REPORTABLE (144)

THE STATE

v

(1) SIMON TAKAWIRA MUSERERE (2) CHRISTOPHER MAGWENZI ZVOBGO (3) MISHECK BVUMBI (4) TENDAI MAHACHI (5) MASIYE KAPARE (6) WILTON JANJAZI (7) PAULINE MACHARANGWANDA (8) URAYAYI MANGWIRO

SUPREME COURT OF ZIMBABWE
MAKONI JA, MATHONSI JA & CHITAKUNYE JA
HARARE, 15 OCTOBER 2021 & 23 NOVEMBER 2021

C. Mutangadura, for the appellant

T. L. Mapuranga, for the 1st respondent

M. Mavunga, for the 2nd respondent

J. Mambara, for the 3rd respondent

T.S.T. Dzvetero with *P. Pathisani*, for the 4th respondent

No appearance for the 5th respondent

S. Machingauta, for the 6th respondent

S. Kachere, for the 7th respondent

C. Mucheche, for the 8th respondent

MATHONSI JA: This is an appeal against the whole judgment of the High Court handed down on 13 May 2019 which found all the eight respondents not guilty and acquitted

them of two counts of criminal abuse of office as public officers as defined in s 174 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Criminal Law Code").

THE BACKGROUND FACTS

At the material time, the first respondent was employed by the Harare City Council ("the Council") as the Harare Waste Water Manager in charge of Harare Waste Water Division. The second respondent was employed by the Council as the Director of Harare Water.

The third respondent was also employed by the Council as its Treasurer while the fourth respondent was its Town Clerk. The fifth, sixth, seventh and eighth respondents were all Councillors who also served as members of the Council's Procurement Board.

Sometime in 2009 there was a cholera outbreak in Harare in which approximately 4 000 residents lost their lives and a further 98 585 residents are said to have been afflicted by the disease. To combat the spread of the disease, the council undertook a programme to rehabilitate its sewage plants at Firle and Crowborough in Harare.

Council embarked on a selective tender process to identify contractors to perform the exercise. In due course two tenders were awarded. The first was awarded to Energy Resources Africa Consortium ("ERAC"). The resultant contract entered into was valued at US$13 816 117,10. It is this transaction which later formed the basis of the first charge preferred against the respondents.

The second tender was awarded to Sidal Engineering (Pvt) Ltd. It was valued at US$18 121 125,16. This transaction later formed the basis of the second charge preferred against the respondents.

In November 2016, the Council resolved that the contract in respect of the rehabilitation of the Water Works was improperly done. It reported the matter to the Zimbabwe Anti-Corruption Commission ("ZACC"). The ZACC formed an opinion that proper procurement procedures were not followed. The respondents were accused of acting in common purpose to show favour to the two entities awarded the tenders.

The appellant jointly charged the respondents with two counts of Criminal Abuse of Duty as a Public Officer as defined in s 174 of the Criminal Law Code. In count one, it was alleged that during the period extending from July 2010 to April 2011, at the Council Office in Harare, they unlawfully and intentionally acted contrary to or inconsistent with their duties as public officers.

The specific allegations in count one were that they:

> "… for the purpose of showing favour to Energy Resources Africa Consortium (hereinafter called ERAC), an unregistered entity acted jointly and in common purpose with each other in corruptly awarding a tender for the rehabilitation of Firle Sewage Digester and Ancillary works valued at US13 816 117.10 (Thirteen Million Eight Hundred and Sixteen Thousand one hundred and seventeen United State Dollars and ten cents) to ERAC withour following Harare City Council Tender procedures ……." (Emphasis added)

The allegations in count two were also couched in similar language namely that:

> "…for the purpose of showing favour to Sidal Engineering (Pvt) Ltd (thereafter called Sidal), (they) acted jointly and in common purpose with each other in corruptly awarding

a tender for the rehabilitation of Firle and Crowborough Sewage Works valued at US$18 121 125.10 (Eighteen million one hundred and twenty-one thousand one hundred and twenty-five United States Dollars and ten cents) to Sidal a company which had no capacity to execute the required work as it in turn sub-contracted Energy Resources Africa Consortium (hereinafter called ERAC) thereby breaching Harare City Council Tender procedures for the purposes of showing favour to Sidal Engineering (Pvt) Ltd." (Emphasis added)

PROCEEDINGS BEFORE THE HIGH COURT

The respondents were arraigned before the court *a quo* on the above two charges. They were accused of showing favour firstly to an unregistered entity (ERAC) and secondly to an entity with no capacity to execute the mandate (SIDAL) without following procedures.

According to the charges, it was the respondents who awarded the tenders. This is the case they pleaded to and were made to prepare to face at the trial. At the trial the appellant's case was that the respondents had not followed the Procurement and Awards and Administration of Tenders Manual ("the manual") in awarding the tenders.

Regarding the awarding of tenders, the appellant led evidence to the effect that the tenders were in fact awarded by the Council and not by the respondents. Throughout the trial the respondents placed in issue the allegation in the charge that they had awarded the tenders.

In respect of the manual, the respondents' case was that it had been adopted by the Chanakira Commission, which had been appointed to run the affairs of the Council at a time when its term had expired. The Commission was later declared illegal by a court of law. Accordingly, so the respondents argued, the Manual was inadmissible as evidence in a court of law, its use by the Council not having been regularized by a subsequent lawful council.

In respect of the accusation that they had failed to follow the tender procedure laid out in s 211 (2) of the Urban Councils Act [*Chapter 29:15*] the respondents' case was that they were in a time of crisis arising from the outbreak of cholera. As a result, they opted to use the selective tender process provided for in s 211 (10) of the Act.

According to the respondents, employing the normal tender procedures would have taken a considerably long time thereby failing to address the emergency. This, together with the fact that Harare's department of water had been given autonomy by the government, meant that there was nothing amiss with the method adopted. Further, it was the respondents' case that it was council which awarded the tenders and not them.

The court *a quo* found that the respondents had not followed the rule of law guidelines leading to the award of the two tenders. Even in the context of the selective tender procedure that is adopted in instances like the cholera outbreak, the court *a quo* found that the decision of council to effectively adopt the recommendation and award the tenders at the same time did not comply with "the rule of law" laid down in s 211 (10) of the Act.

The court *a quo* however found that the manual relied upon by the prosecution as evidence of the transparency procedures for tenders, had been put in place by an illegal commission. The manual had not been adopted or regularized by subsequent councils after the commission had been declared illegal. It was the finding of the court *a quo* that the manual was an illegitimate document which could not be used against the respondents. Whatever procedures the respondents were charged with not following could not draw on an illegal tender manual.

After a detailed analysis of the evidence it was the finding of the court *a quo* that it was not the respondents but the full council which awarded the two tenders. What that means is that an essential element of the charges was not proved by the evidence.

Apart from that, the court *a quo* found that the issue of the water department having been allowed to operate autonomously was critical in the determination of whether the respondents abused their office as public officers. It concluded that:

> "Whilst indeed there has been evidence of anomalies and irregularities in how the accused persons conducted the process when placed against the backdrop of what the law provides, the framing of the charges against the accused of connivance and common purpose fell far too short of being supported by facts. Much of the court's time has been taken in this matter. In many respects this Court sitting as a criminal court where the evidence presented must meet the threshold of beyond reasonable doubt, instead felt it was sitting as a review court of council processes and procedures which council technocrats themselves were somewhat cryptic in their knowledge and sometimes not even in agreement.
>
> We do not believe that any evidence of a conclusive nature was presented to show that they were motivated by the intention to abuse their public office when they obtained the resolution in the defective manner that they did. There may sometimes be a fine line between inefficiency and abuse of office."

Having come to that conclusion, the court *a quo* found all the respondents not guilty and acquitted them on both counts.

PROCEEDINGS BEFORE THIS COURT

The appellant was aggrieved. After obtaining leave, he appealed to this Court initially on the following eight grounds of appeal.

1. The Honourable court *a quo* erred on a point of law on both counts when it held that the appellant had the onus of proving beyond reasonable doubt that the respondents derived a benefit from their participation in a process which led to the award of tenders

to Energy Resources Africa Consortium initially an unregistered entity and Sidal Engineering (Pvt) Ltd whereas s 174 of the Criminal Law Codification and Reform Act [Chapter 9:23] does not require such personal benefit to be proved.

2. The Honourable court *a quo* erred on a point of law on both counts when it concluded that the appellant had the burden of proving that breach of s 211 (10) of the Urban Councils Act [*Chapter 29:15*] by the respondents had been done for the purposes of showing favour to Energy Resources Africa Consortium (initially unregistered entity) and Sidal Engineering (Pvt) Ltd whereas s 174 (2) Of the Criminal Law Codification and Reform Act [*Chapter 9:23*] casts the burden of disproving that presumption of fact on the respondents on a balance of probabilities.
3. The Honourable court *a quo* erred on a point of law on both counts when it concluded that the Harare City Council's Procurement and Awards and Administration of Tenders Manual was inadmissible whereas the manual is the applicable codified source of procurement procedures by the Harare City Council in addition to s 211 of the Urban Counts Act [*Chapter 29:15*].
4. The Honourable court *a quo* erred on a point of law on both counts by not invoking either s 202 or 203 of the Criminal Procedure and Evidence Act which gives the court the power to order amendment of the indictment after it emerged that the award of the tenders was made by Harare City Council pursuant to an unlawful recommendation culminated by defective and criminal tendering processes jointly done by the respondents.
5. The Honourable court *a quo* misdirected itself on a point of fact [ ] in finding that there was no evidence of connivance between the respondents when circumstantial

evidence proved that the violation of s 211 (10) (a) of the Urban Council Act [*Chapter 29:15*] by the respondents was inconsistent with their duties as public officers for purposes of showing favour Energy Resources Africa Consortium (initially an unregistered entity) and Sidal Engineering (Pvt) Ltd thereby acquitting the respondents on a view of facts that could not reasonably be entertained.

6. The Honourable court *a quo* erred at law on both counts in misapplying the defence of necessity given by the respondents to justify their acts of commission and omission in failure to adopt the tendering (procedure) provided by s 211 of the Urban Councils Act [*Chapter 29:15*] as the requirements for such a defence do not avail the respondents.

7. The Honourable court *a quo* erred at law on both counts when it did not apply s 146 (2) (b) of the Criminal Procedure and Evidence Act which [places] the burden of proving an exception, exemption, proviso, excuse or qualification under s 211 (10) (a) of the Urban Councils Act on the respondents.

8. The Honourable court *a quo* misdirected itself on both counts in finding that the cholera outbreak was a justification or excuse for the omission by the respondents to adopt a procurement method provided under s 211 (2) of the Urban Councils Act when fact shows that the budget for rehabilitation for digester systems for the two projects in question had been approved by the Harare City Council as far back as 2009 and the departure from s 211 (2) of the Urban Councils Act [*Chapter 29:15*] exceeded the period of time allowed by the law in case of urgent procurement.

At the hearing of the appeal and during engagement between counsel for the appellant and the court, he was quick to abandon grounds of appeal numbers 1, 3 and 4. He sought to motivate the appellant's case on the remaining 5 grounds.

There may be a multiplicity of grounds of appeal but the issue for determination in this appeal is a very narrow one indeed. It is whether the appellant proved the essential elements of the charges preferred against the respondents beyond a reasonable doubt.

SUBMISSIONS ON BEHALF OF THE APPELLANT

Mr *Mutangadura* for the appellant submitted that the state proved its case against the respondents beyond reasonable doubt because all the eight respondents, as public officers, were bound by statutory provisions regulating the process of initiating and eventually awarding tenders.

Counsel submitted that the evidence led on behalf of the state showed that the respondents had conducted the tender process in a manner that breached the relevant statutory provisions. Where the law required the tendering entity to be a registered company, the respondents allowed ERAC to succeed when it was not registered. It was only registered after it was awarded the tender. In counsel's view, this raised the presumption that ERAC's selection was a sign of showing favour to it, conduct which was inconsistent with the respondents' duties as public officers.

In respect of Sidal Engineering (Pvt) Ltd, Mr *Mutangadura* submitted that the showing of favour arose from the fact that even using the selective method of tender, this entity was never invited to tender for the project. Notwithstanding that, so it was argued, Sidal was

awarded the tender. According to counsel, this was clear testimony of showing favour to Sidal. Let me state in passing that there is evidence on record in the form of a letter dated 17 January 2011 written to Sidal by the second respondent inviting it to tender.

Counsel submitted further that the issue of cholera creating an emergency relied upon by the respondents was self-created. He submitted that cholera afflicted Harare in 2009 and the law provided for timelines on how to handle urgent matters like that. Accordingly, so he argued, there could be no justification for the respondents to violate the law.

The same argument was made regarding the autonomy given by the government to the water department after it had been weaned from the Zimbabwe National Water Authority. It was submitted on behalf of the appellant that as much as the department was autonomous, it was not autonomous when it came to the issues of tender.

Mr *Mutangadura* initially asked this Court to invoke the provisions of either s 202 or 203 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] to amend the charges on appeal to reflect that it is not the respondents who had awarded the tenders but the full council. Alternatively, he asked this Court to find on appeal in terms of s 203, that the defective charges which pointed to the fact that the tenders were awarded by the Council and not by the respondents, to have been cured by evidence.

The approach urged of the court by the appellant is one which caused this Court some disquiet. It amounted to asking the appellate court to amend the charges which the

respondents had not only pleaded and answered to, but the trial court had acquitted them of on the basis of how they were framed. The respondents would not have any other opportunity to answer to the charges as framed on appeal.

Finding himself in a quandary against the background of the concerns raised by the court, Mr *Mutangadura* abandoned that approach. He elected to motivate the appeal on the charges as they were preferred *a quo*.

The other item of concern was the tender manual relied upon by the appellant. Mr *Mutangadura* attacked the finding of the court *a quo* that the manual was inadmissible. While admitting that it had been formulated and adopted by an illegal commission he insisted that it contained the procedures used by the council. For that reason, it should have been admitted and relied upon in finding that the respondents had not complied with its provisions.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS

The point of departure in submissions made on behalf of the respondents was the reference to s 44 (6) of the High Court Act [*Chapter 7:06*] made by Mr *Mapuranga* for the first respondent. He drew attention to the crisp point that there are limited grounds upon which the appellant can appeal against the decision of the court *a quo* acquitting an accused person of criminal charges.

Indeed, s 44 (6) allows the appellant to appeal on only two instances; namely on a point of law or where the High Court has acquitted or quashed the conviction of a person who was

the accused in the case "on a view of the facts which could not reasonably be entertained." Mr *Mapuranga* submitted that the present appeal does not meet the threshold for the appellate court to interfere with the judgment of the court *a quo*.

In counsel's view the mere fact that the appellant was constrained to abandon some of his grounds of appeal during arguments was indicative of the overall weaknesses in the appellant's case. It was submitted that the respondents pleaded to the charges as set out in the indictment and proceeded to respond to the state case as charged. In that regard, so it was argued, it was not open to the appellant to seek to abandon certain aspects of the charges on appeal and still urge the court to convict the respondents on what they did not plead to.

What cut across all the submissions made on behalf of the respondents was that the state had failed to prove essential elements of the charges and that, for that reason, the judgment of the court *a quo* cannot be faulted. Counsel drew on the aspect that the appellant spent a lot of time arguing on the validity of the tender process when the gist of the case was to determine the guilt or otherwise of the respondents on the charges as preferred against them.

Mr *Mapuranga* submitted that, for the trial court to convict the respondents of the crime of criminal abuse of office, both the *actus reus* and the *mens rea* elements must exist. The position taken for the respondents is that they did not have any guilty mind and therefore could not be found guilty of the charges.

Counsel for the rest of the respondents, as if in chorus, associated themselves with submissions made by Mr *Mapuranga* to the extent that they had a bearing on their respective

clients. In addition, Mr *Mavunga* for the second respondent submitted that the abandonment of ground four exonerated the second respondent completely.

He further made the point that the evidence placed before the trial court indicated that ERAC was a consortium of registered companies. As such it was incorrect to refer to it as an unregistered company. In any event, it was subsequently registered.

ANALYSIS

A close examination of the judgment of the court *a quo* reveals that the respondents were acquitted of the two counts on essentially two bases. The first was that on the charges as "framed" an essential element of the charges was not proved. The main element of both counts was that the respondents had awarded the two tenders to the two entities by showing favour to each of them.

Having made those allegations in the charges, the state went on to lead evidence which showed, *inter alia*, that the two tenders awarded to the two entities were awarded by the Council. What the state did was to allege the commission of certain offences only to go on to prove different offences, in a typical case of an ambush.

After doing so, the state did not bother to either amend the charges or to apply before the trial court for the grant of such amendment. It is significant to note that an integral part of the respondents' defences as set out in their defence outlines and in the cross-examination of witnesses, was that the charges were defective.

There can be no doubt in that regard that the state was on notice as to the nature of the respondents' defences as articulated in the outlines and during cross-examination. It did not aid the state case that despite such notice, it did not see the need, right up to the delivery of judgment, to take measures to amend the charges.

Only in the grounds of appeal and indeed in the heads of argument filed in this court did the state advert to something to the effect that the trial court should have *mero motu* invoked the provisions of either s 202 (1) and amended the charges for it, or s 203 and found that the otherwise defective charges had been cured by evidence.

The obvious lack of merit in that argument is what compelled Mr *Mutangadura* to abandon not only that ground of appeal, but also the motivation of the appeal on that basis. The case of *S v Shanda* 1994 (2) ZLR 99 (S) is authority for the proposition that a court can make corrections to the existing charge in terms of s 202 (1) but the section does not allow the court to substitute a totally different charge to the prejudice of the accused.

The concession made by counsel in that respect was proper. But having accepted that the evidence led on behalf of the state did not prove an essential element of the charge, namely that the respondents awarded the tenders, it follows that the respondents could not be convicted on the basis of that evidence. The evidence proved that the tenders were awarded by the full council.

It is trite that where the evidence led for the state does not prove an essential element of the charge, the accused person is entitled, in terms of s 198 (3) of the Criminal Procedure and

Evidence Act, to an acquittal even at the close of the state case. See *S v Tsvangirai & Ors* 2003 (2) ZLR 88 (H); *S v Kachipare* 1998 (2) ZLR 271 (S) at 276D-E, *AG v Tarwirei* 1997 (1) ZLR 575 (S) at 576G; *S v Rubaya & Ors* SC 84/19.

Of course we reject Mr *Mutangadura's* frantic denial that the allegation of awarding the tenders was not an essential element of the charges as disingenuous and self-saving. It is the awarding of the tenders which would amount to showing favour to the two entities that won the tenders. The court *a quo* cannot be faulted for dismissing the charges as framed.

The second basis for the acquittal was that while the evidence showed that the tender procedures had not been followed in making recommendations to the full council, the respondents had given an acceptable and reasonable explanation for the departure from the laid down procedure.

The explanation given was that the outbreak of cholera had created an emergency wherein the selective tender process which is shorter had to be resorted to as opposed to the normal procedure. In addition, when the water department was weaned from Zinwa, it was granted autonomy by the government to operate outside the laid down normal procedures.

The court *a quo* accepted that explanation and gave valid reasons for doing so. More importantly, the court a quo concluded that the explanation given was not only reasonable and acceptable, it had the effect of vitiating the *mens rea* element to commit a crime.

On appeal, that conclusion by the court has been attacked on the basis that no emergency or autonomy can be an excuse for a public official to act outside the law. However, s 44 (6) of the High Court requires the appeal by the appellant to be made where the trial court's view of the facts cannot reasonably be entertained.

I agree with Mr *Mapuranga* that the provision requires the appellant to allege and show a gross misdirection on the part of the trial court's view of the facts before the appeal can be countenanced. In other words, in order to trigger interference by the appellate court, the appellant must demonstrate that the factual findings of the court *a quo* were so grossly unreasonable that no court faced with the same set of facts and applying its mind to them, would entertain such a view.

The appellant has failed to meet that threshold. To the contrary, the reasoning of the court *a quo* has not been shown to be one which this Court can interfere with. The judgment *a quo* cannot be faulted at all. The guilt of the respondents was not proved beyond reasonable doubt. The appeal is without merit.

In the result, it be and is hereby ordered that the appeal is dismissed.

MAKONI JA : I agree

CHITAKUNYE JA : I agree

National Prosecuting Authority, Counsels for the State

Rubaya & Chatambudza, 1st respondent's legal practitioners

Mavhunga & Associates, 2nd respondent's legal practitioners

J. Mambara & Partners, 3rd respondent's legal practitioners

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