REPORTABLE (78)

(1) FAIRCLOT INVESTMENT (PRIVATE) LIMITED (2) GRANT RUSSELL (3) PARAGON PRINTING AND PACKAGING (PRIVATE) LIMITED (4) MARK STRATHEN
v
(1) PROVINCIAL MAGISTRATE SHANE KUBONERA (2) THE STATE

SUPREME COURT OF ZIMBABWE
MAKONI JA, CHIWESHE JA & CHATUKUTA JA
HARARE: 16 SEPTEMBER 2022 & 31 JULY 2024

T. Biti, for the appellants

S. Kachidza with *L. Chitanda,* for the respondent

CHIWESHE JA: This is an appeal against the whole judgment of the High Court (the court *a quo*) sitting at Harare, handed down on 11 May 2022, in terms of which it confirmed, on review, the judgment of the first respondent (the primary court) as being neither irrational nor grossly irregular.

Aggrieved by the decision of the court *a quo*, the appellants have noted the present appeal.

THE PARTIES

The first appellant is a company duly registered in terms of the laws of Zimbabwe. The second appellant is its Director. The third appellant is a company duly registered in terms of the laws of Zimbabwe. The fourth appellant is its Director. The Provincial Magistrate and the State are the first and second respondents, respectively.

THE FACTS

The first and the second appellants and a company called Augur Investments had a fall out concerning their obligations pertaining to the construction of the Harare Airport Road. Various suits and counter suits were filed in the court *a quo* and in this Court. At the centre of these disputes was a piece of land known as Stand 654 Pomona Township, Borrowdale. This property had been offered as security for the payment of Augur Investments as the contractor engaged to construct the Harare Airport Road. Both the first and the second appellants and Augur Investments claimed ownership of this property.

Augur Investments intended to sell the property. Through advertisement, it invited prospective buyers to view the property. The first and the second appellants sought to bar the intended sale through court proceedings. In order to further protect their interests in the property, the first and the second appellants engaged the third and the fourth appellants to erect a bill board at the property inscribed with the following words:

> "Cautionary statement to members of the public, Pomona City Housing Project. Land subject to litigation. Title deeds for land have been pledged as security. Case number HC 4599/19, HC 5989/19, HC 10315/19. Purchase of stands is at the risk of the purchaser."

Augur Investments was offended by the erection of this billboard with words discouraging members of the public from purchasing the stands it had advertised. It pressed charges against the appellants alleging that the contents of the bill board caused and created a criminal nuisance for the purposes of subsection 2 (v) of the 3rd Schedule of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It was alleged that the words on the bill board constituted nuisance and interfered with the peace and comfort of members of the public who may have wished to purchase the stands arising from the subdivision of that property.

The offence of criminal nuisance emanates from the provisions of s 46 of the Criminal Law (Codification and Reform) Act which read as follows:

> "Any person who does any of the acts specified in the 3rd Schedule shall be guilty of criminal nuisance and liable to a fine not exceeding level five or imprisonment for a period not exceeding six months or both."

Subsection 2(v) of the 3rd Schedule to that Act defines acts that constitute criminal nuisance. It reads:

> "Any person who employs any means whatsoever which are likely materially to interfere with the ordinary comfort, convenience, peace or quiet of the public or any section of the public or does any act which is likely to create a nuisance or obstruction shall be guilty of a criminal nuisance."

To that end, the appellants were charged with criminal nuisance. The charge sheet described the acts complained of as follows:

"In that on the 10th of December 2022 and along Borrowdale Road opposite Celebration Centre, Borrowdale, Harare, Fairclot Investments, represented by Grant Russel in his own capacity, Paragon Printing, represented by Mark Strathern in his own capacity, one or all of them, unlawfully and intentionally placed an offensive material on a bill board, "Cautionary statement to the members of the public, Pomona City Housing Project, Land subject to litigation. Title Deed of land has been pledged as security. Case number HC 4599/19, HC 10315/19. Purchase of stands is at the risk of the purchaser," thereby causing false alarm to the public knowingly (sic) that such action is likely materially to interfere with the ordinary comfort and convenience of the public or the possibility that such action is likely to create a nuisance."

The appellants denied the charge. They entered pleas of not guilty and thereafter excepted to the charge.

THE EXCEPTION

The appellants launched a three pronged exception to the charge. They argued that the charge, based on the contents of the words on the bill board, did not disclose any cause of action. They insisted that the contents of the bill board did not interfere with the ordinary comfort, convenience, peace or quiet of the public or any section of the public. Further, the appellants contended that s 2 (v) of the Third Schedule of the Criminal Law (Codification and Reform) Act is too wide, vague and generally imprecise, thus rendering it invalid and unconstitutional, as its provisions violate an accused person's right to a fair trial and equal protection of the law, in contravention of s 68 (3) and 56 (1) of the Constitution. The appellants, on that basis, asked the primary court to refer the matter to the Constitutional Court in terms of s 175 (4) of the Constitution for a determination of the constitutional validity of the said provision.

On the other hand, the State argued that the charge was not defective and that it disclosed the offence preferred against the appellants.

In its very short judgment (one page) the primary court held that:

> "(iii) In respect to exception it is apparent that the defence was now going to issues which were more likely giving defence outline to the charges. The issues can best be restricted during trial process. The defence counsel's application is married with issues *which must be deliberated by court after hearing evidence in respect* of exception. (sic)
>
> (iv) The application for exception to the charges must and is hereby dismissed due to the aforesaid since it lacks merit."

It made no ruling on the question of constitutional validity.

Dissatisfied, the appellants approached the court *a quo* armed with an application for the review of the decision of the primary court on the grounds that it was grossly irregular and irrational. The appellants abandoned the issue of constitutional validity,

preferring to persist only with the exception to the charge on the grounds that it did not disclose any cause of action.

SUBMISSIONS BEFORE THE COURT *A QUO*

The appellants contended that the charge preferred against them did not disclose any cause of action. In particular, it was submitted that the State had not shown in the charge sheet how the words depicted on the bill board created a criminal nuisance as contemplated under s (2) (v) of the 3rd Schedule to the Criminal Procedure and Evidence Act. In other words, the State had failed to show how such words would have caused false alarm to the public or how such action was likely to materially interfere with the ordinary comfort and convenience of the public or any section thereof.

On the other hand, the State noted that the application for review was based on the grounds of gross unreasonableness. It argued that there was nothing grossly irregular or unreasonable about the decision of the primary court. It was asserted that an application for exception having been made and arguments having been heard, the primary court proceeded to make a determination as it was obliged to do. No gross irregularity is apparent in the manner in which the court *a quo* proceeded to deal with the exception. It submitted that an application for review is about procedural irregularities and not the correctness or otherwise of the decision made. The correctness of the decision is a matter that should be taken on appeal.

It was further submitted that as a matter of practice, Superior Courts do not interfere with uncompleted proceedings of a lower court save in exceptional circumstances of proven gross irregularities vitiating the proceedings and which give rise to a grave miscarriage of justice which cannot be redressed by other means. The present case did not fall within that

category. For these reasons, the State urged the court *a quo* to dismiss the application before it.

DECISION OF THE COURT *A QUO*

After hearing the parties, the court *a quo* dismissed the application before it. It noted that it was dealing with the interlocutory decision or incomplete proceedings of the primary court. It observed that the general rule as enunciated in a number of authorities is that a superior court will not readily interfere with unterminated proceedings of a lower court except in exceptional circumstances. Such exceptional circumstances included instances when grave injustice would occur if the superior court did not intervene and where there is gross irregularity resulting in a miscarriage of justice which could not be addressed by any other means. Further, where there is a probability of the proceedings being a nullity "it would be prejudicial to the accused and a waste of time and resources for the trial court to carry on with a trial likely to be declared a nullity." The court *a quo* cited a number of authorities laying down that principle, including the decisions of this Court in *Robert M. Gumbura and 6 Others* v *Fracis Mapfumo N.O. and Another* SC 59/19 and *Attorney General* v *Makamba* 2005 (2) ZLR 54 (S).

It further noted that it could only interfere with the uncompleted criminal proceedings before the primary court if the decision of the primary court to dismiss the appellants' exception to the charge was grossly irregular or irrational. It concluded that the decision of the primary court was neither grossly irregular nor irrational and that there was no basis upon which it could interfere with those unterminated proceedings.

The appellants appealed the decision of the court *a quo* on the following grounds:

GROUNDS OF APPEAL

1. The court *a quo* grossly erred and misdirected itself by ruling that the first respondent's judgment was rational and regular.
2. The court *a quo* grossly erred in failing to realise that the words complained against, on the billboard, could not possibly constitute an offense or a criminal nuisance for the purpose of s 46 as read with the Third Schedule, s (2) (v) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and, therefore the appellants could not possibly be put to trial.
3. The court *a quo* grossly erred in ruling that it could not interfere with the incomplete proceedings before the primary court.

RELIEF SOUGHT

The appellants seek the following relief:

1. The appeal be and is hereby allowed with costs.
2. The order of the court *a quo* be and is hereby set aside and substituted with the following:

"(i) The appeal be and is hereby allowed.

(ii) The first respondent's judgment handed down on 27 October 2021 under CRB 157/12/20 be and is hereby set aside.

(iii) The appellant's exception under CRB 157/12/20 be and is hereby upheld.

(iv) The respondent shall pay the costs of suit."

SUBMISSIONS BEFORE THIS COURT

Preliminary issue – validity of the exception raised by the appellants

At the hearing of this appeal, this Court noted that the exception raised in the primary court in terms of s 180(4) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]

(the Act) did not comply with the wording prescribed under s 180(1) of that statute, which provides as follows:

> "**180 Pleas**
> (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 grounds that it does not disclose any offence cognizable by the court." (Emphasis added)

In casu, the exception taken by the appellants before the primary court was to the effect that the charge did not disclose "any cause of action". The enabling statute clearly provides that an exception, if taken, must relate to the non-disclosure of any offence in the charge. The expression "cause of action" is not, wholly or in part, adverted to in the Act. That non-compliance with the strict wording of the statutory provision renders the exception invalid. The use of the word "shall" in s 180 (1) denotes that the provision is mandatory. A pleading that fails to comply with the mandatory provisions of a statute is defective. The parties were asked to address the court on that point first before having regard to the merits of the matter.

Mr *Biti*, for the appellants, defended the wording of the exception on the grounds that there was no fundamental difference between the expressions "cause of action" and "offence". He did not, however, give any cogent reason why the drafters of the exception had chosen not to comply with the wording that was clearly provided in the Act.

Ms *Kachidza*, for the second respondent, submitted that the words "offence" and "cause of action" could not be used interchangeably in excepting to a charge in terms of s 180 (4) of the Act.

We agree with the submissions made by Ms *Kachidza*. Section 180 (1) of the Act allows an accused person to except to a charge on the grounds that it does not disclose any offence cognizable by the court. Mr *Biti*'s interpretation to the effect that the word "offence" is synonymous with the phrase "cause of action" is at variance with established rules of interpretation. The rules of statutory interpretation dictate that the words of a statute be given their ordinary grammatical meaning unless this would lead to an absurdity. In *Endeavour Foundation & Anor* v *Commissioner of Taxes* 1995 (1) ZLR 339 (S) at p 356 F-G, GUBBAY CJ said:

> "The general principle of interpretation is that the ordinary, plain, literal meaning of the word or expression, that is as popularly understood, is to be adopted, unless that meaning is at variance with the intention of the legislature as shown by the context, or such other "indicia" as the court is justified in taking into account, or creates an anomaly or otherwise produces an irrational result."

See also *Justice Alfred Mavedzenge* v *Minister of Justice, Legal and Parliamentary Affairs* CCZ 05/18.

In *ZIMRA & Anor* v *Murowa Diamonds (Pvt) Ltd* 2009 (2) ZLR 213 (S) this Court echoed the same time honoured principle when it held that:

> "The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further."

In casu, it is instructive to interrogate the grammatical, ordinary and plain meaning of the words "offence", on the one hand and "cause of action" on the other hand, in order to determine whether they are of the same kindred as suggested by counsel for the appellants.

Black's Law Dictionary defines an offence as follows:

> "A crime or misdemeanor: a breach of the criminal laws. … it is used as a genus, comprehending every crime and misdemeanor, or as a species, signifying a crime not indictable, but punishable summarily or by the forfeiture of penalty."

From the above, it can be inferred that the word "offence" generally refers to a violation of a law in the form of a criminal act. It is conduct that is prohibited by law and transgressors are normally subjected to penalties such as fines, imprisonment or other sanctions. Thus offences are typically dealt with in criminal law where the State may prosecute offenders with a view to conviction and punishment. The word "offence" therefore means a crime as defined by the criminal law. That is its ordinary, grammatical and literal meaning as understood in the popular sense.

The term "cause of action", on the other hand, is a civil law concept. In simple terms, a cause of action is a set of facts that gives a plaintiff in a civil suit the right to seek legal remedy against a defendant, such as damages for wrongs committed against him or his patrimony. The term "cause of action" has been defined in several cases in this jurisdiction and beyond. In *Syfin Holdings* v *Pickering* 1982 (1) ZLR 10 (S) this Court held that "a cause of action in any summons is the set of facts which if proved will enable the plaintiff to obtain judgment."

In the South African case of *Abrahams & Sons* v *SA Railways & Harbours* 1933 CPD 626 at p 637 it was stated thus:

> "The proper meaning of the expression 'cause of action' is the entire set of facts which give rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action."

See also *Peebles* v *Dairiboard Zimbabwe* Pvt Ltd 1999(1) ZLR 41.

It is evident that the words "offence" and "cause of action" are as different as chalk and cheese. They refer to two different legal concepts. They cannot be used interchangeably as suggested by the appellants. The appellants` exception as presently couched would be a perfect defence in civil proceedings. The same cannot be a defence in a criminal trial.

DISPOSITION

We conclude therefore that the word "offence" as used in the Act means, in its ordinary and grammatical sense, "a crime" as defined in the criminal law. That is the meaning intended by the legislature. That interpretation accords with the context in which the word is used. Such an interpretation does not lead to any absurdity, repugnancy or inconsistency. It must prevail. The expression "cause of action" is alien to criminal law. The legislature could never have intended that the word "offence" be equated to that civil law concept. It would not make sense. By raising an exception based on the grounds that the charge disclosed "no cause of action", the appellants placed themselves out of statute and pleaded a non-existent defence. There was therefore no exception raised before the primary court. The exception was fatally defective "*ab initio*". For that reason, the matter must be struck off the roll.

In terms of the powers of review bestowed upon this Court under s 25(2) of the Supreme Court Act [*Chapter 7:13*], an order setting aside the proceedings of the court *a quo* and portion of the proceedings of the primary court shall ensue. Both courts sat to determine the fate of a fatally defective exception rendering their proceedings null and void.

As this matter arose from the proceedings of a criminal court, there shall be no order as to costs. In the result it is ordered as follows:

"1. The matter be and is hereby struck off the roll.

2. The proceedings of the court *a quo* be and are hereby set aside.

3. That portion of the proceedings of the primary court relating to the purported exception be and is hereby set aside.

4. The matter is remitted to the primary court for continuation of trial.

5. There be no order as to costs."

MAKONI JA : I agree

CHATUKUTA JA : I agree

Tendai Biti Law, appellant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners