

HIGH COURT OF ZIMBABWE

CHIKOWERO J

HARARE; 5, 6, 20 and 21 November 2024 and 16 January 2025

Assessors: *T Gweme*
Mrs Chitsiga

Judgement

W Mabhaudhi, for the State
F Gashirai and *A Masango* for the first and second accused

CHIKOWERO J:

INTRODUCTION

1. The accused were charged with the crime of fraud as defined in S 136(a) and ((b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law Code).

The charge reads:

“On a date to the Prosecution unknown but during the period extending from 1 October 2022 to 28 February 2023 and at CMED (Pvt) Ltd Head Office Corner Herbert Chitepo/Rekayi Tangwena, Belvedere, Harare, the accused persons Hugh Tinashe Sibanda and Centenary Tobacco (Private) Limited a body corporate established in terms of the laws of Zimbabwe or one or both of them unlawfully made a misrepresentation to CMED (Pvt) Ltd through Billy Maswaure intending to deceive CMED (Pvt) Ltd or realising that there was a real risk or possibility of deceiving CMED (Pvt) Ltd and intending to cause CMED (Pvt) Ltd to act upon the misrepresentation to its prejudice, misrepresented that Centenary Tobacco (Private) Limited had been authorised by the Ministry of Lands, Agriculture, Water and Rural Development and ZIMRA to import 1 500 000 litres of diesel per month duty – free well knowing that the Ministry of Lands, Agriculture, Water and Rural Development and ZIMRA had not made such authorization and by such misrepresentation caused CMED (Pvt) Ltd to act to the misrepresentation thereby causing potential prejudice to CMED (Pvt) Ltd of US\$ 2 805 900”

2. Both accused pleaded not guilty.
3. The facts are either common cause or not seriously disputed.

4. The complainant is CMED (Pvt) Ltd (CMED). It is a company incorporated in terms of the laws of this country. Its sole shareholder is the Government of Zimbabwe.
5. The first accused is Hugh Tinashe Sibanda (Sibanda). He is the Managing Director of Centenary Tobacco Company (Pvt) Limited.
6. The second accused is Centenary Tobacco Company (Private) Limited (Centenary). It is a company incorporated in terms of the laws of this country.
7. In October 2022, Sibanda approached CMED's Head Office intending to import duty-free diesel for agricultural purposes on behalf of Centenary. Sibanda talked to Billy Maswaure in the presence of Belinda Nyangoni. Maswaure is CMED's Fuels Manager while Nyangoni is its Logistics and Distribution Officer.
8. Maswaure advised Sibanda of the requirements needed by CMED for it to facilitate the importation of duty-free diesel on behalf of Centenary. The first requirement was that Centenary had to furnish CMED with a letter from the Ministry of Lands, Agriculture, Water and Rural Development (Ministry of Agriculture) authorizing it (Centenary) to import duty-free diesel. Secondly, Centenary had to furnish CMED with a rebate letter issued by the Zimbabwe Revenue Authority (ZIMRA). Thirdly, the project for which the fuel was needed was supposed to have national project status.
9. Sibanda left and returned after a few days. He handed up to Maswaure photocopy of a letter purportedly issued by the Ministry of Agriculture. Maswaure forwarded the letter to Nyangoni.
10. After sometime Sibanda sent to CMED, via a WhatsApp group created by Nyangoni, photocopy of a rebate letter purportedly issued by ZIMRA.
11. Finally, on a separate date, Sibanda then sent to CMED, on the same WhatsApp group, photocopy of a letter from the Ministry of Finance. The letter was intended by Sibanda and Centenary to fulfil the third requirement by CMED, namely that the diesel was required for a national project.
12. CMED, through Maswaure, acted on photocopies of the said documents, presented to it by Sibanda on behalf of Centenary, by facilitating the importation of duty-free diesel on behalf of Centenary.

13. Between October 2022 and January 2023, CMED imported 4 470 000 litres of duty-free diesel through the National Oil Infrastructure Company (NOIC) for Centenary. Sibanda and Centenary collected the diesel.
14. The 4 470 000 litres of duty-free diesel was covered by 16 bills of entry.
15. In January 2023 ZIMRA detected that the diesel had been improperly imported duty-free. This was so because the rebate letter had been forged. It had not been issued by ZIMRA. Similarly, the letter of authorisation had been forged. It had not been issued by the Ministry of Agriculture.
16. The actual prejudice occasioned to ZIMRA was US\$ 2 805 900, being the duty payable on the diesel. To CMED, the prejudice was potential because ZIMRA demanded that the former pays that duty on the basis that it was CMED which had imported that diesel duty-free on behalf of Centenary.

THE ISSUE

17. This trial turns on one issue, namely, whether Sibanda knew, at the time that he presented the photocopies of the rebate letter and letter of authorisation to CMED on behalf of Centenary, that those documents were forged. If we find that he knew that the documents were not issued by ZIMRA and the Ministry of Agriculture at the time that he presented them to CMED, it would be proper to convict Centenary and himself of the crime of fraud. On the other hand, if we uphold their joint defence that they did not, at the material time, know that the two documents were forged, we will find both accused not guilty and acquit them. The sole issue arises in this way: both Sibanda and Centenary do not deny presenting the documents in question to CMED. What they say is that Kaythan Trading (Centenary's clearing agent) referred them to two tax experts who would put together all documentation required by CMED to enable it to facilitate the importation of duty-free diesel on behalf of Centenary. Those two tax experts were Hamunyari Magura and Bongani Dube. After the duo had availed photocopies of the rebate letter and letter of authorisation to Sibanda, he paid them for the services, in cash. He then presented the two documents to CMED. He, just like Centenary, did not know, then, that the documents had been forged by Magura and Dube.

DISPOSITION

18. We think that a combination of the direct evidence and the circumstantial evidence, properly considered, enables us to render our decision.
19. We will not summarise the evidence of all witnesses produced by the State. Similarly, we will not summarise the evidence of Sibanda, who testified on behalf of Centenary and on his own behalf. This approach is justified on the basis that the trial turns on one issue. We have already defined that issue. What we will do is to refer to pertinent portions of the whole of the evidence on record in our assessment of the matter.
20. We pause to record that it is not necessary that we decide whether it was Sibanda and Centenary, or either of them, who forged the documents in question. The two are not being charged with the crime of forgery as defined in S 137 of the Criminal Law Code. Further, where a charge of fraud is founded on the presentation of a forged document by the accused, as is the case here, it is not an ingredient of the offence of fraud that it be proven that it is the accused who forged the document. The ingredients of the crime of fraud are settled in this jurisdiction: *Prosecutor General of Zimbabwe v Intratrek Zimbabwe (Private) Limited and Ors* 2019 (3) ZLR 106 (S); *Tangwena and Anor v Prosecutor General SC 75/21*; *S v Nyambuya and Anor* HH 308/16 and G Feltoe's Commentary on the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] at p141.
21. It is common cause that Sibanda ignited the chain of events which led to the importation, duty-free, of the huge volume of diesel reflected in the charge. He did this by approaching Maswaure. That interaction enabled Sibanda to obtain information on the requirements to be fulfilled for Centenary to import duty-free diesel.
22. Sibanda worked on the requirements. A week later, he was back in Maswaure's office at CMED. He was armed with what we now know to be a fake rebate letter. It is dated 18 October 2022. Emily Bvumbi is employed by ZIMRA as a Revenue Supervisor. She told the Court that the rebate letter was not issued by ZIMRA, was not uploaded on her employer's system and that it is fake. She explained why she said the document was forged and how she came to know of its existence. It is not necessary to go into all those details

because it was common cause at the trial that the document, at page 3 of exhibit S1, was forged. Bvumbi was the state's fifth witness.

23. This photocopied fake rebate letter, according to Sibanda and Centenary, was availed to the former by Maguri and Dube.
24. Another week passed. Sibanda then sent, via WhatsApp, the photocopied fake letter authorizing Centenary to import the staggering 1 500 000 litres of diesel per month duty-free. This document, at p5 of exhibit S1, is dated 29 September 2022. The document was sent by Sibanda to CMED through the WhatsApp group created by Nyangoni, the State's second witness. Maswaure, the state's first witness, got it through his superior's phone. John Basera, the then Permanent Secretary of the Ministry of Agriculture, testified that the document was not signed by himself (despite the document itself portraying him as the third signatory). In short, his evidence was that the document was not issued by the Ministry of Agriculture. He explained why he said it was a forged document. Again, it is not necessary to go into all that evidence because it was common cause at the trial that the document was forged.
25. This photocopy, too, according to Sibanda, was availed to him by Maguri and Dube.
26. Sometime later, Sibanda then sent photocopy of letter dated 5 October 2022, to CMED via the same WhatsApp group. The document, dated 5 October 2022, was photocopy of a genuine rebate letter authored by ZIMRA authorising Centenary to import 264 x 3mm steel sheets duty free. It is at p4 of the State's exhibit S1. Bvumbi said this document, which was part of the documents submitted by Sibanda to CMED to enable that entity to facilitate the importation of the duty-free diesel on behalf of Centenary, ought not to have been included at all.
27. We turn to assess the evidence.
28. We are satisfied that Sibanda knew, at the time that he presented the photocopies of the fake rebate letter and letter of authorisation, that those documents were forgeries. We have explained why it is immaterial whether it was him or some other person or persons who forged the same.
29. Sibanda initiated the whole chain of events leading to the importation of the duty-free diesel.

30. It was him who approached Maswaure to obtain the relevant information. Information is power.
31. Having empowered himself, he was back in Maswaure's office with the first of the two forged documents. This was a week later.
32. He remained central to the whole episode, by himself, not anybody else, sending the forged photocopied letter of authorisation. This was sometime after he had presented the forged photocopied rebate letter.
33. Even then Sibanda was not done yet. On another day he made use of the WhatsApp platform to present copy of the genuine rebate letter issued by the Ministry of Finance. That rebate letter authorised Centenary to import 264 x 3. 13mm steel sheets duty-free. 264 x 3.13 steel sheets cannot be the same import as 1 500 000 litres of duty-free diesel per month. That Sibanda presented copy of a genuine rebate relating to importation of steel sheets to support his forged documents, on behalf of Centenary, to import duty-free diesel exposes his knowledge, at all material times, that the latter documents were forged. According to Bvumbi, the rebate letter in respect of the steel sheets had not even been used for the purpose for which it had been applied for. In other words, Centenary did not import the steel sheets at all. The fact that CMED, NOIC and ZIMRA did not detect the illegality in good time does not absolve Sibanda and Centenary. It was Centenary which had applied for rebate to import those steel sheets duty-free, not CMED, NOIC and ZIMRA.
34. It is inconceivable that both Sibanda and Centenary would have participated in the long course of criminal conduct, right from initiating the interaction with Maswaure, without knowing that the two photocopies were forgeries.
35. Sibanda says he never asked for the originals of the offensive documents from Maguri and Dube. This was a whole Managing Director of a company duly incorporated in terms of the laws of Zimbabwe. For our purposes, the company was working on importing 1 500 000 litres of diesel duty-free, per month. He says he paid Magura and Dube US\$1 500, in cash, for their services. No receipt was issued. There is completely no paper trail of Sibanda and Centenary having received the services of Magura and Dube. There is no paper trail of those two so called tax experts having been paid. No evidence relating to their identity, qualifications and place of business was placed before us. All that we were told is that

Centenary was referred to the duo by Kaythan Trading. Nobody from Kaythan Trading testified for the defence to lay an evidentiary basis for the assertion that, at the very least, Hamunyari Magura and Bongani Dube exist. It is not good enough for Sibanda and Centenary to simply drop the names “Hamunyari Magura” and “Bongani Dube” and expect this court to accept that it is reasonably possibly true that there exist persons answering to those names and that Sibanda, and Centenary, were victims of those two. Further, it was never explained why Sibanda remained deeply involved in the long course of the criminal conduct, as detailed in this judgment, if he had obtained the services of tax experts, for which he had coughed up US\$ 1 500.

36. Paragraph 3.7 of the defence outline reads as follows:

“After having learnt of the said fraudulent and forged document the 1st and 2nd accused persons filed a police report at Harare Central Police Station under CR 657/3/23 against Hamunyari Magura and Bongani Dube seeking that they be arrested on charges of fraud and forgery pertaining to the ZIMRA rebate letter and the letter from Ministry of Lands, Agriculture, Water and Rural Developments to ZIMRA. This particular police report was made one and half years prior to the accused persons being arrested on charges of fraud and forgery pertaining the very same documents.”

Sibanda, who also testified on behalf of Centenary, adopted the defence outline as part of their evidence in chief. Paragraph 3.7 of the defence outline, which thus became a critical component of their defence evidence, asserts something peculiarly within the knowledge of Sibanda and Centenary. What this means is that the two should have testified to facts giving flesh and blood to the assertions in paragraph 3.7 of the defence outline. This should have entailed the production by Sibanda and Centenary of copy of the police report or outcome of report received. Instead, what did Sibanda and Centenary do? They neither produced copy of the police report nor outcome of report received under the said CR number. At the trial, they quarreled with Rwaindepi Chitagu, who was the investigating officer in the matter, on whether that CR number related to a police report filed by Sibanda alleging fraud and forgery against Hamunyari Magura and Bongani Dube. That quarrel was completely unnecessary. The State had nothing to rebut. Even though what was asserted to be copy of the Outcome of Report Received was shown to Chitagu under cross examination, and asserted to have been investigated by him on the day he testified (having had sight of the defence outline on the same day) and found not to speak to para 3.7 of the

defence outline at all, that document, as we have said, was not produced by the accused. It is not something that this Court can relate to because it was never produced as an exhibit. It is not evidence. In any event, it became common cause that there is no mention of Hamunyari Magura, Bongani Dube, fraud or forgery in that piece of paper. In these circumstances, it is understandable why the accused did not produce anything to buttress para 3.7 of the defence outline.

37. On 6 April 2023 a meeting was held between representatives of CMED, Kaythan Trading, ZIMRA and one representative of Centenary. This meeting was convened at CMED after that company had received a letter from ZIMRA demanding that the former pays duty on the fuel the subject of the charge. Maswaure testified, and we believe him, that Centenary's representative accepted full responsibility for the forged documents and the fraudulent use thereof. His oral evidence is corroborated by documentary evidence. The latter is in the form of a letter written and signed by Sibanda, on behalf of Centenary, on the very day that the meeting was held. The letter, at p 8 of exhibit s1, reads:

“CENTENARY TOBACCO COMPANY

The Commissioner
Customs and Excise
P.O Box 4360
HARARE

6 April 2023

Dear Sir

RE: DUTY DUE

Our meeting on 6 April 2023 refers.

Thank you for taking the time to meet CMED, Kaythan Trading and ourselves.

As Centenary explicitly emphasised, all responsibility and culpability for the fraudulent documents and their use is entirely the fault and sole responsibility of Centenary Tobacco.

CMED and Kaythan Trading (the clearing agent) were unaware that these documents were not authentic and acted entirely in good faith; we request that both these parties be absolved of any and all blame on this matter.

Furthermore, we submit the following proposal to settle the dues arising from Centenary:

1. Payment, within 14 days, of USD 705 000 duty due on the 1 500 000 litres of diesel currently under seizure.
2. Payment of USD 150 000 per month, commencing end of May 2023 until all outstanding duties are cleared.

Yours Sincerely,
(signed)
Hugh Sibanda
DIRECTOR”
(underlining ours for emphasis)

38. Para 3 of this letter is telling. It means what it says and says what it means. Further, there is no mention of Hamunyari Magura and Bongani Dube in that letter and what is now claimed to have been their role regards the fraudulent importation of the diesel duty-free. Furthermore, para 4 of the latter, written and signed by Sibanda on behalf of Centenary, is categorical as to who was unaware that the documents in question were not authentic and acted entirely in good faith and should therefore be absolved of any and all blame on this matter. Those entities were CMED and Kaythan Trading. Taken together with para 3 of the same letter the position of the accused is clear.
39. We do not accept the accused persons’ explanation that the letter of 6 April 2023 was not an admission of criminal liability. Indeed, as demonstrated in this judgement, we do not take this particular piece of evidence in isolation. The message contained therein fits in well with the entirety of the evidence on record. We reject as false the explanation that the letter whose contents we have reproduced at para 37 of this judgement encapsulates a strategic business decision by Centenary. That explanation goes against the grain of the entirety of the evidence on record.
40. Sibanda himself was an extremely evasive and arrogant witness. He avoided simple questions put to him by the cross examiner, choosing to go on a frolic of his own. He answered his own questions, giving long winding statements in the process. His evidence was clearly rehearsed. He was touchy and visibly irritated when asked to explain the use to which Centenary had put the large volume of duty-free diesel collected by it. The cross-examination in this regard was justified on the basis that he claimed in the defence case, and for the first time, that Centenary was a national project status. When cornered, his

feeble, half-hearted, hazy and contradictory testimony on the asserted use of 4 470 000 litres of duty-free diesel in clearing shrubs to pave way for the construction of a tobacco auction floor in Centenary, Mashonaland Central Province, became his undoing.

41. In a case of fraudulent transfer of title in a piece of land, the Supreme Court, in *TBIC Investments (Pvt) Ltd and Anor v Mangenje and Ors* 2018 (1) ZLR 137 (S), said at 143 H-144 B:

“In this case, the fraudulent disappearance of the original title deeds duly endorsed with State title in the Deed’s Office could only have benefitted the parties to the illegal sale of the State land in question. The fraudulent transfer was then perpetrated using a copy of the seller’s title deeds without endorsement of State title. This was meant to facilitate the bogus transfer of State land to the appellant.

In the absence of any other credible evidence to the contrary, the only reasonable inference that can be drawn is that the appellant and Cecil Micheal Reimer were co-conspirators in the perpetration of the fraud. This uncouth reprehensible behaviour cannot be sanctioned by the Courts. That type of criminal conduct discredits both of them as witnesses. It betrays knowledge on their part that the land had indeed been acquired by the State prior to the sale. Otherwise why act unlawfully if the deal was clean and above board?”

Much the same can be said of the accused in this case. They had reaped huge monetary rewards in fraudulently importing the staggering volumes of duty-free fuel. The offence was only detected on the occasion of the authorities noticing anomalies in relation to the 17th bill of entry. There is no reasonably possibly true explanation tendered by the accused. Their defence is beyond reasonable doubt false.

42. The State has proved its case beyond a reasonable doubt. Both accused are found guilty as charged.

43. Verdict: Accused 1 – Guilty as charged
: Accused 2 – Guilty as charged

CHIKOWERO J:

The National Prosecuting Authority, state’s legal practitioners
Gijima Gashirai Gatawa Law Chambers, first and second accused’s legal practitioners