

MAVESE MAPFUMO
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J & MAFUSIRE J
MASVINGO, 1 November 2017; 17 & 24 January 2018

Criminal appeal

Mr *L. Mudisi*, for the appellant

Mr *T. Chikwati*, for the respondent

MAFUSIRE J:

- [1] This was a criminal appeal from the magistrates' court. It was against both conviction and sentence. The appellant was convicted of theft of trust funds as defined in s 113[2] [d] of the Criminal Law [Codification and Reform] Act, *Cap 9:23* [*“the Code”*]. The amount involved was \$2 500. He was sentenced to a fine of \$400, or in default thereof, three months' imprisonment. He was also sentenced to an additional twelve months imprisonment of which six months' imprisonment was suspended for five years on the usual condition of good behaviour. The remaining six months imprisonment was suspended on condition that he paid the complainant restitution in the amount aforesaid.
- [2] The essential facts were common cause or uncontroverted. At all relevant times the appellant was a duly registered legal practitioner. He practised law at Shurugwi, in the Midlands Province. He was engaged by the complainant's brother, one Mr Rambanapasi, a businessman operating from Harare, to provide legal services to the complainant, who lived in Shurugwi. The legal services were required in relation to the complainant's matrimonial problems with her ex-husband, a Mr Makiwa. The complainant paid the initial consultation fee. For over two years the appellant conducted several legal proceedings on behalf of the complainant. From time to time he would submit bills for services rendered, and Rambanapasi would settle them, either immediately or over time.

- [3] One of the disputes between the complainant and her ex-husband concerned the division or redistribution of some immovable property which was considered to be part of the matrimonial assets. In terms of a judgment of the magistrates' court, that asset would be shared equally between the ex-spouses. Either of the parties would be entitled to buy the other out and keep the asset. Estate agents valued the property at \$5 000. The buy-out value of the half share was agreed at \$2 500. The complainant opted to buy out her ex-husband and keep the property. From the evidence, she got \$2 000 from Rambanapasi but deposited \$2 500 with the appellant. The money was meant to finance the buy-out. It was not clear where the top-up came from.
- [4] Subsequently, the complainant's ex-husband refused to accept the amount of \$2 500 aforesaid, or to be bought out of his share altogether. He claimed he had received legal advice that the asset was Government property over which none of them had any saleable rights. As such, he could not be seen to be accepting the \$2 500 for something he could not deliver. He said he had been advised that the magistrates' court's judgment to that effect had been incompetent and therefore, incapable of enforcement.
- [5] The evidence suggests that the complainant's ex-husband revised the value of the asset from the initial \$5 000 down to \$3 000, of which the sale value of the half share would be \$1 500. The ex-husband offered to pay the complainant this amount and keep the asset.
- [6] In his feedback report and advice to both the complainant and Rambanapasi, the appellant agreed with the position that the asset was Government property which could not be disposed of in the manner directed by the court, except for the improvements on it. His own advice on the way forward was that the parties and their legal practitioners would have to meet once again and agree on the value of the improvements, and the value of the half share that the complainant's ex-husband could pay her, given that there was now a dispute over the true value of the property.
- [7] That feedback report and advice by the appellant was on 28 July 2014. There was no immediate response from either the complainant or Rambanapasi. The appellant had last accounted to them on 11 November 2013. The amount due to him then had been

\$932. On 3 August 2014 the appellant submitted to both the complainant and Rambanapasi a detailed statement of account. It set out what work he had carried out in terms of his mandate; what his charge-out rate was; the total amount of time he had expended; what the gross total due by the clients to him was, and what amount of deposit held in his trust account was. The amount due to him on that statement was \$232.

[8] Included in the amount of the deposit held in trust was the sum of \$2 500 aforesaid. The appellant's statement of account concluded as follows:

“Be advised therefore that you should pay the balance on our legal fees being \$232 after converting the \$2 500-00 you had paid for collection by Mr MAKIWA to our legal fees. Kindly pay on or before the 30th of AUGUST 2014 failure [of] which we shall issue summons to you to recover same. We shall not be in a position to render further attendances unless we receive payment as advised. Any queries [sic] must be channelled [sic] to us in writing for record keeping purposes.”

[9] By e-mail dated 6 August 2014, i.e. three days after the appellant's statement of account, Rambanapasi acknowledged the appellant's letter of 28 July 2014, and the statement of account. But, among other things, he expressed severe shock on the appellant's charges, which he considered exorbitant. He also complained bitterly about certain aspects of the appellant's conduct. He demanded what he termed “remittance advices” from the very onset.

[10] The relationship between the parties degenerated, and irretrievably broke down. Rambanapasi lodged a complaint against the appellant with both the Law Society of Zimbabwe [“LSZ”], and the police at Harare. In the course of their investigations, the police enquired from the LSZ. The LSZ advised it was still looking into the matter. But it brought to the police' attention the provisions of s 20 of the Legal Practitioners Act, *Cap 27:07*. In a nutshell, this provision restores, or affirms, *inter alia*, a legal practitioner's common law right of set-off against, or upon moneys held, or received by him/her on account of another person.

[11] By and by, the criminal case against the appellant was transferred from Harare to Shurugwi. Rambanapasi was dropped as the complainant and replaced with the

complainant. The appellant was charged as aforesaid. He pleaded not guilty and relied on s 20 of the Legal Practitioners Act aforesaid as the basis for his entitlement to the money. A full trial ensued. The State's evidence started and ended with the complainant and Rambanapasi. The appellant gave evidence. Initially he represented himself. Eventually he engaged counsel.

[12] The magistrate's reasons for convicting the appellant were multiple. But the quintessence of her judgment was that, a dispute having arisen between the appellant and Rambanapasi over the final bill, it had been unlawful for the appellant to have become the judge over his own cause by deciding how much he was entitled to, and then going on to appropriate the amount from the trust account that had been meant for a different purpose altogether.

[13] The magistrate held that the provisions of s 20 of the Legal Practitioners Act did not apply to his situation because, if after a dispute arises on a legal practitioner's fee, it must first be referred for taxation before the legal practitioner can exercise his or her right of set-off, something that the appellant had failed to do.

[14] In his notice of appeal to this court, the appellant listed twelve grounds. At the hearing, Mr *Mudisi*, for the appellant, conceded that they were repetitive and proliferate. He collapsed them into one single essence. This was that the court *a quo* erred in convicting the appellant when the essential elements of the crime, namely intention and unlawfulness, had not been proved. He said the circumstances of the case were such that the appellant had been entitled to rely on the provisions of the Legal Practitioners Act.

[15] On the first day of the hearing of the appeal, Mr *Mudisi* sprang a surprise and practically forced an indefinite adjournment. He explained that following his attendance at some recent workshop on continual legal education at which the Chief Justice of Zimbabwe had raised concerns about some criminal matters going all the way to the Supreme Court with notable patent defects in the charges, he had reviewed the entire record of the appellant's case, including the charge sheet, and grounds of appeal, and had discovered that the charge laid against the appellant had been fatally defective for

want of averments of the essential elements of the crime. He said this was a legal point which he was entitled to raise at any time of the proceedings. He wanted to file supplementary heads of argument to deal with the point. State Counsel said he would also have to file supplementary heads in reply.

[16] When the matter resumed, a great deal of energy was expended on the technical point, during which, with all due respect, more heat than light was generated. We stood down the point and allowed argument on the merits. We would deliver one judgment on both the point *in limine* and, if need be, the merits. This now is our judgment.

[a] *Charge allegedly defective*

[17] The charge against the appellant in the court *a quo* was framed as follows:

“THEFT AS DEFINED IN SECTION 113[2][d] OF THE CRIMINAL LAW [CODIFICATION AND REFORM] ACT CHAPTER 9:23

In that on the 3rd day of August 2014 and at Traikosh complex 103 Cape Street Shurugwi, Mavese Mapfumo being a legal practitioner converted money which amounted to U\$2 500-00 into his own use which was deposited by Mirirai Tsikira in Mavese Mapfumo and Associates law Firm Trust Account.”

[18] The State Outline was a detailed account of the dealings between the appellant and the clients over the period in question, and the appropriation of the trust funds as charged.

[19] Mr *Mudisi* charged that the absence of the words or phrases ‘intention’ and ‘unlawfulness’, which should be intrinsic to the indictment, made it incurably defective. Citing a plethora of cases; and invoking s 146 of the Code, and s 70 of the Constitution, the basic import of which is that an accused person is entitled to be informed in sufficient detail of the charge he is facing, Counsel vigorously argued that this had not been done, and that, as a result, the appellant had been severely prejudiced in the conduct of his defence in that, even though himself a legal practitioner, he had not quite appreciated the true purport of the charge. That was why in his defence, the argument concluded, the appellant had omitted to challenge the absence of intention, and unlawfulness in his conduct, but had merely rushed to invoke the provisions of s 20 of the Legal Practitioners Act.

[20] Mr *Mudisi* further argued that the inherent defect in the charge could not possibly have been saved by s 203 of the Code. This section provides that an indictment, summons or charge that is defective for want of any matter which is an essential ingredient of the offence, shall be cured by evidence at the trial proving the presence of such matter, unless such defect is brought to the court before judgment. He said the evidence at the trial did not prove intention or unlawfulness of the appellant’s conduct, and that therefore the hole or gap or defect in the charge had remained unrepaired.

[21] Mr *Chikwati*, for the State, argued that the charge was not defective; that even though lacking precision or exactitude, it was drafted with such adequate detail as to have sufficiently informed the appellant of the offence with which he was being charged, and that indeed the appellant had not been prejudiced in any way as he had quite appreciated the charge and had competently pleaded to it. Furthermore, Mr *Chikwati* added, the evidence led at the trial had been so elaborate as to have sufficiently covered any perceived loopholes in the indictment.

[22] The appellant’s point *in limine* was, with all due deference, a fanciful and whimsical academic treatise, probably designed just to ground a moot room contest. Mr *Mudisi* said the appellant did not have to concern himself with the citation, but only with the narration of the charge. That is strange. The appellant had to concern himself with the charge as a whole: the citation, the narration and the State Outline. Moreso that he was a practising lawyer.

[23] Whatever the position at common law might have been, with the codification of criminal offences in Zimbabwe, any person charged with an offence as codified, has to refer to the section of the Code that the charge refers to. In this case, the charge sheet, as read out to the appellant in court, told him that he was being charged with the crime **of theft as defined in s 113[2][d] of the Code** [*emphasis added*]. Section 113[2][d] of the Code defines theft of trust property as follows:

“[2] Subject to subsection [3], a person shall also be guilty of theft if he or she holds trust property and, in breach of the terms under which it is so held, he or she **intentionally**-
[*emphasis added*]

[a]; or

- [b]; or
- [c]; or
- [d] converts the property or part of it to his or her own use.”

[24] Thus, “intention”, an essential ingredient of the charge, is covered.

[25] Sub-section [2] above says it is subject to sub-section [3]. Necessarily therefore, the appellant also had to concern himself with this sub-section as well. It was the complete package from the State. The sub-section says:

“[3] Subsection [2] shall not apply if-

- [a] the person holding or receiving the property has properly and transparently accounted for the property in accordance with the terms of the trust; or
- [b]

[26] Thus, sub-section [3] negatives any unlawfulness in any intention that might have been perceived as criminal. So, the charge preferred against the appellant, just in the charge sheet alone, let alone the detailed State Outline, contained all the necessary and essential ingredients. And evidently, the appellant did appreciate both the full import and purport of the charge. His defence targeted the intrinsic aspects of the charge as laid out in s 113[2][d], as read together with sub-section [3] of the Code.

[27] At the hearing, Mr *Mudisi* himself, wittingly or unwittingly, might have betrayed the position that the point *in limine* was just an academic moot contest. After laying out what he considered to be the model charge that the State ought to have preferred against the appellant, he conceded, during some exchanges with the court, that he would not have contested the point had the charge excluded the citation, as long as the narration contained the essential ingredients. What he was contesting was the flip side, namely the absence of the essential ingredients in the narration, despite that the citation invoked them – a variance without a difference!

[28] Thus, it is our finding that while the charge preferred against the appellant might have lacked precision and finesse, nonetheless, it contained essential details as to have sufficiently informed the appellant of the offence which he was facing. Furthermore, there was no question that the appellant understood and appreciated the nature of the

offence which he faced. Among other things, he competently answered to it. He was not prejudiced.

[29] In the circumstances, the appellant's point *in limine* is hereby dismissed for lack of merit.

[b] *The merits*

[30] Mr *Chikwati*'s unflinching argument on the merits, as I understood him, and in my own paraphrase, was that the appellant was guilty as charged because he appropriated money that did not belong to his client, but to a third party, namely the complainant; that his own client was Rambanapasi who had engaged him, and was paying his bills; that s 20 of the Legal Practitioners Act did not assist him because he converted the trust funds before there had been any agreement with his client on the level of his fees; and that unless and until his bills had been taxed his conduct amounted to theft.

[31] Asked how, even accepting all that, such conduct could be branded criminal, Mr *Chikwati* was adamant that the complainant was not the appellant's client; the entire arrangement having been a *stipulatio alteri* situation where the appellant had been engaged to proffer services for the benefit of a third party, but that contrary to the terms of that *stipulatio alteri* the appellant had ended up unlawfully helping himself to the third party's property. Simply defined, a *stipulatio alteri* is a contract between two people for the benefit of a third party.

[32] Reminded that the court *a quo* had sat as a criminal court to try the guilt or otherwise of the appellant, not as a civil court to try the civil rights or obligations of the parties, Mr *Chikwati* retorted that a single transaction or enterprise can give rise to both civil and criminal proceedings. It became a merry-go-round; a dog chasing its tail!

[33] The court *a quo* completely misdirected itself in convicting the appellant in the circumstances of this case, and especially for the reasons forming the basis of its decision. At the hearing of the appeal, the State's arguments were thoroughly misconceived and they lacked any factual or legal grounding.

[34] Mr *Chikwati*'s refrain that it was Rambanapasi, not the complainant, who was the appellant's client, and that therefore, it was theft for the appellant to have appropriated the complainant's money, not only lacked factual probity, but was also legally unsound. It lacked factual probity because when the relationship; the engagements; the dealings and the conduct of the trio for the period in question, are considered in their entirety and objectively, the appellant was entitled to treat the complainant and her brother, Rambanapasi, as his clients, either jointly or individually. This was so for a number of reasons, not least the following:

- The evidence never placed Rambanapasi and the complainant into any distinct compartments of client and third party beneficiary as it was urged before us.
- It was the complainant who paid the appellant the initial consultation fee. Nowhere does the record say she did this as a conduit pipe for Rambanapasi.
- Of the contentious \$2 500, if Rambanapasi gave the complainant only \$2 000 but the complainant ended up depositing \$2 500 with the appellant, should the appellant be condemned for assuming the top-up, or difference, came from the complainant herself? Did he have to concern himself with this anyway?
- When the case began, Rambanapasi, not the complainant, was the complainant.
- When the appellant reported back and accounted to clients, he would write to both Rambanapasi and the complainant.

[35] There are many other examples. The State should not cherry pick facts selectively and ignore those that may be inconvenient.

[36] However, and more importantly, whether Rambanapasi or the complainant was the appellant's client is plainly a distinction without a difference. It is neither here nor there. What the court *a quo* failed to grasp was that the appellant's defence was a claim of right to the money, by means of set-off, both in terms of s 113[2] [d], as read with s 113[3] of the Code, and s 20 of the Legal Practitioners Act.

[37] Section 20 of the Legal Practitioners Act is in Part IV of that Act that deals with trust accounts. It is Part IV of the Act that sets out the do's and don'ts in the opening and running of trust accounts by legal practitioners. There are certain penalties for misconduct in relation to the misuse of trust account funds. But s 20 says:

“20 Saving of set-off, etc., against trust account

Nothing in this Part contained shall be construed so as to take away or affect a just claim, lien, counterclaim, right of set-off or charge of any kind which a registered legal practitioner may at common law or in terms of an enactment have against or upon moneys **held or received by him on account of another person** [*emphasis added*].”

[38] Thus, contrary to the reasoning of the court *a quo*, and to the ill-conceived arguments by the State before us, a legal practitioner’s right of set-off, if it exists under the common law, is not eroded by anything else said under Part IV. The legal practitioner does not require the consent of the client before he exercises the right of set-off. The section does not say that the client must first agree with the fee before the legal practitioner can exercise set-off. It does not say the legal practitioner must first trace the source of the funds in the trust account for the client before he or she can exercise set-off. If the conditions for set-off under the common law exist, his or her exercise of the right is a unilateral act.

[39] Mr *Chikwati* argued that in the appellant’s case, the conditions for set-off under the common law did not exist because there were no two debts that could be said to have been mutually in existence and due for payment at the same time. He said the debt due to the appellant was owed by Rambanapasi. Yet the appellant took money that belonged to the complainant who owed him nothing. Counsel kept going back to his *stipulatio alteri* argument. With respect, that was one of the misconceptions that, regrettably, we failed to dislodge him from.

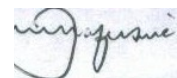
[40] Counsel’s argument above could probably gain traction in a civil court. There, the rights and obligations of the litigants are balanced against each other on a preponderance of probabilities. Not in a criminal court. Here the guilt of the accused to the crime charged has to be proved, not only by showing the existence of the two components – *actus reus* and *mens rea* – but also by proving them beyond any reasonable doubt.

[41] Mr *Chikwati* said in the particular circumstances of this case *actus reus* was given and beyond contest. He said by it alone *mens rea* was also established. This is ludicrous. If

a lawyer claims entitlement to credit funds in his or her trust account for client, because he or she believes he or she is owed fees; if s 20 of the Legal Practitioners Act says he/she can unilaterally exercise the right of set-off if the conditions to do so under the common law exist; if s 113 [2][d], as read with subsection [3] of the Code, says, or imputes that theft of trust funds is only theft if there is an intentional conversion, but that such conversion is excusable if the accused has properly and transparently accounted in accordance with the terms of the trust, how on earth does the lawyer's conduct in appropriating the trust funds become criminal beyond any reasonable doubt?

- [42] On 3 August 2014 the appellant accounted to clients and informed them he had converted the \$2 500 to his fees. The State did not in the court *a quo*, or anywhere else for that matter, prove that his conduct in doing so was in breach of any terms of the trust so as to disqualify him from protection under s 113[3] of the Code, and s 20 of the Legal Practitioners Act. The State did not prove that the conversion was for any purpose, let alone criminal, other than to recover what he felt he was owed for more than two years.
- [43] In our view, this was purely a civil dispute that was improperly turned into a criminal prosecution. If Rambanapasi and or the complainant felt that the appellant's bills were exorbitant, their remedy was to have them taxed.
- [44] In the circumstances, it is our finding that the appellant was wrongly convicted. The appeal against conviction is hereby allowed. The judgment of the court *a quo* is hereby set aside in its entirety. The sentences imposed are hereby quashed.

24 January 2018



Hon Mawadze J: I agree _____ **Signed On Original** _____

Mudisi, Mutendi & Shumba, legal practitioners for the appellant
National Prosecuting Authority, legal practitioners for the respondent