

WILFRED NYAMBO
and
AUXILLIA NYAMBO
versus
THE STATE

HIGH COURT OF ZIMBABWE
MANGOTA AND TAGU JJ
HARARE, 29 October 2014 and 14 January 2015

Mrs B. Mtetwa, for the appellants
T. Mapfuwa, for the respondent

Criminal Appeal

TAGU J: The two appellants were convicted after a contested trial, of 8 counts of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. They were each sentenced to 5 years imprisonment, of which 1 year imprisonment was suspended for 5 years on condition of good behaviour, and a further 1 year was suspended on condition of restitution.

Aggrieved by both conviction and sentence, the two appellants appealed to this Honourable Court. The appellants, who are husband and wife, were convicted on the basis that they sold land which did not belong to the first appellant, to various complainants, through misrepresentations, which resulted in the complainants being prejudiced of their money. The state alleged that the land in question belonged to one Mr Rogerio Barbosa De Sa.

At the hearing of the appeal, Mr *Mapfuwa*, for the respondent made a concession that indeed there was no evidence on record to prove that the land in question belonged to Mr Rogerio Barbosa De Sa, and that the appeal be allowed. In our view this was a properly made concession.

The main issue the trial court should have determined, was, who was the owner of the land in question? The land at the centre of the trial was known as Christmas Gift (Pvt) Limited.

The evidence of Mr Rogerio Barbosa De Sa was to the effect that at one point he offered 15 % shares to the first appellant in DMC Holdings but the first appellant never took up the offer. He in fact said the first appellant did not pay for the shares and, therefore, had no claim to Christmas Gift (Pvt) limited. The evidence of De Sa shows that he was a close friend of both appellants whom he trusted very much. On the other hand the evidence of the first appellant was that he paid \$100 00-00 in free funds held by him in Midlands Bank now HSBC in 1988 through inter-bank transfer since he and Mr De Sa both held accounts with the same bank.

A perusal of the record shows that DMC Holdings (Pvt) limited comprised four subsidiary companies. These are 1. Christmas Gift (Pvt) Limited; (the land in question) 2. Keidans Woodworking (Pvt) Limited; 3. Zambesia Metal Trading and Manufacturing Company (Pvt) Limited; and 4. Woodgate Investments (Pvt) Limited.

Exhibit 31 is a memorandum of agreement entered into by and between Rogerio Barbosa de Sa and the first appellant Mr Wilford Edward Nyambo on 25 October 1988, wherein Edward Nyambo was offered to purchase 15% shares in DMC Holdings (Pvt) Limited. Clause 7 of the agreement read as follows:-

“with effect from the date of this agreement the transferee (DR. Nyambo) shall be entitled to full participation rights in the capital and profits of the company as if he had exercised his option to purchase the said shares on this date. Any distributions by the company shall be payable to the transferor (De Sa) as agent of the transferee in so far as such distributions relate to the shares subject to this option.”

To confirm the first appellant’s story that he had the right to deal with the land as he did are two letters, exhibits 32 and 36. Exhibit 32 is a letter written by Mr Rogerio De Sa dated 28 January 1993 authorising a Mr Frasser, of Nick Collins and Associates, to release all files relating to Christmas Gift (Pvt) Limited to DR. Nyambo (the first appellant). Further, there is exhibit 36 in the record, which is a letter written and signed by both the first appellant and Rogerio De Sa, as Directors of Christmas Gift (Pvt) limited to the Chief Planning Officer for Gweru, dated 13 June 1995 wherein they said:-

“we wish to confirm that D G Machakaire is duly authorised by us to carry out all applications and all necessary work to be presented to yourselves for the above sub-division.

Yours faithfully
For Christmas Gift Private) Limited.”

A further perusal of the record shows nothing to show that Mr Rogerio De Sa later withdrew the authority he gave to the first appellant. In fact the first appellant, being assisted by the second appellant who was responsible for all administrative issues, acted in terms of the memorandum of agreement that the first appellant entered with Mr Rogerio De Sa.

Mrs *B Mtetwa*, even referred us to the case of *Anthony Hickey v (1). DMC Holdings (Private) Limited (2). Christmas Gift (Private) Limited (3) Rogerio Barbosa Azevedo De Sa (4) National Social Security Authority SC 17/ 14*, which showed that Anthony Hickey holds a 30% shareholding in DMC Holdings (PVT) Limited, and that DMC Holdings is a 100% shareholder in Christmas Gift (Pvt)Limited. This means that Rogerio De Sa is not the sole owner of Christmas Gift.

In the circumstances the court erred by concluding that the first appellant had no right in the land in question. There was, therefore, no misrepresentation committed by the appellants.

The conviction of the appellants was therefore improper.

In the result the appeal is allowed. The conviction is quashed and sentence is set aside. The appellants are found not guilty and are acquitted.

MANGOTA J agrees.....

Mtetwa & Nyambirayi, Incorporating Wilmont & Bennet, appellants’ legal practitioners
Prosecutor-General’s office, respondent’s legal practitioners.