

DISTRIBUTABLE (22)

SAMUEL UNDENGE

v

THE STATE

**SUPREME COURT OF ZIMBABWE
HARARE: NOVEMBER 4, 2020 & MARCH 30, 2021**

A. Muchadehama, for the applicant
E. Makoto, for the respondent

IN CHAMBERS

UCHENA JA: This is an application for extension of time within which to apply for leave to appeal. After hearing submissions from both parties, I reserved judgment.

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Civil Appeal No. SC 422/20

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FACTUAL BACKGROUND

The applicant is the former Minister of Energy and Power Development. He amongst other things supervised Zimbabwe Power Company (ZPC). On 14 January 2016, the applicant authored a letter in terms of which he directed ZPC to work with an entity known as Fruitful Communications (fronted by *Oscar Pambuka & Psychology Mazivisa*) until 2018. The engagement was for publicity work relating to the Zimbabwe Agenda for Sustainable Socio-Economic Transformation (Zimasset) programmes. It is common cause that the letter did not state whether or not there was any payment to be made in respect of services rendered. However, Fruitful Communications approached ZPC with that letter claiming to

have been chosen to do the publicity campaign and then invoiced ZPC for the work it alleged to have done.

Subsequently, the applicant was charged with criminal abuse of duty by a public officer in terms of section 174 (1) (a) of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*] (“the Act”). His directive was deemed unlawful and contrary to his duties as a public officer as it favoured Fruitful Communications, enabling it to bypass the mandatory internal tender procedures to be followed by any procuring entity.

The applicant pleaded not guilty to the charge. He denied directing ZPC to improperly engage Fruitful Communications without following tender procedures. The applicant stated that the letter did not bar ZPC from engaging with other media companies. He indicated that the work to be done by Fruitful Communications was for free as it did not involve the expenditure of public funds, thus it did not require tender approval. He submitted that Oscar Pambuka & Psychology Mazivisa had done free work for the Ministry before and it is in that context that the letter was drawn. The applicant further submitted that if the issue for payment arose, ZPC’s accounting officer ought to have followed the required procedures. He contended that Fruitful Communications and its counterparts were the ones who intended to defraud ZPC. As such, he stated that the charges against him were influenced by a political agenda targeted at perceived political opponents. He also stated that he did not benefit from the letter.

After trial proceedings before a Regional Magistrate, the applicant was found guilty as charged. The court opined that the determinant factor was that the applicant accepted to have authored the letter. It further held that the letter, taken in its context, was an

order meant to govern the operations of ZPC. In the result, the court sentenced the applicant to four years imprisonment, of which eighteen months were suspended on condition the applicant does not within that period commit any offence involving corruption.

Aggrieved by that decision, the applicant noted an appeal to the High Court against his conviction and sentence. The appeal was dismissed in its entirety. The court *a quo* held that the trial court properly found that the applicant was not a victim of political machinations as the conduct giving rise to the charge occurred in 2016, before the change of government. Whilst acknowledging that there was no code of conduct in place envisaged by s 106 (3) of the Constitution governing the conduct of Ministers, the court held that that fact did not absolve the applicant from wrong doing. The court *a quo* referred to s 9 of the Constitution and reasoned that the applicant, as a state agent had the obligation to foster good governance and to take measures to expose, combat and eradicate all forms of corruption and abuse of power. It opined that the applicant's directive curtailed ZPC's power to enlist the services of other service providers or invite formal bids as is required by law. The court also found the custodial sentence imposed by the trial court to be appropriate as the crime committed is serious because it undermines public administration and subverts corporate governance.

Aggrieved by the decision of the court *a quo*, the applicant filed a composite application for leave to appeal and bail pending appeal in the court *a quo*. In dismissing the application, the court held that the appeal against conviction and sentence had no prospects of success. It held that the letter, which the applicant wrote, directed ZPC to engage Fruitful Communications for a specific period. It reasoned that had the work been for free, the letter ought to have spelt out that the engagement would be for free as alleged by the applicant.

Dissatisfied by the court *a quo*'s refusal to grant it leave to appeal, the applicant sought leave to appeal to this Court against his conviction and sentence. The application was struck off the roll because it was premised on the High Court Act instead of the Rules of this Court. The applicant states that, that was an oversight by his legal practitioners. He then mounted the present application for extension of time within which to apply for leave to appeal to this Court. He argues that he has high prospects of success as his conviction was wrong and that the sentence imposed by the trial court was unprecedented. The applicant further contends that the letter of 14 January 2016 was taken out of context in that things he did not say were read into it. He further argues that he was convicted on dereliction of duties which were not spelt out.

The respondent opposed the application and averred that the court *a quo*'s findings in respect of the applicant's conviction cannot be assailed. The respondent states that the applicant's conduct of giving directives to his subordinates to work with Fruitful Communications till 2018 without following tender procedures constituted criminal abuse of office. It avers that the applicant's act of signing the letter is evidence that he agreed and associated himself with the contents thereof and thus, showed favour to Fruitful Communications. The respondent also contends that the court *a quo* properly exercised its sentencing discretion in that the sentence imposed does not induce a sense of shock or outrage.

This application raises two issues for determination

1. Whether or not the delay was inordinate?
2. Whether or not the applicant has prospects of success on appeal?

THE LAW

The timelines governing the present application are provided for by r 20 of the Rules which provides as follows:

“Applications for leave to appeal

20. (1) A person who has been refused leave to appeal by a judge of the High Court may, within ten days of the date when leave to appeal was refused, or within fifteen days of conviction, whichever is the later date, apply to a judge for leave to appeal.”

In *Chikurunhe and Ors v Zimbabwe Financial Holdings* SC 10/08 at p 5, the court held that for leave to appeal to be granted, one must show that he or she has prospects of success on appeal. That is the overriding consideration.

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SUBMISSIONS MADE BY THE PARTIES.

Mr *Muchadehama* for the applicant, submitted that the applicant was convicted and sentenced on 20 July 2018. Aggrieved by both conviction and sentence, he appealed to the court *a quo* which dismissed his appeal in its entirety on 8 June 2020. He further submitted that on 11 June 2020, the applicant made an application to the court *a quo* for leave to appeal to the Supreme Court which was dismissed. He averred that the applicant subsequently applied for leave to appeal at the Supreme Court on 28 July 2020 and the application was struck off the roll for being fatally defective as it was made in terms of the High Court Act instead of the Supreme Court Rules, 2018. Mr *Muchadehama* submitted that on 9 October 2020, the applicant applied for an extension of time within which to apply for leave to appeal to this Court. He avers that the delay was not inordinate as it was predicated

on his oversight which he immediately rectified by mounting the present application based on the correct Rule.

Mr *Muchadehama* submitted that the sentence imposed by the trial court and upheld by the court *a quo* is shocking and insensitive considering that the applicant only signed the administrative letter which was abused by others to swindle ZPC. He also avers that the applicant did not benefit in any way from the transaction. As such, he states that the circumstances warranted the imposition of a fine or other lesser punishments other than a custodial sentence.

Mr *Makoto* for the respondent conceded during the hearing of the application, that the delay in applying for extension of time within which to apply for leave to appeal was not inordinate. He further conceded that the question of sentence needs guidance from this Court as this Court last pronounced itself on sentences for corruption in the case of *S v Chogugudza* 1996 (1) ZLR 28 (S) more than 20 years ago.

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APPLICATION OF THE LAW TO THE FACTS

1. Whether or not the delay was inordinate?

Taking into consideration the parties' agreement that the delay was not inordinate, the overriding consideration in an application of this nature is whether or not the applicant has prospects of success on appeal. The concession by counsel for the respondent is, therefore, noted and I find that the delay was not inordinate.

2. Whether or not the applicant has prospects of success on appeal?

The prospects of success in this application are based on the propriety of the applicant's conviction and sentence. Counsel for the applicant averred that the applicant has prospects of success on appeal against conviction and sentence. The gist of the applicant's submissions is that his conviction is improper as the court *a quo* failed to spell out his duties or to show how he had acted contrary to them. He further stated that the court *a quo* read duties into s 174 (1) of the Act which were non-existent.

Professor G Feltoe in his book *A Guide to the Zimbabwean Criminal Law*, 3rd Ed Legal Resources Foundation, 2004, sets out the elements of criminal abuse of duty by a public officer as follows:

“Ingredients [s 174 (1)]

A public officer, in the exercise of his or her functions as such, intentionally – does anything that is contrary to or inconsistent with his or her duty as a public officer; or 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.” (emphasis added)

From these elements, it can be noted that the crime is centred on a public officer's exercise of duties. If a public officer acts contrary to his duties in order to show favour or disfavour to any person, he would have abused his office for purposes of s 174 (1) of the Code. The only exception is where favour or disfavour is made in furtherance of a government policy aimed at the advancement of persons historically disadvantaged by discriminatory laws or practices. See s 174 (3) of the Code. The word “intentionally” means that the conduct constituting abuse must be deliberate, calculated or purposeful and ‘abuse’ connotes misuse, exploitation, taking advantage and recklessness in that conduct. (See *The State v Taranhike & Ors* HH 222/18)

In *casu*, the charge put to the applicant was based on the fact that the letter he wrote to ZPC which favoured Fruitful Communications, was contrary to his duties as it bypassed the tender procedures laid down by the law. In convicting the applicant, the trial court gave credence to the fact that the applicant accepted authorship of that letter. In upholding the trial court's ruling, the court *a quo* whilst acknowledging that there was no code of conduct stipulating Minister's duties, opined that the appellant, as a state agent had to foster good governance in terms of s 9 of the Constitution. It also held that the oath of affirmation into office was reflective of that public duty.

It is my view that the reasoning of the court *a quo* cannot be faulted. The applicant, as a public official in charge of a whole ministry, could not rubber-stamp or endorse everything that came before him as he alleges to have been done in respect of the letter that he alleged was written for him to only sign. Such an office comes with a high level of responsibility and demands the exercise of due diligence. To that end, the court *a quo* justifiably held that the letter was not taken out of context. The applicant signed a letter which caused the breach of tender procedures and cannot hide behind flimsy excuses. He is a sophisticated person who understood the content and consequences of the letter he signed. The findings of the court *a quo* cannot be faulted in this regard as they are reasonable and in sync with the evidence on record. It has not been established that the court of appeal will have any basis for interfering with the court *a quo*'s decision on conviction. See *Barros & Anor v Chimponda* 1991 (1) ZLR 58 (S). It cannot, therefore, be said that the applicant has prospects of success on appeal against conviction.

In respect of the appropriateness of the sentence imposed, the respondent's counsel conceded that there is need for the Supreme Court to give guidance on sentences for

corruption as the last case was considered more than 20 years ago. He, therefore, agreed that there is need for this case to be considered by the Supreme Court on the appropriateness of the sentence imposed by the trial court and upheld by the court *a quo*.

The concession by the respondent's counsel justifies giving the appellant a chance to apply for leave to appeal against sentence. In view of the respondent's concessions each party shall bear its own costs.

In the result it is ordered as follows:

1. The applicant's application for extension of time within which to apply for leave to appeal against sentence is granted.
2. The applicant shall file his application for leave to appeal against sentence within 5 days of the date of this order.
3. Each party shall bear its own costs.

Mbidzo, Muchadehama & Makoni Legal Practitioners, applicant's legal practitioners

Attorney-General's Office, respondent's legal practitioners