TELECEL ZIMBABWE (PVT) LTD
versus
THE STATE

HIGH COURT OF ZIMBABWE
OMERJEE AND KUDYA JJ
HARARE, 11 and 31 May 2006

Criminal Appeal

Mr *Drury,* for the appellant
Mr *Shava,* for the respondent

KUDYA J: This is an appeal against the mandatory minimum sentence of $374 251 198-00, which was equal to the value of the foreign currency that the appellant dealt in without the approval of the regulatory authority, that was imposed by the Regional Magistrate sitting at Harare on 1 April 2004. This sentence was predicated on her finding that there were no "special reasons", in this matter, for the imposition of a lesser fine.

On 4 March 2004, the appellant (Telecel) pleaded guilty to and was duly convicted of 60 counts of purchasing foreign currency from unauthorised dealers at parallel market rates without Exchange Control authority in contravention of section 5(1)(a)(i) of the Exchange Control Act [*Chapter 22:05*] as read with section 4(1)(a)(i) of the Exchange Control regulations SI 109/96. The transactions took place between 20 October 2000 and 7 January 2004 and involved an outlay of $374 251 198.00. At the hearing it was represented by its Managing Director Mr Antony John Carter (Carter) pursuant to a resolution of its Board of Directors of 20 February 2004.

The statement of agreed facts was bereft of any details on the domicile and destination of the foreign currency at the stage that it was in the hands of the sellers and before it was purchased by Telecel.

THE EVIDENCE ON SPECIAL REASONS

The evidence on special reasons was led by Carter. The respondent sought to discredit Carter's testimony through the evidence of Superintendent Joseph Tani and Mr Joseph Jagada, a Chief Law Officer in the Economic section of the Attorney-General's Office.

Carter's testimony went uncontroverted in most respects. He highlighted Telecel's profile. It was established in Zimbabwe in 1998 with a capital injection of US$44 million. 40% of its shareholding is held by local investors while 60% remains in the hands of foreigners. At the material time it had a staff complement of 140 and a substantial, though unquantified, number of downstream dependants who were engaged in selling recharge cards and operating public pay phones. It had 120 000 subscribers, and contributed $1 billion in tax revenues per month with 3½ percentum of its turnover going to POTRAZ, the telephone regulator, as fees in an amount in excess of $200 million every month.

In a bid to provide a necessary and efficient service it imported all its network equipment from Siemens Atea of Belgium. From its inception its appetite for foreign currency was known by the Reserve Bank of Zimbabwe (RBZ) in its capacity as the Exchange Control Authority and by the Zimbabwe Investment Centre. While its founding Managing Director was an expatriate, all its other managerial and technical staff were locals.

In mid 2000 it began to experience major difficulties in accessing foreign currency from its bankers to pay off the Siemens loan and to service Siemens maintenance fees; purchase more equipment and pay management fees. He produced Exhibit '3' a schedule with attachments showing the payments that it made

in honour of its international contractual obligations. The schedule's authenticity was confirmed by invoices from its foreign suppliers.

US$686,000 was paid to Siemens to offset the loan representing 3,5 million deutschmarks, which were authorised by the RBZ on 6 April 2000 as shown in Exhibit '4' but could not be paid then due to the unavailability of foreign currency. Telecel owed: US$74 500 to PSP Canada Inc on 27 March 2001; for 5 sets of recharge cards; US$36 200 to Psitek (Pty) Ltd in Cape Town South Africa on 4 May 2001 for 50 GSM payphones; South African R318 169 to Mithratech SA (Pty) Ltd on 18 April 2002 for 10 000 sim cards; US$40 400 to Global Communications for two Siemens base stations incurred on 8 October 2002 and 27 November 2002 respectively; SAR 61000 to Broadland Investors for 40 000 blank compact discs and 2 printers incurred on 5 November 2002 and 26 November 2002; US$235 045 to Converse of Tel Aviv Israel for undisclosed equipment, US$93 150 to Schlumberger for sim cards, incurred on 25 November 2002. There were other amounts which were listed but had no supporting vouchers, like R257 000 and US$170 000 purportedly paid to Telecel International representing 2% of the appellant's turnover which was due to it as management fees.

The appellant negotiated with its foreign shareholders who agreed to reduce fees due to them of US$3.4 million and with Siemens who reduced its annual entitlement to maintenance fees by 250 000 euros. It also contracted a local company to produce recharge cards for its customers thus saving US$70 000 per month. It carried out all these measures in a bid to mitigate the impact of the shortage of foreign currency, endemic in the official market, on its operations.

In addition Carter testified on the foreign currency drought experienced in the country during the period that Telecel committed the 60 offences in question. He produced cuttings of an article in the Zimbabwe Independent of 28 June 2002

entitled 'Forex rates skyrocket' which made reference to 'run away parallel market rates' and to a press release of 1 July 2002 by National Foods Limited, a public company quoted on the local bourse which explained that salt was in short supply in the market because price controls had impacted negatively on its ability to remain viable as 'foreign currency to pay for salt imports has only been available at current parallel market exchange rates as there is no currency available at the official rate in the market', the Daily News of 8 July 2002 where unnamed exporters complained that the viability of their operations were being negatively affected by the fact that they were sourcing foreign currency on the black market while their remittances were pegged at the official rate. He also referred to the commentary of the editor of the Herald of 28 November 2002 entitled 'current forex woes on way out' in which he praised the measures that had been introduced by the Government to bring sanity onto the foreign exchange market to plug the loopholes as reflected by the sharp drop in parallel market rates and the recognition therein that 80% of all foreign currency transactions were being carried out in that market. The commentary also gave the parallel market rates for the US dollar and pound sterling. Lastly he produced a cutting from the Business Herald of 18 February 2004 which was entitled 'Bank chiefs warned: RBZ boss reads riot act to financial institutions." The article alleged that 15 banks had been penalized for fuelling the parallel market but as a gesture of goodwill the governor had lifted and refunded the penalties in exchange for discipline in the financial sector.

I recognize that these articles were merely the opinions of the writers of those articles which opinions could not be subjected to cross-examination to establish their veracity. They were the type of hearsay testimony contemplated by section 334(3)(a)(ii) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*] as admissible on the basis that through its failure to challenge them the respondent was

deemed to have consented to their production into evidence. They made the point, however, that there existed in the country at the material time a creature called the parallel market whose rates were ascertainable. Further, those articles poignantly demonstrated the large existence of the parallel market which appeared to be overshadowing the official market.

The existence of the shadowy and secretive parallel market at the time cannot be gainsaid. In *Echodelta Limited v Kerr and Downey Safaris (Pvt) Ltd* SMITH J, as he then was, gave judicial recognition of the existence of the parallel market for forex which had been very volatile over the last 15 months as at 28 February 2002. Again in *Meristem Investments (Pvt) Ltd, t/a as Micromat v NMB Bank Ltd* HH 211/02 he recognised the pervasive nature of the parallel market at page 3 to 4 of that cyclostyled judgment, a theme he reverted to in *Stuart Annadale v Material Finance (Pvt) Ltd* HH 213/2002 at page 6 and 11 of that judgment.

It was Carter's further testimony that the drought of foreign currency on the official market drove Telecel to buy it on the parallel market out of necessity and not out of a conscientious effort to defy the regulatory authority or a desire to breach the exchange control regulations. It kept official records of all the transactions, which posed no difficulties for the police when they descended on it. Business survival through acquisition of equipment and the need to service its customers (subscribers) and international loan obligations, drove it to the more expensive parallel market; and as soon as the official market introduced a viable alternative through the foreign currency auction system in mid January 2004, Telecel ceased operating in the parallel market. It would not have survived but for dabbling in the parallel market.

The cross-examination that he was subjected to revealed that Telecel had paid two of its local directors in foreign currency. Superintendent Tani could not shed light as to when this had occurred and as to whether they were paid from funds

purchased in any one of the 60 counts in question. Mr Jagada's testimony related in the main to the plea bargaining events that occurred in his office. Both these two witnesses' evidence did not discredit Carter's testimony that all the foreign currency was purchased outside Zimbabwe and was paid into Telecel's INVIK foreign currency account in Luxembourg. It was from that account that it found its way into the hands of Telecel's creditors. Indeed Superintendent Tani could not proffer any one business enterprise, even those which had flighted press releases on their involvement in the parallel market, which had been prosecuted for purchasing foreign currency on that illegal market.

In the final analysis Carter's evidence did demonstrate on a balance of probabilities that Telecel breached the law on 60 occasions by dealing in foreign currency transactions on the parallel market without Exchange Control approval. It used that foreign currency to pay for its equipment, foreign loan obligations and management fees which it had no choice but to pay in forex. It played the parallel market in order to survive, to remain in business and to ensure the livelihood of its employees, both direct and indirect and its subscribers.

THE TRIAL MAGISTRATE'S FINDINGS

The *court aquo* found no "special reasons in the particular case" before it, which would result in the imposition of a fine of not less than the value of the currency involved. It took firstly the view that Telecel had led no evidence to show that it tried to source foreign currency through authorised dealers and was unsuccessful in that endeavour, secondly the learned trial magistrate took the view that as the company knew very well that it was transgressing the exchange control regulations, it could not hide behind the façade of the large crowd of business corporations that were also doing so to justify the morality of its sixty acts. The trial

court found those actions a direct and total disregard of the law which could not under any circumstances be dignified by the appellation "special circumstances" especially as both *Exchodeltas,* and *Annandell's* cases, *supra*, did not even apply the parallel rate.

On appeal, Mr *Drury* for the appellant attacked the trial magistrate's findings while Mr *Shava* for the respondent supported them.

THE LAW

In *S v Stouyannides* 1984(1) ZLR 144 at 152 C-D, GUBBAY JA, as he then was, stated:

> "Where a finding on whether special reasons exist or not is left by the lawmaker to the opinion of the trial court, in the absence of a misdirection on the facts upon which that opinion is based, the power of an appeal court to overrule it is curtailed. It will only interfere with the opinion of the trial court if satisfied that the facts do not reasonably justify it. It will not interfere merely because it might have formed a different opinion on the facts."

The sole issue for determination in this appeal is therefore whether or not the trial magistrate misdirected herself when she ruled that there were no special reasons in this matter.

The law on special reasons has been laid out in this jurisdiction in a variety of cases, both in the Supreme and this Court. In *S v Vera* 1976(2) RLR 228 at 232 McDONALD AJP dealt with the meaning of special circumstances under the Law and Order Maintenance Act and stated:

> "The court, as the use of the plural in the words 'special circumstances' clearly implies may take into account, in arriving at its decision, the cumulative effect of a number of circumstances. This, too, involves a value judgment. But the use of the word 'special' is not to be ignored. The clear intention of the legislature is that the circumstances should be out of the ordinary, either in their degree or their nature, and that the court should not accept all mitigating

> circumstances as constituting 'special circumstances'. A special circumstance will always be a mitigating circumstance but every mitigating circumstance is certainly not a special circumstance within the meaning of the section."

In *S v Chidziva*, SC 96/82, a contravention of the Precious Stones Act as replaced by Act 1/82 which introduced "special reasons in the particular case" too, GEORGES JA noted that 'special circumstances' and 'special reasons' bore the same meaning. He stated:

> "Although the Act used the word "reasons" it would appear that the factors to be taken into consideration in considering what are 'special circumstances' would not differ from those to be taken into account in considering what are 'special reasons'.

In *S v Holmes* 1982(2) ZLR at 271A (which was quoted with approval by GUBBAY JA in *Stouyannides* case *supra* at 152H-153A) PITTMAN J held that:

> "'special reasons' in section 5(3a), [the precursor to section 5(4)] thus involve an inquiry whether the facts of the case reveal that the moral blameworthiness of the convicted person is less than normal for reasons extraordinary in nature or degree, and thus justify a reduction of the normal punishment."

A debate ensued as to whether the phrase "special reasons in the particular case" encompassed unusual factors peculiar to the offence only, excluding those unusual factors peculiar to the offender (the narrow view) or whether it encompassed unusual factors peculiar to both the offence and the offender (the wider view).

In *Da Costa Silva v R* 1956 R & N 369 at 372 BEADLE J appeared to prefer the wider view which position was also taken by PITTMAN J in *Holmes* case, *supra* as did SQUIRES J in *S v Chisiwa* 1981 ZLR 666 at 671B. DUMBUTSHENA J, however preferred the narrow view in *S v Rawstron* 198 (2) ZLR 221. In *Trucking and Construction (Pvt) Ltd and Ano v S* HH 195/86 SANSOLE J preferred the wider view. He stated at page 7:

> "Speaking for myself, it seems to me that save in those situations where the section or the Act in question contains a definition of 'special reasons' or 'special circumstances' and that definition specifically confines the determination of such reasons or circumstances to the commission of the offence to the exclusion of the offender the broad approach is preferable. It clearly accords with the philosophy of our jurisprudence on sentencing. Thus, bearing in mind this distinction, the conflict between the two approaches regarding the definition of special reasons or special circumstances becomes more apparent than real." (See also *EBRAHIM J'S* sentiments to the same effect in *S v Mbewe* 1988(1) ZLR 7 at 12H-13A)

It seems to me that the wider view best captures the intention of the legislature. 'Case' in my view covers the triad of the offender, the offence and the interests of society, the factors which any sentencer must always bear in mind, to arrive at an appropriate sentence.

While a plethora of cases have defined special reasons, it seems to me that a clearer definition was provided in *Mbewe's* case, *supra* at page 13C-D. It reads:

> "It is apparent that mitigating factors such as 'good character' or "particular hardship" which are of general application, cannot be taken as 'special circumstances'. Neither, it would seem, would contrition as evidenced by a plea of guilty to the offence or co-operation on the part of the accused constitute special reasons. However, where for example the accused was out of necessity compelled by circumstances to commit an offence, e.g. forced to drive whilst drunk because of urgent medical necessity, or was *bona fide* ignorant of some statutory provision of the law, such factors could constitute not only mitigating factors but 'special circumstances' in the case. The above are offered merely as illustrations and are not intended as a closed list."

It is apparent from decided cases therefore that the question of special reasons is dependent on the particular facts of the matter before the court. These factors must be abnormal, unusual; extraordinary in the sense approximating to a choice between life and death, that is, that the accused person is left with no choice but to break the law in order to save his or her life or the life of some other person.

Another factor has to do with the technical breaking of the law as happened in *S v Greatermans Stores (Rhodesia) Ltd* 1974(1) RLR 292 in the sense that the accused breaks the shell but not the essence of law. In other words the breach of the law is an apparent illusion as opposed to an actual reality.

THE MISDIRECTION

Mr *Drury* submitted that the trial magistrate misdirected herself by failing to consider that the totality of the evidence laid out before her constituted 'special reasons'. In her findings she accepted that the appellant was experiencing hardships. She also accepted that other business players were also sourcing foreign currency on the parallel market. She also found as an indisputable fact, a fact conceded to by Mr *Drury* on appeal, that the appellant had not provided any documentary proof that it had applied for foreign currency from the official market and had failed to access it. She did not agree that the appellant was genuinely ignorant of the statutory provisions that it breached nor did she accept that this was a technical breach of these provisions.

These findings were in my view correct. They were factual. What was impeached on appeal was the interpretation she gave to them. Her interpretation was however supported by Mr *Shava*. I agree with Mr *Shava*, that the evidence led at the trial clearly demonstrated that the appellant, through the letter of 6 April 2000 from RBZ, knew that it was mandatory that it seeks authority from the central bank to purchase foreign currency, from authorised dealers, for its legitimate needs. While it recorded the 60 transactions, *in casu* this was not done with a view to assist either the regulating authority or law enforcement agencies, but to comply with its own internal accounting and information processes. After all parallel marketeers were not openly advertising their places of operation and rates on billboards and the

media as authorised dealers were doing. Their operations must have been shrouded in secrecy and were hidden under cover of other legitimate business operations, as some of the sellers appear to be legitimate business concerns involved in other fields of endeavour whose core business is divorced from selling foreign currency.

I also agree with the trial magistrate's finding that this was not a technical breach of the law. In my view, the appellant's actions in purchasing foreign currency from unauthorised dealers was the kernel, the substance of the offence. It was not the shell, the form of the offence. It is inconceivable that the Exchange Control Authority would have breached its own laws by allowing the appellant to purchase foreign currency from unauthorised dealers at parallel rates market if the appellant had applied. The trial magistrate was therefore correct for that reason to hold that it was not a technical breach of the law.

She further ruled that the fact that other business players were engaged in the parallel market was not a special reason. It does not seem to me that that conclusion standing on its own, can possibly be impeached. The appellant, however, did not adduce this evidence of what other corporates were doing in order to demonstrate that it was merely following the crowd. Nor did counsel for the appellant cite and produce the judgments of SMITH J and his opinions and comments thereon in a bid to show that it did not break the law. If, those were the appellant's intentions then it would have pleaded not guilty. The appellant pleaded guilty and produced the documents it did for the purpose of setting up the easel on which it would paint the grim and graphic picture of the economic environment in which it was operating in. It was not necessary for it to produce documentation of its own failed applications in order to demonstrate that there was an acute drought of foreign currency on the official market. It let the picture tell the tale, more effectively in fact, than would have been done by any documented words.

It is my view that the trial magistrate failed to read and therefore interpret the message that that picture conveyed. That picture showed that there was a palpable shortage of foreign currency on the official market in the country. Further that this shortage was abnormal as 80% of the available foreign currency was being traded on the illegal parallel market. It demonstrated that it was public knowledge as expressed in the media that the parallel market was blooming while the official market was shrinking. Notwithstanding this public knowledge, it appeared that law enforcement agencies and the regulatory authority were incapable of stamping it out. It further showed that while it was illegal, this illegality was sanitized and whitewashed by referring to it as the parallel market instead of the black market thus giving it an aura of legitimacy.

Faced with this hostile environment, the appellant had two choices, either it had to behave in an ethical manner, and search for foreign currency on the official market where it was unavailable, and commit corporate suicide or it had to enter the parallel market and survive. It chose life instead of death.

It tried to mitigate its exposure to its foreign currency denominated obligations by pursuing negotiations with its shareholders to forego some of their entitlements to management fees and it contracted a locally based company to produce recharge cards for it. This was, however, inadequate to satisfy its foreign obligations.

In any event it would not make business sense for it to purchase foreign currency on the parallel market which was not only illegal but was also expensive and risky but for the fact that it could not be found on the legal, cheaper and clean official market. The appellant did not utilize the foreign currency to purchase trivial trinkets or luxury goods but it used it to purchase capital equipment for expanding and enhancing its business operations and to meet its foreign contractual obligations

which enabled it to retain its staff, subscribers and contributed to government revenues. The country thus benefited from the foreign currency which might otherwise never have found its way into this country.

The operating economic environment, the use to which the foreign currency that was purchased was put to and the motive(s) that drove the appellant to the parallel market cumulatively show the existence of abnormal, unusual, peculiar and extraordinary circumstances which drove the appellant to break the law. For it, it was clearly a matter of life and death. It was necessary for its survival to purchase foreign currency from unauthorised dealers without Exchange Control authority at parallel market rates. All these constitute 'special reasons.'

I agree with Mr *Drury,* that faced with the evidence adduced by the appellant which was mostly uncontroverted, the court *a quo* misdirected itself in holding that there were no special reasons. That finding is set aside.

SENTENCE

The effect of finding special circumstances is that we are at large on sentence. The appellant is therefore liable to a sentence which is less than the value of the currency that it purchased.

In sentencing the appellant regard is had to the plea of guilty and its beneficial effects on the speed and efficient running of the administration of justice. The appellant was a first offender. It cooperated with the police. The special reasons found lessen its moral blameworthiness and are therefore mitigatory.

I have not lost sight of the aggravating features of the repeated violations of the exchange control regulations on 60 occasions. In *Greatermans Stores*, case *supra* BEADLE CJ emphasised that offences involving contraventions of the Exchange

Control Regulations involve the economic security of the State and quoted with approval Lord Goddard in *Pickett v Fesq* 1949(2) All ER 705 at 707G that:

> "If a person commits an offence against this statute, a statute for the breach of provisions of which very heavy penalties have been provided by Parliament, the offence is serious. It is almost impossible to suppose that there could be circumstances which would justify a court in treating such an offence as trivial."

Mr *Drury* sought to rely on *Greatermans* case for the submission that a relatively nominal fine be imposed and that all the counts be treated as one for sentence. In that case at page 301D it was emphasised that, "the sentence imposed in this case is no precedent for sentences in cases where the facts are different." In that case it was held that the appellant *bona fide* believed that no one in authority objected to what it was doing as the Department of Commerce permitted trafficking in import permits, while in the present matter purchasing foreign currency from unauthorised dealers was not permitted. Further in that case it was conceded and was accepted by the appeal court that the breach was of a technical nature. It was not so in the present matter. The effect of the appellant's actions was to encourage the sellers to stay away from the official market which further reinforced shortages on that market.

In sentencing the appellant I will treat all counts as one for sentence as the manner of execution of the offences and the motive for doing so was the same in all the 60 counts. I do not accept that a nominal fine is called for as I believe that I would be setting the wrong precedent to other persons who found and will find themselves in the same shoes as the appellant.

The appellant is accordingly sentenced to pay a fine of $200 million.

DISPOSITION

In the result we make the following order:

It is ordered that:

1. The finding that there are no special reasons is set aside and is substituted by a finding that special reasons exist. These are that the appellant acted out of economic necessity for business survival and used the foreign currency for the benefit of the country as a whole.
2. The sentence imposed by the trial magistrate is set aside and is substituted by one of a fine of $200 million or in default of payment a warrant of execution against the company's property in that value be issued in the manner contemplated by section 348 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

OMERJEE J, I agree:…….

Messrs Gollop and Blank, appellant's legal practitioners

Attorney-General's Office, respondent's legal practitioners