CHARLES USAIWEVU KANDEMIRI
versus
THE STATE

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 13 July & 19 September 2023

Application for leave to appeal against conviction and sentence

O Marwa, for the applicant
W Mabhaudi, L Masuku & F C Muronda, for the State

KWENDA J:

Introduction

The applicant was the acting Chamber Secretary of the City of Harare. He was charged in this court with Criminal Abuse of Duty as a Public Officer, a crime defined in s 174(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was jointly charged with three others namely: - Hebert Gomba (first accused), Stanley Ndemera (second accused) Hosiah Abraham Chisango (third accused). He was the fourth accused person. The allegations against the applicant and his co accused were that they acted in concert and with common purpose to unlawfully, intentionally and corruptly sell a certain immovable property belonging to their employer, the City of Harare, known as Stand Number 402 Mt Pleasant, to Hardspec Investments (Pvt) Ltd (Hardspec Investments) in a manner contrary to and inconsistent with duty as public officers for the purpose of showing favour to Hardspec Investments or disfavour to a sitting tenant known as Mt Pleasant Sports Club. The first accused was the mayor of the City of Harare and as such, a member of Council as defined in s 199(1)(c) of the Criminal Law (Codification and Reform) Act. The second and third persons were the acting Finance Director and Town Clerk respectively and as such, public officers as persons holding or acting in a paid

office in the service of the City of Harare, a local authority as defined in s 199(1)(d) of the Criminal Law (Codification and Reform) Act.

The applicant and his co accused persons, all, pleaded not guilty and the matter went to trial. At the end of the trial we convicted the applicant and Stanley Ndemera on 24 May, 2023 only and sentenced them on 7 June 2023, each, to imprisonment for 8 years of which we suspended 2 years for 5 years on condition the accused person does not during that period commit any crime involving corruption for which upon conviction he is sentenced to imprisonment without the option of a fine. We gave our reasons *ex tempore*, from a prepared manuscript. In the *ex tempore* judgment I read out what I considered to be the salient features of the reasons for judgment with the intention of releasing a typed judgment later for the record and circulation. The applicant requested a detailed written reasons for their conviction and sentence. Our written judgment is case no HH 391-23.

Before me now is an application for leave to appeal in terms of rule 94 of the High Court rules, 2021, against both conviction and sentence. The application is before me because I was the presiding judge, and in terms of rule 94, the first port of call. The applicant contends that he has prospects of success both against conviction and sentence. He submitted, with his papers, a draft of the Notice of Appeal which he intends to file if grated leave. The application is opposed by the State on the grounds that the intended appeal, as discernible from the grounds of appeal, lacks merit.

Background

In denying the charge the applicant said that the State had not spelt out the specific duty(ies) which he breached. His duties were outlined in s 137 of the Urban Councils Act *[Chapter 29:15]* (the Urban Councils Act) and he had breached none. He said he and his co accused persons did not act at once during the sale. They performed different roles and there was no chance of conniving amongst themselves. He did not know Hardspec Investments or its alleged representatives and thus, could not possibly favour an entity or people unknown to him. He denied convening the meeting of Finance and Development committee saying it was convened by the committee chairperson, Luckson Mukunguma, who was empowered to do so by s 101 of the Urban Councils Act. He also denied that it was his responsibility to publish notices regarding the sale of stands. The City Valuations and Estates Manager was responsible for that.

He was not also responsible for checking whether there had been any objections to notices published in newspapers. The Senior Committee Officer for the Finance and Development Committee was responsible for doing that and bringing any objections to the applicant's attention. He admitted that his memorandum dated 14 October 2019 falsely represented that the notice to sell Stand Number 402 Vainona had been advertised twice in the Newsday Newspaper on 10 and 17 September 2019 and that proof of the advertisements was attached. He, however said, the Senior Committee Officer, who prepared the memorandum for him, was answerable for the misrepresentation and not him. He believed that the error was genuine because there were other memoranda prepared by the same official containing the same error. It was not his duty to do place notices in newspapers advertising the intended sale of stand 402 Vainona or to place such advertisement on the Notice board or to notify the Minister or to do the many things required to be done in terms of s 152 0f the Urban Councils Act.

The State called eight witnesses who gave oral evidence and produced documentary evidence. At the end of the trial it was common cause that, indeed, the applicant did the things alleged by the State and made the omissions alleged by the State. With respect to omissions, the applicant was steadfast that he had no legal duty to act. The only issue was whether he did the things in a manner inconsistent with or contrary to duty as a public officer or whether he was required by duty as a public officer to do the things that he omitted to do. The following facts were common cause. On 4 September 2019 the acting Finance Director, the Town Clerk and the City's Valuations and Estates, one Emmanuel Mutambirwa went to view the stand for the purpose of selling it. As they were viewing the stand, certain two ladies who had attended at the City of Harare Head office for the purpose of negotiating the purchase of Stand Number 402 Vainona on behalf of Hardspec Investments (Pvt) Ltd, happened to be at the stand. Emmanuel Mutambirwa greeted them. Subsequent to the visit, the acting Finance Director set in motion, the process of selling the stand to Hardspec Investments. By the end of the day on 4 September, 2019, the acting Finance Director had written two offer letters. One, was addressed to the sitting tenant, Mount Pleasant Sports Club, purporting to offer it the 'pre-emptive right of first refusal' to buy the stand at a price of USD 2.3 million. The offer was delivered to the club on 5 September 2019, by hand, and was set to expire after 24 hours on 6 September, 2019. Concurrent with the pre-emptive right offer to Mt Pleasant Sports Club, the acting Finance Director wrote

another offer letter to Hardspec Investments offering it the same stand at a price quoted in local currency i.e. RTGS 26 923 340. He gave Hardspec Investments the option to immediately accept the offer and pay the full purchase price, forthwith, into the City Council's bank account. In the letter, acting Finance Director undertook to facilitate internal processes of council to procure the necessary resolutions of the Finance and Development Committee and full council authorising the sale to Hardspec Investments. The acting Finance Director advised Hardspec Investments that the sale was also subject to fulfilment of the legal requirements set out in s 152 of the Urban Councils Act [*Chapter 29:15*]. That offer, too, was valid until 6 September 2019.

One, Councillor Luckson Mukunguma, (called as a state witness) who was the Chairperson of the Finance and Development Committee, caused a special meeting of the committee to be convened to consider a recommendation to sell the stand to Hardspec Investments. In council business the recommendation to the Finance and Development committee was in the form of the 'Town Clerk's report' prepared under the supervision of the Finance Director on behalf of the Town Clerk. The Town Clerk's report, also known as a recommendation to the Finance and Development Committee, was tabled for consideration by the committee at its meeting held in the morning on 5 September, 2019. The committee resolved to recommend the sale to the full council. The full council met for a scheduled meeting later, in the afternoon of the same day and, among other business, adopted a resolution approving the sale. The applicant attended both meetings. It was common cause, at the trial, that stand 402 was sold to Hardspec Investments by private treaty contrary to a standing resolution of City Council of Harare dated 26 September, 2005, which mandated council to sell all land thorough a competitive bidding process. It was also common cause that the applicant did not alert the councillors who constituted the Finance and Development Committee and the full council despite being present during their deliberations as the legal advisor. The issue was whether he omitted to do something which it was his duty to do as the legal advisor. It was also common cause that the selection of Hardspec Investments as the purchaser and the determination of the purchase price was done contrary to the peremptory provisions of s 152 of the Urban Councils Act [*Chapter 29:15*] which the sale did not comply with. These were they. Before selling land owned by it, Council was required to publish the decision to sell the stand in two issues of a newspaper giving notice of the decision to sell the stand, giving a full description of the stand

concerned and stating the object, terms and conditions of the proposed sale. It was required to post a copy of the advertisements on the notice board at the head office and leave it open for inspection during office hours at the office of the council for a period of a period of not less than twenty-one days from the date of the last publication of the notice in a newspaper. The notices published in the newspaper and on the notice board where supposed to invite any person with any objections to the proposed sale to lodge such objection with the Town Clerk within the period of twenty-one days. Council was required also required to submit a copy of the notice to the Minister not later than the date of the first publication of that notice in a newspaper. All this was not done before Hardspec was selected as the purchaser and the determination of the purchase price. The sale was completed without doing anything of the above. It was common cause that the applicant did not raise a red flag despite his employment as the legal advisor of council. It was common cause that the applicant *mero motu* wrote a memorandum on the 10th September 2019 to the acting Finance Director advising him to implement the sale. He followed up with another letter on 14 October, 2019 instructing the acting Finance Director to finalise the sale. It is common cause that the memorandum contained various false information, firstly, that the sale of stand 402 had been advertised in the Newsday Newspaper on 10 and 17 September 2019. Secondly, that proof the advertisements was attached. The sale had not been advertised on the dates in question. It had not been advertised the required number of times. Thirdly, that there had been no objections following the required number of advertisements. This again, was false because only one notice published in the Newsday Newspaper on 12 September 2019. The applicant did not alert council that the selection of Hardspec Investments as the purchaser and the determination of the purchase price did not follow a competitive bidding process. It was common cause that the 2005 resolution could only be rescinded through an elaborate process which was very stringent. Without that process the resolution remained extant. It was common cause that the applicant knew the requirements of s 89 of the Urban Councils Act. He named the section and recited its provisions to the court off the cuff. The procedure is as follows. A resolution passed at a meeting of a council shall not be rescinded or altered at a subsequent meeting of the council unless a committee has recommended that the resolution he rescinded or altered; or a notice of motion to rescind or alter that resolution has been given at least seven days before the subsequent meeting to the chamber secretary and the notice of motion has been signed

by not less than one-third of the membership of the council. If the rescission or alteration occurs within six months from the date of the passing of the original resolution and the number of councillors present at such subsequent meeting does not exceed the number of councillors present when the original resolution was passed, the resolution shall not be altered or rescinded unless at least two-thirds of the councillors or members, as the case may be, present at the subsequent meeting vote in favour of that rescission or alteration. The chamber secretary to whom any notice of motion has been given shall send a copy of the notice to each councillor at least two days before the subsequent meeting at which the motion is to be moved. The applicant attended the meetings of council but said nothing about the legal defects. He confirmed in evidence that he was aware of these defects but his attitude was that it was not his responsibility to comply. It was common cause that the applicant had not done this process and that he did not advise councillors that, for that reason, the resolution remained extant and they were required to call for bids. The issue was whether that amounted to omitting something which it was his duty to do.

The following documentary evidence was not disputed at the applicant's trial. **Exhibit 1** was, *ex facie,* the written offer dated 4 September 2019, emanating from the acting Finance Director addressed to Mt Pleasant Sports Club offering the club the pre-emptive right of first refusal to buy the stand for USD 2.3 million. It showed on the face of it that it was hand delivered received on behalf of the club by Anne-Marie Wede on 5 September 2019. The offer was valid up to 6 September 2019. Its contents were common cause throughout the trial. **Exhibit 2** was, *ex facie*, copy of the notice of the City of Harare's intention to sell Stand Number 402 Vainona for RTGS$ 26 923 340 which was published at p 16 of the Newsday Newspaper on 12 September 2019. Its contents were common cause throughout the trial. **Exhibit 3** was, *ex facie*, written offer dated 4 September 2019 co-penned by Daniel Usingararwe and Peter Dube on behalf of theacting Finance Director addressed to Hardspec Investments offering it Stand Number 402 Vainona at a price denominated in local currency, the sum of RTGS $26 923 340 and giving it the option to pay the purchase price into the council's bank account provided, if it accepted the offer The letter also notified Hardspec Investments that the sale was subject to council formalities and compliance with s 152 of the Urban Councils Act. This document and its contents were common cause at the trial. **Exhibit 4** was, *ex facie,* the Town Clerk's report to the

Finance and Development Committee prepared Peter Dube and Daniel Usingararwe on behalf of the acting Finance Director and signed by the said director. It was, ostensibly, a recommendation to the Finance and Development Committee that Stand Number 402 Vainona be sold to Hardspec Investments for RTGS$ 26 923 340. It is common cause that the acting Finance Director had already offered the stand to Hardspec Investments without the knowledge of council. The report was signed by the acting Finance Director and the Tow Clerk. The report acknowledged the existence of the resolution of Land Alienation Sub-Committee as adopted by full council on 29 September 2005 (item 16) stipulating that all stands for sale were to be advertised inviting tenders, that the stand was currently on lease to Mt Pleasant Sports Club and reserved for recreational purposes, several organisations and individuals had approached the City with proposals for joint ventures, that the council had not realised commensurate value from the proposals hence the decision to sell it , that the intention to sell had been communicated to the lessee on 4 September 2019, that the stand measured 24.5094 hectares and the value was commensurate with the purchaser's special interest in the stand and its location. The report made it clear that the sale was subject to s 152 of the Urban Councils Act [*Chapter 29:15*] and other City's conditions of such sale. The Town Clerk's report was common cause up to the end of the trial. **Exhibit 5** was, *ex facie*, the Chamber Secretary's inter-departmental memorandum dated 14 October from signed by the applicant instructing the acting Finance Director to finalise the sale since there had been no objections to the sale after notice of the sale had been advertised twice on 10 and 17 September 2019 and that proof of the publication was attached. This was false. The document was common cause up the end of the trial. **Exhibit 6** consisted of the minutes of the Finance and Development Committee. Item 4 of the minutes recorded that the committee considered the Town Clerk's report. The committee resolved to and did rescind its lease agreement with Mt Pleasant Sports Club. The committee noted the requirement to go to tender as resolved by the City's Land Alienation Committee on 26th September 2005. **Exhibit 7** was, *ex facie*, the agreement of sale between the City and Hardspec Investments which the applicant submitted for signature by the Mayor and Town Clerk. It was signed by both Hardspec Investments and on behalf of council, purporting to conclude he sale. It back dated the effective date of the sale to 23 September 2019. **Exhibit 8** was, *ex facie*, a memorandum authored by the applicant dated 10 September 2019 directing the acting Finance Director to implement the sale of

the stand and to advise him of the progress. **Exhibit 9** were the minutes of the full council meeting held on 5 September 2019 which adopted a recommendation by the Finance and Development Committee to sell the stand.

The applicant gave evidence. He adopted his defence outline as part of his evidence under oath. He reiterated that among his co functions was the provision of legal services to council, its committees and council departments. He attended the meeting of the Finance and Development Committee and, subsequently, the full council meeting which adopted the Town Clerk's report recommendation to sell the stand to Hardspec Investments. He said the resolution adopted by council in September 2005 which mandated council to sell land by tender only could be rescinded in terms of s 89 of the Urban Councils Act. When the recommendation to sell Stand Number 402 Vainona was adopted by council, his division prepared the action plan which it referred to the relevant departments. Later, he received that file with a memorandum from the City Valuations and Estates division after the publication of the first notice of publication advertising the intended sale of the stand which he signed. Attached to the memorandum was proof of the first publication only. The publication of notices is the responsibility of the CVEM who gives, the first copy of the publication to the committee officers for onward transmission to him. He said did not have to see proof of the other advertisements. It was the responsibility of the Senior Committee Officer to check for objections. After 28 days the Senior Committee Officer prepared the memorandum for his signature to confirm that there had been no objections. In February 2021 it was brought to his attention that the dates contained in his memorandum were wrong. The dates should have been 12 and 19 September and not 10 and 17 September 2019. He said the mistake was not peculiar to the sale of Stand Number 402 as it had been repeated in other files. He did not know Hardspec Investments' representatives and had never dealt with them. He did not play any role in the decision to sell the stand since it was not within his purview. He was not aware that it was under lease because he did not manage leases. He was not aware that the stand was being sold before the approval by council. He said he was not aware that the requisite two advertisements had not been placed in the newspaper when he signed the memorandum which misrepresented that there had been two advertisements. It was not his function to ensure compliance with s 152 of the Urban Councils Act, to notify the minister of the intended sale but that of the CVEM. He conceded that he was aware of the special procedure of

rescinding resolution in terms He called one Stanley Chimbetete as his defence witness. The defence witness said he authored of Exhibit 5, for signature by the applicant.

Reasons for Sentence

In sentencing the applicant, we expressly took into account all the submissions on behalf of the State and the applicant in their detailed written submissions. The submissions are long and form part of the record. We will not repeat them *verbatim*. The applicant adduced evidence in mitigation, where necessary, which was not disputed by the state. We noted that the sentence which we were going to impose had to fit the crime, the offender and public interest. With regards to the crime we took into account the seriousness of the crime in the context of the aggravating and mitigating factors which have a bearing on the degree of moral blameworthiness of the accused persons. With regards to the offender the applicant's personal, circumstances, his age, sex, marital status, employment, his means, any criminal record and motive. We said public interest referred to the need to ensure that the public is protected against criminals, the legitimate expectation of society that those who commit crime get punished as a way of protecting society from such people. An inadequate sentence was likely to erode that public confidence in the criminal justice system and affect its effectiveness. There is need to prevent crime through passing deterrent sentences. See Magistrates' Handbook by Professor G Feltoe Revised August 2021, Part 17 pp 359-391. Some of the important cases are *S* v *Shariwa* 2002 (1) ZLR 314 (H), *S* v *Ngulube* 2002 (1) ZLR 316 (H), *S* v *Nemukuyu* 2009 (2) ZLR 179 (H), *R* v *David & Anor* 1964 RLR 2, *S* v *Mugwenhe & Anor* 1991 (2) ZLR 66 (S). The cases were too numerous to mention.

We took the following personal circumstances of the applicant. He was 53 years old. He held an LLBS (UZ), a Master of Commerce, Strategic Management and Corporate Governance from the same University. He was married with four children. One child was at the University of Lusaka. He attached proof of that which was not contested by the State. His last child was at Eaglesvale Secondary School. He was looking after his brother's child who was at the National University of Science and Technology. He was also looking after his aged mother. His wife was recently retrenched leaving him as the sole breadwinner of his family. He joined the City of Harare as a Legal Officer in 2008. Prior to this he was working as a public prosecutor. In 2009 he was promoted to the position of Legal Manager a position he holds to date. At the time of

commission of this offence he was the Acting Chamber Secretary. It was submitted that a sentence of imprisonment without the option of a fine will completely destroy his career and consequently his family. His profession and training require a person to be fit and proper. He will not be able to practice the profession although he may be able to work as an employee. His chances of employment had been severely diminished. The applicant was also likely to lose his employment and the attendant benefits. His incarceration would be felt by his children who are wholly dependent on him. The accused person suffers from a chronic ailment. He was diagnosed with Atonic bladder with lower urinary tract symptoms. He produced evidence which shows that he requires to drain urine four times a day to stop the urine returning into his system and poisoning the kidneys. He requires a clean environment to conduct the urine draining process and to store the catheters. He submitted that prison is the last place for him to be because he will not survive. It was submitted that imprisoning him is like condemning him to die a slow death.

We took into account his prayer to us not to impose a sentence which will not require him to serve an effective sentence of imprisonment. He implored us to consider the sentence of a fine and if not appropriate the accused persons are amenable to do community service. He submitted that prisons are hopelessly overcrowded and the state is struggling to maintain prisons and feed inmates. Prisoners are afflicted by diseases. Hecited *S* v *Tshuma* 2016 ZLR 553 (H) per Mathonsi J (as he then was) wherein he said where a penal provision provides for a fine or imprisonment, a fine and to non-custodial options had to be considered first.

> "Against that background it is therefore surprising that we have a magistracy which is impervious to decisions of superior courts calling for alternative sentence, but remain rooted in one place."

We took into account his submission based on *S* v *Muhunyere* HB 31-9 at p 3 of the cyclostyled judgment where BLACKIE J, with the concurrence of CHEDA J, quoted with approval from the decisions in the case of *S* v *Rutsvara* S-2-89 and *S* v *Van Jaarsveld* HB 110-90 that:

> "It is the trite that where the statute lays down a monetary penalty as well as a period of imprisonment the court must give consideration to the imposition of a fine. It would normally reserve imprisonment for bad cases.
> …. In statutory offences permitting the imposition of a fine, the normal sentence for a first offender is a fine unless the offence is particularly serious or prevalent or there would be serious consequences if the deterrent of imprisonment is not used."

We accepted that the applicant was a first offender and that we were not supposed over-emphasize the public interest and general deterrence. See *S* v *Scott – Crossley* 2008 (1) SACR 223 (SCA) at para 35: -

> "Plainly any sentence imposed must have deterrent and retributive force. But of course, one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the overriding ones". As our courts have often sad the object of sentencing is to serve the public interest and not to satisfy public opinion. In *S* v *Mhlekazi* and Another 1997 (1) SACR 515 (SCA) at 518 f-g, Harms JA held the following: -
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> > 'It remains the court's duty to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public.'"

We accepted that we had to temper justice with mercy and that mercy is a hallmark of a civilized and enlightened administration which should not be overlooked lest the court reduces itself to the plane of the criminal. True mercy has nothing in common with soft weakness or maudlin sympathy for the criminal or permissive tolerance. It is an element of justice itself. See *S* v *V* 1972 (3) SA 611 (A) @ 614. We also took into account the State's submissions urging us to impose a sentence that is commensurate with the seriousness of the crime and that failure to do so may result in the criminal justice system falling into disrepute and like-minded people not being deterred thereby rendering the courts ineffective. *S* v *Skenjana* (3)1985 SA 52 at 54-55 D.

We, however, rejected the submission in mitigation the claim of inadvertence. We said we had convicted the applicant because we were satisfied that his conduct was intentional.

In submissions on behalf of the State, the State counsel conceded that we should temper justice with mercy. On the true nature and effects of criminal abuse of duty as public officers the following cases relied upon by the State: -

Shaik v *S* (1) 2006 SCA 134

Corruption is a phenomenon that can 'truly be likened to a cancer, eating away remorselessly at the fabric of corporate probity and extending its baleful effect into all aspects of administrative functions'. If unchecked, corruption was becoming systemic and the effects of systemic corruption can quite readily extend to the corrosion of any confidence in the integrity of anyone who had a public duty to discharge, leading unavoidably to a disaffected populace.

South African Association of Personal Injury Lawyers v *Heath & Ors* 2001 (1) BCLR 77 (CC) at 80E-F that: -

> "Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State. ……. It is plainly a pervasive and insidious evil, and the interests of a democratic people and their government require at least its rigorous suppression, even if total eradication is something of a dream."

We accepted the argument by the State that corruption and corrupt activities undermine constitutional rights and further endanger the stability and security of societies, undermine the institutions and values of democracy and ethical values and morality, jeopardise sustainable development, the rule of law and credibility of governments. . .'. see *Phillips* v *The State* 2016 ZASCA 187 @ para 10.

On sentencing trends in cases of criminal abuse of duty as a public officer the State drew our attention to the following cases: -

(i) *S* v *Admire Chikwayi* HB 166/16 who was a public prosecutor given 24 months imprisonment of which 6 months was suspended. He had been bribed with USD300

(ii) (ii) *S* v *Vincent Shava* HB 179/17 a public prosecutor who was given 5 years imprisonment of which 2 years was suspended had been bribed with USD 200

(iii) (iii) *S* v *Paradza*, (*supra*), a former high court judge was given 3 years imprisonment for having tried to influence another judge in a bail application of his business partner

(iv) (iv) *S* v *Samuel Undenge* HH 366/20 a former government cabinet minister was given 4 years imprisonment with 18 months suspended on the usual conditions who had influence a payment by ZPC to a contracted company. The applicant did not assist the court with any precedents where either a fine or community service had been given. The applicant held a senior position in the City of Harare. He betrayed the honour to safeguard public property. The land in question is prime land at the heart of the City of Harare that had survived for a period in excess of

100 years for the enjoyment of everyone in the City. The land was about 24 hectares. There was nothing peculiar with the present case that would warrant the departure from the need to pass deterrent sentence as done in the other matters cited by the State.

(v) *Attorney General* v *Chinyerere & Anor* 1983(2) ZLR 329 (SC) held that corruption in the public service must necessarily attract heavier penalties than corruption elsewhere."

Abuse of that office is a serious betrayal of trust. Persons who accepted appointment to public offices should consider that as an honour as opposed to an opportunity to enrich oneself. The temptation to be corrupt is very high yet the chances of detecting crime is very low. T applicant, by virtue of his station in life, was generally comfortable and imprisonment was likely to be scary. However, our law does not contemplate distinction in sentencing based on status.

When leave to appeal should be granted – the law

At page 483-4 of the *Criminal Procedure Handbook, JUTA* Thirteenth Edition, Joubert the authors state categorically that there has never been a general right of appeal in favour from the higher courts, and leave to appeal had been a prerequisite at all times. In *Rems* 1996(1) SACR 105 (CC)Tat [18]- [25] the South African Constitutional Court held that the requirement for leave to appeal from the superior courts did offend against the right to appeal. The underlying purpose for the limiting requirement is to protect appeal courts against the burden of dealing with appeals which have no prospect of success. The procedure is fair because it allows the accused dual recourse to the higher court of appeal: either withy the leave of the trial court or with leave of the higher court.

The mere circumstance that a case is arguable is insufficient unless if arguable is used in the sense of or to mean reasonable prospects of success. See *Radebe* 2017 (1) SACR 619(SCA). where the court said the mere possibility of success is not clearly not enough. The key consideration in deciding whether to grant an application for leave is whether the applicant has reasonable prospect of success on appeal or whether there is some compelling reason why the appeal should be heard, for example conflicting judgments. See *Criminal Procedure Handbook, JUTA* Thirteenth Edition, Joubert. 529 and the cases cited thereat. Several other phrases have

been used in case law, such as 'the appeal has possibility of success' or 'the appeal has decent chances of success' or that 'the case is arguable' or that the 'case cannot be categorised as hopeless' or 'the appeal is not doomed to fail'. All these are not new or alternative tests in determining applications for leave to appeal but phrases used by judges and the superior courts in explaining what 'reasonable prospects of success' entails. Unfortunately, such words have tended to distort the concept of 'reasonable prospects of success'. In my view is better to stick to the traditional test being 'reasonable prospects of success'.

In *S* v *Mutasa* 1988 (2) ZLR 4 (SC) the Supreme Court of Zimbabwe stated that the correct approach to adopt in determining an application for leave to appeal should not be based on whether an appeal is arguable or not but on its prospects of success. At pages 8 D-H and -9 A-B the court observed as follows:

> "In *R* v *Baloi* 1949 (1) SA 523 (AD) CENTLIVRES JA (as he then was) stated at 524
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> > "In the present case RAMSHOTTOM J granted leave to appeal because
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> > > 'some, at any rate, of the grounds which the accused wishes to raise, or which it is wished to raise on his behalf, seem to be fairly arguable.'
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> That, however ids not the test to be applied. It is true that in *Scott v New Minerva Syndicate Ltd 1911 AD 369* at page 371, one of the grounds on which an application for lave to appeal was granted was that the case was fairly arguable and that in *Wessels* 1933 AD 395 STARTFORD ACJ sad hat
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> > 'if the appeal involves a question of law on which the guilt of the accused depends, leave will be granted if that question is an arguable one.'
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> In both cases the judgment was *ex tempore*, but, in any event, those cases can, in view of the decision in *R* v *Nxumalo* 1939 AD 580, no longer be regarded as laying down the true test. In *R* v *Nafte* 1929 AD 333 at p 338, CURLEWS JA said:
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> > 'Whether a point is unarguable or not is somewhat vague and is not very appropriate.'
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> The same applies to the word 'arguable' and the phrase 'fairly arguable'. The word 'arguable' is misleading unless it is made clear that it is used 'in the sense that there is substance in the argument advanced on behalf of the applicant'-(per TINDALL AJP in *Beatly's Trutee* v *Pandor & Co 1935 TPD 365 at p 366*), for here are very few cases which are not arguable in the wide meaning of the word."

The test for reasonable prospects of success is an objective and dispassionate decision, based on the facts and the law on which the court of appeal could reasonably arrive at a

conclusion different from that of the trial court. The applicant must convince the court that there are sound and rational grounds for concluding that there are reasonable prospects of success on appeal. Rationality requires that those prospects are not remote but the appeal must have a realistic chance of succeeding. A mere 'possibility of success' or that 'the case is arguable' or that the 'case cannot be categorised as hopeless' is not enough.

See *Criminal Procedure Handbook, JUTA* Thirteenth Edition, Joubert. 509.
See also *Mabena* 2007 (1) SACR 482 (SCA) at [22];
Khoasasa 2003 (1) *SA 123 (SCA);*
Smith 2012 (1) SACR 567 (SC) at 7;
Matshona 2013 (2) SACR 126 (SCA

In my view, a mere 'possibility of success' or that 'the case is arguable' or that the 'case cannot be categorised as hopeless' or that 'the appeal is not doomed to fail' are notions that distort the test to be applied in an application for leave to appeal and permit fanciful arguments. They leave out one critical element of the test which is 'reasonableness'. It is trite that the standard of proof required in criminal cases is proof beyond 'reasonable' doubt and not beyond the shadow of doubt. Therefore, the prospects of success must be 'reasonable 'and not fanciful. In my view the intended appeal should be *bona fide.*

Prospects of success of the intended appeal.

I will deal with the grounds of appeal against conviction paraphrased below in their order:

a) *The trial court erred in coming to the conclusion that the applicant intended to favour Hardspec Investments (Pvt)I Ltd in circumstances where the applicant was not known to Hardspec Investments and its employee at all*

It was not part of the State case that the applicant was known to Hardspec Investments or its representatives. The State did not have to prove that in order to succeed. The issue, therefore, did not arise with respect to the applicant.

b) *The court erred in convicting the appellant on circumstantial evidence the applicant omitted to check compliance with the law in order to deceive councillors was not the only reasonable inference to be drawn.*

The applicant had specific roles to play during the sale which imposed on him defined duties and responsibilities by virtue of being the legal advisor of council. He attended the attended meetings held by the relevant committee of council and the full council in his capacity as the legal advisor of council. It was therefore his obvious role to advise council that the sale could not proceed without either a competitive bidding process to select the purchaser and establish the price since the 2005 resolution had not been rescinded. He admitted that his omissions were wilful as opposed to inadvertent. Even if one accepts, for a moment, that it was not his responsibility to do the things necessary to comply with the law, such as to placing the advertisements, calling for bids, placing the advertisement on the notice board for inspection for 21 days, writing to the Minister and giving him copies of the advertisements, setting in motion the process in terms of s 89 of the Urban Councils Act to rescind the 2005 resolution and the other things, it cannot be denied that, as a legal advisor to council, he had the duty to act to alert the council of the numerous illegalities and prevent them. Instead, he wrote two memoranda pursuant to his role as the legal advisor directing the Finance Director to proceed with the sale. He also submitted the agreement to the Mayor and the Town clerk for signing. It was common cause that the applicant would check compliance on the basis of a written checklist. He therefore could not reasonably possibly overlook any aspect. By submitting the agreement for signature with all boxes ticked he wilfully misled the mayor and the Town Clerk.

c) *The trial court erred by disregarding the appellant's defence that the stand 402 Vainona, Mt Pleasant was sold in conformity with the relevant standard operating procedures as well as s 89 of the Urban Council's Act. In so doing so it ignored exculpatory evidence.*

It is not correct that we disregarded the Standard Operating Procedure Manual (SOP). We discussed it at length in the judgment. The document the accused person relied on described itself as a draft. It had not been deliberated on by council. It was not signed. In fact, it never

came up for discussion during the council meetings that deliberated on the sale in question. It is also not correct that the 2005 council resolution which required advertising for bids was rescinded in terms of s 89 of the Urban Councils Act. Both the applicant and the Finance Director conceded under cross-examination by the State that the 2005 resolution had not been rescinded and thus remained extant. It was merely avoided. They then started passing blame to each other. On one hand, the Finance Director said it was a legal issue which fell within the purview of the applicant's job description as the legal advisor of council. On the other hand, the applicant said it could not possibly be his responsibility to have the resolution rescinded because the Finance Director was responsible for sales and compliance issues. The applicant and the Finance Director were represented by the same counsel who was hamstrung ad could not cross-examine either of them. The situation damaged their credibility. We discussed in detail how resolutions are rescinded in terms of s 89 and the quorum requirement before concluding that no such process had been commenced. This issue, too, is covered extensively in the judgment. The council sold the stand with the applicant's involvement. He headhunted the purchaser and agreed terms with the purchaser before even presenting the proposal to council. He recommended the sale but did not disclose that to the councillors that he had already submitted the offer to the purchaser with an invitation to pay the purchase price. The applicant should not have offered the property to Hardspec Investments before notifying the citizenry of the intention to sell, the purpose, proposed land use and proposed price, inviting objections, notifying the minister, placing a notice on the notice board for 221 days, among other requirements. He did not give reasons for his decision to exclude other interested persons. Actually he shut out other interested persons who include Mt Pleasant Sports Club.

d) *The trial court lost its path by failing to consider that the decision to sell stand 402 Vainona was the collective decision of the Harare City Council and the applicant's participation was earnest and in furtherance of Council's objectives of dealing with a dire financial crisis obtaining at the time.*

The necessary funds could still be raised after following the correct procedure. If anything a competitive bidding process was likely to raise more money. In any event, such explanation does not constitute a lawful defence in terms of the defences recognised in the

Criminal Law Code. The applicant had the duty as a public officer to make sure that the sale complied with the law. He had the duty as a public officer to be honest, transparent, fair, impartial and comply with the constitution including giving equal opportunity to all. He had the duty, as the legal advisor to ensure that the sale was transparent through competitive bidding. Hardspsec Investments did not have to compete with any other person. The applicant made the decision to authorise the sale in the face of glaring illegalities. His conduct favoured Hardspec Investments. It was not the applicant's position that he inadvertently omitted to give legal advice. He said he abstained. He therefore failed to rebut the presumption in s 174 (2) the trial court erred in failing to relate to the uncontroverted evidence of Stanley Chimbetete and Emmanuel Mutambirwa.

e) *The trial court erred in differentiating the appellant's intention and participation in the sale of stand 402 Vainona Mt pleasant from that of accused 1 and 3 at the trial in circumstances where the appellant, like his co accused persons, also relied on the probity of documents prepared by the other persons in his department and from the Finance department.*

The applicant had specific roles to play. He was a gate keeper. The applicant prepared the memorandum dated 10th September 2019 directing the Finance Director to proceed with the sale which was in breach of the 2005 council resolution. He wrote the memorandum dated 14 October, 2019 directing the Finance Director to conclude the sale which was still in breach of the 2015 resolution and the many mandatory provisions the Urban Councils Act. He wrote the memorandum submitting the agreement for signing by the mayor and Town clerk purporting that he had ticked all the boxes on his checklist. It is therefore not correct that his liability was premised on documents prepared by the other persons in his department and from the Finance department. It is true that the sale was approved by Council. It was not the State case that the applicant handled this sale single handedly. As head of department it is conceivable that the applicant could delegate certain work to his subordinate. We accepted that he could have asked the witness to write the memorandum for him. He may have also asked the defence witness to check for objections. However, it is common cause that all the paperwork consisting of the memoranda and the attachments was placed before him for verification and signature. It is improbable that he would have signed the memorandum without verifying its contents against

the attachments. There is no reason why he would not have noticed that the attachments referred to in the memorandum were missing.

f) The trial court erred by drawing the inference that that the appellant connived with the second accused to commit the offence in circumstances where no evidence was led by the State to prove such connivance.

The State case particularised the respective specific functions performed by the applicant and his co-accused persons in terms of the positions they occupied in Council. They both, however, had the duty to be sincere in discharging their respective public functions. In this case, the applicant created paper trail to give a semblance of compliance which covered up for the things that had not been done. The covering up means the non-compliance was deliberate. The applicant's role was to convene council meetings and attend as the legal advisor. Even after the council had resolved that the stand should be sold, the sale could only proceed with his permission. He could have raised the red flag at this stage. Instead of doing that a he addressed a memorandum, which he signed, dated 10 September 2019 directing the acting Finance Director to implement the sale of the stand and to advise him of the progress the sale He therefore unlocked the performance of the agreement. He addressed another memorandum dated 14 October, 2019 to the Finance Director authorising him to conclude the sale which was still in breach of the 2015 resolution (for want of competitive bidding) and also in breach the many mandatory provisions the Urban Councils Act. He wrote the memorandum submitting the agreement for signing by the mayor and Town clerk purporting that he had ticked all the boxes on his checklist. The Finance Director had his own roles which were to write the offers, determine the price, prepare the agreement ad to prepare the Town Clerk's report. The different roles acted as checks and balances and the sale would not have gone through without the two colluding.

g) The court further erred by arrogating the duty to notify the Minister of alienation of land in terms of s 152 of the Urban Councils Act to the appellant in circumstances where such duty lay with the Finance department.

Even assuming it was his responsibility to write the necessary correspondence, it was his duty to refuse to pass the sale transaction until the necessary compliance. We mentioned this in the judgment.

h) *The trial court erred in any event in convicting the appellant on a set of facts different from those on which the appellant was indicted, in so doing he court did not properly apply its mind to the issues on which its determination was required*

This is not correct. The basis for the conviction were the facts that were common cause as summarised above. The irregularities afflicting the sale were too numerous for the applicant to overlook.

As against sentence the applicant submitted that

a) The trial court erred in imposing a disturbingly severe sentence of imprisonment for eight years. In so doing the court did not consider the compelling mitigating factors.
b) The court erred by imposing a harsh sentence which induces a sense of shock which sentence is not in line with modern trends for similar matters.

As regards the sentenced imposed, other than boldly asserting that the sentence is so severe as to induce of sense of shock, the applicant did not cite any cases to support the assertion. He did not allege or show any irregularity, midsection in the exercise of discretion. See S v *Sidat* 1997 (1) ZLR 487.He does not deny that this case should be, to date, one of, if not, the worst case of abuse of duty as a public officer. We gave detailed reasons for sentence which the applicant did not attack specifically. In sentencing the applicant, we expressly took into account all the submissions on behalf of the State and the applicant in their detailed written submissions on sentence which we found very informative and useful in assessing sentence.

It is my finding that the applicant does not have reasonable prospects of success on appeal.

In the result I order as follows: -

The application is dismissed.

Tabana and Marwa, applicant's legal practitioners
National Prosecuting Authority, for the State