THE STATE
versus
HEBERT GOMBA
and
STANLEY NDEMERA
and
HOSIAH ABRAHAM CHISANGO
and
CHARLES USAIWEVU KANDEMIRI

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 24 January; 17 March; 10, 11, 12 13 & 31 May; 1, 7, 8 & 10 June; 13 July; 6, 7, 8 & 27 September; 11 October; 8, 15, 16, 29 & 30 November 2022 & 11 January; 1 & 17 February; 10 March; 24 May; 1 & 7 June 2023

Assessors: Mr G Shenje
Mr R Mabandhla

Criminal Trial

W Mabhaudi, L Masuku & F C Muronda, for the State
H Nkomo & G Mhishi, for the 1st accused
J Mambara, for the 2nd accused
G Vhiriri, for the 3rd accused
J Mambara, for the 4th accused

KWENDA J:

Introduction

The accused persons were indicted to appear before this court to be tried for criminal abuse of duty as public officers as defined in s 174(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] allegedly committed during the period extending from September 2019 to October 2020. 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 Codification 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). The accused persons allegedly acting in concert and with common purpose unlawfully, intentionally and corruptly sold a certain immovable property, known as Stand Number 402 Mt Pleasant, belonging to their employer, the City of Harare, to Hardspec Investments (Pvt) Ltd a manner contrary to and inconsistent with the law for the purpose of favouring Hardspec Investments or disfavouring as sitting tenant known as Mt Pleasant Sports Club. Mt Pleasant Sports Club's lease had subsisted from the year 1959 and still had 16 years to run until the year 2035.

All the accused persons pleaded not guilty and the matter went to trial. At the end of the trial we returned the following verdicts on 24 May 2023. We acquitted the first and third accused persons and convicted the second and fourth accused persons. We sentenced the second and fourth accused persons on 7 June 2023, each, to imprisonment for 8 years of which 2 years are suspended for 5 years on condition the accused person does not during that period commit any crime involving corruption for which upon conviction he is sentenced to imprisonment without the option of a fine. We gave our reasons *ex tempore,* from a prepared manuscript. In the *ex tempore* judgment I read out what I considered to be the salient features of the reasons for judgment with the intention of releasing a typed judgment later for the record and circulation. The second and fourth accused persons have requested a detailed written reasons for their conviction. These are they.

The State summary of the allegations

On 4 September 2019 certain two ladies attended at the City of Harare Head office at the Town House for the purpose of negotiating the purchase of Stand Number 402 Vainona on behalf of Hardspec Investments (Pvt) Ltd, a company incorporated in terms of the law of Zimbabwe. The first accused person tasked the second and third accused persons to attend to them. Pursuant to the instruction, the second and third accused persons were accompanied by the City's Valuations and Estates, one Emmanuel Mutambirwa to view the stand in the company of the two ladies.

Subsequent to the visit, the second accused set in motion the process of selling the stand. By the end of the day on 4 Septembr2019, he had written two offer letters. One letter was addressed to the sitting tenant, Mount Pleasant Sports Club, offering it the pre-emptive right of first refusal

to buy the stand at a price of USD 2.3 million. The offer was delivered to the club on 5 September 2019 by hand and expired after 24 hours on 6 September 2019. Concurrently with the pre-emptive right offered to Mt Pleasant Sports Club, the second accused wrote another offer letter to Hardspec Investments offering it the same stand at a price quoted in local currency i.e. RTGS 26 923 340. He gave Hardspec Investments the option to pay the full purchase immediately into the City Council's bank account. In the letter, he undertook to facilitate internal processes of council to procure the necessary resolutions of the Finance and Development Committee and full council authorising the sale to Hardspec Investments. The second accused also advised Hardspec Investments that the sale was also subject to fulfilment of the legal requirements set out in s 152 of the Urban Councils Act [*Chapter 29:15*]. That offer, too, was valid until 6 September 2019.

The first accused requested Councillor Luckson Mukunguma, who was the Chairperson of the Finance and Development Committee, to convene a special committee meeting to consider a recommendation to sell the stand to Hardspec Investments. In council business the recommendation to the Finance and Development committee was in the form of the 'Town Clerk's report' prepared in and by the second accused person's department on behalf of the third accused person. The report would be tabled for consideration by the committee at its the meeting. The meeting of the Finance and Development Committee was convened and held in the morning on 5 September 2019. The meeting considered the report whereupon it resolved to recommend the sale to the full council. Later, in the afternoon the full council met for a scheduled meeting and, among other business, considered the recommendation to sell the stand to Hardspec Investments. The first accused person chaired the meeting which adopted a resolution approving the sale. The second, third and fourth accused person attended both the meetings.

On 10 September 2019 the fourth accused person wrote a memorandum to the second accused person advising him to proceed with the sale. He followed that up with another memorandum dated 14 October 2019 advising the fourth accused person to finalise the sale since there had been no objections after two advertisements published in the Newsday Newspaper on 10 and 17 September 2019 as required by law. Attached to the memorandum was a notice published in the Newsday Newspaper on 12 September 2019. The State alleged that the assertion by the fourth accused person's that the sale had been advertised in the Newsday Newspaper on 10 and 17 September 2019 was false. It was also the State's case that the fourth accused was not supposed to

facilitate the conclusion of the sale without complying, first, with the peremptory provisions of s 152 of the Urban Councils Act [*Chapter 29:15*] which had to be fulfilled before the accused persons could validly sell the stand. For completeness I will paraphrase the legal requirements. These are they. Before selling land owned by it, the accused persons were required to publish the decision to sell the stand in two issues of a newspaper giving notice of the decision to sell the stand, giving a full description of the stand concerned and stating the object, terms and conditions of the proposed sale. They were also required to post a copy of the advertisements on the notice board at the head office and leave it open for inspection during office hours at the office of the council for a period of a period of not less than twenty-one days from the date of the last publication of the notice in a newspaper. The notices published in the newspaper and on the notice board where supposed to invite any person with any objections to the proposed sale to lodge such objection with the third accused person within the period of twenty-one days. The accused persons were required also required to submit a copy of the notice to the Minister not later than the date of the first publication of that notice in a newspaper. The State alleged that the accused persons finalised the sale without fulfilling their obligations in terms of s 152 of the Urban Council's Act. The accused persons also sol d the stand directly and by private treaty to Hardspec Investments contrary to a standing resolution of City Council of Harare dated 26 September 2005 which made it mandatory to advertise all stands on sale inviting tenders. Hardspec Investments did not have to compete with anyone for the stand. The state alleged that the accused persons sold the stand in the manner they did, contrary to their obligation to comply with the law, for the purpose of favouring Hardspec Investments and disfavouring Mt Pleasant Sports Club suffered prejudice as a sitting tenant and as a potential purchaser. Mt Pleasant Sports Club was also prejudiced in the accused persons committed the council to an agreement of sale with Hardspec Investments sell the stand sold the stand to Hardspec Investments on 4 and 5 September 2019 thereby depriving Hardspec Investments the realistic opportunity to exercise its pre-emptive right to buy the stand. It was also denied the opportunity to object to the sale since the accused persons did not invite any objections. The accused persons denied Mt Pleasant Sports Club and other interested persons the opportunity to bid for the stand. The accused persons should not have entertained the representatives of Hardspec Investments when the company had not formally applied to buy the stand.

Hardspec Investments completed paying for the stand on 7 February 2020. It signed the agreement on 5 March 2020. The first and third accused persons signed the agreement of sale on behalf of council on 27 March 2020. The signing of the agreements in 2020 was despite the effective date being backdated in the written agreement to 23 September 2023.

The Defence Outlines

All the accused persons denied the charge. The matter proceeded to trial. In denying the charge all the accused persons were adamant that their actions were above board and consistent with their expected roles defined by their respective job descriptions in the Urban Councils Act and denied making omissions.

The first accused person averred that he could not possibly be held accountable for the sale which was handled by the relevant and responsible specialised departments and approved by the relevant committee of council as well as the full council. He did not facilitate the sale since he generally had no administrative role to play. His only participation was when he signed the agreement. He signed the agreement pursuant to a standing council resolution which appointed him as the signatory on all agreements of sale in his capacity as the mayor. He denied instructing Luckson Mukunguma to convene the committee meeting on 5 September 2019. He denied entertaining the alleged representatives of Hardspec Investments Mavis Madziwanzira and Pauline Gutsa either directly or indirectly. He had no prior knowledge of Hardspec Investments or agents or its interest in the property. To the best of his knowledge he believed that the council meetings which approved the sale were properly convened by the responsible council officers. He was out of Harare when the full council meetings were held and therefore did not and could not possibly chair the meeting. He prayed for his acquittal.

The second accused person's defence was that he followed the correct procedure, to the extent of his involvement during the sale. He did not know Hardspec Investments prior to the sale. It is proper and lawful for any person who is interested in buying land from council to invite council officials to see the land and thereafter submit an offer to buy the land. Council had already decided to sell the stand in the year 2018, that is prior to the purchase of the stand by Hardspec Investments. The decision to sell the stand was arrived at because it had become underutilised and derelict. Mt Pleasant Sports Club was aware of the position taken by council. The second accused person was not responsible for the sales of council land since that fell under the purview of, Emmanuel

Mutambirwa, the Valuations and Estate Manager. He agreed that he signed the offer letters, reports and other documents in connection with the impugned sale of Stand Number 412 Vainona to Hardspec Investments but did so as a matter of routine and in terms of council policy which made him the signatory in his capacity Finance Director. He denied conniving or acting in common purpose with his co-accused in the alleged criminal enterprise. His duties did not coincide with those of his co-accused persons and he could not possibly connive with them. He later indicated his intention to produce City of Harare documents and the minutes of council and committees; and in addition to that, call the Principal Valuations Officer, the current acting chamber secretary holding fort following the suspension of the fourth accused person, the acting Revenue Collection Manager and the senior accountant; as defence witnesses. He prayed for his acquittal.

The third accused person said that he did not commit or connive with co-accused persons to commit the crime charged. He averred that the State had erroneously thrusted upon him duties in the charge sheet which were not within the scope of his responsibilities as Town Clerk. The indictment did not disclose the precise duty which he had abused. His duties are set out in the Urban Councils Act, Council By-laws, Council resolutions and his contract of employment. His responsibilities were to make recommendations to Council on the measures that may be necessary to safeguard council funds and assets and to make recommendations to the various committees of council and full council for the purposes of improving operations. His report to the Finance and Development Committee in connection with the recommendation to sell Stand Number 402 Vainona was prepared and signed prior to the meeting of the Finance and Development Committee on 5 September 2019. He disputed the State's contention that the report was prepared after the committee had already met and approved the sale. He gave notice of his intention to object to the production of the copy of the Town Clerk's report dated 6 September 2019 which the State intended to rely on at his trial. To put this defence into perspective, as the trial unfolded, it became clear to the court that there were two copies of the Town Clerk's report identical in content. The State relied on the copy of the report dated 6 September 2019 signed, ostensibly, by the second and third accused persons. The accused persons relied on the copy dated 5 September 2019 also bearing the signatures of the second and third accused persons. Unlike the State's copy this copy had the initials of the persons who had prepared it. The second accused person said he did not know Hardspec Investments or its representatives, prior his involvement in the sale. He had not

taken any representatives of Hardspec Investments to the stand as alleged by the State or at all. He did not interact with the alleged representatives of Hardspec Investments. The sale of Stand Number 402 had been ongoing since the year 2018 and as far as he was concerned, all necessary procedures and processes for the alienation were fulfilled. The Town Clerk's report recommending the sale was prepared by the Valuation and Estates Manager and presented to him for signature. He signed it on 5 September 2019. He did not do anything to favour Hardspec or disfavour Mt Pleasant Sports Club. All his involvement was above board and within the confines of his duties. He prayed for his acquittal.

The fourth accused person stated that the State outline did not spell out the specific duty (ies) which he breached. His duties are outlined in s 137 of the Urban Councils Act and he breached none. He and his co accused persons performed different roles during the sale. There was no chance of conniving amongst themselves because they did not act at once. He does not know Hardspec Investments or its alleged representatives. He, therefore, could not favour persons unknown to him. The Finance and Development meeting met at the behest of its chairperson, Luckson Mukunguma empowered to do so in terms of s 101 of the Urban Councils Act. The Town Clerk's report which was tabled at the committee's meeting was dated 5 September 2019. It was his responsibility to publish the notice advertising sales of stands The City Valuations and Estates Manager was responsible for that. It was also not his responsibility to check for objections to advertised sales. Checking for objections was the responsibility of the Senior Committee Officer for the Finance and Development Committee. The Senior Committee Officer would then bring such objections, if any, to his attention. He admitted that his memorandum dated 14 October 2019 falsely represented that the notice to sell Stand Number 402 Vainona had been advertised twice in the Newsday Newspaper on 10 and 17 September 2019 and that proof of the advertisements was attached whereas that was not the case. He said he had not been involved in the advertisements. He was also not the author of the impugned memorandum dated 14 October 2019 which he signed. The memorandum was prepared by the Senior Committee Officer after the expiry of 28 days and he was answerable for the mistakes. The error was not deliberate. There were other memoranda prepared by the same official with similar mistakes. It was not his duty to give notice to the Minister of Local Government of council's intention to sell Stand Number 402. Later he indicated

that he was going to call the senior committee officer responsible for the Finance and Development Committee as defence witnesses. He, too, prayed for his acquittal.

The State Evidence

The State called eight witnesses who gave oral evidence and produced documentary evidence. The accused persons also gave evidence in their defence and produced exhibits. The second and fourth accused persons called defence witness. At the end of the trial the various acts and omissions forming the basis of the charge were common cause. This was because the State case was premised on documentary evidence whose contents are accepted as correct. The majority of the state witnesses did no more than produce identify, produce and explain the contents of the documentary evidence. Where they gave their views on whether or not the accused persons had committed the crime charge, we disregarded such views because at law opinion evidence is largely irrelevant unless it falls into any of the exceptions to the rule of evidence which excludes opinion evidence. The verdict is the prerogative of the court which must disabuse itself of any undue influence.

The Documentary Evidence

Basically all the criminal conduct imputed to the accused persons is based on what the State allege are the unescapable inferences to be drawn from the paper trail.

Exhibit 1 was, *ex facie*, the written offer dated 4 September 2019 penned by Daniel Usingararwe on behalf of the second accused person and signed by the second accused person's addressed to Mt Pleasant Sports Club offering it the pre-emptive right of first refusal to buy the stand for USD 2.3 million. It showed on the face of it that it was hand delivered received on behalf of the club by Anne-Marie Wede on 5 September 2019. It was valid up to 6 September 2019. Its contents were common cause throughout the trial. **Exhibit 2** was, *ex facie*, copy of the notice of the City of Harare's intention to sell Stand Number 402 Vainona for RTGS$ 26 923 340 which was published at p 16 of the Newsday Newspaper on 12 September 2019. Its contents were common cause throughout the trial. **Exhibit 3** was, *ex facie*, written offer dated 4 September 2019 co-penned by Daniel Usingararwe and Peter Dube on behalf of the second accused person addressed to Hardspec Investments offering it Stand Number 402 Vainona at a price denominated in local currency, the sum of RTGS $26 923 340 and giving it the option to pay the purchase price into the council's bank account provided. It also notified Hardspec Investments that the sale was

subject to confirmation by council through a resolution and compliance with s 152 of the Urban Councils Act. This document and its contents were common cause. **Exhibit 4** was, *ex facie*, the Town Clerk's report (third accused person) to the Finance and Development Committee prepared Peter Dube and Daniel Usingararwe on behalf of the second accused person for signature by the second and third accused persons. It was directed to the Finance and Development Committee recommending the sale of Stand Number 402 Vainona to Hardspec Investments for RTGS$ 26 923 340. It bore the signatures of the second and third accused persons. It acknowledged the existence of the resolution of Land Alienation Sub-Committee as adopted by full council on 29 September 2005 (item 16) stipulating that all stands for sale were to be advertised inviting tenders, that the stand was currently on lease to Mt Pleasant Sports Club and reserved for recreational purposes, several organisations and individuals had approached the City with proposals for joint ventures, that the council had not realised commensurate value from the proposals hence the decision to sell it , that the intention to sell had been communicated to the lessee on 4 September 2019, that the stand measured 24.5094 hectares and the value was commensurate with the purchaser's special interest in the stand and its location. It recommended that Stand Number 402 Vainona be sold to Hardspec Investments at a purchase price of RTGS$26 923 340, that the purchase price shall be paid before the signing of the agreement, that the sale was be subject to s 152 of the Urban Councils Act [*Chapter 29:15*] and that City's conditions of such sale would apply. The Town Clerk's report was common cause up to the end of the trail. **Exhibit 5** was, *ex facie*, the 4 accused person's inter-departmental memorandum dated 14 October from signed by him advising the second accused to finalise the sale since there had been no objections to the sale after notice of the sale had been advertised twice on 10 and 17 September 2019 and that proof of the publication was attached. Attached to it was a copy of an advertisement dated 12 September 2019. The document was common cause up the end of the trail. **Exhibit 6** consisted of the minutes of the Finance and Development Committee. Item 4 of the minutes recorded that the committee considered the Town Clerk's report presented by the second accused person recommending the sale of Stand Number 402 Vainona to Hardspec Investments at a price of USD 9 per metre. The committee resolved to and did rescind its lease agreement with Mt Pleasant Sports Club. The committee noted the requirement to go to tender as resolved by the City's Land Alienation Committee on 26th September 2005. **Exhibit 7** was, *ex facie*, the agreement

of sale between the City and Hardspec Investments which was signed on behalf of Hardspec on 3 March 2020 and by the first and third accused persons on behalf of the City on 27 March 2020. It back dated the effective date of the sale to 23 September 2019. **Exhibit 8** was, *ex facie*, a memorandum authored by the fourth accused person to the second accused person dated 10 September 2019 directing him to take action to implement the sale of the stand and to advise him of the progress. **Exhibit 9** were the minutes of the full council meeting held on 5 September 2019 which adopted a recommendation by the Finance and Development Committee to sell the stand.

The Oral Evidence

For completeness we now summarise the *viva voce* evidence adduced at the trial and it will be clear why we concluded that the material facts were common cause.

The first State witness was Phillip Tinashe Sewera who testified under oath. He was a commissioner with the Zimbabwe lands Commission. He knew the first accused person as the Mayor of the City of Harare and the second accused person as the Finance Director. He had come to court to give evidence concerning the circumstances of the sale of Stand Number 402 Mt Pleasant which was being leased by the Mt Pleasant Sports Club. The stand was sold during his tenure as the club's vice chairperson. The club's lease which commenced in the year 1956 was valid until the year 2035. At the time of the sale there was very little golf activity and other recreational activities like marathon and dog walking were the order of the day. The sports club was considering change of use. Sometime in 2020, he could not remember the dates, the sports club received very short notice from the city of Harare which gave the club three days to raise the sum of USD 2.4 to buy the stand. Following the short notice, the chairperson and he were tasked to engage the City council as a matter of urgency. They immediately went to meet the second accused person and Mr Mutambirwa to whom they told that there was no way the sports club was going to raise such a huge amount within the period stated in the notice. They requested for reasonable time to exercise the right of first refusal as the club was interested in exercising it. The amount involved was huge and the club needed reasonable time to convene a meeting of its membership to consider the offer and the modalities of raising the money a resolution to buy the property. There was also need to meet the residents of Mt Pleasant to appraise them of the offer and possible termination of the lease. The constitution of the sports club made that processes mandatory. The second accused and Mr Mutambirwa refused to grant the request on the basis that

the city was in urgent and dire need for money to pay wages. They countered that by arguing that the club's lease prevailed over ownership and so the sale could not proceed without the club's consent. While they were waiting the official response to their argument that club's lease prevailed over ownership official they noticed surveyors coming to the land and borehole drilling activities and what appeared to be building construction activities. They approached their local councillor who said he was unable to assist. He later received a call from the Zimbabwe Anti-Corruption Commission to give a statement which he did. Thereafter activities stopped. He identified and produced the offer letter received from council as an exhibit. It reads as follows: -

"Ref: Mr Usingararwe

G52/19

4 September 2019

The Secretary/President
Mt Pleasant Sports Club
40 Bargate
Vainona
HARARE

Dear Sir/Madam

RE: OFFER TO PURCHASE STAND 402 VAINONA TOWNSHIP TO MT PLEASANT SPORTS CLUB FOR RECREATIONAL PURPOSES

The above refers.

Please be advised that council has made the decision to dispose Stand 402 Vainona Township which stand you are currently leasing. The decision was arrived at after council had been approached by various individuals and organisations for a joint venture in developing the subject stand. For various uses. However, the council has failed to unlock value through joint ventures and as such has opted to outright disposal of the subject stand.

Be further advised that as the leaseholder I am offering you the option of first refusal for the purchase price of US 2.3 million (Two million there hundred United States dollars) inclusive of VAT t be paid in equivalent RGS at the prevailing bank rate. The offer is valid up to 6th September. I shall wait for your response before the expiry date.

Yours faithfully

ACTING FINANCE"

The letter bore the signature of the second accused person and was received by the Anne-Marie Wede who acknowledged receipt by signing on the face of that letter on the

5 September 2019. The witness said the soils are not suitable for any other use part from recreational purposes.

The witness was subjected to lengthy cross examination by the legal practitioners representing the accused persons. He became motional under a barrage of questions which appeared to annoy him. He was clearly not happy because, in his view. Mt Pleasant citizens and the club had suffered prejudice. He was aggrieved by the fact that the stand was sold without soliciting the attitude of the residents. The residents needed the land for recreation. He was had not seen the advertisement to sell the stand. He was particularly aggrieved by the fact that Mt Pleasant Sports Club was not given a realistic chance to buy the stand which tit had leased since the year 1959. When it was put to him that there was nothing unreasonable about the offer because all that was required was for the club to accept the offer and not necessarily to pay the required amount and that in any event the club had not accepted the offer when the trial started, he maintained that a decision could not reasonably be expected from the club within 24 hours. He said it was grossly unfair to give 24 hours to the club which had leased the stand for 50 years. He said there was no way he could have convened a meeting of the members, within 24 hours, to consider the offer and give him the mandate to accept the offer and come up with strategies to raise the purchase price.

The material aspects of his evidence was not contested by the accused persons. The content of the offer letter was common cause especially that the offer purported to give the club the right of first refusal to buy the stand which expired after 24 hours. That such a period was too short and inadequate for the witness to convene club was to its members was obvious. It was common cause the residents of Pleasant had not been consulted. It was correct that the second accused person and Luckson Mukunguma refused to accommodate the club's request for more time to respond to the offer. Suffice it to say that when the matter proceeded to the defence case, the second accused person confessed under oath, that the ostensible pre-emptive right which he offered to Mt Pleasant was insincere and that he deliberately gave Hardspec Investments more favourable conditions because it was his preferred purchaser. We found this witness credible. His frustration was understandable.

The second State witness to testify under oath was Osmond Matingwina. He was, at the time of the alleged commission of the crime, employed by Alpha media holdings at the Newsday. He identified the notice published in the Newsday Newspaper on 12 September 2019 which he produced it in court as an exhibit. It was a notice inserted by the third accused person on behalf of the City of Harare in terms s 152 of the Urban Councils Act [*Chapter 29:15*] purportedly informing the public of the City's intention to sell various pieces of land belonging to it including the Stand Number 402 Vainona. He said the request to publish the notice in the Newsday was submitted by Mr Usingararwe.

The evidence of this witness is common cause. Suffice it to say that the notice fell short of the peremptory provisions s 152 of the Urban Councils Act. It was published only once in one newspaper as opposed to two issues of a newspaper. The notice was inadequate because it did not give reasons for the sale and did not invite bids.

The third State witness was Peter Dube who works for the City of Harare as the Principal Estates Officer. He said he was responsible for the sale and lease of municipal land. His immediate superior was Mr Mutambirwa, the City Valuations and Estates Manager, who in turn reported to the second accused person in his capacity as Director of Finance. He had a good working relationship with the second accused person. He identified the offer letter dated 4 September addressed to Hardspec Investments and explained its contents. He said the initials on it indicated that it had been authored by Mr Usingararwe. It had been signed by the second accused person. He recalled that on 4 September 2019 he was with Mr Usingararwe in his office when the second accused person came in the company of two ladies, unknown to him. The second accused person verbally instructed him and Usingararwe to write the offer letter to Hardspec Investments for his signature. He told them what to put in the letter which was to be written concurrently with another offer letter to the Mt Pleasant Sports Club. They wrote the offer letters straight away. Although the second accused person does not ordinarily give him instructions directly, on the day in question the City Valuer who sits between the witness and the second accused person in their hierarchy was away. He complied immediately because he falls under the second accused person's command. He explained the procedure of sale of land following an application by an interested person. The applicant submits an application in writing to the City Valuer. The City Valuer checks whether the land is available. The City Valuer then prepares the Town Clerk's report for submission to the

Finance and Development Committee, in consultation with the Finance Director (in this case, the second accused person). The application is referred to the city planner who should approve the land use before approving the sale. His could not say whether such consultation took place between the City Valuer and the second accused in this case. He did not see anything wrong with making the offers simultaneously because in the event that both offerees accepted the offers made to them, the City would require each to submit proof their respective bank to enable the City to assess their respective capacities to develop the land. The offer addressed to Hardspec was delivered by hand to the ladies who were waiting in another office.

Under cross-examination the witness said he never interacted with the first accused person. He did not agree with the suggestion that the second accused person signed the offer letters as a formality. He was unaware of a written Standard Operating Procedure (SOP). When shown a copy, by the second accused person's legal practitioner, he said he was seeing it for the first time. After perusing the SOP, he said the accused persons followed the correct procedure in selling the stand as set out in the SOP. He was of the view that there was nothing wrong with the direct sale of the Stand Number 402 to Hardspec Investments because that was permissible under the SOP. We are unable to agree with the witness because the procedure set out in the SOP was supposed to commence with a written application by an interested party an identifiable stated specific piece of land belonging to the City. There was no record of such an application. Under cross examination the witness reiterated his view that the sale was board. He was confident that Hardspec Investments had submitted a written application to buy the stand and the sale was duly premised on the application. He also believed the sale of the stand had been duly advertised and no objections had been received. He confirmed that Usingararwe had placed the advert in the Newsday where after they prepared the Town Clerk's report on behalf of the second accused person. He was shown a copy of the Town Clerk's report dated 5 September 2019 which he identified as the one he and Usingararwe had prepared ad signed by the second and third accused persons in their respective capacities as Finance Director and Town Clerk. Usingararwe and he put their initials as the authors. In answer to a question put to him by the court, he accepted that the quote presented to Hardspec was denominated in local currency while that for Mt Pleasant Sports Club was stated in United States dollars to be paid in local currency at the rate prevailing on the date of payment. But said he had no idea why that distinction had been made. While the

witness was visibly jittery and nervous during his testimony and under cross-examination, we have found him to be a truthful witness. He had every reason to be nervous because he was testifying against his superiors. His evidence was confirmed by the documents which he either identified or produced in evidence. The documents were self-explanatory. He was clearly at pains to exonerate them. We will disregard the opinions he expressed for two reasons. Firstly, his view that the accused persons had not done anything wrong was based on this erroneous assumption that the accused parsons had advertised the sale for bids and that they had complied with all legal requirements necessary for the sale to be valid. Secondly, at law, his opinion is general irrelevant and therefore inadmissible. We placed reliance, only, on his testimony verified by the uncontested documents.

The fourth State witness was the Acting Town Clerk, Pakhamile Mabhena Moyo. He said he enjoyed a good working relationship with all the accused persons prior to their arrest. He gave evidence on the functions of the Town Clerk. He said the Town Clerk's powers are set out in the Urban Councils Act. He is the City's accounting officer who oversees all the City's departments. He said the procedure of selling council stands commenced with an application by an interested person submitted to the third accused person through the Estates and Valuations manager because Estates and Valuations department is the custodian of all council land. On receipt of the letter, the second accused person would, through his Valuations department, instruct the planning department to verify land use designation. Thereafter the application was processed through the Finance and Development committee and eventually, the full council. After adoption by a meeting of meeting of the full council, a notice would be published in the newspaper advertising the intended sale and inviting objections. If there were no objections the sale would be confirmed and the purchase price is paid. His cross examination was very brief because his evidence was essentially of a formal nature. He was a credible witness.

The fifth witness was Luckson Mukunguma who was a councillor at the relevant time. He was the chairperson of the Finance and Development Committee. The sale of Stand Number 402 was brought before the committee which he chaired. He recalled that before the sale he accompanied the first and third accused persons to the Stand Number 402 to meet potential buyers. This he did on the invitation of the second accused person and he complied although it was not part of his mandate as a councillor. After viewing the stand, he asked the fourth accused person to

convene a meeting of the Finance and Development Committee to consider the second accused person's recommendation to sell the stand to Hardspec Investments. All the communication between him and the first and fourth accused persons was oral because he was made to believe that the sale was urgent and necessitated by the extraordinary situation that was obtaining. Accordingly, the agenda was not circulated beforehand. He identified the minutes of the committee meeting held on 5 September 2019.

The witness was subjected to length cross examination but the material aspects of his evidence were not contested. Like the other witnesses he gave formal evidence supported by the uncontested documentary evidence. We found him credible.

The sixth witness was Collen Tongowona the City's Chief Security Officer. He said he knew all accused persons and had a good working relationship with them. He was responsible for enforcing council by-laws, investigating losses to council and for that purpose he had access to all council records. He received information to the effect that Stand Number 402 had been sold without following due process. He sent an official to pick the file from the Valuations and Estate Office. When he went through the file he concluded that the sale had anomalies. The anomalies he noted where the following. The file contained two offer letters both dated 4 September 2019. One was to the Mt Pleasant Sports Club and another to Hardspec Investments. He read the contents of the offers. While the letter to Mt Pleasant Sports Club was quoted in USD the offer to Hardspec was quoted in local currency. In his view the differential treatment was uncalled for. He found it anomalous that Hardspec had already been given the right to pay for the stand yet the time within which Mt Pleasant had to exercise the first right of refusal had not expired. He said the report prepared by the second accused person on behalf of the third accused person which was tabled before the Finance and Development Committee was prepared on 5 September 2019 but signed on 6 September 2019. He had no knowledge of the similar report signed and initials dated 5 September 2019. He also found a memorandum prepared by 4 accused person on 14 October 2019 advising council that the requisite notices had been published in the Newsday Newspaper on 10 and 17 September 2019. However, when he checked with the Newsday there were no advertisements placed on the dates meaning that the memorandum by the fourth accused person was untruthful and misleading. In any event, he found it anomalous that the notices would have been placed after the sale had taken place. He said that Hardspec Investments had not paid in full for the stand. He

found payments of only 5 million and 1,9 million. He believed that a sum of 20 million was still owed by Hardspec Investments despite that the agreement had already been signed.

The witness was subjected to lengthy cross-examination but like all the other witnesses his evidence was largely formal. In answer to questions he said he found only one copy of the Town Clerk's report on file. It was dated 6 September 2019. He did not find the Town Clerk's report dated 5 September 2019 on file. Mr *Mambara* who represented the second and fourth accused person put questions based on the SOP. The witness admitted knowledge of the SOP but said he had not read it. Mr *Mambara* also put it to the witness that the amount of 20 million which the witness was outstanding had in fact been paid on 17 September 2019. The witness agreed that there was a payment of 20 million Zimbabwe dollars received on that day but it was a payment by Zim Alloys. His evidence was formal, based on the documents he found on the file. He was a truthful witness.

The seventh witness was Emmanuel Mutambirwa. He was the City's Valuations and Estates Manager. He said Stand Number 402 was not being fully utilised by the Mt Pleasant Sports Club. The second accused made the decision was made to sell the stand because the council was in need of money to pay salaries. He went to view the stand with second and third accused persons. When they arrived at the stand he saw two ladies whom he had seen frequenting their offices. He was surprised to see them there. He immediately suspected that they were estates agents because he had seen them a number of times in the City Valuations and Estates office looking for land to buy. He showed the second and third accused persons the ladies who were standing close to them, about 10 meters away. Neither of them said who they were. He then showed the two accused persons the stand and they returned to the office. Subsequent to that, the committee and council meetings were held on 5 September 2019. He took the court through the stages in terms of the SOP. Stage 1 was the written application by the prospective purchaser expressing interest in buying council land. He said he was sure the application was at the City Valuations and Estates Manager. Stage 2 was the consideration of the application by the CVEM (The application is considered by the Principal Estates Officer). Stage 3 involved collection and analysing data to come up with a recommended price. He was sure he had seen the recommendation by the principal estates officer. Stage 4 was the assessment of the price using the data. This was the responsibility of the Principal Valuations Officer. Stage 5 was the final assessment and submission of reports to

the CVEM, Finance Director and preparation of the Town Clerk' s report for signature by the second and third accused persons. After assessment the CVEM would recommend either a direct sale to an interested person or going to tender. Direct sale meant that the council was foregoing tender processes. He said he was surprised the accused persons sold the stand without inviting bids.

The eighth witness was Daniel Usingararwe employed by the City of Harare as an Estates Officer. In the hierarchy he was three steps below the second accused person. He reported to Peter Dube who reported to Emmanuel Mutambirwa who in turn reported to the second accused person. He authored the offer letter to Hardspec Investments which he gave the second accused person to sign. The contents of the letter were as follows: -

"Ref: Mr Dube/Usingararwe

04 September 2019

Hardspec Investments (Pvt)Ltd
2 Maranzi Road
Kambanji
Borrowdale
HARARE

Attention: Vincent T Guramatunhu

Dear Sir/Madam

RE: PROPOSED SALE OF STAND 402 VAINONA TO HARDSPEC INVESTMENTS (PVT) LTD FOR RECREATIONAL PURPOSES

The above refers.

Please be advised that I am offering your company the abovementioned stand at a purchase price of RTGS 26 923 340.00 (twenty-six million nine Hundred and Twenty-Three Thousand Three Hundred and Forty dollars) inclusive of VAT. Be further advised that you can now go ahead and pay the purchase price pending the outcome of my report to council to secure a council resolution and my communication with the current lease holders. Otherwise the sale is subject to the provisions of s 152 0f the Urban Councils Act [*Chapter 29:15*].
[bank details]

Please submit your proof of payment to the office of the Finance Director at Rowan martin Building as soon as payment has been made. This offer is valid until the 6th September 2019.

Yours faithfully

ACTING FINANCE DIRECTOR"

He also compiled the Town Clerk's report. He disowned the copy of the Town Clerk's report which the state was relying on and had no initials. He associated himself with the report which had initials. The reports were however identical in content and both had been signed by the second and third accused persons. As stated before this court was interested, only, in the contents of the Town Clerk's report only. He went through the stages on the SOP and confirmed that all necessary stages had been fulfilled. We are however unable to agree with him because there was no record of a written application by Hardspec Investments. He was of the opinion that the accused persons were innocent. His opinion was irrelevant.

The State dispensed with the evidence of the ninth witness.

Application for discharge at the close of the State Case

The accused persons applied for discharge at the close of the state case in terms of s 188 (3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. We dismissed the application. At this stage the material evidence of the state witnesses was largely undisputed and confirmed by documentary evidence. At the close of the State case it was clear that the first accused person did not chair the full council meeting on 5 September due to his undisputed absence from Harare. His only involvement was that he had signed the agreement of sale. The third accused person's involvement was as follows. He went to view the stand, He signed the Town Clerk's report and the agreement of sale.

We put all the accused persons to their defence despite what we considered to be the limited involvement by the first and third accused persons because all of them had performed discernible acts in the course of their employment which facilitated the hastily arranged sale concluded without going to tender despite the existence of a resolution which required them to call for bids before settling for Hardspec Investments as the selected purchaser. They sold the stand illegally because they failed to comply with the peremptory provisions of s 152 of the Urban Councils Act were circumvented. The sale favoured Hardspec Investments and prejudiced Mt Pleasant Sports Club in many respects. In addition to that the sale also caused financial prejudice to the council. Council suffered financial prejudice because the second accused locked the purchase price in the Zimbabwe currency which was fast losing value. Hardspec Investments benefited because it did not have to pay the purchase price at the rate prevailing on the date of payment. The accused persons did not give Mt Pleasant Sports Club and other interested persons a realistic opportunity

to buy the stand. We were of the *prima facie* view that the known interest in the property expressed several organisations and individuals cried out for some valid competitive bidding process. All the accused persons participated in the sale, playing different roles in the execution of their respective functions. The first accused person and third accused persons were the designated signatories and their signatures had the significance of concluding he sale. We required him to explain why he signed the illegal agreement. The second accused was the Head of the Finance Department which played crucial roles in executing this sale. He was involved in the preparation of all the paperwork. The fourth accused person attended the council meetings which deliberated on the proposed sale. He attended in his capacity as legal advisor had the obligation to prevent illegalities. He did not. He prepared crucial memorandum wherein he cleared the agreement for execution despite the glaring illegalities afflicting the sale. He presented the illegal agreement for signing by the first and third accused persons. All the accused persons were presumed to have acted in the manner they did for the purpose of showing the favour, disfavour and financial prejudice which ensued. The presumption is created by s 174(2) of the Criminal Law (Codification and Reform) Act.

The Defence Case

The first accused person's defence case

In giving evidence the first accused person adopted his defence outline a part of his evidence in chief. He said he did not instruct anyone to do anything in connection with the sale. The sale was handled by the relevant administrative departments. As far as he was advised it was handled properly and with due adherence to policy. He thought the council meeting was properly convened although he was not in Harare on 5 September 2019 to chair the meeting. He signed the agreement of sale entered into between the City of Harare and Hardspec Investments for the sale of Stand Number 402 Vainona on 27 March 2020 in the execution of his function as the Mayor and the designated signatory. He referred to a memorandum written by the third accused person which was produced as an exhibit by the defence. He was not in a position to explain the delay in the conclusion of the agreement sale because all that was not up to him. It was the responsibility of the legal department headed by the fourth accused person to check the agreement for compliance with the law before presenting same to him for signature.

The first accused person was subjected to lengthy cross-examination by the State. He appeared overwhelmed by the barrage of questions and did not hide his annoyance at what he perceived be personal attacks on him by the State counsel. He, however, remained steadfast that he was innocent because the decision to sell the stand was recommended to the council in the usual way and executed by the technocrats in charge of administration. Upon further questions he conceded that it was illegal to sell the stand by private treaty in the face of the resolution adopted on 26 September 2005 which remained extant. He accepted that council is a second tier of government and its employees are bound by the constitutional imperatives of good public administration.

After considering the totality of the evidence led by the State and his testimony we concluded that the first accused person's only involvement in the imputed sale of Stand Number 402 was his act of signing the agreement of sale. There was no evidence of prior involvement. There was no conclusive evidence that he instructed the second and third accused persons to entertain Hardspec Investments as alleged by the State. It was a fact that he did not chair the full council meeting which approved the sale. It was fact that he signed the agreement only because he is the designated signatory in his capacity as Mayor. It was not his responsibility to check the agreement for compliance with the law but that of the fourth accused person who was the legal advisor.

The second accused person's defence case

The second accused gave evidence. He adopted his defence outline as part of his evidence under oath. He confirmed the offers which he made to Hardspec Investments and Mt Pleasant Sports Club. He signed both offer letters on 4 September 2019. He also confirmed the Town Clerk's report which was prepared on behalf of the third accused person by his department. He confirmed signing the report as well. He said it was his responsibility to sign such important documents prepared in his departments as confirmed by Exhibit 8, being the memorandum by the third accused person on the responsibility of the heads of departments to sign documents. He produced the Standard Operating Procedure Manual (SOP) which he said applied to the sale of Stand Number 402 Vainona forming the subject of this trial. The SOP became effective in September 2019. He took the Court through the procedure of selling land as set out in the SOP.

He said the people occupying the positons mentioned, at every stage of the manual, were the gate keepers to ensure due compliance with every stage. He did not have to be personally involved at every stage. He said The City of Harare was faced with a financial crisis and Stand Number 402 had been on the market since 2018 and there had been no takers until Hardspec came along and offered to buy the stand in September 2019. He admitted that he went to view the stand but he said it was at the behest of the third accused. State witness, Emmanuel Mutambirwa took them to the stand. He did not expect to meet anyone and in fact did not meet any member of the public. He did not pay attention when Mutambirwa greeted certain two ladies. After viewing the stand, they were satisfied that it could be sold to deal with financial challenges faced by the council. Subsequent to the visit, Emmanuel Mutambirwa dispatched his valuers who produced a valuation report putting the value at 2.5 million. He said he had invited the executive of Mt Pleasant Sports Club around 20 August 2019 to whom he offered the stand. They turned down the offer on the grounds that the price was beyond the club's means. Therefore, the offer By Hardspec Investments in September 2019 to buy the stand was received with jubilation. He was equally excited at the development. All the necessary paperwork to be done in his department in connection with the sale was executed by his subordinates, culminating in the Town Clerk's report prepared by Peter Dube and Daniel Usingararwe. He and his team completed all the paperwork under very tight timeframes, that is between 3 and 5 September 2019. The processes included coming up with an assessment and valuation of the property, delivering offer letters to Mt Pleasant Sports Club, him, giving guidelines to Hardspec Investments to help it secure the purchase of the property. He assisted Hardspec Investments because he knew Mt Pleasant Golf Club was not interested in buying the property. In any event the club did not have the purchasing power and had not given its executive the mandate to negotiate the sale. He revealed that he was not serious and sincere when he gave Mt Pleasant Sports Club the pre-emptive right to buy the stand. It was just a ploy to elicit a response from the club rejecting the offer which would be kept on record so that in future no one would accuse him of selling the stand without giving the tenant an opportunity. As far as he was concerned, Hardspec Investments was the only serious purchaser available. He deliberately gave Hardspec Investments a serious offer and deliberately advised it to pay the purchase price ahead of council processes just to give it the pole position to buy the stand. He was in constant communication with someone who represented Hardspec Investments, whose name he did not mention, keeping him or her

updated on developments in council processes in connection with the sale and reassuring him or her. He said he denominated the price offered to Hardspec Investments in local currency because that was the law in terms of SI 142/19 dated 24 June 2019 which outlawed quoting price in foreign currency He therefore converted the price which had been determined as USD2,6 million to local currency at the prevailing rate on 4 September 2019. He did not do the same with the offer made to Mt Pleasant Sports Club because he did not have any intention to enter into any serious negotiations with the club. He had already agreed terms with Hardspec Investments, perhaps informally. The chairperson of the Finance and Development committee convened the meeting of the Finance and Development Committee to consider the proposal to sell the stand to Hardspec Investments.

Under cross examination he made the following concessions. The sale was mooted in the year 2018 before the SOP which he relied on came into existence. There was therefore no reason for him not to advertise the stand in 2018 inviting bids. He conceded that the period of the sale somehow coincided with the touted date of the SOP. He conceded that he had not challenged Charles Dube when he said he (the second accused) brought the two ladies representing Hardspec Investments. He said there was no need to challenge Peter Dube' evidence in that regard because there would was nothing wrong with him introducing the two ladies to Peter Dube. He said land seekers would come to his office without application letters. He would refer such people to Emmanuel Mutambirwa who would assist them if the land was available. It was at this stage that the land seeker would be advised to write an application letter. He said in this case it was Emmanuel Mutambirwa who had interacted with the buyers verbally. He only came on board after the buyer had been found. Then he volunteered unsolicited information. He said he knew of the source of the funds that were used to pay for the property. He said the source was one Rwodzi needed who was desperate to invest his local currency (RTGS) before it lost value in the hyperinflationary environment obtaining at the time.

He closed his defence case.

Our analysis is that the second accused person therefore departed from his defence outline. He confessed to personal interest in the matter. He admitted favouring Hardspec Investments and disfavouring Mt Pleasant Sports Club. He admitted converting the purchase price to a volatile local currency before the sale had been approved by council for the purpose of assisting Hardpsec

Investments because then the price stated in local current would not increase. The financial prejudice to his employer was obvious because where Hardspec gained financially the City Council lost. He admitted that he circumvented the requirement to call for bids. Despite his insistence that Hardspec Investments submitted a written explanation to buy Stand Number 402 Vainona we found that the offer was not on record when the Loss Control Officer called for the file. He confirmed personal interaction with Hardspec. We took into account all his acts and omissions as alleged by the state were common cause ad intentional. The only dispute was that he denied he did anything for the purpose of favouring Hardspec Investments. He abandoned the stance in the defence case. It was also clear that despite stating in the offer letter to Hardspec Investments that the sale was subject to s 152 of the Urban Councils Act and the requirement to call bids, he conceded the sale without either complying with the requirements personally or satisfying himself that the legal requirements had been fulfilled by whoever he may have believed had that responsibility. We were also satisfied that when he said in his offer to Hardspec Investments, the offer would be subject to communication to the lease holders he was insincere because he knew he was just creating paperwork which he would fall back on in future in the event that he was called upon to account. He was therefore pretending to be accountable but lacked *bona fides*. He just mentioned that there were other persons and organisations interested in the property but he did not give them a fair opportunity to participate in the sale.

Third accused person's defence case

The third accused person also gave evidence. He adopted his defence outline as part of his evidence under oath. He is a civil engineer with some post graduate qualifications. His duties were defined in s 136 of the Urban Councils Act. He produced his job description as an exhibit. He explained he was the link between the political and administrative structure of the City Council. The political structure is run by the committee system with 8 committees. Below the political structure is the administrative structure reporting to the committees. Operationally the city had departments headed by departmental heads. His job as town clerk was that he was the strategic leader of all the departments in that he received mandates from the council and converted them into operations. The council needed money for the capacitation of the various departments operationally and to pay salaries. He and the heads of department were tasked to mobilise resources

to meet these obligations. He, indeed went to view the stand. He said the lease agreement with the golf club had been cancelled as at the 5th September 2019. He had not been to the golf course before so he was happy to go and view it. Many other golf courses were assessed. After viewing the stand, they agreed to recommend it for sale. His next involvement was his interface with the Town clerks report which was brought to him by a messenger which he signed on 5 September 2019. It was just a standard report and his role would be placed before the Committee by the CVEM later he signed the agreement of sale on 27 March 2020. The agreement of sale was brought to his attention by the office of the fourth accused person. The chamber secretary has a check-list of the things to be complied with. Under cross-examination he agreed that that he was the ultimate boss and was bound by the provisions of ss 3, 5, 9, 194 and 196 of the Constitution. He was subjected to lengthy cross-examination but remained steadfast about his role during the sale. He said he did not see Pauline Gutsa and Mavis Madzivanzira when he went to view the stand but he saw Emmanuel Mutambirwa waving to certain two ladies. He denied liability for the flaws afflicting the sale because all the necessary groundwork and paperwork was done by the specialised departments. The third accused person then closed his case.

Our analysis of his evidence was that the only roles he executed during the sale by virtue of his office were the following. He went to view the stand. Because of conflicting versions among the witnesses we accepted that that his defence that he did not interact with Hardspec Investments was reasonably possibly true. His other involvement was the signing of the Town Clerk's report. However, the report prominently identified itself as a document emanating from the second accused person's department. His explanation that he relied on his heads of departments was not farfetched. His other involvement was his attendance at the council meetings. He had no reason not to believe the necessary procedures stated in the Town Clerk's report would not be followed. His other involvement was the signing of the agreement. He did so after it had been approved for signing by the fourth accused person who was the legal advisor.

The fourth accused person's defence case

The fourth accused person gave evidence in his defence. He adopted his defence outline as part of his evidence under oath. He said his responsibilities were set out in s 137 of the Urban Councils Act. He is responsible for (*a*) the preparation and distribution of minutes of the

proceedings of a council and its committees, (*b*) the preparation and distribution of agendas and notices of mayoral, council or committee meetings, (*c*) any other duties which may be assigned to him from time to time by the Town Clerk. He would act in the position of Town Clerk whenever the office became vacant or in the event of the absence or incapacitation or inability of the incumbent to act or for any reason by reason of any law or resolution of the council. The provision of legal services to council, its committees and council departments was also his co-function. He was the custodian of council minutes and agenda.

He said he became involved in the sale of Stand Number 402 on 5 September 2019. On 4 September 2019, the Chairperson of the Finance and Development Committee, Luckson Mukunguma told him of the need to convene a special meeting of the committee to consider the sale of Stand Number 402 Vainona on 5 September 2019. Mukunguma wanted the sale of the stand to be considered by the committee before the full council meeting so that it would be tabled before the full council due to the pressing need to mobilise funds. Mukunguma advised him that the councillors were agreeable to meet on 5 September 2019. The fourth accused person issued the relevant notice on 4 September 2019 which convened the meeting on the following day and the sale of Stand Number 402 was on the agenda. The meeting adopted the Town Clerk's report recommendation to sell the stand to Hardspec Investments. He attended the meeting. He said the resolution adopted by council in September 2005 which mandated council to sell land by tender only could be rescinded in terms of s 89 of the Urban Councils Act. When the recommendation to sell Stand Number 402 Vainona was adopted by council, his division prepared the action plan which it referred to the relevant departments. Later, he received that file with a memorandum from the City Valuations and Estates division after the publication of the first notice of publication advertising the intended sale of the stand which he signed. Attached to the memorandum was proof of the first publication only. The publication of notices is the responsibility of the CVEM who gives, the first copy of the publication to the committee officers for onward transmission to him. He did not have to see proof of the other advertisements. It was the responsibility of the Senior Committee Officer to check for objections. After 28 days the Senior Committee Officer prepared the memorandum for his signature to confirm that there had been no objections.

In February 2021 it was brought to his attention that the dates contained in his memorandum were wrong. The dates should have been 12 and 19 September and not 10 and 17

September 2019. He said the mistake was not peculiar to the sale of Stand Number 402 as it had been repeated in other files. He did not know Hardspec Investments' representatives and had never dealt with them. He did not play any role in the decision to sell the stand since it was not within his purview. He was not aware that it was under lease because he did not manage leases. He was not aware that the stand was being sold before the approval by council. He said he was not aware that the requisite two advertisements had not been placed in the newspaper when he signed the memorandum which misrepresented that there had been two advertisements. It was not his function to ensure compliance with s 152 of the Urban Councils Act, to notify the minister of the intended sale but that of the CVEM.

Under cross-examination by the State the fourth accused person conceded that the sale of Stand Number 402 Vainona was fatally flawed and illegal. It was flawed because the 2005 council resolution which mandated council to advertise stands for sale inviting bids was extant. He said that the resolution could only be rescinded by council after following the mandatory steps set out in s 89 of the Urban Councils Act. No such procedure had been followed. He conceded that. The resolution had not been rescinded but was simply avoided. The sale was illegal for non-compliance with s 152 of the Urban Councils Act.

We find that that it was, undeniably, the fourth accused person's responsibility to prevent the flaw and the illegality. He attended the council meetings but omitted to do that. His omission was wilful in the sense that it was not an oversight. He did not alert the councillors that they had to make their resolution subject to an invitation of bids and s 152 of the Urban Councils Act. He therefore did not disabuse the councillors of the misconception that the legal requirements would be met. Initially he said he believed the council resolution which required bids had been rescinded. Later he said he was aware that there was a special procedure of rescinding resolution in terms of s 89 of the Urban Councils Act. The procedure is as follows. A resolution passed at a meeting of a council shall not be rescinded or altered at a subsequent meeting of the council unless a committee has recommended that the resolution he rescinded or altered; or a notice of motion to rescind or alter that resolution has been given at least seven days before the subsequent meeting to the chamber secretary and the notice of motion has been signed by not less than one-third of the membership of the council. If the rescission or alteration occurs within six months from the date of the passing of the original resolution and the number of councillors present at such subsequent

meeting does not exceed the number of councillors present when the original resolution was passed, the resolution shall not be altered or rescinded unless at least two-thirds of the councillors or members, as the case may be, present at the subsequent meeting vote in favour of that rescission or alteration. The chamber secretary to whom any notice of motion has been given shall send a copy of the notice to each councillor at least two days before the subsequent meeting at which the motion is to be moved. It is common cause that nothing like that happened. The fourth accused was aware of the procedure because he gave the section to the court off the cuff. Disregarding a council resolution was one of the illegalities he was supposed to prevent. Initially he had taken the stance that the sale was above board only to concede the flaws and illegalities under cross examination. His argument that it was not his responsibility to comply with s 152 of The Urban Councils Act did not help him because the State charged him with criminal abuse of duty based on both blameworthy omissions and commissions. He intended the acts and omissions to be his conduct. We agree with the State that he unlocked the performance of the agreement through his memoranda which gave the false impression that the sale was above board.

The fourth accused person He called one Stanley Chimbetete as his defence witness. The witness said he authored of Exhibit 5, for signature by the fourth accused person. It will be recalled that Exhibit 4 was fourth accused person's memorandum to the second accused person dated 14 October 2019 authorising the latter to conclude the sale of council Stand Number 402 Vainona to Hardspec Investments. The fourth accused person signed the memorandum which, he admitted, contained several untruths and distortions. Firstly, it lied that the requirement to advertise the stand had been duly complied and proof of the compliance was attached. That was not true. Attached to the memorandum was proof of only one publication and not two. There was no proof of that the following had been complied with namely (1) two advertisements (2) in two newspapers (3) publication of a notice at head office for inspection by the public for 21 days (4) that the notice had been given to the minister on the date of the first advertisement. The witness took responsibility of the misrepresentations in the memorandum. The evidence of this did not exonerate the fourth accused person. As head of department it is conceivable that the fourth accused person would delegate certain work to his subordinate. We accept that he may have asked the witness to write the memorandum for him. He may have also asked the defence witness to check for objections. However, it is common cause that all the paperwork consisting of the

memoranda and the attachments was placed before him for verification and signature. It is very unlikely the he would have signed without verifying the contents of the memorandum against the attachments. There is no reason why he would not have noticed that the attachments referred to in the memorandum were missing and that for those that were attached, dates were not tallying.

At the end of the trial, we arrived at the following conclusions. As stated earlier the state insisted that the Town Clerk's report was prepared on 6 September 2019, a day after the Finance Committee had already deliberated on the proposed sale and the accused persons asserted that the report was prepared, signed and tabled before the Finance and Development Committee on 5 September 2019. We gave the accused persons the benefit of the doubt because it was common cause that the second accused person said in his defence outline that the paperwork was done in a hurry starting on 4 September 2019 to be in time for the council meetings on the following day. It is therefore possible that, in the circumstances, only one copy of the Town Clerk's report was presented for signature for the purpose of the deliberations of the Finance and Development Committee and the other copy was signed on the following day. Nothing much turns on that because we are more interested on the implications of the contents of Town Clerk's report which were common cause up to the end of the trial. We will therefore the insinuation by the State that the report was not before the Finance and Development Committee on 6 September 2019.

General observations pertinent to the verdict

It this case we did not have to deal with many disputes of facts despite the fact that the trial took very long to complete. It was clear from the outset that the State case was based on documentary evidence. The documents spoke for themselves. What delayed the trial was the thrust of the cross- examination by the defence which was aimed at getting the witnesses to express their opinion on whether or not the accused persons committed the crime charged. It is common cause that all the state and defence witnesses, alike, who were subordinate to the accused persons, opined that they were not guilty. The issue of the correct verdict at a criminal trial is exclusively in the domain of this court and the sentiments expressed by the witnesses were irrelevant.

The Law applied to the facts

We acquitted the first and third accused persons because we were persuaded that their roles were minimal and merely formal. We could not ascribe any criminal conduct to them. The first

accused signed the agreement as the designated signatory and under the belief that the fourth accused had checked the agreement. He was justified because the fourth accused person had a check list. The third accused person was just the link between the various professional departments of council and the councillors. All the documents were prepared for him by the relevant technocrats in the departments. He signed the agreement for sale as the designated signatory. The Town Clerk's report which he signed stated that the sale would be subject to s 152 of the Urban Councils Act [*Chapter 29:15*] and the City of Harare's conditions of such sale. The extent of the first and third accused persons' involvement was so minimal that it was not possible to infer the desire to favour or disfavour anyone. Their defence that they were sincere and genuine remained reasonably possibly true at the end of the trial.

As for the second and fourth accused person's conviction we will begin by unpacking the essence and true nature of the crime of criminal abuse of duty as a public officer. Both sides made very detailed and useful submissions on the law. We will consider all the submissions without necessarily reproducing them.

The State counsel submitted that the accused persons' duty as public officers must be understood in the context that the City of Harare is a tier of government and members of council and its employees are public officers who all have the duty to observe the tenets of good governance This was a very powerful submission. In our view the State counsel nailed it because that sums up the essence of the crime. The State counsel repeated the argument in more detail when he cited decided cases in aggravation. Citing *Shaik* v *S* (1) 2006 SCA 134. He submitted that corruption is like a cancer, eating away remorselessly at the fabric of corporate probity and extending its baleful effect into all aspects of administrative functions. Systemic corruption corrodes any confidence in the integrity of anyone who had a public duty to discharge, leading unavoidably to a disaffected populace and impacts negatively on human rights, political processes and ultimately on democracy. Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. Although the State counsel made the submission in aggravation, the argument

provides a useful insight into the nature of the crime and the mischief which the legislature intended to deal with.

On the other hand, the thrust of the closing submissions made on behalf of the accused persons were that the sale was above board. They did not abuse their authority and none among them did anything inconsistent with or contrary to his duty as a pubic officer. None among is guilty of omitting to anything which it was his duty to do. They were genuine in the execution of their functions and did not intend to favour anyone. The submissions are on record and will not repeat them verbatim.

The meaning and application of the crime of criminal abuse of duty as a public officer has been the subject of intense debate among jurists. The question is, what exactly is the conduct prohibited by this crime? The following cases were brought to our attention on behalf of the accused persons.

In *S* v *Taranhike & 5 Ors* HH 222/18 at p 14 of her cyclostyled judgment, TSANGA J said:-

> "… the word abuse itself connotes misuse, exploitation, taking advantage and recklessness in the conduct.
> In the English case of *AG Reference No.3 [2005] QB 73* which turned on characterisation of misconduct and the necessary *mens rea* it was decided that:-
>
> > 'whether the misconduct was of a sufficiently serious nature would depend on the responsibilities of the office and the office holder, the importance of the public objects which they served, the nature and extent of the departure from those responsibilities and the seriousness of the consequences which might follow from the misconduct.'"

In *Kasukuwere* v *Hosea Mujaya & Ors* HH 562/19 CHITAPI J said at p 14 of his cyclostyled judgment:-

> "a public officer carries out a number of duties …., the duties of a Minister are broad and wide and it is necessary for the State to identify in the charge which of the duties the accused abrogated. In other words, the precise duty abused should be included in the charge. The specific legislation or legal document which sets out the code of conduct should also be mention in the charge. The specific criminal element which distinguishes the conduct complained of from a mere labour dispute must be clear."

It was submitted on behalf of the second and fourth accused persons that there '…may sometimes be a fine line between inefficiency and abuse of office. In making that submission counsel relied on the case of *S* v *Simon Takawira Muserere & 7 Ors* HH 321/19 at p 41 of the cyclostyled judgment. Although this was said in mitigation it is clear that, even as they were mitigating the second and fourth accused persons believed that, at worst, they can could only be

guilty of inefficiency as opposed to a crime which requires proof of intention and a criminal motive.

It appears the points made by the judges in the above cited cases in explaining the crime of criminal abuse of duty as a public officer may have been either misunderstood or taken out of context. CHITAPI J in the *Kasukuwere* case, (*supra),* makes a very important point at p 7 of his cyclostyled judgment. The judge said:-

> "There can be no criminal abuse in the air. It is only committed by reference to the dos and don'ts in the performance of the public officer's duty or duties."

This is the point which TSANGA and CHITAPI JJ were at paints to explain in the judgments quoted above, which is that in dealing with the crime of criminal abuse of duty it is easy to fall into the error of applying principles of labour law in a criminal matter. The difference between inefficiency and criminal abuse of office is in the law to be applied. Inefficiency and incompetence are concepts relevant to employment relations or employment law. Jurists know that it is possible for a conduct to give rise to different causes in the various branches of the law. In determining any matter, the judicial officer applies principles derived from the branch of law which applies to the cause of action before him or her and focus on that, without frolicking into the academic argument of how the prohibited conduct may be viewed in other branches of law. Broadly, a crime is a cause of action. I do not have to cite authority for this. I will illustrate my point by giving a practical example. It is trite that in a complaint arising from misrepresentation during the making of a contract, the innocent party may opt for the legal framework provided by the law of contract, to cancel the contract and claim restitution or utilise remedies available in delict and sue for damages he or she suffered as a result of the misrepresentation or may sue in the alternative. The innocent party may report the misrepresentation to the police, even concurrently with seeking contractual or delictual remedies. The judicial officer who adjudicates in the dispute in contract law must focus on the principles of contract and apply them to the dispute without allowing himself to be lured into digressing into the irrelevant academic debate of whether or not the wrongdoer could have been successfully prosecuted for the case. What, therefore, is of concern to the criminal court is whether the facts as alleged establish the elements of crime. These are, whether the acts or omissions constitute the prohibited criminal conduct contemplated in Part II of the Criminal Law

Code, whether the accused person had the requisite state of mind (Part III) and finally, whether the accused person has a defence recognised at law. (Chapter XIV).

I now wish to develop the point made by CHITAPI J in the *Kasukuwere* case, *(supra).* I understood the judge to be making the point that, in the case of criminal abuse of duty as a public officer, the state must first of all identify the act constituting the function which the public officer executed. The State must then identify the **dos** and **don'ts** which are concomitant to that function. I will explain this by giving an example, in the context of this case. In the context of the alleged illegal sale of Stand Number 402, the second accused had the authority to offer the land for sale to prospective buyers. This, he did by way of writing and dispatching offers to prospective buyers. However, the concomitant **dos** were that he was required to give all citizens equal opportunity to compete for the property under the same conditions. He was supposed to subject the prospective purchasers to equal treatment. He was supposed to be impartial, transparent and accountable. The **don'ts** related to the requirement to avoid conflict of interest.

Having observed as above, my task now is to identify the dos and don'ts. In my view all public officers, irrespective of their peculiar responsibilities or job description, have the duty to obey the dos and don'ts. This is duty referred to in s 174 as **'duty as a pubic officer'.**

What then are the **dos** and **don'ts**? Chapter 9 of the Constitution of Zimbabwe (Amendment no. 20) Act 2013 provides the answer to this question. It speaks to the principles of public administration and leadership. See the basic values and principles governing public administration and the responsibilities of public officers and principles of leadership which are entrenched in ss 194 and 196 respectively, of the Constitution. Section 196 says, in very clear terms, that <u>the authority assigned to a public officer is a public trust which must be exercised in a manner which is consistent with the purposes and objectives of this Constitution.</u> All public officers are therefore prohibited from exercising the authority assigned to them in a manner inconsistent with or contrary to the principles of public administration and leadership entrenched in Chapter 9 of the constitution and elsewhere in the Constitution. A public officer is also duty bound to exercise the authority in a manner which promotes the same principles. The principles include respect for human rights. An administrative authority must be accountable, fair, just, honest and give reasons for every administrative decision. A procuring authority must adhere to the dictates of s 315 of the Constitution, that is to ensure transparency, honesty, cost-effectiveness

and competitiveness. A deliberate breach, by a public officer, of the **dos** and **don'ts** in Chapter 9 of the Constitution and elsewhere in the Constitution constitutes the prohibited conduct punishable under s 174(1) of the Criminal Law Codification and Reform Act, if such criminal conduct was intentional for the purpose of doing favour or disfavour or if it resulted in prejudice to anyone. What distinguishes inefficiency from criminal abuse of duty as a public officer is therefore that latter requires criminal intention and corrupt motive. It is not a coincidence that s 174 is worded similarly s 196 of the Constitution. The crime created in s 174 (1) of the Criminal Law Codification and Reform Act *[Chapter 9:23]* is simply a mechanism in criminal law for enforcing the principles of public administration and leadership entrenched in Chapter 9 of the Constitution. Other statutes like the Public Finance Management Act [*Chapter 22:19*], Public Procurement and Disposal of Public Assets Act [*Chapter 22:23*], Procurement Regulations, 2002 [*Statutory Instrument 171 of 2002*], Urban Councils Act [*Chapter 29:15*], Administrative Justice Act [*Chapter 10:28*], Freedom of Information [*Chapter 10:33*] provide mechanisms for the enforcement and promotion of the principles of public administration and leadership. The following are some of the **dos** and **don'ts** that I could decipher from Chapter 9 of the Constitution and elsewhere in the Constitution.

Examples of Dos

a. Exercise the authority of the public office in a manner which is consistent with the purposes and objectives of this Constitution;
b. In the case of public procurement (which by definition includes disposing of public assets) ensure transparency, honesty, cost-effectiveness and competitiveness (s 315) of the Constitution;
c. Respect fundamental rights;
d. promote public confidence in the office held by the public officer (s 196 (1));
e. promote and maintain a high standard of professional ethics (s 194 (1)) (a);
f. serve impartially, fairly, equitably and without bias (s 194 (1) (d);)
g. serve with transparency fostered by providing the public with timely, accessible and accurate information (s 194 (1) (h);
h. serve with objectivity and impartiality in decision making (s 196 (3));
i. Subject the subjects of your authority to equal treatments and equal opportunities. (s 56 of the Constitution);

j. Be accountable through the provision of accurate information (s 62).

Examples of Don'ts

a) avoid any conflict between their personal interests and public or official duties;
b) Do not discriminate (s 56)
c) Do not make arbitrary decisions, be accountable, impartial, fair and just (s 68)
d) Do not pursue self-interests (s 196)

All these principles boil down to 'sincerity'. Among the synonyms of sincerity listed in the Oxford dictionary are genuineness, honesty, seriousness, earnestness, authenticity and candour. The dictionary defines 'sincerity' as the absence of pretence, deceit or hypocrisy.

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.

The crime of criminal abuse of duty is a crime of its own kind. It involves two interrelated but distinguishable acts. The first conduct is the execution of the public function. In this case that would be the act of selling the stand. There was nothing wrong with that act *per se.* The crime is constituted by other blameworthy conduct during such lawful execution of the public function. For example, in procurement, a public officer may call for bids which are submitted in the proper manner and within the stated timeframe. On the face of it there would be nothing wrong until it is discovered that when the bids were still open he opened the bid of one competitor and disclosed the contents to another who had not submitted his or her bid and still had the time to do so. The public officer's conduct in opening a sealed bid and disclosing the content to a competitor

compromises the integrity and fairness of the tender procedure and that is inconsistent with or contrary to what is expected of a public officer who is executing his or her duty as a public officer.

Findings of Fact

We have already made several findings in our analysis of evidence. We do not intend to repeat those. Suffice it to say that all the accused person are public officers who admit that they all played key roles in the sale of Stand Number 402 Vainona. Their different roles were defined by the authority reposing in the public offices they occupied. However, the second accused and fourth accused persons breached the **dos** and **don'ts** set out in Chapter 9 of the Constitution. Their conduct was criminal to the extent that they conducted themselves in ways contrary to or inconsistent with the aforestated constitutional principles of public administration and leadership. The **dos** and **don'ts** breached by the second and fourth accused persons were clearly set out in the state summary and have all been proved.

The second and fourth accused persons had the blameworthy state of mind. The requisite state of mind for this offence is intention which is subjective. In terms of s 13 of the Act where intention is an element of the crime charged, the test is subjective and is whether or not the person whose conduct is in issue intended to engage in the conduct or produce the consequence he or she did. In terms of s 12 of the Act deciding whether or not the person concerned actually possessed that state of mind at the relevant time, the court takes into account all relevant factors that may have influenced that person's state of mind. The motive or underlying reason for a person's doing or omitting to do anything, or forming any intention, is usual immaterial. It is clear that all accused persons intended all their actions and omissions to be their conduct. Where they acted in the manner they did or omitted to do things they intended such actions and omissions to be their conduct.

As stated the accused person's motive is usually irrelevant to the state of mind in crime. However, as an exception to the rule, motive is an essential element of this crime. In terms of the presumption created in subs (3) if it is proved, in any prosecution for criminal abuse of duty as a public officer, that a public officer, in breach of his or her duty as such, did or omitted to do anything to the favour or prejudice of any person, it shall be presumed, unless the contrary is proved, that he or she did or omitted to do the thing for the purpose of showing favour or disfavour, as the case may be, to that person. The State managed to prove that favour and disfavour and

prejudice ensued as a result of their conduct. That is indisputable. The second and fourth accused persons were therefore presumed to have intended the favour, disfavour and prejudice which occurred as a result of their acts and omissions.

The second accused person confirmed the presumption when he confessed the motive during his testimony in the defence case. He was very subtle and calculative. This is a typical case where the crime of Criminal abuse of duty as a public officer as defined in s 174(1) of the Criminal Law (Codification and Reform) Act can be committed imperceptibly or undetectably underscoring the argument that a public officer who commits this type of offence may do so while ostensibly acting *intra vires his* responsibilities or job description. He covered his tracks by appearing to follow procedure to the letter and yet he lacked sincerity. He put self-interest ahead of the interest of the people by treating the stand as his own. The Standard Operating Procedure identified itself prominently at the top as a working document created on 23 April 2017 to be effective in September 2019. It had spaces provide for the name of the person recommending it, date of publication, the date of recommendation, signatures and date thereof. All those spaces were blank. There was no evidence that the SOP had been adopted by the council and if so, when. While it appeared to give the second accused person the option to choose between a direct sale and tender process we note that these are procedures that mutually irreconcilable.

The second accused person deliberately flouted fundamental human rights which promote the constitutional objective of s 196 of the Constitution. He systematically supressed information with his vague Town Clerk's report which seemed to imply that he would go to tender because it simply acknowledged the existence of the relevant council resolution without stating what would happen. (See the right Access to Information). He was therefore not transparent. He did not disclose, in substance, why he had disqualified the various persons who had interest in the stand either for joint ventures or lease or purchase. His decision to disqualify Mt Pleasant Sports Club was capricious. (See the right to administrative justice) He just dismissed their request to be accommodated. He never placed the club's request for extension of time before the council. He subjected Hardspec Investments and Mt Pleasant Sports Club to unequal treatment. He deliberately discriminated between parties when he gave Hardspec Investments unequal treatment. (See the right to equality and non-discrimination). In our view he had no defence to the charge.

We digress to point out that direct sales of land in terms of the touted SOP ought to be discontinued forthwith because that procedure is inconsistent and irreconcilable with the principles of public procurement entrenched in s 315 of the Constitution which are '...to ensure transparency, honesty, cost-effectiveness and competitiveness'. It is totally unacceptable that citizens only become aware of disposal of council land when they see development taking place.

As against for the fourth accused person the presumption remained intact at the end of the trail. If anything the presumption was confirmed by the following inferences, we made. The inferences could be safely drawn from the observations stated below. The only reasonable inference consistent with the totality of the observations we made was that the fourth accused person's omissions were deliberate and calculated to put the councillors off-guard leading to their approval of a flawed sale. The irregularities afflicting the sale were too numerous to overlook. He gave evidence he referred to provisions of the Urban Councils Act and other legislation relevant to local governance with impressive alacrity but when it came to the legal pitfalls bedevilling the sale of Stand Number 402 he pretended to be clueless, feigning exaggerated ignorance and inattentiveness. There is no way he would have overlooked the missing documents in circumstances where he was required to use a check list. In the face of all these inadequacies he *mero motu* generated the necessary memoranda authorising that the sale be concluded. We were satisfied beyond reasonable doubt that he connived with the second accused person to generate the necessary documents necessary to give the impression that the correct procedure had been followed.

For the reasons state above and those in our analysis of the evidence we rejected the defences by the second and fourth accused persons, thereby convicting them and accepted that the defences of the first and third accused persons were reasonably possibly true, thereby acquitting them.

Reasons for Sentence

The second and fourth accused persons stand convicted of a corruption related crime. Sentencing is not easy. It is a rational and informed process wherein the court takes into account all relevant factors. We are grateful to both the State and the defence for the detailed written submissions on sentence which we found very informative and useful in assessing sentence. The submissions are long and form part of the record. We will not repeat them *verbatim*. The written

submissions were very informative on the peculiar personal circumstances of the accused persons. The accused persons also placed before this court evidence, where necessary, which was not disputed by the state. A sentence must fit the crime, the offender and public interest. With regards to the crime the court takes into account the seriousness of the crime in the context of the aggravating and mitigating factors which have a bearing on the degree of moral blameworthiness of the accused persons. With regards to the offender the court looks at his or her personal, circumstances, his age, sex, marital status, employment, his means, any criminal record and motive. Public interest refers to the need to ensure that the public is protected against criminals, the legitimate expectation of society that those who commit crime get punished as a way of protecting society from such people. If courts pass inadequate sentences that has the tendency to erode that public confidence in the criminal justice system and affect its effectiveness. There is need to prevent crime through passing deterrent sentences. All these factors are discussed in the Magistrates' Handbook by Professor G Feltoe Revised August 2021, Part 17 pp 359-391. Some of the important cases are *S* v *Shariwa* 2002 (1) ZLR 314 (H), *S* v *Ngulube* 2002 (1) ZLR 316 (H), *S* v *Nemukuyu* 2009 (2) ZLR 179 (H), *R* v *David & Anor* 1964 RLR 2, *S* v *Mugwenhe & Anor* 1991 (2) ZLR 66 (S). The cases are too numerous to mention.

The circumstances of the second accused person are the following. The accused is aged 65 years of age and thus a senior citizen who has lived without committing crime through his career. He was due to retire from the employment of the City of Harare on 30 June 2023 after thirty-five years of service to the City of Harare in 1988. He started as a Chief Clerical Officer and he rose through the ranks to the position of Acting Financial Director. This conviction may cost him his job and the retirement benefits which, we are advised, include an industrial stand and a residential stand and an opportunity to purchase the motor vehicle he is using at net book value. He holds an MBA (UZ) CIS, CPA and is a member of the Public Accountants and Auditors Board (PAAB). The qualification s likely to come to nought because his profession requires integrity. He will naturally lose respect among his professional person, the society and workmates. He is married and the sole bread winner because his wife is not employed. His children are grown up but one is still dependant on him because he is studying at Manitoba University in Canada. The accused attached proof of the enrolment of the child at the university and the responsibility is conceded by the state. The second accused person looks after three of his late brothers' children. We accept the

submission that the second accused person provides all the financial support in respect of his family and pays for all their educational and medical expenses of those that are dependent on him. Apart from the educational and medical expenses, the accused also contributes to all other monthly expenses for the child in Canada which average approximately USD 500. He is therefore the primary financial caregiver of the family and his incarceration will drastically affect the family. He is God fearing and a member of the Methodist Church. He has therefore fallen from grace in society, at work and at church as a result of this conviction. He suffers from backache associated with old age. Imprisonment will deprive his unemployed wife and his family of a primary caregiver. He prayed for a sentence which will not require him to serve an effective sentence of imprisonment.

The personal circumstances of the fourth accused person are as follows. He is 53 years old. He holds an LLBS (UZ), a Master of Commerce, Strategic Management and Corporate Governance from the same University. He is married with four children. One child is at the University of Lusaka. He attached proof of that which is not contested by the State. His last child is at Eaglesvale Secondary School. He looks after his brother's child who is attending University at the National University of Science and Technology. He also looks after his aged mother. His wife was recently retrenched leaving the fourth accused person as the sole breadwinner of his family. He joined the City of Harare as a Legal Officer in 2008. Prior to this he was working as a public prosecutor. In 2009 he was promoted to the position of Legal Manager a position he holds to date. At the time of commission of this offence he was the Acting Chamber Secretary. It was submitted that a sentence of imprisonment without the option of a fine will completely destroy his career and consequently his family. We agree. His profession and training require a person to be fit and proper. He will not be able to practice the profession although he may be able to work as an employee. His chances of employment have been severely diminished. His future job or career prospects are bleak and will certainly be made worse off were he to be sentenced to a prison term without the option of a fine. The fourth accused person is also likely to lose his employment and the attendant benefits. His incarceration will be felt by his children who are wholly dependent on him. The accused person suffers from a chronic ailment. He was diagnosed with Atonic bladder with lower urinary tract symptoms. He produced evidence which shows that he requires to drain urine four times a day to stop the urine returning into his system and poisoning the kidneys. He

requires a clean environment to conduct the urine draining process and to store the catheters. He submitted that prison is the last place for him to be because he will not survive. It was submitted that imprisoning him is like condemning him to die a slow death.

Both the second and fourth accused persons implored this court to consider the sentence of a fine and if not appropriate the accused persons are amenable to do community service. They submitted that prisons are hopelessly overcrowded and the state is struggling to maintain prisons and feed inmates. Prisoners are afflicted by diseases. They cited *S* v *Tshuma* 2016 ZLR 553 (H) wherein he said where a penal provision provides for a fine or imprisonment, a fine must be considered first and urged the court to give serious consideration to non-custodial options since the accused persons are first offenders.

> "Against that background it is therefore surprising that we have a magistracy which is impervious to decisions of superior courts calling for alternative sentence, but remain rooted in one place."

The defence also cited *S* v *Muhunyere* HB 31-9 at p 3 of the cyclostyled judgment where BLACKIE J, with the concurrence of CHEDA J, quoted with approval from the decisions in the case of *S* v *Rutsvara* S-2-89 and *S* v *Van Jaarsveld* HB 110-90. The learned judge said:

> "It is the trite that where the statute lays down a monetary penalty as well as a period of imprisonment the court must give consideration to the imposition of a fine. It would normally reserve imprisonment for bad cases.
> …. In statutory offences permitting the imposition of a fine, the normal sentence for a first offender is a fine unless the offence is particularly serious or prevalent or there would be serious consequences if the deterrent of imprisonment is not used."

The defence submitted that the accused persons are first offenders who inadvertently transgressed in the course of discharging their duties. A sentencing court must not over-emphasize the public interest and general deterrence. They cited the Supreme Court of Appeal of South Africa in *S* v *Scott – Crossley* 2008 (1) SACR 223 (SCA) at para 35:-

> "Plainly any sentence imposed must have deterrent and retributive force. But of course, one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the overriding ones". As our courts have often sad the object of sentencing is to serve the public interest and not to satisfy public opinion. In *S* v *Mhlekazi* and Another 1997 (1) SACR 515 (SCA) at 518 f-g, Harms JA held the following:-
>
> > 'It remains the court's duty to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public.'"

The accused persons submitted that justice should be tempered with mercy. The element of mercy, a hallmark of a civilized and enlightened administration, should not be overlooked lest the court be in danger of reducing itself to the plane of the criminal. True mercy has nothing in common with soft weakness or maudlin sympathy for the criminal or permissive tolerance. It is an element of justice itself. See *S* v *V* 1972 (3) SA 611 (A) @ 614.

We accepted the submissions in mitigation except where they claim inadvertence. We convicted the accused persons because we were satisfied that their conduct was intentional.

The State made equally powerful submissions in aggravation. The State implored this court to impose a sentence that is commensurate with the seriousness of the crime. Failure to do so may result in the criminal justice system falling into disrepute and like-minded people not being deterred thereby rendering the courts ineffective. *S* v *Skenjana* (3)1985 SA 52 at 54-55 D. Despite recent trends in sentencing deterrence remains all important, paramount and the universally accepted object of punishment. *S* v *Khumalo & Ors* 1984 (3) SA 327, *R* v *Karg* 1961 (1) SA 231. The State conceded that we should temper justice with mercy and compassion and that our sentence should be balanced humane. We must not allow temper to influence us. In other words, we should not over emphasise retribution. We accept the submissions.

On the true nature and effects of criminal abuse of duty as public officers the state relied on the following cases:-

In *Shaik* v *S* (1) 2006 SCA 134 on para 50 SQUIRES J considered corruption in terms of the CA as a phenomenon that can 'truly be likened to a cancer, eating away remorselessly at the fabric of corporate probity and extending its baleful effect into all aspects of administrative functions'. He stated that this manner of corruption had to be checked and prevented from becoming systemic as the effects of systemic corruption can quite readily extend to the corrosion of any confidence in the integrity of anyone who had a public duty to discharge, leading unavoidably to a disaffected populace. The learned judge had regard to the evidence of Mr Hendrik Van Vuuren of the Institute of Strategic Studies, a student and qualified observer of this phenomenon. Mr Van Vuuren testified about the effects of corruption on human rights and political processes and ultimately on democracy. The court was of the view that it was a 'pervasive and insidious evil' and that the public interest required its 'rigorous' suppression. The State also cited the cases of:-

S v *Kelly* 1980 (3) SA 301 (A) the following appears at 313 F:

> "Bribing has been described by this Court as a corrupt and ugly offence. In the business world it undermines integrity for the temptations offered are often, as in this case, great. It is an insidious crime difficult to detect and more difficult to eradicate. It can, if unchecked or inadequately punished by the courts, have a demoralising effect on business standards and fair trading."

In *R* v *Sole* 2004 (2) SACR 696 (LesHC) the Lesotho High Court considered appropriate sentences for a series of bribery convictions. At 699b-700b the court referred to the abhorrence of bribery in Roman-Dutch law and the expressions of strong disapproval that have multiplied with the years. The Constitutional Court in *South African Association of Personal Injury Lawyers* v *Heath & Ors* 2001 (1) BCLR 77 (CC) at 80E-F said the following:-

> "Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State. ……. It is plainly a pervasive and insidious evil, and the interests of a democratic people and their government require at least its rigorous suppression, even if total eradication is something of a dream."

The State submitted that the seriousness of the offence of corruption cannot be overemphasised. It offends against the rule of law and the principles of good governance. It lowers the moral tone of a nation and negatively affects development and the promotion of human rights. As a country we have travelled a long and tortuous road to achieve democracy. Corruption threatens our constitutional order. We must make every effort to ensure that corruption with its putrefying effects is halted. Courts must send out an unequivocal message that corruption will not be tolerated and that punishment will be appropriately severe. It is thus not an exaggeration to say that corruption of the kind in question eats away at the very fabric of our society and is the scourge of modern democracies. However, each case depends on its own facts and the personal circumstances and interests of the accused must always be balanced against the seriousness of the offence and societal interests in accordance with well-established sentencing principles.

The State further submitted that corruption and corrupt activities undermine constitutional rights and further 'endanger the stability and security of societies, undermine the institutions and values of democracy and ethical values and morality, jeopardise sustainable development, the rule of law and credibility of governments. . .'.

Phillips v *The State* 2016 ZASCA 187 @ para 10.

On sentencing trends in similar cases in the recent past in cases of contravening s 174 of the code resulted in imprisonment being visited upon the accused persons in the case of (i) *S* v *Admire Chikwayi* HB 166/16 who was a public prosecutor given 24 months imprisonment of which 6 months was suspended. He had been bribed with USD300 (ii) *S* v *Vincent Shava* HB 179/17 a public prosecutor who was given 5 years imprisonment of which 2 years was suspended had been bribed with USD 200 (iii) *S* v *Paradza*, (*supra*), a former high court judge was given 3 years imprisonment for having tried to influence another judge in a bail application of his business partner (iv) *S* v *Samuel Undenge* HH 366/20 a former government cabinet minister was given 4 years imprisonment with 18 months suspended on the usual conditions who had influence a payment by ZPC to a contracted company.

The State submitted that the accused persons in the present case did not assisted the court with any precedents where either a fine or community service had been given. The accused persons do not appreciate the gravity of the offence for which they have been convicted. Both held quite senior positions in the City of Harare. They betrayed the honour to safeguard public property. The land in question is prime land at the heart of the City of Harare that had survived for a period in excess of 100 years for the enjoyment of everyone in the City. The land was about 24 hectares. It is submitted that a sentence of a fine or community service will amount to a mere slap on the wrist. There is nothing peculiar with the present case that would warrant the departure from the need to pass deterrent sentence as done in the above matter. The seriousness of the offence has to be reflected in the sentence that this honourable court will come up with. The country's determination to deal with the scourge of corruption has to be shown in this sentence.

We accept the submission by the State that Zimbabwe is ranked 157th among the 180 countries on the corruption index. The only viable sentence given the circumstances of this case is a term of imprisonment. We accept that the present case is more serious than the 4 cases of *Chikwayi, Shava, Paradza and Undenge* cited above and that barring any compelling reasons the sentence that has to be visited upon the present accused persons ought to be in excess of any of the sentenecs imposed in the cases cited. The Supreme Court in the case of *Attorney General* v *Chinyerere & Anor* 1983(2) ZLR 329 (SC) held that:

> "Corruption in the public service must necessarily attract heavier penalties than corruption elsewhere."

The State proposed a sentence of imprisonment in the region of 8 years with a portion suspended on the usual conditions will meet the justice of this case given that both accused persons are first offenders. The State in arriving at the period of 8 years, that it has suggested, has also taken into account second accused person's advanced age and the personal mitigatory medical condition of the fourth accused person.

We take into account that occupying or accepting appointment to a public office should be viewed as an honour as opposed to an opportunity to enrich oneself. Abuse of that office is a serious betrayal of trust. The temptation to be corrupt is very high yet the chances of detecting crime is very low. Even where corruption is suspected on reasonable grounds, conviction is rare. The reasons are many. The law enforcement organs have become severely weakened by corruption which works like a virus which has embedded itself in government structures. While accepting that retribution must not be overemphasised, we are of the firm view that a sentence of a fine will trivialise the crime of which the accused persons have been convicted. This is one of the bad cases involving dishonest alienation of public property held in trust. The accused persons worked together to deal dishonestly with State land managed by the City of Harare as a public trust. The land involved is vast and was benefiting a whole community. The accused persons did not only callously privatise such land by selling it to an individual but in a manner calculated to cause prejudice to the fiscus. At this rate there will be no State land left for future generations in a short space of time.

The accused persons, by virtue of their respective stations in life were generally comfortable. Prison will be a nightmare. One may be tempted to find imprisonment shocking in light of that. However, our law does not contemplate distinction in sentencing based on status.

We note that the second accused person was the custodian of State land and appeared to take a greater role for the simple reason that most of the processes had to be originated in his department. However, that is not a reason for distinguishing between the accused persons. The whole criminal scheme was not going to succeed if the fourth accused had not taken part in the deception. His omission was deliberate to deceive the councillors who were deceived to believe that due process had been followed. He clearly intended the councillors to act on his misrepresentation through non-disclosure. The fourth accused person is however sick. His medical

condition will mean that he will suffer greater hardship in prison. He will be treated more leniently. However, as a lawyer he ought to have been more ethical. That is the hallmark of the profession. On his part the second accused person is a senior citizen. He is approaching the end of his productive years in the profession. He has fallen at the last hurdle. We would have treated him differently for that reason. However, each of the accused persons has peculiarly compelling mitigation peculiar to them which do not apply to the other. They therefore are at par and will receive the same sentence. A sentence of imprisonment for ten years would meet the justice of this case. We will however allow the accused persons to benefit from the lower penalty suggested by the State.

The National Prosecuting Authority, for the State
Mhishi Mkomo Legal Practice, first accused person's legal practitioners
Mambara and Partners, second and fourth accused person's legal practitioners
Guwuriro and Associates, third accused person's legal practitioners