

PROSECUTOR GENERAL OF ZIMBABWE  
versus  
DOUGLAS TOGARASEI MWONZORA  
and  
MR A MASAWI N.O

HIGH COURT OF ZIMBABWE  
MAWADZE J  
HARARE, 3 October 2014 and 25 February 2015

### **Opposed Application**

*E Makoto*, for the applicant  
*T Maanda*, for 1<sup>st</sup> respondent  
No appearance for 2<sup>nd</sup> respondent

MAWADZE J: This is an application for leave to appeal against the first respondent's acquittal in terms of s 61 of the Magistrates Court Act [*Chapter 7:10*].

The applicant is the Prosecutor General of Zimbabwe.

The first respondent is Douglas Togarasei Mwonzora

The third respondent Mr A. Masawi is a magistrate employed by the Judicial Service Commission at Harare Magistrates Court and is cited *nominus officiae*.

The applicant seeks to be granted leave to appeal against the acquittal of the first respondent by the second respondent sitting at Harare on 16 February 2014 in a criminal case CRB R123/12. The application is opposed.

The background facts to the application are as follows.

On 16 January 2014 the first respondent was arraigned for trial in the Magistrates Court sitting at Harare facing two counts of theft of trust property as defined in s 113 of the criminal code [*Chapter 9:23*].

In count 1 the charge is that on 23 December 2006 and at Mwonzora & Associates, 4<sup>th</sup> Floor South Wing, Fidelity Life Towers, Releigh Street Harare the first respondent being a legal representative of Everson Shepherd Dandadzi received cash in the sum of Z\$3 500 000 said to be equivalent to US\$14 000 from Everson Shepherd Dandadzi as a refund for cancellation of an agreement of sale of an immovable property located at No. 157 Meyrick Park, Mabelreign Harare, and that instead of remitting the said money to Messrs Manase and Manase legal representatives of Stephen Matongo the purchaser of the said immovable, the first respondent unlawfully and intentionally converted the said amount to his own use and failed to hand it over to Everson Shepherd Dandadzi on demand by Everson Shepherd Dandadzi.

In count 2 the charge is that on a date unknown but during the period of extending 1 January 2007 to 31 January 2007, at the same place as in count 1, the first respondent being a legal representative of Everson Shepherd Dandadzi received in his possession cash in the sum of Z195 000 000 from Stephen Matongo as purchase price cash adjustment and transfer fees, and instead of remitting the said amount to Everson Shepherd Dandadzi the seller of the said immovable property described in count 1, the first respondent unlawfully and intentionally converted the said amount to his own use and failed to hand it over to Everson Shepherd Dandadzi on demand by Everson Shepherd Dandadzi.

The facts giving rise to the charges are summarized in the state outline.

It is common cause that Everson Shepherd Dandadza (Everson) entered into an agreement of sale of an immovable property being an undeveloped stand called No. 57 Meyrick Park with the buyer one Stephen Matongo (Stephen). The immovable property was owned by Everson and the purchase price was Z4 billion dollars and Everson used an Estate Agent CB Richard Ellis.

It is alleged that on 23 May 2006 the buyer Stephen paid an agreed Z\$2 billion through the Estate Agent which money was transferred into Everson's account. On 2 and 4 August 2006, the buyer Stephen made two payments of Z\$ 500 000 each. There was a delay to pay the outstanding balance of Z\$2 000 000. As a result of this delay the seller Everson engaged a legal practitioner being the first respondent to cause the buyer Stephen to now pay an adjustment price of Z\$160 000 000 and transfer fees of Z\$35 000 000. It is alleged that the buyer Stephen failed to

pay hence on 8 January 2007 the seller Everson instructed the first respondent to cancel the agreement of sale and gave the first respondent Z\$3 500 000 (revalued) as refund to the buyer Stephen after which the first respondent issued receipt 070. It is alleged that the first respondent did not remit the money to the buyer Stephen through his legal practitioners Manase and Manase but instead converted it to his own use. The complainant Everson being the seller reported the matter to the police of theft of Z\$3 500 000 (revalued) by the first respondent which the state alleges its equivalent to US \$14 000 and that it was not recovered.

In relation to count 2 it is alleged that the buyer Stephen later made a delayed payment of cash adjustment of the purchase price of Z\$160 000 000 (revalued) and transfer fees of Z\$35 000 000 (revalued) giving a total of Z\$195 000 000 which money was paid into the first respondent's law firm account at Barclays Bank. However the seller Everson rejected the delayed payment and had cancelled the agreement of sale due to hyperinflation. Everson then instructed the first respondent to return the money to the buyer Stephen. It is alleged in count 2 that the first respondent instead converted the money to his own use.

The first respondent pleaded not guilty to both counts and in brief gave his defence outline as follows:

The first respondent said he only became aware of the agreement of sale between Everson and Tail-spring investments represented by Stephen as the buyer in September 2006 well after the agreement of sale had been signed and initial payment made as Everson through the agency of CB Richard Ellis had sold the property for Z\$4 billion and signed the agreement of sale on 23 May 2006. The first respondent said the seller Everson in September 2006 informally approached him alleging the buyer Stephen was in breach of the agreement of sale as he had failed to timeously pay the balance of Z\$500 000 000 and wanted to cancel the agreement of sale as Stephen had refused to pay the price adjustments of Z\$36 000 000 000. The first respondent said he was formally engaged by Everson on 13 December 2006 after which Everson paid consultation fee of Z\$5 000 and service fee of Z\$80 000 on 21 December 2006.

In relation to count 1 the first respondent said the Z\$3,5 million (revalued) was only receipted at his offices on 16 March 2007 and not in 2006 as is alleged. The first respondent said he paid it out through his law firm to Tailspring Investments represented by the buyer Stephen on

25 March 2007. The first respondent however said this cheque was never presented for payment and was outstanding at the close of the first respondent's financial year in August 2007 as per both the cash book and audit. The first respondent therefore denies converting the Z\$3,5 million (equivalent) to his own use in count 1.

In relation to count 2 the first respondent said Everson on his own negotiated the purchase price for a further payment of Z\$160 000 000. The first respondent admits that the amount of Z\$35 000 000 being transfer fees and Z\$160 000 000 price adjustment were paid into his law firm's account on 17 April 2007 by the buyer Stephen. The first respondent said he advised Everson the seller, but Everson refused to accept the money alleging payment was late and in breach of the agreement of sale. The first respondent said this amount was rendered valueless while in his law firm's books due to hyperinflation when the Zimbabwean currency was revalued. The first respondent also denies converting this amount to his own use.

The state led evidence from the seller Everson, the buyer Stephen, the manager of Barclays Bank one Etwell Mhlanga and Mambo Nyeperai an Accountant with the law firm Manase and Manase.

At the close of the state case the first respondent successfully made an application for discharge in terms of s198 (3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The trial court discharged the first respondent at the close of the state case in respect of both counts.

The applicant is aggrieved by this decision and intends, as per the draft grounds of appeal, to appeal against this decision. However, in order to do so the applicant should comply with the provisions of s 61 of the Magistrate Court Act [*Chapter 7:10*] which provides as follows:

“61 Attorney General may appeal to High Court on point of law or against acquittal.

If the Attorney General is dissatisfied with the judgment of a court in a criminal matter-----

(a) upon a point of law, or

(b) because it has acquitted or quashed the conviction of any person who was the accused in the case on a view of the facts which could not be reasonably entertained;

He may, with the leave of a judge of the High Court, appeal to the High Court against this judgement;” (emphasis is my own)

In case of *Attorney General v Lafleur & Anor*, 1998(1) ZLR 520(H) Blackie J stated that the *onus* is on the Attorney General (the applicant in *casu*) to bring the application within the terms of s 61 of the Magistrates Court Act [*Chapter 7 : 10*]. In this regard the Learned Judge said at 521 H – 522 A said,

“A point of law must relate to a decision made by the trial court on a legal issue relevant to the acquittal (which the applicant believes to be wrong) and on which the trial court based its acquittal”.

The Learned Judge continued at 522D – E,

“The phrase ‘a view of the facts which could not reasonably be entertained’ means something more than mistakes or negligence on the part of the trial court. In the case of *Attorney General v Paweni Trade Corp (Pvt) Ltd* 1990(1) ZLR 24 (s) KORSHA JA with the remainder of the court, held that -----

‘It is only when the inference drawn from the primary facts is so inconsistent with logic and common sense that the Attorney General can succeed ..... if there are reasonable grounds for taking certain facts into consideration, and on the facts, when taken together, point inexorably to guilt of the accused beyond per adventure, but the trial court nonetheless acquits the accused, then the trial court has taken a view of the facts which could not reasonably be entertained. Put another way, if, on a view of the facts, the court could not reasonably have inferred the innocence of the accused, then the verdict of the acquittal is perverse, and the Attorney General is entitled to attack it.’”

The proposed grounds of appeal are couched as follows;

- “1. 2<sup>nd</sup> Respondent erred and misdirected himself when he discharged 1<sup>st</sup> respondent at the close of the state case despite a *prima facie* case that had been established by the prosecution.
2. 2<sup>nd</sup> Respondent erred and misdirected himself at law by accepting assertions by the 1<sup>st</sup> respondent made during cross examination of state witnesses as though they were evidence by the 1<sup>st</sup> respondent. 2<sup>nd</sup> respondent was not in a position to decide on the veracity of the versions placed before him without hearing the defence once a *prima facie* case had been established.”

Mr *Maanda* for the first respondent raised basically two points *in limine*.

The first point *in limine* taken is that the application for leave to appeal was made well out of time and on that basis the application should be dismissed.

The second point is that the proposed grounds of appeal are bad at law as they do not meet the requirements of both s 61 of the Magistrates Court Act [*Chapter 7:10*] and s 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

I now deal with the points in *limine seriatim*.

Whether the application for leave to Appeal is out of time

It is common cause that the first respondent was discharged and acquitted on 13 February 2014 and the application for leave to appeal was filed on 9 May 2014. A period of 3 months had lapsed.

The first respondent's argument is that the applicant ought to have filed an application for leave to appear within the time an appeal would ordinarily take to be filed from the Magistrates Court to the High Court, which he said is ten days. The first respondent also submitted that this court should be guided by the time limit within which a review should be filed, which is 8 weeks. It is first respondent's contention therefore that this application for leave to appeal made after more than three months had lapsed is hopelessly out of time.

I am not persuaded by first respondent's submissions in this regard. It should be noted that no time limit is prescribed both in s 61 of the Magistrates Court Act [*Chapter 7:10*] and s 198 (4) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which both provide for the need to seek leave to appeal by the Prosecutor General.

It is however trite that the application for leave to appeal made in terms of s 61 of the Magistrates Court Act [*Chapter 7:10*] should be made without delay and within a reasonable time to ensure that the interests of justice are safeguarded. This point was driven home by Blackie J in the case of *Attorney General v Lafleur and Anor* 1998 (1) ZLR 520 (H) at 523 A-D in which the learned judge said:

“No time limit is set in s 61 of the Act or in any rules of this court within which the Attorney general must file his appeal in terms of that section. It is not clear from the history of the section whether the absence of a time limit by which the applicant must act is by accident or design. It is unusual not to have such a time limit and this section is in stark contrast to the requirements of all other appeals. The omission is particularly striking because the concept that a man, once acquitted of an offence, may not be retried for that offence is a fundamental principle of criminal law. The overriding reason for this principle is the need for finality in litigation ----- . This court, notwithstanding the absence of a time limit to the making of the application for leave to appeal, may, in considering the application, take into account the question of delay by the applicant in filing his application in terms of s 61 and decide the application on that point. Even though s 61

has modified the common law to a limited extent, the exercise of the applicant's powers in terms of that section is subject to the leave of the court and must be exercised reasonably and in the interests of justice. What is reasonable and in the interests of justice is a matter of fact in each particular case." (Emphasis is my own.)

Mr *Makoto* for the applicant submitted that the delay of 3 months is not inordinate as the record had to be transcribed, a process outside the direct control of the applicant. While this explanation is not satisfactory, I am not persuaded that a delay of three months in this case is sufficient to cause the dismissal of the application. While in the case of *Attorney General v Lafleur and Anor (supra)* a delay of 14 month was held to be inordinate and unacceptable, in the case of *Attorney General v Bvuma & Anor* 1987 (2) ZLR 96 (S) leave to appeal was granted despite the delay of eight months. I therefore find no merit in respect of this point in *limine* raised.

**Whether the proposed grounds of appeal are fatally defective**

I have serious difficulties in appreciating the argument raised by Mr *Maanda* in respect of this point in *limine*. The proposed grounds of appeal are premised on the provisions of both s 61 of the Magistrates Court Act [*Chapter 7:10*] and s 198 (3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. I find the proposed grounds of appeal to be short, concise and clear as is required by the rules of the court. This point in *limine* also lacks merit.

I now turn to the merits of the application.

It is trite that in an application of this nature, the applicant in order to succeed, has to establish that the intended appeal enjoys reasonable prospects of success. See *S v Mutasa* 1988 (2) ZLR 4 (S).

I understand the applicant's case to be that the second respondent erred at law by failing to apply the legal principles in s 198 (3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] to the facts of this case and improperly assessed the evidence adduced by the state at the close of the state case.

The second respondent's appreciation of the law in relation to an application for discharge at the close of the state case is beyond reproach. Such an application is in terms of s 198 (3) of the Criminal Procedure and Evidence Act which provides as follows.

"98 (1) ----- not relevant  
(2) ----- not relevant

- (3) If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge, or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty.”

The general principles enunciated in a number of decided cases in interpreting the provisions of s 198 (3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] is that the trial court is enjoined to discharge an accused person at the close of the prosecution case;

- a) Where there is no evidence to prove the essential elements of the offence. See *Attorney General v Bvuma & Anor* 1998 (2) ZLR 96 (S).
- b) Where there is no evidence on which a reasonable court acting carefully might properly convict. See *Attorney General v Mzizi* 1991 (2) ZLR 321.
- c) Where the evidence led by the state is manifestly unreliable that no reasonable court could safely act on it. See *Attorney General v Tarwirei* 1997 (1) ZLR 575 (S).

The second respondent properly applied these principles in discharging the first respondent at the close of the case. There is no need for the court to summarise the evidence in detail for purposes of this application but I will simply highlight what informed the second respondent’s well reasoned judgment.

Etwen Mhlanga the manager of Barclays bank properly conceded that he was an irrelevant witness. This is so on account of the facts that in count 1 it is alleged that the Z\$3.5 million was paid by cheque but the bank statements the state seeks to rely upon relates to a cash deposit.

Mambo Nyeperai, the accountant with Manase and Manase conceded that the proper person the state should have called to support allegations made is Mr *Manase* himself. He nonetheless confirmed the procedure as explained by the first respondent of how law firms account for rejected or unrepresented cheques. It is clear his evidence supports the first respondent’s version rather than the applicant’s version.

Stephen the buyer of the said stand did not support materially the allegations made against the first respondent. He confirmed buying the stand from the seller Everson for Z\$4 billion through an estate agent Richard Ellis. He confirmed the subsequent agreement to top up the selling price of Z\$4 billion by Z\$195 million in 2007 due to inflation and that this agreement

involved the seller Everson and his lawyer the first respondent on one hand and on the other hand himself and his lawyer Mr *Manase*. He made the payments to the first respondent's law firm of the top up price adjustment on dates he could not recall.

Stephen was clear that the key witness in this matter Everson was an unreliable witness and explained why. Stephen said the evidence of Everson is tainted by the fact he made a double sale of the stand. He insisted that contrary to Everson's evidence he had paid for the stand in full and that Everson was greedy and chasing after inflation.

The evidence of the key witness Everson does not only fail to prove the essential elements of the offences charged but is manifestly unreliable and contradictory that no reasonable court acting carefully might properly convict. It is clearly unsafe to act upon such evidence. I will simply highlight the evidence which support these findings.

Everson was unable to explain as to when exactly the payment of Z\$3.5 million was made as he constantly changed the dates. Initially he said it was on 23 December 2006 but when it was confirmed that date fell on a Saturday he changed to 18 December 2006 but still the receipt book showed no payments were made on 18 December 2006. In fact the evidence available is that the cheque of Z\$3.5 million was received from Everson on 16 March 2007 as per the receipt issued. This does not support the material allegation that the first respondent received and converted the Z\$3.5 million on 23 December 2006 which are two essential elements of the offence in count 1.

An overview of Everson's evidence is that he was simply unreliable. He was unable to explain simple issues like when the Z\$3.5 million was paid and receipted. He was unable to produce the cheque leaf from the said Z\$3.5 million. He was even prepared to disown his affidavit made and relied upon in the proceedings before my brother Musakwa J. He even insisted that he was not paid in full for the stand despite Stephen's evidence and the finding by my brother Musakwa J that he had been fully paid and should pass transfer. It is clear that Everson's evidence is tainted by the fact that he was chasing after inflation.

In relation to count 1 the trial court properly made the following findings:

- i) That the evidence led did not show if the payment of Z\$3.5 million was by cash or cheque.

- ii) That the evidence led by the state did not establish whether the payment was made on 23 December 2006 or after Christmas in 2006 or as per the receipt produced on 16 March 2007.
- iii) That evidence led by the state was contradictory as to whether Everson was not issued with a receipt as per his statement to the police or was issued with such a receipt as per his evidence in court.
- iv) That it has not been shown that the amount of Z\$3.5 million has not been properly accounted for in accordance with the best accounting practice.

In relation to count 2 it is not in issue that after receiving the Z\$195 million (Z\$160 + Z\$35) from the buyer Stephen, the first respondent advised the seller Everson but Everson refused to accept the money. It was also shown that the first respondent thereafter made out a cheque of the same amount to Manase and Manase the lawyers for Stephen who too refused to accept the amount. It was placed before the trial court that as per SI 109/08 dated 30 August 2008 all amounts outstanding in count 1 and count 2 were rendered worthless. The evidence led show that the amount of Z\$195 million was accounted for until it was rendered valueless due to moribund currency and inflation which left nothing for the first respondent to convert to his own use.

It was clear that Mr *Makoto* was constrained in making submissions on the merits of the application. He conceded that he could not meaningfully challenge all the exhibits or documents produced during the state case by consent. Mr *Makoto* exhibited understandable inhibitions in making his case on the merits. Put simply he was not able to attack the judgment of the court *a quo*.

I find no misdirection at all either on the facts or the law by the second respondent. The facts in both count 1 and count 2 are largely common cause. All the exhibits which are in documentary form were produced by consent and remained uncontroverted and the trial court properly relied on the exhibits in assessing the state case. The second respondent did not consider extrinsic factors hence his decision cannot be said to be pervasive.

I am not satisfied that the applicant has established that the intended appeal enjoys reasonable prospects of success. To accede to the applicant's request would simply amount to

massaging the applicant's ego. There is need for finality in litigation and I am unable to exercise my discretion in favour of the applicant by granting leave to appeal. It is not reasonable and not in interests of justice to do so. The application for leave to appeal lacks merit and should fail.

Accordingly, it is ordered that;

1. The application for leave to appeal be and is hereby dismissed.
2. There is no order as to costs.

*National Prosecuting Authority, applicant's legal practitioners*  
*Maunga Maanda & Associates, 1<sup>st</sup> respondent's legal practitioners*