

**DISTRIBUTABLE (59)**

(1) BILLY RIGAVA (2) RACHEL CHIBAYA (3) JOHNSON  
SHONHE (4) HARUNAVAMWE NOTBURGA CHIFAMBA (5)  
CHARLES MAPONGA (6) GERALD GORE  
v  
(1) ESTERE CHIVASA N.O (2) THE STATE

**SUPREME COURT OF ZIMBABWE  
HARARE, 10 NOVEMBER 2021**

*T. Magwaliba*, for the first, second, third, fifth & sixth applicants

*L. Uriri*, for the fourth applicant

*F. Kachidza*, for the second respondent

No appearance for the first respondent

**CHAMBER APPLICATION**

**MWAYERA JA:** This is an opposed urgent chamber application for interlocutory relief pending the disposition of the appeal in SC 269/21, in terms of r 39 (1) as read with r 73 of the Supreme Court Rules, 2018 as further read with r 244 of the High Court Rules, 1971. The appeal goes to the root of proceedings pending before the first respondent, a Regional Magistrate. In short the applicants are seeking an order staying proceedings before the first respondent, pending finalisation of the appeal under SC 269/21. On 10 November 2021, I gave an order staying the proceedings. The reasons for the disposition are captioned herein.

## **FACTUAL BACKGROUND**

All the applicants are former board members of National Pharmaceutical Company of Zimbabwe (NATPHARM). The applicants were arraigned before the Magistrates' Court on a charge of criminal abuse of duty as public officers as provided for in terms of s 174 (1) (b) of the Criminal Law Codification and Reform Act [*Chapter 9:23*] ("the Code"). The allegations being that the applicants, during the period between July 2019 and June 2020 as board members at NATPHARM, omitted to discharge their duty to terminate Nancy Sinefu's contract of employment, for the purposes of showing favour to the said Nancy Sinefu to the prejudice of NATPHARM. The relevant provision under which they were charged reads as follows:

"174 Criminal abuse of duty as public officer.

- (1) If a public officer, in the exercise of his or her functions as such, intentionally –
  - (a) .....
  - (b) omits to do anything which it is his or her duty as a public officer to do, for the purposes of showing favour or disfavour to any person, he or she shall be guilty of criminal abuse of duty as a public officer and liable to a fine not exceeding level thirteen or imprisonment for a period not exceeding fifteen years or both."

## **PROCEEDINGS IN THE MAGISTRATES' COURT**

At the commencement of trial, all the applicants excepted to the charge. The exception was on the following grounds:

1. That the charge did not disclose an offence.
2. That the charge did not disclose the specific date when the offence was committed.
3. That NATPHARM being a private company, the applicants were not public officers and,
4. That the charge did not state the law contravened by the applicants.

Central to the applicants' arguments before the first respondent was the submission that NATPHARM is a private company and that as such its employees were not public officers. It was contended that it was incompetent to charge the applicants with criminal abuse of duty as public officers under s 174.

The second respondent opposed the application for exception. Counsel for the second respondent argued that the charge was clear and that it efficiently captured the essential elements. She submitted that the issue of whether or not the applicants were public officers, considering the status of NATPHARM, was an evidential issue that could only be addressed during trial.

The first respondent dismissed the exception, pointing out *inter alia*, that the charge was clear and it met the essential elements of a charge as provided by s 146 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] ("the Act"). The first respondent further held that the issues raised by the applicant were triable issues which could only be determined after considering evidence.

Aggrieved by the first respondent's decisions, all the applicants approached the court *a quo* on review.

### **PROCEEDINGS A QUO**

The applicants submitted that the exception was taken on the basis that factually and legally, no offence was disclosed by the charge. They argued that NATPHARM was not a public but a private entity. Its officers could therefore not be charged in terms of s 174 with criminal abuse of public office.

The applicants' counsel relied on *S v Kasukuwere & Anor* HH 562/19 and *Tobacco Sales (Pvt) Ltd v Entity Star* HC 47/06 to propound the proposition that the fact that NATPHARM is a Private Limited Company means that the applicants, as its officers, do not owe the public any duty and cannot be charged with contravening s 174 as public officers. The applicants' counsel argued that both the factual and legal averments in the charge are incorrect at law and thus there was no charge to answer. The exception, according to the applicants ought to be upheld.

Counsel for the second respondent in opposing the review application submitted that in terms of s 146 of the Criminal Procedure and Evidence Act, the charge was clear. It was further contended for the second respondent, that the exception taken amounted to defences and these are evidential and triable issues. Counsel relied on the authority of *Mupfumira & Anor v Mutevedzi N.O & Anor* HH 200/20 in which it was stressed that an exception cannot be taken on triable issues.

The court *a quo* to a large extent, agreed with the second respondent's counsel's submissions that the charge as framed was adequate and sufficiently informative to enable the applicants to proffer their defences. It held that the charge was not defective and that it had all the essential elements and averments enabling the applicants to properly prepare their defences. The court, in essence concluded that the grounds raised by the applicants as the basis for their exception were matters of evidence which could only be ventilated in a full trial.

The court *a quo* thus dismissed the application for review. This prompted the applicants who were dissatisfied by the court *a quo*'s decision to lodge an appeal with this court under Supreme Court case SC 269/21.

## **PROCEEDINGS BEFORE THIS COURT**

In this application, the applicants are seeking stay of the proceedings before the first respondent pending the determination of the appeal filed before this Court.

At the hearing both counsel for the applicants and the respondents conceded that the matter was urgent as they had successfully sought a postponement of the pending proceedings to a specific date. There was need for the application before this Court to be determined expeditiously as any delay might result in the proceedings before the second respondent resuming before the appeal. The concession was properly taken. Only one issue fell for determination

## **ISSUE FOR DETERMINATION**

1. Whether or not the applicants are entitled to the interim relief of stay of criminal proceedings in the Magistrates' Court pending the determination of the appeal against the decision of the court *a quo* dismissing the review application.

## **SUBMISSIONS BY PARTIES**

Both Mr *Magwaliba* and Mr *Uriri* submitted that the appeal pending before this Court enjoys prospects of success warranting the court to allow the indulgence of stay to allow the determination of the appeal. They were in agreement as to the status of NATPHARM as a private company, this having been spelt out in the charge sheet. It was also submitted on behalf of the applicants that the status of NATPHARM as a registered company in terms of statute is a matter of law and not an evidential and triable issue.

It was further contended that the status of NATPHARM had come to the fore in the matter of *S v Madzikwa* HC ACC 7/20, a case where the NATPHARM Chief Executive Officer was prosecuted and it was alleged that he was a public officer in terms of s 174 of the Code. The court *a quo* found Madzikwa not guilty on the basis that NATPHARM being a private company Madzikwa was not a public officer. The applicants' counsel further submitted that the resolution of the matter in the Magistrates' Court was predicated on matters of law and not triable issues as raised in the exception. They contended that the facts alleged did not disclose any offence as the applicants were not public officers. It was submitted that by failing to appreciate and address its mind to the real issues for determination, the court *a quo* misdirected itself.

Miss *Kachidza* for the second respondent opposed the granting of an interim relief to stop the proceedings in the Magistrates' Court pending finalisation of the appeal that is pending before this court. She conceded that NATPHARM is a private company but argued that, what the applicants raised concerning them not being public officers was a matter of evidence. She further submitted that what the applicants raised was in fact a defence to the charge which should only be determined after ventilation at trial. She contended that the charge was properly crafted and that it sufficiently informed the applicants of the charge in a manner which would enable them to formulate their defences. She further submitted that there were no prospects of success on appeal and that this court should be wary of interfering with untermiated proceedings of lower courts unless there is a gross irregularity which will be prejudicial to the interests of justice.

## **THE LAW**

It is trite that where the applicants seek an interim relief they must satisfy the following settled requirements, namely:

1. Whether or not the party seeking the relief has a *prima facie* right though open to doubt.
2. Whether or not there is a well-grounded apprehension of irreparable harm.
3. That there is no other satisfactory remedy and;
4. That the balance of convenience favours the granting of the interim relief.

See *Airfield Investments (Pvt) Ltd v Minister of Agriculture and Lands* 2004 (1) ZLR 511 (S) and *TM Supermarket (Pvt) Ltd v Avondale Holding (Pvt) Ltd & Anor* SC 37/17.

## **APPLICATION OF THE LAW TO THE FACTS AND ANALYSIS**

In *casu* the applicants excepted to a charge of criminal abuse of duty as public officers as defined in s 174 of the Criminal Code. The second respondent (the Magistrate) dismissed the exception prompting the applicants to approach the court *a quo* on review. Pursuant to the dismissal of the application for review the applicants noted an appeal to this Court. The applicants in this application seek stay of proceedings before the first respondent pending the determination of the pending appeal. The basis of the applicants' application for stay is that the charge does not disclose any offence since NATPHARM is a private company. The argument by the applicants is that they would suffer prejudice if they were left to go through the rigours of trial. The charge as framed did not disclose essential elements of abuse of public office since they are not public officers, so the argument went.

The case of *Williams & Anor v Msipa & Ors* 2010 (2) ZLR 552 relied on by the applicants is instructive. In that case the applicants were charged with the contravention of s 37 (1) (a) of the Criminal Code. It was alleged that the applicants gathered at a meeting with the intention or realising that there was a real risk or possibility of disturbing peace and security or order of the public or any section of the public. The applicants addressed the gathering which remained calm. There were no acts of violence and disorder. The police, however arrested and caused the applicants to be arraigned before the Magistrates' Court. The applicants then applied for stay of proceedings pending the determination of a Constitutional application pertaining to the preferred charge violating their freedom of Association and Assembly. The magistrate dismissed the application prompting the applicants to approach the Supreme Court. The Supreme Court ruled in favour of the applicants. It held that s 37 (1) (a) of the Code was not intended to prevent public gatherings but preserve peace and security. It was held that for remand purposes there is need for the court to be satisfied that facts alleged constitute the offence charged. Further, that there is need for the court to have reasonable suspicion that the accused committed an offence. The applicants in the *Williams* case were simply exercising their fundamental rights of freedom of assembly and expression. As such, placement on remand and trial would be prejudicial and injurious to the applicants.

In *casu*, although the case relates to an application for exception to the charge on the basis that no offence has been disclosed, the matter is akin to the *Williams* case *supra*. This is because the central aspect in both cases is whether or not a party is likely to suffer prejudice if the criminal proceedings proceed before determination of the propriety or otherwise of the charge.

The *Williams* case *supra*, makes it abundantly clear that it is undesirable to proceed in circumstances where a party is likely to suffer potential prejudice.

Considering the fact that the parties are in agreement that NATPHARM is a private company the question of whether its officers were competently charged under s 174 of the Criminal Code is central. To the extent that it is not in contention that NATPHARM is a private company the apprehension by the applicants of suffering irreparable harm by being charged and tried as public officers is reasonable. The interim relief of stay of proceeding pending determination of the appeal in this court appears to be the only satisfactory remedy in the circumstances. It follows therefore that the applicants have satisfied the requirements for the granting of an interim relief.

Further, the question of whether or not the applicants could competently be charged as public officers considering that NATPHARM is a private company is an arguable issue which clothes the appeal under SC 269/21 with prospects of success.

### **DISPOSITION**

It is in the interest of justice that the proceedings before the first respondent be stayed pending the determination of SC 269/21.

Accordingly it is ordered that:

1. Pending the determination of the appeal in case number SC 269/21 the proceedings in the Regional Court case ACC 112-3/20 and ACC 1273/20 be and are hereby stayed.

*Mutuso, Taruvinga & Mhiribidi*, 1<sup>st</sup> – 3<sup>rd</sup>, & 6<sup>th</sup> appellants' legal practitioners

*Matsikidze Attorneys - at-Law*, 4<sup>th</sup> appellant's legal practitioners

*The National Prosecuting Authority*, 2<sup>nd</sup> respondent's legal practitioners