

HERBERT MAPFUMO

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA AND MAKONESE JJ
BULAWAYO 24 JUNE 2013 AND 11 JULY 2013

Mr *R. Mahachi* for the appellant
Mr *T Makoni* for the respondent

Criminal Appeal

CHEDA J: In this appeal, appellant was charged with theft by false pretences, he pleaded not guilty, but, was however convicted and sentenced to 30 months imprisonment of which 10 months imprisonment was suspended on the usual condition of good behaviour. A further 10 months imprisonment was suspended on condition appellant restituted the complainant in the sum of Z\$18,000-00.

Appellant was not happy with that decision and hence this appeal.

The brief facts and background of this matter is that appellant and complainant were known to each other before this alleged offence. According to the State outline, on the 4th September 2004, appellant misrepresented to the complainant that he was selling his house in Nketa for Z\$39,500,000-00. He was paid \$18 600 000-00 as deposit in return he gave the complainant some cancelled bond which he claimed to be a Title Deed for the said house.

Appellant then wrote an agreement of sale purportedly selling the house he was staying in. It however turned out that the house was not for sale and complainant was prejudiced in the sum of Z\$18,600,000-00.

Appellant, who at the time of the trial was represented, told the court that he knew the complainant as a person who operated and/or ran a money lending business and the interests charged were usurious. He further stated that he was advanced a loan by complainant totalling Z\$4,410,000 between 8 August 2004 and 12th October 2004. He was

then forced to surrender his personal movable property namely, Ericson Cellphone, Telecel Line, his wife's sewing machine, his Diploma Certificate and other certificates. In addition he signed an agreement of sale of his house as security of the said loan. He left for Botswana after signing the agreement. When he came back and tried to repay, the complainant refused and insisted that the appellant should transfer his house to him. He, therefore, vehemently denied having taken money from the complainant by false pretences, as he argued that it was a loan.

It is his argument that there was no sale agreement which was contracted by the parties, but, that the transaction was a loan agreement which makes it a civil case and not a criminal one. It is his testimony that during the economic troubles which befell and engulfed the country at the relevant period, he borrowed money from the complainant and pledged his personal movable property itemised above. However, his attempt to re-pay in Zimbabwean dollars was not accepted by the complainant. The complainant then forced him to sign two "agreements" of sale, one for the personal items *supra* and the other for the house. These two loan agreements were signed well after the loan had been advanced by the complainant.

Mr *Makoni* supports this appeal. In his support he submitted that exhibits 2 and 3 are not sufficient proof of genuine agreements presented in an affidavit form.

The exhibits relied on by the court *a quo* were in my mind, designed to clothe a usury interest loan to complainant's benefit. All of this was designed to avoid detection by the fiscal authorities. Complainant, in my view lacked *bona fides* in his dealings. This is borne out by the fact that, at one stage he issued out summons in this court under case HC 1054/05 on the 16th June 2005 and subsequently withdrew it on the 18th July 2005. This is a clear indication that he was trying all he could to recover money which he believed had been lost due to inflation. This indeed makes sense because at that stage the Zimbabwe dollars was rapidly losing value.

It is trite that during the economic downturn the Zimbabwe dollar was losing value at an alarming rate. This economic melt down was felt by all and sundry in this country. It is an economic truism that those who were in the category of financial might unduly

reaped from the poor and desperate members of our society to an extent of bleeding them white as it were.

I can not find any plausible reason why he withdrew this action against complainant if his claim was legitimate as appellant would not have successfully defended this action bearing in mind that his claim was secured by Exhibits 2 and 3. In my view the only reason why he abandoned it, was because he wanted to be paid quicker and a criminal charge would have pushed complainant to panic and promptly pay him back the usurious loan. This withdrawal, to me, is an indication that he did not believe that he had a good and watertight claim against appellant. In other words there was some falsehood in his mind. The application of the Latin maxim, *falsus in uno, falsus in omnibus* (false in one, false in everything) becomes an inescapable conclusion in this matter.

The facts in the record are not sufficient to persuade the court to convict the appellant as it seems that there is a lot complainant was hiding. The State failed to prove its case beyond doubt

A concession has been made by respondent and I am of the view that the said concession has all the hallmarks of justice and therefore is proper.

The said conviction was not safe. It is for that reason that respondent is also not supporting it. The appeal is upheld.

Makonese J.....agrees

Messrs T. Hara and Partners, appellant's Legal practitioners
Attorney General's Office, respondent's legal practitioners