GIL E.C. v STATE

2011 SCJ 278

IN THE SUPREME COURT OF MAURITIUS

In the matter of:-
SCR 8050

EDDIE CONDE GIL

APPELLANT

v.

THE STATE

RESPONDENT

AND

In the matter of:-
SCR 8049

ELEZABETH AQUINO SAMSON

APPELLANT

v.

THE STATE

AND

RESPONDENT

In the matter of:-
SCR 8056

ANDRE ANTHONY LATEGAN

APPELLANT

v.

THE STATE

RESPONDENT

JUDGMENT

The appellants duly represented by counsel stood trial before the Intermediate Court on a joint criminal charge of attempt at swindling in breach of section 330 of the Criminal Code read with section 2 of the Interpretation and General Clauses Act. The learned Magistrate, in an elaborate judgment having weighed the evidence and examined the law applicable, found them guilty. She sentenced each to undergo 3 years' penal servitude. The appellants have appealed against that decision. Each has raised his or her own grounds of appeal. The three appeals were heard

together. We shall deliver one judgment, a copy of which will be filed in each case. We shall refer to the appellants by their surnames for ease of reference.

THE DEFENCE CASE

The Defence of Appellant Gill

Appellant Gil gave his version to the Police. As per his out-of-court statement, he is a Filipino and holds a PHD in banking and finance. He had set up a business of real estate and merchandising by the name of Goldfield World Wide Company of which he is the President/Chairman and his sister, Elezabeth Samson (Appellant Samson) is the Vice-President and Treasurer. It is based in Ras Al Khaimah, Dubai. Here he made acquaintance with a South African by the name of Andre Anthony Lategan (Appellant Lategan) who has been working in Philippines for over 9 years. One day, Appellant Lategan came with a proposal for them to set up a joint venture for a biogas and milling plant in Mauritius. As Appellant Gill had funds at Société Générale, Paris, he offered to give a proof of funds letter to Appellant Lategan on a representation by the latter that the funding bank in Mauritius had agreed to participate in the funding of the projects. Appellant Gil, thereafter, obtained a proof of funds letter from Société Générale, Paris, which came on his personal as opposed to the company e-mail. (Document E refers, for copy of which, see below). His company paid for the group of three to come to Mauritius for meetings scheduled with other players for the purpose. The group included Appellant Lategan's wife, Rebecca. They arrived on 25 April 2010, stayed at Four Seasons Hotel, Bel Air, and were introduced the next day to certain promoters, two of them being Engineers. In the afternoon, they were taken to the Investec Bank (Mauritius) Ltd. They opened personal accounts so that they might make use of same for disbursement inasmuch as the company on whose behalf they were acting, the Mubarak Fund, a humanitarian NGO, was yet to be registered in Mauritius. He maintained that he had 10 billion Euros as deposit at the Société Générale, Paris. He also maintained that the proof of funds paper was genuine and authentic.

The Defence of Appellant Samson

Appellant Samson in her statement to the Police denied that she had anything to do with the proof of funds letter: Document E. She is a business Consultant for financing projects. She has

a company, Treasureland Limited Free Zone LLC, in United Arab Emirates She came from Thailand to Dubai about one year ago. It is here that she met Appellant Lategan who, as a developer, called on her to develop a humanitarian project with the 200,000 hectares of land given by the government in Ras Al Khaimah, Dubai, to her company, Treasureland Ltd FZ, LLC, for infrastructural development with Housing, Electricity, Water, Roads etc. She knows Rebecca, the wife of Appellant Lategan. Appellant Samson stated that she has a family and she moves around socially with her husband, her children and grandchildren in Dubai. Her version is that she happened to be in Mauritius invited by Appellant Lategan, basically on a reconnaissance mission, to see whether she could start a business here. On her arrival date, 25 April, as well as the next, she met a couple of South Africans in Mauritius. They looked for a place to rent and then accompanied the two Appellants with Mrs Lategan to the bank where after some discussion and sharing of information, each filled in a form to open a bank account in his or her personal name.

She denied that there was any proof of fund document used in the meeting. She agreed that she is the Vice President of Goldfield Worldwide Ltd but denied that the company has any dealings with Société Générale, Paris. Her office address is Al Hamra Marine Yacht Club in Al Khaimah. At the hotel, they produced to her a document on which they asked for €100,000 for a project of Serendipity. She declined.

She denied that on 18 April 2010 when she was in company of Appellant Gill, the latter had taken out the proof of funds letter which he had handed over to her which she, in turn, had handed over to Appellant Lategan with the words: “You will want to kiss the Chairman now!” She stated that she had come across that document (Document E) in her e-mail from her private bank Société Générale, Paris. She confirmed the content of what the document represented. Goldfield does have a bank account at the Société Générale Paris. She also denied that there was any discussion regarding a loan of 20m USD with Investec Bank and she was ever involved in it.

The Defence of Appellant Lategan

Appellant Lategan in his statement to the Police stated that he is a South African, a Chartered Accountant working in Dubai. He met Don Wilmans, a professional Architect and an expert in IT who was setting up a wind-farm project in Western Cape. He offered to look for some potential investors for his renewable energy projects. His wife who runs an Architecture and Interior

Design practice in Dubai has a Philippines Manager who introduced him to Appellants Gill and Samson. It is through them that he was introduced to Desmond Magua to discuss a project, Thuthuka by name, set up by Don Wilmans in Mauritius. To verify the credentials of investors, Appellant Lategan asked to be issued a proof of funds which Appellants Gill and Samson gave him on 18 April. He e-mailed it to Desmond Magua who made no comment thereon. The three appellants and Lategan's wife reached Mauritius on 25 April. Desmond Magua, Don Wilmans and John Coetzee were already here days earlier. After some scheduled business meetings on arrival day, they met Mr Mc Enzie, the CEO of Investec Bank on 26 April. At that meeting, the question arose as to the proof of fund letter. His version is that Appellant Gill was unwilling to say anything about it. As far as he is concerned, he stated that it could be verified on a bank to bank basis. The bank invited them to open an account. They were given information pack and forms to fill, which each did but for his name and signature. He denied that it was he who had arranged the meeting. He stated it was Desmond Magua who had done so. He denied having made a request for 10 billion Euros. The document was not a bank guarantee. The meeting for him was a mere preliminary session to see if Investec Bank wanted to be invited into their venture.

THE PROSECUTION CASE

The Prosecution led evidence to the following effect. On 23 April 2010, one Desmond Magua, originally working at the Investec Bank but at the material time working on his own and acting as an intermediary of the three Appellants gave Document E as a proof of funds letter to the CEO of Investec Bank, Mr Mc Enzie, a personal friend of Desmond Magua. The CEO gave this to Mr Duchenne, the Investec Bank Money Laundering Reporting Officer whose responsibility was to carry out a due diligence exercise which he did on the very same day. He learned from Société Générale Paris that Document E was fake. Investec Bank took it as a Suspicious Transaction and reported the matter to the FIU. Investec Bank also obtained legal advice to report the matter to the Police which advised the bank to proceed with "the meeting" with the persons concerned. The three appellants and the wife of Appellant Lategan arrived in Mauritius on 25 April 2010. They met some of the potential partners for discussion on their projects that evening and some others the next day as per their established programme of visit. They were then invited and attended the meeting with Investec Bank of 26 April, which was unscheduled.

The prosecution also called the representative of Société Générale, Paris, witness Garcin, who stated that Document E did not emanate from Société Générale, Paris even if the two persons who have supposedly signed it do work at the bank. He also added that he is familiar with their signatures and can state that the ones at the foot of document E are not theirs. He gave a number of other reasons for which he stated the letter of reference was fake. The FSL report was to the same effect.

The authority of Mr Garcin to give evidence on behalf of Société Générale, Paris, was challenged by the defence and the findings of Mrs Mohungoo were equally challenged by the defence. We think it unnecessary, for the purposes of this case, to decide these issues.

It also came out in evidence adduced by Mrs Vaudin that the persons who were present at the meeting of 26 April were herself and Mc Enzie, the three appellants representing Mubarak Fund, Mr Desmond Magua and two representatives of the Thuthuka Group as well as the wife of Appellant Lategan. It is Mrs Vaudin who gave evidence of what happened at the meeting.

Learned counsel submitted that the prosecution was successful in proving, and the learned magistrate correct in concluding, that an attempt at swindling has been committed by the three appellants on the facts. To learned counsel, the *commencement d'exécution* started when they set out from Saudi Arabia with all their papers for the project and came to Mauritius for funding based on a fake proof of funds which was submitted to Investec Bank through Desmond Magua on 23 April, followed by a meeting with the officials of Investec Bank on 26 April 2010 to obtain funds on behalf of Mubarak Fund payable into their personal accounts for which they had put in applications, pending the registration of Mubarak Fund.

When questioned about the security, they referred to their bank account in the name of Goldfield Worldwide Ltd. existing at Société Générale, Paris. Thereupon, Mc Enzie inquired from Appellant Lategan whether Appellant Gill and Appellant Samson were the authorized signatories of the bank account shown on Document E. Both Appellant Samson and Appellant Lategan replied in the affirmative: Appellant Gill by a nod and Appellant Lategan by an oral confirmation that the funds were good, clean and available. Appellant Samson remarked that she knew the bank was going to ask such a question. Appellant Lategan further added that the bank was only doing its job. When queried as to the source, Appellant Lategan retorted that it was none of the business of the bank. Appellant Lategan told the bank that they were leaving

the country and they needed an answer whereupon the bank responded that it needed a credit check and would revert to them in due course.

The defence also adduced evidence by a retired banker of some experience in the field, witness Maphosa, who basically concluded that Document E was not worth the paper it was written on and that had it been for him, he would have thrown it in the bin.

Appellant Lategan deponed to support his story given to the Police. He denied that he knew anything about the spurious nature of Document E which he passed on to Desmond Magua after it had been handed over to him by the other two appellants on 18 April 2010. He spoke of his good faith in that he had acted as an unsuspecting innocent intermediary where even Desmond Magua, a person knowledgeable in banking services of this nature, had raised no comments upon receiving it. He trusted the two appellants who he saw had a religious background, were interested in humanitarian projects and with whom he had attended prayers. He spoke of the low key role he had played at the meeting, one not called by them but by the bank, of its informal character and short duration where each was offered information packs and made to fill forms to open bank accounts in their individual names.

After analyzing the evidence and the law under which they were charged, the learned Magistrate concluded that the three appellants were guilty of attempt at swindling USD20m from Investec Bank.

The grounds of appeal of Appellant Gill add up to 28 grounds and those of Appellant Samson, equally. The grounds of Appellant Lategan add up to 31. Learned counsel for the appellants rightly avoided burdening the appeal with side-issues in many of the grounds and focused on the essentials.

THE APPEAL

Appeal of Appellant Gil and Appellant Samson

The essentials of the appeal of both Appellant Gill and Samson are to be found in Ground G, Ground M and N of the First Ground of Appeal and Ground (a) coupled with Ground (e) and ground (c) of the Second Additional Grounds of Appeal. They read as follows:

GROUNDS G, M AND N OF THE FIRST GROUND OF APPEAL

G. The Learned magistrate was wrong to allow Mr Edouard Garcin, to give evidence on behalf of foreign Bank when he was not duly empowered to do so.

M. The police failed to enquire fully into the case in that statements were not recorded from alleged promoters of the Mubarak Fund who, according to the evidence on record, had played important roles in the whole matter – thus denying the appellant a fair trial.

N. By organizing the meeting of 26th of April 2010 Investec bank acting on the advice of the police an entrapment of the all the accused was committed. For the reason the conviction should be quashed.

GROUNDS (a) and (e) and (c) OF THE SECOND GROUND OF APPEAL

(a) *The Prosecution failed to prove any "mise-en-scène" by the accused [appellant now].*

(c) On the strength of evidence on record the learned magistrate should have "proprio motu" found that there was an abuse of process and should have stayed the proceedings.

(e) The requisite "mens rea" on the part of the appellant and the other accused is absent and the learned magistrate had evidence on record to come to the conclusion that:-

(i) The idea of proceeding to the Investec Bank was not that of the accused.

(ii) There is not any mention of Mubarak Fund on Doc E. which was not addressed to Investec Bank;

(iii) It was Mr Desmond Magua who decided on his own to approach the Investec Bank for which he has previously worked and it was he who caused the appellant and his sister the second accused to come to Mauritius and said nothing about Doc. E being fake.

(iv) Doc E was prior to it being considered and accepted was subject to verification by 'SWIFT' from Bank to Bank there was not any question of "fraudulent manoeuvre" not any intention to defraud.

(v) The appellant and the other accused were trapped into signing blank form to open accounts in their respective name.

(vi) The evidence falls short of establishing a demand by the appellant and other accused for funds from the Investec bank for a request for a loan of 20 million U.S. dollars as averred in the information.

Appeal of Appellant Lategan

Learned counsel for Appellant Lategan focused on grounds 4 and 5 together and on grounds 8, 9, 14, 16 and 22 of the Additional Grounds of Appeal which read as follows:

4. *There is no evidence of any mise-en-scène by the appellant, which is an essential requirement of the offence charged. In fact there is rather the opposite: the mise-en-scène leading to the meeting of the 26th of April when the offence charged was allegedly committed was since the 22nd of April deliberately and skillfully hatched and orchestrated by Investec's Chief Executive Officer (one Mr. McKenzie), its Chief Operations Officer (one Ms Vaudin) with the participation of one Mr. Desmond Magua (a former officer of Investec) who, on Police advice, deliberately lured and entrapped the appellant to attend a 'meeting' at Investec organised and stage managed by the aforesaid triumvirate of Mc Kensie/Vaudin/Magua on Police 'advice'.*

5. *The evidence adduced fell short of establishing beyond reasonable doubt that the appellant was guilty of the offence charged especially as:*

(a) there was no 'commencement d'éxécution' on his part ;

(b) he did not have the required "pervasive mens rea";

(c) he had not deliberately set up the alleged mise-en-scène at the Bank ;

(d) he had not employed fraudulent pretences, all of which are essential ingredients of the offence charged.

8. The trial court erred in finding that the appellant was not bona fide on account of the reference on Document 'E' to the Mrs Lategan's company 'Serendipity by Design LLC'. The trial court, once more, noticeably failed to direct its mind to the fact that:

(a) document E did not contain any assignment;

(b) such assignment was conditional upon instructions <u>and</u> the issue of a bank guarantee;

(c) such assignment had been suggested by Desmond Magua himself; and

(d) although arrested and detained, the appellant's wife was not prosecuted.

9. The trial court failed to compare the involvement of Desmond Magua and that of the appellant. Had the learned Magistrate carried out that elementary exercise, she would have reached the inescapable conclusion that the appellant was bona fide and blameless as all along he believed that Document E was genuine and no evidence was ushered to prove that this was not the case.

14. Further, on the crucial issue of the appellant's bona fides which was an issue which went to the root of the case, the trial court failed to compare the involvement of Desmond Magua with the appellant's involvement as a 'liaison point' at what was as yet the initial stage of the project. On a proper direction the trial court could not have escaped the conclusion that the appellant was, at least, as blameless as Desmond Magua. Appellant expected Investec to verify document E. Vide his email of 28 April, which also seems to have escaped the lower court's attention.

16. On the whole of the evidence on record the trial court was wrong to have rejected the appellant's version that at all the material times he bona fide acted as a liaison point between the investors and the representatives of Thuthuka Group Ltd.

22. The trial court was wrong to have overruled the objections of the Defence and to have admitted Mr Garcin's evidence. The photocopies of the passports produced by him should not have been admitted in the course of re-examination.

THE CENTRAL ISSUES IN THE APPEAL

As may be seen, the above grounds by all three Appellants raise a number of issues of varying degrees of importance. They have to do with, inter alia: the probative weight to be attached to Mr Garcin's deposition to speak on behalf of Société Générale, Paris; the incompleteness of the enquiry conducted by the investigators and the non disclosure of certain materials by the prosecution; the police-prompted meeting of 26 April; the absence of *mise-en-scène* and of *mens rea;* the misapplication of the distinction between *actes préparatoires* and *commencement d'exécution* with regard to attempt at an offence, etc.

In our view, this appeal may be more conveniently disposed if it were considered under three main issues:

(a) whether the charge as laid disclosed the full offence of swindling on which the offence of attempt at swindling under section 330 of the Criminal Code could at all rest;
(b) whether the particulars as given could amount to the charge as laid;
(c) whether on the state of the evidence, the conviction was justified in law.

DOCUMENT E: THE IMAGINARY CREDIT

But before we do that we need to look at one document which is the centre-piece of this case. It is referred to as Document E which reads as follows:

SOCIETE GENERALE	
Date	*15 April, 2010*
Reference	*SCOE-00345-5824/POF SGB*
To Attention:	*Goldfield Worldwide Ltd*
	Dr Eddie c. Gil Phd.
	Chairman/President
	Dr Elizabeth a. Samson PHL
	Vice President/Treasurer
Account No	*FR 7630003055900010177873331*

Dear Dr Gil and Dr E,. Samson Goldfield Worldwide Ltd

We, Société Générale Bank, with legal address, 29 Boulevard Haussmann 75009 Paris France, at your request, we hereby confirm with full banking responsibility and with full legal liability, that you have not less than Euros Ten Billion euro €10,000,000,000.00) euro in the above reference deposit account number FR7630003055900010177873331, at your bank under your signature, we further confirm that these funds are good, clean, cleared, of non-criminal origin, are free of any liens or encumbrance, were legally earned, and are fully transferable after maturity date.

We further confirm we are ready, willing and able (RWA) to issue one or more certificates of deposit or bank guarantees for the benefit of Goldfield Worldwide Ltd and assigned to Serendipity by design LLC, with a maturity date of not less than 10 years, should we receive your instruction to do so.

This proof of funds letter may be verified on a bank to bank basis via authenticated swift only and cannot entertain telephone calls, no fax, no email and no walk-in verification allowed. This is against the Bank secrecy according to our agreement with our client.

Sincerely,

For and Behalf of

Société Générale, Paris

29 Boulevard Haussann

75009 Paris, France

Patrick Suet (sd)	*Caroline Guillaumin (sd)*
Compliance	*Communications*

We shall, accordingly, consider this appeal from the above-stated considerations. That is not to underrate the other issues raised, some of which are related to those three.

ANALYSIS IN LAW: THE CHARGE, THE PARTICULARS AND THE EVIDENCE

Question 1: Did the Charge as laid disclose the full Offence?

It is axiomatic that a charge for the inchoate offence of attempt will only lie in circumstances where the full offence is itself valid. Section 330 of the Criminal Code provides:

> *"Any person who, by using a fictitious name, or assuming a false character, or by employing fraudulent pretences, to establish the belief of the existence of any fictitious operation or of any imaginary power or credit, ….. obtains the remittance or delivery of any funds …., and by such as aforesaid, swindles another person out of the whole or of a part of his property, shall be punished by penal servitude for a term not exceeding 10 years, and by a fine not exceeding 50,000 rupees." [underlining ours]*

The charge as laid reads that the three appellants –

> *"criminally and willfully by employing fraudulent pretences to establish the existence of an imaginary credit to obtain the remittance of a bank advance of USD20 million from Investec Bank (Mauritius) Limited, attempt to swindle Investec Bank (Mauritius) Limited out of part of its property, which attempt was manifested by a commencement of execution which failed in its effect through circumstances independent of their will."*

The juxtaposing of the text of the law with the averments of the charge reveals one serious omission: the underlined part in the text of the law: I.e. the words "*the belief of*" have not been averred.

As per section 330 of the Act, it fell upon the Prosecution to both aver and prove that the appellants: (a) employed fraudulent pretences; (b) "*to establish the belief ; (c) of the existence of; (d) any … imaginary … credit."* With respect to the missing requirement of belief, the offence under the section does not reside in the prosecution establishing the existence of an imaginary credit: that is what has been averred and was proved. Rather, it resides in the offenders by fraudulent pretences establishing the belief of the existence of an imaginary credit. In the absence of an averment that the fraudulent pretences were directed to establish the specified belief of imaginary credit, there is no offence of swindling.

These two characteristics of the offence assume all their importance when we realize that if the dupe has submitted papers for the processing of a claim and he has employed fraudulent pretences but none directed to establish the requisite belief, there is no offence as such.

As French law terms it, the *démarches* of the offender *"consiste à faire croire à autrui."* We read in **Recueil Dalloz, Pénal, V Escroquerie, note 157**:

> *"La solvabilité imaginaire consiste à faire croire à autrui que l'on possède des biens d'une certaine valeur, ou que l'on jouit d'un crédit réel. Le plus souvent l'escroc tente de faire croire à autrui, que tel ou tel bien lui appartient, alors qu'il n'en ait rien, et parvient ainsi à obtenir la conclusion d'un contrat."* [underlining ours]

Accordingly, in this case based on imaginary credit, the information necessarily had to aver *"les manoeuvres tendant à faire croire à l'existence de biens en vue d'obtenir l'octroi d'un prêt:"* see **Recueil Dalloz, ibid, note 157**. There should be a *mise-en-scène* to create a belief, a plot for make belief. The information having omitted to do so omitted the very essence of the offence of

swindling, the orchestration of a plot to make believe in something illusory. That is one serious omission.

The second flaw in the information resides in the absence of particulars of the fraudulent pretences. If the Prosecution chose to charge the appellants under that species of swindling i.e. imaginary belief which, for its part, requires proof of fraudulent pretences, it should have known that presenting a fake paper about one's credit is no more than a lie. To become a fraudulent pretence, the lie should be coupled with a "fait extérieur." In this case, the Prosecution stayed content with averring only the lie. It omitted to aver the manner in which the lie was intended to be driven home to Investec Bank. Accordingly, it failed to show that the three appellants *"employed fraudulent pretences to establish the belief of the existence of an imaginary credit."*

On this aspect of the law, therefore, the charge as laid failed to aver two essential components of the offence of section 330 of the Criminal Code. The charge was, accordingly, defective. It could not be said that the three appellants stood trial for an offence known to the law.

In the light of the above, it is strictly not necessary that we look at the other issues raised in the appeal. However, on account of a number of pitfalls comprising this offence, we might as well take this opportunity with the facts of this case to touch upon a couple of its special characteristics. We shall first look at the particulars as provided and thereafter see how the judgment proceeded to convict the appellants on a finding of fraudulent pretences not averred in the particulars.

Question 2: Did the particulars as provided disclose an offence of swindling?

The particulars read that the appellants:

> *"relying on a fake bank reference letter allegedly emanating from Société Général, Paris, to the effect that Goldfield Worldwide Ltd, in which said (sic) Eddie Conde Gil and Elezabeth Aquino Samson are President/Chairman and Vice/President/Treasurer respectively, holds a bank account at Société Général, Paris, with a balance of not less than 10 billion Euros, attempted to obtain a remittance of a bank advance (loan) in the sum of USD20 million from Investec Bank (Mauritius) Limited, attempt to swindle Investec Bank (Mauritius) Limited, which attempt failed in its effect through the due diligence exercise carried out by Investec Bank (Mauritius) Limited, which revealed the fake nature of the said bank reference letter."*

Particulars such as the above are good examples if the reliance is on either fictitious name or false character but wrong examples if the reliance is placed on a fake bank balance. One may rely on a fictitious name, without more; or rely on false character, without more, to swindle property. Both would be in order and will fall foul with section 330 of the Criminal Code. But where one relies on a fake bank reference letter, which falls in the category of imaginary credit, there is no offence under section 330. For a fake bank reference is no more than a lie on credit. Accordingly, the particulars provided in this case are deficient in a material particular and, for that reason, defective. The appellants stood charged for an offence not known to law as well as on particulars which did not amount to an offence in law.

The learned magistrate was fully aware of this aspect of the law. She did look for and found in her elaborate judgment, fraudulent pretences or *mise-en-scène* from a number of facts. However, these do not exist in the particulars and she could not have convicted the appellants basing herself on them without amending the information and requiring the appellants to plead anew on account of their material nature. We shall say more about this later. Suffice it to state for the present that the case proceeded on such a procedural defect which went to the very root of the offence and the case.

Question 3: Could the particulars for the attempted offence amount to an offence?

Section 2 of the Interpretation and General Clauses Act defines what constitutes an attempted offence in our law in the following terms:

> *"attempt", in relation to an offence means a commencement of execution which has been suspended or has failed in its effect through circumstances independent of the will of the person making the attempt."*

For the present moment we are not concerned with the difference between commencement of execution and preparatory acts. We shall come back to this aspect below. We are concerned with whether the particulars as provided amount to an offence under the law. The charge avers that the attempt *"failed in its effect <u>through the due diligence exercise carried out</u> by Investec Bank (Mauritius) Limited, which revealed the fake nature of the said bank reference letter."* The question which arises is whether the negative result of a due diligence exercise carried out by a bank could form the basis of an attempt at swindling. The reason is that banks are enjoined by law, by profession, by ethics, by principles of good governance and by best practice not to rely

on the face of documents to offer their services to new clients. They are bound to undertake a proper KYC which includes due diligence processes. Can a client or would-be client be charged for attempt at swindling where the due diligence exercise produced a negative result on account of fake papers? Our answer to that question is also negative.

The reason is that the bank, as an informed, institutionalized professional provider, should not allow others to create a belief in them but it should create its own belief through its own duty of enquiry. That is why a party to a court case who tries his luck by producing fake papers to pursue his claim in court may not be prosecuted for swindling or attempt at swindling. The role of the court is to subject whatever paper is produced to individual scrutiny. The very *raison d'être* of the judge is to assess the probative weight he has to give to the papers submitted to him for the purpose:

> "*le juge a précisément pour mission d'apprécier la valeur probante des documents produits."* See **Recueil Dalloz, Pénal, V Escroquerie, note 247.**

If that is so with the courts, *a fortiori* with banks which are under a statutory, institutional and professional obligation to undertake a due diligence exercise to check for genuineness and authenticity of custom and customer before they may offer any of their services.

That does not mean that a due diligence exercise may never become the basis for an attempt at swindling. It will become so only if the prosecution is able to show that the dupe had employed such means as to mislead by his specious design even the due diligence officer to obtain the remittance. In **Recueil Dalloz, Pénal, V Escroquerie, note 247,** we read:

> *"Il faut qu'il y ait utilisation de manoeuvres frauduleuses, c'est-à-dire en fait présentation de documents ou de témoignages destinées non seulement à tromper la religion des juges, mais encore à obtenir effectivement le jugement recherché. Aussi bien n'est-il pas admis que l'on puisse, à l'occasion d'une procédure juridique intenter une action du chef de tentative d'escroquerie, alors que le juge a précisément pour mission d'apprécier la valeur probante des documents produits."*

In this case, Document E submitted for due diligence itself enjoined the potential sponsor to carry out a due diligence. The document, accordingly, contained what turned out to be a mere lie. We further read from the authorities, **Recueil Dalloz, Penal, V Escroquerie, note 296**:

> *"S'agissant, dès lors, de l'escroquerie, les mensonges purs et simples qui en eux-mêmes ne peuvent constituer une manoeuvre frauduleuse, ne peuvent en aucun car être poursuivis du chef de tentative de l'escroquerie (Crim. 29 déc. 1939, D.H. 1939. 52)."*

Our answer to the above question, therefore, is that the particulars based as they are on a due diligence excise which proved itself negative could not in substance give rise to a charge of attempt at swindling.

Question 4: Could there be a conviction for attempt at swindling on the state of the evidence and the findings of the learned magistrate?

Our reading of the transcript reveal a number of lingering doubts on the prosecution case. The charge speaks of a loan of USD20m when the bank official speaks of a loan of USD10 million. While the involvement of each and every appellant in the transaction is clear, their knowledge of the fake document and the use made or to be made of it is unclear. The enquiry seems to have left out some key characters whose evidence would have gone a long way to find what the truth has been in the transaction. An invisible hand provoked not only the unscheduled meeting of 26 April but also the facts which became the elements of the offence charged. They had not walked into the bank but had been walked into the bank. The evidence of the bank official who attended the meeting and on whose evidence the appellants were convicted may not have had an interest in self-gratification but had a corporate interest in self-justification. The appellants had hardly applied for a bank advance. However, we shall limit ourselves to the following three issues only with regard to the evidence: (a) the need to prove the *mens rea* of the appellants; (b) whether the fraudulent pretence as found by the learned magistrate - which was not averred - could safely be taken to be one; (c) the distinction between *actes préparatoires* and *actes d'exécution*.

Proof of *mens rea*

It is again axiomatic that there is no offence of swindling without proof of *mens rea*. Inasmuch as that is a matter on inference, the learned magistrate quite correctly proceeded in two stages: first, establishing the nexus between the documents and the three appellants; and second, sounding their intentions. With respect to the nexus, she found as follows: *"Accused nos. 1 and 2 are directly linked to that document in that their names are mentioned in it. So is Accused no.*

3 based on his unsworn version that both accused remitted it to him on 18th April." In fact, all three appellants agree that that document passed their hands. Appellant Gil stated that Appellant Lategan was looking for proof of funds so as to secure the participation of funders for his wind-farm and the related projects in Mauritius. Gil admits that he obtained it from his bank, *Société Générale, Paris,* that his company has the funds available at that bank and that the document is a genuine one. There is evidence that Appellant Gil gave this document to Appellant Samson who gave it to Appellant Lategan who sent it to Desmond Magua among the number of papers which were being exchanged among the parties with respect to the projects for which they were looking for investors.

Mere linking the fake document to the three Appellants was only the first stage in the process of sounding the knowledge of the appellants. There was a need for a finding of the specific intention to swindle by way of fraudulent pretence. And the nature of the *mens rea* in swindling being a pervasive one. Accordingly, the prosecution had to adduce facts to show not only that each and every appellant knew that the document was fake but also that the offenders all participated in the *fait extérieur* with the knowledge that the *fait extérieur* would give *force probante* to the lie and result in despoiling the victim of the property coveted: which was in this case USD20 m from Investec Bank.

On the aspect of *mens rea*, this is what the learned magistrate stated:

> *"the intention of all the three accused was to make Investec Bank (Mauritius) believe in their creditworthiness, relying on a document which has been proved to be fabricated. Without any proof of their creditworthiness, they knew that they would not have been provided with the services offered by the investment bank, namely to obtain a loan from Investec Bank. But they used the fake document to obtain the remittance of a bank advance of USD20million. This was likely to be the "cause déterminante" of obtaining the loan. However, the said remise could not be effected inasmuch as the due diligence exercise carried out by the bank revealed that the document relied on by the accused parties to be fake."*

There is an obvious fundamental flaw in the above reasoning. It amounts to saying that the knowledge that the document was fake with respect to their credit was sufficient in law. That is not so, if the charge is preferred under imaginary credit. It is so only where the charge is preferred under fictitious name or false character.

One aspect of the above need a special mention. With her knowledge of the law in the area, the learned Magistrate unconsciously filled in an element which had not been averred in the charge:

the establishment of the belief in the imaginary credit. She was correct in her assessment of what was needed to be proved for the offence. However, she could not proceed to a conviction without a proper amendment to the information. This leads us to the issue of yet another amendment which she should have brought about before she could proceed to convict the appellants: the formulation of the *mise-en-scène.* We have stated above that this was absent in the particulars.

Absence of fraudulent pretence

A reading of the proceedings shows that all that the prosecution was able, at best, to establish is that the bank reference letter was fake. Apart from the fact that there was no averment of any exterior act to support the lie, evidence that the lie was supported by the requisite exterior act is tenuous. When the Appellants were questioned about Document E, Appellant Gill nodded, Appellant Samson stated she knew the bank would ask this question and Appellant Lategan stated that the funds were good, clean and available. In other words, each repeated the lie in Document E in his or her own fashion but none engaged in a course of conduct which was visible et palpable, capable of giving independent force to the lie.

The defence rightly referred to **Garçon, Code Pénal, Art 405, Note 361** in support:

> « *Le Cour de cassation a jugé qu'on ne pouvait condamner pour escroquerie celui qui pour persuader l'existence d'un crédit imaginaire, présente comme valable un billet à ordre qui n'a en réalité aucune valeur. La seule présentation de ce billet sans autre circonstance de nature à abuser la personne à qui il est offert, ne constitue pas une manœuvre frauduleuse* ».

By way of illustration, if at that stage, any of them would have, instead of repeating the lie, further attempted to *faire croire* Investec Bank by means of some exterior act that what was represented in Document E was well and true, then there would have been a fraudulent pretence. Or if the Prosecution could show that there was another document which in its own right supported the lie, there would have been a fraudulent pretence in law: either a statement of account from the bank or a third party's reference etc.

The fraudulent pretence had to support the lie. However, the learned magistrate fully conscious that there was a need for fraudulent pretence not particularized in the information proceeded to decide that the whole enterprise looked to be a *mise-en-scène.* She referred to the number of

documents which had reached the bank prior to the meeting of 26 April, to the answers given by the appellants at the meeting, to what she took to be their concerted and active participation in the meeting, to their filling in their names and signatures in the application forms for personal accounts. To her, those factors could not amount to a lie but to a *mise-en-scène*.

There are a number of objections to that. First, the exterior acts do not support the lie in Document E. The activities are in themselves innocuous. Second, as rightly pointed out by the defence, the meeting of 26 April was not provoked by the three appellants. It was provoked by the Investec Bank who on finding that Document E was fake, contacted the FIU and the Police who advised the bank to carry on with a meeting with the appellants in circumstances when it was not an item found in their agenda of their day's programme with respect to their trip to Mauritius. The defence referred to it as a case of the bank's *mise-en-scène* rather than the appellants'.

The *mise-en-scène* should have been of the appellants' doing, and intended to reinforce the lie in the document at that. As **Recueil Dalloz, Pénal, V Escroquerie, note 250** puts it: the fraudulent pretences should be authored by the swindlers:

> *"Encore faut-il que la méfiance que la mise-en-scène ait été suscité par l'escroc pour les besoins de la cause, condition nécessaire pour qu'il y ait manoeuvre frauduleuse au sens de l'article 405 du Code Penal."*

It should also be shown that all through the *mise-en-scène*, the intention to despoil the victims should be sustained. Refrence may be made here to **Recueil Dalloz, Penal, V Escroquerie, note 296**, which reads:

> *"Aux manoeuvres, doit donc s'ajouter un "fait distinct qui commence l'exécution parce qu'il a pour but direct de dépouiller la victime. Le commencement d'exécution pourra résulter suffisamment des manoeuvres mêmes employées ou des noms et qualités usurpés s'il est établi une intention concomitante de détourner des fonds que le prévenu cherche à se faire remettre."*

The pervasiveness or continuing nature of the *mens rea* is well elaborated upon in note 296 of **Recueil Dalloz, Pénal, V Escroquerie**:

> *"De la même manière, les manoeuvres frauduleuses non suivies de démarches ayant pour but d'obtenir la remise des valeurs, constituent en effet des actes préparatoires et non la tentative qui ne peut résulter que d'un commencement d'exécution (Crim. 15 mars 1894, Bull. Crim. No 68)."*

Third, those facts outlined by the learned magistrate fail to show that the three appellants had come to the bank with the firm and sustained strategy that whatever Document E represented was true and that Investec Bank better believe it and advance them the loan.

As we stated above, if the learned Magistrate referred to all the rigmarole of the papers, the plans, the trip to Mauritius, the meetings with the engineers and the meeting of the 26 April with their answers, she should have amended the information to aver these essential particulars which did not exist in the information. The appellant stood trial to answer the charge of swindling by imaginary credit. The defence had geared up to meet just that averment only. They could not be convicted on a different set of facts without an amendment to the information and time afforded to them to plead anew and meet the new charge for the prejudice otherwise involved in such a procedure.

Fourth, the papers and the activities of the three appellants are as consistent with the pursuit of a honest project as with a dishonest one. On the assumption that they were engaged in an enterprise for swindling prospective sponsors to their projects, the fact remains that their acts and doings were yet to reach that stage which would have amounted to a criminal offence account taken of the fact that their bluff was called well before anything material could happen. This takes us to the elements of the inchoate offence of attempt at swindling.

Distinction between *actes préparatoires* and *commencement d'exécution*

We shall now look at the charge of attempt from the point of view of definitions. Attempt, an inchoate offence, becomes an offence where a person is engaged in a commencement of execution of the offence. The *commencement d'exécution* has to be distinguished from an *acte préparatoire* in that the activity of the offender, however visible and palpable, is still at the preparatory stage and not directly and unequivocally linked to the commission of the offence. On the other hand, a commencement of execution is what it says, the offender has begun the execution but the realization aborts not because of him but because of forces beyond him. i.e. "circumstances independent of the will of the person making the attempt," as the law states.

It is inconceivable that Investec Bank would have proceeded to grant a loan of USD20million to the three appellants forthwith even if someone at the Société Générale, Paris answered that Document E was in order. The appellants would have still been asked to provide further papers,

including title-deeds. The parties were just at the embryonic stage of the application and examination of documents before the process could conclude in an approval of the application, followed by a formal signature of the parties culminating in a remittance. As remarked by witness Vaudin, in this case no loan document had been signed by anyone. There was no other document except Document E that had been handed over. The request was verbal. There was no documentation yet. The meeting took place in the Conference Room, not in an office. The bank had still to go through the various stages: "credit stage, credit process and credit request." Appellant Samson's comment was more pertinent, if ignored. No bank would be so stupid as to grant a loan within a day. And they were all foreigners for that matter.

When the particulars assume that but for the negative diligence exercise carried out the loan of USD20million would have been granted to the three appellants, one would simply like to believe in such a fairy tale. Second, what was the figure of the loan applied for: USD20 million or USD 10 million? Evidence on this matter is tenuous. In the words of note 296 of **Recueil Dalloz, Pénal, V Escroquerie**:

> *"La démarche typique sera la demande de remise d'une somme d'argent. Elle est l'un des éléments essentiels constitutifs de la tentative d'escroquerie (Crim. 3 nov. 1911. Bull. Crim., no 493)."*

Document E which Appellant Gill stated he obtained over the internet on his e-mail from his Bank is well crafted. What it is telling Appellant Gil and Samson is that "We have billions in our bank available for your use. But do not rely on this statement. Check before. You will know whether you both have or you do not have. The document, in other words, is not telling a lie about itself. If one were to give more than a minute attention to such a paper, one should have only oneself to blame. Indeed, the very seriousness of Document E as regards whether it was a bank guarantee, "une attestation", a letter of warmth etc is left to anybody's guess at the end of the day. While prosecution witnesses were divergent in their views, the retired bank officer who deponed for the defence stated he would have thrown it in the bin.

Respecting the nature of the document, **Recueil Dalloz, Pénal, V Escroquerie, note 297**, points to the unequivocal nature of the document:

> *"En revanche constituent des actes préparatoires, les actes qui n'ont pas pour but de tendre à la remise. C'est le cas de l'assuré qui incendie volontairement un camion et qui n'en a pas sollicité le remboursement à la compagnie d'assurance. Il s'agit là d'un acte préparatoire sans commencement d'exécution de l'escroquerie (Crim. 27 mai 1959, bull. Crim., no 282). Il importe dès lors de bien distinguer suivant la nature des actes: est un commencement d'exécution celui qui tend directement au délit (c'est le cas pour*

> *la production en justice de documents mensongers: Crim. 8 nov. 1962, Bull. Crim., no 312), tandis que reste un acte préparatoire celui qui en lui-même reste equivoque et n'a pas pour objet nécessaire de tenter à une remise indue."*

In any case, one thing is sure, the document could not assume such a character of finality and decisiveness in that it did not directly and unequivocally lead to a remittance of USD20 million. The paper lacks finality and decisiveness when in last paragraph, it states so clearly that –

> *"This proof of funds letter may be verified on a bank to bank basis via authenticated SWIFT only and cannot entertain telephone calls. No fax, No e-mail. No walk-in verification allowed."*

If that is so, the question which arises is whether the three appellants were still at the stage of *actes préparatoires* had they already moved into their *actes d'exécution*. Learned counsel for the respondent took the view that the *actes d'exécution* started at the moment the *actes* were prepared and the appellants were in Saudi Arabia. If that is so, it would be a dangerous doctrine of criminal law for attempt.

The learned magistrate dealt with this aspect of the case and using an illustration in a text book as per **Encyclopédie Dalloz, Droit Pénal, Escroquerie, Note 297,** she stated:

> *"A falls upon a plan to get quick and easy money from his insurance company. If he came to the insurance agent and filled in and signed off a form for the claim, his act would be equivocally and directly linked to the question of remittance. This would be an executor act and amount to attempt at swindling. By contrast, if he filled it up and developed cold feet and never finally delivered the form to pursue the claim, there would be no executor act, If he delivered but was discovered before any payment was made, it would amount to attempt at swindling."*

However, the distinction between the facts in the illustration and the facts in our case is that in the example, the form filled is a form of the Insurance Company directly linked to the remittance. There is nothing more which the applicant needs to further do than wait for the remittance of the money. He has crossed the Rubicon as it were. He has filled a form granted by the Insurance Company which is the last formality which the insured has to complete to make his claim. In our case, there are miles and miles to go before the very question of remittance will come into play, if it will come at all. The test is whether the act of the appellants is unequivocally, directly and immediately linked to the remittance of the funds sought.

As the authorities, **Recueil Dalloz, Pénal, V Escroquerie, note 295,** establish:

> *"La difficulté consiste tout d'abord à savoir en quoi doit consister le commencement d'exécution, pour le distinguer du simple acte préparatoire. En fait, il faut qu'il s'agisse d'actes qui "tentent directement au délit" et qui soient en rapport immédiat et direct avec l'infraction (V à cet égard: Crim. 3 déc. 1927. S. 1929.1. 119; 19 nov. 1943, Bull. Crim., no. 129; 25 juin 1959, D. 1959. 452, note M.R.M.P; 22 janv. 1963, D. 1963. 389; V. aussi Crim. 25 oct. 1962, D. 1963. 221, note Bouzat, J.C.P. 1963. II. 12985, note Vouin).*

We further read at **Recueil Dalloz, Pénal, V Escroquerie, note 296:**

> *"Aux manoeuvres, doit donc s'ajouter un "fait distinct qui commence l'exécution parce qu'il a pour but direct de dépouiller la victime". Le commencement d'exécution pourra resulter suffisamment des manoeuvres mêmes employées ou des noms et qualités usurpés s'il est établi une intention concomitante de détourner des fonds que le prévenu cherche à se faire remettre."*

And **note 298,** ibid, to add:

> *"Pour être punissable, la tentative ne doit pas seulement consister en un acte matériel non équivoque."*

In our consideration, on the assumption that all the three appellants knew of the illusory nature of the bank reference letter, the acts of the appellants were still at the stage of *actes préparatoires* and no *commencement d'exécution*. Reference to the example of an insured filling a Claim Form is not apposite to the present situation inasmuch as the Insurance Claim Form has the character of finality with it. In this case, the meeting of 26 April 2010 had the character of a gestation rather than a delivery.

Fair Trial

On the question of fair trial, there is substance in the argument of the defence that Desmond Magua was a crucial witness from whom a lot of light could have been thrown. It is he who received Document E from Appellant Lategan. It is he who acted as the Intermediary between the appellants and Investec Bank. It is he who passed on Document E to Mr Mc Enzie who gave it to Mr Deschenne for the due diligence exercise. Both Mc Enzie and Desmond Magua would have enlightened us on the culpability or lack of it of the appellants.

For this important omission on the part of the investigators or the prosecution, it cannot be said that the appellants had a fair trial or even that they had fairly been brought to trial: see **Backford [1996] 1 Crim. App. Report 94.**

For all these above reasons, we allow the appeal. We quash the conviction of the three appellants and the sentence imposed upon them.

S. Domah
Judge

S. Bhaukaurally
Judge

10 August 2011

Judgment delivered by Hon S.B. Domah, Judge, and Hon S. Bhaukaurally, Judge

E.C. Gil v State SCR 3/159/10- 8050

For Appellant: Mr Y. Mohamed S.C, instructed by Mr Attorney R.K. Ramdewar

For Respondent: State Counsel/Attorney

E.A. Samson v State SCR 3/158/10 -8049

For Appellant: Mr Z. Mohamed of Counsel, instructed by Mr G. Ramdewar, S.A

For Respondent: State Counsel/Attorney

A.A. Lategan v State SCR 3/165/10 – 8056

For Appellant: Mr A. Domingue, S.C, & Miss Y. Moonshiram, of Counsel, instructed by Mrs Attorney Dya Ghose

For Respondent: State Counsel/Attorney