THE STATE
versus
JOHN ARNOLD BREDENKAMP

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 9-12 September 2013

Assessors: Mr. M.T. Mutambikwa
Mr. T. R. Gweme

Application for discharge at the close of the State Case

E. Mavuto assisted by *M. Reza* and *I. Chingarande*, for the State
E. Matinenga assisted by *D. Metha*

CHATUKUTA J: This is an application for the discharge of the accused at the close of the State Case in terms of *s* 198 of the Criminal Procedure and Evidence Act [*Cap 9:07*]. The accused stands charged with one count of fraud and another count of contravening s 5(1)(a)(1) of the Exchange Control Act [*Cap 22:05*] as read with s 4(1)(a) (ii) of the Exchange Control Regulations, 1996 (S.I. 109 of 96). It is alleged in the first count that, between 1 February 2001 and 9 November 2002, the accused unlawfully and with intent to defraud, obtained from one Yakub Ibrahim Mohammed (Mohammed) an amount of US$4 212 123 after having misrepresented to Mohammed that he could repay the amount upon selling his mine in the Democratic Republic of Congo (the DRC). Regarding the 2nd count, it is alleged that the accused unlawfully borrowed the amount referred to in the 1st count knowing that Mohammed was not an authorised dealer.

The accused pleaded not guilty to both counts. He alleges that the amount was borrowed not by him but by KMC Ltd (KMC), a company in which his family had a substantial interest. The company borrowed the money to finance its operations in the DRC. Some of the money was used to finance other companies which supplied goods and services to Zimbabwe during the country's involvement in the DRC. He contends that the matter before the court is a civil one against KMC.

Evidence was led by the State from the following witnesses:-

Yakub Ibrahim Mohammed

He is the complainant in the matter. During the period in question, he was a director and shareholder of a South African company in the business of manufacturing and selling cigarettes. Some of the cigarettes were in a bonded warehouse here in Zimbabwe. The cigarettes were sold in foreign currency to customers from countries such as Mozambique, Zambia and the DRC.

The accused approached him requesting for financial assistance to fund his mining activities in the DRC. The accused made the request in his personal capacity. The witness agreed to advance the accused some money. The accused undertook to repay the advance within a short period after the advancement. The agreement was verbal. The witness advanced the accused about US$4.2 million over a period of time, between 2001 and 2002. The money, so advanced, was from the proceeds of the sale of the cigarettes in the bonded warehouse.

The accused did not repay the money as expected. He made numerous excuses not to pay. After a concerted effort to get payment, the accused finally agreed that he would repay after selling his mine in the DRC. The mine was sold in June 2006 and no payment was made soon thereafter.

He approached one Raj Patel, who was the Finance Director for KMC, demanding payment after he heard of the sale of the mine. An attempt was made in October 2006 to pay him with the depositing of a sum of US$3.5 million into his Jersey, New York, USA account with Stanchart Bank. The bank refused to accept the payment and returned the money to source. In 2008 he communicated by email with one Eddie Cassell also associated with KMC when he did not receive any payments demanding that the trustees administering the affairs of KMC pay him as he had advanced the money to KMC. Eddie Cassell responded, advising him that the attempted payment in 2006 of US$3.5 million had been made in error as the accused was personally liable for the debt.

In 2008 he decided to take legal action. He instituted, together with a company called Sahiwa International (Pvt) Ltd (Sahiwa), a civil claim against the accused and a company called Breco Ltd for the recovery of the debt. It is during these civil proceedings that he discovered that the money he advanced to the accused was never used in the DRC for the purported purpose. Some of the money was used by the accused for his personal needs here in Zimbabwe and some for a feeding programme in the DRC by the Ministry of Defence. It

is then that he realized that the accused had intended to defraud him by alleging that the money was needed to finance KMC's mining activities. Had he known of the intended use of the money he would not have advanced the accused the money. He then proceeded in 2009 to make a report to the police for fraud.

The matter was duly investigated and the docket was referred to the Attorney General. He was advised that the Attorney General had declined to prosecute the case on the basis that the matter was in the public interest. A meeting was convened by the Attorney General where the accused undertook to pay the debt by February 2013. He failed to do so hence the present criminal proceedings.

At the time he instituted the civil proceedings, the accused had paid a total sum of US$400 000. The first payment was for US$200 000 in March 2001 and the other US$200 000 was paid in October of the same year. It was his belief that the accused paid that amount to give the impression that he was trustworthy and give the witness a false sense of security that payment would be made.

Under cross examination, he testified that at the time he advanced the money, the accused specifically told him that the money was for KMC operations. Part of the money was paid by way of cheques in Zimbabwean dollars and the rest was in US dollars (physical or hard cash). He could not recall how much was advanced in Zimbabwean dollars and how much in US dollars. However, the bulk of the advancements were made in hard currency. He unilaterally converted the Zimbabwe dollars into US dollars for accounting purposes. The amount of US$4.2 million stated in the charge and claimed in the civil action includes the Zimbabwe dollar disbursements after conversion.

He acknowledged that the US$400 000 and the US$ 3.5 million were paid out in order to reduce the accused's indebtedness. He further conceded that at the time when summons were issued in 2008, he was convinced that the relationship between him and the accused was of a civil nature. He however changed his evidence and stated that he had in fact made a report to the Fraud Section of the ZRP before he instituted the civil proceedings. Initially he said he made the report in early 2008. He later said that it was between 2006 and 2007. He advised his lawyer Mr. *Mhiribidi* of the report. Mr. *Mhiribidi* made inquiries with the Police on the progress of the report to no avail. Despite being aware of the criminal report, Mr. *Mhiribidi* advised him to proceed with the civil matter and abandon the criminal case.

He accepted that he gave instructions to Mr. *Mhiribidi* to institute civil proceedings on his own behalf and on behalf of Sahiwa. He was not aware that a notice of amendment had

been filed on behalf of both plaintiffs in which he was supposed to cease to be a plaintiff in his personal capacity. He attributed the notice of amendment to one Advocate *Bava* from South Africa and Advocate U*riri*. He indicated that the two filed the notice of amendment without his authority. He however, conceded that the notice of amendment was in fact filed by Mr. *Mhiribidi* as per Mr. *Mhiribidi's* signature on the notice of amendment. He attributed Mr. *Mhiribidi*'s lapse in not advising him of the notice of amendment to health problems.

The accused conceded that he was supposed to have remitted the money from the sale of cigarettes to South Africa. He had intended to so do upon being repaid by the accused. When the accused failed to repay the amount he personally paid the money in 2005 from an off-shore account.

2. Collin Richard Blyth Wood

He testified that he worked for the accused between 1978 and 1988 in Belgium as a financial director and between 1997 and 2006 at KMC in DRC. Between 2001 and 2006 he was the Managing Director of KMC and was based in the DRC. Upon disposal of KMC by the accused, he remained at the mine for four months only. He did not know anything about the case. He only became aware of the money owed to Mohammed on his return to Zimbabwe in 2006 after having been approached by Mohammed. From time to time he came to Zimbabwe and would receive money from the accused in hard currency for operations at KMC. He took to the DRC so much hard currency from Harare that he was directed by the DRC authorities to desist from bringing into that country any hard currency. Although the KMC records did not reflect any indebtedness to Mohammed, he did not dispute that the money he took to the DRC might have been from Mohammed.

3. Gary Neil Webster

He worked for the accused from 1985 up to 1 December 2003. Initially he was an accountant and later accused's personal assistant. He was aware that accused was advanced about US$4 million by Mohammed. The accused used the money for his farming operations here in Zimbabwe and some of the money was used in the DRC.

He resigned from employment with the accused on his own accord. The accused initially persuaded him to stay on. When he refused to stay on, the accused became abusive and threatened to have him killed. At one time the accused stole his vehicle, a Land cruiser, and gave it to his son. He however did not report the theft of his vehicle to the police as he thought the matter would be resolved amicably. He later paid the accused £10 000 in order to have the vehicle released back to him.

He conceded under cross examination that the money for the DRC operation was from different sources. He did not dispute that some of the money could have been from Mohammed. Some of the payments were made through him for KMC and other companies in the DRC. He could not say how much of the money received from Mohammed was used for the accused's personal needs and how much was used in the DRC.

4. Luckson Mukazhi

He is a Chief Superintendent in the ZRP and has been in the police force for 32 years. He was the investigating officer in the present matter. Sometime in June 2009, he commenced investigating the accused following a complaint by Mohammed. He recorded two warned and cautioned statements from the accused, one in relation to the fraud charge and the other to the exchange control charge. The accused denied both charges and stated that the 1st count was a civil matter. The 2nd count was nonsensical. The statements were admitted into evidence by consent.

Upon completion of investigations, the docket was referred to the Attorney General for legal opinion. He was summoned to the Attorney General's office where he was told that the matter had been closed in the public interest as the money advanced to the accused had been used on army operations in the DRC.

The decision of the Attorney General was communicated to Mohammed. The matter was resuscitated when Mohammed expressed his displeasure about the outcome. He again was summoned by the Attorney General for a meeting. Present were both parties, the accused and the complainant. It was agreed at the meeting that the accused would repay the complainant within 6 months. The 6 months were to expire in February 2013. The accused failed to pay within the agreed period.

The witness was aware that when the Attorney General declined to prosecute, the complainant had through his legal practitioner, Mr.*Samkange*, sought a certificate of n*olle prosequi*. His request was turned down.

He was also aware that before he was assigned to investigate the present matter, another investigation had been conducted by the CID Serious Frauds Section in CR 237/05/09. The docket in that matter was closed by the police on 7 May 2009 as it was considered that the complaint was of a civil nature. The police had indicated that the docket would be reopened if there were new developments. The complainant filed a complaint against the police officers who had investigated the matter. The witness was assigned to

investigate that complaint. It was during the investigation of that complaint that the witness was assigned to reinvestigate the matter, hence the current prosecution.

He confirmed that there were no changed circumstances after the closure of CR 237/05/09. The investigations were resuscitated despite an earlier decision that the matter would only be re-opened if there were new developments because of the complainant's persistence. The other reason for bringing the matter to court was that the accused had failed to pay by February 2013 as agreed.

At the close of the State case, the defence applied for the discharge of the accused. The State opposed the application.

The law

An application for discharge at the close of the State case is made in terms of *s* 198(3) of the Criminal Procedure and Evidence Act, [*Cap 9:07*] which states that:

> "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 discussed in a plethora of cases and the law applicable in an application of this nature is well settled. The position is that where the court considers that there is no evidence that the accused committed the offence it has no discretion but to acquit him. In establishing whether or not the accused committed the offence charged the court must consider if:-

(a) there is evidence to prove an essential element of the offence;

(b) there is evidence on which a reasonable court, acting carefully, might properly convict;

(c) the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it.

(see *S* v *Bvuma* 1987 (2) ZLR 1996, *S* v *Muzizi* 1991 (2) ZLR 321, *S* v *Tarwirei* 1997 (1) ZLR 575, *S* v *Kachipare* 1998 (2) ZLR 271 at 276C-277A, *S* v *Tsvangirai* 2003 (2) ZLR 88 at 89H-91A, *AG* v *Makamba* 2005(2) ZLR 54 at 64 G-65 B, *S* v *Benjamin Paradza* 2006 (1) ZLR 20 at 24G-25F, *S* v *Christopher Tichaona Kuruneri*, HH 59-2007, *S* v *Bennet* 2011 (1) ZLR 396 at 400D-401B.)

The court can refrain from exercising its discretion in favour of the accused if at the close of the state case, it has reason to suppose that the evidence adduced by the State might be supplemented by the defence evidence (see *S* v *Kachipare* 1998 (2) ZLR 271(S), 275). It is the duty of the State to place evidence of probative value before the court in order for the court to hold that the State has established a *prima facie* case against the accused, meaning proof of the commission of the offence which implicates the accused to such a degree as to call for an answer.

Both the accused and the state counsel were agreed as to the above stated principles and I am indebted to Mr *Matinenga* for most of the authorities cited above. However, it is necessary to note that whilst agreeing with the general principles, Mr *Reza* sought to distinguish *Bvuma*'s case from the matter in *casu* on the basis that no evidence was led in that case. The distinction is correct in so far as it related to the first to the third counts. A proper reading of the entire case show that evidence was in fact led regarding the 4th count and therefore the principles therein cited apply. In any event the same principles have been adopted with approval in latter cases where evidence was led.

Submission by the accused

Mr. *Matinenga* submitted that the state had failed to place before the court evidence that the accused committed the first count as is required in the plethora of cases cited above. He submitted that the misrepresentation stated in the charge is at variance with the misrepresentation advanced by the complainant in his evidence. As a result there was no evidence to establish an essential element of the offence. He submitted that the payments made to the complainant were intended to reduce the indebtedness of KMC to the complainant. The matter was therefore of a civil nature given the nature of the transaction between the complainant and KMC and the history of the case.

He submitted that the complainant conceded that he was of the opinion that the money was being advanced to KMC as opposed to the accused in his personal capacity. The inconsistencies in the complainant's evidence rendered the evidence unreliable and no court would reasonably convict on the strength of that evidence.

He further submitted that the second count ceased to be an offence with the introduction of the multicurrency regime under the Finance Act (2), 2009 (Act No. 5 of 2009). He further contended that s70(1)(l) of the Constitution has decriminilised what used to be a contravention of the Exchange Control Act because with the advent of the Finance

Act, 2009, all funds are now free funds. Guidelines to Authorised Dealers also issued by the Reserve Bank were said to support the proposition.

Submissions by the State

The State took a robust approach in prosecuting the matter. Whilst Mr. *Mavuto* led evidence, Mr. *Reza* addressed the court on the first count with Mr. *Chingarande* addressing on the 2nd count.

Mr. *Reza* initially submitted that the State had led adequate evidence to prove that the accused had misrepresented that the money advanced to him was intended for mining operations in the DRC yet evidence had been led that he used it for other purposes. He abandoned the submissions after being directed to the misrepresentation stated in the charge. He, however, maintained that the state had established that the accused had not repaid the advance upon selling his mine KMC in the DRC. He submitted that the payment of the US$400 000 was part of the accused's chicanery in that the accused sought to lull the complainant into a false sense of security that he was going to repay the advance when he did not intend to do so. The US$3.5million was also an attempt to deceive the accused as the payment was disowned by KMC trustees in 2008.

Mr. *Chingarande* submitted that it was not in dispute that the accused admitted borrowing money from the complainant. The admission would be established from exh II which is the accused's warned and cautioned statement to the second charge. Exhibit II should be viewed together with the evidence of Collin Richard Blythe Wood and Gary Neil Webster that the accused used the money for his personal needs. The admission is said to be supported by the communication from Eddie Cassell to the effect that the accused was personally liable for the loan and not KMC.

It was submitted that the Constitution did not decriminilise a person securing a loan without authorization. Mr. *Chingarande* submitted that the relevant provision in the Exchange Control Act was not amended or repealed and therefore the offence still stands. It was further submitted that the Guidelines referred to by the defence are guidelines for authorized dealers and do not therefore amend the Exchange Control Act.

I have made a concerted effort in the presentation of the complainant's evidence not to refer to the total payments purportedly made to the accused as an "advance" as opposed to a loan. This has been so because the complainant insisted that the payment was an advance and not a loan. However, the State papers use the words interchangeably. Without professing to be financially astute, to advance money is defined in the Collins Dictionary to

mean to lend money. It appears that the complainant wanted to conceal that the payment was a loan for reasons better known to him. However, I believe it is semantics to refer the payments as an advance or a loan and at this stage I am at liberty to refer to it as a loan which it was.

Regarding the first count, and as rightly submitted by Mr. *Matinenga* the state's evidence bears no resemblance to the charge in a number of respects. Firstly, the identity of the borrower and lender has been illusive. Mr. Mohammed conceded that he intended to advance money to the accused for mining operations at KMC mine in the DRC and not for feeding the Zimbabwean army. He was convinced as evidenced by his communication with Eddie Cassell that he was advancing money to KMC in the DRC. He demanded payment from trustees administering the affairs of KMC because he was of the belief that he had advanced money to KMC. His quest to recover his money was directed at persons associated with KMC. According to his evidence, he approached the late Raj Patel, the late Rob Evans, and Eddie Cassell all associated with KMC. He did not identify any other persons associated with any other company other than KMC. Whilst Collin Richard Blythe Wood and Gary Neil Webster testified that there was no record that KMC borrowed money from the complainant, none of them refuted that the money they received for KMC operations was borrowed for KMC. The evidence adduced by the State and in particular from the complainant clearly reflects KMC as having been the borrower.

Mr *Chingarande*, sought to persuade the court to pierce the corporate veil on the basis that the accused was the owner of KMC. No such evidence was adduced that the accused was the owner of KMC. The attempt to invoke the provisions of *s* 357 of the Criminal Procedure and Evidence Act [*Cap 9:07*] cannot be sustained either. *S* 357 makes a director of a company personally responsible for the company's transgression in certain circumstances. (See *Attorney-General* v *Paweni Trade Corp (Pvt) Ltd & ORS* 1990 (1) ZLR 24 (SC)). However, no evidence was adduced before the court as to the relationship between the accused and KMC and more particularly that he is a director. The only evidence adduced is that he had interests in the company. The capacity of the accused in KMC has been left to the imagination of the court. The charge and the summary of the state case do not even state that the accused is being charged in his capacity as a director or owner of KMC. It is clear that he is being charged in his individual capacity.

The identity of the complainant has also been questioned. The complainant gives the impression that he personally advanced the loan. However, the evidence adduced seem to

imply that the complainant is Sahiwa. This is apparent from the civil proceedings where the complainant jointly with Sahawi, and in his capacity as a director, sued for repayment of the loan. In fact, as alluded to earlier, a notice of amendment to remove the complainant as the second plaintiff is on record in the civil proceedings (although the complainant denies authorizing the issuance of the notice). The evidence of the complainant is that the cigarettes that generated the funds lent to KMC were owned by the South African company. When the accused failed to repay the loan making it difficult for the complainant to repatriate the proceeds of the sales to South Africa, he transferred money from his own personal funds so as to acquit the company's obligations to the South African Government.

Whilst in terms of s 157 of the Criminal Procedure and Evidence Act it is not necessary to identify the particular person alleged to have been defrauded, the charge in the present case does identify that person. Any evidence to the contrary therefore puts into issue the reliability of that evidence.

The reliability of the state's evidence also arises in relation to the exact amount and currency of prejudice. The charge states that the prejudice is US$4.2 million. However, the complainant conceded that the amount includes advances in Zimbabwean dollars which he unilaterally converted into US dollars. The rate of exchange is not known and it has not been disclosed in the state papers or in the complainant's evidence. The court can indeed convict where fraud is established for a lessor amount. However, as per the observations above regarding the question of the identity of the accused, the evidence of the complainant is rendered unreliable by the non-disclosure of the fact that part of the US$4.2 million is supposed to be in Zimbabwean dollars. It appears the intention of the complainant was to mislead the court as to the exact amount and the currency of the money advanced to KMC.

The main inadequacy of the state's evidence relates to the nature of the misrepresentation. The charge states that the misrepresentation is that the accused induced the complainant to part with his money with an assurance that the accused would repay the loan upon selling his mine in the DRC. On the other hand, the complainant testified that the misrepresentation was that the money was to be used for mining operations at KMC and not for feeding programmes and accused's personal use. The two are totally inconsistent. Mr. *Reza* abandoned the misrepresentation advanced by the complainant in his testimony.

Assuming that the charge was to remain intact despite the inconsistencies, the evidence adduced clearly indicate that the accused did what he promised to do. The complainant testified that KMC was sold in June 2006. By that time, the complainant had

been paid US$400 000 in two instalments. The first instalment of US$200 000 was made in March 2001, within a month after the complainant had started advancing the loan. The second payment was made in October of the same year. In October 2006, four months after the disposal of KMC, a sum of US$3.5 million was deposited into the complainant's bank of choice. It is that bank that refused to credit the complainant's account. The accused did not have a say in it. No evidence was adduced that he did. The retraction of the offer to pay was made by Eddie Cassell who the State decided not to call as a witness. The accused cannot be placed on his defence to explain why a person not called as a witness made a certain communication. In any event, that communication was made in 2008, two years after the aborted payment.

The contention by the State that all the payments were made dishonestly with the intention to defraud the complainant is not supported by evidence. Had the complainant's bank accepted the payment of US$3.5 million, a total of US$3.9 million would have been paid leaving a balance of US$300 000. It is inconceivable that the accused would put himself out of pocket to the tune of US$3.9million in order to lull complainant into a sense of false security.

The State has therefore failed to adduce evidence to support the first count.

Turning to the second count, exhibit II is an unequivocal denial of the charge. In fact as stated by Chief Superintendent Luckson Mukazhi, the accused said the allegations were nonsensical. That exhibit II can be said to be an admission eludes me. Blythe Wood denied any knowledge of the transaction. Having been the managing director of KMC he indeed would have been expected to have knowledge of the loan. However, he did not challenge that the money he received from Harare for the benefit of KMC would have been from the complainant. He did not explain the source of the money.

Apart from his say so, Webster did not state how much the accused used for his personal needs and farming operations. He did not state how much was sent to KMC. He did not state on what basis he was of the view that the accused used some of the money for personal purposes other than to say he was the accused's personal assistant.

The transaction indeed has undertones of irregularities, but I do not believe it is sufficient to warrant placing the accused on his defence given the fact that I have already made a finding that the complainant's evidence establish that KMC was the borrower.

The issue raised by the accused on decriminalization or otherwise of the offence the accused has been charged with is in my view a red herring. Section 70 of the Constitution

provides that a person accused of an offence has the right "not to be convicted of an act or omission that is no longer an offence". As rightly submitted by Mr *Chingarande*, the Finance Act, 2009, whilst introducing the multicurrency regime, does not amend 5(1) of the Exchange Control Act. A piece of legislation can only be specifically amended or repealed by another Act. I am yet to come across an Act of Parliament that "globally" amends another Act without specifically stating so as contented by Mr *Matinenga*. No such authority was advanced by the defence for that proposition.

Guidelines cannot also amend an Act of Parliament. They are made pursuant to an Act of Parliament and must be consistent with that Act. Further, the guidelines alluded to are Guidelines to Authorised Dealers. The complainant was not an authorized dealer. The accused in his warned and cautioned statement alluded to that fact.

I will now turn to the question whether or not the charges preferred against the accused are civil and intended to arm twist the accused to settle what he is alleged to owe. The history of the case leading to the prosecution has been presented by Chief Superintendent Mukazhi. This matter has been investigated twice. In the initial investigation the police closed the docket having concluded that the matter was of a civil nature. The matter was reopened and this time the docket was submitted to the Attorney General for a legal opinion. The Attorney General declined to prosecute the matter. Whilst Chief Superintendent Mukazhi testified that he was told by the Attorney General that that the matter was of national interest, the official explanation given by the Attorney General, by way of a letter by C Mutangadura to the accused's legal practitioners of record, was that the matter revolved around a business relationship. That can only mean that it was considered a civil matter. The Attorney General went a step further to decline the complainant's request for certificate of *nolle prosequi*.

Mr Reza queried the decision of the police not to refer the matter to the Attorney General after the initial investigations. He stated that the Police were wrong in concluding that the matter was of a civil nature. They should have referred the docket for a second and presumably professional opinion. However, it appears they arrived at the same conclusion with the police after the second docket was submitted for a second opinion.

This matter is akin to a situation where a farmer approaches a bank for a loan on the assurance that after harvesting his or her crops he or she will repay the loan. If he or she fails to repay the loan after having sold the crops, does that constitute a criminal offence? I do not believe so.

The matter was to be resuscitated after the initial investigations if there were developments warranting a relook at the complaint. Chief Superintendent Mukazhi testified that there were no changed circumstances. The only change of circumstances is that the Attorney General brokered a settlement that the accused was to pay the complainant by February 2013. There is no other explanation as to why the Attorney General changed his mind and decided to prosecute the accused. The conclusion that can be arrived at is that the Prosecuting Authority is acting on pressure from the complainant. Whilst the act of declining to prosecute a matter and refusing to grant a certificate of *nolle prosequi* does not bring a criminal matter to finality and the Prosecuting Authority can reinstitute prosecution, that must be in cognisance of the rights of the accused particularly when the Attorney General has communicated its earlier decision not to prosecute the matter.

The conduct of the Prosecuting Authority to reinstitute prosecution in my view amounts to a dereliction of its duty under the Constitution. The Authority shied away from its responsibility to decline to prosecute a matter and burdened this court with the responsibility to discharge the accused. Section *260* of the Constitution provides for the independence of the Prosecutor-General. Subsection (2) provides that the Prosecutor-General is not subject to the direction or control of anyone and "must exercise his or her functions impartially and without fear, favour, prejudice or bias." As testified by Chief Superintendent Mukazhi, the driving force behind the prosecution was the complainant. The Prosecuting Authority succumbed to the pressure from the complainant to prosecute an apparently civil matter. The Authority therefore acted in complicity with the complainant to use a criminal court to put pressure on the accused in order to collect a civil debt.

In fact, the state counsels appeared to have been going through the motions of a trial merely to satisfy a persistent complainant, even in the face of inherently inadequate and inconsistent state evidence. The noble thing that would have been expected of the counsels was to withdraw the charge at the close of the state case. The state counsels however appeared constrained to do. It is noted that officers under the Prosecuting Authority, just like any other officer of the court, owe a duty to the court to assess the strength of their case as the trial proceeds. Where it becomes apparent that they cannot sustain the charge, they should proceed to withdraw the charge instead of defending the indefensible and shift their responsibility onto the court as happened in the present case.

The provisions of *s* 260(2) are brought to the attention of the Prosecuting Authority that it is now enjoined to formulate and publish the general principles upon which it decides

whether or not to institute and conduct criminal proceedings. I believe the intention in that provision is to ensure certainty and consistency in how matters are handled by the Prosecuting Authority. Neither certainty nor consistency has been exhibited in this case.

It is my conclusion that the accused does not have a case to answer. The application for discharge at the close of the State case succeeds and accused is found not guilty and is discharged.

Attorney General's Office, State's legal practitioners
Atherstone and Cook, accused's legal practitioners