

DISTRIBUTABLE (72)

(1) ISRAEL TANGWENA (2) TONDERAI MUOCHA
v
THE PROSECUTOR GENERAL

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, PATEL JA & BHUNU JA
HARARE: 6 JUNE 2019 & 14 JUNE 2021

C Warara, for the Appellant

E Mauto, for the Respondent.

BHUNU JA: This appeal from the High Court has its genesis in the Magistrates Court which acquitted both appellants on one charge of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and, secondly, operating an unregistered trust in contravention of s 9 of the Private Voluntary Organisations Act [*Chapter 17:05*]. Aggrieved by the acquittal of both appellants on the first count the respondent appealed to the High Court (the court *a quo*).

The court *a quo* after full contest found that the trial court erred and misdirected itself in that it misconstrued the facts in acquitting both accused. On the basis of such finding it adjudged that the trial court ought to have found both accused guilty as charged. It thus upset the judgment acquitting the appellants and issued the following order:

“Accordingly the court orders as follows:

1. The appeal against the acquittal of first and second respondents (Now appellants) in CRB R 856 succeeds.
2. The matter is remitted back to the trial court for sentencing.”

PRELIMINARY OBJECTION

At the commencement of the hearing, counsel for the respondent raised a preliminary objection arguing that the first appellant, Israel Tangwena, should be barred from being heard on account that he is a fugitive from justice on a warrant of arrest.

Counsel for the appellants countered that they were taken by surprise as they were not served with any warrant of arrest. The issue was being raised for the first time at the appeal hearing. It would be unfair and unjust for the respondent to ambush them with an issue never raised before in the pleadings and heads of argument. In any case, the same arguments for the second appellant would apply to both appellants on the merits. There would therefore be no prejudice if the first respondent was heard by the court.

2

Having considered the appellant’s response, counsel for the respondent promptly withdrew his preliminary objection with the court’s approval.

FACTUAL BACKGROUND

The facts giving rise to both charges are hotly contested in the main. What is however not in dispute is that the complainant, Douglas Mamvura, was the owner of a company called Hedgehold Trading (Pvt) Ltd trading as Manna Brands.

On the other hand, the appellants were the owners of an agri-business styled Makonde Industries. The business was in financial distress and consequently under

liquidation. Desirous to revive their agri-business, the appellants approached the complainant with a proposal for Hedgehold to buy the troubled agri-business and assume its liabilities. It was a term of the agreement that the complainant would allot the appellants shares in the company.

It was further proposed and agreed that, because the complainant had a clean financial record with the banks, he would be responsible for obtaining loans from his bank and other financiers to fund the new joint venture agri-business under the style of Hedgehold (Private) Limited.

The complainant bought into the idea and it was agreed that, as the sole financier of the new joint venture rebranded Hedgehold (Pvt) Ltd, he would be one of the Directors, Executive Chairman and majority shareholder of the company. The other minority shareholders would be the two appellants and the late Chimbindi Fanuel. Open Tribe Foundation Trust was to be the fifth shareholder.

The initial CR2 allotted the company's shares as follows:

1.	Douglas Mamvura (Complainant)	75%
2.	Tangwena Israel (1 st Appellant)	11%
3.	Muocha Tonderai (2 nd Appellant)	5%
4.	Chimbindi Fanuel (late)	5%
5.	Open Tribe Foundation Trust	4%

It is common cause that the fifth shareholder, Open Foundation Trust, was unregistered. Its object was nevertheless to cater for the welfare of underprivileged orphans, widows, HIV and AIDS victims. This forms the basis of the second allegation against the appellants, which is however not relevant to this appeal.

In pursuit of the agreement, the complainant mortgaged his home and various other properties, including his wife's car, to raise a total of US\$350 000 which he ploughed into the agri-business. The business venture kick started with the complainant closely guarding his investment for fear of losing his mortgaged properties and investment.

The learned judge in the court *a quo* found that the strict administrative measures adopted by the complainant must have unsettled the other Directors, thereby generating conflict and irreconcilable differences. The conflict culminated in the minority Directors locking out the complainant. They eventually filed a new CR2 with the Registrar of Companies in a bid to strip the complainant of all his rights and interest in Hedgehold. Despite their concerted endeavour to terminate their business relationship with him, they continued to hold onto his investment to his exclusion and detriment.

4

In a bid to achieve their fraudulent scheme, the appellants are alleged to have crafted and filed fraudulent CR2, CR11 and CR14 documents with the Registrar of Companies to divest the complainant of his Directorship and shareholding in Hedgehold.

The appellants denied the allegations of fraud both in the Magistrates Court and in the court *a quo* on appeal.

THE ISSUES FOR DETERMINATION

The appellants attacked the court *a quo*'s judgment on both procedural and substantive grounds. The grounds of appeal however raise one crisp issue for determination.

The single issue for determination is:

Whether or not the court *a quo* correctly found the appellants guilty of fraud as charged.

WHETHER OR NOT THE COURT A QUO CORRECTLY FOUND THE APPELLANTS GUILTY OF FRAUD AS CHARGED.

The appellants challenged their conviction on the basis that the respondent failed to discharge the onus of proving the essential elements of fraud beyond reasonable doubt. Section 136 of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*] provides for the definition and essential elements of fraud as follows:

“136 Fraud

Any person who makes a misrepresentation

- (a) intending to deceive another person or realising 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 realising 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 actual prejudice to another person or is potentially prejudicial to another person, and be liable to:

- (i) a fine not exceeding level fourteen or not exceeding twice the value of any property obtained by him or her as a result of the crime, whichever is the greater; or
- (ii) imprisonment for a period not exceeding thirty-five years; or both”.

The Act defines the offence of fraud in simple though somewhat frosty and verbose language, such that it needs further elucidation to give effect to the intention of the lawmaker.

In plain layman's language, fraud may however be defined as dishonestly making a false misrepresentation with the intention to cause actual or potential prejudice to another person. The intention of the legislature in s 136 of the Act was to proscribe and punish theft by deceitful means.

In the context of the statutory definition of fraud, its essential elements may be paraphrased as follows:

1. Making a misrepresentation to another person.
2. With the intention to cause another person to act on the misrepresentation to the actual or potential prejudice of any person.

Section 136 of the Act is couched in broad terms encompassing a situation where the misrepresentation is made to a person other than the subject of the intended prejudice. To constitute fraud, it is sufficient that a misrepresentation is made to any person with the intention of causing any other person actual or potential prejudice.

In *casu*, it does not therefore matter that the misrepresentation was made to the Registrar of companies with the intention of causing prejudice to the complainant.

It is plain from the evidence led in the trial court that the appellants completed and submitted the alleged fake fraudulent CR2 document dated 23 January 2013. The alleged fake CR2 form now reflects that all the shares in Hedgehold were allotted to Open Tribe Foundation Trust on 25 January 2013. The State alleged that the fake CR2 was backed up by an equally fraudulent special resolution of Hedgehold crafted in the following terms:

“IT WAS RESOLVED THAT:

1. Cancellation of CR2

That the unauthorised CR2 which sought to change the ownership of the company in contravention of paragraph 4 and 5 (b) of the company’s Articles of Association be amended and replaced.

2. Allotment of shares.

That the unissued shares in the company being 1870 (one thousand eight hundred and seventy) shares of 1 (one) dollar each be allotted in full to Open Foundation Trust Trading and that a form CR2, share allotment form, giving effect to the allotment be lodged with the Registrar within the prescribed time.”

The effect of the amended CR2 form was to deceitfully strip and divest the complainant of his entire shareholding and huge investment in Hedgehold Pvt Ltd to the tune of US\$350 000 without his consent. We therefore find no merit in the appellants’ complaint that the court *a quo* misdirected itself in substituting its own discretion for that of the trial court. This is because the trial court’s acquittal of the accused in the face of overwhelming evidence was irrational and grossly unreasonable.

In *Chiodza v Siziba*¹, relied upon by the appellants, this Court held that:

“The general rule regarding factual findings made by a trial court is that they will not be upset by an appellate court unless there had been a gross misdirection by that court on the facts so as to amount to a misdirection in law in the sense that no reasonable tribunal applying its mind to the same facts would have arrived at the conclusion reached by the lower court.”

¹ SC 4/15 at p6

In this case, the basis of the court *a quo*'s interference was the failure by the magistrate to appreciate the full extent of the State's case and the evidence on record leading to a failure of justice. The court *a quo* found that there was clear cogent expert evidence establishing beyond reasonable doubt that the documents admittedly crafted and presented to the Registrar of companies by the appellants to the prejudice of the complainant were fraudulent.

A perusal of the record of proceedings shows that the learned judge *a quo*'s remarks, at p 10 of the cyclostyled judgment, to the effect that the trial magistrate strangely went out of his way to justify the fraudulent acts of the appellants, are beyond reproach.

That being the case, the court *a quo* cannot be faulted for finding that the trial court misdirected itself in acquitting the appellants in the face of overwhelming evidence establishing the accused's guilt. 8

DISPOSITION.

That the State proved the accused's guilt beyond reasonable doubt is beyond question. For that reason, the appeal can only fail.

It is accordingly ordered that the appeal be dismissed.

GWAUNZA DCJ

I agree

PATEL JA

I agree

Warara and Associates, appellants' legal practitioners

National prosecuting Authority, respondent's legal practitioners.