

THE STATE  
versus  
NGONIDZASHE MUGANDANI

HIGH COURT OF ZIMBABWE  
HUNGWE & MANGOTA JJ  
HARARE, 29 July 2015

### **Criminal Review**

HUNGWE J: The record of proceedings in the above matter was placed before me with the following comments from the learned scrutinising regional magistrate.

“The accused who seems to be in a business of manufacturing wardrobes, sofas and other related products was given USD\$450.00 by the complainant as a deposit for the purchase of a 4 piece kitchen unit and a 4 piece wardrobe. Accused promised to deliver he mentioned items to the complainant at Hatcliff within a week.

After a week the accused did not deliver the agreed items and he had already used the cash. The accused was convicted on his own plea of guilty and was sentenced to 12 months imprisonment of which a portion was suspended on condition of community service while the remainder was suspended on condition of restitution.

After having looked at the facts and record of proceedings, I entertained a query as of the appropriateness of the conviction and I raised this with the trial magistrate who seems convinced that the conviction was proper.

In my view, accused and complainant entered into a contract of sale agreement wherein the complainant performed her part of the contract by paying the agreed deposit and accused was supposed to perform his part by delivering the items within a week.

The accused did not perform his part of the agreement hence these current charges. In my view the relationship between accused and complainant was contractual and not a trust agreement.

The magistrate is however of a different view as she insists that a trust agreement was entered into by the accused and complainant and therefore the money which was given to the accused was trust money”

The accused was charged for theft of trust property as defined in section 113 (2)(d) of the Criminal Law (Codification & Reform) Act [*Cap 9:23*].

That section provides:

#### **“113 THEFT**

(1) .....

(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) omits to account or accounts incorrectly for the property; 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; or
- (c) uses the property or part of it for a purpose other than the purpose for which he or she is obliged to use it; or
- (d) converts the property or part of it to his or her own use.”

This section must be read together with subsection (3) which provides thus:-

“(3) Subsection (2) shall not apply if-

- (a) the person holding or receiving the property has properly and transparently accounted for the property in accordance with the terms of the trust; or
- (b) the person disposing of the property retains the equivalent value thereof for delivery to the person entitled thereto, unless the terms under which he or she holds or receives the property require him or her to hold and deliver back the specific property.”

Upon inquiry by the scrutinising regional magistrate, the learned trial magistrate expressed herself in the following terms:

“The court is of the view that this was a criminal offence and not breach of contract for the following reasons. Breach of contract occurs where there is a debtor creditor relationship. In the instant case accused had been given money for a specific purpose which was in deliver a wardrobe and a set of sofas. (sic) According to the commentary on the Code by Professor G Feltoe trust property includes property held by agreement. The holder inter-alia is required to hold the property on behalf of another or account for it to another. In the instant case accused and complainant had entered into an agreement. By failing to hand over the property to complainant, accused failed to account for it. Accused had not borrowed that money from complainant but was holding it on behalf of complainant. In terms of s 113(2) (d) accused commits this offence when he converts the property or part of it to his own use or (c) uses the property for a purpose other than the purpose for which he/she is obliged to use it. It is not in dispute that accused failed to return complainant’s property upon demand. He thus converted the property which in the instant case is US\$450.00 to his own use.”

Whether the learned trial magistrate is correct in her interpretation of the Commentary depends on what constitutes trust property in terms of the Criminal Law Code. Section 112 of the Code defines trust property in the following terms:

“*trust property*” means property held, whether under a deed of trust or by agreement or under any enactment, on terms requiring the holder to do any or all of the following-

- (a) hold the property on behalf of another person or account for it to another person; or
- (b) hand the property over to a specific person; or
- (c) deal with the property in a particular way;

but does not include property received on terms expressly or impliedly stipulating that-

- (i) the recipient is entitled to use the property as his or her own; and
- (ii) there would only be a debtor and creditor relationship between the parties....” (my underlining).

The agreed facts show that the complainant paid the sum of US\$450.00 two sets of furniture which the accused was to be made and delivered to the complainant within an agreed time of seven days. Accused failed to make and deliver as promised. He undertook to refund the complainant instead. The question is whether in terms of the initial agreement, the money paid over became trust

property. In terms of the statutory definition, only property held under a deed of trust; or by agreement; or under any enactment; or on terms requiring the holder to hold the property on behalf of another or account for it to another; or hand over the property to a specific person; or deal with it in a particular way, constitutes trust property. In interpreting the provisions of an enactment, the rules of interpretation must be observed. The plain and ordinary meaning of the words used must be given effect unless that approach leads to an absurdity. Applying this cardinal rule of interpretation, it seems to me that the payment a deposit in the agreed sum of US\$450.00 created a debtor creditor relationship. The payment of deposit implies that there is an outstanding balance to be paid on the subject of the agreement. It is not the full purchase price in terms of which the balance would be due upon delivery of the set of furniture which the accused undertook to manufacture.

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 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.

In my view therefore, the learned regional magistrate is correct in the view he expresses. In the result therefore the conviction cannot stand. It is quashed and the sentence is set aside.

MANGOTA J agrees.