THE PROSECUTOR-GENERAL OF ZIMBABWE
versus
RICHARD MASVAIRE
and
PETER MAJAYA
and
TOBACCO SALES LIMITED
Represented by Washington Matsaire

THE HIGH COURT OF ZIMBABWE
HUNGWE and WAMAMBO JJ
HARARE, 22 May 2018 and 28 November 2018

Appeal by the Prosecutor General

Mrs S. Fero, for the appellant
ABC Chinake, for the respondents

HUNGWE J: This is an appeal by the Prosecutor-General against the verdict of the magistrate discharging the respondents at the close of the State case in case number R931-933/14. The three respondents were the accused in a trial on a charge of fraud before the regional magistrate at Harare. At the close of the case for the State the respondents successfully applied for their discharge in terms of s 198 (3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Unhappy with the discharge of the accused at the close of the State case, the Prosecutor General sought and was granted leave to appeal the decision of the regional magistrate. This appeal is therefore consequent to that leave.

At the hearing of this appeal, Mr *Chinake* for the respondents, raised an objection *in limine* that the order granting leave to file heads of argument out of time by the appellant was improperly obtained. As such, the appellants are barred as they are hopelessly out of time within which to file same. Consequently, appellant is barred. There was no appeal before the court.

For this objection Mr *Chinake* relied on a series of events which followed the grant of leave to appeal against the discharge at the close of the State case. This court granted the said leave under HH 816-15 on 21 October 2015. Mr *Chinake* submitted that the appellant did not file heads of

argument until well after the expiration of a year. After that period, the appellant had sought and failed to secure the extension of leave within which to file heads of argument before MANGOTA J.

Somehow a "strange" order was later obtained, almost a year later, from CHIGUMBA J. *Mr Chinake,* for the respondents, criticized the order as "strange" and "curious" on the basis that the wording of the operative paragraph was incomprehensible; that it was not signed; and that when the court application seeking that order was filed, the respondents had duly opposed the grant of the order. Notwithstanding the notice of opposition, the respondents were not advised of the date of the hearing before CHIGUMBA J. The resultant order does not reflect whether or not the respondents were in default. He contended, on behalf of the respondents, that this "curious" order was not procedurally obtained as the respondents were not heard before a determination to grant the order was made. As such this court must disregard it and hold that in the interests of justice, and in light of the undue delay in the prosecution of the appeal, the appellant is barred for failure to file and prosecute the appeal in time.

Mrs *Fero*, for the appellant, explained away and cleared the air regarding the factual contention put forward by the respondents. She rightly conceded that the appellant indeed did not prosecute the appeal as expeditiously as one would have expected from a diligent litigant. She did not say why this occurred but went on to give a chronology of events which occurred thereafter. She stated that after the grant of leave to appeal nothing apparently happened attendant to the matter. After this period of inaction, it was decided to seek, by way of a chamber application, an extension of time within which to file heads of argument. That application was filed with the Registrar of this court and served on the respondents. It was placed before MANGOTA J.

At the hearing before MANGOTA J, the learned judge directed that the application be filed in Form 29B. Consequently, the applicant formally withdrew the matter. Later, a chamber application in Form 29 B was filed with the Registrar of this Court and served on the respondents in terms of Order 32 Rule 241 of the High Court Rules, 1971. This is the application that was placed before CHIGUMBA J in which the respondents filed a notice of opposition. On 18 May 2017 CHIGUMBA J granted the order sought in chambers without hearing both parties. The Registrar then dispatched the order to the then applicant, the present appellant. In filing his heads of argument, the appellant attached the order to the heads of argument for the purpose of demonstrating that the heads had been filed within the time stipulated in the order. There was nothing "strange", "curious" or "sinister" about the order by CHIGUMBA J.

It is clear that respondents laboured under the mistaken belief that after appearance before MANGOTA J, the appellant was obliged to make a formal court application to secure the extension of time within which to file the heads of argument. In fact, the appellant made a chamber application, as he was entitled to do, and the matter was placed before CHIGUMBA J. Applications filed in terms of Order 32 Rule 241, do not always require a formal set down for hearing of oral submissions nor is the appellant required, as a rule, to file heads of argument. Heads may be filed if the parties believe this may assist the judge in the determination of the application, or if the judge so requests. Even where the judge makes such a request on both parties, it does not necessarily follow that the matter will be formally set down in terms of r 236 of Order 32. Rule 245 is, out of practice, utilized by the placing of the matter before a judge who is expected to consider the papers without delay. Because of the need to act expeditiously in the disposal of such chamber applications, a practice has developed that, generally, no oral argument is invited nor is the subsequent order given accompanied by reasons. This is so notwithstanding the fact that heads of argument may have been gratuitously filed in support of opposing but apparently contentious viewpoints. Such an approach to procedural applications is acceptable in most other jurisdictions as appropriate for the efficient dispatch of matters on the roll.

It would appear from the record that the chamber application for an extension of time within which to file heads of argument in Form 29B was placed before CHIGUMBA J. She considered the papers in chambers and signified the grant of the application by appending her signature to the draft order on 18 May 2017. The observation that the order is incomprehensible is correct. However, that on its own, does not mean that the order extending the time to file heads was not properly sought and granted. The reference to "be and is hereby appreciated" is clearly an error of drafting which escaped both the learned judge as well as the Registrar who issued it. In the context of the application clearly the learned judge meant that the order "be and is hereby granted". Any other construction of the order would render the order *brutum fulmen.* Where, such as here, there is a vague or unclear order, a construction or interpretation which gives effect to the intention of the drafter ought always to be preferred.

I may add here that the Act and the Rules both do not provide any time limits within which to seek leave to appeal against a discharge at the close of the State case[1]. Once leave to appeal had been granted, as indicated above, it was up to the appellant to prosecute it with reasonable dispatch.

[1] In terms of s 198 (4); see also High Court Act, s 44 (b) and SCR r 27A (1).

Whilst no time limits are indicated in both the High Court Act, [*Chapter 7:06*] and the Supreme Court (Magistrate Court)(Criminal Appeals) Rules, 1979, expectation is that the appellant prosecutes his appeal speedily so as not to compromise the respondent's constitutionally entrenched rights to a fair trial within a reasonable time.

In the present matter, the appellant needed to file heads of argument. The purpose of heads of argument is well-known. They serve to give the court and the opposing party an opportunity to prepare themselves for the hearing. Heads of argument outline the submissions relied upon by a party and must set out the authorities, if any, which that party intends to cite for the contention that will be advanced at the hearing of the appeal. Generally, where no heads of argument are filed by the appellant within the time prescribed, the appeal is regarded as having been abandoned. It is dismissed by the Registrar as a matter of course. In the present matter, in light of the observation that there are no time limits prescribed for the Prosecutor-General to have filed his heads of argument, it follows that once leave to appeal is granted, the matter remains alive until it is determined either through the hearing of the appeal itself or though the determination of an application made to dismiss the appeal for want of prosecution. It is important to note that, unlike with criminal appeals in general, the Registrar has no power to dismiss for want of prosecution an appeal by the Prosecutor-General. This implies that the respondent would need to make a formal court application for such dismissal, if minded to do so. In the present matter the respondents did not do so. As matters stand therefore, this appeal is extant, and stands to be determined on the merits.

For these reasons we dismissed the points raised *in limine* and ordered argument on the merits to be received.

Mrs *Fero* advanced four grounds of appeal worded as follows:

1. The court *a quo* erred and misdirected itself when it acquitted the respondents on the basis that the "actual complainant" must be ZAZU Investments (Pvt) Limited and not the 6th state witness in his personal capacity. This was despite cogent evidence on record that the said witness Yakub Ibrahim Mohammed was a shareholder and director ZAZU (Private) Limited and had been instrumental in concluding the agreement in question and produced a company resolution that he was appearing before the court *a quo* in his representative capacity.

2. The court *a quo* erred and misdirected itself by making a finding that there was "no complainant" and therefore no complaint before it simply because ZAZU Investments (Pvt) Ltd was not cited in the state papers as the complainant when it remained unchallenged throughout the proceedings that ZAZU Investments (Pvt) Ltd as represented by Yakub Ibrahim Mohammed was prejudiced by the respondent's misrepresentations.
3. The court *a quo* erred and misdirected itself when it acquitted the respondents when the evidence on record proved a *prima facie* case against them. The evidence proved that the respondents did not disclose to the complainant, Yakub Ibrahim Mohammed, the ZAZU Investments representative that the land on which the flower growing business was being conducted had been gazetted despite having known of the fact in 2008. The complainant acted on the misrepresentation to his prejudice.
4. The court *a quo* misdirected itself when it reasoned that putting the respondents in their defence would be "perpetuating underhand dealings upon underhand dealing" when there was no basis for making such a finding and most importantly when such is not the legal test for placing an accused person on his defence. The evidence revealed a *prima facie* case and the respondents must have been placed on their defence.

Mr *Chinake*, in answer to the concise and detailed heads in support of the grounds of appeal, dwelt more on the points he had addressed *in limine* than on a substantive response to the grounds of appeal advanced by the appellant. He submitted that the appeal is devoid of merit and prayed for the dismissal of the appeal on the basis of the points he had raised *in limine.*

It remains for me to consider whether in fact the learned trial magistrate erred in law when she discharge the respondents at the close of the State case in terms of s 198 (3) of the Criminal Procedure and Evidence Act, *[Chapter 9:07]*.

In an application of this nature, the test is whether the prosecution has, at the close of its case, presented evidence upon which a reasonable court might convict. If so, the accused is put on his defence. If not, the court must discharge the accused. Once this finding is made, the Court has no discretion in the matter. The weight of authority in this regard is to this effect. See *S v Kachipare*[2]*; S v Tsvangirai*[3]

[2] 1998 (2) ZLR 271 (S)
[3] 2005 (2) ZLR 88 (H)

Section 198 (3) of the Criminal Procedure and Evidence Act provides;-

> "198 (3) If at the close of the case for the prosecution the court considers that there is **no evidence** that the accused committed the offence charged in the indictment, summons or charge, or any other offence of which he might **be convicted** thereon, it shall return a verdict of **not guilty**." (my own emphasis).

The test be applied in such an application has been laid down in a long line of cases. It may be summarized+ as being that the court should discharge the accused at the close of the case for the prosecution where:-

(a) There is no evidence to prove an essential element of the offence charged;

Attorney-General v *Bvuma & Anor*[4]

(b) There is no evidence on which a reasonable court acting carefully might properly convict;

Attorney-General v *Mzizi*[5];

(c) The evidence adduced on behalf of the State is so manifestly unreliable that no reasonable could safely act on it;

Attorney-General or Tarwireyi[6]

In *S* v *Nyarugwe* HH 42-16 I had occasion to comment on the test to be applied in the following words.

> "In all the cases the cardinal guide is that the State would have failed to prove a *prima facie* case against the accused. A *prima facie* case is a case where one can say there has been shown, on the evidence led, a probable cause to put the accused on his defence. Generally, probable cause or a *prima facie* case, is made where all the essential elements of the offence charged or any other offence on which the accused may be convicted have been proved on a balance of probability. At this stage the test is not whether there is proof beyond reasonable doubt but whether on a balance of probability it can be argued that the essential elements constituting the offence charged or any other offence have been proved."

The legal position therefore, in application brought in terms of s 198 (3), may be summarised as follows:

(a) an accused person is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself;

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[4] 1987 (2) ZLR 96 @ 102
[5] 1991 (2) ZLR 321 @ 323
[6] 1997 (1) ZLR 575 @ 576.

(b) in deciding whether the accused is entitled to be discharged at the close of the State case, the court may take into account the credibility of the State witnesses, even if only to a limited extent;

(c) where the evidence of the State witnesses implicating the accused is of such poor quality that it cannot be relied upon, and there is accordingly no credible evidence on record upon which a court, acting carefully, may convict, an application for discharge should be granted.

See also *State* v *Shrien Prakash Dewani* CC 15/2014 (Constitutional Court of South Africa).

At that stage of a trial, the evaluation of the evidence is different from that involved at the end of the trial. It is a *sui generis* interlocutory application, which typically raises a question of law and not fact. A court seized with such an application must bear this in mind when adjudicating an application in terms of s 198 (3) of the Criminal Procedure and Evidence Act.

The words "no evidence" have been interpreted to mean no evidence upon which a reasonable court acting carefully may convict. Again the "no evidence" test is *sui generis*. See *S* v *Shuping.*[7] It will be seen that at this stage there is not an onus in the usual sense of the law, and specifically not an onus on a *prima facie* basis to be met by the State. "*Prima facie"* is defined as that: if a party on who lies the burden of proof goes as far as he reasonably can in producing the evidence and that evidence calls for an answer, it is *prima facie* evidence. In the absence of an answer from the other side, it becomes conclusive. Therefore, once a prima facie case has been established the evidential burden will shift to the accused to adduce evidence in order to escape conviction. However the burden of proof will remain with the prosecution.

Mrs *Fero*, for the appellant submitted that in coming to the conclusion that "the actual complainant" must be ZAZU Investments (Pvt) Ltd ("ZAZU") and not Yakub Ibrahim Mohamed ("Yakub") the court erred. This is demonstrated by the further conclusion that there was no complainant before that court when the evidence indicated that ZAZU, as represented by the said Yakub, was conducting the affairs of that company and was authorised to represent it in the proceedings. The evidence which remained unchallenged was that ZAZU, as represented by Yakub had been prejudiced by the misrepresentations made by the respondents during the

[7] 1983 (2) SA 119 (B).

negotiations and conclusion of the transaction involving the immovable property in question. He had paid over the money on the basis of the misrepresentations made to him by the respondents or on respondents' behalf. That misrepresentation consisted of the failure to disclose the fact in respect of ownership status of the land. That fact was that the land in question had been gazetted for acquisition by the State therefore the respondents' interests had been diminished to the extent of the State interest consequent to the gazetting of the land. But for the non-disclosure of this fact, the ZAZU Investments represented by Yakub Mohamed, would not have entered into the agreement or parted with the money which was paid over in pursuance of the agreement. Where parties are negotiating in good faith, the duty to make full disclosure of the subject of the sale, as here, cannot be gainsaid. The respondents clearly had a duty to make full disclosure of all the facts regarding the land or the shares of the company whose major asset was the land in issue. That company conducted its floriculture business on the land which had, to the knowledge of the respondents or respondents' representatives, been gazetted for resettlement. Silence on the part of a person who has a duty to speak, knowing that another person has been or will be misled by the silence constitutes misrepresentation. Therefore *prima facie,* all the essential elements of the offence charged had been proved. In the judgment, the learned magistrate did not advert to this crucial aspect in the determination of the application before her. In this regard she erred on a point of law.

Accordingly, since the essential elements of the offence charged had, *prima facie,* been proved, the court *a quo* erred in discharging the respondents at the close of the case for the prosecution. The allegations set out in the charge had been confirmed in the evidence led from the State witnesses. There was therefore a *prima facie* case against the respondents which disentitled them to a discharge at the close of the case for the State.

The first witness confirms the fact that the land had been acquired by the State in 2002. The second state witness who held an offer letter corroborated this fact. The failure by the respondents, or respondents' representative, to disclose such a material issue regarding the status of the land constituted one of the essential elements of fraud as defined in s 135 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The reasoning of the court *a quo* regarding the absence of a complainant is flawed. Clearly, the court *a quo* did not consider the curative provisions in s 203 of the Criminal Procedure & Evidence Act. If the court *a quo* considered that the correct complainant, from the evidence was

the company ZAZU, then section 203 of the Criminal Procedure and Evidence Act permitted her to read into the indictment that amendment since both the company and Yakub were before it. Any discrepancy between the indictment and the evidence would have been cured by the evidence. Her sweeping statements about "perpetuating underhand dealings upon underhand dealings" are not borne out by the facts of the case and in any event misplaced and entirely wrong. A reading of the evidence does not support this conclusion.

Mr *Chinake* indicated that he did not wish to make any submissions in light of my remarks in HH-816-15, an earlier judgment between the parties. He, however, submitted that an appropriate order, at law, cannot be a remittal to the same magistrate for continuation of trial before the same magistrate since, in his view, that court was now *functus officio*. He also submitted that since the court had already pronounced itself on the guilt or otherwise of the respondents, it should not be asked to make a different finding.

Two issues arise from Mr *Chinake's* submissions. The first issue is whether upon discharging an accused person in terms of s 198(3) of the Criminal Procedure and Evidence Act a trial court becomes *functus officio*.

Is the court *a quo functus officio*?

I assume that the respondents' argument that the court is *functus officio* is premised on the wording or phraseology appearing in s 198 (3) of the Criminal Procedure and Evidence Act. That section contains the following phraseology:

> "…. it shall return a verdict of **not guilty**." (my own emphasis)."[8]

Mr Chinake, for the respondents, argued that such a verdict amounts to an acquittal of the accused. Therefore, having pronounced itself on the guilt or otherwise of the appellants, that court is rendered *functus officio.* But, even so, is the accused acquitted where he is discharged at the close of the case for the prosecution? In administrative law, the principle was stated thus:

> "In general, the *functus officio* doctrine applies only to final decisions, so that a decision is revocable before it becomes final. Finality is a point arrived at when the decision is published, announced or otherwise conveyed to those affected by it."[9]

In civil procedure this court has held as follows:

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[8] s 198(3) of the Criminal Procedure and Evidence Act, [Chapter 9:07]
[9] Cora Hoexter, Administrative Law in South Africa (2nd ed) (2012) at 278

> "In general, the court will not recall, vary or add to its own judgment once it has made a final adjudication on the merits. The principle is stated in *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977(4) SA 298 (A) at 306, where TROLLIP JA stated:
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> > 'The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes functus officio: its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased.'" (per GIBSON J in Kassim v Kassim)[10]

In criminal procedure it would appear that until a final determination on the merits is made, an order under s 198(3) falls to be considered as interlocutory. In *R* v *Eigner*[11] the magistrate, after convicting an 18 year old, postponed the passing of sentence for three years on condition of good behaviour and supervision by a probation officer. The accused joined the army and supervision became impossible. The probation officer then wrote to the magistrate highlighting the fact that it was no longer possible to supervise the accused. The magistrate took the view that he was functus officio. On review YOUNG, J stated:

> "In my judgment the magistrate is not *functus officio* in the matter. The magistrate's court is seized of the case until a final order is made imposing a sentence or discharging Eigner without passing sentence. In the nature of things circumstances may change, calling for an alteration in the conditions attached to the postponement of sentence; and, if the original order was made by a magistrate's court, the application for a variation should obviously be made to a magistrate's court, whether or not the magistrate who made the order is available."[12]

In my view, there is a clear difference between an acquittal and a discharge. Although the words "not guilty and acquitted" and "not guilty and discharged" may be used interchangeably when an applicant in terms of this section in successful, the correct position at law is that because the ruling is only interlocutory at that stage, the court cannot return a final verdict. Therefore, even where a court is satisfied that there is no evidence, at that stage, upon which a reasonable court might convict, the true position is that the accused is only discharged and not acquitted. Section 198 (3) permits the court to discharge an accused before the end of a full trial. A full criminal trial, encompasses the evidence led on behalf of the State and that led on behalf of the accused. A finding of not guilty after a full trial results in an acquittal in the legal sense of the word. The consequence of an acquittal are that the accused cannot be tried again on the same facts and the same charge. In

[10] 1989 (3) ZLR 234 @242
[11] 1965 (3) SA 773 (SR)
[12] R v Eigner supra note 9 @ 774

that sense an acquittal is a judicial decision taken after a full inquiry establishing the innocence of the accused. In other words, an acquittal bars a second trial on the same facts and for the same offence, or on the same facts for any other offence for which different charges from the one made against the accused might have been made.

On the other hand our law provides that where a person has been discharged he can still be rearrested and committed for a further inquiry. An order for discharge simply implies that there is no *prima facie* evidence against the accused to justify further inquiry in relation to the charge. Such an order does not establish anything regarding the guilt of the accused. In such cases a discharge does not bar the institution of fresh proceedings when new or better evidence becomes available against the accused. An instance of this is when the State procedurally withdraws charges against an accused person before he has pleaded to a charge. Whilst the accused person is literally free and is released from court, such a discharge may or may not mean that his innocence has been established. It only means that at that stage there is insufficient evidence to proceed with a trial or to keep him on remand. A refusal of remand also has the same effect. The court, in essence, is putting State on terms; either prosecute the accused or release him. If the charges are not withdrawn, the court invariably refuses to keep an accused on remand. This does not mean that the accused's innocence has been established.

In my view, when a court discharges an accused in terms of s 198 (3) of the Criminal Procedure and Evidence Act, it is merely stating the fact that no *prima facie* evidence has been established to warrant a full trial. It is upholding the accused's right to a fair trial. This is, in my view, the more reason why a careful exercise of judicial discretion is required. There is need to balance the interests of the accused as well as those of the due administration of justice. Only after full trial can the innocence of an accused person be pronounced finally.

In the event, I find that a successful appeal against the verdict of not guilty rendered in terms of s198 (3) of the Criminal Procedure and Evidence Act deprives finality to the proceedings in the trial court. The trial court is not therefore *functus officio* as it is obliged to continue with the trial.

The second issue raised by Mr Chinake does not require as detailed a scrutiny. An order remitting the matter for continuation is not a directive to the court a quo to render a conviction. Where an appeal of this nature succeeds, its value is in identifying an error of law committed in the earlier proceeding which, in the resumed hearing, the presiding officer ought to take note of

for the benefit of a fair trial. The rationale for this is that in an appeal from a decision discharging an accused at the close of the case for the prosecution, generally, there would have been an error of law committed by the court a *quo* either in its conclusion on question of facts or of law or both law and fact. Consequently, an order such as must follow in the present case must be accompanied by reasons or a judgment correcting the error committed in the interlocutory ruling discharging the accused. A court of law is expected to appreciate that an order for continuation of trial is not a direction to convict the accused, but to apply the rules and principles of law in the adjudication process judicially, fairly and properly. To my mind, a trier of fact is expected to be influenced only by the facts and the law. The question of the court having already made up its mind does not arise. It is not expected to.

Consequently I make the following order:-

1. The appeal be and is hereby allowed.
2. The verdict of not guilty be and is hereby set aside.
3. The matter is hereby remitted to the court of the magistrate for continuation of trial with the appellants being put on their defence.

WAMAMBO J ……..agrees

National Prosecuting Authority, Appellant's legal practitioners
Kantor and Immerman, respondents' legal practitioners