

IN THE HIGH COURT OF SWAZILAND

In the matter of: CASE NO. S. 186/81

REX

vs.

SAMUEL DOCTOR F. DLAMINI

CORAM: D.D. WILL, A.J.

FOR CROWN: Mr. T. Masina

FOR DEFENCE: In Person

JUDGMENT

(Delivered on 5th November, 1981)

Will, J.

Before dealing with the individual counts it is convenient to refer to the evidence of a general nature which is applicable to most, if not all, the counts. The general evidence concerns the procedure adopted for the handling of Government funds, for the payment of claims against the Government, and for advances or loans granted from Government funds for official tour purposes.

The procedure for advances or loans made to ministers and civil servants for tour purposes is prescribed in Financial Regulation No. 1209 which is as follows:

"The ACCOUNTANT-GENERAL may approve a tour advance for a tour of duty outside Swaziland and extended tour within Swaziland. The advance should not exceed the level of subsistence and travelling allowance for the period of the tour. The advance will be repaid immediately upon the completion of the tour."

It will be observed that such advances must be authorised by the ACCOUNTANT-GENERAL to whom a payment voucher, completed by the applicant and transmitted to the Treasury by the ministry concerned, must be sent. If the ACCOUNTANT-GENERAL authorises an advance, a cheque from his department, which is usually known as the Treasury, is sent to the officer concerned.

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On completion of the tour of duty for which the advance was made the officer completes a claim form for his expenses and his claim is sent to the Treasury for payment. If his expenses should exceed the advance made to him he would receive from the Treasury a cheque for the excess. If, however, his expenses should be less than the advance made to him he would be required to repay the excess to the Treasury. This process is referred to as "retiring" the advance. Such advances, in practice, are usually made only for foreign tours or for lengthy domestic tours.

Public servants, however, who are authorised to use their own motor vehicles on Government work within the ministry are expected to bear their expenses, such as subsistence and transport costs, and then, at the month's end, to submit a claim for the reimbursement of them. In an exceptional case in which a public servant does not possess the funds to meet his expenses himself an advance may be made to him by the ACCOUNTANT-GENERAL. Such an advance is made on production of a payment voucher transmitted to the ACCOUNTANT-GENERAL by the ministry concerned together with an explanation of the reason for it and a listed estimate of the expected expenses. The retrieval of such an advance follows

the procedure for the retiral of advances for foreign tours or lengthy domestic ones.

I next consider the procedure for payment of wages to Government employees, relating such procedure particularly to the Ministry of Power Works and Communications. There is an Accounts Section at the Head Quarters of the Ministry under the control of the Principal Accountant, Phineas Mahlalela, and of which the Accused was his deputy.

Requisitions are made on payment vouchers, month by month by the various departments or sections of the ministry each of which has its own accounting section. A departmental requisition is for the sum expected to be disbursed in wages for the month.

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The requisition is transmitted through the Head Quarters accounting section of the Ministry to the Treasury. A cheque is made out by the Treasury, not to the Ministry, but to the department or section concerned, for example to the Cleric of Works Manzini. The accountant of the department or section calls at the Treasury for the cheque for which he or she signs in a book provided for the purpose. The payee of such cheques is the clerk of works of the department or section concerned, and endorsement is effected by means of a departmental or sectional rubber stamp impression on which the clerk of works endorses on the space provided for the payee, and the departmental accountant endorses in the space provided for the authorising officer. The cheque is then cashed "by the department or section concerned and employees are paid the sums standing against their names on the pay sheets which they sign on receipt of their wages. Any surplus has to be refunded to Revenue, the Treasury. It is not permissible under any circumstances to use any surplus of wages for another purpose such, for example, as any permissible advance for a civil servant's tour expenses. When advances are permitted they are made either by cheques issued by the Treasury, or if an advance is below 1300-00 from the Ministry's cash advances account, this is sometimes referred to as its "float".

If there is a shortfall in the money made available by the Treasury to the department or section for wages a supplementary requisition is made by the section or department, through the Ministry, to the Treasury, and a cheque is given by the Treasury in favour of the department or section. Any surplus from a supplementary draw on the Treasury may likewise not be used under any circumstances for any other purpose than the payment of wages. Monthly pay-sheets must be retired within 14 days of the end of the month for which the wages were paid. If pay-sheets are not retired by then it is the duty of the

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ACCOUNTANT-GENERAL to query the delay and investigate the reasons for it.

COUNTS 1 to 5

Against this general background I proceed now to deal with Counts 1 to 5. Geina Dlamini was junior clerical officer in the Head Quarters office of the Ministry. He was in charge of the Accounts of a special project which necessitated wages to be paid to labourers on pay sheets for that project, and not on the ordinary recurring monthly pay-sheets of the Ministry nor on the ordinary recurring/pay-sheets of the Ministry's departments or sections.

Gcina was provided by the Treasury with the sum of E5000-00 for the payment of wages for November 1979. Approximately E3000-00 was paid out in wages but he did not retire Ms November 1979 pay-sheets within 14 days because he was endeavouring to have missing labourers traced.

In fact, for reasons which will appear later, he did not retire the pay-sheets at all and they were still in his possession when the auditors arrived in January 1981. The explanation given for the failing by the Treasury to query the long-delayed retiral of these pay-sheets - an explanation with which I was not impressed - was that they were pay-sheets of a special project and therefore were not subject to the same procedure as for monthly recurrent pay-sheets.

In February 1980, however, the Principal Accountant, Phineas Mahlalela, called the Accused as his Senior Accountant, and Hlanganani the head of the section of the Ministry Head Quarters Accounting Section in which Gcina was employed, and told them both that steps should be taken to retire the November 1979 pay-sheets for the special project even though a considerable sum still remained for payment of labourers wages which had not by them been claimed.

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It was the Accused's duty to check the Head Quarters accounts and at the end of March 1980 he checked Gcina's accounts for the special project and then, according to Gcina, the Accused gave him a payment voucher, Exhibit B, in which payment of an advance of E100-00 to Accused was claimed. The purpose of the advance was stated as follows:

"Being an advance to the above officer(i.e. the Accused) for petrol while doing his official duties."

Then, according to Gcina, the Accused himself counted out E100-00 from the money which was still lying on the table. The Accused then asked Gcina to check that the amount which he had taken was E100-00. Similarly in the following months of April,/June, and July advances were made of E60-00, E500-00, E20-00, E490-00 respectively.

As, according to Gcina, substantially what happened in March also happened in the following 4 months - it is not necessary to deal with them specifically save to state that in regard to the advance for the month of April what purports to be an I. O. U. (Exhibit C.) was given.

Gcina stated that he was aware that it was irregular for these advances to be made at all, and particularly to be made from surplus wages, but he was a junior officer and the Accused was a senior officer and his superior in the office. The Accused also assured him that the advances would be repaid after the Accused had submitted his subsistence and transport claims for the months concerned and after his claims had been paid.

The Accused, however, failed to repay any of the amounts despite being required on several occasions to do so. Gcina stated that he reported to Hlanganani, his immediate superior, who said "let us wait - maybe he will pay."

Hlanganani denied that Gcina told him that Accused had taken the money but I accept the evidence of Gcina, who gave his

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evidence well and convincingly, and reject the evidence of Hlanganani who did not impress me favourably. He was Gcina's immediate superior and he was given specific instructions by the Principal Accountant as early as February 1980 to have the pay-sheet retired. His failure and that of the Accused, to cause the pay-sheet to be retired for almost a year can only be explained on the basis that they knew that it could not be retired because there was a shortage in the funds in the hands of Gcina and why there was a shortage.

The Accused's defence was that he repaid all the monies advanced to him from what he received month by month on his claims for expenses. He denied that it was irregular for the advances to be made to him. He claimed that even if such advances were not permissible on a strict application of Financial Regulations a practice had nevertheless arisen for advances to be made. At worst for him, so he contended, he commit no more than an irregularity which might subject him to domestic disciplinary procedures but not to the sanction of the Criminal Law.

I have no hesitation in accepting the evidence of Gcina that the Accused failed to refund the money advanced to him, and in rejecting the Accused's evidence. On this point, and generally on the Accused's

evidence in the case as a whole, I found him to be a thoroughly unsatisfactory witness. I have already stated that I found Gcina to be a credible witness. The Accused was a checking officer of Gcina's cash and he had been specifically instructed by the Principal Accountant in February 1980 to retire the outstanding pay-sheets. If he had repaid these advances, but money was missing on his checking of Gcina's cash, he should have taken steps against Gcina. Instead he continued to take money from Gcina.

There can be no doubt that the taking of these advances by

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the Accused from Gcina's surplus money was contrary to Financial Instructions and practice, and that the Accused must have been well only permissible aware advances were/from the advance cash account and particularly that he was not entitled to take them from surplus wages. The Accused endeavoured to establish that Financial Instructions were generally not observed and that advances were freely made, but there was no evidence to support that. The only instances of advances being made by the MMinistry, and not by the Treasury, for tour allowances were those involving the Permanent Secretary and the Under - Secretary. The only other instances was an advance of E25-00 to an employee by one of the Clerk of Works because of illness. There was urgency about the advances to the Permanent Secretary and to the Under - Secretary.

The Accused said that he did not ask for the return of the acknowledgments of debt (Exhibits BCDEF) because he trusted Gcina who he thought would destroy each one of them as he repaid it. If monthly checks of Gcina's money were made and no shortage was found until the final check by the Auditors in 1981, Gcina must have retained the acknowledgements of debt although they had been repaid and then at about the time of the Accused's arrest, he must have stolen the globular sum of E1170-00.

I find therefore that the Accused took unfair advantage of his superior position to procure from Gcina advances, totalling E1170-00, to which he knew he was not entitled; that he said he would repay them when his monthly claims for expenses had been paid; and that he failed to repay them from those sources or at all.

It now becomes necessary to consider the charges against the Accused in the light of the facts which I have found proved. There are five charges of fraud each of which arises out of the advances during the months of March 1980 to July 1980. As an alternative to the five charges of fraud there is one charge of theft of the total sum of E1170-00.

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The one charge of theft, not being one alleging a general deficiency, may be technically defective for misjoinder, but as there can be no prejudice to the Accused the defect is not fatal. Indeed the defective charge operates to Accoused's advantage because instead of having to meet five counts of theft he is charged on only one, a matter of considerable advantage to him by reason of the mandatory minimum sentence for theft by public servants which is prescribed by Act 5 of 1981.

On the facts I have found proved the charges of fraud clearly fail on at last two grounds. It has not been established, even by conduct, that the Accused misrepresented that he was entitled to these advances. The money was received purely and simply as a result of the Accused having abused his position as a Sanior Officer, it was a form of duress but not fraud. Even if the mis-presentation had been established it was not the misrepresentation, but the duress, which induced Gcina to part with the money. Gcina was well aware that it was irregular for him to make the advances.

I turn now to the alternative charge of theft. A person who, in the position of the Accused, uses undue influence to procure money which he otherwise would not have obtained, is guilty of an unlawful taking (fraudulosa contrectation). It is as if he had taken the money from the cash box himself and had left acknowledgements of debt for them. This is particularly so because it was the Accused himself who took what he wanted from the money he required, relying on the fact that Gcina was hardly in a position to

object him doing so.

Whatever might have been the position if the Accused had repaid the sums borrowed after his claims for subsistence and transport had been paid - a matter I am not called upon to decide - his failure to repay these sums from the sources I have mentioned, or at all, despite the lapse of a lengthy period and despite repeated requests for repayment establishes animus furandi. Support for the conclusion I have reached is to be found

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in the case of H. vs. Milne and Erleigh 1951 (1) SA at pages 864 and 877.

I therefore find the Accused guilty of the charge of theft of E1170-00 which is alternative to the counts 1 to 5.

COUNT 6

On count 6 the evidence was that of Adelaide Mavuso who on the 1st September, 1980 was directed by the Accused who, as Senior Accountant was her superior officer, to prepare a voucher, Exhibit A. On Accused instructions she wrote in the relevant portion of the voucher, which was of the sum of 1800-00 as follows:

"Being supplementary wages advance for P. W. D. daily rated employees for the months of August, 1980" She gave the completed voucher to the Accused who signed it as "ACCOUNTANT-GENERAL". Phineas Mahlalela, the Principal Accountant signed it as head of Department. Phineas Mahlalela signed because the Accused, who brought the form to him, told him that E800-00 was urgently required by the Clerk of Works Manzini for labourers who had not been paid.

Charles Mavuso, who was the accountant in the office of the Clerk of Works Buildings at Manzini, stated that in August 1980 there was a shortage of money to pay labourers. He had requisitioned for, and had received from the ACCOUNTANT-GENERAL the sum of E15500-00 for that purpose, but he found that he was E452-81 short. He spoke to the Accused on the telephone and the Accused agreed to procure the sum of E452-81 for him. There was no mention of the sum of E800-00. The Accused said he would procure the money from other outstations of the Ministry which might have surplus cash, or otherwise by means of a cheque from the ACCOUNTANT-GENERAL. If it had been procured from the ACCOUNTANT-GENERAL he would have expected the ACCOUNTANT-GENERAL to have advised him when the cheque in favour of Clerk of Works Buildings Manzini was ready. The practice was for him to sign

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for such cheques in a book kept for that purpose by the Accountant-General, He did not receive any such cheque from the Accountant-General for the sum of E452-81 but, instead, the Accused gave him that sum in cash. The witness assumed that the Accused had obtained the money from a surplus at some other station. The procedure when one outstation uses the surplus funds of another outstation is for the former to account to the later for the funds so that the former can retire the relevant pay-sheet. It was necessary therefore for Charles Mavuso to know from which other outstation the surplus funds had been made available to him. The Accused did not give him this information and he was afraid then to question the Accused who had reprimanded him for having under-estimated the sum which he required for wages. Later he inquired from the Accused as to how he was to account for the V additional E452-81 and he was told to send the pay-sheets to the Accused with a covering letter addressed to the Accountant-General explaining how he had come into possession of the E452-81, Peter Dlamini, one of the accountants working in the Ministry's head office, sent for Charles Mavuso to explain where the E452-81 had come from. Charles Mavuso told Peter Dlamini that he had received the money from the Accused who confirmed that Charles had handed that sum to him. Accused told Peter Dlamini that the matter was in order.

Charles Mavuso knew nothing about the Voucher Exhibit A nor of the cheque for E800-00 Exhibit M made in favour of the Clerk of Works Manzini Buildings. This cheque was not signed by him and was not received by the Clerk of Works Manzini. Although the cheque was made in favour of Clerks of Works Manzini Buildings it was endorsed by means of rubber stamp which was not that of the Clerk of Works Buildings Manzini but was that of the Principal Building officer. The Accused endorsed the cheque as payee and Hlanganani signed it as authorizing officer. Hlanganani

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stated that when he was asked by Accused to do this he pointed out that it was irregular as the endorsement should have been by the Clerk of Works Buildings Manzini. Hlanganani nevertheless signed as authorizing officer because the Accused, who was his superior officer, assured him that the money was urgently required.

The Manager of the Central Bank of Swaziland stated that the cheque Exhibit M for E800-00 was paid in cash on the 1st September 1980. If regular practice was followed by the paying teller he would have required the person signing as payee on the authorizing stamp to sign in his presence.

Accused, in his evidence stated that he paid the whole of the E800-00 to Charles Dlamini in two envelopes, one for E452-81 and the other for E347-19.

I am satisfied that the Accused did not pay the whole E800-00 to Charles Mavuso, whose evidence I accept, I reject the Accused's evidence. He applied for E300-00 when he was only asked for E452-81; he cashed the cheque himself although it was made in favour of the Clerk of Works Buildings Manzini and did not use the payee's endorsing stamp. There was no need to pay the sum to Charles Mavuso in two separate envelopes and as one envelope contained E452-81 he must have known that that was what was required. Why then draw E800-00?

On the facts I have found proved the Accused did not commit fraud. He did, however, fail to account to the Clerk of Works Manzini for E347-19. He was alleged however to have stolen the money from the Central Bank of Swaziland and for reasons which I have given in a similar situation in Counts 11 and 12, and which need not be repeated herein, it is not competent to convict the Accused on the alternative charge as framed.

COUNT 7 and 8

On these two counts, which may be dealt with together, the evidence of Grace Khoza was that she was the accountant at the Mobile Unit of the Ministry of Power Works and Communications.

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She had a surplus from her money for wages and the Accused, who was her superior officer in the Ministry, told her on 8th October 1980 that he required E500-00 for the Permanent Secretary. She understood him to mean Gilbert Mabila the Permanent Secretary of the Ministry, who wanted it, the Accused said for his expenses on a tour of duty to Maputo. She gave him the sum of E500-00 in cash and he gave her a receipt for it, Exhibit P.

About a week later the Accused again came to her and said he required E200-00 for Christopher Mkhonza, Under Secretary who would be travelling on duty to Lesotho.

She knew it was irregular to advance these sums but she gave the money because of the Accused's senior position. When the monies were not repaid and she was unable to retire the pay-sheets she often spoke to the Accused asking for the return of the money. He kept on telling her that the Permanent Secretary and the Under-Secretary had not recovered their expenses.

Gilbert Mabila stated that he had to procure an advance for his expenses to M aputo from the Accused

because there was no time to procure a cheque from Treasury to which he had applied for the advance. The advance to which he was entitled was E178-00; this was the sum for which he applied, and this was the sum which the Accused gave him. His travelling expenses for E178-00 were claimed in terms of Exhibit Q and this sum was set-off against the E178-00 advanced to him by the Accused. He denied in cross-examination that the Accused gave him E500-00 and it was the first time during his cross-examination in Court that an allegation was made against him that he received E500-00 from the Accused.

Evidence similar to that given by Gilbert Mabila was given by Christopher Mkhonza except that in his case the sum for which he applied was E90-00 representing two days prescribed allowance of E40-00 per day and E10-00 conference allowance. On his return he submitted his claim for E90-00 for his expenses to Lesotho, and his claim was duly paid by the Accountant-General,

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and he then refunded the sum of E90-00 to Mrs Mchanyana an Accountant at the Ministry's Head Office. He denied in cross-examination that he received E200-00 from the Accused.

The Accused's evidence was that he paid E500-00 to Mabila and E200-00 to Mkhonza. He explained that he had given them E500-00 and E200-00 instead of E178-00 and E90-00 respectively by saying that he thought they might have been travelling in their own cars and that they were entitled to travelling allowances over and above their subsistence allowances.

I accept the evidence of Manila and Khoza and reject that of the Accused, If the sums of E500-00 and E200-00 were paid to the Permanent Secretary and the Under-Secretary the Accused

would not have been satisfied with the refund, by setoff, of only E178-00 on the E500-00, and of the refund to his office of only E90-00 instead of E200-00.

I convict the Accused of theft, not of E700-00, as alleged, but of E4-32-00, being the difference between E700-00 and the total of E178-00 and E90-00.

The misjoinder of the two incidents in one charge of theft was not prejudicial to the Accused,

COUNTS 9 and 10

I find the Accused not guilty on Counts 9 and 10 and it is therefore not necessary to deal with them in depth. The charges are of fraud but I have difficulty in clearly understanding what the charges intend to allege. They are very vague and are not the most elegant of charges. In so far as I am able to understand them the Accused is alleged to have misrepresented that Agnes Motsa had not been paid the sura of E50-25 due to her for wages for the days she had worked in October 1980, and that the Accused falsely caused a cheque for this sum to be drawn in her favour although she had already been paid. If this is indeed what is intended by Count 9 not even a semblance of a case was

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made out against him. The evidence shortly summarised is that Agnes Motsa was employed at the Airport. She was to leave for Cairo to attend a course of 6 months duration. Her air craft was to leave at about 11.00a.m. and only shortly before then she reported that she had no money. It was decided, with the Accused's concurrence, that she should be paid a cash advance of E51-75 from funds in the hands of the Clerk of Works of the Airport Department. This sum represented wages for the days she had already worked in October. It was the understanding that the advance made to her would be repaid from her wages cheque from Treasury for the period worked. A wages cheque was duly made in her favour by the Treasury. The Accused cashed her cheque after causing it to be endorsed by impressing upon it the Ministry's endorsing stamp, with his signature as payee and with another signature as that of authorising officer.

The Accused, somewhat belatedly, repaid the sum to the Airport Department. As far as I can understand this confused count, and the confused Count 10, which is linked with it, the Crown case appears really to have been that the Accused did not repay the sum from Agnes Motsa's cheque which he had cashed but from another cheque for E2000-00 made out in favour of one of the Ministry's departments but which was never received by that department. I was not prepared to allow evidence to be given as to what happened to the proceeds of the cheque of E2000-00 because such evidence was not relevant to the charges of fraud as formulated, and it would have been highly prejudicial to the Accused. I rejected the contention of Crown Counsel in seeking to lead such evidence that a verdict of theft was permissible on the charge of fraud on Count 10. His argument as I understood it, was that the Accused did not repay the advance from the money which he had received from the cashing of Agnes Motsa's cheque, but from money which he received from cashing

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the cheque for E2000-00. As I have stated I rejected this argument.

The Accused is found not guilty on Counts 9 and 10.

COUNTS 11 and 12.

Jester Dlamini who gave evidence on Counts 11 and 12 said that she worked in the Ministry's Head Office in the accounting section where she looked after UNISEF affairs. UNISEF is a United Nations Organisation. Giving evidence on Count 11 she said that in December 1980 the Accused directed her to complete a voucher, Exhibit Z, for additional wages which she said were required by the Clerk of Works Electrical. She completed the voucher as directed by him. The amount required was E172-00 which sum she entered in the appropriate space in the voucher form. Later she was shown Exhibit Z, the triplicate copy of the voucher, and Exhibit ZI, the original. She observed that the figure of E172-00 remained as she had written it on Exhibit Z. but, on the original Exhibit ZI the figure had become E2172-00 by the addition of the figure 2. She noted, also, that in the appropriate column the number of the cheque given by the Treasury in respect of the voucher was number 33354. This number had been inserted in the space provided for the purpose, on both exhibits Z and ZI, The relevant Exhibit AA was for E2172.00 and was made in favour of the Clerk of Works Electrical.

Similarly, in giving evidence on Count 12, the witness said that she was directed by the Accused to complete a voucher, Exhibit CC, in favour of the Clerk of Works Nhlango Buildings, for additional wages. The sum which she inserted in the appropriate column on Exhibit CC was E599-00 which is the sum which appears in the triplicate voucher form Exhibit BB. The sum of E1599-00, which appeared on the original voucher Exhibit CC had been altered from what she had written on it by the addition of the figure 1. The cheque Exhibit DD given by the Treasury in

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respect of the voucher was made out in favour of the Clerk of Works Nhlango Buildings. It bore the number 336494 and was for E1599-00. The number 336494 had been inserted in the appropriate space on both the Exhibits BB and CC. It was not part of her normal duties in dealing with UNISEF matters to complete vouchers of this nature but she completed them on the instruction of the Accused, her superior officer. After completing the vouchers she handed them to him. He took away the originals, and the duplicate triplicate and quadruplicate copies in each case.

She admitted in cross-examination that as she had completed the vouchers for the Accused and had no personal interest in their subject matter, the Accused could have altered them if he had wished to do so. This admission, of course, is fatal to the main charge of forgery on Counts 11 and 12. Before leaving her evidence, however, I should mention the fact that, on Count 12, she stated that she received a telephone message from the Clerk of Works Nhlango that the sum of E599-00 for which application had been made was no longer required. She conveyed this message to the Accused who said it was too late as the

vouchers had already gone forward to the Treasury but they would be returned.

Jabue Mabuza giving evidence on Count 11 said that she was the accountant of the Electrical Department. She asked the Accused for E1000-00 in December 1980. The Accused told her he would make the voucher for a larger sum as he required the surplus for Siteki. The Accused brought the cheque for E2172-00, Exhibit AA to her and asked her to endorse it as authorizing officer, the Accused having himself endorsed it as payee, although it was made out to the Clerk of Works Electrical. The Accused XXX the cheque and then asked the witness how much she wanted, and having been given the figure of E974-70, the Accused gave her that sum. She did not know what happened to the

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balance of the cheque although she understood from the Accused that it was to be used at Siteki.

I particularly watched the reaction of this witness when the Accused, in cross-examination, accused her for the first time of having been given the full amount of the cheque Exhibit AA namely E2172-00. She showed genuine surprise and then indignation. As she required E1000-00 from the Accused she did not know where he obtained the figure of E172-00 which was inserted in ZI nor the figure of E2172-00 which was inserted after alteration in Exhibit Z.

Ezekiel Maphalala of the Treasury, who had previously given evidence on another count was recalled by the Crown on Count 11 in regard to the alteration on Exhibit ZI. He was not prepared to concede that the Treasury Checking Office could have failed to notice that the figure 2 had been inserted on Exhibit ZI to make the sum required E2172-00 instead of E172-00, and he considered that the alteration could only been made whilst the vouchers were being taken from the Checking Office to the office from which the cheque was issued. If the Accused made the alteration on the original voucher he should have advised Treasury to that effect. This witness, too, considered that as the payment vouchers had been prepared for the Accused, on his directions, the Accused would had been entitled to alter them.

The Accused's evidence was that he gave the whole sum of E2172-00 to Jabue Mabuza. I have no hesitation in rejecting the Accused's evidence and accepting that of Jabue. As, for reasons which will be given later the Accused must be acquitted, it is unnecessary to refer to the many unsatisfactory features of the Accused's evidence on this count.

On the facts which I have found proved the Accused clearly cannot be convicted of forgery and altering for the reasons that have already been stated. Nor can he be convicted of the alternative charge of theft. That he wrongly - converted to his own use the sum of E1197-34 (the difference between E2172-00 and E974-30) is clear beyond doubt, but there is no evidence at all

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that he stole the sum of E2172-00 or any part of it from the Central Bank of Swaziland from which he is alleged, in the charge, to have stolen it. He cashed the cheque for E2172-00 and -received the money for and on behalf of the Clerk of Works. Out of it he accounted to the Clerk of Works for E974-70 only and he converted the balance to his own use. But on the evidence he did not steal the money from the Bank. Even if the money was stolen from the Bank, the charge would have had to allege some false pretence - the charge however is theft simpliciter.

The Accused is therefore found not guilty on Count 11. Because the facts on Count 12 are similar to those on Count 11 and because, therefore, they cannot support the charges of forgery and uttering, alternatively theft from the Bank, it is unnecessary to say more than to state that a payment voucher Exhibit BB, the triplicate copy, showed E599-00 but the original had been altered to E1599-00; that the cheque Exhibit DD for E1599-00 was made out in favour of the Clerk of Works Nhlanguano Buildings but was cashed by the Accused; and that he failed to account for the money to Busie Dlamini the Clerk of Works but converted the money to his own use. The theft, however, is alleged to have been from the Central Bank of Swaziland and not from the Clerk of Works. The charge is theft simpliciter and if it were possible to

formulate a charge of theft on the facts some form of false pretence would have had to be alleged.

Counsel for the Crown submitted that even though the facts established that the theft was from the Clerk of Works it was competent to convict on the charge as formulated because the Department of the Clerk of Works and the Central Bank of Swaziland are both Government organisations and because the Bank is the custodian of Government funds. I reject this submission out of hand.

It is not necessary to decide the extent to which the Bank

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may be regarded as a Government institution, I accordingly find the Accused not guilty on Counts 11 and 12.

COUNTS 13 and 14

Fonscka Fernando, who is the Clerk of Works Piggs Peak, gave evidence on Counts 13 and 14. He stated that on the 30th December 1980 he brought the sum of E590-00 from his surplus funds to the Accused at Head Office in Mbabane. He did so at the Accused's request. The Accused had given him to understand that the money was required for labourers at Siteki. The Accused gave him a receipt, Exhibit EE for the money. On the 12th of February, 1981 the Accused came to him at Piggs Peak and asked for, and was given, a further sum of E2000-00 which the Accused said he required for the P. W. D. Buildings Section at Mbabane, He was given a receipt Exhibit FF. None of the money was returned to him.

The Accused's evidence was an admission that he received the money but he claimed to have repaid it all to Fernando.

He stated that when he asked for, and received, the E2000-00 in February he duly repaid the sum of E590-00 and he asked for the return of his receipt, Exhibit EE. Fernando told him that it was at his home and the Accused merely left it at that because he trusted Fernando. When, later, he repaid the E2000-00 to Fernando he did not ask for the return of the receipt, Exhibit FF, again because he trusted Fernando. He obtained these suras from Fernando not particularly for Siteki and P. W. D. Mbabane but for a general float which he decided to keep in his safe to have available in case he should be asked for an urgent advance by one of the Clerks of Works. This was an unauthorised float over and above the authorised cash advance float of E300-00 kept in the office.

No one knew of this unauthorised float. Except for another sum of E400-00, which was the subject of one of the other counts,

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he had never before or after kept a special float of this nature. The special float became unnecessary as no urgent requests for money came from Clerks of Works. No calls were made on the sum of E590-00 and to obtain a larger float of E2000-00 upon which also no calls were made was strange. To arrange for a float of E590-00 instead of a round figure of E600-00 was also.

The evidence of the Accused in these counts was unsatisfactory, as it was in the case as a whole, and I have no hesitation in convicting him of the charge of theft of E2590-00 which is alternative to the charges of fraud on Counts 13 and 14. Technically there was a misjoinder in lumping together the two separate incidents of theft in one count but, as mentioned early in this judgment in respect of another count, the misjoinder did not operate to the Accused's prejudice but on the contrary operated very much to his advantage,

COUNTS 15 and 16

As I find the Accused not guilty on Counts 15 and 16 I shall dispose of them in a few words. I am inclined

to accept the evidence for the Crown given by Themba Hlatshwayo on Count 15 and to reject that of the Accused. I am inclined therefore to find that the Accused met Themba in the passage of the Headquarters offices and told Themba that he could not enter his office where he kept his money because the key was broken; and that Themba should let him have the sum of E40-00 from the surplus of funds for wages held by Themba. Themba was aware that it was irregular to advance this money to the Accused but he yielded to the Accused because of his superior position. The Accused gave him to understand that the sum would be repaid on the following day. Themba required the Accused to sign a receipt for the money which he counted out and was holding loosely in his left hand. The telephone rang and whilst Themba was holding the instrument in his right hand the Accused, who was standing next to him on his

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left, pulled the notes from Themba's left hand and quickly made off with them without giving a receipt. Themba followed soon afterwards but the Accused had disappeared. On the following day the Accused was not in the office but on the day after that he asked the Accused for a receipt and was told that the Accused was too busy attending to the Minister to give one, Themba was worried and reported to his immediate superior who is the same Clifford Sihlongonyane who figured in Counts 1 to 5. The E40-00 was never returned. The Accused's evidence is a denial that he received E40-00 from Themba.

As, however, on Count 15 there is only Themba's evidence without anything more against that of the Accused, and as the reasonable possibility cannot be excluded that Themba may have stolen the money and that he has taken the opportunity of the difficulties in which the Accused finds himself to put the blame on him, there is doubt.

The Accused is therefore given the benefit of the doubt on this count and he is accordingly found not guilty.

On Count 16 Medford Khumalo, accounting officer at the Head Office of the Ministry's Accounting Section, stated that on the 2nd March, 1981 the Accused asked him if he could let him have E50-00 from the sum of E132-37 which Medford was holding as surplus from his February pay-sheets. The Accused said he

required the money for the Mbabane Building Branch, but he was in too great a hurry then to give him a receipt. Medford's evidence continued that he did not see the Accused again because on the following day the Accused was in Manzini, and after that the police had stepped in. Medford's pay-sheet was taken by the police and it reflected the shortage of the E50-00 which the Accused had not repaid to him.

The Accused denied receiving E50-00 and suggested that Medford had taken the money himself but had not had an opportunity

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to repay it when his pay-sheet was unexpectedly taken from him by the police. The Accused suggested that the allegations of theft against him which were then being investigated by the police afforded Medford a convenient scapegoat with which to extricate himself from his difficulty. In cross-examination Medford indignantly refuted the Accused's accusation which, he said, was a double lie by which he meant a great falsehood,

I formed a good impression of Medford as a witness and I consider him to have truthful, but on this count there is only the word of Medford and nothing else, against the word of the Accused. I cannot exclude the possibility that the Accused's accusation might reasonably be true and the Accused is accordingly found not guilty.

COUNT 17.

I deal now with Count 17. Stephen Dlamini of the Matsapa Royal Residences said that on the 4th March, 1981 the Accused spoke to him on the telephone and inquired whether he had surplus funds. He told the

Accused he had a surplus of E878-00 from money for wages. The Accused told him that there were four labourers who had not been paid by one of the Roads Department sections' because of shortage of money in that section. Stephen Dlamini stated further that he told the Accused that the Clerk of Works concerned should come to him with the four labourers so that the labourers could sign his pay-sheets after being paid their wages from his surplus. The witness was called to attend to a burning house and in his absence the Accused arrived. He had authorised his accountant, Wilson Hkambule, to pay the labourers if they should arrive with the Clerk of Works concerned. On his return from the fire he discovered that Wilson Nkambule had paid E300-00 to the Accused. Because this was contrary to his instructions he went with Nkambule on Thursday the 5th of March, and again on Friday the 6th of March, to see the Accused at Headquarters.

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He failed to find him on those days and he went again on the Monday but by then the police had taken over. Under cross-examination Stephen Dlamini denied that it was possible for the Accused, on Friday the 6th of March, to have repaid E300-00 to Wilson Nkambule in the Accused's office, because he and Nkambule were unable to find the Accused on Friday the 6th of March, and also because he and Wilson Nkambule were together for the whole time that they looked for the Accused at Head Quarters, and they returned to Matsapa together.

Wilson Nkambule stated that the Accused arrived on the 4th of March at the Royal Residences and told him to give him E300-00 for four labourers who were from different sections of the Roads Department and who could not therefore be brought together with their pay-sheets. The Accused had led him to understand that the Clerk of Works Stephen Dlamini had authorised the payment of E300-00 to the Accused. The witness corroborated the evidence of Stephen Dlamini that he accompanied Stephen Dlamini on Thursday and Friday to look for the Accused at the: Head Quarters but could not find him. He denied that the Accused paid him E300-00 in cash in the Accused's office on the Friday and confirmed that he and Stephen were together all the time. The Accused in his evidence stated that he repaid the money to Wilson Nkambule on Friday the 6th. of March in the Accused's office.

I reject the evidence of the Accused that he repaid the E300-00 to Wilson Nkambule in the absence of Stephen Dlamini and I accept the evidence of Wilson and Stephen that it was not repaid.

The Accused took the money allegedly for labourers who had not been paid, but found they had been paid and thus had it available to repay.

The Accused is found guilty of theft of E300-00 on Count 17.

In the result I find the Accused guilty on 4 counts of theft

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as follows:

- (a) Guilty of the theft of E1170-00 on the alternative charge to Counts 1 to 5.
- (b) Guilty of the theft of E432-00 on the alternative charge to Counts 7 and 8.
- (c) Guilty of the theft of E2590-00 on the alternative to Counts 13 and 14.
- (D) Guilty of the theft of E300-00 on Count 17.

(d. D. WILL)

JUDGE

MBABANE.