

THE STATE

Versus

**ACCEPTABLE BENEFITS CONSULTANTS
(represented by Judith Fadzai Benard)**

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 16 MARCH 2006

Criminal Review

NDOU J: The accused was charged before a Gweru Magistrate with contravention of section 5(1)(a) as read with section 5(2) of the Money Lending and Rates of Interest Act [Chapter 14:14] i.e. failure to display or fix in a conspicuous position its name.

The accused was convicted and sentenced as follows:

“\$200 000/ in default [of] payment 4 months imprisonment”

The learned scrutinising Senior Regional Magistrate, Central Division, submitted the matter on review with *inter alia* the following comments:

“... it is not clear if Judith Fadzai Benard has been charged in her personal or representative capacity. The trial magistrate seemed not to appreciate the difference in terms of procedure. In her reply the trial magistrate stated that the proceedings were in a representative capacity and attached the relevant authority. The relevant authority is, however, defective in that it does not state how the company representative should plead to the charge. Be that as it may, the sentence imposed by the trial magistrate is incompetent as she purports to sentence a company to a custodial sentence. The sentence is also not properly couched”

HB

21/06

I agree with the observations made by the learned Senior Regional Magistrate. The first problem is that the charge sheet and the state outline do not show whether Acceptable Benefits Consultant is an incorporated company, an unincorporated association or a voluntary corporation. This should have been amplified by the prosecutor by handing in a properly certified copy of the certificate of incorporation. I, however, discern that the accused is a private limited company from the authority produced by Judith Fadzai Benard empowering her to represent the company. It is further clear that Judith Fadzai Benard is charged in a representative capacity i.e. the company is charged alone. The provisions of section 385(3) of the Criminal Procedure and Evidence Act [Chapter 9:07] apply. The said subsection provides:

“3. In any criminal proceedings against a corporate body, a director or employee of that corporate body shall be cited, as representative of that corporate body, as the offender, and thereupon the person so cited may, as such representative, be dealt with as if he were the person accused of having committed the offence in question:

Provided that-

- i. if the said person pleads guilty, the plea shall not be valid unless the corporate body authorised him to plead guilty.
- ii. ...
- iii. ...
- iv. if the said person, as representing the corporate body, is concerned, the court convicting him shall not impose upon him in his representative capacity punishment, whether direct or as an alternative, other than a fine, even if the relevant enactment makes no provision for the imposition of a fine in respect of the offence in

question, and such fine shall be payable by the corporate body and may be recovered by attachment and sale of any property of the corporate body ...”

HB

21/06

The authority in this case does not authorise the representative to plead guilty. Without such authority to plead guilty the court must enter a plea of not guilty. Proof of authority to admit on the company’s behalf is necessary – *R v Fruit Growers Distributors (Pvt) Ltd* 1966 RLR 103 (G) and *Criminal Procedure in Zimbabwe* by J R Rowland at 11-10 and 25-22. On this procedural defect alone the conviction cannot stand.

Further, on the question of sentence, the sentence imposed by the court on a corporate body must be a fine only – section 385 (3), proviso (iv), *supra*. Therefore, the alternative sentence of four months imprisonment imposed by the trial court would have been incompetent.

Accordingly, I quash the conviction and set aside the sentence imposed by the trial court. A fresh trial is ordered before a different magistrate.

Cheda J I agree