

IN THE SUBORDINATE COURT OF THE FIRST CLASS
FOR THE LUSAKA DISTRICT
HOLDEN AT LUSAKA
(CRIMINAL JURISDICTION)

2SPC/123/12

BETWEEN:-

THE PEOPLE VS ZELES KUNJA ZULU AND TOP MOTORS LIMITED

FOR THE PEOPLE: MRS SALLY KABANDA
APPEARING WITH MR CLIFFORD MOONGA,
SAVIOR SOMBOSHI AND BONIFACE CHIWALA ALL
PUBLIC PROSECUTORS FROM ANTI CORRUPTION
COMMISSION HEADQUARTERS.

FOR ACCUSED 1: MR. M. KATOLO OF MESSRS MILNER KATOLO AND
ASSOCIATES. INITIALLY, ACCUSED 1 WAS
REPRESENTED BY MR R. MAINZA OF MESSRS
MAINZA AND COMPANY AND MR. O. SINKAMBA OF
MESSRS SINKAMBA AND ASSOCIATES BUT THESE
TWO CEASED REPRESENTING HER BEFORE
MATTER WAS CONCLUDED.

FOR ACCUSED 2: MRS M. ZALOUM'S OF MESMADAMS DOVE
CHAMBERS.

BEFORE: P.B. MWIINGA, PRINCIPAL RESIDENT
MAGISTRATE FOR MANSA SUBORDINATE COURT
SITTING AT LUSAKA.

JUDGMENT

CASES CITED:

1. MWEWA MURONO V THE PEOPLE (2004) ZR 207 (SC) GEORGE BIENGA V THE PEOPLE.
2. CRIEVE SIBALE V ATTORNEY GENERAL(2012) 3 ZR 308 AT 310.
3. GEORGE BIENGA V THE PEOPLE (1978) ZR 32(HC)
4. MACHILIKA KOMBE V THE PEOPLE (2009) ZR 282 (SC)

J1



In this case, Zeles Kunja Zulu (hereinafter called "accused 1 or A1") stands charged with two counts namely counts one and three. Top Motors which will hereinafter be called "**accused number 2 or A 2**") stands charged with one count in count 2.

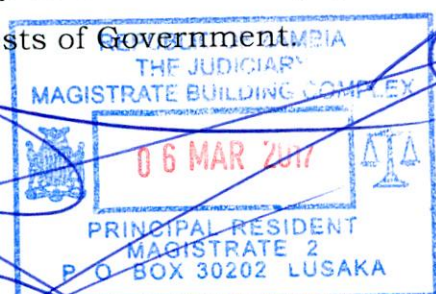
Beginning with counts relating to Accused 1, she stands charged in count one with one count of corrupt practices by a public officer contrary to sections 19(1) and 40 of the Anti- Corruption Act No. 38 of 2010 of the Laws of Zambia.

Particulars of offence allege that Accused 1, on a date unknown but between the 1st day of June, 2008 and the 31st day of July 2008 at Lusaka, in the Lusaka District of the Lusaka Province of the Republic of Zambia being a public officer namely Director of Local Government and Administration in the Ministry of Local Government and Housing, corruptly accepted to have a borehole sunk and paid for by Top Motors Limited at Plot No. 13395 Hill view park Lusaka as an inducement or reward for her having processed or facilitated the purchase of 60 trucks and/or 100 hearses from Top Motors Limited by the Ministry of Local Government and Housing, a Public body.

In count 3, Accused 1 stands charged with one count of abuse of authority of office contrary to section 99 (1) of the penal code chapter 87 of the Laws of Zambia.

Particulars of offence allege that Accused 1, on a date unknown but between 1st day of December 2008 and the 31st day of January 2009, at Lusaka, in the Lusaka District of the Lusaka Province of the Republic of Zambia, being a person employed in the public service namely Director of Local Government and Administration in the ministry of Local Government and Housing, abused the authority of her office by directing and authorizing the payment of K14, 892, 000,000.00 to Top Motors Limited the full contract price for the supply of 100 hearses before delivery of the vehicles contrary to the terms of payment and arbitrary act which was prejudicial to the interests of Government.

J2



Accused 2 stands charged in count 2 of one count of corrupt practices with a public officer contrary to sections 19(2) and 40 of the Anti- corruption Act No. 38 of 2010.

Particulars of offence are that Accused 2, on a date unknown but between 1st day of June 2008 and the 31st day of July, 2008 at Lusaka, in the Lusaka District of the Lusaka Province of the Republic of Zambia, corruptly paid for the sinking of a borehole on Plot No. 13395 Hill view park Lusaka the property of Zeles Kunja Zulu a public officer, namely Director Local Government and Administration in the ministry of Local Government and Housing as an inducement or reward for her having processed or facilitated the purchase of 60 trucks and/or 100 hearses from Top Motors Limited by the Ministry of Local Government and Housing, a public body.

The accused persons denied their respective charges.

At the outset, I warn myself that in criminal cases, the burden of proof lies from beginning to end, on the prosecution which must prove each ingredient of the offence charged beyond reasonable doubt. The case of **MWEWA MURONO V THE PEOPLE (2004) ZR 207 (SC)** is authority for the foregoing.

Section 19(1) of the Anti- corruption commission Act No. 38 of 2010, under which Accused 1 stands charged in count one provides as follows;

“A Public Officer who, by oneself, or by, or in conjunction with, any other person, corruptly solicits, accepts or obtains, or agrees to accept or attempts to obtain, from any person for oneself or for any other person, any gratification as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, anything in relation to any matter or transaction, actual or proposed, with which any public body is or may be concerned, commits an offence.

Section 40 of the same Act provides for general penalty. It enacts thus, “section 40- “Any person who is convicted of an offence under this part, for which no penalty is provided, is liable –

- (a) Upon conviction, to imprisonment for a period not exceeding ten years;.....”).

J3



With the provision of section 19(1) in mind, if the prosecution is to secure a conviction under count one, it must prove the following:

1. That Zeles Kunja Zulu is a public officer.
2. That she corruptly accepted to have a borehole sunk and paid for by Top Motors Limited as an inducement or reward.
3. That 2 above was as a result of her having processed or facilitated the purchase of 60 trucks and/or 100 hearses from Top Motors.
4. That the transaction for which she facilitated the purchase of the 60 trucks and/or 100 hearses concerned the Ministry of Local Government and Housing, a Public body.

In respect of count 3, if the prosecution is to succeed in securing a conviction, it must prove beyond reasonable doubt that;

1. Zeles Kunja Zulu was employed as a Public Officer.
2. That she did make an arbitrary act.
3. That the act was prejudicial to the interests of the Government.

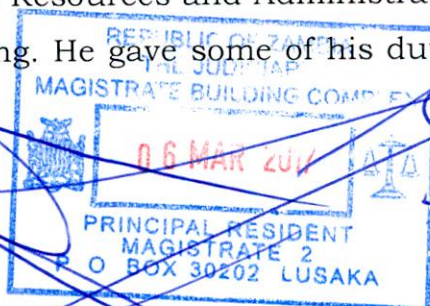
With regard to Accused 2, the essential ingredients of the offence to be proved by the prosecution are:

1. That Accused 2 did corruptly pay for the sinking of a borehole at Accused 1's plot number 13395.
2. That Accused 1, for whom Accused 2 corruptly paid for the sinking of a borehole is a public officer.
3. That in paying for the sinking of a borehole, at Accused 1's plot, Accused 2 was doing so as an inducement or reward for her having processed or facilitated the purchase of 60 trucks and/or 100 hearses from Accused 2.
4. That the transactions relating to the purchase of the 60 trucks and/or 100 hearses related to a public body being the Ministry of Local Government and housing.

The prosecution called eight (8) witnesses.

PW1 was Mushinga Kanila a Director Human Resources and Administration at the Ministry of Local Government and Housing. He gave some of his duties as

J4



handling of all employment matters in the ministry. This includes staff discipline. He averred that sometime in May, 2012, Anti-corruption commission called him. The Anti- corruption wanted to know if PW1 knew anything concerning Zeles Zulu. He confirmed that Accused 1 was his workmate, who at the time worked as Director for Local Government and Administration. He stated that in 2008, he worked with Accused 1 for three months. He gave out Accused 1's job description as:

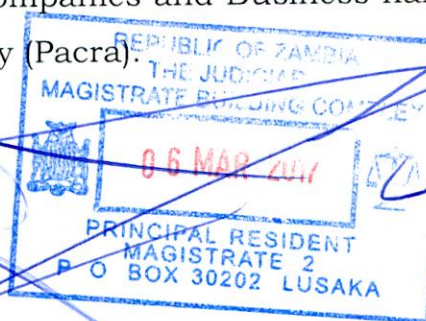
1. To develop and monitor policy and legislation changes to the Local Government.
2. Coordinate administrative, finance, and human resources development in Local authorities.
3. Coordinate mobilization of finance and human resource in order to foster development in Local authorities.
4. Monitoring of the use of resources in Local authorities.
5. Facilitation of timely approval of council budget by the minister as a basis of funding and control.
6. Monitoring and implementation of decentralization policy.
7. Appraisal of staff performance and development in order to improve their performance.
8. Coordination and preparation of briefs and reports on Local Government.

Lastly, he said Accused 1, like other Directors could act as permanent secretary from time to time in the event that the substantive office bearer was not available. He, with case, positively made a positive dock identification of Accused 1.

Under cross examination, he said it was true that Accused 1 could act as permanent secretary (PS) and that the Permanent Secretary is controlling officer. He confirmed that ACC called him to find out if he knew Accused 1's employment status but that they did not ask him if he knew anything to do with the charge Accused 1 was facing.

PW2 was Liwali Mukelabai, an inspector of companies and Business names at the patents and companies registration Agency (Pacra).

J5



He testified that Anti-corruption officers approached him concerning a company called Top Motors Limited. The officers asked for a printout adding that he discovered that Top Motors Limited had changed its name to Delta Auto and Equipment Limited. He stated that according to Pacra records, the change was effected on 29/02/12. The reasons given for the change of name was that the company wanted to start selling equipment apart from Motor Vehicles. He said that he generated two printouts same of which he caused to be produced into evidence marked exhibits P1 and 2 respectively. It was his evidence that before name change, the names of the Directors were:

Liang Ge (first Director), Rodge Leeveeziang, Taaxin Lu and Lichun Wu.

After the company changed its name, and date of incorporation, the names of directors appeared as;

Li Cheng, Rodger Leeveeziang, Tin Songyan, Li Xiang xiang and Ge yongshan.

Under cross examination, he said there was nothing unusual about changing directorship in the company. He stated that there was nothing unusual in Top Motors having changed its name and directorship.

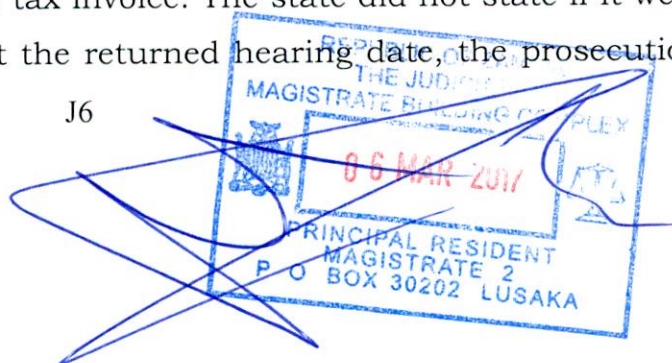
PW3 was Bridget Kapansa, an operations manager at Zambezi Drilling.

She testified that in May 2008, a Mr David Tembo got a quotation for the drilling of a borehole and installation.

The borehole was to be drilled in Chilenje South. The quotation was given to Mr. Tembo on 19/05/08 and it was in the sum of K25, 000,000 old currency.

Four days later, Zambezi drilling received a down payment by cheque from Top Motors. The amount on the cheque was K15, 080,000=. She stated that a receipt was issued. She identified both the quotation and the receipt issued. These were marked ID5, 3 and 4 respectively. It was her evidence that after completion of works, Zambezi drilling received the balance of K10, 400,000= in cash. Following that, in June 2008, Zambezi drilling issued a Tax invoice to Top Motors in the sum of K25, 480, 000= VAT inclusive. I must state here that this witness was not cross examined as defence objected to her having to produce the quotation, receipt and tax invoice. The state did not state if it were to proceed with the witness but at the returned hearing date, the prosecution

J6



called Bisani M. Rao who gave evidence as PW3. I will therefore not consider the evidence of Bridget Kapansa who earlier testified as PW3. It is the evidence of Bisani M. Rao I will take into account and it is he I will regard as PW3.

Mr. Rao, who is managing Director of Zambezi drilling testified that in 2009, ACC officers went to his office and asked him to confirm if they had drilled a borehole in Chilenje. He went through the records and found a quotation dated 19/05/08 which was issued to Mr. David Tembo. The quotation was in the total sum of K25, 000,000 odd of old currency. It was for borehole drilling and installation of a submissible pump. He positively identified the quotation he was referring to and it was marked "ID3".

He averred that on 24/05/08, Mr. Tembo went back to his company and paid a down payment of K15, 080,000= by cheque.

According to him, Mr. Tembo said he would pay the balance after seeing the water. Following the cheque payment, his company issued a receipt in the sum of K15, 080, 000=. He identified the receipt and it was marked "ID4". In June 2008, he assigned his people to go and drill a borehole in Chilenje after which, on 09/06/08, Mr Tembo took the balance of K10, 400,000= which was in cash. Following the receipt of the full payment, his company issued a Tax Invoice to Accused 2 in the sum of K25, 480, 000=. The tax invoice was marked "ID5".

Under cross examination, he said the three documents he identified were never under his custody. He stated that it is nothing wrong for a company to pay for its employee(s) adding that such had happened before.

In re-examination, he said ID3, 4 and 5 were generated by his company.

PW4 was Namata Kalaluka, a Chief Accountant in the Ministry of Health. She testified that prior to her current position, she was principal accountant under the ministry of Local Government. She gave the period as having been between November 2005 and April 2009. Her main duties were financial management for the ministry which entailed that she was inter alia, in charge of disbursing funds to beneficiaries, payment for goods and services. She was also in charge



of budgeting for the ministry. When the procurement of the 100 hearses was done, she was at the ministry of Local Government.

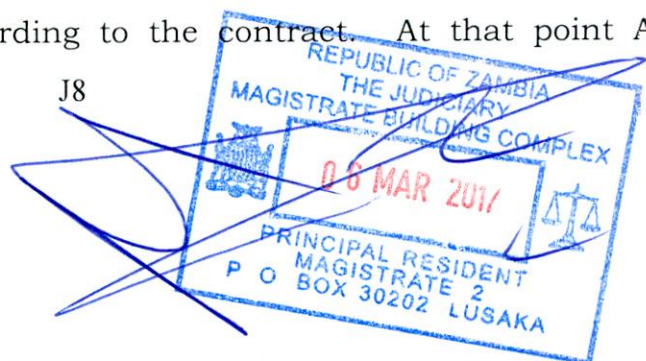
She stated that when ACC officers asked her as to what her role in the procurement of hearses was, she didn't know of any abuse of authority of office concerning Accused 1. She averred that a payment voucher in the total sum of K14 billion kwacha old currency was taken to her office for payment. When that was done, she requested for the contract to satisfy herself of the contents. When she was availed the contract, she noted that the terms of payment were as follows;

40% was to be paid upon signing of the contract, 30% was to be paid upon presentation of shipping documents and the last 30% was to be paid upon acceptance of the goods by the ministry. She positively identified the contract and it was marked "ID6". She said after reading through the contract, she asked the officer who had taken the payment voucher concerning the payment of K14. 8 billion to cancel it. She instructed him to prepare a voucher equivalent to 40% of the total contractual sum. She positively identified the payment voucher representing a 40% payment. It was marked "ID7".

It was her evidence that after "ID7" was generated, an electronic transfer was made. She stated that Accused 1 then wrote a letter to the permanent secretary copied to her. In the letter Accused 1 was expressing concern that they had effected 40% payment instead of 100 % payment adding that there was fear of the funds being mopped by the treasury if not utilized by 31/12/08. Accused 1 stated in her letter that if funds were mopped, the blame should not be on her as she wanted the funds utilized before year end. The said letter led to her being summoned to the minister's office to explain why she did not make a 100% payment to which she explained that she was following the contract. The letter was marked "ID8".

It was PW4's further evidence that a Sylvester Mpande who was from procurement approached her. Mpande was in the company of a Director from Accused 2. The duo wanted to find out why she did not make a 100% payment to which she said she paid according to the contract. At that point A2's

J8



Director explained that they were going to produce a bank guarantee to cover the 60% to which she said she was not competent to handle that.

On 05/01/09, she got a letter from A2. The letter was addressed to the PS. A2 was providing a bank guarantee from the bank of China. When this letter came, A1 was acting PS as the incumbent had travelled out of town. On the said letter, acting PS Zeles Kunja had instructed that payments be processed.

To the instruction was attached a bank guarantee from bank of China. Having received the instruction to pay, she forwarded the same to the head of procurement for advice. The advice was that it was okey since the bank guarantee was provided. That was how she instructed her accountants to prepare payment voucher for the balance of K8.9 billion. She stated that the K8.9 billion payment was approved by A1.

The payment voucher for K8.9 billion, the letter from Top Motors and the bank guarantee were marked IDS 9a, 9b and 9c respectively. IDS,6,7,8,9a,9b and 9c were produced into evidence marked P6,7,8,9a,9b and 9c respectively. She closed by identifying A1 from the accused dock.

When cross examined by Counsel Sinkamba, she said she wouldn't say she knew that the 100 hearses were purchased under Presidential order adding that she was aware that the matter was discussed at a Management Meeting and also taken to Minister honourable Masebo at the time. She stated that she explained that she paid according to the contract thus refused to pay 100%. This was in the presence of PS Ambassador Joel Ngo, Ms. Zeles Zulu, Albert Kayaba. This followed the question put to her by the Minister concerning why she had not paid 100%. She stated that in the contract, there was nothing to do with the bank guarantee. She stated further that since there was a bank guarantee, the Ministry would not have lost as it would cash in the bank guarantee. It was her evidence that A1, wrote a memo to the PS expressing fear that the money would be mopped by the treasury if not utilized, she thus, wanted them to pay in full. She stated also that A1 did authorize the payment.

J9



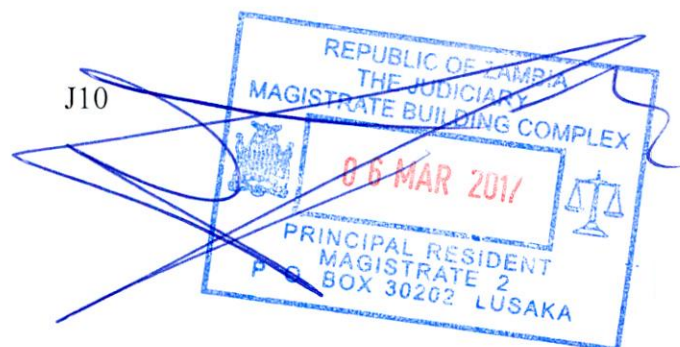
When cross examined by Counsel Mrs Zaloumis, she said there was nothing wrong in the manner the hearses were purchased. She stated that all the payments were passing through her and that she attended meetings concerning the subject purchases. She averred that in the meetings she attended, she saw nothing wrong.

It was her evidence that in the meeting, there was no authorization of payment of 100%. She stated that the head procurement had stated that since a bank guarantee had been provided, the 60% balance could be paid. She stated further that during the meeting, the 100% payment was discussed but that no agreement was reached to pay.

When cross examined, in relation to P8 when she said there was nothing wrong, she meant that funds had been committed thus, the perceived danger was not there. She averred that during the meeting of 24/12/08, the 100 % payment was discussed and that she did not object because she had not seen the contract adding that she only saw the contract when time to pay came. She reiterated that authorization of payment was done by A1.

PW5 was Joel Mululwe Ngo, who at the material time was Permanent Secretary in the Ministry of Local Government and housing. He gave the period as from November 2007 to January 2009. He gave his functions as being in charge of coordinating the functions of the Ministry with other Ministries. He was also controlling officer of the Ministry's finances.

He testified that on 24/12/08, he, on behalf of Government signed a contract with Top Motors for the supply of 100 hearses. The signing of this contract was witnessed by A1. The terms of payment were that 40% was to be made upon signing of contract, while 30% was to be paid upon production of shipping documents and the last 30% upon delivery of the vehicles. He stated that in reality, 40% was paid upon signing of the contract but that the 60% was paid at once which was at variance with the terms of the contract. A1 did



authorize the payment of 60% as she was acting PS at the time as the incumbent PS was out of the country.

In cross examination, he said A1 approved the 60% payment for the hearses and that that was at variance with the contract. He simply was consistent.

PW6 was Sylvia Sichone, who, at the material time was head of procurement at Local Government and housing.

She narrated how the procurement procedure of the 100 hearses was done. She said after Zambia National Tender Board had sent the bids for evaluation, an evaluation committee in which A1 was a member was constituted. After the evaluation, A2 was recommended to be awarded the contract which it was.

When cross examined by Counsel Mainza, she said looking at P11, the valuation report shows that the award of the contract to A2 was done in a transparent manner. She said she had no personal knowledge of a borehole sunk at A1's residence. She said she gave an opinion to PW4 supporting the payment based on the bank guarantee.

When cross examined by Mrs. Zaloumis, she said in the evaluation, it is difficult to tell others what to do. When cross examined by Counsel Sinkamba, she said an opinion to pay did not mean pay adding that she didn't endorse on the voucher.

PW7 was Patrick Chila Chama, an investigations Officer from ACC. He testified that on 24/06/09, ACC received a complaint alleging corruption and abuse of authority of office in the manner the procurement and payment for 100 hearses was conducted. He, together with two workmates visited Ministry of Local Government and housing where they retrieved documents relating to the transaction. Among the documents retrieved were two contracts, one relating to 60 x 2 ton trucks while the other related to the procurement of 100 hearses. Also retrieved were three payment vouchers two of which related to the payment for the 100 hearses. As part of the investigations, Ms. Namate

J11



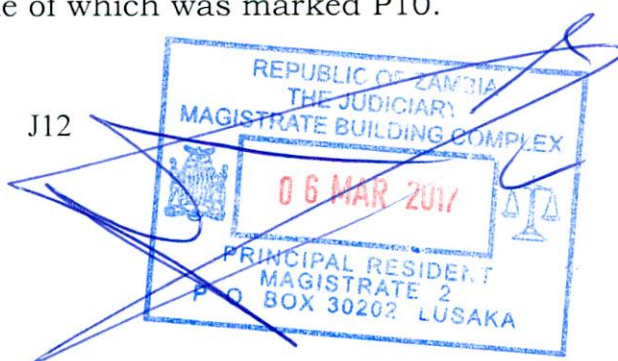
Accountant and PS in the Ministry were also interviewed. Equally interviewed was Mr. Mushinge Kawile (PW1) who confirmed that A1 was a Public servant.

He averred that he also visited Top Motors Limited where Managing Director called Liang Ge was interviewed. This was to confirm that A2 did indeed supply the vehicles in question. He stated that Mr Ge did avail him with his colleagues a number of box files relating to most of the financial transactions.

From the files was retrieved a receipt from Zambezi drilling and exploration for the drilling of a borehole in Chilenje South. The receipt was in the sum of K15,080,000.00. Also retrieved was a Tax Invoice in the sum of K25,480,000.00 and finally a copy of a quotation from Zambezi drilling issued to a Mr David Tembo of top Motors. He, with ease, positively identified IDs 3,4 and 5 and caused them to be produced into evidence marked exhibits P3,4 and 5 respectively.

I must state here that the production of ID3 was objected to but I did allow its production into evidence based on the guidance provided in the case of **GEORGE BIENGA V THE PEOPLE (1978) ZR 32 HC.**

It was his further evidence that Mr. Rao of Zambezi drilling was interviewed and he revealed that he issued P4 to A2 because he had received a cheque from Mr Tembo drawn on Top Motors. He also positively identified a warn and caution statement administered to A1 same of which was produced marked P12. PW7 also caused to be produced into evidence a letter from the Zambia National Tender Board asking the Ministry of Local Government to evaluate the bids. The letter was marked P13. He further caused to be produced into evidence, the minutes of a meeting between ZNTB and Ministry of Local Government concerning the procurement of 100 hearses. The minutes were marked exhibit P14. This though was objected to but I overruled the objection as PW7 had custody of P14. Also produced into evidence was the contract relating to the 60 x 2 ton trucks same of which was marked P10.



Under cross examination, he said the contract relating to the 100 hearses did not provide for a bank guarantee. He stated that the borehole was drilled in May/June 2008 and that the contract for the hearses was signed the same year. It was his evidence that during the meeting at ZNTB, concerns were raised as to why government was procuring 100 hearses of a model that had never been tested in Zambia and from a manufacturer who had never supplied vehicles in Zambia. He said that A1, as team leader of the delegation from Local Government and housing stated that government had procured 150 light trucks from the same manufacturer when that was never the position. The foregoing made him to conclude that A1 favoured A2 as a result. He conceded to the fact that A1 was junior amongst the people who attended the meeting where A2 was awarded the tender. He stated that the evaluation stage was done collectively adding that A1 never made any favour. He averred that ZNTB made the final decision to award the contract to A2 and that A1 is not a member of ZNTB.

When cross examined further, he said that apart from the borehole, he had no evidence to show that it was a reward for facilitating the payment. He stated that there was no payment from A1 to Top Motors (A2). He added that a reward is not supposed to be paid back. He averred that at the time he was interviewing A1, she said she had repaid K21,000. He averred that he went to A2 to find out if A1 had repaid but could not recall what A2 said.

When cross examined by Counsel Mrs. Zaloumis, he said the contract did not provide for a bank guarantee adding that once a contract is signed, there is no room for discretion. He stated that it was wrong for A2 to ask for 60% payment by providing a bank guarantee when the contract did not provide for such. He said that A2 corruptly paid for the sinking of a borehole at A1's place.

He confirmed that he knew that A1 was related to Mr Tembo and that at the time of the investigation, A1 said she had repaid K21,000 odd.



When re-examined, he said on P9b, Top Motors was requesting for 60% payment and that Sylvia Sichone made a comment saying, "you may consider paying as advised by the PS". He added that Sylvia's advice was not authority.

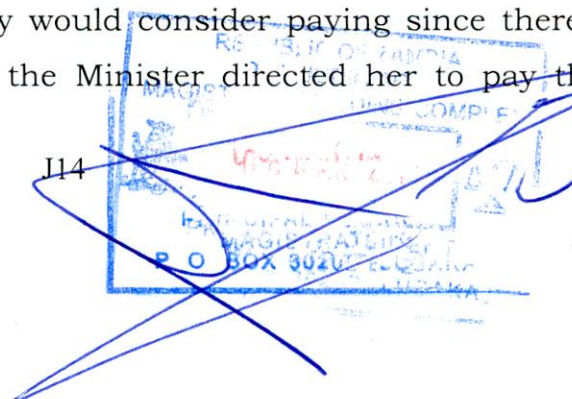
PW8 was Mulengwa Rabecca, a Senior Community Education Officer at the ACC. This witness was the lead investigator in the joint investigation of the matter thus, her evidence was materially similar to the evidence of PW7. As such, I did not find it necessary to repeat it.

In cross examination, she was consistent.

In her defence, A1 gave sworn evidence and confirmed that she is the owner of plot 13395 Hill view Chilenje South. She also confirmed that she was a Director Local Government and Administration. She gave the procedure involved when making payments and said the authority to pay as per exhibit P7, came from the PS in the PS's capacity as controlling officer. PS Joel authorized the payment of the 40% on P7.

As regards the payment of the 60%, as per exhibit P9B, she said she wrote to say, "PA, process the payment." It was her evidence that she gave the instruction in her capacity as controlling officer having been acting PS at the time. She averred that she was the only one who, at the time, was authorized to give instructions to all Directors and Juniors and that if she did not, nothing would happen. She also confirmed nothing would happen. She also confirmed that she was acting PS when A2 wrote the letter requesting to be paid the balance of 60%. It was her further evidence that she signed the contract and that the payments were to be 40% upon signing of contract, 30% upon receipt of the motor vehicles.

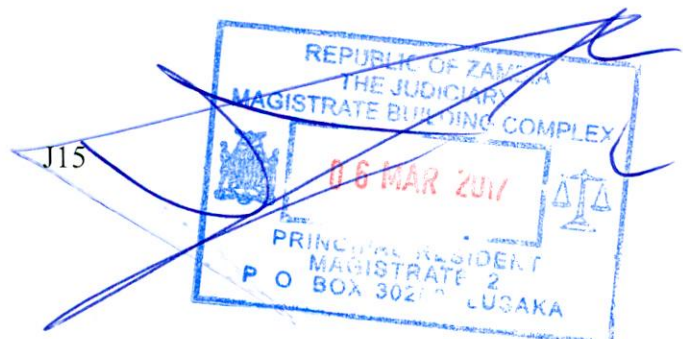
It was her further evidence that PA insisted that in making payment, the contract was supposed to be followed but that she had consulted the head of procurement who advised that they would consider paying since there was a bank guarantee. She stated that the Minister directed her to pay the 60%



balance based on the bank guarantee adding that although she knew the payment terms, she didn't tell the Minister.

When cross examined by Counsel Mrs. Zaloumis she said she never corruptly accepted to have a borehole sunk at her place and paid for by Top Motors. She denied having requested A2 to pay for her borehole and that A2 never promised that it would pay for her borehole for facilitating payment for the 60 light ton trucks and 100 hearses. She added that the borehole was sunk after the 60 light trucks had already been bought and that on her own, she would not have facilitated the purchase of 100 hearses. It was her evidence that regarding the cheque payment for her borehole by A2, the arrangement was between Mr Tembo and A2. She said A2 is her relative i.e her brother. She stated that Mr Tembo went to pay for the borehole using a Top Motors cheque and that she personally didn't know about the payment using a Top Motors cheque. She added that Mr Tembo told her that he wanted money from his employers but that he could not be given because the employers wanted papers or title deed. She reiterated that Mr Tembo made his own arrangements for him to get money from his employers using the borehole and that she and Mr Tembo agreed that she would pay him back.

When cross examined further, she said she had no contract with Top Motors regarding the sinking of the borehole. In respect of count 3, she said A2 never asked her for payment. She denied having talked to Top Motors at any given time. She admitted having told the Principal Accountant to pay the balance of 60% of the K14 billion contract sum. She denied having been privy to the issue of bank guarantee saying it was PW5 who was. She reiterated the fact that she authorized payment of 60% in her capacity as Acting Permanent Secretary. She added that when she found the letter on the PS's table, she did not have a choice not to pay. She stated that they had political pressure over the issue as the President too was interested.



When cross examined by prosecutor Ms. Kabanda she said P7, was a payment voucher and that she signed on it for payment to be done on 29/12/08.

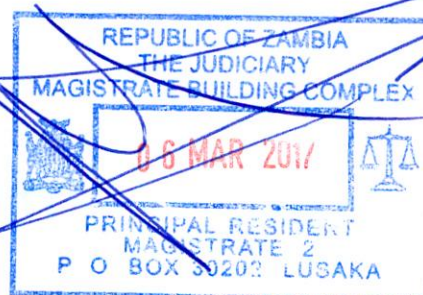
When shown P7,P9 and P10 and asked if payment would have been effected without her signature on the three documents, she responded in the negative. She stated that she didn't read the contract relating to the purchase of 100 hearses, though she signed it as witness. She stated that exhibit "P9b" was a letter from Top Motors dated 05/01/09 and that A2 took it to her and not PW5 Ngo; adding that, that was the time she was Acting PS. She stated that "P9B" went to accounts on 07/01/09 adding that accounts could not have seen it before then.

When returned to P14, she said those were minutes of the meeting dated 25/11/08 and that the PS put her as delegation leader. She was asked to read paragraphs 1 to 5 and these show the concerns observed.

When cross examined by prosecutor Mr. Moonga, she said paragraph 2 of P14 shows where Ministry of Local Government responded. She said they negotiated for 150 vehicles but that only 60 were bought. She averred that she did not personally tell ZNTB that the Ministry procured 150 light trucks. When shown P12, she confirmed that it was her warn and caution statement. She read page 12 after which she said she did not have evidence that the Ministry procured 150 light trucks. It was her evidence that she was not sure if the Ministry ever procured 150 light trucks and that she did not deliberately make the statement to that effect to Mr. Shawa. She said this is because for the 90 trucks, they gave money to the councils.

When cross-examined further, she said the borehole drilled at her place was paid for by herself. She averred that she had no evidence to show that she paid for the borehole adding that she did pay the money to David Tembo.

J16



She stated that she paid Mr. Tembo for the borehole a month after it was drilled but that Mr. Tembo did not issue her with a receipt or invoice. She confirmed that she never discussed the drilling of the borehole with Liang Ge of Top Motors. She said Mr. Tembo never took quotations from Zambezi drilling concerning the amount for the drilling of the borehole. When referred to P12 at page 8, where she said she made an appointment to see Mr. Ge, she said she did not ask Mr. Ge to drill the borehole. When cross-examined further, she said she met Ge to pay for the borehole and that she did tell the officer that fact.

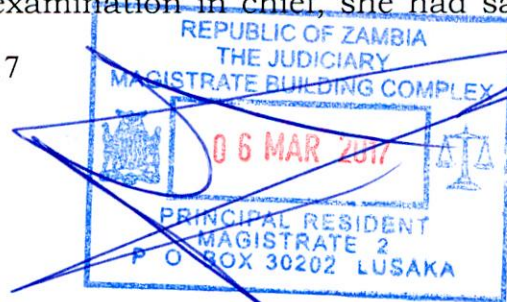
She confirmed the plot number to be plot 13395. She conceded to the fact that she did not dispute that she authorized payment of 60%.

She averred that she was directed to pay by late Hon. Tetamashimba but that the directive was not in writing. She stated that over the meeting with Mr. Ge, no one proposed that she should see him. She confirmed that as per P12, she discussed issue of payment of a borehole with Mr. Tembo.

She stated that she had a relationship with both Mr. Ge and Mr. Tembo both of whom were from Top Motors. She said she interacted with Mr. Tembo concerning the payment for the borehole before the contract was awarded. She averred that it was true that in her evidence in chief, she had said that she was shocked when she found a drilling machine at her house and that she asked Mr. Tembo as to what was going on. It was her further evidence in cross-examination that she wrote a memo to PS Ngo i.e. P8 but that PS Ngo never acted on it. She reiterated the fact that the sinking of the borehole came before the award of the contract. It was her evidence that in a meeting they had earlier held, the principal accountant had said that payment should be in accordance with the contract.

When cross-examined by Mr. Chiwala, she said the mopping of finances is done on 31st December each year but that the payment of 60% was after that date. It was her evidence that in her examination in chief, she had said that

J17



she knew the terms of the contract but that now she had said she didn't know the terms of the same contract.

In re-examination, she said she didn't corruptly accept for the borehole to be sunk because the borehole was a business deal between her and Mr. Tembo whom she said was her relative.

She added that the agreement was that she was going to pay Mr. Tembo K15,000.00 for him to buy a plot and that she infact paid back. She stated that between her and A2, there was no connection regarding the drilling of the borehole.

Regarding authorization of payment, she said what she meant was that payment is a process and that her signature alone would not make the payment to go through. Over her remark to say, "PA process the payment," she said what she meant was that the PA was supposed to start the process because it goes through various steps. Over the memo she wrote concerning the payment, she said she did so because they had several meetings in the Ministry concerning any payment.

She said she went to meet Liang Ge because she wanted an invoice as requested by the bank because she wanted to get a truck. She stated that the warn and caution was hers and that she did not lie to the officer when she said she went to meet Liang Ge, at his office. She stated that it is not correct to say she went to meet Liang Ge because of the qualification for the borehole. She confirmed having authorized bank guarantee and that 60% was paid at once.

DW2 was Mr. David Tembo. He testified that he knew A1 as his niece. Regarding the borehole sunk at A1's premises, he said the borehole was his. It was his evidence that he wanted to buy a plot but that his employers (i.e. A2) whom he relied on for the money could not give him the money as his plot in Kabanana had no papers.

J18



As such, he decided to sink a borehole at A1's residence with an understanding that A1 was to give him the money to purchase a plot.

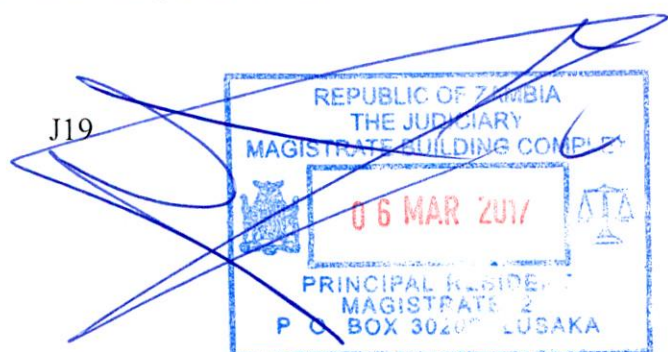
He stated that A1 gave him a cheque in the sum of K15,080.00 as payment for the borehole. He averred that the arrangement regarding the borehole drilled at A1's premises was between him and A1 and that A2 had no knowledge of the same. It was his further evidence that from A2, he only got K15,080.00 adding that A1 thereafter gave him K10,000.00 to make the total of K25,080.00 full payment to the drilling company.,

When cross-examined by Mrs. Zaloumis for A2, he said the quotation from Zambezi drilling was in his name adding that A2 did not tell him to put the quotation in his name. He maintained that the top up cash was given to him by A1 and that A2 never knew anything about it.

When cross-examined by the prosecution, he said that A2 paid K15,080.00 towards the borehole adding that if A1 had said something else, what he was saying was the truth. When shown P4, he confirmed that it was a receipt for a borehole. When shown P3, he said it was a quotation for the drilling of the subject borehole whose total price was K25,000.00 but that Liang Ge only signed accepting K15,080.00.

He could not recall A1 having gone to view the keep Zambia clean campaign vehicle. When cross-examined further, he said he had no document to show that A1 gave him K10,000.00. When shown P12 at page 8, he said A1 admitted meeting Liang Ge and discussing what she had discussed with himself. He stated that he did not know the date A1 met Liang Ge adding that he was not aware of any meeting.

It was his evidence that he did not know if A1 paid back any money to A2. He averred that he never personally paid back money to A2 same of which came from A1. He denied ever having received K21, 000.00 from A1.

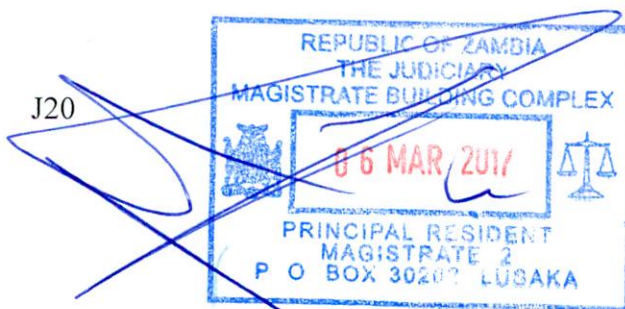


When re-examined, he maintained that A2 gave him K15,080.00 and that the balance was from A1. He denied knowledge of any meeting between A1 and Liang Ge. He maintained that A1 never gave him money to take to A2.

Liang Gee testified as DW3 on behalf of A2. He stated that at the material time, he was working for A2 in the capacity of managing Director. He confirmed that A2 assisted Mr. David Tembo (i.e. DW2) with the sum of K15,080.00 for purposes of sinking a borehole. He denied having had any dealings with A1 concerning both the purchase of the light trucks and the 100 hearses. It was his evidence that he was only seeing A1 here at court for the first time when this case came up. He gave reasons for the assistance rendered to DW2 as due to the fact that he had helped A2 a lot from inception. It was his further evidence that A2 asked to be paid the balance of 60% as the supplier wanted full payment since they were dealing with the supplier for the first time. He confirmed having authored a letter asking to be paid in full and that the said letter was addressed to the Acting Permanent Secretary.

When cross-examined by Counsel Katolo he said P6 was a contract entered into between A2 and Ministry of Local Government and Housing in respect of the supply of 100 hearses. He gave the contract date as being 24/12/08.

When shown P10, he said it was a contract relating to the supply of 60 light trucks, same of which was dated 19/12/07. When shown P4, he said it was a borehole receipt dated 24/05/08 adding that as at that date, there was no running contract between A2 and Ministry of Local Government. He stated that the two contracts had no relationship with A1 and that A1 did nothing wrong. When cross-examined further, he said P5 was a tax invoice issued to A2 by Zambezi Drilling adding that it is in the total sum of K25,480.00 but that A2 never paid the total amount to Zambezi drilling. He recalled having seen and signed P3 i.e. the quotation. He reiterated his assertion that he never had a meeting with A1 or indeed a meeting where he invited DW2 to be part of the meeting.



When cross-examined by prosecutor Ms. Kabanda he said it was true that DW2 took a quotation to him and that he accepted it. He maintained that he never met A1 adding that while A2 drilled a borehole, the same was for Mr. Tembo. He confirmed having signed P10 but said when doing so, he never met PS Ngo or A1 saying procurement gave it to him to sign in the absence of the duo. When shown P9, he said it was a bank guarantee and that he signed a letter for bank guarantee on 07/01/09. He added that when he wrote 05/01/09, that could have been a mistake. He confirmed that where it is written process payment, the date was 05/01/09 while the date on the bank guarantee was 07/01/09. He conceded to the fact that the bank guarantee was not in line with the terms of contract but that the same was done based on the advice from procurement.

When shown P5, he said according to P5, client was A2. It was his evidence that A2 made a cheque payment to Zambezi drilling for Mr. Tembo's water problems.

When re-examined, he said the tax invoice was in A2's name. When shown P3, he said it was a quotation in David Tembo's name. He stated that the letter of guarantee was addressed to Acting PS and that the bank guarantee was dated 07/01/09.

The foregoing was all the evidence I received in this case. I do now state facts I found not to be in dispute.

1. It is a fact that Zales Kunja (i.e. A1) was, at the material time, an employee of the Ministry of Local Government and Housing .
2. It is a fact that a borehole was drilled at plot 13395 Chilenje South which plot belongs to A1.
3. It is not in dispute that the payment of K15,080,000.00 was made to Zambezi drilling by A2 using a cheque.
4. It is a further fact that a receipt and tax invoice were issued by Zambezi drilling to A2 in the total sum of K25,480,000.00.

J21



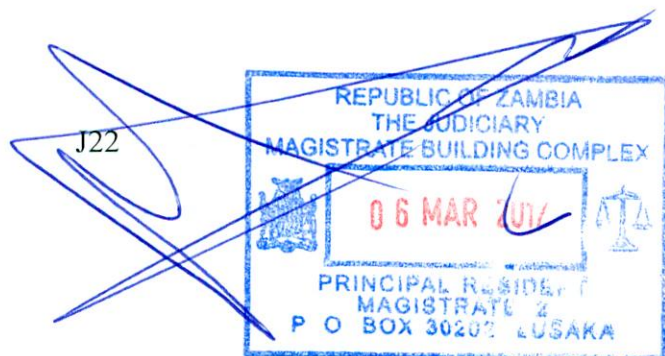
5. It is also a fact that the borehole was drilled in May, 2008 during which there was no running contract between A2 and the Ministry of Local Government.
6. It is equally a fact that the contract relating to the purchase of the 100 hearses stipulated that 40% was to be paid upon signing of contract, 30% upon proof of shipping documents and 30% upon receipt of the vehicles.
7. It is common cause that full payment of the contract price was made contrary to the contractual terms and that the person who was Acting PS when this happened was A1.

The questions I must resolve in respect of count one (1) are:

1. Was the borehole sunk at A1's plot paid for by A2 for purposes of being an inducement or reward for her to facilitate A2's supply of 100 hearses to the Ministry of Local Government and Housing?
2. Being Director Local Government and Administration in the Ministry of Local Government and Housing, does it qualify A1 as a Public Servant?

If the answers to the above questions are in the affirmative, then, the prosecution would have proved its case. But, if the answer to both or one of the above questions is in the negative, then the accused number one will be entitled to an acquittal on this count.

Before proceeding to address count one, I wish to, at this point express my gratitude to the members of the bar for their educative and valuable lessons I learnt from both sides during the trial of this case. I thank most sincerely the defence team for the detailed submissions without which it would have been difficult to write this Judgment. I wish to also take this opportunity to express my heartfelt condolences to the members of the prosecution team for the untimely death of the lead prosecutor in this case Ms. Sally Kabanda who died before the delivery of this Judgment.



At the time of my writing this Judgment, I took judicial notice that the Anti-Corruption Commission Act No. 38 of 2010 of the Laws of Zambia had been repealed and replaced by the Anti-Corruption -Commission Act No. 3 of 2012. The question I posed to myself was whether a repealed law could be a basis for a court's decision to convict or acquit persons indicted under law which is no longer in existence. To the foregoing, I found the answer to be as stated in the provisions of Section 14 (3) (b) of the Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia. Section 14 (3) states that;

"Where a written law repeals in whole or in part any other written law, the repeal shall not

(b) Affect the previous operations of any written law so repealed or anything duly done or suffered under any written law so repealed"

With the foregoing in mind, I proceeded to decide this case based on the provisions of the Act under which the accused persons were charged despite the Act having been repealed before Judgment.

I now turn to resolving the question whether the borehole sunk at A1's premises and paid for by A2 was so sunk as inducement or reward for her having facilitated the supply of the 60 light trucks and/or 100 hearses to the Ministry of Local Government and Housing.

In relation to count one, Mr. Katolo relied on **BLACKSTONES CRIMINAL PRACTICES 2004 BY PETE MURPHY ED. OXFORD UNIVERSITY PRESS PARAGRAPH B15.6A PAGE 711** which defines corruptly as means:

"Purposefully doing an act which the law forbids as tending to corrupt. Any improper and unauthorized gift, payment or other inducement offered to a councilor or such other officer is likely to be considered corrupt".

Counsel submitted that in order to get a clear picture on whether A1 corruptly accepted to have a borehole sunk and paid for by A2 as an inducement or reward for having processed the purchase of 60 trucks or

J23

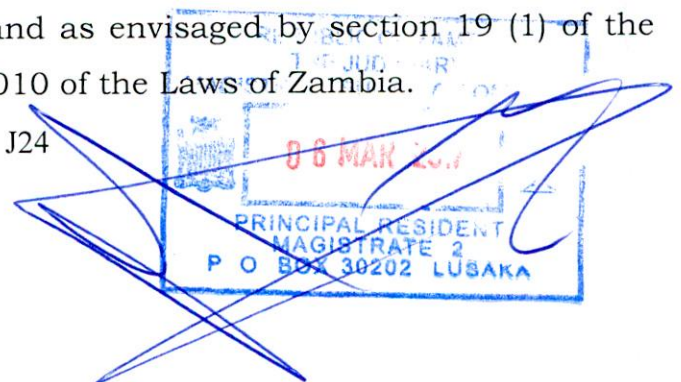


100 hearses from A2, the time period of the offence needed to seriously be considered.

He pointed to the period ranging 1st June to 31st July, 2008. It was Counsel Katolo's further submission that the evidence on record shows that the central tender committee held its meeting on 18th December, 2008 regarding the supply of hearses. Letter for the award of the tender was dated 18th December, 2008 and that exhibits P13 and P14 are dated 21st and 25th November, 2008 respectively when the discussions for the purchase of the hearses was receiving active attention. He argued that during the period 1st June, 2008 and 31st July, 2008, A1 had no opportunity or at all to process any payment or facilitate the purchase of the 100 hearses as the contract relating to the same was not yet in existence. He added that A1 could not guess that the purchase of the hearses would come into effect sometime in November/December, 2008. He added that exhibits P3, P4 and P5 relating to the drilling of the borehole were generated between 19th and 24th May, 2008. As such, Counsel submitted that the incident of the drilling of the borehole was earlier in time and could not serve as a reward or inducement for the supply of 100 hearses. Counsel Katolo added that A1 had no opportunity to commit any corrupt practice between 1st June, 2008 and 31st July, 2008 in relation to a contract that only came into existence on 24th December, 2008. He closed by saying opportunity is a factor of time and space.

The foregoing were the very persuasive submissions by Counsel Katolo. The question I ask myself is, persuasive as the foregoing submissions may be, can they find favour of this court, I found it prudent to not only consider the meaning of the word corruptly as defined by the learned authors of Blackstones Criminal Practice but also to consider the meaning of the same word as defined by Lord Parker C.J. in R V Smith (1960) 1 ALL ER 256 at 257 and as envisaged by section 19 (1) of the Anti-Corruption Act No. 38 of 2010 of the Laws of Zambia.

J24



RV Smith was a case relied on by Counsel Katolo. In that case, Lord Parker C.J. as he then was defined corruptly as follows;

“What does the word corruptly mean? This is the law am telling you this as law: “corruptly” means with intention to corrupt; in other words, if I offer you a reward in order that you do something which may help me I am doing it corruptly.”

Having cited the above case, Counsel submitted that between 1st June, 2008 and 31st July, 2008, there was no contract of any nature between Ministry of Local Government and Top Motors Limited in which A1 could have developed any corrupt intention. To this I totally agree that during the period 1st June, 2008 and 31st July, 2008 there was no running contract between Ministry of Local Government and Top motors. But, could it be said that corrupt intention in this case and particularly on the part of A1 would only occur if it related to the period ranging 1st June, 2008 to 31st July, 2008 when clearly there was no running contract?

To answer this question, it is necessary in my view to look at the provisions of section 19 (1) of Act No. 38 of 2010.

The section enacts thus:-

‘A public officer who, by oneself, or by, or in conjunction with, any other person, corruptly solicits, accept or obtains, or agrees to accept or attempts to obtain from any person for oneself as an inducement or reward for doing or forbearing to do, or for having done or forborne to do anything in relation to any matter or transaction actual or proposed, with which any public body is concerned, commits an offence.’

With the foregoing meaning of section 19 (1) of Act No. 38 of 2010 in mind, I do entertain a view that an corrupt act by someone, in this case A1 can occur whether or not there is a contract actually in existence at the time of the

J25

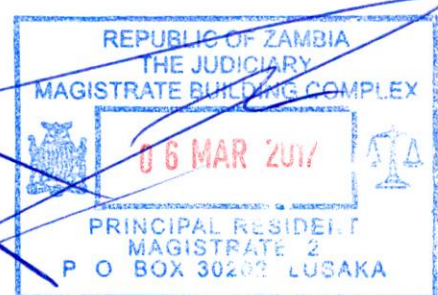


corrupt act. This is because the section envisages inter-alia, a proposed matter or transaction.

From the evidence on record, it is clear that A1 played a part in the contract relating to the 60 light tone trucks. She signed P6 as a witness. Equally DW4, Liang Ge, Managing Director of A2 did participate in signing that contract on behalf of A2. That, in my view brought A1 and DW4 into contact some of which could have provided an opportunity for the duo to discuss future transactions. I hold this view due to the following reasons:-

1. Exhibit P3, a quotation from Zambezi drilling shows a total figure of K25,000,000 old currency. This was dated 19th May, 2008, and addressed to D. Tembo but accepted by DW4 Liang Ge. Mr. Ge denied ever having met A1 or indeed having, as Top motors, paid for her borehole. He stated that he was seeing A1 for the first time here at court. This was in sharp contrast with the evidence of A1 both viva voce and as contained in exhibit P12, the warn and caution statement where she admitted meeting DW4 and discussing the issue of the borehole. On this aspect therefore, the defence evidence is manifestly contradictory. I have no doubt that one of these two i. e A1 or DW4 was lying. Meanwhile, the prosecution led evidence as per P3 that a quotation was obtained in the sum of K25,000,000, receipt issued to A2 as per exhibit P4 albeit in the sum of K15,080,000 but a tax invoice was issued to A2 in the total sum of K25,480,000 as per P5. These, as the evidence on record can show, were documents retrieved from the box file at A2's premises during investigations. One wonders what A2 could have been doing with P5 if it contends that it never paid the full amount in respect of the borehole.
2. Exhibit P8 is a memo dated 29th December, 2008 addressed to the Permanent Secretary. It was authored by A1 and in it, she was asking that full payment be made to A2. The payment was in respect of 100 hearses. In her last but one paragraph, she wrote as follows:-

J26



'On Friday, that is when I was informed that the whole amount could not be paid but we should adhere to the contractual terms (40%). Although this is acceptable, there is no guarantee that by February when the vehicles are delivered, the funds will be there, and that the rate will still be the same. Therefore, having discussed the matter with the head (PSU) and head (Internal Audit) this morning she advised that the supplier can provide a performance bond. My worry sir is that, there is no guarantee that the funds will be reserved by Ministry of Finance and National Planning as advised by the Principal Accountant on Friday.

In order to cover myself if anything goes wrong, I have decided to put this issue in writing so that you may make a decision."

From the foregoing, A1 clearly knew that payments were supposed to be as per the provisions of the contract. She had been advised to adhere to the contractual terms but ignored. She sought the decision of the incumbent PS Joel Ngo regarding the making of full payment for the 100 hearses but never got it. Despite knowing that the PS had not responded to her memo of 29/12/08, she proceeded to instruct that payment be made by the Principal Accountant as can be seen from exhibit P9 (b) where , on 05/01/09, she wrote to say, "Principal Accountant process the payment". The remark is on a letter to herself by DW4 on behalf of A2 and dated 05/01/09 the day she instructed that payment be processed.

The foregoing conduct by A1 and DW4 leaves me with no doubt in my mind that the duo knew exactly what was going on and what they intended to achieve i.e payment of the 60% balance at all cost. I do find that her conduct regarding her conduct regarding her manoeuvres in ensuring that she paid out to A2 constitute odd coincidences as envisaged by the holding of the

J27



Supreme Court in ***MACHILIKA KOMBE VS. THE PEOPLE (2009) ZR 282 (SC)***.

I do, on the whole of the evidence on record, fail to accept the view that there was no corrupt intention on the part of A1. I equally decline to accept that the corrupt action by A1 should only be viewed in the context of the period 1st June, 2008 to 31st July, 2008. This is so because, under section 19 (1) of Act No. 38 of 2010, there can be corruption even for a proposed matter or transaction. I cannot certainly accept that Government could have only made the decision to purchase the hearses in November and contract in December, 2008. This is a decision which, in my view, should have been discussed earlier and those concerned it A1 inclusive made aware of. The question that linger my mind i.e, why would A2 pay for a borehole at A1's premises if it was not expecting favours in return?

While the defence contended that the borehole was sunk for David Tembo, I did not find the explanation by the defence reasonable. This is because, while A1 purported that she made business transaction with Mr. Tembo who is her uncle, the duo contradicted themselves in material respects. A1 said she had paid a total of K23, 000,000 back to A2 through David Tembo when he testified, he denied having received any money from A1 for purposes of repaying to A2. He stated that he never got more than K15, 080,000 from A2 clearly again, the defence evidence was seriously contradictory. I can therefore, for the reasons herein given believed and accepted the version of the evidence provided by the prosecution as being more credible. I am therefore satisfied beyond reasonable doubt that A1 corruptly accepted the sinking of the borehole to be paid for by A2, for, if the contrary was the case, she would, in my view, have declined to take part in the transaction relating to the 100 hearses as she knew that she had, had business dealings with A2 previously. Secondly, she would not have gone to the extent she did go in ensuring that A2

J28



got paid 60% balance in total disregard of the contractual terms regarding payment. The essential element of corrupt practices is therefore proved beyond reasonable doubt. The fact that the transaction related to a public body is common case. The Ministry of Local Government is a public body. The only question remaining to be resolved is whether A1 qualified to be called a public officer at the material time. To this, I find the answer to be in the affirmative. This is because a public officer is detained as:-

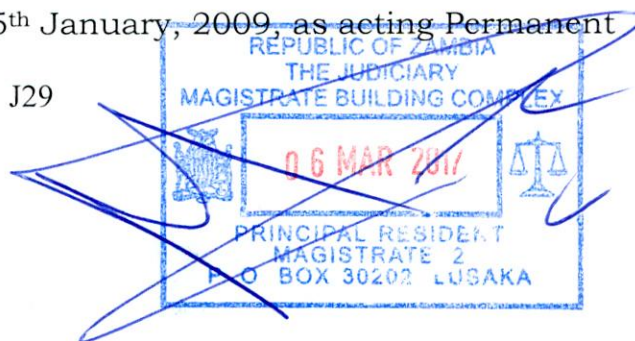
“Any public officer means any person who is employed in the service of a public body. And public body includes the Government, any Ministry and Department of the Government, a local authority, Parastatal board, Council.....” **GRIEVE SIBALE V. ATTORNEY GENERAL (2012)3 ZR 308 AT 310 HOLDING NUMBER 12.**

For the reasons herein given, I am satisfied that the prosecution has succeeded in proving the guilty of accused 1 in count 1 beyond reasonable doubt and I convict her accordingly.

For the convenience sake, I do now turn to address count 3 which also relates to A1.

In respect of count 3, the evidence on record is clear to the effect that A1 was, at the material time, the Acting Permanent Secretary thus controlling officer. It is common cause that A1 had made several and frantic efforts to ensure that the 60% was paid to A2. As the evidence can show, she had meetings held with the Minister and issue of having to pay full amount was never resolved. She wrote a memo to the substantive Permanent Secretary Mr. Joel Ngo lobbying him to make a decision but in vain. This was produced marked P8. In the memo, dated 29th December, 2008, she was referring to the discussion of 27th December, 2008. Thereafter, she, on 5th January, 2009 as acting Permanent

J29



by A2 addressed to her. The remark was; "Principal Accountant process the payment."

This remark in my view, cannot be said to have been seeking advise on the part of A1. This is, in my understanding of it, a pure instruction or directive requiring the Principal Accountant to effect the payments. On P9 (b) she did make the following remark;

"PA supplier has provided a bank statement requesting for the 60% balance. You may consider paying as per attached copy and as instructed by the Permanent Secretary". The foregoing was in my view, written in very plain English. This cannot be said to have been seeking professional advice to the effect that payment would be made correctly. Instead, what PW4 was doing was to ask the Principal Accountant to use her discretion if she so wished based on the presence of the bank guarantee and the instruction by the Permanent Secretary who at the time was A1.

Counsel Katolo submitted that PW4 testified that he was summoned to the Minister's office to explain why the 100% payment had not been effected. This, according to counsel, PW4 was confirming that the Minister was putting pressure for 100% payment because the President of Zambia wanted to launch the hearses. He submitted that this was echoed by DW2 i.e Hon. Kasonso who testified that he was present in the Minister's office when the Minister was directing A1 to effect 100% payment.

The version of the submissions by counsel is partly what PW4 and DW5 said. However, it must be made clear that when summoned by the Minister, PW4 did explain that he was merely following the terms of the contract. In the meantime, A1 said regarding the 60%, she wrote on P9 (b) to say "Principal Accountant process payment" based on the fact that at the time she was

J30



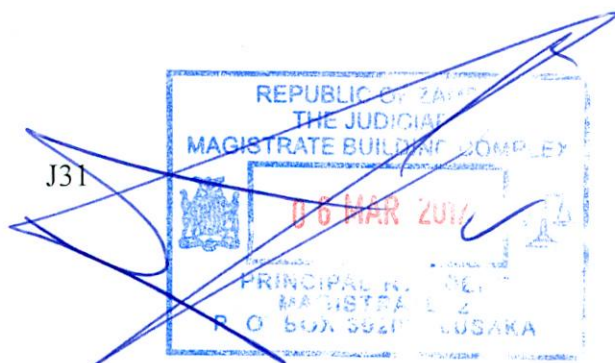
Controlling officer, she added that she was the only one who was authorized to give instructions to all Directors and seniors. When cross examined, A1 said that the Permanent Secretary insisted that contract be followed. She averred that the Minister directed her to pay the 60% based on the bank guarantee. She conceded to the fact that she knew the contractual terms regarding payment but that she did not tell the Minister about it. The question I ask myself is, why was A1 concealing the fact regarding the terms of contract by not telling the Minister whom she alleges was putting pressure on her?. The only logical explanation I find is that she knew that if she did, the Minister would tell her to abide by the contractual terms. For the reasons herein stated, I do find that A1's action in authorizing payment of 60% contrary to the terms of contract was arbitrary. Arbitrary act by A1 has therefore been proved and in my view, A1 should not wonder why she is the only one appearing before court because firstly, the instruction to pay 60% balance disregarding the terms of contract was made by her when she acted as Permanent Secretary. Secondly, she is the only one, at least from the evidence, who is known to have had a borehole sunk at her place and paid for by A2. Thirdly, she is the only one who as already stated in this judgment, was making frantic efforts to pay off the 60% balance without following the terms of contract.

The next issue to be determined is what prejudice if any, the Government of the Republic of Zambia suffered due to A1's arbitrary decision in effecting payments of 60% at once without following the contract.

To answer the above, I found it prudent to define the word prejudice. The Act does not define the word thus, I relied on the definition as contained in

BLACKS LAW DICTIONARY, EIGHTH EDITION 2004 Reprint at page 1218.

The word prejudice is defined as;



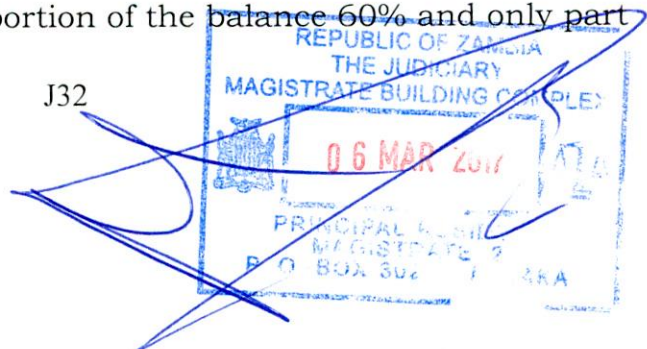
“Damage or detriment to ones legal rights or claims”.

The defence submitted that the state failed to demonstrate or show what prejudice if any the state suffered by reason of the payment having been effected in the manner it was. The reason given was that the 60% payment was based on the bank guarantee.

The foregoing view held by the defence notwithstanding, I do respectfully differ and hold a considered view that A1 did clearly abuse the authority of her office. This is so because firstly, on exhibit P (9) (b), she directed the payment. This directive was made on 5th January, 2009 on P (9) (b), the letter authored to herself by Liang Ge who was Managing Director of A2. The letter was dated 5th January, 2009 and acted upon the same day i.e regarding the directive to process payments. As at 5th January, 2009, the day the directive to pay the 60% was being made, there was no bank guarantee. The bank guarantee, which was produced into evidence as exhibit P (9) (C) is dated 7th January, 2009 and was to expire by 2nd February, 2009. As P9 (C) can show, any demand in respect of the bank guarantee was supposed to reach the bank of China not later than 2nd February, 2009. Thus, I hold the firm view that the Government funds, having been paid out in direct disregard of the contractual terms, did remain unsecured. The hearses had not yet been brought to Zambia. The contract stipulated that 40% was to be paid upon signing of contract, 30% upon proof of shipment documents and 30% upon purchasers receipt of the vehicles.

Clearly, from the foregoing, A1 did act in an arbitrary manner and, the meaning of prejudice being, “damage or detriment to one’s legal rights or claims”, I do entertain a view that the state did suffer prejudice, it had a legal right to remain with its money i. e portion of the balance 60% and only part

J32



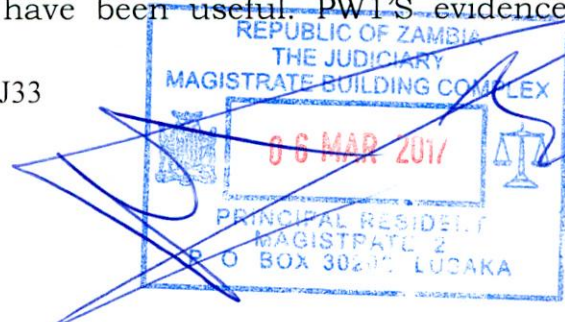
with it as per the provisions of the contract. These contractual terms of payment were well known by A1. The question lingers why her alone seems to have found it, crucial to have to pay off against the terms of contract. As the evidence of PW7 i. e Patrick Chila Chama can show at page 548 of the handwritten record of proceedings, A1 directed the payment of the final 60% balance within ten days of the date of signing of the contract whose terms of payment she elected to ignore. As that was going on, the hearses were not yet brought to Zambia. For the foregoing reasons, I do hold the view that detriment in this regard cannot be viewed purely in the context of actual loss to the Government of the Republic of Zambia but rather, it should be construed to include inter-alia the effect on the legal right over the money which had been paid out and remained unprotected between the time the unlawful payment was made and the delivery of the hearses to the purchaser. When A1 gave the directive to pay, she was a public officer being a Director Local Government Administration in the Ministry of Local Government and Housing.

For the reasons herein given, I have no doubt in my mind that the prosecution has succeeded in proving the guilty of A1 in count 3 beyond reasonable doubt as by law required. I do therefore find her guilty as charged and convict her accordingly.

I now turn to addressing count 2 which involves Top Motors Limited (i.e A2). A2 is facing one count of Corrupt Practices with a public officer by offering to sink a borehole for A1 and paying for the same borehole.

In resolving Count 2, I found the evidence of all the witnesses called by both the prosecution and the defence to have been useful. PW1'S evidence was

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important in that it established that A1, is a Public Officer, for the offence which A2 stands charged to be proved, there must be evidence to show that the person with whom A2 allegedly engaged in corrupt practices was, at the material time, a Public officer. PW1 gave uncontroverted evidence to the effect that A1 worked as Director Local Government Administration at the time.

Coming to PW2, I found the evidence relevant in so far as it confirmed that A2 changed its name from Top motors to Delta Auto. This act, as the Defence correctly submitted, A2 was perfectly entitled to do under the provisions of the Companies Act Chapter 388 of the Laws of Zambia. What I did not find to be correct was the reasons given for the change of name. The reason was being that the company wished to expand its business to include the selling of equipment apart from Motor vehicles. This reason does not satisfy the dictates of company law. This is because under the Company's Act, once incorporated, the application for information cannot, under the companies Act in its present form, be amended as there is no provision for its amendment. However despite the Change of name, Top Motors cannot avoid any obligations it could have incurred before the name change. This is what section 36(5) of the Companies Act Chapter 388 of the Laws of Zambia provides. As such, if A2 is found wanting in this case, it will still be liable albeit now under the name of Delta Auto

As regards PW3 i.e. Mr., Rao, his evidence was material in that he indicated that Mr. Tembo i.e DW3, did go to Zambezi drilling and asked for a quotation for the drilling of a borehole. He confirmed that the borehole was actually drilled and paid for by A2. He did positively identify the quotation, receipt and tax invoice all of which were issued to A2 by Zambezi drilling. While the defence argued and submitted that the borehole was being drilled for Mr. Tembo, the question that lingers in my mind is why was it that the documents relating to the borehole transactions were all, in the name of A2? Defence submitted that P3 was issued to Mr. Tembo. This is not in my view the correct position. This is so because had that been the correct position, P4 and P5

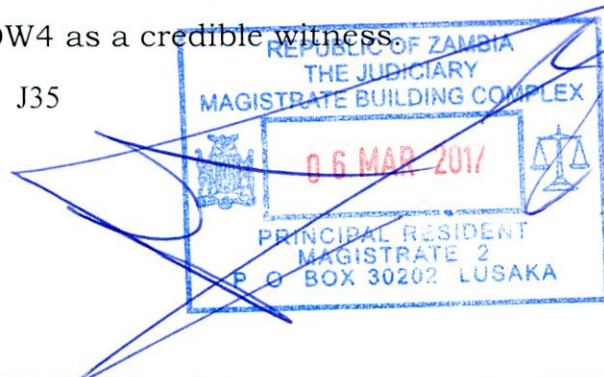


would have been issued in the names of David Tembo and not in the names of A2. A thorough check of the documents therein referred to clearly shows that the client was A2 and not David Tembo. This, in my view, explains why exhibits P3, P4 and P5 were found among other documents of A2 in A2's box file during the investigations by PWS 7 and 8. I therefore do not agree with the defence when it says, the borehole drilling transaction was between A1 and her uncle David Tembo.

Regarding the evidence of PW4, she clearly established that the 60% final payment was authorized by A1 and that, that was at variance with the terms of contract. PW5 who was the substantive PS at the material time confirmed that the payments to A2 were authorized by A1 and that the same was done in disregard of the terms of payments as contained in the contract which contract A1 was not only a signatory to as a witness but was also made aware of by the principal Accountant when she refused to pay the full payment.

As for PW6, it is true that her evidence was a mere narration of the tender procedure which she confirmed was followed. The defence has submitted that A2 never directly dealt with A1 as DW4, Mr. Liang stated in his evidence that he dealt with procurement and that he was only seeing A1 for the first time here at Court when this matter came up thus, there was no way A2 could have paid a reward or inducement to her. I must state here that on this piece of evidence the defence witnesses did contradict themselves. In exhibit P12 at page eight (08), A1 confirmed that she made an appointment to meet Peter Liang Ge. The appointment was made by DW3. A1, on the same page, confirms having actually met DW4 and discussed that issue of the borehole. The meeting was at DW4'S office. At page (09), she stated that she made a verbal agreement that the total cost of K31million would be paid back in installments. With the foregoing in mind, I do find that DW4 was lying when he denied ever having met A1. P12 was a warn and caution statement administered to A1 in the presence of two of her lawyers at the time one of whom was counsel Remy Mainza. I cannot therefore consider DW4 as a credible witness.

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In P14, the Zambia National tender Board raised concerns to the effect that;

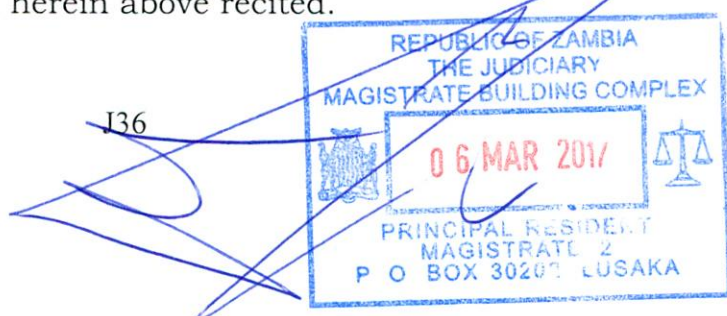
1. The vehicles had not been tested in Zambia and hence it would not be prudent to invest public funds into procuring one hundred vehicles of a make that had not been tested.
2. The manufacturer of the vehicles had not supplied vehicles to Zambia before.
3. The evaluation committee had considered bidders who had offered superior specifications non responsive.

To the foregoing, the Ministry of Local Government and housing responded through A1 who was delegation leader as follows:

“The Ministry of Local Government and Housing had in the recent past procured one hundred and fifty vehicles from the same manufacturers, through Top Motors Limited. The vehicles have been distributed to all the one hundred and fifty constituencies in the Country. These vehicles were procured for all the districts in the Country. The make of vehicles was Yuejin trucks. The trucks are labeled make Zambia clean and Healthy Campaign. They are two (2) Tone trucks.”

With regard to the one hundred (100) hearses, the Ministry of Local Government and Housing stated that the vehicles had met all the minimum specifications set by the ministry. The others were considered non responsive because the extra features were not necessary. For example, the five doors were not required and the hearse only needed a back door for the coffin and two front doors, one for the driver and one for the passenger to accompany the coffin. No other people will be allowed in the hearse.

The foregoing responses are at page 2 of exhibit P14 and given by A1. A1 did in fact sign at page 3 of P14. Meanwhile, as the evidence on record can show, under cross examination, A1 conceded to the fact that she lied when she gave the report contained in P14 and herein above recited.



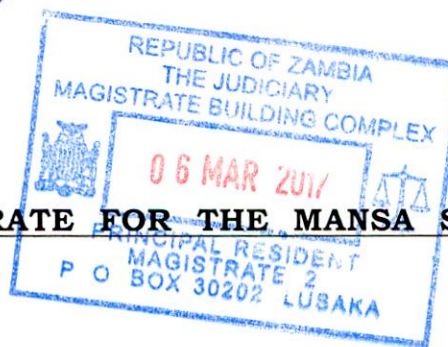
In the light of the foregoing, I do find the evidence of the witnesses called by the prosecution as having been more credible than the version of the defence. The lies presented by A1 to ZNTB can, in my view, only be by a person who had a personal agenda to fulfill. That agenda in my view was to ensure that A2 get awarded the contract at all cost. As already stated in this judgment A1's maneuvers could only be attributed to the borehole A2 paid for her. This is the same lady i.e A1 who ensured that A2 got paid full amount in direct disregard of the terms of contract. Based on the evidence on record, and the reasons herein given, I find that prosecution has proved its case against A2 beyond reasonable doubt as by Law required. I just can't comprehend why A2 was paying for A1's borehole if it were not for the favours A2 was to receive and did in fact receive from A1 in her Official capacity. I do therefore find A2 guilty as charged and I convict it accordingly.

DELIVER IN OPEN COURT THIS 6TH DAY OF MARCH, 2017 AT LUSAKA.

HON P.B. MWIINGA

**PRINCIPAL RESIDENT MAGISTRATE FOR THE MANSA SUBORDINATE
COURT SITTING AT LUSAKA**

06/03/2017



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