

THE STATE

Versus

SIMON GAMHA N.O.

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 5 February 2024

Sentence in terms of s 54(2) of the Magistrates Court Act [Chapter 7:10]

N. Mabhena, for the State
G. Sengweni, for the accused

DUBE-BANDA J:

[1] The accused, Mr Simon Gamha appeared before the Magistrates Court and this court as a representative of a company called Silver Bern International (Private) Limited. The accused appeared before the lower court and this court in terms of s 385(3) of the Criminal Procedure and Evidence Act [Chapter 9:07], which provides that in any criminal proceedings against a corporate body, a director or employee shall be cited and be dealt with as if he were the person accused of having committed the offence in question.

[2] The accused was charged with the crime of contravening s 3(1) of Statutory Instrument 213/22 (S.I. 213/22) i.e., as read with s 6 of the Base Minerals Export Control Act [Chapter 21:01 (Act)]. It being alleged that during the period extending from 21 December 2022 to 23 December 2022 and at Beitbridge Boader Post, the accused, without lawful excuse unlawfully and intentionally exported 96 metric tonnes of lithium bearing ores to South Africa without a written permit issues by the Minister in violation of S.I. 213/22 as read with s 6 of the Base Minerals Export Act.

[3] The accused was legally represented throughout the proceedings, i.e., before the lower court and this court. He pleaded guilty before the lower court and was duly convicted. The lower court was presided over by a provincial magistrate, who noted that the she could not impose an appropriate sentence within the limits of her sentencing jurisdiction. The magistrate took the view that the circumstances of the case merited a sentence beyond her

jurisdiction. The lower court stopped the proceedings in terms of s 54(2) of the Magistrates Court Act [Chapter 7:10] and sought direction from the Prosecutor-General in terms of s 255 of the Criminal Procedure and Evidence Act [Chapter 9:07] (CP & E Act). The Prosecutor-General directed in terms of s 255(b)(i) CP & E Act that the matter be transferred to this court for sentence.

[4] Nothing turns on the conviction. It is in terms of the law. Section 385(3)(i) of the CP& E Act was complied with in that on 21 June 2023 the company resolved to authorise Mr Gamha, the accused to be its representative in these criminal proceedings and to plead guilty to the charge. In the reading of s 227(1) of the CP & E Act I am satisfied that the proceedings before the Magistrates Court were in accordance with real and substantial justice.

[5] In determining an appropriate sentence that is just and fair, this court will take into account the circumstances of the accused, the nature and the gravity of this crime and the interests of the society. The court will further take into account the legislative penalty provision, i.e. s 6 of the Base Minerals Export Control Act.

[6] Before the lower court, counsel for the accused and counsel for the State made submissions in mitigation and aggravation respectively. At the commencement of the proceedings in this court, the court invited Mr. *Sengweni* counsel for the accused and Ms. *Mabhena* counsel for the State to make further submissions, if any. Both counsel informed the court that they had no further submissions to make. They merely responded to the questions put to them by the court.

[7] Before the lower court, Mr *Sengweni* addressed the court and placed factors which he urged the court to take into account in order to impose a lesser sentence. Counsel submitted that the accused was a first offender, and that he pleaded guilty. It was submitted that this offence was committed a week after the S.I. 213/22 came into effect, when arrangements had already been made to export the lithium bearings ores to South Africa. It was submitted further that the accused had no knowledge of this Statutory Instrument. Counsel argued that the company suffered financial loss as a result of the commission of this offence in that the trucks that it had hired to transport the ore were detailed at the Beitbridge boarder post for a period exceeding a month. At the time the trucks were released they had incurred a hire bill

of over USD\$15 000.00. Counsel submitted that the company has ceased to operate and this court should not order the forfeiture of the lithium bearing ores as such an order will lead to the liquidation of the company. Counsel further submitted that the police be ordered to release 66 tonnes of lithium it is holding in connection with another matter.

[8] Per *contra*, counsel for the State submitted, again before the lower court that the court can only deal with the ninety-six metric tonnes, not some other lithium seized in connection with another matter not before court. Counsel argued further that the lithium ore subject to this case must be forfeited as a measure of preventing the company from benefiting from an illegality.

[9] In the consideration of sentence the convenient starting point is the legislative penalty provision, i.e., s 6 of the Base Minerals Export Control Act which provides as follows:

Offence and penalty

Any person who contravenes or fails to comply with any order or with the terms and conditions of any permit issued to him under an order shall be guilty of an offence and liable to—

(a) a fine not exceeding level nine or twice the value of the base minerals in respect of which the offence is committed, whichever is the greater; or

(b) imprisonment for a period not exceeding two years; or to both such fine and such imprisonment. (My emphasis).

[10] It is important to state that s 6(b) of the penalty provision is not applicable in this case by operation of law. In terms of s 385(3) of the CP & E Act if a person representing a corporate body is convicted, the court shall not impose upon him in his representative capacity a sentence of imprisonment. Therefore, the only sentence available to a representative of a company is a fine. In terms of s 6(a) of the Base Minerals Export Control Act a maximum fine to be imposed in a case of a contravention of the Act, is a fine not exceeding level nine or twice the value of the base minerals in respect of which the offence is committed, whichever is the greater. The level nine fine is USD\$600.00 and the recovered lithium bearing ore is valued at USD 14880.00. Twice the value of the lithium ore is USD\$29 760.00. Therefore, in this instance the highest fine permissible by law is USD\$29 760.00. This means this court has a discretion to impose a fine not exceeding USD\$29 760.00.

[11] This court will factor into the sentencing equation the fact the accused is a first-time offender, and he pleaded guilty. However, the argument that the company suffered a financial loss as a result of this case is not mitigating because it is the company that embarked on a criminal enterprise and must live with the consequences of such criminal conduct. The argument that at the material time the company did not know that its conduct contravened the law is not supported by the facts of this case. At the port of exit the company disguised lithium ore as Manganese ore because it had knowledge of the unlawfulness of its conduct.

[12] It is aggravating that the Agent who presented the declaration documents to the Zimbabwe Revenue Authority (ZIMRA) falsely indicated that the trucks were carrying Manganese ore, hiding the fact that the trucks were loaded with lithium ore. This was intended to mislead ZIMRA and in the process export Lithium ore under the guise that it was Manganese ore. In this case the quantity of the lithium ore intended to be exported is aggravating, the company intended to export ninety-six (96) metric tonnes of lithium bearing ore valued at USD\$14 880.00. This is a huge amount of lithium ore. A deterrent sentence is merited in this case.

[13] Regarding the issue of forfeiture, State counsel sought that the lithium ore subject to this crime be forfeited to the State. On the other hand, Mr *Sengweni* submitted that the ore be released to the company. Counsel submitted that the company has ceased to operate and this court should not order the forfeiture of the lithium bearing ores as such an order will lead to the liquidation of the company.

[14] In terms of s 62(1) CPEA, the court is given the discretion to order the forfeiture of certain items which have been used in connection with criminal activity. This discretion lies with the court and must be exercised reasonable and judicially. Section 62(1) CPE & A Act provides that:

A court convicting any person of *any* offence may, without notice to any other person, declare forfeited to the State –

- (a) any weapon, instrument or other article by means whereof the offence in question was committed or which was used in the commission of such offence; or
- (b).....”

[15] The use of the words “any offence” indicates that it is not necessary for a particular enactment specifically to provide for forfeiture in the event of a conviction. See Prof. G.

Feltoe *Judges Handbook* (2016) p 264. Therefore, the fact that s 6 of the of the Base Minerals Export Control Act does not provide for forfeiture is inconsequential. Section 62(1) of the CP & E Act is relevant and applicable to this case. In this case the accused intended to unlawfully export lithium ore to South Africa, therefore, lithium ore is material through which the offence in question was committed. This case is different from a case where the subject of forfeiture is a motor vehicle that had been used in the commission of an offence. See *Ndhlovu (1)* 1980 ZLR 96 (GD); *Nongerai & Ors* HB-43-13. This is a case where what is subject of forfeiture is the lithium ore through which the offence in question was committed. Notwithstanding its value, it cannot escape forfeiture. It is like in a case of armed robbery, the gun used in executing the robbery cannot escape forfeiture because of its value. So, in this case, the lithium ore subject of this crime cannot escape forfeiture because of its value. No weight can be attached to the fact that an order of forfeiture will lead to the liquidation of the company. It is the company that embarked on a criminal enterprise and it must live with the consequences of such criminal conduct.

[16] As stated *supra*, in this case the maximum fine permissible at law is USD29 760.00. I take the view that the highest fine allowed must obviously be reserved for the most serious examples of the offence. Although this case cannot be described as the most serious example of a case of contravening the Base Minerals Export Act, it remains a bad case. The accused intended to export a huge quantity of lithium bearing ore in contravention of the law. The sentence must reflect this phenomenon, and alert the accused that there can be no benefit from crime. The sentence must show that such crime committed by corporate bodies will not be tolerated. Companies must act and conduct business within the confines of the law. A deterrent fine is will meet the justice of this case. Again, the lithium ore must also be forfeited to show that crime committed by corporate will not be tolerated by the courts.

[17] On a balanced consideration of the totality of the evidence and the facts of this case, this court considers that the following sentence will meet the justice of this case:

- i. The accused is sentenced to a fine of USD10 000.00 payable in the equivalent Zimbabwean dollars at the prevailing interbank rate.
- ii. The ninety-six (96) metric tonnes of lithium bearing ores be and is hereby forfeited to the State.

It is so ordered.

*National Prosecuting Authority, State's legal practitioners
Sengweni & Partners, accused's legal practitioners*