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

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 6 & 19 December 2018

Urgent Application

A. Muchadehama, for applicants
E. Mavuto, for first respondent

MUSAKWA J: The applicants are seeking a stay of criminal proceedings that are pending before the second respondent pending the determination of the application for review lodged against a dismissal of their exception to charges preferred against them.

The applicants are charged with contravening s 174 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The charge reads as follows-

> "In that on the date to the prosecutor unknown but during the period extending from 2012 to December 2017 and at Gokwe Own Council, Gokwe, both Jaison Max Kokerai Machaya and Chibururu Chisainyerwa or one or both of them, being public officers in the exercise of their functions as such intentionally acted contrary to or inconsistent with their duties as public officers or omitted to do anything which it is their duty as public officers to do, that is to say Jaison Max Kokerai Machaya and Chibururu Chisainyerwa unlawfully took 1000 stands that had been allocated to the Ministry of Local Government, Rural and Urban Development as commonage by the Gokwe Town Council and for the purposes of showing favour to Striations World Marketing (Private) Limited Company diverted and offered the said stands to Striations World Marketing (Private) Limited Company and later sold the stands to members of the public."

The charge could have been drafted with more precision. According to the outline of state case the first applicant was appointed Governor and Resident Minister for Midlands Province in August 2008. The second applicant has been the Midlands Provincial Planning Officer since 2005. Under the auspices of the National Housing Delivery Programme the

applicants convened an informal meeting with Gokwe Town Council executives and requested for residential land for allocation to civil servants. Gokwe Town Council had no vacant land.

The second applicant prepared a layout plan for Mapfungautsi Extension. On 3rd October 2012 the second applicant submitted the layout plan to Gokwe Town council for adoption prior to Ministerial approval.

The two applicants caused the layout plan to be submitted to the Department of Physical Planning before it was adopted by Gokwe Town Council. This was approved, with the second applicant being instructed to advise Gokwe Town Council. Nonetheless the second applicant did not advise Gokwe Town Council since the layout plan had not yet been adopted. The applicants exerted pressure on Gokwe Town council which eventually adopted the plan on 17 May 2013.

Following adoption the second applicant submitted the approved plan to Gokwe Town Council. Thereafter the applicants demanded the surrender of 1000 stands out of 3360 in Mapfungautsi Extension from Gokwe Town Council. On 27 May 2013 Gokwe Town Council offered land to the Ministry of Local Government through the Midlands Provincial Planning Department. The 1 000 stands constituted commonage land. The allocation was supposed to be brought to the attention of the Department of State Lands. The applicants then allocated the stands to Striations World Marketing (Private) Limited Company.

On 3 July 2013 the first applicant wrote to the Department of State Lands requesting for survey instructions. The letter specified that the land to be surveyed was for Mapfungautsi Extension Phase 1. The first applicant also specified that Gokwe Town Council had offered 100 stands to the Ministry of Local Government. The Ministry of Local Government, Rural and Urban Development gave instructions for the survey of the 1 000 stands. Thereafter Striations World Marketing (Private) Limited Company developed the stands which were then sold to the public at a cost of $3 900.00 each. In order not to raise suspicion surveying costs were said to be borne by Striations World Marketing (Private) Limited Company. Again, in a bid to sanitise the scandal, fake minutes were generated which purported that the Midlands Housing Delivery Programme Committee had offered Striations World Marketing (Private) Limited Company 1000 stands in Mapfungautsi Extension.

Upon their arraignment the applicants pleaded and excepted to the charge in terms of s 171 (2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. It was contended that the charge and outline of the case did not disclose an offence. The main contention, even in the

present application centred on what constitutes commonage. Reliance was placed on the Manual for Management of Urban Land.

In its reasoning the trial court noted that in terms of s 180 (1) of the Criminal Procedure and Evidence Act a charge can be excepted to on the basis that it does not disclose an offence. Reference was also made to s 146 which outlines the requirements of a charge. The court a quo also distinguished between allegations and truth which is based on evidence. It noted that what constitutes commonage land remained disputed and was therefore a triable issue. It concluded that there is nothing vague or embarrassing about the charge.

In his submissions Mr *Muchadehama* stressed that what constitutes commonage is ten per cent of the available land as at the time of transfer. If 3336 stands are involved, then ten per cent of that would be 336. Since no transfer of land has taken place, then there is no triable issue. He also emphasised that the land in issue is state land and not commonage. Even if this is state land the question that arises is whether the applicants had authority to deal with it in the manner they did.

Mr *Mavuto* submitted that courts rarely interfere with uncompleted proceedings such as the present matter. He was of the view that the intended review has no prospects of success. He further submitted that an exception relates to a defect in a charge. Thus the charge preferred against the applicants is not defective. He also submitted that he did not come across where the applicants claimed to have been prejudiced in their defence.

Section 170 of the Criminal Procedure and Evidence Act provides that-

"(1) Any objection to an indictment for any formal defect apparent on the face thereof shall be taken by exception or by application to quash such indictment before the accused has pleaded, but not afterwards.

(2) Any objection to a summons or charge for any formal defect apparent on the face thereof which is to be tried by a magistrates court shall be taken by exception before the accused has pleaded, but not afterwards.

(3) Any court before which any objection is taken in terms of subsection (1) or (2) may, if it is thought necessary and the accused is not prejudiced as to his defence, cause the indictment, summons or charge to be forthwith amended in the requisite particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared."

A reading of the above provision leaves no doubt that an exception is taken to a charge and not the facts accompanying the charge.

The trial magistrate was quite correct to refer to s 146. Section 146 provides that-

"(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 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) Subject to this Act and except as otherwise provided in any other enactment, the following provisions shall apply to criminal proceedings in any court, that is to say—

(*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.

(3) Where any of the particulars referred to in this section are unknown to the prosecutor, it shall be sufficient to state that fact in the indictment, summons or charge.

(4) Where a person is charged with a crime listed in the first column of the Second Schedule to the Criminal Law Code, it shall be sufficient to charge him or her with that crime by its name only.

(5) No indictment, summons or charge alleging the commission of a crime mentioned in subsection (4) shall be held to be defective on account of a failure to mention the section of the Criminal Law Code under which the crime is set forth."

Commenting on s 133 (1) of the then Criminal Procedure and Evidence Act [*Chapter 59*] REYNOLDS J had this to say in *S* v *Sikarama and Another* 1984 (1) ZLR 170 at 171-

> "The requirements embodied in this provision are, in essence, that (a) the offence with which the accused is charged, and (b) the material facts constituting the offence, are both set out with sufficient clarity for the accused to be properly informed of the case which he has to meet (Ex p Minister of Justice: in re *R* v *Masow and Another*, 1940 AD 75; *R* v *Wantenuar* 1940 SR 174)."

There is no doubt that the applicants were not prejudiced in their defence. This is because they were able to plead and except at the same time. If the charge was so defective as not to be meaningful, the applicants would not have been able to plead. They outlined their defence as provided in s 180 (5) of the Criminal Procedure and Evidence Act.

The applicants have set store on the argument about commonage. This is on account of the Ministry of Local Government, Public Works And National Housing's Manual For The Management Of Urban Land. The document was issued by the Permanent Secretary for Local Government, Public Works And National Housing. It is meant for guidance in land management in all local authorities. Paragraph H of Part 11 of the Manual provides the following on commonage.

> "In all local authority areas, Government shall retain land, known as the 10 % commonage, for its own use. The 10 % commonage refers to the 10 % of all vacant and undesignated Urban State land at the

> point of transfer. To determine the 10 % commonage, the boundary of the centre is define. Thereafter all the vacant/un-alienated State land is identified (excluding land previously reserved for government use). Ten per cent of such land is calculated and a commonage account is then opened using the format shown in form UL.8. The 10 % commonage account shall be signed for by the Chief Executive Officer and the District Administrator. The account is kept by the District Administrator.
>
> No local authority may allocate commonage. This is the prerogative of the Minister of Local Government, Public Works And National Housing.
>
> When a council acquires additional land using funds from the State or the National Housing Fund, 10 % of the acquired land shall be added to the commonage register."

Minutes of the Gokwe Town Council Works and Services Committee meeting held on 21 May 2013 show that a request for 1000 stands by the Provincial Governor was discussed. It was resolved to allocate the stands to the Ministry of Local Government, Public Works And National Housing in advance than to allocate to the Governor. During the same month Gokwe Town Council addressed a letter to the Department of Physical Planning in which the allocation of 1000 stands to the Ministry was confirmed. The allocation was described as commonage. Reference was made to stands 7117-8117 from which was culled the 1000 stands.

If the applicants' contention is that the land in question was not commonage but something else that is for the trial court to determine. That issue cannot be determined at this stage. A criminal matter cannot be determined on the strength of papers placed before the court as happens in motion proceedings. The applicants have a defence which they want disposed of by way of exception. With all due respect, that is not the purpose of an exception.

The essence of the charge is that the applicants abused their authority as public officers by diverting to a private company, 1000 stands that had been allocated to the Ministry of Local Government, Public Works And National Housing. The charge alleges that the applicants were public officers. As part of the exception it was contended that the post of Provincial Governor or Resident Minister was abolished by the present Constitution. Therefore the continued holding of such post by the applicant after the coming into operation of the Constitution was illegal. I am not persuaded by that argument. It is irrelevant whether the first applicant was a Governor or not. What will need to be proved is whether he held a paid office in the service of State. This accords with the definition of public officer as provided in s 169 of the Code which reads as follows-

> "public officer" means—

(*a*) a Vice-President, Minister or Deputy Minister; or

(*b*) a Chairperson of a Provincial Council elected in terms of section 272 of the Constitution; or

(*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;"

It has been held that superior courts intervene in uncompleted proceedings sparingly. They only do so in rare cases where there is miscarriage of justice. In this respect see *Attorney-General* v *Makamba* 2005 (2) ZLR 54 (S).

I am mindful that I am not dealing with the actual review. However, I must be satisfied that the intended review enjoys some prospects of success. It looks like the applicants are not happy with the decision to dismiss the exception and not necessarily how that decision was arrived at. The remedy would have been an appeal but the applicants must have found that mounting an appeal at this stage of the proceedings is untenable. Hence the resolve to prosecute this as a review. As was held by MAKARAU J (as she then was) in *Dombodzvuku* v *Sithole NO and Another* 2004 (2) ZLR 242 (H) and at 246-

"A decision is said to be grossly unreasonable if it is completely wrong and is not merely a different way of looking at the issue: see *Tenesi* v *Public Service Commission* 1996 (1) ZLR 196 (H)."

As observed in Oskill Properties v Chrmn, Rent Control Board 1985 (2) SA 234 (SEC), the onus resting upon a litigant seeking to set aside the exercise of a discretion on grounds of unreasonableness is considerable. In my view the task is Herculean if it is an interpretation of the law by the judicial officer that is sought to be impugned as being unreasonable. An incorrect rendition of the law cannot be grossly unreasonable merely because it does not find favour with its attacker. The person attacking it must go further and show that on the facts before the court, the decision reached defies all logic and is completely wrong. A different opinion of the law, clearly showing how it was arrived at, cannot be said to defy logic. It may be wrong but may not necessarily be unreasonable. GARWE J, as he then was, observed in *Zambezi Proteins (Pvt) Ltd & Ors* v *Minister of Environment & Tourism & Anor* 1996 (1) ZLR 378 (H), not every mistaken exercise of judgment is unreasonable and not every reasonable exercise of judgment is right."

With the above analysis, I do not see the applicants succeeding in their quest to set aside the dismissal of their exception by way of review. It has become fashionable to challenge the dismissal of exceptions by way of review even where as in this case, it is evident that the applicants have not demonstrated how they were prejudiced in their defence.

It follows then that the application for stay of proceedings be and is hereby dismissed.

Mbidzo Muchadehama & Makoni, applicants' legal practitioners
National Prosecuting Authority, 1st respondent's legal practitioners