

FRANCESCO MARCONATI
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 19 November & 5 December 2024

Criminal Appeal

T L Mapuranga, with him *C Chingwe*, for the appellant
T Kangai for the respondent

ZHOU J: This an appeal against conviction only. The appellant was convicted on two counts, one of fraud as defined in s 136 (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], and a second count of contravening s 67 of the Companies and Other Business Entities Act [*Chapter 24:31*] as read with s 202 (1) of the same Act.

The appeal is opposed by the respondent.

In respect of the first count, that of fraud, the allegations against the appellant were that on 14 October 2021, 21 December 2022 and 27 November 2023 at the Registrar of Companies, Harare, the appellant forged minutes of a general meeting and a Form CR6, which was never filed at the Registrar of Companies but was submitted to Ecobank, intending to cause Li Song to act upon the misrepresentation to her prejudice or realising that there was a real risk or possibility that Li Song might act upon it to her prejudice. The allegation was that following the submission of the documents referred to above Li Song was removed as a signatory to the bank. The further allegation is that the submission of two other CR6 Forms which he tendered to the Registrar of Companies thereby resigning Li Song from her directorship of Eagle Italian Shoes (Private) Limited company and also resigning Agrilink as the Company Secretary constituted the offence of fraud.

In respect of count two, the allegations were that on 21 December 2022 and 27 November 2023 at the Registrar of Companies in Harare, the appellant unlawfully and intentionally made false statements in some forms. The said statement was that Li Song had resigned her directorship in Eagle Italian Shoes (Private) Limited and that Agrilink had

resigned from its position as the Company Secretary of the said company. It is further stated that the appellant had appointed his own son as one of the directors of the company.

Following the leading of evidence, the Court *a quo* concluded that the guilt of the appellant had been proved beyond reasonable doubt.

In seeking to impeach the judgment the appellant relies on five grounds which essentially raise three issues, namely: (1) whether the defence of *autrefois acquit* ought to have been upheld, (2) whether the Court *a quo* misdirected itself in finding that the appellant acted unlawfully in removing Li Song as director and Agrilink as the Company Secretary, of Eagle Italian Shoe Company given that the appellant had been cleared of any wrong doing following his acquittal in Case Number HREP 1289/22, and also in view of the fact that appellant in any event held the majority shareholding in the company, and (3) whether the use of the word “resigned” in describing the manner in which the complainant and the erstwhile Company Secretary left the company constituted an offence of fraud or contravention of the cited provisions of the Companies and Other Business Entities Act.

The essentials of the offence of fraud are ably and elegantly articulated by both the Court *a quo* in its judgment and counsel in the heads of argument filed on behalf of the parties. In essence, the offence is constituted by the making of a misrepresentation (false statement) to a person who acts on that statement to his or her detriment or the making of such false statement realizing the risk or possibility that the person to whom the misrepresentation is made may act thereon to his or her prejudice. In other words, the prejudice or potential prejudice must be to the person to whom the misrepresentation was made and who has or could act upon such false representation. *In casu* the allegations contained in the charge sheet in respect of the fraud count clearly show that no misrepresentation was made to the complainant, Li Song. Instead, the facts alleged are that the misrepresentation was made to Ecobank or to the Registrar of Companies. The evidence led from the state witnesses, in particular Li Song, essentially supported the allegations in the charge sheet. In essence, the evidence failed to establish the essentials of the offence of fraud, because the alleged representation was not made to the person who is alleged to have been prejudiced or potentially prejudiced. The learned Magistrate in the Court *a quo* repeated these very same allegations but surprisingly relied upon them to come to the conclusion that the offence of fraud had been committed. Clearly, the allegations as contained in the charge sheet and the state outline, the evidence of the prosecution witnesses, and the facts found as proved by the court *a quo*, all do not support the finding of guilty. On

this basis alone the conviction could not stand, and the appellant ought to have been acquitted.

The plea of *autrefois acquit* is predicated upon the appellant having been acquitted in respect of one transaction which preceded the other transactions upon which the charge of fraud and that of contravention of the provisions of the Companies and Other Business Entities Act are based. Although these other submissions of the company returns proceeded on the backdrop of the acquittal, they could not properly ground the *autrefois* acquit plea. What could be said of them is that the appellant having been acquitted, any transaction that was predicated upon the perceived validity of the first transaction as validated by the acquittal, could not justifiably sustain a conviction. There could be no fraud or contravention of the Companies and Other Business Entities Act because the appellant clearly acted on the basis that his acquittal meant that he had properly removed the complainant from directorship. Whether he was mistaken in his understanding of the correct legal position or not is immaterial because the offences concerned clearly require that there be *mens rea* in the form of intention. Be that as it may, nothing turns on the rejection of the plea of *autrefois acquit* in light of what we have noted earlier on in relation to the absence of the essentials of fraud.

Any procedural defects in the removal of a fellow director by the appellant does not constitute a criminal offence. That is a matter that falls within the purview of the civil law.

As for the second count, s 67 as read with s 202(1) of the Companies and Other Business Entities Act, criminalises the making of a false statement in a return or any other document for the purposes of any provisions of the Act. The factual basis of the conviction *in casu* was that on the two dates stated in the charge sheet and repeated in the judgment of the Court *a quo*, the appellant made false statements in the CR6 Forms to the effect that Li Song and Agrilink had resigned from their positions, yet he had removed them. The appellant's defence was that he had removed the two pursuant to a meeting that he called and used his majority shareholding to remove Li Song and Agrilink from their positions. Regarding the use of the word "resigned", appellant pointed to the notes in the relevant form which limit the options to be filled in regarding how a person would have ceased to be a director. His submission, as advanced by his counsel, was that he followed advice in choosing the word "resigned" as it was closest to the manner in which the two had ceased to be director and Company Secretary of the Company.

The approach to be embraced in determining whether the prosecution has discharged its evidentiary burden is encapsulated in the leading statement in *R v Difford* 1937 AD 370 at 372, that:

“ . . . no onus rests on the accused to convince the Court of the truth of any explanation he gives. If he gives an explanation, even if the explanation is improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal . . .”

See also *S v V* 2000 (1) SACR 453(SCA).

The wording of the Form CR6 is such that removal as an option for explaining how a person ceased to be a director of a company is not provided for. The appellant gave an explanation as to why he chose to inscribe the word “resigned”, and further explained that this decision was pursuant to his taking of legal advice. That explanation cannot be rejected out of hand. It is based upon a reading of the provisions of the Form. There was therefore no case of making a false statement in the CR6 Form. For these reasons the conviction for court 2 is also set aside.

In the result, IT IS ORDERED THAT:

1. The appeal be and is allowed.
2. The conviction is quashed and the sentence set aside. The following is substituted:

“Count 1: Not guilty and acquitted.

Count 2: Not guilty and acquitted.”

CHIKOWERO J: agrees

ZHOU J:

Madzima & Company Law Chambers, appellant’s legal practitioners
National Prosecution Authority, respondent’s legal practitioners