SOMVELI DHLAMINI

Versus

THE STATE

HIGH COURT OF ZIMBABWE
MUTEVEDZI AND CHIVAYO JJ
BULAWAYO, 24 October and 16 January 2025

Criminal Appeal

K. Ngwenya for appellant
K.M. Nyoni for respondent

MUTEVEDZI J: At the time of his arrest and prosecution, Somveli Dhlamini (the appellant) was the mayor of Victoria falls, a town in the northernmost part of Zimbabwe, famous for being home to one of the world's greatest natural wonders- the Victoria Falls. There was however nothing wondrous about the appellant's fall from grace and the subsequent ignominy of being imprisoned.

Background

[1] The allegations against the appellant were fairly straight forward. They were that between 1 August and 6 September 2022 he made an application for a residential stand under an arrangement which was called the 'Wood Road Residential Scheme' in the town. When he did so, he purported to be one Valentine Munyaradzi Maseko (Valentine). In 2003, Victoria Falls Town Council (council) had offered Valentine a residential stand at number 1139 in a location called Aerodrome. The further allegations were that at the time he applied for the Wood Road stand, the appellant knew that he was not eligible to benefit from the scheme. He also knew that Valentine had not applied for a stand under the Wood Road arrangement. As a result of that misrepresentation, the appellant was offered stand number 1771 Wood Road Victoria Falls. In all that, so the allegations went, he intended to deceive the council or at least realised that there was a real risk or possibility that the council could be deceived to act upon his misrepresentation. His actions caused the council actual prejudice to the tune of United States fifteen thousand dollars (USD $ 15 000) and potential

prejudice of USD $ 66 462.75. When the allegations surfaced, the appellant was arrested and arraigned for trial.

Proceedings in the court aquo

[2] At his trial, the appellant denied the charges against him. His defence was inexplicit. He said he did not misrepresent to any council official that he was Valentine Maseko. He could not have done so because all the council officials who were involved in the vetting process leading to the allocation of the stand personally knew him. They could not have been fooled by any pretence that he was Valentine. Instead, he was clear that he was representing Valentine. The council officials who carried out the vetting process allowed him to so represent Valentine because they were all aware of Valentine's case. It was a special one. He further argued that the vetting of Valentine to ascertain if he qualified for the scheme was just a formality because he had already been offered residential stand number 1771 Wood Road as a replacement for stand number 1139 Aerodrome which he had previously been allocated to him in 2003 but could not develop because it was situated in a military zone. His further contention was that it is not a crime for one to make payment to council on behalf of another. He added that he was not the one who had made the payment of ZW$ 7 500 000.00 but had simply presented the deposit slip for receipting. When he did so, he was not aware that the transfer of the funds had not gone through. The account from which the transfer had been made was not his. He therefore lacked the intention to misrepresent and genuinely thought the transfer of the funds had been done. He further stated that he was at all times representing Valentine. It is why on the questionnaire he appended his signature but initialled it with a pp to signify his representative capacity. He rounded his defence by alleging that council had not suffered any actual or potential prejudice because it confirmed that USD $10 000 was received as part payment for stand 1771. The amount was not paid back to valentine.

[3] To prove its case against the appellant prosecution led evidence from various witnesses. The facts of the case are convoluted. It is important therefore that we put everything into context. The first witness was Ronny Dube (Ronny), town clerk for the council. He said the appellant was elected as a councillor in Victoria Falls in 2016 and later as mayor of the

town in 2018. He recalled being called to the appellant's office in 2020 where the appellant showed him some papers which related to Valentine. The appellant then inquired whether Ronny could facilitate transfer of the stand which was in Valentine's names into his. Ronny asked for paper trail such as an agreement of sale to enable him to facilitate the transfer. The matter appeared like it had ended there.

[4] It was only later in August 2022 when he encountered the name Valentine Maseko once more. An accountant who worked under him called Bhekisipo Dube, approached him. He was seeking directions on how to deal with a payment which the appellant intended to make on behalf on Valentine. The appellant insisted on making payment in Zimbabwean dollars contrary to the instructions which the accountant had. Ronny said he then approached the appellant and advised him that council policy stipulated that payment was to be made in USD. The appellant's response was that he (appellant) was 'Valentine' and he was entitled to pay in local currency. Ronny said he retorted that Valentine was not a councillor. The appellant's insistence stung Ronny and he became suspicious. He dug deep into the issue. He traced the papers through which stand 1139 had been allocated to Valentine. To his astonishment, he noted that the questionnaire for Valentine's application for eligibility to the Wood Road scheme had been filled by the appellant. He had also signed it on behalf of Valentine. Part of the papers claimed that the stand was a replacement for stand 1139 Aerodrome which had purportedly been previously issued to Valentine. When he checked, he again noted that the stand 1139 had never belonged to Valentine after he failed to meet his obligations. Council had sent him an agreement of sale which he had not bothered to sign and return to council. There had not been any payment for the stand. Ronny's conclusion was that Valentine did not and had never owned stand 1139.

[5] In addition, Ronny said, supposing that Valentine owned stand 1139, he still was not supposed to benefit from the Wood Road scheme because the resolution by council which the appellant chaired had been that anyone who owned a house or had been allocated a stand, or had been allocated a stand which was then repossessed for whatever reason, or anyone who had a spouse who fitted into the earlier categories within council's jurisdiction was not eligible to benefit under the new scheme. Because of the stringent criteria, both the appellant and Valentine did not qualify to participate or benefit from the new scheme.

The appellant had previously been allocated stand number 56 Aerodrome which he had later sold. Ronny said he further found from the files that the bio data which Valentine had used in applying for stand 1139 in 1999 was totally different from that which had been used in the application for stand 1771. In addition, there was nothing like an affidavit or power of attorney or any other document which showed that the appellant had authority to represent Valentine. Ronny added that it was strange that the allocation of stand 1771 was purported to be a replacement for stand 1139 because the former was a low density stand whilst the latter was a medium density stand. He further stated that the value of stand 1771 was USD $25 000. Only $10 000 had been paid. Up to the time of the appellant's prosecution USD $15 000 was outstanding. The appellant had also purportedly paid $ZW 7. 500 000. It was the money which he was arm twisting the accountant to receipt. Those events opened the pandora's box that got the appellant into trouble. Ronny concluded his evidence by saying the seven million five hundred-thousand-dollar deposit was fictitious because to date, the money had not reached council's bank account.

[6] **Valentine** also testified. His evidence was simple. The appellant was a family friend from years gone by. In 1999 Valentine applied for and was allocated stand 1139. He could not develop it because it was situated in an army cantonment area. In 2003, he decided to dispose the stand. He sold it for $400 to the appellant. He produced the agreement of sale which the court aquo accepted as an exhibit. He forgot about the issue until in 2021 or 2022, when the appellant called him and advised him that the army had vacated the area where the stand was. As such it was now free of any encumbrances and he wanted him to sign some papers. The appellant was brandishing a power of attorney and an agreement of sale. He advised Valentine that he was having problems with council in transferring the stand. The papers would be evidence that he had sold the stand to him. The appellant then made him sign another agreement of sale claiming that the stand had been sold for USD $ 14000. He however insisted that the stand had been sold once in 2003 for $400. They had planned to meet earlier on the day in question because the appellant wanted to attend a mayors' meeting in Gweru. The appellant did not arrive at their rendezvous at the scheduled time. Valentine said, tired of waiting for the appellant, he started drinking beer. When the appellant eventually arrived, Valentine just signed the papers without reading

them. He was possibly already inebriated. Critically Valentine said apart from the application for stand 1139 he never made any other application for land in Victoria Falls. In addition, he never asked the appellant to apply for land on his behalf at any point. He said as such, if any application was made for council to replace stand 1139 with any other stand in the town, that application would have been made without his knowledge. He was not aware of the communication from council allocating him stand 1771 as a replacement for stand 1139. He had not completed any questionnaire for vetting by council. He denied making any payment for stand 1771 or authorising the appellant to deposit USD $10000 for the stand. He was equally unaware of the payment of ZW$ 7. 500 000.00. In a nutshell Valentine knew nothing about stand 1771 Wood Road.

[7] Council's housing director called **Munyaradzi Nyamande** also testified. His testimony was that the appellant became interested in stand 1139 from 2018 to 2022 because he would come to his office with issues to do with that stand. His claim was that Valentine was unable to develop the stand because of its location. He wanted Valentine to be given another stand in lieu of 1139. Later the appellant advised him that he and Valentine had discussed selling the stand. In 2022, the appellant attended at council offices for vetting on behalf of Valentine, under the Wood Road scheme. During vetting, they looked for justification to issue Valentine with a stand. The low hanging fruit was to say Valentine had been allocated a stand in an army cantonment area. They allocated Valentine with stand 1771. The condition for issuance was that Valentine had to pay USD $25000 which was strictly supposed to be paid in United States dollars because only councillors and council employees were exempt from that requirement.

[8] The last witness was **Bhekisipo Dube**. The only relevant aspect of his evidence was that the money purportedly paid by the appellant never reflected in the council's account at the bank.

[9] In his defence, the appellant maintained that when he appeared before the council vetting committee, he had not said he was Valentine but that he was representing Valentine. He did that on the advice of the Town Clerk and the Accountant. He admitted that Valentine was supposed to fill in the vetting form but the town clerk had advised him to fill it himself. He argued that he was interested in the stand since he had bought it from Valentine but

could not develop it because it was in a restricted area. He maintained that Valentine was the one who had caused council to replace stand 1139 with stand 1771. He made the further argument that other councillors and council employees whom he named had benefited from the scheme. He admitted paying USD $10000 towards the stand and that another USD $ 7. 500 000 was paid by his friend and benefactor called Blessing Ali. Unfortunately, Ali later advised him that the payment had been reversed. The appellant did not call any witnesses.

Findings by the court aquo

[10] The court aquo analysed the evidence before it and made several findings. It stated that the evidence of Valentine had gone largely unchallenged. As a result, the court found that:

a. Valentine had sold stand 1139 Aerodrome to the appellant in 20023 for $400 after he had failed to develop it because of its location
b. Thereafter, he lost interest in the stand until the appellant contacted him in 2021 with the proposals already recited in evidence above
c. He did not apply for stand 1771
d. He did not ask the appellant to represent him in applying for stand 1771
e. He did not make a single payment towards the purchase of that stand
f. He neither filled nor signed any papers in relation to stand 1771
g. If any papers or anyone purported that he had anything to do with stand 1771, then those were misrepresentations.

[11] The court also found that the appellant withheld exhibits 6 and 7 which were letters purportedly written by Valentine requesting council's housing director to swap stand 1139 with stand 1771, until after the state witnesses had all testified and been dismissed by the court. It held that he had only produced the letters in his evidence in chief. As such none of the witnesses was able to comment on it. On the signature part the court *a qou* found that the letter bore the names "cmaseko (pp) 0772667009". The court said it was therefore not clear who had signed the letter but that it certainly wasn't Valentine as shown by the pp. It concluded that the letter was fictitious and had been manufactured by the appellant. The court further held that if the evidence were to be followed, it was accepted that

Valentine had surrendered all rights in the stand when he sold it to the appellant in 2003. It meant therefore that he had no title in it whatsoever. As such when the appellant attended the vetting process for stand 1771 Wood Road, he was not representing Valentine but himself. It was for his benefit. It added that the purpose of the vetting process was to ascertain whether the prospective buyer qualified to be allocated a stand under the Wood Road scheme after meeting all the criteria set by council.

[12] The court found further, pursuant to the evidence of Ronny, that issues of swapping stands had nothing to do with the vetting processes that took place. It said where someone wished to have their stand replaced for one reason or another, the issue would be brought before the full council for a resolution to be made. The court further said that Valentine's case had not been brought before the full council as required by procedure. It then concluded that the reason why the appellant had made an application purporting to be Valentine was to acquire stand 1771 through the backdoor. It said he knew he did not qualify for that stand because he held another stand at a location called Mkhosana. In addition, the court found as a fact that the appellant could not swap a medium density stand for a low density stand because the values were different. It rounded off its findings by stating that if anything, Valentine never paid for stand 1139. As such it was not his and was not entitled to sell it to the appellant. It found that prosecution had proved its case against the appellant beyond reasonable doubt and accordingly convicted him. It sentenced him to 36 months imprisonment of which 6 months imprisonment was suspended for 5 years on condition of future good behaviour.

Proceedings before this court

[13] The appellant was dissatisfied with the above outcome of the trial and the punishment imposed. He took his case on appeal with this court. He filed his notice and grounds of appeal on 17 October 2023. The appeal was herd on 24 October 2024. We dismissed both the appeal against conviction and against sentence on the same day after giving extempore reasons. We were later requested to provide the appellant with the full reasons for our decision. This judgment constitutes those reasons.

[14] The appellant's grounds of appeal were couched as follows:

i. The court aquo grossly erred at law and in fact that the state had proved a case of fraud against the appellant beyond reasonable doubt

ii. The court aquo grossly misdirected itself by making a finding that the appellant made a misrepresentation to the complainant notwithstanding that its Town clerk and Housing Director knew that the appellant had acquired rights to stand 1139 Aerodrome which was replaced by stand 1771 Wood Road, Victoria Falls

iii. The court aquo erred grossly by basing its conviction on evidence not before it such as that appellant was not served with Exhibits 6 and 7 and claiming that the court had a copy of the return of service which the state told the court it did not have

iv. The court aquo made a mistake by making a conclusion that exhibits 6 and 7 were filled by the appellants at the City Council

v. The court aquo erred grossly by disregarding exhibits 6 and 7 which were tendered with the consent of the state

vi. The court aquo erred grossly and misdirected itself by making a finding that appellant's misrepresentation on 15 August 2023 induced Victoria Falls City Council to allocate Valentine Munyaradzi Maseko stand 1771 Wood Road which had already been allocated to him in 2021

vii. The court erred by making a finding that Victoria Falls City Council suffered potential prejudice which was neither proved in court nor submitted by the state

viii. The court aquo erred by making a finding that the City Council stood to suffer any potential prejudice without specifying what the potential prejudice was

Ad sentence

ix. The sentence imposed by the court aquo induces a sense of shock considering the appellant's personal circumstances and circumstances of the case

x. The court aquo erred in sentencing the appellant to a term of imprisonment while acknowledging there was no prejudice to the complainant

[15] Thereafter, the appellant prayed that his conviction be set aside and that it be substituted with a verdict of not guilty and acquitted. Alternatively, he prayed that if the appeal against conviction failed the sentence imposed be quashed and in its place be substituted the sentence that 'the accused pays a fine of $500.'

[16] The state opposed the appeal. The simple basis of its opposition was that all the elements of the crime of fraud had been proved.

[17] In his heads of argument and at the hearing counsel for the appellant persisted with the argument that the elements of fraud had not been proved. He said that Valentine and through him the appellant, had acquired rights in stand 1139 which was later swapped for stand 1771. He said the letter of allocation exhibit 6, showed that Valentine had been allocated stand 1771 in 2021 months before the allegations of fraud involving the Wood Road scheme had surfaced against the appellant. That fact, so the argument went, meant that Valentine had lost any rights which he had in stand 1139 Aerodrome. In other words, the appellant's argument was that the completion of the questionnaire for vetting for qualification to the Wood Road scheme which he purportedly did on behalf of Valentine was an unnecessary exercise because Valentine had already been allocated the stand he was applying for.

[18] The argument relating to actual and potential prejudice was premised on the allegation that the Ronny Dube (the Town Clerk) had allegedly admitted that if anyone failed to pay for a stand Council would repossess such stand. If it did, it would therefore mean that Council would have suffered neither actual nor potential prejudice.

[19] Regarding the admission of extraneous evidence, the appellant said that initially prosecution had objected to the production of exhibits 6 and 7. The production of a return of service became necessary to resolve the issue. Because the state did not have the return it climbed down and withdrew its objection leaving the exhibits to be admitted by consent. In its judgment, the court aquo surprisingly adverted to a return of service which had not been tendered by either of the parties. That, so the appellant argued, prejudiced him because he was denied the opportunity to confirm the authenticity of the return of service.

[20] In the same vein, the appellant said the court aquo disregarded evidence which had been properly admitted. He rounded off by saying that in any event, the issue of the return of service was neither here nor there because it did not change the fact that there was no misrepresentation.

The issues

[21] What is apparent from the above grounds of appeal is that some of them attack the same issues. For instance, grounds one, two, six, seven and eight all impugn the court aquo's finding that prosecution proved, beyond reasonable doubt that the offence of fraud

was committed. Put in another way, the argument in all of them is that not all the essential elements of the offence of fraud were proved. Our understanding of ground three was that it accused the trial court of having convicted the appellant using extraneous evidence. Grounds four and five appeared related. Whilst ground four complained that the court aquo wrongly concluded that it was the appellant who had filed the two exhibits in question with the Council, ground five alleged that the same court had disregarded the same exhibits in making its decision. At the end of the day, the only issues set out by the grounds of appeal are:

a. whether or not the court aquo was right to convict the appellant of fraud
b. whether or not the court aquo used extraneous evidence to so convict the appellant and
c. whether or not it disregarded important evidence supporting the appellant's defence

The law on fraud

[22] The crime of fraud, is provided for under section 136 of the Criminal Law (Codification and Reform Act) [Chapter 9:23] (the Code). It is couched as follows:

> **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 another person may act upon the misrepresentation to his or her prejudice;
>
> shall be guilty of fraud if the misrepresentation causes actual prejudice to another person or is potentially prejudicial to another person, 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".

[23] From the above definition, the elements which constitute fraud are that an accused must:

a. make a misrepresentation to another person
b. with the intention to cause another person to act on the misrepresentation to the actual or potential prejudice of any person.

[24] In the case of *Tangwena and Anor v The Prosecutor-General* SC 75/21, the Supreme Court said, in plain terms, fraud is a species of theft by deceitful means. At p. 6 of the cyclostyled judgment it stated that:

> "Section 136 of the Act is couched in broad terms encompassing a situation where the misrepresentation is made to a person other than the subject of the intended prejudice. To constitute fraud, it is sufficient that a misrepresentation is made to any person with the intention of causing any other person actual or potential prejudice."

[25] Our understanding of the above holding is that an accused person can direct his/her misrepresentation at a person other than the one whom he intends to deceive by the misrepresentation as long as he does so with the intention to cause actual or potential prejudice on the targeted person.

[26] In the case of *Musendo and Anor v The State* HH 289/17, at p. 7 of the cyclostyled decision, HUNGWE J (now JA), explained the element of misrepresentation in the following manner:

> "By misrepresentation is meant a deception by means of a falsehood. Put differently, the accused must represent to another that a fact or set of facts exists which in fact does not exist. Although the misrepresentation will generally take the form of writing or speech, conduct other than writing or speech may sometimes be sufficient, such as a nod of the head to signify consent. (*S* v *Larking* 1934 AD 91). The misrepresentation may either be express or implied, by commission or omission. In most cases misrepresentation is made by way of commission. Further, the misrepresentation must refer to an existing state of affairs or to some past event, but not to some future event. *S v Feinbert* 1956 (1) SA 734 (o) @ 736. In certain situations, however, a person who promises to do something at some future stage implies, when making the promise that she intends fulfilling it, if this is not in fact her intention she is guilty of a falsehood regarding an existing state of affairs in that she implies that she has a certain belief or intention which she in fact does not have."

[27] Needless to state, existence and non-existence cannot exist at the same time. They are mutually exclusive. The two states cannot be both or neither. As such where one alleges the existence of a fact which does not exist, the finding that one would have lied is inevitable. The dicta in *Musendo (supra)*, makes it clear that misrepresentation can take various forms ranging from written, oral to non-verbal conduct such as signs of

acquiescence. It can be by commission or omission. It must either relate to the present or the past. It applies to future events in rare occasions.

[28] Prejudice as an element of fraud simply means that there must be some kind of harm, detriment, disbenefit or disadvantage inflicted upon another as a result of the misrepresentation made to them or to another person. Obviously, prejudice can be caused to both natural and juristic persons. The prejudice need not actually occur. It is sufficient that the complainant in a matter was subjected to potential or possible harm. In other words, a successful misrepresentation is not a requirement to prove fraud. In this regard, I can do no better than once more advert to the eloquently put remarks of HUNGWE J in *Musendo* at p. 8 where he said:

> "The prejudice need not sound in money only; or only patrimonial. Potential prejudice means that the misrepresentation looked at objectively, involved some risk of prejudice, or that it was likely to prejudice. "Likely to prejudice" does not mean that there should be a probability of prejudice, but only that there should be a possibility of prejudice. *S v Hayne* 1956 (3) SA 604 (A). What this means is that <u>what is required is that prejudice can be, not will be, caused.</u> More importantly the prejudice need not necessarily be suffered by the representee, i.e the person to who the misrepresentation is directed; prejudice to a third party, or even to the State or the community in general is sufficient; (*S* v *Myeza* 1985 (4) SA30 (T) @ p 32 C). <u>It is not relevant that the victim was not misled by the misrepresentation because it is the representation's potential which is the crucial issue</u> (*R* v *Dyonta* 1935 AD 52; *S v Isaacs* 1968 (2) SA 187 (D) @ p 191. As such it follows that since potential prejudice is sufficient, it is unnecessary to require a causal connection between the misrepresentation and the prejudice. Even where there is no causal connection there may still be fraud provided one can say that the misrepresenting holds the potential for prejudice." (underlining is my emphasis).

Application of the law to the facts

[29] In this case, when the allegations against the appellant were distilled from the maze of arguments which he put forward, they appeared simple. They were that he applied for a stand under the Council's Wood Road scheme. At the time he made his application, he said he was Valentine Munyardazi Maseko when he was not or at the very least, he said he was representing Valentine when he was acting on his own accord and for his own interests because Valentine had not applied for a stand under the Wood Road arrangement. By that he is said to have intended to deceive council into allocating him a stand and therefore act to its prejudice, through the identity of Valentine.

[30] The question is therefore whether or not the above constituted a misrepresentation or not. Earlier we specified the findings which were made by the court aquo in this respect. It said that Valentine neither personally applied for stand 1771 nor asked the appellant to do so on his behalf. The evidence given by Valentine that he knew nothing about stand 1771 was barely controverted in the trial aquo. The findings by the trial magistrate in that regard were therefore beyond reproach. It followed that when the appellant advised Council that it was Valentine who had applied for stand 1771 or that he was applying for the stand on his behalf, he had lied. If he did, he presented the existence of a set of facts which in fact did not exist. In short, he misrepresented to Council.

[31] We also said earlier that misrepresentation can take various forms. The appellant argued that it could not have been possible to deceive Council officials that he was Valentine Maseko because they all personally knew him. He may have been correct to say that but he forgot that he had a questionnaire which he purported to have been completed by Valentine when in fact Valentine had not even seen that document. The appellant's argument about swapping stand 1139 for 1771 was entirely misplaced. The issue of whether or not Valentine had ceded his rights in stand 1139 was not material. In any case, it was proved that Valentine had held no such rights in the first place because he did not meet his part of the bargain in the acquisition of that stand including payment of the purchase price.

[32] The further contention by the appellant that he could not have misrepresented to Council because Valentine had been allocated stand 1771 in 2021, well before the allegations of fraud surfaced was illogical and self-defeating. If Valentine had been so allocated, it would not have been necessary for him or the appellant to then complete the questionnaire in relation to the Wood Road scheme. As said by the state witnesses, all they could have done was present an agreement of sale to Council for a change of ownership of the stand. The lengths to which the appellant went in the vetting process betray his lies. In any event, the procedure for swapping stands was completely different from that of initial acquisition. The appellant seemed to have lost sight of the critical allegation by the state in its charge sheet. It was that he had applied for a stand 'purporting to be Valentine Maseko.' The further details about how Valentine did not qualify to be allocated a stand

under the Wood Road scheme, though important to prove the state's case were superfluous in relation to the misrepresentation. The appellant was aware that he could not be allocated a stand in Wood Road because of the rigorous criteria, the setting of which he had been part of. Apart from stand 1139, he did not deny the allegation by Ronny Dube that he also owned another stand in an area called Mkhosana. The entire circus about Valentine was therefore a smokescreen for him to get a stand in Wood Road via the back entrance as held by the trial court.

[33] In the end, we could not find any fault in the court *a quo's* determination that the element of misrepresentation was proved beyond reasonable doubt.

[34] **Regarding prejudice,** the appellant's argument was strange. It was that because Council would have recovered the stand if he had not paid the purchase price in full. He said it indeed recovered the stand so there was no potential or actual prejudice. But he was wrong. As already said, prejudice or potential prejudice need not be monetary or patrimonial because, even anything detrimental to the complainant's interests is sufficient. To council, although monetary prejudice could not be discounted, the issue was not solely about money. Rather it was about allocating a stand to someone who did not qualify and who was not eligible to benefit under the scheme. It was that the appellant used deceitful means to be allocated stand 1771. What the appellant was expected to understand particularly because he was not an ordinary citizen, but the mayor of the complainant council, was that the Council is a public institution. It is a public trust which ought to be run for the public benefit. When it sets policies and criteria by which public land will be allocated to the residents of the town and those criteria are violated by deceitful means, not only the Council but the communities it serves and members of such communities are prejudiced. As stated in *Musendo* prejudice to a third party, or even to the State or the community in general is sufficient. Put bluntly, the appellant's argument amounted to contending that it did not matter that he was allocated the stand despite being not eligible as long as he paid the purchase price or where he failed to do so, as long as Council was able to repossess the stand. Even the appellant himself must have seen through the nudity of that argument.

[35] Further, the question was not whether or not the appellant would have paid for the stand in full or not. It was about whether or not he was entitled to be allocated a stand in the first place. As demonstrated above, he clearly was not. That is where the prejudice stemmed from. The problems regarding payment only served to compound the appellant's woes. The stand was in the name of Valentine Munyaradzi Maseko. If it was, Council policy dictated that he could not pay for it in local currency. It had to be paid in United States dollars. Yet the appellant said he wanted Valentine to pay in local currency for his (appellant's) benefit. There was obviously a reason why payment was required in foreign currency for everyone else. If a non-councillor or non- employee of council paid in local currency, it was an act that would prejudice council in as much as it was a misrepresentation. The finding by the court *a quo* was that Council would have been prejudiced if the appellant had successfully paid for the stand. Admittedly, the court aquo's thinking was that prejudice could only be ascertained in monetary terms but we have already illustrated the non-monetary form of prejudice that would have been suffered. But in the end, we cannot again fault the court *a quo's* conclusion that there was in this case, no actual prejudice but potential harm because the appellant did not succeed in duping council.

The extraneous evidence

[36] Extraneous evidence is testimony that comes from outside the court or evidence which is not pertinent to the resolution of the matters at hand. The extraneous evidence alleged in this case was in relation to exhibits 6 and 7. Both exhibits were letters allegedly authored by Valentine imploring Council to consider allocating him another stand in lieu of stand 1139 which he said he could not develop for reasons beyond his control. Exhibit 6 was allegedly written on 29 March 2012 whilst exhibit 7 was dated 21 August 2014. Interestingly the two letters bear different signatures. Both signatures are different from the one on the agreement of sale which Valentine admitted to signing. The 21 August 2014 letter was simply signed "yours Faithfully, Mr M. Maseko" in long hand, whilst the earlier letter was signed "Yours Faithfully, Munyaradzi Maseko" in print and had the inscription 'CMaseko(pp) 0772 667 009', in long hand. We safely concluded therefore that the agreement was the document which bore his true signature. Argument ensued in the trial

court about the admissibility of the exhibits during the defence case. The state argued that it had not been made aware of them earlier whilst the defence said it had been given the exhibits by the state. The court aquo was alleged to have directed an adjournment to allow the state to produce the return of service proving that the state had not served those documents on the defence. When the court reconvened, the state did not have the return. It consequently withdrew its objection. The exhibits were then admitted. What irked the appellant was that in its judgment, the court aquo then adverted to a return of service which had not been tendered by either of the parties. Counsel for the appellant said that caused the appellant prejudice because he was denied the opportunity to confirm the authenticity of the return of service. In the same vein, he said the court *a quo* had disregarded evidence which had been properly admitted and which supported his defence. He added that he retained the right to challenge the return of service but was denied that opportunity because it was evidence which had been brought in by the court aquo. He rounded off by saying that in any event, the issue of the return of service was neither here nor there because it did not change the fact that there was no misrepresentation.

[37] We must admit that we read and re-read the record of proceedings but could not find the part of the proceedings where the return of service in question was tendered by any of the parties and admitted as an exhibit by the trial court. We noted also that the exhibits were numbered sequentially. They ended at exhibit 7 which is described above. The return of service had no exhibit number but appeared after exhibit 7. We were not sure therefore how it got into the record of proceedings. We agreed with counsel for the appellant that it should not have formed part of the record of proceedings.

[38] In the case of *S v Tafadzwa Mapfoche* SC 84/21, the Supreme Court dealt with the question of what must happen when a court has admitted and placed reliance on evidence which it ought not have admitted in the first place. It held that such evidence must be expunged from the record. Resultantly, we had in this case, no choice but to also expunge the evidence of the return of service. That on its own is however not sufficient to vitiate the entirety of the proceedings. At p. 9 of the cyclostyled judgment in *Tafdzwa Mapfoche*, the Supreme court stated that after expunging from the record the evidence which was

improperly admitted or relied on, an appellate court must weigh, whether there remains sufficient evidence implicating the appellant in the commission of the crime.

[39] Given the admission that the issue of the return of service did not affect the appellant's contention that he did not misrepresent anything, we are not sure whether the expunging of the evidence of the return would take the appellant's case any further. In any case, the court *a quo's* basis for according little if any value to exhibits 6 and 7 was not solely the return of service. It said that it was also because the appellant had from the beginning of the trial, been in possession of the letters but had opted to hide them and keep his mouth shut about them. His counsel had not put any questions to the state witnesses regarding the letters. It further said Valentine was alleged to be the author of the letters yet he had vehemently denied, both in his evidence in chief and under cross examination, having had anything to do with stand 1139 after he had sold it to the appellant in 2003 until their encounter in 2021. That approach was correct in our view. If indeed the appellant had authentic letters authored by Valentine, beseeching Council to give him another stand in place of 1139, it must have been incumbent upon the appellant and his Counsel to present those letters to Valentine and cross examine him on them. Producing them at a stage when the state could not ask its witnesses to comment on the documents was disingenuous. That he wanted to ambush the state with the documents is supported by the absence of any mention of either of the letters in the appellant's defence outline. Whilst he mentioned other documents therein, he chose to be mum about the letters. If they had been mentioned then prosecution would at least, have been warned to examine its witnesses especially Valentine and seek their comments on them. The court rightly drew adverse inferences from such action.

[40] All said and done, our conclusion is that even after expunging the contentious return of service from the record, the evidence which remained was sufficient for the court to find as it did, that exhibits 6 and 7 were likely to have been manufactured by the appellant. We therefore found the ground of appeal to have been without merit.

[41] The above discussion is connected to the ground that the court *a quo* disregarded exhibits 6 and 7 after they were tendered into evidence by consent. To say the court disregarded evidence is to allege that it paid no attention to or ignored, the evidence. That

allegation is different from one that the court accorded little or no value or rejected for one reason another, evidence after considering it. Our take is that, in this case, the appellant intended to refer to the latter scenario because the court *a quo*, in a significant portion of its reasons for judgment, directed its attention at the exhibits in issue. As such, it did not disregard the exhibits. It considered the evidence and gave its reason for discrediting it. Apart from referring to the return of service, the appellant did not attack any of the reasons which the court gave for its finding. It was a finding of fact which we could not lightly interfere with on appeal. Once again, we were constrained to dismiss as we did the ground of appeal for being unsustainable.

The appeal against sentence

[42] In the grounds of appeal against sentence, the appellant emphasised that the trial court ought to have considered his (appellant's) personal circumstances and that there hadn't been actual prejudice to Council. In argument, counsel said that the appellant was a first offender with heavy family responsibilities and that it was unlikely that he would reoffend. Further he said that the appellant had benefitted nothing from the commission of the offence. As such, so the argument proceeded, the court aquo must have considered sentencing him to pay a fine of $ 500.

[43] In its reasons for sentence, the court aquo made the points that the appellant abused the position that he held. He was the mayor of Victoria Falls Council; it said because of that position, his conduct was expected to have been above reproach. He was the highest ranking official in that institution. It added that he committed the crime after careful planning and that he was patient in that planning and waited for the right opportunity.

[44] Our starting point in examining whether the court *a quo* misdirected itself in sentencing the appellant to 36 months imprisonment, was his counsel's mistaken view about the effects of actual and potential prejudice in fraud cases. The law as prescribed in s 136 of the Code, does not distinguish between potential and actual prejudice after a conviction. The sentences are the same for either form of prejudice. What may be important to distinguish between the two is why there was no actual prejudice. In cases where an accused voluntarily withdrew from his or her scheme before prejudice was occasioned, then a court may be entitled to give that person a significant discount from his/her sentence.

But in instances such as the present case, where the appellant was only stopped in his tracks because his victim had systems that were able to detect his fraud, nothing beneficial may come out of his failure to occasion actual prejudice.

[45] Like, the court aquo said, the appellant occupied public office. He was an elected mayor of the people of Victoria Falls. He must have known that by committing the crime, he was betraying the trust bestowed on him by thousands of people under his stewardship as mayor. To us, the appellant was lucky to get away with a slap on the wrist for a particularly egregious crime. There is no difference between the fraud he committed and criminal abuse of office. In one way or another he was a corrupt public official who abused his office for self-benefit. In the case of *S v Kandemiri* HH 533/23, this court cited with approval the remarks *Shaik* v *S* (1) 2006 SCA 134 that:

> "Corruption is a phenomenon that can 'truly be likened to a cancer, eating away remorselessly at the fabric of corporate probity and extending its baleful effect into all aspects of administrative functions'. If unchecked, corruption was becoming systemic and the effects of systemic corruption can quite readily extend to the corrosion of any confidence in the integrity of anyone who had a public duty to discharge, leading unavoidably to a disaffected populace."

[46] Admittedly, the considerations of the appellant's personal circumstances and that where a penal provision provides for the payment of a fine, a sentencing court must commence from that premises are correct. But that is only applicable in appropriate circumstances. In this era where all agencies concerned with the administration of criminal justice are grappling with corruption, those who defraud public institutions which they lead must not expect to be treated differently from those charged with criminal abuse of office or any other form of corruption. They are no different from each other.

[47] What heightened the appellant's moral blameworthiness is the careful planning that he demonstrated. He designed a sophisticated plan that fell slightly short of deceiving everyone involved. He was a cunning character who showed brazen criminal resolve to perpetrate the offence. As mayor of the town he sunk so low as to parade himself before a vetting committee with the clear intention of committing a fraud. The people of Victoria Falls did not deserve him as their leader. The country does not deserve leaders who are so greed as to only think about themselves. For more than four years, the appellant's mind raced around how he could acquire public land which he was not entitled to.

[48] There is in our considered view, nothing that induces a sense of shock with the sentence imposed. If anything, what is shocking is the leniency of it. The appellant appreciated it himself. It was the reason why his counsel made a timid argument regarding the alleged inappropriateness of the sentence. The trail court did not misdirect itself in any way. For those reasons, we had no hesitation dismissing as we did, the appeal against sentence.

MUTEVEDZI J ……

CHIVAYO J ……. Agrees

Mvhiringi and Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners