PHILLIP CHAMUNORWA NDENGU

Versus

V.P. GUWURIRO N.O

And

THE STATE

HIGH COURT OF ZIMBABWE
MANZUNZU and CHILIMBE JJ
HARARE 15 June 2022 & 22 February 2023

Opposed application

D.Coltart for applicant
R. Chikosha for the respondents

CHILIMBE J

PRECIS

1. Applicant appeared before first respondent ("the trial magistrate") facing a charge of incitement to commit public violence.
2. Applicant did three things-all in one breath. He pleaded not guilty to the charge, amplified this plea with a defence outline, and excepted to the charge.
3. The sum total of the complaints raised in the exception was that the charge disclosed no offence cognizable at law.
4. The exception was dismissed by the trial magistrate who ordered the matter to proceed, subject to an amendment to part of the charge.
5. The ruling prompted applicant to file the present application seeking a review of the proceedings in the court *a quo.*
6. This court finds that the exception in the court *a quo* was wrongly taken by applicant, insufficiently opposed by the second respondent ("the State"), and incorrectly disposed of by the trial magistrate.
7. At the base of all these procedural mishaps lay a defective charge that remains unremediated.
8. As the reviewing authority, we are now tasked with the duty to assess the effect of these replicated errors in the proceedings of the court *a quo,* and establish if our interference is, in the first place, warranted[1].

[1] See the instructive Supreme Court decision on this point in *Prosecutor General of Zimbabwe v Intratek Zimbabwe (Pvt) Ltd & 2 Ors* SC 67-20.

9. That duty, and what to do by it, become the object of this decision.

BACKGROUND

[1] This is an application for the review of unterminated proceedings before first respondent. Applicant faced a charge of incitement to commit public violence as described in section 187 (1) (a) "as read with section 37 (1) (a)" of the Criminal Law (Codification and Reform) Act [Chapter 9:23] ("the code"). Reference to section 37 (1) was an obvious error admitted by the State and recognised by the court. Applicant raised this error in his exception. The correct cross reference was section 36 of the code.

[2] It was alleged by the State that applicant, on an unspecified date, joined two social media platforms ("the WhatsApp groups"). One was styled *"# 31 July Mass Protest*" and carried 244 subscribers, and the other – "*31 July Peaceful Demo 9*" with 255 participants. It was also alleged that applicant recorded a video in which he uttered the following words; -

> "I am sick and tired of the government, it is torturing people and it is not paying good salaries to its security forces".

[3] The State averred that accused`s creation of the video and membership to WhatsApp platforms formed part of a criminal enterprise. The applicant`s intention was to incite members of the public to join unlawful gatherings as well as commit acts of public violence across the country on 31 July 2020.

THE EXCEPTION

[4] Applicant excepted to the charge. He did so, according to his papers, in terms of section 171 (2) of the Criminal Procedure and Evidence Act [Chapter 9:07] ("CPEA"). The exception was filed simultaneously with a plea of not guilty, as well as a defence outline. A reading of the exception taken in the court *a quo* discloses three main issues; -

i. That the mis-citation of section 37 instead of section 36 in the charge prejudiced applicant in his defence.
ii. That the charge omitted the crucial allegation that the words allegedly uttered were communicated to anyone.
iii. That even if the said words were communicated, they were innocuous averments free of any of harmful or criminal intent.

[5] The trial magistrate dismissed the exception. She also ruled that the mis-citation of section 37 (1) be amended in terms of section 170 (3) of the CPEA and that other defects be cured by evidence. We will return to this ruling.

THE GROUNDS FOR REVIEW

[6] In paraphrase, applicant impugns the proceedings in the court *a quo* for the following reasons;[2]

i. Having concurred with applicant that the charge was incorrectly framed in so far as it referenced section 37 (1) (a) of the code, the trial magistrate`s subsequent failure to uphold the exception amounted to a gross irregularity.
ii. That the trial court also failed to recognise the fatal (and incurable) error in the charge owing to the state`s failure to allege that the offending message was communicated.
iii. The trial court`s ruling that the noted defects in the charge were curable by (a) adduction of evidence and (b) amendment of the charge in terms of section 170 (3) of the CPEA amounted to yet another gross misdirection.
iv. That the trial magistrate had demonstrated such interest or bias in the cause that applicant was apprehensive of a fair trial.
v. That the peril he faced given the misdirection could only be averted by a stoppage of proceedings and reversal of trial court`s ruling on his application. He prayed, in the main, for a quashing of the charges against him

CORRECT APPROACH IN APPLICATIONS TO INTERFERE WITH UNTERMINATED PROCEEDINGS IN LOWER COURTS

[7] It is settled law that a superior court should interfere with the unterminated proceedings of a lower court only in the rarest of circumstances[3]. The correct approach to adopt was set out by MAKARAU JA (as she then was) in *Prosecutor General of Zimbabwe v Intratek*

[2] The allegations of bias will not detain this court given the key dispositive issues forming basis of this judgment.

[3] (See *Attorney- General v Makamba* 2005 (2) ZLR 54 (S); *Rasher v Minister of Justice* 1930 TPD 810; *Ginsberg v Additional Magistrate of Cape Town* 1933 CPD 357; *Walhaus v Additional Magistrate, Johannesburg & Anor* 1959 (3) SA 113 (A); *Masedza & Others v Magistrate, Rusape and Others* 1998 (1) ZLR 36 (H); *Mantzaris v University of Durban -Westville &Others* (2000) 10 BLLR 1203 LC; *Rose v S* HH71/2002; *Mutumwa and Anor* v S HH104/2008,; *Chikusvu v Magistrate, Mahwe* HH100/2015; *Chawira and Others v Minister, Justice, Legal and Parliamentary Affairs and Ors* CCZ3/17 and *Shava v Magomere* HB 100/17).
"

Zimbabwe (Pvt) Ltd & 2 Ors SC 67-20 [at page 8] where the learned judge of appeal noted that; -

> "Thus, put conversely, the general rule is that superior courts must wait for the completion of the proceedings in the lower court before interfering with any interlocutory decision made during the proceedings. The exception to the rule is that only in rare or exceptional circumstances where the gross irregularity complained of goes to the root of the proceedings, vitiating the proceedings irreparably, may superior courts interfere with on-going proceedings. The rationale for the general rule may not be hard to find. If superior courts were to review and interfere with each and every interlocutory ruling made during proceedings in lower courts, finality in litigation will be severely jeopardised and the efficacy of the entire court system seriously compromised."

[8] This principle was reduced to a 7-point checklist by this court per KWENDA J in *Priccilar Vengesai v Hosea Mujaya and Another* HH 163-22 [at 6-7] which went thus; -

i. [It must be established] that there are exceptional circumstances
ii. arising from a proven irregularity
iii. the irregularity has the effect of vitiating the proceedings
iv. resulting in miscarriage of justice
v. there is a nexus between the miscarriage of justice and the interlocutory order which is clearly wrong
vi. and that there is proven serious prejudice to the rights of the litigant
vii. the prejudice cannot be redressed by any other means

PROPRIETY OF THE EXCEPTION IN THE COURT A QUO

[9] The present proceedings draw root from the challenged validity of a charge. It will be necessary therefore, to traverse a number of provisions in the CPEA because in that statute lie answers to the questions arising in this dispute. The CPEA provides, among others, for two important matters relevant to this application. Firstly, the CPEA defines the essentials of a valid charge (see section 146). Secondly, it prescribes how a person arraigned to answer a charge should respond that charge, (see sections 170,171,178,180 among others). In doing the former, the CPEA waives, for certain charges, the standard requirements and particulars [4]

[4] (See Part X, sections 146 to 159 dealing variously with requirements for indictments relating to specific offences or situations. Further prescriptions are found in Part XI of the CPEA-sections 172 in particular,173 and 176. as well as Part XII,

normally pre-requisite in a charge. In fact, the CPEA even proceeds further to create some "rules" endorsing these exemptions for select charges in section 151.

[10] Apart from such specified exemptions, the CPEA generally requires a charge to carry the essential elements of an offence. The CPEA is amplified by case law which has articulated the importance, necessity and characteristics of a valid charge[5]. A charge should sufficiently inform an accused person of the allegations against him. In doing so, a charge need not be honed to perfection; it must merely be cast in pragmatism. CHITAPI J put is as "*Reasonable, rather than absolute clarity is sufficient to validate a charge*[6]*"* in *Kasukuwere v Mujaya*.

[11] These requirements of a valid charge are traceable to an accused`s right to a fair trial espoused in section 69 of the Constitution of Zimbabwe. There is also a very practical side to it all. A charge defines the State`s claim which the accused, as the other party to criminal proceedings must answer. The charge on one side, and plea/defence on the other, help the trial court to identify the controversy between the parties and guide the processes to resolve same.

[12] Coming to the second part, the CPEA allows three sets of responses from an accused to whom a charge has been put; - a plea of guilty or not guilty; an exception to the charge, or an exception plus a plea. The various types of plea which an accused can offer are set out in section 180 (2) (a) to (i). These pleas also include what would stand as "special pleas" in civil proceedings. Where an accused intends to except to a charge put to him, he can do so in terms of sections 170,171,178 and 180 of the CPEA, depending on the nature of the accused`s complaint. The CPEA is quite particular about the exercise by an accused, of his right to except to a charge. For instance, once an accused person pleads to a charge, he is barred from raising certain exceptions. Similarly, the CPEA prescribes how a trial court presented with a plea and or exception to a charge must then proceed.

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sections 202 and 203)

[5] *Kasukuwere v Mujaya & 2 Ors* HH 562-19; *S v Job Sikhala* HMA 562-19. *In Moloi and others v Minister for Justice and Constitutional Development and others* 2010 (2) SACR 78 (CC) at 90 para 28 It was held that; - "In S v Hugo [1976 (4) SA 536 (A)] it was held that, where the State elects to make representations on the charge-sheet upon which it relies, the accused is entitled to regard these as exhaustive and to prepare his defence in respect of these representations, and no other. In R v Alexander and Others [1936 AD 445 at 457], with approval in S v Pillay [1975 (1) SA 919 (N) at 922A], the purpose of the charge-sheet was found to be - '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 piecing sections of the indictment or portions of sections together what the real charge is which the Crown intends to lay against him."; See also *R* v *September* 1954 (1) SA 574.

[6] At page 3 of the cyclostyled judgment.

[13] Below is a summary of the above options available to an accused person facing a charge; -

1. Where an accused wishes to specifically object to a formal defect apparent on the face of the charge; -he proceeds in terms of section 170 (1) or (2) but before pleading to the charge.

2. Where an accused wishes to except generally to a charge but before pleading to it; -he proceeds in terms of section 171 (1).

3. Where an accused wishes to except generally but after or simultaneous with a plea; - he proceeds in terms of section 171 (2).

4. Where an accused wishes to except; - namely to specifically object or apply that a charge be quashed on the basis that it is calculated to embarrass him in his defence; - he is guided by section 178 (1).

5. Where an accused avers that he was wrongly named in the summons, indictment or charge; -the court may proceed in terms of section 178 (2).

6. Where an accused (a) has no qualms with non-or defective service or (b) does not allege that a charge seeks to embarrass him in his defence, he may still except to the charge as guided by section 180 (1) on the basis that the charge discloses no offence cognizable at law.

7. Where an accused elects to plead to a charge he proceeds in terms of section 180 of the CPEA.

OBJECTION TO A CHARGE IN THE MAGISTRATE`S COURT.

[14] The applicant stated that his exception in the trial court was taken in terms of section 171 (2) of the CPEA. This was not entirely correct. The exception was an exercise of an accused`s options in sections 180 (4) which permits an accused to plead and except simultaneously to a charge, as read with section 171 (2). The applicant`s exception then, and

argument now, remain the same; - the charge is invalid because it discloses no cognizable offence at law.

[15] The CPEA provides that he who wishes to except to a charge on the grounds that it discloses no cognizable offence at law must do so in terms of section 180 (1). This section prohibits such an excipient from raising that sort of an exception after plea. The applicant herein excepted to the charge in the court *a quo* after plea-clearly rendering his exception improper. The State`s opposition to the exception did not identify nor oppose this impropriety. The trial court in turn, failed to locate the incompetence in the State and accused`s application and opposition respectively, leading to a serious misdirection.

[16] In addition, the CPEA states as follows in section 170 (2); -

> (2) Any objection to a summons or charge for any formal defect apparent on the face thereof which is to be tried by a magistrate's court shall be taken by exception before the accused has pleaded, but not afterwards.

This provision is clear. It applies to (i) all objections which an accused may wish to raise as (ii) against charges preferred against such accused persons in the magistrate`s court, (iii) being objections apparent from/confined to/ emerging from the face of the charge (iv) which must be raised as an exception (v) before plea. The question is; - was the applicant`s exception not an objection to the charge emanating from a formal defect apparent on the face of the charge? Should it then not have been properly taken in terms of that section? A more fundamental inquiry becomes; -are there any exceptions that may be taken against a charge which do not in fact amount to objections to formal defects apparent on the face of the charge? Implying therefore that all exceptions in the magistrate`s court must be taken in terms of section 170 (2) and before plea?

[17] Mr. *Coltart* argued that this was not so. Firstly, the defect in the charge relating to a mis-citation of section 37 (1) of the code instead of section 36 was not a formal defect apparent on the face of the charge. It went deeper than just a mere mistake and confused applicant in his defence. As stated, I find little substance in this argument. The mis-citation was a simple error given the content of the charge and the facts in the accompanying state outline. In any event, if the applicant`s complaint was that the charge embarrassed him in his defence, he ought to have raised his exception in terms of section 178 of the CPEA and before plea.

[18] Secondly, Mr. *Coltart* argued [7] that section 171 (2) [effectively 180 (4) as read with 172 (2)] extended to the applicant a right to concomitantly plead and except to a charge. In that respect, applicant`s right, derived as it did from law, could not, be fettered. The simple answer to that argument lies plainly in the CPEA; in in terms of sections 180 (4) and 171 (2), - gives the right to plead and except. But the CPEA also takes that right away in terms of sections 170,178 and 180.

[19] To answer the questions raised in [17] above, I must state that the definition of "formal defect apparent on the face of the charge" was neither a specific focus of argument in this matter nor dispositive of it. I am therefore content to let the cattle graze where they browse. However, I may mention in passing that the words "formal defect apparent on the face of a charge" are not defined in the CPEA. In *Intratek Zimbabwe (Pvt) Ltd & Anor v Prosecutor General of Zimbabwe & Anor* HH 849-18, ("*Intratek v PG Zimbabwe*"), this court noted that these words did no more than distinguish an exception from a defence as it held that; -

> "A distinction ought to be made between an objection to a charge and a defence to a charge. What is being contended as an objection to the charges is actually the applicants' defence"[8].

[20] To some, if not considerable extent, the CPEA seems to create uncertainty when it comes to exceptions to charges. It appears to distinguish those exceptions which an accused may raise if he "objects" to "formal defects" on the face of a charge [section 170 (1) or (2)], from those scenarios excipiable in terms of section 178 or 180 (1) where an accused claims that charge embarrasses him in his defence or discloses no cognisable defence at law. The question is; - will the cause of an accused`s complaint in both circumstances not emanate from the face of the charge? And as a formal; defect thereof? The answer is; - to a large extent, the complaint is indeed likely to issue from a defect apparent from the face of a charge-but perhaps not exclusively so.

[21] This answer derives from the trite definition of what an exception is at law. It is a complaint against a claimant`s pleading which frames the claim[9] ;-based on defects appearing therefrom. An exception attacks the pleading on the face of it and not beyond. As

[7] [Paragraph 9 of Accused`s "Reply to the State`s Response to the Exception to the Charge" at page 62 of the record]

[8] Page 3 of the cyclostyled judgment of Intratek v PG.

[9] *Colonial Industries Ltd v Provincial Insurance Co Ltd* 1920 CPD 627- an exception must emanate from the face of pleading. A complaint against a cause of action issuing elsewhere must be taken as a special plea.

an example, that accused person who might today find himself charged with the murder of Napoleon Bonaparte- (yes, the very Napoleon I, Emperor of France) may elect to object to that ridiculous charge via an exception in terms of section 170 (1) or (2). This he must do even if the charge came impeccably drafted with all the essential elements of the offence of murder neatly inserted. The sheer senselessness of the charge will be a fact apparent from the face of the charge sheet, and so will form a clearly excipiable grounds ahead of it being a defence. But the CPEA accords, from the wisdom of the legislature, such an accused person, the right to also argue that the charge embarrasses him in his defence [section 178], or that it discloses no offence cognizable at law [section 180 (1)] in addition to the fact that it carries a formal defect on the face of it [sections 170 (1) or (2)].

[22] Mr. *Chikosha* then argued the point noted by this court in *Kasukuwere v Mujaya* (supra). This court per CHITAPI J, opined that an accused who excepted and pleaded simultaneously to a charge risked an adverse inference. Pleading to a charge which an accused also attacked as ambiguous amounted to reprobation and approbation. Counsel submitted that in the light of the presumption in *Kasukuwere*, applicant's exception, accompanied as it was by both a plea and defence outline, amounted to a contradiction.

[23] The point raised by State counsel and the *dictum* in *Kasukuwere* illustrate why an accused person must carefully select the applicable provision in the CPEA governing the choice he picks in tendering his plea or objection. Where an accused person argues that a charge embarrasses him in his defence, he cannot except, plead and tender a defence outline because section 178 prohibits such an approach. Again, where an accused person alleges that a charge discloses no cognizable offence at law [180 (1)], he must except before plea.

[24] The simple answer to Mr. *Chikosha*` s argument is that applicant took his exception under an incorrect section of the CPEA. As regards the propriety of applicant`s simultaneous tender of a plea and exception, I comment as follows; -an exception must be distinguished from a strong or plausible defence cognisable by the law[10]. Where an accused person wishes to conflate an exception and strong defence as applicant did, in terms of section 180 (4) and 171 (2), the excipient himself and the circumstances of his case must determine (a) justification for such approach and (b) whether or not the presumption in *Kasukuwere* is sustained. In *casu*, it is not necessary to pursue this argument given that applicant took his exception incorrectly, for reasons already noted, in the court *a quo.*

[10] See *Intratek v PG Zimbabwe* (supra).

THE CHARGE PREFERRED AGAINST APLICANT

[25] I now come to the charge itself. The charge preferred against applicant in the court *a quo* carries two aspects; - the incitement part (section 187 (1) of the code), and the actual offence to which the incitement relates (section 36). The mis-citation of section 37 instead of 36 need not detain us given that it is neither material nor dispositive of the application.

[26] The real argument is whether the first part of the charge was properly framed. Mr *Chikosha* for the respondents submitted that it was. Mr. *Coltart* for applicant retorted that it was not. As the old Zimbabwean adage says, do not estimate the length of a snake, take a piece of string and measure it! Herewith the charge (in full), and the first part of the statute laid in comparison, with the essential elements numbered therein; -

The Statute

> Section 187 (1) -any person who, in any manner, ***[1]*** communicates ***[2]*** with another person— ***[3]*** intending *by the communication* ***[4]*** to persuade or induce *the other person* ***[5]*** to commit a crime.

The charge

> "In that on a date unknown to the prosecutor but during the month of July 2020 Phillip Chamunorwa Ndengu unlawfully joined two Whatts App groups called July 31 Demo (with 255 participants and # 31 JULY MASS PROTESTS with 244 participants and by self-recording a vedio (sic) where he said, "**I am sick and tired of the government, it is torturing people and it is not paying good salaries to its security forces". *[3]*** intending by the communication ***[4]*** to persuade or induce the other people accessing that message ***[5]*** to act in concert with one or more other persons, to forcibly and to a serious extent disturb the peace, security or order of the public or any section of the public or invades the rights of other people intending such disturbance or invasion or realising that there is a real risk or possibility that such disturbance or invasion may occur."

[27] Section 187 (1) outlines 5 essential elements of the charge. The second respondent`s charge contains the last 3 essential elements. These last 3 elements reflect the mental element to the crime. The state outline similarly completely disconnected the accused, his self-recorded video and the other persons in the WhatsApp groups. There is no *actus reus* alleged in the charge. Joining WhatsApp groups does not in itself amount to communication. Nor does the recording of the video containing the words quoted in the charge.

[28] The critical averments that he (i) *broadcast, shared, relayed, uploaded or communicated the video,* (ii) *to an identifiable group of people*, is absent. There is no nexus, as was argued by *Mr. Coltart*, between the video or communication, and the targeted audience. In that respect the State did not allege that the applicant communicated the "communication" to another person. This submission is correct. In the absence of specific allegations founding the physical elements of the offence, the charge put to the applicant was therefore defective. This is critical point that turns this review application in favour of applicant.

[29] I am somewhat puzzled by the strategy adopted by the State in managing this prosecution. The charge contains all the ingredients of the offence except the critical aspect of how applicant communicated the message. Similarly, the state outline sidestepped that specific averment of how applicant related his message to other persons. The state papers are presumptuous of the fact that applicant conveyed the message in the WhatsApp groups that he had joined. The charge could have been cured of its defect by the simplest of effort. Further, the State had opportunity to propose to amend the charge in its opposition to the exception. It did not.

[30] It could have also proposed to do so in the notice of opposition to the present application. Again, the State elected not to. It has not even attended to correction of mis-citation of section 37(1) of the code rather than section 36 as directed by the court *a quo*. It remained importunate that the charge- which clearly omitted an essential element- was valid. An indication of the proposed amendment would have given a good sense of whether the applicant was likely to be prejudiced in his defence, thus addressing one key statutory requirement of the CPEA. [See the approach taken by the State in *S v Kurotwi* HH 36-12].

[31] The applicant proffered a second submission. He argued- and strenuously so- that in any event, the words in the video could not be properly construed as being inciteful in nature. I comment as follows; -section 187 (1) of the CPEA is couched in the widest of terms. It merely requires the State to allege (and of course eventually prove) that an accused person "*communicated in any manner with any person*". The nature or manner of communication are not qualified. This aspect was discussed in *S v Nkosiyana* 1966 (4) SA 655 (A) where it was observed [at 658-9] as follows;

> "Hence it seems to me proper to hold that, in criminal law, an inciter is one who reaches and seeks to influence the mind of another to the commission of a crime. The machinations of criminal ingenuity being legion, the approach to the other`s mind may

> take various forms, such as suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading, or the arousal of cupidity. The list is not exhaustive. The means employed are of secondary importance; the decisive question in each case is whether the accused **reached** and sought to influence the mind of the other person towards the commission of a crime." [Emphasis added].

[32] The wisdom in the above *dictum* is, as they say, straight from the ancestors. Communication indeed manifests is many forms. Who in this jurisdiction, or elsewhere on the continent is not aware of the prototype African mother`s famed "talking eye"? The one directed at errant children in the presence of guests? And communicating the fate of those young ones once the visitors depart? Communication can indeed take any form.

[33] Likewise, section 187 (1) is indifferent to the import of a communication. That notwithstanding, applicant's argument would still not, strictly on that basis alone, sustain an objection to the charge. It cannot be said that an utterance expressing disgruntlement with a government and its perceived ills would be completely irrational to, or totally disconnect from a charge of incitement to commit public violence. Especially where the facts alleged by the state refer to arrangements to organise unlawful public disturbances. Whether the allegation could result in a conviction becomes a separate issue. That becomes a matter of evidence. As noted above, this court in *Intratek v PG Zimbabwe*, held that a distinction must be maintained in an application for an exception; between the alleged invalidity of a charge and the claimed invincibility of the defence to it. The focus at the exception stage of the proceedings related to the impeachment of the charge. On that basis, the applicant`s fulmination that the words allegedly uttered were innocuous was ill-placed.

[34] As a last word on that point; - the wideness prescribed by section 187 (1) and other similarly worded statutory provisions is not without limit. The law; -both in statute and custom- mirrors the Constitution`s abundant safeguards against arbitrary, capricious, frivolous or malicious conduct or infringement of rights. Those safeguards should temper any instincts towards abuse of the latitude extended by legislature in section 187 (1) and its ilk. The wideness of section 187 (1) further strengthens the need for careful drafting of charges relating to offences emanating from that provision.

THE SEVEN-POINT APPROACH IN VENGESAI v MUJAYA

[35] In summation, the court *a quo*`s misdirection was substantial. Insufficient attention was paid to the nature of the exception brought before it. The court`s ruling did not specifically

attach itself to the issues raised in the exception. It left other matters unanswered. The trial court proceeded to issue an order that the charge be amended in terms of section 170 (3). That order was not competently made. Further, the trial court did not consider whether or not the amendment to the charge that it ordered would prejudice applicant in his defence. Such conformation was pre-requisite to the making of the order to amend.

[36] The trial court also ruled that "some of the defects" would be cured by evidence. These defects were not specified. It was important for the court to articulate what these defects were given the challenges that had been raised in the exception. It is not clear from the record whether the court was alive to the fact that its options in disposing of the exception were defined by the CPEA. There was no finding by the court *a quo* that as it stood, the charge lacked an essential element and therefore was materially defective.

[37] The proposed rectification of the defects noted in the charge by the trial court was a further misapplication of the law The applicant thus faces the prospect of proceeding with what this court termed a "legal invalidity" [*Priccilar Vengesai v Hosea Mujaya and Another]*. The State believed there is a solution to the matter and submitted in its opposing affidavit [paragraph 9 on page 81 of the bundle] to the present application that; -

> "There is no irreparable harm that will visit the applicant if the application is dismissed as they have remedies after completion of the trial"

[38] This suggestion by the State represents the very reason why applicant excepted to the charge. He argued that having to undergo a trial on an invalid charge was an infringement of his right to a fair trial. That complaint was serious. It had to be properly inquired into and disposed of. The trial court did not do so correctly. The import of its ruling was to order applicant to undergo a trial tainted by a fundamental defect. It would be remiss for applicant to undergo a trial on the basis on an invalid charge whose course of remediation has not been ascertained. In that regard, the misdirection by the court *a quo* warrants an intervention by this court so as to avert that injustice.

[39] The question is; - can this court salvage the proceedings of the court *a quo* given the noted defects? In addition to the guidance in *Priccilar Vengesai, Prosecutor General v Intratek* and others, this court must not embark on a frolic of its own[11]. Even the exercise of

[11] See *Mubaiwa v Chiwenga* SC 86/20 and *Gateway Primary School & 2 Ors v Fenesey & Anor* SC 63-21 at page 7 where the Supreme Court commented on the qualification of its general authority by the statute relevant to the dispute then before it, in the following terms; - "The power, "*to give such judgment as the case may require*" is in my view not an open cheque for the court to go on a frolic of its own giving any judgment it desires. That power is confined to what it is authorised to do

its inherent jurisdiction and inherent powers[12] are circumscribed by section 29 (2) (b) (iii) of the High Court Act [Chapter 7:06] which provides that [annotated]; -

> (2) If on a review of any criminal proceedings of an inferior court or tribunal, the High Court considers that the proceedings—
>
> (*b*) are not in accordance with real and substantial justice, it may, subject to this section —
>
> (iii) ***[1]*** set aside or ***[2]*** correct the proceedings of the inferior court or tribunal or any part thereof or generally, ***[3]*** give such judgment or ***[4]*** impose such sentence or ***[5]*** make such order as the inferior court or tribunal ought *in terms of any law* to have given, imposed or made on any matter which was before it in the proceedings in question;

[40] Sub-paragraph (iii) of 29 (2) (b) creates two possible routes for this court to take in curing the court *a quo*`s flawed proceedings. The first route entails either setting aside ***or*** correcting the proceedings. The second pathway empowers this court to remedy the defects which tainted the proceedings by assuming the authority exercisable by the lower court within the prescription of the CPEA. In my view, the only option open to this court is to set aside the proceedings with a residual remedy. The mis-steps taken by the court *a quo* are incapable of salvage. In the same vein, the provisions of the CPEA prevent a substitution of the court *a quo*`s order with a competent one which it could have issued. The following are my reasons; -

[41] Section 170 (3) of the CPEA as noted, allows a court disposing of an exception to order the remediation of a defective charge by amendment. But with the exception having been brought in terms of section 180 (4) and 171 (2), the option reposed in 170 (3) becomes unavailable. That remedy is reserved for those applications for an exception brought in terms of section 170. (1) or (2). This court cannot therefore resort to that facility for the simple reason that the court *a quo* could not have utilised it.

[42] Secondly, one could consider the route set out in section 202 of the CPEA.This section empowers a trial court to amend a charge "when on trial". A careful reading of that section suggests that the Act limits the sort of matters that can be amended on a charge to the correction of patent errors rather than fundamental defects. The words "…*and any other*

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under s 22. As the power of substitution is not given under s 22 of the Act, the court cannot exercise such power. If it does, it acts without jurisdiction."

[12] See Martin *Sibanda and Anor v Benson Chinemhute and Anor* HH 131/04; *Derdale Investment (Pvt) Limited v Econet Wireless (Pvt) Limited and 2 Others HH 565/14*; *Machote v Zimbabwe Manpower Development Fund* HH 813-15

errors" tenders that suggestion. This also seems to be the view taken by this court per BHUNU J (as he then was) in *S v Kurotwi* (supra), unless I misread the learned judge`s observation.[13]

[43] Thirdly, section 203 follows suit and creates room for the resolution of any defects in a charge and states that; -

> **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.

[44] The underlined phrase descopes matters such as present application where the court *a quo*`s attention was drawn to the defects. In any event, it is one thing for a trial court to commence and hear a matter unawares of a defect in a charge. It is entirely another for such court to then deliberately proceed to do so, well-aware that (a) a charge is defective and (b) there are no remedial arrangements to address that defect.

DISPOSITION

[45] It is therefore ordered that; -

1. The proceedings in the court *a quo* be and are hereby set aside.

[13] The court stated [at page 2] that; - "Section 202 was precisely meant to facilitate the correction, alignment, synchronization and harmonization of the facts and the charge depending on the exigencies of the case at any given time."

2. The judgment of the court a quo be and is hereby set aside and replaced with the following order; -
    i. The application for an exception be and is hereby dismissed for want of proper procedure.
    ii. The charge preferred against applicant in the court *a quo* be and is hereby quashed and set aside as it is incurably defective.
3. There be no order as to costs.

CHILIMBE J_____ [22/02/23]

MANZUNZU J_____I AGREE [22/02/23]