



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No. 117/2006

In the matter between:-

**REX**

and

**CHARLES MYEZA  
PHUMZILE MYEZA  
MUSA NGWENYA  
PPC ELECTRICAL (PTY) LTD**

**Neutral citation:** *Rex v Charles Myeza & Others* (117/06) [2012]  
SZHC 147 (28<sup>th</sup> June 2012)

**Coram:** HLOPHE J

**Delivered:** 28<sup>th</sup> June 2012

**For the Crown:** Mr. N. M. Maseko

**For the 1<sup>st</sup> Accused:** Mr. M. T. Mabila

**For the 2<sup>nd</sup>, 3<sup>rd</sup> and  
4<sup>th</sup> Accused:** Mr. S. Gumedze

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**JUDGMENT**

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- [1] The four accused persons stand charged with various offences which include several counts of fraud, forgery as well as uttering. In all there are twenty counts of fraud, fifteen of forgery and also fifteen of uttering. All the accused persons are affected by the fraud charges whilst only accused number one is affected by the forgery and uttering charges.
- [2] The thrust of the fraud charges is that on the various dates mentioned therein, which range between August 2004 and November 2005, all the accused persons, whilst acting in furtherance of a common purpose, misrepresented to the Royal Swaziland Police that they had performed certain electrical works as reflected in invoices prepared and presented to the Royal Swaziland Police and subsequently to the Swaziland Government Treasury Department for payment.
- [3] The contention is that there was either no such work performed or where any work was performed, it was only a portion of what was claimed. Notwithstanding these anomalies, the Government of Swaziland had, whilst acting on the advice of the Royal Swaziland Police, paid the amounts claimed to its detriment. From the alleged incidents of fraud the Swaziland Government had lost a total sum of E661 046.36, which was all paid to the fourth accused company.
- [4] As concerns the forgery charges the first accused was alleged to have forged the signature or entered the name of one AV Mkhalihi Assistant Superintendent, his senior at work into a certain contract awarding certain work to the fourth accused for the year 2004/2005. It was alleged this was aimed at, and did, facilitate the fraudulent transactions that resulted in the loss of

the sums of money referred to in fraud counts. When he did this, the first accused was not authorized either by the said Mr. Mkhalihi or anyone else with authority.

[5] The other aspect of the forgery charges related to certain invoices which the first accused is alleged to have received by entering the name of one Vusie Silindza as the person who received same when such was not true. In fact the receipt of the invoices as Vusie Silindza had the tendency of making it look like the invoices concerned were received by the said Vusie Silindza because he in terms of procedure, was required to enter his name as recipient as an indicator that he had satisfied himself the work for which the invoice was issued had been done. This was however not the case. This action had therefore facilitated the payment of the amounts referred to in the fraud counts. It has to be recorded that there are about five counts of fraud to which no charges of forgery and uttering relate and these are from count four to count nine.

[6] The uttering charges related to the putting into effect of the invoices by presenting them for payment. Like the forgery counts, there are fifteen such counts and they are all directed against the first accused person.

[7] It is significant to note that accused numbers 1, 2 and 3 are all directors in accused number four, the company called PPC Electrical (PTY) LTD. The first and the second accused are also husband and wife and are the formational Directors of the fourth accused whilst the third accused only became a Director in July 2005 after the resignation of the first accused from the Directorship of the company. It is a fact that a few of the transactions complained of occurred after July 2005.

- [8] Following that some of the invoices bore the name P.C.C. Electrical (PTY) LTD as opposed to PPC Electrical (PTY) LTD, the parties agreed from the onset that in fact that invoices be taken as having read PPC Electrical (PTY) LTD as for purposes of this matter it meant the same thing as the latter, it having been a mere typographical error.
- [9] At the close of the crown case, counsel for the accused persons indicated that they were moving an application in terms of section 174 (4) of the Criminal Procedure and Evidence Act no.67/1938, contending that no prima facie case had been made against each one of the accused persons except the fourth accused and therefore that the accused persons concerned be acquitted and discharged at this stage of the proceedings.
- [10] As this application was opposed I was then addressed at length by the counsel representing the first to the third accused. This judgment is therefore a sequel to that application.
- [11] Before dealing with this application I should give a brief summary of the evidence given by the crown witnesses so that as I deal with the submissions and contentions made, I do so on the basis of the evidence placed before me.
- [12] The evidence led by the crown is to the effect that the first accused was employed as an accountant to the Royal Swaziland Police and was based at its Finance Department at the Police Headquarters. The structure of the said department was that, the senior most officer was one Petros Ndlangamandla followed by one Absalom Mkhalihi and that the accused person reported to the said officers. Otherwise the functions of this office entailed the

processing of payment to those contractors who had rendered a service to the Royal Swaziland Police. These contractors would be those engaged by the Royal Swaziland Police through certain contracts. These contracts would often be signed on a yearly basis.

[13] The assignment of work to the contractors it was alleged by the crown witnesses was a preserve of a certain department of the Royal Swaziland Police, called the Research and Planning Department. This department was also required to verify and certify if any given work had been performed by a certain contractor. One particular officer who used to go and verify including certify that certain work had been done or performed by a contractor was Vusie Silindza. His certification that the work had been done and that payment was therefore due, was expressed through receiving and signing a particular invoice presented by the contractor concerned. The officer confirmed that his duties entailed the foregoing and he gave evidence as PW 2.

[14] It was alleged as concerns the fraud counts against the accused persons that the invoices concerned or forming the basis of the charges either had only part of the work done or had no work done at all. Owing to the stage of the proceedings to which this ruling relates I will not deal in detail with the full particulars as to which invoices related to partly performed work or to no work performed at all. It suffices to state that evidence was led showing that counts 4, 5, 6 and 8 related to those invoices where work was partly performed whilst counts 1,7, 9, 12, 15, 18, 21, 24, 27, 30, 33, 36, 39, 42, 45 and 48 related to those invoices where no work was allegedly done.

- [15] The evidence presented by the crown went on to suggest that although none of the accused persons are shown as having personally filled in the information into the invoices allegedly indicating partly done work or no work done at all, they are said to have acted in consort with the person or persons who filled in such information. It seemed common course that such person was one Paul Hlatshwayo who for some reason was not charged together with the accused persons, allegedly because he was intended to be made a witness at first.
- [16] The first accused person was however shown through the evidence presented to be the person who without any authority to do so, received and signed the invoices filed by or on behalf of the fourth accused person, a company in which he was a director, a factor he had not disclosed to his employers. Furthermore, and as stated above, in receiving the said invoices the first accused signed as or wrote the name of Vusie Silindza and his rank in the Police Force. This it was contended he did to make it look like Vusie Silindza had not only received the document but had also certified that the work was done and therefore that same was ripe for payment.
- [17] The thrust of this evidence was that the first accused did this to facilitate the payment of the money fraudulently claimed from the Royal Swaziland Police or the Swaziland Government to the fourth accused, a company in which he was a Director or later on, where his wife was a Director.
- [18] Other than the evidence to the effect that the second accused was a signatory to the Bank account of the fourth accused where the proceeds from the allegedly fraudulent invoices were deposited including that she signed when some of such proceeds were

withdrawn, there is no other evidence directly indicating that the said accused person had been a party to the fraud complained of. Whether a necessary inference can be drawn to the effect that by partaking in the withdrawals referred to above she was committing the offence same is a moot point, whose decision would be whether in law the inference to be drawn is consistent with all the facts and whether it is the only reasonable one to so draw as stated in ***R v Blom 1939 AD***. This aspect shall be dealt with later in this judgment.

[19] No direct evidence was led indicating or showing a role played by the third accused in furtherance of the crime complained of, that is as concerns the fraud charges. This leaves him with only the provisions of section 338 (1) of the Criminal Procedure and Evidence Act as his link, to the charges.

[20] With regards the counts of forgery preferred against the first accused, the evidence led was that he had entered the name of Vusie Silindza as a signature or as the person who received an invoice which led to the prejudice eventually suffered by the Swaziland Government or the Royal Swaziland Police where it paid fourth accused the amounts claimed in the allegedly fraudulent invoices. Similarly, the other counts of forgery were shown by the evidence to relate to an entry in a contract allegedly concluded between the Royal Swaziland Police on the one hand and the fourth accused on the other. It is common course that the first accused had, during the conclusion of same, signed as, or filled in the initials of, A. V. Mkhalihi Assistant Superintendent. This was in relation to the 2004/2005 contract.

[21] The version of the crown as concerns the said contract was that it was not authentic and the first accused had no authority to sign it

in the first place, let alone in the name of his senior who was there and would have signed it himself if it needed to be signed. Otherwise the thrust of the forgery charges against the accused was that the documents complained of told a lie about themselves.

[22] Otherwise as concerns the fourth accused person, the application in terms of section 174 (4) was not moved on its behalf and it was promptly acknowledged by its counsel, Mr. Gumedze that a *prima facie* case had been made against it.

[23] It is against the backdrop of the foregoing summary of the evidence that the application made on behalf of the first to the third accused was moved, asking that they be acquitted and discharged without them having been called to their defence. As already indicated above, the crown opposed the said applications.

[24] It was contended by Mr. Mabila on behalf of the first accused that there was no evidence led necessitating that his client gives an explanation on any of the charges preferred against him. In effect Mr. Mabila was saying no *prima facie* case had been established against the said accused.

[25] He went on to contend that this was because the test on whether or not his client needed to explain himself as set out in ***The King vs Duncan Magagula and 10 others criminal case no. 43/1996*** had not been met. This test he submitted was whether there was evidence on which a reasonable man acting carefully might convict.”

[26] Mr. Mabila further submitted that his client would have only been required to explain if he had been charged with the statutory



offence of corruption and not the common law offences he had been charged with because for instance on the fraud counts, his client had not been shown as having played a part in the preparing of the invoices shown to be fraudulent. As concerns the forgery and uttering counts, he submitted that his client had not been shown to have signed the documents complained of using the signatures of the officers complained of but their names and went on to submit that the forgery charges were not appropriate because his client had been shown to have signed all the documents in a similar manner including those with which he was not charged with similar offences. This submission related to certain documents forming part of the batches founding the charges against the accused. For instance invoices and claims by such companies or contractors as SEREC Radio, Carson Wheels, PC 2000 and Feederm, to mention but a few. Mr. Mabila's argument was that he had accepted the invoices thereon as Vusie Silindza even though he has not been shown to have had an interest therein. He contended further that his client had on some of such instances signed the contracts as AV Mkhaliphi Acting Superintendent and he had not been shown to have had an interest in signing such a document.

[27] This court was also referred to a number of judgments by Mr. Mabila in which various principles of law were expounded. In fact it was contended that there were no basis for this court to draw reasonable inferences against the accused because such inferences were not the only reasonable ones to be drawn as stated in ***R v Blom 1939 AD 199.***

[28] As concerns the second and third accused's application for discharge at the close of the crown's case, Mr. Gumedze, submitted that there was no evidence on which this court could

convict his clients if he were to close his case at this stage. Whilst evidence was led indicating that the second accused was a signatory to the Bank accounts of the fourth accused, it was not enough to cause her to be called to her defence. This he said was because no adverse inference could be drawn against her given that the account referred to was an active account of the fourth accused where monies earned from legitimate contracts were or used to be deposited which means that it cannot be enough to call her to explain simply because she withdraw money as it was not only the money illicitly obtained that was deposited into that account which means she could not be faulted for signing the withdrawal of monies.

[29] As concerns the third accused, Mr. Gumedze submitted none of the witnesses ever mentioned this particular accused person as having played a role in connection with any of the offences allegedly committed. On these basis it was contended he ought to be acquitted and discharged.

[30] Mr. Gumedze went on to raise an argument in relation to section 338 (1) of the Criminal Procedure and Evidence Act of 1938. He acknowledged that on the face of it the section concerned required that once a *prima facie* case is established against a Company, then the Director or Secretary or Officer of the said company, becomes obliged to show that he played no part in the commission of such an offence and that he could not have prevented it.

[31] Mr. Gumedze was thus of the view that this court was, acting on the basis of this section, entitled to call the second and third accused persons to their defence. He however submitted that such would be unconstitutional as it would be against the

presumption of innocence which the Constitution guarantees against an accused person. Mr. Gumedze submitted that this court should then declare the aforesaid section 338 of the Criminal Procedure and Evidence Act 1938, concerned null and void to the extent of its inconsistency with the Constitution.

Section 338 (1) of the Criminal Procedure and Evidence Act provides as follows:-

*“In any criminal proceedings under any statute or statutory regulation or at common law against a company, the Secretary and every director or Manager or Chairman thereof in Swaziland may, unless it is otherwise directed or provided, be charged with the offence and shall be liable to be punished therefore, unless it is proved that he did not take part in the commission of such offence, and that he could not have prevented it.”*

[32] Opposing the accused persons’ applications, Mr. Maseko on behalf of the crown stated that the application as moved on behalf of the first accused person had no merit. This he submitted was because the accused was being linked to the commission of the offences concerned, particularly the fraud charges not just by the doctrine of common purpose and his being a Director in the fourth accused, against whom a *prima facie* case was made by section 338 (1) of the Criminal Procedure and Evidence Act of 1938 but also by the role he personally played in the commission of the said offences.

[33] He submitted it was imperative that the first accused explains himself as to why he received the invoices in the name of Vusie Silindza and therefore presented an impression that the work had been performed, inspected and the invoices certified for payment.

This was all the more so, he submitted, because he had an interest in the fourth accused as a Director, a factor which had itself not been disclosed to the said accused person's superiors. It was the actions of the first accused which perfected and or accomplished the fraud committed against the Royal Swaziland Police. For instance his signing the invoices in the name of Vusie Silindza had with it the effect that the fraudulent invoices were ripe for payment because the work was done.

[34] As concerns the forgery charges against this accused it was contended by Mr. Maseko that the first accused had a case to answer because he had signed certain invoices in the name of Vusie Silindza by entering the name of the said person and that when he did so, he intended to defraud. In fact the documents concerned told a lie about themselves after his having signed them.

[35] On the charge of uttering Mr. Maseko contended that the accused should explain why he put into effect or tendered the documents for payment in the circumstances particularly where his interest in the fourth accused had not been disclosed.

[36] As concerns the second and third accused persons, Mr. Maseko's argument was that they were required to explain themselves because they were Directors in the fourth accused, a company. In terms of section 338 of the Criminal Procedure and Evidence Act 67 of 1938, they were required to show that they did not take part in the commission of the offence and that they could not have prevented it.

[37] According to Mr. Maseko, the fact that they were Directors in the fourth accused, against whom a *prima facie* case was made,

necessitated that they give an explanation because a company acts through its Directors or officers. It was, so his argument went, not necessary that they each be individually shown to have played a role in the commission, but that as Directors they were required to give an explanation as to whether or not they did take part and whether they did know about the commission of the offences concerned.

[38] On the constitutional question raised, which is to say that section 338 (1) of the criminal Procedure and Evidence Act of 1938 was unconstitutional because it amounted to a reverse onus and therefore it contravend section 21 (2) (a) of the Constitution of Swaziland, which guaranteed the accused's right to the Presumption of Innocence, Mr. Maseko submitted that in the context of our Constitution such a section would not be unlawful because the Constitution per section 21 (13) provided that it does not amount to a reverse onus to call an accused person to explain himself if an existing law required such a person to do so. The Constitution of Swaziland permits the calling of an accused to explain himself in our context as that is what section 338 of the Criminal Procedure and Evidence Act requires.

[39] It is important that I record the contentious sections of the Constitution at play here, that is section 21 (2) (a) and section 21 (13) which read as follows:-

*“21 (2) A person who is charged with a criminal offence shall  
be*

*(a) Presumed to be innocent until such person is  
proved or has pleaded guilty.*

“21 (13) *Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of :-*

(a) *Subsection 2 (a) to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts;”*

[40] Having summarized the facts in the matter and the submissions made before me, I now have to determine the application concerned; which is to say, has a *prima facie* case been made against the accused which necessitates that they be called to their defence?.

[41] I acknowledge from the onset that the court has a discretion to exercise judicially and judiciously at this stage of the proceedings. I further agree that the test to be used is that set out in the case of ***The King vs Duncan Magagula and 10 others criminal case no 43/1996*** which was expressed as follows at page 8 of the unreported judgment:-

*“This section is similar in effect to section 174 of the South African Criminal Procedure, Act 51 of 1977. The test to be applied has been stated as being whether, there is evidence on which a reasonable man acting carefully might convict (**R v Sikhumba 1955 (3) SA 125; R v Augustus 1958 (1) SA 75**) not should convict (**Gascoyne v Paul and Hunter 1917 TPD 170; R v Shein 1925 AD 6**).*

From this test it is clear that the court has a discretion on whether or not to grant the discharge. This has been observed in numerous

cases which include that of ***Rex vs Elizabeth Matimba and Joyce Ntombifuthi Mdluli criminal case no. 184/1998.***

- [42] As concerns the fraud charges, the evidence indicates that the first accused who had not disclosed his direct interest or even the indirect one, in the fourth accused, received invoices by entering the name of PW 2, Vusie Silindza whose duty it was to receive same and also certify that the invoices were authentic and that the contents therein indicated or resembled work done.
- [43] In my view the first accused needs to explain the *prima facie* case established against him, which is that he was acting in common purpose with the author of the fraudulent invoices and was ensuring that the fraud was perfected. This is more so because PW 2 is on record as having said he was the only one authorized to sign the invoices concerned as a confirmation that the work was done and that payment could be made. This he would do after having verified from the place where the work was done that indeed that was the case. With regards the invoices concerned no work had been done and he had not verified as required of him. Furthermore the evidence is so far not disputed that on some of the invoices only a portion of the work had been done whilst on the others (about fourteen of the fraud counts) no work had been done at all.
- [44] The first accused needs therefore to explain why he signed the invoices concerned in the manner he did particularly the invoices from a company where he was a director, a factor not itself disclosed. He should also explain why he signed the invoices in the first place in the name of Vusie Silindza and not his own if he was so entitled, authorizing payment of the monies claimed when only

part of the work claimed for had been done or none had been done at all.

[45] Other than that she is a Director to the fourth accused like all the other accused persons, the second accused is linked to the counts of fraud with which she is charged by the fact that she was a signatory to the fourth accused's Bank account into which the moneys paid as a result of the fraudulent invoices were deposited.

[46] The question now becomes whether in law this aspect has created a *prima facie* case requiring her to explain herself.

[47] Viewed from this point, I am convinced she would have been required to explain herself if firstly it had been shown that the company was not performing any legitimate work for which it was paid. Otherwise the crown's evidence indicates that the company was performing at least some legitimate government work. This is what in my view makes it unnecessary for her to explain given her being linked thereto by her being a signatory to the account, I do not believe that a reasonable man acting carefully might convict in such a case. This is because for him to do so, he has to reason by inference. I do not think that in such a case it would be the only reasonable inference to draw to say that by being a signatory to the account, she was aware the money in that account were proceeds of illicit deals or of crime.

[48] Furthermore the evidence of the crown does point out who allegedly committed the offences, which excludes her. There is in such a case no need in my view for her to explain herself as whatever was done has been shown to have been done by identifiable persons, who include the first accused person and



possibly one Paul Hlatjwayo, without any mention of her being made other than that she was a Director in the said company.

[49] On her being a Director of the fourth Respondent and whether this suffices to necessitate her being called upon to explain herself, I would go to what I have just said that the accused is not shown by the crown to have committed any offence and that the people who allegedly did so are disclosed in the crown's own evidence. It would be different if no one was being implicated yet the company had received some unexplained monies. I am of the view in such a case every Director would be required to explain as required in terms of section 338 of the Criminal Procedure and Evidence Act. I say this because I believe it should always be borne in mind that at the heart of criminal proceedings is the fundamental principle that an accused person has no duty to prove his innocence. In my view section 338 (1) in its application as suggested by Mr. Maseko should be made in those deserving cases where the evidence does not reveal the responsible accused persons.

[50] Because of the conclusion I have reached on this aspect of the matter, I see no reason why I should be dealing with the constitutionality or otherwise of section 338 of the Criminal Procedure and Evidence Act as raised by Mr. Gumede relying on section 21 (2) (a) of the Constitution and the response thereto by the Director of Public Prosecutions, Mr. Maseko as regards the provisions of section 21 (13) of the same Constitution. I refrain from doing so as guided by the settled Principle that deciding a constitutional question ought to be avoided where a matter can be determined on some other point other than the constitutional one. The case of ***Daniel Didabantu Khumalo v Swaziland Government Civil Appeal case no 31/ 2010*** is instructive in this regard just as is that of ***S v Mhlungu and others 1995 (3) SA 867 (CC) at paragraph 59 D - F*** as well as that of ***Zantsi v***

***Counsel of State and another 1995 (4) SA 615 (CC) at paragraph 54 C -D.***

In the latter case the following was stated:-

*“It is only where it is necessary for the purpose of disposing of the appeal, or where it is in the interests of justice to do so, that the constitutional issue should be dealt with first by this court. It will only be necessary for this to be done where the appeal cannot be disposed off without the constitutional issue being decided; and it will only be in the interests of justice for a constitutional issue to be decided first, where there are compelling reasons that it should be done.”*

[51] I am convinced there is no such a compelling reason in this case. I am supported in this view by the attitude adopted by all counsel involved in the matter who ended up agreeing that it was not necessary to determine the constitutional question on the material and the issues before court.

[52] The position of the third accused, who was only linked with the offences solely by his being a director cannot be treated differently from that of the second accused in my view. By this I mean it is not enough for him to be required to explain himself simply because he was a Director in the fourth accused yet he was not mentioned by evidence in the commission of the offence when the people who played a role in the commission of the offence are disclosed and or are identifiable in the evidence. His case is even made stronger by the fact that he only became a Director in 2005 July when the first Respondent resigned. During his short period as a Director of the fourth Respondent he has not been shown to have played any part other than his being a director.

[53] This being the case, the third accused ought not to be called to his defence in order for him to explain anything. He should therefore be acquitted and discharged for in my view the applicable test, which is whether if he were to close his case now, he could be convicted, favours him.

[54] As regards the charges of forgery preferred against the first accused, there is evidence led by crown witnesses to the effect that he signed the invoices in the name of Vusie Silindza who was entitled to do so. By so signing it has been alleged he was misrepresenting to make it look like the work shown therein had been done. For these reasons it was alleged he committed the crime of forgery. It is a fact established by the crown that he, accused one, signed the invoices concerned as Vusie Silindza. In the circumstances of the matter and unless there was a contrary interpretation he was making the documents concerned tell a lie about themselves which is what forgery is about. See in this regard ***JRL Milton South African Criminal Law and Procedure volume 2, Common Law Crimes, 3<sup>rd</sup> Edition 1996, Juta & Co. at page 743.*** I am convinced that the first accused needs to explain himself on why he signed the said invoices.

[55] The same thing applies to the uttering charges faced by the first accused. Again he is the only one who can explain why he tendered the fraudulent invoices for payment in the circumstances of the matter. He therefore cannot be acquitted at this stage but will be called upon to give an explanation.

[56] Having come to the conclusion, I have, I accordingly make the following order:-

(1) The first applicant's application for an acquittal and discharge in terms of section 174 (4) of the Criminal Procedure and Evidence Act 1938, as amended be and is hereby dismissed with the result that the first accused person is called to his defence in respect of all the fraud, forgery and uttering charges he is facing.

(2) The second and third accused persons' application in terms of section 174 (4) of the Criminal Procedure and Evidence Act of 1938 as amended be and is hereby granted, with the result that the second and third accused persons are acquitted and discharged at this stage of the proceedings.

**Delivered in open Court on this the .....day of June 2012.**

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**N. J. HLOPHE**

**JUDGE**