LAZARUS MUCHENJE
and
PARADZAI MUTANDWA CHAKONA
versus
REGIONAL MAGISTRATE VONGAI P GUWURIRO N.O.
and
PROSECUTOR GENERAL OF THE REPUBILC OF ZIMBABWE

HIGH COURT OF ZIMBABWE
KWENDA & CHIKOWERO JJ
HARARE, 14 December 2021 & 28 July 2023

Court Application for Criminal Review

T W Nyamakura, for applicants
No appearance for first respondent
F Kachidza, for 2nd respondent

KWENDA J: *Introduction.* That the authority of the State vests in the government of the day is, in my view, trite. That such authority is exercised through tiers of government should be common knowledge. Historically, tiers of government consisted, mainly, of the national government and local authorities. (See s 5 of the constitution). However, Zimbabwe, like other modern constitutional democracies, has embraced the new concept of tiers of government in terms of which the constitution requires the government to delegate certain of its traditional functions to commissions, agencies of government and entities wholly owned or controlled by the State (including companies), which, despite their separate legal personality and institutional independence, are, essentially, arms of government in the service of the State and with the power to exercise certain delegated constitutional authority of the State. See Chapter 9 of the Constitution of Zimbabwe (Amendment No 20) Act 2013. The philosophy behind the new constitutional dispensation is beyond the scope of this judgment. Suffice to say that only employees of the executive arm of government remain in the civil service. See s 199 of the constitution. Other public officers are now in the service of the State in the paid offices of independent commissions, agencies

of government and entities wholly owned or controlled by the State (including companies), statutory body corporates and local authorities.

This development, being relatively recent, partly implemented by the introduction of the institutional independence of commissions in the 19th amendment of the constitution and now fully fledged in the 2013 constitution, may have been overlooked by the applicants in this case despite the authoritative statement by the apex court (Constitutional court) in *Wekare v The State and The Attorney General of Zimbabwe and Zimbabwe Broadcasting Corporation* CCZ 9/2016 per Malaba DCJ, as he then was. In that matter Wekare had challenged the constitutional validity of s 38B, 38 C, 38 D and 38 E of the Broadcasting Services Act [*Chapter 12:06*] which empower the Zimbabwe Broadcasting Corporation (a company wholly owned and controlled by the State and registered in terms of the Companies Act [*Chapter 24.03*] *(*"the companies Act") to collect and use a government tax payable by listeners for broadcasting services and empower the company with the authority to appoint its employees as inspectors, at par with police officers, to enforce and, where necessary, collect the tax. The following is discernible from the ratio of the judgment: -

a) The Zimbabwe Broadcasting Corporation was incorporated under the Companies Act in terms of the Zimbabwe Broadcasting Corporation (Commercialization) Act, 2001 (No. 26 of 2001) which mandated the Minister to take such steps necessary to form signal carrier and broadcasting companies under the Companies Act [*Chapter 24:03*], limited by shares, as successor companies to the corporation that was a parastatal of government. One of the companies is now known as the Zimbabwe Broadcasting Corporation, which took over the functions of broadcasting, and such assets, liabilities and staff of the Corporation as are connected with those functions.
b) The provisions of the Broadcasting Services Act [Chapter 12:06] providing for the collection of the tax known as listener's licence fees by the successor company (wholly owned and controlled by the State) is lawful and a constitutional and a legitimate exercise of the Legislature's constitutional power vested in it and lawfully delegated to the state controlled company.
c) The State has, thus, deliberately transformed certain of its arms of government, like parastatals, into entities and companies wholly owned and controlled by it conferred with

delegated power to exercise the constitutional authority of government and mandate to provide services to the people.

d) Such companies are to the extent of the delegation, tiers of government despite their incorporation in terms of the Companies Act or its successor, the Companies and Other Business Entities Act *(Chapter 24.31) ("*the Companies and Other Business Entities Act*").*

e) The delegated authority is exercised in the public interest.

f) The incorporation of a company wholly owned and controlled by the State in terms of the Companies Act is purposeful to give it the mark of institutional independence as a legal *persona* distinct from the shareholder.

There is, therefore, no gainsaying that State controlled companies and their employees exercise the delegated constitutional authority of the State as a public trust. The *Wekare* case was concerned with events before the promulgation of the Constitution of Zimbabwe (Amendment No 20) Act 2013. Chapter 9 of the 2013 constitution now expressly entrenches the designation of companies wholly owned and controlled by the State as tiers of government (see sections 194 and 195 of the constitution), and their employees as public officers who exercise the authority of the State as a public trust (see s 196 of the constitution) and that such employees are in the service of the State (see s 196 of the constitution).

Another notion that has been debunked by the 2013 constitution is the mindset which associates government with the exercise of coercive power of the State only. One of the central themes of the 2013 constitution is the provision of services to the people through the national government, local authorities, government agencies and entities (including companies) wholly owned and controlled by the State). See, for example, sections 8, 9, 194, 195 and 315 of the constitution. The definition of public officer in s 169 (d) of the Criminal Law (Codification and Reform Act *[Chapter 9:23]*) ("Criminal Law Code") must be understood in the context of this introduction.

The application before us

The applicants named this matter a 'court application for review filed in terms of ss 26 & 27 of the High Court Act [*Chapter 7:06*] as read with s 171 (1) (b) of the Constitution as read with r 62 of the High Court Rule 2021'. Section 171 (1) (*b*) of the Constitution of Zimbabwe

(Amendment no 20) Act 2013 ("the constitution") gives this court the jurisdiction to supervise magistrates' courts and other subordinate courts and to review their decisions. The constitutional power was operationalised in s 26 of the High Court Act *[Chapter 7:06]*. As such it may have been unnecessary to cite the constitution because this is not a constitutional matter.

The background to the application

The applicants are on trial before the first respondent, who is a Regional Magistrate for the Eastern Division sitting at Harare. The second respondent is the Prosecutor General who is the Head of the National Prosecuting Authority established in terms of s 258 of the Constitution to institute and undertake prosecution on behalf of the State and discharging all and any functions necessary or incidental to such prosecutions. The applicants are answering to the charge of criminal abuse of duty as public officers as defined in s 174(1)(a)(b) of the Criminal Law Code. The allegations are that during the period extending from March 2019 to May 2019 the applicants were employed by Net One (Private) Limited ("Net One"), a company wholly owned and controlled by the State. The first applicant was its Chief Executive Officer. The second applicant was a board member and chairperson of the Human Resources Committee. The State alleged that Net One is a 'public entity' and as such the accused persons were public officers by virtue of holding paid offices in the public entity as contemplated in s 174 (1) of the Criminal Law (Codification and Reform) Act. The State further alleged that the accused persons both and each or one or the other of them intentionally did things contrary to or inconsistent with their duty as public officers or omitted to do things which it was their duty as public officers to do for the purpose of showing favour to the first applicant and disfavour to Net One by allegedly colluding to unlawfully award the first applicant an unauthorised housing benefit allowance. The alleged unlawful conduct is said to have culminated in an alleged unauthorised lease agreement in terms of which the first applicant leased a residential property belonging to Net One at a paltry monthly rental of ZWL$ 1 000, way below the equivalent of USD 2 500 and USD 3 500 which had been recommended by Pam Holding and Kennan Properties respectively. These two are firms of estates agents. In so doing the applicants benefited the first applicant in the sum of ZWL 363 875. 00 and caused Net One financial prejudice in the same amount. The State alleged that the applicants failed in their duty to

manage the affairs of the State because Net One is a public entity wholly owned and controlled by the State.

Both applicants pleaded not guilty. They claimed that Net One is not a public entity and for that reason alone the charge put to them was incurably bad. They said they were not public officers as defined in s 169 of the Act for the purposes of s 174(1) of the Criminal Law (Codification and Reform) Act. They put the State to the proof of the allegations, firstly, that Net One is a public entity and secondly, that they (the applicants) are public officers. I will not delve into the other aspects of their defence because applicants' counsel abandoned five of the applicants' grounds for review leaving only one issue to be determined in this review. The same is whether or not the first respondent correctly held that the applicants are public officers. Ordinarily, that, too, would not be subject of a review because that goes to the merits as an essential element of the crime which must be pleaded and proved by the State. We only agreed to deal with the matter as a review as an exception to the rule because the applicants argued that the trial magistrate's decision was contrary to case law and therefore illegal.

The trial progressed up to the end of the State case, at which stage the applicants applied for discharge in terms of s198(3) of the Criminal Procedure and Evidence Act. Section 198(3) of the Criminal Procedure and Evidence Act requires a criminal court to acquit an accused person on trial for a criminal charge if, at the close of the State case, the court considers that there is no evidence that the accused person committed the crime charged. The applicants premised the application on three grounds. Firstly, that they were not public officers because their positions are not covered in the definition of 'public officer' in s169 of the Criminal Law Code. Secondly, that the State failed to adduce evidence justifying the inference that either of the applicants had acted contrary to established duties as a public officer. The evidence shows that the second accused acted lawfully and within his mandate. Thirdly, no amount of evidence could change the fact that Net One is a private company under the Companies and Other Business Entities Act [*Chapter 24:31*] and not a public entity under the provisions of S 169 of the Criminal Law Code. The applicants described as preposterous, the attempts by the State to use the definition of 'public entity' in s 4 of the Public Finance Management Act *[Chapter 22:19]* ("the Public Finance Management Act") to

support its allegation that Net One is a public entity. Defence counsel relied on the case of *S v Chikumba* 2015 (2) ZLR 382. I will quote from page 390F-391 H: -

> "In the present case, the State has conceded that Air Zimbabwe Holdings is a private company. The concession is well made. One would think that that would be the end of the matter. It was not. The State has argued further that the applicant was properly found guilty because as Group Chief Executive Officer for Air Zimbabwe Holdings, he was ***de facto*** "*a person holding or acting in a paid office in the service of the State* …." as defined by s 169 of the Criminal Code. As such, he was "*a public officer*" within the meaning of s 174(1)(a) of that Code.
> The State argued that the situation on the ground was that the State is a major stakeholder in Air Zimbabwe Holdings; that the board that administers its affairs is appointed by the government; that major decisions of the company have to be made in consultation with the line ministry and that the contracts of employment of senior staff have to be approved by the State.
> Finally, the State made the point that in certain circumstances the State does run private companies and that employees in such companies are obviously in the service of the State.
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> In my view, the question who is a public officer, or which types of entities are State bodies for the purposes of s 174(1)(a) of the Criminal Code, was not left to mere conjecture. It is clearly set out. In s 169 the Criminal Code defines "***a public officer***" to mean:
>
> (a) a Vice-President, Minister or Deputy Minister; or
> (b) a governor ……
> (c) a member of a council, board, committee or other authority which is a statutory body or local authority or which is responsible for administering the affairs or business of a statutory body or local authority; or
> (d) **a person holding or acting in a paid office in the service of the State**, a statutory body or a local authority; or
> (e) a judicial officer;"
>
> The argument by the State is fallacious. It purports to read into the Code words that are not there. The section does not refer to government-controlled entities. It refers to persons holding office in the service of the State. To say the Chief Executive Officer of Air Zimbabwe Holdings, a private company, is the same thing as "*a paid office in the service of the State*" is absurd. The government is merely a shareholder in the airline. It is not the employer. In my view, the person referred to in that section is a civil servant who is employed directly by the State and paid directly by it.
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> It is true that the State may sometimes run its affairs indirectly through statutory corporations. But the definition of "*public officer*" caters for that. Section 169 defines a "*statutory body*" to mean, among other things, "… *any body corporate established directly by or under an Act for special purposes specified in that Act*". An example that quickly comes to mind is that of the National Social Security Authority which is established by its own Act of Parliament, namely, the National Social Security Authority Act, *Cap 17:04*. Of course, there are many others. But Air Zimbabwe Holdings is a private company formed by shares and registered in terms of the Companies Act. It is not a statutory corporation. It was not even the successor company to the old corporation which the government consciously and purposefully dismantled in 1998.
>
> Mr *Muchini* argued that because the government has direct shareholding in the airline and literally runs its day to day affairs, it means that any person employed by such an entity must be deemed to be holding or acting in a paid office in the service of the State, within the meaning of s

169(d) of the Criminal Code and s 332 of the Constitution. He argued that the intention behind the creation of the offence in 174(1)(a) of the Criminal Code was to protect **public funds** and **public property** as defined in s 308 of the Constitution. In terms of this section "***public funds***" and "***public property***" include any money, or any property owned, or held by the State, or any institution, or agency of government, statutory bodies **and government-controlled entities** (emphasis by State Counsel). Such a definition, the argument concluded, manifestly covers Air Zimbabwe Holdings.

Such a tortuous construction is unwarranted. The applicant was not charged with any offence whose elements required the importation of definitions from the Constitution. He was charged with contravention of a specific provision of the Criminal Code. That provision is not at all in conflict with any provision of the Constitution. On the contrary, the definition of "*public officer*" in the Constitution, for example, is almost identical to that in the Criminal Code. What is more, the language of the Code is quite plain. It is unambiguous. The ordinary and grammatical meaning is clear. There is no need to resort to aids of construction."

In further argument before the first respondent, the applicants' counsel submitted that criminal legislation should be restrictively interpreted. He moved the first respondent to interpret the definition of the crime of criminal abuse of duty as a public officer as defined in s 174 (1) narrowly rather than broadly in what he described as the *ius strictum* principle. The common law statutory provisions creating crimes should not have their range extended beyond the plain meaning of the language of the law or statute as that is beyond the competence of the court. To this end counsel quoted *CR Snyman,* Criminal Law 6th Edition at p 36: -

"An accused may not be found guilty of crime and sentenced unless the type of conduct with which he is charged:

a) has been recognized by law as a crime
b) in clear terms
c) before the conduct took place
d) without the court having to stretch the meaning of the words and concepts in the definition to bring a particular conduct of the accused within the compass of the definition.
e) after conviction the imposition of punishment also complies with the four principles set out immediately above

He also cited the following cases: -

S v Augustine 1986 (30) SA 294 (C) at pp 302 (I)-303 (A)

". ...there are always people to be found who invite and favour "extensions" by the court of the existing principles of the common law to encompass situations which they feel "should" have been encompassed, even if they have not hitherto been so encompassed. I do not think the Courts should respond too readily to such invitations. Fundamental innovations like this are for the Legislature, (if so advised), and not the Courts. That being so, I certainly have no desire to rush in where other courts have feared to tread."

Chihava & Ors v *The Provincial Magistrate* 2015 (2) ZLR 31 CC 35H - 36E

> "The starting point in relation to the interpretation of Statutes generally would be what is termed 'the golden rule' of statutory interpretation. This rule is authoritatively stated thus in the case of Coopers and Lybrand Bryant 1995 (3) SA 761 (A) at 7
>
> > "According to the "golden rule" of interpretation, the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument."

Natal Joint Municipal Pension Fund v *Eudimeni Municipality* 2012 (4) SA 593

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in light of the ordinary rules of grammar and syntax; Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the statute itself., read in the context and having regard to the purpose of the provision and the background to the preparation and production of the document'"

Chegutu Municipality v *Manyora* 1996 (1) ZLR (SC) 264 D – E which cited the case of *Stafford v Special Investigating Unit* [1998]4 ALL SA 543 (E) 553 b-c with approval: -

> "A court cannot act upon mere conjecture and speculate as to whether or not the legislature might have overlooked something, it cannot supplement a statute by providing what it surmises the legislature omitted. The court therefore must give effect to what the act says and not what it thinks it ought to have said."

The application for discharge before the first respondent was opposed by the State. The State submitted that there are two conflicting judgments of the High Court which have a bearing on whether or not the applicants are public officers. They drew the court's attention to the cases of *S v Chikumba* 2015 (2) ZLR 382 per Mafusire J and *S v Taranhike and Ors 2018 ZLR (1) 399 (H)* per Tsanga J. I have already quoted the relevant dicta in *Chikumba* case, supra. I now quote from the *Taranhike case* at page 404 F-G.

> "In the English case of *R* v *Cosford, Falloon and Flynn* [2013] 2 Cr App R 8 for example the court concluded that the important point is:

> "whether that duty is a public duty in the sense that it represents the fulfilment of one of the responsibilities of government such that the public at large have a significant interest in its proper discharge".
>
> In that case it was held that nurses in a prison setting, whether trained as prison officers or not, and whether or not, if the prison is run directly **by the State or indirectly through a private company, paid by the State to perform its functions, had duties which fulfilled the requirement of a public office for this purpose**."

The State urged the first respondent to follow the *Taranhike* case because it was decided in 2018, later than the *Chikumba* case which had been decided in 2015. The State also submitted that the *Taranhike* case was to be preferred because it was decided after the promulgation of the Public Entities Corporate Governance Act *[Chapter 10:31* ("Public Entities Corporate Governance Act") which defined public entity in s2 as any entity whose operations or activities are substantially controlled by the State or by a person on behalf of the State, whether through ownership of a majority of shares in the entity or otherwise.

The application for discharge at the close of the State was dismissed by the first respondent on the basis of, among other reasons, her finding that the applicants were public officers. She distinguished the decision of this court in the *Chikumba* matter, on the basis that it was decided before the promulgation of the Public Finance Management Act and Public Entities Corporate Governance Act. The fact that the applicants were employed by a company incorporated in terms of the Companies Act did not change the fact that the Public Finance Management Act [*Chapter 22:19*] defines a 'public officer' as any person whose salary is paid from a fund audited by the Comptroller General and the Public Entities Corporate Governance Act defines a statutory body as a body corporate established directly by or under any Act for special purposes specified in that Act where members consist of wholly or mainly of persons appointed by the President, Vice President, a Minister or Deputy Minister. Net One was such body corporate because it was created in terms of sections 106 and 107 of the Postal & Telecommunication Act [*Chapter 12:05*] ("Postal & Telecommunication Act") and its members are appointed by the Minister.

The grounds of the application before us

Before us now is an application for the review of the first respondent's ruling. The applicants are seeking an order setting aside the order which dismissed their application for

discharge at the close of the State case and replacing it with an order granting the application and acquitting them at the close of the State case. The argument is that is that the first respondent committed a gross irregularity when she held that the applicants are public officers.

On one hand, the applicants remain steadfast that they are not public officers. They appear to agree with the State that what determines whether one is a public officer is the type of entity which he or she works for. They simply do not agree with the State's portrayal of Net One as a public entity. According to them, as opposed to being a public entity, it is a private company limited by shares under the provisions of the Companies and Other Business Entities Act. The first respondent grossly misdirected herself when she concluded that the applicants are public officers following the definition of 'public officer' in the Public Finance Management Act and that Net One is a public entity following the definition of 'public entity' in the Public Entities Corporate Governance Act because both statutes have no bearing on the interpretation of provisions of the Criminal Law Code. The first respondent committed a gross irregularity when she came up with her own definition of 'a public officer' which is not supported by any of the descriptions in s 169 of the Criminal Law Code. In so doing the first respondent, usurped the constitutional prerogative of the Legislature to make the law. The irregularity went to the root of the trial thereby vitiating the legality of the proceedings. The illegality infringed upon the applicants' right to a fair trial as enshrined in s 69 of the Constitution of Zimbabwe (Amendment No 20) Act 2013. They argued, further, that, in any event, the Public Finance Management and the Public Entities Corporate Governance Acts were promulgated after the conduct giving rise to the charge and as such do not apply to conduct before their promulgation. I have checked and noted that the Public Entities Corporate Governance Act was passed in 2018 as Act *4/2018*. The Public Finance Management Act was passed in 2019 as Act 11/2019.

On the other hand, the State filed two conflicting responses. Initially the State defended the first respondent's ruling in a notice of opposition and opposing affidavit filed on the 1st December 2021. Various reasons were relied upon for taking that position. Firstly, that Net One is a public entity in terms of the Public Entities Corporate Governance Act. Secondly that it is a company or other commercial entity wholly owned and controlled by the State. Alternatively, the applicants are public officers by virtue of the definition of 'a public officer' in the Public Finance

Management Act as any person who is a paid a salary from a fund audited by the Comptroller and Auditor General. Later, on the 13th December 2021, the State filed another response wherein it conceded that the applicants were not public officers, backing that by reference to the case of *S v Chikumba* 2015 (2) ZLR 38. The State also conceded that the description of a public officer in s 169 (d) as a person holding a paid office in the service of the State applied to 'civil servants' only. The State also conceded that the Public Entities Corporate Governance Act and the Public Finance Management Act had no bearing on the interpretation of the Criminal law. We asked the State whether we could abort the review because the State had the prerogative, in light of the concession, to either withdraw the charge after plea or stop the prosecution in which case the accused applicants would be acquitted. State counsel indicated that the conflicting responses by its officers reflected conflicting views and lack of consensus on the legal issue and there was need for this court to make a definitive pronouncement on it.We agree.

Findings of this court

Firstly, we hold that the applicants are public officers by virtue of being persons holding or acting in a paid office in the service of the State. The notion, touted by the applicants, that the whole phrase 'a person holding or acting in a paid office in the service of the State' refers to the civil service only, is wrong. We are fortified in this view on the authority of the case of *Wekare* case, supra. The case made it clear that the incorporation of a company wholly owned and controlled by the State in terms of the Companies Act was purposeful to give it the mark of institutional independence as a legal *persona* distinct from its shareholder but that does not make the company a private interest or privately owned company. The authority delegated to the company, to be exercised through its employees, is a public trust to be exercised in the public interest.

Secondly we hold that the problem in this case started with the formulation of the charge by the State. In terms of s 169 of the Criminal Law Code, a person is a public officer because he or she falls in any one of the categories of people stated therein under different paragraphs. Each of the definitions is self-sufficient. It does not have to be read in conjunction with any other. The definition under consideration in this judgment is paragraph (d), which is that public officer means 'a person holding or acting in a paid office in the service of the State, a statutory body or a local

authority'. The State should have cited the specific paragraph and reproduced the wording of the statute. Section 146(2)(a) of the Criminal Procedure and Evidence Act *(Chapter 9:07)* ("the CP & E Act") makes it clear that the description of any offence in the words of the enactment creating the offence, or in similar words, shall be sufficient. There was no need for the State to use the word 'public entity' which does not exist in s 169 of the Criminal Law Code. I can do no more that demonstrate the correct formulation of this element of the charge than acknowledge with approval the formulation of the charge by the prosecution team comprising W *Mabhaudi, L Masuku & F C Muronda* in the case of\s v *Hebert Gomba and 4 others* HH 391 /23 see page 1 of the cyclostyled judgment where at the following appers:-

> "The first accused was, at the relevant time, the mayor of the City of Harare and as such, a member of Council as defined in s 199(1)(c) of the Criminal Law \9Codification and Reform) Act. The second, third and fourth accused persons were the Acting Finance Director, Town Clerk and Acting Chamber Secretary respectively and as such, persons holding or acting in a paid office in the service of the City of Harare, a local authority as defined in s 199(1)(d) of the Criminal Law Codification and Reform Act. The City of Harare is an urban local government authority and tier of Government whose mandate is to represent and manage the affairs of people in the City (see s 5 of the Constitution)."

That is how this particular element of the charge should be pleaded in future or something close to that because it is clear and specific. However, in this case the imperfection was cured in evidence because the parties eventually zeroed in on s 169 (d) of the Criminal Code.

Thirdly, we hold that government agencies and companies wholly owned by the State are arms of government. The concept is underpinned by a well-established principle of our common law of the legal extension of the arm. In its simplest form it applies in criminal law in circumstances where a person uses an instrument or a child to fish items from a house through a small opening. The instrument is at law an extension of his or her anatomy. In the case of a child, its actions are his. In the context of crime, it would be absurd for the accused to dissociate himself from the child on the basis that it has separate existence.

With respect to agencies of government as tiers of government, the underpinning legal philosophy of the concept is also very clear. Agency, means representation and the concept remains the same irrespective of the branch of law one is dealing with. See CONTRACT General Principles, Juta, Sixth Ed at page 295

"The concept of representation as it is known to modern South African law was unknown to Roman law, and originated in Roman Dutch law.
Representation is not a contract but a legal phenomenon which occurs where a person (the representative) clothed with authority performs a juristic act on behalf of another person (the principal)
..
The representative, as it were, acts like a juridical midwife who delivers rights and duties for her principal".

At page 297

> ...the concept of agency is often used in the correct sense of the word (namely indicating the phenomenon of representation itself) …."

See also Business Law in Zimbabwe R H Christie, JUTA,1998 at page 343

> "Perhaps the most important of an agent's duties is the duty to show the utmost good faith, or *uberrima fides*. It is obviously undesirable that an agent should allow a position to develop where his personal interest conflicts with his duty to his principal, and if such situation does, or is likely to develop the agent must fully disclose the nature and extent of his interest to his principal: *Shayne v Garden City Properties (Pvt) Ltd 1973(2) RLR 332 (A), In Fox and Carney (Pvt) Ltd v Dilworth 1974 (1) RLR 124 125, 1974 (2)*'SA 631 532 Macaulay J said that:
> "The essence of the agent's fiduciary duty is that he must not use his services to promote any interests other than his principal's, he must give the latter the full benefit of his services and any benefit or advantage which arises in the course of executing the mandate."

These same principles lie beneath agency in public law i.e. the Constitution and the Criminal Code. Section 194 (1) as read with s195 (1) of the constitution make it clear that agencies of government, companies and other commercial entities owned or wholly controlled by the State are subject to the basic values and principles governing public administration set out in Chapter 9 of the constitution. It is therefore wrong and mischievous for such entities or their employees to claim that they represent private interests. Section 196 puts it beyond doubt that government agencies and employees of companies and other commercial entities owned or wholly controlled by the State are public officers and the authority assigned to them is held by them as a public trust which must be exercised in a manner which is consistent with the purposes and objectives of this Constitution and in a manner which demonstrates respect for the people and a readiness to serve them rather than rule them.

Fourthly, we hold that, ironically it is the applicant's counsel who is complicating a very simple and straight forward definition of public officer in paragraph 169 (d) by introducing the words 'civil servant' or civil service' which are not part of it. He has therefore fallen foul of the

very things that he accuses the first respondent of doing. If the intention of the Legislature was to refer to civil servants in s 169 (d) it was easier to use the two words instead of saying it in a roundabout manner. If anything the term civil service has become moribund. It was deliberately expunged from the definitions in s 332 of the constitution by section 22(*a*) of Act 2 of 2021 because, unlike the classical position, it no longer applies to all persons in the service of the State. It was replaced by the term, the 'Civil Service' described in s 199 of the constitution as the people employed by the State and responsible for the administration of Zimbabwe but excluding members of the security services, judges, magistrates and persons presiding over courts established by an Act of Parliament, members of Commissions established by the Constitution, the staff of Parliament and any other person whose office or post is stated by this Constitution or an Act of Parliament, not to form part of the civil service. Yet all these persons excluded from the civil service are in terms of Chapter 9 of the constitution. While the definition of crime should not be extended to include situations not covered by the crime, it is equally true that a crime must not be defeated by frivolous argument. The Criminal Law Code explains, in its own words, in the preamble, that the purpose for codifying the criminal law was, among other reasons, to reform the common criminal law of Zimbabwe …. and…set out in a concise and accessible form what conduct our criminal justice system forbids and punishes and what defences can be raised to criminal charge. This needs no interpretation. The Legislature could not be clearer. There are only two aspects to paragraph 169 (d) of the Criminal Law Code. A public officer is a person who (i) holds or acts in a paid office (in the service of the State.).

There is no need to argue that the first part means a person in the paid office 'of the State' or of 'the civil service'. In fact, the public officer contemplated in paragraph (d) of s 169 does not have to be a full time employee of a tier of government. He or she only needs to be acting in the office even in that particular instance only. It is a notorious historical fact in Zimbabwe that the prosecution of the six air force officers charged with treason in or around 1985 were prosecuted by Honour Mkushi who is the principal of a law firm known as Sawyer and Mkushi as a government agency. He naturally received remuneration for that and by conducting a prosecution at the public instance he was in the service of the State. This court can also take judicial notice of the fact that there are certain members of the Special Anti-Corruption Unit who appear before it

in the Anti-Corruption Division to prosecute cases of corruption at public instance. Two of them are full time employees of companies which have no relationship with the State, as company secretaries. One is a principal of a law firm. Members of tribunals appointed in terms of s 174 (4) to enquire into alleged gross misconduct of a judge are obviously public officers when they deal with that enquiry. A person occupying or acting in a paid office in the service of the state is a public officer despite not being part of the civil service or that he occupies or acts in some other paid office in the service of a non-state organisation, company or entity. I need to conclude this part of the judgment by observing that the codification of the criminal law and extensive amendments to the criminal procedure was intended to make the law simpler, concise and more accessible.

Unlike the common law position where crimes where just stated in a few words and it was up to the courts to develop the principles that apply to the crime, the codified criminal law is now explained in detail. In applying the codified law one must bear in mind the preamble of the Criminal Law Code which speaks of the common criminal law of Zimbabwe in conformity with the fundamental principles set out in the Constitution and other fundamental principles developed over time by our criminal justice system and in order to set out the criminal law in a concise and accessible form.

The second part of paragraph (d) of s 169 of the Criminal Law Code should not present problems because s 196 of the constitution is clear that the authority of the state is a public trust to be exercised to serve the people not to rule them and not to further personal interests. The applicants in this matter seem to believe that they were not accountable to the people yet the people are the source of the authority they exercise. The applicants arrogantly want to use such authority with impunity instead of being of service and accountable to the people who are the source of that power. That is preposterous.

It is a trite position of law that an agent may not claim greater rights, power and authority than the principal. The constitution is unambiguous that all tiers of government and agencies are subject to the constitution. It is therefore not a coincidence that the duty imposed on public officers in s 196 of the constitution is worded similarly to the definition of the crime defined in s 174 (1) of the Criminal Law Code. The purpose of s 174 of the Criminal Law Code is to criminalise

conduct undermining the principles of probity set out in the constitution, eg s 196 (1)(c) and 196 (3) (b)s(c).

Fifthly, we hold that as explained the *Wekare* case, supra, the registration of government companies in terms of the Companies Act is for the purpose of institutional independence only, and like the other independent institutions like the Zimbabwe Anti-Corruption Commission the independence does not make the employees unaccountable to the people. If anything the independence is intended to support democracy. (See the title of Chapter 12 of the constitution). It also has the benefit of ease of doing business by the removal of bureaucracy and the effects of the unfriendly State Liabilities Act *[Chapter 8:14]*. By parity of reasoning it may be noted that the Broadcasting Services Act puts licensing inspectors at par with police officers. It would be absurd that Police officers would be subject to fiduciary duties in chapter 9 of the constitution while their counterpart licencing inspectors owe no fiduciary duty to the State. It would equally be absurd for the government which is the principal in the agency relationship with its agencies to be subject to chapter 9 of the constitution and yet give its agencies impunity. Net One is one of the successor companies of a government parastatal known as the Post and Telephone Corporation and the ratio in the *Wekare* case, supra, should apply to it. Another example is the National Pharmaceutical Company of Zimbabwe which is a procurement arm of government. It would be absurd that the State would be required in terms of s315 of the constitution to prescribe procedures for the procurement of goods and services by the State and all institutions and agencies of government at every level, so that procurement is effected in a manner that is transparent, fair, honest, cost-effective and competitive and yet the government agency to which the procurement function is delegated, owes no duty of probity towards the State.

Sixthly, we hold that the first respondent was therefore correct in referring to such statutes as the Public Finance Management and the Public Entities Corporate Governance Acts in order to demonstrate that Net One is wholly owned and controlled by the State through such statutes and the applicants are deployed to hold and occupy paid offices in companies wholly owned and controlled by the State to perform juristic acts in the service of the State on behalf of government. She ought however to have gone further to demonstrate that in defining the term ‘public officer’ she was not borrowing the definitions in the statutes concerned but construing the criminal law in

conformity with the constitution. This, she was required to do in terms of the Criminal Law Codification and Reform Act. Recently in the case of the *State v Gomba* , supra, at page 35 of the cyclostyled judgment I said:

> "The relevance of the Constitution in crime is also self-evident in the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] which explains, in its own words, in the preamble, the legislative purpose for codifying the criminal law. The following appear in the preamble. I have underlined the key words or phrases. The Legislature found it 'desirable to codify and, where necessary, reform the common criminal law of Zimbabwe in conformity with the fundamental principles set out in the Constitution and other fundamental principles developed over time by our criminal justice system and in order to set out in a concise and accessible form what conduct our criminal justice system forbids and punishes and what defences can be raised to criminal charge. The preamble needs no interpretation. The Legislature could not be clearer. The courts, too, are public institution which must interpret and apply the criminal law in a manner which conforms with, promotes and is generally not inconsistent not contrary to the Constitution."

However, that does not detract from the fact that she correctly found that the applicants are public officers and thus liable to be charged with the crime of criminal abuse of office.

The first respondent was correct in her conclusion that the *Chikumba case,* supra, is distinguishable. In addition to the reasons she gave we add the following.

The views expressed in that case were in the context of a bail application pending appeal. The bail application was pending appeals noted in this court by Chikumba and his co-appellant, Pfumbidzai who had been convicted in the Regional Magistrates Court under CRB R672-3/14 for Criminal abuse of duty as public officers as defined in s174 (1) of the Criminal Law Code. The court was concerned with the issue of prospects of success on appeal only, sometimes referred to as whether the appellant has an arguable case on appeal or whether the appeal is doomed to fail. It did not definitively determine the contested issue of whether or not Peter Chikumba and his co-appellant were public officers as contemplated in s 174 (1) of the Criminal Law Code. The appeal is still pending in this court. The opinion expressed at the stage of bail pending appeal will have no bearing on the actual outcome of the appeal.

On the other hand, the dicta in the *Taranhike,* supra, was definitive after the issue had been argued at trial. Tsanga J, who presided at the trial, was aware of the sentiments by the judge in the *Chikumba* case,supra. She cited it and distinguished it. (See at page 404 D-E.

> "In this instance, even if the debt legally belonged to Infralink which is a private corporation, when the facts as described herein are looked at in their entirety, it is hard to

> see how ZINARA can be said to be out of the picture or to be divorced from any actions taken by the accused in their capacity as public officers on behalf of Infralink."

The *Chikumba case*, supra, is also distinguishable on another ground. The court opined that restricting the application of paragraph (d) of s 169 of the Criminal Law Code to the civil service was not inconsistent with any provision of the constitution. Its attention was not drawn to s 199 and chapter 9 of the constitution. In terms of s 199 of the constitution, the term civil service no longer covers all public officers and in terms of chapter 9, one does not need to be in the civil service to be in the service of the State.

The first respondent also correctly held that despite Net One (Pvt) Ltd being a company under the Companies and Other Business Entities Act it is wholly owned and controlled by the government. She demonstrated this by reference to provisions of the Public Finance Management and the Public Entities Corporate Governance Acts. She could have gone further to demonstrate by reference to Chapter 9 of the constitution that the applicants are public officers. No actual an permanent miscarriage of justice ensued from her failure to do so.

The attack on the person of the first respondent who has been accused of being motivated by bias to extend the meaning of the concept of public officer was not justified. Legal practitioners are expected to be slow to make such serious allegations against judicial officers at every level because the courts are the custodians of the rule of law. In terms of s 2 of the Constitution the rule of law is supreme authority. Jurists must, in levelling criticism against other members of the profession, be temperate because the possibility is always attendant that, they could actually be wrong.

Disposition

In the result we do not find merit in the application and order as follows:

The application is dismissed with no order as to costs.

KWENDA J:……..

CHIKOWERO J: Agrees……

Masango Seda Mutema Attorneys, first respondent legal practitioner
National Prosecuting Authority, second respondent legal practitioners