TREGERS INDUSTRIES (PVT) LTD

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA AND NDOU JJ
BULAWAYO 31 JANUARY 2007 AND 5 JUNE 2008

J Samkange for the appellant
T Mkhwananzi for the respondent

Criminal Appeal

NDOU J: The appellant is a private limited company duly incorporated under the laws of Zimbabwe. On 19 July 2004 the appellant represented by Gerald Kuong Keyer, its Group Operations Director, was arraigned before a Bulawayo Regional Magistrate on charges framed under the Exchange Control legislation. Appellant pleaded guilty to 293 counts of illegal dealing in foreign currency i.e. contravening section 5 (1)(a)(i) of the Exchange Control Act [chapter 22:05] as read with section 4(1)(a)(i) of the Exchange Control Regulations Statutory Instrument 109/96 and one count of attempted dealing in foreign currency. The amount involved amounted to $6 224 159 418,64 for illegal dealing and $18 794 400 for attempted illegal dealing in foreign currency.

The appellant further pleaded guilty to 286 counts of illegal causing foreign currency to be exported from Zimbabwe without authorisation. The currency involved amounted to $724 411 646,81.

The appellant was fined $2,5 million for the 293 counts of illegal dealing in foreign currency, $2 million for attempted dealing in foreign currency and $500 million for 286 counts of illegal expatriation of foreign currency.

The appellant is not satisfied with the sentence only and hereby appeals against sentence only. On appeal, the appellant prays that we set aside the above sentences and substitute them with a globular fine $100 million or in default of payment a warrant of execution against the appellant's property in that value to be issued in the manner contemplated by section 348 of the Criminal Procedure and Evidence Act [chapter 9:07]. I propose to consider the grounds of appeal in turn.

Technical splitting of charges

The appellant's case is that the learned trial Regional Magistrate injudiciously and unreasonably exercised his sentencing discretion by failing or refusing to treat all charges as one for the purposes of sentence with the result that the cumulative fine imposed became unreasonably excessive. This failure, it was submitted, amounted to a blatant misdirection by the trial court, entitling this court to interfere with the sentences imposed. It is an accepted principle of our law on sentencing that, save in exceptional cases, it is more preferable for a sentencing court to impose a separate sentence for each offence charged, where the accused has been convicted of more than one offence – *S* v *Chawasarira* 1991(1) ZLR 67 (H). At page 69H-E, SMITH J expressed this sentencing principle as follows:

> "Separate punishment should, save in exceptional cases, be imposed for each separate charge. One globular sentence for two or more offences should only be considered where the offences are of the same or similar nature and are closely linked in point of time. If these two requirements are not satisfied then a separate sentence must be imposed in respect of each offence." - See also *S* v *Nkosi* 1965 (2) SA 414 (C) at 415-6 and *S* v *Leshaba & Ors* 1968(4) SA 576 (T).

In the *Nkosi* – case, *supra,* at 415, BANKS J observed:

> "In the vast majority of cases no practical advantage results from imposing a globular sentence. A reasonable sentence can usually be determined by deciding upon a reasonable sentence for each count and then by <u>scaling down the sentence if the cumulative effect renders the total unreasonable.</u>" (emphasis added)

In casu, the reasons for sentence show that the trial magistrate applied his mind to the question of a globular sentence. He, however, exercised his wide sentencing discretion in the manner outlined above. There is, in my view, no injudicious and/or unreasonable exercise of this discretion – *Ramushu* v *S* SC-25-93. In view of the principle set out in *S* v *Chawasarira*; *S* v *Nkosi* and *S* v *Leshaba & Ors supra,* his exercise of the discretion cannot be faulted – *S* v *Nhumwa* SC-40-88. This is not an exceptional case requiring that a globular sentence be imposed – *S* v *Mpofu* (2) 1985 (1) ZLR 285 (H) at 288E-H and *S* v *Sawyer* 1999(2) ZLR 390 (H) at 393. Illegal dealing in foreign currency and illegal expatriation of foreign currency are two

separate statutory offences with their separate statutory penalties. The appellant did not suffer prejudice as a result of being sentenced separately. There is evidence that the trial magistrate scaled down the fines in order to render the cumulative effect reasonable. The appellant was fined a total about Z$3 billion for offences involving around Z$7 billion.

Mitigatory features

The appellant's contention is that the trial court placed "insignificant weight" on features of mitigation. The first feature is the appellant's plea of guilty. It is trite that the sentencing court must place due weight on the plea of guilt and reflect this in the sentence imposed – *S* v *Katsawa* 1997 (2) ZLR 102 (H); *S* v *Munechawo* 1998(1) ZLR 129 (H) and *S* v *Mpofu (2) supra*.

The second feature cited is the motive behind the transgressions. With respect, the trial court alluded to these two features in his reasons for sentence. What is left to be determined is whether he attached appropriate weight to them. This is evinced by the following passages in the reasons: page 28

> "The accused pleaded guilty and showed contrition. The accused kept the records well and assisted the police. If the accused had no co-operated, the state would have probably not have found the evidence and if it had pleaded not guilty, the trial would have lasted long and adversely affected resources."

And, further he repeated this feature at page 31 before stating:

> "The accused had no option but to source the forex [sic] from the parallel market. The relevant authority was partly to blame for the situation in which accused found himself [sic] in, that is the acute shortage of forex and the practice was notorious by its widespread."

And at page 32:

> " I estimate his [sic] blameworthiness to be above average to high."

In the end the trial court, with regards to the charge of illegal dealing in foreign currency amounting to over $6 billion, sentenced the appellant to a fine of $2,5 billion. Appellant was fined $500 million for illegal externalisation over $720 million. As alluded to above, overall the appellant was fined a total of about $3 billion for offences involving $7 billion. Why would the trial court imposed a fine

equivalent to almost half of the foreign currency involved? The penalty regime under the Exchange Control Act and Exchange Control Regulations, *supra,* is characterised by dollar to dollar fines. Further, it is an accepted principle of our law that the fine should exceed the amount of prejudice involved in the commission of the offence unless there are special reasons for not doing so – *S* v *Urayayi* HB-54-84; *S* v *Dhokwani* HH-2-82 and *S* v *Matika* HB-17-06. The only explanation for such a sentence is that the trial court took into account the cumulative effect of separate sentences and the above mentioned mitigatory features. In the circumstances, the sentence is not disturbingly inappropriate so as to warrant interference by this court.

Accordingly, the appeal against sentence is dismissed.

Cheda J ……. I agree

Byron Venturas & Partners c/o Dube & Partners, appellant's legal practitioners
Criminal Division, Attorney General's Officer, respondent's legal practitioners