

**JEALOUS NGURINGA**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
KAMOCHA J & CHEDA AJ  
BULAWAYO 1 AND 25 OCTOBER 2012

*Z Ncube* for appellant

*W Mabhaudi* for respondents

Criminal Appeal

**CHEDA AJ:** This is a criminal appeal against a decision of the magistrates' court where the appellant was convicted of two counts of fraud and sentenced to 4 years imprisonment of which 2 years were suspended, one year on condition that he does not within a period of 3 years commit an offence involving an act of misrepresentation, and one year on the condition that he restitutes both complainants the sum of ZAR25 000 and US\$2 400, respectively by 31<sup>st</sup> May 2012.

The charge against the accused on count one was that he deceived one Jabulani Mbewe by making a representation to him that he was going to clear Jabulani Mbewe's consignment of tyres with ZIMRA and transport them from Durban, South Africa to Bulawayo at a fee of ZAR3 076,00 and as a result Jabulani Mbewe released ZAR25 000,00 to the appellant to his prejudice.

On the second count it was alleged that the appellant made a similar misrepresentation to Zwelithini Moyo that he was going to clear Harvest House International Church's consignment of lighting equipment imported from China and transport it from Durban, South Africa to Bulawayo at a fee of ZAR29 470, thereby causing the complainant to release ZAR29 470,00 to the prejudice of Harvest House International Church.

The appellant pleaded not guilty to both counts. He was represented by a legal practitioner in the trial who prepared the appellant's defence outline.

The appellant's defence briefly, was that he runs a clearing and logistics company called Sable Logistics P/L. He entered into an agreement with the complainant for the clearance and delivery of the goods. A deposit was agreed and paid by the complainant. The appellant then

encountered challenges in the process as the goods had accumulated storage charges which he had not foreseen at the time of contracting. The complainant was duly advised of the developments and undertook to foot the storage fees but has not fully paid, thereby preventing the appellant from fulfilling his mandate. He said he was capable of fulfilling the contract provided complainant pays the charges failing that he is prepared to refund the complainant under the terms applicable to the clearance of goods under such circumstances.

In his evidence the complainant said he was introduced to the appellant by one Sikhumbuzo Hadebe who is a clearing agent. The complainant told Hadebe that he had a consignment of tyres from China arriving in Durban. A calculation was made of the figure for transportation and clearing fees at the port but excluding duties paid. It was R30 746,00. Appellant asked for a deposit of R21 000. The complainant asked for 2 hours after which he met the appellant at Hadebe's office so that he could have a witness. Appellant was given R21 000 and gave a breakdown of the tabulated expenses. Appellant told the complainant he would be in Durban the following day. That was the last time complainant saw the appellant.

When complainant e-mailed the appellant some days later appellant said there were some storage charges which amounted to R19 000,00. He queried this. He asked for a copy of the invoice. The appellant would not produce any. Appellant asked complainant how much he had. Complainant said he had R4 000,00. He was told to go to CBZ and see one Martha Takawira. He gave her the money. Appellant later confirmed receipt of the money on the phone. Three weeks later when complainant asked for progress he got a copy of an e-mail in which appellant advised him he was in Durban. However, the complainant learnt that appellant was in Harare. He checked with Harvest House Church and found that they had appellant's passport. Appellant had not paid Astrad Shipping. He later got a full report from Astrad Shipping. Police from Hillside phoned and advised the complainant that they had the appellant. He learnt from Astrad Shipping that the storage fee was 750 x 4. They also advised that they had never received any cent towards the consignment of the tyres.

As a result he lost R62 573,10 and the R24 000 that he gave the appellant. He never recovered anything. He said the appellant at some stage told him that the truck was on the way.

Augustine Muchekeni a member of the CID said when he investigated the matter, it was never stated to him which agent the appellant was using to clear the goods and no third party was ever disclosed.

In his defence appellant said he runs a small logistics management company called Sable Logistics. He met complainant at Hadebe's place on 15 August. He explained the clearing process in Durban which involved tracking of the ship and whether it had docked or off loaded. The documents from the complainant indicated that the expected date of arrival was 16

August, meaning he anticipated his goods the following day. He confirmed to complainant he would leave the very day for Durban. He told complainant he would give him all the receipts of payments done in Durban.

In answer to a question put to him the appellant said he operated accounts with clearing houses. He said Mbewe's goods were expected on 16 August but he was now aware that the goods had arrived. They had not advised him well on time the ship docked. A few days later he was given storage figures of almost R17 303,30 by Astrad. He came back to Bulawayo. They had a meeting and he mentioned a new balance of R50 000 as an estimate invoice. The complainant said he had no money.

Under cross examination appellant admits receiving money from the complainant. Asked if he cleared the goods he answered "Yes". Asked if complainant got his goods he answered "No". Asked what happened to the money he said he paid R15 000 to Astrad Shipping and the balance was for fuel, toll gates, road access and that he flew to Durban. Asked why Astrad said it had not been paid he said he could not comment. Asked "Where is the money US\$3 000?" He replied "I used it and just have not paid."

Q Where would you get it?

A A couple of people owe me

Q Who are these?

A I just didn't think you will ask me the names.

It is strange for a person who claims to have flown to Durban to say he used the money for fuel and toll gates. One does not buy fuel and pay toll gates when travelling by plane. The answers given by the appellant to the above questions highlight his deceitful conduct.

In his notice of appeal the appellant says he was convicted of 2 counts of fraud and this is confirmed by the endorsement on the back of the summary jurisdiction form.

Initially this form had an additional page with count 3. The complainant on count 1 is Jabulani Mbewe who wanted to bring a consignment of tyres. The complainant on count 2 was Zibusiso Zwelithini Moyo who wanted to bring in lighting equipment on behalf of a church and paid the appellant ZAR29 470,00.

The name of the complainant on count 3 is not clear on the indictment but it was alleged that the appellant took \$3 300,00 from this person saying he had trucks coming from South Africa and he wanted money to clear them, yet there were no such trucks.

The record does not show that the appellant pleaded to this charge.

A careful perusal of the record shows that the complainant on count 2 said he represented a church organization and did not want to have the matter prosecuted. The magistrate endorsed that the charge on count 2 was withdrawn before plea. The record also shows that no evidence was led on count 2. Evidence was led on count 1 from the complainant and another Eunice Marufu, and that evidence seems to relate to count 3 to which no plea was recorded. However, in the judgment the trial magistrate refers to Eunice Marufu as the complainant on count 2.

It was not disputed even by the complainant that the money that appellant got from her was a loan. She said she was happy to lend him the money and did not see anything criminal about it.

The appellant asked for a loan. The complainant granted him a loan. He promised to pay it back. The loan is still due although he has not yet paid. There is nothing to stop her from recovering the loan whether by simple demand or civil action. The manner in which a person makes use of money loaned to him, or uses it for something different cannot be retrospectively constitute a criminal act at the time the loan was obtained. For that reason I am of the view that the submission on behalf of the appellant that this is a purely civil matter has merit.

The position regarding the money obtained from the complainant on count 1 is on a completely different footing. The money was not loaned to the appellant. It was not for his own use and as such he had no right to use it for what he wanted. He had no discretion over its use. It was obtained specifically for the purpose that he told the complainant which was to pay for the clearance of the complainant's goods. Obtaining the money for that specific purpose, with that specific undertaking, then diverting or converting it to his own use to the prejudice of the complainant was clearly a criminal act on his part. He gave false explanations, he inflated the figures for the payments required. He refused to give the complainant documents to show how the money had been used.

Bearing in mind that there was no evidence led on count 2, and the fact that the money from 3<sup>rd</sup> complainant was a loan, I consider that the proper recording of the proceedings should have reflected that the appellant pleaded not guilty to counts 1 and 3 and should have been convicted on count 1 and acquitted on count 3.

The respondent had conceded the appeal against conviction saying that the evidence on count 1 revealed a civil and not a criminal case. He also submitted that the appellant should not have been charged but his company. It is important to note that right from the beginning the complainant dealt with the appellant in person. The appellant never involved his company or purported to be acting on behalf of the company. He was doing things himself personally. The money was paid to him. There was no contract or documentation involving the company. When he was charged he never raised the issue of his company. He was represented at the time several bail applications were made. He was still represented from the beginning to the end of the trial. No mention was made of the company. Even in this appeal he never made any reference to the company. We found the basis of the concession by the respondent strange and unsupported and it was rejected.

In our view the appellant was correctly convicted on the first count and that conviction is upheld.

On the sentence, the appellant was sentenced on the basis that the conviction was on 2 counts.

Since we find that the correct conviction is against count 1 only we are of the view that the sentence can be reduced proportionately. We therefore order as follows:

1. The conviction on count 1 is upheld.
2. The conviction on the 2<sup>nd</sup> count is set aside and he is acquitted.
3. The appellant is sentenced on count 1 to 2 years imprisonment with labour of which 6 months is suspended for 5 years on condition the appellant does not during that period commit any offence involving an act of fraud committed during that period, and the another 6 months is suspended on condition he refunds the complainant all the money that he failed to account for.

Kamocha J ..... I agree

*Shenje & Co* appellant's legal practitioners  
*Criminal Division, Attorney General Office* respondent's legal practitioners