BRIAN TARISAI KAMBASHA
and
HEMINGWORTH CARTWRIGHT (PVT) LTD
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MUSHORE JJ
HARARE, 30 June 2016 and 25 January 2017

Criminal Appeal

T G Musarurwa, for the appellants
S Mashavira, for the State

MUSHORE J: The appellants were convicted of theft of trust property in terms of s 113 (2) (d) of the Criminal (Codification and Reform) Act [*Chapter 9:23*]. The first appellant was sentenced to 5 years imprisonment of which 1 year imprisonment was suspended on condition that he did not commit an offence involving dishonesty for five years; with another year being suspended on condition of restitution of US$50, 125-00 by a certain date. The effective sentence was 3 years imprisonment. The second appellant was sentenced to the payment of a fine in amount of US1000-00 by a certain date and in default of payment, a warrant of execution would become enforceable against it.

Dissatisfied with the outcome, both appellants have filed this appeal on the following grounds:

(a) That the relationship between the appellants and complainant was one of debtor/creditor and;
(b) That the essential elements of the offence were not met; and
(c) That in likening the appellant to the notorious fraudster, Ronald Mavhunga and injudiciously characterising the first appellant as ‘a cunning malcontent’, the court convicted appellants due to a pre-conceived prejudice toward him.

The legal points arising in grounds 1 and 2 are related so we will consider those two grounds together.

It is common cause that the appellants entered into an agreement with complainant in which they undertook to erect a 100KVA solar plant at the complainant's farm. It is common cause that the complainant's discontent arose when he became frustrated with the appellant's failure to complete the installation of the solar plant within the time limits agreed by the parties in a written and signed memorandum of agreement. It is also common cause that in pursuance of the first phase of the agreement, complainant advanced the sum of US$ 50,125-00 to the appellants and that appellants cleared the ground and erected metal poles, but failed to put into place the solar panels to complete the project. According to the appellants, the work which they did constitutes 80% of the project. Complainant estimated the value of the work done to have been US$3,000-00 of work. After the poles had been erected the appellants stopped work. The appellants said it was because the US$50,125-00 had been used up due to a failure to get a 60% discount promised to complainant upon entering into the agreement. On the other hand complainant's concerns when he reported the appellants to the Police were that the appellants had downed tools because, he said, they had converted the funds to their own use.

However, when looking at the facts of the matter, the defence raised by the appellants was plausible given the fact that they had rendered a statement of account; provided the court *a quo* with elaborate photographs of the work they had done thus raising reasonable doubt that they had simply taken the money and converted it to their own use. Complainant did not contest that evidence at all. Further both sides agreed that the appellants failed to get the 60% discount for the solar plant from the suppliers which hampered the appellant's ability to perform in terms of the agreement between the appellants and the complainant. This fact renders significance to the appellants' defence that the US$50,125-00 was insufficient for completion of the installation. Also, the agreement was in two parts with the first phase being the US$50,125-00 going towards the installation of the 100 KVA solar plant and the second phase being for the installation of a 200 KVA and 600 KVA plant for which the complainant was to pay a further US$250, 000-00. The relationship between the parties is clearly one of creditor/debtor and the money given to the appellants falls outside the purviews of the definition of trust property as defined in the Criminal (Codification and Reform) Act [*Chapter 9:23*].

Our system of law (Roman-Dutch) relating to theft of trust money is derived from the Transkeain Penal Code. Section 183 OF THE NATIVE TERRITORIES (TRANSKEAIN) PENAL CODE ACT NO. 24 of 1886 reads:-

> "Everyone commits theft who having received any money …. on terms requiring him to account for or pay the proceeds thereof to any other person, fraudulently converts to his own use or fraudulently omits to account for the same…. Provided that if it be part of the said terms that the money ….. shall form an item in a debtor and creditor account between the person receiving the same and the person to whom he is to account for or pay the same, and that such last mentioned person shall rely only on the personal liability of the other as his debtor in respect thereof, the proper entry of any part of such proceeds in such account shall be deemed a sufficient accounting for the part of the proceeds so entered".

It is important to emphasize that 'trust property" in a criminal matter or within the definition given in the Criminal (Codification and Reform) Act does not require that there be a fiduciary relationship in *strictu sensu*. To limit the meaning of trust property in this way would result in this kind of theft being only applicable to an incomplete group of people and on the other hand, inappropriately exempt other individuals from prosecution. Trust property as defined in the Criminal Code merely denotes a responsibility by the receiver of the money to use it for the purposes for which it was intended. In *Boesak* v *The State* 2000 (1) SACR 633 (SCA), Smalberger, Olivier and Farmer spoke of the principles when deciphering whether or not there is theft of trust money as occurring:-

> "….where a person entrusted with money for purpose A uses such money for purpose B, or appropriates it for his own use, this presupposes that purpose A and purpose B are unrelated, or that there does not exist a sufficient nexus between them. The underlying ratio is that by using the money donated for purpose A for purpose B, the donor is being denied his say over the manner in which the money is dealt with. In effect he is deprived of his control over the money. Where purpose A and purpose B are related, the matter becomes one of degree. If the relationship is sufficiently close that it might reasonably be concluded that the donor would have no objection to the money being used for purpose B, the required appropriation for there to be theft would not have been established."

In the current matter the relationship between the parties was contractual and ongoing and complainant should have exhausted civil remedies for breach of contract and sued the appellants for specific performance; or cancellation of the agreement and damages in a civil court.

During the trial the appellants produced correspondence between themselves and the complainant; wherein the appellants had requested an extension to the agreement to a certain date, failing which they promised to reimburse complainant his funds.

Professor Snyman in his book *Strafreg* 2nd Ed at p 532, broadly propositioned the general approach in giving the following example:-

> "where money is held by X in trust for Y, or received from him with instructions that it will be used for a specific purpose, X's conversion of the money to his own advantage will not be theft if throughout, he has a liquid fund of money available from which he can reimburse Y."

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.
In casu, we are of the considered view that the letter which the appellant's wrote to the complainant resonates with sincerity on the part of the appellants to reimburse the complainant to the extent that the appellants were well intended in the performance of their obligations *in contractu*. It was not their intention *ab initio* to convert money to their own use. In their letter dated 7th August 2014 they wrote:-

[record, p 121, 122]

> "The amount received (US$50,000-000) was meant for construction and installation of the phase one 100kw Solar PV Plant at Hopedale farm in Bindura whose groundwork preparation has been done. With all the unforeseeable challenges faced at Hemmingworth Cartwright as discussed to the principle agent, Mr Perence Shiri (complainant) in our updates and feedback meetings, we would like to sincerely assure you that were taking the matter very serious (sic) as it is our highest priority. Hopedale Farm still remains our first proposed demo site in Zimbabwe, and we would like a final extension deadline to be November 2014.
>
> After this date, should Hemmingworth Cartwright fail to complete or re-commence work on site, then the full initial deposit of US$50,000-00 will be paid in full with 5% within 48hours.
> We sincerely apologise for the inconvenience caused
> Signed etc."

The trial court ought to have taken into consideration that their failure to obtain a 60% discount for the complainant affected their ability to complete their obligations in phase 1 of the project. The State failed to establish a *prima facie* case at the closure of the State case and the appellants' application for absolution from the instance should have been granted.

It is our considered view that the essential elements for the offence of theft of trust property as cited and appearing in s 113 (2) (d) were not met. The complainant should have proceeded with a civil claim for breach of contract and sued for either specific performance or for cancellation and damages. The facts of this case fall within the exceptions which are expressly provided for in s 112 of the Criminal (Codification and Reform) Act [*Chapter 9:23*].

Regarding ground 3 wherein appellants complain that the inflammatory and injudicious comments made by the court *a quo* in its judgment demonstrated that the court *a quo* had a preconceived prejudice toward the appellants, we see no evidence of that. From our reading of the record it appears that the court *a quo* got rather excitably incensed at the appellants after viewing all the evidence. Although the comments are indeed unacceptably injudicious, we see no real cause of concern that the court *a quo* was biased towards the appellants.

It is our view that the court *a quo* misdirected itself in convicting the appellants of theft of trust property. Indeed the trial court should not have placed the appellants on their defence given the fact that the state failed to establish a *prima facie* case against the appellants at the closure of the state case.

Accordingly, we rule as follows:-

> "The convictions against both accuseds are quashed and the sentences are set aside. Both accuseds are found not guilty and are acquitted".

HUNGWE J agrees……..

Mambosasa, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners