

REPORTABLE (89)

FUNNY MACHIPISA
v
(1) NGONI NDUNA N.O (2) THE NATIONAL PROSECUTING
AUTHORITY

SUPREME COURT OF ZIMBABWE,
UCHENA JA, MATHONSI JA & CHATUKUTA JA
HARARE: 21 OCTOBER 2022 & 18 SEPTEMBER 2023

L. Madhuku, for the appellant

L. Chitanda, for the respondents

UCHENA JA: This is an appeal against the whole judgment of the High Court Harare dated 6 July 2022 dismissing the appellant’s application for the review of the first respondent’s refusal to find the appellant not guilty in spite of his having upheld the appellant’s exception taken together with the plea in terms of s 180 (4) of the Criminal Procedure and Evidence Act [*Chapter 9.07*] (the Act).

BACKGROUND FACTS

The facts giving rise to this appeal are as follows. The appellant is employed by the City of Harare (“the city council”) as Deputy Director of Housing and Community Services and was at the time of the alleged commission of the offence the Acting Director of Housing and Community Services when the incumbent was attending a week-long workshop in Kadoma. In June 2021, he was arraigned before the first respondent facing a charge of “criminal abuse of

duty as a public officer, in contravention of s 174 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]” (the Criminal Law Code). The allegations levelled against him are that he irregularly and fraudulently allocated non-existent stands to various persons who had applied for stands to the city council but were not yet due for allocation of stands and some who were not on the City Council’s waiting list.

The first objection taken by way of exception, was taken with the consent of the parties in terms of s 170 (2) of the Act. At that stage the appellant only objected and did not plead to the charge. It enabled the first respondent to order the second respondent to amend the charge in terms of s 170 (3) of the Act to which it added an alternative charge of fraud. The amended charges, were read to the appellant who pleaded and excepted to them, in terms of s 180 (4) of the Act.

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In his exception, the appellant pointed out certain irregularities in the amended charges such as the failure to specify how he showed favour to the persons he allocated the non-existent stands to.

The first respondent upheld the exception. It ordered that the trial should proceed on the basis of the charge he ordered the prosecution to amend and prefer against the appellant in terms of s 170 (3) of the Act. The appellant demanded a verdict of not guilty and an acquittal. His counsel contended that after his exception was upheld, he was entitled to a verdict of not guilty and an acquittal as his plea remained hanging in the air pending the charge the first respondent had ordered the second respondent to amend.

In his submissions on the appellant's demand to be found not guilty and acquitted, the State's counsel conceded that the appellant was indeed entitled to a verdict of not guilty. In his ruling, the first respondent refused to return a verdict of not guilty, as demanded by the appellant, notwithstanding the concession made by the prosecution. He, ruled that:

“Section 170 (3) of the Code provides what happens where an exception has been made it (sic) is stated that:

‘(3) Any court before which any objection is taken in terms of subsection (1) or (2) may, if it is thought necessary and the accused is not prejudiced as to his defence, cause the indictment, summons or charge to be forthwith amended in the requisite particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared.’

In the event of an exception being upheld, the indictment shall be amended and the trial shall proceed as if no such defect had appeared.” (emphasis added)

Aggrieved by the first respondent's refusal to return a verdict of not guilty, the appellant filed an application for review in the court *a quo*. The basis of his application is stated in his notice of application, which partly reads as follows:

“Illegality: The decision by the first respondent [in *State v Funny Machipisa* ACC 158/20] not to return a verdict of “Not guilty” after upholding the applicant's exception, which exception had been taken in terms of s 180 (4) of the Criminal Procedure and Evidence Act [*Chapter: 9:07*], is illegal as a contravention of s 180 (6) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The applicant was entitled, as of right, to a “Not guilty” verdict once an exception which he had taken after pleading “Not guilty” had been upheld.”

SUBMISSIONS MADE IN THE COURT A QUO

Submissions made by the appellant

In moving for a not-guilty verdict, Mr *Madhuku* for the applicant, argued that the first respondent's decision was tainted by either “gross irregularity” or by being “clearly wrong.”

He contended that the not-guilty plea which he tendered inevitably ought to have been followed by a not-guilty verdict. It could not “hang in the air waiting for an amended charge.” He submitted that s 180 (6) of the Act provides that any person who has pleaded is entitled to a verdict. He therefore submitted that the first respondent’s decision violated that provision and, as such, constituted a gross irregularity.

The applicant’s counsel further contended that s 180 (6) should be read together with s 8 (b) of the Act, which makes an acquittal mandatory whenever charges are withdrawn after a plea.

The second respondent’s submissions

In countering the appellant’s averments, Mr *Muziwi* for the second respondent contended that there was no irregularity in the first respondent’s decision. He submitted that the first respondent acted in accordance with the law. He further submitted that the first respondent has the discretion to direct the prosecution to amend the charge, among other options.

Mr *Muziwi* further contended that an order to amend a charge is an interlocutory ruling. It is a ruling made in the course of on-going, uncompleted proceedings, which superior courts do not interfere with except in exceptional circumstances where it would have been established that the lower court committed a gross irregularity or was clearly wrong. He further argued that no gross irregularity had been proven in respect of the manner in which the trial court conducted the proceedings, warranting interference by the court *a quo*.

In spite of his earlier resistance to the application for review, counsel for the second respondent subsequently changed course and conceded that the first respondent erred and his decision should be set aside on review.

DETERMINATION OF THE COURT A QUO

After hearing counsel, the court *a quo* held that it could not interfere with unterminated proceedings, as there was no justification for such intervention. It did not agree with the submissions of the applicant's and second respondent's counsel that the first respondent erred in refusing to find the appellant not guilty.

In arriving at its decision that the trial court had correctly applied the law, the court *a quo* said:

“In *casu*, the pertinent question is, does the first respondent's decision fall into the exceptional category reflecting gross irregularity? We think not.

An examination of the first respondent's ruling shows that he took guidance from the applicable law. To begin with, he exercised the discretion provided for in s 171 of the Criminal Procedure and Evidence Act, where an accused person decides to both plead and except to the charge. Section 171 reads:

‘(1) When the accused excepts only and does not plead any plea, the court shall proceed to hear and determine the matter forthwith and if the exception is overruled, he shall be called upon to plead to the indictment, summons or charge.

(2) When the accused pleads and excepts, together it shall be in the discretion of the court whether the plea or exception shall be first disposed of.’

The first respondent exercised his discretion in terms of subsection (2) and dealt with the exception first. **What was he then going to do with the plea of not guilty, which had been tendered together with the exception?**

The first respondent was guided by s 170 (3), which allows amendment of the indictment summons or charge provided such amendment does not prejudice the accused in his defence.

This section provides as follows:

‘(3) Any court before which any objection is taken in terms of subsection (1) or (2) may, if it is thought necessary and the accused is not prejudiced as to his defence, cause the indictment, summons or charge to be forthwith amended in the requisite particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared.’

A significant aspect of the first respondent’s ruling is the distinction he draws between the upholding of an exception and the quashing of the charge. These are different courses of action provided for in s 170 (1). The accused either excepts to the charge, or”-- (emphasis added)

It further dealt with situations where a superior court can interfere with unterminated proceedings. It stated that the test for intervening in unterminated proceedings is high as repeatedly emphasized by case law. It found no gross irregularity in the first respondent’s ruling and dismissed the application before it. Aggrieved, the appellant noted the present appeal on the following grounds.

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GROUND OF APPEAL

The appellant’s grounds of appeal read as follows:

1. The court *a quo* improperly exercised its discretion and misdirected itself in finding that there was no gross irregularity in the first respondent’s refusal to return a verdict of “Not guilty” after upholding the appellant’s exception to the charge, which exception had been taken in terms of s 180 (4) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].
2. The court *a quo* erred in law and misdirected itself in not finding that the first respondent’s refusal to return a verdict of “Not guilty” after upholding the appellant’s exception to the charge, which exception had been taken in terms of s 180 (4) of the Criminal Procedure

and Evidence Act [*Chapter 9:07*], was so clearly wrong as to warrant its review before the termination of proceedings.

SUBMISSIONS MADE BEFORE THIS COURT

Appellant's submissions

Mr *Madhuku* for the appellant submitted that both parties agreed before the trial court that the appellant was entitled to a verdict of not guilty after the exception was upheld. It was further submitted that the first respondent refused to return a verdict of not guilty, notwithstanding the concession made by the second respondent, resulting in the appellant's application for review before the court *a quo*.

He submitted that in terms of s 180 (6) of the Act, any person who has pleaded to a charge is entitled to a verdict and that after upholding the exception, the trial court ought to have returned a verdict of "not guilty" as had been pleaded. He further submitted that the court *a quo* was not clear in its approach to reviewing unterminated proceedings in that it should have first asked itself whether the appellant established the grounds of review.

He also argued that if review grounds exist, it ought to have questioned the degree to which the grounds of review had been established. He submitted that the court *a quo* did not render a decision on this issue. He further submitted that if one pleads not guilty, and the charge is thrown out, one remains not guilty and proceedings should come to an end at that stage. He argued that the trial court had no authority to amend the charge in view of the fact that, the exception was taken together with the plea in terms of s 180 (4) of the Act.

Mr *Madhuku* also contended that s 171 (2) of the Act gives the court discretion on what it can dispose of first when an accused person pleads and excepts at the same time. He submitted that the court *a quo* has jurisdiction to review untermiated proceedings and the court ought to take a two-staged approach in such circumstances, which are:

1. It must ask itself has the appellant established, the grounds of review.
2. If the grounds for review exist it should ask itself a second question, have the grounds been established to the required degree?

In respect of the above questions, Mr *Madhuku* argued that the court *a quo* erred when it held that there was no irregularity in the proceedings before the first respondent. He further emphasised that if one pleads not guilty and the charge is thrown out, one remains not guilty at that stage. He argued that proceedings should come to an end at that stage and that the state should start a fresh action. He argued that the first respondent had no authority to order an amendment after the exception had been taken together with the plea. He argued that a plea of ‘not guilty’ cannot hang in the air. He contended that the discretion must be exercised in a way that disposes of the matter.

Submissions by the second respondent

Conversely, Ms *Chitanda* for the second respondent, submitted that there was no gross misdirection as the court *a quo* exercised its discretion judiciously. She submitted that since the appellant pleaded and excepted to the charges at the same time, s 171(2) of the Criminal Procedure and Evidence Act allows the court, discretion on which to dispose of first between the plea and the exception. She further submitted that the discretion was properly

exercised in moving for an amendment of the charge in terms of s 170 (3) after upholding the exception.

STAY OF PROCEEDINGS IN THE TRIAL COURT

At the end of their submissions, the parties applied for the stay of proceedings in the magistrates' court until judgment in this case is handed down. We agreed with the parties and ordered that the proceedings before the trial court be stayed pending the determination of this appeal.

SUPPLEMENTARY HEADS

During the preparation of this judgment it became apparent to the court that there was need to give the parties an opportunity to make submissions on the interpretation of s 170 (2) and (3) of the Act on the issue of whether or not it was competent for the first respondent to order the amendment of the charge when the appellant had pleaded and excepted in terms of s 180 (4) of the Act. The need arose as this Court has to determine whether or not the first respondent could lawfully invoke the provisions of s 170 (3) of the Act, after upholding the appellant's exception taken together with the plea of not guilty in terms of s 180 (4) of the Act. That issue had not been adequately covered by the parties at the hearing of the appeal.

Appellant's supplementary heads

In his supplementary heads Mr *Madhuku* for the appellant submitted that s 170 (2) does not, arise because it only deals with objections and not exceptions. He further submitted, that the appellant pleaded and excepted in terms, of s 180 (4). He submitted that s 170 has a very restricted scope as it only applies to objections that attack "formal defects apparent on the face of

the charge”. He submitted that what the appellant raised were not formal defects apparent on the face of the charge, but were objections which went to the root of the charge. He stressed that the exception the appellant raised in terms of s 180 (1) of the Act was an attack on the ground that the charge did not disclose the offence in question.

Second respondent’s supplementary heads

In her supplementary heads Ms *Chitanda* for the second respondent confirmed that the appellant pleaded and excepted in terms, of s 180 (4) of the Act. Contrary to her earlier concession in para 7 and 9 of her supplementary heads, the second respondent’s counsel argued that the appellant wrongfully pleaded and excepted to the charge in terms of s 170 (2) of the Act. She, on that basis, prayed for the dismissal of the appellant’s appeal.

ISSUES FOR DETERMINATION

The issues which fall for determination are:

- 1. Whether or not in view of the provisions of s 170 (3), it is competent for a Magistrate, after taking a plea and an exception at the same time, other than in terms of s 170 (2) and upholding the exception to thereafter order the prosecution to amend the charge in terms of s 170 (3) of the Act.**
2. Whether in view of the provisions of s 180 (1) the appellant could competently except and plead in terms of s 180 (4) of the Act.
3. Whether or not the court *a quo* erred in finding that there was no gross irregularity or illegality, in the first respondent’s upholding of the appellant’s exception and plea

together and ordering the 2nd respondent to amend the charge in terms of s 170 (3) of the Act.

THE LAW

The first and second issues which arise for determination in this case call for the interpretation of the legal framework governing objections and exceptions taken to charges by accused persons in terms of s 170 (2) and (3), 171 (1) and (2) and s 180 (1) and (4) of the Act.

Objections and exceptions are provided for by s 170 (1) to (3), s 171 (1) and (2), and s 180 (1) and (4) of the Act.

Section 170 (1) to (3) provides for objections by way of exceptions as follows:

- “(1) Any **objection to an indictment** for any formal defect apparent on the face thereof shall be taken by exception or by application to quash such indictment before the accused has pleaded, but not afterwards.
- (2) Any **objection to a summons or charge** for any formal defect apparent on the face thereof **which is to be tried by a magistrates court shall be taken by exception before the accused has pleaded, but not afterwards.**
- (3) Any court **before which any objection is taken in terms of subsection (1) or (2) may, if it is thought necessary and the accused is not prejudiced as to his defence, cause the indictment, summons or charge to be forthwith amended in the requisite particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared.**” (emphasis added)

Section 170 (1) applies to objections in the High Court. It does not apply to the Magistrate’s Court. The Magistrates Court is excluded by the use of the word “indictment” which only applies to the High Court. Section 136 of the Act confines an indictment to the High Court as follows:

“(1) When a person charged with an offence has been committed for trial or sentence and it is intended to prosecute him before the High Court, **the charge shall be in writing in a document called an indictment.**” (emphasis added)

Section 170 (2) which applies to objections in the Magistrates Court does not allow an accused person to plead and except at the same time. It only allows the accused to except to the charge before he pleads to it. It is therefore incompetent for an accused to plead and except to a charge in terms of s 170 (2).

Section 170 (3) can only be invoked when an objection has been taken in terms of s 170 (1) or (2) of the Act. When no objection has been taken in terms of s 170 (1) or (2) a court cannot invoke the provisions of s 170 (3). The use of the words “Any court **before which any objection is taken in terms of subsection (1) or (2) may**” limits the court’s authority to order an amendment of a charge or indictment to situations where an objection in terms of an exception would have been made in terms of s 170 (1) or (2). That authority cannot be exercised without it first having been triggered by the provisions of s 170 (1) or (2).

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Section 171 reads:

- “(1) When the accused excepts only and does not plead any plea, the court shall proceed to hear and determine the matter forthwith and if the exception is overruled, he shall be called upon to plead to the indictment, summons or charge.
- (2) When the accused pleads and excepts together, it shall be in the discretion of the court whether the plea or exception shall be first disposed of.”

In terms of s 171 (2) a court can exercise its discretion on which to dispose of first, the exception or the plea. After determining the exception first and upholding it, a court cannot

exercise its discretion in terms of s 170 (3) of the Act, because s 170 (3) can only be resorted to after determining an objection in terms of either s 170 (1) or (2).

Section 180 (1) (4) and (6) provides as follows:

- “(1) If the accused does not object that he has not been duly served with a copy of the indictment, summons or charge or apply to have it quashed under section *one hundred and seventy-eight*, **he shall either plead to it or except to it on the ground that it does not disclose any offence cognizable by the court.**
- (2) -----
- (3) -----
- (4) The accused may plead and except together.
- (5) ----
- (6) Any person who has been called upon to plead to any indictment, summons or charge **shall, except as is otherwise provided in this Act or in any other enactment, be entitled to demand that he be either acquitted or found guilty** by the judge or magistrate before whom he pleaded:” (emphasis added)

Section 180 (1) provides that an accused shall either plead to or except to a charge on the ground that it does not disclose, any offence cognisable by the court. This means an accused who has been served with a copy of the indictment, summons or charge, shall either plead or except the charge on the ground that it does not disclose any offence cognisable by the court The use of the word “shall” and as emphasised by the use of the word “either” in the same sentence means an accused who excepts because the charge is not cognisable by the court can only except. He cannot except and plead at the same time. He can only take one of the two options provided by s 180 (1).

Section 180 (4) allows an accused to plead and except together. It however does so permissively by using the word “may” as opposed to the mandatory provisions of s 180 (1) which provides that an accused shall either plead or except to the charge. It must also be stated

that the use of the word “may” in s 180 (4) cannot be read to give a right contrary to the mandatory provisions of s 180 (1). A plea of not guilty or guilty in terms of s 180 (2) can only be entered by an accused who accepts that the charge discloses an offence cognisable by the court. If the accused believes that the charge is not cognisable by the court he does not plead to it. He should except to it.

Section 180 (6) entitles an accused who has pleaded, except as is otherwise provided in this Act or in any other enactment to demand that he be either acquitted or be found guilty by the judge or magistrate before whom he pleaded. The use of the words “**except as is otherwise provided in this Act or in any other enactment be entitled**” means an accused can only demand and be granted a verdict if there is no other provision in this Act or any other enactment on which the trial can proceed bearing in mind the circumstances of each case. The prosecution can in response agree or disagree with the accused’s demand. If it disagrees it must point out the law which provides for the procedure in terms of this Act or any other enactment in terms of which the court must act in determining whether or not to grant the accused’s demand for a verdict. In the absence of such procedure which applies in the circumstances of an accused in terms of this Act or any other enactment the accused will be entitled to a verdict. It must be stressed that if there is no justification for granting a verdict the court should order that the trial must proceed.

The third issue depends on the correct application of the law on when superior courts can review and interfere with untermiated proceedings.

It is now trite that superior courts will not lightly interfere with unterminated proceedings brought on review before them. They can only do so in exceptional circumstances where the trial court's proceedings will have been affected by gross irregularities which irredeemably vitiates the proceedings. Untermated proceedings can also be reviewed and set aside if the interlocutory order of the trial court is clearly wrong.

In the case of *Attorney General v Makamba* 2005 (2) ZLR 54 (S) at 648D Malaba JA (as he then was) said:

“The general rule is that a superior court should intervene in uncompleted proceedings in the lower courts only in exceptional circumstances of proven gross irregularity vitiating the proceedings and giving rise to a miscarriage of justice which cannot be redressed by any other means or where the interlocutory decision is clearly wrong as to seriously prejudice the rights of the litigant”.

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In the case of *Prosecutor General of Zimbabwe v Intratek Zimbabwe (Pvt) Ltd, Wicknell Munodaani Chivayo and L Ncube* SC 67/20 Makarau JA (as she then was) dealing with the same issue at p 8 of the cyclostyled judgment said:

“Thus, put conversely, the general rule is that superior courts must wait for the completion of the proceedings in the lower court before interfering with any interlocutory decision made during the proceedings. The exception to the rule is that only in rare or exceptional circumstances where the gross irregularity complained of goes to the root of the proceedings, vitiating the proceedings irreparably, may superior courts interfere with on-going proceedings”.

It must be stressed that if there is a gross irregularity it must be one which goes to the root of the proceedings and has the effect of vitiating the proceedings irreparably. This means the proceedings cannot be procedurally continued with without the intervention of the superior court because the irregularity will have irreparably vitiating them.

There may however be situations where only part of the proceedings will have been irredeemably vitiated by irregularities and another part for an example the earlier proceedings remains untainted by the irregularities. In such circumstances a superior court can set aside the later part which will have been irredeemably vitiated by irregularities and order the trial to proceed from the untainted part.

APPLICATION OF THE LAW TO THE FACTS

- 1. Whether or not in view of the provisions of s 170 (3), it is competent for a Magistrate, after taking a plea and an exception at the same time, other than in terms of s 170 (2) and upholding the exception to thereafter order the prosecution to amend the charge in terms of s 170 (3) of the Act.**

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The first objection/exception on the basis of which the original charge was amended was with the consent of the parties. The charge was correctly amended because the parties had consented to an objection being taken before plea in terms of s 170 (2) of the Act. It entitled the first respondent to lawfully order the amendment of the charge in terms of s 170 (3) of the Act.

After the charge had been amended, the appellant pleaded not guilty and excepted to it. The exception and plea, were allegedly taken in terms of s 180 (4) of the Act. As already explained under the analysis of the law s 170 (3) does not apply to circumstances other than when an objection will have been taken before the court in terms of s 170 (1) and (2) of the Act. This issue is answered by the law. The court *a quo* therefore erred when it held that the first

respondent correctly ordered the prosecution to amend the charge in terms of s 170 (3) of the Act.

2. Whether in view of the provisions of s 180 (1) the appellant could competently except and plead in terms of s 180 (4) of the Act.

The appellant, allegedly excepted and pleaded in terms of s 180 (4) of the Act. I say allegedly because the appellant took the exception and plea on the basis that the charge did not disclose an offence cognizable by the court. That places the appellant's exception under the provisions of s 180 (1).

In para 6 of his supplementary heads Mr *Madhuku* said:

“In this case, it was an exception as the attack was on the ground that the charge did not disclose the offence in question. This sort of exception is permitted by s 180 (1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]”.

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Once it is established that such an exception falls under s 180 (1) it cannot be taken together with the plea. The appellant's exception and plea together in circumstances where the exception should have been taken in terms of s 180 (1) is incompetent because they were made contrary to the provisions of the law.

3. Whether or not the court *a quo* erred in finding that there was no gross irregularity or illegality, in the first respondent's upholding of the appellant's exception and plea together and ordering the second respondent to amend the charge in terms of s 170 (3) of the Act

It has already been established, that the decision of the trial court in refusing to find the appellant not guilty was based on its reliance on the mistaken belief that s 170 (3) authorised it to order the prosecution to amend the charge and proceed with the trial on the charge which was still to be amended, even though the appellant had allegedly pleaded and excepted in terms of s 180 (4) of the Act.

As has already been established the first respondent erroneously upheld the appellant's exception and plea. He should in view of the provisions of s 180 (1) not have allowed the appellant to plead and except at the same time. It also erroneously ordered the second respondent to amend the charge in terms of s 170 (3) of the Act.

In its judgment the court *a quo* relied on s 170 (3) in finding that the first respondent had authority to order the second respondent to amend the charge and that the trial was to proceed on the charge which was still to be amended. It is clear that both the trial court and the court *a quo* did not realise, that s 170 (3) could not be invoked, as the appellant had not pleaded and excepted in terms of s 170 (1) or (2)) of the Act.

As explained under the analysis of the law, s 170 (3) does not authorize the court to order an amendment of the charge in cases other than those in which an objection by way of an exception would have been upheld in terms of subs (1) or (2) of s 170 of the Act. It is therefore clear that the first respondent's interlocutory orders upholding the exception which had been made together with the plea contrary to the provisions of s 180 (1) and ordering the amendment of the charge are wrong and should not have been upheld by the court *a quo*.

This Court must determine whether or not the irregularities which occurred in the proceedings before the first respondent irredeemably vitiated the whole proceedings. We are satisfied that they have that effect on the proceedings from the appellant's exception and plea onwards. We are also satisfied that the interlocutory decisions of the court *a quo* after the appellant's exception and plea are clearly wrong. We however are cognisant of the fact that the errors were induced by the appellant's incompetent excepting and pleading together, contrary to the provisions of s 180 (1) of the Act. Whatever is done contrary to the provisions of the law is a nullity. There is therefore, need to set aside, parts of the proceedings which are a nullity, and order the trial to continue in respect of the valid parts of the proceedings.

Proceedings and decisions of a court of law are validated by their being conducted or made in terms of the law. Proceedings and decisions made contrary to the provisions of the law are clearly wrong and are a nullity which must be set aside on review or appeal.

DISPOSITION

The proceedings before the first respondent from the taking of the exception and plea together are irredeemably irregular and the court *a quo*'s decisions after that stage of the proceedings are clearly wrong and must be set aside because they are contrary to the provisions of the law. This is however a case which warrants ordering the trial court and the parties back to the stage they were at before the incompetent exception and pleading were taken together and the erroneous orders which followed thereafter. The appellant's exception and plea must be set aside to enable the appellant to correctly plead or except. The erroneous orders of the first respondent

must also be set aside. In view of the fact that this appeal arises from proceedings of a criminal trial each party shall bear its own costs.

It is therefore ordered as follows:

1. The appeal partially succeeds with each party bearing its own costs.
2. The judgment of the court *a quo* be and is hereby set aside and is substituted as follows:
 - “2.1. The proceedings in the court *a quo* from the accused’s exception and plea and the trial court’s upholding of the exception and order that the prosecution amend the charge in terms of s 170 (3) of the Act be and are hereby set aside.
 - 2.2.1 The case is remitted to the trial court for the trial to continue from the stage when the accused was invited to plead to the charge in terms of the law.

MATHONSI JA:

I agree

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CHATUKUTA JA:

I agree

Lovemore Madhuku Lawyers, applicant’s legal practitioners

The Prosecutor General, 1st and 2nd respondent’s legal practitioners