INTRATREK ZIMBABWE (PVT) LTD
and
WICKNELL MUNODAANI CHIVHAYO
and
STANLEY NYASHA KAZHANJE
versus
PROSECUTOR GENERAL OF ZIMBABWE
and
P MATURURE N.O

HIGH COURT OF ZIMBABWE
CHIKOWERO & KWENDA JJ
HARARE, 28 July 2020 & 7 August 2020

Opposed Application

L Uriri, for 1st & 2nd applicants
S. M Hashiti, for the 3rd applicant
T Mapfuwa, for the 1st respondent

CHIKOWERO J: I will refer to the parties as Intratrek, Chivhayo, Kazhanje, the PG and the court *a quo* respectively. Where it is convenient to do so I will refer to the first 3 parties as the applicants and the last two as the respondents or first and second respondent as may be appropriate.

Chivhayo is the managing director of Intratrek Zimbabwe (Pvt) Ltd. The latter is a company incorporated in terms of the laws of Zimbabwe. Kazhanje was at the material time the Board Chairman of the Zimbabwe Power Company (ZPC).

On 18 June 2019 they appeared before the court *a quo* at Harare Magistrates Court, sitting as an Anti-Corruption Court.

The applicants were facing a charge of bribery as defined in s 170 (1) (b) of the Criminal Law (Codification and Reform Act [*Chapter 9:23*]. In respect of Intratrek and Chivhayo, it was alleged that on 21 January 2016 at CBZ Bank, Kwame Nkrumah Branch, Harare the trio or one of them unlawfully gave or agreed to give or offered an agent, namely Kazhanje then a director and Board Chairman of the Zimbabwe Power Company (Pvt) Ltd, a gift or consideration as an inducement or reward for doing or omitting to do or having done or omitted to do any act in relation to his principal's affairs or business or for showing or not showing or having shown or

not shown any favour or disfavour to Intratrek and Chivhayo in relation to Kazhanje's principal's affairs or business. In short, the charge was that Intratrek and/or Chivhayo bribed Kazhanje by transferring to him US$10 000 as an inducement or reward for facilitating or influencing the ZPC Board of directors to make decisions favourable to Chivhayo and Intratrek in relation to the contract for the Gwanda Solar Project.

As for Kazhanje he was charged for being the receiver of the bribe.

The State outline then set out how the offence was alleged to have been committed.

On 28 May 2019 the first and second applicants had filed a request for further particulars to the charge and the State outline. On 11 July 2019 the Prosecutor General's representative filed a response thereto.

Section 177 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the CPE Act) provides that the court may order delivery of particulars to any matter alleged in a charge, summons or indictment. It does not provide for delivery of particulars to any matter set out in the State outline. That is the first problem, in my view, with the request for further particulars. It is unlike in civil procedure where a request for further particulars covers both the summons and declaration/particulars of claim.

In that request, the applicants attached various annexures and sought admissions from first respondent relative thereto. The admissions were made. In some cases, first respondent indicated that what was sought was evidence and inferences which it would ask the court *a quo* to make from the evidence.

A total of twenty-eight annexures were attached to the request for further particulars. Admissions were sought touching on the identity of those documents and their place in the matter. The annexures comprised, among others, letters, contracts, and judgments of this court one of which has been overturned on appeal and the other whose appeal is pending in the Supreme Court.

Dissatisfied with what it perceived to be a reluctance to comply with some of the particulars requested, the applicants made an oral application before the court *a quo* for an order to compel delivery of those particulars.

Third applicant associated himself with both the request and the application. The application was opposed, and dismissed. The court *a quo* found that what was requested was in fact evidence and therefore improper.

Next, the applicants excepted to the charge. The submissions were these. The third applicant argued that the defect was that the charge did not specify whether the US$10 000 was an

inducement or a reward. Further, all three applicants argued that the charge, as amplified by the further particulars, did not disclose an offence. The exceptions were based on s 170 (2) and 180 (1) of the Criminal Procedure and Evidence Act respectively. The court *a quo* dismissed the exceptions. It found no formal defect in the charge. It must have found, indeed it found, that the charge disclosed the offence of bribery. The reason is this. It found that what was requested constituted evidence. The charge as it stood disclosed the offence of bribery *vis a vis* the applicants. The applicants are before us in an application to review the court *a quo*'s decision.

The two grounds of review read as follows:

> "1. The decision complained of is a grossly unreasonable abdication of judicial power in that the second respondent did not apply his mind to the substantive and procedural issues before him.
> 2. The decision complained of is patently contrary to law and determined the exception before the second respondent on an improper basis and is such that no reasonable judicial officer who had applied his mind to the facts would have reached the same decision."

The first respondent opposed the application. The parties filed heads of argument.

First and second applicants made these submissions before us. Second respondent's decision dismissing the exception was grossly unreasonable. The "common cause facts" show that there was no bribery. For example, it was admitted by the first respondent in replying to the further particulars that the tender for the Gwanda Solar Project was awarded to Intratrek through Chivhayo by the State Procurement Board and not the ZPC Board which Kazhanje chaired. The ZPC Board's mandate was to implement the contract. There was therefore no basis for the first respondent to lead other evidence at the trial speaking to bribery of third applicant because it had admitted that it was the State Procurement Board (SPB) which awarded to the applicant the tender for the Gwanda Solar Project. The offence of bribery was therefore not disclosed. Mr *Hashiti* referred us to the South African Supreme Court of Appeal decision in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking and Advertising Standards Authority* SA 459/04 where that court held it proper to have regard to documentary evidence attached to pleadings in determining an exception. My view is our law is different. Evidence is inadmissible in determining an exception. Evidence is adduced at trial. Mr *Uriri's* argument on common cause facts showing that the offence of bribery was not disclosed finds no favour with me. We rejected this argument in *Mupfumira and Another* v *Mutevedzi and Another* HH 200/20. Firstly, there are no facts to talk about at this stage. There is nothing from the applicants in the nature of facts. They have not pleaded to the charge, tendered a defence outline nor has

any evidence been led which would found the basis for common cause facts, if any. All there is at this stage are the charge and the state's allegations as set out in its outline. What happened *a quo*, in my view, is that the applicants sought to truncate the trial by resorting to a procedure foreign to our law. Under the guise of seeking particulars to the allegations in the charge they expanded the request to cover allegations set out in the state outline. They went further to seek admissions disguised as further particulars. The state seemed not to have initially noticed, *a quo*, that the applicants had sought to jump the gun. Admission of facts is a procedure available at the trial, post plea and tendering of a defence outline, before the state has opened its case. The multitude of questions contained in what was called a request for further particulars, the annexures thereto and the answers solicited were correctly disregarded by the court *a quo* in determining the exception. The time will come when evidence will be led, with exhibits, if any, produced in accordance with the rules of evidence. I also take the view that the charge does not become defective by dint of characterizing the US$10 000 as either an inducement or a reward. These are alternatives speaking to the same charge of bribery.

Looked at from another perspective counsel for the applicants, while purporting to be seeking further particulars, were actually cross examining the PG's representative. The latter was responding, again through what was called a reply to the further particulars. There is no law in our jurisdiction sanctioning the PG's representative to be subjected to cross examination either pre- trial or at the trial itself, either through papers filed of record or orally. The net effect of what was done was to delay the trial. The court *a quo* dismissed the exception because it was based on what was effectively evidence improperly put before it as well as evidence sought to be prematurely placed before it. We see no merit in the application for review. We are remitting the matter to the court *a quo* for trial. From the record of proceedings put before us the applicants first appeared before that court around 18 July 2019. It appears the matter was then ready for trial. What this means is that the applicants have managed to delay the commencement of the trial by a period of one year.

Mr *Hashiti* asked us to consider a court record which was not before the court *a quo*. The argument birthed by that record was also not placed before that court. We were told that the third applicant has since been convicted of contravening s 173 of the Code viz corruptly concealing from a principal a personal interest in a transaction. The facts and evidence were said to be the same as in the bribery charge. He submitted that there was therefore an improper splitting of charges as well as a basis for arguing that the third applicant was previously convicted of an offence arising from the same set of facts and evidence.

Section 180 of the Criminal Procedure and Evidence Act lists 9 pleas that can be pleaded to a charge. The usual ones are guilty or not guilty. But s 180 (2) (c) provides that a person can plead that he or she has already been convicted of the offence with which he is charged. It is not necessary that I discuss whether that plea is available to the third applicant. What is important is that s 186 of the Criminal Procedure and Evidence Act provides that issues raised by a plea (except that of guilty or a plea to the jurisdiction of the court) shall be tried. The third applicant should therefore plead to the charge. The matter should be tried.

Further, whether there was a splitting of charges placing the third applicant in danger of a duplication of convictions on the same evidence is an issue which we cannot consider at this stage. If he is convicted his remedy may be to raise that as one of his grounds of appeal. Mr *Hashiti* referred us to a number of South African and Zimbabwean cases on this point. They include *Zachariah* v *The State* Criminal Appeal number APP 331/01.

The application for review, in the circumstances, has no merit.

The present is not one of those rare cases where grave injustice might otherwise result or justice might not by other means be attained if we do not interfere in the unterminated proceedings in the court *a quo*. See *Prosecutor General of Zimbabwe* v *Intratrek Zimbabwe (Pvt) Ltd and 2 Ors* SC 59/19; *Dombodzvuku and Anor* v *Sithole N.O and Anor* 2004 (2) ZLR 242 (H).

In the result, it is ordered that:

1. The application for review be and is dismissed.
2. The matter is remitted to the court *a quo* for the applicants to plead to the charge with the matter proceeding to trial.

KWENDA J agrees .....

Manase and Manase, 1st and 2nd applicants' legal practitioners
Mhishi Nkomo Legal Practitioners, 3rd applicant's legal practitioners
National Prosecuting Authority, 1st respondent's legal practitioners