

PROSECUTOR GENERAL
versus
ISRAEL TANGWENA
and
TONDERAI MUHOCHA

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 9 February 2016 & 20 July 2016

Criminal Appeal

MUSHORE J: On 6 October 2014, both the respondents were arraigned at the Magistrates court on two charges. Firstly for fraud as defined in s 136 of the Criminal (Codification and Reform) Act [*Chapter 9:23*] and secondly of having contravened s 9 of the Private Voluntary Organisation Act, [*Chapter 17:05*] “*Operating a Trust without Registering with the Ministry of Public Service, Labour and Social Welfare*”.

SUMMARY OF FACTS.

The facts which led to the arrest and prosecution of the respondents can be summarised as follows:-

The respondents were desirous of setting up an agro-business venture when they approached the complainant for an injection of cash against which complainant would acquire a considerably large shareholding in a company styled Hedgehold Trading (Private) Limited. The intention behind the complainant, Douglas Mamvura, and the respondents doing business together was to acquire an existing agri-business owned by the respondents (styled Makonde Industries) which was currently under-liquidation, and accordingly with a sizeable cash injection from the complainant become shareholders together in the new agri-business company (Hedgehold Trading (Private) Limited). Thus Hedgehold Trading (Private) Limited would effectively be purchasing Makonde Industries and assuming its liabilities. It turned out that one of the reasons why the respondents approached the complainant (*inter alia*) was that he was better placed to secure bank funding, because both respondents’ ability to achieve investor confidence was marred by their involvement in their failed venture Makonde Industries. In fact

the banks who ultimately advanced the loans to the new business fairly insisted that the complainant be the larger shareholder in the new venture. In all practicality it was logical that complainant be allocated a larger shareholding because he had single-handedly raised all the funding for the new entity (Hedgehold). Complainant was to be appointed Executive Chairman of Hedgehold Trading (Private) Limited.

Complainant then began securing the necessary funding and acquired a loan of US\$250,000-00 from his bankers Stanbic Bank PLC, against which he put up his home described as 20 Lingnell, Close, and Borrowdale. He acquired a further loan of US\$100,000-00 from Commercial Bank of Zimbabwe which he injected into the business and against which he put up another property, 2491, Cherrybank Township which property is registered in the name of one Andrew Tagarira Mawere, an associate of the complainant. Complainant furnished his bankers with a C.R. 2 which had been prepared by the respondents, (exh '2' *a quo*; record p 374); and a C.R. 14 (also prepared by the respondents) which cited him as one of five (5) Directors in Hedgehold Trading (Private) Limited; (exh '5' *a quo*; record page 375 and 376) and it was then that the money was released to the company by the banks.

The C.R. 2 which was resultantly filed with the Companies Office bore the following information on the shareholding structure for Hedgehold Trading (Private) Limited:-

- (i) Complainant 75%
- (ii) first respondent 11%
- (iii) second respondent 5 %
- (iv) Fanuel Chimbindi (late) 5%
- (v) Open Tribe Foundation Trust 4%

The latter shareholder Open Tribe foundation was, according to the respondents' representations to the complainant, a voluntary or organisation which had been formed to look after orphans, widows and individuals suffering from HIV/AIDS. Apparently the prospect of being involved in a profitable business, which would in some way assist the more vulnerable members of society, appealed to complainant's philanthropy.

In the teething stage and in order to keep the business afloat, complainant transferred US\$12,000-00 of his own personal savings to the company, and in addition obtained a soft loan from a microfinance company called H and H against which he pledged his wife's vehicle as security. However from the outset, first respondent hardly came to the business to work and when asked, he made excuses that he was busy securing clients and yet he only ever brought in

one client, since the company had commenced operations. The second respondent who had been appointed Operations Director came to work regularly, however complainant came to realise that he lacked competence. All the while complainant worked tirelessly to protect his investment. Ultimately conflicts arose between the Directors, which culminated in the respondents locking complainant out of the premises, and then to his surprise, firing him. Complainant took the matter up in the civil courts *per* an urgent application for an interdict and spoliation. Whilst the civil litigation was under way, it was then that the respondents filed the fraudulent C.R 2; C.R. 14 and a C.R 11 form at the Companies Office. The form C.R 11 purported to change the company ownership reflected in the initial share structure by divesting the entire shareholding into Open Tribe Foundation by Special Resolution. Complainant, on the other hand, had never resigned from Hedgehold Trading (Private) Limited, neither was he privy to, or involved in the compilation or filing of that C.R 11 (exh '19'; record p 428). The new C.R. 2 (exh '18'; record p 425) which complainant was oblivious of at the time it was filed, reflected that all the shares in Hedgehold Trading (Private) Limited, were now owned by Open Tribe Foundation.

Now although count 2 is not part of the current of the appeal, for the sake of completeness I will quickly refer to the facts which brought about that charge. It was the State's case that the facts showed that Open Tribe Foundation was not and never was registered with the Ministry of Public Service, Labour and Social Welfare as required in terms of the Private Voluntary Organisation Act,[*Chapter 17:05*]. In those circumstances therefore it was not lawfully able to transact business, or to have shares transferred to it. It would have had to be registered first.

Coming back to the charge of fraud, the State alleged that the form C.R 11 filed, was fraudulent in that the respondents had falsely represented that the complainant *a quo* was no longer a director or shareholder in the company. In addition it was alleged that the form CR14 filed by the respondents at the companies office falsely recorded complainant as having resigned and wrongfully and unlawfully replaced complainant with a certain Gladys Tusó. When complainant discovered the fraud he reported the matter to the Police leading to the arrest of the respondents. Complainant has never recovered the US\$350,000-00 which he had invested.

After a lengthy trial, the respondents were both found not guilty of the charges and acquitted. Dissatisfied with the outcome, the appellant filed an appeal challenging the acquittal of both the respondents on the fraud count, on the following grounds:-

Grounds of Appeal

1. The learned Magistrate misdirected himself by disregarding the evidence of the officials from the Deeds Office who testified that the documents which were submitted by the first and second respondents (accused's in the court *a quo*) were fake.
2. The learned magistrate grossly erred by failing to realise that the forgery and submission of the fake documents by the first and second respondents which dispossessed the complainant of his shares in the company constituted unlawful misrepresentation.
3. The court *a quo* erred in holding that the conduct of the first and second respondents did not result in actual or potential prejudice to the complainant.
4. The learned Magistrate did not exercise his discretion judiciously in holding that Takawira Cosmas Bosha was a credible witness yet his testimony was mainly hearsay evidence.
5. The learned magistrate erred in not giving due consideration to the documentary evidence which corroborated complainant's evidence.
6. The learned Magistrate grossly erred by giving undue consideration to the High Court Civil Judgment involving the same parties which had no bearing or relevance to the issues before him.

The appellant asks that the judgment which acquitted the first and second respondents of fraud be quashed and replaced with a verdict of guilty as charged, and that the matter be remitted to the court *a quo* for sentence.

During the appeal hearing, the respondents failed to take the point that the grounds upon which the appellant premised its appeal were fatally flawed for want of compliance with the rules, in that they were not clear and specific. The matter proceeded to argument and after hearing counsel for both sides, judgment was reserved. Here is the judgment and its reasons.

Section 61 of the Magistrates' Court Act [*Chapter 7:10*], entitles the Prosecutor General to appeal against the judgment of a criminal court as follows:-

- “61. Prosecutor General may appeal to the High Court on point of law or against acquittal**
If the prosecutor General is dissatisfied with the judgment of a court in a criminal matter-
(a) upon a point of law; or

(b) because it has acquitted or quashed the conviction of any person who was the accused in the case on view of the facts which could not reasonably be entertained;
he may with the leave of a judge of the High Court, appeal to the High Court.
Provided...”

The rules, in particular, r 7 of the Supreme Court (Magistrates Court) (Criminal Appeals) Rules, 1979 makes provision for the Prosecutor General with respect to filing an appeal in this manner on a point of law. Although r 7 does not specifically and directly mention the manner in which the grounds should appear, r 22 of the Supreme Court (Magistrates Court) (Criminal Appeals) Rules, 1979 should be referenced in order that there is compliance with the rules. The grounds should be laid out in a clear and specific manner.

As I have mentioned earlier, the grounds raised by the Prosecutor General in its Notice of Appeal did not meet the required standards in terms of the rules and to that extent they were fatally flawed.

However, this case cries out for the court’s interference in the public interest, and thereby in the interests of justice, and it is in order to achieve that, it is our considered view that s 38 A (2) of the High Court Act [*Chapter 7:06*] which confers special powers to the High Court be invoked.

“38 A *Special powers of High Court in respect of appeals by the Prosecutor-General on points of law.*

- (2) On an appeal by the Prosecutor-General on a point of law or against the acquittal or quashing of a conviction by any court or tribunal, The High Court*
- (a) may confirm the decision of the court or tribunal concerned; or*
 - (b)*
 - (c) may exercise such other powers as are conferred upon it in relation to appeals against conviction or sentence by any other provision of this Act and may, where there has been an acquittal or quashing of a conviction and where it is considered desirable having regard to the interests of justice to do so; substitute a verdict of guilty and either pass sentence itself or remitted case to the court or tribunal concerned for the passing of sentence”*

The court enjoys latitude in circumstances where it is faced with an irregularity; which it must capitalise on so that it may ensure that the irregularity is attended to and rectified, with the resultant effect that the interests of justice may be served and thereby the interests of the public protected. On that very point, Hungwe J in *Prosecutor-General v Richard Musvaire and Ors* HH CON 8/15, had this to say:-

“Rules of court are meant to safeguard the court’s inherent power to ensure that justice is done. This power is ensconced in rule 4C of the High Court Rules, 1971. Superior courts need this power to effectively supervise all inferior courts and tribunals.”

In the present matter, it is apparent that the court *a quo* erred most spectacularly in failing to appreciate the full extent of the state's case and the evidence on record. It is therefore necessary to address such a failure of justice.

WAS THERE A FRAUDULENT MISREPRESENTATION?

Section 136 of the Criminal Code provides:-

“136 Fraud

Any person who makes a misrepresentation-

- (a) intending to deceive another person or realising that there is a real risk or possibility of deceiving another person; and*
- (b) intending to cause another person to act upon the misrepresentation to his or her prejudice, or realising that there is a real risk or possibility that the another person may act upon the misrepresentation to his or her prejudice;*

shall be guilty of fraud if the misrepresentation causes prejudice to another person or creates a real risk or possibility that another person might be prejudiced, and be liable to-

- (i) a fine not exceeding level fourteen or not exceeding twice the value of any property obtained by him or her as a result of the crime, whichever is the greater; or*
- (ii) imprisonment for a period not exceeding thirty-five years or both”*

Complainant denied having any involvement in the compilation of the documents which formed the basis of the charges faced by the respondents. This is what the complainant said regarding the questionable documents:-

“Record page 69

Q. May you please take a look at this document?

A. The document in front of me is a C.R.11 dated the 26th June 2014 and again there was a resolution that it was resolved that number 1 cancellation of the C.R. 2. This document was actually cancelling the original C.R. 2 form that we had submitted to the bank in terms of the shareholding structure so they had come up with a new C.R. 2 form so it was cancelling the old C.R. 2 form. It must happen to say that in order for a document like his to be produced there has to be an order from the court for this cancellation to take place as far as what I know in terms of business.

.....
.....

Q. Can you please explain what you meant when you talked about the original form C.R. 2 form? What difference does it have with the C.R 2 form that I have just shown you here in court?

A. On the original. C.R 2 form as a shareholder I had 75%. On this new C.R 2 form the shareholder has got zero nothing absolutely nothing.

Q And the one that you are talking of as the new C.R. 2 form is it the one dated 25 June 2014?

A. Yes that is the new CR2 form which now I am no longer shareholder.

- Q And how is it that you ended up having nothing yet you were the one who contributed the majority of the shares in the company?
- A And again it was because I am sure that the first and second accused have got a very good answer to that but just as far as to say that you know I am equally surprised from having contributed all this to nothing it's for me it still remains a mystery and it just shows the level of deceit associated with the first and second accused.
- Q. Can you take a look at this document and comment?
- A. The document in front of me is a C.R. 14 form. This form is dated the 9th July 2014 and on this C.R. 14 I am listed as having resigned. It's now different from the original C.R. 14 form here I am listed as having resigned on the 1st of July 2014 and there is now a new Director called Gladys Tusso appointed that day, that the change now from the original C.R. 14.
.....
.....
- Q. You talked about the C.R. 14 stating that on listing you as someone who had resigned, did you at any time sign a resignation letter?
- A. No I didn't sign any resignation letter actually if I had to sign a resignation letter It could have been to myself because it was my business. I wouldn't exonerate anyone so I didn't sign a resignation letter.
- Q. And upon all this happening what then what steps did you take?
- A After having recorded and seen this document I had to go and report to Serious Frauds where I highlighted all the misdemeanours that had taken place and obviously I knew that even in terms of the resolution that they had passed they were illegal in terms of section 126 (1) of the Companies Act where I was not even given notice of the meeting that they all had so all these were fraudulent activities and obviously in terms of the Companies Act it attracts also imprisonment. They passed vote on extraordinary general meeting without giving notice, they passed a consensual resolution.
- Q. What was the money that you were prejudiced by the actions of the said accused persons one and two?
- A. At this stage we are looking at \$350,000-00 its much more than that but 350 being the 250 in terms of the first facility that I got another \$100,000-00 that I got from CBZ".

The documents upon which the state presented its factual basis for alleging fraud were the CR 2, CR 11 and CR 14 filed by the respondents divesting the complainant from his shareholding and directorship in Hedgehold Trading (Private) Limited. It was the state's case that because of the questionable content of these documents, the Companies Office refused to endorse the above stated forms as being genuine; added to the fact that purported signatures of document examiners were not authentic. The respondents defence to the charge was that the forms were officially and properly executed.

There is enough *viva voce* evidence on record which emanated from the officials in the Companies Office whereby they categorically distanced themselves from the relevant documents which were under scrutiny.

The following are a few excerpts (taken from many) from the second state witness Roselyne Kanyemba who worked in the Company's Office as a document examiner.

On p102 when she is asked to authenticate the form CR 2 allegedly signed by her, her response is *“We don’t comment on CR tools and the signature on it is not mine. So I cannot comment on that signature. But the wording and there was comparing with the file; the wording don’t know the signature and the I name is mine”*. When she is asked to comment on exh 12, the document the CR 11 which on p 104 she responds *“It is not an official document”*

At p 146 she gives more specific evidence regarding the fraud when she says:-

“Page 146

As far as I am concerned, the accuseds should be charged because they are the ones who produced this document, not from our office; because they knew where they got the stamp because it’s different from mine. So they are the ones who should tell us where they got the stamp and I would like to know where they got it because they are putting me in jeopardy by signing my name using a wrong stamp”

Later in the record she gave more detailed evidence about the irregularities apparent on the CR2.

When called upon to testify about the questioned C.R 11, Rose Kanyembe had this to say:-

“Page 161

Yes that’s why I am saying it is a forgery. Maybe it’s someone or even the client. They have access to these files. They are public documents. So maybe they put it there because from our office we don’t cancel. That’s why I said it was a forgery. We do not cancel documents after registering. If there is an error like in this case, it was stamped ‘19 June’ the cancelled document, we would request the clients to bring another copy for fresh and clean stamping.”

And on p162

“This document was a fake and by trying to put it into our office files, it was trying to legitimize what was is wrong” (Emphasis added)

Rose Kanyemba also testified that her signature was forged on the CR14.

The third state witness who was also a Deeds Office examiner, a Richard Mukumbiririrwa corroborated Rose Kanyemba’s testimony when he gave evidence that the documents were indeed questionable and were not to be taken at face value.

The testimony of these two witnesses whose job is to authenticate documents amongst other things, leaves very little room for doubting that the documents are questionable. Both witnesses distanced themselves from the documents and they labelled them as inauthentic and vividly explained why. Rose Kanyemba described them as a forgery in all material respects. It

is in disregarding this unambiguous testimony the court *a quo* erred. It was a misdirection on the part of the court *a quo* to render this evidence as being insignificant where in fact it was the only direct expert testimony on the status of the documents upon which the misrepresentation was founded.

THE QUESTION OF MOTIVE.

It seems that for the most part, the court *a quo* came to a finding to disregard complainant's evidence as being unreliable, because it supposed that the complainant had brought criminal charges against the respondents out of ill-motives. *A quo*, the court determined that the complainant levelled the charges having formed the view that the complainant was seeking recourse in the criminal courts because he had failed to obtain judgment in the civil case wherein he had sought spoliation. In so finding the court *a quo* incorrectly leaned on the observations made by the judge in the civil matter and then erred by importing those observations and findings made by the civil court into the criminal proceedings. Thus because the court *a quo* erroneously applied the civil court's reasoning into its own determination it ended up disregarding the State's evidence in its entirety. The evidence and findings in the civil proceedings are irrelevant *insofar* as the criminal prosecution was concerned. Apart from the evidence and the findings of the civil court, the standard of proof in a civil matter is totally different. The court *a quo* should have been more focused on the evidence before it and not the proceedings of another court. Just because the complainant failed to get a favourable judgment in a civil court, that did not mean that the complainant's evidence lacked value in the criminal proceedings. By relying on the findings in the civil court, the magistrate lost himself.

Further it is the finding of this court that the court *a quo* erred in assigning its own opinion of complainant into the proceedings and therefore wrongly concluded that the criminal case was founded on complainant's disgruntlement.

WHETHER OR NOT COMPLAINANT SUFFERED PREJUDICE?

Because of the respondent's fraudulent actions, complainant was dispossessed of his entire shareholding in Hedgehold Trading (Private) Limited. He was also fraudulently dispossessed of his Directorship in the company. Clearly, complainant suffered actual prejudice as a result of the actions of the respondents.

It is highly implausible that complainant would have consented to his entire shareholding being transferred to an unregistered voluntary organisation which he knew virtually knew nothing about, without at the very least receiving some form of compensation. It is also very unlikely that he would surrender his home; another property; pledge his wife's vehicle and empty at least one bank account for no reason at all. Why would complainant act in such a foolhardy manner when by all accounts prior to meeting the respondents he had been operating a successful business? Clearly the court *a quo* should have been alive to the fact that the defence cases were of no substance.

Further, the court *a quo* erred in its reasoning when it said:-

“Record, page 15 (judgment)

The actus reus which the accused's (respondents) did not run away from. They compiled the forms. It doesn't matter whether they indeed carried the papers themselves or hired someone to do it for them.

There is a second run up which is the mens rea (sic) i.e. were they after committing a crime; did they not report him to the police and/or they were simply saying to the complainant, 'you can't do this to us. You have no right to take over our company and allot yourself so many shares before we approve'”

The court *a quo*'s sentiments by calling to question complainant's credibility have not gone unnoticed. The magistrate out rightly rejected his version of events despite the facts on record. In *R v Sibanda* (1) 1964 R.L.R. 360 (A.D.), it was determined by the appellate division that in an appeal against the decision of a magistrates' court if the magistrate misdirects himself on the evidence and that such a misdirection affects the magistrate's view on the credibility of the appellant, the appeals court should ignore the magistrate's findings on credibility and approach the matter simply on the appellant's evidence. The court should then examine the record to determine whether or not the conviction and in this case acquittal is justified.

In the present matter, the magistrate went beyond finding the complainant's testimony to be incredulous and began making assumptions that were in no way apparent from the evidence given. The court *a quo* very strangely indulged itself in a justification of the fraudulent actions of the respondents by inferring that those actions were warranted. The court *a quo* had misguidedly formed the view that the respondents' actions were reasonable because the respondents objected to the complainant having a larger shareholding than that off the respondents. More so the court *a quo*'s reasoning is incomprehensible, given the fact that it was the respondents themselves who compiled the C.R. 2 which gave the complainant a 75% shareholding in Hedgehold Trading (Private) Limited. Later on the respondents themselves

filed the contentious C.R. 2 which took away the 75% shareholding owned by the complainant. Clearly the act of compiling documents which divested the complainant of his shareholding and Directorship and which documents the experts found to be questionable, suggests that the respondents had the *mens rea* to benefit from their conduct. It is our considered view that the court *a quo*'s observations became skewed because it concluded bizarrely that complainant's acts were motivated by vengeance.

THE EVIDENCE OF ONE TAKAWIRA COSMOS BOSHA

The appellant is complaining about the reliance placed upon this witness's testimony by the court because it submits that Takawira Bosha's evidence was hearsay evidence. Takawira Bosha was a defence witness. He worked for an accounting office called Accounting Bureau and he was called to testify about the questioned documents; the C.R 2 and C.R 11, but he did not meaningfully assist the defence cases. He simply provided an insight into accounting procedures and rounded off his testimony with a confirmation that all his evidence pertaining to the case was hearsay evidence. Nothing turned on his evidence, and whether the court *a quo* accepted it or rejected is frankly irrelevant to the thrust of the state case which had long been fortified well before Mr Bosha happened along.

In conclusion therefore, and in the light of the above, it is our considered view that the court *a quo* misconstrued all the evidence presented by the State and ascribed all types of motives and reasons on the part of the complainant that are not apparent from the record of evidence. Accordingly, the court orders as follows:-

1. The Appeal against acquittal of first and second respondents in CRB R 856/14 succeeds.
2. The conviction is quashed and the sentence is set aside
3. The matter is remitted to the trial court for sentence.

HUNGWE J : agrees:.....