

IN THE HIGH COURT OF SWAZILAND

Case no.l 17/2006

In the matter between:-

REX

and

CHARLES MYEZA PHUMZILE

MYEZA MUSA NGWENYA

PPC ELECTRICITY (PTY) LTD

Heard:

Neutral citation: *Rex v Charles Myeza & 3 others* (117/06) [2013]
SZHC 186 (22nd August 2013)

Coram: HLOPHEJ

For the Crown: Mr. N. Maseko

For the Defence: 1st Accused Mr. M. Mabila

2nd - 4th Accused Mr. S. Gumedze

22nd August 2013

Delivered:

JUDGMENT

- [1] Four accused persons appeared before me charged with twenty counts of fraud with the First accused being charged with a further fifteen counts of forgery and another fifteen of uttering a document well knowing it to be forged.
- [2] As regards the fraud charges, the accused were alleged to have, whilst acting in furtherance of a common purpose, unlawfully and intentionally misrepresented, by preparing and submitting for payment, the invoices forming the basis of each particular charge and claiming that they represented a genuine claim for work performed including materials purchased and applied in each particular transaction, by the Fourth accused, a company in which they all had an interest, when that was allegedly not the case.
- [3] It was contended further that as a result of each such misrepresentation, the Swaziland Government, particularly, the Treasury Department, suffered prejudice or financial loss in a total sum of E 661 046. 36 when it honoured the said invoices.
- [4] In connection with the fifteen counts of forgery it was alleged that in each such count, the first accused person had unlawfully, falsely and with intent thereby to defraud and to the prejudice of the Royal Swaziland Police and the Treasury Department of the Swaziland Government forged

an instrument in writing being the signature of either Vusi Silindza or that of Absalom Mkhalihi on either the invoice or contract concerned in the particular charge. It should be noted that the charges of forgery, related to the first accused having either received (and in some instances having signed some of) the invoices forming the subject matter of the charges by entering the name (and at times the signature) of Vusie Silindza as well as to the first accused having signed a document that purported to be a contract between the Royal Swaziland Police and the fourth accused as and in the name of one Assistant Superintendent Absalom Mkhalihi who was the authorized officer to do so without his consent or authority. The latter document was shown as having been used to support the payment vouchers of the alleged fraudulent invoices processed for payment by the first accused.

- [5] In a nutshell the signature of Vusie Silindza was allegedly forged so as to misrepresent that the work claimed for in each invoice was performed. This was because of Mr. Silindza's special function in the processing of payment of invoices for work done as he was allegedly the one to verify if such work had indeed been done and at what cost. This he would confirm through entering his name and even signing the relevant invoice before passing it over for payment to the accounts department where the first accused was based. The forgery alleged on the contract signed as Absalom Mkhalihi was allegedly to misrepresent that indeed the fourth accused had been given the tender for the work done.
- [6] The invoices in which there was allegedly a misrepresentation that work had been done when allegedly none at all had been are those founding

counts 1,9,12,15,18,21,24,27,30,33,36,39,42,45,and 48. Otherwise the invoices in which only part of the work claimed for had allegedly been done are those founding counts 4,5,6,7 and 8. The allegations in all the foregoing counts of fraud are that they were all received (with some of them being signed) by the first accused entering on them the name of Vusi Silindza.

- [7] It is worthy of note that the invoices received as Vusi Silindza by the first accused are in two groups - the first one being those on which the name “Vusi Silindza “Sergeant” appear next to the heading - “Received By” on the invoice and those which bear both the name Vusi Silindza Sergeant followed by his purported signature entered next to the heading or phrase - “Received By”. What is important though with these entries is that it was not disputed during the trial that they were all made or done by the first accused. Their natural effect was also not disputed which is that they suggested or confirmed on the face of them that Vusi Silindza was the one entitled or authorized to receive them from the contractor concerned after which he verifies the work done and approved payment by means of writing his name and signature on the invoices. The suggestion in this regard was that the invoices and the contracts done in other officers’ names were telling a lie about themselves which is what forgery is all about.
- [8] With regards the uttering charges, the first accused was alleged to have offered, uttered and put off the alleged forged invoices and contract referred to above. Again it was not in dispute that the said documents

were actually processed for payment by the first accused who did so

when he had an undisclosed interest in the fourth accused company that had prepared the invoices and presented them for processing and payment.

[9] The crown led the evidence of 21 witnesses in an endeavour to prove its case against the accused persons in this matter. The summary of the evidence by the crown witnesses as may be relevant for my current purposes is as set out in the following paragraphs.

[10] PW1, William Wayne Dlamini, gave evidence and stated under oath that he was employed by the Royal Swaziland Police as Director - Research and Planning. In 2004 - 2006, he held the rank of Senior Superintendent whilst in charge of the same department in the Royal Swaziland Police. This department was responsible among other things for the repairs and renovations that needed to be carried out at Police stations or Police officers' residential houses throughout the country. This department was responsible for engaging companies to conduct renovations or repairs whenever and wherever such was necessary in the places mentioned above.

[11] The procedure of having repairs done was that once engaged for the performance of the duties required, a company or contractor would do the work after which it would then present its invoice or invoices to the Planning and Research Department for verification, firstly that indeed such work had been done and secondly at what cost. This department verified this through two officers, Majabula Mkhathwa and Vusi Silindza. The latter was however the one who often performed the task

of verifying the work done including approving the cost involved as well as to authorize that payment be made in an appropriate case. The approval that payment be made because work was done, was manifested through Mr. Silindza entering his name on the invoice and even signing it as a recipient. An invoice that did not bear the signature of either Silindza or that of any other officer in the Research and Planning Department meant that such a payment would be irregular in as much as there would be no proof that the work or services had been rendered.

[12] This procedure leading to payment was confirmed by PW2, Vusie Silindza who informed the court that it was indeed the function of the Research and Planning department, at which he was based whilst reporting to PW1, to engage contractors and allocate them work or services to be rendered to the Police Stations or Police residential houses.

[13] The procedure was that once the contracted work was performed, the contractor was required to get in touch with the Research and Planning Department and to hand over the invoice to the said department, from which an officer in the position of this witness would be released to go to verify if any work had been performed by the contractor, and secondly, and if it was performed, the monetary value of the work so performed. If satisfied with the propriety of the claim including the work done, he would then enter his name on it and sign same as its recipient which also served as an approval that payment be made.

- [14] Despite this procedure, there were certain requirements as regards the documents that should accompany the invoice. Such documents include a job card whose duty was not only to confirm the work done as listed on the invoice but to disclose as well the place or police station where same was- done. Proof of this was the invoice and accompanying job card as contained in the bundle of documents handed into court as volume 10.
- [15] If the station where the work was done was not being disclosed in terms of the job card then it had to be disclosed on the face of the invoice itself. Otherwise the invoice concerned should further be accompanied by the valid contract for that year concluded between the company and the Royal Swaziland Police. The purpose of this contract was explained as satisfying the requirement of a government order which is otherwise a prerequisite for the honouring of an invoice to be paid, unless there was a contract in place. Otherwise the invoice and its annexures referred to above are annexed to a voucher and then batched.
- [16] The processing of these documents so as to come up with a voucher are done by the Finance Department of the Royal Swaziland Police where after they are signed by the warrant holder or his reliever. In the current matter the officer responsible for their preparation in the Finance department was the first accused.
- [17] As regards the invoices forming the basis of the charges preferred against the accused persons in this matter, the court was informed under oath by PW2 that he never, as the person authorized to, engaged the

fourth accused to perform the services in question at any point. He said he was primarily the person responsible for the award of such jobs to contractors. He had, he testified, sometime in the past, engaged the fourth accused, PPC Electrical (PTY) LTD, to perform certain electrical repairs at Siphofaneni Police Station; New PTS Police Camp in Mbabane as well as at the old PTS Police Camp. He otherwise denied having engaged the fourth accused company to perform any other electric repair works at any other station.

[18] He further denied having engaged the said accused company to perform any electric repair work at Sidvokodvo, KaPhunga, Bhunya, Sandlane and Sicunusa Police Stations. He also denied having engaged the fourth accused or any of its officials, to perform the duties or to provide the services resulting in any of the invoices that form the basis of all the fraud charges against the accused persons.

[19] Although the invoices in question suggested *ex -facie* themselves that this witness had received them, from the company, he denied any such and identified the hand writing entering his name on such invoices as that of the first accused person who did not deny that he had indeed entered the witness's name on the invoices concerned. It was later put to this witness that his name had been affixed thereon following his having agreed and/or authorized the first accused to receive those invoices and to enter this witness's name on same. However, PW2, was consistent in his denial of ever authorizing accused one to receive the invoices concerned in his name or even knowledge of their existence.

■ - [20] PW2 also clarified that the invoices in question were not properly done as they did not disclose *ex -facie* themselves the Police Stations at which the work claimed for per invoice was done. This was abnormal because there was a requirement such be disclosed; if not on the face of the invoice itself, then through a job card annexed to the invoice concerned. This witness was of the view that other than part of the work claimed for disclosed in terms of the Sidvokodvo, KaPhunga, Bhunya and Sandlane Police Stations, all the fourteen invoices reflected work never done at any station. I can only hasten to point out at this stage that it was not put to this witness or any other crown witness where exactly the work per each such invoice was performed, it being generally contended that work was done.

[21] According to PW3, Absalom Mkhalihi, in 2004 - 2005 he was employed by the Royal Swaziland and was based at the Police Headquarters in Mbabane. At the time he held the rank of Assistant Superintendent. He was situate at the Finance Department of the Royal Swaziland Police. He was an Assistant to the Head of Department, Petros Ndlangamandla, who was the warrant holder. PW3 was a reliever to Petros Ndlangamandla in the signing of documents for payment purposes.

[22] PW3 testified and confirmed that the proper procedure in the payment of invoices for repairs effected was that the invoice should be delivered with the Research and Planning Department to enable them verify if the work was done including the proper amount payable after this was approved by PW2, Vusie Silindza from the said department.

[23] As concerns the invoices forming the basis of counts 1, 4, 5, 6, 7 and 8 as well as those forming the basis of counts 9, 12, 15, 18, 21, 24, 27, 30, 33, 36, 39, 42, 45 and 48 he was not in a position to say they were for work performed and where as that did not lie with his office. As for him, the person authorized to do so, was Vusie Silindza. It was improper for the first accused to receive and sign for such invoices in the name of or as PW2. He had also not authorized the 1st accused who was his junior at work, to sign the contract in his own name. He acknowledged he could have approved payment by signing the voucher where there was annexed the contract whose authenticity he was disputing, but explained that such was not approving the contract concerned but was merely a mistake brought about by a failure to properly scrutinize the documents involved owing to the amount of work involved taken together with the trust that had developed between them as employees who all knew their work.

[24] PW3 also testified that they processed the invoices by PPC Electrical (PTY) LTD or even those from PCC Electrical without knowing that the first accused had any interest in the said companies as the first accused person had not disclosed that fact to them. They only learnt he had such an interest after there had been leaked information to the press that some of them were paying their own companies for work not done. He otherwise was not in a position to confirm or dispute that some of the invoices were claiming for work not done at all. This witness further went on to confirm that the amounts claimed in terms of the invoices

forming the subject matter of the 20 fraud charges were paid to the fourth accused.

[25] Otherwise the evidence led by the crown through its witness, PW4 was to confirm that whereas the contract relied upon to pay PPC Electrical (PTY) LTD invoices had shortcomings in so far as it was not signed with the specimen signature of the warrant holder, it was non the less paid the amount claimed. This phenomenon applied to several PPC Electrical (PTY) LTD invoices. The money claimed was paid to PPC Electrical (PTY) LTD even for those invoices on PCC Electrical (PTY) LTD letter heads as those found in the bundle of documents identified as volume 2.

[26] PW5 -PW11 are crown witnesses who gave evidence to the effect that during 2004- 2005 period, they were based at the Sidvokodvo Police Station. They otherwise confirmed that in the houses they stayed they had some electrical problems addressed by PPC Electrical (PTY) LTD. These were however miner electrical repairs which were not time consuming as they entailed lighting systems repairs together with replacing electric stoves disks which were worn out with new ones. What came out clear in their evidence was that not all that was claimed in terms of the Sidvokodvo invoice filed reflected work done as it had clearly been inflated. They were each there through out the repairs in their offices and recounted before court the work done.

[27] PW 12 Richard Dlamini gave evidence and informed the court that he was based at Sicunusa Police Post from 2004 - 2012, as a police

officer. He denied that any electric works had ever been performed by PPC Electrical (PTY) LTD at Sicunusa Police Station during the said period. Other than problems associated with a low current in view of their being at the end of long electrical line, they had no electrical problems to be fixed. The invoice forming the basis of count 1 was therefore not stating the correct position when claiming for work supposedly done at Sicunusa Police Station as no work at all had been done by PPC Electrical (PTY) LTD. The whole sum of E42 139.10 which was paid PCC Electrical (PTY) LTD in terms of this invoice was therefore a loss to the Treasury Department.

[28] At KaPhunga Police Station, it was alleged there were inflated claims for work not done at all when considering that the invoice indicated various electrical stoves as having been fixed when there was not even a single one repaired as in reality there were no such electrical stoves at the time. In this regard there was led the evidence of PW13, Joyce Shabangu who stated that during the period concerned she was residing at KaPhunga with her husband, the late Mr. Shabangu who was the station commander. She is now still with the police force even though she was now based, at Matsamo Border Post. The house they shared with her husband was the only one with an electric stove, which was on its own too old for repairs and none were done. Otherwise all the other houses there occupied by the police had no electric stoves and therefore none could be repaired.

[29] When it was put to her that some electric stoves were actually repaired she was adamant none was because there were no electric stoves.

Whatever work had been done, would be less than the claimed amounts when taking into account that no electric stove repairs ever occurred. She also testified that the time taken by PPC employees was much shorter than the hours claimed per the invoice.

[30] Otherwise the only items she attested were repaired electrically by a group led by a certain Mr. Hlatshwayo, who was apparently the one working for PPC Electrical (PTY) LTD, were a geyser in her house and a certain light. She could not deny that the amount claimed in terms of the invoice issued was overstated or inflated by a sum of E30 484.95 so as to make the sum of E52 611.25 in all.

[31] According to Sergeant Wilfred Msibi, PW14, he was based at Bhunya in April 2005. During the said period, the fourth accused was engaged to provide electric repairs at the said police station. He denied however that the contents of the invoice in count 6, reflected a true account of the repairs and spares utilized. It was apparently inflated. He could not deny that the invoice was inflated by a sum of E62 169.70 as claimed and as alleged in the charge sheet. Among the indicators of the inflated work done at Bhunya was the allegation that certain fan ceilings were fitted when that was not the case.

[32] As concerns count seven, evidence was led to indicate no work was done in justifying the invoice served on the complaint to pay. All the work done at Bhunya was that acknowledged above for the sum of E1 9 731.60. Otherwise the sum of E28 698.40 was not in respect of any

work done but represented a loss to the complainants, through paying the amount claimed interms of the invoice.

- [33] PW 15, 4474 Constable Fana Dlamini stated that he was situated at Bhunya during April 2005. He testified that some repairs were done at Bhunya but refuted that contents of the invoice reflected the correct and accurate details of the work done there. In fact he went into the specifics of the exaggeration on the work done which did not support the amounts of the material used which he indicated to be false. The time spent at Bhunya as reflected on invoice was far too exaggerated as no such time was spent there at all.
- [34] PW 16 Dumisani Steven Hlatshwayo gave evidence and corroborated the version by PW 14 and PW 15, when he testified that much as PPC Electrical (PTY) LTD did perform work at Bhunya where they were staying, it ended up claiming for things not done under the guise they had been performed. They were agreed the invoice claiming a sum of E62 167.70 was greatly inflated in itself whilst the one claiming E28 689.40 was reflective of no work done at all at Bhunya and was therefore an outright loss to the complainant.
- [35] PW 17, 2273, Constable Jackson Maseko gave evidence with regards count 8, and confirmed that he was based at Sandlane Border Post, where he occupied a Government house in line with his employment, in January 2005. Whereas his house was in need of electrical repairs, they were attended to by fourth accused's employee by the name of Hlatshwayo who was in the company of some assistants of his. The said

problems were mainly the hanging out wires and the worn out globe holders. As a result the contents of the invoice issued indicated an exaggeration of the work done including an inflation of the amounts due. He further attested that Hlatjwayo and his team only spent two days there, with the first such having been a half day as they only arrived there around noon. The hours claimed ex -facie the invoice forming the basis of count 8, were therefore exaggerated.

[36] As indicated by PW 2 and PW 3, the invoices forming the basis of counts 9, 12, 15, 18, 21, 24, 27, 30, 33, 36, 39, 42, 45 and 48, did not indicate ex -facie themselves, the stations where the work was done nor was there any evidence of any place where such work was performed. The crown had thus concluded that these invoices were not in respect of any work done. They were not supported by the job card either to spell out what work was done where.

[37] The said invoices amounted in all to a sum of E476 073.31, which was a loss to the complainants. I can only comment that throughout the proceedings no evidence of where the work billed for in terms of these invoices was produced as well as who it is from the research and planning department that approved the work done and even the amount due before payment was made .

[38] The crown also led the evidence of PW 20, Joburg Mathunywa who testified that he was employed by the Ministry of Public Works in the Electrical Department, a job he said he had done for over 30 years. He

described his position as that of Technician II, which he said signified his expertise and special electrical qualifications.

[39] Sometime in 2005, he said he was requested by the police involved in the investigations of this matter to assist them with his expertise. He was called upon to determine what electrical items had been installed in certain works allegedly conducted or performed by the fourth accused in Police stations such as KaPhunga, Sidvokodvo, Bhunya, Sandlane and Sicunusa.

[40] Relying on what they were shown by the occupants of the houses concerned as well as those that had been in charge of the electrical works conducted by the fourth accused personnel in the Police Stations concerned, he was able to ascertain the extent of the work done including what items were used which translated as well to the extent of the amounts spent and therefore the amounts properly owed the fourth accused. In this regard he said he prepared certain schedules outlining his findings which were eventually handed into court as evidence and which can be seen at pages 3 to 20 of the documents marked "Bundle A" . It was obviously from this exercise that the investigation was able to determine what was eventually expended or was lawfully due to the fourth accused from the invoices prepared. Clearly the charges preferred against the accused in relation to the work done at the specified Police Stations were based on this information.

[41] Although this witness was cross -examined at length, nothing was done in my view to dent his credibility. This is all the moreso because his

evidence was corroborative of the evidence by the other crown witnesses who had already testified that the contents of the accused persons' invoices were exaggerated and the amounts claimed therein inflated. The witness was otherwise unshaken under cross - examination.

[42] PW 21 was 2353 Senior Superintendent Mumcy Dlamini, who testified that she was the investigating officer in the matter. She received a report about a company called PPC Electrical (PTY) LTD which was allegedly defrauding government by filing fraudulent invoices which were paid. She verified the information by going to the Treasury Department to obtain the invoices concerned which she said were fourteen in number.

[43] She therefore engaged the signatories of the documents in her possession who included Mr. Vusie Silindza and Absalom Mkhalihi. Mr. Silindza denied knowledge of any such documents including the signatures appearing thereon as his. Mr. Mkhalihi on the other hand is said to have denied having signed the contract used to support payment of the amounts claimed.

[44] Having done her investigations, including having obtained the services of Josiah Mathunjwa and his assistant who helped them ascertain what work had been done, she was able to arrest the first and second accused persons who were in control of the bank account into which the proceeds from the alleged fraudulent invoices were deposited. She testified that she thereafter arrested the accused persons as directors of

the fourth accused company as well as for their role in the commission of the offences and after allegedly having cautioned them in terms of the Judges' Rules.

[45] The crown witnesses were subjected to lengthy and intense cross - examination by defence counsel. The Defence case as put to the crown witnesses was that the accused as charged with the offences, including accused 1, did not have anything to do with the fraud because as Directors, they had employed certain members of staff who included a certain Managing Director by the name of Paul Hlatshwayo who was the one to know whether work was or was not performed. Although the first accused was shown by the evidence as having signed the invoices from the fourth accused in the name of Vusie Silindza who was entitled to receive same and sign thereon as approval of the work done and the amount due, it was put to the crown witnesses that the documents concerned had been signed by the first accused allegedly because of an agreement he had with Vusie Silindza as well as the fact that he did not know what work had been done or not done as he never went to the stations to ascertain if any work was done. He also claimed that he never prepared the invoices which were prepared by the employees of the fourth accused. It was suggested he had dealt with the PPC Electrical invoices on a routine basis as he had done with other invoices in which he had not been shown to be having an interest.

[46] At the close of the crown case, the defence moved an application for the acquittal and discharge of all the first three accused persons, arguing that a *prima facie* case had not been made to warrant them being called

to their defence. This application was as envisaged by section 174 (4) of the Criminal Procedure and Evidence Act of 1938 as amended.

[47] I prepared a fully reasoned ruling in that regard in which I accede to the application vis -a -vis the second and third accused persons. In a nutshell, I acceded to their application because throughout the crown's case there was no evidence at all linking them with the commission of the offence whilst there was evidence specifically implicating the alleged wrongdoers. There was not even evidence of a common purpose established to link the said two accused persons to the crime in my view. In fact the test used to determine whether or not to grant an application was not met. The said test had been expressed as whether at that stage there was evidence on the basis of which a reasonable man acting carefully might convict. This was expressed in such cases as that of ***Rex vs Duncan Magagula and 10 others, High Court Criminal Case No. 43/1996.***

[48] As regards the first accused, in whose favour the application was also made, I came to a different conclusion, which was that a *prima facie* case had been made against him. This in a nutshell was because of a combination of factors which cumulatively would in my view, lead to one conclusion and one conclusion only if he were to close his there and then which is that he was party to the commission of the offence. This necessitated that he explains himself. These cumulative factors I refer to are that there was evidence that:-

- (a) The twenty PPC Electrical (PTY) LTD allegedly fraudulent invoices were a combination of those in which part of the work claimed for had been performed as regards the first five and the 15 others had no work done at all and did not even have a station at which the work would have been done.
- (b) All the twenty allegedly fraudulent invoices had been submitted outside the established procedure which was that they are handed over to the Research and Planning Department who would verify the accuracy of the invoices with regards the work done and the amounts claimed before being handed over to the Finance Department for payment to be processed. It shall be noted that in this matter the invoices bypassed this step and were inexplicably simply handed over to the Finance Department where they were again inexplicably received by the first accused who received them by writing ex-facie the name of the officer responsible for same in the Research and Planning department namely Vusi Silindza .
- (c) The questionable nature of these 20 invoices was established through credible evidence insofar as it was shown that five of them had only part of the work done, when fourteen had no station where the work was allegedly done including the fact that such work had never been verified before they were paid and were actually shown by the evidence as having not been performed at all. The fifteenth invoice on those having no work done at all suggested on its face that such work had been done at Sicunusa

police station which was common cause had not been performed there at all. These called for the first accused to explain as the person who received them outside the procedure established, in somebody else's name who turns out to be the person authorized to receive them, the first accused having gone on to process them for payment as well as the fact that he was doing all this when he had concealed his interest in them as a director of the fourth accused. These factors point to an inescapable conclusion if unexplained that his dealing with the documents in the manner he did was more than a coincident.

(d) The evidence had also established that the proceeds from the alleged fraudulent invoices had been deposited into the Bank Account of the fourth accused held with Swazi Bank and were always accessed by the first accused and the second accused, his wife.

(e) Several allegedly fraudulent invoices were on the letter heads of a company called PCC Electrical (PTY) LTD, and were all received by the first accused as Vusie Silindza. These were processed for payment by the first accused who went on to annex the contract signed on behalf of Mr. A. V. Mkhalihi Superintendent allegedly without his authority to facilitate payment without his authority, by the first accused. The question that begs an answer being why the first accused dealt with these invoices in the manner he did and why he ensured the proceeds were paid to his company.

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•* - (f) As regards the forgery charges, there was evidence that the first accused had received some of the twenty allegedly fraudulent invoices in the name of the authorized officer, Vusie Silindza, some of which he went on to sign as the said Mr. Silindza. There was also the contract on which he was shown to have entered the name of Absalom Mkhalihi who was the authorised representative of the Royal Swaziland Police in concluding it thereby giving an impression it was authentic yet there was evidence that the said Absalom Mkhalihi had not authorized it. The writing of the names of these officers, including their signatures, on the documents concerned made them tell a lie about themselves which is what forgery is all about. Again, therefore, this calls for an explanation from the first accused person.

(g) As regards the charges of uttering a forged document well knowing it to be forged, there was evidence linking the first accused with processing for payment the invoices that had to his knowledge not complied with the established procedure of handing invoices over to the Finance Department. He had in fact gone on to cash the proceeds from the fourth accused's bank account which consummated the putting off of the forged document.

There was also the uttering of the contract signed by the first accused as PW3, Absalom Mkhalihi which was put off when it was, in terms, of the evidence used by the first accused to support payment of the allegedly fraudulent invoices.

These issues also called for an explanation from the first accused in relation to the uttering charges.

[49] As indicated above, there was no contention that a *prima facie* case had not been made against the fourth accused and indeed no application for its acquittal and discharge in terms of section 174 (4) of the Criminal Procedure And Evidence Act of 1938 had been made.

[50] My ruling at the close of the crown case to the effect that the first and fourth accused persons had a case to answer and therefore had to be called to their defence was necessitated by the foregoing considerations which are easily discernable ruling concerned.

[51] At the commencement of its case, it was indicated that the defence intended calling several witnesses. It was to transpire later that the defence actually meant eight witnesses in all and they comprised DW 1, Somandla Myeza, DW 2, Muzi Masinga, DW 3, Paul Hlatshwayo, DW 4, Mathew Nkambule, DW 5, Bheki Hlatshwayo, DW 6, Charles Myeza, DW 7, Petros Mankwempane Ndlangamandla and DW 8, Barbara Mlotshwa.

[52] Defence Counsel involved in the matter proposed to deal with their case through first calling witnesses for the fourth accused. As indicated earlier, the case for this particular accused was that work had been performed for all the invoices issued even though it was not all witnesses who prepared the invoices or even knew what the contents of each such invoice was. Otherwise the evidence by DW 1, DW 2, and

DW 3 was to support this contention. In an endeavour to overcome a hurdle that had already played itself out in so far as it had not been put to the crown witnesses, it was contended for the first time that police had taken certain diaries together with some arch-lever files, during their investigations at the homestead of DW 3, Paul Hlatshwayo. It was claimed that these documents, allegedly confiscated by the police, had the details of what work was performed in respect of each particular invoice as well as the station where it was so performed.

[53] These three witnesses further contended that at Sidvokodvo, KaPhunga, Bhunya and Sandlane Police Stations they had performed the work claimed for *ex -facie* the invoices and that no work was claimed for without it having been performed as contended by crown witnesses. They contended they took several days at each station and claimed that the work they did in each such station was deeply involved.

[54] Paul Hlathwayo claimed to have been in charge of all the electrical works allegedly performed by or on behalf of PPC Electrical (PTY) LTD including preparing the invoices forming the basis of the claim. He however could not say where the work disputed was specifically done. He contented himself with giving a general answer to the effect that they had performed all the work for which the invoices were billed for without being specific where exactly such work was done. This was surprising in this regard as Paul Hlatshwayo was the one who claimed to have been in charge of all the work allegedly performed by the fourth accused and was further responsible for preparing the invoices complained of. It is fanciful in my view for him not to be able to give

an answer on where the work was done even in respect of a single one of the invoices with no station as that would not have been a difficult task if the work had indeed been done.

[55] I must state at this stage that Paul Hlatjwayo's demeanor as a witness was not impressive at all. He was exposed to be lying on several occasions and was shown to be highly unreliable. I was left in no doubt that he had in fact played a major role in the commission of these crimes. I therefore have no difficulty in rejecting his evidence.

[56] Otherwise in an apparent attempt to meet the glaring shortcomings brought about by the failure to explain the Police Stations to which the invoices concerned related, this witness restated the version by the other defence witnesses mentioned for the first time in their evidence without being put to the crown witnesses claiming that, there were certain diaries and an arch-lever file which used to contain the details of where the work was performed including its extent, which they said were taken by the police during investigations and were never returned.

[57] In order to deal with this claim which was in the form of an application asking that I direct the police to produce the diaries and arch lever file in court, and with crown counsel disputing the existence of any such items, I directed that a fully fledged written application be prepared and served on the other side so as to enable all the parties involved to understand fully the nature of the case made as well as to respond thereto fully. It suffices to say that from the papers filed of record there

appeared a glaring dispute of fact which necessitated that oral evidence be led. It was agreed between the parties that I allow the defence witnesses to incorporate in their evidence the aspect dealing with the dispute of fact referred to after which the crown was to be allowed to lead its witnesses in this regard should it see the need.

[58] It was however apparent that their contentions were more of an afterthought when considering that it was not put to each of the crown witnesses who established through evidence that the work performed in some of the stations was exaggerated with the amounts claimed being inflated whilst establishing further that in relation to the fifteen invoices, no work at all had been done as the invoices concerned had themselves been received outside the proper procedure by the first accused person who had had to even falsify his identity in the process. Our law is now settled on what the effect of an afterthought is. Such evidence falls to be rejected as was stated in ***Dominic Mngomezulu and 10 others VS. Rex Appeal case no. 96/94.***

[59] Besides the defence case suffering a blow or set back because the case it sought to advance by means of the diaries and arch-lever file amounted to an afterthought as it was not initially put to the crown witnesses during the time they gave evidence, it was infested with contradictions from the defence witnesses concerned. Paul Hlatshwayo's version on how the diaries were taken including their description differs markedly from that of DW5 Bheki Hlatshwayo. PW21, Senior Superintendent Mumcy Dlamini, told the court that she and her investigating team never took any diaries nor arch-lever files belonging to Paul

Hlatshwayo and that testimony to that effect was the fact that such had not been put to her nor to any of the crown witnesses at the time they gave their testimony.

[60] From the onset I cannot accept that the investigating officers confiscated diaries from the accused. Other than that they would have done so to incriminate the accused persons, no sound reasons have been put forth why they would have confiscated the said items. The accused persons who sought to peddle such a story would themselves suggest no such reasons why the police would confiscate same or even they would want to incriminate them.

[61] In any event it is very fanciful that the accused would not be in position to know what invoices prepared by them related to which particular stations. Infact the mystery is why were these invoices prepared without their stations being set out on the face of them in line with what had happened with all the other invoices which I accept and find as a fact was the established requirement.

[62] It shall be noted it defeats logic how the employees of the company, particularly, one Paul Hlatshwayo would realistically prepare so many invoices without stating the stations they related to when taking into account the common cause facts that after work had been performed, Silindza from the Planning and Research Department was required to verify as a fact that such work had indeed been done including its monetary worth. How then would he have known where such work was done if no such a station was not disclosed *ex -facie* the invoice itself or

through an annexure thereto in the form of a job card as I was told was the initially accepted procedure.

[63] At this juncture I am reminded of the evidence of Paul Hlatshwayo who under cross -examination confirmed before court the importance of disclosing the station where work had been performed when he said during the early stages of their relationship with the Royal Swaziland Police they were required to disclose the station of the work performed through a job card which he said they later discarded owing to their indigence as it was expensive for them to obtain the relevant stationery and they eventually agreed that the disclosure of the station and work done be made *ex -facie* the invoice. Clearly his contention that the evidence of the station for which the work billed for was performed, would now be contained in certain diaries which were taken and hidden by the police for an undisclosed reason is in itself completely false and I have no hesitation whatsoever in rejecting same as I hereby do.

[64] Otherwise reverting to the evidence of the defence witnesses on the frau it was stated that the invoices were after preparation taken by DW 3, Paul Hlatshwayo and dropped at the Deep Inn located at the Finance Department of the Police Headquarters where it is a fact accused 1 was working even though DW.3 sought to tell the court he did not know where he worked which I find says a lot about his credibility on its own as it is unthinkable he would not know where his codirector worked particularly if that codirector worked for their main client and was the one always processing their invoices for payment.

[65] I further find it difficult to accept the story as put forth by the defence witnesses to the effect that they had agreed with PW 2, Mr. Vusie Silindza that the invoices for work done be served at the Finance or Accounts Department of the Police Headquarters through being dropped at the so-called Dip-in as opposed to what was proved to be the established procedure namely that such invoices were supposed to be delivered at the Research and Planning Department to enable officers of this department verify if indeed such work had been performed and its monetary value. The falsity in this contention by the defence witnesses is in how and when Vusie Silindza would have been able to ascertain and or confirm if the work was done including its monetary value as this was no doubt mandatory. They themselves have not suggested that Mr. Silindza was part of any criminal enterprise done with them. It only complicates it further that the first accused who knew the procedure well on the delivery of invoices and the related duties of the Research and Planning Department would go on and process such an invoice on the say so of Mr. Silindza who clearly would not have verified the said invoice given it was the only one released to process payment.

[66] The case of the first accused as I could discern from his evidence is that he dealt with the invoices of the fourth accused he found at the deep -in of the Finance or Accounts Department like he dealt with all invoices presented to the said department. This he sought to infer from the invoices forming part of the documents or invoices batched together with those of the fourth accused.

[67] At this stage I need to clarify that during the early stages of the crown case, Defence Counsel, particularly counsel for the first accused, insisted that all documents forming part of a batch be disclosed by the crown which asked for an adjournment to produce such documents. The said documents were later produced and had invoices received by the first accused almost in the same manner as those of the PPC Electrical invoices. These were marked volumes 1-10 and were eventually accepted as evidence and given matching exhibit numbers.

[68] My comment is that one would not know whether the receipt of the invoices by the first accused were innocent as no evidence was led in this regard to clarify their status. It suffices to say they were not in issue and of significance is that there is no evidence before me on why their receipt did not comply with the established procedure. The point being made here is that the first accused who violated a known procedure in his acceptance or receipt of important documents or invoices when he should not have done so before they were verified by the Research and Planning Department cannot be allowed to rely on his own violation of established procedure to justify his actions. In fact seen for what it is, I have no doubt he deliberately violated the procedure with regards to these other invoices to create a trend so as to cover himself up in the event what he was doing was uncovered which is why he insisted on these other invoices to be produced as well.

[69] I must say that as the Judicial officer seized with this matter from inception and having observed the demeanour of witnesses, I was left in no doubt that the evidence of most of the defence witnesses was

completely unconvincing as confirmed by their demeanour with some being irrelevant like that of DW 4 who tried to prove that the fourth accused did work for the Royal Swaziland Police as opposed to the specific fraudulent invoices. These are in particular DW 1, DW 2, DW 3, DW 4 and DW 6. They were clearly witnesses who were clutching at straws and had serious difficulties in putting their cases across. I therefore cannot accept their versions. The worst of all these witnesses was PW 3, Paul Hlatshwayo, who from the evidence was one of the major perpetrators of the fraud committed in these charges. This is confirmed by his own admission in court that all the apparently fraudulent invoices were prepared by him. These were invoices which were, from the evidence led exaggerated and over inflated with others being prepared in the name of a non-existent company called PCC Electrical (PTY) LTD whose proceeds surprisingly found their way to the coffers of PPC Electrical owing to the first accused having processed and channeled them in that regard. This I mention to express an observation that PW 3, should consider himself lucky that he escaped being prosecuted for his role in this rather serious case of fraud.

[70] Coming back to the matter at hand, I must say I do not agree with Mr. Mabila's submission that this court had only called on the first accused to explain himself on merely why he signed the invoices concerned as Vusie Silindza as well as why he signed the contracts in question as A. V. Mkhaliphi Superintendent. The court required an explanation on the broad terms and full context of the matter as referred to above at paragraphs 49 (a) to (g). I must deal with the explanation given by the accused to determine if indeed he gave the reasonable and probably true

explanation required of an accused in a criminal matter. In this regard the case of **R v Difford 1937 AD 370 at page 373** becomes apposite where it was stated that an accused person has no duty to prove his innocence as all that is required is for him to give a reasonable explanation which is possibly true. .

[71] I am convinced from the evidence given that a reasonable and possibly true explanation has not been given in this matter in favour of the defence. I have already stated why I consider the explanations given to be false beyond a reasonable doubt.

[72] The facts and circumstances of the matter clearly established a case of the first accused and the fourth accused person (acting through Paul Hlatshwayo) as having acted in furtherance of a common purpose in the commission of the crimes of fraud in the matter.

[73] Common purpose was defined as follows in **Thobias v S 2003 (6) SA 505**.

“The doctrine of common purpose is a set of rules of the common law that regulates the attribution of criminal liability to a person who undertakes jointly with another person or persons, the commission of a crime. Burchell and Milton defines the doctrine of common purpose in the following words:

“where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for the specific criminal conduct committed by one of their member

which falls within their common design. Liability arises from their common purpose to commit the crime

[74] It has also been said that in common purpose “the act of one becomes the act of the other if it is done in pursuit of a common design”. The case of *S' v Shaik and others 1983 (4) SA 65A* is apposite in this regard.

[75] The question is whether the circumstances of this matter do reveal a common design by the accused persons. In other words is there any agreement or an active association in a joint unlawful enterprise. There clearly is no doubt that each one of the two accused played a vital role in ensuring that the common goal which was to siphon money from the coffers of the Treasury Department was achieved. The first accused ensured that was the case by violating the established procedure and signing or receiving the invoices concerned either as Vusie Silindza or even as himself when he was aware the established procedure did not allow him at least at that stage to do so. On the other hand the fourth accused per Paul Hlatjwayo actively associated in the joint unlawful enterprise with the first accused by creating the inflated invoices as well as those invoices for which no work had been done at all.

[76] In law fraud occurs where there is an unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another. See in this regard CR Snyman in his work, Criminal Law, 3rd Edition, 1995 page 487.

- - [77] *In Dumsani Magagula and another v The King Criminal Appeal Case No. 21/2004*, the court had the following to say on when fraud can be said to have been committed:-

“It is, of course necessary in a charge of fraud for the crown to prove a willful perversion of the truth made with the intention to defraud, that is, to induce someone to embark on a course of action to his actual or potential prejudice ”

[78] The question for one to ask himself, is whether there was any misrepresentation intentionally made to defraud which resulted in actual prejudice or which is potentially prejudicial to another or put differently, was there a willful perversion of the truth made with the intention to defraud someone.

[79] It seems to me there can only be one answer to the question which would be in the affirmative and is to say, there would be no doubt that such a misrepresentation was established in the evidence against both the first and fourth accused persons. The misrepresentation or perversion of the truth started with the inflation of invoices and creating others when no work was done or only a portion of what was claimed had been done and graduated to the violation of procedure by the first accused which manifested itself in the latter receiving invoices he was not supposed to receive at that stage and worsened when he received them in the name of the person entitled to receive them including at times inserting his signature. This does not mean that the accused person cannot be liable

where he received the invoices in his name when they were fraudulent

as clearly the violation of the procedure was meant to misrepresent that the research and planning had already approved the invoices.

[80] The accused persons have therefore failed to give a reasonable and probably true explanation on why the invoices were raised including what work was done and where as well as its extent just as the first accused would not explain in the manner expected of him, the receipt of the invoice without following the proper procedure including his purporting to receive them as the authorized person to receive same in the name of Vusie Silindza.

[81] As regards the counts of forgery leveled against the first accused, it is not disputed that the said accused did enter the name of Vusie Silindza, including his signature in some of the invoices when he was not entitled to do so in terms of the established procedure. It is a fact that his said conduct was pivotal in ensuring that the payment of the invoice concerned was honoured. In other words his entertaining the fraudulent invoices before they had complied with the established procedure as well as his entering the name and signature of Vusie Silindza on some of the said invoices was calculated to mislead the officers responsible for processing payment to approve of same on the understanding the said invoices had followed all the stages including the verification that the work was done and therefore could be processed.

[82] Forgery consists in unlawfully and intentionally making a document tell a lie about itself as was stated in *JRL Milton's South African Criminal*

1996, Juta and Company at page 743. Did the first accused make the documents forming the subject matter of the relevant charges tell a lie about themselves, is the question I must ask myself.

[83] As referred to above the documents complained of as having been forged are invoices received in the name of Vusie Silindza by the first accused who went on to affix a signature on others as well as the contracts in which it is common course had the name of A.V. Mkhalihi written on it by the first accused.

[84] In line with the conclusion I have already reached above on why the first accused cannot escape liability for fraud, I cannot help to find that the intention was to have the documents, that is the invoices, herein, tell a lie about themselves, to the complainant's prejudice. The receipt of the documents by the first accused as if they were received by Vusie Silindza who was entitled to receive them, is to me a clear case of forgery, for whose liability the first accused cannot escape. The same thing should apply to the contract dated the 5th April 2004 -April 2005. I have no hesitation that the insertion of the name of A. V. Mkhalihi by the first accused on the contract as the person representing the police in the conclusion of the contract when he was not even there, was clearly in a bid to make the document tell a lie about itself which was that it had been signed by the person entitled to sign it.

[85] Although the first accused suggested that he had been mandated by the person entitled to sign the said contract in A. V. Mkhalihi, I have no difficulty in rejecting such a suggestion. No sound reason why Mr.

Mkhaliphi had had to authorize the first accused to sign such a document on his behalf. The court is informed by the warrant holder Mr. Petros Ndlangamandla, who corroborated Mr. A. V. Mkhaliphi that such a power could not even be delegated to a junior officer as it could be delegated to an assistant of a warrant holder. Thirdly it was suggested that PW 3 and DW 7 themselves used to authorize the payment of invoices backed by the same contract and they therefore could not be heard distancing themselves from it.

[86] That the Warrant holder and his reliever signed the said voucher to authorize the payment of invoices supported by the contract signed by A. V. Mkhaliphi, suggests carelessness of the higher than normal degree, but I cannot say they were aware of it, when they have come forward to say they had not scrutinized the documents involved but simply relied on the trust they had on the first accused. As a consequence, I am constrained to find that the first accused cannot escape liability on those counts for which the invoices were supported by the impugned contracts. The point is that the preparing of the contracts concerned when he was there and could have done it himself was an indicator that the said document was being made to tell a lie about itself.

[87] The same thing applies with regards the effect of the signing of the invoices as Vusie Silindza by the first accused. This means that the first accused cannot escape liability with regards to the said documents.

- [88] As regards uttering of the forged document well knowing it to be forged, the consideration is whether the accused person concerned, did put into effect a forged document or forged documents.
- [89] Again the evidence established that the documents forged by the accused when he inserted the names of the person authorized to sign the invoices on them, and also going on to sign the contract standing in as a Government Order in the name of the warrant reliever, A. V. Mkhalihi, were put into effect by him. The sole reason for doing so was to gain or achieve some advantage for his company and eventually for himself as he and his wife were the ultimate beneficiaries of the putting into effect of the forged documents.
- [90] I am therefore of the considered view that the first accused cannot avoid liability for all the counts of uttering he is charged with.
- [91] In his written submissions the Director of Public Prosecutions, required me to address the liability of the accused person as based on section 338 (1) of the Criminal Procedure And Evidence Act particularly vis -a -vis section 21 of the Constitution.
- [92] In view of the peculiar circumstances of the matter where the first and 4th accused persons are connected by the evidence to the offences with which they are charged, I need not answer the academic questions on what the effect of section 338 (1) of the Criminal Procedure And Evidence Act vis -a -vis section 21 of the Constitution is. I refrain from

deciding this question on the understanding that one does not need to

decide a constitutional question in a matter if it could be decided on some other legal grounds. The cases of Daniel Didabantu Khumalo VS The Swaziland Government Civil Appeal Case No. 31/2010 as well as that of S vs Mhlungu and Others 1995(3) S.A. 867 (CC) at paragraph 59 D - F and that of Zantsi vs Council Of State And Another 1995(4) S.A. 615 CC at paragraph 54 C-D are instructive.

[93] Consequently I have come to the conclusion that the accused persons cannot escape criminal liability to the charges preferred against them and I accordingly convict the first and fourth accused persons of the offences with which they are each charged.

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Delivered in open Court on this the ^{22nd} day of August

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N. J. HLOPHE JUDGE