

PETER CHIKUMBA
and
GRACE NYARADZAYI PFUMBIDZAI
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO & KWENDA JJ
HARARE, 30 January 2024

Criminal Appeal

T Mpofu, G R J Sithole and T Makamure, for the 1st appellant
T Kujinga, for the 2nd appellant
T Kangai, for the respondent

KWENDA J: The appellants were charged, tried and convicted in the Magistrates court for Criminal Abuse of Duty as defined in s 174(1)(a) of the Criminal law (Codification and Reform) Act [*Chapter 9:23*] (hereinafter called the Criminal Law Code) committed at a time when they were both employees of the Air Zimbabwe Holdings (Pvt) Ltd, a company incorporated in terms of the Companies Act [*Chapter 24:03*] but wholly owned and controlled by the State. The first appellant was the Group Chief Executive and the second appellant was the Company Secretary and Legal Manager and as such, public officers as contemplated in s 174(1)(a) of the Criminal Law Code. It was the State case that the appellants, whilst acting in concert, wrongfully and unlawfully appointed Navistar Insurance Brokers (Pvt) Ltd on 18 March 2009 as the local insurance broker for the Air Zimbabwe Holdings (Pvt) (Ltd) without going to tender as required by law thereby showing favour to Navistar Insurance Brokers (Pvt) Ltd. Air Zimbabwe Holdings (Pvt) (Ltd) insurance cover had ceased on 31 January 2009. The State alleged further, that the appellants' conduct in appointing Navistar Insurance Brokers (Pvt) Ltd as the local insurance broker for the Air Zimbabwe Holdings (Pvt) (Ltd) without going to tender as required by law was inconsistent with or contrary to their duties as public officers and favoured the broking company and they had contravened s 174(1)(a) of the Criminal Law Code. The appellants were charged in the

alternative with having contravened s 30 of the Procurement Act [*Chapter 22:14*] as read with s 5 (4)(a)(2) and s 35 of the Procurement Regulations [S.I. 171/2002] which deals with the appellants' statutory obligation to have gone to tender in the circumstances of this matter. The appellants were convicted in the main charge of criminal abuse of office and acquitted of the alternative charge. They were each sentenced to imprisonment for 10 years with 3 years suspended for five years on conditions of good behaviour during the period of suspension.

The appellants separately appealed against both conviction and sentence. This court combined the appeals for a joint hearing since they emanated from a joint trial. The first appellant raised nineteen grounds of appeal against conviction and five against sentence in his initial notice of appeal which was filed with this court on 21 April 2015. The second appellant raised seven grounds of appeal against conviction and four against sentence in her initial notice of appeal which was filed on 16 April 2015.

On 1 September 2015, roughly five months after the initial notices of appeal were filed, the appellants both filed notices of amendments to their grounds of appeal. The first appellant announced his intention to add four more grounds of appeal against conviction and the second appellant sought to add three more grounds, also against conviction. The proposed additional grounds were identical in all respects.

The matter came before this court for argument on 29 March 2016 whereupon counsel for both appellants moved the court to adopt the amendments. The respondent's counsel objected to the amendments sought. The intended amendments and the State's objection to them are the subject of this court's judgment in case No. HH 231/17.

What is important for this judgment is that in addition to the amendments sought, the appellants sought to raise and argue, for the first time on appeal, as a point of law, that the appellants were not public officers as defined in s 169 of the Criminal Law (Codification and Reform) Act for the purposes of s 174(1)(a) of the Act and were, therefore, not liable to be charged with the crime of criminal abuse of duty as public officers defined in s 174(1)(a) of the Criminal Law Code. The issue had not formed part of their defence at the trial and had not been raised at the time of noting the appeal.

The term 'question of law' relates to the application of a legal principle to an established set of facts in the determination of whether a crime was committed. See Criminal Procedure Handbook, Thirteenth Edition, edited by Joubert at p 514. It is now settled that, a

point of law may be taken for the first time on appeal if its consideration invokes no unfairness to the other party against whom it is directed and the point is covered by the facts pleaded. The principle is explained in much detail in Herbstein & Van Winsen: *The Civil Practice of the High Courts of South Africa*, Vol 2 from p 1246. See also *Ngani v Mbanje, Mbanje v Ngani* 1988(2) SA 649 (ZS) and *Goto v Goto* 2001(2) ZLR 519 (S). In this case, that the appellants were both employees of the Air Zimbabwe Holdings (Pvt) Ltd, a company incorporated in terms of the Companies Act [Chapter 24:03] but wholly owned and controlled by the State was an established fact since it was common cause. The State was not taken by surprise since the facts giving rise to the point of law were part of the State case. The point of law was, therefore, properly taken by the appellants.

The crime of criminal abuse of duty as a public officer is defined in s 174(1)(a) of the Criminal Law Code as follows: -

“174 Criminal abuse of duty as public officer

(1) If a public officer, in the exercise of his or her functions as such, intentionally
(a) does anything that is contrary to or inconsistent with his or her duty as a public officer; or
(b) omits to do anything which it is his or her duty as a public officer to do;
for the purpose of showing favour or disfavour to any person, he or she shall be guilty of criminal abuse of duty as a public officer and liable to a fine not exceeding level thirteen or imprisonment for period not exceeding fifteen years or both.”

The terms “statutory body” and “public officer” are defined in s 169 as follows: -

“public officer” means

- (a) a Vice-President, Minister or Deputy Minister; or
- (b) a Chairperson of a Provincial Council elected in terms of section 272 of the Constitution;
or
- (c) a member of a council, board, committee or other authority which is a statutory body or local authority or which is responsible for administering the affairs or business of a statutory body or local authority; or
- (d) a person holding or acting in a paid office in the service of the State, a statutory body or a local authority; or
- (e) a judicial officer;

“statutory body” means

- (a) any Commission established by the Constitution; or
- (b) any body corporate established directly by or under an Act for special purposes specified in that Act.

At the hearing of this appeal, the State abandoned its opposition to the appeal and filed a concession. The State based the concession on the outcome in the matter of *Muchenje and Another v Guwuriro N.O. and Another* SC 478/23. The issue for determination in that Supreme Court appeal was identical to the point of law taken by the appellants in this case, namely whether the two appellants in that case, Muchenje and another, were by virtue of being employees of a company incorporated in terms of the Companies Act but wholly owned and controlled by the State, public officers liable to be charged with the crime of criminal abuse of office as defined in s174 of the Criminal Law Code as read with s 169 of the Act. The State submitted, as the reason for its concession, that the issue had been determined by the Supreme Court when it ruled in favour of Muchenje and Another and allowed their appeal after finding that they were not public officers as defined in the Criminal Law Code. The State advised this court, in its concession, with the concurrence of appellants' counsel, that the presiding Supreme court judges commented that the current definition of the term 'public officer' could not be extended to include such employees of a company incorporated in terms of the Companies Act despite the fact that the State may be the sole shareholder. The Honourable judges of the Supreme Court commented that the Legislature ought to amend the definition of public officer, if it was so minded, to expressly include such employees. We did not have to hear oral argument in this matter in light of the pronouncements by the Supreme Court. We were satisfied that the concession was proper, whereupon we allowed the appeal and quashed the appellants' conviction. We indicated, however, that our written reasons for accepting the State's concession would follow. These are they.

The Supreme Court disposed of the *Muchenje* matter, supra, by way of a court order and written reasons for judgment are not yet available. Our reasons for allowing this appeal can only be understood against the background of what transpired in the *Muchenje* matter, supra, that is, the opposing arguments presented before us in that case, our disposition of that matter and the outcome of the appeal in the apex court. Below therefore is what transpired in the case of *Muchenje and Others v Muchuchuti & Others* HH 463/23. I prepared the judgment with which my brother concurred. The material facts are on all fours with the facts of this matter and pertinent to the determination of the question of law presently before us.

Muchenje and another had been charged with criminal abuse of duty as public officers as defined in s 174(1) (a) (b) of the Criminal Law Code which they had allegedly committed as employees of Net One (Private) Limited (“Net One”), a company wholly owned and controlled by the State. The State case was that they were public officers as contemplated in s 174(1) of the Criminal Law (Codification and Reform) Act by virtue of their employment by Net One, which, it was common cause, was wholly owned and controlled by the State but incorporated in terms of the Companies Act. They had allegedly acted contrary to or inconsistent with their duty as public officers for the purpose of showing favour to the first applicant and disfavour to Net One when they allegedly colluded to unlawfully award one of them, Lazarus Muchenje, an unauthorised housing benefit allowance culminating in an alleged unauthorised lease agreement in terms of which Muchenje leased a residential property belonging to Net One at a paltry monthly rental of ZWL\$ 1 000, way below the equivalent of USD 2 500 and USD 3 500 which had been recommended by Pam Holding and Kennan Properties respectively. Muchenje and his co accused person had excepted to the charge on the grounds that it was incurably bad in that it alleged that they were public officers as defined in s 169 of the Act for the purposes of s 174(1) of the Criminal Law Code when they were not. The trial court dismissed the exception whereupon the matter came before us for review.

The argument on behalf of *Muchenje* and his co applicant before us was as follows. The accused persons were not public officers because their positions are not covered in the definition of ‘public officer’ in s 169 of the Criminal Law Code. No amount of evidence could change the fact that Net One is a private company under the Companies and Other Business Entities Act [*Chapter 24:31*] and not a public entity under the provisions of s 169 of the Criminal Law Code. The applicants described as preposterous, the attempts by the State to use the definition of ‘public entity’ in s 4 of the Public Finance Management Act [*Chapter 22:19*] (“the Public Finance Management Act”) to support its allegation that Net One is a public entity. They relied on the case of *S v Chikumba* 2015 (2) ZLR 382. I will quote from p 390F-391 H: -

“In the present case, the State has conceded that Air Zimbabwe Holdings is a private company. The concession is well made. One would think that that would be the end of the matter. It was not. The State has argued further that the applicant was properly found guilty because as Group Chief Executive Officer for Air Zimbabwe Holdings, he was *de facto* “a

person holding or acting in a paid office in the service of the State ...” as defined by s 169 of the Criminal Code. As such, he was “*a public officer*” within the meaning of s 174(1)(a) of that Code.

The State argued that the situation on the ground was that the State is a major stakeholder in Air Zimbabwe Holdings; that the board that administers its affairs is appointed by the government; that major decisions of the company have to be made in consultation with the line ministry and that the contracts of employment of senior staff have to be approved by the State.

Finally, the State made the point that in certain circumstances the State does run private companies and that employees in such companies are obviously in the service of the State.

In my view, the question who is a public officer, or which types of entities are State bodies for the purposes of s 174(1)(a) of the Criminal Code, was not left to mere conjecture. It is clearly set out. In s 169 the Criminal Code defines “*a public officer*” to mean:

- (a) a Vice-President, Minister or Deputy Minister; or
- (b) a governor
- (c) a member of a council, board, committee or other authority which is a statutory body or local authority or which is responsible for administering the affairs or business of a statutory body or local authority; or
- (d) **a person holding or acting in a paid office in the service of the State**, a statutory body or a local authority; or
- (e) a judicial officer;”

The argument by the State is fallacious. It purports to read into the Code words that are not there. The section does not refer to government-controlled entities. It refers to persons holding office in the service of the State. To say the Chief Executive Officer of Air Zimbabwe Holdings, a private company, is the same thing as “*a paid office in the service of the State*” is absurd. The government is merely a shareholder in the airline. It is not the employer. In my view, the person referred to in that section is a civil servant who is employed directly by the State and paid directly by it.

It is true that the State may sometimes run its affairs indirectly through statutory corporations. But the definition of “*public officer*” caters for that. Section 169 defines a “*statutory body*” to mean, among other things, “... *anybody corporate established directly by or under an Act for special purposes specified in that Act*”. An example that quickly comes to mind is that of the National Social Security Authority which is established by its own Act of Parliament, namely, the National Social Security Authority Act, [Chapter 17:04]. Of course, there are many others. But Air Zimbabwe Holdings is a private company formed by shares and registered in terms of the Companies Act. It is not a statutory corporation. It was not even the successor company to the old corporation which the government consciously and purposefully dismantled in 1998.

Mr *Muchini* argued that because the government has direct shareholding in the airline and literally runs its day to day affairs, it means that any person employed by such an entity must be deemed to be holding or acting in a paid office in the service of the State, within the meaning of s 169(d) of the Criminal Code and s 332 of the Constitution. He argued that the intention behind the creation of the offence in 174(1)(a) of the Criminal Code was to protect **public funds** and **public property** as defined in s 308 of the Constitution. In terms of this section “**public funds**” and “**public property**” include any money, or any property owned, or held by the State, or any institution, or agency of government,

statutory bodies **and government-controlled entities** (emphasis by State Counsel). Such a definition, the argument concluded, manifestly covers Air Zimbabwe Holdings.

Such a tortuous construction is unwarranted. The applicant was not charged with any offence whose elements required the importation of definitions from the Constitution. He was charged with contravention of a specific provision of the Criminal Code. That provision is not at all in conflict with any provision of the Constitution. On the contrary, the definition of “*public officer*” in the Constitution, for example, is almost identical to that in the Criminal Code. What is more, the language of the Code is quite plain. It is unambiguous. The ordinary and grammatical meaning is clear. There is no need to resort to aids of construction.”

They also argued that criminal legislation should be restrictively interpreted and moved this court to interpret the definition of the crime of criminal abuse of duty as a public officer as defined in s 174(1) narrowly rather than broadly in what he described as the *ius strictum* principle. They argued that statutory provisions creating crimes should not have their range extended beyond the plain meaning of the language of the law or statute as that is beyond the competence of the court. They quoted from *CR Snyman*, Criminal Law 6th Edition at p 36: -

“An accused may not be found guilty of crime and sentenced unless the type of conduct with which he is charged:

- a) has been recognized by law as a crime
- b) in clear terms
- c) before the conduct took place
- d) without the court having to stretch the meaning of the words and concepts in the definition to bring a particular conduct of the accused within the compass of the definition.
- e) after conviction the imposition of punishment also complies with the four principles set out immediately above

They also cited the case of *S v Augustine* 1986 (30) SA 294 (C) at pp 302 (I)-303 (A)

“...there are always people to be found who invite and favour “extensions” by the court of the existing principles of the common law to encompass situations which they feel “should” have been encompassed, even if they have not hitherto been so encompassed. I do not think the Courts should respond too readily to such invitations. Fundamental innovations like this are for the Legislature, (if so advised), and not the Courts. That being so, I certainly have no desire to rush in where other courts have feared to tread.”

and *Chihava & Ors v The Provincial Magistrate* 2015 (2) ZLR 31 CC 35H - 36E

“The starting point in relation to the interpretation of Statutes generally would be what is termed ‘the golden rule’ of statutory interpretation. This rule is authoritatively stated thus in the case of *Coopers and Lybrand Bryant* 1995 (3) SA 761 (A) at 7

“According to the “golden rule” of interpretation, the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument.”

Natal Joint Municipal Pension Fund v Eudimeni Municipality 2012 (4) SA 593

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in light of the ordinary rules of grammar and syntax; Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the statute itself., read in the context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

Chegutu Municipality v Manyora 1996 (1) ZLR (SC) 264 D – E which cited the case of *Stafford v Special Investigating Unit* [1998]4 ALL SA 543 (E) 553 b-c with approval: -

“A court cannot act upon mere conjecture and speculate as to whether or not the legislature might have overlooked something, it cannot supplement a statute by providing what it surmises the legislature omitted. The court therefore must give effect to what the act says and not what it thinks it ought to have said.”

On the other hand, the State submitted before us, in the *Muchenje* matter, that there were conflicting judgments of the High Court which have a bearing on whether Muchenje and his co accused were public officers referring to the cases of *S v Chikumba* 2015 (2) ZLR 382 per MAFUSIRE J and *S v Taranhike and Ors* 2018 ZLR (1) 399 (H) per TSANGA J. I have already quoted the relevant dicta in *Chikumba* case, supra. I now quote from the *Taranhike* case at page 404 F-G.

“In the English case of *R v Cosford, Falloon and Flynn* [2013] 2 Cr App R 8 for example the court concluded that the important point is:

“whether that duty is a public duty in the sense that it represents the fulfilment of one of the responsibilities of government such that the public at large have a significant interest in its proper discharge”.

In that case it was held that nurses in a prison setting, whether trained as prison officers or not, and whether or not, if the prison is run directly **by the State or indirectly through a private company, paid by the State to perform its functions, had duties which fulfilled the requirement of a public office for this purpose.**”

The State also submitted that the *Taranhike* case was to be preferred because it was decided after the promulgation of the Public Entities Corporate Governance Act [*Chapter*

10:31 (“Public Entities Corporate Governance Act”) which defined public entity in s2 as any entity whose operations or activities are substantially controlled by the State or by a person on behalf of the State, whether through ownership of a majority of shares in the entity or otherwise.

The fact that the applicants were employed by a company incorporated in terms of the Companies Act did not change the fact that the Public Finance Management Act [Chapter 22:19] defines a ‘public officer’ as any person whose salary is paid from a fund audited by the Comptroller General and the Public Entities Corporate Governance Act defines a statutory body as a body corporate established directly by or under any Act for special purposes specified in that Act where members consist of wholly or mainly of persons appointed by the President, Vice President, a Minister or Deputy Minister. Net One was such body corporate because it was created in terms of ss 106 and 107 of the Postal & Telecommunication Act [Chapter 12:05] (“Postal & Telecommunication Act”) and its members are appointed by the Minister.

In disposing of the *Muchenje* case, supra, I made the following findings with which my brother agreed: -

1. Muchenje and his co accused were, by virtue of their employment by Net One (Private) Limited (“Net One”), a company wholly owned and controlled by the State, persons holding or acting in a paid office in the service of the State and therefore public officers. We relied on the case of *Wekare v The State and The Attorney General of Zimbabwe and Zimbabwe Broadcasting Corporation* CCZ 9/2016 per MALABA DCJ, as he then was particularly the dicta paraphrased below: -
 - a. The Zimbabwe Broadcasting Corporation was incorporated under the Companies Act in terms of the Zimbabwe Broadcasting Corporation (Commercialization) Act, 2001 (No. 26 of 2001) which mandated the Minister to take such steps necessary to form signal carrier and broadcasting companies under the Companies Act [Chapter 24:03], limited by shares, as successor companies to the corporation that was a parastatal of government. The Zimbabwe Broadcasting Corporation took over the functions of broadcasting, and such assets, liabilities and staff of the Corporation.
 - b. The provisions of the Broadcasting Services Act [Chapter 12:06] providing for the collection of the tax known as listener’s licence fees by the successor company

(wholly owned and controlled by the State) are lawful and a constitutional and a legitimate exercise of the Legislature's constitutional power vested in it and lawfully delegated to the state controlled company.

- c. The State has, thus, deliberately transformed certain of its arms of government, like parastatals, into entities and companies wholly owned and controlled by and conferred with delegated power to exercise the constitutional authority of government and mandate to provide services to the people.
- d. Such companies are to the extent of the delegation, tiers of government despite their incorporation in terms of the Companies Act or its successor, the Companies and Other Business Entities Act (*Chapter 24:31*) ("the Companies and Other Business Entities Act").
- e. The delegated authority is exercised in the public interest.

2. We also concluded that the notion that the whole phrase 'a person holding or acting in a paid

office in the service of the State' refers to the civil service only, is wrong. We based that finding on our interpretation of Chapter 9 of the Constitution of Zimbabwe. Companies wholly owned and controlled by the State are government arms which, in terms of the new constitutional dispensation ushered by the Constitution of Zimbabwe in 2013 took over functions previously carried out by government ministries. We found that it was clear in s 194(1) as read with s 195(1) of the constitution that agencies of government, companies and other commercial entities owned or wholly controlled by the State are subject to the basic values and principles governing public administration set out in Chapter 9 of the constitution. We held that s 196 puts it beyond doubt that government agencies and employees of companies and other commercial entities owned or wholly controlled by the State are public officers and the authority assigned to them is held by them as a public trust which must be exercised in a manner which is consistent with the purposes and objectives of the Constitution. We concluded that Muchenje and his co accused were liable to be charged for the crime of criminal abuse of duty as public officers and remitted the matter for continuation of trial.

Muchenje and another appealed against our decision in case discussed above. The Supreme Court allowed the appeal. While the written reasons for judgment are not available

it is clear from the submissions by the State counsel while conceding to this appeal that the legal argument made on behalf of Muchenje and his co accused person before us and persisted with in the Supreme court, prevailed in the apex court. We are guided accordingly and hold that the current definition of public officer in s 169 of the Criminal Law Codification and Reform Act [Chapter 9:23] does not include employees of companies wholly owned and controlled by the state incorporated in terms of the Companies Act or its successor, the Companies and Other Business Entities Act (Chapter 24:31) (“the Companies and Other Business Entities Act”).

The State has persisted with preferring the charge despite the dicta in the case of *S v Chikumba* 2015 (2) ZLR 382. It is up to the Legislature to align the definition of public officer in s 169 of the Criminal Law Codification and Reform Act with Chapter 9 of the Constitution if so inclined.

In the result we allowed the appeal and quashed the appellants’ conviction.

KWENDA J.....

CHIKOWERO J agrees.....

Rubaya & Chatambudza, first appellant’s legal practitioners
Venturas & Smakange, second appellant’s legal practitioners
National Prosecuting Authority, respondent’s legal practitioner