HH 85/05
CRIMINAL APP. 124/05

ENDY MHLANGA
vs
THE STATE

HIGH COURT OF ZIMBABWE
KAMOCHA and PATEL JJ
HARARE, 15 and 21 September 2005

Mr *E T Matinenga*, for appellant
Mr *M Nemadire*, for respondent

KAMOCHA J: The appellant appeared in magistrate's court facing two charges. The first count was one of theft by conversion of a motor vehicle. Secondly he was charged with contravening section 3(1) (f) of the Prevention of Corruption Act [*Chapter* 9:16].

He tendered pleas of not guilty to both counts but was, nevertheless, convicted on both counts at the end of a protracted trial despite his protestations. On the first count the trial court sentenced him to undergo 4 years imprisonment of which one and half years imprisonment was suspended for a period of 5 years on the customary conditions of future good behaviour. The second count attracted a fine of $750 000.00 or in default of payment 3 months imprisonment.

The appellant appealed to this court seeking to have the convictions in respect of both counts quashed and the sentences set aside. In the event that this court upheld the convictions appellant sought to have the sentences imposed by the court *a quo* to be substituted by the imposition of nominal fines in respect of each count.

His grounds of appeal were these-

"Ad conviction
Count 1

(a) The learned magistrate erred in disregarding the clear conclusion of law set out in a motor vehicle registration book that mere registration of a motor vehicle into one's name is not proof of legal ownership.

(b) The learned magistrate erred in convicting the appellant yet the evidence adduced by the State witnesses clearly pointed to the fact that the motor vehicle in question was always known and understood to be a Zexcom asset.

(c) The learned magistrate erred in convicting the appellant yet exhibit seven clearly indicated that the motor vehicle was registered among the various Zexcom assets in the Zexcom asset register.

(d) The learned magistrate erred in concluding that the contents of the minutes and resolutions of a meeting said to have been held on the 8th January 1999 (Exhibit 3 and 4) were a dishonesty contrivance by appellant to facilitate the commission of a theft.

(e) The learned magistrate erred in disregarding the evidence of the only independent witness Kennie Mhlanga, to the effect that the circumstances surrounding the purchase and registration of the motor vehicle in question was (sic) in accordance with the active knowledge, participation and approval of one of the State witnesses, Vivian Mwashita, the Board Member.

(f) The learned magistrate erred in finding that the evidence of Gwitira and Mudara corroborated the State case when the former conceded that he did not attend any meeting of the Board in 1999 and the later, a mere clerical employee, did attend Board Meetings and was therefore not privy to deliberations and determinations of the Board.

(g) The learned magistrate erred in not finding that the repossession of the motor vehicle by the Judicial Manager was inconsistent with the theftous conduct.

(h) The learned magistrate erred in finding that the motor vehicle's state of disrepair; its use by appellant in his quest to win the Chitungwiza primary elections; and the fact that it may have been driven by persons not known to Mudara were indications of theftous.

(i) The learned magistrate erred in finding that the State had proved its case beyond a reasonable doubt. The state did not adduce any evidence pointing to the use of the motor vehicle outside the normal personal and business use of a motor vehicle by appellant in his position as a Managing Director.

Count 2

(a) The learned magistrate erred in convicting the appellant when it is clear that Zexcom Board of Directors well knew that Mashtech Training College belonged to appellant.

(b) The learned magistrate erred in convicting the appellant yet it is clear from the contents of exhibits 3 and 4 that it was agreed and resolved by the Board of Directors that Mashtech Training College was to repair and service Zexcom motor vehicles.

(c) The learned magistrate erred in not finding that appellant had made sufficient disclosure as evidenced by the fact that authorised Zexcom

signatories signed cheques in favour of Mashtech for work done on Zexcom's behalf both before and after the intervention by the Task Force.

d) The learned magistrate erred in finding that appellant used his position to unduly influence the signing of cheques in favour of Mashtech when there was no basis for such finding at all.

Ad Sentence

a) The learned magistrate erred in imposing a custodial sentence on the appellant in respect of count one yet the conviction in respect of that count is merely technical.

b) The fine imposed on the second count is so severe as to induce a sense of shock having regard to the technical nature of the offence."

Mr Nemadire appearing for the respondent conceded that the evidence presented to the trial court did not prove that the appellant had the requisite *mens rea* to commit the crime of theft by conversion. It came out clearly from the evidence of one of the members of the Board of Directors, Vivian Mwashita that although the motor vehicle was registered in the name of the appellant, it was at the disposal for use by other Directors (herself inclusive) and appellant never claimed to own it. The vehicle still remained on the Zexcom asset register.

Further the court *a quo* should not have ignored the fact that mere registration of a vehicle in one's name is not proof of legal ownership.

I am satisfied that the concession made by respondent's counsel was properly made. It therefore follows that both the conviction and sentence on count one cannot be allowed to stand.

I now turn to the second count. The appellant was the proprietor of a company known as Mashtech Training College which was formed before Zexcom. All war veterans were aware that he was the proprietor. Mashtech Training College was operating from premises next to where appellant was working for P.O.S.B. Some of the meetings, at which the formation of Zexcom was discussed, were held at the premises of Mashtech Training College. Most of the Directors knew very well that appellant was the proprietor of Mashtech Training College. It is not disputed that cars belonging to Zexcom were repaired at Mashtech and job cards for the repairs of Zexcom motor vehicles

were produced in court. Cheques were made out in favour of Mashtech and were signed by the proper signatories before and after the Zexcom board was dissolved. Cheques continued to be made by Zexcom in favour of Mashtech after Zexcom's management was taken over by what was described as the Task Force.

It is indeed common cause that the appellant went beyond acting openly. But the crucial question is whether or not that amounted to sufficient disclosure as envisaged by the provisions of section 3(1)(f) of the Prevention of Corruption Act, [*Chapter* 9:16]. Which, in my view, should be read with the provisions of section 186 of the Companies Act [*Chapter* 24:03]. The relevant provisions of section 186 are set out *infra*: -

"186 Disclosure by directors of interests in contracts

(1) Subject to this section, it shall be the duty of a director of a company, who is in any way, whether directly or indirectly, interested in a co tract or proposed contract with the company to declare the nature and full extent of his interest at a meeting of the directors of the company. (My underlining)

(2) In the case of a proposed contract, the declaration required by this section to be made by a director shall be made at a meeting of the directors at which the question of entering into the contract is first taken into consideration or, if the director was not at the date of that meeting interested in the proposed contract, at the meeting of directors held after he became so interested, and in a case where the director became interested in a contract after it is made, the said declaration shall be made at the first meeting of the directors held after the director becomes so interested.

(3) For the purpose of this section, a general notice given to the directors of a company by a director to the effect that he is a member of a specified company or firm and is to be regarded as interested in any contract which may, after the date of the notice, be made with that company or firm shall be deemed to be a sufficient declaration of interest in relation to any contract so made;

Provided that-

i) there is stated in the said notice the nature and extent of the interest of the said director in such company or firm;

ii) at the time the question of confirming or entering any such contract is first taken into consideration, the extent of his interest in such company or firm is not greater than is stated in the notice;

iii) No such general notice shall be of any effect unless either it is given at a meeting of the directors or the director giving the notice takes all reasonable steps to secure (sic) that it is brought up and read at the next meeting of directors after it is given; emphasis added.

iv) Such a general notice shall not be effective beyond the date of the annual general meeting next after the date of the notice, but from time to time be renewed." My emphasis

What is clear from the provisions of the Companies Act is that the disclosure should be made at a meeting of directors of the company. Appellant was one of the directors of Zexcom. He therefore should have made the disclosure at a meeting of directors at which the question of him or Mashtech entering into the contract with Zexcom was first taken into consideration. Appellant was obliged by law to take all reasonable steps to ensure that the disclosure was made at a meeting of directors otherwise the purported disclosure would be of no force or effect.

Appellant did not claim to have given the disclosure as laid down in the above provision. Instead he sought to pursuade this court that since he had gone beyond acting openly that amounted to disclosure by conduct which, he submitted, would be sufficient disclosure. That in my view is clearly untenable in the light of the above clear provisions of section 186 of the companies Act.

In conclusion, I hold that appellant failed to disclose, at a meeting of directors of the company, the nature and extent of his interest in Mashtech.

As regards the sentence imposed by the trial court it was submitted that it was so severe as to induce a sense of shock when regard is had to the technical nature of the offence. The submission is without merit. The learned trial magistrate gave full reasons for arriving at such a sentence. The Prevention of Corruption Act provides a fine. The court properly exercised its discretion and sentenced the appellant

to pay a fine of $750 000.00 or in default of payment 3 months imprisonment. This sentence cannot be said to be severe at all. In the result the appeal against both conviction and sentence on count 2 fails.

The order of this court is as follows:

IT IS ORDERED THAT

Count 1:

1. The appeal against both conviction and sentence be and is hereby upheld.
2. The conviction be and is hereby quashed and the sentence set aside.

Count 2:

1. The appeal against both conviction and sentence be and is hereby dismissed in its entirety.

PATEL J, agrees:.....

*Musunga & Associates,* appellant's legal practitioners

*Criminal Division of the Attorney General's Office,* respondent's legal practitioners