

HAMILTON MADZUDZU
and
STANLEY CHIWANDAMIRA
and
JETHRO BETE
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & WAMAMBO JJ
HARARE, 27 March & 25 April 2018

Criminal Appeal

Ms M Chimhoga, for the appellants
F I Nyahunzvi, for the respondent

HUNGWE J: We dismissed this appeal in its entirety without hearing the respondent's submissions at the hearing of this appeal. The reasons for our decision are as follows:

1. The appellants were convicted of corruptly concealing from their principal a personal interest in a transaction as defined in s 173 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. They were sentenced to three years imprisonment which was wholly suspended on condition they each do not commit an offence of a similar nature for which they are each sentenced to imprisonment without the option of a fine.
2. The facts found proved were that the appellants were employed in managerial positions within the complainant company which was in the business of installing and servicing of ventilation fans and air-conditioning units, installation of kitchen wall exhaust fan fittings and fabrication of the same.
3. During their employment they set and promoted a company in the same business line and appointed their spouses or children as directors of that company. When asked to provide a quotation by their employer's clients, they would also submit a

lower quotation from this company with the result that the employer's client would prefer the lower quotation.

4. Two of the appellants tendered their resignations at the same time. The other resigned shortly thereafter. This raised suspicion within the company leading to an audit at their former employer's operations. The audit revealed the above facts.
5. At their trial they raised as a defence the fact that the employer had unlawfully accessed their emails where the quotations drawn on their new company were found. They claimed that such evidence was inadmissible. The trial court rejected this claim. They also believed that the trial court relied on the audit report when that report was biased against them. They also claimed that there was no proof that they had a personal interest in their new company in which their spouses and children were directors.
6. The trial court rejected their defence and convicted them.

The purpose of the offence created in section 173 of the Criminal Law Code is to preserve the integrity of the agents of a business entity and the appearance of business integrity of the business entity. The constituent elements of the offence are an

“agent who carries out any transaction in connection with his or her principal's affairs or business without disclosing to the principal that he or she holds a personal interest in the subject-matter of the transaction:

- (i) intending to deceive the principal or realising that there is a real risk or possibility that the principal may be deceived; or
- (ii) intending to obtain a consideration knowing or realising that there is a real risk or possibility that such consideration is not due to him or her in terms of any agreement or arrangement between himself or herself and the principal;.....”

The evidence led at trial demonstrate that the appellants connived to set up a business entity involved in the same line of business as their employer. They did not disclose this fact to their employer. They then channelled their employer's business by quoting the employer's client on behalf of their new company at lower rates than the employer.

This evidence was revealed by the audit. It was overwhelmingly stuck against the appellants. Ms *Chimhoga* failed to demonstrate how it can be supposed that the trial court erred in convicting the appellants in light of the overwhelming evidence on the record. An appellate

court cannot interfere with the findings on credibility unless it is shown that no reasonable court applying its mind to the facts, could have made such a finding. We found no basis to infer any bias. The alleged labour dispute which Ms *Chimhoga* was at pains to make an issue of arose well after the audit had been instituted. It did not motivate the audit.

In the circumstance we were satisfied that there was no basis to interfere with the conviction. There was no appeal noted against the sentence imposed so nothing turned on it.

For these reasons we dismissed the appeal in its entirety.

WAMAMBO J: agrees.....

Gutsa & Chimhoga Attorneys, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners