



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

**Criminal Case No. 241/12**

**THE KING**

**And**

**THULI MKHONTA**

**ACCUSED**

**Neutral citation:** *The King v Thuli Mkhonta (241/12) 2014 [SZHC] 38*

**Coram:** OTA J.

**Trial commenced:** 13 FEBRUARY 2013

**Trial ended:** 5 DECEMBER 2013

**Delivered:** 13 MARCH 2014

**Summary:** Criminal procedure: The Accused an employee of the Master's office is charged for the offences of Fraud, Forgery and Uttering. Fraud: ingredients constituting offence. Accused is found to be complicit in the unlawful misrepresentation with the intent to defraud, through a forged prospectus, which was presented to the Assistant Master as genuine and authentic and which induced the Assistant Master, to his loss and prejudice, to pay the sum of E40,000=00 out of a deceased estate held at the

Master's office. Accused is found guilty of Fraud: Forgery; the Accused is found to have aided and abated the forgery of the fraudulent prospectus. Accused is found guilty of forgery. Uttering: This offence embodies the same ingredients as the offence of Fraud; it constitutes an unnecessary splitting of charges which is prejudicial to the Accused. The Accused is discharged and acquitted of the offence of Uttering in the circumstances.

## JUDGMENT

OTA J.

[1] The Accused Thuli Mkhonta is charged on two counts of offences as follows:-

### “COUNT ONE

**The accused person is guilty of the crime of FRAUD**

In that upon or about the 16<sup>th</sup> February 2012 and at or near Manzini area in the Manzini region, the said accused person acting within the course and scope of her employment as a civil servant stationed at the Master of The High Court Manzini office, did unlawfully and with intent to defraud, misrepresented to the Assistant Master of the High Court that a request dated 16<sup>th</sup> February 2012 of E40,000=00 purported to pay school fees for a child in South African Flight Training Academy which they then and there produced, exhibited and submitted to the said Assistant Master of the High Court to his loss and prejudice was genuine and authentic, and did thereby by means of the said misrepresentation induce the said Assistant Master of the High Court to sign and grant the sum of E40,000=00 from Account number 04000003548.

WHEREAS the accused person at the time she made the aforesaid misrepresentation well knew that the said request dated 16<sup>th</sup> February 2012 was not genuine and authentic and that the said Phila had never enrolled at South African Fight Training Academy and was not entitled to the payment of E40,000=00 and thus the accused person did commit the crime of FRAUD.

## COUNT TWO

**The accused person is guilty of the crime of (a) FORGERY (b) UTTERING a forged document knowing that it was forged.**

- (a) In that on or about the 16<sup>th</sup> February 2012 and at or near Manzini area in the Manzini Region the accused (sic) Master of the High Court – Manzini office, did unlawfully falsely and with intent thereby to defraud and to the prejudice of the Assistant Master of the High Court, forge an instrument in writing to wit, a prospectus purporting to be prospectus of school fees for Phila Mamba from the South African Flight Training Academy for the payment of E37,990=00 and thus the accused did commit the crime of FORGERY.
- (b) In that upon or about 16<sup>th</sup> February 2012 and at or near Manzini in the Manzini Region the said accused (sic) Master of the High Court Manzini office, did unlawfully and with intent to defraud and to the prejudice of the Assistant Master of the High Court, offer, utter and put off the said forged document to the Assistant Master of the High Court, she, the accused, when she so offered, uttered and put off the aforesaid instrument, well knowing that it (sic) to have been forged and did thereby commit the crime of UTTERING”.

[2] When the Accused was arraigned before this court, she pleaded not guilty to the charge which elicited a full blown trial. The Crown led a total of 7 (seven) witnesses in support of its case.

[3] PW1 was Sihle Easter Dlundu an Assistant Master of the High Court attached to the Master’s office Manzini. His duties included rounding up the estates, custodian of deceased estates and to supervise the Master’s office in Manzini. PW1 informed the Court that beneficiaries sometimes requested for money from estates. After they filed the requests with the clerks, the file is brought to him for signature or when there are disputes in the files they are brought to him to try to resolve the disputes. PW1 told the Court that quite apart from the names on the files, the Master’s office also gives the files estate file numbers in a bid to differentiate

them. PW1 identified the Accused person as Thuli Mkhonta. He told the Court that the Accused is one of the clerks employed at the Master's office Manzini and does the job of clerks as he has described. He said Accused in her day to day endeavours is involved in requests for money by beneficiaries and that he has worked with the Accused since the 1<sup>st</sup> of July 2011. It was further PW1's evidence, that on the day in question he received a file in which there was a request for the sum of E40,000=00 from one Nokuthula Dlamini (PW2) who is also a clerk at the Master's office Manzini. PW2 informed PW1 that she was actually bringing the file on behalf of the Accused who was in her office. PW2 told PW1 that she should not be the one to be questioned about the file. PW1 told the Court that he does not know why the Accused was in her office since she was still on leave. The file PW1 received from PW2 was for Sphephile Happiness Mamba (PW5), who is the surviving spouse of Mahlakaniphane Peregrine Mamba (the deceased). The estate file for the deceased is held under file number EM3/2012. The request was in respect of payment of school fees for Phila Mamba (PW3) who was alleged to have been attending the Flight Academy in South Africa. Apart from the name of PW3 on the request, he was further identified with passport No. 10016446. The duration of the training was for 6 months at the cost of R37,990=00.

- [4] It was further PW1's evidence that he then checked through the file to ensure that all the requisite documents were in order before he issued the request. He found all the necessary documents in the file, namely, a hand written letter alleged to have been written by PW5 (exhibit D), a typed version of exhibit D (exhibit D1), a letter alleged to be from the South African Flight Training Academy confirming that PW3 is a student enrolled with them (exhibit E); a bank statement showing the balance of E164,935=00 in the account of the deceased (exhibit F); a death notice indicating that PW3 and PW5 were beneficiaries in the deceased estate (Exhibit

A) and a letter directing Nedbank to pay an amount of E40,000=00 to PW5 to take care of the fees in respect of PW3 (exhibit C). Exhibit C was initialed by PW2 who prepared it as per the procedure in the Master's office. He then asked that PW5 should come to his office the following day before he approves the request. The reason he made this request was because the money requested was much and there were other children named in the deceased estate who also had to benefit. He thus wanted PW5 to agree that if he gave her the money it will be counted as benefit for both herself and her child who was going to school. When PW5 came she confirmed that her son was attending the flying school but she appeared to be nervous.

- [5] PW1 told the Court that he further looked at the letter from the South African Flight Training Academy confirming that PW3 was indeed a student. After satisfying himself with these documents, PW1 signed the letter (exhibit C). Exhibit C which is dated 16<sup>th</sup> February 2012 was directed to Nedbank addressed to the Manager. It authorized the bank to pay to the deceased's surviving spouse PW5 the sum of E40,000=00 to pay school fees for Phila Mamba, PW3. At the time he signed exhibit C, PW1 was not aware that the sum of E50,000=00 had previously been paid out of the estate to PW5 as there was nothing in the file indicating such payment. However, based on suspicions then circulating in the office about the request for E40,000=00, after about an hour after PW5 had gone to the bank, he called the bank to confirm that there had been no previous withdrawals because the file did not show any. When he made the call the bank told him that there was a withdrawal of E50,000=00 in January 2012. Based on this information, PW1 called PW2 who had handled the file and asked her about the documents evidencing the previous withdrawal as there were supposed to be copies in the file. PW2 told him that she found none in the file when she wrote exhibit C on behalf of the Accused. PW1 then called the Accused and asked her

about the documents since she handled the file. PW1 told the Court that the Accused told him that the document may have fallen out of the file. She then proceeded to her office and came back with the letter for the withdrawal of E50,000=00 saying that she found it in her office and it might have fallen there. PW1 however refused to collect the document from the Accused and rather elected to print a copy of same from the computer. The letter is in evidence as exhibit B.

[6] PW1 told the Court that in exhibit B which was addressed to Nedbank, the former Master Magagula had authorized the sum of E50,000=00 to be paid to PW5. That if he had been aware of this he would not have approved payment of the subsequent sum of E40,000=00 to the same person. This is because this means that a total of E90,000=00 out of the E164,000=00 in the estate will be paid to PW5 alone who had only three children and the balance of the money left will not be sufficient for the other dependants. PW1 told the Court that in the wake of these events, he telephoned PW5 and told her that he had wrongly approved the request for the payment of E40,000=00 to her and she had to return the money. PW5 said she had the money with her and PW1 could go and collect it. She did not query why she had to return the money. It was further PW1's evidence that PW5 told him that she was sorry for what had happened. That an officer by the name of Thuli in the Master's office misled her into making the request. PW1 told the Court that apart from the Accused there is another Thuli in the office who is a cleaner. PW1 said that when PW5 told him that Thuli had misled her, he understood her to be referring to Thuli Mkhonta the Accused because the other Thuli does not handle files.

[7] PW1 told the court that he called a friend of his who is a police officer at Manzini to assist in the recovery of the money. The police officer called PW5 and asked

her to take the money to the Siphofaneni Police Station. They proceeded to the Siphofaneni Police Station where they found PW5 and the money. Since it was dark and the Siphofaneni police had no vehicle to escort them and there was also no safe at the Master's office to keep the money, they left the money at the Siphofaneni Police Station. The money was picked up on Monday with an escort from the Siphofaneni Police Station and deposited at a Government Guardian Fund.

[8] PW1 told the court that exhibit E turned out to be fraudulent because he telephoned the South African Flight Training Academy and they denied any knowledge of a student called Phila Mamba. They told him that Phila Mamba had never enrolled with the Flight Academy. PW1 told the court that the genuine version of exhibit E belongs to another file in estate number EM492/06 for the deceased Hebron Ticalo Sukati. One of the beneficiaries in that estate was Tanele Mandisa Sukati who was in fact a student at the South African Flight Training Academy. The Accused was the one also working on this file.

[9] Under cross-examination, PW1 told the Court that he heard that the Accused was not employed as a clerk in the Master's office but as a switch board operator but she was allowed to perform clerical duties that she in fact was not employed by Government to perform. PW1 told the Court that he cannot deny Accused's instructions that she retrieved the missing documents (exhibit B) from the photocopying office and not her office. PW1 agreed that in Swaziland the name Thuli is used to shorten many names including Nokuthula. He stated that it was Nokuthula that brought the Mamba file to him and not the Accused. PW1 agreed that at no stage did the Accused make a request to him to approve the request of

PW5. He agreed that at no stage did the Accused present exhibits E, D and D1 to him. He agreed that he never saw the Accused forge exhibits E, D or D1.

[10] PW1 told the Court that in the wake of a request he has powers to approve less money than requested depending on the available amount. He told the Court that since the request was for E37,990=00, PW2 merely rounded it up to the amount of E40,000-00 which is the nearest ten as per the practice at the Master's office. That in the Mamba case a figure was already inserted but sometimes the clerks go to him with the letters without the figures to consult with him. He agreed that exhibit E which he saw before he approved the request stipulated that the student has to pay the deposit before acceptance. He agreed that no where in exhibit E was it stipulated that the student had to pay the sum of E37,990=00 which is the total sum of the course. PW1 agreed that exhibit E is not addressed to the Master's office and does not make mention of the file reference No. EM3/2012. He also agreed that exhibit D1 is typed and has a date which is handwritten and that D1 does not make mention of estate file No. EM3/2012. He agreed that the word donation in D1 is cancelled by ink but says he is not in a position to confirm whether the person who typed the letter was asking for donations for fees for her son studying in the Flight Academy. He said it could have been a typographical error. That such letters are received routinely by the Master's office and the staff do not concern themselves with the English as some of those people are not learned. PW1 agreed that no where in exhibit D1 did the author request for money to pay PW3's school fees but stated that notwithstanding, it is taken that the author is requesting money from the file. PW1 further agreed that exhibit D has no reference or request for funds. He told the Court that when PW2 brought the file to him, she told him that the Accused had asked her to put her (PW2's ) initials on the file since Accused was on leave. That PW2 was suspicious of the file and asked him to check the file through. This was before he signed the request.



[11] PW1 admitted that he recorded a statement with the police in relation to this matter. He told the Court that he thinks he signed the request after speaking to PW5 on the following day. He agreed that he did not include the issue of PW2 telling him that she was suspicious of the file in his statement. He agreed that in his statement he stated that it was an hour after PW5 left with the signed request that another colleague came and informed him that she was suspicious of the file. He agreed that his evidence in Court in this regard is inconsistent with his statement.

[12] PW1 said that it could be true that on 16<sup>th</sup> February 2012, the Sukati file was not in his office but in the photocopying room being worked on by the Accused. That he only had sight of the file which was among the bundle of files in his office, on the week following the incident. It was further PW1's evidence that since most of the members of the public who come to the Master's office need assistance to conduct their transactions sometimes such assistance entails showing them specimen of the necessary documents for them to understand it. PW1 further stated that it is correct that when he spoke to PW5 prior to signing the request, inspite of his concerns that the amount of E40,000=00 she requested was too much considering that there are other dependant in the estate,PW5 did not tell him that she had in fact previously received E50,000=00. He said he would have expected her to mention this after he showed his concern about the E40,000=00. PW1 stated that there was no letter in the file requesting the previous amount of E50,000=00 and he is not sure of what happened to the letter. It might have fallen out or been misplaced.

[13] PW2 corroborated the evidence of PW1 in material respects. She stated that the Accused had asked her to write the letter exhibit C to Nedbank. That when she

wrote exhibit C, exhibit B which is evidence of the previous withdrawal of E50,000=00 was not in the file. That when she received the file she checked through it in the presence of the Accused. That one of the documents that induced her to prepare exhibit C was the presence of exhibit E in the file. She was further induced to prepare exhibit C because the Accused told her that when the deceased was alive he previously paid for PW3's fees and that she was the one who was refusing that payment should be made to him and that PW3 will not have a bright future. The Accused said this after PW2 had commented that the amount of E37,990=00 requested in exhibit E was too much.

[14] PW3 Phila Mamba told the court that he attended school up to Standard Five (5) and he failed this class. He was doing Standard Five (5) in 2011. He told the court that he has no passport or travel documents and therefore he has never been outside the borders of the country. He denied being a student at the South African Flight Training Academy.

[15] PW4 was Siphiwe Hilda Mabuza. She told the court that prior to this incident when her father passed away that it was the Accused that helped her at the Master's office. They already had an established relationship. That when PW5 needed help on the estate of her husband she took PW5 to the Accused and the Accused retrieved the estate file which PW5 had already opened at the Master's office and then asked PW5 to go and draft a letter stating what she wanted. PW5 went home and drafted the letter and both of them went back to the Master's office and PW4 gave the letter to the Accused who took it to the Master Mr Magagula. The Accused came back with the Master and met them in her office. The Accused told them that there was E164,000=00 in the estate so there was enough money. The Master said he will not release the E64,000=00 which they had requested but

he could give less than that. Thereafter, the Master went out with the Accused who later came back and told them that the Master had agreed to release the sum of E50,000=00. The Master signed the letter and PW5 took it to the bank. After a few days the Accused called PW4 to ask if PW5 had not yet been paid the money because the Master said he wanted E5,000=00 out of the money. PW4 telephoned PW5 who confirmed that she had received the money. PW4 and PW5 took the money to the Master's office where they gave E5,000=00 to the Accused in her office. The Accused thanked them and said she will give the money to the Master. The Accused also asked them to come back as she was going to give them more money as the money in the estate was much.

[16] It was further PW4's evidence that at a later date they telephoned the Accused to make enquires about the deceased's car which PW5 also registered at the Master's office. Accused told them to find a prospective buyer and to take the buyer to the Master's officer in order to sell the car. They later went to the Accused at the Master's officer and told her that they could not find any prospective buyer but they had come to see her because she had told them that they must come back. It was then the accused wanted to know what they were going to use to request for the money because the last time they had used the fact that PW5 need food and wanted to finish an uncompleted building. PW5 didn't know of anything to use to request for the money.

[17] The Accused then asked them if PW5 had a male child among the beneficiaries who could be used to request the money. PW5 mentioned the name of Phila Mamba (PW3). It was then the Accused took exhibit H from another file and told them to go and write a letter using PW3's name to request for the money. The Accused told them that exhibit H is for a child attending a Flight Academy. She

told them to go to the mall to get the letter typed and that to get the money they must write just like in exhibit H which she gave them. They then left for the mall where they asked a typist to do a letter just like the one in exhibit H but it must reflect PW3's name. PW4 stated that Accused had told them that the money that PW3 was going to get was the money that he was to use to enroll at the Flight Academy and that that was the only way PW5 was going to get the money. The typist at the mall asked PW5 to write and they will type but PW5 could not write. They asked a boy at the mall to assist them in writing. He did, after which they gave the letter to the people there to put it in the computer. The photocopiers also photocopied exhibit H. PW5 said when they went back to meet the Accused at the Master's office they were carrying three documents namely exhibit H, the photocopy of exhibit H and the letter written by the boy and that they gave all the documents to the Accused. She said the Accused tore two of the documents leaving only the letter written by the boy saying that she only asked them to write a letter. She said they found the Accused not in her office but in the same room where she was preparing a document in a machine. That it was the same room from which the Accused had retrieved exhibit H from one of the documents stacked in the office and given it to them.

[18] PW4 stated that she saw the letter written the boy in the mall. It was written just like the last time but asking for money to take PW3 to school. It was a request for the amount of E40,000=00 she recalled. PW4 said that after PW5 got the money she later called her and informed her that she had been asked by the Master's office to return the money. PW4 identified exhibits D, D1 and H.

[19] Under cross-examination, PW4 admitted that when they prepared D and D1 they knew that the information contained therein was false. She said PW5 instructed the

typist at the mall to fill in the name of PW3 in exhibit E which is a document similar to exhibit H save for the names of the students appearing therein. She said the Accused asked them to write the name of the child on that document. She said they knew that what was on exhibit E was not right and that the intention was to deceive the recipient of exhibit E. She said PW5 was dictating the letter in exhibit D after she took out exhibit H which they had been given by Accused. She agreed that exhibits D and H are not the same save for the mention of the South African Flight Training Academy.

[20] PW5 was Siphephile Mamba the surviving spouse and the executrix to the estate of the deceased. She told the court that when she first went to the Master's office she met PW2 who wrote a letter for her to go to the bank in order to ascertain how much was in the deceased's bank account. She came back from the bank with information contained in a sealed envelope which she gave to PW2. PW2 told her that there was E164,000=00 in the account. PW2 then opened a file and registered her fully with her children. PW2 told her that she will be able to assist her if she could go and get school receipts for her children. It was then she approached PW4 for help. PW4 phoned an employee at the Master's office telling her that they will be coming to see her and the said employee said they must bring her nice things. PW5 then went to a nearby homestead and asked for a chicken which she has not paid for. The Master's office employee said that the chicken must be cooked when PW4 telephoned her. PW4 told her that the name of the Master's office employee that they were going to see is Thuli. She has come to know the said Thuli as the Accused person. When they got to the Master's office they met the Accused and PW4 told her that they needed help to get the sum of E64,000=00. The Accused asked what the money was for and PW5 told her that it was to complete her building, pay school fees for the children as well as buy food. The Accused then told them that she was not allowed to authorize more than E10,000. That they had

to involve the Master Mr Magagula. The Master came to the Accused's office and also told them the same thing. When the Master left the Accused's office, the Accused followed him out and later came back and told PW4 and PW5 that the Master had agreed to the sum of E50,000=00. Accused further told them that the Master wanted them to give him E5,000=00 for the assistance he gave them. The Accused then gave them a paper and asked them to go to Nedbank. She said that what was written in the paper was E50,000=00. It was further PW5's evidence that after the sum of E50,000=00 matured, she together with PW4 took the sum of E5,000=00 and gave to the Accused at the Master's officer as she had requested. PW4 went with her because the Accused had said that PW4 must come with her as she did not know PW5. After she gave the money to the Accused, the Accused told her that she could still come back because there was still money in the account. PW5 said that she was afraid of what the Accused said to her so she went back to PW4 and told her that she was afraid that the file might get missing considering the money she gave to the Accused. She asked PW4 to accompany her back to the Master's office as they had been told that meetings would be called yet those meetings had not been called. She told PW4 that she was afraid that her husband's car which she had also registered at the Master's office may be stolen. They telephoned the Accused who told PW5 to find someone to buy the car and then take him to her. PW5 could not however find someone to buy the car. She was later helped after the meeting of the next of kin when she was told to evaluate the car. Thereafter, she got someone to buy the car.

[21] PW5 told the court that based on the fact that the Accused had asked her to come back she approached PW4 who telephoned the Accused. The Accused told them that she was on leave but will be in the office by Thursday to do something. PW4 and PW5 thus went to the Master's office on the Thursday after the Accused had phoned PW4 to ask where they were. On getting to the Accused she asked them

what reason PW5 was going to give for getting the money. They told her that they did not have any. At that time PW5 did not have any reason in mind. It was at that juncture that the Accused said she was going to help them. She took a file from a corner and took out one paper from it (exhibit H). Accused then asked PW5 if she had a child that she could register in the paper. PW5 said she could register PW3. Accused told them that they must cancel the name of Mandisa Sukati written on exhibit H . Accused told them that the Sukati child had been enrolled in a Flight Academy and that they will use the paper to request for the money. The Accused then asked them to go and photocopy the paper. They went to the mall to photocopy the paper. She said all she understood from the Accused's explanation and the subsequent transaction at the mall was that she was to cancel the name of the Sukati child and put PW3's name. It was a boy in the mall who helped them to write the letter. She said its like what the boy wrote was then taken to the photocopiers and neatly photocopied. She said they then took the documents back to the Accused but she cannot recall if it was 2 or 3 documents they were carrying when they went back to the Accused. But she remembers it was the Sukati document and those they photocopied. She said the Accused tore one of the documents and put it in the bin but she cannot remember which one. She said the following day she called the Accused who asked her to meet her at Clicks. She met the Accused at Clicks and the Accused gave her the cheque for E40,000=00 yet on the paper on which they had been told to cancel the name of the Sukati child was written E37,000=00. The accused told her to go to the bank and that when she comes from the bank she should go to the Master's office because the Master wanted to see her. The Accused also told her that if the Master asks her how many of the children who are beneficiaries in the estate were her biological children, she should say all of them, meanwhile only three (3) of those children were hers including PW3. After she left the Accused she went straight to the bank and was given E40,000=00. Thereafter, she went to the Master's office and met PW1. PW1 asked her how many of the beneficiaries were her children and she

said three (3). He further asked her if PW3 was registered at the Flight Academy and she said yes even though that statement was not true. PW1 then told her that she and PW3 were not going to get any other money from the estate. Thereafter, she left the Master's office with the money and went straight to her house. At around 2 to 3 pm, PW1 telephoned her saying that she had committed an offence and asked that the money should be returned. She took the money to the Siphofaneni Police Station. PW5 further stated that the Accused telephoned her to find out what PW1 was saying, this was after PW1 had called her to return the money. The Accused asked her to delete her number from her cell phone and that she deleted the number which would have shown that the Accused called her after she had received PW1's call.

[22] PW5 told the court that PW3 schooled as far as standard 5 which he did not pass. PW3 does not have a passport. He has never been outside the country. He has never enrolled in a Flight Academy. PW3 is still in school and PW5 has plans of taking him to the Manzini Industrial Training School to learn plumbing and electrical works. She said there are nine (9) children who are beneficiaries in the estate, three (3) of which are her biological children. She said she was carrying all the documents when they returned from the mall but cannot recall how many the documents were and which one of the documents she carried from the Mall was torn apart by the Accused. She stated that among the document there was one that looked like exhibit E which had PW3's name and that they had gone to the Mall in the first place specifically to create that document for PW3.

[23] Under cross-examination, PW5 agreed that the first time she went to open the file at the Master's office she dealt with PW2, who told her that she needed to get a prospectus for her son to request money for his school fees. That she cannot



remember whether PW2 told her that the limit of the amount she could withdraw is E10,000=00. She insisted that when they first met the Master he said he could only give her E10,000=00. When the Master left the Accused followed him and later came back to inform them that she had persuaded the Master to give them E50,000=00 and that they will pay the Master E5,000. She insisted that she was the one who called PW4 to remind her that they had to go and pay the Accused E5,000 and not the other way round. She denied that the reason why there is contradiction in her evidence and that of PW4 on the issue of the payment of the E5,000 is because the story to the effect that the Accused asked them to pay the E5,000 to the Master is fabricated. She said that it is not true as alleged by the defence that they paid the E5,000 out of their own free will and volition. She said that she does not know that PW4 requested that the Accused gives her some money out of the E5,000. All she knows is that the Accused asked her to give PW4 about E500 because she also helped her. She said that it is not true that the Accused did not tell her to tell the Master that all the children were hers. She said that it is not true that after the transaction of the E50,000=00 that all the Accused told her was that she should be free to come back to the Master's office for any help she needed in relation to the estate. She insisted that the Accused told her to come back because the money is still there and this was what prompted her to go back to the Master's office. That she also feared that the estate file would get missing. Even though she had no reason on that occasion to request the money it was the Accused that suggested that they get a prospectus for school fees by inserting a child's name in a photocopy of exhibit H. She and PW5 then decided to insert PW3's name. She agreed that she was the one who told the person in the mall to insert PW3's name in the copy of exhibit H and not the Accused. She admitted that when she instructed the person at the mall to insert PW3's name in exhibit H, she knew that the import would be that PW3 was schooling in South Africa even though that was false, but that she did not know that she was

committing an offence since she was instructed to do so by the Accused who is a staff in the Master's office. She thought that was the rule in the Master's office.

[24] She agreed that the only document that the Accused gave her was exhibit H. That she prepared exhibits D and D1 in the mall and they are different from exhibit H. That she does not know which one of the documents that the Accused tore.

[25] PW6 was Sikholiwe Busisiwe Magagula who stated that she typed exhibit C after being given the file by PW2 who had written the letter. She also told the court that the Accused asked for exhibit C from her and she gave it to the Accused.

[26] PW7 Makhosazane Shongwe of Nedbank testified in relation to how the bank received exhibits B and C and carried out the written instructions. She also showed the court exhibits F and G which are bank statements relating to the estate in issue. Exhibit F shows the original balance of E164,935.03. Exhibit G shows the balance of E74, 885.03 after the two (2) payments of E50,000.00 and E40,000.00 respectively had been effected against the account.

[27] PW8 was 4352 Detective Constable Goodness Dlamini the investigating police officer. She stated that in the course of her investigations she interviewed PW5 and PW3 and that PW3 confirmed that he was a school drop out of standard 5 and that he never applied to the Flight Academy in South Africa. From interviewing PW4 and PW5 she got information that PW5 got help on how to fraudulently claim money from the Master's office (through the forged prospectus for PW3), from an employee of the office who was introduced to her by PW4. That the

employee took a document from another file and gave to PW4 and PW5 to go and make some amendments. PW8 and other investigating officers proceeded to Guateng where the South African Flight Academy indicated in the forged prospectus is located. They interviewed one Candice Oconor who is the Marketing Manager of the Flight Academy. They established that the documents for PW3 were not valid. Candice Oconor told them that PW3 never applied nor registered at the Flight Academy. She disowned the documents for PW3. PW8 and her team also discovered that it was Tanele Sukati that was schooling at the Flight Academy and that the information in the alleged prospectus for PW3 were the same information in the acceptance letters for Tanele Sukati. The information in the acceptance letter included the passport number, the course Tanele was attending, the amount of fees and the duration of the course. It was clear that the difference from the two documents were the students names. It was this acceptance letter and enrollment document belonging to Tanele that was sent by the South African Flight Academy to the Master's office for payment of her fees from the deceased estate of Mr Sukati. This convinced her that someone in the Master's office who had access to both files perpetrated the crime.

[28] PW8 also confirmed from bank statements she obtained from Nedbank that two transactions had taken place in the Mamba estate account. An earlier withdrawal of E50,000=00 authorized by the Master Mr Magagula and the subsequent withdrawal for E40,000=00 authorized by PW1. She made a court order to FNB and verified that the earlier withdrawal of E50,000=00 was deposited in PW5's account. PW8 through the help of the Home Affairs Department also established that the passport no as indicated in the document of PW3 was lawfully issued to Tanele Sukati. PW8 further interviewed some officers from the Master's office and obtained statements from them. Her investigations led her to the Accused person. She cautioned the Accused in terms of the Judges Rules and the Accused

opted to write a statement on her own. Thereafter, PW8 charged the Accused for the offences of fraud and forgery. Nothing turns on the cross-examination of this witness.

[29] In her defence the Accused testified on oath and called no witnesses. She stated that she did not represent to the Assistant Master that PW3 was enrolled at the Flight Academy. She said that when PW5 came requesting for school fees she asked her if they had brought a prospectus. They asked what a prospectus was and Accused then looked at another file and took a prospectus (exhibit H) from there photocopied it and then gave it to them and they left and came back at around 1 pm. In exhibit H Tanele Sukati is the student. She said she did not prepare exhibit E. She did not assist PW5 in preparing exhibit E. PW5 and PW4 did not state in court that she assisted them in preparing exhibit E. She did not help them to print the document. She did not prepare either exhibits D or D1 and she did not assist PW5 in preparing the documents and PW5 did not state in court that Accused helped her in preparing the documents. She did not advice PW5 to go and photocopy exhibit H as she alleged. She did not advice PW5 to put the name of PW3 on exhibit E.

[30] Accused further told the court that she met PW5 through a relative of hers who told her that PW5 wanted to come to the Master's office to ask for school fees. She told her relative that they must go to the office because she was on leave. Upon their insistence that they wanted to deal with her alone, she told them that she will go back to the office on a Wednesday to finish up with work which she left behind there and proceeded on leave. When they met her in the office was when she gave them the photocopy of exhibit H. They left and came back at 1 pm with the sample of prospectus she gave them. When she realized that the copy of the prospectus

they brought back bore South African Flight Academy, she tore it up and threw it away. She then took them to PW2 to help them since she was on leave. She left them with PW2 and went back to continue with her work. Accused said apart from the document with South African Flight Training Academy, PW4 and PW5 were also carrying other documents on which was written to whom it may concern. Even though she did not read these other documents she realized that one was typewritten while the other one was handwritten. That she attached these documents to the file and handed it over to PW2. That when she tore up the document written South African Flight Training Academy PW5 complained saying that they spent money to do it but she told PW5 that the document did not belong to her file but to another file. Accused said that she did not remove exhibit B from the file and that it was eventually retrieved from the computer. She said that when PW5 came back to her with the documents she did not know that they contained a misrepresentation of facts. That she did not stand to gain anything from the money which PW5 was to get from the Master's office. She denied ever talking about a motor vehicle which was in the possession of PW5. That when PW4 called her all she talked about was that PW5 wanted to ask for school fees.

- [31] Under cross-examination, the Accused told the court that before she handed over the file to PW2 for processing she attached about 2 to 3 letters to the file but that she could not remember exactly which letters although she recalls a handwritten one. She said she did not take note of exhibit E and does not know if it was in the file before she gave it to PW2 for processing. All she remembers is that she tore the paper which had South Africa flight Training Academy written on it. Accused admitted that as at the time of processing the request she knew that a previous request of E50,000=00 had already been made in respect of the same file. She agreed that she knew about exhibit B before the transaction. Accused agreed that PW2 testified that after she gave her the file she checked through it thoroughly to

see if the documents were in order. Accused also agreed that PW2 stated that one of the things that made her process the file was the presence of exhibit E, the prospectus in the file. She stated that she does not know how exhibit E ended up in the file since she tore it up. She however agreed that PW1 also testified that he saw exhibit E in the file before he signed exhibit C.

[32] Accused further told the court that she cannot recall PW4 and PW5 telling the court that she had told them to remove the name of the Sukati child and put the name of PW3. She said that all these witnesses said to the court was that she had asked them to photocopy exhibit H. Accused however agreed that she had given a photocopy of exhibit H to PW4 and PW5. The Accused agreed that when she first collected the file for the Mamba estate from PW2 she checked through it so she knew of the number of beneficiaries in the estate. The Accused admitted receiving the sum of E5,000=00 from PW5 after the first transaction of E50,000=00 but says PW5 gave it to her as a token of her appreciation. She said that when she gave PW2 the file to process she could not have instructed PW2 on what to do because she is just a switch board operator and PW2 is senior to her. She stated that her telling PW2 that PW3's father had previously paid his fees was not a sin.

[33] It is on record that both sides filed written submissions which they embellished orally in court. I have had due regard to the contentions advanced by both sides. Having carefully considered the totality of the evidence led, I find that the common cause facts of this case are as follows:-

(1) At the death of Mahlakaniphane Peregrine Mamba his deceased estate was registered at the Master's office under estate file No. EM3/2012.

- (2) Also registered at the Master's office are nine (9) beneficiaries of the estate including PW3.
- (3) PW5, the surviving spouse of the deceased and the executrix of the estate is the biological mother of three (3) of the beneficiaries including PW3.
- (4) The balance of the account of the deceased (exhibit F) held at Nedbank Manzini showed the amount of E164,935=00.
- (5) With the help of PW4 and the Accused, PW5 made a first withdrawal of the sum of E50,000=00 from the deceased estate as evidenced by exhibit B.
- (6) Exhibit B which is dated 9 January 2012 was approved by the Master of the High Court one Mr Dumisani R. Magagula.
- (7) Out of the E50,000=00 as evidenced by exhibit B, PW5 gave the sum of E5,000=00 to the Accused.
- (8) PW4 and PW5 approached the Accused to help PW5 make a second withdrawal.
- (9) The Accused who was then officially on leave met with PW4 and PW5 at the Master's office and gave them a photocopy of exhibit H.
- (10) Exhibit H is a prospectus from The South African Flight Training Academy in respect of one Tanele Mandisa Sukati, passport No. 1001646 who was registered there to do a course described as CPL Lectures. The duration of the course was for 6 months at the cost of R37,990=00.
- (11) Exhibit H had been sent by the South African Flight Training Academy to the Master's office to enable the office process the school fees of Tanele Sukati from the deceased estate of her father, Hebron Ticalo Sukati also registered at the Master's office under estate No. EM492/06.

- (12) The Accused was the one who processed the claim for the fees relating to Tanele Sukati for payment.
- (13) After the Accused gave a photocopy of exhibit H to PW4 and PW5, the duo proceeded to the Mall where they made a photocopy of exhibit H and deleted the name of Tanele Mandisa Sukati therefrom and inserted the name of PW3, Phila Mamba, thus creating exhibit E. PW4 and PW5 claim that they were instructed by the Accused to do this. The Accused denies this allegation. I will come to this issue in a moment.
- (14) The essential features of exhibit E are as follows:- The student is Phila Mamba, Course - CPL Lectures; Duration - 6 months; Passport Number - 10016446, Total Fee - R37,990=00.
- (15) Exhibit E is thus a replica of exhibit H save for the names of the students in the respective documents.
- (16) Quite apart from exhibit E, PW4 and PW5 also created exhibits D and D1. Exhibit D is a handwritten version of D1, wherein PW5 is requesting for school fees for her son who is alleged therein to be in final year in the Flight Training Academy in South Africa.
- (17) PW4 and PW5 went back to the Master's office and handed over exhibit D, D1, H and E to the Accused.
- (18) The Accused tore one of the documents and threw it in the bin.
- (19) The Accused then handed over the file together with the other remaining documents to PW2 to process since she was officially on leave and could not do it herself.
- (20) PW2 checked the file to ascertain that all the requisite documents were present and she found all the documents including exhibit E in the file.



- (21) On the strength of exhibit E, PW2 prepared exhibit C, which is a letter dated 16 February 2012 and addressed to the Manager of Nedbank authorizing payment of the sum of E40,000=00 from the deceased's account held therein, to PW5 to pay school fees for PW3.
- (22) PW2 then presented the file together with exhibits C and E to PW1 for his signature.
- (23) PW1 in turn checked through the file to ascertain that all the relevant documents were present. All the documents were in the file including exhibit E which prompted PW1 to sign exhibit C.
- (24) Accused then collected exhibit C from PW6 and handed it over to PW5.
- (25) It was after PW5 had collected the sum of E40,000=00 from the bank that PW1 discovered from the bank that an earlier withdrawal of E50,000=00 had been made from the deceased's account in January 2012 by PW5 as evidenced by exhibit B.
- (26) As at the time PW2 processed the file and PW1 signed exhibit C, exhibit B was not in the file.
- (27) Upon inquiry, the Accused told PW1 that exhibit B had probably fallen out of the file, she then went out and came back with a copy of exhibit B. PW1 however opted to have exhibit B printed from the computer.
- (28) The sum of E40,000=00 was recovered from PW5 on the same day.
- (29) It was subsequently discovered that Phila Mamba (PW3), is a standard 5 school drop out, does not have any travel documents, has never travelled out of Swaziland and never registered at the South African Flight Training Academy.

(30) Investigations mounted by PW8 and her team led to the subsequent arrest of the Accused.

[34] ANALYSIS

COUNT 1: THE OFFENCE OF FRAUD

The learned author **JRL Milton** in the text **South African Law of Procedure Vol 11 (Common Law Crimes) Juta 1996 at 703**, gave the common law definition of the offence of Fraud as consisting of unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another. The essential ingredients of the offence are therefore as follows:-

- (a) Unlawfully making,
- (b) with intent to defraud;
- (c) a misrepresentation;
- (d) causing;
- (e) prejudice.

[35] I'll use these ingredients as a compass to ascertain whether the evidence led proved the offence of Fraud beyond reasonable doubt. I will commence this exercise by first considering (a) – (c) above as to whether the Accused could be held to have unlawfully with intent to defraud made a misrepresentation to the Assistant Master. Since the Accused denies any involvement in the offence charged, the questions that have arisen are as follows:-

- (1) Was the Accused complicit in the entire misrepresentation?
- (2) Was it the Accused who gave the prospectus exhibit H to PW4 and PW5?

- (3) Did the Accused just give them the prospectus without saying anything as she claims or did she advise them on what to do with the prospectus in terms of what to put inside and how to use it as PW4 and PW5 allege?
- (4) Did the Accused have anything to do with the file before it got to PW2 and the Assistant Master, PW1?
- (5) Was the Accused aware that there had been a previous withdrawal of E50,000=00 as evidenced by exhibit B?
- (6) Why was there no evidence of exhibit B in the file when it got to PW1 and PW2?

[36] Now, the relevant instrument with which this unlawful misrepresentation was executed is the prospectus exhibit E. The evidence of the Crown is that a copy of a prospectus, exhibit H, was given to PW4 and PW5 by the Accused. The Accused has admitted giving exhibit H to them. The fact forming the basis of this offence is not the giving or receiving of the prospectus but that the Accused put in the prospectus facts that were not true for the purpose of fraudulently obtaining money from the deceased estate.

[37] It is the case of the Crown that the prospectus contained truthful information about Tanele Sukati the actual owner of the prospectus but that PW4 and PW5 deleted the name of Tanele Sukati from the prospectus and replaced it with the name of Phila Mamba, thereby representing that the information in the prospectus belonged to Phila Mamba. The case of the Crown is further that it is the Accused who advised PW4 and PW5 to do all this as a way of obtaining the money. PW4 and PW5 who have admitted inserting the name of Phila Mamba in exhibit H thus creating exhibit E, testified that the Accused advised them to do so when they

approached her to assist them in getting money from the deceased estate. She advised them on this approach. For her part, the Accused has denied giving PW4 and PW5 any such advice. A determination of this point turns on the credibility of the witnesses for the Crown and the Accused. I will have to decide who to believe and who not to believe. This decision will depend on a consideration of the totality of the circumstances surrounding the entire transaction.

[38] I have carefully and calmly perused the totality of the evidence led on both sides on this issue and I find that I believe the testimony of PW4 and PW5 that it was the Accused who gave them the idea and advised them on how to carry out the unlawful misrepresentation in order to fraudulently obtain money from the deceased estate. In furtherance of this enterprise she gave them the prospectus exhibit H belonging to Tanele Sukati, in addition of engaging in a series of other activities.

[39] The reasons for my belief are as follows:- It is noteworthy that on the day of the incident the Accused was not supposed to be on duty. She was officially on leave. She was not asked to break her leave and come back. She came back on her own. The common cause evidence is that PW4 and PW5 had telephoned the Accused whilst she was on leave and she told them that she was coming to work at the Master's office on that day and that they should meet her at the work place. The question that has most agitated my mind, is, why was it necessary for the Accused to handle the transaction personally? She should have referred PW4 and PW5 to the staff on duty but she chose to come in person and handle it personally. The reason may not be far-fetched in view of the financial reward she enjoyed in the first transaction when she helped PW5 collect the amount of E50,000=00 from the deceased estate. The common cause evidence is that on that occasion she was

rewarded with the sum of E5,000=00. The Accused said that the E5,000=00 was given to her as an appreciation of what she did for PW5. PW4 and PW5 maintained that she demanded for that sum of money saying that it was the Master who wanted it. I am minded to believe PW4 and PW5. As a public servant the Accused is not supposed to receive any gratification whether demanded for by her or given to her as a gift in respect of the discharge of her public duties. This is an offence in terms of section 21 (2) (a) of **The Prevention of Corruption Act, 2006**, which states that the offence of bribery is committed where:-

“(2) **A public officer who, whether in Swaziland or elsewhere, solicits or accepts an advantage as an inducement to, or a reward for or otherwise on account of the public officer –**

**(a) performing or forbearing to perform any act as such public officer”.** (emphasis mine)

[40] Yet the Accused collected the money. I believe that that was the incentive for her electing on coming out of her leave to come and handle the second transaction personally.

[41] Furthermore, when the Accused gave PW4 and PW5 the prospectus, she gave it to them with full knowledge of its contents as belonging to Tanele Sukati whose file she was then also working on by way processing her school fees. PW4 and PW5 say that when they took exhibit H to the Mall, they photocopied the document and altered the photocopy by replacing the name of Tanele Sukati therein, with that of Phila Mamba thus creating exhibit E which they returned to the Accused. In fact PW5 was emphatic in her evidence that she was carrying exhibit E with her when she returned from the Mall because they went to the Mall in the first place to create exhibit E for Phila. From the totality of the evidence led in this case, it is obvious to me that PW4 and PW5 gave exhibit E to the Accused and the Accused

saw exhibit E. There is nothing to show that she asked PW4 and PW5 questions concerning the correctness of the information as it relates to Phila Mamba's name that had been put in place of Tanele Sukati's name. If she was independent of the action of PW4 and PW5 she would have asked questions concerning the correctness of the information in exhibit E, which to her knowledge belonged to Tanele Sukati. There is no evidence to show that she refused to accept exhibit E as containing information that relates to Tanele Sukati and not Phila Mamba whose name had now been put on it.

[42] It is puzzling that an officer who should verify the genuineness of claims for such monies by ensuring that the application for such monies have presented correct and genuine facts, knowing fully well that PW5 had in exhibit E adopted information belonging to Tanele Sukati as if they belonged to Phila Mamba, accepted exhibit E without question. The evidence shows clearly that she had knowledge of the content of the prospectus exhibit H which she gave to PW4 and PW5 and was in a position to know that the content of exhibit E which PW4 and PW5 returned to her was the same except as to the name of the child. Therefore, it is reasonable to regard her as knowing fully well that the prospectus exhibit E contained facts not belonging to Phila Mamba.

[43] What is very interesting here and which is very important in pointing to her involvement in this matter is that she accepted exhibit E put it in the file and started the processing of the request for money by giving the file to PW2 with exhibit E in it for further action. PW2 and PW1 testified that it was on the basis of the presence of the exhibit E in the file which the Accused forwarded to PW2 that they approved the payment. Even though the Accused now claims that it was exhibit E which bears the heading of the South African Flight Training Academy

that she tore up and put in the bin, this story to my mind is so improbable as to be incapable of belief. I say this because PW2 testified that after the Accused handed over the file to her to process on the basis that she, the Accused was on leave, PW2 checked the file in the presence of the Accused. She saw exhibit E in the file showing that the amount requested was E37,990=00 for Phila's school fees and that Phila was to go to the South African Flight Academy to learn to fly planes. That was when PW2 asked the Accused how come the amount requested was so high and the Accused replied that the deceased had paid the fees for Phila before he died, then why should PW2 deny Phila a bright future by refusing to pay. PW2 told the court that it was the presence of exhibit E and the comment made by the Accused about her denying Phila a bright future that motivated her to process the file. The defence never challenged this evidence when cross-examining PW2. In fact the Accused categorically stated in cross-examination that her telling PW2 that Phila's father had previously paid his fees was not a sin. It is trite that where evidence tendered in examination in chief is not challenged or controverted under cross-examination, it is taken as admitted and established. See **Rex v Zonke Tradewell Dlamini and Another Criminal Case No. 165/10 paras [198] – [200]**.

[44] Furthermore, the Assistant Master PW1 also testified to the effect that when he received the file from PW2, the presence of exhibit E in the file was one of the things which compelled him to sign exhibit C. The obvious fact flowing from the above stated facts, is that exhibit E was in the file when the Accused handed it over to PW2 for processing. The question here is if it was torn apart by the accused as she now contends how come it was in the file? In any case, the prospectus was the foundation for the release of the money for Phila Mamba's school fees. It is thus incongruous for the Accused to contend that she tore the prospectus up, yet still proceeded to give PW2 the file to process. I reject this

defence as patently absurd. From the above stated facts it is obvious that the document which the Accused tore was not exhibit E which was in the file when she handed it to PW2. The suggestion by the Accused during her examination in chief that when she tore the document PW5 complained saying that she had used money to do it, is unsustainable. It was never put to PW5 or PW4 in cross-examination. It is thus a recent fabrication. An afterthought.

[45] More to the above is the fact that the Accused admitted handling the previous transaction relating to the release of E50,000=00 to PW5 from the deceased estate as evidenced by exhibit B. The documentation (exhibit B) ought to have been in the file as part of the continuous official record relating to that estate yet when PW2 received the file from the Accused and upon going through it she did not see any document relating to that transaction. The first time she heard of the previous transaction was after the approval had been given for the subsequent withdrawal of E40,000=00 and PW6 showed exhibit B to her. Furthermore, the Assistant Master PW1 also confirmed that exhibit B was not in the file when he checked it before he signed exhibit C. He told the court that the first time he became aware of the previous transaction of E50,000=00 was about an hour after PW5 had gone to the bank to collect the subsequent transaction of E40,000=00. PW5 had called the bank based on suspicions of the staff at the Master's office concerning the subsequent transaction. The bank then told him of the previous transaction. PW1 called the Accused and asked her about the transaction. It was then the Accused proceeded to her office and came back with the letter of withdrawal of E50,000=00 saying that she had found it in the office and it might have fallen there. PW1 refused to collect the letter from the Accused and rather had the same letter (exhibit B) printed from the computer in the secretary's office. The defence did not specifically challenge that it was the Accused that brought a copy of exhibit B to PW1 before he had it printed from the computer. What they sought to



clarify in the cross-examination of PW1 was that the Accused had retrieved the copy of exhibit B from the photocopying room where it had fallen and not from her office as testified by PW1. This clarification to my mind does not take the defence any further. I say this because I am inclined in the circumstances of this case, to believe that it was the Accused that removed exhibit B from the file. The absence of exhibit B from the file was not coincidental. The Accused had a duty to inform PW1 and PW2 of the previous transaction and being the person who handled the previous transaction, the Accused who had been handling such requests should have known that PW5 was not entitled to the subsequent withdrawal considering the number of the beneficiaries in the estate which it is obvious that she was aware of. In fact, PW1 had categorically told the court that if he had known of the previous transaction he would not have approved the subsequent withdrawal of E40,000=00 to PW5 because that meant that the balance in the account will not be sufficient for the other beneficiaries. In spite of this the Accused went ahead and forwarded the file to PW2 to be processed and did not draw the attention of PW1 and PW2 to the previous transaction. It is not in doubt that the Accused knew that the previous transaction she had facilitated would determine the grant or refusal of the subsequent withdrawal of E40,000=00 yet she failed to disclose this fact to PW1 and PW2. It took the bank's intervention to exume this fact and bring it to the knowledge of PW1.

- [46] In the light of the above, it is reasonable to believe that the Accused suppressed the information of the previous transaction in furtherance of the unlawful fraudulent misrepresentation in the prospectus, exhibit E. The money is being administered by the Master. She aided the unlawful fraudulent misrepresentation in exhibit E by not informing the Assistant Master and PW2 of the previous transaction as evidenced by exhibit B.

[47] On these premises, I find it as a fact that the Accused was in complicity with PW5 in unlawfully making, with intent to defraud, a misrepresentation through exhibit E which they submitted to the Assistant Master of the High Court as genuine and authentic and did thereby by the means of the said misrepresentation induce the Assistant Master to sign and grant the sum of E40,000=00 from the deceased's account to PW5.

[48] On the essential elements of causing and prejudice as per (d) and (e) enumerated in para [34] above, the analysis made ante in respect of unlawfully making a misrepresentation with intent to defraud, apply *mutatis mutandis*. It is indisputable that it was the unlawful fraudulent misrepresentation orchestrated by PW5 in complicity with the Accused through exhibit E that induced the Assistant Master, to his loss and prejudice, to sign and grant the sum of E40,000=00 to PW5.

[49] In the light of the totality of the foregoing, I find that the Crown has proved its case beyond reasonable doubt on the offence of Fraud as charged in count 1. The Accused is found guilty of the offence of fraud in count 1 and is accordingly convicted of the offence as charged in that count.

[50] COUNT TWO: THE OFFENCES OF FORGERY AND UTTERING

In this count the Accused is charged under the following heads: (a) Forgery and (b) Uttering. I have hereinbefore set forth the particulars of this count in para [1] above. It bears no repetition.

[51] It is convenient for me to first deal with the offence of Uttering under (b) above. This is because, this charge when wholistically considered with the charge of Fraud in count 1 appears to me to constitute an unnecessary splitting of charges. The criminal conduct imputed to the Accused in the offence of Uttering can be said to constitute in substance only one offence which could have been properly embodied in one all embracing charge. I say this because the crime of Uttering consists in putting off, unlawfully and with intent to defraud, a false document which causes actual prejudice or which is potentially prejudicial to another see **Milton (Supra) at page 750**. These elements, as I have already abundantly shown in this judgment, also found the offence of Fraud.

[52] Commenting on this selfsame issue in the case of **Mandlenkosi Ncongwane v Rex Appeal Case No. 9/99, pages 3-4**, the erstwhile Court of Appeal per **Beck JA**, speaking the unanimous mind of the court stated as follows:-

**“ Although the point has not been raised in the notice of appeal, it must be stated at the outset that there was a duplication of conviction (what used to be called a splitting of charges) with regard to counts 2 and 4 and 5 and 7, which are the counts of fraud and of uttering in respect of the two forged cheques. The act of uttering the forged cheques constituted, or was at least an integral part of, the intentional fraudulent misrepresentation that the appellant is alleged to have made to the persons to whom he uttered the cheques; it was part and parcel of a continuous course of conduct done with fraudulent intent. (S v GROBLER EN’N ANDER 1966 (1) S.A. 507 (A.D.) at 511 G-H).**

The learned Chief Justice was alive to the difficulty. Just before delivering judgment on sentence he said to Crown counsel “another thing that worries me about this ..... the fraud, doesn’t it really include a crime of uttering a forged document? I sn’t that really the same thing? Is there a splitting of charges here?”, to which counsel merely replied “There is none my Lord”, whereupon the learned Chief Justice said “Well then, I will just make the sentences run concurrently; which he proceeded to do.

With respect to the Learned Chief Justice however, this is not the correct way of solving the problem. The mere fact of being separately charged is

not only incorrect , it is also potentially prejudicial to an accused to have such an additional conviction form part of his criminal record. See, for instance, the passage in the judgment of Wessels J.A. p.523 B – E in the case of *S v Grobler en’n Ander* (supra). Accordingly the convictions on the counts of uttering, namely counts 4 and 7, must be quashed and the sentences on those two counts set aside”.

[53] Furthermore, the Supreme Court considered this question in the case of **Nkululeko Freedom Sihlongonyane v Rex Criminal Appeal No. 3/2010**. [2010] SZSC 17, in respect of the conviction of the Appellant for the offences of Murder and Robbery arising from one course of conduct. The court said the following:-

“ **In Siphso Lucky Fakudze v Rex Criminal Appeal No. 19/2008 Foxcroft J.A. stated:-**

**‘The history of the rule of practice against splitting of charges in South Africa may be traced back to a dictum in R v MARINUS, 5S.C 349 in 1887. The rule was fully considered in S v GROBLER, 1996 (1) S.A 507 (A.D), where Wessels JA said at p523B:-**

**‘In S.A Criminal Law and Procedure Vol. 5 by Lansdowne and Campbell at 226, the matter is fully dealt with and the equitable objections to splitting of charges listed, at p231, the following appears**

**‘Where one act or series of acts constitute at the same time offences of different species as for example, when an act of carnal intercourse is committed in circumstances which amount to both incest and rape, the proper cause, it is submitted, is whether to charge only one of the offences, or to charge both alternatively. Although, there appears to be no statutory bar to splitting, as there is in section 336 of the Criminal Procedure Act of 1977 in South Africa, the rule of practice is a sound one and ought to be applied in this jurisdiction in appropriate cases’.**

**These remarks are apposite to the facts of this case. The appellant’s and his co-accused’s conduct was really one course of conduct and this was recognized as such by the trial judge. It follows that the proper charge against the appellant and his co-accused should have been of Murder**

**only. In the result the conviction of Robbery must be set aside. They could have been charged with Robbery in the alternative”.**

[54] From the facts of this case, which I have exhaustively canvassed above and in line with the foregoing condign decisions, it is incontrovertible that the offence of Uttering is an integral part of the continuous course of conduct carried out by the Accused with the intent to defraud. It is thus improper to have the separate charge of Uttering. At best it should have been charged in the alternative to the offence of Fraud.

[55] The Accused is for the above stated reasons found not guilty for the offence of Uttering as charged in count 2 (b). She is discharged and acquitted of the offence of uttering as charged in that count.

[56] Let us now consider the offence of Forgery pursuant to count 2 (a). It is clear from the proved facts in this case that PW4 and PW5 forged exhibit E. This, they achieved by deleting the name of Tanele Sukati from exhibit H which was given to them by the Accused and in its place inserting the name of Phila Mamba. Even though it is common cause that the Accused did not participate in the actual alteration of exhibit H and the creation of exhibit E, in the sense that she did not personally alter the document and was not present when it was altered, this enterprise was however aided and abated by her. She was the brain behind it. PW4 and PW5, as I have abundantly enunciated hereinbefore, did not know that they could forge exhibit E. It was the Accused that advised them to do so and gave them specific instructions on how to actualize this. She was complicit with PW5 in the offence of Forgery. I thus find that the Crown has proved its case beyond

reasonable doubt on the offence of Forgery as charged in count 2 (a). I find the Accused guilty of the offence of Forgery and convict her accordingly.

[57] CONCLUSION

1. The Accused is found guilty and convicted of the offence of Fraud as charged in count 1.
2. The Accused is found guilty and convicted of the offence of Forgery as charged in count 2 (a).
3. The Accused is found not guilty of the offence of Uttering as charged in count 2 (b). She is discharged and acquitted of that offence.

**DELIVERED IN OPEN COURT IN MBABANE ON THIS**

**THE ..... DAY OF .....2014**

**OTA J.**

**JUDGE OF THE HIGH COURT**

**For the Crown**

**B. Magagula  
(Crown Counsel)**

**For the Accused**

**L. Gama**

