



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No. 138/2009

In the matter between

**REX**

and

**MPHUMELELO MAMBA  
ELPHAS SANELE VILAKATI  
NDUMISO MAMBA  
MULTI TRADE INVESTMENTS (PTY) LTD**

**Neutral citation:** *Rex v Mphumelelo Mamba & Others* (138/09) [2013]  
SZHC 242 (24<sup>th</sup> October 2013)

**Coram:** Mamba J

**Heard:**

**Delivered:** **24 October, 2013**

[1] Criminal Law – on a charge of fraud that accused unlawfully and intentionally misrepresented to Government that they had completed repairs to certain motor vehicles as required. Government paying as a result of such misrepresentation. Motor vehicles found at premises of accused being repaired. Accused informing the court that latent defects in the repairs discovered by Government after payment and motor vehicles then returned for proper repairs.

- [2] Criminal Law – incompetency or unworkmanlike performance not per se evidence of fraud.
- [3] Criminal Law – liability of company servants or directors. Director resigning as such but remaining signatory to company bank account. Such resignation not real, ineffectual, and a sham. Such Director guilty as a servant of the company under section 338 of the CP&E.
- [4] Criminal Law – company controlled and governed in every way by two directors who are share holders. Company their alter ego and they are personally criminally liable.
- [1] The accused face an indictment that alleges that they are guilty of seven counts; the first six of which are of the crime of fraud whilst the last count is that of theft. It is alleged by the crown that the accused, in committing the said crimes, were acting in furtherance of a shared or common purpose.
- [2] It is common ground that at all times material hereto, the first accused (hereinafter referred to as A1) was an employee of the Central Transport Administration (CTA) and as such, was, amongst other things responsible for inspecting and certifying whether or not government vehicles that had been given to private panel beaters and spray painters had been competently done or repaired. The 4<sup>th</sup> accused (A4) was one of such private garages or workshops that repaired Government motor vehicles entrusted to them by the Central Transport Administration, on behalf of the Government. The other two accused persons were directors of A4.

- [3] At the close of the crown case, A3 was acquitted and discharged on all counts as there was no evidence implicating him with any of the offences herein. He was at the material time a student and did not play or take part in the day-to-day running or operations of A4. He was in a way, a dormant or sleeping director. There is further no evidence to prove that he knew that these crimes were being committed in the name of A4 and that he could have prevented or stopped such crimes from being committed.
- [4] Initially, A1 was also a director of A4 but later resigned his directorship. He said he did so after being advised that because of his role and functions at the Central Transport Administration also involved outsourcing the repairs of Government motor vehicles to A4, this could pose a conflict of interest. I shall return to this aspect of the matter later in this judgment.
- [5] On count 4, the crown alleges that on or about 19<sup>th</sup> October, 2004 the accused acting in the furtherance of a joint and common purpose did unlawfully and with intent to defraud, misrepresent to the Accountant General that the necessary repairs on motor vehicle SG 133 WO had been duly undertaken and completed and thus by means of the said

misrepresentation induce the Accountant General to pay to A4 a sum of E47,670.00. The crown alleges that when the accused made this misrepresentation, they knew that it was false inasmuch as the said motor vehicle had not been completely repaired.

[6] At the close of the crown case, it emerged from the evidence of Elyan Masuku (PW2), that when the Board of Directors of the Central Transport Administration visited A4's premises on 21 December, 2005 this motor vehicle had been fully repaired and was ready for delivery to the CTA. Whilst it was not clear when the required repairs were completed, payment for such repairs had been made to A4 on 19 October, 2004. Consequently, as there was no evidence to establish that there was a fraudulent misrepresentation on this count, the accused were acquitted and discharged on this count.

[7] Section 338(1) of the Crimininal Procedure and Evidence Act 67 of 1938 provides that:

‘In any criminal proceedings under any statute or statutory regulation or at common law against a company, the secretary and every director or manager or chairman thereof in Swaziland may, be charged with

the offence and shall be liable to be punished therefor, unless it is proved that he did not take part in the commission of such offence, and that he could not have prevented it.’

It is on the basis of these provisions that A2 and A3 were charged with these offences herein which were essentially committed by A4’s servants in the name of A4. The philosophy or rationale behind section 338(1) are not difficult to fathom. A company though itself a legal persona or entity, is an artificial persona. It has no mind or hands of its own by which it may carry out or do any juridical act. Its acts or mind are those of its directors and other officials that are entrusted with its operations. Therefore, such officials are, in the main, responsible or liable for the criminal acts they commit on behalf of the company.

[8] PW1, Polycarp Dlamini, was the General Transport Manager of the Central Transport Administration at the time material herein. He told the court that A1 was the Operations Engineer at the CTA. He also informed the court that A2 had also worked in the Accounts Department at the CTA from 1995 until 2004.

[9] It is common cause that the procedure employed in outsourcing the repairs of motor vehicles from the CTA to independent or private panel beaters and spray painters was that the CTA would issue a service Request form to the service provider stating or listing the type and nature of the work requested and in turn the chosen service provider would also state and itemize the charges, including labour for it. Once the required work had been done or performed, the repairer would then verbally inform the relevant department within the CTA of this fact. Upon receipt of this information, a technician or inspector from the CTA would then go and inspect the said motor vehicle and if satisfied that indeed the work had been done or carried out as required, he would certify this in writing on the service request form. This inspection would take place at the premises or workshop where the motor vehicle had been repaired and not at the CTA. The repairer would then and only then send an invoice to Government requesting payment for the services done and certified as aforesaid. The next step would be the issue of a payment voucher by the relevant department instructing the Account General to make the requisite payment for the services rendered. If satisfied with all the documentary information, the Accountant General would then cause a cheque in the stated amount to be issued to the relevant service provider.

[10] In the instant case, it is common cause that it was A1 who made the relevant certification that the motor vehicles that are the subject of the relevant counts herein had been adequately repaired and completed. I now deal with these counts in turn hereunder.

[11] Count one relates to motor vehicle SG 383 WO. The crime was allegedly committed on 25 May 2004 and the government was allegedly defrauded a sum of E59 950.00. This count is linked to count seven wherein the crown alleges that the accused billed the government twice for the same service. The essence of the allegation and submission by the crown is that the accused issued two invoices for the same task and caused government to make payment to A4 for double the stipulated work or service. I shall advert to count 7 presently.

[12] According to PW1, the purchase order or service request form (exh N) in respect of motor vehicle SG 383 WO was issued and dated 15 April 2004. The corresponding invoice from A4 is number 059 and is dated 27 April 2004 and the relevant payment voucher is number 251 and is dated 15 May 2004. This voucher is for a sum of E87 610.00 comprising E59 950 in

respect of repairs to SG 383 WO and a sum of E27 660.70 being repairs to motor vehicle SG 601 AG. The relevant or corresponding cheque bears number 557312 and is dated 24 May 2004. (See exhibits K, L, M, N and O).

[13] PW2 stated that when he and his team visited A4's premises on 21 December, 2005, motor vehicle SG383 WO was one of the Government motor vehicles that were there and was still under repairs.

[14] Count two refers or relates to motor vehicle SG 493 CP. The relevant service request form is exhibit F and is dated 09 August 2004. Again its repairs were certified as having been completely and adequately carried out by A1. There is no date indicated for this certification. The relevant invoice from A4 is number 072 (exh G) and is dated 23 September 2004 and the total charge is a sum of E37 458.27. The relevant payment voucher is B244 dated 22 September 2004. The Government settled this amount using cheque number 608801 (exhibit I). The purchase order in this case was issued and signed by PW1. Exhibit I is dated 23 September 2004. Again, the motor vehicle concerned herein was on 21 December 2005 found at A4's premises apparently still under repairs.



[15] The relevant exhibits in respect of count three are A, B, C, D and E being the service request form, invoice number 074, Government Purchase Order Number 106935, payment voucher number 187 and cheque number 624916 dated 19 October 2004, respectively. The amount involved is a sum of E73 469.00.

[16] Motor vehicle SG 119 WO, or at least the repairs thereto, is the subject of count five. The crime is said to have been committed by the accused on 3 November, 2004. The amount that was allegedly defrauded from the government is a sum of E25 160.00. The evidence of PW1 shows that the purchase order is number 106933 and is dated 12 October, 2004. The corresponding invoice from A4 is number 076 and is dated 29 October, 2004. The relevant payment voucher is B42 and is dated 2 November, 2004 whilst the relevant cheque bears the date of the following day ie 3<sup>rd</sup> November, 2004. These are exhibits Q,R,S and P respectively. Again motor vehicle SG 119 WO was one of those vehicles found by PW2 still under repairs at A4's premises on 21 December, 2005.

[17] The pattern repeats itself in count six where motor vehicle SG 372 HE is involved. This crime is said to have been committed by the accused on or

about 22 December 2004 and the money involved is a sum of E46 129.00.

The relevant documents are as follows:

(a) Purchase Order Number 106950 dated 25 November, 2004, exhibit W;

(b) Invoice Number 084, exhibit V; dated 6 December 2004.

(c) Payment Voucher B191, exhibit U dated 22 December 2004 and

(d) Cheque Number 655981 for E46 129.00 dated 22 December 2004 payable to A4. Again, PW2 said the relevant motor vehicle was found at A4's premises on 21 December 2004 and it was evidently being repaired or fixed.

[18] On count seven the Crown alleges that the accused did unlawfully and intentionally steal money in the sum of E59 950.00 which was the property of the Swaziland Government. This is alleged to have been committed on 24 December, 2004. In support of this charge, the crown relied on the evidence of PW1. The evidence in this case is contained in exhibit X, Y, Z and AA. The cheque in this case is dated 25 January 2005 whilst the invoice from A4 is Number 060. The crown alleges that this is an unlawful duplication of invoice 059 dated 27 April 2004 in respect of motor vehicle SG 383 WO.

[19] On the last count (in the preceding paragraph) the accused have stated that this was another totally new work or task altogether. It was the same motor vehicle and it had exactly the same type or nature of damage on it and thus attracted the same nature of repairs and charges as the earlier one. The sum total of this assertion is that the charge in question was legitimate and lawful. There is, however, apart from the evidence of the accused, not even an iota of evidence to support this assertion. One has to bear in mind in the circumstances of this case that the relevant invoice by A4 is Number 060 which comes immediately after invoice Number 059 which is the invoice for the same motor vehicle but bearing a different date. Invoice 060 is dated 24 January, 2005 and invoice 059 is dated 27 April 2004. Invoice 061, issued by A4 and presumably from the same invoice book, is dated 18 May 2004. It is therefore totally incongruous and totally inexplicable why invoice Number 059 was issued much later than the other invoices numerically or chronologically coming after it. Having considered the evidence by the crown and the total circumstances herein, I have no hesitation in accepting the evidence by the crown that there was a deliberate, intentional and unlawful duplication of the services that were rendered by A4 to the government in respect of the motor vehicle in question. The crown has, beyond any reasonable doubt, proven its case on count seven.

[20] On the other five counts that remain, the accused have conceded that the motor vehicles in question were found at A4's workshop in December, 2005 by PW1 and his team. The accused also accept and acknowledge the fact that by this time, A4 had already been paid by the government for the services agreed upon. The accused have testified that A4 had indeed carried out or rendered the required services and delivered the motor vehicles to Government but the government had later returned them complaining that the motor vehicles had not been competently serviced or done. They referred to them as return jobs ie, that A4 was re-doing or properly servicing the motor vehicles in respect of the initial damages. This, the accused asserted, accounted for the lack of any other documentation other than those papers exchanged between the parties for the initial work on each vehicle.

[21] The accused further testified that there was evidence showing that the motor vehicles in question had refueled from some of the government fuel depots after the dates on which they were paid for by Government, but before the 21 December 2005 when they were found at A4's premises by PW2 and his team. The accused argued that these refueling instances proved that these

motor vehicles were at the time of refueling, being used by the relevant government departments.

- [22] In terms of exhibit JJ which is the CTA system-fuel consumption per vehicle for the period 01 January, 2003 to 30 September 2009, motor vehicle SG 383 WO refuelled on 17 May 2005, 27 June 2005 and 03 October 2005. According to exhibit L and N this motor vehicle was certified by A1 and A4 as having been adequately and completely repaired on 27 April 2004. For it to refuel on the dates stated above it must have been in the possession and use by the government. But then that it was later found at A4's premises in December 2005 would suggest that it must have been subsequently returned there. This, in my judgment is a reasonable if not plausible deduction or reasoning and supports the evidence of the accused that this was a return job.
- [23] Exhibit HH indicates that motor vehicle SG 493 CP refueled on 02, 07, 08 and 10 December, 2005. Again PW2 and his team found it at PW4's premises on 21 December of that year. Payment regarding its repairs was on 23 September, 2004 (count two).

- [24] Again, when it comes to count three where vehicle SG 642 WO is in issue, exhibit II indicates that this motor vehicle refueled on 31 January 2005, 09, 17, 21, 24 February 2005, 02 March 2005 and 12 September 2005. On the other hand payment for its repairs was done on 19 October, 2004. (See exhibits B, C and D).
- [25] Motor vehicle SG 119 WO is the subject of count 5. As per exhibit P, Q, R and S the repairs to this vehicle were completed in October 2004 and payment for such services was made by Government on 03 November 2004. This vehicle later refueled on 22 November, 2005, which again is a date before it was found by PW2 at A4's premises. (See exh FF).
- [26] Exhibit GG records that vehicle SG 372 HE refueled on the following dates: 01 February 2005, 06 May 2005, 24 May 2005, 21 and 29 November 2005, 02, 05 and 08 December 2005. Again these are dates prior to this vehicle being found by PW2 at A4's premises. Again these dates relate to a period after the said vehicle was repaired, delivered to and paid for by Government. (See exhibits T, U, V and W). This evidence also answers the crown's argument on this count (6).

[27] The crown has not disputed the evidence relating to the refueling of the vehicles in question. As I have already stated above, this evidence reasonably suggests that the vehicles in question were being used by the government at the relevant time. That they were later found at A4's premises being repaired, strongly suggests that they had been returned to A4 to be properly fixed or repaired. This strongly suggests that the initial repairs had been incompetently done and this had been only discovered after the motor vehicles had been delivered to and paid for by Government.

[28] The accused have not been charged with having incompetently repaired the motor vehicles, or that their services were unworkmanlike or anything of the sort. The charge is that they misrepresented to Government that they had completed the required repairs and that because they had carried out their part of the bargain or contract, they had to be paid. There is no evidence that, assuming of course that the vehicles were incompetently repaired and had to be re-done; the accused knowingly and wittingly set about to defraud Government by incompetently undertaking the repairs in question. The evidence merely suggests that the Accused's workmanship was not up to the required standard. It was poor and incompetent.

[29] For the above reasons, I hold that the crown has failed to prove its case on the required standard of proof beyond a reasonable doubt against any of the accused herein on counts one, two, three, five and six herein. They are all found not guilty on these charges and they are acquitted and discharged thereon.

[30] I have, however, found that there was a deliberate and unlawful duplication of the charges pertaining to motor vehicle SG 383 WO. This duplication resulted in a double payment by government to A4 and this double payment is the subject of count 7.

[31] A1 has told the court that he resigned as a director of A4 in or about 2003. He said he did so in order to prevent a conflict of interest as he was responsible for outsourcing repairs of CTA motor vehicles to A4. He however, remained a signatory to A4's bank account. He said he was requested to do so by A2 as A2 could not find another person to replace him. This is totally unacceptable and totally unreasonable and unconvincing. A1's so called resignation was not real. It was a sham or ruse aimed at insulating him from the dealings or workings of A4. He remained, in my judgment, together with A2, the brains and driving force behind A4. Both



controlled and governed A4. This assessment accords with the provisions of section 338 (6) of the Criminal Procedure and Evidence Act. In reality A4 existed on paper only. It was their alter ego.

[32] For the foregoing A1, A2 and A4 are found guilty and are convicted of the theft of E59 950-00 from the Swaziland Government as alleged in count seven.

**MAMBA J**

**For the Crown : Mr A. Makhanya**

**For Defence : Mr B.S. Dlamini**