



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Criminal Case No. 381/2012

In the matter between

**THE KING**

AND

**SIMEON MAKHUBU  
CHAWA NXUMALO  
LUNGILE MAGAGULA  
M & Q POULTRY SUPPLIERS (PTY) LTD  
COMFORT ZAKHELE HLOPHE  
VUSANI HLOPHE  
CB OFFICE AUTOMATIONS**

**Neutral citation:** *The King v Simeon Makhubu & 6 Others* (381/2012)  
[2018] SZHC 04 (31 January 2018)

**Coram:** **MAMBA J**

**Heard:** **March, April, July and October 2017**

**Delivered:** **31 January 2018**

- [1] Originally there were seven (7) accused persons before the court, however, the charges were withdrawn against Accused 3 and 6. In all, there are 87 counts and the First Accused appears on all of these. The indictment is very bulky. Save for count 87, which is the last count, each count has one or two alternative counts. The last count stands alone, with no alternative to it.
- [2] At all times relevant hereto, the First Accused was the Principal of Mhlatane High School. It is alleged that as such principal he was a public officer and all the offences he faces were committed by him whilst acting within the course and scope of his employment. His description as a public officer, in view of his aforesaid employment with the government school, has not been disputed or challenged.
- [3] On all the 87 counts, the First Accused is charged with the crime of contravening Section 24 (1) and (2) of The Prevention of Corruption Act 3 of 2006. As already stated, count 87 has no alternative charge. The rest of the counts have fraud and theft as the first and second alternative respectively.

- [4] The nub or crux of the charges against the First Accused is that whilst acting in his capacity aforesaid, he unlawfully and intentionally diverted various sums of monies at diverse occasions, from the school for purposes unrelated to unauthorised for which the money was intended. The main charge and first alternative on each count alleges that the First Accused with intent to defraud the relevant school or his employer, the Government of Swaziland. The second alternative alleges, in each case, the crime of theft. Again, on all the counts, the property allegedly stolen and diverted is money that came into the custody of the First Accused in his capacity as the Principal of the school.
- [5] The 5<sup>th</sup> and 7<sup>th</sup> Accused feature in counts 81, 82, 83, 84 and 86 plus the alternative counts of fraud to each of these. The First Accused features together with 2<sup>nd</sup> and 4<sup>th</sup> on count 85 after the charges were withdrawn against the 3<sup>rd</sup> Accused. The 2<sup>nd</sup> and 4<sup>th</sup> Accused feature in count 85 only.
- [6] The 7<sup>th</sup> Accused is a company registered with limited liabilities in terms of the company laws of Swaziland. At all times material hereto, it was one of the suppliers of books, stationery and office equipment to Mhlatane High School. The 5<sup>th</sup> Accused was one of its directors. It is

alleged that the accused persons were acting in furtherance of a shared purpose when they committed these offences.

[7] The Crown led a total of 16 witnesses in its quest to establish or prove its case against the accused persons, who pleaded their innocence on all the charges. The defence led only three witnesses in support of its case. These witnesses include the first and fifth Accused. The other witness who gave evidence as DW3 was Ncamsile Fortunate Gwebu, who, at the material time was employed by the 7<sup>th</sup> Accused as an accountant.

[8] At the close of the case for the Crown the First Accused was acquitted and discharged on counts 45, 84, 85 and 86. That ruling meant the end of the case for the 2<sup>nd</sup> and 4<sup>th</sup> Accused. Counts 81, 82 and 83 remained for the 5<sup>th</sup> and 7<sup>th</sup> Accused. These three counts relate to the alleged submission of fraudulent invoices against the school by A7. An explanation was, however, given by both the 5<sup>th</sup> Accused and DW3, that these invoices were made out and submitted to the school on the request of the auditors of the school. They were thus submitted for audit purposes only and the school was not charged or being expected to pay for the goods stated therein. Payment had already been made and these payments had been duly reflected in the company's (7<sup>th</sup> Accused)

statement of account. Therefore there was neither actual nor potential prejudice to the school or government. Learned Counsel for the Crown, properly conceded this fact in his final submissions in respect of the 5<sup>th</sup> Accused as there was no evidence that, as a director of the 7<sup>th</sup> Accused he was aware of this and had failed to prevent or stop it. The invoices in question were issued by DW3. Apart from this, the evidence is again plain in my judgment that these invoices were innocently issued to satisfy the government auditors' demands. There was no criminal intent or *mens rea* involved to found the requisite intent either to defraud the complainant or for that matter to divert the stated sum of money from the school to the 7<sup>th</sup> Accused. This applies equally regarding the First Accused person.

[9] For the above reasons, the 1<sup>st</sup>, 5<sup>th</sup> and 7<sup>th</sup> Accused are found not guilty and they are acquitted on counts 81, 82 and 83 and the alternatives to those counts.

[10] On count 87, the Crown alleges that on or about the 31<sup>st</sup> day of January 2012 and at or near Piggs Peak or Mbabane, the First Accused unlawfully and intentionally and with intent to defraud, divert a sum of E3750.00 from the school funds of Mhlatane High School and thereby

depriving the said school of the said amount. This was in contravention of Section 24 (1) and (2) of The Prevention of Corruption Act Number 3 of 2006 (hereinafter referred to as the Act). The Act refers to such a crime or deed as offence of Cheating the Public Revenue.

[11] Section 24 of the Act provides that

‘24. (1) A person commits the offence of cheating the public Revenue where as a result of the fraudulent conduct of that person, money is diverted from the revenue and thereby depriving the public revenue of money to which the government is entitled.

(2) A public official or any person commits an offence of cheating the public revenue where that official or person diverts any property belonging to the government or its agencies, which that official or person had received by virtue of the position of that official or person, to an independent agency or individual for purposes unrelated to the purpose for which that property was intended, for the benefit of that official or that person or of a third party’.

The act defines “property” as “money or any other movable, immovable, corporeal or incorporeal thing, whether situated in Swaziland or elsewhere and includes any rights, privileges, claims, securities and any interest therein and all proceeds thereof.’

[12] The evidence by the Crown is that 300 cement blocks were delivered at the home of the First Accused at Nkhaba by PW6 and PW7 who were employees of Peak Blocks who supplied the cement blocks. These blocks were delivered to the home of the First Accused on 15 April 2011, in his absence. The invoice in this regard is number 2433 and was handed in as exhibit B and was prepared by Ncane Makama an employee of Peak Block. The Crown alleges that the First Accused used money from the school fund to pay for these blocks which were for his personal use at his private home. The First Accused denies that these cement blocks were delivered at his home and were for his personal use. According to exhibit B, the receiver of that consignment is S.S. Makhubu and the school was charged and it paid for these items per exhibit B1 which also included the price of cement blocks delivered to the school on 19 May 2011. The cheque for this payment was co-signed by the First Accused. He denies that he appended the signature S.S. Makhubu on

exhibit B. No handwriting expert has been called by the Crown to shed light on this writing. However, this writing or signature is plainly similar to the other admitted signatures or initials by the 1<sup>st</sup> Accused. One need not be a handwriting expert to make this determination. In any event, there is clear evidence by the Crown from PW6 and PW7 that the cement blocks in question were delivered at the private home of the 1<sup>st</sup> Accused. The school paid for them from its own funds. This was clearly not for the benefit of the school. It was money to be used for the school, however. It was plainly a diversion for the benefit of the 1<sup>st</sup> Accused and this was an offence of stealing or cheating the public revenue as described in Section 24 (2) of the Act. Section 24 (1) of the Act refers to 'fraudulent conduct', whilst subsection (2) does not. Whilst it may be argued that fraud on the part of the 1<sup>st</sup> Accused has not been proven in this regard, the fact of the matter though is he caused the school to pay for items that were for his personal benefit. That was without any justification. He is therefore guilty as charged on count 87; of contravening Section 24 (2) of the Act.

[13] The indictment runs into several papers and is very thick. As already stated, almost each count has two alternative counts to it. I shall herein reproduce the first count and its two alternatives.



'Count 1

First Accused is guilty of the crime of contravening Section 24 (1) and (2) of The Prevention of Corruption Act No. 3 of 2006.

In that upon or about the 1<sup>st</sup> March 2011 and at or near Piggs Peak in the Hhohho Region, the said Accused person [who was] employed as a head teacher of Mhlatane High School and as such a public officer acting within the course and scope of his employment did unlawfully and with intent to defraud, divert E22 500.00 from the school funds, thereby depriving the Mhlatane High School/Government of the said money.

ALTERNATIVELY

The First Accused is guilty of the crime of Fraud. In that upon or about the period 1<sup>st</sup> March 2011 and at or near Piggs Peak in the Hhohho Region, the said accused who is the head teacher (Principal) of Mhlatane High School and as such a public officer acting within the course and scope of his employment, did unlawfully and with intent to defraud, misrepresent to the school committee of Mhlatane High School that certain payments amounting to E22 500.00 ---- reflected in cheque No. 5199 made on the 1<sup>st</sup> March 2011 were payments being made for genuine and authentic activities of the said Mhlatane High School and did by

means of the said misrepresentation induce the school committee to authorise the false payments which resulted in the actual loss and prejudice incurred by both the said school and Ministry of Education to the sum of E22 500.00 ---- reflected in cheque No. 5199,

WHEREAS at the time the Accused made the false misrepresentation well knew that the said payments were not made for genuine and authentic activities of the said school and that the school committee and the Ministry of Education would not ordinarily approve and /or authorise such payments and thus the said accused is guilty of the crime of Fraud.

AND ALTERNATIVELY FURTHER

The first accused is guilty of the crime of Theft.

In that whereas at all times, material to this charge, the said accused in his capacity as the Principal of Mhlatane High School and as such an employee of the Swaziland Government under the Ministry of Education entrusted with the management of school monies did on the 1<sup>st</sup> March 2011 at or near Piggs Peak in the Hhohho Region, unlawfully and intentionally steal a sum of E22 500.00 ---- reflected in cheque No 5199 in the lawful

possession of the school chairperson (Nicholas Mbuli) and thus committed the crime of Theft.’

The other counts are as inelegantly drawn or stated and follow the same pattern or theme.

- [14] Since 200, Queeneth Lukhele, who testified as PW12, was the Secretary at Mhlatane High School and was under the direct supervision of the First Accused. She started working at the school whilst the First Accused was the Deputy Head Teacher of the school. She testified that the First Accused authorised and or sent her to go and encash various cheques at the Bank and the monies were either given to the First Accused or directly given to Sjabu. The said withdrawals were from the school Bank account. It is common cause that these cheques were signed by both Mr. Makhubu (First Accused) and the then School Committee Chairman Mr. Nicholas Mbuli. These were the two signatories to the said Bank account at the relevant time. When the trial commenced, Mr. Mbuli had already died and thus he could not and did not testify. It is however, common cause further that Mr. Mbuli had signed and left several bank cheques with the First Accused. This was done, it was explained by both the Crown and the First Accused, to allow the First Accused to run or conduct the affairs of the school without the necessity of waiting for the presence and participation of the School Committee Chairman.

[15] It is also noted that PW12 stated that she was not the only person who was instructed by the First Accused to cash some of the cheques in question. Siboniso Zwane, Celiwe Mavuso and Nolwazi Malambe were some of these people who did so. The vouchers in connection with these cheques were, however, captured by PW12 in the relevant school records. The vouchers in question were handed in by her as exhibit M1-M76. The letters by the First Accused authorising her to make the bank withdrawals were handed in as exhibits N1-N80. Her evidence was also that at times the First Accused would simply telephone the relevant bank and grant her the authority to make the withdrawals, or encashment of cheques.

[16] PW12 conceded that Mr. Makhubu did not only authorise her to cash monies that were given to Sjabu. She was, for example, permitted to withdraw monies for student's refunds.

[17] I set out hereunder the charges or counts against the First Accused, the dates on which the offences were allegedly committed, the cheques used in each case, amount involved and the relevant corresponding vouchers or letters of authorisation:

COUNT	DATE	CHEQUE	AMOUNT	VOUCHER/LETTER	EXHIBIT NUMBER
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		<b>NO</b>			
1	01/03/11	5199	22 500.00	M1 (a)	M1
2	21/03/11	4046	15 000.00	M2	M2
3	25/03/11	6424	12 000.00	M3 (a)	M3
4	29/03/11	6436	15 000.00	M4	M4
5	30/03/11	6445	20 000.00	M5 (a)	M5
6	04/04/11	6447	20 000.00	M6 (a)	M6
7	06/04/11	6452	12 000.00	M7 (a)	M7
8	08/04/11	6456	30 000.00	M8 (a)	M8
9	13/04/11	6467	10 000.00	M9 (a)	M9
10	16/04/11	4087	10 000.00	M10 (a)	M10
11	26/04/11	4089	40 000.00	M11(a)	M11
12	05/05/11	6474	20 000.00	M12(a)	M12
13	16/05/11	6488	40 000.00	M13 & M13 (a)	M13
14	25/05/11	6494	15 000.00	M14 (a)	M14
15	30/05/11	6499	35 000.00	M15 (a)	M15
16	08/06/11	6530	40 000.00	M16 (a)	M16
17	22/06/11	6559	35 000.00	M17 & M17 (a)	M17
18	28/06/11	6571	20 000.00	M18 & M18 (a)	M18
19	12/07/11	6602	25 000.00	M19 (a)	M19
20	19/07/11	6612	30 000.00	M20 (a)	M20
21	25/07/11	6624	45 000.00	M21 & M21 (a)	M21
22	01/08/11	6628	40 000.00	M22 & M22 (a)	M22
23	09/08/11	6651	25 000.00	M23 & M23 (a)	M23
24	11/08/11	6654	20 000.00	M24 & M24 (a)	M24
25	18/08/11	6663	15 000.00	M25 & M25 (a)	M25
26	22/08/11	4199	20 000.00	M26 & M26 (a)	M26

27	26/08/11	4207	15 000.00	M27 & M27 (a)	M27
28	31/08/11	6673	12 000.00	M28 & M28 (a)	M28
29	02/09/11	4212	20 000.00	M29	M29
30	15/09/11	6685	15 000.00	M30 & M30 (a)	M30
31	20/09/11	6696	30 000.00	M31 & M31 (a)	M31
32	27/09/11	6727	20 000.00	M32 & M32 (a)	M32
33	04/10/11	6746	20 000.00	M33 & M33 (a)	M33
34	10/10/11	6763	20 000.00	M34 & M34 (a)	M34
35	11/10/11	6767	5 000.00	M35 & M35 (a)	M35
36	13/10/11	6769	15 000.00	M36 & M36 (a)	M36
37	17/10/11	6775	20 000.00	M37 & M37 (a)	M37
38	17/10/11	6776	5 000.00	M38 & M38 (b)	M38
39	20/10/11	6781	10 000.00	M39 & M39 (b)	M39
40	25/10/11	6784	20 000.00	M40 & M40 (a)	M40
41	07/11/11	6811	30 000.00	M41 & M41 (a)	M41
42	11/11/11	6819	30 000.00	M42 & M42 (a)	M42
43	14/11/11	6821	20 000.00	M43 & M43 (a)	M43
44	15/11/11	6822	5 000.00	M44 & M44 (a)	M44
46	21/11/11	6830	35 000.00	M46 & M46 (a)	M46
47	25/11/11	6831	25 000.00	M47 & M47 (a)	M47
48	26/11/11	6833	40 000.00	M48 & M48 (a)	M48
49	30/11/11	6846	50 000.00	M49 & M49 (a)	M49
50	06/12/11	6853	50 000.00	M50 & M50 (a)	M50
51	09/12/11	6864	40 000.00	M51 & M51 (a)	M51
52	23/12/11	6874	20 000.00	M52 & M52 (a)	M52
53	28/12/11	6877	10 000.00	M53 & M53 (a)	M53
54	30/12/11	6878	25 000.00	M54 & M54 (a)	M54

55	05/01/12	6881	20 000.00		M55
56	18/01/12	6896	15 000.00	M56 & M56 (a)	M56
57	23/01/12	6903	15 000.00	M57 & M57 (a)	M57
58	31/01/12	6940	30 000.00	M58 & M58 (a)	M58
59	06/02/12	6945	30 000.00		
60	06/02/12	6948	10 000.00	M60 & M60(a)	M60
61	14/02/12	6967	30 000.00	M61 & M61(a)	M61
62	06/02/12	6988	15 000.00	M62 & M62(a)	M62
63	24/02/12	6999	40 000.00	M63 & M63(a)	M63
64	21/03/12	7046	20 000.00	M64 & M64(a)	M64
65	27/03/12	7058	25 000.00	M65 & M65(a)	M65
66	30/03/12	7073	20 000.00	M66 & M66(a)	M65
67	03/04/12	7079	20 000.00	M67 & M67(a)	M67
68	13/04/12	7086	25 000.00	M68 & M68(a)	M68
69	18/04/12	7096	10 000.00	M69 & M69(a)	M69
70	04/05/12	7109	20 000.00	M70 & M70(a)	M70
71	10/05/12	7116	20 000.00	M71 & M71(a)	M71
72	21/05/12	7146	25 000.00	M72 & M72(a)	M72
73	13/07/12	7244	5 000.00	M73	M72
74	25/07/12	7260	10 000.00	M74 & M74(a)	M74
75	26/07/12	7261	10 000.00	M75	M76
76	27/07/12	7264	10 000.00	M76 & M76(a)	M76
77	30/07/12	7268	15 000.00	M77 & M77(a)	M77
78	02/08/12	7271	10 000.00	M78 & M78(a)	M78
79	07/09/12	7309	30 000.00	M79 & M79(a)	M79
80	05/10/12	7375	20 000.00	M80 & M80(a)	M80
81	01/02/10	6066	38 000.00	C81	Q1(c)

82	01/02/10	6065	200 000.00		Q2(c)
83	01/02/10	6064	145 199.95		Q3(c)
84	20/05/10	6185	150 000.00		Q4(b)
85	23/07/12	NIL	20 304.00		
86	Jan. 2013	NIL	50 930.00		
87	<b>31/01/12</b>		<b>3 750.00</b>		B

[18] The 1<sup>st</sup> Accused testified that he honestly or genuinely believed that the person who ostensibly told him to make the various payments in question was an Inkhosikati. He told the court that as a Swazi, he could not say no to this order or instructions. In short, he said he was compelled to obey these orders. This compulsion aside, he testified that the alleged Inkhosikati informed him that the monies would be repaid to the school. These interactions between the 1<sup>st</sup> Accused and Sjabu went on for quite a while and all the time the 1<sup>st</sup> Accused was giving money from the school funds or account to Sjabu. The monies were not repaid and the First Accused kept no record whatsoever of the monies he was churning out to Sjabu. Sjabu did not give him any receipt for the payments either. This, in my judgment, clearly shows that the 1<sup>st</sup> Accused is lying in his evidence that he believed that the money would be repaid to the school or that there was ever an undertaking to repay it.



[19] I is also significant to observe that the 1<sup>st</sup> Accused was unable to tell the court what law or rule of Swazi Customary law obliged him to obey such an order, even assuming it came from an Inkhosikati. Again, on being quizzed whether it was in the first place proper for him, as a male Swazi person, to speak privately to or with an Inkhosikati, he conceded that it would have been improper. It is also observed that the First Accused continued making payments to Sjabu from the school fund even after being warned that the said Sjabu was a fraud or con. No Inkhosikati was involved in this scam. In all he paid a sum of about E1741500.00 to Sjabu. None of this amount was ever repaid to him or the school.

[20] I am advised that Swazi Law and Custom does not demand absolute and blind obedience to superior orders. Mr. Makhubu himself readily accepts this fact. When asked by the Court if he would have killed himself if so commanded by the so called Inkhosikati, he rhetorically said “everyone fears death.” That is a diplomatic no in my book.

[21] I accept unequivocally that respect and obedience are the bedrock of Swazi life and culture. But surely there are bounds or limits to this. Thus the saying that the defence of obedience to superior orders “*yasala e Nuremberg*”. Even in the armed or Disciplined Forces where the defence

is frequently raised and where discipline and obedience to orders is key, a subordinate is not expected or obliged to obey an order that is manifestly illegal and unreasonable. (See *S v Mostert* (AR 842/03) [2005] ZAKZHC 27; [2006] 4 ALL SA 83 (N) (8 March 2005) and the case is cited therein.

[22] The regularity or repetitiveness, as shown in the table above, with which the money was being taken from Mr. Makhubu is simply astounding. It is unbelievable. (*Ngatsi bekudliwa emakhiwa*). No one comes begging or even demanding a loan at such short or regular intervals.

[23] Even accepting for the moment that the 1<sup>st</sup> Accused honestly believed that he was acting on superior orders, these orders were manifestly unlawful, outrageous and most unreasonable. No one is expected to obey orders from whatever quarter – that are unlawful and grossly unreasonable.

[24] From the above analysis and summary of the evidence, the First Accused is found guilty on all these counts; viz counts 1-80, less count 45. He is also found guilty on count 87. The total amount involved on these counts is about E1745250.00.

*[Handwritten signature]*  
**MAMBA J**

NEBULA  
LAMB

1<sup>st</sup> APPLICANT  
2<sup>nd</sup> APPLICANT