IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No. 28/2012

In the matter between:

MPUMELELO MAMBA 1st Appellant

ELPHAS VILAKATI 2nd Appellant

MULTI TRADE INVESTMENT 3rd Appellant

And

REX Respondent

N**eutral Citation:** Mpumelelo Mamba and 2 Others v Rex (28/2012) [2016] SZSC *70 (30 June 2016)*

Coram: DR B.J. ODOKI, C. MAPHANGA and M. LANGWENYA

Heard: 19 MAY 2016

Delivered: 30 JUNE 2016

Summary: Criminal Procedure – Theft – Public officers stealing from employer – Company controlled by directors who are public officers as well as shareholders – Application of Section 338 (6) of the Criminal Procedure and Evidence Act, 1938 – Appeal against conviction and sentence – Appeal dismissed and sentence confirmed.

JUDGMENT

M. LANGWENYA AJA

[1] The three appellants were charged before the High Court with seven counts; the first six counts are of the crimes of fraud and the last count is that of theft. It is alleged that in each case, each of these appellants were acting in furtherance of a common purpose. They pleaded not guilty. They were

acquitted and discharged on all the counts of fraud but convicted of the crime of theft. The first and second appellants were sentenced to three years imprisonment which was backdated to 13 November 2013. In addition to the sentence of three years imprisonment, all three appellants were ordered to compensate, jointly and severally, each paying the other to be absolved, the Swaziland government the sum of E59 950.00 this being the total amount for which they have been convicted.

[2] The appellants were respectively accused numbers 1, 2 and 4 at the trial. There was also a 3rd accused- Ndumiso Mamba who was acquitted and discharged at the close of the case for the prosecution.

[3] The first and the second appellants were employees of the Central Transport Administration (CTA) and also doubled up as the Directors of the third appellant. The third appellant is a private garage or workshop that repaired Government motor vehicles entrusted to them by the Central Transport Administration (CTA) on behalf of the Government of Swaziland. Initially, the first appellant was also a Director of the third appellant but supposedly resigned his directorship for ethical reasons. In his words, the first appellant

resigned his directorship after being advised that because his role and functions at the CTA involved outsourcing the repairs of Government motor vehicles to the third appellant, this could cause a conflict of interest.

[4] In relation to the second and third appellant, Section 338 (1) of the Criminal Procedure and Evidence Act 67 of 1938 was applied by the trial Court. The Section provides that: *In any criminal proceedings under any statute or statutory regulation or at Common law against a company, the Secretary and every Director or Manager or Chairman thereof in Swaziland may, be charged with the offence and shall be liable to be punished thereof, unless it is proved that he did not take part in the commission of such offence, and that he could not have prevented it.*

[5] As a Director and Shareholder, the second appellant was accordingly charged with the offences committed by the third appellant's servants in the name of the third appellant. In the correct words of the learned trial Court Judge Mamba, "*The philosophy or rationale behind Section 338 (1) is not difficult to fathom. A company though itself a legal person or entity, is an artificial person. It has no mind or hands of its own by which it may carry out or do*

any juridical act. Its hands or mind are those of its directors and other officials that are entrusted with its operations. Therefore, such officials are, in the main, responsible or liable for the criminal acts they commit on behalf of the company."

[6] Dissatisfied with the conviction and aggrieved by the sentence, the appellants appealed to the Supreme Court and argued *inter alia* that:-

a) The Court *a quo* erred in law and in fact in convicting the appellants on the charge of theft;

b) The Court *a quo* erred in law and in fact in holding that there was double payment in respect of motor vehicle SG 383 WO and that no further work was done on the said motor vehicle;

c) The Court *a quo* erred in law and in fact in rejecting the appellants' evidence that the motor vehicle SG 383 WO was brought to the premises

of the third appellant for repairs on three different occasions after being involved in separate accidents;

d) The Court *a quo* erred in law and in fact in relying on the Theft and Kindred Offences Act for purposes of sentencing when the appellants were charged with the common law offence of theft;

e) The Court *a quo* did not exercise its discretion fairly and justly in imposing a custodial sentence without the option of a fine.

[7] Mr Makhanya who appeared on behalf of the Respondent argued that the Court correctly convicted the appellants of theft; that evidence tendered in Court clearly stated that there was double payment for the same items for repair of motor vehicle SG 383 WO; that the trial Court correctly found that invoices number 060 did not follow seriatim invoice 059 because the former was dated 24 January 2005 while the latter was dated 27 April 2004; on sentence, Respondents argued that in the absence of extenuating circumstances, the trial Court was justified in sentencing the appellants to a term of three years imprisonment without the option of a fine.

[8] The material facts giving rise to the conviction of theft have been articulately and accurately set out by the learned trial Judge Mamba and I can do no better than refer to his judgment in this regard. The first appellant was an employee of the CTA responsible for, among other things, inspecting and certifying whether or not government motor vehicles outsourced to private panel beaters and spray painters had been competently done or repaired.The second appellant worked in the Accounts department at the CTA from 1995 until 2004. As stated in paragraph 3, the third appellant was a garage or workshop that repaired government motor vehicles on instruction by the CTA on behalf of the government of Swaziland.

[9] The procedure followed in outsourcing the repairs of motor vehicles from the CTA to independent or private panel beaters and spray painters was that the CTA would issue a service Request form to the service provider stating or listing the type and nature of the work requested and in turn the chosen service provider would also state and itemize the charges, including labour for it. Once the required work had been carried out, the repairer would then verbally inform the relevant department within the CTA of this fact. Upon receipt of this information, a technician or inspector from the CTA would then go and inspect the said motor vehicle and if satisfied that indeed the work had been

done as required, he would certify this in writing on the service request form. This inspection would take place at the premises or workshop where the motor vehicle had been repaired and not at the CTA. The repairer would then and only then send an invoice to Government requesting payment for the services done and certified as aforesaid. The next step would be the issue of a payment voucher by the relevant department instructing the Accountant General to make the requisite payment for the services rendered. If satisfied with all the documentary information, the Accountant General would then cause a cheque in the stated amount to be issued to the relevant service provider.

[10] In the present case, it is common cause that it was the first appellant who made the relevant certification that the motor vehicle that is the subject of this appeal in count seven, this being the count of theft, had been adequately repaired and completed.

[11] Count one relates to motor vehicle SG 383 WO. The crime was allegedly committed on 25 May 2004 and the government was allegedly defrauded a sum of E59 950.00. This count is linked to count seven wherein the prosecution alleges that the appellants billed the government twice for the

same service. The essence of the allegation and submission of the prosecution is that the appellants issued two invoices for the same task and caused government to make payment to the third appellant for double the stipulated work or service.

[12] According to PW 1, the purchase order or service request form (exhibit N) in respect of motor vehicle SG 383 WO was issued and dated 15 April 2004. The corresponding invoice from the third appellant is number 059 and is dated 27 April 2004 and the relevant payment voucher is number 251 and is dated 15 May 2004. This voucher is for the sum of E87 610.00 comprising E59 950.00 in respect of repairs to SG 383 WO and a sum of E27 660.70 being repairs to motor vehicle SG601 AG. The corresponding cheque bears number 557312 and is dated 24 May 2004 (Refer to exhibits K, L, M, N and O).

[13] PW2 stated that when he and his team visited the third appellant's premises on 21 December 2005, the motor vehicle SG 383 WO was one of the Government motor vehicles that were there and was still being repaired.

[14] On count seven the prosecution alleges that the appellants did unlawfully and intentionally steal money in the sum of E59 950.00 which was the property of the Swaziland Government. This offence is alleged to have been committed on 24 December 2004. The relevant cheque in this case is dated 25 January 2005 whilst the invoice from the third appellant is number 060. The Crown alleges that this is an unlawful duplication of invoice number 059 dated 27 April 2004 in respect of the motor vehicle SG 383 WO. In support of this charge, the prosecution relied on the evidence of PW1 who told the Court that the appellants got double payment for the same repairs of motor vehicle SG 383 WO and on exhibit X, Y, Z and AA. PW9 Dumisa Ngwenya also gave evidence to the effect that there were two payments of the same amount in the name of the motor vehicle SG 383 WO. PW 9 stated that during his investigations in October 2005, he found the motor vehicle SG 383 WO on the premises of the third appellant awaiting repairs. It was the evidence of PW 9 under cross examination that the motor vehicle SG 383 WO was involved in one accident.

[15] The appellants' explanation to the allegations of duplication of invoice number 059 dated 27 April 2004 is that the same motor vehicle was brought to them for another totally new task altogether. They stated that the same

motor vehicle SG 383 WO had the same type or nature of damage and therefore required the same nature of repairs and the same charge as reflected in invoice number 059 dated 27 April 2004 and invoice number 060 dated 25 January 2005. The appellants argued that on the basis of this explanation the charge in question was legitimate and lawful. The version of the appellants does not find support in the evidence presented by the Crown. Other than the appellants' say so, their version appears to be an improvisation adapted to the evidence of Crown witnesses.

[16] The trial Court rejected the version of the appellants in preference for that of the Crown.

[17] I now turn to the appeal of the appellants. Counsel for the appellants argued that the Crown did not prove the commission of the crime of theft by the appellants. Theft, in substance consists in the unlawful and intentional appropriation of the property of another (Refer to **S v Visagie 1991 (1) SA 177 (A) at 1811**). The intent to steal (*animus furandi)* is present where a person (1) intentionally effects an appropriation; (2) intending to deprive the owner permanently of his property or control over his property, (3) knowing

that the property is capable of being stolen, and (4) knowing that he is acting unlawfully in taking it (Refer to **J. R. L. Milton: South African Criminal Law and Procedure: Vol II (3rd Edition): page 616**.

J. R. L. Milton at page 617 states further that "…it is not sufficient that the accused intentionally effected a *contrectatio* of the property. In order for there to be *mens rea* of theft the *contrectatio* must be accompanied by an intention permanently to deprive the owner of the benefits of his ownership."

The present facts and evidence suggest that the appellants did unlawfully appropriate to themselves the sum of E59 950.00 after duping the Government of Swaziland into paying them twice for a once off repair on the motor vehicle SG 383 WO. The appellants well knew they were not entitled to the second payment. The learned trial Judge *a quo* was in my view correct to find that the version of the appellants was false in the circumstances.

[18] The pertinent question is whether it has been shown that the appellants had the requisite intention to permanently deprive the Government of Swaziland the amount of E 59 950.00. The answer to that question depends upon the assessment of the evidence as a whole, the drawing of inferences from the proven facts and the subsequent conduct of the appellants, and more

importantly what was said by the appellants in their exculpatory version. There is evidence that the appellants were twice paid for the same repairs on the same motor vehicle to wit SG 383 WO. The appellants admit so much.

[19] There is a strong indication in the evidence, which points irrefutably to the conclusion that when the appellants were paid twice for the repair of the motor vehicle SG 383 WO, they intended to and indeed appropriated the E59 950.00 paid to them by the Government of Swaziland. The explanation given by the appellants for receiving the second payment is that the motor vehicle SG 383 WO was twice involved in a crash, but that is where the similarity in their version ends. The second appellant's version is that SG 383 WO was brought to third appellant's premises in September 2005 with its bumper laced with fur and tied with a wire. The version of the first appellant on the other hand is that SG 383 WO was taken to third appellant early in the year 2004. There is no reason given why their versions are at cross purposess in this important respect. Further, the second appellant states that when SG 383 WO was brought to third appellant's premises in September 2005, he went to the first appellant and informed him that the motor vehicle had not been incompetently done, that it was not at third appellant's premises for a return job. The first appellant told the second appellant to fix the motor vehicle and

not question what CTA personnel said. It is significant that the first appellant would have to be told by the second appellant about the reason for the subsequent referral of SG 383 WO to the third appellant; the first appellant was the person responsible for outsourcing government motor vehicles to the third appellant as such, this information should have been at his disposal. This explanation to my mind, is so bereft of any truth that it can safely be rejected as false beyond reasonable doubt.

[20] In my view, the appellants' version is contrived to try to disassociate themselves from their illegal and intentional appropriation of the amount of E 59 950.00 that the Government of Swaziland was duped into paying the appellants, this was a misconception about the true gravamen of their implication in a course of criminal conduct. The story about a second or third accident involving the motor vehicle SG 383 WO, is in my view an invention. In the result I find that PW 1 and PW 9's evidence is to be believed when their evidence contradicts that of the appellants.

[21] The embellishments given in the appellants' testimony in the record of proceedings seems to be improvisations intended to adapt their versions to

that of PW1 and PW 9's evidence. PW1 and PW 9 found SG 383 WO at third appellant's premises between October and December 2005 still under repairs. The first and the second appellants' explanation why the motor vehicle SG 383 WO was still being repaired long after the job had been paid is far from convincing as I have already indicated. Whatever discrepancies may exist in the evidence of Crown witnesses is tangential to the real material issue of appellants' invoice numbers 060 and 059 which is dated 24 January 2005 and 27 April 2004 respectively; while invoice 061 by the third appellant and presumably from the same invoice book is dated 18 May 2004. The cheques and invoices referred to herein are the documentary evidence for double payment that was unlawfully derived and appropriated by the appellants.

[22] The appellants' exculpatory version was wholly improbable as to be plainly untruthful and palpably false. I do not propose to go into all the unsatisfactory features of their evidence referred to by the trial Court in its well-reasoned judgment. Suffices to say, the trial Court's assessment of all the evidence, its adverse credibility findings relating to the appellants and its rejection of their evidence cannot be assailed nor can its favourable credibility findings concerning the Crown witnesses. The accounts of the

Crown witnesses were satisfactory and accord with the probabilities. PW1 and PW 9 corroborated each other in material respects. A reading of what is available of the Court record leaves not the slightest doubt that the prosecution evidence was honest and accurate.

[23] Axiomatically, an accused person need not put up a version that is more than reasonably possibly true and the version need not even be believed. The abiding question is, can the appellants' version satisfy this test? In my view and for reasons set out above the question should be answered in the negative.

[24] The sentence imposed is assailed on the basis that it is strikingly inappropriate; that the trial Court exercised its discretion unfairly and unjustly in imposing a custodial sentence without an option of a fine. The first and second appellants stole from their employer. In the words of the learned trial Judge, "they betrayed the trust that their employer had placed on them."

[25] The first appellant was the Operations Manager at the CTA while the second appellant worked in the accounting department at the CTA. Both the first and second appellants were directors and shareholders of the third appellant. Although the first appellant had ostensibly resigned his directorship in the third appellant, he continued as a signatory to the third appellant's bank account. The trial Court found that the so-called resignation by the first appellant was nothing but a sham. It was the finding of the trial Court further that, both the first and the second appellants were the "brains and driving force behind" the third appellant.

[26] The Court *a quo* enquired into the applicability or otherwise of the Theft and Kindred Offences by Public Officers Order 22 of 1975 to the present case. At page 5 of the judgment on sentence, the trial Court ruled that the Order was inapplicable in this case.

[27] It is now common cause that theft by public officers at the CTA at the relevant time was rampant. For a long time, it appeared difficult for the authorities to identify and root out such criminal conduct. The Courts are

obliged to render effective assistance lest the game be thought to be worth the candle.

[28] In this instance, the money that was stolen by the appellants was not overly large but nevertheless not insubstantial either. I am satisfied that the seriousness of the offence requires a custodial sentence to the first and second appellants. A period of three (3) years imprisonment will answer the requirements of justice in this instance.

[29] In addition to the above sentence, all three appellants are ordered to compensate, jointly and severally, each paying the other to be absolved, the Swaziland Government in the sum of E59 950.00, which is the total amount for which they have been convicted.

[30] In the result, the appeals of the appellants against their conviction and sentence are dismissed.

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M. LANGWENYA AJA

I agree _____

DR B.J. ODOKI JA

I agree _____

C. MAPHANGA AJA

For Appellants: Mr A. S. Dlamini

For Respondent: Mr A. Makhanya