

**REPORTABLE** (56)

**EDMORE MADHUME**  
**v**  
**THE STATE**

**SUPREME COURT OF ZIMBABWE**  
**BHUNU JA, MATHONSI JA & CHIWESHE JA**  
**HARARE, 16 JUNE 2021 & 13 JUNE, 2022**

*T. Maanda*, for the appellant

*K.H. Kunaka*, for the first respondent

**CHIWESHE JA:** The appellant was convicted by the Magistrates Court (the trial court) sitting at Harare of nine counts of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to 4½ years imprisonment of which 1 year was suspended for a period of 5 years on appropriate conditions of good behavior. A further 2 years was suspended on condition that he restitutes the complainant, Webbles Shipping Company, in the sum of US\$39 413.37, on or before 30 May 2014 through the Clerk of Court, Harare.

Aggrieved by this turn of events he appealed to the High Court (the court *a quo*) against both conviction and sentence. The court *a quo* dismissed the appeal. He now appeals against the whole judgment of the court *a quo* to this Court for relief.

## **FACTUAL BACKGROUND**

The appellant was employed by the complainant, Webbles Shipping Company, as its Operations Manager. The company is in the business of shipping, namely import and export of goods. Its business includes clearance of customs duty for goods at ports of entry. It has offices in Harare, Mutare and Beitbridge. The company runs a subsidiary account with the Zimbabwe Revenue Authority (ZIMRA) into which it deposits money for purposes of clearing customs duty on behalf of its clients. The money withdrawn from this account for that purpose would be recovered from the clients on whose behalf customs duty would have been paid.

It was the appellant's duty to receive the money so recovered and to hand it over to the Accounts Department of the company. In this regard he would be assisted by junior staff manning the ports of entry at Harare, Mutare and Beitbridge. The appellant had a password which gave him access to the company's subsidiary account with ZIMRA to enable him to pay customs duty on behalf of clients.

In order to so pay duty for a client, the appellant or subordinate employee would generate a document or form called a bill of entry. Using the company's password, the appellant or any other employee would then trigger payment of duty from the company's subsidiary account. Each password was given the appellant's or the employee's name and each bill of entry would bear the name of the employee who generated it. At the time of the alleged commission of the offence, the company's account with ZIMRA had a credit balance of US\$60 000.00.

## **THE ALLEGATIONS**

In December 2012, the company's Managing Director, one Alexious Mandishona, acting on information, requested ZIMRA to furnish him with a statement of the company's account. He discovered that the company's account had been used to pay duty on behalf of six corporate clients. He had no knowledge of these transactions. He asked ZIMRA to print out the relevant bills of entry in order to ascertain what had transpired. He observed that the bills of entry were initiated using the appellant's password. The company's ZIMRA account had been debited to a total of US\$39 413.37. The account had not been reimbursed of this amount through repayment on the part of the clients concerned.

It is alleged that the appellant received the repayments but failed to pass them on to the accounts department for onward deposit into the ZIMRA account. The appellant denied the charges and stated that he never personally handled cash as that was the domain of the Accounts Manager and his staff. He further contended that if the accounts in question were handled fraudulently it must have been by his junior employees and not him. He was of the view that he stood accused of this offence merely because his password was used in raising some of the bills of entry.

## **THE EVIDENCE ADDUCED BEFORE THE TRIAL COURT**

It was common cause that the appellant was employed by Webbles Shipping Company as its Operations Manager. In that capacity his duties included the day to day supervision of employees manning the company's offices at the ports of entry at Beitbridge, Mutare and Harare. He also had oversight responsibility over the state of the company's subsidiary account with ZIMRA. In December 2017 it was discovered that this account had been debited to a total of US\$39 413.37 representing the amount spent by the company in

paying duty on behalf of various clients. No repayments by the benefitting clients were deposited back into the account. An investigation was carried out leading to the arrest of the appellant.

The State led evidence from the following employees of the company, namely Freddy Mutizwa, Edmore Manditsera and Patience Dambarwa. The gist of their evidence was that on various occasions each of them had been instructed by the appellant to use appellant's password to clear goods for clients and remit to him monies received from such clients. The appellant received the money either directly as cash or through deposits made into his personal bank account or other persons' account.

In that regard their evidence was corroborated by clients such as Medwell Dambarwa, Elisha Mazhawidza and Beven Dukuche.

On the other hand the appellant denied any wrongdoing, insisting that his duties did not include handling of cash, a function strictly assigned to the accounts department. He maintained that his password had been abused by the junior employees for their own benefit.

The trial court made a finding of credibility in favour of the State witnesses and rejected the appellant's defence. It found the appellant guilty of fraud as charged and sentenced him to four and half year's imprisonment of which one year was suspended for five years on conditions of good behavior. Another two years were suspended on condition that he restitutes the complainant in the sum of US\$39 413.37 by 30 May 2014.

Aggrieved by that outcome the appellant noted an appeal in the court *a quo* against both conviction and sentence.

## GROUND OF APPEAL IN THE COURT A *QUO*

### (a) AD CONVICTION

The appellant raised four grounds of appeal in the court *a quo* couched as follows:

- “(a) It (the court *a quo*) convicted the appellant in a situation whereby the proven facts did not support the said conviction. The appellant’s version of the events culminating in his prosecution was highly probable and totally exclusive of the essential elements of the charges on which he was convicted.
- (b) The Honourable court *a quo* mainly relied on circumstantial evidence in convicting the appellant in a situation whereby the proven facts yielded a number of logical inferences. The loss was not solely traceable to the appellant.
- (c) The State did not prove the appellant’s defense to be false beyond doubt. Appellant was thus enjoined to enjoy the benefit of the doubt which was an acquittal in this case.
- (d) Wherefore the conviction by the court *a quo* must be set aside and appellant be acquitted and discharged.”

### (b) AD SENTENCE

“If the appeal against conviction fails, on appeal against sentence it shall be contended as follows:

- (a) Given the compelling factor of mitigation in this case, the sentence of the Trial Court is manifestly excessive as to induce a sense of shock.
- (b) Wherefore the sentence of the court *a quo* must be set aside and in its place appellant be ordered to restitute the complainant of the loss conclusively traceable to him and the remaining portion of the sentence be suspended on condition appellant undergoes Community Service.”

The court *a quo* correctly ruled that the first and third grounds of appeal against conviction were not proper grounds of appeal for lack of compliance with the rules. It thus proceeded to deal with grounds (b) and (d) only.

After a survey of the facts of the matter as canvassed in the trial court the court *a quo* considered the submissions made before it by Mr *Maanda* for the appellant and Ms *Kunaka* for the respondent. Mr *Maanda* argued in the main that the trial court erred in relying on circumstantial evidence and that other employees had access to the appellant's password. There were no receipts proving hand over of the money to the appellant. Further, he argued that the testimony of the State witnesses needed to be treated with caution as it was them who received the cash after using the appellant's password. Mr *Maanda* however conceded that as the appellant could not account for the money given to him, his conduct in that regard would constitute theft of trust property as opposed to fraud.

On her part Ms *Kunaka* submitted that although the appellant's password was used to process the bills of entry his co-workers stated that they were acting on his instructions. She pointed out that the sum of US\$4 300.00 had been deposited into the appellant's account and witnesses had also stated that they had handed cash to the appellant. She conceded that in the absence of testimony from Lindiwe, into whose account the sum of US\$4 621.63 had allegedly been deposited on appellant's instructions, the State was unable to sustain that allegation. In any event no deposit slip or bank statement had been produced to prove that transaction. In the circumstances the concession was properly made. This amount must be deducted from the total sum of US\$39 413.37, to leave a balance of US\$34 791.74.

After a detailed analysis of the essential elements of the offence of fraud the learned judge *a quo* concluded that the facts before him did not disclose that the appellant committed fraud. What the facts proved was theft, a competent verdict to fraud. The court *a quo* found that what the appellant did was to receive trust money which he failed to account for. That constitutes theft in terms of s 113(2) of the Code.

It was for these reasons that the court *a quo* dismissed the appeal against conviction. As for the appeal against sentence, the court *a quo* found that there was no basis for interfering with the sentence imposed by the trial court. It saw no misdirection on the part of the trial court which would warrant interference with its sentencing discretion.

## GROUNDS OF APPEAL IN THIS COURT

Aggrieved by the decision of the court *a quo*, the appellant has noted this appeal on the following grounds:

### “AD CONVICTION

1. The court *a quo* erred in law in convicting the appellant of a competent verdict of theft and so erred because, on the facts of the record, the essential elements of theft are not included in the essential elements of fraud and he did so contrary to the provisions of s 274 of the Criminal Law (Codification and Reform) Act.
2. Having found that the appellant’s conduct did not amount to fraud, the court *a quo* erred in law and misdirected itself in not upholding the appeal against conviction on a charge of fraud.
3. The court *a quo* erred and committed a misdirection on the facts in holding, as it did, that there was direct evidence of theft whereas on the record there was no such evidence.
4. More particularly the court *a quo* erred in convicting appellant on a competent verdict in that:
  - (a) There was no evidence, except the mere say so of State witnesses, that appellant instructed his subordinates to act as they did resulting in the prejudice to the complainant.
  - (b) There was no evidence, except the mere say so of State witnesses, who should have been treated as accomplices, with the necessary caution towards their evidence, that he shared in or received the proceeds from his subordinates.
  - (c) There was evidence through testimony that the subordinates originated the bill of entry and used the password of the appellant; and
  - (d) There was evidence on the testimony of the State witnesses that there was a possibility that appellant’s password was abused.
5. Having noted the concession by the State that failure to call the testimony of Lindiwe whose full and further particulars and her bank account and transaction details are unknown, was an anomaly, the court erred, without any proof of the deposit into her account and the purpose thereof in relation to the commission of the offence by appellant, in accepting the testimony that appellant gave instructions for the money to be deposited into Lindiwe’s account and relying on that as direct evidence of theft.
6. The court *a quo* misdirected itself by holding that the \$4 300 that was deposited into appellant’s account was proceeds of the commission of the offence of theft without applying its mind to the accused’s version on it, and determine if his

version was reasonably possibly true and without deciding that it was so improbable that it could not reasonably possibly be true.

7. While the court *a quo* held that there was direct evidence of the theft, it misdirected itself in law in that it essentially and unwittingly but wrongly relied on circumstantial evidence by relying on the unproven fact that some money was deposited into Lindiwe's account and that the appellant received \$4 300, whereas the circumstantial evidence could not be relied on as the proven facts did not exclude other reasonable inferences other than the inference of the guilt of the appellant.

#### **AD SENTENCE**

8. The court *a quo* erred in upholding the sentence imposed by the magistrate court as it is so excessive as to induce a sense of shock.
9. The court *a quo* did not consider the mitigation factors proffered by the appellant which if it did it would have arrived at a different sentence.

The appellant prays that the appeal succeeds and that the decision of the court *a quo* be set aside and that it be substituted with the following:

- (i) The appeal against conviction succeeds. The conviction is quashed and the sentence set aside.  
Or alternatively
- (ii) The sentence imposed be set aside and in its place be substituted with two years' imprisonment one of which is suspended for five years on the usual conditions and the remaining one year be suspended on condition the appellant pays restitution to the complainant."

#### **THE LAW**

- (a) **Whether theft is a competent verdict to a charge of fraud as defined in s 136 of the Criminal Law Codification and Reform Act) [Chapter 9:23].**

Section 274 of the Code provides as follows:

"274 Conviction for crime other than that charged.

Where a person is charged with a crime the essential elements of which include the essential elements of some other crime, he or she may be found guilty of such other crime, if such are the facts proved and if it is not proved that he or she committed the crime charged."

Further s 275 provides as follows:

"275 Verdicts permissible on particular charges

Without limiting section two hundred and seventy-three or two hundred and seventy-four, a person charged with -

- (a) A crime specified in the first column of the Fourth Schedule; or
- (b) ...; or
- (c) ...;

may be found guilty of –

- (i) A crime specified opposite thereto in the second column of the Fourth Schedule;  
or
- (ii) ... of
- (iii) ...;  
if such are the facts proved.”

A cursory look at the Fourth Schedule will show that a person charged with fraud under s 136 of the Code may be convicted of theft if the State fails to prove the offence of fraud but theft. By provision of statute therefore theft is a competent verdict to fraud.

The argument to the contrary by Mr *Maanda*, for the appellant, is clearly misplaced. It must be noted that s 275 does not in any way limit the provisions of s 273 or s 274 such that it may still be competent for a court to convict a person of theft without resort to the provisions of s 275. That is so because the essential elements of fraud include the essential elements of theft, namely the unlawful taking of property belonging to another with intent to permanently deprive the owner of his or her property without his or her consent.

The court *a quo* therefore cannot be faulted in convicting the appellant not of fraud but of the competent verdict of theft of trust property. This Court agrees with Mr *Maanda* however that the court *a quo* erred, having convicted on a competent verdict, by not entering a verdict of not guilty of fraud. The appellant should have been acquitted on that main charge.

**(b) Whether there was direct evidence adduced against the appellant**

Mr *Maanda* sought to argue that no direct evidence was led before the trial court. He submitted that the conviction was based on circumstantial evidence. That being the case he further argued that the trial court should have relied on the rule that a conviction based on circumstantial evidence is not safe unless the conclusion sought to be drawn is the

only reasonable inference arising from such circumstantial evidence. Nothing could be further from the truth. Direct evidence was given that a total of US\$39 413.17 had been debited against the complainant's subsidiary account with ZIMRA. Indeed this fact was common cause.

Further direct evidence was adduced by both company employees and other persons that they had had dealings with the appellant and that to all intents and purposes the missing funds were received by the appellant either directly or through the complainant's employees.

In one of such instances the money was deposited into the appellant's personal bank account at his behest. This Court would reject therefore the contention that in convicting the appellant, the trial court relied solely on circumstantial evidence.

**(c) Credibility of State Witnesses**

The trial court found the State witnesses credible and convicted the appellant accordingly. It is trite that an appeal court will not lightly interfere with a finding on credibility made by a trial court. Mr *Maanda* sought to persuade the court *a quo* that the trial court ought to have treated the State witnesses as accomplices. He had not in his heads of argument *a quo* raised this point. The court *a quo* dismissed that assertion for that reason. Mr *Maanda* did not persist with such argument in his submissions before this Court.

**DISPOSITION**

The court *a quo*'s reasoning cannot be faulted. The court *a quo* correctly held that the facts proved did not disclose the offence of fraud but theft. It found that what the appellant

did was to receive trust money and failed to account for it. For that reason it found the appellant guilty of theft not fraud.

The appellant was in charge of the day to day operations of the company and in direct supervision of the employees whose duty it was to raise the paper work that led to the loss. He allowed the employees to use his password to effect the transactions in question. He failed to monitor the daily entries in the company's account with ZIMRA and thus failed to prevent the loss. The trial court found the State witnesses credible. The evidence as a whole pointed to one direction – that the appellant received company funds and failed to account for them.

On the whole this Court is satisfied that the evidence adduced against the appellant proves beyond reasonable doubt that the appellant committed the offence of theft. However, Miss *Kunaka* for the State, properly conceded that there was no evidence that any money had been deposited into Lindiwe's bank account. The concession is properly made. The sum of US\$4 621.63 must be deducted from US\$39 413.37 leaving the balance of US\$34 791.74.

Mr Maanda was correct in submitting that having convicted the appellant on the competent verdict of theft, the court *a quo* should have entered a verdict of not guilty to the main charge of fraud. The order hereunder will correct that anomaly.

This Court concludes therefore that the appeal against conviction must succeed in part. As for the appeal against sentence this Court agrees with the reasoning of the court *a quo* namely, that there is no basis upon which the sentence imposed by the trial court could be interfered with.

It is accordingly ordered as follows:

**AD CONVICTION**

1. The appeal against conviction partially succeeds.
2. The order of the court *a quo* is amended to read as follows:
  - “(a) The appeal against conviction partially succeeds.
  - (b) The order of the trial court be and is hereby set aside and substituted with the following:
    - (i) The accused be and is hereby found not guilty of the offence of fraud.
    - (ii) The accused be and is hereby found guilty of theft as defined in s 113 of the Code, a competent verdict to fraud.
    - (iii) The total prejudice to the complainant is in the sum of US\$34 791.74.”

**AD SENTENCE**

3. The appeal against sentence be and is hereby dismissed.
4. The sum of US\$39 413.37 reflected in the sentence of the trial court be and is hereby substituted with the sum of US\$34 791.74.

**BHUNU JA** I agree

**MATHONSI JA** I agree

*Maunga, Maanda & Associates*, appellant’s legal practitioners

National Prosecuting Authority, respondent’s legal practitioners