

PETER WILLIAM THOMAS

vs

THE STATE

HIGH COURT OF ZIMBABWE
CHIDYAUSIKU AND GWAUNZA JJ
HARARE 25th July 2000 and 29 May, 2002

Advocate E Morris for the Appellant
Mr P Munziri for the Respondent

Criminal Appeal

GWAUNZA J: The appellant, who had pleaded not guilty to that charge, was convicted, in the magistrates' court, of fraud and sentenced to 5 years imprisonment with labour with 2 years being suspended on condition of good behaviour.

He now appeals against both this conviction and sentence.

The allegations against the appellant were that on the 7th of March, 1997 and at the Standard Chartered Bank, Old Mutual Centre, he, with intent to defraud as well as to prejudice, Interstate Construction (Pvt.) Ltd., did misrepresent to the bank and in that way, did obtain a cheque book No. 01785324 in the name of Interstate Construction (Pvt.) Ltd. It was alleged further, against him, that from the cheque book which he had fraudulently obtained, the appellant had issued four cheques payable to his company, Peter Thomas (Pvt.) Ltd. He had then tendered the four cheques, whose amounts were \$15 756, \$50 000, \$50,000 and \$40,000 respectively, for payment. It was alleged that he did all this fully knowing that he was not authorised either to obtain the cheque book or sign the four cheques. It is further alleged that by his conduct, the accused had caused Interstate Construction Company potential prejudice to the tune of \$155 756.

The following facts are common cause or not disputed;

- (i) The complainant company Interstate Construction (Pvt.) Ltd. ('Intestate') rented from the accused and occupied, offices located at the same address as

the accused's company Peter Thomas (Pvt.) Ltd. This was at No. 19 Union Avenue, Harare.

- (ii) In January 1995 the Interstate, represented by its Managing Director, Mr W. Lessing ('Lessing') engaged the services of the appellant as a financial administrator for the company.
- (iii) To facilitate the discharge of his responsibilities the parties agreed that the appellant be made a signatory to Interstate's current account with Standard Bank, No. 01960393 ('Account No. 1').
- (iv) Also signatories to the same account were Interstate's managing director, Mr W. Lessing and two others, one from the side of the complainant and one from the side of the appellant.
- (v) The appellant's responsibilities included the issuance of cheques in favour of Interstate's debtors, in payment of the company's various debts and expenses.
- (vi) In December 1996, without the knowledge of the appellant, Lessing opened another current account in the name of Interstate, with the same bank, Standard Bank and at the same branch ('Account No. 2'). He was the sole signatory of this account (No. 9785524).
- (vii) At the end of January 1997 the appellant and Lessing had an altercation or confrontation in the appellant's office, arising from allegations levelled by Lessing against the appellant, that the latter was having an affair with Lessing's former wife Monica Margaret Lessing ("Monica").
- (viii) The confrontation resulted in Lessing being ordered by the appellant to 'vacate' the offices that his company, Interstate was occupying, an order that Lessing complied with.

- (ix) The bank continued to send the statements relating to the two current accounts, to the appellant's address, even though the statement relating to Account No. 1 was addressed to the "The Secretary" while that relating to Account No. 2 was addressed to "The Director" of Interstate.
- (x) Lessing and the appellant did not thereafter have any business dealings with each other.
- (xi) On the 7th and 8th March, 1997, the appellant went to the Bank, taking with him a statement addressed to No. 19 Union Avenue (his office), and relating to Interstate's Account No. 2. He requested information relating to the balance on the account and having obtained it, requested and obtained a new cheque book and wrote the four cheques that are the subject of the charge brought against him.
- (xii) Three of the cheques were written on the 7th, while the fourth one was made on the 8th of March, 1997. After getting Angela Mitchell who worked with him to co-sign the cheques, the appellant deposited them in the Bank Account of his company Peter Thomas (Pvt.) Ltd.
- (xiii) The bank's system detected the irregularity that the two signatories to the four cheques did not have the authority to sign cheques on this account, i.e. Account No. 2 and "unpaid" the cheques, after marking them "no authority to sign".
- (ixx) On Monday the 10th of March, 1997, the appellant received a telephone call from Lessing's former wife Monica, during which she asked whether he was aware of the existence of Account No. 2, whose sole signatory was Lessing.
- (xx) The appellant then, on the same date, wrote to the Bank (exh 8b) informing them that he had not been aware of the existence of Account No. 2 and that he had 'inadvertently' requested a cheque book and issued the four cheques in

question, against that account. He asked that the cheques be, accordingly dishonoured.

- (xxi) Charges of fraud were subsequently brought against the appellant, leading to his trial and the conviction and sentence now being appealed against.

At the hearing of the appeal, the appellant made an application for the leading of additional evidence not led at the trial, citing a number of reasons for that not having happened. The main thrust of his application was that his Counsel, Advocate Carter, due possibly to the effects of surgery that he had undergone sometime before the trial, had not conducted the appellant's defence as competently as he might otherwise have done. The application was opposed by the respondent. The Court reserved its judgment on this application, a matter which we will revert to later in this judgment.

As already indicated, the appellant pleaded not guilty to the charge of fraud, and pleaded two defences, that of mistake of fact and that of a claim of right arising from a debt he said was owed him by Interstate.

In this respect the appellant gave among others the following grounds of appeal;

- a) that the trial court erred in finding that the appellant's conduct constituted a criminal offence in the circumstances, which were that the Bank was in fact not deceived, nor was there any possibility that it would be so deceived.
- b) that the trial court erred in not accepting that the appellant established the defence of mistake of fact in that his conduct excluded the necessary mens rea to constitute the crime of fraud.
- c) that the trial court erred in not finding that the Appellant acted in pursuance of a claim of right arising from the debt owed them by Interstate Construction (Pvt.) Ltd. and
- d) that the court a quo erred in not finding that the State had failed to make out the crucial aspects of misrepresentation with intent to fraud, the absence of a claim of right or that there had been a reasonable or bona fide mistake on the appellant's part.

In relation to sentence the appellant gives the main grounds that the sentence of five years was so severe as to induce a sense of shock, and that the trial court had erred in not taking proper cognisance of such mitigating circumstances as that the accused was a first offender and that he had written to inform the bank of his error in signing on the wrong bank account as soon as he realised that this is what had occurred.

We will consider first whether the appellant's actions amounted to fraud and if so whether or not the evidence before the court established that the appellant had the necessary *mens rea* to commit the offence.

“Fraud” is defined as follows in Milton's “Southern African Criminal Law and Procedure”¹(with the essential elements underlined);

“Fraud consists in unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another”.

The same author asserts further ;

“in effect, this crime punishes any instance of dishonest misrepresentation that causes another some prejudice”.

Going by this definition, the State in our view had to prove, beyond any reasonable doubt, that the appellant;

- (i) fully knew that the complainant had a second account with the same bank
- (ii) that he fully knew that the statement of account he took with him to the bank and the cheque book he requested related to that account;
- (iii) that he did not have signing powers on that account and that
- (vi) he therefore unlawfully misrepresented to the bank that he had authority to obtain the cheque book and issue cheques from it and
- (v) that his intention in doing so was to defraud the complainant company thereby causing it prejudice.

We are not satisfied, in the light of the State case and the evidence before the court, that all the elements of fraud, as defined above, have been proved beyond a reasonable doubt.

It is common cause that the appellant received from the Bank, because it was addressed to his address, a statement relating to Account No. 2. It is also common cause that Lessing had opened this second account without the appellant's knowledge. More importantly, it is common cause that despite the confrontation between these two and the subsequent vacation by Lessing and therefore Interstate, of the offices rented from the appellant, the latter remained a signatory to Account No. 1. Lessing had taken no steps to have the appellant removed from the list of signatories. In this capacity, the appellant technically had the authority to request balances on the account from the Bank, and request new cheque books.

However, on the 7th of March 1997, the appellant went to the bank, holding the statement in relation to Account No. 2 and requested a bank balance, and cheque book, and issued three cheques payable to his company. His defence is that he genuinely believed he was dealing with Account No. 1, to which he was a signatory.

The issue of whether or not he dishonestly misrepresented that he had the authority not only to request the cheque book but also to issue the cheques he did can only be determined on the basis of whether or not he genuinely laboured under the mistake that he was transacting on Account No.1.

It was accepted that the appellant was ignorant of the existence of Account No. 2 until after he had issued the cheques in question. It is at the same time not disputed that he had had sight of the two statements since both were sent to his address, naturally showing different account numbers. It was contended for the State, and found by the trial court, that this fact should have alerted him to the existence of the second account.

¹ Vol. II "Common Law Crimes", 1996, page 202.

We do not share this view. The appellant asserted and was not challenged on this point, that he also, as a financial administrator, handled a number of other accounts not belonging to Interstate. His evidence was that what was important for him to note was the name of the account, not its number. We do not find this explanation to be unreasonable, especially given that both accounts were with the same branch of the bank (and presumably had the same branch number printed on the cheques), statements relating to both were sent to the appellant's address, and he was still a signatory to Account No. 1. In any case anybody familiar with cheque book accounts knows such numbers are invariably long.

This court does not put much weight to the evidence that because the statement relating to account No. 1 was addressed to the "Secretary" while that relating to Account No. 2 was addressed to the "Director", the applicant should have realised that it was a different account. In the absence of the specific name of an addressee, it is not unreasonable for the appellant to regard any mail pertaining to an account that he managed and that was addressed to his office, as something he was authorised to open.

That being the case we are satisfied the State failed to prove beyond a reasonable doubt that the appellant knew the complainant had a second account with the same branch of the bank and that the account in respect of which he requested the cheque book in question related to that account.

When all this is added to the facts that;

- (i) the appellant used his own name in requesting the balance and cheque book on the account in question, and
- (ii) that he wrote to the bank immediately upon realising his mistake in attempting to transact on account No. 1;

the probabilities are increased that he genuinely believed he was dealing with an account that he believed was the one in respect of which he had signing powers.

It therefore follows that if the appellant genuinely believed he was dealing with account no. 1, being in ignorance of the existence of the second account, he could not have known that he had no authority to request the cheque book that was given to him.

The appellant went on to issue cheques from the cheque book. If it is accepted, as this court does, that the appellant laboured under a genuine mistake of fact when he requested the bank balance and cheque book from the bank, which turned out to have related to an account whose existence he was not aware of, it must also be accepted that he issued the four cheques in question genuinely believing he had the authority to do so. It also follows that when he presented the cheques for payment he was under the continued mistaken belief that the cheques had been drawn on an account in terms of which he had signing powers. The effect of all this is to rule out any dishonest misrepresentation to the bank, by the appellant.

The case before the court is not that the appellant issued cheques for amounts he was not entitled to, from an account that he was signatory to (ie account no. 1). It is that he issued cheques in relation to an account he knew he was not a signatory to, thereby attempting to defraud the complainant. This court does not find credible the evidence of Lessing that the agreement between the two sides was that any two signatories on a cheque had to each represent one side, i.e. Intestate's or the appellants. This is because except for Lessing, the other witnesses, Cronje and Mitchell, (albeit complainant's) and the appellant, denied knowledge of this arrangement. Certainly the bank had not been told of the arrangement.

Although somewhat evasive on the issue, Lessing did not rule out the possibility of Interstate owing money to the appellant. As long as it is also accepted that as a signatory to account no.1 the appellant had the authority to issue cheques from it to pay Interstate's debts (including one owed to his company) and as long as it is accepted that any two signatories to that account could sign cheques on it, we are not satisfied that the State has proved beyond a reasonable doubt that the appellant, in erroneously dealing with Account no.2 had the necessary *mens rea* to commit the crime he is charged with nor, more specifically, to defraud Interstate and cause it

actual or potential prejudice. This is so even had the appellant signed cheques from account No. 1.

The court finds any such intention to have been negated by the fact that immediately upon gaining knowledge of both the existence of Intestate's second account and his lack of authority to sign and issue any cheques on it, the appellant wrote to the bank informing them of his mistake and asking that the cheques should be dishonoured. That the bank had already on its own dishonoured the cheques does not, in our view, detract from the appellant's genuineness in attempting to correct a wrong he had inadvertently committed.

The probability of the appellant's mistaken belief is increased to the point of near, if not total, certainty when one considers that the actions complained of would, given the appellant's profession and therefore familiarity with banking processes, be totally inexplicable otherwise. If a layperson knows one cannot simply affix one's signature to a cheque without being authorised to sign it (that is why such people will invariably try to imitate the genuine signatory's signature), it is highly improbable that someone engaged in the business of financial administration and all that it entails in respect of signing cheques, would fail to appreciate the futility and danger of signing cheques on an account to which he is not signatory.

By the same token we find it unlikely that the realisation that the cheques had been erroneously issued and in circumstances that would have exposed the appellant to criminal charges, only dawned on the appellant on being informed that he in fact had no signing powers in respect of that account. As a financial administrator the appellant surely did not need to be told that one only signs cheques where one is authorised to do so. Therefore if, for example, the appellant on Friday the 8th of March did not know the consequences of signing and issuing a cheque he was not authorised to sign, or knowing them, was careless of the serious risk he took, he is not likely to have suddenly realised the folly of what he had done upon being informed by Mrs Lessing that he had no signing powers on the account from which he had signed four cheques only three days previously. Consequently, his actions in proceeding

with such a course of action, we are persuaded, cannot be explained except in terms of a serious and genuine mistake of fact on his part.

One deserved criticism of the appellant's actions could perhaps be the fact that he must have had a reasonable belief that Lessing would not have wanted him to continue dealing with him professionally after the confrontation and its aftermath despite the fact that he remained signatory to the first account. Accordingly, he should not have contemplated dealing with the account (even if it had been the correct one) without reference to Lessing. While his actions smack of an intention to avoid Lessing, and quietly pay himself for services rendered to the complainant, they do not, in our view and given the facts of this case, suggest a criminal intent. This fact is not altered by Lessing's evidence, which was disputed by the appellant and was also not conclusive as to who had authored the letter, that he or his son had written a letter to the appellant formally terminating his services. Nor is it altered by the fact that the appellant wrote in his warned and cautioned statement that he had stopped working for the complainant company at the end of January 1997.

The appellant's responsibilities involved managing the accounts and financial affairs of Interstate. While this part of his responsibilities did end with the confrontation between him and Lessing, it is evident that for reasons best known to Lessing, the part of the appellant's responsibility relating to the signing authority on Account No.1 remained. Lessing opened Account No. 2 in December, 1996. He and his company were at that time located at the same address as the appellant so he used that address. Significantly, the two had not yet had their confrontation. Had Lessing wished to exclude the appellant from signing any of the company's cheques on the first account, he could surely have easily done so formally. Instead, he went on to open another account (No.2) and omitted, consciously, to inform the appellant of this fact. This suggests some form of bad faith on the part of Lessing. His explanation that he had been advised by someone at the bank that that was the best way to exclude an unwanted signatory did not sound too credible. There normally is a process that one follows to change the signing regime concerning any current account. Since Account No. 2 was opened in December 1996, over a month before the confrontation with the appellant, one may well ask, what had stopped, Lessing from following this process?

That undoubtedly would have been a more effective way of preventing the appellant from signing any Interstate cheques, in his or anybody's favour. It would also have been the logical way to complete the process of 'firing' the appellant that the letter from Lessing or his son had started.

It appears to us that had the appellant been removed from the list of signatories to Account No. 1 (exh 3) and informed about it, he would, in all likelihood, not have taken the actions he did, despite receiving the statements at his office. It is also evident that, had the Appellant and Mitchell signed cheques pertaining to Account No. 1 (whether or not they were dishonoured) the appellant might not have been facing the charges he is now facing. The appellant not only had signing powers thereto, he was also owed money by Interstate, in payment of which, technically, it was within his authority to issue cheques. The second defence that the appellant pleaded, that of a claim of right, would have been more appropriate under those circumstances, especially given the fact that the quantum of the debt was in question. In the light of our finding in this matter, it is not necessary for us to consider the merits or demerits of this defence.

All in all we find, in the light of the appellant's proven defence of mistake of fact, that the State failed to prove beyond any reasonable doubt, that the crime of fraud or even attempted fraud had been committed.

This finding makes it unnecessary for the court to consider the application by the appellant for leave to adduce fresh evidence on appeal.

In the premises, the appeal succeeds in its entirety.

The conviction is quashed and the sentence set aside.

CHIDYAUSIKU JP (as he then was): I agree.