



THE SUPREME COURT OF SWAZILAND

JUDGMENT

Appeal Case No: 01/2010

In the appeal between:

THEMBELA ANDREW SIMELANE

Appellant

and

REX

Respondent

Neutral citation: *Thembela Andrew Simelane v Rex 01/2010*
[2012] SZSC 04 (31 May 2012)

Coram: **EBRAHIM JA**

DR. TWUM JA

AGIM JA

Heard: **22 MAY 2012**

Delivered: **31 MAY 2012**

Summary: **Criminal Appeal - Theft by attorney of trust funds - Appeal struck off as the matter was *res judicata*.**

EBRAHIM J.A.

[1] The appellant was convicted in the High Court on six counts of theft and sentenced to five years imprisonment on each count, with the sentences on each count to run concurrently. In addition he was sentenced to a fine of E50, 000.00 on all counts or in default twelve months imprisonment on all six counts. These sentences were ordered to run concurrently.

[2] The appellant appealed to this court against both the convictions and sentences imposed up on him. This was during the course of the last sessions of this court held in November 2011.

[3] At the hearing the appellant was represented by Mr. M. Mabila and he advised the court that the appellant was not proceeding with the appeal against the convictions but that the appeal would be against the sentences imposed only.

[4] At the conclusion of the hearing of that appeal the court made the following order:

“The accused is sentenced on all six counts taken together to:

- (a) a fine of E50 000 (fifty thousand Emalangeni) or in default of payment thereof to twelve months imprisonment; and
- (b) 5 (five) years imprisonment. The sentence is backdated to 12 February 2011 to allow for the period already spent by the accused in custody to be taken into account.”

[5] In that judgment it is patently apparent that even though Mr. M. Mabila, in essence, had abandoned the appellant’s appeal against the convictions the court nevertheless carefully considered the evidence which led to the convictions of the appellant. This is singularly apparent from paragraph 3 at page 3 of the cyclostyled judgment to paragraph 7 to page 9 of the judgment.

[6] What is clear also, is that the court in paragraph 46 of its judgment stated:

“1. Subject to paragraph 2 hereof the appeal is dismissed”,

which meant the appeal against conviction was dismissed.

[7] It is therefore patently apparent that this matter is *res judicata* and should not have been brought again before this court on appeal.

[8] In the result the matter is struck off the roll on the grounds that it is *res judicata*.

A.M. EBRAHIM
JUSTICE OF APPEAL

I AGREE :

DR. S. TWUM
JUSTICE OF APPEAL

I AGREE :

E.A. AGIM
JUSTICE OF APPEAL

For Appellant : **Mr. M. Mabila**

For Respondent : **Mr. S. Fakudze**