WISHES NYONI

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & MOYO JJ
BULAWAYO 13 & 23 FEBRUARY 2017

Criminal Appeal

M. Ncube for the appellant
Ms S. Ndlovu for the respondent

MAKONESE J: The appellant appeared before a regional magistrate at Bulawayo facing a charge of contravening section 136 of the Criminal Law (Codification and Reform) Act (Chapter 9:23); fraud. The appellant pleaded not guilty to the charge and after a full trial was convicted and sentenced as follows:

> "US$1 000 fine in default 3 months in prison. In addition 6 months in prison suspended for 5 years on condition the accused does not commit within that period an offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine."

The appellant filed this present appeal against conviction and sentence on the grounds that the trial magistrate misdirected himself in assessing the evidence presented before the court and hence wrongly convicted the appellant.

Factual background

The appellant and the complainant one Tawodzera Davies Muhambi were co-directors in a company known as Eyeland Trading (Pvt) Ltd. The complaint was, according to the allegations by the state, the sole shareholder prior to the commission of the offence. Sometime during the month of January 2012, the appellant approached the Registrar of Companies at Tredgold Building, Bulawayo and misrepresented himself as the secretary of Eyeland Trading,

whereupon he presented for filing a CR 2 form (allotment of shares) in which he fraudulently allotted himself 750 shares and 749 shares to the complainant, without the knowledge and consent of the complainant. The state alleged that armed with the CR2 form depicting him as holding he majority shares the appellant had approached his legal practitioners with instruction to file for liquidation of Eyeland Trading (Pvt) Ltd. As a result of such representation, on the 15th of March 2015 a provisional order for the liquidation of Eyeland Trading was granted and Bongani Ndlovu was appointed as provisional liquidator. The complainant became aware of the allotment of shares to the appellant on 25th November 2014 when he was served with court papers for the liquidation of Eyeland Trading. The state alleged that the potential prejudice to the complainant was US$375 186 arising from his unlawful conduct. In his defence, the appellant averred that in or around 2010, he together with complainant, and one Delma George Lupepe and Phaulani Ngwenya agreed and resolved to incorporate and register a company known as Eyeland Trading (Pvt) Ltd. A consultant known to the complainant, one George Witman Phiri assisted in the drawing and preparation of the necessary papers of incorporation and registration of the company. The appellant contended that for all intents and purposes the four individuals were meant to be shareholders but for the purposes of incorporation only two shares were issued to complainant and Lupepe, each with one share. The shares for the two other persons were to be discussed afterwards. After three months from the date of registration of the company Lupepe and Ngwenya left the company. The appellant and the complainant remained as the two members of the company. The appellant avers that, effectively, they became equal shareholders. A consultant one Goodwishes Phiri prepared the necessary documents to reflect the new arrangement. The appellant signed the relevant documents in his capacity as a Director as he had the legal authority to do so. Goodwishes Phiri proceeded to the Companies Office and filed the documents. The appellant's defence was that he did not prepare the documents in issue and that Goodwishes filed these documents with the knowledge and consent of the complainant. The appellant further denied illegally allotting himself shares. It was the appellant's defence that the allegations of fraud came as an afterthought as complainant was upset by the application for liquidation of Eyeland Trading. It was alleged by the appellant that complainant had established a new company known as United Milling Company (Pvt) Ltd /a UNIMILS which he had used to piggy-back on the assets, labour and sweat of Eyeland Trading.

The trial magistrate rejected the appellant's defence and found that he had acted with the requisite mens rea at the material time when he filed the CR2 allotment of shares form and that he intended to defraud the complainant in acting in the manner he did.

Grounds of appeal

The appellant advanced fie grounds of appeal as set out below:-

"The court a quo erred in fact and law in arriving at a conclusion that it had been proved that the appellant had acted with the necessary intention to defraud the complainant when in fact and in truth, and to all intents and purposes;

(a) Appellant was a shareholder
(b) Appellant was asked to sign a CR2 form confirming his standing as a shareholder merely to formalize a situation that existed on the ground
(c) Appellant's claim of right defence was not disproved
(d) The court *a quo* did not reject he appellant's version as probably reasonably true and such could not properly convict."

In his response to the grounds of appeal, the learned regional magistrate had this to say;

"(a)*The court found that the appellant signed the form CR2 in order to defraud the complainant*
(b) Prior to signing and presenting the form CR2 the complainant was the sole shareholder of the company which position was altered by appellant's action
(c) The appellant has no sustainable defence of claim of right
(c) The court found that although the appellant and complainant carried on the business as if they were partners, the appellant was not a partner until he filed a fraudulent drawn up form CR2 at the Companies Registry."

Section 136 of the Criminal Code provides as follows:

"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 such misrepresentation to his or her prejudice;

> shall be guilty of fraud if the misrepresentation causes prejudice to another person or creates a real risk or possibility that another person might e prejudiced, 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 greater, or
> (ii) imprisonment for a period not exceeding thirty-five years; or both."

The crime of fraud is committed when essentially four elements are established, namely:-

(a) unlawful making
(b) with intent to defraud
(c) a misrepresentation
(d) that causes actual or potential prejudice to another person.

The author, Jonathan Birchell, in his text, *Principles of Criminal Law*, 5th Edition at page 742 defines fraud as follows:-

> "Fraud consists in unlawfully making with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another."

The author goes on to describe fraud as the crime of the liar, cheat or confidence trickster. It seeks to punish those who use deceit to obtain property or some other advantage from another person.

In this matter, the point taken on appeal is that the conviction of the appellant in the court a quo is improper in that the state failed to prove the essential elements of the offence of fraud. In particular, the appellant argues that it was not shown that he appellant had any intention to defraud the complainant when he signed the CR2 form (allotment of shares) which made him a shareholder.

It was not disputed that the CR2 form was drawn up, together with other documents, by an external consultant one Phiri who is now deceased. The appellant signed the CR2 form and other documents, including a CR14 form. The appellant contended that he did not originate the

CR2 form but was merely performing an administrative function in signing the form in issue. The appellant further argued that the state failed to controvert the assertion that the CR2 form was filed by the external consultant who presented the same to the Registrar of Companies. As such the fact that he signed the document in issue did not show that he had the requisite intention to commit fraud. The evidence led did not establish that the appellant made a representation to the Registrar of Companies, neither did the state prove that there was actual or potential prejudice to anyone as a result of the alleged misrepresentation.

It is my view, that the appellant's defence cannot be rejected out of hand for a number of reasons. It did not escape the court's attention that the complainant himself authored a company profile for Eyeland Trading (Pvt) Ltd indicating that he and the appellant were the two shareholders of the company. The introduction to the company profile is worded, in part in the following terms:-

> "*Unifoods is a food manufacturing and distribution company. The shareholders, Mr Davis T. Muhambi and Wishes S. Nyoni are a young and dynamic duo, who have set out to leave an inedible foot-print in the marketing and distribution of fast moving consumer goods …"*

The company profile clearly indicates that Eyeland (Pvt) Ltd is a company trading as UNIFOODS. It was not disputed by the complainant that that the appellant had contributed the bulk of the assets of the company at its inception. This conduct clearly indicates that the appellant was for all intents and purposes treated as a shareholder of the company. Documents presented before the court a quo indicated, further, that a Stanbic loan resolution reflected the appellant as a company secretary of Eyeland Trading. In his evidence in chief, the complainant summerised events leading to the signing of the CR2 form in the following terms:

> "... *Therefore we met, myself, Davis Muhambi and Goodwishes Phiri in Muhambi's office at number 15 Bon Accord Road, Westondale in Bulawayo. In fact that meeting two things were agreed firstly that an amendment needed to be done to the company's CR14 to effect a removal of Mr Roland Mlalazi who had by that time left the company a year and half before and to do an allotment of shares with the effect of leaving myself and Muhambi as the 50-50 shareholders of the company. As such when Goodwishes Phiri came to my office on the 12th January 2012 requesting my signature on the relevant forms to implement those agreed changes I was happy to sign as a valid legal officer of the company and acting in good faith in implementing something I had agreed to with Davies Muhambi as joint shareholders. None of this was done in secret to Mr Muhambi."*

I note, here that he complainant admitted having discussed the issue with the appellant, particularly the shareholding of the company. Complainant denied that there was any agreement between the parties. It was therefore evident to the trial court that there was conflict between the parties as regards the shareholding. The appellant's defence was that the CR2 form was signed and executed with the complainant's knowledge, whether express or implied. In a situation where there is conflict in the evidence pitting the evidence of the complainant against that of the appellant, it was not competent for the court a quo to accept the evidence of the complain, without rejecting the appellant's evidence as not being reasonably possibly true. Where doubt is raised, the court must in all probability be inclined to acquit the accused. The court *a quo*, in my view failed to appreciate that the appellant in any event had a claim of right. The court *a quo* held that the relationship that existed between the complainant and the appellant suggested that of co-shareholding. The learned magistrate comments as follows:

> *"The accused adduced evidence tending to establish that he and the complainant acted towards the company and each other in a way that suggested shareholding."*

Inspite making these observations, the learned magistrate goes on to curiously appear to contradict himself when he held as follows:-

> *"Complainant strenuously denied this but there were appearances that although the shareholding structure did not support the view, the actual relationship on the ground portrayed such a picture."*

The acceptance by the trial magistrate of the correctness of the appellant's assertion should have been enough to throw doubt on the state case. The appellant's explanation had a ring of truth to it. As I have already alluded to, once doubt is cast on the state case it cannot possibly be said that the appellant's version was not reasonably possibly true. The behaviour of the complainant in compiling a company profile indicating the appellant as a co-shareholder and the submission of a Stanbic Bank loan resolution reflecting the appellant as a company secretary of Eyeland Trading only points to the conclusion that the parties did present themselves as shareholders. The appellant's action in signing the CR2 form can be sustained by a defence of claim of right. This defence is grounded on a genuine, honest belief that his conduct is not dishonest hence not unlawful. Appellant believed he was a shareholder owing to the picture that was portrayed and confirmed by the trial magistrate, that the actions of complainant and accused suggested co-shareholding.

It is a settled principle of our law that an accused person only has to provide a reasonable explanation in defence to a charge. He does not need to prove his innocence. The court may only convict when the defence proffered by an accused is established to be false and utterly improbable.

In *S* v *Manyika* 2002 (2) ZLR 103 (H) 104G – 106B, MAKARAU J (as she then was) stated as follows:

> "It is trite law that in criminal proceedings, the onus is on the state to prove the offence beyond reasonable doubt. While the concept has been easy to understand, it has not been equally easy to explain. Different courts have tried to explain the nature of the onus on the state in difference ways, do pending on the stage of the proceedings the trial would be at when the onus is tested. Thus, where a defence has been proffered on behalf of the accused, the onus on the state has however been explained in relation to hat defence. In *R* v *Difford* 1937 AD 370 (a case cited by authors Hoffmen and Zeffert in their textbook, *The South African Law of Evidence*, 4th Ed p 525), the learned Judge of Appeal had this to say:

> "No onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal…"

See also the remarks of DUMBUTSHENA (CJ) in the case of *S* v *Isolano* 1985 (1) ZLR 62 (5) and *State* v *Makanyanga* 1996 (2) ZLR 231

Conclusion

The court *a quo* did not reject the appellant's explanation out of hand and it was not shown that his defence was so unreasonable that it could not be accepted as reasonably possibly true. In my view, the court fell into error in convicting the appellant when sufficient doubt had been created in the state case. The state failed to discharge its onus of proving the accused's guilt beyond reasonable doubt.

In the result, it is ordered as follows:

1. the appeal is hereby allowed.
2. The conviction and sentence is set aside.

Phulu & Ncube appellant's legal practitioners
The National Prosecuting Authority respondent's legal practitioners