HERBERT GOMBA
versus
NGONI NDUNA N.O
and
THE NATIONAL PROSECUTING AUTHORITY

HIGH COURT OF ZIMBABWE
CHIKOWERO AND MANYANGADZE JJ
HARARE, 20 May and 15 June 2022

Court Application for Review of Unterminated Trial Proceedings

L Madhuku, for the applicant
No appearance for the 1st respondent
T Mapfuwa, for the 2nd respondent

CHIKOWERO J:

INTRODUCTION

This is an application for review of the first respondent's decision dismissing the applicant's exception to a criminal charge.

THE PROCEEDINGS BEFORE THE MAGISTRATES' COURT

The applicant is appearing before the Magistrates Court sitting at Harare on a charge of criminal abuse of duty as a public officer as defined in s 174 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (The Criminal Law Code). He is jointly charged with two others. The first respondent is presiding at the trial while the second respondent is prosecuting on behalf of the State.

The applicant objected to the charge by taking an exception in terms of s 170(2) of the Criminal Procedure and Evidence Act [*Chapter 9:23*]:

("the Code") which reads:

"**170 Objections to indictment, how and when to be made**
(1) …
(2) Any objection to a summons or charge for any formal defect apparent on the face thereof shall be taken by exception before the accused has pleaded, but not afterwards.
(3) …"

The objection was opposed and dismissed.

The two co-accused did not object to the charge.

The bases for the failed exception have been elevated to feed into the grounds anchoring the invitation to interfere with the unterminated trial proceedings pending before the first respondent.

THE LAW ON INTERFERENCE WITH UNTERMINATED PROCEEDINGS PENDING BEFORE AN INFERIOR COURT

The law was settled in *Attorney General* v *Makamba* 2005(2) ZLR 54(S) with MALABA JA (as he then was) expressing the principle, at 64C, in these words:

> "The general rule is that a Superior Court should interfere in uncompleted proceedings of the lower courts only in exceptional circumstances of proven gross irregularity vitiating the proceedings and giving rise to a miscarriage of justice which cannot be redressed by any other means or where the interlocutory decision is clearly wrong as to seriously prejudice the rights of the litigant."

In *Prosecutor-General of Zimbabwe* v *Intratrek and Anor* SC 67/20 MAKARAU JA (as she then was), with the concurrence of other members of the court, explained the same principle, at p 8:

> "Thus, put conversely, the general rule is that Superior Courts must wait for the completion of the proceedings in the lower court before interfering with any interlocutory decision made during the proceedings. The exception to the rule is that only in rare or exceptional circumstances where the gross irregularity complained of goes to the root of the proceedings, vitiating the proceedings irreparably, may Superior Courts interfere with on-going proceedings."

See also *Prosecutor General of Zimbabwe* v *Intratrek Zimbabwe (Private) Limited and Others* SC 59/2019.

THE GROUNDS FOR REVIEW

Cognisant of the limited grounds for interference with unterminated proceedings pending before a subordinate court, the applicant couched what he contended were exceptional circumstances as follows:

> "**17.1 Illegality:** The decision by the first respondent [In *State* v *Herbert Gomba and 2 Others* ACC 71/20 and ACC 75/20] to dismiss the exception which exception had been taken in terms of section 170(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], is illegal in that three different public officers, each with a different duty, cannot commit the same offence under section 174 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] to the extent of being tried together.

17.2 **Procedural Impropriety**: The decision by the first respondent [In State v Herbert Gomba and 22 Others ACC 71/20 and ACC 75/20] to dismiss the exception that had been taken in terms of section 170(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], was procedurally improper in that the decision would lead to a trial on a charge that does not meet the mandatory requirements set out by the High Court in Saviour Kasukuwere v Hosiah Mujaya, Zivanai Macharaga and the State of Zimbabwe HH 562/19.

17.3 Irrationality: The first respondent's decision to permit the trial to proceed on a charge that is so defective as to be void ab initio [*In State* v *Herbert Gomba and 2 Others* ACC 71/20 and ACC 75/20] is irrational in the sense that it is so unreasonable that no reasonable person, applying his or her mind to the charge as it stands, could have made such a decision."

WHAT ARE THE ESSENTIALS OF A CHARGE?

The lawmaker has provided the answer in s 146(1) of the Code:

"**146 Essentials of Indictment, Summons or Charge**

(1) Subject to this Act and except as otherwise provided in any other enactment each count of the indictment, summons or charge shall set forth the offence with which the accused is charged in such manner and with such particulars as to the alleged time and place of committing the offence and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge."

WHAT ARE THE ESSENTIAL ELEMENTS OF THE OFFENCE OF CRIMINAL ABUSE OF DUTY AS A PUBLIC OFFICER?

The Criminal Law Code describes the offence as "criminal abuse of duty as a public officer". Section 174 of the Criminal Law Code provides:

"**174 Criminal abuse of duty as a public officer**

(1) If a public officer, in the exercise of his or her functions as such, intentionally

(a) Does anything that is contrary to or inconsistent with his or her duty as a public officer; or

(b) Omits to do anything which it is his or her duty as a public officer to do;

for the purpose of showing favour or disfavour to any person, he or she shall be guilty of criminal abuse of duty as a public officer and liable to a fine not exceeding level thirteen or imprisonment for a period not exceeding fifteen years or both."

In our view, the essential elements of this offence are:

- A public officer
- in the exercise of his or her functions as a public officer
- intentionally
- does anything that is contrary to or inconsistent with his or her duty as a public officer or
- or omits to do anything which it is his or her duty as a public officer to do

- for the purpose of showing favour or disfavour to any person.

See Professor G Feltoe's *Commentary on the Criminal Law* (Codification and Reform) Act [*Chapter 9:23*], January 2012 at pp 170-171; *S* v *Taranhike and Ors* 2018(1) ZLR 399(H) at 403C.

THE CHARGE

In relevant part, the charge which triggered the objection by the applicant reads:

"…..(hereinafter called the accused) charged with the crime of:

CRIMINAL ABUSE OF OFFICE AS DEFINED IN SECTION 174 OF THE CRIMINAL LAW (CODIFICATION AND REFORM) ACT [*CHAPTER 9:23*].

In that, on a date unknown to the Prosecutor but during the period extending from 2019 to February 2020, the accused persons Herbert Gomba, Samuel Nyabezi and Munyaradzi Bowa, one or more of them in the exercise of their duties or functions as public employees of City of Harare intentionally and contrary to or inconsistent with their duties identified State land and allocated to Taringana Housing Consortium after using plan number TPX/WR/07/15 which belonged to Youths in Business Housing Trust thereby abusing their offices and authority as employees of the City of Harare and showing favour to Taringana Housing Consortium and disfavour to Youth in Business Housing Trust and the State."

THE DETERMINATION OF THIS APPLICATION

There can be no doubt that the charge as couched leaves a lot to be desired. The offence is misnamed as "criminal abuse of office." It was clumsy to effectively allege that the applicant (and the two not before us) were public officers by describing them as "public employees of City of Harare". The word between "Consortium" and "using" should have been omitted. The phrase "abusing their offices and authority as employees of City of Harare" was unnecessary and could also have been omitted while the phrase "and disfavour to Youth in Business Housing Trust and the State" may have been replaced by "and prejudice to Youth in Business Housing Trust which had already been lawfully allocated the same land by the Minister of Local Government Public Works and National Housing".

Having made these observations, the issue is whether this is an exceptional matter calling for our interference with the trial proceedings at this stage.

ILLEGALITY

That the offices which qualify the applicant and his co-accused as public officer are not stated in the charge is moot. It was common cause both below and before us that the applicant was the Mayor of the City of Harare at the material time while his co-accused were

the City's Acting Town Planner and the Chief Surveyor respectively. In any event, para(s) 1, 2 and 3 of the State outline (which must be read together with the charge sheet) make this plain.

Mr *Madhuku* argued that it is not competent to jointly charge three different public officers under s 174 of the Criminal Law Code. He submitted that s 158 of the Code (which permits the charging together of persons alleged to have committed the same offence) does not apply in the present matter as the offence with which each of the three public officers was charged was not the same as that alleged against the others by dint of the duty allegedly abused being unique to each of them.

We think that the argument is academic. The learned Magistrate dismissed the same contention on the basis that the charge alleges common purpose. We share the same view. The duties of the three public officers may be different. That is not important. What is critical is that the allegation is made in the charge that they acted in common purpose, contrary to and inconsistent with their respective functions as public officers, by identifying and allocating State land to Taringana Housing Consortium. The means by which the applicant and his co-accused are alleged to have committed the offence is also spelt out in the charge. Our reading of the charge is that the very acts of identification and allocation of the State land in question was outside the powers and duties of the applicant and his alleged accomplices (the *actus reus*) hence the allegation that in so doing they were acting contrary to or inconsistent with their duties. It is not an allegation of criminal abuse of duty as public officers in the sense of breach of their duties but, at the risk of repeating ourselves, it is alleged criminal abuse of duty as public officers by dint of acting contrary to or inconsistent with their functions as public officers. We think that the charge is thus speaking to the same offence in that the three are alleged to have unlawfully identified and allocated the same piece of land to the same housing Consortium. In other words, the facts alleged as constituting the offence are the same as against the applicant, Nyabezi and Bowa.

There is, in the circumstances, nothing exceptional in the first ground for review. We dismiss it.

PROCEDURAL IMPROPRIETY

Mr *Madhuku* relied on two decisions of this court to found the argument that it is mandatory for a charge of criminal abuse of duty as a public officer to allege the duties that

were abused and how such occurred. See *Kasukuwere* v *Mujaya and Ors* HH 562-19, *Mupfumira and Anor* v *Mutevedzi N.O and Anor* HH 200/20 at p 20.

Mr *Mapfuwa* argued that it is not always necessary to allege, in the charge, the duty abused and the manner thereof. In other words, the submission was that the reasonable sufficiency or otherwise of the allegations in a charge would turn on the circumstances of each matter.

We agree with Mr *Mapfuwa* that the present is an example of a matter where it is not necessary to allege the duty which was abused. This is so because, although the legislature has labelled the offence as "criminal abuse of duty as a public officer" the definition of the crime itself makes it clear that the offence is wide enough to cover an instance where the public officer, in reality, is being charged for unlawfully and intentionally acting contrary to or inconsistent with his duty as a public officer for the purpose of showing favour or disfavour to any person. It appears that the basic values and principles governing public administration, which include integrity, transparency and accountability are what the lawmaker aspired to cultivate by criminalising the conduct aforementioned. This seems to explain why the offence falls under [*Chapter IX*] of the Criminal Law Code (Bribery and Corruption).

We note too that even if it were necessary in this particular matter to allege in the charge the duty abused and the manner thereof, there would still be no procedural impropriety in dismissing the exception because the first, second and third paragraphs of the State outline referred to three annexures attached thereto outlining the duties of the Mayor (applicant), Acting Town Planner (Nyabezi) and Chief Land Surveyor (Bowa). These annexures are not part of the record placed before us. All the same, we see nothing on record indicating that the applicant and his co-accused requested to be furnished with the annexures (which would be part of the State papers) and that such requests were turned down.

In all the circumstances, it appears to us that the want of an allegation in the charge relating to the duty of the applicant and the manner of its abuse did not render the charge defective.

The second ground for review is dismissed.

IRRATIONALITY

Contrary to the applicant's contention, the charge is not so defective as to be *void ab initio*.

A charge is neither a State outline nor evidence. By using the phrase "….one or more of them….." the second respondent was alleging common purpose. It is clear that the alleged unlawful conduct ascribed to the applicant and/or all the three persons on trial is the identification and allocation of State land to Taringana Housing Consortium for the purpose of showing favour to it. The plan number TPX/WX/07/15 is alleged to be the means by which the offence was committed.

Although the particular State land is not specifically named in the charge sheet there would be nothing precluding the applicant from requesting for further particulars for the purpose of the trial (s 177 of the Code). The absence of an allegation speaking to the identity of the land in question in the charge – beyond what is contained therein – does not go to the root of the matter so as to vitiate the trial proceedings. The remedy, as we have pointed out, is for the applicant to apply to the learned magistrate for delivery of the requisite particulars.

We have already highlighted the unsatisfactory features of the charge. To the extent that the charge goes as far as alleging the showing of favour to Taringana Housing Consortium the particulars furnished are reasonably sufficient to inform the applicant of the nature of the charge. The offence itself is cited as a contravention of s 174 of the Code. In our judgment, the applicant is under no illusion of the offence with which he is charged and the manner of the alleged commission thereof. See *R* v *Mlotshwa* 1968(2) RLR 172(GD); *S* v *Ndhlovu* 1984(1) ZLR 175(S).

The advertence to disfavour to Youth in Business and the State, in the charge, was, in our view, an incident of unwarranted confusion on the part of the person who drafted the charge. Having made the averment that the applicant and his co-accused acted contrary to or inconsistent with their functions as public officers by identifying and allocating the State land in question to Taringana Housing Consortium for the purpose of showing favour to the latter (in circumstances where the accused persons did not have such powers of identification and allocation of State land at all) it necessarily follows, in our estimation, that this was a case where they could not, at the same time, be alleged to have been showing disfavour to Youth in Business Housing Trust and the State. If the land in question had already been lawfully allocated to Youth in Business Housing Trust, it may have been proper to simply aver that Youth in Business had been prejudiced. If the land allocated to Taringana was not that already lawfully allocated to Youth in Business (but was, instead, State land) the correct allegation may

have been that the State was prejudiced, rather than that the accused persons showed disfavour to the State. The inclusion of the apparently offending details in the charge did not detract from that which was alleged to be the offence committed by the applicant and his co-accused. The applicant can still apply for delivery of further particulars, if he so wishes. The State can amend the charge. The learned magistrate may consider exercising his discretion in favour of ordering such an amendment. We are satisfied that there was nothing irrational in the manner that the learned magistrate disposed of the objection.

Nyabezi and Bowa await the resumption of the trial.

DISPOSITION

This is not one of those rare or exceptional cases where there is a gross irregularity going to the root of the proceedings, vitiating the proceedings irreparably, as to justify interference with the on-going proceedings before the second respondent.

ORDER

1. The application for review of the interlocutory decision handed down by the Regional Court for the Northern Division in ACC 71/20, ACC 75/20 and ACC 76/20 dismissing the applicant's exception to the charge be and is dismissed.
2. There is no order as to costs.

MANYANGADZE J, agrees: ……

Lovemore Madhuku Lawyers, applicant's legal practitioners
The National Prosecuting Authority, second respondent's legal practitioners