

THE STATE
versus
HUGH TINASHE SIBANDA
and
CENTENARY TOBACCO COMPANY (PVT) LTD

HIGHCOURT OF ZIMBABWE
CHIKOWERO J
HARARE; 18, 20 and 24 February & 7 March 2025

Assessors: T Gweme
: Mrs Chitsiga

Sentencing Judgment

W Mabhaudhi with L Masuku, for the State
F Gashirai with A Masango, for the offenders

CHIKOWERO J:

[1] The offenders 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).

[2] The allegations are that on a date to the Prosecutor unknown but during the period extending from 1 October 2022 to 28 February 2023 and at CMED (Pvt) Ltd Head Office situate at the Corner of Herbert Chitepo and Rekayi Tangwena Avenue, Belvedere, Harare they misrepresented to CMED (Pvt) Ltd that the second offender had been authorised by the Ministry of Lands, Agriculture, Water and Rural Development and the Zimbabwe Revenue Authority (ZIMRA) to import 1 500 000 litres of diesel per month duty free well knowing that the said Ministry and ZIMRA had not made such authorisation. Acting on the misrepresentation CMED (Pvt) Ltd imported duty-free diesel on behalf of the second offender. This resulted in potential prejudice to CMED (Pvt) Ltd in an amount equivalent to the duty which should have been paid to ZIMRA for the diesel in question.

[3] The offenders pleaded not guilty but were convicted as charged after a full trial.

[4] The court found that the first offender both in his personal capacity and as a director and representative of the second offender, had misrepresented to CMED (Pvt) Ltd through Billy Maswaure that the Ministry had authorised the second offender to import 1 500 000 litres of duty-free diesel per month, well knowing that there had been no such authorisation. Having been induced by the misrepresentation, which came in the form of forged correspondence purportedly authored by the Ministry of Lands and ZIMRA, CMED (Pvt) Ltd imported a total of 4 470 000 litres of diesel on behalf of the second offender duty free.

[5] The court rejected the offenders' defence that they did not know, at the material time, that the purported correspondence authorising the importation of the duty free diesel had been forged.

[6] The penalty for the crime of fraud is provided for in s 136(a) and (b)(i) and (ii) of the Criminal Law Code. It is a fine not exceeding level fourteen or not exceeding twice the value of any property obtained by the offender as a result of the crime, whichever is greater; or imprisonment for a period not exceeding thirty-five years; or both

[7] In terms of the Criminal Law (Codification and Reform) (Standard scale of Fines) Notice, 2023 Statutory Instrument 14A of 2023 the monetary amount for a level 14 fine is US\$5000. However, although that fine, as with all others set out in that Statutory Instrument is expressed in the United States dollars it may be payable in the equivalent Zimbabwean dollars at the prevailing interbank rate. This is provided for in the Criminal Law (Codification and Reform) (Standard Scale of Fines) Notice, 2023: Correction of Errors Statutory Instrument 19 of 2023.

[8] The Criminal Procedure (Sentencing Guidelines) Regulations, 2023 Statutory Instrument 146 of 2023 ("the Sentencing Guidelines") came into force on 8 August 2023. In terms thereof, the presumptive penalty for the crime of fraud where there are aggravating factors is 20 years imprisonment. Where the fraud has been committed in mitigating circumstances the presumptive penalty is 6 months imprisonment. The Sentencing Guidelines, while not being a closed book, provide guidance to a sentencing court because therein is set out examples of both mitigating and aggravating factors. Where in sentencing an offender a court departs from a presumptive sentence it is required to justify the same.

[9] No significant body of case law has been developed in this jurisdiction for fraud since the advent of the Sentencing Guidelines. This is understandable given that the Sentencing Guidelines came into force on 8 August 2023. That is less than two years ago.

[10] There are mitigating factors in this case. Both offenders have transgressed for the first time. The second offender has made an arrangement with ZIMRA to pay to the latter duty in the sum of US\$2 100 900 in respect of the 4 470 000 litres of diesel. Further, the second offender has made an arrangement with ZIMRA to pay the fine levied by the latter for not having paid the duty in the first place. These mechanisms, activated by ZIMRA, are in terms of the Customs and Excise Act [*Chapter 23:02*] (the Customs and Excise Act).

[11] The first offender has just entered his most productive phase in life. He is 41 years old. He is already before this court, in a civil matter, in proceedings for divorce, and has been awarded custody of the couple's children. The one is aged 7 years while the other is three years older. This offender has already undergone some form of punishment because he has been in custody since his arrest on 13 September 2024. The effects of him not being a free man have started to manifest. His children's education has been disrupted as the school fees have not been paid.

[12] Messrs Gashirai and Masango, for the offenders, despite being urged to do so, did not address the court on the means, savings and assets of the offenders. The submissions in this respect were restricted to a disclosure that the second offender owns an immovable property situate in the jurisdiction of the Muzarabani Rural District Council. We were told that a tobacco processing plant stands on that piece of land.

[13] There is evidence of prior planning and premeditation in the commission of this offence. The first offender appeared at the CMED (Pvt) Ltd's Head Office to acquire information on the prerequisites for the importation of duty free diesel. Billy Maswaure, the CMED (Pvt) Ltd's Fuels' Manager, furnished the first offender with the relevant information. What this means is that the first offender had, before interacting with Maswaure, planned and premeditated how, using the second offender as cover, he could commit this white-collar crime. He initiated the whole chain of events leading to the importation of the duty free diesel. Having procured and presented the two photocopied fake letters authorising the importation of duty free diesel, he then furnished a genuine rebate letter from Zimra to ensure that it would be possible to effect the importation.

The genuine rebate letter had nothing to do with the importation of diesel. It had been issued to authorise the second offender to import duty free steel sheets. Those steel sheets were never imported.

[14] The first offender was the brains behind the commission of the offence. He was central to its execution.

[15] It is true that the charge alleged that CMED (Pvt) Ltd suffered potential prejudice. That was so because ZIMRA, content to utilise recovery mechanisms under the Customs and Excise Act, did not initiate these criminal proceedings. ZIMRA took the position that CMED (Pvt) Ltd, the second offender and the clearing agent were all jointly and severally liable for the unpaid duty and the penalties due to ZIMRA. ZIMRA blamed CMED (Pvt) Ltd for not conducting thorough due diligence to forestall the commission of the offence. In short, ZIMRA's stance was that since CMED (Pvt) Ltd had facilitated the importation of the diesel into the country it too was liable.

[16] ZIMRA suffered actual prejudice in the sum of US\$2 100 900. This represents the duty which should have been paid to it by the second offender for the imported 4 470 000 litres. Perhaps it would have been better aligned to the intention of the legislature if the prosecution had, in the charge alleged that ZIMRA suffered actual prejudice rather than settling for potential prejudice suffered by CMED (Pvt) Ltd when actual prejudice was as clear as daylight. In *Tangwena and Ors v The Prosecutor General SC 75/21*, BHUNU JA, writing for the court, said at pp 5 – 6 of the cyclostyled judgment:

“The Act defines the offence of fraud in simple though somewhat frosty and verbose language such that it needs further elucidation to give effect to the intention of the lawmaker.

In plain layman's language, fraud may however be defined as dishonestly making a false misrepresentation with the intention to cause actual or potential prejudice to another person. The intention of the legislature in s 136 of the Act was to proscribe and punish theft by deceitful means.

In the context of the statutory definition of fraud its essential elements may be paraphrased as follows:

1. Making a misrepresentation to another person.
2. With the intention to cause another person to act on the misrepresentation to the actual or potential prejudice of any person.

Section 136 of the Act is couched in broad terms encompassing a situation where the misrepresentation is made to a person other than the subject of the intended prejudice. To constitute

fraud it is sufficient that a misrepresentation is made to any person with the intention of causing any other person actual or potential prejudice.

In *casu*, it does not therefore matter that the misrepresentation was made to the Registrar of Companies with the intention of causing prejudice to the complainant.”

ZIMRA was a victim of the crime. CMED (Pvt) Ltd was also a victim of the crime. It remains exposed in the sum of US\$2100 900 for as long as the second offender has not discharged its obligation to pay the sum of US\$ 2100 900 to ZIMRA. Therein lies the potential prejudice. The quantum of that potential prejudice is enormous.

[17] So too is the diesel for which duty was not paid – 4 470 000 litres. The offenders benefitted from the crime. The diesel was not recovered. It was all disposed of by them. The value of that diesel is US\$4 725 370. That is the cost at which it landed in the country. As already alluded to excise duty (US\$1 341 000) carbon tax (US\$178 800) and strategic reserve levy (US\$581 100) were not paid. It is these three components that constitute the US\$2 100 900 duty.

[18] What is undeniable is that, on the facts of this matter, we talk of CMED (Pvt) Ltd having suffered potential prejudice of US\$2 100 900 only because ZIMRA suffered actual prejudice of US\$2 100 900. ZIMRA is only but the revenue collection arm of the Government. The offenders, in committing this crime, engaged in unethical business practices. They hurt the economic. They obtained an unfair advantage over their law-abiding competitors. Their actions hurt the fiscus by depriving it of the much needed revenue. This militated against the capacity of various stakeholders being able to deliver goods and services to the people of this country. Government is one of those stakeholders. In short, the offenders acted against the national interest. That cannot be condoned.

[19] The offenders did not need to commit 16 counts of fraud. What they did is akin to that which prompted the court in *Attorney General v Paweni Trade Corp (Pvt) Ltd and Ors* 1990(1) ZLR 24 SC to say, in somewhat different circumstances, at 37D:

“Now having set up the machinery whereby the fraudulent claims by the first respondent would be processed for payment at the Ministry of Labour and Social Services where Govere worked as the Principal Executive Officer in charge of the whole Accounts Department of the Ministry and payment of the fraudulent vouchers effected at the Central Payments Office, where John Chinaka was employed as Senior Executive Officer, the third respondent was in clover. There was no need for him to personally attend to each claim submitted by the first respondent for payment. He had

by bribing the two officials of the Ministries concerned, effectively eroded the will, if there ever was any, of those officers so tainted to resist the processing of fraudulent claims submitted by the first respondent. He had in effect paved the way for each fraudulent claim to be smoothly processed from beginning to end without further ado. He, it was, who fashioned the mechanism for defrauding the State.”

By presenting to CMED (Pvt) Ltd the two forged letters and the one genuine rebate letter which had nothing to do with the importation of duty free diesel by the second offender, the first offender had paved the way for the processing of each bill of entry relating to the importation of the diesel. He had set up the machinery for that to be done. The moral blameworthiness is not lessened by the fact that the one act of misrepresentation enabled the importation of 16 consignments of diesel without paying duty. In fact the multiple times that the diesel was imported into the country, without paying duty, shows that the offenders were determined to stop at nothing to unlawfully benefit from crime to the prejudice of the fiscus and the society at large. With the one act of misrepresentation CMED (Pvt) Ltd was induced, in 2022, to import duty free diesel on behalf of the offenders on 20 and 25 October, 2, 7, 10, 15, 22 and 28 November, 2, 7, 12, 20 and 29 December as well as on 10, 23 and 20 January 2023. Indeed, the offenders had caused CMED (Pvt) Ltd to import on their behalf 1 500 000 litres of duty free diesel (which was not the subject of the trial) when the offence was detected. This was import number 17. In other words, the offenders had ample opportunity between 20 October 2022 and 20 January 2023 to reflect on their misdeeds and to put a halt thereto. This they did not do.

[20] The offenders were not contrite. The second offender had no option but to settle payment terms of the duty with ZIMRA. Despite this, the sum of US\$2 100 900 remains unpaid. A full trial could have been avoided, had the offenders been contrite.

[21] We agree with Mr Mabhaudhi that the aggravating factors outweigh the mitigation. We have set out and discussed both sets of factors.

[22] Mr Gashira proposed that we settle for a fine of US\$2 100 900 as against the second offender. This amount is greater than the level 14 fine of US\$5 000. It equals duty yet to be paid to ZIMRA. It is not in excess of twice the sum of US\$4 470 000 (being the value of the diesel obtained by the offenders as a result of the crime). We think that the sentence proposed is just and proportionate. The second offender will still, outside the scope of this judgment, be required to pay duty to ZIMRA, the fine and penalties. But we are unable to accede to the application for time

to pay the fine. Mr Gashirai had proposed a period of twelve months to pay the fine. It will be recalled that the second offender did not take the court into its confidence in respect of savings, means and assets held by it. We disallow the application for time to pay the fine.

[23] We acknowledge that which is favourable to the first offender. This is his first foray into crime. He deserves some lenience. He is into his most productive years on this earth. He has a young family. The family will suffer were he to be incarcerated. He has spent close to half a year in custody. This we bear in mind. We will exercise some measure of mercy by suspending one quarter of the sentence that we will impose on the first offender. The present is a case where deterrence, prevention and retribution outweigh the interests of the individual offender. This case exemplifies the commission of fraud as an economic crime at a level necessitating the imposition of a custodial sentence on the first offender in the region of the presumptive penalty. We will suspend a significant portion on account of the mitigation. A non custodial sentence is inappropriate. So is a wholly suspended custodial sentence.

[24] The first offender is sentenced to 20 years imprisonment of which 5 years imprisonment is suspended for 5 years on condition the offender does not within that period commit any offence involving an element of dishonesty for which upon conviction the offender is sentenced to a term of imprisonment without the option of either a fine or community service.

Effective: 15 years imprisonment

[25] The second offender shall pay a fine in the sum of US\$2 100 900. The Registrar of the High Court shall issue a Writ of Execution Against Movable and Immovable Property requiring the Sheriff for Zimbabwe to attach and take into execution the movable and immovable property of Centenary Tobacco Company (Pvt) Ltd to cause to be realised therefrom the sum of US\$2 100 900 being the fine.

CHIKOWERO J:.....

*The National Prosecuting Authority, the State's legal practitioners
Gijima Gashirai Gatawa Law Chambers, first and second offenders' legal practitioners*