

THE STATE
versus
HERBERT GOMBA
and
STANLEY NDEMERA
and
EMMANUEL MUTAMBIRWA
and
DANIEL USINGARAHWE

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 18, 19, 20, & 30 October 2023; 7, 16, 17 & 29 November 2023;
10 January 2024; 10, 12, 13, 14, 18, 19, & 20 March 2024; 21 May and 8 July 2024

Criminal Trial

Assessors: Mr Kunaka
: Mr Mhandu

W Mabhaudi with L Masuku & F C Muronda, for the State
A Mugiya, for the 1st accused
A Rubaya for the 2nd accused
T T G Musarurwa, for the 3rd accused
T J Magaya, for the 4th accused

CHIKOWERO J:

- [1] The accused persons were indicted for trial on a charge of criminal abuse of duty as public officers as defined in s 174(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (“the Criminal Law Code”)
- [2] The allegations are that on a date to the prosecutor unknown but during the period extending from September 2018 to August 2020 they acted in concert to facilitate the creation and sale of commercial stands on land, which was already on lease to Old Hararians Sports Club, to three sister companies without following lawful procedure.

[3] Among the six irregularities relied on by the state are the following. First, noncompliance with the provisions of s 152 (2) of the Urban Councils Act [*Chapter 29:15*] (“the Urban Councils Act”) in that they did not give notice of the Council’s intention to sell the land before the land was sold. Second, they failed to institute change of reservation procedures in terms of s 49 (3) and (4) of the Regional Town and Country Planning Act [*Chapter 29:12*] (“the Regional Town and Country Planning Act.”) before selling the land. Third, they sold the land to three companies against the recommendations endorsed on the sub divisional plan itself that the land could only be put on lease, rather than sale, unless certain conditions were met. Fourth, the land sold was under lease to Old Hararians Sports Club in terms whereof it was zoned for public open space and recreation. In a nutshell, the accused persons are alleged to have criminally abused their duties as public officers by selling urban land without complying with the law governing such sales. In doing this, so it is alleged, they showed favour to the three sister companies and disfavor to Old Hararians Sports Club. The showing of favour is said to have arisen from these circumstances. First, the sales were to handpicked beneficiaries despite the existence of a 2005 Council resolution which required that sales of Council land be by public tender. Second, there was no notice given to the public of Council’s intention to sell the land in question to invite not only objections but bidders so that Council would get the most out of the land in the event it were eventually sold. Third, the disfavor to Old Hararians Sports Club and the favour to the three sister companies was in this. The former, though still a tenant in terms of the lease agreement running up to 2044 in respect of the same land, for public open space and recreation, was disadvantaged in that the land was sold to the three handpicked companies for an entirely different use. That use was commercial. This would mean that the land was no longer available to Old Hararians Sports Club for use as a public open space and for recreation.

[4] The state alleges that the accused persons were all public officers. The allegations are that the first accused was the Mayor of the City of Harare while the second, third and fourth accused persons were the City’s Acting Finance Director, the City Valuer and Estates Manager and a Valuation Technician respectively.

[5] While admitting that he was a public officer the first accused’s defence was that he was not involved in the alleged creation and sale of the stands and had no knowledge of the same. He put the State to the proof of its allegations.

[6] Having led no incriminating evidence against him, at the close of the case for the prosecution the state stopped prosecuting the first accused. That development rendered it unnecessary for the court to determine the first accused's written application for discharge at the close of the State's case. Consequently, the Court found the first accused not guilty and acquitted him at that stage of the trial. In the circumstances, nothing further will be said about the first accused. He is no longer part of these proceedings.

[7] The fourth accused held the lowest office in the Valuation and Estates Management Division. That division falls under the Finance Department. His defence was that he was not involved in the alleged creation and sale of the stands in question. He did not know how his name and initials ended up being reflected on council documentation used in the process leading up to the alleged sale of the stands.

[8] After considering all the evidence, including that led by him in his own defence, the court is satisfied that the state has failed to prove its case beyond reasonable doubt against the fourth accused. This is a case where the State, in its closing submissions, should have conceded as much. Its own witness, Conrad Rutsitu, exonerated the fourth accused. Even as he testified, Rutsitu, like the fourth accused, was still employed as a Valuation Technician by the City of Harare. He told the court that it was him, and not the fourth accused, who authored the documentation which bore the fourth accused's reference. The witness did that on the instructions of his senior, one Peter Dube (a valuation officer). The State did not bother to seek an explanation from Rutsitu on why he used the fourth accused's reference in initiating the creation of the Town Clerk's reports to the finance committee, the letters to each of the three companies communicating approval of the sale of the stands to them, among other documents, instead of using the witness' own name and reference.

[9] What was telling in Rutsitu's evidence was the damning revelation that his superiors had the clearly undesirable practice of preparing correspondence on the City of Harare's letterhead bearing the witness and fourth accused's references behind the witness and fourth accused's backs.

[10] We are aware that in defending himself, the fourth accused explained that his reference could have been captured on the town clerk reports to the Finance Committee and the letters to the beneficiary companies because templates were used, resulting in a simple exercise of copying and pasting without making the necessary changes.

[11] This explanation, coupled with the evidence of Rutsitu, means that there is no link whatsoever between the fourth accused and the charge preferred against him.

[12] No other witness linked the fourth accused to the commission of the offence charged.

[13] We now examine whether the state has proved its case against the second and third accused persons.

[14] In his nine paged defence outline, the second accused put the State to the proof of all its allegations. In other words, he put in issue all the essential elements of the offence as well as:

“Each and every allegation of fact and law contained in the indictment, outline of the State case and or witness statements as well as alleged documentary exhibits that the state bases its case on in a bid to try and link him to the offence in question...”

[15] In outlining his defence, he denied unlawfully and intentionally acting contrary to or inconsistent with his duties as set out in any enactment, any signed contract of employment, any signed job description and or any applicable standard operating procedure. He denied acting in common purpose with his co-accused to facilitate the alleged illegal sale of three commercial stands on sub divisional plan TPF\CR\04 \18 to Optel Enterprises (PVT) Ltd, Silver Harbour Enterprises (PVT)Ltd and Leanforth Investments (PVT) Ltd. Among other things, he challenged the state to place before the court irrefutable evidence which sets out his alleged personal involvement in the alleged stands in the manner alleged or at all. He challenged the State to prove his alleged illegal conduct during the alleged process leading to the alleged illegal sale of the stands in question. He denied conniving with his co-accused to illegally initiate the creation of commercial stands for sale to the three beneficiary companies. He challenged the state to prove as a matter of fact that he is the one who appended the signatures under the designation of the Acting Finance Director or the alleged town clerk reports to the Finance Committee. He also, in the defence outline, challenged the State to prove that he was personally involved in the alleged preparation of the alleged offending town clerk reports to the Finance Committee and or contributed to the contents of the alleged offending town clerk reports. He challenged the state to prove that it was him who signed the letters communicating to the three companies that council had approved the sales of the stands to them and that they should pay the purchase price mentioned in each of those letters into the named council bank account and furnish proof of such payment to the office of the Finance Director at Rowan Martin Building soon thereafter.

[16] It is necessary that we set out the contents of paragraphs 5.9, 5.10 and 6 of the second accused's defence outline. They read:

"5.9 The second accused asserts that as the Acting Finance director he was just one of the employees of the Council of the City of Harare. It is the Council which had the obligation to comply with section 49(3) and 49(4) of the Regional, Town and Country Planning Act [Chapter 29:12] and section 152 (2) and 152 (3) of the Urban Councils Act [Chapter 29:15]. The second accused person asserts that he cannot be answerable for and on behalf of the full council of the City of Harare which had the relevant obligations to comply with the statutory provisions as set out above. The failure of the full council of the City of Harare to comply with the statutory obligations alleged cannot translate to him having personally failed to comply with those provisions of the law in circumstances where no duty accrues to him as an individual and or as Acting Finance Director of the City of Harare. The second accused person asserts that he is not synonymous with the full council of the City of Harare as contemplated by the State in its indictment and outline of the State case.

5.10 He cannot possibly be held criminally liable for alleged offending conduct and or alleged offending action which was alleged to have been done by his equals from different departments of the City of Harare.

6 The second accused asserts that he cannot be properly prosecuted alone based on alleged town clerk reports which reports were allegedly signed by the town clerk and were allegedly considered by the Finance and Development Committee members as the Town Clerk Reports in circumstances where it is the Town Clerk who is the Accounting Officer of the City of Harare and the person responsible for the Town Clerk's Report as the name says. The second accused is further perplexed by the absence of the members of the Finance Committee from the trial yet they are the ones who resolved to recommend to the full council to sell the alleged stands to the three companies Optel Enterprises (Pvt)Ltd , Silver Harbour Enterprises (Pvt) Ltd and Leanforth Investments (Pvt) Ltd."

[17] The indictment is clear. The state alleges therein that the offence was committed during the period from September 2018 to August 2020 by the accused persons, at City of Harare Council offices, Central Business District with the second accused committing the offence by criminally abusing his duty as the Acting Finance Director.

[18] Although he opened his defence outline by resorting to the scatter gun approach of virtually denying everything and putting the State to the proof thereof, the same defence outline is clear, and specific, in paragraphs 5.9, 5.10 and 6 that the second accused did not deny that he was the City of Harare Acting Finance Director during the period the offence is alleged to have been committed. That period, as set out in the indictment, spanned the period from September 2018 to August 2020. This means he did not put the State to prove this fact. Indeed, the State case was conducted on the basis that the second accused was the Acting Finance Director of the City of Harare during the period September 2018 to August 2020.

[19] The indictment has an annexure. The latter sets out two duties of the Finance Director, among others. Those listed are:

- “(a) to ensure the financial interests of the Council are safeguarded in all property acquisitions and disposals.
- (b) to design and implement robust systems and controls to monitor implementation of financial and property valuation policies.”

[20] In outlining his defence the third accused asserted that everything that he did was above board. He received instructions from his superiors to expedite sale of these particular stands to raise revenue to pay salaries of Council employees as well as to increase the council’s revenue base. Council was in a precarious financial position. He informed his immediate superior, the Finance Director, that there was a need to advise Old Hararians Sports Club, as the leaseholders of the land in question, of the proposal to subdivide the land and sell the same. Hence the Acting Finance Director wrote to Old Hararians Sports Club on 20 August 2019 advising that council had identified stand 13378 Harare Township (which was one of the pieces of land leased to the Sports Club) for alienation for commercial purposes. The third accused asserted that there was nothing criminal in the entire process which culminated in addressing correspondence to three companies wherein it was stated that council had approved the sales and that each of them should pay the purchase price into a nominated council bank account and furnish proof of payment to the office of the Finance Director at Rowan Martin Building.

[21] We think it useful to highlight paragraphs 10 and 11 of the third accused’s defence outline. They read:

“10. The third accused will further deny that the transaction showed any disfavor to Old Harrarians Sports Club as the portion of land was vacant and unutilized and did not impede the affairs of the Old Hararians save for speculative reasons of holding onto unused council land. Old Hararians could not utilize the said land as they unlawfully subleased other portions of the land that fell under their lease.

11. Lastly, the third accused will deny that there was any intention of circumventing sections 49 or 152 of the Regional, Town and Country Planning Act [Chapter 29:12] as the letters to the said companies did not constitute a sale but an offer to sell once two primary conditions were met which were firstly the payment and secondly approval by the Minister.”

[22] We pause to remark that it appears to us that there may very well have been interference with investigations in this matter, by persons unknown, the result of which may have been the disappearance of some documents which one would have expected to have been produced as exhibits. These documents include the memorandum which accompanied the sub divisional plan

as it moved between the offices of the Director of Finance and the Director of Works. The tracing paper used in preparing the sub divisional plan was not placed before us. We hand down this judgment without knowing whether the investigations included placing the three town Clerk Reports to the Finance Committee and the three “offer” letters to pay the purchase prices of the three stands before a questioned document examiner as there are disputed signatures thereon. These six documents were among the fourteen documentary exhibits produced by the state. We did not uphold the second accused’s objection to the production of the six documents in view of the basis upon which the state moved for their production. We shall, elsewhere in this judgment, ventilate this issue in more detail.

[23] A number of the State witnesses were not entirely truthful. We were satisfied that, to that extent, they were protecting each other. We shall demonstrate why we take this view.

[24] It is against this unenviable background that this court must still decide whether the State has proved its case against the second and third accused beyond reasonable doubt.

[25] The third accused, at the material time, was the custodian of council land. Samuel Nyabeze, the City of Harare planner testified that he oversaw the creation of subdivisions on the land in question because he had received a request from the City Valuation and Estates Division to do so. The actual drafting of the plan was done by his subordinate, Jephious Chando. Chando also testified. So did Chando’s immediate superior, Wadzanai Annie Vhutuza (the Principal Town Planner). These three State witnesses all hailed from the town planning division of the City of Harare. That division fell under the Department of Works. They contradicted each other but, because it suited them to do so, they all spoke with one voice in contradicting Luckson Mukunguma. Mukunguma was an impressive and truthful witness.

[26] Nyabeze testified that the result of the request for sub division of the land was the creation by Chando, and the approval by himself, of what was placed before us as exhibit s 2. This document is the approved subdivision plan of the land situate at the corner of Bishop Gaul Avenue and Drummond Chaplin Street (under lease to Old Hararians Sports Club) which saw the creation of five stands. The five stands were for a fuel filling station, market area for fresh farm produce, active recreational space, medical center and crèche respectively. The first three stands are what the State alleges were sold to Silver Harbour (Private) Ltd for construction of a fuel service station, to Leanforth Investments (Private) Limited for construction of a fuel service station (although even

the sub divisional plan itself reflects the intended use as active recreational space) and to Optel Enterprises (Private) Limited for the operation of a fresh farm produce market respectively.

[27] Nyabeze testified that it is Chando who endorsed the notes, in long hand, which we now see on exhibit s 2. He said he had written those notes on tracing paper using a special pen. All that Chando did as far as those notes were concerned was to read them and copy them onto what is now exhibit s2, in long hand. These notes, which were referred to as conditions upon which the proposed sub divisional plan was then approved to transform it into a sub divisional plan read as follows:

“NOTES

- 1) ZONE: open space and recreation-phase 2, 3 and 4.
- 2) Approval is for lease purposes only pending change of reservation process.
- 3) No stand shall be disposed before finalization of change of reservation in terms of section 49 (3) of the RTCP Act.”

[28] The tracing paper, if ever it existed, was not, as we have already said, produced as an exhibit. Chando said he destroyed it, together with the notes thereon.

[29] Vhutuza, who stood between Chando and Nyabeze in the City Planning division hierarchy, told us that the sub divisional plan did not contain the notes as it passed through her desk on its way to Nyabeze. We are satisfied that she was protecting her superior, (Nyabeze) when she testified that the trio (Chando, Nyabeze and herself) discussed the plan and came up with the common position that the sub divisional plan be approved but subject to the conditions that we have already set out.

[30] The notes are undated. They are not signed off yet the sub divisional plan itself, which is computer printed, is clearly indicated as having been drawn by J C (for Jephious Chando) in September 2018 and approved by the City Planner, Nyabeze (who signed it off) on 30 July 2019.

[31] Luckson Mukunguma was the Chairperson of the Finance and Development Committee at the material time. He did not work in the City Planning Division. We have no reason to reject his evidence that the Finance and Development Committee, which he chaired, resolved to recommend to full council to sell the three stands to the three companies because, among the documents circulated with the agenda of his committee’s meetings, was an unconditionally approved sub divisional plan placed before his Committee on 22 and 30 October 2019. It looked exactly like exhibit 2, minus the handwritten notes.

[32] His testimony made a lot of sense. He told us that his committee would never have resolved to recommend to full council that it sells the three stands if the approved sub divisional plan had contained the offensive handwritten notes.

[33] Indeed, the notes are clearly out of place. The land, in its un-subdivided state, was already on lease to Old Hararians Sports Club. That lease expires in 2044. So the same land could not be approved for lease purposes only when it was already, without any need for sub-division, on lease to Old Hararians Sports Club. Put simply, the agenda placed before the Finance and Development Committee on 22 and 30 October 2019, as it pertained to the three stands and the three companies, spoke to recommendations to sell and not to lease the land in question.

[34] Zvenyika Isaiah Chawatama also testified for the prosecution. He is the Director of Works and hence Nyabeze's immediate superior. In March 2020, at a time when this matter was under investigations by law enforcement officers, Chawatama asked Nyabeze to produce the approved sub-divisional plan. To use the witness words, he found it "fishy" that Nyabeze produced a sub-divisional plan containing handwritten notes but without the memorandum accompanying the movement of such a plan. The memorandum is significant because it records communication between the Director of Works (Chawatama) and the Director of Finance relative to the approved plan. Nyabeze, so said Chawatama, was unable to explain his inability to produce the memorandum despite the fact that the two documents speak to and accompany each other.

[35] It is for these reasons that we think that Nyabeze must consider himself fortunate that he was not indicted for trial together with the accused persons for conniving with them by illegally creating and approving a sub-divisional plan purporting that un-subdivided land already on lease by Council to Old Hararians Sports Club as public open space and for recreation was commercial land to facilitate its sale to the three sister companies.

[36] It was common cause that on 9 March 2016 and 11 May 2017 Optel Enterprises (Private) Limited and Silver Harbour Investments (Private) Limited, applied to council through the City Valuer and Estates Manager (the third accused was not yet the incumbent) to purchase land to develop a suburban market garden and a fuel service station respectively. But that did not justify the flouting of the laws relating to the procedure for disposal of urban council land.

[37] Through the town clerk (Hosiah Abraham Chisango) the state produced exhibits s 3, s 4, s 9, s 10, s 12, s 13, and s 14. Despite the second accused's objection, these documents were

produced, and through Chisango, because they are official records of Council. As the Chief Accounting Officer of the Council he has access to Council records and is the custodian thereof. Exhibit s 3 is the record of the minutes of a meeting of the City of Harare's Finance and Development Committee held on 22 October 2019 at which that Committee resolved to recommend to full Council to sell stand 40 778 Harare Township to Silver Harbour (Pvt) Ltd for the setting up and operation of a fuel service station at a price of US \$89 040 payable in Real Time Gross Settlement dollars (RTGS\$) at the prevailing bank rate on the day of making the payment. At the same meeting, the committee resolved to recommend to full council to sell stand number 40 779 Harare Township to Leanforth Investments (Private) Ltd for the operation of a fuel service station at a price of US \$105 948 payable in RTGS dollars at the prevailing bank rate on the day of making of the payment of the payment.

[38] Mukunguma, who was one of the Councillors, chaired this meeting. The officials present included one L Churu in his capacity as Acting Finance Director and the third accused in his capacity as the City Valuer and Estates Manager. Also in attendance was one P Charumbira from the Department of Works.

[39] Exhibit s 4 is a record of the minutes of a meeting of the City of Harare's Finance and Development Committee held in the Council Chamber at Town House on 30 October 2019. Mukunguma also chaired this meeting. The council officials in attendance included the second and the third accused persons in their capacities as Acting Finance Director and City Valuer and Estates Manager respectively. Also in attendance were L Churu from the Finance Department, L Chirombo, P Charumbira and Engineer N Karidza. The latter three represented the Department Of Works. It is at this meeting that the Committee resolved to recommend to full Council to sell stand number 41 215 Harare Township to Optel Enterprises (Private)Ltd for fresh farm produce market purposes for RTGS \$2 019 722 including Value Added Tax.

[40] Exhibits S 9, s 10 and s 11 are the Town Clerk Reports to the Finance Committee in which recommendations were being made by the Finance Department (headed by the Acting Finance Director) to the Finance and Development Committee to sell the three stands to the three companies for the amounts and purposes which we now know. Exhibits s 9 and s 10 are dated 30 September 2019 but were signed by the Town Clerk, Chisango, on 21 October 2019. This was after the two documents had been signed, on the same date, by a person above the designation

“Acting Finance Director.” Because they are official public documents in the custody of the Town Clerk the court admitted exhibits s 9, s 10 and s 11 into evidence but not because the state proved that the second accused appended his signature thereon (since he challenged the state to prove that fact). Attorney General v Bennett 2011 (1) ZLR 396 (S) is thus distinguishable both on the law and the facts.

[41] Exhibit s 11, signed by the Town Clerk, the Director of Housing and Community Services and someone above the designation “ACTING FINANCE DIRECTOR”, all on 28 October 2019, was admitted into evidence on the same basis as exhibits s 9 and s 10.

[42] Exhibit s 4 (Council’s Finance and Development Committee minutes of the meeting of 30 October 2019 which was attended by the second and the third accused as well as L Churu among others) reads in part:

“3. SALE OF STAND 4215 HARARE TOWNSHIP TO OPTEC ENTERPRISES (PVT) LTD FOR FRESH FARM PRODUCE MARKET PURPOSES [(D. 1 (1))]

The committee considered a confidential report (18 October 2019, circulated with the agenda) by the Acting Finance Director recommending sale of stand 4215 Harare Township to Optel Enterprises (Pvt) Ltd for fresh farm Produce Market purposes at a selling price of (RTGS \$2 019 722) two million and nineteen thousand and seven hundred and twenty two RTGS dollars inclusive of Vat (15%).

Stand 4215 was as a result of the sub- division of the Remainder of Salisbury Township as per plan number TPF/CR/04/18 creating a Fuel Service Station, Market Area for Fresh Farm Produce, Active Recreation, Medical Centre and Creche Purposes.”

[43] The Report referred to in this excerpt is exhibit 11. It was signed on Monday 28 October 2019. It was then circulated together with the agenda of the meeting of Wednesday 30 October 2019. We now know, despite the fact that the agenda pack was not produced before us as a bundle, that the pack included a replica of exhibit s2 minus the offensive handwritten notes. Both in paragraphs 5.9, 5.10and 6 of his defence outline and in cross examining the State witnesses, the second accused accepted that he was the Acting Finance Director during the period from September 2018 to August 2020. Needless to say, the period from 18 October 2019 to 30 October 2019 falls within the period covered by the indictment as the period when the offence is alleged to have been committed. There is nothing in exhibit s 4 suggesting that the second accused did not receive the agenda documents prior to the holding of that meeting. There is nothing in the same minutes suggesting that the second accused, as the Acting Finance Director, queried the genuiness

of the approved sub-divisional plan and exhibit s 11 seeing those two were said to have been circulated by him in his capacity as the Acting Finance Director.

[44] In these circumstances there can be no doubt that the second accused, given his duty of ensuring that council land was disposed of lawfully and to best advantage, was involved in the process of the illegal creation of stand 4215 Harare Township and the facilitation of its sale to Optec. Even if we had found that this particular stand was not eventually sold to Optec (because no agreement of sale was availed to Optec for signature) the offence of criminal abuse of duty as public officer had already been committed not only by the second but also by the third accused.

[45] The second accused conceded under cross examination that it is not possible to sell Council land without the involvement of the Acting Finance Director. This means that it would not have been possible for any recommendation to have been made, via the Town Clerk reports to the Finance and Development Committee, for the sale of the three stands in question without his involvement as the Acting Finance Director. It would have been the icing on the cake if the State had proved, possibly through expert evidence, that it was the second accused who signed the Town Clerk reports and the three “offer” letters as Acting Finance Director. Even without such proof the cumulative effect of the evidence placed before us, including the vital concession made by the second accused, proves that the second accused was involved in the illegal sub-division of the land into stands to facilitate the sale of three of those stands to the three handpicked companies without change of reservation and in breach of s 152 of the Urban Councils Act.

[46] In relevant part, the letter of 13 November 2019 reads as follows:

“The Managing Director
Optel Enterprise (Private) Limited 3013 Rudland Avenue
HARARE

Dear Sir or Madam

RE: SALE OF STAND 4215 HARARE TOWNSHIP OF SALISBURY TOWNSHIP LANDS TO OPTEL ENTERPRISES (PRIVATE) LIMITED FOR FRESH FARM PRODUCE MARKET PURPOSES

The above refers

Please be advised that on 30 October 2019, Council under item 3 of Finance and Development Committee minutes of 30 October 2019 approved the sale of stand 4215 Harare Township of Salisbury Township Lands to Optel Enterprises (Private) Limited for Fresh Farm Produce Market purposes for an amount of two million and nineteen thousand seven hundred and twenty two RTGS dollars (RTGS \$2 019 722.00) inclusive of 15% VAT

You can now go ahead and pay the purchase price pending finalization of the requirements of section 152 of the Urban Councils Act which governs such land sales. Our banking details are as follows:

BANK	BRANCH
CABS	CENTRAL AVENUE
ACCOUNT NAME	ACCOUNT NUMBER
RATE/ BILLS	1002733316

Please submit your receipts to the office of the Finance Director at Rowan Martin Building as soon as payment has been made.

Yours Faithfully
(Signed)
ACTING FINANCE DIRECTOR.”

[47] The letters to the other two companies were produced as exhibits s 12 and s 13. They were also written on 13 November 2019. The contents of exhibits s 12, s 13 and s 14 are similar, with the necessary changes.

[48] The State did not prove that exhibits s 12, s 13 and s 14 were signed by the second accused. However, it managed to prove that the entire process from the illegal creation of the three stands and the sale thereof were with the involvement not only of the second but also of the third accused.

[49] it was only on realizing, in the wake of the dismissal of his applications for discharge at the close of the State’s case and for leave to appeal that decision, that the uncontested fact that he was the Acting Finance Director during the period that the offence was committed linked him to the commission of the offence that the second accused made an about turn. He had realized that the mere failure by the State to prove that the signatures on the Town Clerk’s reports and the exhibits s 12, s 13 and s 14 were his was insufficient to distance him from the offence. In his defence case he then contradicted a vital cog of his defence outline by denying, for the very first time, that he was the Acting Finance Director during the period when the offence, going by the indictment and the evidence led by the state, was committed. If it had been his defence all along that he was not the Acting Finance Director during the period September 2018 to August 2020 that is what he should simply have asserted in his defence outline. It would have been unnecessary to burden the court with a mouthful defence outline when all that he needed to do was to assert that he did not participate in the alleged commission of the offence because he was not the Acting Finance Director at the relevant time. Indeed, it was only in his defence case, at a time when all the state witnesses had testified and been excused that the second accused surprised the court by saying he was the Heads Budget at the material time and that he alternated with four others (whose

names he mentioned also for the first time) in performing specific assignments in an unstructured manner in the office of the Acting Finance Director without any letters of appointment. While it is true that L Churu attended the Finance and Development Committee meeting of 22 October 2019 as the Acting Finance Director everything else points to the second accused as having been the Acting Finance Director during the relevant period. We underline the fact that in his own defence outline the second accused asserts this as fact. That fact therefore did not need to be proved by the state. The positive assertion by the second accused relieved the State of that burden.

[50] The third accused did not dispute that he was involved in the creation of the stands in question and the process leading to them being sold to the three companies. He says that was not a crime. That cannot be so. He was the custodian of Council land at the relevant time. He knew that the land was on lease to Old Hararians Sports Club. The lease agreement would expire in 2044. No change of reservation was ever initiated by him. Yet he was participating in the creation of commercial stands on land which was lawfully for public open space and recreational purposes and was heavily involved in facilitating the sale of those Stands to three handpicked companies.

[51] The second and third accused persons should never have been involved in escalating this matter to the stage where an agenda was placed before the Finance and Development Committee recommending to that committee that the stands in question be sold to the three handpicked companies.

[52] There was no compliance with the peremptory provisions of s 152 of the Urban Councils Act. The single advertisement published in the Daily News of 11 December 2019 is not what the said section contemplates. In any event, it was published when the three companies had already been advised, falsely, that council had approved the sale of the Stands to them. The advertisement was not a notice of Council's intention to sell the three stands at all because Optec, Silver Harbour and Leanforth had already been asked to pay the purchase prices and to furnish proof of such payment to Council. The departmental memoranda of 29 January 2020 by the Acting Chamber Secretary instructing the Acting Finance Director (for the attention of the City Valuer and Estates Manager) to conclude the agreements of sale in favor of Optec and Silver Harbour were red herrings. The memoranda could not sanitise the unlawful procedure by which Optec and Silver Harbour were favoured over every other citizen, including Old Hararians Sports Club, in the sale of the stands. Indeed, C U Kandemiri, the Acting Chamber Secretary, may very well have been

attempting to conceal evidence of the commission of this offence by composing documents painting a false picture of what actually happened.

[53] For completeness, we record that it matters not that the three companies, on the evidence placed before us, did not sign written agreements of sale to purchase the three stands from Council. We are aware also that the State did not prove that the companies in question paid the purchase prices. No receipts were produced. No bank statements were produced. All that stands on record is the oral evidence of Alan Mutsitu, the company secretary of Optec, Silver Harbour and Learnforth that the purchase prices were fully paid. But, in the circumstances, all this does not matter. The second and third accused should not have colluded and participated in the illegal creation of the three stands to facilitate their sale to the three companies. Whether the purchase prices were paid is besides the point. The “offer letters” constitute evidence, read with Mutsitu’s evidence, that the three stands were sold. Such sales were not in line with the statutory provisions governing sale of urban land. The resolutions contained in the Minutes of the Finance and Development Committee meeting of 20 October 2019 and 30 October 2019 are not resolutions of Full Council yet the land was sold to Optel, Silver Harbour and Learnforth on the basis of such resolutions as if they were Full Council Resolutions. That was criminal. That the three handpicked companies were unlawfully favoured is beyond doubt. That they did not sign agreements recording their purchase of the land in question cannot mean that they did not purchase rights in the land. The sales were effected, albeit illegally. We have already highlighted the second and third accused persons’ involvement in the illegal creation of the stands and the sale thereof. Indeed, by virtue of the offices they held in Council at the material time, it would not have been possible for the land to be unlawfully sub-divided let alone unlawfully sold without the involvement of the second and the third accused persons. That some other persons in the employ of the Council may have been complicit in the commission of the offence does not detract from our finding that the State has proved its case against the second and the third accused persons beyond reasonable doubt. We so find.

VERDICT

Accused 2: Guilty as charged

Accused 3: Guilty as charged

Accused 4: Not guilty and Acquitted

CHIKOWERO J

The National Prosecuting Authority, legal practitioners for the State
Mugiya Law Chambers, first accused's legal practitioners
Rubaya & Chatambudza, second accused's legal practitioners
Sibonile Kampira Attorneys At Law, third accused's legal practitioners
Magaya Mandizvidza legal practitioners, fourth accused legal practitioners