JAISON MAX KORERAI MACHAYA
and
CHISAINYERWA CHIBURURU
versus
THE STATE
and
CHARITY MAPHOSA ESQUIRE N.O

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 14 September 2019, 15 & 23 October 2019, 15 & 26 November 2019 & 19 February 2020

Urgent application for stay of criminal trial

A Muchadehama for the 1st & 2nd applicants
T Mapfuwa for the 1st & 2nd respondents

KWENDA J: **Introduction:** The applicants are on trial at Gweru Regional Magistrate Court jointly charged with the crime of Criminal Abuse of Duty as Public Officers as defined in section 174(1) of the Criminal Codification and Reform Act Chapter 09:23. The 1st respondent is the State. The 2nd respondent is the trial magistrate, cited in her official capacity.

The first applicant is a former resident Minister for the Midlands Province. He was resident Minister at the time of the alleged crime. The second accused was the Midlands Provincial Planning Officer. They were both public officers at the time of the alleged crimes. They are jointly charged with criminal abuse of duty as public officers as defined in s 174 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (Criminal Law Code). Criminal charges are always contained in one long statement. The present charge was to the effect that

- the applicants/accused persons unlawfully diverted 1000 stands
- which Gokwe Town Council had allocated to the Ministry of Local Government, Rural & Urban Development to administer as 'commonage'
- applicants / accused persons took control of the stands in manner inconsistent and contrary with their duties as public officers

- and offered them to a company known as Striations World Marketing (Pvt) which sold the stands to members of the public
- and in so doing they intended to and did show favour to Striations World Marketing (Pvt) Ltd.

Both applicants pleaded not guilty. Their joint defence outline was a bare denial. Specifically, they both denied acting in common purpose and taking the stands as alleged. They also denied showing favour to Striations World Marketing (Pvt) Ltd. In other words, they put all state allegations in issue and gave no indication in their defence outlines of what their explanation would be if it was established by the State that they dealt with the stands in the manner alleged.

The trial has progressed up to the closure of the State case. The applicants' applied for discharge at the close of the State case in terms of section 198(3) of the Criminal Procedure and Evidence Act *[Chapter 09:07]*.[1] The grounds of the application were the following:-

(a) the scope of the crime charged is too broad "impossibly broad" 'in fact' the negligent performance of duty can … squarely be prosecuted under s 174. The definition of the crime is too broad and therefore unconstitutional and not reasonably expected in a democratic society. The crime tends to criminalise honest mistakes or negligent performance of duty. The vagueness of the description of the crime gives room for selective prosecution.

(b) The offence should apply only when the allegation is that the person had knowledge that his conduct was illegal. ….., the public officer charged with the offence must know that he/she is acting contrary to his/her duty or omit to do something which he/she knows it is his/her duty to do. The public officer charged with the crime must have intended to be corrupt by desiring to confer undue or illegal benefit on someone unfairly or illegally prejudicing someone else.

(c) The State must lead cogent and impeccable evidence.

[1] (3) If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge, or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty.

(4) …….

(d) The applicants revived the grounds of exception, arguing that, if anything, the evidence adduced up to the end of the State case established that the conduct complained of is not criminal.

(e) They prayed for their acquittal and relied on the often cited case of *S* v *Kachipare* 1998 (2) ZLR 271 (S).

The second respondent dismissed the application for discharge which was opposed by the State. Aggrieved by second respondent's decision to put them on their defence, the applicants filed an application for review before this court under case number HC8210/19. The application is pending. It is against the backdrop of the review application that the applicants brought this urgent chamber application for stay of the criminal trial proceedings pending the outcome of the review. The draft provisional order is a follows: -

> **"Terms of final order sought**
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> Criminal proceedings against the applicants under CRB no. 1253-4/18 be and are hereby stayed pending the outcome of the application for the application for review in case no HC8210/19
>
> **Interim relief granted**
>
> Pending the discharge or confirmation of this provisional order criminal proceedings against the applicants under CRB no. 1253-4/18 be and are hereby stayed"
>
> **Grounds for this application**
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> The grounds of this application are as follows: -
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> (1) The applicants filed an application for review on 8 October 2020
> (2) The preparation of the transcript of the trial proceedings was going to take time since the proceedings were very long and the trial magistrate will have to proof read the 595-page record of proceedings.
> (3) Meanwhile, the matter had been postponed to 15 October 2019 for the defence case
> (4) The applicants submitted that unless the trial proceedings were stayed the pending review would be *brutum fulmen*
> (5) The application for review has prospects of success on review because the trial court's decision to refuse discharge at the close of the State case was unreasonable.
> (6) The application for review enjoys good prospects of success
> (7) The applicants would suffer irreparable harm if the trial proceeded before the outcome of the review

(8) There was no other remedy

I postponed the urgent chamber application to allow the State to file opposing papers and for the transcript to be ready. The parties agreed that it was in the interests of justice for the trial court to wait for the outcome of this urgent application. I ordered accordingly. The transcript was only made available to me on the 26th November 2020 after five postponements. Meanwhile the State filed papers opposing this application. The grounds of opposition are that the trial court's decision to dismiss the applicant's application for discharge at the close of the State case is correct and supported by evidence. The State submitted, further, that superior courts should refrain from interfering with criminal proceedings pending before a lower court but should only do so in exceptional circumstances of proven gross irregularity vitiating the proceedings and giving rise to a miscarriage of justice which cannot be remedied by other means.

Urgency

I treated this matter as urgent because, clearly, I was duty bound to hear the merits before the next date set for continuation of the trial. The urgent matter for stay is intended to stop the trial from progressing to the next stage. If this application does not succeed either for lack of urgency or on the merits, the review might as well be abandoned or aborted. The applicants will have to wait for the trial to complete and then either seek redress by way of review or appeal if the eventual judgment is unfavourable. There would be no need for this court to remain seized with a dispute of whether or not the applicants should be put on their defence when the matter has already progressed beyond the close of the state case into the defence case.

The provisional order quoted above presents two problems if granted as it is. Firstly, the applicants have not taken any steps to request an urgent set down of the review yet the interim relief, if granted, will have unlimited validity and could suspend the criminal trial proceedings *ad infinitum* as long as it is not discharged by order of court. Court applications are party driven and it will be up to the applicants to set down the provisional order for confirmation or discharge. The applicants will, therefore, not have the incentive to come back to court. The second problem is that the final order sought is identical to the interim relief.[2] While there is good authority for the legal position that a litigant may want the same order

[2] *Kuvarega v Registrar General* & Anor case 1988 (1) ZLR 188 (H)

today, tomorrow and in future, in other words an applicant may want the interim relief confirmed as final on the return day,[3] it must always be borne in mind that a provisional order ceases to be temporary if it can apply with finality. In this case the interim relief has more finality than the draft final order which will automatically lapse when the review is determined. The applicants will have no reason to look forward to confirmation because it will result in an inferior order. However, I am empowered by the rules of this court to grant any appropriate order as I deem fit if I am convinced on the papers and argument that the applicants have made a *prima facie* case justifying such order.

It was on the basis that the date for continuation of the trial was imminent and that I have powers to correct defects in the provisional order that I exercised my discretion in favour of hearing the argument on the merits of this application.

The hearing

During argument, Mr *Muchadehama* went straight to the merits of the review application arguing that my decision, whether or not to grant this application, should be based solely on the prospects of success of the review application. In other words, if I am satisfied that *prima facie* the review has merit, then I must grant this application. He explained the grounds of review as follows: -

(a) It was procedurally irregular for the trial court to put the applicants on their defence in circumstances where it ought to have acquitted them. The decision to put the applicants on their defence is inconsistent with the evidence adduced in the State case.

(b) the trial court's decision to place the appellants on their defence is grossly unreasonable and irrational because the trial court did not state the basis upon which it believed the witnesses. The summary of the evidence, in the trial court's ruling is not correct. The witnesses gave exculpatory evidence.

(c) An essential element of the crime was not proved. At the end of the State case none of the State witnesses had outlined what the applicants' duties were.

[3] Amalgamated Rural Teachers Union of Zimbabwe & Another v ZANU PF & Another (**HMA 36-18**, HC 263/18)

Mr Muchadehama relied heavily on the judgment of this court in the matter of Saviour *Kasukuwere* v *Hosiah Mujaya*, *Zivanai Macharaga* and others HH 562/19 (the *Kasukuwere* case)[4] As I will demonstrate hereunder, I do not see how the judgment has any bearing on an application for discharge at the close of the State case.

In argument the State submitted that there are no exceptional circumstances justifying the interference by this court with a trial which is in progress before a court with competent jurisdiction. The state submitted, further, that the state evidence which remained uncontroverted at the close of the State case proved that the applicants had discharged their functions as public officials in a manner which lacked transparency and integrity and therefore inconsistent with their duty as public officials. The State submitted that there was clear

[4] At p 13 of the cyclostyled judgment the court made the following remarks

> "Indeed, as I observed earlier on a charge under section 174 is, in essence, in the nature of an act of misconduct in the discharge of duty by a public officer which has been criminalized. Section 174 deals with anomalous conduct by a public officer. It connotes a deviation from the standard, normal or expected. It defies logic and legal reasoning for the prosecution to argue that the standard or norm in regard to which an accused has deviated is not an essential element of the charge of criminal abuse of duty. A layman interrogating a charge of criminal abuse of duty would ask what it is that the accused should have done but did not do before asking questions as to the motive for not doing that which was accused's duty to do or not do."

At page 8 the court drew from an earlier judgment of this court in *S* v *Taranhike and Others* HH 222/18 where the Honourable TSANGA J, quoting from Chinese case authority, stated that in interrogating the crime of criminal abuse of duty by public officers

> one must examine what, if any powers, have been entrusted to the defendant in his official position for the public benefit, asking how if at all the misconduct involves an abuse of these powers.

At p 14 of the cyclostyled judgment said

> I must therefore authoritatively state that it is necessary to include in a charge under s 174 (criminal abuse of duty as a public officer), as essential particulars details of the standard practice, norm, or duty which the accused was required to act in accordance therewith and that the accused acted contrary or consistently therewith for criminal motives as set out in s 174 as they apply. A failure or omission to do so leaves a charge hollow and not only will such a charge not disclose an offence or not provide sufficient particulars to inform the accused of the case which he or she must answer to, such a failure makes the choice vague and prejudicial or embarrassing as would justify its quashing in terms of s 178 (1) of the CPEA.

At p 15 the Honourabe CHITAPI J pointed out that a criminal trial is not a game of hide and seek but a pursuit of justice citing *S* v *Godfrey Gandawa and 2 Others* HH 478/18, *S and Anor* v *Machaya and 7 Others* HH 442/19. He said withholding evidence and relevant information from the accused is illegal.

evidence that the applicants acted in common purpose to favour Striations World Marking (Pvt) Ltd which ended up with *mana* from heaven in the form of 1000 residential stands to sell in circumstances that remains unexplained by the applicants. There is absolutely no paper taril concerning how first applicant ended up seized with the stands which he dished out to Striation Investments (Private) Limited. Gokwe Town Council declined to let 1st applicant deal with the stands and decided, instead, to offer the stands to the Ministry as 'commonage'. The allocation letter did not reach the Ministry. Somehow, 1st applicant took control and dealt with the stands as if they had been lawfully put at his disposal. The second applicant is alleged to have been in connivance with 1st applicant because he allegedly deliberately fast tracked the processing and approval of the layout plans. He flouted mandatory adoption of the layout by Gokwe Town Council.

In his reply, Mr *Muchadehama* submitted that 'commonage' had not been defined and that is fatal to the state case. I disagree. Nothing turns on the definition of 'commonage'. The allegation is that the 1st applicant abused his position as a minister, and thus a public officer, to divert an allocation of stands destined for the Ministry of Local Government which he gave to a non-government entity known as Striation (Pvt) Ltd thereby showing favour to the company.

Findings

[A] I do not see how the principles discussed in the *Kasukuwere* judgment apply to this case. The Kasukuwere judgment was concerned with an exception to the charge at the commencement of the trial. Exceptions to the charge are raised in terms of the provisions of section 171 of the Criminal and Procedure and Evidence Act Chapter 9:07[5] and adjudicated upon at the beginning not at the close of the State case. **See also section 146 of the CP&E Act.[6]** Applications for discharge are made after evidence has been led and the State has closed

[5] **171 Exceptions**
(1) When the accused excepts only and does not plead any plea, the court shall proceed to hear and determine the matter forthwith and if the exception is overruled, he shall be called upon to plead to the indictment, summons or charge.
(2) When the accused pleads and excepts together, it shall be in the discretion of the court whether the plea or exception shall be first disposed of.

[6] **146 Essentials of indictment, summons or charge**
(1) Subject to this Act and except as otherwise provided in any other enactment, each count of the indictment, summons or charge shall set forth the offence with which the accused is charged in such manner, and with such particulars as to the alleged time and place of committing the offence and the person, if any, against whom and

its case. Such applications are governed by section 198(3) of the Act. The relevant consideration is whether or not there is *prima facie* evidence that the accused committed the crime.[7] He even argued that the State should have called His Excellency, the President of the Republic of Zimbabwe to testify on the minister's duties. He said the State's failure to call the President to testify was fatal to the state case since the 1st appellant's duties as minister remain unknown. Accordingly, the *Kasukuwere* case is distinguishable from this case and I will not rely on it.

[B] The relevant considerations were set out succinctly by the State in its notice of opposition prepared by Mr Uladi.

> "……. superior courts should be refrain from interfering with criminal proceedings pending before a lower court and should only do so in exceptional circumstances of proven gross irregularity vitiating the proceedings and giving rise to a miscarriage of justice which cannot be remedied by other means."

There is good authority for the submission. **See** the case of *Isaura Masinga and Ms Sande NO and Prosecutor General HH 372/19*[8]

Mr Muchadehama completely abstained from addressing the court on the existence of exceptional circumstances warranting interference by this court with criminal trial proceedings which are still in progress before a court with competent jurisdiction. The fact that an

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the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.
(2) …..
(*a*) the description of any offence in the words of any enactment creating the offence, or in similar words, shall be sufficient; and
(*b*) any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the enactment creating the offence, may be proved by the accused, but need not be specified or negatived in the indictment, summons or charge, and, if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the prosecution.

[7] (3) If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge, or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty.

[8] 'This court will ordinarily not sit in judgment over a matter before an inferior court except in very rare circumstances where a grave injustice would occur if it does not intervene. While it is correct that this court has review jurisdiction over unterminated proceedings it is always slow to intervene in unterminated proceedings of an inferior court except in cases of gross irregularities in the proceedings or where it is apparent that justice may not be attained by any other means." See *Achimulo* v *Moyo* NO 2016 (2) ZLR (H) at 417-C

interlocutory order may be wrong is not on its own a reason for interference or imposing a decision on the lower court or interfering with the exercise of discretion by the lower court. **See** the case of *Isaura Masinga and Ms Sande NO and Prosecutor General* (supra). Even if the interlocutory decision is shown to be wrong, the superior court will not interfere before the trial

[C] The following facts are either common cause or uncontested at the close of the state case.

a) The first applicant was a Minister of government. In his capacity as resident Minister he approached Gokwe Town Council with a request for 1000 stands for allocation civil servants at a low cost.
b) Gokwe Town Council did not have any available stands at the time of the request.
c) The first applicant, caused second applicant to prepare a layout of new residential stands in Gokwe. Second applicant prepared the layout plan of new stands to be known as Mapfungautsi Extension, Gokwe at 1st applicant's request and instance.
d) Second applicant submitted the layout plan for adoption by Gokwe Town Council on 3 October 2012.
e) Second applicant submitted the layout plan to the department of Physical Planning of the relevant Ministry for approval on 5th October 2012, before its adoption by Gokwe Town Council. The State witness said the approach was contrary to procedure
f) The department of Physical Planning approved the layout plan on the 8th May 2013, hence the creation of 3 300 stands in Gokwe to be known as Mapfungautsi extension.
g) While pushing for the adoption of the layout plan by Gokwe Town Council, the second applicant withheld the letter of approval from the town council. In other words, Gokwe deliberated on an issue which was *fait accompli* without such knowledge.
h) On the 17th May 2013 Gokwe Town Council finally adopted the layout plan which, unbeknown to it, had already been approved.
i) First applicant then pursued his request for 1000 stands which was turned down by Gokwe Town Council which opted, instead, to allocate the 1000 stands to the department of State Lands for management under a scheme known as 'commonage'.

j) The letter of allocation of the stands to the department of State Lands never reached the department. Somehow the stands were diverted to first applicant who allocated them to Striations World Marking (Pvt) Ltd

k) Striations World Marking (Pvt) Ltd is not a government entity and it is not known how the first applicant ended up in control of the stands when Gokwe Town Council had turned down his request for the stands (even he does not know).

l) At all times the applicants were exercising their governmental functions as public officers.

I am not persuaded that it was unprocedural or irregular or unreasonable or irrational for the trial court to put the applicants on their defence to explain their conduct. Their failure to give reasonable explanation puts them at risk of being convicted. Section 174(1) of the Criminal Law Code does not criminalise all conduct inconsistent with duty or incompetence *per se*. What distinguishes the crime created by section 174(1) from mere incompetence is the state of mind. It is not necessary always to outline the duties of a minister or public officer in as far as the crime created by section 174(1) is concerned. The State is only required to show that the public officer intentionally took advantage of his/her position or influence or power as a public officer to benefit either himself or show favour to another person. Where a person in a position of power acts for his or her own self-interest or for an ulterior or improper purpose, such conduct is inherently inconsistent with discharge of duty as a public officer.

See *Pfumbidzayi* v *State* HH-726-15[9]
See also *S* v *Taranhike & Ors* HH-222-18[10]

[9] Section 174 of the Criminal Law Code:

… is not meant to punish employees who happen to be public officers for mere incompetence or unsatisfactory performance of the duties for which they were appointed. It is not meant to supplant or complement the employment law principles relating to proper performance of duty. For that reason, not every unsatisfactory performance of duty constitutes an offence in terms of that section. The section must be considered for what it was intended – to punish those who abuse their office in order to gain some advantage whether for themselves or some other persons. The motivation for action taken by a person who qualifies as a public officer will therefore be helpful in determining the intention element, as the offence is clearly not a strict liability offence. Further, in considering whether there was criminal abuse of duty the court must consider the circumstances in which the officer was and not to adopt an armchair approach to the issues with the benefit of hindsight.

[10] the conduct constituting the abuse must be deliberate, calculated or purposeful. The word abuse connotes misuse, exploitation, taking advantage and recklessness in conduct. The misconduct impugned must be calculated to injure the public interest so as to call for condemnation and punishment.

In my respectful view therein lies the gravamen of the offence under s 174 (1) of the Criminal Law Codification and Reform Act [*Chapter 9:23*]. Section 88 of the Constitution provides that executive authority of Zimbabwe derives from the people and must be exercised in accordance with the Constitution. The authority vests in the President who exercises it, subject to the Constitution and through cabinet. A minister of government must act in accordance with the law. The president normally assigns to a minister (a) law(s) (usually acts of parliament) to administer. Such assignment is routinely published in the government gazette. The minister can only do that which the Act of Parliament empowers him/her to do. Gokwe declined to handover stands to the first applicant because administration of state land did not fall under his ministerial purview. In as far as ministers of government and other public officers are concerned there is a national code of ethics in the form of the constitution. All conduct must conform to it. The founding values and principles of the Constitution are enunciated in s 3 of the Constitution and find expression throughout the constitution. It is not necessary to call the president to testify to list the duties of a minister. The offence created by s 174(1) is a species of corruption. **See also section 194 of the constitution for basic values and principles governing public administration.**[11]

There is no likelihood of any harm befalling the applicants which cannot be corrected by way of appeal or review after judgment by the trial court.[12] **9** I am not persuaded that there are compelling reasons to interfere with the trial which is still in progress.

In the result I order as follows:

This application be and is hereby dismissed.

Mbizo Muchadehama and Makoni, applicants' legal practitioners
National Prosecuting Authority, 1st respondent's legal practitioners

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[11] **194 Basic values and principles governing public administration**
(1) Public administration in all tiers of government, including institutions and agencies of the State, and government-controlled entities and other public enterprises, must be governed by the democratic values and principles enshrined in this Constitution, including the following principles—
(*a*) a high standard of professional ethics must be promoted and maintained;
(*b*) efficient and economical use of resources must be promoted;
(*c*) public administration must be development-oriented;
(*d*) services must be provided impartially, fairly, equitably and without bias;

[12] **See Prosecutor General of Zimbabwe v Intratek Zimbabwe (Pvt) Ltd, Wicknell** Munodaani Chivhayo & Anor SC59/201