PETRONELLA KAGONYE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 18 November & 1 December 2022

Chamber Application

T Magwaliba, for the applicant
Z Macharaga with *C Muchena*, for the respondent

CHIKOWERO J:

1. This is an application for leave to appeal to the Supreme Court in terms of s 44(4) of the High Court Act [*Chapter 7:06*] as read with Rule 94 of the High Court Rules, 2021.
2. Sitting together with MANYANGADZE J, we dismissed the applicant's appeal against conviction and sentence
3. The magistrates court convicted the applicant on a charge of theft of trust property as defined in s 113(2)(a) of the Criminal Law(Codification and Reform) Act [*Chapter 9:23]*.
4. It sentenced her to 36 months imprisonment of which 12 months was suspended for 5 years on the usual conditions of good behavior. A further 8 months imprisonment was suspended on the condition that the applicant paid restitution.
5. Since the other member of the appellate court was not available, I heard the present application as a single judge.
6. Leave to appeal must be granted in circumstances where the intended appeal has a reasonable prospect of success. Put differently, there should be substance in the intended appeal. See *State* v *Mutasa* 1988 (2) ZLR 4 (S); *Whaley & Others*; (*Law Society Intervening)* v *Cone Textiles (Pvt) Ltd* 1989 (3) SA 574; *State* v *McGown* 1995(2) ZLR

81 (S); *Prosecutor-General of Zimbabwe* v *Intratrek Zimbabwe (Private) Limited* (2) *Wicknell Munodaani Chivayo* (3) *L Ncube* N.O SC 59/19.

7. In respect of the appeal against conviction, we found that the trial court had not misdirected itself in finding that the applicant had failed to account for twenty laptops donated to two schools in Goromonzi South Constituency.
8. Having received those laptops from the Postal and Regulatory Authority of Zimbabwe (POTRAZ) for onward delivery to the schools, the applicant had, instead, donated two laptops to tertiary students at campaign rallies, one laptop to a Ruwa school for the physically impaired and completely failed to shed light on what happened to the other seventeen laptops.
9. In the intended appeal to the Supreme Court the applicant proposes to argue that she did not know that she was required to deliver the twenty laptops to the two Goromonzi South Constituency Schools because the Handover Form was not brought to her attention.
10. We think that there is no substance in the intended argument. The communication between the appellant and Potraz was reduced to writing. The Handover Form was part of such Communication. That form required the applicant to use her discretion in choosing the two schools to receive the donation but with a rider that she needed to avail documentary proof that the intended beneficiaries had indeed received the donation. This she was to demonstrate within a given time-frame. He brother, who signed the Handover Form on behalf of the applicant, took delivery of the laptops on her behalf. The brother doubled up as the applicant’s driver. He was a holder of an Undergraduate as well as a Post Graduate University degree. I see no reasonable prospect of the Supreme Court finding that such an educated man, sibling and driver to the applicant, did not advise the latter of the need to account to Potraz. That the applicant authorized him to collect the laptops on his behalf demonstrates that the brother was a responsible person. It is fanciful in my view to hope that the Supreme Court is likely to find that the applicant did not know of her duty to account to Potraz.
11. The foregoing also disposes of the second proposed ground of appeal. I see no substance in the intended argument that the applicant did not have the requisite state of mind to

commit the offence of theft of trust property when she disposed of the laptops in the manner that she did.

12. Further, my discussion of the prospect or otherwise of the proposed first ground of appeal applies with equal force to the intended fifth ground of appeal. The trial court did not convict the applicant on the basis that she negligently disposed of the twenty laptops.
13. I think that it is asking too much for the applicant to entertain any hope that the Supreme Court may find that the applicant believed that the laptops had been donated by Potraz in terms of her letter of 26 July 2018. There was no basis for such a belief. There was no evidence that the letter, assuming it was a genuine document, was ever received by Potraz. It bore no Potraz date-stamp which would otherwise have served as an acknowledgement that the letter was received by that entity. Dewera, who hailed from Potraz and testified as a State witness, was categoric that the laptops were a donation for two schools in Goromonzi South Constituency under the E-Learning project. The donation was triggered by the applicant's own letter of 20 June 2018 addressed to then Minister of Information, Communication Technology and Cyber Security, Supa Mandiwanzira.
14. That the letter of 26 July 2018 was a ruse was put beyond doubt by the fact that the copy produced by the applicant as an exhibit bore her signature yet the copy served on the prosecution was not signed at all-yet both were claimed to have been copies of the letter collected from the applicant's office for the attention of Supa Mandiwanzira. Mandiwanzira was not called as a defence witness.
15. In any event, the applicant changed her defence as the trial progressed. In her defence outline she flatly averred that she did not receive the twenty laptops at all. The first and second State witnesses were cross-examined on this basis. The witnesses stuck to their testimony, to wit, that the applicant received the twenty laptops from Potraz under the E-Learning project.
16. It was only later, as the trial forged ahead, that the applicant executed a somersault. It was this. She had in fact received the twenty laptops from Potraz. The donation was not to schools in Goromonzi South Constituency under the E-Learning project. Instead, it was for the needy in her constituency. This was in line with her letter of 26 July 2018.

She had no duty to account either to Potraz or to anybody for that matter. The manifest falsity of this defence was put beyond doubt not only by the evidence adduced by the prosecution but by the fact that the applicant had effectively scored an own goal in that this was not the defence raised in her defence outline.

17. The foregoing disposes of not only the third but also the proposed fourth ground of appeal. I think it is unreasonable for the applicant to suppose that the Supreme Court may find, as a fact, that Mandiwanzira's driver physically collected the letter of 26 July 2018 from the former's office. Even that driver did not testify as a defence witness nor was the supposed letter to Mandiwanzira tendered as an exhibit. What was produced was a letter which was claimed to be copy of that collected by Mandiwanzira's driver. I have already indicated that the copy produced, as an exhibit, bore the applicant's signature whereas that furnished to the prosecution did not. This anomaly was never explained.
18. It only remains for me to say this. What is put forth as the proposed final ground of appeal is bereft of any prospect of success. The trial court did not place any onus on the applicant to prove his innocence. The prosecution had a formidable case against the applicant. The evidence was overwhelming. Even without the applicant shooting herself in the foot, as indicated elsewhere in this judgment, conviction was certain.
19. The offence was committed at the time the applicant was not only the Member of Parliament for Goromonzi Constituency but also a Cabinet Minister. She was the Minister of Labour and Social Welfare.
20. I am aware that an application for leave to appeal against sentence should be treated less rigidly than where leave to appeal is sought against conviction only. The reason is that there is more room for a different opinion when it comes to sentencing. Even then, I am not at all persuaded that there is reasonable prospect of success in arguing that the sentence imposed induces a sense of shock. It appears the trial court actually erred on the side of lenience. I do not see any prospect of the applicant moving the Supreme Court to find that the sentence of 36 months imprisonment is manifestly excessive as to induce a sense of shock. Not only that. The learned magistrate suspended a third of the custodial term on the usual conditions of good behavior. She did not end there. She went on to suspend a further 8 months imprisonment on condition the applicant paid restitution to

leave the period of incarceration at 16 months if the applicant effects full restitution. Considering the courts' tough stance in sentencing high ranking public officers convicted of corruption related offences, the applicant, it seems to me , was indeed fortunate relative to sentence.

21. The application for leave to appeal is meritless
22. In the result, the application for leave to appeal to the Supreme Court be and is dismissed in its entirety.

Mahuni Gidiri Law Chambers, applicant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners.