THE STATE
versus
METALLON GOLD ZIMBABWE (PVT) LTD

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 22 October 2018 and 16 March 2022

Application to quash charge

T Kasema, for the State
T Zhuwarara, for the Accused

Accessors: *Kunaka*
Chitsiga

CHITAPI J: The accused is a duly registered company in accordance with the Laws of Zimbabwe. Its offices are located at Block 6, 1st Floor, Arundel Norfolk Road, Mount Pleasant, Harare. The accused's principal business is gold mining and selling of the same. The accused appeared before the court on 22 October, 2018 on an indictment comprising six (6) counts of contravening the Exchange Control Act, [*Chapter 22:05*]. The details of the charges were stated as follows:

> "That Metallon Gold Zimbabwe (Pvt) Ltd, a company duly registered in Zimbabwe and is in the business of gold mining and selling, being represented by Hapson Makotore of block 6, 1st Floor, Arundel Norfolk Road, Mt Pleasant, Harare (hereinafter called the accused) is guilty of the crimes of:-
>
> **FIRSTLY: EXTERNALISATION as defined in Section 5(I)(a) of the Exchange Control Act [*Chapter 22:05*] as read with Section 11(1) (b) of the Exchange Control Regulations Statutory Instrument 109/96 (6 COUNTS)**
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> **SECONDLY: CONTRAVENING SECTION 5(i)(b) of the Exchange Control Act [*Chapter 22:05*] as read with Section 11(1) (a) and (b) of the Exchange Control Regulations Statutory Instrument 109/1996 (6 COUNTS)**
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> **COUNT 1**
> In that during the period extending from January 2009 to December 2013 Metallon Gold Zimbabwe (Pvt) Ltd externalised a total of USD $9932 365.00 to REDWING UNITED KINGDOM LTD on the pretext that it was payment for management and services fees whereas in actual fact and to their knowledge no man-hours were committed neither were there any services rendered to Metallon Gold Zimbabwe (Pvt) Ltd by Redwing United Kingdom.
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> **COUNT 2**

In that during the period extending from June 2011 to January 2012 Metallon Gold Zimbabwe (Pvt) Ltd paid out US$5 800 000.00 to Stonehage Trust through Mtetwa and Nyambirai Trust disguised as loan payment whereas no such amount was due to Stonhage, by so doing Metallon Gold Zimbabwe (Pvt) Ltd externalized US$5 800 000.00 out of Zimbabwe without the Exchange Control approval.

COUNT 3

In that sometime in 2010 Metallon Gold Zimbabwe (Pvt) Ltd paid a dividend of US$51 000.00 despite the company having made a loss and it is further alleged that in the year 2012 the accuse also declared a dividend of US$25 000 000.00 whereas the company had an operating profit of less than US$25 000.00. By so doing the accused person financed a dividend from non-distributable reserves without exchange control approval.

COUNT 4

In that during the period extending from June 2011 to January 2012 the accused Metallon Gold Zimbabwe (Pvt) Ltd being represented by Happison Makotore paid US$87 871.00 to First Atlantic a company domiciled outside Zimbabwe through Mtetwa and Nyambirai Trust disguised as loan repayment whereas no such amount was due to First Atlantic by so doing Metallon Gold Zimbabwe (Pvt) Ltd externalized US$87 871.00 without the approval of the Exchange Control Authority.

COUNT 5

In that sometime in 2012 Metallon Gold Zimbabwe (Pvt) Ltd without lawful authority from the Reserve Bank of Zimbabwe Exchange Control wrote off a balance of an advance loan of US$7 717 000.00 as uncollectable thereby technically externalizing the said US$7 717 000.00 being a loan advance to accused's sister company in South Africa.

COUNT 6

In that in period 2012 Metallon Gold Zimbabwe (Pvt) Ltd paid a dividend worth US$12 200 000.00 to shareholders but failed to withhold tax to dividends paid to non-resident shareholders in contravention of the Exchange Control Regulations.

Wherefore, upon due proof and conviction thereof the said Prosecutor-General prays the judgment of the court against the said Metallon Gold Zimbabwe (Pvt) Ltd represented by Happison Makotore, according to law."

The accused through counsel advised the court that it intended to apply for the quashing of the indictment. Accused's counsel tendered a notice in terms of s 179 of the Criminal Procedure and Evidence Act, [*Chapter 9:07*] (CPEA) of its intention to apply for the quashing of the indictment on the grounds that:

> "The charges are materially defective and thereby are calculated to prejudice and embarrass it in its defence."

Section 179 of the Criminal Procedure and Evidence Act provides in summary that where an accused who is to be tried on any indictment, summons or charge intends to apply that the charge, summons or indictment should be quashed in terms of s 178 of the CPEA or to except to the charge or raise any of the pleas set out in s 180 of the CPEA, other than a guilty or not guilty plea provided for in paragraphs (a) or (b) of subs 2 to s 180, the accused is required to give due notice of the accused's intention to move the said motions. The length of the notice is not given in s 179. However it should be reasonable. What amounts to reasonable notice is said in s 179 aforesaid to be dependent on or be informed by the particular circumstances of each case. The notice should set out the grounds on which it is contended that the charge should

be quashed or the grounds on which the exception is based as the case maybe. The rationale for giving notice of the application is to afford the state sufficient time to consider the notice and grounds thereof so that the state is in a position to respond to the application and not delay the trial by seeking a postponement to prepare a response.

In casu, the notice was filed on the date of trial. Inevitably and due to the nature of the grounds of the application which required a consideration of the Exchange Control regulations as set out by the accused, the state counsel applied for a postponement of the trial in order that he could prepare an appropriate response. I granted the postponement. I took the opportunity to remind counsel that it was an imperative to strictly comply with the provisions of s 179 aforesaid on the requirement to give reasonable notice of the motion to quash the charge or except to the charge, indictment or summons going forward and having noted that the accused had together with the notice filed written submissions in support of the application to quash the indictment I directed the state counsel who waived the notice and undertook to file the state's response by the following day on 23 October 2018 which he did. Counsel presented argument on 24 October, 2018 and judgment was reserved. The judgment has unfortunately taken long to be prepared through a misfiling whereby the record was returned to registry instead of being filed on pending or reserved judgments. Neither the accused nor the State have followed up on the reserved judgment. They were reasonably expected to do so. The delay is regretted.

I must start by interrogating the nature of the application which the accused has made. The accused has applied for the quashing of the indictment. An application to quash an indictment, summons or charge is provided for by s 178 of the Criminal Procedure and Evidence Act. The section provides as follows:-

> "**178 application to quash indictment**
> (1) The accused may before pleading, apply to the court to quash the indictment, summons or charge on the ground that it is calculated to prejudice or embarrass him in his defence.
> (2) Upon an application in terms of subs (1), the court may quash the indictment, summons or charge or may order it to be amended in such manner as the court thinks just or may refuse to make any order on the application.
> (3) If the accused alleges that he is wrongly named in the indictment summons or charge. The court may on being satisfied by affidavit or otherwise of the error, order it to be amended."

An application to quash an indictment in the High Court may only be made by the accused on the limited ground that the indictment summons charge is "calculated to prejudice or embarrass him in his difference." The rule derives from the imperative to ensure that the accused is subjected to a fair trial. The right to a fair trial is absolute as provided for in s 70(1)(b) of the constitution as read with s 86(3)(e). The subject matter of the need to accord the accused

a fair trial by holistically determining an exception or application to quash the judge was extensively discussed in the judgment *Saviour Kasukuwere* v *Hosiah Mujaya & 2 Ors* HH 562/19 and cases cited therein.

An indictment will be valid if it avers that the accused committed an act that is a contravention of the criminal law as provided for in the statute which creates the offence. In the Kasukuwere case *supra* the case of *Rex* v *Alexander & others* 1936 AD 445 is quoted to the following effect.

> "The purpose of a charge sheet is to inform the accused in clear and unmistakable language what the charge is or what charges are which he has to meet. It must not be framed in such a way that an accused person has to guess or puzzle out by piecing sections of the indictment or portions of sections together what the real charge is which the crown intends to lay against him."

In *S* v *Hugo* 1976 (4) SA 536 (A) at 540, it is stated:-

> "An accused person is entitled to require that he be informed by the charge with precision or at least with a reasonable degree of clarity what the case is that he has to meet……."

The Constitutional Court of Zimbabwe in the case of *S* v *Mwonzora* CCZ 17/06 quoted the case of *S* v *Hugo* with approval. The Constitutional Court had occasion to deal with the issue of the adequacy of a charge. In that case the accused had applied for the quashing of the charge laid against him of undermining the authority of the President as defined in s 33(2)(a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*].

The charge was drawn in a tautologous and repetitive manner. The court stated on p 4 of the cyclostyled judgment as follows:

> "The object of a charge is to inform the accused person in sufficient detail and clear language of the offence with which he or she is charged to enable him or her to consider the accusation. The charge must state the essential elements of the offence with sufficient precision and provide sufficient particulars of the facts or omissions alleged to have been committed which constitute the criminal offence. The accused person must not be left to guess or speculate as to the true nature of the offence he or she is charged with and the case he or she has to answer."

In *S* v *Hugo* 1976 (4) SA 536(A) at 540E MILLER JA said:

> "The clear intention is and indeed it is only fair that sufficient particulars should be furnished in order to enable an accused to prepare his defence."

The above position was also referred to by the accused's counsel who referred in his written submissions to the *Mwonzora* case *supra* and *R* v *Wantenaar* 1940 SR 174 and *R* v *Mlotshwa* 1968(2) RLR 172 G.

In respect to the sufficiency of details required in a charge s 146 of the Criminal Procedure and Evidence Act provides for essentials of an indictment, summons or charge. The provisions thereof provide as follows:-

146 Essentials of indictment, summons or charge

(1) Subject to this Act and except as otherwise provided in any other enactment, each count of the indictment, summons or charge shall set forth the offence with which the accused is charged in such a manner, and with such particulars as to the alleged time and place of committing the offence and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

(2) Subject to this Act and except as otherwise provided in any other enactment, the following provisions shall apply to criminal proceedings in any court, that is to say-

a) the description of any offence in the words of any enactment creating the offence, or in similar words, shall be sufficient; and

b) any exception, exemption, proviso, excuse or qualification, whether it does not accompany in the same section the description of the offence in the enactment creating the offence, may be proved by the accused, but need not be specified or negative, no proof in relation to the matter so specified or negatived shall be required on the part of the prosecution.

(3) Where any of the particulars referred to in this section are unknown to the prosecutor, it shall be sufficient to stat that fact in the indictment, summons or charge.

(4) Where a person is charged with a crime listed in the first column of the Second Schedule to the Criminal Law Code, it shall be sufficient to charge him or her with that crime by its name only.

(5) No indictment, summons or charge alleging the commission of a crime mentioned in subs (4) shall be held to be defective on account of a failure to mention the section of the Criminal Law Code under which the crime is set forth.

Where an indictments contains the essentials as aforesaid it cannot be held to be calculated to prejudice or embarrass the accused in his defence. It must be underlined in this regard that in terms of subs 2 of s 178 of the Criminal Procedure and Evidence Act, the court in determining an application to quash an indictment has a discretion to either quash the indictment or order that the indictment should be amended in such manner as the court

considers just or "may refuse to make any order on the application". It is not clear as to the purport of the court refusing to make an order where an application has been made to it because generally speaking a court has a legal obligation to determine every issue brought before it for determination. *In casu* because I was not asked to refuse to give an order nor did I consider it necessary to refuse to make an order, I will leave the jurisprudence on the meaning to be assigned thereto as a moot point to be decided on another day.

The application to quash the indictment herein is predicated upon the accused's submission that the charges as framed do not constitute an offence or disclose an offence cognisable at law or that the manner in which the charges are framed is calculated to prejudice the accused in his defence. The challenge I have with having to determine whether or not the framing of a charge is calculated to prejudice or embarrass the accused in his defence is that without an indication of the defence being alleged, the court would have no factual basis from which to determine that the accused's defenece may be prejudiced or the accused may be embarrassed. The other issue arising for comment is that ordinarily, when an allegation is made that the charge does not close an offense cognisable at law, the implication would be that there is in fact no valid charge. If there is no valid charge then there is nothing or no charge to which the accused must be asked to answer. Nothing sits on a nullity and nullity cannot be amended. This is the general rule. However in relation to applications to quash a charge, the court can order the amendment of a charge which would otherwise be a nullity. The rationale for giving the court the discretion to order an amendment is commendable because an accused cannot be allowed to avoid having to stand trial for an alleged crime merely because the charge suffers from a defect which can be corrected. Ultimately, the accused must not be allowed to avoid trial on the basis of a technicality in the drawing up of a charge. The criminal justice system would lose respect in the eyes of society were guilty accused to be allowed to avoid being tried on technicalities. Thus rather than let crime go unpunished by simply quashing a charge, consideration should be had to ordering an amendment which would have the effect of enabling the accused to understand and appreciate the charge which the accused has to meet.

On the merits of the application, the accused averred that the charge refers to a contravention of s 5(1)(a) and s 5(1)(b) of the Exchange Control Act [*Chapter 22:05*] yet the foresaid ss do not create any offence. Section 5 (1) of the exchange Control Act reads as follows:-

"**5 Offences and Penalties**

(1) Subject to subs (2). A person who, either within or outside Zimbabwe
(a) Contravenes or fails to comply with:-
(i) any provision of this Act other than section eight, or
(ii) the terms of or conditions of any permit, authority, permission, direction, notice, order or other instrument made or issued under or by virtue of this Act; or
(b) For the purposes of this Act, makes any statement or produces any document which is false in any material particulars shall be guilty of an offence."

It is clear from the above provisions that the *actus reus* of the offences appear in subparagraph (i) and (ii) of para (a) of subs (1) of s 5 whilst para (b) of subs (1) of s 5 also creates a stand-alone offence.

The accused suggested that it may well have been that the State intended "to allege a breach of s 5 (1)(a)(1) of the Exchange Control Act". It was submitted that for that to be so, then the exception had to be allowed since the charge as formulated could not be pleaded to. There is an obvious contradiction in this submission because the application made is to quash the charge and not an exception.

The State in its response averred that there was a typographical error. It was submitted in para 2 of the State's response as follows;

"**2 Points *in Limine***
The State wishes to amend the typographical error in the citation of the charge from s 5(1)(a) of the Exchange Control Act to read s 5(1)(a)
Section 5(1)(b) should read s 5(1)(b)"

The State submitted that the amendments if granted would not prejudice nor embraces the accused in his defense.

In my view the accused's objection is a technical one in that it seeks that the State must point to the precise section of the Exchange Control Act on which the charge is based. Generally speaking, a charge under an enactment may not be quashed only on account that a wrong section of the enactment has been cited in the charge which however contains details of the *actus reus* committed and further avers that the commission of the *actus reus* was unlawful. The court will as a matter of practice simply order the State to provide the details of the section contravened and amend the charge accordingly.

In casu, and in respect to citation of a section which does not exist. I must remark that the accused was being petty in raising the alleged misnomer as a ground to quash the charges. This is so because the charges allege the *actus reus* in detail. Therefore the accused had it really been minded to advance its request to a trial within a reasonable time would simply have requested for further particulars before trial as opposed to applying for the quashing of charges s 172 of the Criminal Procedure and Evidence Act provides as follows:

"**177 Court may order delivery of particulars**

1) The court may either before or at trial, in any case if it thinks fit, direct that particulars be delivered to the accused on any matter alleged in the indictment, summons or charge, and may, if necessary adjourn the trial for the purpose of the delivery of such particulars.
2) Such particulars shall be delivered to the accused or to his legal representative without charge, and shall be entered in the record and the trial shall proceed in all respects as of the indictment, summons or charge had been amended in conformity with such particulars"

In casu, in relation to all the (6) six counts, the broad allegation was that the accused misrepresented the true nature of payments which it made purporting that they were due for reasons of payment given, yet the reasons given were false. The accused then only needed to seek information from the State on the provisions of the Exchange Control Act, the State was alleging the commission of illegality in each particular transaction. No reasonable court would under the circumstances of this case quash a charge which broadly quotes the correct main section and incorrectly the subsections and paragraphs where the detail of what the accused is alleged to have done is clearly set out in detail.

There was therefore no merit in the application to quash the charge based on miscitation of the subsections of s 5 of the Exchange Control Act. The State counsel in his submissions requested for leave to amend the charge. In that respect such leave shall be granted.

The next ground in support of the application which the accused relied upon was that the charges were split into six counts. The accused's counsel relied on the case *S* v *Zacharia* 2002(1) ZLR 48 to plead the test for whether there has been splitting of charges. Counsel submitted that there are two tests which can be employed to determine whether there has been an improper splitting of charges. The tests are the single intent and the same evidence tests. In his submission as stated in para 10 of the submissions to quash the indictment, the accused's counsel submitted as follows;

> "10 In this matter the same facts in regards the 6 counts are used to substantiate two different charges. In other words, the court is being asked to consider 6 counts and in respect of 2 separate charges. The facts in respect of each count is being used as a basis to come up with two separate convictions."

A consideration of the indictment shows that indeed, in respect to each count the accused allegedly committed two offences, the first being what the charge describes as externalization or payment of foreign currency outside the country without Exchange Control approval and secondly, the indictment charges a contravention of s 5 of the Exchange Control as read with s 11(b) of the exchange Control Regulations 1996 in the 6 counts and the then s 5

of the Exchange Control Regulations as read with s 11(1)(a) and (b) of the Exchange Control Regulations.

The Exchange Control provide is s 11(1)(a) and (b) and 2(a) and (b) as follows;

"**11 Payments outside Zimbabwe**

(1) Subject to subsection (2), unless otherwise authorized by an Exchange Control authority, no Zimbabwean resident shall-
   (a) make any payment outside Zimbabwe; or
   (b) incur any obligation to make a payment outside Zimbabwe
(2) subsection 1 shall not apply to –
   (a) any act done by an individual with free funds which were available to him at the time of the act concerned; or
   (b) any lawful transaction with money in a foreign currency account."

In short, s 11(1) as quoted prohibits Zimbabwean residents from making payments or incurring obligations to make payment outside Zimbabwe unless they have obtained exchange control approval. Subsection 2 provides for exemptions which can be invoked as defenses to justify the making of a foreign payment or incurring of an obligation to make a payment outside Zimbabwe. The making of a payment outside Zimbabwe without exchange control approval is a separate act which is prohibited. The incurring of an obligation to make a payment is a separate act which is prohibited. The *actus reus* which ground the two acts are different. An indictment should not conflate the two.

A consideration of the indictment leaves me in doubt to understand which conduct is a contravention of which provision. A common thread which runs through all the six counts is that the accused is alleged to have entered into the described transactions without exchange control approval. The indictment does not specify in relation to each count which provision of the Exchange Control Regulations between 11 (1)(a) or (b) was contravened. Equally the state even after the amendment which I said I would grant needs to specify whether the accused in relation to each count has contravened s 5(1)(a) or (ii) or 5 (1)(b). Section II of the Exchange Control Regulations is a prohibitory section whilst s 5(1) of the Exchange Control then criminalizes the commission of the prohibited conduct set out in the regulations. Therefore there is need for clarity in relation to each count on which paragraph or subparagraph of subs 1 of s II of the Act, the state places reliance upon. The charges are therefore clumsily drawn and therefore imprecise.

The submission that there has been a splitting of charges is not sustainable if one bases the submission on the counts as they stand. Each count relates to a separate *actus reus* from the other in terms of dates and details of what the accused allegedly did. There is no scope for

imputing one continuous course of conduct in relation to the alleged commission of the individual offences. Equally it cannot be said that there was a single intent in regard to the conduct of the accused in regard to six counts which as noted are distinct in terms of dates and details of how the offence was committed.

The single or dominant interest test is simple enough to understand. The accused sets out to achieve a goal. That goal constitutes an offence. For example using a related example, the accused intends to externalize or make an outside or foreign payment outside Zimbabwe. The accused prepares false documentation which the accused utters and uses to achieve his or her main goal which is to get money outside the country. The accused by preparing false documents will have done so as part of a continuous conduct to realise his goal. The state should under such circumstances charge the principal offence as revealed by what the accused intended to achieve. This simplistic example explains the dominant or single intend test. It dovetails with the continuous transaction test. The splitting of charges objection is however qualified by s 145 of the Criminal Procedure and Evidence Act.

State Counsel submitted that the provisions of s 145 of the Criminal Procedure and Evidence Act dispenses with the objection to splitting charges. In the case of *S* v *Chikukwa* 2016 (2) ZLR 495 the provisions of s 145 were interrogated in detail by myself. To restate, s 145 provides as follows:

> "Where doubtful what offence has been **committed** if by reason of the nature of an act or series of acts, or of any other uncertainty as to the facts which can be proved, or if for any other reason whatever it is doubtful which of several offences is constituted by the facts which can be proved, the accused may be charged with having committed all or any of those offences, and any number of such charges in the alternative with having committed some or one of those offences".

In relation to unpacking s 145, I stated as follows at p 501 A-B:

> "In my judgement s 145 of the Criminal Procedure and Evidence Act has largely diluted the scope of the exception which an accused can take based on an alleged spatting of charges. The section allows great latitude to the state to charge various offences whether separately or in the alternative arising from one act or series of acts or where facts are uncertain to what charge exactly to put to the accused in the indictment. Without stating authoritatively that this is so, it appears to me that the objection to a splitting of charges may well have become academic in view of the provisions of 145 aforesaid……"

From the above it is clear that s 145 has given the state a leeway to charge the accused with as many charges as may competently arise from the facts either individually or in the alternative. The accused will face a multiplicity of convictions. The courts have invariably cured the likely prejudice which may be occasioned by a multiplicity of the convictions which arise from one course of conduct by treating all counts as one for purposes of sentence.

The problem in this case in my analysis of the objections and the charges is not so much about the purport of s 145. It is the imprecision in the drafting of the counts. Whether the facts in each count reveals one charge or several is not the problem in my view. The individual charges which may arise from the same facts must be explicitly and precisely set out. They must not be bunched together. In the indictment objected to, six counts of contravening s 5(1)(a)(i) of the Exchange Control Act as read with s 11(1)(b) of the regulation must be separately set out from the counts of contravening s 5 (1)(b) of the same Act as read with s 11(1)(a) or (b). Therefore whilst the state cannot be limited as to the number of charges which the state intends to prefer each such charge must be separately stated and should comply with s 146 on the details to be included on a charge, summons or indictment.

In respect to the insufficiency of material or details in the charge, which the accused raised in relation to each count, I have already noted that all the charges arise from the allegation of lack of exchange authority when the accused allegedly acted as detailed in the charge. The issues are straight forward. The charge must allege not just that there was need for exchange control approval and end there but that the accused acted without such approval. The accused in relation to requiring such further details as it may require in relation to the charge to enable it to defend itself effectively may also request further particulars to any matter arising in the charge where such particulars are reasonably necessary to enable the accused to take the next step in its defence.

Under the circumstances I do not consider that it would save the interests of justice or the proper administration of the criminal justice system to quash the indictment. It is clear that the state alleges conduct against the accused which it alleges to amount to a contravention of the Exchange Control Act as read with the relevant sections of the exchange control regulations. The proper course to adopt should be to allow the state to amend the indictment.

Accordingly I will make the following order:

1. The accused's application to quash the indictment is dismissed.
2. The state is granted leave to amend the indictment so that each count is separately drawn up with correct statute references where applicable and fully complies with the provisions of s 146 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

3. The state shall prepare file and serve the amended indictment within 14 days of the granting of this order.

National Prosecuting Authority, applicant's legal practitioners
Scanlen & Holderness, respondent's legal practitioners