IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **Criminal Case No. 420/2010**

In the matter between:

REX **Applicant**

VS

THEMBA PHINEAS DLAMINI **1st Respondent**
JOHANNES MANDLA NDLANGAMANDLA **2nd Respondent**
THEMBI NDLANGAMANDLA **3rd Respondent**
ESAU MUZI DLAMINI **4th Respondent**
DUMSANI MNAZARETHA MKHUMANE **5th Respondent**
EDUCUM SUPPLIERS INVESTMENTS (PTY) LTD **6th Respondent**
HART SUPPLIERS (PTY) LTD **7th Respondent**

Neutral citation: *Rex vs Themba Phineas Dlamini and Others* (420/2010) [2016] SZHC 100 (21 June 2016)

CORAM **MAMBA J**

HEARD:

DELIVERED: **21 June, 2016**

JUDGMENT

[1] This judgment is, in a way, a sequel to the section 174 (4) of the Criminal Procedure and Evidence Act 67 of 1938 ruling I made in this matter on 11 September, 2015. In the ruling I stated as follows:

> '[3] There are, in all nine (9) counts of theft in the indictment and these are as follows:
>
> 3.1 On the first count, it is alleged that all three accused persons are guilty of the crime of theft. The crown alleges that this offence occurred between 03 May 2007 and 02 October 2007 at Evelyn Baring High School in Nhlangano where the first accused (hereinafter referred to as A1) was the School Principal. It is alleged that the accused unlawfully and intentionally caused a general deficiency of E3 783.95.
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> 3.2 Likewise, the second count alleges that the accused, between the 15th day of January, 2007 and 4th March 2008, all three accused unlawfully and intentionally caused a general deficiency of E18,895.00 at the same school.
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> 3.3 The 3rd count alleges another general deficiency of E6909.00, that was unlawfully and intentionally

created by the accused at the same school during the period between 02 October 2007 and 15 July 2008.

3.4 On the 4th count, a general deficiency of E21 034.55 was allegedly created. This was during the period 03 May 2007 to 02 October 2007 and 15 July 2008.

3.5 On count 5, a general deficiency of E4, 594.25 is complained of and is said to have occurred or caused on 02 October 2007.

3.6 On count 6, a general deficiency of E24 740.00 is alleged to have been caused by the accused on 14 September 2009.

3.7 Only A1 is changed on count seven (7), where it is alleged that he unlawfully and intentionally created a general deficiency in the sum of E4000.00. This is said to have occurred on 08 December 2006.

3.8 Again, only A1 is charged on counts 8 and 9. There, it is alleged that he intentionally and unlawfully caused a general deficiency of E6013.95 and E4800.00 on 15 March 2005 and 24 January 2006, respectively and as in all the other counts, this offences were committed at the school stated above.

[4] It is also alleged and it is common cause that at all times material hereto, the second accused (hereinafter referred to as A2) was a director of the 6th Accused, who shall hereinafter be referred to as A6).

[5] In its quest to establish its case against the accused, the crown led 18 witnesses. I should immediately note that at the close of the case for the crown, the crown abandoned the last count, ie, count nine (9) and A1 was consequently acquitted and discharged thereon. During argument for the discharge of the accused on the rest of the charges, counsel for the crown conceded that the crown had produced or led no evidence implicating any of the accused in respect of count two (2). All three accused persons were again, accordingly acquitted and discharged on that count. This ruling is therefore only in respect of the seven (7) remaining counts namely; counts 1, 3, 4,5,6,7 and 8. I deal with these counts below.'

[2] Because the evidence overlaps in many respects in counts 1, 3, 4 and 5, I shall deal with these four counts together in the final segment of this judgment.

[3] **COUNT 6**

The three accused persons are charged with the theft of money in the sum of E24 740.00, which was the property of Evelyn Baring High School (hereinafter referred to as the school). They are alleged to have committed this crime on or about 14 September, 2009 at Nhlangano. It is also alleged that they were acting in furtherance of a shared or common purpose. Mr Ndlangamandla was a director of the 6th accused (the company) whilst Mr Dlamini was the Principal of the school.

[4] I must mention from the outset that the crown alleges that the accused stole the money and 'thereby created a general deficiency of E24 740.00 …'. This assertion, from the available evidence and pleaded case by the crown is totally misconceived. First, no statement of account or balance sheet has been either suggested or furnished to the court to show or prove such a deficiency, shortage or shortfall in the monies held by the school at the material period. A deficiency by definition is a deficit or debit balance. Secondly Accused 2 and Accused 6 were never at any time servants or agents of the school who had custody of monies or property belonging to the school. This, notwithstanding, I shall treat this count as one of fraud or theft simplicitor. I say fraud because the allegation and the evidence that the crown led suggested that Mr Ndlangamandla in his

capacity as Director of Accused 6 and in collusion with Mr Dlamini, issued an invoice for goods supplied to the school well knowing that no such goods had been supplied to the school and Mr Dlamini, paid the amount stated in the invoice, well knowing that no goods had been supplied to the school. Thus both the invoice and payment were false and therefore fraudulent.

[5] Fraud is a more serious type or species of theft than theft simplicitor. I would therefore leave the question open whether having been charged with theft, an accused may be convicted of the more serious offence of fraud. Without deciding the issue; because it is not necessary for me to do so, I would hold that, on first principles of law, this would not be permissible.

[6] The evidence on this count, ie count 6, is largely common ground. The material point of departure between the accused and the crown is whether the goods stated in the invoice were supplied or delivered to the school or not. The crown states that no such goods were ordered by and delivered to the school by Accused 2 and Accused 6. The accused state the opposite. The invoice in question is exhibit V and is dated 05 August 2009.

[7] Esaw Muzi Dlamini stated that sometime in 2010, he was requested by Mr Ndlangamandla, a former business associate of his, to collect a cheque for him from the school. Muzi explained that Mr Ndlangamandla explained to him that as a Member of Parliament, he was experiencing difficulties collecting monies for work or services rendered to government schools or entities in Swaziland. He told him that he had, through Accused 6, rendered services to the school and was awaiting payment. Muzi agreed. It was further agreed that the cheque payment would be deposited into Hart Suppliers (Pty) Ltd bank account which was under the control and direction of Muzi. Thereafter, Hart Suppliers (Pty) Ltd would issue a cheque or make payment to Accused 6, after deducting bank charges in the sum of E400.00. This evidence has been confirmed by Mr Ndlangamandla. He stated that because he was a member of parliament at the time, parliament or government had passed certain regulations barring members of parliament from having any business dealings with government schools and other government departments or entities. Meanwhile he had rendered services or supplied goods to the school through Accused 6 and in order to be paid, the payment had to go via a third party, in this case Hart Suppliers (Pty) Ltd. Therefore his evidence is that he did supply the goods to the school and therefore the payment was legitimately and lawfully due to Accused 6. His evidence is supported by Mr Dlamini (A1).

[8] Mr Dlamini testified that at the relevant time he returned to the school whilst he was on sick leave and found stationery and other material placed in the passage in the administration building at the school. He had come to the school to attend to urgent matters that needed his attention. The acting head teacher or principal at the school at the time was Thomas Dlamini. The acting principal informed him that the material had been ordered or purchased to be used in the mock examinations, practice papers and external examinations. He stated further that the Deputy principal gave him the relevant invoices and urged him to make payment to the suppliers which included Hart Suppliers and Websters. When he suggested to return to the school to make payment in the next week, the Acting Principal insisted that there was money available for the suppliers and payment should be made that day. Mr Dlamini (A1) said he was persuaded by these entreaties and he signed the relevant cheque.

[9] It is also important to note that Mr Dlamini (A1) testified that the school had never dealt with Hart Suppliers (Pty) Ltd before and he thus kept its invoice in his brief case with the aim of investigating or at least making further inquiries on this company or entity and its association with Accused 6. He said after his suspension from his stewardship as principal

of the school, the relevant invoice was confiscated from him by the police.

[10] In my ruling referred to in paragraph 1 above, I stated the following regarding the applicable invoice herein:

> '…Its layout or format is markedly different from the other invoices. For example, the postal address of A6 appears on the top left corner whilst only its telephone numbers appear on the top right hand corner. The telephone numbers have eight digits. This, according to the crown is irregular as local telephone numbers had only seven digits at the time. Again, on the bottom left hand corner it has the words "**P.S**. cheque paid to Hart Suppliers (Pty) Ltd". This suggests that it was or might have been completed after the relevant date and backdated. This clearly cries out for an explanation from the accused.'

[11] It is pointed out herein that Exhibit V is not the invoice referred to by Mr Dlamini (A1). He referred to an invoice from Hart Suppliers (Pty) Ltd. It is significant to note that neither Muzi (PW1) nor Thobile (PW2), who were the persons that dealt with the issue of the cheque on behalf of Hart Suppliers (Pty) Ltd ever talked about issuing an invoice to the school. In fact Thobile testified that Muzi informed her that Mr Ndlangamandla

would bring the cheque to her for banking and that is what happened. It is therefore surprising how an invoice from Hart Suppliers (Pty) Ltd could have found its way to the school and eventually Mr Dlamini (A1) in respect of this transaction.

[12] It is also noted by this Court that the existence of this invoice was never ever put or suggested to any of the crown witnesses. The court got to hear about it for the first time in the evidence of Mr. Dlamini (A1).

[13] On the anomalies appearing on exhibit V referred to in paragraph 10 above, Mr Ndlangamandla told the court that this was not the original invoice that was sent to the school for the supply of the goods in question. He told the court that Exhibit V was printed for accounting purposes only and the questionable information thereon was not supplied to the printers by him. The printers, he stated, inserted those details on the invoice without his involvement. Infact Mr Ndlangamandla testified that he instructed the printers to note that the cheque would be issued out to Hart Suppliers (Pty) Ltd and that this was before the cheque was actually issued by the school or Mr Dlamini (A1). There is no order number reflected on exhibit V. Again, Mr Ndlangamandla was, frankly, at pains or at sea to explain in any intelligible manner why he instructed his printers – Njalo Print – to print exhibit B when Accused 6 still had plenty

of invoices available. The printers were not called to rebut the damning evidence led by the crown. I make this observation fully mindful of the law that an accused person does not bear an onus to prove or establish his innocence. This principle has been authoritatively stated as follows:

> "In *S v Van der Meyden 1999 (1) SACR 447 (W) at 449* Nugent J summed up the position regarding establishing the accused's guilt at the end of the case in the following language:
>
> > 'The onus of proof in a criminal case is discharged by the State if the evidence established the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see example R v Difford 1937 AD at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility and an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other. In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at

> the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt, and so too does not look at exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.'

(See the principles stated in R v Dominic Mngomezulu)

[14] However, where the evidence has been shown to be actually false in the circumstances of each case, it stands to reason that, in the particular circumstances of that case, it cannot be reasonably possibly be true.

[15] From the above facts and the law, I have no hesitation whatsoever in concluding that Exhibit V is phoney. It is a forgery. It was created by Mr Ndlangamandla to shore up or justify the unlawful payment he had received from the school. Again, when Mr Dlamini (A1) made the said payment, no goods had been supplied to the school. Mr Dlamini was fully aware of this fact. His evidence that there was an invoice from either Hart Suppliers (Pty) Ltd or Accused 6 in this regard is clearly an afterthought. It is false and a fabrication by him.

[16] I am satisfied that the crown has, beyond any reasonable doubt established or proven its case against all three accused persons in respect of count 6. They are accordingly found guilty as charged on this count.

[17] **Count 7**

Mr Dlamini (A1) is the only one facing this count. It is alleged that on or about 08 December 2006 and at or near the school, he unlawfully and intentionally stole a sum of E4000-00 which was the property of the said school. Again the crown alleges that he created a general deficiency in the said amount. The evidence on this count was that of Mr Dumsani Mnazaretha Mkhumane (Pw12) who was at the relevant time the chairman of the school committee and signatory to the school's bank account.

[18] Mr Mkhumane told the court that he was granted a loan for E4000-00 by Mr Dlamini (A1) from the school's bank account. Initially it was agreed that he would repay this money in instalments. Later he was told by Mr Dlamini not to repay the money to the school as Mr Dlamini (A1) had repaid the money on his behalf. Dlamini told Mkhumane to repay the money to him. He never did so.

[19] The relevant cheque in this regard is exhibit T3 and was signed by both Messrs Dlamini and Mkhumane. It is common cause that members of the school committee were at the relevant time eligible to apply for loans from the school. So, there was, in my view nothing amiss in granting the loan to PW12. In any event, it was a loan and had to be repaid. There was therefore no intention of permanently depriving the school of that money; initially that is. However, when Mr Dlamini informed Mr Mkhumane not to refund the money to the school but pay it to him personally, there was at the very least, an attempt to steal the money from the school.

[20] Attached to Exhibit T3 is receipt number 080 for R4000.00 from S and S Stationery (Pty) Ltd of 127, Joseph Bosman, Silverton Pretoria, South Africa. This receipt is dated 11 December 2006 – 3 days after T3 and it is exhibit T2.

[21] Mr Dlamini (A1) in his testimony told the court that he used his personal money in the sum of E4000-00 to purchase stationery from S&S Stationery for the school and it was for this reason that he told PW12 to pay the E4000-00 to him personally as he had used his personal funds on behalf of the school. The crown alleges, however, that there is no company registered in the Republic of South Africa by that name. This

was the evidence of Abram N. Tuwe from the intellectual Property Commission of South Africa in Pretoria.

[22] Mr Tuwe was, however, not in a position to dispute that S & S Stationers was registered as a close corporation. This assertion was put to him under cross examination by Counsel for Mr Dlamini who suggested that his information was obtained from Sofia Mentz from the office dealing with close corporations. There was no direct information on the existence of this entity as a close corporation. For his part Mr Dlamini stated that this entity did exist and did sell the relevant material to the school. He stated though that he had never been to its principal place of business but that its personnel or sales agents would personally visit the school and offer to sell to it certain goods or material. It was Mr Dlamini's evidence that the material purchased in this regard comprised stationery and that his office was responsible for purchasing such material. There was no evidence to gainsay this.

[23] I note herein that the crown sought to establish that S & S Stationery (Pty) Ltd does not exist rather than prove that the goods allegedly bought and supplied to the school were actually not supplied or received by the school. There is a very thin or fine line between the two, I think. The central allegation by the crown is that the goods were not supplied to the

school and therefore the school suffered a loss in the said amount. I do not think it is the duty of the defence to prove that the said goods were actually bought and supplied to the school. The burden lies on the crown to prove beyond a reasonable doubt that the school suffered the said loss. I have already stated that there is no conclusive evidence to prove that S & S Stationery (Pty) Ltd is not a registered and trading entity in the Republic of South Africa. I also observe that the crown did not make any attempt to lead any evidence relating to the physical address and telephone number stated on exhibit T2, which is the receipt allegedly issued by S & S Stationery (Pty) Ltd.

[24] From the above evidence, it cannot be said in my view that the evidence given by Mr Dlamini on this count has been shown beyond any reasonable doubt that it cannot be said to be reasonably possibly true. As already stated above, the existence or otherwise of S & S Stationery is in doubt. This doubt is a reasonable doubt and Mr Dlamini must have the benefit thereof. Consequently I find him not guilty on this count. He is acquitted and discharged thereon.

COUNT 8

[25] The evidence on count 8 is almost similar to that pertaining to count 7. The relevant exhibits on this count are exhibit S1 – S3. Exhibit S2 is receipt number 0594 for R6103-95 issued to the school by Vrydump

Suppliers (Pty) Ltd of P.O. Box A334 Pongola KZN, 1207 Pongola. The corresponding school payment voucher(s) has no number and the cheque (S3) is dated 15 March 2005. Mr Dlamini stated that he issued this cheque in order 'to buy Books from RSA'. He gave the cheque to Esaw Nxumalo to cash at the Bank and he, Mr Dlamini, paid for the said books in cash. He stated that these were not text or prescribed school books. He told the court that he was entitled to purchase such books. Again no evidence has been led to contradict this assertion by him.

[26] As in count 7, the crown contends, again through the evidence of Mr. Tuwe, that Vrydump Suppliers (Pty) Ltd is not a registered company in the Republic of South Africa and therefore it could not have supplied the said books to the school. Consequently, the crown argues, S2 is a forgery and the money reflected thereon and on S3 was stolen by Mr. Dlamini. 3788 Sergeant Mpendulo Dlamini (Pw14) also stated that he could not find any registration of Vrydump Suppliers (Pty) Ltd. He said he got an affidavit from Anna Sofia Mentz testifying to this effect. This affidavit was, however, not submitted to court as an exhibit. It is therefore not before the court and the evidence of Pw14 on the said allegations are clearly hearsay and inadmissible to prove the truthfulness thereof. This is also true of the evidence by this witness that he obtained information

from Pongola Post Office that 1207 is not registered under Vrydump Suppliers (Pty) Ltd but under an individual or a person.

[27] Mr Dlamini in his evidence stated that Vrydump Suppliers (Pty) Ltd was an association of teachers in the Vryheid (Efilidi), Dumbe (Paul Pietersburg) and Pongola area in Northern KwaZulu Natal who were in the business of selling school material in that area and in Swaziland. He said, like S & S Stationery, the sales agents for this association moved around schools and sold their merchandise to them. He stated that he bought the relevant goods from this entity. He did not, however, lead any direct evidence to prove the existence of this association although he mentioned a certain Mr Ntshangase who was the agent or sales person of this association.

[28] I note the near similarities of the physical addresses or location for both S & S Stationery (Pty) Ltd and Vrydump Suppliers (Pty) Ltd; ie 127 Pretoria and 1207 Pongola. Suspicious as these may seem, it does not, in any significant way sway the evidence in favour of the crown. Again, as in count 7, the crown singularly focused its attention on the official registration of this entity.

[29] From the foregoing evidence, it cannot be said in my judgment that the crown has, beyond any reasonable doubt established that Vrydump Suppliers (Pty) Ltd does not exist or did not exist at the relevant time. Further, the crown has failed to prove that the material allegedly purchased by Mr Dlamini in respect of this count was in actual fact not purchased by him and that he stole the relevant money thus causing a loss to the school. I find him not guilty on this count too.

[30] In paragraph 12, 13, 14 and 15 in my ruling on the application in terms of section 174 (4) of the Criminal Procedure and Evidence Act 67 of 1938, I stated as follows:

> '[12] The evidence on counts 1, 3, 4 and 5 overlaps in many essential respects. For instance, count 3 alleges that the offence was committed 'on or about the 2nd October 2007 and 15th July 2008'. This is repeated in count 4, with the addition that the 3rd May 2007 is also alleged. The latter date, i.e. 03 May 2007 also appears in count 1. The confusion, however, does not end here. All four of these counts include the 2nd day of October, 2007. Whilst specific amounts have been alleged on each count as constituting a general deficiency or shortage, the evidence is less than clear on these counts. Having said this, the crucial point for

consideration though is that all these transactions relate to the alleged selling, supply of and payment for books and stationery by A6 to the school. The crown has led evidence from the responsible heads of departments at the material time at the school who all testified that they never received some if not all of these books or goods. Exhibits R1 – R4 concern the supply of materials to the school. A sum of E22 646-25 was charged and paid for these. The invoice is dated 03 May 2007 and the relevant cheque is number 002316 dated 07 May 2007. According to R2, these goods were received by A1 who in turn issued cheque R4 as payment. This clearly calls for an explanation from him as to whether he actually received these items and if so what he did with those items.

[13] As stated above, the common date in all these four counts is 02 October, 2007. According to the indictment E46 321.75 is the total general deficiency involved in these counts. PW7, Themba Rodgers Mamba informed the court that as head of the social studies department, he did not receive some of the Books listed in invoice number 0121 dated 15 July 2008 from A6. He testified that on 13 March 2009, he

received only 90 copies of the Book Geography of Swaziland as per exhibit H. These books had been ordered in 2008. The other books for his department listed on that invoice were neither ordered nor received by him.

[14] PW3, PW4, PW5, PW6 and PW10, who were all heads of departments at the material period, testified that some of the books in the various invoices from A6 had not been requisitioned or ordered by them. Pw3, Maria Nkosazana Lukhele particularly emphasized that none of the books listed in invoice 0040 dated 02 October 2007 had been ordered by her or the department of English. She also stated that these books were also not received by her and were also not reflected in her Stock Book which she kept at the time. She also emphasized that the school usually did not order books in October as this was the time for examinations. Orders were made prior to that month. I note, however, that because the invoice is dated 02 October 2007 would seem to suggest that the order may have been actually made before that date.

[15] I do observe that the crown case has not been logically and systematically presented. The evidence is scattered and at times disjointed. For example, there was no attempt whatsoever made to quantify or state the values of the Books that were not received by the various departments of the school on each count. The witnesses were content just to state that certain books were not received by them or their departments. These deficiencies or imperfections, however, do not render the evidence by the crown so weak as to merit no response from the accused. The invoices and cheque payments are not evidence of delivery of the items in question. There are also no order or requisition documents in support of these invoices and payments. If indeed the books were actually supplied, A2 and A6 must say so. Similarly if these books or items were actually received by the school, then A1 must give that explanation.'

I repeat these observations in this judgment. These deficiencies or short comings in the case for the crown have not been cured.

[31] It is common cause that heads of departments at the school did not deal directly with the Principal in placing their orders for books. They dealt with the Deputy Professional, who at the time was Tom or Thomas

Dlamini or Mr Matsenjwa. The Deputy professional received orders for books from the heads of department and forwarded these to the Principal. Again when the purchases were received, they were collected from the Principal's office and signed by the Deputy Professional who then caused the heads of departments to sign for their respective orders. Mr Tom Dlamini was not called as a witness in these proceedings. No explanation for this was given by the Crown and none was required. But the absence of the evidence of Mr Tom Dlamini has created a huge lacuna in the evidence presented by the crown. Mr Dlamini is the missing link. This is significant considering the evidence of Mr Dlamini (A1) that in making or effecting payment he relied on the information presented to him by the Deputy Professional. He emphasized that the Principal (him) was not involved or responsible for receiving books from suppliers. He was often too busy and out of office to be saddled with this task.

[32] Overall, this case was immaturely and inadequately investigated. Its presentation in court, did not help either. In his final argument before court, Counsel for the crown conceded that he had not established his case beyond a reasonable doubt on counts 3, 4 and 5.

[33] From the foregoing analysis of the facts and the law, I find that the crown has failed to prove its case against any of the accused persons in respect

of these counts, ie, 1, 3, 4 and 5. They are all found not guilty on these counts and are accordingly acquitted.

[34] In the event, both Mr Dlamini and Mr Ndlangamandla are found guilty on count six (6) for the theft of a sum of E24 749.00 belonging to the school.

[35] Pw12 Mr Mkhumane was introduced and treated as an accomplice witness. However, having heard the evidence herein, I hold that he was not an accomplice witness. He applied for a loan from the school and this loan was granted to him. He made an undertaking to repay the money. There was never any intention on his part not to repay it. He did not commit any criminal offence and thus cannot be regarded as an accomplice witness.

MAMBA J

For the Crown:	**Mr. A. Matsenjwa**
For the 1st Accused:	**Adv. M. Mabila**
For the 2nd and 6th Accused:	**Mr. B.J. Simelane**