STATE
versus
PARAGON REAL ESTATE REPRESENTED BY
ROBSON RUNDABA
and
NOREEN MUTEPHA.

HIGH COURT OF ZIMBABWE
UCHENA J SITTING WITH ASSESSORS MR CHIDYAUSIKU AND
MR KUNZWA
HARARE 8 October 2008, 26 November 2008 and 20 March 2009

**Criminal trial, Exception, and application to quash the Indictment.**

Mrs *C. M. Dube*, for the State.
Mr *C. Mhike*, for the 1st accused.
Mr *J.M. Mafusire*, for the 2nd accused.

UCHENA J. The accused persons were jointly charged with the crime of fraud it being alleged, that they misrepresented to the complainant that the second accused had ready cash with which she could buy the complainant's house. It there-after turned out that the second accused was not a cash buyer, as she was buying through a Bank loan. The state alleges that the sale to the second accused caused prejudice to the complainant.

The accused persons, raised exceptions, to the indictment, and applied for its quashing.

The indictment, the accused persons excepted to reads as follows;-

"That Paragon Real Estate duly represented by Robson Kundaba, and Noreen Mutepha are guilty of Fraud

In that sometime on 6 of July 2001 and at Paragon Real Estate, Jay Kandiwo an employee of Paragon Real Estate misrepresented to Janetha Magori that one Noreen Mutepha had committed herself to purchase her house which was on sale and that the money was readily available. On the strength of this misrepresentation Janetha Kuyenga Magori was made to sign an agreement of sale which the other parties had already signed. Whereas in truth and infact when Janetha Magori was made to sign the agreement of sale the money was not readily available thereby prejudicing Janetha Magori of her house. Paragon Real Estate submitted fraudulent documents to the High Court of Zimbabwe, which documents formed the basis upon which Janetha Magori was evicted from her house."

The first accused's grounds of exception are mainly;

1. On the *exceptio rei-judicata* which means (the issues in dispute have already been determined by a court of competent jurisdiction, between the same parties or their privies) Counsel for accused 1 submitted that the facts on which the indictment is based have already been determined by the High Court in Civil proceedings between the accused persons and the complainant in HC 8320/01, HC 7186/04 and HC11310/04., and.

2. That the indictment does not allege that the first accused intended to deceive the complainant

The second accused's exception is also based on the allegation that the alleged misrepresentation has already been determined by the High Court in the cases referred to above. It was also alleged on her behalf, that neither, the indictment, nor summary of evidence, mentions any of the basic elements of the crime of fraud against her. In particular the following was raised-

1. What is it that second accused allegedly misrepresented?

2. When and where was the alleged misrepresentation by second accused?

3. To whom was the alleged misrepresentation by second accused?

4. What was the nature of the alleged misrepresentation by second accused?

It is not in dispute that the complainant and the accused persons' cases were heard and determined by the High Court sitting as a Civil Court. It is agreed between the accused persons and the state that the civil cases related to the house which is the subject of this prosecution, and the agreement which resulted in the house being transferred into the second accused's name. It is common cause that the complainant was subsequently evicted from the house on the basis of one of the decisions of the High Court sitting as a civil court. I have despite searches by the Registry, and requests to the accused's Counsels not been able to find copies of the judgments on which the exception on the basis of *rei-judicata* is being raised. Counsel for accused 2 who first advised the Court that the records in question had been removed from the criminal record has not been able to assist despite reminders send to him after the case was postponed for judgment. I will therefore proceed on the basis that the judgments are judgments in *rem* (final and definitive judgments by competent courts, based on the merits of the cases, which are binding on the whole world on the decided issues). I take this position, because the state in spite of the accused persons', allegation that the judgments are judgments in *rem* did

not say that they are not. It merely, argued that they were judgments in civil proceedings and can not be used as a bar to criminal proceedings.

Mr *Mhike* for accused 1 and Mr *Mafusire* for accused 2 submitted that the accused persons can not be brought to trial on issues which have already been decided by the High Court. They submitted that as the judgments are in *rem* they are binding on the whole world, and that, that should include the Attorney- General. Mrs *Dube* for the state submitted that the special plea of the *exceptio rei-judicata* is not part of the law of criminal procedure.

**Res Judicata**

If the current proceedings were of a civil nature and the facts were as has been stated above there would have been no dispute as to whether or not the principles of the *exceptio rei judicatae* are applicable. It must however be stated from the outset that criminal and civil proceedings belong to two different fields of procedural and substantive law. Mr *Mafusire* for accused 2 and Mr *Mhike* for accused 1 premised their submissions on Almer's Precedents of pleadings 3rd edition @ pages 257-258, Beck's Theory and Principles of Pleadings in Civil Actions, 4th edition @ page 42, and the case of *Rex vs Manasewitz* 1933 AD 165 @ 168.

The textbooks on which counsel for the accused persons relied on, discusses civil procedure, and compares it where appropriate to criminal procedure. Almer's Precedents of Pleadings at pages 257 to 258 discusses circumstances under which the special plea of the *exceptio rei-judicatae,* can be raised. He stresses the point that though it is at common law known as an *exceptio* it can not be raised by way of exception, but must be raised as a special plea. He points out that for the special plea to succeed there must be a final judgment, by a competent court on the same thing or grounds, and the issues determined in the previous litigation must have been between the same parties or their privies. I agree with the learned author's exposition of the circumstances under which the special plea of the *exceptio rei-judicata* can be raised as a bar to subsequent civil proceedings. The exposition of the law by the learned author does not however deal with the following-

1. whether or not the Attorney –General can be the complainant's privy?

2. whether a civil order evicting the complainant from the house in dispute or confirming the second accused's title to the house can be said to be the same as a prosecution for an alleged fraud committed in the process of acquiring the house?

The application of the *exceptio rei-judicatae* to criminal procedure, is in my view excluded by the provisions of section 180 (1) and (2) of the Criminal Procedure and Evidence Act [*Cap 9: 07]* herein-after called the (CP&E Act). The section provides as follows-

"**180 Pleas**

(1) If the accused does not object that he has not been duly served with a copy of the indictment, summons or charge or apply to have it quashed under section *one hundred and seventy-eight*, he shall either plead to it or except to it on the ground that it does not disclose any offence cognizable by the court.

(2) If the accused pleads, he may plead—

(*a*) that he is guilty of the offence charged or, with the concurrence of the prosecutor, of any other offence of which he might be convicted on the indictment, summons or charge; or

(*b*) that he is not guilty; or

(*c*) that he has already been convicted of the offence with which he is charged; or

(*d*) that he has already been acquitted of the offence with which he is charged; or

(*e*) that he has received the pardon of the President for the offence charged; or

(*f*) that the court has no jurisdiction to try him for the offence; or

(*g*) that the prosecutor has no title to prosecute.

(3) Two or more pleas may be pleaded together, except that the plea of guilty cannot be pleaded with any other plea to the same charge."

In terms of s 180 (1) an accused person has the following options;-

1. He can object on the ground that he was not duly served with a copy of the indictment, summons or charge,

2. Apply, to have the indictment, summons or charge quashed, or

3. Plead to the indictment summons, or charge, or

4. Except to the indictment, summons or charge on the ground that it does not disclose an offence cognizable by the court.

The listing of the available options means these are the only options the legislature intended to give to an accused person. The accused can therefore not introduce an option not found in s 180 (1) of the CP&E Act.

Section 180 (1) makes it clear that an exception to an indictment or charge can only be on the ground that it does not disclose any offence cognizable by the court. If the accused does not except in the prescribed manner he has to plead in any one or more of the ways prescribed by s 180 (2) of the CP&E Act. It is in my view not permissible to raise the *exceptio rei- judicatae* as an exception as the grounds on which an exception can be raised are prescribed by s 180 (1). The plea of the *exceptio rei-judicatae* is in fact not

part of our law of criminal procedure. It was introduced into the law of criminal procedure as the plea of *autrefois* acquit or convict. It can not be pleaded in any other way.

Defence counsel for the first and second accused, relying on the case of *Rex vs Manasewitz* (*supra*) submitted that the plea of *rei-judicata* is equivalent to the plea of *altrefois* acquit. It is true that while confined to civil procedure it plays a role, equivalent to that played by the plea of *altrefois* acquit or convict in criminal procedure. This does not mean that one can substitute the other. It merely means it is the parallel civil procedure which deals within civil procedure with a situation dealt with by the plea of *altrefois* acquit in criminal procedure. An analysis of what WESSELS CJ said at page 168 in the case of *Rex vs Manasewitz* (*supra*) will illustrate the difference. He said-

> "There is no doubt whatever that by our law an accused person when once acquitted of an offence may not be tried again for the same offence if he was in jeopardy on the first trial—"He was so in jeopardy if (1) the court was competent to try him for the offence; (2) the trial was upon a good indictment on which a valid judgment of conviction could be entered, and (3) the acquittal was on the merits, i.e.. by verdict on the trial or in summary cases by dismissal on the merits followed by a judgment or order of acquittal." (Russell on Crimes, 8th ed. at p. 1818.) ---------- The reason why a former acquittal can be pleaded to a second trial is based in English law on the maxim *ne ma debet bis vezari si constat curiae quod sit pro una et eadem causa,* and this maxim is derived from the Roman law of the *exceptio rei judicatae.* A plea of *autrefois* acquit is in fact equivalent to a plea of the exception *rei judicatae* in our law."

The reference to the *exceptio rei judicatae* being equivalent to the plea of *autrefois* acquit could have led defence counsel to the submission that the former is applicable across the divide between civil procedure and criminal procedure. However, an examination, of the three elements, for the applicability of the plea of *altrefois* acquit should have dissuaded them from pursuing that argument to the extent they did.

The first element is the competence of the court to try the accused for the offence. The three judgments relied on by defence counsel were delivered by civil courts presided over by judges of the High Court. While it is true that judges of the High Court can preside in both civil and criminal courts, civil courts are, in terms of section 3 of the High Court Act [*Cap 7;06]* constituted differently from criminal courts. Section 3 provides as follows-;

> "Subject to section *four*, the High Court shall be duly constituted—
>
> (*a*) for the purpose of exercising its original jurisdiction in any civil matter, if it consists of one or more judges of the High Court;
>
> (*b*) for the purpose of hearing a criminal trial, if it consists of one judge of the High Court and two assessors;
>
> (*c*) for the purpose of exercising its powers to review the proceedings or decision of any inferior court, tribunal or administrative authority, if it consists of one or more judges of the High Court;
>
> (*d*) for the purpose of exercising its appellate jurisdiction in any matter, if it consists of not less than two judges of the High Court."

Civil trials are therefore presided over by one or more judges of the High Court, while criminal courts are presided over by a judge sitting with two assessors. Therefore the civil courts which delivered the three judgments relied upon by defence counsel could not while presided over by a judge sitting alone, have been competent courts for purposes of presiding over the criminal case of fraud.

The second element is on the trial being upon a good indictment on which a valid judgment of conviction could be entered. There were no good indictments in the three civil cases relied upon. No conviction could have been entered in each of the three civil cases. The courts as already said were not properly constituted for purposes of hearing criminal cases and delivering a valid verdict on a criminal indictment.

The third element is on the acquittal being on the merits. It is obvious that there were no criminal indictments presented before the civil courts. I would therefore find that the accused persons never stood in jeopardy of being convicted on an indictment of fraud when their cases were heard by the civil courts.

In the result I can not uphold the accused persons' exceptions to the indictment on the ground of the *exceptio rei-judicatae.*

**The exception.**

The accused persons' exception to the indictment is also premised on the ground that it does not disclose against them an offence cognizable by the court.

**Accused 1.**

Mr *Mhike* for the first accused submitted that the indictment does not fully spell out the elements of fraud as the accused's intention to deceive was not alleged. The last part of the indictment in my view indirectly makes that allegation. It reads as follows;-

> "Whereas in truth and in fact when Janetha Magori was made to sign the agreement of sale the money was not readily available thereby prejudicing Janetha Magori of her house. Paragon Real Estate submitted fraudulent documents to the High Court of Zimbabwe, which documents formed the basis upon which Janetha Magori was evicted from her house."

This part of the indictment indirectly alleges that the complainant was intentionally given misleading information about the money being readily available so that she could sign the agreement. It also alleges that the first accused submitted fraudulent documents. This can not be for any reason other than that of deceiving the complainant. In my view the indictment discloses a cognizable offence against accused 1. As suggested by Mrs *Dube* for the state, it should however be amended by adding to it the words "with intent to deceive." The accused, will not suffer any prejudice if the indictment is amended. The indictment will for the sake of clarity be amended in the second line of the second paragraph by inserting the words "with

intent to deceive", between the words "Magori" and "that". The exception can therefore not succeed. The issue of the 1st accused's representation by an officer who has left the company can be cured by an amendment substituting him with another officer of the first accused.

**Accused 2.**

Mr *Mafusire* for the second accused raised questions as to when, where and how his client is alleged to have made any misrepresentation, and the nature of such misrepresentation. The indictment does not disclose that the second accused played any part in the misrepresentation alleged against Kandiwo the first accused's employee. It also does not allege that the second accused was present when the first accused made the misrepresentation, nor does it allege that she was aware of the misrepresentation and cooperated with Kandiwo's misrepresentation of the facts. The charge as it stands does not therefore disclose a cognizable offence against accused 2.

Mrs *Dube* for the respondent conceded the inadequacy of the indictment against accused two. She however sought a postponement to enable her to consider the way forward. When the hearing of the application resumed she sought the court's permission to allow her to amend the charge so that it can make the necessary allegations against the second accused. Mr *Mafusire* for the second accused objected to the amendment alleging that the amendment would prejudice the second accused. Prejudice for which an application to amend can be refused is one which affects the accused's defence. In this case Mr *Mafusire* objected on the ground that the complainant has in documents used in the civil cases already referred to, admitted that she signed the agreement. He also submitted that the state's and wittiness's summaries are at variance with the proposed amendments. An examination of the state's and wittiness's summaries confirms Mr *Mafusire*'s submission. The state's summary does not allege that the second accused participated in the misrepresentations made by Kandiwo. It does not say the second accused was present when the misrepresentations were made. The complainant's summary does not in any way implicate the second accused. The summaries of other state wittiness's do not allege any wrong doing by accused 2. I would therefore agree that an indictment which alleges that the accused did things which the state's own summary and wittiness's summaries say or imply he did not do is prejudicial and embarrassing to the accused's defence. I am therefore satisfied that neither the original indictment nor the proposed amended indictment discloses an offence cognizable by the court, against accused 2.

The defects in the indictment were raised by Counsel for the second accused two years ago. The state promised to amend the charge but did not do so until now. It is obvious that the state has not efficiently prepared for the prosecution of this case.

**Application to quash.**

It was also contented on behalf of both accused persons that the indictment should be quashed as it is calculated to prejudice or embarrass them in their defence. The accused person must in his application show how he will be so prejudiced or embarrassed. The prejudice must relate to his defence to the indictment preferred against him or her.

If an accused person opts to quash the indictment he can only do so in terms of s 178 of the CP&E Act, which provides as follows;-

> "(1) The accused may, before pleading, apply to the court to quash the indictment, summons or charge on the ground that it is calculated to prejudice or embarrass him in his defence.
>
> (2) Upon an application in terms of subsection (1), the court may quash the indictment, summons or charge or may order it to be amended in such manner as the court thinks just or may refuse to make any order on the application.
>
> (3) If the accused alleges that he is wrongly named in the indictment, summons or charge, the court may, on being satisfied by affidavit or otherwise of the error, order it to be amended."

As already stated above, Mrs *Dube* for the state applied for an adjournment of the applications after which, she, presented a proposed amendment to the indictment. The proposed amended indictment reads as follows-;

> "In that sometime in 2001 and at paragon Real Estate, Jay Kandiwo an employee of Paragon Real Estate and Noreen Mutepha misrepresented to Janetha Kuyenga Magori that second accused had committed herself to purchase her house which was on sale and that the money was readily available. On the strength of this misrepresentation Janetha Kuyenga Magori was asked to sign a paper which she was not given a copy of. Janetha Kuyenga Magori did not proceed to enter into an agreement of sale with first and second accused. A forged agreement of sale which purports to have Janetha Kuyenga Magori's signature was later submitted by second accused in the High Court together with other papers filed of record. The documents formed the basis upon which Janetha Kuyenga Magori was evicted from her house, whereas in truth and in fact the Agreement of sale was forged as it had not been signed by Janetha Kuyenga Magori thereby prejudicing, the said Janetha Kuyenga Magori of her house."

The court can grant an amendment if doing so does not prejudice or embarrass the accused person in his defence. In this case the accused persons are still to plead and give their defences to the indictment. There would ordinarily be no prejudice if the accused persons can plead and give there defences without being prejudiced or embarrassed by the amended indictment.

Mr *Mafusire* for accused two submitted that the complainant has taken certain positions in the civil litigation, on how she signed the agreement of sale. It was also contented on behalf of the second accused that the proposed amended indictment will contradict the state's summary, and wittiness summaries as to how the alleged events took place. The state's summary does not allege that the second accused participated

in the misrepresentations made by Kandiwo. It does not say the second accused was present when the misrepresentations were made. The complainant's summary does not in any way implicate the second accused. The summaries of the other state wittiness's do not allege any wrong doing by accused 2. I would therefore agree with Mr *Mafusire* that the proposed amendment by the state would amount to manufacturing evidence against her, as it contradicts the state's and the wittiness's summaries. That in my view would prejudice and embarrass accused two in her defence.

As regards the first accused the proposed amendment does not add anything new against it. The amendment was meant to include the second accused's alleged involvement If the indictment against accused two is quashed there will be no need for the proposed amended indictment. As already indicated there are allegations that the complainant in civil litigation already referred to above, agreed to having signed the agreement of sale. That is a matter of evidence, which in my view will not prejudice the first accused but may in-fact give it an advantage when it comes to the cross examination of the complainant. I would therefore, as already indicated under exceptions, hold that the 1st accused will not suffer any prejudice if the original indictment is amended.

In the result

1 The indictment against accused 2 is quashed.

2 The first accused's exception and application to quash the indictment, is dismissed

3 The indictment against accused1 is amended by the insertion, in the second line of the second paragraph, of the words "with intent to deceive", between the words "Magori" and "that." and the substitution of the words "duly represented by Stephen Mudzudzu its Managing Director," by the words, "duly represented by Robson Kundaba, its Sales Director."

*Atherstone & Cook*, first accused's legal practitioners.
*Scanlen & Holderness*, second accused's legal practitioners.
*The Attorney General's Criminal Division*, respondent's legal practitioners.