

**REPORTABLE (1)**

**FREDRICK CHARLES MUTANDA**

**v**

- (1) THE PROSECUTOR GENERAL OF ZIMBABWE**
- (2) THE ANTI-CORRUPTION COMMISSION OF ZIMBABWE**
- (3) THE RESERVE BANK OF ZIMBABWE**
- (4) THE REGIONAL MAGISTRATE, MR N MUPEYIWA N.O.**

**CONSTITUTIONAL COURT OF ZIMBABWE  
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JCC, GWAUNZA JCC,  
GARWE JCC, GOWORA JCC, HLATSHWAYO JCC, GUVAVA JCC &  
MAVANGIRA AJCC  
HARARE, MAY 28, 2014  
JUDGMENT RELEASED ON 28 FEBRUARY 2017**

*T Mpofu*, for the applicant

*Ms S Fero*, for the first respondent

No appearance for the second and fourth respondents

*T Chitapi*, for the third respondent

CHIDYAUSIKU CJ: At the conclusion of submissions by counsel, the Court dismissed this application but ordered a trial *de novo* before a different regional magistrate.

The Court issued the following order:

**“IT IS ORDERED THAT:**

1. The application for stay of prosecution is dismissed.
2. Consequent upon the concession by the State regarding the fairness of the continued trial before the same magistrate, the proceedings in case CRB 172-3/12 are quashed and a trial *de novo* is ordered before a different regional magistrate.
3. Detailed reasons for judgment will be handed down in due course.”

The parties were advised that reasons for judgment would follow. These are they.

The facts of this matter are as follows. The applicant was arrested by members of the second respondent on 26 November 2011 on allegations of contravening s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (hereinafter referred to as “the Act”). He appeared in the Harare magistrate’s court on 29 November 2011 facing three counts of fraud, as defined in s 136 of the Act, and two counts of theft, as defined in s 113 of the Act. He was placed on remand and bail was denied.

His trial was finally set down for 28 May 2011 before a regional magistrate. The State then dropped the fraud and theft charges and substituted in their place a charge of contravening s 5(1)(a)(ii) of the Exchange Control Act [*Chapter 22:05*] as read with s 13(2) of the Exchange Control Regulations, 1996 (“the Regulations”), that is, externalisation of property rights or patents without the authority of the Reserve Bank of Zimbabwe (“the Reserve Bank”). The applicant was notified of the new charge well before the trial date.

On 27 May 2013, a day before the trial was due to commence, the applicant filed an application excepting to the charge. In this application the applicant challenged the lawfulness of his arrest by members of the second respondent. He submitted that members of the second respondent did not have arresting powers. He also argued that his right to a fair hearing was infringed by the State, in that he was previously charged with fraud and theft at his initial appearance, charges which were totally different from the one he was now facing at the trial but emanating from the same transaction. The application excepting to the charge

was found to be without merit and dismissed by the magistrate on 28 June 2013. The trial then commenced.

On 24 July 2013 the applicant made yet another application to have his matter referred to the Constitutional Court in terms of s 175(4) of the Constitution of Zimbabwe (hereinafter referred to as “the Constitution”). In the application for referral the applicant contended that the dismissal of the exception violated his constitutional rights in the following respects –

- a) the right to be informed promptly of the charge in sufficient detail to enable him to answer it, in contravention of s 70(1)(b) of the Constitution;
- b) the right not to be convicted of an act or omission that was not an offence when it took place, protected under s 70(1)(k) of the Constitution;
- c) the right to equal protection and benefit of the law, enshrined in s 56(1) of the Constitution;
- d) the right to a fair and public hearing within a reasonable time before an independent and impartial court, protected under s 69(1) of the Constitution; and
- e) the right to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property, either individually or in association with others, as enshrined in s 71(2) of the Constitution.

The application for referral was also dismissed. The magistrate dismissed the application on the grounds that it was a ploy to delay the trial. It would appear the court *a quo*

did not apply its mind to the issue of whether or not the application was frivolous and vexatious. This clearly was a misdirection.

The applicant now approaches this Court in terms of s 85(1) of the Constitution. In my view, two issues fall for determination by this court, namely

- (1) Whether or not the application is properly before this Court;
- (2) If the application is properly before this Court, whether or not the applicant has established that his rights guaranteed by ss 70(1)(b), 70(1)(k), 56(1), 69(1) and 71(2) of the Constitution have been violated by the dismissal of his application for exception to the charge.

*Ms Fero*, for the first respondent, conceded that the matter was properly before the Court and should be determined on the merits. The concession was made on the basis that the learned trial magistrate had misdirected himself by dismissing the application on the ground that it was a waste of time without applying his mind as to whether or not the application was frivolous and vexatious.

The Court was satisfied that the first respondent's concession was properly made and that this Court was at large to consider the merits of the application.

I now turn to the second issue of whether or not the applicant has established that his rights guaranteed under ss 70(1)(b), 70(1)(k), 56(1), 69(1) and 71(2) of the Constitution were violated.

*Ms Fero*, for the first respondent, argued that the applicant did not come anywhere near establishing any one of the grounds setting out the basis of the alleged violation of his constitutional rights. She submitted that the first respondent had since dropped the fraud and theft charges which the applicant was arrested for and initially brought to court on. The applicant is only facing the charge of contravening s 5(1)(a)(ii) of the Exchange Control Act, as read with s 13(2) of the Regulations, that is, externalisation of property rights or patents without the permission of the Reserve Bank. It is common cause that in April 2013 the applicant was advised of his trial date, being 28 May 2013. On 22 April 2013 State papers were served on the applicant, informing him of the charge he was now facing under the Exchange Control Act and Regulations.

A day before the trial date, the applicant filed an application for exception, excepting to the charge on the basis that his arrest was unlawful and that the outline of the State case did not disclose an offence. The application was determined and dismissed by the fourth respondent. It is the dismissal of that application which the applicant avers contravenes his rights under ss 70(1)(b), 70(1)(k) and 70(2) of the Constitution.

The right protected under s 70(1)(b) of the Constitution is twofold, namely –

- (a) the right to be informed promptly of the charge; and
- (b) the right to be informed of the charge in sufficient detail to enable a person to answer it.

The facts of this matter show that the applicant was timeously informed of the charge he was facing, was given sufficient details of the charge and given ample time to prepare his defence. The applicant was given all the State papers that he needed to prepare for his trial. In

fact he was given all the information that the first respondent had in its possession and intended to use against him at the trial. The applicant was never denied access to any document or information that he intended to use in defending himself.

I am accordingly satisfied that he was given sufficient notice of the charge he was facing to enable him to answer the charge. The charge which the applicant was facing emanated from the same set of facts as that of the fraud and theft charges that were dropped. There was no prejudice suffered by the applicant in the changing of the charge and notifying him of the same. The applicant was given more than a month to prepare for his trial, which is sufficient time for one to prepare for trial.

The applicant also failed to prove in what manner his right to be informed promptly of the charge in sufficient detail was infringed, so as to justify a permanent stay of the proceedings against him.

The applicant's right to a speedy trial was not in any way violated by the dismissal of the application for exception to the charge. Neither was his right enshrined under 71(2) infringed. This ground of the application cannot succeed.

The applicant also alleged that his right enshrined in s 70(1)(k) of the Constitution had been infringed. In his application it was never explained how this right had been infringed. The heads of argument filed by *Mr Mpofu* failed to substantiate this allegation.

Section 70(1)(k) of the Constitution ensures that the State does not apply penal statutes with retroactive or retrospective effect. In terms of this section, conduct in the form

of an act or omission that at the time it took place did not constitute an offence cannot thereafter become an offence for which a person can be prosecuted and punished.

The acts or omissions complained of in the State outline in this matter reveal that the offence disclosed in s 5(1)(a)(ii) of the Exchange Control Act, as read with s 13(2) of the Regulations, that is, externalisation of property rights or patents without the authority of the Reserve Bank, was in existence at the time the alleged offence was committed. The statutory provisions which the applicant is alleged to have contravened did not come into existence after the alleged conduct of the applicant.

Again, this ground of the application for the permanent stay of criminal proceedings cannot succeed.

*Ms Fero*, for the first respondent, argued that the matter should be referred back to the regional magistrate's court for a continuation of the trial. She, however, conceded that the proceedings should be set aside and the trial commenced *de novo* before a different regional magistrate.

In my view, this concession is properly made for the following two reasons –

First, the attitude of the fourth respondent in this application reveals that the applicant may be justified in fearing that he may not get a fair trial before the same magistrate. This arises from the stance adopted by the trial magistrate to this application. A trial magistrate should not oppose an application such as this one. He or she should simply place before the court facts he or she believes will assist the court in arriving at a correct decision and

undertake to abide the decision of the court. Opposing an application such as this one is likely to lead to the perception by an accused person that he or she will not get a fair hearing from a court that opposed his application.

Secondly, the trial magistrate has concluded, in his ruling in respect of the application by the applicant's co-accused and in a similar application by the applicant, that there was a need to hear evidence on whether or not externalisation of copyrights and/or patents without the authority of the Reserve Bank constitutes a contravention of s 5(1)(a)(ii) of the Exchange Control Act, as read with s 13(2) of the Regulations.

I have serious reservations regarding the correctness of this conclusion. The law is the law. There is no need to hear evidence to establish the law. In any trial, evidence is required to establish facts and not the law. A trial court can hear submissions from counsel on what the law is, but it cannot seek to hear evidence to determine what the law is except in instances where the court seeks to establish foreign law, in which case evidence on foreign law from experts is admissible.

In my view, after hearing submissions by the parties, the learned magistrate should have determined whether the facts alleged by the State constituted an offence or not. Failure to make that determination could possibly lead to a violation of the constitutional right of the applicant to protection of the law.

In the case of *Williams and Anor v Msipha N.O. and Ors* SC 22/10 this Court held that putting an accused on trial on facts which even if proved do not constitute an offence is a violation of the right to protection of the law guaranteed by the Constitution.



In the result, the application for stay of prosecution was dismissed, the proceedings set aside and a trial *de novo* was ordered in the event that the Prosecuting Authority still wishes to proceed with the matter despite the observations made herein.

**MALABA DCJ:** I agree

**ZIYAMBI JCC:** I agree

**GWAUNZA JCC:** I agree

**GARWE JCC:** I agree

**GOWORA JCC:** I agree

**HLATSHWAYO JCC:** I agree

**GUVAVA JCC:** I agree

**MAVANGIRA AJCC:** I agree

*Tamuka Moyo Attorneys*, applicant's legal practitioners

*National Prosecuting Authority*, for the first respondent

*T H Chitapi & Associates*, third respondent's legal practitioners