STANLEY NDEMERA
versus
THE STATE

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

Application for leave to appeal against conviction and sentence

T Mapuranga for applicant
W Mabhaudi, L Masuku & F C Muronda, for the State

KWENDA J:

Introduction

It appears to me that an accused person who, during a criminal trial, takes the court into his confidence, and confesses to an act or omission constituting an essential element of a crime, may not genuinely appeal against the trial court's finding that he committed such act or that he made such an omission unless the appeal takes the form of retracting the admission on any valid legal ground. The admission means that there will be no dispute on the issue between the State and the accused to be resolved by the court. See *S* v *Kwainona* 1993 (2), ZLR 354. The principle should apply even if the confession came in the defence case where the accused initially denied the charge.

In this case, the applicant was the acting City Treasurer of the City of Harare. His department was the custodian of State land and responsible for most of the administrative work in the alienation of Council land. As he was testifying on his own behalf in the defence, he confessed, without any prompting, that during the sale of council property known as stand 4402 Vainona, Harare, he intentionally executed his role in a manner calculated to show favour to a company known as Hardspec Investments by handpicking it as the purchaser, fast-tracking the sale and giving it very easy terms and disfavour to Mt Pleasant Sports club, a sitting tenant, by

ostensibly purporting to give it the pre-emptive right of first refusal which, by his own admission again, was unrealistic and insincere.

I presided at the trial, with two assessors, at the trial of the applicant for allegd 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), Hosiah Abraham Chisango (third accused) and Charles Usaiwevu Kandemiri (fourth accused). He was the second accused person. All the accused persons pleaded not guilty and the matter went to trial. We convicted the applicant and Charles Kandemiri on 24 May 2023 and acquitted the other two. We sentenced the applicant and Charles Kandemiri on 7 June 2023, each, to imprisonment for 8 years of which 2 years are suspended 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, placed before me because I was the presiding judge. 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.

The background

The allegations against the applicants 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 the law for the purpose of showing favour to Hardspec Investments or disfavour to the 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 third and fourth accused persons were Town Clerk and Acting Chamber Secretary 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 was the Acting Finance Director and as such, a public officer, too.

In denying the charge all the accused persons said that their actions were above board and consistent with their expected roles defined by their respective job descriptions in the Urban Councils Act and denied making omissions. The applicant's defence was that he followed the correct procedure, to the extent of his involvement during the sale. He did not know Hardspec Investments prior to the sale. It was proper and lawful for Hardspec Investments to invite council officials to see the piece of land it was interested in buying and thereafter submit an offer to buy the land. Council had already decided to sell the stand in the year 2018, that is prior to the purchase of the stand by Hardspec Investments. Council's decision to sell the stand was arrived at because it had become underutilised and derelict. Mt Pleasant Sports Club was aware of the position taken by council. He was not responsible for the sales of council land since that fell under the purview of, Emmanuel Mutambirwa, the Valuations and Estate Manager. He agreed that he signed the offer letters, reports and other documents in connection with the impugned sale of Stand Number 412 Vainona to Hardspec Investments but did so as a matter of routine and in terms of council policy which made him the signatory in his capacity Finance Director. He denied conniving or acting in common purpose with his co-accused in the alleged criminal enterprise. His duties did not coincide with those of his co-accused persons and he could not possibly connive with them. He later indicated his intention to produce City of Harare documents and the minutes of council and committees; and in addition to that, call the Principal Valuations Officer, the current acting chamber secretary holding fort following the suspension of the fourth accused person, the acting Revenue Collection Manager and the senior accountant; as defence witnesses. He prayed for his acquittal.

The State called eight witnesses who gave oral evidence and produced documentary evidence. At the end of the trial the role played by the applicant during the sale was common cause. This was because the State case was premised on uncontested documentary evidence which revealed the role played by the applicant. The majority of the state witnesses did no more

than identify, produce and explain the documentary evidence. During cross-examination by the defence, the state witnesses were invited to and did express their views on the correct verdict. In preparing judgment, we disregarded the views expressed because, at law, opinion evidence is largely irrelevant unless it falls into any of the exceptions to the rule of evidence which excludes opinion evidence. The proper verdict is the prerogative of the trial court.   In any event their views were inconsistent with the weight of evidence.

The facts that were common cause were the following. On 4 September 2019 the applicant was accompanied by the Town Clerk and the City's Valuations and Estates, one Emmanuel Mutambirwa to view the stand 402 Vainona, Harare for the purpose of selling it. As they were viewing the stand, certain two ladies who had been to the City of Harare Head office at the Town House for the purpose of negotiating the purchase of Stand Number 402 Vainona on behalf of Hardspec Investments (Pvt) Ltd, a company incorporated in terms of the law of Zimbabwe, were within sight. Emmanuel Mutambirwa greeted them. Subsequent to the visit, the applicant set in motion the process of selling the stand to Hardspec Investments. By the end of the day, on 4 September 2019, the applicant had written two offer letters. One was addressed to the sitting tenant, Mount Pleasant Sports Club, offering it, what he described in the letter as, a pre-emptive right of first refusal to buy the stand at a price of USD 2.3 million. The offer was hand delivered to the club on 5 September 2019 and was due to expire after 24 hours on 6 September, 2019. Concurrent with the pre-emptive right offered to Mt Pleasant Sports Club, the applicant 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 forthwith into the City Council's bank account. He did not give a similar option to Mt Pleasant Sports club. In the letter, he 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. He 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 applicant on behalf of the Town Clerk. The report was tabled before the committee at its meeting held in the morning on the 5th of September, 2019. The meeting resolved to recommend the sale to the full council. The full council later met on the same day for a scheduled meeting and, among other business, adopted a resolution approving the sale. The applicant attended both meetings but did not disclose that he had already sold the stand, in the sense that he had already offered it to Hardspec Investments on agreed terms.

After the council meetings, the Chamber Secretary, wrote a memorandum to the applicant advising him to proceed with the sale. Kandemiri wrote another memorandum dated 14 October, 2019 advising the applicant to finalise the sale and misrepresenting that two advertisements had been published in the Newsday Newspaper on 10 and 17 September 2019 as required by law. The misrepresentation was glaring because attached to the memorandum was only one notice published in the Newsday Newspaper on 12 September 2019. The applicant prepared a written agreement of sale despite being aware that the peremptory provisions of s 152 of the Urban Councils Act [*Chapter 29:15*] for a valid sale had not been complied with. He was aware of the mandatory requirements because he had stated in his recommendation to council that the sale would be subject to the fulfilment of the legal requirements. These are 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. The applicant offered the stand to Hardspec Investments, agreed with it on the price and terms of payment before even initiating any process of complying with all that. He finalised the sale well

knowing that all the said legal requirements had not been met. He sold the stand directly by private treaty to Hardspec Investments contrary to a standing resolution of City Council of Harare dated 26 September, 2005 which made it mandatory to advertise all stands on sale inviting bids. He made sure Hardspec Investments did not have to compete with anyone for the stand. The sale favoured Hardspec Investments and disfavoured Mt Pleasant Sports Club as a sitting tenant and as a potential purchaser. Pleasant Sports Club was prejudiced in that the applicant committed the council to an agreement of sale with Hardspec Investments on the 4th September, 2019; before the pre-emptive offer to Mt Pleasant Sports Club had expired on the 6th September 2019. The applicant therefore deliberately deprived Mt Pleasant Sports Club a realistic opportunity to exercise its pre-emptive right to buy the stand and the opportunity to object to the sale since he did not invite any objections. The purported pre-emptive right was a ruse and the applicant conceded that in the defence case. He denied Mt Pleasant Sports Club and other interested persons the opportunity to bid for the stand. He entertained the representatives of Hardspec Investments when the company had not formally applied to buy the stand. He also continued to interact with Hardspec Investments for the purpose of ensuring that it clinched the sale ahead of any other person. Hardspec Investments completed paying for the stand on 7 February 2020 and signed the agreement on 5 March, 2020. The agreement was signed on behalf of council on 27 March, 2020. The signing of the agreements in 2020 was despite the effective date being backdated in the written agreement to 23 September 2019.

The following documentary evidence was not disputed at the applicant's trial.

Exhibit 1 was, *ex facie*, the written offer dated 4 September 2019 penned by Daniel Usingararwe on behalf of the applicant and signed by him addressed to Mt Pleasant Sports Club offering it 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. **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. **Exhibit 3** was, *ex facie*, written offer dated 4 September 2019 co-penned by Daniel Usingararwe and Peter Dube on behalf of the applicant addressed to Hardspec Investments offering the company Stand Number 402 Vainona at a price denominated in local currency, the

sum of RTGS $26 923 340 and giving it the option to pay the purchase price into the council's bank account provided, if it accepted the offer, the letter also notified Hardspec Investments that the sale was subject to council formalities and compliance with s 152 of the Urban Councils Act. **Exhibit 4** was, *ex facie*, the Town Clerk's report to the Finance and Development Committee prepared Peter Dube and Daniel Usingararwe on behalf of the applicant. It was signed by the applicant and the Town Clerk. The Town clerk's report was, ostensibly, a recommendation to the Finance and Development Committee that Stand Number 402 Vainona be sold to Hardspec Investments for RTGS$ 26 923 340. The report acknowledged the resolution of Land Alienation Sub-Committee as adopted by full council on 29 September 2005 (item 16) which required council to advertise all stands to be sold invitingbids, that stand 402 Vainona Harare was being leased by Mt Pleasant Sports Club, that 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. It recommended that Stand Number 402 Vainona be sold to Hardspec Investments at a purchase price of RTGS$26 923 340, that the purchase price shall be paid before the signing of the agreement, that the sale was be subject to s 152 of the Urban Councils Act [*Chapter 29:15*] and that City's conditions of such sale would apply. 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 him advising the applicant 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. It is common cause that the property had not been advertised as purported and there no proof of advertisements dated 10 and 17 September 2019 attached. **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 presented by the applicant recommending the sale of Stand Number 402 Vainona to Hardspec Investments at a price of USD 9 per metre. 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 prepared and was signed by Hardspec Investments on 3 March, 2020 and by the Mayor and Town Clerk, on behalf of the City of Harare on 27 March, 2020. It was back dated to 23 September 2019. **Exhibit 8** was, *ex facie,* a memorandum authored by the Chamber Secretary to the applicant dated 10 September 2019 directing him to take action 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. The only dispute was that in his defence outline, the applicant denied that he did anything for the purpose of showing favour to Hardspec Investments. As he was giving evidence in chief, all that changed. He suddenly departed from the defence outline and disclosed the things he did for the purpose of favouring Hardspec Investments and disfavouring Mt Pleasant Sports Club. He said the initial assessed price was in United States dollars which he deliberately converted to the local currency. He said de did the conversion well knowing that the local currency was volatile due to hyperinflation. He said he had done that to benefit Hardspsec Investments because the price stated in local currency would not increase. He admitted his conduct in converting the and stating the price in the local currency was beneficial to Hardspec Investments and prejudicial to the City Council. He admitted that when he sold the stand directly to Hardspec Investments without calling for bids he had avoided the 2005 resolution of council which required a competitive bidding process. While insisting that Hardspec Investments submitted a written application to buy Stand Number 402 Vainona, he conceded that there was no record of the application. He then, suddenly, confirmed that he had personally interacted with Hardspec through its representatives during the negotiations of the sale for the purpose of assisting Hardspec Investments because he preferred to Mt Pleasant Golf Club. He believed that Mt Pleasant Golf Club did not have the financial resources and its representatives who had approached him did not have the mandate to negotiate the sale. He revealed that the pre-emptive right of first refusal which he gave Mt Pleasant Sports Club was insincere. He admitted that it was just a ploy to elicit a response from the club (hopefully, rejecting the offer). The anticipated response would be kept on record so that in future no one would accuse him of selling the stand

without giving the tenant an opportunity. He deliberately gave Hardspec Investments a serious offer and deliberately advised it to pay the purchase price ahead of council processes just to give it the pole position to buy the stand. He was in constant communication with someone who represented Hardspec Investments, whose name he did not mention, keeping him or her updated on developments in council processes in connection with the sale and reassuring him or her. He said he denominated the price offered to Hardspec Investments in local currency because that was the law in terms of SI 142/19 dated 24 June 2019 which outlawed quoting price in foreign currency He therefore converted the price which had been determined as USD2,6 million to local currency at the prevailing rate on 4 September 2019. He did not do the same with the offer made to Mt Pleasant Sports Club because he did not have any intention to enter into any serious negotiations with the club. The following responses were elicited from him during cross examination, re-examination and questions by the court. The decision to sell stand 402 was made in the year 2018. This was before the SOP, which he relied on, came into existence. There was no reason for him not to advertise the stand for bids in 2018. He conceded that he had not challenged Charles Dube, the state witness who said he (the applicant) brought the two ladies representing Hardspec Investments. He said there was no need to challenge Peter Dube' evidence in that regard because there would be nothing wrong with him introducing the two ladies to Peter Dube. He said land seekers would come to his office without application letters. He would refer such people to Emmanuel Mutambirwa who would assist them if the land was available. It was at this stage that the land seeker would be advised to write an application letter. He said in this case it was Emmanuel Mutambirwa who had interacted with the buyers verbally. He only came on board after the buyer had been found. He said he knew of the source of the funds that were used to pay for the property. He said the source was one Rwodzi needed who was desperate to invest his local currency (RTGS) before it lost value in the hyperinflationary environment obtaining at the time. He conceded that when he concluded the sale the mandatory legal requirements for a valid sale had not been complied with and that is still the case. He admitted that his omission was despite stating in the offer letter to Hardspec Investments that the sale was subject to s 152 of the Urban Councils Act and the calling of bids.

He conceded the following regarding the Standard Operating Procedure (SOP). It identified itself prominently at the top as a 'working document' created on 23 April 2017 and it

was expected to be effective from September 2019. It had spaces provided for the name of the person recommending it, date of publication, the date of recommendation, signatures and date thereof. All the spaces were blank. It had not been by the council.

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. 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 aged 65 years of age and thus a senior citizen who has lived without committing crime through his career. He was due to retire from the employment of the City of Harare on 30 June 2023 after thirty-five years of service to the City of Harare in 1988. He started as a Chief Clerical Officer and he rose through the ranks to the position of Acting Financial Director. This conviction may cost him his job and the retirement benefits which, we are advised, include an industrial stand and a residential stand and an opportunity to purchase the motor vehicle he is using at net book value. He holds an MBA (UZ) CIS, CPA and is a member of the Public Accountants and Auditors Board (PAAB). The qualification s likely to come to nought because his profession requires integrity. He will

naturally lose respect among his professional person, the society and workmates. He is married and the sole bread winner because his wife is not employed. His children are grown up but one is still dependant on him because he is studying at Manitoba University in Canada. The accused attached proof of the enrolment of the child at the university and the responsibility is conceded by the state. The second accused person looks after three of his late brothers' children. We accept the submission that the second accused person provides all the financial support in respect of his family and pays for all their educational and medical expenses of those that are dependent on him. Apart from the educational and medical expenses, the accused also contributes to all other monthly expenses for the child in Canada which average approximately USD 500. He is therefore the primary financial caregiver of the family and his incarceration will drastically affect the family. He is God fearing and a member of the Methodist Church. He has therefore fallen from grace in society, at work and at church as a result of this conviction. He suffers from backache associated with old age. Imprisonment will deprive his unemployed wife and his family of a primary caregiver.

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. We accepted the following submissions in mitigation. The applicant was a first offender and that we were not supposed over-emphasize the public interest and general deterrence. 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. It is an element of justice itself. See *S* v *V* 1972 (3) SA 611 (A) @ 614. We were therefore required to temper justice with mercy. for the criminal or permissive tolerance. 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.

We also took into account the following submissions by the State. Indeed, we were required to temper justice with mercy. However, there was need to impose a sentence commensurate with the seriousness of the crime, for failure to do so would 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. 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'. As I will demonstrate before these are not new and alternative tests to be used 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

> "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.*

Whether the applicant’s appeal has reasonable prospects of success on appeal.

I have paraphrased the applicant’s grounds of appeal against conviction below. He avers that the trial court erred and therefore misdirected itself: -

a) in disregarding the Standard Operating Procedure Manual (SOP) which was effective September 2019 and provision of which were relied upon when disposing of the stand 402 Vainona Township on the 5th of September 2019.
b) in convicting the applicant on the basis of having sold the stand in circumstances where there was irrefutable exculpatory evidence that the stand was sold by the full council of the City of Harare pursuant to a resolution of council and the applicant did not vote.
c) in convicting the applicant on the basis that he sold the stand in breach of the resolution of the land Alienation Sub-Committee which required council to advertise for bids when the resolution in question had been rescinded in terms of s 89 of the Urban Councils Act [*Chapter 29:15*].
d) in ascribing criminal responsibility to the applicant’s acts that showed lack of intention or at worst inefficiency or incompetency
e) in rejecting the evidence of the witnesses who exonerated the applicant
f) in failing to find that that the applicant’s actions were not motivated by the to favour or disfavour any party but by the desire to quickly raise money on behalf of the employer to pay salaries that were overdue
g) in concluding that there was connivance between the applicant and Charles Kandemiri when there was no evidence of such connivance

h) in arrogating purported collective criminal responsibility of council onto the applicant in circumstances were the councillors who resolved to sell the stand were supposed to be personally answerable for their offending conduct.

As against sentence the applicant submitted that we erred in

a) not giving any credit to the applicant's age and personal circumstances which called for a sentence which would not see in last his last years in prison
b) sentencing the appellant to a n unduly harsh sentence which induce a sense of shock
c) failing to give credit to the fact that the applicant was a first offender.

I am not satisfied that the applicant's intended appeal has reasonable prospects of success. The court did not disregard his defence around the Standard Operating Procedure Manual (SOP). We discussed the SOP, at length in the judgment. It was in draft form and had not been approved by council. It was not even signed. It could not have been used during the sale It was not part of his recommendation to council. In fact, it never came up for discussion during the council meetings which deliberated on the sale.

The applicant avers that the trial court erred in convicting the applicant on the basis of having sold the stand in circumstances where there was irrefutable exculpatory evidence that the stand was sold by the full council of the City of Harare pursuant to a resolution of council and the applicant did not vote. The applicant had, by virtue of his appointment as acting Director of Finance, defined roles to play during the sale of stand 402. He was charged for his own criminal conduct. No one, in the City of Harare, including the councillors, could sell the stand single headedly.

With regards to the resolution of the Land Alienation Committee of Council adopted in 2005, the following was common cause. The resolution mandated the council to advertise all land for sale and to invite bids. It is common cause that when the applicant selected Hardspec Investments as the purchaser and agreed terms with it, the procedure of inviting bids through advertisements had not been followed. No bids were invited. There was no process of rescinding the said resolution by the Land Alienation Committee of council adopted in 2005 in terms of the procedure set out in terms of s 89 of the Urban Councils Act. There was no formal resolution of council rescinding it. The resolution was simply disregarded on the recommendation of the applicant. Both the applicant and Charles Kandemiri conceded under cross-examination by the

State that the 2005 resolution had not been rescinded. It was merely avoided. The applicant and Charles Usaiwevu Kandemiri accepted that the resolution and remained extant but shifted blame to each other. On one hand, the applicant said the resolution and its rescission were legal issues which fell within the purview of Charles Usaiwevu Kandemiri, as the legal advisor of council. On the other hand, Charles Usaiwevu Kandemiri said it could not possibly be his responsibility to have the resolution rescinded because the applicant was the person responsible for sales of land and compliance issues. The applicant and Charles Usaiwevu Kandemiri were represented by the same counsel who was hamstrung to cross-examine either of them, whereupon the dispute between the two accused persons remained unresolved thereby damaging their credibility. However, to us it was not important to resolve their disagreement. The fact remained that the resolution was extant and the applicant selected the purchaser in the absence of a bidding process. We discussed the procedure of rescinding resolutions in terms of s 89 extensively in the judgment. He headhunted the purchaser and agreed terms with the purchaser before even presenting the proposal to council.

The applicant avers that the trial court erred in ascribing criminal responsibility to the applicant's acts which showed lack of intention or at worst inefficiency or incompetency. To the contrary, the following reveal that the applicant's conduct was intentional. He confessed that his conduct was deliberate and calculated to benefit Hardspec Investments He confessed to acts calculated to disadvantage Mt Pleasant Sport club. He never mentioned the Standard Operating Procedure to council because he knew it was not in place. His acts and omissions are stated in detail under the facts that were common cause at the trial and were all purposeful.

It is correct that we rejected the opinions of the various witness on the proper verdict to be returned is covered extensively in the judgment. It all boiled down to the fact that their opinions were not only inconsistent with the common cause facts but also excluded by the rule of evidence against opinion evidence.

The applicant's argument that he is innocent because his actions were not motivated by the desire to favour or disfavour any party but by the desire to quickly raise money on behalf of the employer to pay salaries did not exonerate the applicant because that is inconsistent with his confession. More money was to be raised through a competitive, transparent, fair, honest and impartial system which accorded with the constitutional requirement for accountability and

competition in procurement. The applicant had initially denied any personal knowledge and interaction with Hardspec Investments or its representatives because he knew that his discreet interaction with a Hardspec Investments offended against the principles of fairness and transparency. He suddenly confessed such improper interaction in the defence case and that was motivated by his personal desire to favour Hardspec Investments. He had no reason to conclude the sale in circumstances where the peremptory provisions of s 152 of the Urban Councils Act had not been fulfilled, even accepting that it was not his responsibility to take the positive steps to comply. He would have held the sale in abeyance until the compliance issues had been dealt with.

In argument the appellant's counsel relied heavily on the case of the Prosecutor General v The *State* v *Muserere & Ors* SC147/21, *Musimbe* v *The State* SC 104/22 and *S* v *Choguugudza 1*996 (1) ZLR 28. In *Muserere and Ors* SC 147/21 (*Muserere* case) the relevant pronouncement relied upon is at p (s) 15 -16 of the cyclostyled judgement: -

> "The second basis for the acquittal was that while the evidence showed that the tender procedures had not been followed in making recommendations to the full council, the respondents had given an acceptable and reasonable explanation for the departure from the laid down procedure.
>
> The explanation given was that the outbreak of cholera had created an emergency wherein the selective tender process which is shorter had to be resorted to as opposed to the normal procedure. In addition, when the water department was weaned from Zinwa, it was granted autonomy by the government to operate outside the laid down normal procedures.
>
> The court *a quo* accepted that explanation and gave valid reasons for doing so. More importantly, the court a quo concluded that the explanation given was not only reasonable and acceptable, it had the effect of vitiating the *mens rea* element to commit a crime.
>
> On appeal, that conclusion by the court has been attacked on the basis that no emergency or autonomy can be an excuse for a public official to act outside the law. However, s 44 (6) of the High Court requires the appeal by the appellant to be made where the trial court's view of the facts cannot reasonably be entertained.
>
> I agree with Mr *Mapuranga* that the provision requires the appellant to allege and show a gross misdirection on the part of the trial court's view of the facts before the appeal can be countenanced. In other words, in order to trigger interference by the appellate court, the appellant must demonstrate that the factual findings of the court *a quo* were so grossly unreasonable that no court faced with the same set of facts and applying its mind to them, would entertain such a view.
>
> The appellant has failed to meet that threshold. To the contrary, the reasoning of the court *a quo* has not been shown to be one which this Court can interfere with. The judgment *a quo* cannot be

faulted at all. The guilt of the respondents was not proved beyond reasonable doubt. The appeal is without merit."

Based on that judgment, Mr *Mapuranga*, for the applicant, argued that while it is incontestable that the applicant played his role in a manner which favoured one party and disfavoured another or others, the applicant should have been acquitted because his dominant motivation was to raise funds on behalf of his employer quickly because of the urgent need to pay salaries. He argued that the argument that corruption cannot be justified on any ground was rejected by the supreme court. He said somehow corruption is excusable if it is justifiable. He said that was the *ratio* of the *Muserere* case, (*supra)*. I think Mr *Mapuranga* either misunderstood the judgment or read it out of context. I do not understand the M*userere* case, supra, to be saying that public officers have the discretion to be corrupt. I also do not understand the M*userere* case, supra, to be altering our codified principles of criminal law on liability for criminal conduct as stated in s 9 of the Criminal Law Codification and Reform Act *[Chapter 9 :23]* (Criminal law Code). In terms of s 9 of the Criminal Law Code a person shall only be acquitted of a crime if he or she engaged in the conduct constituting the crime lacking any of the requisite blameworthy states of mind referred to in sections *thirteen* to *sixteen*, as the Criminal Law Code or any other enactment creating the crime may require or if his or her liability is based upon unlawful conduct, that is, upon conduct for which there is no lawful excuse affording that person a complete defence to the criminal charge, whether in terms of Chapter XIV or otherwise.

In the *Muserere* case, the accused persons lacked the requisite state of mind which consisted of intention and a corrupt motive. In addition to that, the *Muserere* case, supra, the is distinguishable from his case on the facts and law that applied. In the *Muserere* case, supra, the accused persons had a choice between two competitive bidding processes. The accused persons were dealing with a choral outbreak. A local authority is not only authorised but required to take extraordinary measures to deal with an emergency. See sections 55 and 56 of the Public Health Act *[Chapter 15:07]*. Salary arrears cannot be an emergency because the situation does arise suddenly. The applicant said the council decided to well the stand in the year 2018 after realising that it had become derelict. There was no reason why bids were not invited then. In addition to that, in the *Muserere* case, supra, there was no case of misrepresentation of facts to the council and its committees. In this case council was not even aware that offer and acceptance had already

taken place when the applicant purported to make recommendations through the Town clerk's report. Council also approved the sale subject to fulfilment of the peremptory requirements of the Urban Councils Act to place all information regarding the intended sale, the reasons for the sale, the intended purchaser and intended price within the public domain through public notices numbering not less than four and place all such information before the minister. In this case, the applicant purported to be sincere by creating paper trail to give a semblance of compliance, when in reality he was not being honest.

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 the, 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 that the applicant has no reasonable prospects of success on appeal. In addition to that his intended appeal is not *bona fide* because he does not intend to retract, on any stated lawful basis, any of the admissions he made at the trial leading to his conviction.

In the result I order as follows: -

The application is dismissed.

Rubaya and Chatambudza, applicant's legal practitioners
National Prosecuting Authority, for the State