

SAVIOUR KASUKUWERE
versus
MR HOSIAH MUJAYA
and
MR ZIVANAI MACHARAGA
and
THE STATE OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 25 July & 21 August 2019

Opposed Criminal Review Application

T Magwaliba, for the applicant
S Fero, for the 2nd & 3rd respondents

CHITAPI J: The issues which arise in this matter raise the need to conscientize both the prosecution and the judicial office on the importance of the right of an accused person to a fair hearing. The right by virtue of s 86 (3) (e) of the Constitution is absolute. In terms of the provisions aforesaid, “No law may limit --- and no person may violate—the right to a fair trial.” The scope of what constitutes a fair trial or hearing is very wide. For example, in terms of s 70 (1) (b) of the constitution, an accused person has a right to be “promptly informed of the charge; in sufficient detail to enable to answer it.” It follows therefore that a challenge to a charge is not just a matter of course. A determination on the challenge can make a difference as to whether or not the accused is able to exercise the right to a fair trial and adequately prepare a defence as provided for in s 70 (1) (c) of the constitution and to adduce and challenge evidence as provided for in s 70 (1) (h) thereof.

The background to this review application is that the applicant appeared on trial before the first respondent on 29 November 2018 to answer to four (4) counts of criminal abuse of duty as a public officer as defined in s 174 (1) (a) of the Criminal Law (Codification & Reform), Act [*Chapter 9:23*] (The Code). The applicant against a background of earlier correspondence between his legal practitioners and the third respondent represented by the

second respondent took an exception to the charges before pleadings as provided for in s 170 (1) of the Criminal Procedure & Evidence [*Chapter 9:07*] (CPEA) which provides that:

“Any objection to an indictment for any formal defect apparent on the face thereof shall be taken by exception or by application to quash such indictment before the accused has pleaded; but not afterwards.” See *Parsons & Anor v Chibanda N.O & Anor* 2013 (2) ZLR 209 *per* MUSAKWA J. The same wording is used in regard to a summons or charge in the magistrates court in s 170 (2).”

The rationale for s 170 (1) and (2) is a matter of common sense and logic. An accused cannot approbate and reprobate at the same time. The accused cannot plead to the charge thereby implying that it is properly drafted and then after entering a plea, attack its propriety. The maxim *quod approbo non reprobo* “lies as the rationale to s 170 (1). The same principle applies in relation to civil procedure wherein an exception to a summons must, if it is intended to except be taken before pleading to the merits. Pleading to the merits acts as a bar to raising an exception since by pleading to the summons and declaration on the merits, the implication is that the plaintiffs claim documents are answerable on the merits in their form. See *Tobacco Sales Producers (Pvt) Ltd v Eternity Star Investments* 2006 (2) ZLR 293, *per* KUDYA J.

I have commented on the nature of the application for exception in order to underline the point that such an application is provided for by law. It is an antecedent application to a trial and is no less important than the trial itself inasmuch as it is in fact part and parcel of trial proceedings. An exception to a charge application must be meticulously dealt with by the presiding judicial officer. The application sets the ground for a fair contest between the State as the accuser and the accused person. A fair trial and hearing starts at this stage. An accused person who excepts to a charge must be regarded not as a time waster but as asserting his or her rights to a fair trial. It is incompatible with fair trial standards to order an accused to plead to a charge which he or she has challenged or excepted to without interrogating the charge and the accused’s exception and making an informed determination on the charge as drafted and the objection raised.

I propose to deal with the law relating to the framing of a charge for it not to be excipiable generally and in respect of a charge under s 174 of the Code, in particular. I will then consider how the charges against the applicant were framed and how the first respondent dealt with them. I will then determine whether the review application impugning the first respondent’s decision to dismiss the exceptions should stand or be set aside on review as prayed for by the applicant.

The framing of a charge is not a walk in the path. One should start by making the general jurisprudential principle that good laws must be clear and unambiguous. By equal measure, a charge must be clear and unambiguous. In other words, the accused person must not be left unsure or unclear as to the case that he or she must answer to. If the basis of the charge is an act of commission or omission, the charge should be clear enough for the accused to appreciate the conduct, act or omission which he or/she is alleged to have committed or omitted to do and the fact that the act of commission or omission is criminalized. Reasonable, rather than absolute clarity is sufficient to validate a charge. By this, I do not mean to condone ambiguity in the framing of a charge. The charge must at least contain sufficient details to fully and sufficiently inform the accused of the criminal wrong alleged against such accused. The charge from a basic understanding must address or allege “what did the accused do or not do, where and when? Why or how is it alleged that the accused’s conduct constitutes an offence?”

Section 146 of the Criminal Procedure and Evidence Act, provides for “essential of indictment, summons or charge.” I hasten to state that the words indictment summons or charge mean one and the same charge. The word indictment as provided for in s 136 of the CPEA is used in the High Court as referring to a summons or charge, the two being interchangeably the used in the Magistrates Court. Section 146 cuts across the proceedings in both the High Court and Magistrates Court. The provision of the section reads as follows:

“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.

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

(a) the description of any offence in the words of any enactment creating the offence, or in similar words, shall be sufficient; and

(b) any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the enactment creating the offence, may be proved by the accused, but need not be specified or negated in the indictment, summons or charge, and, if so specified or negated, no proof in relation to the matter so specified or negated shall be required on the part of the prosecution.

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

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

[Subsection inserted by section 282 of Act 23 of 2004]

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

In summation it can be said that the provisions of s 146 (1) are firstly subject to both THE cpeand to any other enactment which may similarly provide to the contrary. Secondly, 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 time and place of the commission of the offence and the person, if any, and the property if any, against whom the offence was committed “as may be reasonably sufficient inform the accused of the nature of the charge” (own underlining). The words “reasonably sufficient” denote that the context or situation of a particular case will determine what is reasonably sufficient to inform the accused of the nature of the charge. The simplicity of the case before the court in terms of facts, the law or both are relevant considerations in informing the degree of particularity of what must be alleged in the charge as would pass the scale of “reasonably sufficient.” The bottom line is that the detail given in the charge should be sufficient to enable the accused to understand what conduct or omission on the accused’s part it is alleged as constituting an offence. In cases where the accused is required to conduct himself in a particular manner but commits a cognizable offence by conducting himself or herself in a manner inconsistent with how he should have conducted himself, the charge should in particularity *inter alia* provide details of the manner that the accused is required to have acted and alleged the inconsistent conduct which the accused engaged in if this is what constitutes the offence. The accused must not be left to speculate on the charge he or she must answer to.

A number of persuasive cases abound and I refer herein to some South African decided cases. They interpret s 84 of the Criminal Procedure Act, 1997 of South African which is similar in wording to s 146 of the Zimbabwe Criminal Procedure and Evidence Act. In *S v Sewela* 2007 (1) SACR 123 (W) quoted by STEYNE & MARKS JJ in *Essop v S 204 ZAKZPWC 45* at para 3, the court state “on a procedural level, it is required averments, and a charge sheet should contain all the essential allegations to be proved by the prosecution in order to sustain a guilty verdict.”

In the same case of *Essop (supra)* it is stated in para 7:

“In *S v Langa* 2010 (2) SACR 289 (KZP) the majority of the court recognized the principle that a fair trial demands that an accused has the requisite knowledge in sufficient time to make critical decisions which will bear on the outcome of the case as a whole. It is for this very reason that a charge sheet ought to inform an accused with sufficient detail of the charge

he or she should face. It should set forth the relevant elements of the crime that has been committed and the manner in which the offence was committed---”

In *Rex v Alexander & Others* 1936 AD 445 at 445 the court stated:

“The purpose of a charge sheet is to inform the accused in clear and unmistakable language what the charge is or what the charges are which he has to meet. It must not be framed in such a way that an accused person has to guess or puzzle out by piercing sections of the indictment or portions of sections to gather what the real charge is which the crown intends to lay against him.”

In the case of *Intratrek Zimbabwe (Pvt) Ltd & Another v Prosecutor General & Another*

HH 849/18, quoted in the second and third respondents’ heads of argument, MUSAKWA J stated as follows in reference to s 170 of the CPEA;

“From a plain reading of the above provision, it is clear that an exception to a charge is based on formal defects that are apparent. -- A distinction ought to be made between an objection to a charge and a defence to a charge. I agree.”

I do not however read the learned judge’s pronouncement to mean that it does not constitute a formal defeat apparent on the face of a charge where the charge omits to include essential averments on which the charge is based. The learned judge must not be understood as having limited the scope of the word defect to spelling errors and like mistakes

Indeed, to hold otherwise would be illogical. Thus, where for example, the criminal conduct complained of arises from an act of omission, the duty to act in a particular manner as well as the omission to act in the manner that is expected must both be pleaded. A failure to do so makes a charge excipiable on the face of it. The charge will be defective. In legal terms a defect as defined in the Law Dictionary 2 ed is “the want or absence of some legal requisite, deficiency, imperfection, insufficiency.”

I now turn to the exposition of the offence of Criminal abuse of duty as a public officer. Section 174 of the Criminal Law (Codification & Reform) Act, which creates the offence provides as follows:

“174 Criminal abuse of duty as 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 period not exceeding fifteen years or both.
(2) 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.

(3) For the avoidance of doubt it is declared that the crime of criminal abuse of duty as a public officer is not committed by a public officer who does or omits to do anything in the exercise of his or her functions as such for the purpose of favouring any person on the grounds of race or gender, if the act or omission arises from the implementation by the public officer of any Government policy aimed at the advancement of persons who have been historically disadvantaged by discriminatory laws or practices.”

Section 174 creates a very serious offence which falls under Chapter IX of the Criminal Law (Codification & Reform) Act. The offences created in Chapter IX relate to bribery and corruption. The offences strike at the root of good governance. At the centre of the crimes is greed for money, power and luxury at the expense of good public administration and transparency. The offences result in bureaucratic and inefficient administrative structures and systems in public and private administration. It not a secret that the present government has decreed a zero tolerance for corruption and that there should be no sacred cows in the fight to eradicate corruption. The none tolerance for corruption mantra by Government is based on the realization and acceptance that there can be no meaningful economic and social development is a society bedevilled or plagued by corruption.

I chose to briefly dwell on the serious nature of the Chapter IX offences generally in order to underline the point that, the prosecution of such offences require astuteness on the part of the prosecution. A failure to properly and successfully prosecute such offences invokes public indignation. The public which has an interest in the prosecution of such cases ends up quite understandably, drawing wrong conclusions that the criminal justice system especially courts would be the ones lacking in the resolve to have corruption and kindred matters determined. Matters are taken to court for prosecution. However, unless meticulously presented, the accused persons not unexpectedly will raise all sorts of lawful objections to forestall the trial. Some objections have substance whilst others are flimsy. The exception to a charge as I have already observed is a critical and significant objection which must be diligently handled because it is an important procedural step in the fair trial process. For the layman, what is determined upon a challenge to a charge under s 174 of the Code is the composite questions; Is the accused a public officer? Entrusted with what duty and required to discharge it how? What did the public officer do? Did he in doing so or omitting to do so intentionally act in a manner inconsistent or contrary to his duties.? If yes, did he so act or omit to act for purposes of showing favour or disfavour to any person? In so acting or

omitting to do so, was the public officer favouring in line with government a race or policy gender which was historically disadvantaged by discriminatory laws or practices?

An astute, shrewd, clever and sharp prosecutor must first appraise himself or herself fully with the elements of the offence called abuse of duty as a public officer as set out in s 174. What is clear from a reading of s 174 is that, the public officer must have acted contrary to or inconsistently with or must have omitted to do anything which it is the public officer's duty to do. As a matter of common sense, it is embarrassing to the public officer to allege what he or she did and found a charge thereby without anything further. A charge can only properly arise where it is alleged that the public officer was supposed to act in a certain disclosed manner and that in abrogation of the duty to act in that manner, the public officer acted contrary thereto by commission or omission, the details of which must be captured in the charge.

Section 146 (2) (a) provides that it is sufficient in crafting a statutory offence charge to describe the offence in the word of the statute concerned or in similar words. This provision does not detract from s 146 (1) which provides that the charge must provide such particulars as would be reasonably sufficient to inform the accused of the nature of the offence. Describing an offence in the words of the enactment does not mean that essential particulars to inform the accused of the nature of the charge must be omitted. For example, s 174 of the Code creates an offence called "criminal abuse of duty as a public officer." It will therefore be sufficient to describe the offence using the words as quoted. The charge must still contain sufficient particulars to inform the accused of how it is alleged that he committed the statutory offence so described as "criminal abuse of duty as a public officer." A public officer is invariably tasked to carry out a number of duties. It is only proper that where it is alleged that the public officer abused his duty, the precise duty which was abused should be included in the charge. The provisions of s 174 are too broad and generalized. It is for this reason that the duty abused be disclosed by reference to how it should have been carried out and how the accused's conduct as described derogated from the discharge of the duty. Criminal abuse of office has connotations of a labour matter. It may aptly be described as an act of misconduct by a public officer which has been criminalized by statute. A person can only commit an act of misconduct by measuring his or her conduct against the norms of carrying out duty or by reference to conduct which may be listed as misconduct if committed or omitted to be carried out in the course of employment. 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. Were any other approach to be followed, there would be arbitrary arrests and prosecutions in that a public officer would just be accused of improper conduct or abuse of duty at every turn for conduct which does not amount to criminal abuse of that public officer's duties.

In the case *S v Taranhike and 5 Ors* HH 222/18, TSANGA J quoted the Hong Kong case of *HKSAR v Wong Lin Kay* [2012] 2 HKLRD 898 in which the final court of appeal in interrogating the crime of criminal abuse of duty by public officers held that:

“...one must examine what if any powers have been entrusted to the defendant in his official position for the public benefit, asking how if at all the misconduct involves an abuse of those powers.”

The dicta in the above case is applicable to the interpretation of s 174 of the Code *in casu*. A charge arising therefrom must allege the powers which the accused is entrusted with which basically is the duty to act in a certain way. A failure to act in that certain manner with attendant intention to show favour or disfavor to any person is what grounds the charge. TSANGA J went further to state that:

“To be guilty of abuse of public office what can be gleaned from the above (s 174) is that:

- One must have engaged in conduct that is inconsistent with duty as public officer
- Must act intentionally in the act or omission
- The purpose of the conduct must be to show favour or disfavor to any one person.”

It follows that for a charge to disclose the offence of criminal abuse of duty as a public officer, the elements of the offence as set out above must be alleged. In addition, the duty which the person was supposed to do which that person discharged contrary to how he should have or inconsistently should be alleged in the charge as well.

An illustration by example will show how a charge under s 174 would be adequately crafted. Take an example of a security guard in the employ of the State. Part of his duties are to ensure that no one who does not produce an identity card is allowed into a guarded building. The guard must also record the name and particulars of every entrant. The security guard (W) in breach of his defined duties allows (X) into the building when (X) does not have an identity card. The guard does not record (X's) name or particulars. The guard would have acted inconsistently with his duties by commission or omission and in the process shown favour to X. Note must be taken that in terms of s 174 (2) favour or disfavour is presumed once the prosecution proves that the public officer acted contrary or inconsistently with his or her duty to the favour or prejudice of any person. In terms of s 146 (2) of the Criminal Procedure and Evidence Act, exceptions, presumptions, provisions, excuses or

qualifications which the accused may avoid liability by and which it would be the accused's duty to prove need not be specified in the charge although they can still be specified.

“Criminal Abuse of Duty as a public officer as defined in s 174 of the Criminal Law (Codification and Reform) Act, [Chapter 9:23]. In that on (date, time and place) W, a security guard in the employ of the State and as such a public officer whose duty it was not to allow any person access into XYZ building under his guard without the person first producing his identity card and W recording the details of the person, unlawfully and intentionally acted contrary to or inconsistently with his duty aforesaid, by allowing into the said building X who had no identity particulars and not recording X's details, thereby showing favour to X.”

The above example is just an illustration of how a charge under s 174 could embrace such particulars as would be reasonably sufficient to inform an accused of the nature of the charge as required under s 146 (1) of the Criminal Procedure and Evidence Act. If one interrogates the example, the accused will have been informed that:

- (a) he is charge das a public officer
- (b) who is required to carry out a specified duty in a particular manner as outlined
- (c) that he intentionally and therefore acted unlawfully by acting contrary to his duties
- (d) by allowing X access in the building when X had not produced required documentation
- (e) by further not recording X's details
- (f) his omission or commission amounted to a favour to X.

I would therefore suggest that all that is required to draft a statutory charge under s 174 which discloses an offence and is not excipiable is for the drafter to acquaint himself or herself with the elements of the offence and incorporate them in the charge.

I now deal with the application before me in substance. The applicant excepted to the following 4 charges before the second respondent:

Count 1: Criminal abuse of duty as defined in s 174 (1) (a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

“In that on 12 February, 2016 and at the Ministry of Local Government, Public Works and National Housing, Makombe Building, Harare, Saviour Kasukuwere intentionally acted contrary or inconsistent with his duties as a public officer by instructing George Mlilo and/or Rhory Andrew Shawatu to withdraw eight (8) Good Hope offer letters issued to the applicants mentioned in column (1) of schedule (A) below, citing that the government had other pressing needs for that land but instead on 23 February, 2016, Saviour Kasukuwere directed George Mlilo/or Rhorp Andrew Shawatu to allocate and to cause issue of offer letters in favour of seven (7) applicants as shown in column (2) of the said schedule, thereby showing disfavor to applicants in column (1) and favour to applicants in column (2) of the schedule.” (sic)

Count 2:

“In that on 4 August, 2016 and at the Ministry of Local Government, Public Works and National Housing, Makombe Building, Harare, Saviour Kasukuwere intentionally acted contrary or inconsistent with his duties as a public officer by directing the Principal Director, State Lands Joseph Makanyakora and or the deputy director State Land management section Andrew Shawatu and or the Director of Physical Planning to issue out an offer letter in the name of an unregistered company called Bo junior Investments (Pvt) Ltd allocating 20 hectares land being the remainder of Shawasha B farm thereby showing favour to Shuvai Gumbochuma who supplied the company name.”

Count 3: Criminal abuse of duty as a public officer

“In that on 24 March, 2017 and at the Ministry of Local Government, Public Works and National Housing, Makombe Building, Harare, Saviour Kasukuwere intentionally acted contrary or inconsistent with his duties as a public officer by directing Ethel Mlalazi to find land for Shuvai Gumbochuma in Masvingo and to assist in an offer letter in the name of Grusbly Investments (Pvt) Ltd allocating 50 hectares land being the remainder of Clipsham Farm, Masvingo thereby showing favour to Junior Shuvai Gumbochuma who supplied the company name.”

Count 4: “Criminal abuse of duty as defined in s 174 (1) (a) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23]

“In that on a date to the prosecutor unknown but during the period extending from the month of May 2012 to 20 September, 2012 and at the Ministry of Indigenization and Economic Empowerment, Harare, Saviour Kasukuwere in the exercise of his duties as Minister of Youth, Indigenization and Economic Empowerment presided over the selection of Brainworks Capital being represented by Georg Manyere without subjecting him to a tender process that is contrary to or inconsistent with his duties as a public officer, thereby showing disfavor to the other would be applicants and showing favour to Brainworks represented by George Manyere.”

Alternatively : Contravening s 7 (1) as read with s 35 of the Procurement Act [Chapter 22:14]

“In that on a date to the prosecutor unknown but during the period extending from the month of May 2012 to September, 2012 and at the of Youth, Indigenization and Economic Empowerment, Harare, Saviour Kasukuwere appointed Brainworks Capital to offer financial advisory works to the National Indigenization Economic and Empowerment Board (NIEEB) without seeking the prior approval of the State Procurement Board in contravention of the provisions of the said Act.”

The typed record of proceedings on the exception a substantial 131 pages. The judgement of the first respondent is four pages. The judgement is not detailed. I will comment on it in substance later. The thrust of the application was that the charges lacked an essential element of the offence of criminal abuse of duty. The applicant’s counsel submitted in regard to all the charges that it was essential for the prosecution to identify the duty in respect of which it was alleged that the applicant acted contrary to or inconsistently with. The applicant’s counsel gave examples of how The Law Society By-laws in relation to legal

practitioners in so far as they set standards for performance of duty. Counsel also gave an example of the judicial code of conduct in so far as it sets standards for judicial officers. Counsel argued that in the examples he gave, a charge of acting contrary to or inconsistent with the accused person's duty would have to be based on a deviation from an identified standard within a specific provision of the code allegedly broken being cited. Counsel submitted that there was no code of ethics or statutory instrument which regulated the conduct of a Minister in the allocation of land. He further submitted that the State did not allege the existence of such code of conduct nor a standard practice which ought to have been followed. It was further submitted that although the State outline alleged that in count 3, the applicant allocated three pieces of land to Junior Shuvai Gumbochuma "without following the standard practice in land allocation for residential development", this did not cure the charge nor place the applicant in a position to be sufficiently informed of the nature of the charge to be able to meaningfully defend himself. The deficiency remained that the alleged "standard practice" which was allegedly not followed remained just an expression as it was not disclosed. Counsel argued that the law or duty which was breached should be identified.

In respect of s 174 of the Code under which the applicant was charged, counsel argued that although it created the offence of a public officer acting contrary to or inconsistent with his or her duty, the duty or duties are not defined. It was submitted that the duties had to be found in another source. That source was according to counsel, missing. Counsel also attacked the inconsistency in the columns to schedule A to the charge wherein it was alleged that the applicant took land from 8 allottees and allocated the same to one company Rodonor Investments, yet 7 allottees were allocated land. Counsel also pointed out to contradictions in the charge wherein three of the allottees appear in column 1 as having had land taken away from them yet they appear again in column 2 as having been allocated land. Counsel submitted that it was anomalously disfavor and favour a person at the same time.

The above constituted the gist of the exception which was taken on behalf of the applicant in counts 1, 2 and 3. Fuller details are to be found in the written application on pp 101 – 120 of the record. In relation to count 4, counsel submitted that, the role of the applicant as Minister in the procurement process which he allegedly abrogated was not pleaded in the charge. Counsel submitted that the alternative charge of breaching the Procurement Act could only be brought against the procurement entity as defined because it

was the one which as a procurement entity was bound by procedures laid down in the Procurement Act. The applicant was not a procurement entity in terms of Second Schedule of the Procurement Regulations, S.I. 171/2002 as amended by S.I. 160/12. Counsel referred especially to s 3 of the regulations and submitted that without alleging that the applicant as Minister had duties to carry out on behalf of the procuring entity and that he abrogated these duties, the charge alleged against him under the Procurement Act was a *non sequitur*, if I may use the expression. The applicant's prayer was for the exception that the charges did not disclose an offence to be upheld and that they consequently be quashed and set aside.

In his response in relation to the exception the second respondent as third respondent's counsel in the court *a quo* took the position that the exceptions were not only untimely raised but that they lacked substance and amounted to a time-wasting technique. Second respondent took note that the defence counsel had raised the issue of the charges omitting to allege or set out the standard which the applicant deviated from. He however submitted that the state outline consistently mentioned that there is "a land allocation procedure that the accused did not follow." Second respondent submitted that the defence had through further particulars requested for the allocation procedure to be furnished in writing. He submitted as follows on pp 36 and 37 of the record:

"Now even if the court is to go through the entire outline of the State case, it mentions consistently that there is a land allocation procedure that the accused did not follow. Now my colleague says in his request for further particulars he requested for something that is in writing or that so-called land allocation procedure. Your worship already we get to that point, the defence is now going into the merits of the matter, that is a triable issues (sic). Does this alleged land allocation procedure in existence or not? Isn't it that is why we are here? Now if the State fails to prove that there is a land allocation procedure, the case falls on its face. At that point we are supposed to produce this land allocation procedure your worship. That can be produced through evidence...

Your worship land allocating procedure does not necessarily mean that it has to be in writing for it to be in existence. It does not necessarily follow. Now if it is an aspect to say can land allocating procedure that is not written down sufficient or not, that is a triable issue as well."

Second respondent went on to submit that there were witnesses lined up to testify that the applicant was superintending the land allocation. He further submitted that the question of land allocating procedure was going to be central in the trial. Second respondent submitted that he was shocked by the submission made by the applicant's counsel that Ministers did not have a code of ethics. He submitted that the issue of a Minister's code of Ethics did not in any event arise in the matter because, as second respondent continued;

"...What we only need to prove your worship is that there is a land allocating procedure that is in existence and the accused person omitted to follow it. Now your worship, I want the

court to take notice as to what can possibly be alleged at this stage and what can be proved in evidence.”

Counsel further significantly submitted thus on p 38 of the transcript:

“What we need to allege at this point are simply the essential elements of the offence that the accused person is a public officer or was a public officer at the material time, that there was a certain conduct or omission by him which favoured a particular person or disfavoured a particular person and in so doing it was inconsistent with his duties. Now as to what was inconsistent with his duties, I have already indicted that there is a land allocating procedure and the allegations are clear that the accused person did not follow these procedures and favoured a company or a person, are Shuvai Gumbochuma....”

I must at once express my surprise at the apparent belligerent, hostile and argumentative posture which was adopted by the second respondent as prosecutor. What counsel submitted in essence was that it was not necessary for the charge to disclose or allege the procedures which should have been followed nor indeed the applicant’s duties in that regard. The attitude was more of a refusal to disclose material information or facts as would enable the applicant to plead an informed plea. Indeed, as I observed earlier on, a charge under s 174 is in essence in the nature of an act of misconduct in the discharge of duty by a public officer which has been criminalized. Section 174 deals with anomalous conduct by a public officer. It connotes a deviation from what is standard, normal or expected. It just defies logic and legal reasoning for the prosecution to argue that the standard or norm in regard to which an accused has deviated is not an essential element of a charge of criminal abuse of duty. It was alarming for the second respondent to submit that the standard or procedure which an accused act contrary to or inconsistently with would be proved in evidence. There was utter confusion in the submission. In accordance with rules of procedure, only disputed facts are subjected to proof. Admitted facts are taken as proven. The applicant as accused could only have admitted or put in issue by way of pleading guilty or not guilty as the case maybe to disclosed facts. A layman interrogating a charge of criminal abuse of duty would ask what it was that the accused should have done but did not do before asking questions as to the motive for not doing that which was accused’s duty to do or not do.

In my view, there was really no reason other than an unnecessary though regrettable flexing of muscle by the second respondent as prosecutor in not just applying to amend the charges by alleging the procedures which the applicant flouted and further alleging that that it was applicant’s duty to follow them yet he unlawfully and intentionally negated or countermanded them for purposes of showing favour or disfavour to any person. At the

hearing before me, Mrs Fero fairly conceded that there was nothing to have stopped the trial prosecutor from simply amending the charge to include details of the standard practice or norm which it was the accused's duty to follow and the nature of the direction. In the *Taranhike* judgment (supra) TSANGA J quoted the case of AG Reference No. 3 (2005) QB 73 in which the *mens rea* for criminalized misconduct was described as—

“--whether the misconduct was of a sufficient serious nature would depend on the responsibilities for the office and the office holder, the importance of the public object they served, the nature and extent of the departure from these responsibilities and the seriousness of the consequences which might follow from the misconduct.”

I must therefore authoritatively state that it is necessary to include in a charge under s 174 (criminal abuse of duty as a public officer) as essential particulars, details of the standard practice, norm or duty which the accused was required to act in accordance therewith and that the accused acted contrary or inconsistently therewith for criminal motives as set out in s 174 as they apply. A failure or omission to do so leaves a charge hollow and not only will such a charge not disclose an offence or not provide reasonably sufficient particulars to inform an accused of the case which he or she must answer to, such failure makes the charge vague and prejudicial or embarrassing as would justify its quashing in terms of s 178 (1) of the CPEA.

A reading of the first respondent's ruling shows that he perfunctorily dealt with the application in his determination or ruling. With due respect to the first respondent the ruling does not show that he applied his mind to the legal issues raised in the exception. He did not even interrogate the element of a charge under s 174 of the Criminal Law (Codification and Reform) Act. It was incumbent on the first respondent to have further interrogated each count in turn and determined the validity thereof *seriatim*. The failure to do was an irregularity and misdirection making the review of the proceedings a necessity. The first respondent at best stated in regard to the application as appears on 35 of the record:

“the allegation against the accused person in counts 1, 2 and 3 are somewhat similar. It was stated that the accused, who was a Government Minister at the relevant time, had allocated state land to Mrs Gumbochuma or to her shelf company procedurally. The act was referred to as showing favouritism to Mrs Gumbochuma or disfavor to the people who already held offer letters in respect of that land. These letters were withdrawn as a result.

The state lined up witnesses where evidence looks relevant to the matter at hand.

The applicant is dissatisfied that the state did not spell out the correct “laid down procedures” which the accused was supposed to have followed. They argue further that Cabinet Ministers have no code of conduct given to them. I have my own reservations about that. What cannot be denied though is that Cabinet Ministers take an oath before appointment to that office

In count 4, it was being alleged that the accused person had flouted tender procedure. The applicant argues that since the accused person is not an accounting officer for that procuring

entity, he could not have committed the crime. The state however wants to prove that the accused person chaired a meeting that led to the awarding of the tender unprocedurally.

The defence are raising what must be regarded as triable issues throughout in their exception whereas the state pointed out that they would expect that exception would be raised where

- (i) The charge does not disclose reasonable sufficient particulars to inform the accused person of the nature of the charges against him as required in s 146 (2) (b) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*]...”

The first respondent went on to rule that detailed explanations and a request to the state to provide them “from the word go or at least in their responses to the letters written would be tantamount to attempting to give evidence from the bar” In my reading and interpretation, what the first respondent was stating was that, the accused was not entitled to the information or disclosure of the procedures he flouted not only in the charge but even where he requested for such particulars. Such a ruling was wrong in law, common sense and logic not only because the particulars omitted from the charge and further requested for and denied would be reasonably required to inform the accused of the nature of the charge, but also because a refusal and denial of the same would violate fair trial standards.

A criminal trial is not a game of hide and seek but a pursuit for justice. See *S v Godfrey Gandawa and 2 Others* HH 478/18; *S and Anor v Machaya and 7 Others* HH 442/19. The State must be open to the defence by advising of the evidence to be adduced and documents to be produced. For the State to withhold relevant information even when requested to and for the trial court to endorse the illegality of withholding evidence on the basis that it is a triable issue would offend fair hearing rights of an accused and clearly would be unconstitutional. This was the situation in the proceedings under my review herein. In my judgment therefore, it would be a violation of fair trial standard to say to an accused as done in this case, “You acted contrary or inconsistently with your duties in doing this and that with a criminal intent. As to what and how you ought to have discharged your duties you will be appraised in the course of the trial.” An approach like this would by any measure be prejudicial to an accused since he would have to be preparing and mounting a defence as the trial progresses with facts already known to the State but withhold from the accused unfolding. In the process of preparing his defence in the midst of trial the accused risks an adverse inference being drawn against him for failure to disclose all material facts in a defence outline where he has elected to testify.

In the judgment of the first respondent the crisp issue which he was requested to address was the adequacy of the averments to be included in a charge under s 174 as charged

more particularly by ruling on whether or not a failure or omission to include a standard procedure to be followed by the accused in the discharge of duty was a necessary and material ingredient of the charge. The state for its part submitted quite wrongly that this was a matter of evidence. The first respondent wrongly agreed with the second respondent's submission. Although neither counsel or the court addressed the point, there is provision for a defect in a charge being cured by evidence at trial. Section 203 of the CPEA provides as follows:

“203 Defect in indictment, summons or charge may be cured by evidence

When an indictment, summons or charge in respect of any offence is defective for want of the averment of any matter which is an essential ingredient of the offence, the defect shall be cured by evidence at the trial in respect of the offence proving the presence of such a matter which should have been averred unless the want of such averment was brought to the notice of the court before judgment.”

If one unpacks the quoted provision, it is apparent that an omission to aver an essential ingredient of an offence charged renders the charge defective. The defect must however be raised by the accused person before judgment. If so raised, the issues must be deliberated upon by the court and a determination given. If not raised prior to judgment, then the defect shall be cured by evidence.

Following on the above, it was a misdirection on the part of the first respondent to fail to answer the question whether or not the objection raised in the form of the want of averment of the standards which the applicant acted contrary to or inconsistently with was an essential ingredient of the offences charged. It was wrong to determine that the issue was evidential. Equally the second respondent as prosecutor was also wrong to hold the view that the question raised stood to be cured by evidence.

The applicant raised at least five grounds of review in this application. They are as follows:

1. That the ruling made by the first respondent is so outrageous in its defiance of logic that no reasonable magistrate applying his mind to the exception would have arrived at such a decision. The first respondent simply did not consider the exception at all. He did not address his mind to the fact that the exception alleged that an essential element of the offences alleged was not contained in the charges.

2. The first respondent in his ruling reviewed and commented upon evidence which was not led before the court. That constitutes a gross irregularity justifying the setting aside of the ruling.
3. The first respondent was biased and showed interest in the cause before him. He prejudged the exception which had been filed even before he had read through the exception
4. The first respondent openly confessed that he was conducting the proceedings under pressure from certain persons. He was therefore not independent and impartial as his duties required him to be.
5. The second respondent did not have title to prosecute the applicant. He was aware of the constitutional Court Order in *Reni Nyagura v Lanzani Ncube N.O and Ors* CCZ 53/18 but did not disclose the effect of that order on his legal capacity to prosecute the applicant.

I have in my judgment noted and accepted that the first respondent misdirected himself in how he dealt with the exception raised more particularly in that he did not determine the crisp issue which fell for determination which was the adequacy and validity of a charge under s 174 wherein details of the standard or procedures which the accused was guided by and should have followed are not averred. I have determined that the averments as aforesaid constitute a necessary and material ingredient to sustain a charge under s 174 as discussed. I am therefore persuaded to accept that the first ground of review was established and proven by the applicant on a balance of probabilities. The absence of the averments vitiates the charge as no offence is disclosed by a charge of acting contrary to or inconsistently with one's duties where the details of the duty how the duty, should have been carried out are wanting or lacking in the charge. It will be noted that in all the 4 counts this essential averment or ingredient was not included in the charges. The charges should have clearly revealed with sufficient particularity that there are identified procedures in place, the duties, of the applicant in regard thereto and his conduct which if pitted against the procedures and his duties would show the inconsistency or contrary manner of discharging the duties. The intention of showing favour or disfavour would arise from the proven devious conduct or be even inferred.

In view of the determination I have made on the first ground of review, there is little to be achieved by interrogating the remaining four grounds of review as the result and order which I propose to make would not change by reason of any decision I may make on each of

them individually. Suffice however to note that there are on record discernible signs of impatience exhibited by the first respondent who appeared intent to have the trial progress. Some remarks which the first respondent made were unfortunate if not injudicious. For example, he commented that he did not expect that anything else would come between the commencement of the trial and “whatever event could intervene in between.” In other words, the first respondent could by those comments be mistakenly interpreted as having perceived the filing of the exception as an unwelcome intervention when he was intent on the trial commencing. The first respondent also made comments that “Special anti-Corruption Courts” are trial courts and certainly not remands courts. Onlookers naturally put pressure on the court so that they decide on these matters expeditiously.” The first respondent then made another comment that “I cannot do more than urge the parties to criminal trial to run with the courts and not walk when the court is running.” These comments were unfortunate and indeed Mrs *Fero* for the second and third respondents conceded that the first respondent appeared excitable. The same applies to comments he made that the state had witnesses whose evidence was relevant yet no evidence had been placed before him by any witness. The impartiality of a judicial officer is a constitutional issue and it forms one of the cornerstones of the justice delivery system. Being a judicial officer is a position of honour and trust with judicial power deriving from the people. It is important that in the exercise of the judicial function, the judicial officer must remain guarded and refrain from *inter alia* passing comments and remarks which may be construed as a compromise to the judicial officer’s impartiality.

A legal procedural issue was raised by Mrs *Fero* in her heads of argument. She correctly pointed out that a superior court should only intervene in uncompleted proceedings of an inferior court in exceptional circumstances where there is a gross irregularity. She referred to the decision of the Supreme Court in *Attorney General v Makamba* 2005 (2) ZLR 54 (S) at 64 C-F where MALABA JA (as he then was) stated-

“The general rule is that a superior court should only intervene in uncompleted proceedings of the lower court 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.”

The above principle is indeed trite if not a rule of thumb not only in this jurisdiction but
in most jurisdictions. The inferior courts are courts of law created to discharge their judicial mandates. The superior court performs a supervisory and oversight role over inferior courts.

The superior court should therefore avoid interfering with the workings of the inferior court unless it is absolutely necessary.

In this application, I determine that proceeding to a trial on a charge which does not disclose an offence and where there has been no compliance with the requirements of s 146 of the CPEA and where necessary particulars to enable the accused to prepare his defence have been denied him amount to a violation of the accused's right to fair trial standards and a fair hearing. The violation of the right to fair trial standards and a fair hearing is an exceptional circumstance warranting the intervention of the superior court. Fortunately for the due administration of justice, the consequences of the intervention in this matter do not put the case to an end. The effect of the intervention is to create a level playing field and achieve a fair trial for the applicant. the integrity of the criminal justice system requires such intervention lest the court are seen as kangaroo courts which do not uphold the rule of law. There should be no compromise on matters to do with violation of absolute rights like the right to a fair hearing. I considered this matter as crying out for intervention and in any event, it is a moot point whether the nature of the intervention in this case would not be one to be lauded since the court simply directs the lower court on ensuring that procedures are followed to attain justice. It is in any case refreshing to note that the Supreme Court has not attempted to define or limit the circumstances where an intervention in uncompleted proceedings would be justified. It follows that the facts and circumstances of each case will in a given case justify the intervention or its refusal as the case may be.

I consider it appropriate to comment on the conduct of the State prosecuting counsel. The prosecutor's role is pivotal in the criminal justice delivery. The Prosecutor General in terms of s 260 of the Constitution is independent and not subject to the direction of anyone in regard to decisions he makes to prosecute a person on a case. This discretionary power is only reviewable on limited on constitutional grounds or bad faith. The decision which the Prosecutor General and his prosecutors make impact heavily on the lives and liberty of accused persons. The discretion which they exercise should be delicately exercised with deliberation and thoroughness. There should be due regard paid to fair trial rights of an accused. The right is absolute. I repeat my observations that I found it thoughtless and frivolous that such an important matter involving an Ex Minister and as such being a matter of immense public interest could be scuppered or torpedoed by belligerence on the part of the prosecutor in withholding information which was allegedly available. This was a case in which the allegations were that the applicant ought to have acted in a certain manner but

abused his duties by acting in the manner charged, How any reasonable prosecutor would have decided that an averment as to what the norm was so that the applicant could appreciate how he abused his duties by acting in the manner charged was not a necessary averment or ingredient in a charge was alarming. Since charges of corruption and abuse of office have become topical, it is hoped that trials will not be scuppered by prosecutors withholding information necessary for an accused to properly plead to the charge and compose an informed defence.

I now conclude by dealing with whether or not to grant the applicant's prayer. Before I do that, I should mention that Mrs *Fero* raised an issue at the end of the hearing that the applicant was in contempt of court because he was on an outstanding warrant of arrest. She however capitulated and submitted that this application was filed before the issuance of a warrant of arrest. Mr *Magwaliba* objected to the propriety of Mrs *Fero* raising the issues of contempt of court and submitted that the proceedings relating thereto were subject of a pending appeal; under case No. SC 358/19. It would be procedurally wrong for me to make a pronouncement on a matter pending on appeal. Mrs *Fero* correctly abandoned the issue.

At the hearing Mrs *Fero* did not address the court on the appropriate relief to give in the event that the application was upheld. When I raised the issue with her she submitted that if the application is upheld I should act in terms of s 29 (2) (b) (iii) of the High Court Act, *Chapter 7:06* and correct the proceedings by setting aside the first respondent's order and substituting it with an order which the first respondent should have made. Mr *Magwaliba* submitted that if I was inclined to substitute the order, I should remit the case for determination before a different magistrate. The challenge I have is that Mrs *Fero* did not apply for an amendment to the charges. If both counsel had agreed on the addition of the missing ingredients or averments to the charge as prayed for by the applicant, I would have corrected the proceedings by simply setting aside the first respondent's ruling and ordered that the trial should proceed on the amended charges as agreed. I am constricted by the absence of an application to amend the charges and there is also on record no facts adduced by the state as would enable that an appropriate amendment be interrogated by the court. This is so because the second respondent did not disclose the information insisting wrongly that the information was a trial issue.

Resultantly, I determine that

- (a) The first respondent ruling dismissing the applicant's exception to the charges is hereby set aside.

- (b) The failure to allege essential averments on the standards and procedures which the applicant ought to have followed and allegedly acted contrary to or inconsistently with his duties as well as a failure to allege the duties which the applicant abrogated vitiates the charge sheet and renders it a nullity.
- (c) In the event that the Prosecutor General determines to prosecute the applicant on any amended charges, the fresh proceedings shall be commenced before a different magistrate other than the 1st respondent, H Mujaya Esquire.
- (d) There be no order as to costs.

Mhishi Nkomo Legal Practice, applicant's legal practitioners
National Prosecuting Authority, 2nd & 3rd respondents' legal practitioners