

1. THE STATE  
Versus  
TATENDA SHONHIWA

2. THE STATE  
Versus  
DOCKLANDS INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE  
CHILIMBE J  
HARARE 10 February 2023

### **Criminal review**

CHILIMBE J

#### BACKGROUND

[ 1] The accused persons in the two separate matters, (which I will refer to as *S v Shonhiwa* and *S v Docklands* respectively) were each convicted of theft of trust property as defined in s 113 (2) of the Criminal Law (Codification and Reform) Act [ Chapter 9:13] (the “Code”). The proceedings in *S v Shonhiwa* were referred to a regional magistrate for scrutiny in terms of s 58 of the Magistrates Court Act [ Chapter 7 :10]. The learned regional magistrate correctly queried the propriety of the conviction and in turn sought the High Court`s intervention.

[ 2] In *S v Docklands*, the proceedings were referred to this court for review in terms of s 57 of the said Magistrates Court Act. Similar defects were noted regarding the conviction. In both instances, the trial magistrates acknowledged the errors impugning the convictions. Briefly, the circumstances are set out below; -

#### THE FACTS IN *S v SHONHIWA*

[ 3] The accused was charged with theft of trust property and specifically as defined in s 113 (2) (b) of the Code. This section provides thus; -

“(2) Subject to subsection (3), a person shall also be guilty of theft if he or she holds trust property and, in breach of the terms under which it is so held, he or she intentionally—

(a) .....; or

(b) hands the property or part of it over to a person other than the person to whom he or she is obliged to hand it over.” [underlined for emphasis]

[ 4] The charge was set out as follows; -

“In that on the 3<sup>rd</sup> of September 2021 and corner Kaguvi and railey [ Raleigh] street in Harare, TAWANDA E SHONHIWA [ the record bears the name TATENDA E SHONHIWA], in violation of the trust agreement with ALEXIO KAMBALANGA which required him to hold property namely us\$750 on behalf of ALEXIO KAMBALANGA, unlawfully and intentionally converted the property to his own use and failed to handover the property to ALEXIO KAMBALANGA upon demand by ALEXIO KAMBALANGA.”

[ 5] This charge unequivocally tells the following story; -the accused received a sum of money from the complainant on the date mentioned with instructions to reimburse the same amount back to the complainant. It suggests perhaps a scenario where one hands over his wallet to a friend before dashing into a crowded public toilet and upon conclusion of proceedings therein, emerges, rejoins his mate and requests his wallet back.

[ 6] The state outline told a story different and one completely unsupportive of the charge. It was alleged that the accused was handed the money with instructions to procure roofing timber on behalf of the complainant. On the basis of this averment, which in fact, reflects the truth of what transpired from the uncontested facts, the charge was automatically rendered defective when considered against the requirements of valid charge in terms of s 146 of the Criminal Procedure and Evidence Act [ Chapter 9:07].

[ 7] The accused pleaded not guilty but was convicted after a trial in which the court received testimony from two witnesses only; -the accused and complainant. It was not in dispute that the accused received an amount of US\$750-00 from the complainant in the Kopje are of Harare`s central business district. It was also common cause that the accused was mandated to apply the funds in the purchase and delivery of roofing timber.

[ 8] Both the accused and complainant both testified that the money was handed over on 3 August 2021 -a Tuesday and that the goods were due three days later on Friday the 5<sup>th</sup> September 2022. Inexplicably, this testimony appeared to have been lost on both the court and the prosecutor who found that the transaction occurred during the month of September rather than August of the same year.

[ 9] These dates were critical having regard to firstly, the nature of the charge which alleged that the accused had, contrary to the mandate, surrendered the money received from complainant to an unauthorised third party. The accused`s defence was that he paid in the funds to a supplier as a deposit but delivery of the goods was affected by the rains. Two receipts issued by Zama Timbers & Sawmills were tendered as exhibits A and B respectively. They bore the dates 5 and 8 August 2021 in the amounts of USD\$960 and USD\$180.

[ 10] The complainant`s evidence was that after failing to deliver the timber in the three days agreed, the accused (i) “kept postponing the dates” (ii) gave various excuses (iii) became evasive and (iii) avoided picking the complainant`s calls. This evidence suggests that a second trust arrangement was concluded after the accused failed to deliver the timber. He was thereafter obliged to reimburse the funds.

[ 11] Two issues emerge from this evidence. Firstly, this seems to be the position taken by the State in framing the charge. Namely that the breach of the trust arrangement arose at the stage that the accused failed to deliver the timber and subsequently failed as well to reimburse the money. But the from the facts, it becomes clear that such a position becomes untenable. The funds were (a) handed over on 3 August 2021 and (b) with specific instructions that the accused should apply them in the procurement of timber. Secondly, the accused tendered a plausible explanation of how he applied the funds and the rejection of this account by the court, backed as it was by documentary evidence, was improper.

[ 12] Thirdly, it is also necessary to draw attention to the fact that neither the charge, state outline nor evidence led brought out the specific manner in which the money was to be applied. This brings into question the discretion and latitude which accused was entitled to exercise in dealing with the funds, an aspect that was neither raised nor considered during the proceedings.

## THE FACTS IN S v DOCKLANDS

[ 13] The accused, an entity, pleaded guilty and was convicted of theft of trust property as defined in s 113 (2) (d) of the Code. The charge was framed as follows; -

“In that on the 19<sup>th</sup> day of May 2022 and at 9475 Damofalls Ruwa, Docklands Investments represented by Cephas Chisvo in violation of a trust agreement which required him to hold US\$3000-00 to supply roofing timber on behalf of Rest Neshana, Docklands Investments represented by Cephas Chisvo intentionally converted the money to his own use and failed to handover the roofing timber or US\$3000-00 to Rest Neshana upon demand.”

[ 14] The charge seems resistant to acknowledging that the funds were to be expended or applied toward procurement of timber. Similarly, the state outline was unclear as regards how exactly the transactions in pursuit of securing the timber were to be processed.

[ 15] In his exchanges with the court, the following emerged ;-(a) that the company encountered challenges in procuring the timber due to the rains (b) money was applied to purchase fuel for the tractors utilised to cut the timber to make the poles.

## THE LAW ON THEFT OF TRUST PROPERTY

[ 16] This court has, in numerous authorities<sup>1</sup>, issued the following guidance on dealing with theft of trust property cases. It is always useful to revert to basics and refer to the Code in (a) the definition of trust property in s 112, (b) the definition of the offence itself in s 113 (2) and (c) the definition of what theft of trust property is not in s 113 (3) and (4).

[ 17] Secondly, it is particularly important to establish the exact terms of the obligation. This for the simple reason that for an accused to be held to any terms for the holding or dealing with trust property, the terms and conditions concerned must be established.

[ 18] Thirdly, particular regard should be had to cases involving money or cash and the “debtor-creditor” relationships defined in s 112 of the Code. In *S v Mugandani* (supra) it was held as follows [ at page 3]; -

“It seems to me that where a person makes a deposit payment over an item displayed for sale in a shop and goes away, a debtor and creditor relationship is impliedly created. In

<sup>1</sup> See *Predom Investments (Pvt) Ltd & 2 Ors v The State* HH 32-15; *S v Lianda* HH 224-15; *S v Mugandani* HH 635-15; *Kambasha & Anor v The State* HH 36-17; *S v Mavengere* HB 267-18.

such a situation the money paid which, in my respectful view is a fungible, may be used by the recipient as his or her own as long as he or she acknowledges his or her indebtedness to the depositor. This creates an exception envisaged in the definition in s 112 of the Code. Any other interpretation will result in every debtor being criminally liable where they fail to pay their acknowledged debt. This, in my view, would create an absurdity which the legislature clearly did not intend.”

[ 19] The above remarks would not necessarily be restricted only to instances where the complainant pays a deposit in the terms encountered in *Mugandani*. In the two matters before the court, it is clear that money was paid to enable the accused to procure the roofing timber required. No particulars were furnished to suggest that the funds paid in were to be directly or strictly applied in a particular manner. The accused remained obligated to deliver on the goods but failed to do so. The subsequent failure to reimburse must be viewed against the original terms. This is the caution sounded by MUSHORE J in *Kambasha & Anor v The State* HH 36-17 [ at page 4]; -

“Plainly speaking, a trial court in such circumstances should apply its mind to the facts with the purpose of determining whether the facts allude to a genuine desire to act on such an offer of reimbursing the creditor, because if the desire is indeed genuine, there is no theft of trust property. However, the trial court must exercise caution, not to find that just because there was an overture on an accused’s part to reimburse a complainant, therefore *ex simpliciter* the accused cannot be guilty of theft, because an offer to reimburse does not constitute a full defence to a charge of theft. The court must determine whether it can be said from the facts of that case, that the accused lacked the intention to misappropriate the funds.” [ Emphasis added]

#### CRIMINAL LIABILITY OF CORPORATIONS AND ASSOCIATIONS AND THEIR MEMBERS, EMPLOYEES AND AGENTS

[ 20] In *S v Docklands*, the accused is a body corporate. It was represented by Cephass Chisvo in his designation as a director of the company. It is necessary in passing, to sound the

reminder that section 277 of the Code carries a number of presumptions in criminal proceedings against body corporates. In particular, the presumption of criminal liability set out in section 277 (3) which provides as follows; -

(3) Where there has been any conduct which constitutes a crime for which a corporate body is or was liable to prosecution, that conduct shall be deemed to have been the conduct of every person who at the time was a director or employee of the corporate body, and if the conduct was accompanied by any intention on the part of the person responsible for it, that intention shall be deemed to have been the intention of every other person who at the time was a director or employee of the corporate body:

Provided that, if it is proved that a director or employee of the corporate body took no part in the conduct, this subsection shall not apply to him or her.

It is necessary to factor the provisions of this charge in mind when drawing up a charge and facts supporting that charge.

[ 21] It is in view of the foregoing that we found the convictions in respect of both matters unsustainable. Accordingly, it is hereby ordered that; -

1. The proceedings in case number CRB HREP 89004/21 be and are hereby set aside and the conviction and sentence are set aside.
2. The proceedings in case number GMZ448/22 be and are hereby set aside and the conviction and sentence imposed are set aside.

CHILIMBE J \_\_\_\_\_ 23/02/23

NDLOVU J \_\_\_\_\_ I agree

i. CRB HREP 89004/21

ii. CRB GMZ448/22