

THE STATE
versus
OFFER SIVAN
and
CASSANDRA MYBURG

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 22, 24 November 2022, 24, 27 January,
1, 17 February, 28, 29 March, 20, 21 April, 4 & 5 May 2023

Assessors: Mr Alexander H Mhandu
Mr Thomas Mpofu

Criminal Trial

W Mabhaudi, L Masuku for the State
T W nyamakura, M Tarugarira, J Sande, for the accused persons

KWENDA J: At the end of a criminal trial the court makes up its mind as to whether the State has proved its case against the accused beyond reasonable doubt and that is what is normally contained in a judgment (See G Feltoe's *Magistrates' Handbook* Revised Edition 2021 at p 345). This implies a reasoned judgment. In this case, however, we acquitted the accused persons when, after a protracted trial when the Prosecutor General threw in the towel and exercised his prerogative to stop the prosecution in terms s 8(2) of the Criminal Procedure and Evidence Act [*Chapter 9.07*]. We gave our brief reasons *ex tempore* because we had simply followed the dictates of the law. The accused persons have, through their legal practitioners, requested full written reasons for judgment. It is within their rights to do so. It is a request that we cannot competently decline despite the fact that it appears straight forward that as a matter of law, a court must acquit the accused when the Prosecutor General stops a prosecution after the accused persons have pleaded to the charge. A court does not engage in correspondence with the parties to explain the

outcome of a criminal trial. It speaks through a judgment. Even if the court was inclined to decline the request it would still be required to give reasons. In addition to that, the public has a vested interest in the full reasons for the outcome of a public prosecution.

The accused persons were indicted to appear before this court for trial jointly charged with the crime of Fraud as defined in s 136 of the Criminal Law Codification and Reform Act [*Chapter 9:23*] allegedly committed between during the period extending from September 2020 and December 2021. The following allegations were made against them. The first accused is a director of Adlecraft (Pvt) Ltd and the second accused is his personal assistant. Acting in common purpose, the accused persons, allegedly unlawfully misrepresented to the Stanbic bank that one Gilad Shabtai, also a director of Adlecraft Investments, had agreed with them to open two bank accounts in the name of the company at the bank's Belgravia branch. They allegedly forged Gilad Shabtai's signature on the account opening forms and on an alleged false company resolution dated 29th September 2020 which appointed the first accused as the sole signatory to the bank accounts. One account was denominated in Zimbabwean dollars and the other in United States dollars. The matter was allegedly reported to the Zimbabwe Anti-Corruption Commission by one Munyaradzi Gonyora in November 2021. The account opening forms were examined by two handwriting experts who came to the same conclusion, that the signature attributed to Gilad Shabtai on the account opening forms does not match his undisputed signature. The accused persons allegedly withdrew and misappropriated sums of ZWL22 359 513 .14 and USD 762 983.06 thereby causing financial prejudice to the company and at the same time prejudicing the Stanbic bank's reputation.

The accused persons denied the charges. Their defence was that the allegations are malicious. The Prosecutor General had already declined to prosecute the case after determining that, in essence, the dispute was mere manifestation of a boardroom squabble between the first accused person and Gilad Shabtai which had no place in the criminal courts but stood to be resolved in the civil courts. Given that background, their prosecution on a charge on which the Prosecutor General had already pronounced himself in their favour was, therefore, an unwarranted and criminalisation of the civil dispute already pending in the High Court under various case numbers with case whose case numbers which the accused persons provided. They accused the State counsel Mr Mabhaudi of double standards and bias in favour of Gilad Shabtai and Munyaradzi Gonyora. When the first accused lodged what they perceived to be a criminal

complaint against Gilad Shabtai and Munyaradzi Gonyora Mr Mabhaudi would dismiss same as a civil dispute but when the latter did the same against the first accused, Mr Mabhaudi would readily label the similar allegations to be criminal.

On the merits, the accused persons denied forging Gilad Shabtai's signature as alleged or at all. They averred that the company resolved, with the full participation of Gilad Shabtai, to open the bank accounts for easy of doing business with clients who banked with the Stanbic bank. Munyaradzi Gonyora is merely Gilad Shabtai's proxy who stands in for him during the periods of the latter's absence from Zimbabwe. Pursuant to the resolution, Munyaradzi Gonyora collected the forms from the bank and brought them to the second accused who completed the uppermost sections of the account opening forms in her capacity as first accused's personal assistant. The first accused signed the forms his capacity as director of the company. The second accused person signed as a witness to the first accused's signature. Thereafter she returned the forms to Munyaradzi Gonyora who took them to the bank. The accused persons did not accompany Munyaradzi Gonyora to the bank when he went to submit the applications and thus do not know what transpired there. Munyaradzi Gonyora, therefore, lied under oath to the extent that he denied knowledge of the bank accounts. Gilad Shabtai could also not possibly complain of fraud because he, on divers occasions, received substantial amounts transferred from the bank accounts. He did not make any complaint to the Stanbic bank either disowning the bank accounts or the impugned signature or the resolution. The accused persons were in possession of a resolution dated 8 March 2022 signed by Gilad Shabtai and Munyaradzi Gonyora confirming their knowledge of the bank accounts. Adlecraft Pvt Ltd had not complained of theft of its funds. The company had bank accounts with several banks and in all cases the first accused person was, as the company's managing director and his status as the sole signatory of the bank accounts. His position as managing director and status as the sole signatory of the company's bank accounts was still subsisting even as the trial started and progressed. It was therefore false that the accounts at the Stanbic bank were opened as a way of facilitating the theft of the company's funds. Had the first accused person been inclined to steal company funds he would have done so using the various bank accounts.

At the beginning of the trial, the State, acting in terms of subsection (1) of s 66 of the Criminal Procedure and Evidence Act[Chapter 9:07] (hereinafter called the Criminal Procedure

and Evidence Act) notified the accused and the court of its intention to call six witnesses namely Gilad Shabtai (a director of Adlecraft (Pvt) Ltd whose signature was allegedly forged at the bank and on an alleged forged document purporting to be the company’s resolution), Munyaradzi Gonyora (an alleged director of the company who allegedly reported the matter to the Zimbabwe Anti-Corruption Commission, herein after called ZACC), Simba Mawere (employed by the Stanbic bank as an internal legal advisor who was expected by the State to confirm that the accused persons made certain misrepresentations to the bank), Kuraunoe Madzivanyika (a Forensic Scientist/ Expert who was expected by the State to confirm that following an examination carried out by him during criminal investigations he arrived at the conclusion that Gilad Shabtai had not signed the Stanbic account opening forms), Leonard T Nhari (a Forensic Scientist/ Expert with experience dating back to 1980, who was expected by the State to confirm that following an examination carried out by him during a criminal investigation he had arrived at the conclusion that Gilad Shabtai had not signed the Stanbic account opening forms) and Owen Mutembwa (an investigating officer employed by the Zimbabwe Anti-Corruption Commission who was expected by the State to tell the court that he had investigated the allegation of fraud, how he had done so and identify the exhibits he had secured for the purposes of the trial).

The trial commenced on 22 November 2022. From that date the court was seized with preliminary issues which it disposed of on 17 February 2023 paving the way for the trial on the merits.

The state called Simba Mawere as its first witness. He explained the procedure at the bank on the opening of new bank accounts. He produced the two forms used to open the two impugned bank accounts in the name of Adlecraft (Pvt) Ltd. He explained that the bank accounts were opened in compliance with the banks’ ‘Know-your-client’ protocols which involved verification of company’s documents, identification documents of the directors and proof of residence. Know-your-client is a procedure which is very important which the bank takes it seriously and could not be dispensed with. Any flaws would have resulted in the applications to open the bank accounts being rejected. The applications forms were duly signed by the directors in person. The forms did not have to be signed in the bank. The bank opened the bank accounts after all the verifications and formalities had been completed to its satisfaction. The bank had not received any complaint regarding the opening and transactions on the bank accounts. No one had approached the bank

with a request to red flag the bank accounts. Anyone alleging a fraud or forgery should have approached the bank would have inevitably triggered investigations by the bank into the complaint. The bank had not received any complaint from Adlecraft (Pvt) Ltd of a fraud, forgery or misappropriation of company funds. Everything was done above board.

The next witness to testify for the State was L T Nhari, a forensic expert/ scientist of many years' experience who gave evidence on 20 April 2023. He worked for the Zimbabwe Republic Police as a forensic scientist from the year 1982 until his retirement in 1999. Upon his retirement he got employment by and did consultancy work for various organisations like the Commonwealth Fund and Namibian government. He also did consultancy work in Zimbabwe in civil disputes. In this case he was approached by certain legal practitioner representing Gilad Shabtai, whom he named, who asked him to examine certain questioned signatures on some Stanbic account opening forms attributed to Gilad Shabtai and compare them with what the lawyer said were undisputed signatures of Gilad Shabtai. We have withheld the name because the lawyer was simply an agent of the complainant. What is important is the message that we convey through this judgment. After analysing the samples, the witness came to the conclusion that signatures attributed to Gilad Shabtai on the questioned account opening forms bore no resemblance to what were said to be his undisputed signatures. He produced the comparison charts in court as exhibits. He was surprised when he was summoned to ZACC in connection with a comparison he had done at the behest of a lawyer as a private brief during his private consultancy. He found it unprocedural to be compelled to testify as a State witness in a criminal case where he had not interacted with any investigating officer during a criminal investigation. He had not interacted with Gilad Shabtai and had never met him. He was thus unable to say the signature given to him by the lawyer was indeed that of Glad Shabtai or that Gilad Shabtai's signature had been forged. Shabtai had not disowned the questioned signatures in his presence. In a criminal investigation the investigation officer approaches him according to Police procedures and advises him of the issue to be investigated. The nature of the dispute as presented to him by the investigating officer determines how he approaches the matter. Under cross examination he repeated his frustration with the fact that he had been compelled to testify, at a criminal trial, in connection with documents that he had prepared in connection with his work as a private consultant.

When the witness finished testifying, Mr *Nyamakura* representing the accused person, rose to say his clients' concerns about how the trial was progressing. His clients were concerned that Gilad Shabtai who appeared on the State papers, to be the key complainant had not been seen or appeared at court since the commencement of the trial. Ordinarily, a criminal trial begins with evidence of the complainant because the evidence of such a witness sets the tone and is critical for the identification of issues. The rest of the witness just serve to confirm the complainant's evidence. The court asked the State counsel to explain why the trial had progressed for five months without the complainant giving evidence. In response, the State submitted that the Gilad Shabtai was in South Africa and had indicated to the State that he would not come to court until the availability of a Hebrew interpreter was confirmed to him. The court registered its displeasure at the attitude adopted by the complainant to put the court and the State on terms. In terms of our law of criminal procedure a witness is compellable to give evidence at a criminal trial. (The law is discussed later in this judgment). In any event, the court was aware that the Registrar had secured the Hebrew interpreter at the commencement of the trial. The court enquired from the State counsel on the whereabouts of another key witness, Munyaradzi Gonyora, who was said to have reported the alleged fraud. The State counsel replied that he had no knowledge of the whereabouts of that witnesses. As it turned out the State had not made any effort to subpoena the witnesses. Pressed further the State counsel asked for an adjournment to look into the matter. After the lunch break the State counsel advised the court that he still had not been able to locate the witnesses but had conferred with the legal practitioner who was watching the proceedings on their behalf of Gilad Shatai who could be of assistance to the court in locating Gilad Shabtai. He asked for the permission to take instructions from a legal practitioner who was in court watching the proceedings. The court refused the permission because the State counsel does not take instructions from anyone except the Prosecutor General at a criminal trial. A lawyer who is briefed by any interested part to watch proceedings must do so quietly from the gallery because criminal proceedings are ordinarily open to the public. He has no role to play and has no audience during the proceedings. The State counsel must not only be in charge of a prosecution but must be seen to be and not to pander to the whims of a member of the gallery. The State counsel then sought leave of the court to call the legal practitioner to give evidence on the whereabouts of the witnesses and when they would be able to attend. We turned down that request as well. Allowing the legal

practitioner to address the court, *albeit* from the witness stand, was a procedure not provided for in our rules of criminal procedure and was tantamount to granting him audience to address the court through the back door on behalf of the Prosecutor General. The court warned the State counsel against giving the impression that that the legal practitioner was conducting a private prosecution disguised as a prosecution at public instance.

The State requested an adjournment of the trial in order to secure the attendance of the witnesses. We adjourned the trial proceedings to the 4th May 2023 for continuation on 4 and 5 May 2023. The court pointed out that it was not inclined to grant the State further postponements beyond the 5th May 2023.

On 4 May 2023, the two key State witnesses Gilad Shabtai and Munyaradzi Gonyora were still not in attendance. It turned out that the State had not subpoenaed the witnesses despite the court having indicated that State witnesses are compellable and may only be absent after being excused by the court. The State counsel had not neither interacted nor communicated with them at all since the commencement of the trial. The situation was very unusual because State counsel are well advised to interview their witnesses before trial. This is critical for many reasons. Very often some witnesses may need to refresh their memory from their statements to the Police. Some witnesses may point out inaccuracies in their statements recorded by the Police. It is also not uncommon for witnesses to turn hostile. A prosecutor who did not speak to his witness before calling him or her as witness may not succeed to have a witness such a witness declared hostile by the court. As it turned out the State counsel's earlier submission on 20 April 2023 that Gilad Shabtai would not attend until a Hebrew interpreter was not based on his personal enquiry with the witness but on what the lawyer watching the proceedings on behalf of Gilad Shabtai had told him. When pressed further on the whereabouts of Gilad Shabtai, the State counsel said he was in Israel. He did not know the whereabouts of Munyaradzi Gonyora. When asked to explain whether the submission was based on his personal enquiry with the witness, he said that had just been communicated to him by the legal practitioner watching the proceedings on behalf of Gilad Shabtai.

Mr *Nyamakura*, with leave of the court, rose again to register further concerns on behalf of the accused persons. He pointed out that the State appeared to under the direction of the lawyer representing Gilad Shabtai. He submitted that such conduct was an infringement of the accused

persons' right to a fair trial by an impartial court. He further argued that the prosecution was subordinating itself to Gilad Shabtai and his legal practitioner in violation of s 260 of the constitution which reads as follows: -

“Independence of Prosecutor-General

- (1) Subject to this Constitution, the Prosecutor-General (*a*) is independent and is not subject to the direction or control of anyone; and
- (*b*) must exercise his or her functions impartially and without fear, favour, prejudice or bias.
- (2) The Prosecutor-General must formulate and publicly disclose the general principles by which he or she decides whether and how to institute and conduct criminal proceedings.”

The State counsel did not give a direct response to the submission because it was unassailable. A public trial can only be objectively fair if the Prosecutor General or his representative, during a prosecution at the public instance, exercises all his or her functions independently, that is, impartially and without fear, favour, prejudice or bias. This will be discussed in more detail later in this judgment. State counsel abandoned the move to call Gilad Shabtai's lawyer and called the investigating officer, Owen Mutembwa, to give evidence under oath on the issue of the non-availability of the witnesses. Sworn, Owen Mutembwa testified that he had never seen Gilad Shabtai and Munyaradzi Gonyora. He had not investigated the matter. He had not recorded the witnesses' statements. Gilad Shabtai's statement had been recorded in South Africa by a Notary Public. The investigating officer had never been in touch with the witnesses and did not know whereabouts. The witnesses. He had also not interacted with the two handwriting experts. He had therefore not carried out investigations at the Stanbic bank. All the critical investigation had been conducted by the lawyer who represented the Glad Shabtai. The investigating officer said he had not subpoenaed the witnesses earlier at the beginning of the trial. He had only liaised with the lawyer who had a watching brief from Gilad Shabtai who had informed him that Gilad Shabtai was abroad. He had expected to find Gilad Shabtai and Munyaradzi Gonyora at their last known address in Hoggart Hill, Harare but when he went there on 3 May 2023 with the intention of serving them with subpoenae he discovered that they had left the place. Cell numbers given to him by Gilad Shabtai's lawyer were not reachable. He, therefore, had lost hope of securing the attendance of the witnesses at court.

Following the evidence of the investigating officer and concerns raised by Mr Nyamakura, for the accused, the State counsel advised the court he was agonising over the issue and needed time to consider the way forward in view of the non-availability of the State witnesses whose whereabouts were unknown. We adjourned the trial to the 5th of May 2023 and reminded the State that this would be the last indulgence.

On 5 May 2023 the State informed the court that the Prosecutor General had decided to stop the trial in the exercise of the power given to him in terms of s 8 (2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The State counsel read the provisions in court which are as follows:

“8 Power to stop public prosecutions

The Prosecutor-General, or any person conducting criminal proceedings on behalf of the State may—

- (a) before an accused pleads to a charge, withdraw that charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge;
- (b) at any time after an accused has pleaded to a charge, but before conviction, stop the prosecution in respect of that charge, in which event the court trying the accused shall acquit the accused in respect of that charge.”

The State counsel tendered a sworn statement by Gilad Shabtai as the basis for stopping the prosecution which we could not admit as evidence or as part of the exhibits on record because the law does not provide for the production of withdrawal statements. Such statements are not directed to the court but to either the Police or the Prosecutor General. In the case of a public prosecution in progress it is up to the National Prosecuting Authority to decide whether or not to proceed and not the Court.

Before concluding this judgement, we must comment on pertinent issues that arose during the course of the trial for the future guidance of counsel in the interests of preserving the integrity of the criminal justice system. Criminal procedure is defined in *Criminal Procedure Handbook*, 13th Edition published by Juta and edited by Joubert’ at p 7 as the law regulating: -

“*inter alia*, the duties and powers of the criminal courts and prosecutorial authority; the duties of the police, especially, during the course of investigations of a crime; the rights of suspects and arrested and accused persons; pre-trial procedural matters; bail, the charge sheets(in the lower courts) and indictments (in the superior courts); pleading; the course of the trial , and especially the trial rights and duties of the prosecution(the state) and the defence; verdict; sentencing; post-trial remedies (such as appeal and review)and executive action(eg mercy, indemnification and free pardon)”

We agree with the definition. The powers to arrest are set out in ss 24 and 25 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. In terms of s 25 of the Act a police officer should arrest on reasonable suspicion that the person concerned has committed an offence. In terms of s 219 (1) of the Constitution the Police Service is responsible for detecting, investigating and preventing crime. A related function is given to the Zimbabwe Anti-Corruption Commission which is to investigate and expose cases of corruption in the public and private sectors and to combat corruption, theft, misappropriation, abuse of power and other improper conduct in the public and private sectors. A situation where a complainant in a criminal matter arrogates to himself the power to investigate crime or record statements from witness or to secure the attendance of witnesses or to determine whether or not and when such witnesses shall attend court or place conditions for their attendance, as happened in this case, is clearly inconsistent with the supreme law of the land.

The independence of the National Prosecuting Authority is entrenched in Part 13 Part 2 of the Constitution of Zimbabwe (Amendment No 20) Act 2013 and is discussed in more detail later in this judgment below is because as can be gleaned from s 258 of the constitution, the National Prosecuting Authority is responsible for instituting and undertaking criminal prosecutions on behalf of the State and discharging all functions that are necessary or incidental to such prosecutions. It is therefore the responsibility of the State to secure the attendance of state witnesses. In terms of s 261 (1) of the constitution the Prosecutor-General and officers of the National Prosecuting Authority must act in accordance with this Constitution and the law. In terms of s 260 of the constitution of the constitution the Prosecutor-General is, subject to the Constitution, independent and not subject to the direction or control of anyone; and must exercise his or her functions impartially and without fear, favour, prejudice or bias. It was therefore incumbent upon the State counsel to be seen to be firmly in control of the prosecution. Related to this is that in terms of s 259 (1) of the Constitution the Prosecutor-General is the head of the National Prosecuting Authority. The decision to decline prosecution made on behalf of the Prosecutor General is a *quasi*-judicial function and once communicated to the accused persons and the complainant, could only be rescinded, if at all, by the Prosecutor General on good cause shown. In this case it is clear that the complainant, who was not satisfied with the earlier decision to decline prosecution, took it upon himself to compile his own docket by conducting his own criminal

investigation and recording statements of witnesses and secure their attendance at the trial. A criminal court should not be misled into presiding over a private prosecution which is disguised as a public prosecution based on a police docket compiled from police investigations.

The State is expected to secure the attendance of state witnesses through the subpoena because it has the force of law. In terms of s 231 of the Criminal Procedure and Evidence Act every witness duly subpoenaed to attend and give evidence at any criminal trial shall be bound to attend and to remain in attendance throughout the trial, unless excused by the court. (The underlining is for emphasis). Further, in terms of s 237 of the Criminal Procedure and Evidence Act where any person subpoenaed to attend a criminal trial, without reasonable excuse, fails to obey the subpoena and it appears from the return or from the evidence given under oath that the subpoena was served upon such person to whom it is directed, or if any person who has attended in obedience to a subpoena fails to remain in attendance, the judge or magistrate may issue a warrant directing that such person be arrested and brought at a time and place stated in the warrant, or as soon thereafter as possible, before him or some other judge or magistrate.

The State having stopped the trial after the accused persons had pleaded to the charge, the law commanded the court to acquit the accused persons. In the result we returned the following verdict: -

The accused persons are found not guilty and are acquitted.

Prosecutor General, for the State
Tarugarira Sande, accused persons' legal practitioners