

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

v

VICTOR MAKEKA

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu
on the 17th day of February, 1997.

The accused is charged with the crime of forgery.

In that upon or about the 6th day of August 1990 and at or near Lesotho Bank main branch Maseru the said accused, did unlawfully, falsely and with intention to defraud and to the potential prejudice of Pie Batignolles Ltd, forge an instrument in writing, to wit, a cheque purporting to be drawn by Spie Batignolles Ltd upon Barclays Bank Maseru Branch for payment to the bearer of the sum of M250,000-00.

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ALTERNATIVELY

Accused is guilty of contravening Section 182(2) of the *Criminal Procedure and Evidence Act 1981*

In that upon or about the 6th day of August 1990 and at or near Lesotho Bank main branch in the district of Maseru, the said accused did unlawfully and with intent to defraud, conspire to aid or procure the commission of fraud against Lesotho Bank.

The accused pleaded not guilty.

The Crown called five witnesses and closed its case, while the accused called only one witness but did not give any evidence, then he closed his case.

PW1 Captain George Mofolo, a policeman gave evidence that as a result of a report he received, he rushed to Lesotho Bank main branch. When he got there he was given a bank deposit slip of Lefa Moloi, and a cheque. PW1 was also given a report about these items. He drove around looking for Lefa Moloi and other people pursuant to the report he had received. When PW1 got to the gate of Lakeside Hotel, he found accused, Lefa Moloi and one Mokhomo in a motor vehicle. PW1 was able to fix his attention on these people because he had been given information about Mokhomo, whom he knew as a prosecutor in the Magistrates' Court.

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PW1 took these people to the Charge Office where their identities were established. He got some explanations from them although he does not remember the details. Accused's explanation was eventually reduced to writing. Subsequently specimen of their handwritings were taken and sent to forensic science laboratories in the Republic of South Africa. He identified a cheque which was already marked Exhibit 1 (from a previous trial of other accused) as the one he was given by the Lesotho Bank. It was a cash cheque dated 16th July, 1990, and on its face the word "Forgery" was written in red. On it were written "two hundred and fifty thousand Maloti only" and the word "cash".

Investigations led to the arrest of Tohlang Sello as a result of information received but not from the accused. PW1 went to Spie Batignolles Ltd and got explanations and specimen signatures from the people who seemed to have signed the cheque. They were C. Levine, chief accountant, and D. Ravel, financial controller, both of Spie Batignolles Ltd. They claimed the cheque leaf was lost or stolen but they had not signed it. By this time PW1 had a letter dated 17th July, 1990, purportedly written by them, they denied writing it. PW1 did not remember when and how this letter got into his possession. PW1 then photostated a blank cheque from Lesotho Bank and got specimen of the handwritings of the accused and other suspects. PW1 also obtained a specimen of Bourgeois' signature which was similar to one of the signatures on the cheque. PW1 says they questioned Tohlang Sello whom they suspected and later released him. The cheque was handed in and marked Exhibit 1, Exhibits "2" and "3" were the specimen of Ravel and Bourgeois

handwritings which were also handed in. The specimen of accused handwriting was missing from the file.

PW1 in cross-examination said he was very new when he arrested the accused and is not sure whether he was charged and brought to Court. He cannot remember when accused was brought to court or released. PW1 would not deny if accused said he was only arrested in 1992. PW1 admitted that it was Tohlang Sello who was initially arrested and charged. Accused was not at that stage charged. PW1 said he regarded taking a person for questioning for 48 hours as he did to the accused as an arrest. The reason being that he had given them a charge. Subsequent investigations led to the dropping of charges against Sello.

The evidence of PW2 Majara Edward Masupha was that he got specimen handwritings to be sent for analysis in the Republic of South Africa. He was a retired Colonel in the police force. PW2 does not know accused personally although he came across accused's name in records. His job was to deal with investigators. The specimen of accused's handwriting marked "C" was asked for after the transmission form Exhibit 4 had been sent to the disputed handwritings sections in Pretoria. PW2 caused further specimen of accused's handwriting to be obtained and they were sent to Pretoria. According to PW2, he obtained 30 specimen. PW2 handed in the affidavit from the disputed handwritings section from South Africa which stated that the handwriting "C" was the one appearing on the cheque.

The Crown then called PW3 Tohlang Sello. In his evidence he told the Court he held a BA degree from Manning University in Ireland. He worked at the Lesotho Highlands Water Authority around 1990. He had met the accused, Mokhomo and Moloi at the Charge Office in August 1990. He had previously met the accused at Shakes restaurant or beer hall around 1st August, 1990. Accused said they should talk before he left. They stood at the passage, accused was carrying Homes Trust papers. He showed PW3 a blank cheque on which amounts had not been filled. Accused asked PW3 if he knew any one who could cash the cheque for him. Accused wanted someone who worked at a bank. As PW3 could not help, he went back into Shakes beer hall and PW3 left. On the 6th August, 1990, he saw accused near Lesotho Bank main branch on Kingsway. Accused called him from a red car as PW4 was walking along Kingsway. Accused told PW3 that he had succeeded in that thing. PW3 said to the accused "thank you" and PW3 went on his way.

That evening the police came for PW3 and he found accused and others at the Charge Office. PW3 was asked questions about cheques. Amounts had been filled and they ran to hundreds of thousands of Maloti. The police said accused had said he got the cheques from PW3. PW3 told them what transpired at Shakes restaurant. Accused was quiet and did not say anything in his presence. PW3 was locked up with Moloi and Mokhomo by the police. PW3 was released seven days later after he had been taken before the Magistrate and was released on bail if he was not mistaken.

The cheques, according to PW3, were stamped Spie Batignolles a company that worked for Lesotho Highland Development Authority. PW3 then said (after being shown the cheque) there was one cheque he had by mistake thought there were two cheques. PW3 told the Court he subsequently met accused in prison but they never discussed the events that have a bearing on this case. PW3 had also been arrested for something else. Accused only asked PW3 to help him find a lawyer as he had been arrested for that matter of Mokhomo.

Under cross-examination accused's Counsel attacked the character of PW3 and actually told the Court he was aware he was opening the accused to the same attack. I will not go into all that. PW3 denied it was him who had a blank cheque which he wanted to cash so that PW3 could buy a policy from the accused. PW3 denied he said accused should fill in the sum of M250,000-00 on the cheque inside Shakes place and that accused kept on reporting the progress about the cashing of the cheque. PW3 denied that accused informed PW3 that he had found a person who would change the cheque on the day PW3 passed near the bank. PW3 said he had a right to be in the street next to Lesotho Bank, his presence in the street was not an unexplained coincidence. PW3 denied that he wanted to know the result. It emerged PW3 was on bail because he was charged with some other offence. Questions established PW3 had been mixing with criminal elements although he was always innocent. The accused's method of cross-examination was to put PW3 on trial and show him as a criminal. Details are not important and were irrelevant. In any event, it was revealed in cross-examination that PW3 had not been convicted

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of the offences he kept on being charged with.

The next Crown witness PW4 was Sehlabaka Sehlabaka of the main branch of Lesotho Bank who works as an internal auditor of the bank. He showed the Court that he had been called by Mokhomo and Moloi who wanted to cash the cheque Exhibit 1 and withdraw M250,000-00. They gave him the cheque, he caused Moloi to sign at the back of the cheque after filling a deposit slip and producing an identity document. The cheque was referred to Barclays Bank for special presentation. Moloi and Mokhomo waited. PW4 was called by the Manager who asked him whether he was aware the cheque was a forgery. When PW4 told him Mokhomo and Moloi were owners of the cheque and PW4 tried to call them, PW4 found they had left. The matter was reported to the police. The cheque Exhibit 1 had been written "Forgery" when it was returned by Barclays Bank and had been rubber-stamped by Barclays Bank the date 6th August, 1990. Mokhomo had shown PW4 a letter dated 17th July, 1990, to prove the cheque was genuine.

PW4 had previously met accused at the house of PW4 when Mokhomo had asked him to help him change a cheque as he was very busy, being a public prosecutor. PW4 agreed to help. When he offered Mokhomo a drink, Mokhomo called the accused to come and share the drink. Accused came and had a drink and they left with Mokhomo. PW4 again saw accused on the 6th or 7th August, 1990 when he had gone to identify Mokhomo and Moloi at the charge office.

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Under cross-examination, PW4 said he did advice Mokhomo and Moloi to go and cash the cheque at Barclays Bank because that would be quicker but they insisted on the long procedure of special clearance by Lesotho Bank. PW4 said he did suspect that something was wrong but it was for Barclays Bank to say. They as a bank wanted the deposit.

The last Crown witness PW5 was Brigadier Johannes Hattingh, the head of the questioned documents section of the Forensic Science Laboratory in South Africa. He had 16 years' experience on the job and had attended several courses. He stated that he received Exhibit 1 and various specimen handwritings. Their attention was attracted to specimen handwriting marked "C". They asked for several specimen of it as it had resemblance to the disputed writing. It is helpful to have several specimen as it is not easy to be certain on only a few specimen. PW5 photostated them and out of these specimen cut off words, enlarged them, and pasted them on a chart together with the enlarged photo of the cheque. The chart was marked Exhibit A. He ticked off 25 points of similarity between writing "C" and that on the cheque. Writing "C" was recorded as accused's handwriting. PW5 prepared an affidavit and sent it to the Lesotho Police together with the exhibit.

The actual specimen of the accused's writing had been misplaced. Counsel for the accused stated that the accused never disputed that he filled in the word cash and the amount of M250,000.00 in words.

The Crown closed its case.

An application for the discharge of the accused was made and refused. Reasons will be clear later.

The first witness for defence (DW1) was Osiele Tšeliso Pule. DW1 told the Court that he went to the tavern of Shakes and sat with the accused in there to discuss his mother's burial policy. A man he did not know said they should go and talk at the passage. This man had produced what looked like a bank cheque, but it was blank. He wanted some assistance. DW1 admitted he was on friendly terms with the accused and they had known each other since 1981.

In answering questions DW1 said this man did not talk with accused for a long time. DW1 said (some days later) he had heard accused who was holding the cheque Exhibit "1" speak of M250,000. This was about a week later when accused came to the house of DW1. On that occasion, accused said he wanted to go and see Mokhomo. DW1 said he was invited to by accused to come and give evidence because that man who had a cheque at Shakes now says it was accused's cheque.

After the accused had closed his case, both Counsel addressed me.

"The essence of forgery is that the forged document is in some way an imitation of a genuine document and not merely a document which contains a false statement."
See Classen Dictionary of Legal Words and Phrases Volume II at page 103.

There can be no doubt that Exhibit 1 looked a genuine cheque and that it was

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presented to the Lesotho Bank as if it was genuine. There is no need to go into this aspect at length. In this crime of dishonesty, it is not necessary for the prosecution to prove that the potential victim of a forgery actually suffered prejudice, all the Crown has to prove is that such a forgery in the ordinary course of things was calculated to cause prejudice. See *R v. Jolosa* 1903 TS 694 at page 699. On this aspect I was not addressed because the nature of evidence was such that both sides were in agreement that this aspect of the crime of forgery had been proved. What is in issue is the accused's guilt because he has pleaded not guilty.

The facts that are not disputed are that this cheque was at some stage in the hands of the accused and that the accused wrote on the Spie Batignolles Ltd Barclays Bank cheque the following words "Cash, Two Hundred and Fifty Thousand Maloti". It is also not disputed that at one stage PW3 Tohlang Sello was at Shakes near the market and that a blank cheque was discussed. Furthermore on the day the cheque was presented at the Lesotho Bank, PW3 Tohlang Sello passed and briefly exchanged words about the cheque. There is also no dispute that accused was there at the bank employee's home when Mokhomo was going to make arrangements to change the cheque with the bank employee, although he remained in the car during the discussion between Mokhomo and the bank employee.

Accused called DW1 Osiel Tšeliso Pule, who confirmed what accused had put to PW3 that the cheque originated from PW3. DW1 took the matter a stage further and showed that some days later the cheque came into the hands of the accused

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who at DW1's home spoke of the Two Hundred and Fifty Thousand Maloti and took the cheque to Mokhomomo. He revealed this information quite frankly during cross-examination. He was not shielding accused in any way and in fact made the position of the accused worse than it would have been had DW1 not given evidence. DW1 was not a highly sophisticated man, but he was not a fool.

PW3 Tohlang Sello was a highly educated man, especially in economic matters. That means he was not ignorant in matters concerning money. It was clear PW3 was not being very honest about his knowledge of the cheque. PW3 pretended for a long time that he was shown several cheques by the accused at Shakes restaurant when it was only one cheque.

Accused's case was that PW3 brought the cheque to the accused. The accused filled in the amount of two hundred thousand Maloti and reported to PW3 the progress of the cheque as arrangements were being made to cash it. Accused did not give evidence, all this comes from the nature of his cross-examination. PW3 in answer to questions said when accused called him from the red car outside the Lesotho Bank, accused said he had succeeded in that thing. This was on the day the accused had found people to help him change the cheque into money. According to PW3, accused had some days earlier asked PW3 help him cash a cheque that was blank when they were at Shakes place.

The fact of the matter is that accused did not succeed to get the cheque

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changed. What was happening was that accused had found people to help. The first question is why should the accused have been reporting progress to PW3 if the story of PW3 was true? Secondly, why should PW3 have been outside the Bank at Bank when an attempt to change the cheque was being made? PW3 says he happened to be passing the bank by coincidence as he was entitled to walk in the street. PW3 was never asked why accused chose to up-date him about developments at that stage. On that very day, the police arrested him and during interrogation told him the cheque originated from him. Accused was present but did not say a word. PW3 was charged with this crime and taken before a magistrate where he was according to PW3 probably given bail. PW3 told the court the matter never proceeded and the charge was withdrawn. It has to be noted that PW3 is not on trial, the accused is.

PW3, I equated with an accomplice and to quote from SchreinerJA in *R v. Ncanana* 1948(4) SA 399 at page 158:-

"Not merely a witness with a possible motive to tell lies...but is such a witness peculiarly equipped, by reason of his inside knowledge."

I am obliged to treat PW3 as a *socius criminis* although he was not declared one. I have to treat his evidence with caution. Even so his evidence is not materially different from what the accused wanted the court to accept. The only real difference in his evidence and the accused's case as put through questions and the evidence of DW1 Osiel Pule is about the origin of the cheque. Accused says it originated from PW3, there is a lot of circumstantial evidence that this might be so. Indeed the

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demeanour of PW3 gives me a strong suspicion that accused's case as put through cross-examination could be true. DW1 who seemed to be an honest witness says the cheque came from this man whom he did not know but who must have been PW3. The problem I have with the evidence of DW1 Osiele Pule is that I have a lurking suspicion that some of his evidence in respect of PW3 might have been based on what he was told by the accused. For purposes of this case, I do not have to decide how the cheque came into the accused's possession. All I have to accept is that the stolen or lost Spie Batignolles cheque came into the hands of the accused.

I believe PW3 when he says the cheque was at some stage in the hands of the accused (because this is conceded by the accused) and that PW3 met the accused at the Bank and got a report that the accused had found people to change the cheque. I accept this because accused conceded it through his cross-examination. For purposes of this trial, I also (for the accused's benefit) accept that PW3 was a co-conspirator in the whole process of changing the cheque which probably came into the hands of the accused through PW3. This is what the accused suggested and even brought DW1 to confirm. DW1 takes the matter further and says from the accused's receipt of the cheque, he became a major role player. This fact I accept especially because accused filled in the amount of M250,000-00 and kept close contact with the people accused (either alone or with others) had found to change the cheque. Indeed he seemed to have kept them under surveillance even when they were in the bank. It is not surprising that when they were arrested, accused was with them.

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What puzzles me is that the accused would like the Court to infer innocence into his admitted actions and what DW1 who is accused's witness has told the Court. Forgery is perpetrated through a document in *Seccombe v. Attorney General* 1919 TPD 270 at page 277 it was said by Wessels J.:-

"The word "document" is a very wide term and includes everything that contains the written or pictorial proof of something. It does not much matter of what material it is made."

Today forgery is a species of fraud. See Hunt *South African Criminal Law and Procedure (Common Law Crimes)* 2nd Edition at page 788. The learned author takes the matter further and says:-

"A forged document most commonly tells a lie as to the person who made or authorised its making."

When accused wrote the words "cash" and "Two Hundred and Fifty Thousand Maloti", he knew those words were being written on the cheque that belongs to Spie Batignolles Ltd. and that he was not authorised to write those words by Spie Batignolles Ltd. Accused was deceiving the Bank. By adding something, deleting or erasing something from a document in order that it can purport to be what it is not and making it appear to "have been drawn up by somebody other than the author" forgery is committed. See Snyman *Criminal Law* page 264. When this is done:-

"...in as much as it might have been received, it might have deceived, it might have caused prejudice... That does not mean to say that a court should find any remote or fanciful prejudice to constitute potential prejudice."—Williamson JA in *Dormehl v. The State* 1966(1) P.H.H. 223.

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What remains for me to decide is whether the Crown has proved beyond a reasonable doubt that the accused committed the crime charged or its alternative.

Forgery is committed by unlawfully making a false document with the intent to defraud to the actual or potential prejudice of another.—Snyman *Criminal Law* at page 464. The question to be decided is whether applicant did make a false document. It appears to me that there is no doubt that a blank cheque cannot be deemed to be a document. A cheque that has been filled and signed ready for presentation to a bank is a document. Exhibit 1 is therefore a document.

It is very clear that the drawing of this cheque Exhibit "1" involved more than one person. Forgery can be executed through the instrumentality of agents whether in the plot or innocent.—*R v. Joffe* 1934 SWA 108. I examined Ravel's signature provided in the 15 specimen collectively marked Exhibit "2", it ended in what appeared to be an acute angle or parallel lines. With Exhibit 1 both lines which had ended in parallel lines or an acute angle in Exhibit 2 converged and formed what looks like a lake. Bourgeois signature in Exhibit "3" looked very similar to that on Exhibit "1". PW5 Brigadier Hattingh observed a double line in Exhibit 1 and concluded it could be a forgery of Bourgeois signature in Exhibit 3.

I noted that PW5 thought Ravel's signature looked very much like to that on Exhibit 1. He said he was passing a layman judgment's. It has to be born in mind

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that expert evidence is for the guidance of the court or the jury. The Court is the one that decides. Even an untutored eye can sometimes spot differences that are significant in questioned documents. It is however very dangerous to abandon caution when comparing handwritings. See *R v. Fourie* 1947(2) SA 972 where Hoexter J said it is very dangerous for a judicial officer to adopt the role of handwriting expert and support a conviction on the observation made by him. It seems to me that these signatures on Exhibit 1 could well have been forged even the bank spotted that it was a forgery. That being the case, the conclusion I come to is that accused did not draw the document Exhibit 1 alone.

Even if the signatures on Exhibit 1 had been genuine, it is not disputed that the cheque was stolen or got lost from its rightful owners. The signatures on the cheque which was otherwise blank would not make it a document for purposes for which the cheque was meant, which is obtaining money from a bank. I hold that the cheque was a forged document drawn by accused and others.

The accused's part in the forgery is the one that was the most potentially prejudicial to the Spie Batignolles Ltd. of all the people who were in league with him. The reason being that accused filled in the amount on an otherwise blank cheque that would not have been a document for presentation in order to draw money from the bank account of Spie Batignolles Ltd. In short, accused's part in attempting to prejudice Spie Batignolles by causing two hundred thousand Maloti to be withdrawn from the bank account of Spie Batignolles completed the fraud.

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The Court has to give the accused the benefit of the doubt where it can. In this case, the facts point to a participation that cannot be ignored. Once accused had the cheque, as I have already stated, he did all he could to see that the cheque whose amount he had filled was cashed to the prejudice of Spie Batignolles Ltd.

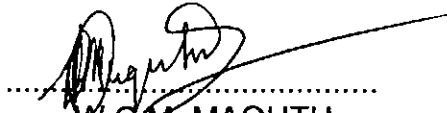
What accused did throughout the trial was to show he was not alone in this crime. This was obvious because he could not have got the cheque from Spie Batignolles Ltd. easily. If PW3 brought the cheque to him to invite his participation, that did not assist the accused in any way, it only strengthened the element of conspiracy. When DW1 gave evidence, he was not helping accused in any way. DW1, under cross-examination, put the participation of the accused in the conspiracy with other people, to procure the commission of the fraud by carrying the cheque to Mokhomomo beyond doubt. This, together with filling the amount on an otherwise blank cheque makes the accused into one of (if not) the main perpetrator of the crime.

Fraud is a crime of dishonesty. The accused is not a simpleton at all. He is an insurance agent and knew what he was doing.

Accused, in my view, is guilty of the main charge of unlawfully and falsely forging a cheque purported to have been drawn by Spie Batignolles Ltd on Barclays Bank Maseru for the payment of M250,000.00 with the intention to defraud to the prejudice of Spie Batignolles Ltd of the said sum.

Stand up accused.

I find you guilty of forgery as charged.



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W.O.M. MAQUTU
JUDGE

For the Crown : Mr. S. *Sakoane*
For the Accused : Mr. N. *Mphalane*