IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No: 20/2009

In the matter between

MDUDUZI VINCENT VILAKATI APPLICANT

and

HENRY KHUMALO N.O. 1ST RESPONDENT
THE SWAZILAND GOVERNMENT 2ND RESPONDENT
THE ATTORNEY GENERAL 3RD RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS 4TH RESPONDENT

Neutral citation: *Mduduzi Vincent Vilakati v Henry Khumalo N.O. and others (20/09) [2012] SZHC 85*

Coram: OTA J.

Heard: 17th April 2012

Delivered: 24th April 2012

Summary: *Application to review sentence imposed by the Magistrates Court:- doctrine of functus*

officio and doctrine of estoppel per rem judicatam/res judicata distinguished: principles of res judicata in criminal proceedings-doctrines of autrefois acquit and convict: Issue of sentence res judicata having been decided by the High Court in the exercise of its appellate jurisdiction Application dismissed.

[1] The nub of this case is whether this Court can invoke it's review and supervisory jurisdiction, pursuant to section 152 of the Constitution of the Kingdom of Swaziland, to review the sentence of 7 years imposed upon the Applicant by the Magistrates Court sitting in Mbabane, on the 17th of December, 2007.

[2] Section 152 of the Constitution provides as follows:-

'' The High Court shall have and exercise review and supervisory jurisdiction over all subordinate courts and tribunals or any lower adjudicating authority, and may, in exercise of that jurisdiction, issue orders and directions for the purpose of enforcing or securing the enforcement of its review and supervisory process''

[3] Before dabbling into the merits or demerits of this application, a resume of the history of this case at this

juncture, to my mind will help forster a better understanding of my reasoning and conclusions reached.

[4] Now, it is on record that the Applicant herein and one **Selby Masango,** as 1st and 2nd accused persons respectively, were arraigned before the Magistrates Court holden at Mbabane, for the offence of Robbery. They were alleged to have, each or both of them acting jointly in furtherance of a common purpose, robbed one **Jan Dlamini** of a total sum of E54,496.00 in cash and E3,258.00 in cheque. Both accused persons pleaded not guilty. Whereupon a trial ensued, at the end of which the court a quo found both accused persons guilty. The Court a quo after mitigation, sentenced each of the accused persons to 7 years imprisonment without an option of a fine. The Court couched its sentence in the following language as appears in the record.

‘‘ *The Court sentences each one of you to 7 years imprisonment without an option of a fine. Accused I has been out on bail on*

(sic) his sentence will commence today (07.12.07) in respect of accused 2 sentence shall be deemed to have commenced being on the 07th September 2006.''

[5] Aggrieved by the foregoing conviction and sentence imposed by the Court a quo, both accused persons simultaneously fired off appeals which are evenly dated the 11th December 2007, challenging both their convictions and sentence. For the purposes of this exercise, it is convenient for me to regurgitate only the contents of the appeal filed by the Applicant, herein, **Mduduzi Vilakati**. It reads thus:-

> *'' I hereby humble (sic) appeal against my conviction and sentence that was imposed on me by Senior Magistrate Henry Khumalo on the 7th of December 2007 on a robbery offence.*
>
> *The reason why I appeal against my conviction is that I was wrongfully and unfairly sentenced on a robbery offence yet the items were recovered on the same day or short space of time hence I should have been convicted of a lesser crime.*

Secondly I should have been subjected to a less sentence with an option of a fine of this offence even if the robbery charge was upheld because my sentence is too harsh as a first offender. In due course I will submit my heads of argument for my appeal before Court''

[6] Notwithstanding the clumsiness and inelegance of this notice of appeal, its import is that the Applicant was challenging both his conviction and sentence by the court a quo.

[7] It is on record that the appeals of both accused persons were embodied in criminal appeal case no. 20/2009, which was heard by the High court, per **Banda CJ and Masuku J,** on the 11th of August 2009. The High Court promptly rendered its decision on the 20th of August 2009, wherein it quashed the conviction of the 2nd Appellant, Selby Masango and set aside the sentence of 7 years imprisonment imposed upon him by the trial court. However, the Court confirmed both the conviction and sentence of the 1st Appellant/Applicant,

in the following words as appear in paragraphs 27.3 and 27.4 of the cyclostyled judgment:-

> *‘‘ 27.3 Both the conviction and sentence of the 1st Appellant be and are hereby confirmed.*
>
> *27.4 Should the 1st Appellant be minded to appeal against his sentence, he is ordered to apply in writing for a certificate to appeal to the Supreme Court within 14 days of the delivery of this judgment’’.*

[8] It is on record that in the wake of the foregoing judgment of the High Court, and in apparent dissatisfaction of same, that the 1st Appellant/Applicant, launched a further appeal to the Supreme Court. This appeal is encapsulated in annexures MV1 and MV2, respectively, exhibited to the Applicants founding affidavit in the substantive application. Suffice it to say that the appeal which was solely against sentence, prayed the Supreme Court not only for a lesser sentence, but also, that the 7 year sentence by the

High Court, be backdated to the date of the Applicant's arrest on the 5th of September, 2006, The first Appeal application contained in MVI was filed on the 10th of September 2009, and the 2nd Appeal application contained in MV2, was filed on the 17th of March 2010, going by the stamp of the Registrar of the High Court affixed on these two processes.

[9] It is sufficient for me to state here, that the record demonstrates beyond dispute that neither of the two Appeal applications were heard, nor determined by the Supreme Court. Rather, what appears to have happened is that whilst the appeal applications to the Supreme Court abated in the archieves of that court, the Applicant commenced the application instant before the High Court, on the 28th of February 2012, seeking to invoke its review jurisdiction, to review the sentence imposed by the Magistrates Court by backdating same by a period of 105 days, as well as costs of the application. The relevant prayers of the application

launched by way of Notice of Motion against the trial Magistrate, the Swaziland Government, the Attorney General and the Director of Public Prosecutions, are contained in paragraphs 2 and 3 respectively, of that process, and they state as follows:-

'' 2. Reviewing and/or correction of the 1st Respondents judgment of the 7th December 2007, against the Applicant on the basis that the sentence meted out to the Applicant was not backdated.

3 costs of the application in the event of an unsuccessful opposition''

[10] The Respondents who are opposed to this application filed a notice to raise points of law, in the following terms

'' 1) This application for the review and setting aside of a sentence imposed by a Magistrate.

2) The Applicant has already appealed to this court against both sentence and conviction in case number 20/2009. That appeal failed.

3) This court is functus officio in respect of both conviction and sentence.

4) In truth this application is a review of the appeal proceedings before this court in case number 20/2009.

5) A judge of this court has no power to review the proceedings before a judge or judges at the same level in the hierarchy of courts.

6) In the premises this court has no jurisdiction to entertain the application

Wherefore I pray that:-

(i) the points be upheld, and

(ii) the application be dismissed''

[11] It cannot be gainsaid, that by the foregoing notice to raise points of law, the Respondents challenge the jurisdiction of this court to entertain and determine the Applicants application for review.

[12] The poser at this juncture is; Does this court have the jurisdiction upon the facts and circumstances of this case, to exercise its review jurisdiction in entertaining and determining this review application?

[13] The Respondents say no. Their take is that since the question of the Applicants 7 year sentence had been canvassed and concluded by the High Court, per **Banda CJ and Masuku J,** sitting on appeal, another High Court clearly lacked either review or supervisory jurisdiction to reopen this issue. They contend that this court is functus officio the issue of Applicants sentence, and it is immaterial that the question of it's backdating, which vexes the court presently, was not urged or canvassed or decided in the appeal.

[14] For his part the Applicant who filed comprehensive heads of argument, urged copious authorities and tendered oral argument via counsel, contended, that this court is not functus officio, but is clothed with the powers to entertain and determine the review application, pursuant to its review and supervisory jurisdiction embodied in Section 152 of the Constitution. The Applicant's take, going by **Mr Masego's** submissions, is that since the question of backdating of

his sentence was not canvassed or determined in the appeal to the High Court, it was still open for this court to ventilate on review.

[15] Now, it is beyond controversy that, this court has review and supervisory jurisdiction over the decision of Magistrates Courts, pursuant to Section 152 of the Constitution Act. However, it appears to me that this review and supervisory jurisdiction cannot be invoked to aid the Applicant, upon the facts and circumstances of this case. This is because the question of the sentence of the Applicant which he seeks to reopen by way of review in this Court, is one that has been canvassed by this Court, in the exercise of its appellate jurisdiction, in criminal appeal No. 20/2009, culminating in the decision of the 20th of August 2009. In that judgment, the High Court confirmed both the conviction and sentence imposed upon the Applicant by the court a quo. This state of affairs to my mind, clearly disables the jurisdiction of this court to inquire into the

same question of the sentence of the Applicant, by way of review.

[16] It seems to me that this courts review jurisdiction is disabled, not by the doctrine of functus officio, upon which the Respondents erroneously placed reliance in their points in limine, but on the doctrine of estoppel per rem judicatam or res judicata.

[17] It cannot be gainsaid that these two concepts are the same in the sense that they are both saying ‘‘don’t touch the case again’’. The difference however, lies in the fact that res judicata operates in a wider perspective and relates to every decision or case decided by another court, whether lower, coordinate or higher in the judicial hierarchy . The central theme of the concept of res judicata is that the same subject matter has been litigated upon between the same parties or their privies or assigns, and pronounced upon by a court of competent jurisdiction, and so cannot be

relitigated. Whereas the principle of functus officio postulates that, the same court which has detemined a matter cannot reopen any issue in the case, by way of rehearing, review, alteration or variation of the judgment or order, after it has been entered or drawn up. This rule has been subject to certain qualifications, which is that there is inherent power in the court to correct any clerical mistake or error arising from any slip or omission, so as to do substantial justice and give effect to it's meaning and intention. The doctrine of functus officio is therefore predicated on the principle that the courts power to deal with the same case terminates upon judgment.

[18] This doctrine has recently been the subject of determination by the Supreme Court in the case of **The Swaziland Motor Vehicle Fund V Senzo Gondwe Civil Appeal No. 66/2010,** wherein that Court cited with approval the locus classicus judgment of **Trollip JA,** in the case of **Firestone South Africa (Pty) Ltd V**

Genticuro A.G 1977 (4) SA 298 (A) at p. 306, on this principle as follows:-

> *''The general principle, now well established in our law, is that, once a Court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that it thereupon becomes functus officio, its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased---. There are however, a few exceptions to that rule which are mentioned in the old authorities and have been authoritatively accepted by this Court. This, provided the Court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement it in one of the following cases---''*

[19] In conclusion **Ramodibedi CJ**, stated the following in the **Gondwe Case (supra**) **at page 11 (paragraph) 11:**

> *'' I am mainly attracted by the more enlightened approach which permits a judicial officer to amend or supplement his pronouncement or order provided he does not change its sense or substance. I consider that this approach should*

guide this Court as the highest Court in the country so as to enable it to do justice according to the circumstances---''

See Sikhumbuzo Masinga V The Director of Public Prosecutions and others, Civil Case No. 21/2009, Nokuthula Mdluli V Stanley Mnisi and others Civil Appeal No.431/11.

[20] Therefore, the doctrine of functus officio would hold sway, if the application instant was for the High Court to review its own judgment rendered on appeal in Criminal Appeal Case No. 20/2009, on the 20th of August, 2009. This is however not the case. The application instant, is for the High Court to review the sentence imposed by the Magistrates court on the Applicant on the 7th of December 2007, a question which has already been ventilated and concluded by the High Court on appeal. This state of affairs raises the doctrine of estoppel per rem judicatam or res judicata.

[21] The doctrine of res judicata is not technical in nature. It is one of the most fundamental doctrines of all Courts see **Roger V Queen (1894) HCA 42.** It operates to oust the jurisdiction of the Court. This doctrine which is more commonly applied in civil proceedings, is however no less applicable in criminal proceedings. It is analogous to the defences of autrefois acquit and convict. These two doctrines are underpinned by the common law principle against double jeopardy, which states that no one should be twice placed in jeopardy of being tried or convicted and punished for the same offence. **As Lord Mc Dermott stated in the case Sambasivam V Public Prosecutor, Federation of Malaya (1950) AC 450 at 479,**

> *'' The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication''*

[22] Therefore, the policy that underpines the two doctrines, autrefois acquit and autrefois convict, is not only the avoidance of double jeopardy, but the public interest, that there be an end to litigation. This public interest found expression in the words of the Court in the case of **Moresby-White V Moresby-White 1972 (SA) 3**, as follows:-

> *‘‘ Public policy dictates that there be an end to litigation, that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered for ever settled as between the parties—’’*

[23] Therefore, once a court of competent jurisdiction pronounces an acquittal or conviction and punishment, in a criminal trial, a valid, binding and subsisting judgment enures as between the parties, which can constitute a veritable basis for the final termination of any further criminal proceedings on the same facts, before the same court or another court, in limine or at any stage.

See Connelly V DPP (1964) AC 1254 at 1331, R V Tonks (1916) 1KB 443 11 Criminal Appeal 12 284.

[24] The rules of res judicata, and autrefois acquit or convict, apply in the Kingdom as part of the Roman Dutch Common Law, pursuant to Section 252 of the Constitution Act which preserved the principles of Common Law in the following language:-

> *'' subject to the provisions of this Constitution or any other written law, the principles and rules that formed immediately before the 6th September 1968 (Independence Day), the principles and rules of the Roman Dutch Common Law applicable to Swaziland since 22nd February 1907, are confirmed and shall be applied and enforced as the Common Law of Swaziland, except where and to the extent that those principles or rules are inconsistent with this constitution or a statute''*

See **Tsabile Mamba V Bhadala Mamba Civil Case No. 145/09.**

[25] The plea of res judicata in criminal proceeding can only succeed if the following ingredients are established:-

1) The previous proceedings relied on in raising the objection is a criminal proceedings.

2) There was a binding and conclusive verdict which acquitted or convicted and punished the accused in the previous proceedings.

3) The accused is charged with an offence which is the same or substantially the same with the offence for which he was previously convicted or acquitted.

4) The facts of the present case are the same facts on which the previous trial, conviction and acquittal is based.

5) The court that convicted or acquitted must be a court of competent criminal jurisdiction.

See the decision of the Gambia Court of Appeal in the case of **The State V Abdoulie Conteh (2002-2008) IGLR at page 172.**

[26] In casu, I hold the view that the judgment of the High Court sitting on appeal in Criminal Appeal Case No.

20/2009, meets the foregoing requirements. This is because the question of the Applicants sentence in that appeal proceedings, was fought between the same parties, and by implication, their privies and assigns, as well as upon the same facts, as the review application instant. The question of the sentence of the Applicant which was canvassed and determined in that criminal appeal process, is therefore res judicata the High Court, and cannot now be reopened via the review and supervisory jurisdiction of this court, or under any guise.

[27] In coming to this conclusion, I am mindful of the fact that the question of the backdating of the said sentence of the Applicant, which is the issue in the review application instant, was not urged, ventilated or determined by the High Court in Criminal Appeal No. 20/2009.

[28] However, the principle of issue estoppel, embodied in the doctrine of res judicata, presupposes, that once the High Court was seized with the sentence of the Applicant on appeal, it was seized with all questions and issues pertaining to said sentence, such as its backdating, which the Applicant was obligated to urge upon the court, or forever hold his peace. Therefore, the judgment of the High Court on appeal operates as res judicata, not only with regards tot the actual decision or questions ventilated in the appeal, but also with regards to all other questions and issues the determination of which was essential to the decision in question.

See African Farms and Township Ltd V Cape Town Municipality 1963 (2) SA 555 (A) Clement Nhleko V M.H. Mdluli & Company and another, Civil Case No. 1393/09.

[29] In the final analysis, since the judgment of the High Court on appeal, confirming the sentence of the

Applicant, is valid, subsisting and binding upon the parties, it disables this court from revisiting same, pursuant to its review or supervisory jurisdiction. The proper course would be for the Applicant to place the question of backdating the said sentence before the Supreme Court, which is the appellate court with the jurisdiction to set aside, vary or review it.

[30] It appears to me that it was in apparent recognition of this fact, that the Applicant noted the appeals to the Supreme Court as contained in annexures MV1 and MV2, respectively. It is my considered view, that the Applicant ought not to have abandoned the said appeal to the Supreme Court, but ought to have sought condonation from that court to argue his appeal.

[31] It remains for me to add here, that the mere fact that the Supreme Court is billed to sit in May 2012, and by the Applicants estimation, the backdating of his sentence by 105 days of his pre trial incarceration, via

this review application, will mean his release from custody around the 15th of April 2012, does not justify the application nor does it detract from the fact that an appeal to the Supreme Court is the proper course in these circumstances.

[32] In conclusion, since I have determined that this court lacks the jurisdiction to entertain and determine this review application, to dabble into the question as to whether or not the Magistrates court in it's sentencing regime, contravened the provisions of Section 16(9) of the Constitution, by not backdating the said sentence, will merely be pedantic, serving no useful purpose.

[33] It is by reason of the totality of the foregoing, that I find that this application lacks merits. It according fails in its entirety. On these premises, I make the following orders:-

1) That the application to review or correct the sentence imposed by the Magistrates Court on the Applicant, dated the 7th December 2007, be and is hereby dismissed.

2) I make no order as to costs.

For the Applicant: Mr W Maseko

For the Respondents: Mr M Mathunjwa

DELIVERED IN OPEN COURT IN MBABANE ON THIS

THE……DAY OF……2012

OTA J.

JUDGE OF THE HIGH COURT