

THE STATE
versus
JEMINA GUMBO

HIGH COURT OF ZIMBABWE
MAKONESE J
HARARE, 5-16 November 2012 and 28 August 2013

Criminal Trial

P Mpfu, for the State
A. Rubaya, for the accused

MAKONESE J: The accused was arraigned before this court on allegations of contravening s 174 (1) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*], that is to say, criminal abuse of duty as a public officer. In brief, the accused who was employed by the Municipality of Chitungwiza as a Director of Housing, Education and Community Services is alleged to have corruptly allocated various stands situate at the Town Centre in Chitungwiza for lease to individuals and organisations for commercial purposes without obtaining Council Resolutions, and without advertising such leases as required in terms of s 152 (2) of the Urban Councils Act [*Cap 29:15*]. The State alleges that by allocating the stands without following laid down procedures the accused showed favour to the beneficiaries and disfavour to stake-holders and the Chitungwiza Community at large, who would have an interest in the allocated of such stands. It is further alleged that when the accused unilaterally allocated the said stands, there was no involvement of full Council, and that she had no right to usurp the powers of Chitungwiza Municipality Council by unilaterally allocating the commercial stands in the manner she did.

In a lengthy trial that commenced on the 6 November 2012, the State opened its case by producing various documentary exhibits with the consent of defence counsel. These exhibits related principally to copies of memorandum of agreements of sale relating to the 22 counts the

accused is facing. The State proceeded to lead oral testimony from a total of nine witnesses before incorporating the evidence of nine other witnesses by way of formal admissions in terms of s 314 of the Criminal Procedure and Evidence Act [*Cap 9:07*].

The State closed its case and the defence has now applied for a discharge of the accused person at the close of the State case on the grounds that the State has not led sufficient evidence upon which a reasonable court acting carefully, could or might convict the accused. The application is strenuously opposed by the State and it has been argued by the State that sufficient evidence has been adduced to warrant the placement of the accused on her defence. The State has argued that at this stage the State is not required to prove its case beyond a reasonable doubt but to raise a *prima facie* case.

I will not endeavour to repeat the evidence of each and every witness who testified, but shall summarise the main aspects of the State case. I shall examine the law relating to such applications and then determine whether the application before me is meritorious.

The Evidence

It is the State's contention that the accused abused her duty as Director of Housing, Education and Community Services for Chitungwiza Municipality, and as a public officer in allocating commercial stands without following proper and laid down procedures. The shortcomings of the accused person in this regard as highlighted by the state witnesses are as follows:

- (a) that she violated the provisions of s 152(2) of the Urban Councils Act [*Cap 29:15*] in that she failed to advertise the sale of the stands in the local newspapers.
- (b) that she allocated the stands without obtaining Council Resolutions in violation of Part III of the Manual For the Management of Urban Land.
- (c) that accused failed to apply for a change of use in respect of two stands namely, stand 19740 and 19745, which had been earmarked for public facilities but allocated as commercial stands.
- (d) that by allocating the stands without following laid down procedures, the accused showed favour to the beneficiaries and disfavour to stake-holders and the Chitungwiza community in general.

The main witness for the State was Wadzanai Dube who was employed at the

relevant time as the Administrative Assistant in the Department of Housing at Chitungwiza Municipality. She testified at length and was subjected to extensive and thorough cross-examination by defence counsel. The thrust of her testimony was that the accused instructed her verbally to allocate various stands to individuals and organisations without following proper, laid down procedures. The defence hotly contested the witness's account that she acted on the instructions of the accused person. The defence pointed out that Wadzanai Dube was an interested party as she had herself allocated herself a stand under the names "WD Investments", the initials referring to her own names.

There can be no doubt that at the relevant period all systems had virtually collapsed at Chitungwiza Municipality and that the situation was a free for all. There can also be no doubt that from the Mayor, the Town Clerk and all Heads of Department, there was no proper supervision and compliance with laid down procedures. It seems to me that the general laxity in the enforcement of procedure was the catalyst for the collapse of the system. The question that must be put and answered is, why did the mayor, Town Clerk and all the other Heads of Department allow the situation to degenerate into what can only be described as an all round-failure of management systems? I am of the view that the entire Town Council is to blame for the failures, and as such no one individual can assume liability collectively for the entire council and its management. For example, and strictly speaking the duty to advertise was the responsibility of Council and not the accused individually. It should be noted that Fungai Samuel Mbetsa testified that he was appointed to head a team appointed by the Minister of Local Government whose primary function was to resuscitate the Chitungwiza Municipality. The terms of reference of this committee was to bring the organisation to normality, and to carry out an audit of the systems that were in place. These terms of reference are a clear admission that everything was not well at the Town Council.

In analyzing the evidence of all the state witnesses, what came out clearly is that there was no direct evidence to link all the offences to the accused person. The state did not, in my view, establish that the accused was responsible for all the allocations in respect of the 22 counts. In any event, if the accused in her personal capacity failed to follow the proper procedure in the allocation of stands in violation of Council standing orders, this would at best amount to a dereliction of duty. The employer, being the municipality would have a good case to launch a

labour case on the grounds that accused person was failing to discharge her duties in accordance with her terms of employment.

The Law

Section 174 (1) of the Criminal Law (Codification and Reform) Act, stipulates that:

- “(1) If a public officer, in the exercise of his 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 a period not exceeding fifteen years or both.”

In an application for discharge at the close of the State case there are three principal considerations, namely-

- (a) where no sufficient evidence has been led to establish an essential element of the offence
- (b) whether there is no sufficient evidence that has been adduced and upon which a reasonable court acting reasonably might or could convict
- (c) whether the evidence adduced by the State is so manifestly unreliable that a reasonable court could not safely convict.

See *S v Kachipare* 1998 (2) ZLR 271.

Section 198(3) of the Criminal Procedure and Evidence Act provides that 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 or any other offence of which he (or she) might be convicted thereon, it shall return a verdict of not guilty.

The law is now well established that if at the end of the case for the prosecution there is no evidence upon which the court could convict, the court shall discharge the accused person.

In the instant case the State has thus far led evidence which clearly shows that Chitungwiza Municipality as a whole was being mismanaged. The accused person as one of the Head of Departments cannot assume collective criminal liability on behalf of the rest of the management, or indeed Council itself. The state has failed to establish that the accused showed favour to any person or organisation in respect of all the 22 counts. The mere fact that procedure was not properly followed by the accused in the allocation of stands cannot establish the requisite criminal intention to prove the crime of criminal abuse of office. I am, therefore, not

convinced that the state has established a *prima facie* case warranting her being placed on her defence. I agree with defence counsel that placing the accused on her defence would be tantamount to asking the accused person to convict herself from her own mouth. The state case standing on its own should be strong enough to sustain a *prima facie* case.

In the result, the application for a discharge at the close of the State case is upheld, and the accused person is accordingly found not guilty and acquitted.

*Criminal Division, Attorney General's Office, state's legal practitioners
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