Judgment No. HB 96/06
Case No. HCA 226 – 230/04

THE STATE

Versus

(1) TAPSON SIBANDA
(2) BARBRA BASOPA
(3) BANENKOSI SIBANDA
(4) THENJIWE NDLOVU
(5) MIRIAM NKOMO

IN THE HIGH COURT OF ZIMBABWE
CHEDA AND NDOU JJ
BULAWAYO 21 MARCH 2005 AND 12 OCTOBER 2006

S Siziba, for the appellants
T Mkhwananzi, Ms B Wozhele & A V Mabhande for the respondent

Criminal Appeal

NDOU J: By agreement of the parties we heard argument in all these matters together as the issues raised are substantially similar and the appellants were all represented by the same legal practitioner. I, however, propose to highlight the facts of each case.

Tapson Sibanda: The appellant was convicted by a Nkayi magistrate of fraud in that on a date unknown, but sometime in 1997, he appeared before a board that was vetting participants in the liberation war/struggle of Zimbabwe. He misrepresented himself to the said vetting board that he participated consistently and persistently in the struggle while in fact he did not. As a result of the misrepresentation he fraudulently received the total sum of $289 143,24 from the War Veterans Fund which he did not deserve. He was convicted on his own plea of guilty and was sentenced to 18 months imprisonment. 10 months of the sentence was suspended as follows: 2 months suspended for 5 years on conditions of good behaviour and further 8 months on conditions of restitution. The appellant appeals against sentence only.

Barbra Basopa: The appellant was also convicted by a Nkayi magistrate of fraud in that on the date unknown to the prosecutor, but during the month of November 1997 she misrepresented herself to the abovementioned War Veterans Vetting Board that she underwent military training and that she participated consistently and persistently in the liberation struggle of Zimbabwe whereas in truth she did not do so. Through her misrepresentation she obtained from the War Veterans Fund, an amount totalling $339 517,60 which was not due to her. She was sentenced to 24 months imprisonment of which 12 months was suspended for 5 years on conditions of good behaviour and 9 months on condition of restitution. She appeals against sentence only.

Banenkosi Sibanda: Likewise, the appellant was convicted by the same Nkayi magistrate of using the same *modus operandi*, to defraud the War Veterans Fund of a total of $339517,60 not due to her. She was sentenced exactly like the previous appellant. She appeals against sentence only.

Thenjiwe Ndlovu: Likewise, the appellant was convicted by the same Nkayi magistrate of using the same *modus operandi* to defraud the war Veterans Fund of exactly the same amount of money not due to her. She was sentenced exactly like the previous appellant. She initially appealed against both conviction and sentence but later abandoned the appeal against conviction. She therefore, appeals against sentence only.

Miriam Nkomo: Likewise, she was convicted by the same Nkayi magistrate of using the same *modus operandi* to defraud the War Veterans Fund of exactly the same amount of money not due to her. She was sentenced exactly like the previous appellant. She appeals against sentence only.

What can be gleaned from record of proceedings is that appellants Barbra Basopa, Banenkosi Sibanda, Thenjiwe Ndlovu and Miriam Nkomo were refugees under the auspicies of ZAPU and were exiled in Zambia. The position of Tapson Sibanda is not that clear. The former appellants had fled persecution (most likely of political nature) during the sad days of hostility resulting from the minority government in power at the time and so-called freedom fighters. By enacting the War Veterans Act [Chapter11:15] ("the Act") the legislature sought to provide assistance to war veterans and their dependents. A War Veterans Fund was created by section 3 for the provision of such assistance. The intention of the Act, is not to assist everyone who was part of the liberation movements outside the borders of Zimbabwe. It does seek to benefit all war veterans in the generic sense. Benefit is restricted to war veterans as defined in section 2 of the Act. Section 2 provides:

> ""War Veterans" means any person who underwent military training and participated, consistently and persistently, in the liberation struggle which occurred in Zimbabwe and in neighbouring countries between 1st January, 1962, and the 9th February, 1980, in connection with the bringing about of Zimbabwe's independence on the 18th April, 1980."

This is the only category of war veterans that is entitled to claim from the War Veterans Fund. The Act does not apply to those who left the country and became refugees, assisted in the camps or further their education. Parliament, in its wisdom, chose a restrictive definition of war veteran. The emphasis in the Act is the military aspect of participating in the liberation war. This is further evinced by the fact that the administration of the Act is assigned to the Minister of Defence (Statutory Instrument 76 of 2001). The fact that the latter four appellants carried out some chores in the liberation movements camps does not entitle them to benefit. They appreciated this hence their misleading the vetting team that they were trained

militarily and participated persistently and constantly in the struggle. Their conduct is therefore criminal. At most, their effort at the camps merely constitutes mitigation of their criminal conduct when punishment is considered. Looking at the facts of these matters, the appellants did not commit common law fraud, but fraud within the ambit of section 24(1)(b) of the Act. It was therefore undesirable to charge the appellants under common law, where the Act caters for the situation – *Moyo* v *S* HH-43-03 and *S* v *Sibanda* HB-76-05. In terms of section 224 of the Criminal Practice and Evidence Act [Chapter 9:07] it is possible to alter the charges here from common law fraud to contravention of section 24(1)(b) of the Act as there is no prejudice to the appellants. In exercise of our review powers, the "fraud" is deleted from the citation of the charge sheets and substituted with "Contravening section 24(1)(b) of the War Veterans Act [Chapter 11:15]". The convictions are confirmed as amended. Coming back to the sentences imposed it is trite that this court can only interfere if the sentence is irregular and there is a misdirection. This appeal court is enjoined to be careful not to erode the sentencing discretion of the trial courts. In *S* v *Ramushu & Ors* SC-75-93, GUBBAY CJ held:

> "Every appeal against sentence save where it is vitiated by irregularity or misdirection, the guiding principle to be applied is that sentence is pre-eminently a matter for the discretion of the trial courts and that an appellate court should be careful not to erode such discretion. The propriety of a sentence, attached on the general ground of being excessive should only be altered if it is viewed as being disturbingly inappropriate."

In this case, however, the sentence has to be viewed in terms of section 24(2) of the Act i.e. a fine not exceeding Level Six [revalued $2 000] or to imprisonment not exceeding one year or to both such fine and such imprisonment. What is

therefore, the appropriate sentence for the appellants? The following words by Lawton L J, in *R* v *Sargeant* (1974) 60 CR App Rep 74 (CA) at page 77 are relevant:-

> "The old testament concept of an eye for an eye and tooth for tooth no longer plays any part in our criminal. There is, however, another aspect of retribution which is frequently overlooked. It is that of society, through the courts, must shoe its abhorrence of particular types of crimes, and the only way in which the courts can show this is by the sentence they pass. The courts do not have to reflect public opinion. On the other hand the courts must not disregard it. Perhaps the main duty of the courts is to lead public opinion."

The legislature does not seem to view the crime in a very serious light as evinced by the above-mentioned penalty. I think they had in mind people like the appellants who participated in the struggle, but not war veterans within the definition of the Act. These, in my view, would be entitled to a fine as prescribed by the Act. The case may be different in cases were a person who never participated in the liberation struggle at all pretends he or she did so and defrauds the War Veterans Fund. The latter would be a potential candidate for the imprisonment. In *S* v *Sibanda, supra*, CHEDA J, confirmed a sentence of a fine of $200 000 or in default of payment 2 months imprisonment plus an additional custodial sentence of 2 months suspended on condition of restitution. The prejudice in that case was $1 087 989,42 i.e. almost three times more than the prejudice in each of these cases. In the circumstances a fine coupled with a wholly suspended prison sentence will meet the justice of each of these cases. The appeals succeed. The sentenced imposed by the trial magistrate are all set aside and substituted as follows:

EACH: $2 000 (revalued) or in default of payment 10 months imprisonment. In addition, 12 months imprisonment all of which is suspended on condition the accused restitutes the War Veterans Fund on or before 30 November 2006 through the Clerk of Court Nkayi Magistrates' Court i.e.

(1) Tapson Sibanda restitutes $289 143,24 [or its equivalent revalued amount]

(2) Barbra Basopa restitutes $339 517,60 [or its equivalent revalued amount]

(3) Banenkosi Sibanda restitutes $339 517,60 [or its equivalent revalued amount]

(4) Thenjiwe Ndlovu restitutes $339 517,60 [or its equivalent revalued amount]

(5) Miriam Nkomo restitutes $339517,60 [or its equivalent revalued amount]

Cheda J ………………………….. I agree

Cheda & Partners, appellants' legal practitioners
Attorney General's Office, respondent's legal practitioners