

THE ATTORNEY-GENERAL
versus
GLOBECAST AFRICA

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 26 September, 24 October and 4 November, 2008

Application for Leave to Appeal

R K Tokwe, for applicant
E T Matinenga, for respondent

MUSAKWA J: This is an application for leave to appeal against the decision of the magistrates' court to acquit the respondent at the close of the State case.

The respondent was charged with contravening s 7 (1) as read with subss (4) and (5) of the Broadcasting Services Act [*Cap 12:16*] to which it pleaded not guilty. The facts state that the respondent is a South African based company that was represented by Thabani Mpfu. On 26 March, 2008 the respondent brought into Zimbabwe satellite uplink equipment that had been hired by Transmedia Corporation (hereinafter called "Transmedia"). The equipment was to be used to cover the harmonized elections during the period between 28 and 29 March, 2008. Two engineers employed by the respondent brought in the equipment. The respondent was supposed to obtain a license to operate broadcasting services or to operate as a signal carrier from the Broadcasting Authority of Zimbabwe through Transmedia.

On 27 March, 2008 and at Harare International Conference Centre the respondent was alleged to have operated as a signal carrier or provided broadcasting services without a license by facilitating a satellite link between the Minister of Information and Publicity and Cable News Network. The respondent's engineers operated the equipment.

The respondent's defense was to the following effect: The equipment and its personnel were lawfully brought into the country. The agreement between the respondent and Transmedia entailed the provision of a satellite uplink facility by the respondent between 25 March and 6 April 2008. It was also a term of the agreement that Transmedia would provide the necessary approvals and license. The respondent had previously dealt with Transmedia on

similar arrangements. The respondent believed that Transmedia had fully attended to its obligations. Having received no communication from Transmedia about difficulties in securing the license, the respondent commenced to execute its part of the agreement. Performance was done with the full knowledge of Transmedia. As such, the respondent lacked the necessary *mens rea* as it believed that Transmedia had procured the license for the relevant period.

For purposes of obtaining the license for the satellite uplink facility the Broadcasting Authority of Zimbabwe invoiced Transmedia for the period 28 to 29 March, 2008. It is common cause that Transmedia did not obtain the license. However, the respondent's engineers had been cleared for accreditation to cover the period 20 March to 6 April, 2008.

The agreement between Transmedia and the respondent provided as follows:

“Transmedia hereby invites Globecast of South Africa to provide a satellite uplink and live position to cover the Zimbabwe elections for accredited media organizations. Transmedia will provide the required licenses and necessary approvals. Globecast will provide the necessary staff and equipment and satellite capacity.

The revenue will be split 50% after all costs have been deducted including the license fee. Globecast will provide a record of the booked satellite times and Transmedia will second one of its personnel to the operation for verification.

This is valid for from 25 March to 6 April 2008 election period only”.

Evidence was led from several witnesses including the acting chief executive officer for Transmedia, Mr Cloud Nyamundanda. His testimony was to the effect that Transmedia hired equipment from the respondent and they were to obtain a temporary license from the Broadcasting Authority of Zimbabwe. Transmedia would then authorize the respondent when to transmit. It was not for the respondent to know whether the license had been procured. When the respondent's engineers arrived in the country on 27 March, 2008 they were met by Transmedia's former chief executive officer, Mr Alfred Mandere. The witness was not present. Mr Mandere was subsequently discharged from employment. He is said to be wanted by police and is on the run.

Evidence was also led to the effect that on two previous occasions the respondent had transmitted under similar circumstances where no license had been issued to Transmedia. The instruction to transmit had come from Transmedia. In the present matter, when the respondent's engineers were asked whether they had a licence, one of them produced the

invitation letter from the Ministry of Information and Publicity. The respondent's crew, when questioned, never said they were broadcasting on behalf of Transmedia.

The record of proceedings does not contain what the respondent's counsel submitted in the application for discharge at the close of the State case. However, the trial court in its judgment noted that the basis of the application was that the respondent lacked *mens rea* to commit the offence and that the evidence adduced by the State was manifestly unreliable.

In its reasons for acquitting the respondent the trial court held that the offence in question was not that of strict liability. Based on this conclusion the trial court further reasoned that no evidence was led to prove that the respondent had the requisite *mens rea*. Thus, relying on s 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], it held that no evidence was led to prove an element of the offence (in this case, *mens rea*).

In the applicant's draft notice of appeal it is contended that the trial court erred in holding that the offence in question is not one of strict liability. The second ground of appeal is that the trial court erred in concluding that the offence in question requires proof of intention. This, in my view, is superfluous as it relates to the first ground. The third ground is that the trial court erred in relying on previous dealings between the respondent and Transmedia which were in contravention of the law.

Mr *Tokwe*, for the applicant, submitted that the crux of the matter is that the respondent operated without a license. It is immaterial that Transmedia had only secured an invoice. No instruction had been given to the respondent to broadcast the Minister's interview. Mr *Tokwe* also submitted that it was clear that Transmedia applied for a license to cover the period 28 to 29 March, 2008 whereas the contract period between it and the respondent covered the period 25 March to 6 April, 2008.

He also submitted that the offence does not require proof of intention as it is one of strict liability. It was his contention that the provision creating the offence is couched in a language that does not prescribe a particular criminal state of mind on the part of the accused. As regards the nature of the crime, he submitted that the statute provides for a fine and imprisonment as well as forfeiture. In respect of the status of Transmedia, Mr *Tokwe* submitted that it is not a statutory body. Therefore any reference to its former chief executive officer, Mr *Mandere* is of no consequence.

In his submissions, Mr *Matinenga* for the respondent stated that he supported the trial court's decision although he did not agree with the trial magistrate's reasons in their entirety.

He also submitted that the defense raised by the respondent was that of claim of right. He further submitted that the documentary evidence as well as Mr Nyamundanda's testimony has to be considered. Mr *Matinenga* was emphatic that it could not be argued that the respondent had an obligation to obtain a license. It was not known what transpired between Mr Mandere and the respondent's engineers. According to Mr *Matinenga* the issue of interpretation was irrelevant. This is because there was no obligation to obtain a license on the part of the respondent. Thus the situation in the case of *S v Zemura* 1973 (2) RLR 357 (A) did not arise in the present matter.

Mr *Matinenga* also raised an issue with the manner in which the case was prosecuted. He pointed out that the respondent's engineers were initially prosecuted for practicing journalism without accreditation. They were, however, acquitted and charges were then preferred against the respondent. The contention here is that there was no good faith on the part of the prosecutor involved.

The law regarding an application for leave to appeal is well settled. Such an application is determined on the basis of prospects of success. In the case of *S v Mutasa* 1988 (2) ZLR 4 (S) it was held that an applicant has to show that he has good prospects of success.

The first point to note in respect of the trial court's reasons in determining the application for discharge is that it did not give its reasons for holding that the offence preferred against the respondent was not one of strict liability. The trial court only came to a conclusion without applying the tests cited in *Zemura's* case (*supra*) which it relied on. There is no doubt that such an omission amounts to misdirection. As it stands one is left uncertain as to the ratio for the decision. In my view, one cannot uphold a decision that is not supported by any reasons. It is like upholding a sentence that is not supported by any reasons. A judgment that is not supported with any reasons is no judgment at all.

Section 7 (1) of the Broadcasting Services Act [*Chapter 12:06*] provides that:

"Subject to this Act, and the Zimbabwe Broadcasting Services Corporation Act [*Chapter 12:01*], no person shall provide a broadcasting service or operate as a signal carrier in Zimbabwe except in accordance with a broadcasting licence or signal carrier licence, as the case may be".

It is common cause that Transmedia was to obtain a license to operate the equipment that was brought into the country by the respondent. The license was to be a temporary one for

the period extending from 28 to 29 March, 2008, according to the invoice that was issued. For some unknown reason the license was not obtained.

Whilst the contract between Transmedia and the respondent covered the period between 25 March and 6 April 2008, it does not follow that the contract could be performed prior to the issuance of the license as argued on behalf of the respondent. How were the respondent's personnel going to start operating the equipment without being given the go-ahead by Transmedia? It is speculative to surmise that they could not have commenced operations without being sanctioned by Mr Mandere. It is not known what transpired between the engineers and Mr Mandere. This is due to the fact that Mr Mandere is on the run and on the other hand the engineers did not testify in this case. However, it is significant to note that when the engineers were asked if they had a license they produced an invitation letter. They did not say they had been authorized by Mr Mandere. In any event, Mr Mandere was not a public official who it could be argued like in the *Zemura* case, could authorize the broadcast without the license.

The argument that Transmedia had on previous occasions authorized the respondent to broadcast under similar circumstances does not dispose of the issue. It is also immaterial that it was only Transmedia that was fined on those previous occasions. In my view s 7(1) must be read in conjunction with the definition of the Broadcasting Services Act which states that:

““Broadcasting service” means any service which delivers television or radio programmes to persons having equipment appropriate for receiving that service, whether the delivery is effected by means of or uses the radio frequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means, and includes any of the services referred in paragraphs (a) to (j) of subsection (2) of section seven;...”

From the above definition it seems to me that what the respondent did through its engineers was to provide a broadcasting service as defined by the Act.

Mr *Matinenga* also submitted that the defense raised by the respondent was one of claim of right and he cited the case of *S v Mutizwa & Ors* 1988 (2) ZLR 74 (S). In that case the appellants were convicted of malicious injury to property. They had stopped the building operations of the complainants in their grazing lands. In the process they destroyed structures that had been erected by the complainants. In doing so they had acted on the instructions of the Branch Chairman of ZANU (PF) as well as his Executive, the Councillor and Land Development Officers. They believed that they had the right to stop illegal settlers from

occupying their land. The defense raised by the appellants was upheld on appeal. In upholding the appeal, the Supreme Court accepted the State's concession that the appellants had led evidence on which lay the foundation for a *bona fide* claim of right.

In the present matter can a defence of claim of right succeed without the respondent being put on his defense? On what basis would such a defense succeed without evidence being led on behalf of the respondent? It is trite that a defence outline is not evidence.

The appeal being sought by the appellant concerns issues of law which in view were not well articulated by the trial court. One cannot say in the circumstances there are no reasonable prospects of success. In view of my conclusion one cannot entertain the submissions to censure the trial prosecutor. In addition, that issue did not arise for argument before the trial court.

In the premises the application is granted in terms of the draft order as amended.

Attorney-General's Office, applicant's legal practitioners
Mtetwa & Nyambirai, respondent's legal practitioners