

ELVIS MHINGA

And

FUNGAI NANGATI CHATIKOBO

And

SHEPARD PATRICK TIRISI MADZUNGU

And

OBERT JAKATA

versus

THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J & ZISENGWE J
MASVINGO, 30 September, 2020.
Full written reasons provided on 26 January 2021

Criminal appeal

Mr O. Mafa, for the appellants
Mr E. Mbavarira, for the respondent

ZISENGWE J. On 30 September, 2020 we delivered an *ex tempore* judgment whose net outcome was to the following effect; (i) to uphold the 3rd and 4th appellant's appeal against conviction in respect of count 1 (and the concomitant setting aside of the sentence attendant thereto), (ii) to dismiss the 1st and 2nd appellants appeal against both conviction and

sentence in respect of count 1, and (iii) to dismiss the appeal by all four appellants against both conviction and sentence in respect of count 2.

A request was subsequently made by the appellants for written reasons informing that decision and what follows are those reasons;

The background

The four appellants were arraigned before the Magistrates Court facing two separate but related charges. In count 1 they were charged with forgery (i.e. contravening section 137(1) (a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] (the criminal code) and in count 2 they were charged with fraud (i.e. contravening section 136 of the Criminal Code).

Both charges stemmed from a series of events which took place in the first few months of 2018 involving the alleged fraudulent sale by the appellants to the complainant of a certain house. That house is situated in the Runyararo residential area of Masvingo namely House Number 16155 Sheba Gava Street Runyararo West (“the property”).

In count 1, which in the scheme of things appears to be the precursor to the second count, the appellants were charged with forging a specific power of attorney, the forgery coming in the form of making that document purporting it to have been authored by or at the behest of one Maplan Dick, when in fact it was not. In a nutshell the state alleges that the intention in so manufacturing that false document was to defraud the complainant Shakemore Muzvidziwa.

The nub of the charge in count 2 is that the four appellants acting in common purpose, and using the forged Power of Attorney referred to in count 1, duped the complainant into believing that the 1st appellant was legitimately selling and was entitled to sell the property which misrepresentation the complainant could (and did) act upon to his prejudice.

Upon arraignment all four appellants denied each of the two charges. However, at the conclusion of the trial they were each found guilty as charged in respect of both charges. Each of them was subsequently sentenced to 12 months’ imprisonment in respect of count 1 and to 4 years’ imprisonment in respect of count 2. Part of the cumulative sentence was suspended partly on condition of ‘good behaviour’ and partly on condition they restituted the complainant the sum of money he had paid as the purchase price of the house.

Aggrieved by what they perceived as insupportable convictions and astounded by the severity of the sentence thereby imposed, they appealed against both to this court.

The appellants all denied any wrongdoing whatsoever in the transactions that led to these charges and presented a united front to confront the allegations. They indicated in their defence outline (as they would maintain throughout the ensuing trial) that all that transpired was that the complainant purchased the property from the 2nd appellant through an outfit called J. Mark Properties the latter who are essentially Real Estate Agents.

The sole involvement of the 1st appellant, so the defence went, was to source at the behest of the 2nd appellant any potential purchasers of the property which the latter was desirous of disposing of. This, according to them was precisely what 1st appellant proceeded to do when he secured the complainant as one such potential purchaser. To that end therefore, an agreement was reached as between the 1st appellant in his capacity as representative of the 2nd appellant on the one hand and the complainant on the other for the purchase of the property at a price of US\$30 000. However, according to the appellants, the complainant, with the concurrence of the 1st appellant proceeded to pay the purchase price in South African Rands.

According to the appellants the deal unfortunately fell through when the 2nd appellant completely rejected payment of the purchase price in Rands insisting on United States Dollars. It was the appellants' position that as of that stage the complainant had paid the sum of R200 000 as part of the purchase price. The rejection of payment in that currency effectively terminated the transaction in question leading to a refund by the 1st and 2nd appellants of the said amount to the 3rd and 4th appellants.

It was the appellants' version before the court *a quo* that when that first deal collapsed, the 3rd and 4th appellant acting at the specific instance of the complainant sourced and secured an alternative property (the second property) namely stand number 16276 Agrippa Mkahlela Street. The amount that had since been refunded was accordingly deposited into the account of one Ephraim Ndadzibaye, the owner of the second property. However, according to them the complainant for some inexplicable reason, made an about turn and cancelled that agreement of sale and demanded his money back. To compound matters before the refund could be made, the complainant made a report to the police resulting in their arrest.

It was their contention, therefore, that the dispute relating to the two abortive transactions is purely contractual and any remedies that may possibly attend thereto are strictly civil in nature.

In the ensuing trial four witnesses testified for the State and each of the four appellants testified in their respective defence. What follows is a summary of the salient aspects of those accounts.

Shakemore Muzvidziwa

He is the complainant in this matter. It was his evidence that he was deceived by the appellants into parting with his cash on the pretext that he was purchasing the property.

He indicated that in a meeting he held with all the appellants he was made to believe that the 1st appellant was the owner of the property and that the 2nd appellant was the former's sister. According to him those negotiations culminated in the figure of US\$30 000 being agreed upon as the purchase price of the property. Significantly, it was his evidence that 2nd appellant agreed on the purchase price being R280 000 in lieu of the United States dollars equivalent.

Pursuant to that agreement, he would make an initial payment of R135 000 with the 1st and 2nd appellants granting him a three months' period to settle the outstanding balance. In the wake of that initial payment he received documentation in the form of a written agreement of sale, an affidavit, a power of attorney, a copy of an identity document and some receipts confirming payment. The first three documents mentioned above are marked as exhibits 1, 2 and 3 of record respectively.

It was his further evidence that in the following months he would make additional payments in two tranches comprising R69 000 and R54 000 leaving an outstanding balance of R22 000.

He indicated that 3rd and 4th appellants subsequently called him to their offices on the pretext that he was required to sign some Zimbabwe Revenue Authority (ZIMRA) documents. However, upon his arrival he discovered that goal posts had been shifted as he was informed that the property was no longer available for sale owing to some dispute over the same. According to them, the seller had since passed away and members of his family were embroiled in a dispute over that property rendering it impossible to continue with the sale.

When he enquired about his money he was basically sent from pillar to post as 3rd and 4th appellants referred him to 1st and 2nd appellants and when the latter two emerged they informed him that the money was with the former two.

His efforts to recover the money he had paid ultimately proved futile. He testified that at some point the 3rd and 4th appellants promised him a refund within a fortnight something that never materialised.

When he threatened to forcibly occupy the property, he was promised that he would purchase the second property in its stead. However, that transaction similarly proved to be another episode in deception because he soon realised that he had been again presented with a fictitious power of attorney and a “fake” owner of the property. He also learnt that the same property had in fact been sold to someone else as well.

He would dismiss suggestions that the agreement of sale in respect of the first property was terminated owing to the rejection of the 2nd appellant of payment in South African Rands. He reiterated in this regard that the agreement, of which the 2nd appellant was party, incorporated that very exigency of payment of the purchase price in that currency. He further indicated that the 1st and 2nd appellants had in fact received payment of three separate instalments of the purchase price in that very currency.

He would equally refute under cross examination suggestions that he had abruptly cancelled the agreement of sale in respect of the 2nd property.

Webster Dube

He testified as the second State witness. He indicated that he was in the company of the complainant when negotiations for the purchase of the property were made. His evidence in this regard to a great extent mirrored that of the complainant.

Maplan Dube

The evidence of this witness is crucial as it lies at the very heart of both counts. It is common cause that he was the owner of the property in the period immediately preceding the transactions constituting the subject matter of these charges. In summary his evidence was to the effect that following his transfer from Masvingo to Karoi in 2017 he decided to dispose of his Masvingo property (i.e. the property). To that end he placed advertisements with Great Zimbabwe Realtors in addition to circulating information to that effect by word of mouth via his relatives.

Significantly, it was his evidence that it was only in March 2018 that he concluded an agreement of sale with the 2nd appellant in respect of the property for the purchase price of US\$22 000.

However, as things turned out, he was to receive a phone call from the CID in Masvingo on the 24th of May 2018 wherein allusion was made to the effect that he had sold the property to the complainant.

He would soon discover upon his arrival at the said CID offices that there had been a masquerade wherein a fake power of attorney (which he obviously distanced himself from) had been used to effect a fraudulent sale of the property.

The other salient parts of his evidence are that he confirmed having sold the property to the second appellant but insisted that this was only in March 2018; well after it was purportedly sold to complainant some two months earlier. He completely distanced himself from the specific power of attorney wherein he purportedly authorised 1st appellant to dispose of the property. He equally dissociated himself from the agreement of sale purportedly entered into between him and the complainant. Needless to point out that information about his death was a blatant lie.

Takesure Buzu

He was the Investigating Officer of the matter and testified as the 4th and final State witness. His evidence centred on the interviews he conducted individually with all parties concerned in the wake of the report against the appellants having been made.

The most significant pieces of evidence to emerge from those interviews were that the appellants informed him that they had sold the house in question on behalf of Maplan Dick on the strength of the Power of Attorney issued by the latter to 1st appellant. According to him the appellants informed him that the agreement of sale with complainant had fallen through because Maplan Dick had hiked the purchase price hence they (appellants) had channelled the money towards the acquisition of a different house.

Also important was his evidence that in February 2018, one Faith Jabangwe had been made to make payment towards the purchase of the same property.

He would dismiss as a forgery the document purporting to be an agreement of sale between Maplan Dick and second appellant dated 5 February, 2018 pointing out as he did that Maplan Dick dissociated himself from the same. It was his further evidence that his

investigations revealed that the appellants had sold the property to the complainant well before Maplan Dick sold it to 2nd appellant.

He testified that armed with a search warrant he proceeded to the offices of “Work Stone investments” where the 1st and 2nd appellants operated from and retrieved an agreement of sale between Maplan Dick and the 2nd appellant. This latter document tallied with the one he had obtained from Maplan Dick.

Appellants’ evidence

For their part the four appellants in their respective accounts maintained their positions as articulated earlier. Their individual accounts dovetailed and fed into each other. In chronological order they presented the following evidence. That on 5 February, 2018, Maplan Dick sold the property to the 2nd appellant and a written agreement of sale was drawn up. As fate would have it, barely two months later 2nd appellant decided to dispose of the property to meet certain pressing financial obligations. To that end she tasked the 1st appellant to dispose of that property. The rest of their evidence is as described earlier.

At the conclusion of the trial, the court *a quo* upon an extensive evaluation of the evidence placed at its disposal and for the reasons given accepted the version of the State witnesses and rejected that of the appellants. Ultimately the court found that the State had managed to discharge the burden reposed on it namely to prove its case against each accused beyond reasonable doubt in respect of each of the two charges.

After hearing submissions on sentence, the court proceeded to sentence the appellants as stated hereinbefore.

Aggrieved by both conviction and sentence the appellants mounted the current appeal.

The grounds of appeal against conviction were couched in the following terms:

1. *The court erred and indeed fell into error by blanketly convicting all 4 appellants of forgery without particularizing the role allegedly played by each of the 4 in the alleged forgery.*
2. *The court erred by convicting the 4 appellants of forgery when the essential elements of the offence were never proved beyond any reasonable doubt by the State.*
3. *The court erred and indeed fell into error by turning a blind eye to the unnecessary splitting of charges. If at all forgery was committed then the purpose for the forged*

document was to commit fraud. The court therefore erred by treating the continuous transaction as two separate charges.

4. *The court erred in making a finding that the 4 appellants were guilty of fraud when the essential elements of fraud were not proved beyond any reasonable doubt. The court ought to have considered the following: -*
 - (i) *That if accused 2 bought the property from Maplan Dick then if she participated in the subsequent sale of the property to complainant she did not misrepresent anything to complainant hence there is no fraud to talk about.*
 - (ii) *The court ought to have taken judicial notice that it was Maplan Dick who had the burden to prove that the Power of Attorney was a forged document. The evidence adduced from Maplan Dick fell short of proving that indeed the document was not authentic. A mere spelling of a name does not translate a genuine document into a forged one.*
 - (iii) *The court ought to have led evidence from the Commissioner of Oaths who commissioned the Power of Attorney so as to arrive at an informed decision regarding who authored the document in issue. Otherwise in the absence of testimony by the Commissioner of Oaths it remains unclear whether the purported deponent physically appeared before the Commissioner of Oaths to sign the document under oath or not.*

The State for reasons advanced resisted in its entirety the appeal against conviction contending as it did that there was no misdirection on the part of the court *a quo* in convicting all 4 appellants in respect of both counts.

The first three grounds will be addressed simultaneously as they are all interrelated and are all in respect of count 1 namely the forgery charge. The logical first port of call is whether there was a forgery at all because if there wasn't, then *cadit quaestio*. If indeed there was, only then would the question of the involvement (if any) of each of the appellants arise. Thereafter, the question of whether there was an improper splitting of charges leading to a duplication of convictions as contended by the applicants would have to be considered.

Forgery is defined in s 137 of the Criminal Code in the following terms: -

137 Forgery

- (1) *Any person who forges any document or item by—*

- (a) *making a document or signature which purports to be made by a person who did not make it or authorize it to be made or by a person who does not exist; or*
- (b) *tampering with a document or item by making some material alteration, erasure or obliteration;*

with the intention of defrauding another person or realising that there is a real risk or possibility of defrauding another person thereby, shall be guilty of forgery.

The central question, therefore is whether or not the Power of Attorney in question was authored at the behest of Dick Maplan.

As indicated earlier Dick Maplan completely distanced himself from that document. Although he did not say it in as many words, the Magistrate found, correctly in our view, that Maplan Dick had absolutely no reason to dispute the authenticity of that document if at all he had participated in its authorship. He candidly admitted that he in fact sold the property to the 2nd appellant. Should he have, pursuant to or in connection with that sale, authored the Power of Attorney authorizing 1st appellant to make any further transactions he would in all probability have admitted as much. There would have been nothing amiss about him having done so.

But that is just the tip of the ice-berg, there are several discrete pieces of evidence indubitably pointing towards that document having been forged and these, in no order of importance, may be summarised as follows.

Firstly, there is the misspelling of Maplan Dick's name in the impugned power of attorney. It is inconceivable that Maplan Dick would associate himself with a document whose importance is of that magnitude wherein there was such a glaring misspelling of his name. So glaring is that misspelling that that is the first thing that immediately strikes you upon its perusal. It could not by any stretch of the imagination be regarded as a "slip of the pen".

Still on the question of that misspelling; if appellants' version is anything to go by, the agreement of sale of the property by Maplan Dick to 2nd appellant would in scheme of things have preceded the authoring of the Power of Attorney in question. How probable is it then that having entered into that agreement of sale a few weeks earlier, where all the names were correctly spelled, that there would be a sudden and graphic distortion of Mr Dick's name from 'Maplan' to 'Maphah'. The two are as different as chalk from cheese, so to speak lending

credence to the state's assertions that the power of attorney was forged. The attempt made by the appellants in their grounds of appeal to downplay the significance of the misspelling wherein they describe it as a "mere spelling mistake" (implying that such a misspelling is innocuous and inconsequential) is untenable. It is a very relevant piece of evidence connected to the question of the forgery of that document.

Equally significant is the date on which the disputed document was authored. Mr Dick was adamant that as at February 2018 he had not yet in any event disposed of his property to the 2nd appellant. He only did so in March 2018. As stated earlier there would be no logical reason for him to misrepresent that fact.

A contention was mounted on behalf of the appellants to the effect that the court ought not to have accepted the evidence of Maplan Dick on his mere *ipse dixit*. What was lost on them was that this was essentially a question of credibility and matters of credibility remain principally within the province of the trial court. The appellate court seldom interferes with findings of credibility by a lower court. It can only do so where such findings are clearly unreasonable and not supported by the facts. See *Bakari v Total Zimbabwe (Pvt) Ltd* SC 226/16; *Barros v Chimponda* 1999 (1) ZLR 58 (S).

This is because having been steeped in the atmosphere of the trial, the trial court will have had the opportunity to observe the witnesses and assess their candour and demeanour. Thus, in the absence of any irregularity either proved or apparent *ex facie* the record, the appeal court will not usually reject findings of credibility by the trial court and will usually proceed on the factual basis as found by the trial court. We could not find any such irregularity or misdirection in the acceptance by the court *a quo* of Maplan Dick's evidence and the rejection of that of the appellants. As alluded to above, the misspelling of Maplan Dick's name on the power of attorney strengthens rather than diminish the view that it was authored before the sale of the property by Maplan Dick to the 2nd appellant

It was spiritedly argued on behalf of the appellants that the failure by the State to secure the evidence of the person who supposedly commissioned the affidavit cum Power of Attorney dealt in fatal blow to assertions of its falsity. That argument cannot be sustained. During oral submissions in court in this appeal, counsel for the appellants was at pains to identify who exactly that commissioner of oaths was. It boggles the mind that appellants would have expected

Maplan Dick (or the police) to track down a person whom he (i.e. Maplan Dick) swore was completely unknown to him let alone ever having had any dealings with.

Although the onus rests on the State to prove its case beyond reasonable doubt, this is one instance which in the ordinary course of things, behoved any of the appellant(s) insistent on the authenticity of that document to secure the attendance of that person whom they claimed had commissioned the same. That would not in the least amount to a reversal of the onus of the parties.

Then there is the question of the person to whom the authority was supposedly given through the power of attorney. It defies logic that Maplan Dick having supposedly sold the property to 2nd appellant in January 2018, as contended by the appellants, would then proceed to grant the Power of Attorney to 1st appellant to deal with the property. Not only would that be unusual as it would potentially pose serious challenges in any future registration of the property but it would also create a blatant contradiction. One would have expected that the power of attorney in those circumstance would be issued to 2nd appellant.

Interestingly the 1st appellant denied any knowledge of the power of attorney. During his cross-examination by the prosecutor the following exchange took place:

Q: You saw the power of attorney

A: Yes, but I did not read it

Q: You heard the complainant saying that you tendered it to him

A: No

Q: You heard Maplan Dick saying he never authorised the power of attorney

A: I did not listen to it for it has nothing to do with me

Q: I put it to you that it is a forged document

A: No comment

A few moments later the cross examination would similarly proceed as follows.

Q: And he said he [Maplan Dick] never gave you authority to sell it [the property] through a power of attorney

A: Yes

Q: The same power of attorney has no date

A: I do not have a comment

This was clearly a vain attempt by the 1st appellant to put distance between himself and the disputed power attorney. That unintended consequence was of course to wreak havoc to the appellants' common position that the power of attorney was in fact authentic. Just how probable is it in the context of this case that Maplan Dick would grant a power of attorney to 1st appellant without the involvement or concurrence of the latter. Stranger still is the fact that the latter would subsequently use that very document to sell the property to the complainant. The power of attorney in question was obviously the vehicle through which the 1st appellant purportedly sold the property to the complainant whether at his (i.e. 1st appellant) own instance as testified by the complainant or at the instance of the 2nd appellant as suggested by all appellants. The fact remains that the 1st appellant is inextricably connected to that power of attorney.

There is no need to belabour the point, the court *a quo* in my view, was correct in making a finding as it did that the Power of Attorney in question was indeed a forgery. It lied about itself, it purported to be what it was not. It was never authored by or at the behest of the Maplan Dick.

That the intention in forging the document was calculated at defrauding any person who so acted on it can hardly be disputed. All the essential elements of forgery were amply satisfied.

Whether all four appellants acted in common purpose in forging the Power of Attorney.

The argument here was that the apparent indiscriminate conviction of all the four appellants on the forgery charge without particularizing the role played by each of them was erroneous. It was contended that from the evidence there was no basis or justification in finding that the four appellants acted in common purpose in forging the Power of Attorney.

Reliance was placed *inter alia* on the case of *S v Thebus* 2003 (6) SA 503 (CC) where the following was stated regarding the doctrine of common purpose.

“The liability requirements of a joint enterprise fall into two categories. The first arises where there is a prior agreement, express or implied, to commit a common offence. In the second category, no such prior arrangement exists or is proved. The liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind.”

It was therefore argued that no evidence had been adduced to suggest that there was prior agreement by the four appellants to manufacture, with fraudulent intent, the disputed Power of Attorney nor was it established beyond reasonable doubt that they all participated in forging the same.

In the overall scheme of things, it is common cause that the four appellants fall into two groups. The first group consists of the 1st and 2nd appellants who are alleged to have masqueraded as the owners of the house. The 3rd and 4th appellants belong to the second group who, supposedly in their capacity as estate agents, facilitated the sale of the property between the 1st and 2nd appellants on the one hand, and the complainant on the other. The question that begs therefore is the role (if any) played by each of the appellants in forging the Power of Attorney.

Seldom does one find direct evidence in forgery cases of the forger actually performing the physical act of doctoring the document or item and this case is no exception. The falsity of the document is usually discovered in the wake of it being tendered to third parties. Almost invariably therefore the identity of the forger is ascertained either on the basis of forensic evidence or from inferential reasoning based on the circumstantial evidence of the case.

In that context, the Magistrate's reasoning as it relates to the involvement of 1st and 2nd appellants can hardly be faulted. They are the ones who secured that forged document as a spring board to launch the eventual sale of the property to potential purchasers of the property. The connection between the document and the 1st and 2nd appellants is direct and obvious. The fact that the fake Power of Attorney purports to show authority being granted to 1st appellant to deal with does not help the latter's cause. In this regard we once again ask the rhetorical question we paused earlier namely; on what basis would he (i.e. 1st appellant) have hoped to enter into contracts of the sale of the property with potential purchasers if not armed with a power of attorney. Any potential purchaser would obviously have been interested in establishing the authority he held to conclude that sale. That is when the "cooked" power of attorney came in handy: it would (as it did) hoodwink any such potential buyer into believing he had been appointed as agent to sell the property on behalf of a particular principal. Despite his protestations to the contrary 1st appellant's connection to the authorship of the document is clear.

Equally cogent is the evidence of the nexus between 2nd appellant and the forgery. He at all times associated herself with it. The import of the evidence of the 1st appellant was that it was

2nd appellant who was answerable regarding the origins of the power of attorney. The evidence shows that 2nd appellant conveniently skirted and was evasive on the question of the circumstances surrounding her acquisition of that document. Ultimately, however, when the evidence is viewed in its totality it is clear that the duo acted in cahoots to create that false document.

The alleged involvement of the 3rd and 4th appellants is however a different kettle of fish. The court *a quo* based its findings on the doctrine of common purpose. The question therefore is whether there was sufficient evidence justifying such a conclusion.

The common law principles applicable to the doctrine of common purpose have since been captured in Chapter XIII of the criminal code. In particular s196 provides as follows: -

“196. Liability of co-perpetrators

(1) Subject to this section, where -

(a) two or more persons knowingly associate with each other with the intention that each or any of them shall commit or be prepared to commit any crime; and

(b) any one of the persons referred to in paragraph (1) (“the actual perpetrator”) commits the crime; and

(c) any one of the persons referred to in paragraph (a) other than the actual perpetrator (“the co-perpetrator”) is present with the actual perpetrator during the commission of the crime;

the conduct of the actual perpetrator shall be deemed also to be the conduct of every co-perpetrator, whether or not the conduct of the co-perpetrator contributed directly in any way to the commission of the crime by the actual perpetrator.”

From the above, therefore, the pre-requisites for imputing liability on alleged co-perpetrators (i.e. common purpose) in terms of the Criminal Code can be summarised as follows-

- (i) conscious association in a criminal enterprise by two or more persons
- (ii) intention to commit the crime
- (iii) commission of the crime by one or more of such persons
- (iv) presence of the co-perpetrator(s) during the commission of the crime

In our view the use of the phrase “knowingly associate” in section 196 covers both situations conceived under the common law consisting firstly of instances of prior agreement by the co-perpetrators and secondly cases where no prior agreement exists but an accused nonetheless participates in the commission of the crime. Regarding the latter category the following was stated in *State v Mgedesi and Others* 1989 (1) SA 687 (A).

“In the absence of proof of prior agreement, accused No. 6, who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be held liable for those events, on the basis of the decision in State v Safatsa and Others 1988 (1) SA 868 (A) only if certain pre-requisites are satisfied. In the first place he must have been present at the scene where the violence was committed. Secondly, he must have intended to make common cause with those who were actually perpetrating the assault, fourthly he must have manifested his sharing of common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifth, he must have the pre-requisite mens rea, so in respect of the killing of the deceased he must have included them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue.”

It is pertinent to note that the code dispenses with the requirement which exists under the common law that there be a physical act of association by the co-perpetrator for liability to attach.

Ultimately one finds in the context of the present case that there was insufficient evidence to suggest that the 3rd and 4th appellants knowingly associated in the forging of the Power of Attorney. Further, it was also not demonstrated beyond reasonable doubt that they were present when that document was being manufactured. It is far-fetched to suggest that because they wittingly acted on it, therefore they must have also participated in its making. To the contrary the evidence appears to show that the Power of Attorney was brought to them by the 1st and 2nd appellants. Put differently, it is a plausible explanation that the 3rd and 4th appellants only became aware of the forged power after it had already been forged. It was on that basis that we concluded that the court a quo had erroneously found that the State had proved the forgery charge against the 3rd and 4th appellants beyond any reasonable doubt and accordingly upheld their appeal in that regard.

The alleged improper splitting of charges

It was argued at considerable length on behalf of the appellants that convicting the appellants of both forgery and fraud amounted to an improper splitting of charges. The basis of

that argument was that the forging of the Power of Attorney (should that have been the case) was merely a preparatory and facilitative step towards the commission of the fraud. Therefore, on the basis of the “single intent test” charging and convicting the appellants of both forgery and fraud was unjustified and impermissible, and only the fraud charge ought to have been preferred against them.

However, as was correctly pointed out by the State that argument would perhaps have carried the day under the common law. That position, as far as the crimes of forgery and fraud are concerned, has since been modified by s 137(2)(a) of the Code which provides as follows;

137 Forgery

(1)

(2) *In a case where-*

(a) *a person delivers or causes to be delivered a forged document or item to another person with the intention of defrauding that person or realizing that there is a real risk or possibility of defrauding that person*

(i) *the competent charges shall be fraud AND forgery if the person delivering the forged document or item or causing it to be delivered also forged it;*

(ii) *the competent charge shall be fraud if the person delivering the forged document or item or causing it to be delivered did not forge it (emphasis added)*

The use of the conjunctive AND in paragraph (i) above implies that it is competent to charge (and convict) an offender in circumstances such as the present of both forgery and fraud.

The fraud charge

Some of the arguments presented in respect of this charge overlap with those raised in connection with the forgery charge. In the main however, the tenor of the argument was that the State failed to prove the essential elements of fraud rendering a conviction unjustified.

S 136 of the Criminal Code provides as follows;

“136 Fraud

Any person who makes a misrepresentation -

- (a) *intending to deceive another person or realizing that there is a real risk or possibility of deceiving another person; and*
- (b) *intending to cause another person to act upon the misrepresentation to his or her prejudice, or realizing that there is a real risk or possibility that another person may act upon the misrepresentation to his or her prejudice; shall be guilty of fraud if the misrepresentation causes prejudice to another or creates a real risk or possibility that another person might be prejudiced*”

The essential ingredients of the offence of fraud in terms of the above section, apart from the unlawfulness of the conduct, are therefore

- (a) the making of a misrepresentation
- (b) intention to deceive by the misrepresentation
- (c) prejudice or potential prejudice

The main thread that ran through the appellants’ version was that there was no misrepresentation at all made by them given that 2nd appellant had earlier purchased the property which she subsequently authorized the 1st appellant to dispose of.

However, as the court *a quo* correctly observed, the evidence when considered holistically paints a completely different picture from the one the appellants attempted to convey.

It is important to stress right from the onset that the evaluation of evidence requires of the court to consider the evidence as a whole, instead of focusing too intently upon the separate and individual parts of the evidence. Doubt may indeed arise when one or more aspects of the evidence are viewed in isolation, but when evaluated with the rest of the evidence, such doubt may be set to rest. The proper approach in the evaluation of evidence was set out *S v Chabalala* 2003 (1) SACR 134 (SCA) 139i-140b where the following was stated:

“The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides, and having done so, to decide whether the balance weighs so heavily in favour of the state as to include any reasonable doubt to the accused’s guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as a failure to call a material witness concerning an identity parade) was decisive but that can only be on an ex post facto determination and a trial court (and counsel) should avoid the

temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture of the evidence”

The following are some of the features which we found as demonstrating beyond reasonable doubt that the sale of the property to the complainant was fraudulent through and through.

Firstly, there is the crucial issue of date of sale of the property to complainant. As indicated hereinbefore, Maplan Dick while admitting having sold the property to 2nd appellant was steadfast that this was only in March 2018. Prior to that he had had no dealings with any of the appellants. He would have had no reason to misrepresent such facts. One can only conclude that the plan to defraud potential buyers was hatched after the appellants got wind that Maplan Dick was desirous of disposing of the property. To this end he had openly advertised that property.

The misspelling of Maplan Dick on both the agreement of sale (exhibit 1) and the Power of Attorney (exhibit 2) was neither anecdotal nor inconsequential; it is explicable in terms of the quartet (particularly the 1st and 2nd appellants) not having had any dealings with Maplan Dick as of that stage. It stands to reason that they neither had his particulars nor an existing agreement of sale from which they could copy his name correctly. They had only gotten wind of his intention to dispose of the property resulting in them failing to capture his name correctly.

Thirdly, contrary to the position adopted by the appellants that it was the 2nd appellant who sold the property to the complainant, the evidence by the 1st two State witnesses was to the effect that it was the 1st appellant who held himself out to be the owner of the property. The said witnesses indicated that although the 2nd appellant was present during negotiations she introduced herself as merely the sister of the 1st appellant the latter who was supposedly the owner of the property. The question that begs is why would they misrepresent the true ownership of that property as at that stage.

The variance in the identity of the true owner of the property is reflective not only of the fact that as of that stage neither the 1st nor 2nd appellants had yet acquired property from Maplan Dick but more importantly that this was an elaborate con-trick which they had hatched to sell a property which did not belong to them.

Further, even if one were to accept for a moment that it was 2nd appellant who sold the property to the complainant in the aftermath of her having purchased it from Maplan Dick, why then would the seller be recorded as Maplan Dick who had long since fallen out of the picture?

Equally compelling is the evidence surrounding the reason for the cancellation of the agreement of sale. In this regard the appellants resorted to the subterfuge that this was occasioned by the spurning by the 2nd appellant of the payment in South African Rands. This explanation was outrightly dismissed by the complainant who indicated that both 1st and 2nd appellants were present during negotiations leading to the agreement of the purchase price. More pertinently the complainant testified that they principally agreed on a purchase price of R280 000 in lieu of the US\$30 000 which was the agreed amount in United States dollars. This then led him to make an initial payment of R135 000. What is critical here is that this was in the presence of all the appellants. He specifically indicated that 2nd appellant was present. There would be no real motive for the complainant to mislead the court in this regard.

We found it utterly strange (if the appellants' version is anything to go by) that 1st appellant having been mandated by 2nd appellant to sell property in United States Dollars and the 3rd and 4th appellants having been equally informed that the seller was selling his property in United States dollars would wander off on a frolic of their own and sell the property in a different currency without as much as breaking stride to ascertain whether this was acceptable to her.

Still on the subject of the currency of payment, how probable is it that the complainant would make subsequent payments in South African Rands without the supposed seller being aware of the unit of payment.

As if that is not enough, the reason given to the investigating officer (the 4th State witness) was at odds with what they later told the court. To the former, the reason for the cancellation of the amount was that the seller (who at that stage was given as Maplan Dick) had hiked the price of the property. Needless to say that at that stage even if one were to go by the appellant's defence, the property no longer belonged to Maplan Dick nor could he hike the price of the property.

To the complainant, the reason for the cancellation for the contract of sale were the squabbles that beset the family of Maplan Dick in the aftermath of his supposed demise. All of which was, of course, the work of pure fiction on their part.

How the reason for the termination of the contract of sale would morph from the unfortunate demise of Maplan Dick, to the latter having supposedly hiked the purchase price of the property and yet again to the 2nd appellant having spurned payment in ZAR is breathtaking to say the least.

Equally stunning was the constant mutation of the true identity of the owner/seller of the property. During the negotiations for that sale, the seller was presented to the complainant as the 1st appellant (with the 2nd appellant as the sister of the former only accompanying him). To the investigating officer and later to the complainant, the seller was given as Maplan Dick. In court during the trial the seller would transform yet again to the 2nd appellant. All this point an ignoble picture of duplicitous conduct on the part of the appellants.

The involvement of the 3rd and 4th appellants in the fraudulent enterprise is just as glaring as that of their co-appellants. The uncontroverted evidence of the complainant was that after he had made several payments to the 3rd and 4th appellants he was summoned to their office to sign some ZIMRA documents only to be informed upon his arrival that sale was “still – born” owing to the demise of Maplan Dick which was a pack of lies as neither had the latter died nor was he involved in the sale at all. The copy of the death certificate which they relayed to the complainant despite it being illegible hence inadmissible as evidence in court was nonetheless false for the simple reason that Maplan Dick is alive and well today. It’s illegibility in the context of the complainant’s evidence does not detract from its falsity.

If the 3rd and 4th appellants were innocent intermediaries who were unfortunately caught up in the crossfire of the 1st and 2nd appellant’s sinister web of lies and deceit they would neither have misrepresented to the complainant the reason for the apparent termination of the contract as being the death of Maplan Dick nor would they have misrepresented to the court that the reason for such termination was the rejection by the 2nd respondent of payment of the purchase price in ZAR. The potpourri of falsehoods which they peddled at every turn can only mean one thing; they were at the heart of the misrepresentation which ultimately caused prejudice to the complainant.

As further demonstration of their involvement in the fraudulent scheme, 3rd and 4th appellants attempted to sell to the complainant a property belonging to one Ephraim Ndadzibaye on the pretext that it belonged to Tanaka Bernard Ndadzibaye. Although the second abortive transaction took place after the one that forms the subject matter of the charge in count 2, it is trite that evidence of behavior after an event can serve as an indication as to the state of mind at the time of the event (see *State v Majosi and Others* 1993 (2) SACR 532 (A) at 538 (B)).

During the trial the appellants belatedly introduced documents purporting to show that complainant sold the property to 2nd appellant in January 2018 as well as Power of Attorney attending to same. What boggles the mind is why the complainant was not confronted with those documents during cross examination so that he could comment thereto? Cross examination is a tool designed to present such an opportunity.

One could go on *ad infinitum* to demonstrate the series of misrepresentations made by the appellants to the complainant.

The mental element (i.e. intent to defraud) is self-evident. The appellants clearly sought to reap where they did not sow; they duped the complainant into parting with his money through a web of lies and deceit. He was hoodwinked into believing that this was a legitimate property sale when in fact it was not. He ended up being prejudiced of some R252 000 which he is yet to recover.

It was for the above reasons that we concluded that all the essential element of the offence of fraud were amply satisfied and no misdirection is attributable to the court *a quo* in either its factual findings or the legal conclusions arrived at. The four appellants were properly convicted.

Regarding sentence

The main gripe against sentence was that it was excessive (particularly with regard to the 2nd appellant who was described as widowed and of ill health) and that the court *a quo* should have considered an overall non-custodial sentence. To that end it was suggested that a 24 months' prison term partly suspended on condition of good behavior and partly on condition of restitution was appropriate.

It must be stressed right from the onset that sentencing remains pre-eminently in the discretion of the trial court. An appeal court will only interfere with such discretion upon a

finding of a clear misdirection. See *S v Mugwenhe and another* 1991 (2) ZLR 66 and *S v Mundowa* 1998 (2) ZLR 395.

In the present case the sentence which ultimately left the each of appellants with an effective prison term of 24 months (after making good the loss incurred by the complainant) can hardly be said to be excessive. The sentence was in our view appropriate and fit the offence the offenders and the general interest society. In its reasons for sentence the court *a quo* properly considered the personal circumstances of the accused persons. In particular that they were all first offenders who were susceptible to rehabilitation. The court also considered the possible hardships the sentence might cause to the appellants' families. Regarding the offence the court *a quo* correctly found that it was indeed a serious offence which had caused substantial prejudice to the complainant. For our part we find it pertinent to note that there was an element of preplanning, premeditation and careful execution of the fraudulent scheme.

Further it is apparent from a reading of the record that the court *a quo* considered the objects of punishment (deterrence, retribution, reformation and prevention) and was alive to the need to temper punishment with an element of mercy.

Ultimately therefore we did not find any material misdirection on the part of the court in the exercise of its sentencing discretion and we noted that the sentences in respect of both counts were in keeping with sentences imposed in cases of a similar nature.

There is indeed a bounden duty for the courts to send out a clear message that such conduct where fraudsters set up elaborate schemes to cheat home seekers into parting with their hard-earned cash cannot be tolerated.

It was for the above reasons that we gave the following order: -

ORDER

IT IS ORDERED THAT: -

1. Count 1:

- a) The appeal by 3rd and 4th appellants against conviction is upheld and the judgment of the court *a quo* is set aside and substituted with one of "Not Guilty and acquitted". The sentence in respect of each of them is hereby set aside.

b) The appeal by 1st and 2nd appellants in respect of both conviction and sentence is hereby dismissed.

2. Count 2:

Appeal against both conviction and sentence in respect of all 4 appellants be and is hereby dismissed.

MAWADZE J Agrees.....

Mutendi, Mudisi and Shumba, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners