when for instance a card is stolen and used to obtain funds or purchase goods, where a stolen account number and card number are used to obtain funds.

Arguably the misrepresentation should be made to a person as per the definition of the offence however what then is the position when it relates to bank accounts and computer systems that regulate data transfer between the bank mainframe and instructions coming from automatic teller machines and other computers.

Theft as an offence consists in an unlawful *contrectatio* with intent to steal of a thing capable of being stolen.⁷ Arguably if through the use of a credit card a bank official gains access to the account of a client unlawfully and transfers the funds on that account to his own or someone else's theft is not committed in that the funds are incorporeal and such incapable of being stolen contrary to the definition of the offence.

This dissertation will delve into these issues and will also consider other common law offences that pertain to credit card fraud and determine whether indeed they are sufficient to deal with the issue of credit card fraud or whether supplementary legislation is needed.

⁶ Hughes, G. 1990: *Essays on Computer Law*. Melbourne, Australia: Longman Cheshire, 674

⁷ Hunt, P. 1982. *South African Criminal Law and Procedure*. 2nd Edt. Durban: Juta & Co Ltd. p 602

Background

It is not necessary to define what a debit or credit is in the world today, neither what an Automatic Teller Machine is. This is because these devices and become such a part of modern day that everywhere, the world over they are utilised and they are at every corner of the street and they are indispensable.

When one thinks of an ATM, automatically the image of a bank, money, bank credit or debit card are created in the mind and rightly so, as these items, institutions and devices are interrelated and cannot operate independently. These are typical characteristics of the modern day banking industry that ensure that banking is made easier, faster and more convenient.

Automatic teller Machines are machines linked to the mainframe computer of banks in which the accounts of clients and customers are stored, the bank card is a device that contains the accounts details of the account and card holder, which when placed into the ATM and pin entered will connect the machine to the respective account of the cardholder while the bank is the institution in which money is held in trust on behalf of the account holders i.e. Bank clients subject to the terms and conditions of the contract between the bank and the client.⁸

According to Detective Hangula of the Commercial Crimes Unit⁹, with the introduction of the ATM and alternative payment methods by banks the world over in the mid 19th century fraud and other offences relating to credit cards began to emerge, initially in the United States where the credit cards were invented and within several years reached the plains of Africa and specially Namibia, a country that is hardly technologically advanced to deal with offences accompanying computer crimes and which is still largely dependent on the common law for offences.

The question on which this work is based is whether the common law offences currently used during criminal and civil litigation to charge persons who have committed offences relating to credit and credit card fraud are sufficient and adequate to secure convictions in light of the growing complexity and schemes that criminal elements have begun to develop and make use of.

⁸ Naukushu (2010)

⁹ lipinge, H.2010 [Interview with Mr. T.M Hangula, Commercial Crimes Unit. NAMPOL] Windhoek

This dissertation will focus on the respective offences that are utilised by the prosecuting authority as well as the law enforcement agencies when dealing with offenders of these types of offences.

Attention will further be paid in this dissertation to the different schemes and techniques that perpetrators of this offence utilise and how these fit into the definition and description of fraud.

Research Methodology

Methodology consisted primarily of internet articles on the topic of cards, credit card fraud and computer crimes and material was collected from different websites both local and international

Interviews were carried out as part of information collected. Individuals from the respective institutions that deal with card fraud and are effected and affected by this offence. These included the Namibian police, the Office of the Prosecutor-General, the local banks especially First National Bank and Bank Windhoek as well as the media.

Various textbooks also comprised research information. The internet as well as textbooks with information on computer related offences pertaining to foreign states and their respective legislation was referred to as well.

The entire research took place over primarily one year and several months and was done in Windhoek.

CHAPTER 1

HISTORY AND FORMS OF CREDIT CARDS

In 1949, Frank McNamara, head of the Hamilton Credit Corporation in the United States went out to eat with Alfred Bloomingdale, McNamara's long time friend and grandson of the founder of the Bloomingdales Store, and Ralph Sneider, McNamara's attorney. The three were eating at a restaurant located in New York and at the end of the meal McNamara reached into his wallet only to realise that he had not brought along money.¹⁰

Merging the concepts from the dinner, the lending of credit cards that the trio that they had been discussing and 'not having cash on hand' to pay for the meal, he came up with a new idea: a credit card that could be used at multiple occasions and the concept of a middle man between companies and their customers.¹¹

Charge cards were then introduced in 1950 and in 1951 the Diner's Club issued the first credit card to 200 customers who could use it at 27 restaurants in New York but it was only until the establishment of standards for the magnetic strip in 1970 that the credit card became part of the information age.¹²

American Express issued their credit card in 1958 while bank of America issued the Bank Americard (Visa) bank credit card later in 1958.

Charging for products and services has become a way of life. No longer do people all over the world bring cash when they have to purchase products they simply charge it with the use of their cards. Certain people do it for the convenience of not carrying cash others put it on plastic so that they can purchase items that they cannot afford at that present moment.¹³

The inventor of the first bank issued credit card was John Biggins of the Flatbush National bank of New York in 1946. He also introduced the 'charge in' program between bank

¹⁰ E, Starbuck, B, Woolsey, 2010. *The History of Credit Cards* [online] available from <<http://www.didyouknow.org/creditcards/>>: (accessed October 2010)

¹¹ E, Starbuck, B, Woolsey, 2010 supra

¹² E, Starbuck, B, Woolsey. *The History of Credit Cards*, available online @ <http://didyouknow.org/creditcards/>: (accessed October 2010)

¹³ 2010. *The First Credit Card* [online]. Available from: <<http://www.history1990s.about.com/od/1950s/a/firstcreditcard.htm>> (Accessed October 2010)

customers and local merchants where merchants could deposit sales slips into the banks and the bank billed the customer who used the card.¹⁴

According to Mr Naukushu of First National Bank,¹⁵ the above is the history of credit cards in the world however in Southern Africa and especially in South Africa credit cards were introduced with the first banks that were established in South Africa namely Standard Bank and First National Bank and through these came the introduction of credit cards into the Namibian market during the colonial occupation of Namibia by South Africa.

Standard Bank was the first bank to set up office in Namibia in 1915 in Luderitz and First National followed thereafter

Currently the use of credit cards in Namibia as in the world over is at a large scale and credit cards are used for a wide range of transactions like the paying of bills, telephone, clothing and household bills and Automatic teller machines are found at almost every corner of the country and cards can be used by any person from the age of sixteen provided there is parental or guardian consent¹⁶.

Types of Credit Cards

The credit card is then a plastic card which contains information (card number, owner's identity) on the magnetic stripe belonging to the person to whom it was issued to. It is loaded with a limited amount of money which such holder is allowed to utilise which must be paid back to the issuer, in most cases the Bank that issued the card.¹⁷

According to Detective Inspector Tsuseb of the Commercial Crimes unit of the Namibian Police, there are several types of credit cards in use around the world as well as in Namibia.¹⁸ A Debit card is one type of credit card that does not offer a credit limit but is linked to the owner's bank account and the holder can make payments depending on the availability of money on the account to which such card is linked, all major banks in Namibia issue debit

¹⁴ E.Starback,B Woolsey.2010. *Who Invented Credit cards* [online], Available from <http://www.inventors.about.com/od/cstartinventions/a/cerdit_cards.htm (Accessed October 2010)

¹⁵ Naukushu(2010)

¹⁶ Naukushu(2010)

¹⁷ D/Insp Tsuseb, Sgt Lilungwe.2010. *Fraud by Credit Card, Traveller's Cheque and Money Laundering*. Paper presented at the Commercial Fraud Workshop. 7-9 April 2010.Oshakati

¹⁸ Tsuseb,Lilungwe: 2010

cards. Examples of these types of cards are debit cards from First National Bank of Namibia, Standard Bank of Namibia, Bank Windhoek as well as Nedbank.¹⁹

He adds that as second type of credit card is a charge card. This card does not give a credit limit and the total amount spent on the card is to be repaid to the card organisation at the end of every month and examples are the Dinners Club Cards and American Express cards.²⁰

A third type of credit card according to Inspector Tsuseb is the Garage and Petrol cards which are usually linked to another credit card or the bank account of the holder. Where it is linked to a credit card for instance Master Card payments are made on a monthly basis.²¹

Fleet cards are another type of credit card according to Inspector Tsuseb, which are common for corporate clients who own fleets of vehicles and the practice is that there is normally one main card with several other cards called secondary cards but they are all linked to one account and one card is usable on one vehicle.²²

Lastly he states that there are Private Label Cards which are in most cases exclusive to a business that issue them. The practice is that the client only obtains one upon approval of his application to have an account and examples of these are cards issued by Edgars, Markhams, Woolworths, Jet etc.²³

From the above examples of credit cards one immediately notices that credit cards have several factors in common and these include the link to either other credit cards or the link to bank account.

In every circumstance there is a link to money as this is the basis of their existence.

Secondly most if not all credit cards have a magnetic strip at the back which stores all of the information of the card holder.²⁴ Thirdly, according to Mr Naukushu, most of these cards do not require the insertion of a personal identification number, mere presentation and the transaction can go through.

¹⁹ *ibid*

²⁰ *ibid*

²¹ *ibid*

²² *ibid*

²³ *ibid*

²⁴ Naukushu(2010)

It goes without saying then that in the wrong hands or in the event where a credit card is stolen, copied and or used without the consent of the holder or owner of the card, his or her funds available on the card can be used by the perpetrator. The fact that no fingerprint recognition mechanism or other form of security apart from the pin also makes the credit cards susceptible to fraud.

In the event of debit cards which require a pin again obtaining a pin without the authorisation of the card holder could prove to be detrimental to the finances of the holder on that account. Just as feared the above was exactly the situation that began in Europe and all over the world where credit cards were used and South Africa as well as Namibia was no exception either.²⁵

Credit Fraud and Schemes

According to Advocate Lategan, it was about 2005 and 2006 when card fraud cases began to attract the attention of both law enforcement and the general public in Namibia. She adds that it is difficult if not impossible to pinpoint the time when card fraud began, i.e. the first incidences, but cases of card snatching and forced withdrawals can be traced back to as far as 2003.²⁶

These incidences she adds were however far apart and isolated and did not make use of complex high tech equipment or require the use of devices to copy and steal information like they do now. In most cases she adds, these perpetrators were charged with offences such as theft, robbery, attempted robbery etc. Then, most if not all criminal conduct relating to the use of credit cards could be encompassed in either theft or robbery.²⁷

Advocate Lategan states that credit card fraud then is a wide ranging term for the fraud committed using a credit card. The means to do these or the way in which it takes place varies depending on the type of scheme employed however the purpose usually remain the same and that is to obtain the funds of the victim without his authorisation and this is the prejudice.

The perpetrators of this offence may actually steal the physical card, create and use a counterfeit credit card or illegally obtain the data associated with a credit card holder's account in order to access and use the owner's credit normally by copying or making use of

²⁵ Hangula (2010)

²⁶ Lategan (2010)

²⁷ ibid

the magnetic strip that is at the back of the card.²⁸ Whatever the method employed the following are usually the common schemes the world over.

Common Schemes

According to Inspector Tsuseb, Intercept fraud takes place when a person applies for a credit card from their local bank and steals the card before it actually reaches the person whom it was intended for (either from the post office or from the mail box of the addressee. The Inspector adds that the perpetrator will be able to access the funds that are on the credit card and a large amount of money may be lost in his way if it goes undetected for a while for a credit card fraudulently fills in wrong information either about their personal details or their address in order to obtain a credit card. The implication with this sort of fraud he adds is that once the person has hold of the card he can make use of the funds and not pay the bank and the bank likewise will have difficulties tracing the perpetrator in light of the wrong details provided.

Unauthorised -use fraud according to Detective Hangula is by far the easiest form of fraud to commit and it takes place when the offender orders a product, services or other merchandise and gives an unauthorised credit card number. The implication is that the actual owner of the account will be billed for those goods or services that he was not responsible for.²⁹ This type of fraud is however not quite common in Namibia because most times service providers and stores usually require that one pay in cash or physically make use of the credit card by sipping in point of sale devices referred to as the swiping device and they do not require of one to merely state a credit card number.

Chargeback fraud, which is more common in the United States, occurs when the legitimate card holder uses the card to purchase goods or services and when the statement comes from the credit card issuer he (cardholder) claims that he never received the service or the item in question or that he never authorised the transaction.³⁰ This allegation can however be counter acted with documentary proof of signature after the service was rendered and it can be proven that the cardholder is not honest.

²⁸ Gerson, J. 2010. *Guide to Credit card fraud*[online] available from <<http://www.hg.prg/credit-card-fraud.html>> 1-2 [accessed 5.10.2010]

²⁹ Hangula (2010)

³⁰ *ibid*

Skimming takes place where an employer or a merchant for instance makes a copy of the card holder's credit card before processing the transaction and this copy may be sold on the black market to professionals who may clone illegal copies of these cards and obtain the card holder's funds illegally.³¹ Detective Hangula states that this form of fraud is the most common one in Namibia at the moment, accounting for up to 90% of credit fraud cases reported to the Unit.

He adds that skimming does not only take place during the process of making a payment or during a transaction between a merchant and a cardholder but has over the years become most frequent at ATMs. He says that the perpetrators set up a skimmer device in the machine that reads the magnetic strip attached to the card when one places the card into the slot. He adds that this device is used together with various other devices including miniature video cameras that monitor the keypad of the ATM by attaching a false fascia over the original keypad.³²

The video camera records the pin number as it is entered while the device in the card slot copies the information on the magnetic strip and a new card with the same information and the same pin is replicated.

Doctored cards are another way in which a fraudster can temper with an existing card, says Detective Hangula. He adds that these are also known as fake cards and the fraudster merely erases the metallic strip with a powerful electro- magnet and then he tempers with the details on the card so that they match the details of a valid card which he may have attained from a stolen till roll or other method.

Hangula adds that when the fraudster goes to use the card, the cashier will swipe the card through the terminal several times before realising that the metallic strip does not work in which case she/he may manually input the card details into the terminal. This form of fraud is however quite risky says the detective as the cashier will be holding the card quite closely to read the numbers on it and if the fraudster did not do a good job of forging the card he is at risk of detection.

This method like many of the methods mentioned above is dying out slowly but surely in the world and in Namibia as more innovative methods of theft and fraud are created. One

³¹ Naukushu (2010)

³² Hangula (2010)

wonders whether with all these different techniques of fraud in use, what challenge does the offence of credit fraud create to the offence of fraud contained in our common law and what does literature, case law and legislation address these challenges. The next topic will deal with these issues.

Conclusion

The world over, credit cards are in use and have become such a modern day tool that it is difficult if not impossible to imagine life without them. As stated before they have managed to simplify financial transaction and have also to some extent contributed to development and globalisation as a whole.

People no longer need to carry cash around and risk becoming victims of robberies, furthermore credit cards can be used all over the world, one merely puts their card into the automatic teller machine in any country of the earth and where the bank approves the transaction one is able to get cash in that respective currency and what is more convenient than that.

However as, fast, creative and efficient as this invention is, so too are the criminal methods to defraud it and the response by the law will be discussed in the subsequent chapter.

CHAPTER 2

FRAUD AND THE ELEMENT OF MISREPRESENTATION

According to Advocate Lategan of the Prosecutor-General's office in Windhoek, traditionally credit card fraud was and is still governed by the common law offence of fraud in Namibia. She further states that ³³ the offence governs incidences where cards are stolen and used to withdraw funds from the bank account of card holders, where cards are forged or cloned as discussed above, where cards are intercepted i.e. interception fraud discussed above, basically all forms of unauthorised use of credit cards fall under this common law offence.

Fraud is defined as the 'unlawful and intentional making of a representation which causes actual prejudice or which is potentially prejudicial to another person.'³⁴ Gordon Hughes in his book titled 'essays on Computer law' provides the same definition for fraud albeit it being an Australian publication it appears the definition is similar the world over.³⁵ According to an online article entitled 'Fraud Explained' it was stated that in South Africa, the use of the term fraud is in its widest possible meaning and is intended to include all aspects of economic crime and acts of dishonesty³⁶.

The crime of fraud in South Africa and Namibia covers such a wide field of activities. These activities are those that involve the deceit and trickery and have the effect of causing prejudice to another by way of a misrepresentation which induces such prejudice. The crime stem from the crimes of *stellionatus*³⁷ and *criminal falsi*³⁸ however later the South African courts abandoned the two distinct offences and recognised the single crime of fraud.³⁹

Hunt's definition is however the most comprehensive and he clearly sets out and defines the different elements of the offence i.e. the act, unlawfulness, intent, causal connection and

³³Lategan (2010)

³⁴ Snyman, C.R. 1993: *Criminal Law*, London: Butterworth. p504

³⁵ 1990. Melbourne Australia.: Longman Professional, p674

³⁶ *Fraud Explained* [available online] (accessed 9 September 2011

)<http://www.mtn.co.za/SUPPORT/REPORTFRAUD/pages/F>

³⁷ Long, B.2004 www.drbilllong.com/words/stellar11.html (accessed 30 August 2011) (Which has its origins in Roman law and traditionally called 'crimen stellionatus' and defined as the 'deceitful or underhand dealing' and fraud is an ingredient of it.)

³⁸ Bouvier, J.1856 [available online]<http://legal-dictionary.thefreedictionary.com/crimen+falsi> (accessed 30 August 2011) *Criminal falsi* is a fraudulent alteration, or forgery, to conceal or alter the truth to the prejudice of another and is similar to the traditional offence of forgery and uttering.

³⁹ Milton, J.1996., *South African Criminal law and Procedure: Common Law Crimes Vol II* 3rd Edt, Juta & co Ltd p 706-707

prejudice or potential prejudice.⁴⁰To just briefly run through the elements basically Hunt states that an '*actus reus*' consists of a misrepresentation in that an untruth is told or in another way the truth is twisted. A representation is made about the existence of certain facts which in reality do not exist and can be about past, present or even future events.⁴¹

He further states that misrepresentation can either be by words i.e. where one expressly tells an untruth or by conduct where it can be inferred from one's conduct that he or she has made or is making a misrepresentation. Regarding prejudice he states that prejudice may be pecuniary or non pecuniary and that even potential prejudice is sufficient to secure a conviction on fraud. Whether the existence thereof may be sufficient to warrant unlawfulness is determined by the "reasonable man" test or the moral convictions of a community as it is commonly referred to.

When one compares the definition or rather the elements of fraud to the schemes of 'doctored cards and skimming and dissects the process to fit the elements, in order to make a comparison, the following is noted.

- a) It is my opinion that the act is indeed unlawful and intentional in that the withdrawal of funds belonging to one person by another without their consent is against the law in whatever form and constitutes the elements of theft. It then goes without saying that this must be intentionally done in that unintentional withdrawal of funds may not lead to criminal sanctions as the required 'intent to defraud' is not present, criminal capacity therefore lacks
- b) Regarding prejudice, in both doctored cards and skimming, the purpose and the motive behind the schemes is to gain financial benefit in whatever money. It may be to obtain cash directly of the card holder or to use that card to purchase goods thus making use of the funds on the card.
- c) In both these situations I believe that the amount used to purchase these goods and the cash withdrawn from the value of the prejudice and where the criminal fails to withdraw or to make use of the funds then the attempt would still render one liable under the offence of fraud as was stated in the case of *R v Moolchand*⁴².

⁴⁰ Milton (1996 :701)

⁴¹ *ibid* :702

⁴² (1902)23 NLR 76

The court held in that case that ‘potential prejudice means that the making of the misrepresentation looked at objectively must have involved a risk of prejudice, proprietary or non proprietary.

It was further held that the test is whether it is reasonably possible that prejudice would occur and this same sentiments were expressed by the court in the case of *R v Seambe*⁴³ where it was further stated that the question is not whether X intended to cause prejudice but rather whether, objectively viewed, his misrepresentation would have brought about the prejudice. I am of the opinion that in the case where the criminal is found inserting or trying to insert the card into the slot, whether it is a cloned card or an original card that belongs to someone else, he can be charged with fraud on the basis of an attempt.

Given the above, credit card fraud meets the two requirements of the offence of fraud however the requirement of misrepresentation has proven to be unclear when credit cards are involved and the discussion follows below which will then attempt to answer the dissertation question.

From the above definition of fraud, it has been suggested that a difficulty arises with regard to computers and the crime of fraud in that the misrepresentation is made to a machine and not to a person as per the traditional definition thereof.⁴⁴ It also follows that since misrepresentation is made by way of words or conduct a question arises as to whether this includes the use of a computer or rather an instruction given to a computer as was stated in the case of *S v Van den Berg*⁴⁵ as being sufficient.

According to J.W Dreyer in ‘De Rebus’, November 1983 at page 587, “As far as fraud in concerned, which consists in unlawfully making with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another, the difficulty lies in the element of misrepresentation is not normally made to a person but to a computer. He adds that it is therefore unlikely that the criminal who is misappropriating the valuable

⁴³ 1927 AD 42

⁴⁴ Van der Merwe, D.P. 1987. *Computers and the Law*. Durban: Juta & Co Ltd.p90

⁴⁵ 1991 (1) SACR 104

information can be charged with fraud.” The same sentiments were expressed by Coetzee in his writing entitled *Die Landros*⁴⁶

From the above writings in *De Rebus*, it appears that he is of the opinion that in cases of misrepresentation involving a machine, then the misrepresentation is made to the machine and not to a person. If this indeed is the position, that would mean that in a matter of credit card fraud when a fraudster uses a stolen card for instance and inserts it into the machine and enters the pin number then he misrepresents to the machine that he is authorised to make the transaction and that he is in fact the owner of the account where the money is withdrawn.

This could be quite problematic in that the fraud definition speaks of misrepresentation to a person and not a machine. Legally a person can both be a natural person and a juristic person but obviously a machine does not fall within the definition of a juristic person let alone natural.

This view is however not shared by all South African authors or writers or even Judges, it appears that only the above authors share this opinion. In the matter of *S v Van Den Berg*⁴⁷, the issue was answered in the negative by Judge Stegmann. The matter was one of an accused who was charged with fraud after she unlawfully credited a bank account with an amount of R800.

The court considered the conduct of the accused in crediting the account and stated that ‘from the answers given by the accused to the magistrate’s questions it would appear that she unlawfully credited a particular account in Santambank when the account was not entitled to such a credit.

The Judge adds that it is in his view that a misrepresentation to the bank and the fact that the misrepresentation was introduced into the computer system electronically differs from one in which the clerk who with the intention to deceive, makes a false entry with a pen into the 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.....’⁴⁸

⁴⁶ Vol 19, No 3 July –September 1984

⁴⁷ 1991 (1)SACR p104

⁴⁸ Ibid: 106

From the above Judge Stegmann holds that the misrepresentation was indeed made to the bank and not to a system or machine and the means used to make this misrepresentation was the computer system. The fact that Santamtam has legal personality as an institution is sufficient to make the misrepresentation unlawful.

In the case of *S v Myeza*⁴⁹ where the accused person was charged and convicted of fraud after he placed a beer can ring into a parking meter instead of a coin and activated the parking meter. On review, it was contended that fraud is a consequence crime that the prejudice must have been caused by the misrepresentation and the misrepresentation must induce a person, and not a parking meter, to believe or to accept that the misrepresentation is true and it must be able to result in prejudice’.

I personally agree with the above contention in that in order for the parking meter to be activated, a foreign object was introduced .A beer can ring masquerading as a coin led the meter to be activated under the ‘false order’ that a coin had been inserted .Two questions have to be determined.

- a) If the ring had not been inserted, would the meter have been activated?
- b) What action led to the activation of the meter?

In the former the answer is that negative, the meter would not have been activated without the ring and the insertion of the ring is what led the meter to be activated. In other words it was given false orders under the disguise of genuine orders and I would agree with the contention that the misrepresentation was made to the meter as it acted upon it.

The Court of appeal however upheld the conviction in the Myeza case and held ‘*the material deficiency... [the contention that the misrepresentation was not made to a person] seems to be that it is only the use of a foreign object instead of a coin that is regarded as a misrepresentation. It is in fact the application of the foreign object to obtain a result from the parking meter, which result creates the misrepresentation and enables the perpetrator to park undisturbed and ostensibly lawfully in the demarcated space*’.

Jonathan Burchell⁵⁰ states that on the above reasoning it would follow that persons who withdraw money from automatic teller machines (ATM’s) in banks by misrepresenting their identities could be convicted of fraud since the ATM is nothing more than a computer linked

⁴⁹ 1985 (4) SA p 30

⁵⁰ 2006.*Principles of Criminal Law*.Lansdowne:Juta & Co p840

to the funds and records of the bank and serves as a conduit for transmitting instructions as to the receiving or withdrawal of funds, the misrepresentation involved is made to the banker.

Forgery and other offences

Further according to Advocate Lategan, the doctoring of cards or fake cards as they are known was and is provided for under the offence of forgery and uttering. The duplication, tempering or reproduction of a credit card for purposes of obtaining or using funds that belong to the cards holder without the authorisation of the card holder is in law ,forging.⁵¹

Another law that somewhat has an impact on credit card fraud in Namibia is the Payment Systems Management Amendment Act of 2010. The Payment System Management Act of 2003 provided for the management, administration, operation, regulation, oversight and supervision of payment, clearing and settlement systems in Namibia and to provide for incidental matters.⁵²

This Act had no mention of credit fraud, neither did it provide for it in any of its sections despite the fact that it dealt with payment systems. It was IN year 2010 that the Act was amended (Payment Systems Management Amendment Act 18 of 2010) and it now criminalises certain offences relating to card fraud.

The offences that are criminalised in this act include those related to instrument, device, apparatus, material and components used during the commission of an offence and Section 16B states that “any person makes, adapts or repairs or buys or sells or exports from or imports to Namibia or possesses or uses any instrument ,device, material, or component thereof that the person knows or reasonably ought to have known that it has been used or is intended for the use in forging or falsifying a payment instruction or for use in defrauding a lawful holder of a payment instruction commits an offence.”⁵³

The above essentially means that any person who is found in possession of, sells or imports or exports any device or part thereof for use in forging or falsifying a payment instruction shall be guilty of an offence. Consequently the possession or import or use of any skimming devices, devices that are used to copy information from the magnetic strip of a card as well the possession of counterfeit cards, blank cards or doctored cards is criminalised in as long as

⁵¹ Lategan(2010)

⁵² Preamble of the Payment Systems Management Act 18 of 2003

⁵³ Act 18 of 2010

the person knew or ought to have known that their intended purpose was to defraud the lawful holder of these cards.

It noteworthy to mention that this amendment is a vital one in the fight against credit card fraud, as it is probably the only Act that directly addresses the issue of devices that may be used to defraud. However it does not deal with credit fraud in its entirety in that it does not encompass all the types of schemes used such as the interception of a credit card sent from a bank to the lawful owner.

Mr Lusepani of the Prosecutor-General's Office supports the view of Advocate Lategan in that fraud is the offence that perpetrators of these schemes are charged with. He states that during schemes such as cloning or fake cards, which are the most common, misrepresentation is achieved by the mere fact that the card holder passes off to the merchant that he is the lawful owner of the card and then subsequently to the issuing Bank that he being the owner of the card and bank account from which the funds are obtained, has given his permission for the transaction to take place.⁵⁴

He also mentions that misrepresentation according to law does not only have to be done to natural persons but that the Bank as an institution is treated in law as a person as well just that it is a juristic person. He added that that if one should go into the depth of it, essentially the computer system of the bank is run by an administrator or so who ensures that the system works in a certain way and smoothly and he runs programmes and fixes problems in the system, it may also be to this person that the misrepresentation is done, though this may heavily be argued.

He further states that even English law supports the notion that the fraud in credit card and cheque offences allows for the misrepresentation to be made to the bank and not the machine and further states that for instance in the case of *McPherson and Watts* (1985) Crim LR 508, CA, an English case, the appellants, using cheque books and stolen bank guaranteed cards obtained payment on a number of cheques in Germany. The cheques were drawn on the Nat West bank which through the cards had guaranteed payment. During the trial, the court held that by presenting the stolen cheques and cards to the bank, they misrepresented to the bank that they were the lawfully entitled to have the cheques, that regarding the cards, they were in lawful possession of them, that they were entitled to the benefits arising from being

⁵⁴H lipinge March 2010 [Interview with Mr. Lusepani, Senior Legal Officer, Prosecutor-General's Office] Windhoek

holders of the cards and they caused the bank to act to its detriment by issuing funds to persons who were not entitled to it.

He added that it was unlawful i.e. against the law to take part in these schemes as well as wrongful, that intent to defraud was easy to prove in that one may determine what the card was then used for or the reason behind taking the card. In these circumstances, the facts surrounding the entire case would have to be considered including the fact that a person in possession of another's card, would most probably not use it to benefit himself but would rather report it or hand it to the police unless he intended on defrauding the owner, circumstances surrounding the case assist to determine intent.

Regarding prejudice he adds that if it transpires that the card has been used, either for purchases or that money is withdrawn, then prejudice is proven and the value of such prejudice or detriment would be the amount withdrawn including bank charges and service fees etc. He adds that any attempt to withdraw or use the funds from the account would lead to potential prejudice.

He also added that where it cannot be proven that funds were withdrawn but conspiracy can be proven then the perpetrators can be charged under the Rioter's Assembly Act of 1856 which criminalises any conspiracy to commit offences where for instance conspiracy to commit a fraudulent offence can be proven.

Regarding possession of duplicated cards he states that forgery and uttering will not suffice as an offence to charge a perpetrator with, contrary to what was advocated by Advocate Lategan in light of the elements of the offence. He states that forgery, despite the literal meaning of it i.e. an imitation of something and in common parlance the production of a fake article, the word has a different meaning in the legal sense. It is only extended to documents or writings and not anything other than that, let alone cards. And he adds that it is in these circumstances that the Payment System Management Amendment Act comes into play and perpetrators can be charged with possession of these types of devices.

Another offence that is used to charge culprits is that of common law theft according to Advocate Lategan. She adds that if someone is found in the possession of cards that do not belong to him or her, depending on the circumstances i.e. if the owners can be traced to testify before court than that person can be charged with theft alternatively possession of suspected stolen property in contravention of Section 6 of Ordinance 12 of 1956. She adds

that theft is a continuous crime as such any person who is subsequently found in possession of those cards can be charged with theft regardless of whether he was the one who stole them or not.⁵⁵

Draft Bill on Electronic and Communication Transaction of 2010

For those in the field of e-commerce or who operate businesses online and whose middle names are ‘electronic transactions’, there is a huge hype about the introduction of this Bill. It caters for electronic transactions and provides for inter alia, electronic signatures, unauthorised entry and tempering with computer systems etc. it is going to be the first law in the country to govern electronic transaction as well as cyber crimes and a particular section of it may have an impact on credit fraud as well.

Section 37 of the Bill states that “any person who fraudulently causes loss of property or damages to another person by

- a) Any input alteration, or suppression of data; or
- b) Any interference with the functioning of a computer system with the intent to procure for himself or another person an advantage, shall commit an offence. This section can be arguably invoked in circumstances where devices are placed on ATM’s to both record the pin number and to capture the data on the cards. If it can be successfully argued that an ATM is a computer system then placing of devices in it and on it would suffice as interference in order to procure an advantage or gain.

Section 39 of the Bill criminalises any person who aids and abets someone to commit the offences provided for in section 35 to 39 and a convicted person is liable to pay a minimum fine of N\$20000,00 or imprisonment for a minimum period not exceeding 24 months or both.⁵⁶

The bill covers quite an extensive area and the first provision in particular may be used in credit card fraud cases in that the alteration may be interpreted to include the doctoring of a card, the removal of data from the card using an electro magnet as well as the physical tempering of the details on the card to fit those desired.

⁵⁵ Lategan(2010)

⁵⁶ Article 40

It is my opinion that the interference of with the functioning of a computer may also be interpreted to include the attachment of devices such as those used during skimming to the ATM and the installation of video cameras that record the pin number of the victim. It can however be argued that the Bill cannot encompass schemes such as the actual theft of the card and subsequent presentation thereof under the pretence that it belongs to that specific person as there is no interference with the computer system neither is there an input, alteration or suppression of data in a case such as this.

Conclusion

South African authors such as J Dreyer and Coetzee contend that where a misrepresentation is made to an ATM or other machine such as the parking meter in the case of Myeza, fraud will not suffice as a charge and one cannot be convicted of fraud in light of the fact that fraud cannot be made to a machine but only to a human being.

They contend that due to the nature of the transaction, the fraud is targeted towards an inanimate object and when one compares this to the elements of fraud, misrepresentation cannot be made to a machine.

It has however on the contrary been held by several court cases including foreign cases that in cases involving credit card fraud or even cheque fraud the misrepresentation is made to the respective Bank in that the ATM merely acts as a conduit or instrument of instruction or an agent of the bank and one looks at the situation as a whole, the misrepresentation is made to the bank and it is the bank that is deceived and it is also the bank that is prejudiced or potentially prejudiced in those circumstances.

The position of misrepresentation in South Africa has been dealt with and the subsequent chapter will look at how other states and legislation deal with the offence of credit card and fraud And how it is criminalised in their jurisdictions.

CHAPTER 3

CREDIT CARD FRAUD IN OTHER JURISDICTIONS AND INITIATIVES ADOPTED

South Africa

According to an online article by M. Smith regarding statistics compiled by The South African Banking Risk Information Centre in 2008 on the impact of credit card fraud on several banks in South Africa, fraud was stated to be at its most highest and continues to rise⁵⁷. The rand value on all forms of credit card fraud was 34% higher in 2007 when compared to the value in 2006. The total amount of money siphoned from the credit card industry was R350 million in that year alone.⁵⁸

According to the same article by M. Smith⁵⁹, the surge in credit fraud can be attributed to the increase in the use of credit cards in the South African market. Eighty percent of total credit card fraud falls within one of two categories he adds. In 2007 a total of R160 million was spent on stolen cards while lost cards accounted for R120 million and the card –not-present schemes, this is where the fraud is done without the presence of a card and on line and these amounted to R60 million according to Smith.

From the above it appears that it is not only Namibia that is badly hit by this offence but South Africa seems to be the worst hit among the two countries and population has a large part to play. Despite the research done in the dissertation, no website or article or information could be obtained depicting the statistics of credit card fraud in Namibia and I am of the opinion that it has either not been carried out or is not treated as public information.

According to Smith, amongst the many initiatives that the country has is the Commercial Branch of the South African Police Service, which is responsible for the policing of serious commercial crime in South Africa. He adds that this Component consists of 17 branches countrywide and a Serious Economic Offences Unit, stationed at the national South African Police Service Head Office. The Commercial Branch polices 57 Acts of Parliament and investigates all serious fraud and theft cases in the country.⁶⁰

⁵⁷ Smith, M. 2001 *Credit Card Fraud on the rise in South Africa*. Africa's Financial and Advisory News and Information portal: [online] Available at <<http://www.FA News. Co. za>>. [Accessed 9 October 2010]

⁵⁸ ibid

⁵⁹ ibid

⁶⁰ ibid

Regarding credit card offences, the Government and the South African Business Risk Intelligence Centre have combined forces and exchange information and intelligence on bank-related crimes states Smith.

Smith adds that the Centre was established by 4 of the major banks in South Africa and Business against Crime, a non-governmental organisation that represents the business sector and assists Government in the fight against crime in South Africa. The organization seeks to support Government's efforts by complementing its resources with the considerable entrepreneurial, managerial and technological skills.

The purpose of the Centre according to Smith is to gather intelligence regarding crimes committed in the banking sphere and also works closely with all banks in South Africa in addressing commercial crime. Threats posed by organised groups are dealt with by means of the establishing of task teams, with representatives from the Commercial Branch and the relevant banks working together to investigate the crime.⁶¹

Prior to 2002 says Smith, South Africa had no legislation dealing with cybercrimes or computer crimes. The country relied on its common law offences derived from Roman Dutch Law to deal with offences relating to computers but it was soon discovered that these offences and techniques were fast becoming too complex for the old laws of the republic. As a matter of urgency the laws had to be 'up graded'.

In 2002 South Africa enacted the Electronic Communications and Transactions Act.⁶² The aim of the ECT was and still is inter alia "to provide for the facilitation and regulation of electronic communications and transactions; to provide for the development of a national e-strategy for the Republic; to promote universal access for electronic communications, transactions and the use of electronic transactions by SMMEs; to prevent abuse of information systems and to encourage the use of e-government services". Indeed, the focus of the ECT is on protecting 'data' or data messages.⁶³

The ECT deals comprehensively with cybercrime in Chapter X111. The following offences are punishable offences in the ECT, namely sections 86(4) and 86(3) address new forms of crimes, the law being called anti-cracking (anti-thwarting) and hacking law, which prohibits

⁶¹ Smith (2010)

⁶² *ibid*

⁶³ Preamble to Electronic Communications and Transactions Act 25 of 2002

the selling, designing or producing of anti-security circumventing technology; e-mail bombing and spamming is addressed in terms of sections 86(5) and 45 of the ECT respectively; whereas the crimes of extortion, fraud and forgery are addressed in terms of section 87.⁶⁴

Section 3 of the ECT provides that in instances where the ECT has not made any specific provisions for criminal sanctions, then the common law will prevail.⁶⁵

South Africa however is a step further in the fight against fraud and have established 'Specialised Commercial Crimes Courts' in November 1999 according to Advocate Lategan. These courts emerged from a partnership between the SAPS (The Police service), the National Prosecuting Authority, the Department of Justice and Business against Crime (BAC). Situated in Pretoria, the court consists of two regional courts with a mandate to hear the cases brought to trial by the Specialised Commercial Crime Unit (SCCU) of the South African Police.⁶⁶

The courts deal primarily with commercial offences and range from money laundering, fraud basically all fraud cases except for relatively small, straightforward frauds, normally committed by a single individual, unless it is alleged that she has committed numerous such crimes. For instance, if a person pays with a cheque while the funds in her account are insufficient to cover the transaction, she will most probably not be prosecuted by the SCCU.

However, if the amount in question is very large says Advocate Lategan, or the suspect is believed either to be part of a syndicate committing this crime repeatedly or to have passed a series of these cheques, the likelihood increases. On the other hand, some of the most complex and high value frauds will also probably not be prosecuted. Furthermore prosecution of these offences is limited only to within the Pretoria jurisdiction and the courts handle cases that are too serious for district courts but less serious for higher courts.⁶⁷ It is my opinion that Namibia should take examples from these initiatives as they portray the determination to combat the crime of fraud on all levels and engaging all stakeholders and not merely the police.

⁶⁴ Cassim, F 2009. A Comparative Study. **Formulating specialised Legislation to address the Growing Spectre of Cybercrime**[online] available from <<http://www.saflii.org/journal/PER/2009/18.html>>(Accessed October 2010)

⁶⁵ Cassim (2009)

⁶⁶ Lategan (2010)

⁶⁷ Lategan (2010)

Canada

According to D.Batchelor in Canadian law, the theft or forgery of credit cards and unauthorised use of computers is dealt with Under Section 342 of the Canadian Criminal Code. Credit card fraud falls under the umbrella of Computer crimes and more specifically computer fraud.⁶⁸

According to D.Batchelor⁶⁹ in his online article titled *Computer Crimes*, Canada's definition of computer crime is taken from International Convention on Cybercrime passed in 2001 that deals with offences involving the use of computers, offences against the confidentiality, integrity and availability of computer data and systems and offences relating to the infringement of copyright and ancillary liability.

The United States

Under United States law, Section 1030 (a)(4) of the United States Criminal Code prohibits unauthorised access to a protected computer with intent to defraud and obtain something of value. It criminalises wire fraud and certain unauthorised access offences that have at their root the intention to defraud and to gain some benefit⁷⁰. Credit card fraud in the States has no one specific legislation that caters specially for it but rather falls under the umbrella of computer crimes, however different other types of fraud relating to credit and computers are criminalised under various statutes.

One such Act is the 'Fair Credit Billing Act' of 1974, which Act serves the purpose of protecting consumers from unfair billing practices provides a mechanism for addressing billing errors in open end credit accounts such as credit card or charge card accounts.⁷¹

It appears that legislation is not much regarding card fraud in the US however quality in this case outweighs quantity. There's also several initiative put into place regarding the offence and one of this is the Federal Trade Commission which serves as the nation's consumer

⁶⁸ Batchelor, D. 2010. Part II *Computer Crimes*. [online] available from <<http://www.dahnbatcheloropinions.blogspot.com/2010/09/computer-crimes-part-2.html>. [Accessed October 2010]

⁶⁹ Batchelor (2010)

⁷⁰ Nicholson, J et al. 2000. *Computer Crimes*. American Criminal Law Review. Vol 37 No 2. p209

⁷¹ *Guide to Credit card Fraud law* available online at <http://www.hg.org/credit-card-fraud.html> (accessed November 2010)

protection agency, collecting complaints about companies, thefts of a various nature as well as fraudulent acts.⁷²

According to an online article entitled Guide to credit card law, one of the outstanding initiatives in dealing with fraud in the United States is the Secret Service. It is responsible for maintaining the integrity of the financial infrastructure and payment systems. As a part of this mission, the secret service implements and evaluates prevention and response measures to guard against electronic crimes as well other computer related fraud.⁷³

Lastly there is the US Department of Justice Fraud Section, similar to the Fraud Unit of the Prosecutor-general's Office in Windhoek and this Unit is a front line litigating unit that acts as a rapid response team in the investigations well as prosecution of complex white collar crimes throughout the country.⁷⁴ According to the online article entitled Guide to Credit card Law, the unit has vast experience and expertise with regard to sophisticated fraud schemes and its most prized treasure is its ability to respond swiftly to address law enforcement priorities.

United Kingdom

In the United Kingdom, most fraudulent acts fall under the ambit of the Theft Act⁷⁵ This includes theft, obtaininbg property by deception, and false accounting. According to D.Davies the British Law Commission identified a problem that a computer cannot be deceived and that certain legislation is now rendered less effective when it comes to computers but it has however not proposed a legislative intervention into the matter yet.

According to C.Tapper⁷⁶ however it can be argued that the deception of a machine actually involves the deception of those who operate by means of the machine. The common law offence of conspiracy is available when more than one person is involved because the Computer Misuse Act of 1990 does not apparently contain any provisions relating to the offences of credit card fraud and computer fraud

⁷² Guide to Credit Card Law(2010)

⁷³ ibid

⁷⁴ ibid

⁷⁵ Davies,D.1991.Computers and Law Vol 2.Issue 3 p10-11

⁷⁶ 1989. *Computer Law*. p315

Australia

Australian jurisdiction and the manner in which the courts deal with the issue of misrepresentation in cases involving credit card fraud is quite similar to the position in South Africa. In the case of *R v Evennet*⁷⁷ where the accused exceeded his credit limit when making a withdrawal at an ATM that was offline, the defence contended that the Bank consented to the withdrawal because of the manner in which the ATM was programmed. The Court of appeal rejected the contention because of the fact that the Bank could not have consented to that transaction through an ATM.

In the case of *R v Baxter*⁷⁸, also an Australian case the accused made withdrawals from an ATM while online however the funds on the account were a result of fraudulent deposits made into the account in the past. He contended that there was no misrepresentation made to the Bank as the ATM was a non human entity that was not capable of thought or being misrepresented.

The court however held that the ATM is a facility provided by the bank in the course of conducting its business and as such the misrepresentation is made to the bank which is a legal entity and capable of being misrepresented and not to the ATM as contended by the accused. This case fully supports the judgment of the court in the South African case of *S v Myeza*⁷⁹ where the court was also of the view that in the case where the accused inserted a foreign subject into the slot of a parking meter, the misrepresentation was not made to the meter but rather to the Municipality that was in control of the meter.

According to Gordon Hughes⁸⁰ Australia has various jurisdictions that operate locally and have legislation that governs the whole of the country. The Crime Act of 1900 was amended to criminalise instances where unauthorised access is accompanied by an intention to defraud, to obtain financial advantage or to cause loss or injury.⁸¹

It is noteworthy that this provision in Australian law can be used in relation schemes such as hacking and to the theft and subsequent use of cards to withdraw funds or to purchase goods in that the access to the bank account arguably is unauthorised, even the use of the card is

⁷⁷ 1987 2 Qd.R.753

⁷⁸ (An unreported decision)

⁷⁹ *ibid*

⁸⁰ 1991. *Computer Law & Practice*. Recent development in Australian Computer Law Regulation. Melbourne. Australia

⁸¹ Gordon(1991)

unauthorised and if used with the intention to defraud then the provisions of that Act can apply.

.These then are some of the initiatives that the Australian government has put in place to deal with the offence of fraud and particularly fraud through the use of a computer and the provisions of the Acts can easily be used to include offences of credit card fraud.

Namibia

The Fraud Unit of The Office of the Prosecutor –General under the Ministry of Justice, Public Prosecutions Department is the unit in Namibia that is tasked with the direct prosecution of fraud and fraud related offences.⁸² The initial stage involved the investigation of the allegation by the Namibian Police and depending on the seriousness and the magnitude of the fraud i.e. the amount involved or whether is a syndicate will determine whether the case will be heard in the lower courts and prosecuted by the prosecutors or whether it will be sent for indictment to the high Court in which case the matter will be handled by the Advocates at the Fraud unit states Advocate Eixab.

He adds that in some cases the Advocates may be called upon to assist in prosecuting fraud matters in the lower courts due to their specialisation and experience and he was not aware of any cases that involved credit card fraud that have already been prosecuted.

Another division in the fight against fraud is the Commercial Crimes Unit of the Namibian Police, Serious Crimes Department according to Constable Hangula.He states that the division was also set up by the Namibian police to investigate incidences of fraud and commercial fraud in the country. The two offices work hand in hand and the office of the prosecutor general aids the commercial crimes investigations by providing advice, guidance and guidelines in the investigation of these complex offences. After the investigations are completed, PG's office prosecutes the perpetrators and the courts convict.⁸³

Another initiative that was established to deal with fraud was the Anti- Corruption Commission in 2003. The commission though dealing primarily with issues of corruption is likewise tasked to investigate matters of fraud if falling within the ambit of the Anti Corruption Act and after investigations are completed are taken to the PG's office for

⁸² Lipinge, H. 2011 Sept [Interview with Advocate J.Eixab, Anti-Money Laundering and Asset Forfeiture Unit, Office of the Prosecutor –General]Windhoek

⁸³ Hangula(2010)

decision on the appropriate charge, further instructions regarding investigation, and prosecution.⁸⁴

Of recent development was the establishment of the Ministry of Information and Technology (2010) which is tasked with researching and providing guidelines and advice to the government on issues involving technological advancement and possible legislation that cabinet needs to enact to be on par with complex technological offences that have come about and continue to increase with globalisation and electronic advancement.⁸⁵

Namibia, being signatory to the Declaration of Principles of the World Summit on the Information Society (WSIS) is tasked with the obligation to create an enabling environment for the development of the information society and to serve as a tool for good governance states Advocate Eixab. Accordingly, adds the Advocate, the rule of law, accompanied by a supportive, technologically neutral and predictable policy and regulatory framework reflecting national realities, it is essential for building a people centred Information Society.⁸⁶

Apart from the above initiatives that have been established to deal with fraud, the financial institutions in the country also play a role in educating the public about the dangers of credit card cloning and how to keep their cards safe. Bank Windhoek for instance has a weekly newsletter that is released via email, television and newspaper which deals with different topics having an impact on customers and bank related issues.⁸⁷

Naukushu says credit card fraud has on several occasions been the topic of the Newsletter and still continues to be due the rise in incidents of fraud being reported. The bank also has a forensics department as well as a separate division that deals with any issue regarding cards and particularly credit card fraud. also assists the police with the investigation of criminal cases relating to fraud.⁸⁸

Bank Windhoek has a Cards and Support Services division headed by Mr Stoney Steenkamp which researches, and assists the local police in the investigation of card fraud related offences while, first national Bank has a similar department headed by Mr Dixon Norvall (the

⁸⁴lipinge, H. Sept 2010 [Interview with Mr C Inambao, Senior Investigator, Anti-Corruption Commission] Windhoek

⁸⁵ Inambao (2010)

⁸⁶ Eixab (2011)

⁸⁷ Naukushu (2010)

⁸⁸ ibid

credit card division) that deals with investigations of alleged fraud and assists the police with investigations and any information that they may require during the duties.

Furthermore, the bank has put up warning signs and guidelines on how to protect customers from credit card fraud at every ATM to alert the users on what to be alert for when using an ATM and how to spot 'fishy transactions' as well as what to do in the event of a lost or stolen card. First national bank as well as Bank Windhoek both have a 24/7 toll-free number that can be called in the event of a lost or stolen card or where a customer suspects that his/her card has been cloned for instance.⁸⁹

Analysis and conclusion

It is common because that law are in place in almost every country of the continent that deals with fraud in some way or other. Some laws may be more specific than others in that they directly address the issues or the offence while others are more general and one need to find a way to fit the offence in the broad definition.

In Namibia as is the case in South Africa fraud in dealt with under the common law offence of fraud which definition has been provided in previous chapters. It consists of the elements of unlawfulness, intent to defraud, prejudice and potential prejudice and lastly misrepresentation.

One of the questions that this dissertation was aimed at determining was whether the elements and activities of credit card fraud can be encompassed into the definition of fraud, it being a common law offence and arguably outdated and insufficient to deal with these modern day offences. It is submitted that when one compares the manner in which schemes such as phishing, skimming, doctoring of cards, cloning of cards and charge back fraud are committed, all these schemes have similarities that underlie them.

Firstly they all involve credit cards; the obtaining of the card in most circumstances if not all is done without the authorisation of the card holder; they are all aimed at obtaining a benefit, in most cases a financial benefit at the expense of the card holder who is then subsequently prejudiced. Whether the cards are cloned, or information on the cards removed or tempered

⁸⁹Naukushu (2010)

with,irregardless of how the card is manipulated the underlying intention is to obtain a benefit and the manner in which this is carried out will determine who is misrepresented.

The South African authors Coetzee and J Dreyer were of the opinion that in the case where a card is tampered with or stolen and presented for payment the misrepresentation was made to the machine. Case law over the years in different jurisdiction such as Australia and the United States has overruled this contention and held that the ATM is a mere instrument of the Bank, in the same way as the parking meter was an instrument of the municipality in the Myeza case.

The fact of the matter is that a machine cannot be misrepresented to and rightly so as it does not form the definition of a natural person neither is it a legal person however one needs to be take into consideration that whatever machine it may be that may be the target of the fraudulent activity, whether it may be a vending machine ,parking meter, electricity or water meter, it is normally an instrument used for a certain purpose by a certain company,organisation,institution or even a person and these entities can be misrepresented to.

In conclusion it is the finding of this dissertation that regarding the offence of credit card fraud and in relation to the common schemes of credit fraud discussed earlier in this work, the common law offence of fraud, albeit its seemingly out datedness and age has developed tremendously through case law over the years in South Africa especially and this development through case law has enabled it to be on par with modern offences because traditionally the elements of offences remain the same despite the schemes employed.

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