

THE STATE
versus
ARTHUR CHIKUKWA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 3 October 2016

Criminal Trial

T Kasema, for the State
Mrs V Chikomo, for the defence

CHITAPI J: The accused was indicted to this court on two charges, one of fraud as defined in s 136 (a) and (b) of the Criminal Law (Codification & Reform) [*Chapter 9:23*] and in the alternative to the fraud charge, a charge of contravening s 302 of the Mines & Minerals Act, [*Chapter 21:05*] which section was quoted as “ceding or assigning any right without authority from the President of Zimbabwe.” The second charge was money laundering as defined in s 8 (3) of the Money Laundering & Proceeds of Crime Act [*Chapter 9:24*]. The details of the charges will be set out later.

The accused’s trial was set down on 27 July 2016. The trial did not commence. The accused had been assigned a *prodeo* counsel by the Registrar of this court. The *prodeo* counsel was Mr F G Gijima. When Mr Gijima sought to obtain instructions from the accused person, the accused advised him that he preferred to engage counsel of his choice. Mr Gijima who had been holding on to the brief since 16 June 2016, then formally applied to be excused. Miss *V Chikomo* who was in court advised the court that she had assumed agency for the accused. She indicated that she or her firm, Majoko and Majoko legal practitioners had always represented the accused from the time of his arrest. She made an application in terms of s 165 of the Criminal Procedure & Evidence [*Chapter 9:07*] for the postponement of the trial. She also applied in terms of s 167 of the same Act that the accused person’s bail be extended. The reason given for seeking the

postponement was to allow the legal practitioner sufficient time to consider the indictment papers, consult with the accused and thereafter prepare a defence outline. The state did not oppose the application. The court postponed the case to 16 August, 2016 having agreed that it sacrifices its vacation period to accommodate the trial. When the case came up for trial on 16 August 2016, it was further postponed to 23 August, 2016 on account of the unavailability of the trial judge who was engaged in a training programme.

Prior to the hearing, the accused's counsel on 11 August, 2016 filed a notice of exception to the charge in terms of s 5 (7) (*sic*) of the Criminal Procedure & Evidence Act which section she applied to amend to read s 171 at the hearing. The gravamen of the exception was that the alternative charge which the state intended to cause the accused to plead to did not disclose any cognizable offence. The indictment against the accused was worded as follows:

“Count 1 – Fraud as defined in section 136 (a) and (b) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] Alternatively : Contravening Section 302 of the Mines And Minerals Act, [Chapter 21:05] “Ceding of assigning any rights without authority from the President of Zimbabwe”

Count 2 – Money laundering as defined in section 8 (3) of the Money Laundering and Proceeds of Crime Act [Chapter 9:24]

In that on the date to the Prosecutor unknown but during the period extending from July 2014 to December 2015 and at number 30 Stonechart land, Borrowdale, Harare, Arthur Chikukwa, unlawfully and with intend to defraud, misrepresented to Light-glass Enterprise Private Limited being represented by Salim Suleman Desai that he had a Coal Mining Concession in Tuli, Matabeleland South Province held under Special Grant number 5341 in the name of Rockrabbit Investment Private Limited and that he had a mandate to sell the Special Grant from Rockrabbit investments Private Limited whereas in truth and actual fact when Arthur Chikukwa made the misrepresentation he well knew he had not obtained authority to sell the said Special Grant to Light-glass Private Limited. By means of his misrepresentation, Arthur Chikukwa caused Light-glass Enterprise Private Limited to surrender house number 30 Stonechart Lane Borrowdale, Harare, Toyota Prado registration number ABR 4643, a Toyota Lexus registration number ACD 5457 and cash amounting to US\$125 000-00 all valued at US\$2 775 000-00 to the prejudice of Light-glass Private Limited.

Alternatively:- Contravening Section 302 of the Mines and Minerals Act, [Chapter 21:05] “Ceding or Assigning any rights without authority from the President of Zimbabwe”

In that on the date to the Prosecutor unknown but during the period extending from July 2014 to December 2015 and at number 30 Stonechart Lane, Borrowdale, Harare, Arthur Chikukwa, without lawful authority from the President of the Republic of Zimbabwe, issuer of the Special Grant number 5341 and well knowing that the rights to the said Special Grant were personal to Rockrabbit Investment Private Limited unlawfully ceded or assigned such right to Light-glass Enterprise Private Limited represented by Salim Desai in contravening of the said Act.

Count Two: Money Laundering as defined in Section 8 (3) of the Money Laundering and Proceeds of Crime Act [Chapter 9:24]

In that on the date to the Prosecutor unknown but during period extending from July 2014 to December 2015 and at number 30 Stonechart Lane Borrowdale, Harare, Arthur Chikukwa received, possessed, concealed and disposed of property namely a Toyota Prado registration number ABR 4643, Toyota Lexus registration number ACD 5457, cash amounting to US\$125 000-00 and a residential property namely number 30 Stonechart Lane, Borrowdale, Harare knowing or suspecting at the time of receipt of such property and that the said property is the proceeds of crime. That is to say, Arthur Chikukwa acquired used or possessed property and money mentioned in the charge knowing that at the time of receipt that such amounts of money and property were proceeds of a crime of Fraud.”

The defence counsel’s argument was that s 302 of the Mines & Minerals Act was prohibitory only but did not criminalize the acts outlined therein. The section reads as follows:

“302. Rights under special grant personal to the grantee. The rights granted under a special grant shall be personal to the grantee, who may not cede or assign any such rights to any other person unless authorized to do so by the President”.

The state purported to have created an offence out of the alleged failure by the accused to obtain Presidential consent before ceding or assigning rights to special grant number 5341 which was issued to Rock rabbit Investments (Pvt) Ltd to Light-glass Enterprises (Pvt) Ltd. The defence counsel’s objection was well taken. The purport of s 302 is simply to define the characteristics of a special grant and how it may be ceded or assigned. In short a special grant remains reposed in the person to whom it has been granted by the President in terms of s 301 of the said Act. The holder of a special grant who intends to cede or assign the holder’s rights to it requires the permission or consent of the President to do so, otherwise the purported assignment or cession will be a nullity. It is not a criminal offence to have engaged in such nullity. State Counsel properly conceded that the alternative charge was bad in law. He applied to withdraw it. A withdrawal was not the proper remedy because a nullity is not withdrawn since it is non-existent. Accordingly the purported alternative charge was expunged from the record.

The defence counsel submitted as part of the exception dealt with above that count 1 being the fraud charge read together with its alternative was vague and embarrassing because the fraud charge alleged that the accused misrepresented that he had a coal concession yet the alternative charge alleged that he acted without Presidential authority. The allegations were mutually destructive being inconsistent. The exception to the charge being vague and embarrassing was however abandoned in the light of the State’s concession that the alternative

charge did not ground any offence. Following the expungement of the alternative charge, the exception having been withdrawn, thus left the court had no cause to deal with it any further.

The defence counsel next argued that there was an improper slitting of charges between the fraud charge and the charge of contravening s 8 (3) of the Money Laundering & Proceeds of Crime Act, [*Chapter 9:24*]. Counsel's argument was that the allegations by the State were that the accused received the property the subject of the Money Laundering & Proceeds of Crime Act as part of the same or single transaction of the charge of fraud. To split the charge of fraud and the subsequent disposal of the property would in counsel's submission lead to a duplicating of punishment in the event of a conviction on both accounts. She argued that without proving fraud, the offence of Money Laundering would also fall away. Counsel referred to *S v Grobler* 1996 (1) SA 507 (AD) and *S v Dzimire & Others* 1997 (2) ZLR 27 to support her submission that where the accused has a single intent, it would be improper to charge him with more than one offence where the same facts ground the two offences. State Counsel submitted that there was no improper splitting of charges because the second offence of money laundering was grounded in criminalizing the making of economic advantage out of the proceeds of the fraud. I dismissed the exception and indicated that my reasons would be handed down as part of the main judgment.

The essential elements of the offences in counts 1 and 2, that is Fraud as defined in s 136 of the Criminal Law Codification & Reform Act and Money Laundering as defined in s 8 (3) of The Money Laundering & Proceeds of Crime Act are expressed in the respective enactments. Fraud is defined in s 136 (a) and (b) as charged by the State as follows:

“136 Fraud

Any person who makes a misrepresentation –

- (a) intending to deceive another person or realizing 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 realizing that there is a real risk or possibility that another person may act upon the misrepresentation to his or her prejudice.
Shall be guilty of fraud if the misrepresentation causes actual prejudice to another person or is potentially prejudicial to another person,.....”

The elements of fraud are therefore that:

- (i) an accused must make a misrepresentation
- (ii) with intention to deceive or with realization which is real and not fanciful that the other person might be deceived by the misrepresentation.

- (iii) the accused must intend that the misrepresentation be acted upon or he must realize the risk or possibility that the other person may act upon the misrepresentation to his prejudice.

Money Laundering charged in count 2 is defined in the relevant provision as follows:

“8. Money Laundering Offences

- 1.....
- (a).....
- (b).....
- 2.....
- 3. Any person who acquires, uses or possesses property knowing or suspecting at the time of receipt that such property is the proceeds of crime commits an offence.”

The essential elements of an offence under s 8 (3) of the Money Laundering Proceeds of Crime Act as quoted above are that the accused must

- (i) acquire, use or possess property
- (ii) do so in the knowledge or under a suspicion as at the date he takes receipt of that property that the property is the proceeds of crime.

“Proceeds of crime is defined in the definition section as “proceeds” and “proceeds of crime” means any property or economic advantage derived from or obtained directly or indirectly through the commission of a criminal offence, including economic gains from the property and property converted or transformed, in full or in part into other property.”

It is also necessary to consider the provisions of section 145 of the Criminal Procedure & Evidence Act, [*Chapter 9:07*]. The section reads as follows:

“145. Where doubtful what offence has been committed; if by reason of the nature of an act or series of acts or of any uncertainty as to the facts which can be proved, or if for any other reason whatever, it is doubtful which of several offences is constituted by the facts which can be proved, the accused may be charged with having committed all or any of those offences, and any number of such charges may be tried at one time; or the accused may be charged in the alternative with having committed some or one of those offences.”

Also relevant to consider in disposing of the defence exception is s 8 (b) of the Money Laundering & Proceeds of Crime Act. It provides as follows:

“(b) In order to prove that property is the proceeds of crime, it is not necessary for there to be a conviction for the offence that has generated the proceeds, or for there to be a showing of a specific offence rather than some kind of criminal activity, or that a particular person committed the offence.”

In amplification of her objection, defence counsel submitted that the court should in determining the exception consider the nature of the criminal acts alleged against the accused and whether the same facts will establish both charges. She argued that if the same evidence will ground both charges, then there would be a splitting of charges leading to duplication of punishment. The defence counsel further submitted that count 2 on Money Laundering depended on proof of fraud. She submitted that if fraud was not proved, then the accused would be free to deal with the property as he chooses. If however, the property was tainted then it would constitute proceeds of crime. I understood counsel's argument therefore to be that the one charge could not exist outside of the other one.

In my judgment s 145 of the Criminal Procedure & Evidence Act has largely diluted the scope of the exception which an accused can take based on an alleged splitting of charges. The section allows great latitude to the State to charge various offences whether separately or in the alternative arising from one act or series of acts or where facts are uncertain as to what charge exactly to put to the accused in the indictment. Without stating authoritatively that this is so, it appears to me that the objection to a splitting of charges may well have become academic in view of the provisions of s 145 aforesaid. The objection or exception is not one which comes often before the courts anymore. I note that the equivalent provision exists in the South African Criminal Procedure Act No. 51 of 1977. It reads as follows:

“83. **Charge where it is doubtful what offence committed;** if by reason of any uncertainty as to the facts which can be proved or if for any other reason it is doubtful which of several offences is constituted by the facts which can be proved, the accused may be charged with the commission of all or any of such offences, and any number of such charges may be tried at once or the accused may be charged in the alternative with the commission of any number of such offences.”

I have quoted the South African equivalent of our s 145 because a reading of South African authorities which presented themselves as more in numbers than locally decided cases are persuasive on account of the provisions of the law being similar in both jurisdictions.

The traditional test for determining whether there has been an improper splitting of charges it to the following effect:

- (a) where an accused commits two acts of which each standing alone would ground a criminal charge but does so with a single intent, both acts being necessary to carry out

that intent, then the proper approach would be to indict the person for one offence because the two acts in fact constitute one criminal transaction.

Or

- (b) whether the evidence necessary to ground or prove one of the charges will also support the other charge, the offences can be said to be same in substance.

See *Sabuyi* 1905 TS 170 *Gordon v R* 1909 EDC 254; *R v Molloy* [1921] 2 K.B 364; *R v Disney* [1933], All ER 626; *S v Ndou & Ors* 1971 (1) SA 668 and cases quoted by the defence counsel.

Locally, instructive cases include this court's decisions in *S v Zacharia* 2002 (1) ZLR (1) 1985 H; *R v Peterson* 1970 RLR 49, *R v Chinemo* 1985 (1) ZLR 32. In *R v jambani* 1982 (1) ZLR 213 (H), this court ruled that where the facts of a case disclose two stand-alone crimes, the State should charge the offences which constitute the dominant intent of the accused when he engaged in that conduct. This is not without its difficulties because at the stage of putting an indictment to an accused, it might be difficult before evidence has been led to decide or conclude on what his dominant intention is, especially where for example the accused is not admitting to the offence. The accused may also change his dominant intention in the course of committing the offence. The State could also consider charging the more serious of the offences. Whilst s 145 of the Criminal Procedure and Evidence Act could be said to be applicable in cases where there is doubt as to what offence has been committed, it appears to me that the crux of the provision is to cater for a situation where the facts will be revealing several crimes. It may well be placing an unfair duty on the State to determine an accused's dominant intent prior to putting a charge to him. It does appear to me to be a burden which should properly be determined by a court and even then after evidence has been led. To ask or expect the State to determine what an accused's dominant intention is may arguably be to place a judicial burden on the prosecution.

The authorities' state that the rule is intended to protect the accused from being unduly prejudiced due to a multiplicity of convictions arising from one continuous conduct in that the accused would then have to be sentenced on each charge. In practice as suggested by Professor G Feltore on p 79 of the *Criminal Defenders Handbook* Revised ed 2008, the prejudice is cured by taking all counts as one for purposes of sentence.

In my understanding the test for determining if there has been a splitting of charges is not a rule of law but of logic and common sense. The facts of each case must be considered on their merits in order to achieve fairness towards the accused see *S v Manipa* 1985 (4) SA 633 at 635, *R v Kuzwayo* 1960 (1) SA 40 and *R v Johannes* 1925 TPD 782. The application of the practice and tests should not in my judgment lead to fettering the authority of the Prosecutor General to bring to court against the accused the charges which on the evidence available to him or her an accused should answer to.

Lastly with respect to the present case, the defence argument also hits a brick wall when one considers the provisions of s 8 (6) of the Money Laundering and Proceeds of Crime Act. As will be noted from a reading of the provisions, it is not necessary in proving the charge of Money Laundering to first prove the commission of the offence giving rise to or generating proceeds of crime. It is also not a requirement that a particular person did commit the offence which generated the proceeds of crime. The section requires proof that the proceeds of crime came by the accused as a result of "some kind of criminal activity." It follows that the elements of the two offences are different though evidence here and there might dovetail. It was for the above reasons that I dismissed the exception.

The accused pleaded not guilty to the charges following the dismissal of the preliminary points. The charges he pleaded not guilty to were set out earlier in this judgment being count 1 (Fraud) and count 2 (Money Laundering in contravention of s 8 (3) of the relevant Act. A repeat of the wording of the offences accordingly is not necessary. After the summary of the evidence of the state witness was read into the record, defence counsel submitted that she had only prepared a defence outline in relation to count 1 (the fraud charge). She submitted that she had not prepared a defence outline in relation to the second count because she needed further particulars in the form of title deeds to the property mentioned in the indictment. She then sought to apply for further particulars in terms of s 177 of the Criminal Procedure and Evidence Act. The application was not opposed by the State although it came as somewhat of a surprise to the court because the information sought could have been applied for before commencement of trial in the interests of managing time. The accused also appeared to have anticipated that his preliminary objections would succeed with regards the arguments on splitting of charges hence his election not to prepare a defence outline relative to the second charge of Money Laundering.

The court adjourned the trial to 2:30pm to allow the defence counsel to prepare the supplementary defence outline to deal with the second count. It ordered that she be supplied with a copy of the title deed to the property mentioned in the indictment. When the trial resumed, the accused counsel read into the record, the supplementary defence outline as she had already read into the record the defence outline on count 1 prior to the matter being stood down to 2 : 30pm.

The issues for determination in this trial are not complex. In order to understand them, it is necessary to summarise the witness's evidence adduced by the State. In terms of s 314 of the Criminal Procedure and Evidence Act, the defence counsel on behalf of the accused formally admitted the evidence of the State witnesses listed as Patrick Zambara, Tendayi Robert Njiva and Audries Stephanus Van Der Merwe. It is not necessary to go into detail with respect to the admitted evidence of each witness. Its brief summary will suffice in each case.

Patrick Zambara: Is an uncle to the accused and is a car dealer. He sold the Toyota mentioned in the indictment on behalf of the accused for a sum of US\$55 000-00 which was paid in cash on 15 November 2015. He also referred the accused's wife to Tendai Robert Njiva when the former wanted to borrow US\$3 000-00 against the surrender as surety of the Toyota Lexus motor vehicle registration ACD 5457 mentioned in the indictment.

Tendai Robert Njiva: Transacted with the accused's wife in regard to the Toyota Lexus. He advanced the accused's wife Josephine Chiweshe US\$3000-00 and held the vehicle as security. This was in December, 2015. In February 2016, the accused proposed a vehicle/cash top-up deal. The accused was given a BMW (i) and US\$5 000-00 in exchange for the Toyota Lexus. From the US\$5 000-00, the accused repaid the loan borrowed by his wife.

Audries Stephanus Van Der Merwe: Was the property manager in charge of 30 Stonechart Lane Borrowdale, Harare being the property referred to in the indictment. He also had custody of the Toyota Prado and Toyota Lexus referred to in the indictment. He surrendered the property and the car keys to Salim Suleman Desai who in turn surrendered the same to the accused who was to take occupation of the property and charge of the vehicles.

The above summarises the undisputed evidence of the three witnesses. Oral evidence was led by the State from 3 witnesses namely Robert Mhlanga, Salim Suleman Desai and Zhang Niah Hai. The evidence of the said witness was to the following effect:

Robert Mhlanga: Is a businessman and a director of several companies within and outside Zimbabwe. In 2014 he met up with the accused. At the material time his group of companies and partnered with a Dubai based company whose interests were to invest in coal mining. The intention was for the partnership to set up a coal powered electricity generating plant as well as to export excess coal. The accused gave out or represented to the witness that he owned a coal concession in Bubi area. The area of Bubi was strategically located in terms of logistics in that it was near the border of Beitbridge and transportation of the coal to Maputo for export was also going to be easy. The witness said that the accused then made presentations on the concession and he was very convincing. The witness was persuaded to enter the deal and the accused charged US\$3 million for the concession which amount the witness found to be on the high side. The witness said that it was decided to make payment in the form of a property in Greystone Park Harare valued at US\$2,5 million, US\$125 000-00 cash and two motor vehicles.

The witness stated that he is a very busy person. He then engaged a lawyer to take up the finalisation of the deal. The instructions to the lawyer were that the accused was to avail proof of title to the concession and a geological report from which the quantities of available coal could be estimated. The accused became evasive and illusive. The witness' consortium then thought that they could have been conned.

Asked by the prosecutor to give details of how the accused purported to be the owner of the concession, the witness said that the coal concession was in the name of Rockrabbit and the accused said that he was 100% owner of Rockrabbit (Pvt) Ltd. The witness further stated that the accused represented that apart from coal, there was also coal bed methane which would be processed into gas. The witness' group did not doubt the accused's presentations because they knew that there was a history of gas and coal within the area. The accused was therefore given the benefit of doubt. The witness's consortium which included the investors left the paper work to be sorted out by the lawyer after the lawyer had been provided by the accused with the proof of title to the concession and the geological report. The witness said that the lawyers who were tasked to complete the deal were Desai and Associates and that the transaction was supposed to be completed in the name of a special purpose vehicle, namely a shelf company called Light Glass Enterprises (Rt) Ltd whose only asset was the Greystone Park Property. The motor

vehicles which were to form part of the purchase consideration belonged respectively to the witness's wife and to another shelf company owned by the witness.

Under cross-examination, the witness confirmed that he made a statement which was recorded in South Africa. He said that Felicia Mhlanga was his wife and Ronnie Nyandoro a business associate. He stated that the investors which he courted were the Adani Group based in Dubai. He described the investors as the largest coal investors in the world. When he transacted with the accused, he did so on behalf of the company which owned the Greystone Park property. The company is the one which was to partner with the Adani Group. The witness did not tell the accused the identity of the investor but just that there were foreign investors in the coal mining group project. The witness was asked whether there were resolutions made by the companies which owned the properties in issue herein to deal in them. The witness replied that whilst he accepted that there had to be resolutions, the properties were given to the accused to show goodwill. Documents of title were not passed over to the accused and would only be so passed over to him on completion of the transaction. He agreed with the suggestion that the accused thought that he was receiving the property from the witness as consideration for the concession.

The witness said that he was a shareholder in Light-glass Enterprises (Pvt) Ltd, the company which owned the Greystone park property. He stated that the mandate of the lawyer was to ensure that all conditions precedent to the making of the written agreement had been met and to reduce the agreement to writing thereafter. Asked whether he parted with a valuable house on the strength of verbal promises by the accused, the witness said that, the title deed was withheld and would only be released upon the accused providing proof of ownership of the coal concession and the geological survey report showing the existence of coal in the concession. No formal transfer of any of the assets was done in favour of the accused. He said that the accused failed to meet the conditions precedent. He confirmed that the accused was given occupation of the house in 2014. He also confirmed that the vehicles were disposed of although he was not aware of the finer details of the transactions. The lawyer Mr Desai held the title deed to the property and the vehicle registration books.

Asked whether he was aware that a special grant should be explored within 3 years, the witness responded that he was not aware and had not held a special grant before. It was put to the witness that the accused would testify that he never offered the special grant for sale to the

witness but offered the witness the opportunity to invest in it and the witness agreed to the offer. The witness denied the suggestion. The witness also denied that he sought 60% control of the Rockrabbit Investment (Pvt) Ltd, the company which held the special grant. The witness agreed that the lawyer Mr Desai told the police that he, the lawyer, was a director of Light-glass Investments (Pvt) Ltd when he made a report against the accused to the police. He denied that he knew a police officer called Dafana from the Frauds section nor Mr Zhang Niah Hai. He denied that he only decided to back out of the deal upon realising that it was not economically viable to invest funds in coal mining. He also denied that the lawyer had not exercised due diligence before partying with the property and stated that if the accused's title to the special was produced as well as a geological survey report, his consortium would take up the concession. The witness agreed that he was aware of the existence of civil summons for the eviction of the accused from the property but denied that he was using the criminal procedure to get his property back.

Under cross-examination, the witness stated that he did not know how the motor vehicles had been disposed of. He also stated that the legalities of the transactions and the consummation or finalisation of the same was left to the lawyer Mr Desai.

Salim Suleman Desai: Is a legal practitioner and principal in the firm Desai and Associates. He is the lawyer whom the last witness referred to as having been mandated to conclude the transaction. He testified that he was a director of Light-glass Investments (Pvt) Ltd and was representing the company. He produced a company resolution by consent as exh 1. The resolution dated 29 January 2016 authorised him to represent the company and make a report to police authorities to recover the assets handed over to Arthur Chikukwa after he fraudulently misrepresented the viability of the Tuli Coal concession.

The witness testified that in July, 2014, he was instructed to handover to the accused a residence in Stonechart Lane as well as a Prado and a Lexus vehicles by Robert Mhlanga. The property was said to be part of an agreement between Robert Mhlanga and the accused for the purchase of Tuli concession in the Tuli area. The witness does most of the conveyancing for Light-glass (Pvt) Ltd and is the one who had fronted or represented the company in the purchase of the Stonechart Lane property. He gave the accused US\$100 000-00 and Robert Mhlanga handed over to the accused another US\$25 000-00. He also handed over to the accused a Toyota

Prado and a Lexus motor vehicles. The accused in turn gave the witness an application for a special grant and details of the accused's national identity card.

The witness produced by consent as exhibits which were marked and described as herein following copies of respectively:

2 (a) application for Special Grant No. 5341 to prospect for coal granted to Rock Rabbit Investments (Private) Limited under Cabinet minute No. 79/2013 and signed in approval by His Excellence The President RG Mugabe on 13 March, 2014 authorising its issue pursuant to the provisions of s 301 of the Mines Minerals Act, [*Chapter 21:05*].

2 (b) the Special Grant No 5341 issued to Rock Rabbit Investments (Private) limited by the Minister of Mines and Mining development on 25 October, 2013 following authorization by the President as per 2 (a) above. The Special Grant was signed as duly registered in terms of the same provisions of s 301 of Mines and Minerals Act on 19 March, 2014 by or on behalf of the Secretary of the Mines and Mining Development Ministry.

2 (c) Letter dated 19 March, 2014 by the Chairman of the Mining Affairs Board addressed to the Directors of Rock Rabbit Investments (Pvt) Ltd to which was attached the Special Grant in 2 (b).

2 (d) Copy of the accused's Zimbabwe passport No. DN 957634 issued by the Registrar General at Harare on 28 April, 2014

The above as described are the copies of documents which the witness testified to as having been handed over to him by the accused against the witness handing over of the Stonechart Lane residence in issue herein, the Prado and Lexus and US\$100 000-00. The witness said that he was given by the accused the originals of exh(s) 2 (a), (b) and (c).

Asked as to why the accused gave him the documents, the witness said that the documents were intended to prove the ownership of the concession. He said that since there was no document to show the identification of the holder described as Rock Rabbit Investments, he asked the accused for the company registration documents for Rock Rabbit and for the geological reports on the coal concession as per instructions from Robert Mhlanga. He testified that the accused promised to avail the documents. Once the documents were availed to him, the witness said that he was then going to prepare a formal written agreement. The accused according to the witness failed to produce the documents despite numerous requests, meetings and phone calls which went on between the accused and the witness. The witness stated that on

account of the failure of the accused to provide the documents, he then requested him to return the property which he had handed over to him including the cash but the accused failed to do so.

The witness continued in his testimony that the accused failed to provide proper proof of ownership of Rock Rabbit Investments (Pvt) Ltd until he reported the matter to the police. He also held meetings with the accused aimed at resolving the matter amicably but the accused who appeared amenable to return the property or assets pre-paid to him failed to do so. Asked as to why there was a prepayment, the witness responded that the prepayment was a good will gesture intended to secure the deal because Robert Mhlanga had identified an outside serious investor in the energy sector keen to invest in Zimbabwe. By pre-paying, the rationale was also to prove the *bona fides* and seriousness of the purchaser. The prepayment was predicated upon a representation made by the accused to Robert Mhlanga with assurance that proof of ownership of the concession would be availed as well as proof of the extent of the coal deposits also assured by the accused to be available.

The witness produced by consent the company documents for Light-glass Enterprises (Private) Limited as exh(s) 3 (a) and 3 (b) being the CR14 and CR6 dated 7 August, 2012. The CR14 shows that directors of the company are the witness and Artwell Mandivenga. The witness was also shown as the secretary of the company. With respect to the property values, the witness indicated that the immovable property in Stonechart lane has 2 title deeds, one to a developed area and the other to an undeveloped area. He valued the property at \$3million made up of US\$2.5 million for the property and US\$5000 0000-00 paid for transfer costs to obtain the property. The Prado motor vehicle had done 16 000km and he valued it at US\$60 000-00. The Lexus had done 7 000km and he also valued it at US\$60 000-00. The witness said that upon investigations by police being carried, it was discovered that the accused had disposed of the motor vehicles. The accused had obtained the registration books of the vehicles from the witness under the pretext that he wanted to renew the vehicle licences which had expired. As regards the Lexus, the witness said that he was made to understand that it was being held by someone owed money by the accused as surety. The vehicles were not recovered. The witness did not transfer the property to the accused on account of the accused's failure to produce documents which he had undertaken to do.

The witness said that he did not trace the ownership of Rock Rabbit Investments (Private) Limited because the onus was on the accused to do so. The court noted that such failure by the witness to do the investigation showed lack of diligence on his part both as a lawyer and a director. Any legal practitioner worth his salt would be expected to carry out as part of diligence process, the identification of a party whom he is dealing with and to authenticate it. The witness stated that the police showed him documents showing that the accused was not a director of Rock Rabbit Investments (Pvt) Ltd. He said that the accused purported to be the owner and director of Rock Rabbit Investments and also gave him a document pertaining to a certain woman called Chiweshe whom the accused presented as his wife and co-director in Rock Rabbit Investments.

Under cross examination, the witness was referred to his recorded statement. It was pointed out to him that he had stated therein that the accused had misrepresented to Light-glass Investments (Pvt) Ltd. The witness responded that the misrepresentation was made to him and to Robert Mhlanga. It was also pointed out to the witness that the charge sheet was alleging that accused misrepresented that he had a mandate and that the witness had also stated in his statement that a verbal agreement was reached between Light-glass (Pvt) Ltd and the accused. The witness was further cross examined to reconcile his testimony with that of Robert Mhlanga who had said that the accused was representing himself.

A lot of the cross-examination of this witness was aimed at trying to show that the charges were being made because the coal concession turned out to be unviable and that Light-glass (Pvt) wanted to pull out of the agreement and in the process recover back the property it previously surrendered. Reference was also made to a Bulawayo case CR 311/01/16 which was said to have been based on a complaint by Light-Glass Investments that the accused misrepresented that coal deposits were economically viable. The proceedings in that case were of course not produced to this court nor was the court advised of what became of that matter. It did not appear that the matter was adjudicated upon by a court as no evidence of how it was disposed of was given to the court.

The witness was also cross examined on the tenure of a special grant and the need to pay for licence renewals. He was also asked to comment on whether he was aware that the Geological Department will assay samples. The witness said that he agreed on the issue of

allegations of non-availability of the concession being made to the police but insisted that the accused said he had a mandate to sell. The witness agreed that he was shown a document on Rock Rabbit letterhead dated 25 October, 2012 directed at the Ministry of Mines listing shareholders' of Rock Rabbit as Abigail Zauyamakando, Sunungurai Kundishora and the accused in proportions of 50%, 22% and 23%. The three are described as directors as well in the document produced as exh 7. The witness denied that he was shown the letter as part of the application for the Special Grant. The witness said that he did not show Robert Mhlanga the Special Grant until December 2015 because Mhlanga was in and out of the country. What the witness was waiting to be supplied with by the accused was proof of ownership of Rock Rabbit Investments and the geological report. He said that the conclusion that the concession was not viable was reached upon a consideration of the failure by the accused to provide the geological report. Asked by the court as to why the deal would not be consummated or completed, the witness said that the accused also failed to provide company documents in the form of the CR14 and CR for Rock Rabbit Investments (Private) Limited.

Zhang Niah Hai: Stated that he was introduced to the accused by Mr Mabhena, an official in the Ministry of Mines in 2010. The accused was introduced to him as a consultant. Mr Mabhena was the Chief Mining Commissioner. The witness wanted to apply for a Special Grant to mine coal. He did not know the procedures. He engaged the accused to assist as consultant in applying for the Special; Grant using the witness' company Rock Rabbit Investments (Private) Limited. The application was successful and the witness identified exh 2 (a) and (b). He said that he never got the original Special Grant because Mr Mabhena who gave him the copy of exh 2 (a) and (b) said that the original was in the office. The witness produced the company documents for Rock Rabbit Investments Private Limited showing that the director were the witness and his father. He produced the certificate of incorporation, the CR14 and CR 6. The accused's name did not appear on the documents.

The witness testified that accused was never a director nor shareholder of Rock rabbit Investments (Pvt) Ltd. He only came to know about Light-glass Enterprises in March 2016 when police approached him on enquiries. He said that he never asked the accused to act on behalf of Rock Rabbit Investments (Pvt) Ltd in transacting with Light-Glass Enterprises (Pvt) Ltd in relation to any transaction. Asked to comment on the accused's assertion that he owned a 60%

shareholding in Rock Rabbit, the witness responded “That would be funny. It’s not possible at all.” The witness did not know Robert Mhlanga and did not receive any payment from that company. The witness said he never offered the company for sale nor did he ask anyone to offer it to anyone. He said that the coal concession in issue was operational and under his control.

Under cross-examination, the witness was referred to extracts from his statement to the police in which he stated that the accused had come to the witness’ office as a consultant in 2010 and during that time he had verbally agreed that the accused could be director of Rock Rabbit. The witness also agreed that he had in his statement to the police stated that the accused was one of the directors of Rock Rabbit Investments (Pvt) Ltd. He however maintained that he did not know that the accused had sold the Special Grant to Light-glass Enterprises as he was never consulted.

The witness denied that he had used the services of the accused in other transactions. He was however shown a mandate document produced as exh 8 in which a company called Crowcon Investments (Private) Limited mandated the accused and 2 others on 17 May, 2016 to help identify investors and partners to exploit Special Grant No. 5324 in Gweru District. He agreed penning the document. He testified that the accused was only engaged by him as a consultant and they did not contact each other for a long time.

The State closed its case and the accused’s counsel advised the court that she intended to apply for the discharge of the accused at the close of the State case. She asked to be allowed to file a written application. An application by the prosecutor made to have the accused committed to custody in terms of s 126 of the Criminal Procedure & Evidence Act was turned down by the court as the allegation that accused wanted to dispose of the property pertaining to this case was not substantiated. The accused himself denied that he had attempted to sell the property. Section 126 aforesaid gives the court a discretion to withdraw a bail order, vary alter or add to the bail conditions of any accused on bail where the interests of justice demand it. This provision is sparingly used and must be invoked only where it is clear on proven evidence that the interests of justice will be served by reviewing a bail order in existence. The court also advised the prosecutor to simply place a caveat on the property as a measure to ensure that the real rights to the property remained extant.

The defence counsel subsequently filed a 25 paged written application for discharge of the accused in terms of s 198 (3) of the Criminal Procedure & Evidence. The State Counsel filed his opposition. After going through the submissions, I dismissed the application and indicated that my reasons for doing so would be incorporated in the main judgment. The provisions of s 198 (3) of the Criminal Procedure & Evidence Act provides as follows:

“198 Conduct of trial

- (1)
- (2)
- (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 section has been subject of extensive judicial interpretation before its amendment in 1997. The amendment to the section was to include the word shall in directing the court to acquit an accused where the State evidence fell short of satisfying the provisions of the section. Therefore cases decided before the amendment which interpreted the section as giving the court a discretion to acquit the accused at the close of the State case must be considered as having been qualified to the extent aforesaid. The cases of *S v Kachipare* 1998 (2) ZLR 271 (S) at 275 and decisions made thereafter like *S v Tsvangirai & Anor* 2003 (2) ZLR 88, *S v Bredenkamp* 2013 (2) ZLR 228; *S v Kuruneni* HH 59/07, *S v Paradza* 2006 (1) ZLR 20; *S v Madzogo & Ors* HH 397/15 and *S v Nyarugwe* HH 42/16 are instructive.

An application made in terms of the said section should not be actuated by the desire to rest the inclination of the court on its assessment of the State evidence. It is in this court’s view an application which should be made *bona fide* and be supportable on the facts. Ordinarily it should not be a difficult application at all because the facts led in evidence will normally just fall short of establishing that the accused committed the offence charged or a competent verdict offence on the charge. The first point to appreciate is the law. An accused or his counsel seeking to invoke the provisions of the section should first consider the elements of the offence charged and any competent verdict which is possible on the charge. The next step is then to consider whether evidence has been led which bears on the essential elements of the offence. *In casu*, the court has already outlined the elements of the offences of fraud and money laundering as defined in the enactments creating them.

It is not necessary in the view of this court to take more time than necessary to show that the application lacked merit. The complainant parted with property to the accused in circumstances in which the State witnesses testified that the accused had misrepresented that he was the owner of or had a mandate to dispose of a coal concession which he purported to sell to the complainant. The coal concession is in the name of a company of which the accused is neither a shareholder nor a director at least going by official records. The coal concession company director gave evidence that the accused did not own the concession nor did he have a mandate to dispose of it or quote investors in it. It is not disputed that the complainant derived nothing from the transaction. The accused took possession of fixed property, cash and cars for which the complainant has testified that no corresponding consideration as promised was derived by the complainant. Given the definition of Fraud and Money Laundering, as espoused above, there is no doubt that a *prima facie* case was made out by the State. The argument that the charge sheet lists the complainant as a company and yet the evidence reveal otherwise shows a lack of appreciation of the offences charged and criminal procedure rules. Section 138 of the Criminal Law Code speaks to the fact that the identity of the person who is deceived or suffers prejudice is not material. It is the making of a misrepresentation which causes prejudice or is potentially prejudicial which is the gravamen of a fraud charge. With respect to the charge of Money Laundering, the State only needs to prove that there was some criminal activity which generated the proceeds. The evidence adduced by the State, *prima facie*, showed that the property which the accused obtained came his way through what would appear to have been misrepresentations thus qualifying them for criminal activity. The application merited dismissal and was so dismissed. The accused had to answer to the charges on the evidence led by the State.

The accused gave evidence in his defence. He is a graduate in metallurgical engineering. He obtained his degree in 1998 from Cape Town University. He has worked for several corporate entities within Zimbabwe and the region. He decided in 2009 to take advantage of opportunities presented by the indigenisation thrust then obtaining in Zimbabwe. He met the last State witness Zhangu Huai Nai (Zhang) in February 2010. He was then working as an independent consultant. Zhang called him to his offices and told him about his interest in coal mining and his difficulties with securing a special grant for coal prospecting which he had applied for under Crown Con Investments. Mr Zhang suggested to engage the accused as

consultant with respect to Crown Con and the accused agreed. He then reconstructed the transaction for a fee charge of US\$ 2 million which Mr Zhang said he could not afford to pay. In lieu thereof Mr Zhang then gave him an opportunity to be a director in Rock Rabbit Investments (Pvt) Ltd. The accused then made an application for a coal special grant on behalf of Rock Rabbit Investments. He said that Mr Zhang asked him to look for his own directors and he identified two directors. He produced a receipt exhibit No. 5 for US\$100 000-00 dated 30 December, 2010 in payment of the application for a special grant in the name of Rock Rabbit Investments. Mr Zhang told him that he could make money for himself and his chosen directors.

The accused testified further that Mr Zhang wanted payment of US\$310 000-00 before he could change the directorship of Rock Rabbit Investments Pvt to include the accused and his two directors. The witness said that Mr Zhang already had a special grant under Crown Con Investments (Pvt) Ltd and there was no way that he could have successfully applied for another special grant. The witness produced as exh(s) 6 (a) (b) and (c) documents relating to the president's authorisation of the issue of Special Grant No. 5324 to Crown Con Investments, the special grant issued and the letter from the Mining Affairs Board confirming the issuance of the Special Grant.

The accused stated that in 2012, him and his other directors Abigail Makando and Sunungurai Kundishora wrote a letter to the Minister of Mines advising of their directorship in Rock Rabbits Investments (Pvt) Ltd. They attended interviews with the Minister and subsequently with the President. He said that interviews are carried out because coal is a strategic mineral and Government would want to know who it is dealing with. The Special Grant application was successful and it was issued and Gazetted in March/April 2014. Asked whether he had a mandate to sell Rock Rabbit Investments, the accused responded that the Special Grant was never sold. He said that they only needed investment partners to put finance into the project.

The accused met Robert Mhlanga through introduction by the Mining Commissioner for Manicaland Mr Chimusasa and also through the involvement of one Ronnie Nyandoro. The accused told Robert Mhlanga that he was looking for an investor who could invest \$15 million into the project. He said that he told Mhlanga that what was required was mine set up and exploration. The accused testified that Robert Mhlanga responded that if he was to put in US\$15 million, he needed to get the controlling stake and would buy 60% of the venture for US\$8

million. The accused would give the accused and his co-directors amounts ranging between US\$2 – US\$2.5 million each. Robert Mhlanga further said that cash was a problem and he would pay using an immovable property which he discounted to US\$2 million, a Toyota Lexus valued at \$40 000-00 and a Toyota Prado valued at US\$50 000-00. Mhlanga then said that the assets were to be handed over to the accused by Suluman Desai to whom the accused should deliver the document for the Special Grant. The total payments fell short of \$910 00-00 and of this amount Desai paid the account \$100 000-00.

The accused took possession of the property and the vehicles. The vehicles were not up to his tastes and he had them disposed of and he used part of the proceeds to pay Ronnie Nyandoro for linking him to Robert Mhlanga. Ronnie Nyandoro was paid US\$55 00-00. The accused said that he realized that the property belonged to Light-Glass Enterprises and the vehicles were registered in other names namely Felicia and Avante, a company. He also realized that Robert Mhlanga did not appear as director of Light-glass Enterprises and the shareholders were different. He said that he got the information from his sources at the companies office.

When it was put to him by his counsel that Mhlanga and Desai had testified that it was a condition of the sale that he provides a geological report, the accused said “the geological report comes with a cost. The idea of investing is to come up with a geological report. If he had invested the \$15 million we could have done the exploration to quantify and delineate the resource. We could not have a geological report before the money. Drilling has to be done.”

The accused produced exh 8, the mandate document by Crown Con dated May 2016 signed by the witness Zhang. The accused said that he realized after his arrest that once beaten twice shy and asked Zhang to give a written mandate in respect of consultancy involving Crown Con and to spell out the parameters.

Asked by his counsel why Robert Mhlanga was treating him like that, he said that in 2014 when they met, he asked him to reduce their relationship into writing and he thought that he would do so considering the portfolio which he was running. He said that because of the change in the fortunes of Robert Mhlanga and collapse of his empire he was now using police to resile from the agreement as he knew that the Special Grant was valid for 2 years. He said that Robert Mhlanga now wished to walk away since he could not raise the capital required to move the

project forward. He said that for a project of that magnitude he dealt on trust with nothing put in writing hence making it difficult for anyone to say what was agreed.

In cross-examination the accused agreed that he never showed Mhlanga the Special Grant. He gave it to Mhlanga's lawyer Desai. He denied that he was supposed to produce documents of his connection with Rock Rabbit Investments (Pvt) Ltd. He stated that Mhlanga only wanted to see the Special Grant. He agreed that he did not pay the \$310 000-00 required by Zhang for his admission into the directorship of Rock Rabbit Investments. He agreed that Zhang had said that he, the accused was not a director of Rock Rabbits and further that the issue of \$310 00-00 had not been mentioned nor put to Zhang to confirm or deny when Zhang gave evidence and was cross-examined.

He also agreed that the allegation of him owning 60% of Rock Rabbit was not put to Zhang. He said Zhang was nowhere near the transaction. He agreed that he did not appear in exh(s) 4 (a) (b) (c), documents for Rock Rabbit Investments as Director but insisted that he was a director. He did not disclose to Zhang that he had received any payments connected with the Special Grant. Asked whether there was a resolution by other directors for the disposal of a shareholding in Rock Rabbit the accused said that the other directors were impatient. He did not advise Mhlanga about Mr Zhang because Mhlanga said anyone in the accused's trailer was the accused's problem to deal with. Asked why he did not partly pay Zhang, he said that the money paid to him was in the form of property and he also paid back \$100 000-00 to the person he had borrowed from on applying for the Special Grant. The accused said that he had been verbally appointed as executive director by Mr Zhang whilst his colleagues were non-executive. He said that he did not know the shareholding of Light-Glass Enterprises. He said in re-examination that Mr Zhang was not part of Special Grant 5314. On questions by court, the accused said that from the proceeds of the disposal of the Lexus, he used them to pay for services. He said that Desai the lawyer was part of speculating by not preparing a written agreement and that he was going back on the true facts in his evidence.

The court is required to determine whether the accused made a misrepresentation. The fact that such misrepresentation if proved could have been made to Robert Mhlanga as a person or to Suleiman Desai or to Light-glass Enterprises is not material. The misrepresentation of proved to have been made must cause prejudice or be potentially prejudicial and the accused

must be proved to have intended that the misrepresentation be acted upon or realized a real risk that it would be acted upon to another person's prejudice.

The court has considered all the evidence led in this case as well as the submissions made by both counsels. The allegation against the accused was very simple. He is alleged to have misrepresented that he had a mandate to sell or deal in a Special Grant whose holder is Rock Rabbit Investments (Pvt) Ltd. It is common cause that the Special Grant SG 5341 was issued to a legal persona, Rock Rabbit Investments (Pvt) Ltd. It is also common cause that the official documents for Rock Rabbit Investments (Pvt) Ltd which were produced by consent do not reflect that the accused has any connection with the said company in the sense of being a director, shareholder or officer of the same. A director of the company Mr Zhang testified that the directors of the company were himself and his father. He agreed that the accused was referred to him as a consultant by the Ministry of Mines Chief Mining Commissioner and that the accused played his consultancy role leading to the issuance of the Special Grant. Mr Zhang denied that he ever engaged the accused as agent for Rock Rabbits to find any investors for exploration of the Special Grant coal concession. Mr Zhang is connected to the accused as a person who had a business relationship. He is not connected to Mhlanga, Desai or Light-glass Enterprises. It was not suggested to him that he would have a motive to falsely implicate the accused by denying that the accused had authority to represent Rock Rabbit Investments with regard to the disposal or exploration or investing in its Special Grant.

The accused on the other hand insisted that he was a director of Rock Rabbit Investments (Pvt) Ltd appointed verbally and controlling 60% of the company. In the same vein he testified that Mr Zhang had wanted US\$310 000-00 before he could register the accused and his co-directors as directors of the company. The long and short of the accused's contradictory positions is that he in fact accepted that until he had consummated the agreement as to satisfying payment for the directorship, he was not a director. It is not necessary to determine whether or not at law a director can be appointed verbally because the accused on his admission was supposed to pay for the same. If the accused was not a director, he could only have been authorised to act for the company as its agent. Such agency was not proved and was denied by Zhang. The accused purported shareholding and directorship in Rock Rabbit Investments existed in name only and was also denied by Mr Zhang.

Documents were produced to the court purporting that the accused and two others persons were directors of Rock Rabbit. The documents were uttered to the Ministry of Mines and to the President. They were false. They are not officially accepted documents proving a directorship. On the accused's account one gets the impression that there was another unregistered Rock Rabbit Investments Company made up of the accused and his two co-directors. The truth however is that there was only one Rock Rabbit company, the holder of SG 5341 of which the accused was neither a director nor an appointed agent to deal in its Special Grant.

The evidence of Robert Mhlanga was that the accused was supposed to provide proof of ownership of the Special Grant which Special Grant as admitted by the accused was not produced to the witness. The witness also stated that he wanted the accused to produce the geological report on the concession. It would not have been reasonable for Robert Mhlanga to simply either by himself or through his company agree to commit US\$15 million or \$8 million into the unknown. The witness said that the accused was very convincing in his presentations to him. This could not have been unexpected given the accused's knowledge of mining as a graduate metallurgical engineer. The fact that good faith was at the centre of Robert Mhlanga's parting with his property cannot be denied. It is clear from the facts. The witness Desai Suluiman did not unfortunately do much to safeguard the interests of the complainants. An astute legal practitioner should have done more to protect his client as part of a process of due diligence. It was the lawyer's job to alert Robert Mhlanga after making the necessary checks that the accused was not part of Rock Rabbit Investments (Pvt) Ltd. The lawyer should then have sought that the accused produces proof of directorship or official authority to show that he was an agent of the holder of the Special Grant authorized to deal in it with third parties.

The accused is on the facts guilty of fraud. He misrepresented that he had authority to deal in the Special Grant. Robert Mhlanga acted on this misrepresentation and in the process parted with valuable property to his prejudice or to the prejudice of the companies which owned the property, 2 cars, US\$25 000-00 and it is not denied that the accused was paid a further US\$100 000-00 by Suleman Desai. What is also clear is that in the absence of authority or a mandate from Rock Rabbit as testified to by Mr Zhang, the complainant stands defrauded. Had Rock Rabbit benefited from the proceeds then one could argue otherwise. What the accused did

was kept a secret from Rock Rabbit Investments yet it had everything to do with its Special Grant.

Once the accused received the properties and money through engaging in activity of a criminal nature the property became proceeds of crime. How the accused can purport to be entitled to hold on to the property in the circumstances presents itself as a mystery. The argument that this is a civil dispute has no merit. It can only derive merit if the accused had shown that he acted with authority or a mandate to court the complainants into participating in or deriving interests in the Special Grant. The accused was proven not to have such authority or mandate. The accused was proven to have received and disposed of cash and cars obtained as result of a misrepresentation. The accused received occupation of a fixed property though he has no title. He is clearly not entitled to the immovable property in as much as he was not entitled to the money which he was paid and the cars. Having received and disposed of property which he obtained through his criminal activity, the accused was also therefore guilty of Money Laundering.

In all the circumstances of the case, the accused is found guilty on both counts.

Sentence

The accused counsel called the accused to give evidence in mitigation of sentence. Whilst expressing surprise at his conviction because he believed that he was doing his work in good faith and with honour, he testified that he was a father of 3 daughters aged 16, 13 and 6 years old respectively. He was married and a family man. He values his career, loves it and respects its ethics. He said that when he dealt with Robert Mhlanga and Zhang Nia Hai, he did so in good faith. In hindsight he realized that he should have engaged a legal practitioner in his dealings. He offered to reimburse the complainant of his losses to the last cent if given an opportunity to do so. He said that he would recover the vehicles from the buyers and surrender them back. When questions were put to him by the prosecutor, the accused offered to reimburse or pay the accumulated bill of owner's charges due on the complainant's property which he took possession of. The agreed amount which he committed to reimburse was in the sum of US\$58 534-05. Exhibit 9 being a statement of account from Harare City Council for the period 31 August, 2014 to 30 September, 2016 was produced by consent. It is in the sum of US\$54 118-57. There is a

balance carried over into August 2014 in the sum of US\$4 415-48. It is not clear as to the period to which the amount relates. To order the accused to take over the balance which may well relate to a period before the accused was exercising rights of ownership or possession of the property is not fair nor justified. The sum of US\$54 118-57 will therefore be used in ordering restitution or compensation. Whilst on this point Ms *Chikomo* appeared to suggest that rates are paid by the registered owner. This of course would apply in circumstances where the owner has possession and control of the property or where there is agreement as to who pays rates. I did not hear Ms *Chikomo* to persist in the point that the accused is not liable to compensate the complainant for the accrued charges. In any event the accused committed himself to pay the money through his own volition.

In further mitigation, the defence counsel submitted that the convictions would affect the accused in his social standing and that this was a form of punishment. She also submitted that consideration be given to the fact that both the accused and complainant did not appear to appreciate the legal intricacies involved and that there was no malice on the part of the accused. Defence counsel referred the court to the provisions of s 236 of the Criminal Law Codification and Reform Act to advance her point that the fact that the accused acted through a mistake of law or ignorance of the same can properly be taken as mitigatory. The accused did not in this matter raise the question of ignorance of the law as a defence nor did he seek to be excused from blame on the basis of any genuine mistake of fact or law.

The facts of this matter are very simple. The court found as a fact that the accused made a misrepresentation to the effect that he had authority to dispose of or deal in the special grant concerned. The complainant acting in the genuine belief that the misrepresentation was true transacted with the accused and parted with valuable property and money which accrued to the accused or to his benefit. The accused in turn laundered part of the property he obtained as a result of the commission of the fraud by disposing of the same. These are the simple proven facts.

In the court's view, in crimes of dishonesty where prejudice has been caused to the complainant by or as a result of the accused's conduct, the accused should be disgorged of the ill-gotten gains and compensate the complainant for the loss suffered. The offences which the accused was convicted of are serious and attract sentences ranging in the case of fraud, from a

fine not exceeding level 14 (US\$5 000-00) or twice the value of the property involved whichever is greater or to imprisonment for a period not exceeding 35 years or both such imprisonment and a fine. With respect to Money Laundering in the second court, the court can impose a fine not exceeding US\$5 000-00 or twice the value of the property which forms the subject of the charge whichever is greater. The court can also impose a term of imprisonment not exceeding 35 years or both a term of imprisonment and a fine. There is no gain saying that the legislature views the offences as serious ones and indeed they are abhorrent. In this case the complainants gained nothing because the special grant rights as testified to by Mr Zhang belong to Rock Rabbit Investments (Pvt) Ltd and not Robert Mhlanga or Lightglass (Private) Limited. The accused received and retained complainants' property and money for no value to the complainants. The court in its judgment expressed surprise that in the circumstances of the case, the accused insisted on laying claim or entitlement to the complainant's property.

In the accused favour however is the fact that he has offered to reconstitute the property which the complainants lost and divest himself of the ill-gotten gains. The accused offered to return the complainant's immovable property, money paid to him as well as the vehicles or the value thereof. The accused was given the sum of US\$125 000-00 in cash. He said he would return the Prado Motor vehicle. He was facing problems recovering the Lexus motor vehicle in order to return it. However its value was agreed to be in the sum of US\$40 000-00. The court was told that the person to whom the Toyota Prado was disposed to has a claim for US\$56 500-00 against the accused being the amount which the accused was paid. The state counsel submitted that the Prado must be returned to the complainant as it is part of proceeds of crime.

The prosecutor asked the court to act in terms of sections 362 and 364 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] and order compensation for the liability for rates and also compensation to one Enias Mudenge who is in possession of the Toyota Prado motor vehicle. When I was in the midst of assessing sentence, it occurred to me that I had not interrogated the issue of when and how the accused proposed to make good the prejudice. On 30 November, 2016 being the date that sentence was due to be delivered I advised counsel that I had not completed assessing sentence and I asked the accused's counsel to address me on the issues which had exercised my mind as aforesaid. I considered that it would not have been

appropriate to simply order that restitution be affected by dates fixed by myself randomly without affording the accused the opportunity to address me on the point. The defence counsel submitted that if given a day or two she would get definitive positions on restitution.

On 1 December, 2016 the defence counsel reported that the house 30 Stonechart lane Borrowdale had now been vacated by the accused's family save for workers in outbuilding. The keys to the residence were brought to court and an order was made that restitution of the immovable property had been effected. This left the issue of the Toyota Prado motor vehicle registration No. ABR 4643. The person to whom the vehicle had been sold by or on the authority of the accused was present in court. The court asked her to take the witness stand. She is Enesia Mudenha. She gave evidence of how she had purchased the vehicle for US\$56 500-00 from Lingbay Enterprises of 609 Rugare Close Greystone Park, Harare on 15 November, 2015. She is based in Triangle. The vehicle was registered in her name. She is now registered as the owner. The vehicle now bears registration No. ADC 9665. She said that she took out a loan from her employer to purchase the vehicle. She is still repaying the loan. The witness was silently sobbing as she explained how she innocently bought the vehicle and could not understand why the law could not protect her under the circumstances. She expressed her desire to keep the vehicle. The fact that she was an innocent purchaser was not put into issue. She referred to court cases HC 4127/16 and HC 4070/16 in which she has been fighting to retain the vehicle as an innocent purchaser.

The director of the company which sold the Toyota Prado vehicle to the buyer Mudenha was also present in court. He testified in corroboration of the buyers claim that she was an innocent purchaser. It was not clear how Lingbay Enterprises had been able to procure the registration of the vehicle into the buyers name without the written authority of the company in whose name the vehicle was registered. The court however noted that the buyer was not complicit in the process of change of ownership.

The court must be guided by the provisions of sections 365 and 366 (2) of the Criminal Procedure & Evidence Act in this case. The sections read as follows

“365. Restitution of unlawfully obtained property

(1) Subject to this Part, a court which has convicted a person of an offence involving the unlawful obtaining of property of any description may order the property to be restored to its owner or the person entitled to possess it.

- (2) For the purposes of subsection (1), where the property referred to in that subsection consists of –
- (a) money, the court may order that an equivalent amount be paid to the injured party from moneys –
 - (i) taken from the convicted person on his arrest or search in terms of any law; or
 - (ii) held in any account kept by the convicted person with a bank building society or similar institution; or
 - (iii) otherwise in the possession or under the control of the convicted person;
 - (b) fungibles other than money, the court may order that an equivalent amount or quantity be handed over to the injured party from similar fungibles in the possession or under the control of the convicted person.

366 Cases where award or order not to be made

- (1) A court shall not award compensation in terms of section three hundred and sixty-two, three hundred and sixty-three or three hundred and sixty four-
- (a) In respect of any loss or diminution of a right or personal injury where such loss, diminution or injury results from an accident arising out of the presence of a vehicle on a road, unless in the case of loss or diminution of a right it arises from damage that is treated by paragraph (b) of subsection (2) of section three hundred and sixty-two as resulting from theft;
 - (b) In respect of any loss or diminution of a right or personal injury –
 - (i) where the amount of compensation due to the injured party is not readily quantifiable; or
 - (ii) where the full extent of the convicted person’s liability to pay the compensation is not readily ascertainable; or
 - (iii) unless the court is satisfied that the convicted person will suffer no prejudice as a result of the claim for compensation or restitution, as the case may be, being dealt with in terms of this Part.
- (2) A court shall not order the restitution of any property in terms of section three hundred and sixty-five if it appears to the court that another person, who had no knowledge that the property had been unlawfully obtained, has acquired a right or interest in the property which might be prejudiced if the property were restored to its owner or to the person entitled to possess it.”

The provisions of s 366 (2) protects a person who has acquired tainted property innocently without knowledge that the property was unlawfully obtained. If such person has acquired a right or interest in the property which would be prejudicial if the property is taken away and restored to its owner, then an order of restitution cannot be made. In this case it is clear that Enesia Mudenha had no knowledge that the property or car was tainted property. She bought the vehicle in good faith, paid for it through a loan which she is servicing at work and thus acquired an interest in the property. She stands to suffer prejudice if the vehicle is taken away from her. The court will accordingly not order her to surrender the vehicle. The accused must instead retribute the complainant the value of the vehicle. The amount of prejudice to the complainant with regards the Toyota Prado was agreed to be the sum of US\$60 000-00.

On the agreed facts, the direct prejudice suffered by the complainant after recovery of his US\$2 500 00-00 valued property is as follows:

Toyota Prado	US\$60 000-00
Toyota Lexus	US\$40 000-00
Cash	US\$125 000-00
Total	US\$225 000-00

The figure of US\$225 000-00 is the one which the court will consider as the complainant's loss in assessing sentence. With regards an order of compensation for rates, this is not part of prejudice for sentence purposes. It is expenditure which the complainant has incurred as a result of the accused's retention of the property. The award is based on s 365 of the Criminal Procedure & Evidence Act and it was applied for by the prosecutor in terms of s 368. The complainant is free to register the award of compensation in terms of s 372 of the said Act as a civil judgment within 30 days and to execute on it.

The accused in this case was simply greedy. It was clear that he had not passed any value to the complainants and yet he not only sought to retain the complainant's property but clung on it without justification until his conviction. His attitude is difficult to understand because it was clear that his promised transaction had hit the rocks. The owners of the special grant said that the accused had no authority to dispose of or deal in it. It was at that stage that he should have simply let go.

In passing sentence the court will take into account, the usual triad of the accused personal circumstances, the circumstances of the commission of the offence and the interests of society. The law on fraud punishes dishonesty which manifests itself through misrepresentations which causes prejudice or are potential prejudicial to another person. Society expects people to deal with each other at arm's length or with goodwill, trust and honesty. The accused has fallen from grace in this case. No length of sentence will punish him more than his fall from grace. The court will also measure the sentence it will impose with a degree of mercy. The complainant especially Robert Mhlanga was let down by his advisors. The court has already noted that there

was no due diligence by the complainant's advisors otherwise they should have advised complainant better.

The two offences of which the accused has been convicted as already are serious. The amount of prejudice involved is substantial. A sentence which will not destroy the accused but will rehabilitate and deter him and other like-minded persons is one which encourages that the accused effects restitution so that he learns that crime does not pay nor should crime be the route to riches. The offences are connected in that count I gave rise to count 2. The counts will be taken as one for sentence purposes.

The accused is sentenced as follows:

1. 10 years imprisonment of which 2 years are suspended for 5 years on condition the accused is not convicted of any offence of which dishonesty is an element for which he is sentenced to imprisonment without the option of a fine.
2. 4 years imprisonment is suspended on condition the accused pays restitution of US\$225 000-00 to the complainant through the Registrar of this court by no later than 31 December, 2017.
3. Effective person term to be served is 4 years imprisonment.
4. An order of compensation is hereby granted to the complainant, Light Glass Enterprises (Pvt) Ltd in terms of s 362 of the Criminal Procedure & Evidence Act, [Chapter 9:07] in the sum of US\$54 118-57.

Majoko & Majoko, applicant's legal practitioners
National Prosecuting Authority, State's legal practitioners