TENDAYI WASHINGTON NYAMAJIWA
versus
THE STATE

HGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 23 July 2015 & 7 October 2015

Concession by the National Prosecuting Authority in terms of s 35 of the High Court Act, [*Chapter 7:06]*

F Murisi, for the appellant
R Chikosha, for the respondent

HUNGWE J: The appellant was convicted of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act, *[Chapter 9:23]*. He was sentenced to eight years' imprisonment of which three years imprisonment was suspended on the usual conditions of good behaviour. Dissatisfied with both conviction and sentence, the appellant filed a notice of appeal against both conviction and sentence.

The following facts are common cause. The appellant operates an unregistered car dealership. The appellant was contracted by the Urban Development Corporation, the complainant, to supply Toyota Corolla motor vehicles. The complainant's board made a recommendation that the motor vehicles be bought from the appellant without going to tender. It is not in dispute that one of the board members was well known to the appellant. Appellant was invited to bring a sample. After the show vehicle passed AA tests, the appellant was paid for the total cost of the vehicles through an RTGS direct deposit into his bank account on 19 October 2012. The appellant made a cash withdrawal of the full amount the next day. That very day he lost the money to thieves before he had travelled to South Africa where he intended to buy and import the vehicles from. He reported the theft to police. The appellant notified the complainant of this sudden turn of events. He maintained this position throughout. A police officer confirmed that the appellant had explained this from the outset.

The appellant took to the points on appeal.

The first point taken was that the trial magistrate misdirected himself by making a finding that the complainant was a credible witness when his evidence was largely hearsay. The second point was that the trial magistrate misdirected himself when he concluded that the appellant misrepresented information to the complainant when in fact complainant had lost the complainant's money to thieves and had the reported the matter to police. And finally the appellant attack conviction on the basis that the court a quo erred in failing to appreciate that the appellant's explanation regarding the circumstances surrounding how the money was lost was a reasonably possibly true. As such the conviction was improper.

The point upon which this appeal turned in my view is whether, on the evidence, the state had proved beyond doubt a reasonable doubt that the appellant had **misrepresented** to the complainant that he had the capacity to supply three used Toyota motor vehicles with an intent to defraud. Fraud is an offence whose main element is the making of a misrepresentation with an intent to defraud. Generally, fraud is defined and understood as a false representation of a matter of fact - whether by words or by conduct, by false or misleading allegations, or by concealment of what should have been. In other words fraud consists in an intentional misrepresentation of material existing fact made by one person to another with knowledge of its falsity. It will constitute fraud if a person intentionally misrepresents or conceals information in order to deceive or mislead and the person so misrepresenting realises that someone may act on the misrepresentation to their actual or potential prejudice. Section 136 of the Act sets out clearly the essential elements of this offence by breaking the definition into plain segments into which it becomes easy to determine which element was satisfied and which was not.it is clear from the admitted facts that the complainant did not go to tender. How then did it identify its supplier? The facts show that the Board Chairman identified the appellant as a supplier. That explains why he was awarded the business to supply this order. Appellant did not in any way make any misrepresentations to either the Board Chairman or his chosen representative. They invited him to supply as he was "known" to be a supplier of used cars.

That is not the end of the matter.

Upon his losing the cash payment made into his account by the complainant, he had reported the theft to the police so that they can investigate the theft. What they established was not placed before the court during trial. Had this been done, it would have cleared the air regarding the veracity or truthfulness of the report itself. Without it, the appellant's story

remains unchallenged. Whether one doubts the truthfulness of the report of theft, the fact remains that appellant gave a reasonably possibly true story in respect of how he failed to supply as agreed.

In my view the matter regarding whether the offence of fraud has been proved beyond a reasonable doubt remains doubtful in light of the fact that the fact of misrepresentation was never proved. Whilst the indictment alleges that the appellant misrepresented to one Esther Mukome. That same Esther Mukome told the court that the appellant came to her office from the Board Chairman's office. He was introduced to her as the supplier. There is nowhere in her evidence where she alleged that the appellant claimed that he owned motor vehicles which the complainant wanted to buy. It was understood by everyone involved that he was a supplier of the same. I would have found differently had the fact been that the appellant had pretended that he owned cars which were ready for delivery upon payment. Instead, the evidence on record is that the complainant agreed to make payment before the motor vehicles had been specifically identified, let alone delivered. One must therefore give the appellant the benefit of the doubt, in respect of whether such a representation was ever made, and if it was, whether the appellant made it with an intention to deceive. As would happen in such deals there is no record of this transaction in the complainant's files. One would have expected the complainant, a large corporate, to have some form of record regarding the capital outlay before the goods were delivered. It seems to me that the absence of this is not without reason. The reason is, someone in the Chairman's office identified the appellant hoping to give business to an acquaintance but unfortunately it all went wrong. I do not see how it can be shown that such a person internally and nicodemously identified could be said to have made a misrepresentation with an intent to deceive. The parties conduct after the loss of the money to thieves also points to the unlikelihood of an intent to deceive. The parties tried to resolve the matter without police involvement. If it had suddenly dawned on the complainant that they had been scammed, they would not have entered into negotiations with the appellant regarding the refund of the stolen money. In my view, whilst one cannot categorically conclude that the appellant did defraud the complainant, there is also the possibility that in fact the appellant did not do so but genuinely lost the money to thieves. Where such a doubt exists, it must always be resolved in favour of the appellant.

It is for this reason that we believe that the concession given by the state was well made.

In the result the appeal ought to succeed. The verdict of the court *a quo* is altered to read:

"Not guilty and acquitted."

BERE J authorises me to state that he agrees with this judgment.

Murisi & Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners