JANE SHAWO
versus
N. KATIYO N.O.
and
THE STATE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 24 July 2013 & 14 January 2014

Unopposed motion court

Ms *P Mtetwa* for the applicant
No appearance for the respondents

MAFUSIRE J: This matter appeared on the unopposed motion roll for 24 July 2013. It was an application for review. It was alleged that the first respondent, a regional magistrate, had misdirected himself by convicting the applicant of theft of trust property as defined in s 113(2) of the Criminal Law (Codification and Reform) Act allegedly because the value of the property involved had not been ascertained.

In spite of the fact that the application had been unopposed I dismissed it. It lacked merit. No cause of action had been established. Here are the details:

The property in issue belonged to a deceased estate. It comprised a number of immovable properties and some vehicles. The applicant had been a sister of the deceased. It was common cause that she had sold one of the vehicles and had converted the proceeds for her own use. It was also common cause that she had been collecting the rents from the immovable properties for her own use. The deceased had been survived by a wife and children. In the regional court the second respondent had proved that the applicant had refused to surrender the administration of the deceased estate to the executor when he had eventually been appointed.

The defence proffered by the applicant to the charge in the regional court had apparently not succeeded. Whilst admitting to the disposal of the vehicle and to the collection of rentals, the applicant had alleged that she had been entitled to the proceeds because she had been in a business partnership with the deceased; that she had not been paid anything for

the two years that she had taken care of the deceased estate prior to the appointment of the executor and that it had been the applicant herself who had added the improvements to the immovable properties from which the rents had been collected.

Finding that the case had been a unique one the first respondent had sentenced the complainant to three years imprisonment which he had wholly suspended on certain conditions. At the trial it appeared that initially there had been a dispute as to the value of the vehicle which the applicant had disposed of and the quantum of the rentals which she had collected. However, it also appeared that there been some sort of consensus between the parties and the court that the parties would reach agreement on the value of the vehicle and the quantum of the rentals. The matter had proceeded to mitigation and aggravation of sentence and the pronouncement of the penalty but without finality on the figures. However, it was abundantly clear from the record that the figures had had no bearing on the decision to convict and on the sentence imposed.

The single basis for the review application was that it had procedurally been irregular for the first respondent to have convicted without any evidence of the value of the prejudice. I disagreed. As I have already pointed out, the issue of the value of the vehicle sold by the applicant and the quantum of the rentals collected by her had played no role in the decision of the first respondent to convict. The record of the court *a quo* showed that the applicant had properly been convicted on the evidence led, almost all of which had been common cause. It is not a requirement for a charge under s 113(2) of the Code (theft) that the value of the property stolen be established first before a conviction. Furthermore, and at any rate, it was not correct that the applicant had been convicted without any evidence of the value of the prejudice as alleged by the applicant in her application. She herself had come up with a figure representing the proceeds that she had received for the vehicle. That had been the value that she had placed on it. She had also come up with a figure for the total rentals that she had collected from the properties. It was only that the state counsel had come up with his own figures. But the essential point was that the different figures had had no bearing on whether or not a crime had been committed. Further, the figures had also had no bearing on the sentence that the first respondent imposed because he had reasoned that the crime had been a unique one.

In my view the application for review was opportunistic. It lacked merit. That is why I declined it.

P. Chiutsi Legal Practitioners, applicant's legal practitioners