



IN THE HIGH COURT OF SWAZILAND

CASE NO. 234/2002

HELD AT MBABANE

BETWEEN

THE KING

VERSUS

**THEMBELA ANDREW SIMELANE
(OPERATING AS BHEKI G. SIMELANE & CO.)**

CORAM

AGYEMANG

J

**FOR THE CROWN:
DLAMINI (MS)**

M.

**(DIRECTOR OF PUBLIC
PROSECUTIONS)**

**FOR THE ACCUSED PERSON:
ESQ.**

L.R. MAMBA

DATED THE 19TH DAY OF JANUARY 2010

JUDGMENT

By an amended indictment, the accused person has been charged with six counts of the crime of theft.

These are the matters of common cause:

The accused person and his brother, one Bheki G. Simelane (deceased) were legal practitioners practising under a firm known as Bheki G. Simelane and Company. Between AD 1998 and AD 2001, the accused person received instructions from certain persons who wished to claim monies from the Motor Vehicle and Accident Fund (hereafter referred to as the MVA Fund). Some of the claims were in respect of personal injuries suffered in road accidents while others made claims as dependants of deceased persons whose deaths were caused by motor accidents. Between AD 2000 and AD 2002, the MVA Fund processed the claims and made out cheques to the firm of Bheki G. Simelane and Company in settlement of the claims. The said cheques duly cleared and were paid into the trust account of Bheki G. Simelane and Company.

The monies which were paid into the said trust account on behalf of the claimants were never paid to the intended beneficiaries. This failure to pay out what had been received by that firm to the claimants, resulted in reports being made to the Police and the Law Society of Swaziland. An investigation

into the affairs of the company that resulted from these reports revealed that the money in the trust account was insufficient to pay out the claims of the claimants, although their cheques had been paid into the account. The claims thus remained unpaid. The accused person who was held out as a partner of the firm was charged jointly with his brother Bheki G. Simelane who was held out as the senior partner of the firm with the crime of the theft of the several monies paid out to the firm on behalf of the claimants. Following the death of Bheki G. Simelane, the accused herein now stands arraigned on six counts of theft.

The Crown called twelve witnesses in proof of the prosecution's case. By reason of the fact that the crime was alleged to have been committed with regard to monies due to six persons with varied claims and under various circumstances, I hereby set out in summary the evidence of all these persons who as complainants, testified in support of the Crown's case.

The Crown called as its first witness, the Managing Director of the MVA Fund: Mr. Helmund Vilakati. This witness who had overall responsibility for the operation of the MVA Fund explained, that the Fund which was set up by an Act of Parliament, had a mandate to compensate victims of road accidents. Leading the court through the process of a claimant making a claim until it was settled by the Fund, he testified that the Fund sometimes made payments to claimants for medical treatment after it had satisfied itself that such was necessary. In other cases, monies were paid out having regard to the loss of income of the claimant. Dependants of deceased persons also

received payments for loss of support. He explained that once the category had been established, payments would be made upon negotiated terms.

The relevance of his testimony to the present case was that the firm of Bheki G. Simelane and Company did receive monies upon claims on behalf of all six complainants in the present case. Tendering a document which was admitted in evidence as exhibit A and which contained a compilation of data regarding such payments obtained from the records of the Fund, he testified regarding the following: that the cheque exhibit A1 numbered 4121 for the amount of E250,000 was made out to Bheki G. Simelane and Company in respect of the claim of Steven Maseko. It was paid upon a requisition form in favour of Bheki G. Simelane and Company for the benefit of the claimant Steven Maseko. That the cheque was honoured thus indicating that the said firm did receive the monies on 17th April 2001, was evidenced by a Bank Statement exhibit A3.

The witness also testified that an amount of E81,060 was made out upon a cheque numbered 4302: exhibit B. The cheque was made out upon a requisition form exhibit B1 in favour of Bheki G. Simelane and Company, for the benefit of Jeaneth T. Dlamini. This was after an offer to settle contained in exhibit B3 had been accepted on behalf of the claimant. That the cheque was honoured was evidenced by the MVA Fund's Bank statement exhibit B2 on which the withdrawal in favour of Bheki G. Simelane and Company was indicated.

The witness testified once again that the MVA Fund made out a cheque exhibit C, numbered 6321, for the sum of E26,500, to Bheki G. Simelane and Company for the benefit of claimant Doctor Sithole. It was paid upon a requisition form exhibit C1. The Bank statement of the MVA Fund showed (exhibit C2) that the said cheque was honoured on 5/8/02 and the monies thus received by Bheki G. Simelane and Company.

Regarding Mumsy Vilakati's claim, a cheque exhibit D numbered 6365 for the sum of E69,157.25 was made out to Bheki G. Simelane and Company on behalf of that claimant. The said sum included counsel's fees and same was explained in a letter admitted as exhibit D1. The amount contained in the requisition form exhibit D2 being the claim, was E66,397.25. That the amount was received by that firm was evidenced by the MVA Fund's Bank statement exhibit C2 showing that it was honoured on 5/8/02.

The witness testified further, that a cheque exhibit E numbered 5578 was made out upon a requisition form, to Bheki G. Simelane and Company. It was for the sum of E675,781.00, being claims for four persons. Out of that sum, E402,603.00 was due to the claimant Moses Thulane Shongwe. That the cheque was honoured on 19th December 2001 was evidenced by the Fund's bank statement exhibit E2 and the money thus received by Bheki G. Simelane and Company and intended for the benefit of the claimant. The MVA Fund had made a settlement offer per document exhibit E3 which was accepted on behalf of the claimant who had given a special power of attorney exhibit E4 to the firm of Bheki G. Simelane and Company.

The witness tendered an affidavit in terms of the MVA Fund's Regulations authored by Moses Thulane Shongwe, the claim form emanating from the Fund regarding that claimant's claim as well as the settlement agreement referred to as the Acquittance Form for him. These were admitted as exhibits E5, E6 and E7 respectively.

It was the evidence of the witness also, that a cheque numbered 5961 was made out to Bheki G. Simelane and Company for the benefit of four claimants. It was for the sum of E87,405,00. Out of the sum, E 26,800.00 was paid in respect of the claim of Dick Ncongwane. The sum due to the said claimant as offered by the Fund in a letter exhibit F1 and accepted on his behalf was E25,000. The additional sum of E1,800 was paid out as costs. Although the cheque could not be traced after an alleged diligent search, the MVA's Bank statement indicated that the cheque was honoured on 3rd December 2001. The several cheques amount to a total of E856,120.25.

According to PW2 claimant Stephen Maseko, on 25th October 1997, he was involved in a motor accident. After a stay in the Raleigh Fitkin Memorial Hospital, he left that hospital of his own accord and thereafter, with the help of his employers, sought treatment at Mbabane Clinic where he was treated by a Dr. Jere. As the charge of that hospital was enormous (about E33,000) which he had to pay per deductions from his salary, he instructed the accused person at the offices of Bheki G. Simelane and Company, to process a claim from the MVA Fund on his behalf duly authorising him per a power of

attorney. The witness who had no money for consultation and for the processes needed for such claim, was assured by the accused person, that all such charges would be deducted from the money paid by the MVA Fund in settlement of the claim. The accused person took the witness to Linkfield, Johannesburg for a second opinion. PW2 was advised that he would need further treatment.

During the period when the witness was waiting for money from the MVA Fund upon his claim, the accused person corresponded with him regularly. At this time, by reason of extreme financial hardship which resulted in his children being put out of school the witness requested for financial assistance from the accused person, who made out a loan of E10,000 to him.

In a letter admitted in evidence as exhibit A4, the accused person stipulated conditions under which the said loan would be given to the witness. These included the furnishing of a letter by the witness' employers and proof that the money would be applied for medical purposes. The name of the institution and the attending doctor were to be supplied as well. The accused person on June 4 2001, advanced the said sum of E10,000 to the witness. The accused person did not at this time or any subsequent time inform the witness that prior to his receipt of the E10,000 advance, the MVA Fund had in fact paid the sum of E250,000 on his behalf to the firm of Bheki G. Simelane and Company. Sometime after this, the witness who often went to the offices of that firm to enquire about the progress of his claim but had failed to meet the accused person on a number of occasions (as he was said to be attending

court on such occasions), made a follow-up at the offices of the MVA Fund. There he was informed that a cheque for medical expenses in the sum of E250,000 was made out by that outfit to the firm of Bheki G. Simelane and Company on 10th April 2001. Armed with this information, the witness went to the offices of Bheki G. Simelane and Company where he finally met with the accused person. The witness testified that the accused person informed him that the money was not for his personal use but was paid out for his medical treatment. The accused person in an alleged show of indifference then left the office before the witness could complete what he wished to say. The witness then engaged the offices of P.R. Dunseith Attorneys who pursued the matter of recovering what was due the witness first by writing letter exhibit A7 to Bheki G. Simelane and Company, and later, at the court. The witness in spite of this effort never received the monies due to him which had been paid to the accused person's firm. The office of Bheki G. Simelane and Company did not send his file to P.R. Dunseith Attorneys although same had been requested for, neither did the witness receive the promised further medical treatment which on the accused persons' own showing, was the reason for which the sum of E250,000 was paid out to his firm on behalf of the witness.

It was the evidence of PW3 Jeaneth Dlamini that as a widow, she sought to pursue a claim for herself and her two fatherless children as dependants of her deceased husband Nhlanhla Solomon Dlamini from the MVA Fund with the assistance of the firm of Bheki G. Simelane and Company. The said husband died in a motor accident on 8th November 1999 and the witness engaged the services of the accused person, working from the offices of

Bheki G. Simelane and Company in AD 2000. The accused person did pursue the claim as evidenced by letters exhibits B7 series, and B8 addressed to the MVA Fund. He informed the witness that he had put in the claim per letter.

On 23rd May 2001, the MVA Fund made out a cheque for the sum of E81,060 in settlement of the witness' claim. The cheque exhibit B1 was made out to the firm of Bheki G. Simelane and Company. The cheque was honoured by the Bank as shown in exhibit B2 on 1 June 2001. The witness' sister informed her that her claim had been settled by the MVA Fund. When she approached the accused person and enquired about this, the accused person informed her that he could not give her cheque as it had to be co-signed by his brother Bheki who was out of the country. When the office was closed before she could receive her money from the accused person, the witness whose sister worked at the firm of Bheki G. Simelane and Company and was informed that her claim had been paid, approached the Law Society and lodged a complaint against the accused person. She received the file on her claim from her sister who took it from that office and hid same. In that file, the witness found a letter exhibit B5 dated 28th November, 2001 addressed to her as well as exhibit B6, a statement of account from that office regarding her claim which were never sent to her. The witness never received her money and she testified that she never gave her consent to the accused person, or anyone to appropriate the money due to her.

It was the evidence of PW4 Doctor Sinette Sithole that having sustained injuries in a motor accident on 2nd July 2000, he engaged the services of the

accused person and instructed him to pursue a claim with the MVA Fund on his behalf. In documents admitted as exhibits C3, C4, C6, C6A-C6F, the accused person who put in the claim on behalf of the witness, corresponded with the MVA Fund. The witness also signed an Acquittance Form at the direction of the accused person. The MVA fund settled the claim and made out a cheque exhibit C to the firm of Bheki G. Simelane and Company on behalf of the witness, on 30th April 2002. It was for the sum of E26,500.

In a file emanating from the office of Bheki G. Simelane and Company on his claim which he saw after the offices of Bheki G. Simelane and Company were closed, the witness found a letter exhibit C5 and a statement of account exhibit C5A which were addressed to him but were never sent to him. The accused person did not at any time inform the witness that any monies had been received by his firm on his behalf. In fact, on two occasions: on 29th May, 2002 and sometime in mid-June June of 2002, when the witness enquired of the accused person whether his claim had been settled, the accused person informed him that his cheque was not ready. The witness never did receive the money thus due him upon his claim.

Like the other complainants, he averred that at no time had he given his consent to the accused person or any other person for the money due him to be appropriated by such person.

According to PW5, Mumsy Nomsa Vilakati a widow without gainful employment and mother of five children, following the demise of her husband Jabulani Vilakati in a motor accident on 28th June, 1999, she sought to pursue a claim for herself and her children as dependants of her deceased husband.

She thus in that same year, instructed the accused person to put in a claim on her behalf and duly authorised him so to do per special power of attorney exhibit D3. While she waited for the settlement of her claim, she often made enquiries regarding the progress of her claim from the accused person who allegedly assured her on a number of occasions that he was working on it and that she would receive her money in thirty days. The accused person never informed her that her claim had been settled, neither did the accused person at any time inform her that his firm's trust account had problems. The witness went to the accused person's firm when her child was taken ill and she found herself in sore financial straits. Finding the offices of Bheki G. Simelane and Company locked up, she went to make enquiries regarding the progress of her claim from the MVA Fund. There she was informed that her claim had been settled with the payment per cheque dated May 2002 of E69,157.25 to the firm of Bheki G. Simelane and Company on her behalf. Not having consented to the use of her money by the accused person or any other person, she also laid a complaint at the Law Society. The witness testified that she never received the money from the accused person nor did she recover it even after she laid her complaint.

PW6 Dick Richard Ncongwane informed the court that in the morning of 8th October 1999, he was involved in an accident while on board a kombi. When he was discharged from the Raleigh Fitkin Memorial (Nazarene) Hospital to which he had been taken, he engaged the services of the accused person and instructed him to put in a claim on his behalf with the MVA Fund. He alleged that he received no correspondence from the accused person

updating him of the progress of his application. It was for this reason that he decided to go to the offices of Bheki G. Simelane and Company to enquire of the progress of his claim and there found the offices locked up and one Lucky Howe knocking on the door thereat. He then proceeded to the offices of the MVA Fund where he also as other witnesses, was informed that his claim had been settled with the payment of the sum of E26,800 inclusive of costs, to the firm of Bheki G. Simelane and Company. He thus went to the Police Station to lodge a complaint against the accused person. According to the witness, he never received the money due him upon his claim. Like the other prosecution witnesses, this witness testified that he never gave his consent to the accused person or any other person for his money to be appropriated by such person. He testified that he never received the letter exhibit F4 and statement of account F4A emanating from the offices of Bheki G. Simelane and Company which were produced and shown to him in court.

Moses Thulani Shongwe who gave evidence as PW7 testified that he was involved in an accident in January 2000. He recounted that six months later, after he had recovered sufficiently to use crutches, he approached the offices of Bheki G. Simelane and Company for them to facilitate a claim from the MVA Fund. He testified that at all material times, he dealt with the accused person who took his particulars, and made out the claim on his behalf. For this purpose he gave a power of attorney (admitted in evidence as Exhibit E4) to the firm Bheki G. Simelane and Company. The accused person corresponded regularly with the witness but on no occasion did he inform him

that the claim had been finalised and that the firm had received monies in full settlement of the claim from the MVA Fund.

Indeed, the witness alleged that he used to follow up on the progress of his claim with accused person who always assured him that the claim was yet being processed. The witness recounted that once when he was in dire need of money, he approached the accused person for a loan. This was because he understood that his claim had not yet been settled. The accused person gave him a loan of E300 on 17th May 2001. In a letter exhibit E9 addressed by the accused person to the witness, he stipulated that the said loan would attract interest. In January 2002 when the witness found himself once again in financial difficulties and could not afford to send his four children to school, he asked the accused once again for an advance. He received from the accused person, the sum of E5,000. Although this sum was not described as a loan in the cover letter exhibit E10, and although no interest was exigible thereon, no indication was however given to the witness that his claim had been paid by the MVA fund. Sometime after this, the witness went to the office of the MVA Fund to inquire about the status of his claim. It was then that he was informed by that office that an amount of E402,603. 00 had been paid to the firm of Bheki G. Simelane on his behalf and that the cheque was made out to that firm in December 2001.

The witness following this, went to the offices of Bheki G. Simelane where he sought audience with the accused person, the lawyer who had represented him in the claim. When he was unable to meet with the accused person who was repeatedly alleged to be preparing to attend court although the witness suspected that he remained in his office throughout such times, the witness

engaged the services of P.R. Dunseith Attorneys for the purpose of recovering the monies due him. The said attorneys wrote on behalf of this witness to the firm of Bheki G. Simelane and Company and when it appeared that nothing would be gained therefrom, a suit was commenced at the High Court. In spite of a writ of execution (exhibit W) that was issued with regard thereto, the witness never received the money which had been paid by the MVA Fund in settlement of his claim. It was the evidence of PW7 that he never consented to the use or appropriation of his money received by the firm of Bheki G. Simelane and Company on his behalf from the MVA Fund.

PW8 Kobla Quashie was a Chartered Accountant appointed by court order to be a joint curator in the matter of Bheki G. Simelane and Company upon an application by the Law Society of Swaziland in Case No. 1795/02. It was the evidence of this gentleman that the curator commenced its work on 11th June 2002 and completed its work by the issuing of a report on 4th July 2002.

This witness testified that although he could not get hold of the late Bheki G. Simelane for an interview (as he was out of the country), he was able to meet with the accused person who subjected himself to an interview on 23rd June 2002. The interview he said, was cordial. He stated that the accused person informed him that he and his brother Bheki had no partnership agreement but that he had permitted his name to be used on the letterhead of the firm Bheki G. Simelane and Company as part of the process of formalising a partnership. He said that the accused person also named the auditors of the firm Bheki G. Simelane and Company. Upon this information, the curator wrote a letter exhibit H to one Mr. Kamugisha requesting for information

regarding the list of trust creditors of Bheki G. Simelane and Company as at 30th June 2000 and 30th June 2001, as well as details of all trust accounts of that firm.

In a reply exhibit H1, the said Mr. Kamugisha of Accons Accounting Services (Pty) Ltd, furnished the list of trust creditors as at 30th June 2000 but not the following accounting year for he alleged that he had not received those from the firm of Bheki G. Simelane and Company. He also added that they had never issued a trust certificate to the firm because his auditing firm had not been able to verify the transactions in the trust account, especially those relating to a trust account in South Africa where it was believed most of the monies were kept. Although the auditor named Standard Bank of South Africa regarding an account held by the firm of Bheki G. Simelane and Company, he could not verify if it was a trust account although he was certain that it was used to transact the business of the firm. This was confirmatory of what the accused person had informed the witness during their meeting of 23rd June 2002, that indeed his brother had transacted the firm's business through a South African bank. The accused person allegedly said though that he personally had no foreign bank account.

According to the witness, as the total list of trust creditors as at 30 June 2000 was E751,491 and the account was overdrawn by E343,019.24, it was clear to him that the account had a shortfall of E1,094,510.27. He calculated that with cheques in transit valued at E817,614.74, this meant that the bank balance stood at E474,595.50 - a credit balance. He tendered in evidence, a copy of the Bank Reconciliation with a list of outstanding cheques, a letter written by the witness to the Attorney-General inquiring if his office was in

receipt of trust certificates for the firm and a letter from him to the Law Society inquiring if the Law society had issued the firm of Bheki G. Simelane and Company with Fidelity Certificates. They were admitted as exhibits J and K and L respectively. Unfortunately, he received no response from either the Attorney-General or the Law Society. The witness then wrote to banks in Swaziland: First National Bank, Standard Bank and Nedbank Swaziland for information regarding trust accounts if any, held by them on behalf of the firm Bheki G. Simelane and Company. It turned out that only Nebdbank Swaziland had such an account. In response to that enquiry contained in letter exhibit M, Nedbank replied per letter exhibit M1. In exhibit M1, the bank advised that the trust account held by Bheki G. Simelane and Company had a balance of E112,702.82. They also indicated that there were two signatories to that account, being: Bheki G. Simelane and Thembela Simelane (accused person herein). The bank also sent along five returned cheques of the firm exhibits N, N1-N4, three of which had been signed by one of these signatories alone. It was said to signify that any one of them or both could sign cheques drawn on the account.

The witness also having been apprised both by the accused person and Mr. Kamugisha that the firm's business was sometimes transacted through banks in South Africa, the witness per a private investigator looked into the existence of trust accounts of Bheki G. Simelane and Company in South Africa, but found none.

The work carried out by the joint curators was set out in a document which was admitted in evidence as exhibit O. The work he said, was carried out by a team of five comprising three employees from Kobla Quashie and

Associates, Attorney Mbuso Simelane and Dumile Magongo both of Bheki G. Simelane and Company, articled clerk and accountant thereat, respectively. He testified that although the group did not lay hands on trust ledgers and fixed journals, they went through the trust receipt book, trust cash book, and individual client's files. These revealed that a total of E9,511.747 had been deposited into the trust account; E5303,147.89 had been paid out to trust creditors. The balance of over E4,000,000 was used for cash payments to both Bheki and Thembela Simelane, rental payments, water and electricity payments, telephone and fax payments, mortgage bond payments, motor vehicle expenses, bank charges and miscellaneous expenses (set out in exhibit O). Upon calculation, it became clear that for the period: 1 July, 2000 until 31 May, 2002, the firm Bheki G. Simelane and Company had a shortfall of E4,728,554 in its trust account.

All this the witness testified, informed what was incorporated in the report of the curator which was tendered in court and admitted as exhibit G.

During cross-examination this witness admitted that the shortfall in the firm's trust account could have occurred before the accused person joined the firm of Bheki G. Simelane and Company, and that in fact that during his last year, working as auditor for the firm which was 1994 or 1995, he did not give a trust certificate to the firm as its trust account was not in order. Even so, he averred that during the accounting period of 1 July 2000 until 31, May 2002, contrary to legitimate practice, the trust account of Bheki G. Simelane and Company was also being used as a business account as even payments for utilities for the firm were paid out of that account. He added furthermore, that some of the disbursements of the firm which could have been legitimate such

as, some transfers including, the payment of E245,306 to the accused person from the trust account to the business account could not be traced to particular client files.

According to the witness, due to the substantial shortfall, the curator after the completion of his work, wrote to the Attorney-General and to the Law Society advising that certain further measures be undertaken to ascertain the true state of affairs and to decrease the deficit. These were however not done.

PW9 Mbogeni Dlodlu and PW10 Phindile Nkambule officials of Nedbank Swaziland, testified that the trust account of Bheki G. Simelane and Company described as No. 0200000159 SZL had two signatories: Bheki G Simelane, and Thembela Simelane and that either signatory could sign a cheque drawn on the account.

PW9 also tendered in evidence a statement of account of the said trust account which was admitted as exhibit P. In exhibit P, the transactions regarding the MVA Fund cheques of the six complainants were indicated therein, showing that the cheques were in fact deposited into the trust account and honoured. He testified that the transactions in the trust account as exhibited in exhibit P, were mostly cheque deposits and cheque withdrawals. He added that the trust account of the firm was unusual in its operation as there were regular cash withdrawals unlike obtains in other trust accounts.

But for all the apparently accurate information given by PW9, it was clear that his knowledge of the account in question was limited as he had not been in his position for very long. More particularly, he appeared to have over-

generalised what obtains in his assertion that the cash withdrawals were unusual, for he appeared to have backtracked somewhat when he was confronted with the scenario of when an attorney deals with monies belonging to persons with no bank accounts. Furthermore, the witness' statement that any of the signatories could sign a cheque was not supported by the mandate which should have confirmed that alleged arrangement. The statement thus appeared to be have been based on surmise itself based on the unimpressive fact that three out of numerous cheques drawn on that account, were signed by only one signatory.

PW10 whose evidence sought to cure the defect in PW9's evidence regarding the matter of the signatories, was a sorry one as she appeared to know even less than the preceding witness and could not give credible evidence of the fact she sought to establish, that is: that the signing mandate was that either of the partners could sign cheques drawn on the trust account.

PW11, was the erstwhile professional assistant of P.R. Dunseith Esq: A. M. Lukhele Esq. He testified in the absence of that attorney who having left legal practise and emigrated to Scotland, was thus unavailable as a witness.

This witness who alleged himself to be fully conversant with the matter of Moses Thulane Shongwe and Steven Maseko against the firm of Bheki G. Simelane and Company, tendered in evidence, letters written on behalf of Moses Thulane Shongwe to the firm of Bheki G. Simelane and Company. They were admitted in evidence as exhibits T and U. Another letter written by

P.R. Dunseith in response to a letter exhibit 1 written to him by the firm of Bheki G. Simelane and Company was also tendered in evidence and admitted as exhibit V. This letter he said was in response to a matter raised by the firm of Bheki G. Simelane and Company that it was expecting an insurance pay-out which it would use in settlement of Moses Thulane Shongwe's claim. Letter Exhibit V which requested for proof of the insurance claim of the firm of Bheki G. Simelane and Company, received no response. The witness also tendered in evidence a writ of execution that was issued in respect of a judgment obtained by P. R. Dunseith Attorneys on behalf of Moses Thulane Shongwe at the High Court which was not successfully executed. The writ was admitted in evidence as exhibit W. The witness confirmed that the two gentlemen who consulted their offices: Moses Thulane Shongwe and Steven Maseko never received the moneys due them under their claim from the MVA Fund, as the firm of Bheki G. Simelane and Company was unable to pay them.

The Police investigating officer gave evidence as PW12. He testified that a complaint was lodged by PW5 (Mumsy Vilakati) on 14th June 2002. This was regarding her claim with the MVA Fund which had allegedly been appropriated by the firm of Bheki G. Simelane and Company. Following this, other persons also made similar complaints. It was upon these that his outfit conducted an investigation into the affairs of the firm of Bheki G. Simelane and Company. The Police investigation team got hold of exhibit P which indicated bank transactions of the firm of Bheki G. Simelane and Company and analysed same. Cheques drawn on the Bheki G. Simelane and

Company's trust account were also taken into custody and analysed as part of the investigations.

A visit to the office of the Registrar of Companies revealed that the firm of Bheki G. Simelane and Company was not registered thereat. No information of its directors was thus available. No partnership agreement was located either. According to the witness, the letterhead of the firm showed that the partners were Bheki G. Simelane and Thembela Simelane. These names did not appear to be in any hierarchy such as obtained on other letterheads of other firms such as P.R. Dunseith Attorneys' which clearly indicated a hierarchy leading him to the conclusion that the brothers were equal partners in the firm of Bheki G. Simelane and Company. The said deduction led to the arrest of the accused person upon a warrant on 3rd September 2002. He was subsequently granted bail by the court. He testified that Bheki G. Simelane could however not be arrested as he was out of the country.

The prosecution closed its case at this point.

I must comment on the demeanour, comportment and content of the evidence of the witnesses for the prosecution. I was much impressed by the quality of the evidence given by many of the prosecution witnesses in its consistency. Many of the witnesses were credible and they gave honest testimony upon which I would place much credit.

An application in terms of S. 174 (4) was made and dismissed after the close of the prosecution's case. I indicated that the reasons would become apparent with the delivery of judgment after trial.

The accused person elected to give evidence from the witness box.

It was the case of the accused person, a lawyer by training who was admitted as an attorney of the High Court of Swaziland in 1990, that from the time he became an articled clerk in 1989 until he left to join the firm of Bheki G. Simelane and Company in August 1997, he worked at the firm of William F. Mthembu.

The accused person testified that his brother Bheki G. Simelane who operated the law firm of Bheki G. Simelane and Company as well as family members, encouraged him to leave the firm of William F. Mthembu where he had worked as a partner since 1990, to join the firm of Bheki G. Simelane and Company.

He alleged that although he and his brother had the intention of entering into a partnership agreement, they never did. Yet as part of the formalisation of the partnership arrangement, his name appeared on the letterhead of the firm. The accused person alleged that he did not ask for the books of accounting, relying on the word of his brother Bheki that all was well. The accused person alleged that the signing arrangements of the trust account held at Nedbank Swaziland, was that both he and his brother were to sign cheques although prior to AD 2000 and AD 2001, he signed a few cheques by himself when the firm had to make payments. He alleged that on such occasions, his brother who was often out of the country, would advise the bank telephonically that the accused person alone would sign the cheques but that same should be honoured.

Indeed, the sheer number of cheques that were co-signed as opposed to the few that had single signatures, appeared to support his claim.

It was his evidence that he only became alerted to the fact that there was a problem with the trust account of the firm when sometime towards the end of AD 1999 and AD 2000, he heard rumours that clients were not being paid monies due them before he joined the firm. Sometime in AD 2001, he realised that there was a problem with the trust account of the firm. According to him, when he confronted his brother Bheki over this state of affairs, the latter informed him that there was money in a Standard Bank account in South Africa operated by the firm. He alleged that he was much dismayed by this as he was aware that the Legal Professional's Act required all trust accounts to be in Swaziland and that he told his brother this and asked for proof that such an account existed which proof was never given him. He alleged that in May-June 2002, he had numerous discussions with his brother who was out of the country and informed him of the claimants whose monies had been paid by the MVA Fund but whose payments from the firm could not be made to them. His brother allegedly admitted that there were problems with the trust account of the firm. He then allegedly informed the accused person that he was in South Africa to try and settle an insurance claim for losses in the trust account which included the period before the accused person joined the firm. Thus did the accused person relay this information to P.R. Dunseith Attorneys in exhibit 1. He added that he was however unable to respond to exhibit V by which the said attorney asked for proof of the alleged insurance claim because contrary to his brother Bheki's assurances, no such details were received by him from the latter.

The accused person testified that at the time of the closure of the firm of Bheki G. Simelane and Company, more particularly, on 6th June 2002 its trust

account had a balance of E129,296.60, an amount that was insufficient to pay the trust creditors, the claimants herein. Indeed he alleged that during his time at the firm of Bheki G. Simelane and Company, there was never sufficient money to pay trust creditors.

It was the case of the accused person that he had never withdrawn any of the monies belonging to the claimants herein for his own use. He alleged that he failed to make payments to the claimants herein because there was a shortfall in the trust account and also, because Bheki his brother whose responsibility it was to authorise payments was out of the country. So it was that after he had made out statements of account for the various claimants, they had to abide the approval of Bheki his brother who would then requisition the preparation of cheques for the claimants. It was the evidence of the accused person that after he prepared the statements of account, he could do no more; he had facilitated payment and his brother Bheki had to approve them before they could be paid. According to the accused person, when he informed the claimants that their cheques were not ready, he was referring to the cheques to be made out to them by the firm of Bheki G. Simelane and Company and not the cheques that were made out to that firm by the MVA Fund on behalf of the claimants.

He alleged that he failed to tell the claimants of the shortfall in the trust account because he believed Bheki his brother who said he would make good that shortfall. Furthermore, he wanted to protect other clients who were owed monies and to avoid a stampede of clients rushing to collect their claims as happened when one Marli Johnson took judgment against the firm

and attached its office goods. He alleged that the publicity given that case by the newspapers resulted in other claimants rushing for their monies. The accused person asserted that he believed that even in face of the shortfall in the trust account, claims should be satisfied in an orderly manner. He alleged that the claimants remained unpaid because Bheki was mostly out of the country between December 2001 and May 2002 and had not authorised payment of the claims of the complainants herein. He alleged also that Bheki probably did not authorise the payments because he wanted to delay same until there were insufficient funds in the trust account and that it was for this reason that between 27th March 2002 and 31st October, 2002, cheques drawn on the trust account were for amounts not exceeding E20,000. He emphasised that neither he nor Bheki had the intention not to pay the claimants their due and that he intended to pay out the claims after Bheki had made good the shortfall as promised. This became impossible when after Marli Johnson's case, there was a stampede of clients rushing for monies that could not be paid and the Law Society closed the office.

The accused person testified that when it became apparent that the trust account did not have sufficient monies to meet the legitimate claims of the complainants, he approached the Law Society and related to Mr. Paul Shilubane who held office as President or Vice-President (as the case may be) of that outfit, the problems with the trust account and the problems the accused person had regarding the running of the firm in the absence of his brother who at this time was incommunicado. Together, they went to see the Attorney-General who at first advised that Bheki be contacted or that the

accused person surrender the office to the Law Society. The Law Society following this moved an application to have Bheki G. Simelane and the accused person suspended. According to the accused person, he opposed the application as he regarded himself an employee and not a partner as Bheki had been in charge of the firm and the partnership arrangement had not been formalised. The order sought was however granted. He testified that it was after these matters that the Police arrested him while he was at home. He had no intention he said, of leaving Swaziland. Bheki G. Simelane had however left Swaziland. Another application for sequestration for insolvency was brought against the accused person before the court. According to the accused person, he did not oppose same as he hoped the monies realised from the sale of the properties would go towards paying the outstanding claims. Upon the order granted by the court, the accused person's two houses including the one in which he lived with his family were sold by the curator. He alleged that the property of Bheki G. Simelane who remained outside the country was however not sold and his family continued to live thereat until they left the country at some point.

Reacting to the evidence of the curator that the trust account was used as a business account, the accused person alleged that on occasion, monies were paid directly from the trust account to clients or on their behalf. So were payments to sheriffs, correspondence to other attorneys, medical trips to Johannesburg deducted directly from the trust account. He added that where a statement of account supported fees, cheques would be made out directly (not through the business account), transferring monies from the trust account to the partners' account.

It was the evidence of the accused person that his only fault in the matter was that he neglected to find out the status of the trust account of the firm Bheki G. Simelane and Company before he joined it. He lamented that he had paid dearly for such conduct socially when he was branded a thief; furthermore, he had suffered financially when he was suspended and had no source of income (he even had to rely on the largesse of relatives to pay his children's school fees). Physically, he alleged that he had become hypertensive and had developed severe headaches; emotionally, he had suffered through his empathy with the claimants who did not deserve to lose their monies. He bewailed the fact that these persons were mistaken in their belief that he was personally responsible for their loss because he handled their cases not appreciating that he did so on behalf of the firm.

The accused person alleged that after all this, in the period AD 2006 – AD 2007, Bheki G. Simelane met the trustee appointed to oversee the matter of Bheki G. Simelane and Company, one Mr. Lucky Howe and that Bheki allegedly accepted responsibility for the shortfall in the trust account before that gentleman and allegedly gave undertakings on meeting his liability. Regarding Bheki's dealings with the trustee, the accused person also tendered in evidence a letter written by Bheki to Mr. Howe which was admitted as exhibit 4.

The said trustee of the insolvent estate of Bheki and Thembela Simelane appointed by order of this court sometime in AD 2000, Mr. Lucky Howe, was called as a witness for the defence.

His testimony was that right after his appointment, he took custody of what he could find at the firm of Bheki G Simelane and Company. He also received

files from the curator Mr. Kobla Quashie. It was his evidence that the accused person cooperated with him and even unsuccessfully tried to help him secure a register for tracing files. The accused person did not however mention anything about the firm's alleged trust account in South Africa. He alleged further that the accused person kept him informed of his movements and even sought and received permission from him before he left the jurisdiction for South Africa where he went to secure employment. He added that he met with accused person in South Africa when he went to meet with Bheki G. Simelane. The trustee narrated the circumstances of his meeting with Bheki Simelane which he said took place in the early AD 2000's thus: that the latter had arranged the meeting which took place at a hotel in Johannesburg in South Africa.

It was the evidence of the trustee that the purpose was to discuss the estate, especially the trust creditors who wished to know among other things, where Bheki was and whether he would assist to pay what was due them. He testified that he discussed payment of the claims of the trust creditors with Bheki who accepted the responsibility to pay and promised to do so every quarter or half-yearly from the proceeds of a business opportunity he allegedly had with a company of which he was a shareholder. Bheki allegedly gave him a document showing the imminence of the business opportunity. The trustee emphasised that the undertaking to pay the trust creditors was given by Bheki alone and that the accused person who was present at the meeting briefly remained silent throughout the meeting. It was after this that Bheki returned to Swaziland where he appeared before the Mbabane Magistrate's court and was granted bail. He testified that he did not receive

any monies from Bheki for transmission to the creditors as the latter had promised from the first quarter when same became due, until his death in 2008. According to the trustee, he informed the trust creditors after the first quarter failure, of the said state of affairs.

At the close of all the evidence, this sole issue stood out for determination:

1. Whether or not the prosecution has proved the charge of theft beyond a reasonable doubt.

The charge of theft is defined as: "...an unlawful *contrectatio* with intent to steal a thing capable of being stolen, see: *The South African Criminal Law and Procedure, Hunt and Milton Vol. II 602*

With regard to monies held in trust, "the use of it with intent to steal, coupled with the failure to preserve an equivalent liquid fund, is theft" *The South African Criminal Law and Procedure, Hunt and Milton Vol. II 634.*

The intent to steal includes an intention to deprive the owner permanently of the full benefit of his ownership. In this, the perpetrator need not intend to gain, nor need he intend to prejudice the owner or possessor thereof. Furthermore, he must not hold an honest belief that the owner or possessor would permit the *contrectatio* see *The South African Criminal Law and Procedure, supra at 616.*

In a charge of theft therefore, the essential ingredients in respect of which the prosecution must discharge its burden of proving the guilt of the accused person beyond a reasonable doubt are summed up as follows:

There must be a *contrectatio* by the accused person of a thing of which he is not the owner or the one entitled to its benefit. This is more easily defined as an assumption of control or appropriation.

“...In the case of money and funds which are commonly manipulated by means of negotiable instruments and book entries, such transactions may constitute a sufficient assumption of control and therefore a contrectatio...”

The South African Criminal Law and Procedure, supra at 609.

The appropriation must be inferred from the fact that the intent is to deprive the owner or one entitled to a thing of its benefit permanently;

It must be unlawful, for the owner or one entitled to the benefit of the thing must not consent to it;

It must be dishonest for the accused person must not hold an honest view that the owner would permit it.

Can the Crown be said to have discharged its burden of proving these?

In considering this, a paramount issue arises for determination and it is this: could the accused person who worked in the firm of Bheki G. Simelane and Company be charged with the crime of theft of MVA Fund cheques where same were deposited in the trust account of that firm and were withheld from the intended beneficiaries?

Among the defences put forward by the accused person who asserted that it was Bheki his brother who had charge of matters in that firm, was that he was not a partner of that firm but considered himself an employee, for a partnership agreement was never finalised between his brother Bheki and himself.

It seems to me that overwhelming evidence was led of a *de facto* partnership between the accused person and his brother Bheki G. Simelane. First of all, the letterhead of the firm which was placed in evidence bore the names of both brothers and described them as partners. Secondly, the signing rights

alleged by the accused person that the brothers were joint signatories to the firm's trust account confirm, rather than negate the existence of a partnership. However the most persuasive pieces of evidence are these: that the accused person acknowledged that he did not draw a salary from the firm as an employee would, but that his emoluments were determined by the fees the firm received in a month which were shared between himself and his brother. Lastly, the affidavit filed by Bheki G. Simelane in an application before the High Court dated 20TH August 2007, seeking orders *inter alia* to remove Lucky Howe from his trusteeship of the insolvent estate of Bheki G. Simelane, the accused person, and Bheki G. Simelane and Company, in which he described himself as the senior partner, and the accused person a partner in the firm of Bheki G. Simelane and Company, and the confirmatory affidavit of the accused person in which he acknowledged everything in relation to him in Bheki's affidavit as true, lead me to no other conclusion than that the accused person was a *de facto* partner in the firm of Bheki G. Simelane and Company. As a partner, misconduct regarding the trust account of the firm could result in a charge of theft against the accused person should the facts support such finding, see: per Hunt and Milton's *The South African Criminal Law and Procedure, supra* footnote 319 at page 634 "The *contrectatio* usually simply takes the form of drawing the money and spending it. All the trust money need not to be spent. The slightest deficiency without equivalent liquid fund reserves, is enough. The *contrectatio* may consist in paying the trust money into an overdrawn bank account with the result that it is set-off against X's indebtedness to the bank: *R v. Frisby 1932 SWA 8 at 11-14; R v. Gush 1934 AD 260 at 262 -3*".

The prosecution led uncontroverted evidence that the accused person was the one who worked on the MVA Fund claims of the six complainants herein. The Crown also established that the firm of Bheki G. Simelane and Company did receive cheques on various dates in satisfaction of the claims of the complainants. Evidence was led that the cheques were honoured by the bank and same were credited to the account of the firm of Bheki G. Simelane and Company from which the claimants should have been paid. Evidence was further led that regarding five of the complainants save for Dick Ncongwane, the accused person appeared to have kept them informed of the processes of making their claims. Yet the accused person in face of opportunities he had to inform them that their monies had been received by the firm of Bheki G. Simelane and Company, concealed the information regarding the fact that the monies had been received.

Some of the opportunities were these: according to PW7 Moses Thulane Shongwe, he went to the offices of the firm twice a week. He asked for an advance from the accused person. Although his money was received into the account of the firm on 19th December, 2001, the accused person gave him an advance of E5,000 in January 2002. In a cover letter to the advance of the money, the accused person not only failed to inform him that his money had been received, but he promised to keep him updated of the progress of his claim, clearly communicating that the money was yet to be received.

After that complainant found out from the MVA Fund that his money had in fact been paid, the accused person failed to give him audience although the complainant went to his office on a number of occasions.

PW2's money was received into the account on 17th April 2001, this was before he asked for a loan of E10,000 from the accused. The accused person did give the loan but failed to tell him that it was an advance from his money which had been received. When that complainant found out from the MVA Fund that his money had been paid, the accused person curtly informed him that the money paid was not for his use but was for medical expenses. This allegation of the witness was not denied in cross-examination.

The accused person who gave regular reports to the other complainants of the progress of the claims per letter, failed to inform them by that same mode that their monies had been received. In fact, the accused person informed them that their cheques were not ready when they enquired from him.

The prosecution led evidence to show that when the office of Bheki G. Simelane and Company was closed, there was a shortfall of E4,835,650.00 and that although the trust account of the firm was in the black, the monies in it were insufficient to pay the claims of the complainants even though monies had been received into that account on their behalf. Even so the prosecution led evidence to show that each of the complainants could have been paid their due if the accused person who worked on their files had intended to pay them. In this regard, the prosecution led evidence that on 17th April, 2001 PW2's cheque could have been made out and used for his medical expenses as the balance of the trust account of the firm as at 10th May 2001 was E368,419.27 and the cheque from MVA was for E250,000.

Jeaneth Dlamini's cheque for E81,060.00 was honoured on 1st June 2001. As at 5th June 2001 E174,363.05 was in the account, this also could have been honoured but was not.

After PW7 Moses Thulane Shongwe's claim for E402,603.00 incorporated in exhibit E2 for E675,781.00 was honoured on 19th December 2001, on 22nd December 2001 E200,000 was withdrawn from the account, leaving an account balance of E482,164.33. He could have been paid but was not, however a number of withdrawals of smaller amounts ranging between E10,000 and E50,000 took place.

Dick Ncongwane's cheque for E26,800 was honoured on 12th March 2002. On 27th March 2002, the balance outstanding on the trust account was E65,402.60. The claim could have been paid but was not.

Mumsy Vilakati's cheque for E69,157.20 was honoured on 8th May 2002, so was Doctor Sithole's E26,500. The balance on the account was E103,807 and both cheques could have been honoured but were not. Indeed at the closure of the office, the balance stood at over E100,000.

The prosecution led evidence per the curator that the trust account had transactions which ought not to have featured therein as they properly belonged to the business account of the firm. These were: payments for electricity and water, telephone and fax, rent, motor vehicle expenses, cash payments of E254,306 to the accused person and E633,936 to Bheki which could not be traced to particular files and expenses such as charges inter alia for school fees, charges from La Casserole Restaurant, Multi-Choice, Mbabane Club, captured under "Other expenses" in exhibit O. Indeed it was his conclusion that the trust account was ran as a business account.

The evidence of the prosecution showed clearly that in the absence of an explanation from the accused person, the accused person who handled the claims of the complainants and was a de facto partner in the firm of Bheki G.

Simelane and Company whose trust account received these monies, was culpable in that he failed to pay the monies that were received from the MVA fund on behalf of the complainants and would be held to have appropriated them to his use without the consent of the claimants.

While the burden of the prosecution was to prove its case beyond a reasonable doubt, the burden assumed by the accused person was simply to raise a reasonable doubt, see: ***R v. Difford 1937 AD 370 at 383.***

Practically it meant that if his story was reasonably probable, he had discharged same and ought to be acquitted of the charges.

It was the case of the accused person that the monies were paid into the trust account of the firm of Bheki G. Simelane and Company which had problems unknown to him when he joined the firm. He alleged also, that he did all that was required of him when he prepared statements of account for the claimants whose monies had been paid by the MVA Fund to the firm and that he had no authority to authorise payment, it being the prerogative of Bheki his brother who unfortunately was mostly out of the jurisdiction between December 2001 and April 2002. Thus were the payments not made to the complaints.

The accused person also said that the payments were not made because there was a shortfall in the account which Bheki was to make good but failed to do so and that when he realised this, he made a report to the Law Society which eventually resulted in the closure of the firm.

Is this version reasonably probable such as will negate a finding of guilt of the charge of theft? It seems to me not.

I say so for the following reasons: first of all, the accused person's admission that he found out about the shortfall from the end of AD 1999 to AD 2000 makes clear a matter he admitted during cross-examination: that at the time all six cheques were sent by the MVA Fund to the firm, he knew of the shortfall. That he permitted the cheques to be deposited in the trust account which was in that state was clearly for one reason which he admitted: that the sums paid on behalf of each of the complainants would go to decrease the shortfall and supply funds for the firm to meet other expenses. The accused person was most clear in his answers during cross-examination, that although he could have paid each complainant by the time their cheques were honoured by the bank, this was not done because it depended on how many other claims were ready for settlement.

By this assertion, the accused person who referred to his scheme as a "pack of cards" admitted that he with his partner appropriated the sums of money for the use of the firm which had liquidity problems so that the firm could meet its liabilities. There was thus clearly, an intent to deprive the owners of these monies, their due.

The assertion of the accused person that he hoped that at a future time, his brother would make good the shortfall and thus enable payment to the complainants cannot serve to negate this intention of depriving the complainants permanently of their due. I say this because the accused person has relied on the fact that he prepared statements of account for each complainant, to demonstrate his intention to pay them. But when? It seems to me that the existence alone of such statements cannot be relied on for such a conclusion to be drawn. This is because he failed to inform the complainants

long after he drafted those statements that their monies had been paid although he had opportunity to do so.

Although the accused person insisted that the money paid by the MVA Fund on behalf of PW2 Steven Maseko was for further medical treatment and not to be paid to him, was negated in exhibit 1 when he promised that the firm would pay out the claim once its insurance claim was realised. In any case, he never produced evidence that he made appointments for PW2 for further treatment which he alleged were made but did not materialise. Nor, since on his showing, the appointments did not materialise, was the E250,000 paid for that purpose returned to the MVA Fund, to PW2, or found in the account at the time of the closure of the firm.

The accused person's assertion that the monies were not paid because his co-signatory Bheki was often out of the jurisdiction was negated by the fact that after PW7 Moses Thulane Shongwe's cheque was honoured by the bank on 19th December 2000, as aforesaid, a series of withdrawals took place. Surely if such withdrawals could take place, PW7's money could have been paid as well. It seems to me that the money was not paid to PW7 for the reason later given by the accused person, that the account became active after the deposit of PW7's money therein although his due was not paid to him because in his own words, "...there were other clients".

Furthermore, the accused person was most clear in his answers during cross-examination that he did not pay the complainants their due when their monies arrived because payment depended on the number of cheques in line awaiting payment.

The accused person informed the court that although cheques drawn on the trust account of the firm had to be signed by both partners, on occasion, he signed alone after Bheki had asked the bank to honour such cheques. In face of the pressure placed on him by PW7 and PW2, surely the accused person who said Bheki at this time was mostly out of the country could have got him to approve those payments, or directed the bank to permit the accused person to sign such cheques. These gentlemen went to look for the accused person in his office many times and ended up engaging P.R. Dunseith Attorneys to help recover their monies. It is worthy of note that in exhibit 1, the accused person did not rely on what he is saying now in court, that he was awaiting Bheki's approval of the amounts and authorisation of the cheques for payment. The latter version appears to be an afterthought to exonerate him from blame.

The accused person alleged that when he told some of the complainants that their cheques were not ready, he referred not to the MVA Fund cheques, but to the firm's cheques. This would have been believable but for the fact that he who had kept the complainants informed of the progress of their claims before payments were made, at that point failed to tell them that the monies had been paid by the MVA Fund. Surely if the absence of Bheki prevented him from issuing the firms' cheque to the complainants, it did not stop him from explaining that although the MVA Fund had paid the claims, the firm's cheques were delayed due to internal administrative problems. Instead, none of the complainants received information about the payment from him most of them receiving such information from the MVA Fund. Indeed when the accused person had opportunity to inform the complainants such as when he

gave the advances to Moses Thulane Shongwe and Steven Maseko that the MVA Fund had paid the claims, he kept silent, in the case of Moses Thulane Shongwe, assuring him that the process was still going on.

The accused person testified that he built “a pack of cards” based on the system of robbing Peter to pay Paul and he hoped that at some future date, there would be enough money in the account to pay the complainants herein. His silence on the receipt of the MVA Fund cheques clearly indicates that he knew or had no reason to believe that the complainants would consent to have their monies used in this fashion. He proceeded to deprive them of the benefit thereof until some future uncertain date, or at all. The uncertainty of when payment would eventually be made to the complainants, coupled with the concealment of the fact that the monies had been received, added to the fact that those who received information of the MVA Fund payments were refused audience with him, as well as his own assertion that there would be insurance funds to pay the claims which proved to be an untruth, lead me to no other conclusion but that the accused person knowing the state of the trust account, and not having any liquid funds anywhere to meet the claims, never intended to pay the claimants. Thus is his intention to deprive them of their monies permanently, established.

That the accused person’s act was dishonest is borne out, rather than negated by the fact that the accused person at some point made a report of the problems in the firm to the Law Society. That conduct in my view does not show that he was concerned about the inability of the firm to pay its liabilities. On his own showing, he found out this disconcerting fact of the firm’s inability to pay its clients their due, towards the end of AD 1999 and AD 2000. Surely

he had opportunity at that time to make the report to the Law Society. His own admissions bear witness to the fact that he did not do so because clearly he devised his “pack of cards” scheme to take care of the problem. That was a demonstration of dishonesty.

The accused person in a bid to exculpate himself informed the court that Bheki accepted liability for what had happened regarding the trust account and the appropriation of clients’ monies before the trustee. However, I noted that the trustee in his evidence was clear that all that Bheki did was to undertake to pay the claimants. It seems to me that as Senior partner (which description the said Bheki used for himself in the application to remove the trustee Lucky Howe referred to before now), the bare undertaking to pay the claimants during this time of shame and grief, without an unequivocal assumption of responsibility for the appropriation of clients’ monies, should not be considered an admission of guilt such as would exonerate the accused person from blame where the evidence as I have found, points clearly to his guilt.

Contrary to the submissions made by defence counsel at the close of the case for the prosecution, this is not a case in which one in charge of funds finds himself with a shortfall that he cannot account for. This is a circumstance in which the accused person has admitted that monies he received as a partner of a firm were deliberately applied to the firm’s other liabilities (payment of outstanding clients’ cheques) and that it was a pack of cards he built in the vain hope that at some future uncertain point, he would

have enough money in the kitty to repay what he had wilfully applied for other purposes benefitting him through the firm: (*ibid* p. 634 footnote 319).

I am persuaded that the Crown has proved the guilt of the accused person beyond a reasonable doubt in that as partner of his firm, he received instructions from clients and received monies on their behalf which being placed in the firm's trust account, he used up for the purpose of settling other liabilities of the firm and this, without the consent of the owners of the money.

I am not persuaded that the accused person told the truth in the various stories he told the court for reasons set out before now.

Neither do I find his explanation reasonably probable, to negate a finding of guilt of the crime of theft. Indeed I have laboured to demonstrate in my examination of his case, matters that reveal the accused person's explanation inconsistent with his own admissions and beyond reasonable doubt, false, see: per Curlewis CJ in ***R v. Difford (supra)***.

In the circumstance, I find that the Crown has led cogent evidence which puts the matter beyond reasonable doubt that the accused person used monies belonging to the six complainants for the benefit of his firm: Bheki G. Simelane and Company of which he was a partner.

In this, it matters not that he himself did not benefit which is what he alleged. Yet from the evidence, I find that the use of the complainants' monies to decrease the shortfall in the trust account which was caused by many factors including that the trust account had inter alia, payments made to the accused person of money which the curator could not trace to any particular file, certainly benefited the accused person.

I find that the Crown has discharged its burden of the proof of the guilt of the accused person of the theft of monies belonging to the six complainants herein beyond a reasonable doubt. These were monies received by his firm on behalf of the complainants and appropriated dishonestly to the use of the accused person as partner of his firm, Bheki G. Simelane and Company. He is accordingly convicted of the crime of theft as charged.

MABEL AGYEMANG

HIGH COURT JUDGE