HIGH COURT OF SWAZILAND

Held at Mbabane

Shadrack Hlophe
Applicant

vs

Magistrate Peter Simelane N.O.

1st Respondent **The**

Attorney General

2nd Respondent

Civil Case No.345/2009

Coram	MAPHALALA PJ
For the Applicant	MR. B.S. DLAMINI
For the Respondent	MR. DLAMINI

JUDGMENT
10th July 2009

[1] On 13 February, 2009 the Applicant filed an application in the long form for orders in the following terms:

> **"a) That an order be and is hereby issued declaring the Applicant's conviction based on hearsay evidence was irregular and therefore wrongful in the circumstances.**

2) **That an order be and hereby issued reviewing, correcting and/or setting aside, the 1st Respondent's sentence issued against the Applicant in which the 1st Respondent imposed a custodial sentence without the option of a fine as being irregular and/or unreasonable in the circumstances.**

3) **That an order be and is hereby issued calling upon the 1st Respondent to dispatch, within 14 days of the receipt of the Notice of Motion to the Registrar, the record of the proceedings in Criminal Court Case No.478/08.**

4) **Such further and/or alternative relief."**

[2] The application is founded on the affidavit of the Applicant where he relates all the material facts in this case. In the said affidavit the Applicant states that on 8th October 2008 he was arrested by members of the Royal Swaziland Police based at Nhlangano and charged with contravening the provisions of the Girls and Woman Protection Act. He was admitted to bail and subsequently pleaded to the charge he was facing. After the Crown had led evidence to prove the commission of the offence he was sentenced to five years without an option of a fine with three and a half years suspended.

[3] The Applicant contends that the sentence imposed upon him was grossly irregular and unreasonable in one or more of the following grounds:

> **"9.1 It has been an established practice in all the subordinate Courts in Swaziland to impose the option of a fine of not more than E2000.00 in such similar cases upon the conviction of an accused person.**

5) **The Honourable Magistrate did not state any reasons at all in the sentence as to why the option of a fine is not suitable in this particular case nor are there any reasons stated for the departure in the established practice of imposing the option of a fine in such cases.**

6) **The 1st Respondent failed to take into account the fact that the Applicant is an extremely old person of 70 years old, who in the circumstances was unlikely to repeat such an offence.**

7) **The 1st Respondent failed to weigh the scales of imposing a custodial sentence as opposed to the option of a fine and the likely effect that a custodial sentence would have on a 70 year old person.**

8) **The 1st Respondent failed to consider that the option of a fine was the most appropriate in the circumstances given the positive attitude that the complainant and her family had towards the Applicant and that they were not willing to testify against the Applicant save for the compulsion imposed upon them by the law.**

9) **The sentence by the 1st Respondent was one "directed towards the deterrence of would be offenders". It has long been held that to impose a sentence on the basis of deterring would be offenders is wrongful and unlawful and cannot be done.**

> **9.7 No proof was led in court to substantiate the allegation that the complainant was 14 years old at the time of the sexual intercourse. The court only relied on the unsubstantiated testimony of the complainant. Such testimony can properly be regarded as hearsay in the absence of a birth certificate produced in Court."**

[4] The Respondent has filed a Notice of intention to raise points of law and has not filed any opposition on the merits of the case. This judgment is concerned with this aspect of the matter. The points of law read as follows:

> **"The matter is *res judicata* in that;**
>
> **The Applicant seeks for an order reviewing the sentence imposed upon him by the 1st Respondent in Nhlangano Magistrate Court Case No. 478/2008.**
>
> **The High Court in the exercise of power conferred by section 79 of the Magistrate Court Act 66/1938 (as amended) has already reviewed the sentence imposed by the 1st Respondent under Review Case No. 35/2008.**
>
> **The court per Annandale J held that the proceedings of the 1st Respondent are in accordance with real and substantial justice. A copy of the record is attached herein.**
>
> **The matter is *lis pendens* in that;**

The Applicant seeks to review a matter which is pending review under Case No.4770/2008. This matter under Case No. 4770/2008 was differed to another date. While still pending the Applicant then brought the same application under Case No.345/2009. Now there are two cases involving the same parties and same cause of action pending before this Honourable Court".

[5] In arguments before me the Respondent contended that the proceedings of the Magistrate's Court were reviewed by this court in terms of Section 79(1) of the Magistrate's Court Act No.66 of 1938. The Respondent argues that having reviewed the matter in terms of the said Act this court cannot review it again.

[6] The Respondent contends that the only remedy availing to the Applicant is to apply for the withdrawal of the certificate by the Judge who reviewed the matter and then file an appeal. Otherwise no court can deal with the matter as it stands. The First Respondent has also cited the case *ofR v Disler 1933 CPD 408.*

[7] The second point raised is that the matter is *lis pendens* in that the Applicant has brought the same proceedings under case no.380/2008. In that the matter was never finalized under this case number. Applicant has opted to bring the same proceedings afresh amending some of the provisions of his Notice of Application and supporting affidavit under case number 380/08. Applicant's actions prejudice the Respondent who had already filed his answers to case no.380/2008.

[8] Counsel for the Applicant on the other hand contended before this court that the above is not correct. The arguments of the Applicant are outlined in his Heads of Arguments filed before this court. The gravamen of the Applicant's case is that the reason the Applicant has brought this application is that the conviction of the Applicant was based on inadmissable evidence, namely hearsay evidence in so far as the age of the complainant is concerned. In this regard the court was referred to page 14 of the record of proceedings and the text book by *Herbstein at el The Civil Practice of the Supreme Act of South Africa (4th Ed.)* at page 928. The court was further

referred to *Hoffman and Zeffert, The South African Law of Evidence, 4th Ed.* at page 149.

[9] The first issue for decision is whether the matter is *res judicata* as far as review proceedings are concerned and secondly that the same matter is *lis pendens* under Case No.3 80/2008 before this court.

[9] Having considered the arguments of Counsel on the issue of *res judicata* it appears to me that the arguments of the Respondent are correct. I say so because the proceedings of the Magistrate's Court were reviewed by this court in terms of Section 79(1) of the Magistrate's Court Act No.66 of 1938. In this regard I agree *in toto* with the Respondent's contention that the only remedy availing to the Applicant is to apply for the withdrawal of the certificate by the Judge who reviewed the matter and then file an appeal. In this regard see the South African case *o f R vs Disler 1933 CPD 408.*

[10] On the issue of *lis pendens* it would appear to me that the Applicant has brought the same proceedings under Case No.380/08. The matter was never finalized under this case number.

[11] It would appear to me that Applicant has opted to bring the same proceedings afresh amending some of the provisions of his Notice of Application and supporting affidavit under Case No.380/2008. The

Applicant's action prejudice the Respondent who had already filed his answers to Case No.380/2008.

PRINCIPAL JUDGE

S.B. MAPHALALA

[12] In the result, for the aforegoing reasons the application is dismissed with costs.