

THE STATE
versus
1. LOVEMORE KUROTWI
2. DOMINIC MUBAIWA

HIGH COURT OF ZIMBABWE
BHUNU J

HARARE, 15 February 2011, 13 February 2015 and 4 May 2016

Assessors: 1. Mr Chidyausiku.
2. Mr Shenje.

Criminal trial

C. Mutangadura, for the State
Mrs B. Mtetwa, for the 1st accused
L. Uriri, for the 2nd accused

BHUNU J: This is an application for the discharge of both accused persons at the close of the State case in terms of s 198 (3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The section provides for the acquittal of an accused person at the closure of the State case if the court is of the opinion that there is no evidence that the accused committed the offence charged or any other offence upon which he might be convicted arising from that charge.

The first accused is an entrepreneur in the diamond mining industry operating under the style of Core Mining and Mineral Resources (Pvt) Ltd a South African registered company in which he is a director and shareholder. The 2nd accused is the erstwhile Chief Executive Officer of the Zimbabwe Mining Development Corporation hereinafter referred to as ZMDC.

Benny Steinmeitz Group Resources (BSGR) is a company based in South Africa with interests in extraterritorial diamond mining ventures.

ZMDC is a State owned public company duly registered as such in terms of the Zimbabwe Mining Development Act [*Chapter 21:06*] whereas Marange Resources (Pvt) Ltd is a subsidiary company of ZMDC. In that capacity it is mandated among other things to invest and engage in mining business ventures on behalf of the State.

Sometime in 2006 it acquired special grants to prospect and mine diamonds in the Marange district. The special grants covered a total area of more than 66 648 hectares in extent. For want of adequate financial resources it sought joint venture partnerships with reputable competent financiers in the industry.

Both accused now stand charged with fraudulently causing the government of Zimbabwe actual prejudice to the tune of two billion United States dollars. It being alleged that both accused persons acting in consort and common purpose through a series of fraudulent misrepresentations to the government of Zimbabwe, the Ministry of Mines and Mining Development and ZMDC induced ZMDC to enter into a joint venture agreement of diamond mining with Core-Mining to the loss and prejudice of government in the sum of Two Billion United States dollars.

The factual basis upon which the charge is founded is to a large extent well documented and a matter of common cause. The *viva voce* evidence of the bulk of State witnesses is somewhat tainted as most of them were either accomplice witnesses or persons with special interest in the outcome of this trial.

At the inception of the trial Mrs *Mtetwa* took a preliminary point arguing that the charge was defective in so far as it did not particularise the natural persons to whom the alleged misrepresentations were made. I overruled the objection on the basis that there was no legal requirement that in a charge of fraud the State must particularise the natural person to whom the misrepresentation was made. Section 136 of the Criminal Law (Codification) and Reform Act [*Chapter 9:23*] under which the common law offence is now codified simply defines fraud as:

“136 Fraud

Any person who makes a misrepresentation□

- (a) intending to deceive another person or realising that there is a real risk or possibility of deceiving another person; and
- (b) intending to cause another person to act upon the misrepresentation to his or her prejudice, or realising that there is a real risk or possibility that another person may act upon the misrepresentation to his or her prejudice;

shall be guilty of fraud if the misrepresentation causes actual prejudice to another person or is potentially prejudicial to another person, and be liable to□

- (i) a fine not exceeding level fourteen or not exceeding twice the value of any property obtained by him or her as a result of the crime, whichever is the greater; or

- (ii) imprisonment for a period not exceeding thirty-five years; or both”

It is plain that the section makes no distinction between a natural and juristic person. For that reason, it is sufficient for the State to allege that a misrepresentation was made to an artificial person.

In terms of s146 (2) (a) of the Act when framing a charge, it is sufficient for the State to describe the charge in the words of the enactment creating the offence or in similar words. If however the accused person needs to know the natural persons to whom the misrepresentation was made he or she may request for further particulars in terms of s 177 of the Criminal Procedure and Evidence Act [*Chapter 9:09*] as Mrs *Mtetwa* did in this case.

The application for further particulars was however ill-conceived and misplaced in that the summary of State case in her possession particularises the natural persons to whom the alleged misrepresentations were made. For the avoidance of doubt the summary states in clear unambiguous terms that the misrepresentations were made to the Minister of Mines and Mining Development Obert Mpfu, the ZMDC Chief Executive Officer Dominic Mubaiwa and various other persons mentioned in ZMDC minutes. There is therefore no substance in Mrs *Mtetwa*'s complaint that her client was handicapped in the preparation of his defence for want of information as to the natural persons to whom the alleged misrepresentations were made.

In her heads of argument Mrs *Mtetwa* further argued that her client could not be prosecuted in his personal capacity because the alleged offence was committed in the course of duty as company director. Placing reliance on the case of *Mkombachoto v CBZ and another*¹ she strenuously argued that it was a principle of company law that actions done for and on behalf of a company should not be visited on a director of the company in his personal capacity unless a basis for piercing the corporate veil has been established. The *Mkombachoto* case (*supra*) was a civil matter. It appears counsel got all mixed up and sought to apply inapplicable civil law principles to criminal proceedings. While the corporate veil doctrine might protect a director against personal civil liability it certainly does not protect him against criminal conduct committed while going about his company duties.

¹ 2002 (1) ZLR 21 (H)

A company director who commits a crime while going about his company's business attracts personal criminal liability under s 318 of the Companies Act [*Chapter 24:03*] as read with s 385 (7) of the Criminal procedure and Evidence Act [*Chapter 9:07*].

Section 318 (1) of the Companies Act prohibits directors from indulging in fraudulent conduct while conducting their company's business while ss 3 criminalises such conduct and it reads:

- “3) Without prejudice to any other criminal liability incurred, where any business of a company is carried on with such intent or for such purpose as is mentioned in subsection (1), every director of the company or *other* person who was knowingly a party to the carrying on of the business in manner aforesaid shall be guilty of an offence and liable to a fine not exceeding level ten or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.”

It should be noted that the above section opens the door for the prosecution of company directors for any other criminal offences they might commit while going about their company's business. To that end s 385 (7) of the Criminal Procedure and Evidence Act renders evidence admissible against the company also admissible against the director whether or not the company is also charged with the same offence.

What this means is that it is perfectly permissible to charge both the director and his company either jointly or separately for the same offence committed in the course of company business. In other words a company director or employee can be an accomplice to a crime committed by his company. For the fore going reasons I can only come to the conclusion that the doctrine of corporate veil has no place in this case. It provides no shield for the accused's alleged fraudulent criminal conduct. He can therefore not hide behind the corporate veil.

I now turn to consider the matter on the merits. It is common cause that ZMDC was desirous to enter into a viable joint mining venture with an investor with a sound financial footing on behalf of its principal the government of Zimbabwe. The 1st accused introduced BSGR to government and ZMDC as a viable investor in the diamond mining industry. Due to the scourge of economic sanctions against Zimbabwe both ZMDC and BSGR elected to transact business through special purpose vehicles being Marange Resources (Pvt) Ltd and Core Mining (Pvt) Ltd respectively.

Now, the allegations are that both accused persons acting in common purpose fraudulently misrepresented to government through the ministry of Mines and ZMDC that Core-mining was a special purpose vehicle for BSGR standing as guarantor for Core-Mining.

As a result of such misrepresentation government approved the joint venture agreement between Marange Resources (Pvt) Ltd and Core-mining under the mistaken belief that Core-Mining was a special purpose vehicle for BSGR with the capacity to finance the whole joint venture mining enterprise to the tune of US\$2 billion. It is alleged that both accused persons fraudulently held out to the Minister of Mines and ZMDC officials that Core-Mining had the capacity to carry out its mandate when in truth and in fact they knew that it was a mere shelf company with no capacity whatsoever to carry out such a mammoth task.

It is common cause that the 1st accused Lovemore Kurotwi made various representations to both the minister of mines and ZMDC in which he held out that Core Mining was a special purpose vehicle of BSGR capable of financing the joint diamond mining venture to the tune of US\$2 billion. The critical issue for determination is however, not that the representations were made but whether they were made fraudulently with the intention to mislead the complainant to enter into a fictitious joint mining venture with a bankrupt entity to its loss and prejudice as alleged by the State.

The alleged representations made by the accused are amply captured in accused one's letter dated 30 March 2009 addressed to the Minister of Mines Obert Mpfu. The letter reads:

“Dear Minister Mpfu,

RE: JOINT VENTURE WITH ZIMBABWE GOVERNMENT THROUGH ZMDC TO MINE MARANGE DIAMONDS.

Reference is made to the meeting we held in your Bulawayo office on Friday 27th March 2009 at which my partner was also present and at which we discussed the above subject.

We discussed the intended investment in the above mentioned mine by BSG Group which I represent in Zimbabwe. Our discussion has culminated in the attached documents which I am attaching by way of introducing Bateman Engineering, a subsidiary of BSG Group which is the holding company involved in mainly mining (particularly diamonds), processing and engineering activities throughout the world as per the enclosed introductory profile summary.

I have worked with this organisation in the last three years and my association with the group has shown me that they can and have the capacity to go a long way in resuscitating our economy in Zimbabwe. Having worked with the group and practically seen their seriousness and singleness of purpose, I am convinced that this initial project we intend to carry out with them, an investment worth up to 2 billion, will lead to the opening up of bigger projects and investments in the future.

May I also take this opportunity to acknowledge and thank you for giving us an audience at such short notice which we fully appreciate. Please feel free to go through the enclosed information and get back to me at your earliest convenience.

Yours sincerely

Signed

Lovemore Kurotwi.”

True to his word on 5 May 2009 BSGR wrote to the Chief executive Officer ZMDC expressing its willingness to fully support Core Mining in the proposed joint venture but set conditions which had to be fulfilled before it could participate in the joint venture. The letter reads in part:

“Subject to the provisos listed below, BSGR intends to fully support Core in all aspects of its obligations in the Marange Diamond Project (operation, management, financing, processing) once final binding agreements have been concluded.

The above intention by BSGR is subject to the following:

1. that the Core diligence report indicates to BSGR that the Marange Diamond Project can be economically mined in accordance with all BSGR’s internal investment criteria;
2. That all legal tenure matters relating to the Marange Diamond Project area have been resolved (or suitable comfort has been provided to BSGR for the resolution of such tenure matters);
3. That final agreements in respect of the Marange Diamond Project are concluded between the ZMDC and Core that are acceptable to BSGR.
4. That all diamonds to be produced from the Marange Diamond project continue to be certified in terms of the Kimberley processing Certification Scheme ; and
5. That all parties to the Marange Diamond project Joint venture will adhere to the principles of good corporate governance. The parties will ensure that the operations are conducted in a way that is consistent with the rule of law and protects all stakeholder(s) and Shareholders’ rights. The parties shall ensure that there will be adherence to all anti-corruption laws. The parties shall adhere to international norms in this regard and shall ensure that no corruption practice take place.

...

Yours faithfully

Signed

MARC STRUIK
Director”

On the basis of the above undisputed letter the Court finds as a matter of fact that the 1st accused was in fact telling the truth when he made the representation to the minister and

ZMDC that Core Mining was a special purpose vehicle of BSGR. It is also common cause that BSGR met all the prescribed requirements for the joint venture to be consummated. No question of misrepresentation of facts can therefore arise in this respect.

It is however plain that BSGR was raising issues of fundamental importance which needed to be resolved before any sane investor could commit himself to any investment. Issues of due diligence, security of tenure, contractual validity, freedom from corruption, adherence to international norms and the rule of law are critical considerations to any investor before he can sink his hard earned money into any investment. Thus before the parties could conclude a lawfully binding contract, the conditions set by BSGR had to be dealt with and addressed to the satisfaction of all the parties concerned.

The elementary rules of contract are that for there to be a valid contract there must be a meeting of the minds in the sense of offer and acceptance communicated between the parties. While the offeror may set conditions for acceptance the offeree's acceptance must be candid, unequivocal and devoid of any doubt or conditions. In the words of Professor Christie²:

“To be effective in creating a contract, acceptance must be so clear and unequivocal as to leave no reasonable doubt in the offeree's mind that his offer has been accepted... A purported acceptance in the form of, ‘Yes but...’ will not do, because by seeking to add to or subtract from the terms of the offer it does not create the necessary agreement but leaves the negotiations open.”

In the South African case of *Price v Price*³ the court quoting from an American textbook⁴ observed that:

“Any words or acts of the offeree indicating that he declines the offer or which justify the offeror in inferring that the offeree intends not to accept the offer, or give it further consideration, amounts to a rejection. This principle is most commonly illustrated where a counter-offer or a conditional acceptance which amounts to a counter-offer is made by the offeree. This operates as a rejection of the original offer.

The reason is that the counter-offer is interpreted as being in effect a statement by the offeree not only that he will enter into the transaction on terms stated in his counter-offer, but also by implication that he will not assent to the terms of the original offer. An answer purporting to accept upon condition is not an acceptance but is in effect a counter-offer, because it states in substance that the offeree will contract on the terms of the original offer if some addition or subtraction is made from them, but implies that otherwise he will not comply.”

² . R.H Christie Business Law in Zimbabwe 1998 edition at page 39

³ . (696/89) [1990] ZASCA 87.

⁴ Williamston on Contracts (Third edition) Vol. 1 paragraph 51 (pages 164 – 167)

The principle was succinctly articulated in *Sands & Company INC*⁵ where the court remarked that:

“It is a fundamental principle of contract law that a valid acceptance must comply with the terms of the offer, and, if qualified with conditions, it is equivalent to a rejection and counter-offer”

What this means is that BSGR’s conditional acceptance was a rejection of the original offer coupled with a counter-offer to stand as financial guarantor to Core Mining on its own terms in the proposed joint mining venture.

Thus if the parties were to conclude a valid binding contract, the above conditions set by BSGR had to be met or a compromise reached first before a valid contract could be entered into between the parties.

It is common cause that the conditions stipulated by BSGR in its counter-offer were never met or addressed. Confronted by Mrs *Mtewa* counsel for the 1st accused with the difficult question how there could have been a valid contract when BSGR’s conditions were never met, Mr Masimirembwa the erstwhile ZMDC chief executive, a lawyer by training retorted that the counter-offer merely amounted to a suspensive condition.

That response is misplaced and erroneous at law. Consensus is of the essence of contract. There can be no contract where there is no agreement as to the terms of the contract and the parties are not *ad idem* as is the state of affairs in this case. A suspensive condition can only come into play where the parties are in agreement and they agree to suspend the operation of the contract until the happening of a particular event. Since there was no agreement in this case there was no conditional contract that came into being. That being the case, there was nothing to suspend in the absence of any contractual agreement.

It was therefore untenable, illogical and remiss of government and ZMDC to insist on Core mining being funded by BSGR with the full knowledge that its conditions had not been met.

The long and short of it all, is that in the absence of any agreement the proposed contract for BSGR to stand as guarantor for Core Mining as its special purpose vehicle was aborted and BSGR moved out of the picture.

Despite BSGR having moved out of the picture, ZMDC continued to negotiate with Core Mining resulting in the signing of a memorandum of agreement between Marange Resources (Pvt) Ltd and Core mining and Minerals Resources (Pvt) Ltd on 24 July 2009.

⁵ 2005 NY Slip Op 30510 (U)

ZMDC signed and stood as guarantor for Marange Resources whereas Subithry Naidoo and Licht Yehuda signed and stood as guarantor for Core Mining. The purpose and terms of the agreement are in the introductory clause 2 para(s) 2.1.3 to 2.2.3 which provide as follows:

- “2.1.3 Marange wishes to strategically partner with Core Mining which shall provide funding as well as financial, technical management and operational expertise upon the terms and conditions of the shareholders agreement and this agreement, to develop, mine, market and beneficiate diamonds and/or other material mined from the concession areas.
- 2.1.4 Marange is a wholly owned subsidiary of ZMDC and ZMDC as shareholder hereby guarantees the obligations of Marange under and in terms of this Agreement in terms of clause 16 of this Agreement.
- 2.1.5 Core Mining is a company in which at least 50% of the issued share capital shall be held by Subithry Naidoo and Licht Yehuda hereby guarantees the obligations of Core Mining under and in terms of this Agreement in terms of clause 17.
- 2.2 Marange or its nominee and Core Mining shall incorporate a JOINT VENTURE COMPANY in Zimbabwe as soon as reasonably possible after the signature date, the issued ordinary shares of which shall, immediately after incorporation, be subscribed for and be held as 50% by Core Mining and 50% by Marange or its nominee, in order to fulfil the functions referred to in clause 2.1, on the terms and conditions of this Agreement.
- 2.3 Marange or its nominee and Core Mining jointly undertake to procure that THE JOINT VENTURE COMPANY agrees in writing to be bound by and perform all of its obligations as set out in this agreement.”

The above document speaks for itself. In terms of the well-known parole evidence rule no one can speak on its behalf as it is the exclusive memorial of the parties' agreement. The parties are strictly bound by the four corners of the contractual document. The parties cannot add or subtract anything from the contractual document.

In *Minister of Home Affairs and another v Trimu Agencies and Distributors*⁶ the Supreme Court held that the effect of the parole evidence rule is that where a contract is

⁶ 2000 (2) ZLR 191 (S)

incorporated into a single and complete written document that reflects the entire agreement a party to that agreement cannot lead evidence to add to or modify that written agreement.

It is clear in this case that the memorandum of agreement makes no reference at all to BSGR as guarantor for Core Mining. That being the case, neither party nor the court can incorporate BSGR into the contract when the written document signed by the parties freely and voluntarily with their eyes wide open makes no mention of BSGR at all.

Both government and ZMDC cannot be heard to complain that they were duped into signing the contractual document under the mistaken belief that BSGR was standing as guarantor for Core mining when the contractual document makes no mention of BSGR at all.

It is also inconceivable that both government and ZMDC could have believed that BSGR was the guarantor for core Mining when Subithry Naidoo and Licht Yehuda signed the contractual document in their personal capacities as guarantors without any reference to BSGR.

Considering that the contractual document was subjected to scrutiny by government lawyers before execution it is highly unlikely and not in the least probable that they too could have been mistaken that BSGR were the guarantors for Core Mining when the written contract stipulated in clear and unambiguous terms that Subithry Naidoo and Licht Yehuda were the guarantors.

It is wholly unbelievable that government, ZMDC and Marange Resources could have genuinely believed that BSGR was standing as guarantor for Core Mining with the full knowledge that they had not accepted its counter offer. It therefore boggles the mind how all these three eminent entities backed up by proficient lawyers could have entertained the idea of contracting with BSGR without the contractual basics of offer and acceptance.

On the basis of the above findings of fact the court comes to the conclusion that the government, ZMDC and Marange Resources having failed to accept BSGR's counter offer they elected to contract with Core Mining on the terms and conditions stipulated in the memorandum of agreement of 24 July 2009.

The memorandum of agreement required that a due diligence test be carried out on Core Mining to assess its capacity to discharge its contractual obligations in terms of the proposed joint venture agreement before signing a shareholder agreement.. To that end it is alleged that accused one in collusion with the 2nd accused led ZMDC on a wild goose chase by conducting a sham due diligence test in South Africa where they misrepresented certain massive diamond mining operations as belonging to Core-Mining. As a result of such

misrepresentation government and ZMDC were induced to approve the joint venture agreement to their loss and prejudice to the extent of US\$2 billion.

It was common cause that a due diligence test was conducted in terms of the memorandum of agreement. A factual dispute however arose concerning the status and ownership of the mining operations exhibited to ZMDC officials during the exercise. This prompted the State to apply for the court to go for an inspection *in loco* in South Africa to view the evidence which could not be brought to court. I granted the application under judgment number HH 285-12.

As this was a novel unprecedented exercise it might be necessary to outline the steps and procedures we adopted to facilitate the holding of an inspection *in loco* in South Africa.

1. The State through our embassy requested for Mutual Legal Assistance from the South African Department of International Relations and Cooperation to conduct an inspection *in loco* at Pikwane Diamonds and the Vaal Bosch diamond mining Area in Kimberly, South Africa.
2. Following the observance of all protocols permission was dully granted by the South African authorities to conduct the inspection *in loco* in their country in terms of their International Co-operation In Criminal Matters Act 75 of 1996.
3. The inspection *in loco* was conducted on 12 December 2014 in terms of s7 which provides that:

“Foreign requests for assistance in obtaining evidence

7. (1) A request by a court or Tribunal exercising jurisdiction in a foreign State or by an appropriate government body in a foreign State, for assistance in obtaining evidence in the Republic of South for use in such foreign State shall be submitted to the Director- General.
- (2) Upon receipt of such request the Director General shall satisfy himself or herself
 - (a) That proceedings have been instituted in a court or tribunal exercising jurisdiction in a the requesting State; or
 - (b) That there are reasonable grounds for believing that an offence has been committed in the requesting State or that it is necessary to determine whether an offence has been so committed and that an investigation in respect thereof is being conducted in the requesting State.

- (3). For purposes of subsection (2) the Director-General may rely on a certificate purported to be issued by a competent authority in the State concerned, stating the facts contemplated in paragraph (a) or (b) of the said subsection.
- (4) The Director-General shall, if satisfied as contemplated in subsection (2), submit the request for obtaining assistance to the minister for his or her approval.
- (5) Upon being notified of the Minister's approval the Director-General shall forward the request contemplated in subsection (1) to the magistrate within whose area the witness resides."

Before convening the court sitting, the designated magistrate and I agreed that the magistrate was merely a facilitator in proceedings which were essentially those of a Zimbabwean Court. His role was to convene the Court and grant the Zimbabwean Court permission to conduct its business on South African soil.

The proceedings commenced with the South African prosecutor presenting the purpose of the sitting to the magistrate. The magistrate acknowledged and welcomed the Zimbabwean Court to South Africa. He then granted the Zimbabwean Court permission to convene on South African soil. Thereafter he handed over the proceedings to the Zimbabwean Court dully constituted on South African Soil.

Once properly constituted as a Zimbabwean Court on South African soil I took over the judicial mantle and commenced proceedings in terms of Zimbabwean rules and procedures.

At the commencement of the hearing Mrs *Mtewa* indicated that the defence had hired a South African Advocate to assist with clarification on certain issues since we were on foreign land. I overruled the application on the basis that this was a Zimbabwean Court to which South African lawyers ordinarily have no audience without following set procedures.

After handing over the judicial mantle the magistrate remained with the court throughout observing the proceedings but without taking any part in the deliberations.

From the court room the court proceeded to Pikwane Diamond offices at 88 Dutoit Street Kimberly. All the state witness comprising Gloria Mawarire, Tichaona Muhode and, Ashton Ndlovu indicated and identified a boardroom at the offices as the boardroom they were taken to during the due diligence exercise on Core in 2009. Thereafter the entourage proceeded to the Vaal Bosch mining area about 80 kilometres west of Kimberly.

Apart from confirming that this was the general area where they were taken to during the due diligence exercise, none of the State witnesses was able to pinpoint the exact location where they viewed the mining operations allegedly misrepresented by the accused as belonging to Core Mining. In fact the court was taken to a patch of deserted forest in the wilderness with no sign of any mining operations having taken place.

The State then closed its case without leading any evidence pertaining to the alleged misrepresentations allegedly made by the accused concerning the due diligence exercise on Core Mining. No evidence was led to establish that Core Mining did not operate from Pkwane Diamond offices. There was equally no evidence led to establish that Core mining did not own the mining operations viewed by the due diligence delegation. In fact the State took the court all the way to South Africa to show it none existent evidence in the forests of the Vaal Bosch area.

Misrepresentation is a vital component of the crime of fraud without which the crime cannot be committed. That being the case I accordingly come to the conclusion that the state has failed to establish that the due diligence exercise was fraudulent as alleged by the State.

Since the 2nd accused's liability is crafted on the back of the allegations against the 1st accused, they either sink or swim together.

As already pointed out at the beginning of this judgment I have elected to base my judgment mainly on irrefutable documentary evidence and matters which are common cause. This is because I consider the bulk of *viva voce* evidence in this case to be coloured and tainted by self-interest as most of such evidence is from suspect co-conspirators. I have also disregarded character evidence as intrusive and unhelpful in the determination of this case.

The State having failed to establish a *prima facie* case against the accused it is accordingly ordered that both accused be and are hereby acquitted and discharged.

*The Attorney-General's office, the State's legal practitioners
Mtetwa & Nyambirai Incorporating Wilmot & Bennet, the 1st accused's legal practitioners
Kantor & Immerman, the 2nd accused's legal practitioners*