

LUKE M. AKINO
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO AND KWENDA JJ
HARARE, 14 September, 2021 and 01 March, 2022

Criminal appeal

G.Madzoka, for the appellant
T.Mapfuwa, for the respondent

CHIKOWERO J:

Introduction

This is an appeal against conviction only. The intended notice of appeal against sentence is invalid for want of a prayer.

The Proceedings a quo

The appellant was convicted by the Regional Court sitting at Harare on a charge of criminal abuse of duty as a public officer as defined in s 174(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

He was sentenced to 3 years imprisonment of which 1 year imprisonment was wholly suspended for 4 years on condition he does not within that period commit an offence involving corruption or abuse of office for which upon conviction he is sentenced to imprisonment without the option of a fine.

The facts found proved were that on dates unknown to the prosecutor but during the period between August and November 2017 and at the Zimbabwe Mining Development Corporation (ZMDC) Head Office in Harare the appellant, as the Acting General Manager of the ZMDC, and hence a public officer, in the exercise of his functions as such, had contracted a company called Mashungupa and Muhita Engineering Projects (Pvt) Ltd (M and M) at a cost of \$168126-25 without following informal tender procedures. By so doing the appellant had shown favour to M and M since the latter did not compete with any other company for the job before being contracted.

By the same token, the appellant intended to cause and did in fact show disfavour to ZMDC. The appellant denied ZMDC the opportunity to cast its net, so to speak, before bringing M and M on board. The contract in question required M and M to carry out a resuscitation project at Jena Mine, a wholly owned subsidiary of ZMDC.

The crux of the appellant's defence was essentially two –fold. Firstly, he contended that he was not the Acting General Manager of the ZMDC between August and November 2017. He was only appointed Acting General Manager with effect from 4 August 2018 as evidenced by the ZMDC's Board of Directors' letter dated 3 August 2018. Secondly, the decision to contract M and M was not made by him. Instead it was a joint decision by the board and management of the ZMDC.

After an assessment of the totality of the evidence placed before it, including the credibility of the witnesses called by the respondent, and the appellant himself, the court, for purposes of this appeal, found that the appellant was the Acting General Manager at the material time (hence a public officer) and had contracted M and M without following informal tender procedures. Put differently, the court rejected the defence as being beyond reasonable doubt false.

The grounds of appeal

They are three. It is contended that the trial court erred:

1. “in finding the appellant guilty of contravening s 174 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] in light of the overwhelming evidence that the appellant was not an employee nor an accounting/public officer at Zimbabwe Mining Development Corporation (ZMDC) as at October 2017 to November 2017.
2. In ignoring the evidence of the witnesses to the effect that the awarding of the tender was a board and management decision and not a decision of the appellant.
3. In overlooking the evidence of Tinashe Chiparo which exonerated the appellant.”

The Issues for determination and our disposition of this appeal

The third ground of appeal is neither clear nor concise. It does not identify the particular portion of Chiparo's testimony which the appellant claims to be exculpatory and which the trial

court overlooked. It is not this court's task to compose a valid ground of appeal for the appellant. In the circumstances, we uphold Mr Mapfuwa's argument that this ground of appeal is invalid. We strike out ground of appeal number 3.

The first ground of appeal questions the correctness of the factual finding that the appellant was the Acting General Manager of the ZMDC at the material time. The magistrate's finding on this issue was predicated not only on an assessment of the credibility of the persons who testified before him but also on his analysis of the oral testimony in light of the numerous exhibits placed before him.

Our view is that the court conducted a thorough analysis of the evidence and provided sound reasons for its factual finding that the appellant was the Acting General Manager of the ZMDC at the material time. The documentary evidence in support of such a finding was simply overwhelming. Respondent called witnesses whose evidence gelled with such exhibits. The court correctly refused to be hoodwinked by the ZMDC Board's letter of 3 August 2018 "appointing" the appellant as the Acting General Manager with effect from 4 August 2018. In both that letter and the one dated 16 August 2017, the ZMDC Board was simply toying around with words. A court of law looks at the substance rather than the form. The latter correspondence, addressed to the Minister of Mines, reads:

"Dear Sir

RE: APPOINTMENT OF GENERAL MANAGER FOR ZMDC: MR DEMAND GWATINETSA

I regret to inform you that Mr Gwatinetsa, whom the ZMDC Board had selected and recommended to the Ministry to be appointed as General Manager for ZMDC, unexpectedly turned down our offer on 2 August 2017. A copy of the email message he sent to this effect is attached.

At its meeting on 9 August 2017 the Board decided to re-advertise and select a new person within the next three weeks, we shall advise you on progress. Meanwhile, the Board resolved to have Mr Luke Akino, a member of the Board, supervise and coordinate ZMDC operations until a suitable replacement has been found. He is not appointed in any substantive position, but just to supervise and help coordinate the said operations until we get a suitable replacement within the next three months.

During this period the Board will consider a suitable allowance to compensate for his activities at the corporation, for which we shall seek your approval before paying out. Finally, we trust that the above is with your approval"

This letter was signed by the Board Chairperson. He was a co-accused. He died during the course of joint trial

In context, the letter of 16 August 2017 means that the appellant was to act as the General Manager since Mr Gwatinetsa had unexpectedly turned down the offer to take up the General Manager's post. There was a gap which needed to be temporarily plugged. Mr Chimhina, who had been the Acting General Manager immediately before the Board meeting of 9 August 2017, reverted to his substantive role of Group Human Resources Manager with effect from 10 August 2017. It was common cause at the trial that the appellant ceased to be a member of the ZMDC Board of Directors with effect from 10 August 2017, in view of his new role. It is true that he did not have a contract of employment with ZMDC speaking directly to his being the Acting General Manager beginning 10 August 2017 nor was he on the payroll. But this is inconsequential. He clearly understood that he was now the Acting General Manager, he was understood to be such and he conducted his duties accordingly.

The minutes of the ZMDC Executive meeting held on 31 August 2017 in the ZMDC Boardroom in Harare reflect the following attendees:

“PRESENT

Mr C Chitambira	-Chairman of Finance Investments
Mr L. Akino	-Acting General Manager
Mr G. Chimhina	-Group Human Resources Manager
Mr S. Gaihai	- Business Development Executive
Col L.Gondo	-Acting Chief Operations Officer
Mr J. Maiwasha	-Acting Chief Finance Officer”

We highlight that this management meeting was held on 31 August 2017 and that the appellant's post speaks for itself. Indeed, he was one of three office- holders in acting positions.

Further, a Jena Project Management meeting was held between the ZMDC and M and M on 8 November 2017, in the ZMDC General Manager's office at 90 Mutare Road in Harare at 10.00hrs. Two persons represented M and M. Three represented the ZMDC. The latter were the Acting General Manager (Mr L Akino), Acting Chief Operations Officer (Col L Gondo) and Project Administrator (Mr W Busangavanye). The minutes reflect that the Acting General

Manager (AGM) was active in deliberations on the business of the day. His contribution included the following: explaining why M and M was contracted, detailing the drawdowns effected on the project funds injected by Fidelity Printers, highlighting that the Jena Mine plant was closed for seven days in October 2017, reopened, explaining the performance of the mine and laying out the way forward *vis-à-vis* operations at the mine.

On 30 November 2017, on the ZMDC letter-head, the appellant wrote to M and M. He signed the letter as “L Akino

Acting General Manager”

The list of directors at the foot of that letter has the appellant as “L Akino (Acting General Manager)”.

It is necessary that we cite the relevant portion of the ZMDC Board’s letter of 3 August 2018 “appointing” the appellant as the Acting General Manager. It reads:

“Attention: Mr L Akino

RE: APPOINTMENT AS ACTING GENERAL MANAGER FOR ZMDC

Reference is made to the above matter.

The Mining Development Board has decided to appoint you as the Corporation’s Acting General Manager with effect from the 4th of August 2018 until further notice. You will be expected to coordinate the day to day business of the Corporation, reporting to the Mining Development Board Chairman. In addition, you will be responsible for strategy development and implementation as you will be instructed by the Board.

It will be your responsibility to see to it that all entities including Joint Ventures under the Zimbabwe Mining Development Corporation are properly managed and productive during this period. The Board, Management and staff would like to wish you well during your Acting appointment and fervently hope that your assistance with the Corporation will be beneficial to both parties.”

This letter was signed by the then Board Chairperson, Mr Chimboza. We share the trial court’s view that this letter could not have fooled anybody. The first rung of the appellant’s defence was predicated on the contents of this letter. It suffices that we record that the drafting of the letter in question was an exercise in futility. It was a vain attempt to mask the self-evident fact that the appellant was the ZMDC Acting General Manager with effect from 10 August 2017.

In terms of s 169 of the Act a public officer includes a person holding or acting in a paid office in the service of the state, a statutory body or a local authority. It is not in dispute that ZMDC is a statutory body as envisaged in the same section. It is a body corporate incorporated in terms

of the laws of Zimbabwe as the government's mining arm. It is a public entity. As the Acting General Manager, the appellant was the accounting officer at the material time.

In light of the evidence on record, the trial court neither erred nor misdirected itself in finding as fact that the appellant was the Acting General Manager of the ZMDC and hence a public officer between August 2017 and November 2017. The first ground of appeal is unmeritorious.

There also is no merit in the second ground of appeal. The Court did not ignore evidence as alleged. Thomas Mashungupa of M and M testified that he received a telephone call from the ZMDC General Manager's office. The caller requested the witness to appear at that office. It matters not whether the caller was the appellant himself or a ZMDC employee from the General Manager's office. What is significant is that the court found that Mashungupa was credible in testifying that on pitching up at the Acting General Manager's office he was verbally awarded, by the appellant, with a contract to resuscitate Jena Mine. Informal tender procedures were not followed. The magistrate found that Mashungupa had no reason to fabricate evidence. As the Managing Director of M and M, he certainly knew who had contracted his company and the circumstances thereof. The court was alive to the contents of minutes of a ZMDC Board meeting which directed management to follow informal tender procedures before contracting an external person for the Jena Mine resuscitation project. We see no basis on the record to disagree with the magistrate's factual finding that it was the appellant who verbally contacted and contracted M and M, without going to tender, despite the Board's directive. To conceal this unlawful act, the appellant had then proceeded to harness his colleagues in causing the sourcing of two quotations for the same project at a time when he had already awarded the contract to M and M. Mashungupa became aware of the subsequent interviews of the two companies, and his testimony was believed. It was in line with the exhibits.

We have already observed that a firm finding of fact was made after an assessment of the credibility of, in particular, Mashungupa and the appellant. We are not convinced that the court's finding, based on its assessment of the credibility of the witnesses, was wrong. Our reading of the record shows that Mashungupa was not at all shaken under cross-examination. In addition to his evidence, which reads well, the magistrate had the added benefit of observing not only the appellant and Mashungupa but all the other witnesses as they testified. Of the appellant as a witness, the court's impressions were these, per p(s) 20 and 23 of the judgment:

“Accused number 1 was not such a good witness. He preferred to deny the undeniable. He sought to engage in semantics. He was doing the duties of the General Manager or is it Acting General Manager. He was regarded as a General Manager. He held or regarded himself as the General Manager. On the day Engineer Mashungupa went to the relevant office to negotiate this contract, he turned out at accused number 1’s door. Accused number 1 did not re-direct him to the right office. He proceeded to entertain him and that meeting led to the appointment. One would want to know in what capacity accused 1 was holding himself? Was he a board member who was hiring personnel, a job which was supposed to be done by management or he was either the Acting General Manager or Acting General Manager if ever there is such a post.

.....
He did not jointly sign that document with anybody. He did not suggest that he was signing it on behalf of Chimhina or some other Acting General Manager. He was signing on his own behalf. Is it being suggested surely that he was so dull that he did not know who he was or he was criminally impersonating the Acting General Manager? I am persuaded that he had been appointed the Acting General Manager and that is why he was calling himself that. He was simply trying to run away from the fact that he was the Acting General Manager who had flouted the tender procedures.....”(Underlined for emphasis)

Since the appellant has failed to demonstrate the existence of any misdirection and has not convinced us that the factual finding that he awarded the contract to M and M is wrong, we dismiss the second ground of appeal. See *S v Mashonganyika* 2018 (1) ZLR 216 (H).

In the result, the following order shall issue:

The appeal against conviction be and is dismissed.

Kwenda J: Agrees

Honey and Blanckenberg, appellant’s legal practitioners
The National Prosecuting Authority, respondent’s legal practitioners.