



## IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Case No. 42/2007

In the matter between:

**REX**

**And**

**MUSA FAKUDZE AND ELEVEN OTHERS**

**Neutral citation:** *Rex vs Musa Fakudze & 11 Others (42/07) 2017 SZHC*  
*10(9th February 2017)*

<b>Coram:</b>	Hlophe J
<b>For the Crown:</b>	Mr M. Nxumalo
<b>For the 6<sup>th</sup> And 7<sup>th</sup> Accused:</b>	Miss S.Thango (in person)
For the 8 <sup>th</sup> And 9 <sup>th</sup> Accused:	Miss E. Matsebula (in person)
For the 12 <sup>th</sup> Accused:	Mr T. Mamba
<b>Date Heard:</b>	7 <sup>th</sup> February 2017
<b>Date Handed Down:</b>	9 <sup>th</sup> February 2017

## Summary

**Criminal Law – Criminal Procedure- Sentencing – Status and Purpose of sentence – Consideration of a Triad and what it entails in sentencing – What an appropriate sentence is in the circumstances.**

---

### **Judgement on Sentence**

---

[1] On the 15<sup>th</sup> December 2016, I handed down a judgement in the above matter which entailed some six counts in all. I returned guilty verdicts in four of the counts namely counts 3, 4, 5 and 6. I found the 6<sup>th</sup>, 7<sup>th</sup> and 12<sup>th</sup> accused persons guilty of Bribery in counts 3 and 4 respectively. In count 5, I found the 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, and 12<sup>th</sup> accused persons guilty of fraud. In count 6 I found the 6<sup>th</sup>, 7<sup>th</sup> and 12<sup>th</sup> accused guilty of fraud as charged. Otherwise these counts where the above accused persons were convicted were respectively Bribery as a briber in one count 3 and Bribery as a bribee in the other one (count 4). In count five (5) the charge was that of fraud involving a sum of E880, 400-00. In count 6 the charge was that of Fraud involving a sum of E3, 462, 000-00.

[2] The Bribery in counts 3 and 4 essentially entailed what I can loosely term the different sides of the same coin. The sum involved in these counts was a sum of E754 000-00 which was paid by the 6<sup>th</sup> and 7<sup>th</sup> accused

persons, who are in reality a Company and its Director, to the 12<sup>th</sup> accused person who is shown as having accepted it. These are the facts that formed the basis of the Briber and Bribee accusations. The fraud in count 5 entailed a total sum of E880 400-00 which represented a loss allegedly incurred by Government. The fraud alleged in Count 6 entailed a total sum of E3, 462, 000-00, which depicted a loss allegedly incurred by the Swaziland Government as a result of the fraud in question.

[3] After listening to the submissions made on mitigation or aggravation of sentence by the Respective parties, I am now called upon to pass what I consider an appropriate sentence in the circumstances.

[4] This stage has been observed as the most difficult one in all criminal trials because no sooner does a court pass a sentence than that sentence is viewed as either too harsh or too lenient in the eyes of those having an interest in it; who no doubt react to it from their points of view which are influenced by which one of the parties one sympathizes with.

[5] In order to maintain the delicate balance I am required to, I have tried the best I can to avoid too harsh a sentence just as I have had to do the same in avoiding too lenient a sentence. I have therefore tried the best I can to uphold the triad which is about taking into account the three competing

interests which are necessarily those of the accused, those of society and the crime committed in each count. I have tried to attain what has been referred to as a delicate balance in numerous judgements of this court, the Supreme Court and those from Foreign Jurisdictions, which is that a sentencing court should not approach the issue of sentence in the spirit of anger just as it should avoid passing a sentence that has “misplaced pity” as a component see in this regard this court’s Judgement in **Rex Vs Polycarp Dlamini case No.403/2011** as well as the case of **S. V. Rabie 1975(4) SA 870 and S.V.Zinn 1969 (2) SA525.**

[6] As regards the interests of each one of the accused persons in each case, particularly after taking the view that the companies charged with their Directors, are mere alter egos of the said Directors, I considered the following:

**The 6<sup>th</sup> and 7<sup>th</sup> Accused**

As against the 6<sup>th</sup> and 7<sup>th</sup> Accused persons I considered that the 7<sup>th</sup> accused, who merely used the 6<sup>th</sup> accused as her vehicle or alter ego, was a first offender just like the other two accused persons in the subsequent two counts. She was, even though I was not told what her real age was, in my view, a relatively young person who still had a future ahead of her and who still had a lot to contribute to society. She revealed that she had some three children who she said depended on her for their own

livelihood and upkeep. She further informed court that she was a very cooperative person and she urged this court not to send her into prison given her role of bringing up her children including her having to take them through school.

[7] I however must point out that I did not sense much remorse in her submission. I found this disturbing when considering that the weight of the evidence depicted her as the one responsible for the major losses from the Job Creation Funds after one Ezrom Magagula who however was never charged. The evidence also showed her as the one who corrupted to a great extent the 8<sup>th</sup> and 9<sup>th</sup> accused persons (namely Masima Consultancy and Ethel Matsebula respectively). She is shown in the evidence as having filled in the schedules with fictitious names of attendees at the training exercise. This she did after undertaking to help the 9<sup>th</sup> accused person create a replacement of some alleged last schedules.

### **The 8<sup>th</sup> & 9<sup>th</sup> Accused Person**

[8] When considering the interests of the 9<sup>th</sup> accused person I must consider them together with those of her company, the 8<sup>th</sup> accused which was for purposes hereof, a mere alter ego of hers. I will deal with the 9<sup>th</sup> accused

person as if the 8<sup>th</sup> accused person, her alter ego, is not there for purposes of sentence.

[9] I have considered that she is a first offender, who had apparently conducted herself well until the time she got herself into this situation when she was apparently in her fifties. I have considered as well that she is a single parent who is responsible for her three children. It is otherwise apparent from her evidence that she had tried to perform her obligations in a very upright manner but ended up getting into this situation following in each instance what she termed the disappearance of her schedules which had the names of the training attendees who were allegedly trained by her and her employees. This according to her drove her into getting these schedules manufactured, with the aid of accused 7 and one Clement Mdluli; hence the charges she has been convicted of.

[10] I have accepted this version of hers from the evidence and I can tell that the schedules bearing the names of the attendees or alleged attendees had become a much sought after commodity as batches with fictitious names were apparently being prepared to form a basis for the batches filed and paid. This was of course an indicator of the failure or the lack of the controls that were necessary for the project to be a success. This on its own calls for a sentence that is blended with mercy in my view,

particularly on someone like this particular accused. The evidence reveals that she was actually “corrupted” by the 7<sup>th</sup> Accused who went on to manufacture some schedules for her benefit. She ofcourse saw this manufacture of these schedules as a solution to her problems when she knew it should not have been.

[11] I must say I also sensed a lot of remorse from this particular accused person, who I accept was forced by the circumstances of the repeated loss of her schedules at the Ministry of Finance’s Accounts Department where same had been submitted. It is however a reality that she did receive the proceeds of the apparent crimes and went on to spend same for her benefit. She otherwise cooperated visibly with the court, was forthright in her evidence on what had happened getting her into the situation she found herself in and avoided as much she could not to waste the Court’s time.

### **The 12<sup>th</sup> Accused**

[12] I have taken into account that she was a first offender at her elderly age and that she had managed a clean record in her life until the time she got herself into this situation.

[13] She was evidently remorseful as exhibited in her cooperating during the trial and during her Counsel's submission in mitigation of sentence. She in doing so avoided wasting the Court's time. She was therefore evidently remorseful in my view. It was an indicator she would not fall into the same trap in future, which is what the purpose of sentencing is; that is to be corrective in its effect.

[14] She is a widow who is responsible, according to her mitigation, for funding the education of her daughter who is at the University together with some two other dependants. This I have to take into account in meting out what I consider an appropriate sentence as it is a sign of responsibility to her family and by extension to society as a whole.

[15] There is however a serious point of aggravation in her case from the legal point of view. She was placed in a position of trust and was thus required to exhibit same in her dealings. Her conduct amounted to stealing from her employer which in numerous Judgements of this Court has been found to be an aggravating factor, warranting a custodial sentence.

### **The Offences Involved**

[16] Having said all I have above, I do not have to lose sight of the fact that the offences for which these accused persons have been found guilty of



are viewed by society as very serious. Whilst they are serious by their nature, their situation is worsened by the amounts of money lost which are attributed to them. These offences are a manifestation of the derailment of what was obviously a noble project.

[17] There is currently a move to not only discourage the commission of such offences but to totally eliminate them. In line with this drive, I am called upon to issue a clear and unequivocal message to other would-be offenders. The message should clearly be that of passing deterrent sentences.

[18] I do not lose sight of the fact that these offences are on the rise besides their being prevalent, which means that sentences indicating a disapproval of such offences should be passed.

[19] **Interests of Society**

Society requires that its resources are protected so that public monies go into more deserving projects: It is for this reason that society expects that offenders in offences like these are dealt with in a manner that shows its disapproval. It therefore looks to the Courts to do this and the sentences I mete out should bear this out.

### **Generally**

[20] Having made these observations it merits a comment for me to say that of course sentences cannot be issued in vacuou but should as it were be as much as possible, shaped by the circumstances of each particular case. Were it not for the fact that it has taken close to 10 years for the matter to get to this stage and the fact that all these years the Accused had the proverbial sword hanging over their heads, I have no doubt a more severe sentence would have been warranted. I however cannot close my eyes on this important factor.

[21] The other general factor for consideration is the fact that the entire Job Creation Exercise was implemented without proper controls being put in place which made it easier for those who are easily tempted to be so tempted. This again should have a telling impact on the severity or leniency of the sentence to be imposed.

[22] Ever since the trial of this matter commenced before me, there has always been a perception, correctly or incorrectly, that only fewer people than those who had a hand in the commission of the offences leading to the depletion of the sum of E50, 000 000 have been arrested and charged. I can only say that this perception becomes even stronger if one considers the Report of the Commission of Inquiry that was set to ascertain the

propriety of the utilization of the said sum of money and the recommendations involved there on. I am of course clear that the report on its own does no more than suggest the existence of a Prima Facie case which on its own takes the matter nowhere in the absence of evidence being led by competent and credible witnesses in Court: I however cannot ignore this perception during the sentencing stage in this matter.

[23] I am generally of the view that what I have just said in these latter three or so paragraphs, does suggest that the sentence I impose in these circumstances may generally not be as severe as it could have been if it had not been influenced by the present context.

### **Sentences in Comparable Matters.**

[24] Several cases in this jurisdiction have been dealt with involving somewhat similar offences which should, within a proper context, act as a guide. It would be advisable to draw similarities and disparities in order for this Court to be properly guided and therefore be able to find a space where to fit the sentences in this particular matter. These are cases like that of **Rex Vs Polycarp Dlamini Supra, Rex Vs Mpumelelo Mamba** and **another** case number **138/2009 Rex Vs Charles Myeza Case**

**No.117/2006 and Rex Vs Andrew Thembela Simelane Case No. 234/2002** to mention but a few.

[25] In **Rex Vs Polycarp Dlamini** an accused who testified in favour of the crown in dealing with what was there termed organized crime, was sentenced to 9 years, three years of which were suspended on condition he was not to be convicted of a similar offence after a separation of trial, had occurred in a case involving the loss of 11 million Emalangenis against the Swaziland Government. This was influenced more by his decision to unreservedly give evidence in the case. He had also contended without the contrary being shown that he had only benefited a sum of E126000.00. He was on the basis of this admission ordered to refund government such an amount over and above the sentence he got in the peculiar circumstances of the matter.

[26] In **Rex Vs Charles Myeza Case No.117/2006** an accused who had been found guilty of fraud for having allegedly defrauded Government a sum of E650 000.00 or there about, was sentenced to 5 years imprisonment taking into account the peculiar circumstances of that matter. This sentence was confirmed by the Supreme Court on appeal.

[27] **In Rex Vs Mpumelelo Mamba and another (Supra)** an accused who was found guilty of fraud (or theft) involving a sum of E59 000.00 was sentenced to three years imprisonment.

[28] **In Rex Vs Thembela Andrew Simelane (Supra)** an Attorney who was convicted of having taken part in the theft of a sum of around E650 000.00 of Trust Monies held in the Account of their Firm was sentenced to 5 years imprisonment, which was confirmed by the Supreme Court.

[29] **In Sipho Marco Gama Vs Rex Criminal Appeal Case No.206/2002 (SC)** the Supreme Court confirmed a 6 years imprisonment sentence that had been imposed on an accused person who had defrauded the Swaziland Insurance Corporation of a sum of E30 000.00. It did not matter much that he had paid back the amount defrauded. The paramount factor being that he had been placed in a position of trust.

[30] Bearing all the foregoing in mind, I am convinced that the following will be the appropriate sentences to impose in the peculiar circumstances of this matter:

[31] **Counts 3 and 4 - (The Bribery Counts Consisting of the Briber in Count 3 and the Bribee in Count 4).**

Due to the fact that these two counts are a converse of each other I am convinced that a sentence in the following terms, meted out on all the three Accused persons who are accused 6, 7 and 12 shall be appropriate (This offence involves a sum of E754 000.00).

30.1. The three accused persons are each sentenced to six years imprisonment.

30.2. Two years of this sentence shall be suspended for a period of three years on condition that the accused persons are not convicted of a similar offence.

[32] **Count 5 – (Being Fraud found to have been committed by the 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 12<sup>th</sup> accused persons.** This offence involves the loss of a sum of E880 400.00).

31.1. All the four accused persons namely the 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 12<sup>th</sup>; are each sentenced to 6 years imprisonment.

31.2. Two years of this sentence shall be suspended for three years on condition that they are not convicted of a similar offence.

[33] **Count 6 – (Fraud found to have been committed by the 6<sup>th</sup>, 7<sup>th</sup> and 12<sup>th</sup> accused persons.** The offence involves the loss of a sum of E3, 462, 000.00 to The Swaziland Government).

32.1. The 6<sup>th</sup>, 7<sup>th</sup> and 12<sup>th</sup> accused persons be and hereby each sentenced to 10 years imprisonment.


[34] The sentences in counts 3, 4 and 5 (excluding that imposed on the 8<sup>th</sup> and 9<sup>th</sup> accused persons in count 5) are to run concurrently with the sentence in count 6. The effect being that the affected accused persons are to serve 10 years in Prison.

[35] Any period spent by each one of the accused persons in custody at whatever stage of these proceedings, shall be taken into account in computing the appropriate sentences. I am informed these periods are as follows with regards each accused person:

35.1. As concerns the 7<sup>th</sup> accused: The period between the 21<sup>st</sup> January 2007 and 28<sup>th</sup> February 2007 together with that between the 15/12/2016 and 22/12/2016 is to be factored in the calculation of the 7<sup>th</sup> accused sentence.

35.2. As against the 9<sup>th</sup> accused the period between the 15<sup>th</sup> December 2016 and 9<sup>th</sup> February 2017 shall be factored into the sentence.

35.3. As against the 12<sup>th</sup> accused person, the period to be factored in the calculation of the appropriate sentence shall be the 21<sup>st</sup> January 2007 to the 28<sup>th</sup> January 2007.



**N. J. HLOPHE**  
**JUDGE – HIGH COURT**