

MEHLULELI DUBE
versus
MUNGWARI ESQUIRE N.O.
and
THE STATE

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 15 February 2018 & 28 February 2018

Review Judgment

D C Dhumbura, for the applicant
R Chikosha, for the 2nd respondent

MUSHORE J: This is an application for the review of criminal proceedings in the Magistrates Court. The applicant unsuccessfully raised an exception to the charges in their totality stating that on the facts and the indictment itself, he had not committed an offence. The proceedings are not complete. The review application is being made by the applicant who is desirous that if this court agrees with the exception which he took, that the proceedings against him be halted. The grounds for review which the applicant requires a determination are stated as follows:-

1. That the Magistrate did not fully address the issue “*that I had knowledge of an on-going investigation and that was sufficient to bring me within the ambit of the charge*”; and
2. The court *a quo* also (wrongly) found “*that there was no need for the Police to produce a court order before my co-operation could be enforced*”

The review powers of this court are outlined in s 29 (1) (a) as read with s 29 (2) of the High Court Act [Chapter 7:06].

Applicant was charged with having defeated the course of justice as defined in s 184 (1) (e) of the Criminal (Codification and Reform) Act [Chapter 9:23]. He was charged in the alternative with money laundering as defined in s 8 (3) of the Money Laundering And Proceeds

of Crime Act [*Chapter 9:24*], it being alleged that he had unlawfully acquired, used or possessed US\$183 000.00; or alternatively Criminal Abuse of Office by ignoring a Police directive to stop a financial transaction.

The background in this matter was that applicant if employed by Fidelity Printers and Refiners in the position of Head, Gold Operations. The State Outline charges that on 13 June 2017, a certain Malvern Chimutashu representing Vernmal Investments approached a certain Blessmore Chanakira and represented to Blessmore Chanakira that he was selling 225 000 litres of diesel at a value of US\$234 000.00. In pursuance of such purchase, Blessing Chanakira paid Malvern Chimutashu by depositing US\$234 000.00 into Vernmal Investment's CABS bank account. Instead of providing Blessing with the diesel, Malvern used part of the money (US\$183 000.00), which had been deposited by Blessing, to purchase gold from Fidelity Printers and Refiners, Msasa for himself. Malvern failed to supply Blessing with the diesel and Blessing followed the issue up with Malvern. Malvern confessed that he had used part of the fuel purchase proceeds to procure gold. In following this up, a certain Mr Moyo from Fidelity Printers and Refiners intervened and directed Malvern to write a letter of refusal of the funds to procure gold, to be honoured and paid. Malvern did as directed and that letter was received by applicant who allegedly advised Assistant Inspector Mudzimukunze that he would temporarily stop the transaction, and thereby prevent the payment from going through. According to the State, the Assistant Inspector asked the applicant to refrain from honouring the payment until such time that the Police obtained a warrant of seizure from the court. The warrant of seizure was apparently delivered to the applicant 2 ½ hours later. However by the time that the warrant of seizure was obtained by the Police, the payment to Fidelity had been processed already. The State alleged that applicant had deliberately allowed the transaction to go through and thereby applicant had obstructed and/or defeated the course of justice.

Applicant's counsel took a preliminary point at the inception of the criminal trial *a quo* by way of an exception to the charges filed. Applicant disputes, and maintains that he did not act unlawfully. He stated through his counsel that Assistant Inspector Mudzimukunze had informed him that he would bring a court order. Applicant states that the court order was never produced and thus he was not bound at law to stop the payment. He submitted that instead he was bound by his contract of employment to perform his duties and that he had acted according to his employment obligation. He said that the warrant of seizure was produced by the Police much later but that his actions were not unlawful even in the face of a notice of seizure having been obtained and being shown to him well after he had allowed the transaction to go through.

He submitted through his counsel that the notice of seizure was not relevant to any action which applicant took in that it was a notice to seize assets.

In essence therefore the exception to the charge which was taken by applicant a quo was that the prosecution against him had no merit because;-

- (a) He had not committed an offence because there was no court order in place barring the transaction, when the transaction went through; and
- (b) The fact that the transaction went through did not defeat or obstruct a fraud investigation; and
- (c) That in any event he had no knowledge of there being an on-going fraud investigation at the time that the Assistant Inspector spoke to him.

The charge of defeating or obstructing the course of justice is an offence where the intention of an accused, either by an act or omission, is designed to defeat or obstruct criminal proceedings underway. By that definition it must be assumed that an accused was aware at the relevant time that there were criminal proceedings underway and that such an act or omission would have the effect or potential to obstruct such investigative proceedings, or to alter the course of an investigation. In his submissions to the court, applicant's counsel submitted that applicant was never ordered by lawful means to stop the transaction. It was pointed out that in the indictment itself pertaining to the obstruction of justice states that applicant was never ordered by court order (or even by the Police themselves) to stop the transaction, but had merely been 'advised' by the police to do so. It cannot therefore be concluded that applicant has committed a crime. I agree with the point taken by applicant's counsel. If applicant had been shown a Court Order which ordered that the transaction be stopped; and nevertheless applicant proceeded to ignore it, then it could be said that applicant had defeated the course of justice. In those circumstances applicant would have committed an unlawful act. Further, by seeing a court order, applicant would have been aware that there was a criminal investigation underway or that there was a crime committed or about to be committed. In my view, anything short of the production of an actual court order is not a reasonable basis to conclude that applicant formed the intent to obstruct the course of justice.

In actual fact applicant was simply performing his contractual obligations to his employer. He had nothing to gain in either event. He is unknown to both Malvern and Blessing. Applicant never purported to represent himself. At all times he was acting as an employee of

Fidelity Printers and Refiners and his actions were in the course of such employment. Further, Fidelity Printers and Refiners also had nothing to gain by the transaction proceeding.

I do not accept that there was any criminal motivation behind applicant's actions. Applicant's actions did not end or forfeit the criminal investigation. There is no intimation that any money was lost or that any financial prejudice was occasioned. A warrant of seizure has been obtained. Such a warrant was obviously obtained in order to freeze the transaction. The warrant of seizure states:-

“.....It is therefore directed that FIDELITY PRINTERS AND REFINERS, MSASA, HARARE:

Temporarily stop delivery or refund of payment in respect of purchase made by VERNMAL INVESTMENTS from CABS account number 10005609667 on 13 June 2017”

Because there is no mention of financial prejudice in either of the charges and the State Outline, it is clear that no financial prejudice (an essential part of the charges) has been shown to exist. Applicant is not even mentioned in the Investigation Officer's witness statement for the fraud investigation.

Accordingly, it is my considered view that the Magistrate failed to provide justification for believing that applicant had knowledge of the fraud investigation; or that applicant's performance of his work duties were a criminal act.

In the result I order as follows:

- (a) The exception taken by the applicant as a preliminary point is upheld.
- (b) The main charge and alternative charges of:-
 - (i) contravening section 184 (1) (e) of the Criminal Code,
 - (ii) contravening section 8 (3) of the Money Laundering and Proceeds Crime Act; and
 - (iii) contravening section 174 of the Criminal Code;be and are hereby dismissed forthwith”.

Coghlan Welsh & Guest, applicant's legal practitioners
National Prosecuting Authority, for 2nd respondent's legal practitioners