

FORIT CONTRACTING (PVT) LIMITED  
Represented by BLESSING TAPFUMANEYI  
and  
RICHARD NHOKWARA  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
ZHOU AND MHURI JJ  
HARARE, 11 October 2021

### **Criminal Appeal**

*T L Mapuranga*, for the 1<sup>st</sup> appellant  
*A Chimhofu*, for the 2<sup>nd</sup> appellant  
*Ms K H Kunaka*, for the respondent

ZHOU J: This is an appeal against the judgment of the Magistrates' court in terms of which the appellants were convicted of fraud as defined in s 136 of the Criminal Law (Codification and Reform Act [*Chapter 9:23*]). The appeal is against both conviction and sentence.

The facts which are material are as follows. There was an accident involving motor vehicles belonging to the complainant and the first appellant. It is common ground that after that accident the first appellant made a claim for payment of a sum of money in respect of the damage to its motor vehicle. Appellants state that Old Mutual Insurance company, the complainant's insurers paid a sum of US\$2 000.00 out of the sum of money which had been presented as representing the full cost of the loss suffered by the first appellant. The first appellant then demanded the balance in the sum of US\$7 270.00 from the complainant.

The allegations of fraud are that in demanding the balance of US\$7 270.00 the appellants misrepresented to the complainant that the complainant had paid an admission of guilt fine, and exhibited to him the Z69J Form, being the admission of guilt Form, with a signature attributable to the complainant. Having accepted his liability, the complainant went on to make the payment. This is the payment which, it is alleged and was accepted by the court *a quo*, represented the prejudice to the complainant. The complainant's evidence was

that he became aware that he ought not to have paid the money after his insurance had made a payment. He suggests that he became aware of this after listening to a television programme.

Fraud is committed when a person makes a misrepresentation intending to deceive another person or realising that there is a real risk or possibility of deceiving another person; and intending to cause another person to act upon the misrepresentation to his prejudice or realising that there is real risk or possibility that another person may act upon the misrepresentation to his prejudice. In the present case the misrepresentation is not established. The admission of guilt form which forms the basis of the alleged misrepresentation was itself attributable to the complainant. It is difficult to understand how he would have been misled by the document. If he did not sign it he would have readily dismissed it. He could not have acted on it as is alleged. But more fundamentally, there was no evidence which was led to prove that the appellants were aware that the admission of guilt form was not signed by the complainant. If anything, it is the conduct of the complainant of not just admitting liability based on the Z59J Form but also going further to make payment which misled the complainants. Whichever way one looks at it, the first requirement of the offence of fraud was not proved. Although the outline of the State case suggests that the first appellant connived with one Wallacy Muroyiwa to produce the disputed Z69J Form, the learned magistrate in his judgment found that it had not been proved as to who signed that form. Once this conclusion was reached the appellants ought to have been acquitted then. The mere awareness of the existence of the document which the learned magistrate relied upon, does not prove that the appellants were aware that it was being disputed.

There is also the aspect of the alleged prejudice. Clearly from all the evidence, the appellant's claim for US\$7 270.00 was based on what it considered to be due to it by the complainant. The complainant had an election to challenge that amount. He could not have paid it merely because the admission of liability had been shown to him as the Z69J Form does not prove the quantum of damages. Linking this payment to the Z69J was therefore clearly a misdirection. It was not prejudice, and certainly it was not a loss linked to the Z69J Form. On this basis, an essential of the offence of fraud, that is actual prejudice which was alleged *in casu*, is missing.

In light of the above, this court came to the conclusion that the conviction was not supportable.

In the result, IT IS ORDERED THAT:

1. The appeal against conviction succeeds.

2. The judgment of the court *a quo* is set aside and the following is substituted:  
"The accused are found not guilty and acquitted."

MHURI J, agrees:.....

*Rubaya & Chatambudza*, first appellant's legal practitioners  
*Gutu & Chikowero*, second appellant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners