IN THE HIGH COURT OF SWAZILAND

Case no. 500/2010

In the matter between:-

JABULANI MASUKU **Applicant**

and

MAGISTRATE SIPHOSINI DLAMINI N.O **1st Respondents**

THE ATTORNEY–GENERAL **2nd Respondents**

Neutral citation: *Jabulani Masuku v Magistrate Siphosini Dlamini N.O and another* (500/10) [2013] SZHC260(22nd November 2013)

Coram: HLOPHE J

For the Applicant: Mr. Manana

For the Respondents: Mr.T. Vilakati

Summary:

Applicant one of two people convicted of theft of items allegedly in the value of E8 200.00 and sentenced to two years imprisonment or to two thousand Emalangeni fine – Applicant approaching this Court for an order inter alia reviewing, correcting and setting aside the conviction and sentence imposed

on him by the Learned Magistrate – Contended that Court a quo committed an irregularity when convicting the appellant and his co-accused as no common purpose in the commission of the offence was alleged per the charge sheet – Contended further that the value of the goods or items not established ex facie the evidence led –In the circumstances conviction a result of a misdirection – Before filing opposing papers, Respondents took points in limine contending that the matter was res judicata considering that same had already been reviewed per Judge Mabuza – Court of the view matter is Res Judicata – Application accordingly dismissed.

JUDGMENT

[1] The Applicant is one of two accused persons charged with the theft of various items from Mlalatini Development Centre, which can be loosely described as 4x30m rolls of fence; 8x50km barbed wire. It is not disputed that the said items were valued at around E8 200.00

[2] Although the Applicant and his co-accused had pleaded not guilty to the charges, they had nonetheless been found guilty and duly sentenced to two years imprisonment or to a fine in the sum of Two Thousand Emalangeni.

[3] It is a sequel to the said conviction and sentence that the Applicant instituted the current proceedings, seeking *inter alia* an order of this Court reviewing, correcting and setting aside the decision of the Court *a quo* convicting and sentencing him in the manner aforesaid.

[4] The grounds for the review sought were into *inter alia* that the Court a quo committed an irregularity or a gross irregularity by dealing with the matter in the manner it did and in going on to convict and sentence the Applicant when considering that it had not been alleged *ex facie* the charge sheet that the Applicant and his then co-accused had acted in furtherance of a common purpose in committing the offences they allegedly committed. It was alleged by Applicant in his papers that because of this shortcoming, the Court *a quo* should not have convicted and sentenced the Applicant and his co-accused. It was contended that this Court should review and set aside the said decision.

[5] There was also reliance on a contention that the value of the goods had not been established in evidence before Court such that the Court *a quo* was allegedly not in a position to impose a sentence let alone the one it imposed, as it could happen that the alleged stolen items were valueless.

[6] The Respondent did not file opposing papers, which in any event is consistant with the practice holding or applicable in this Court, where the first Respondent, as the Judicial Officer who heard the matter under review, is not required to file an opposing affidavit as opposed to just filing the record of proceedings.

[7] In the present matter, there was however, raised a point *in limine* by Counsel for the Respondent. The point concerned was couched in the following terms:-

> *"The matter is res judicata in that the Applicant seeks an order reviewing the decision of the 1st Respondent under case No. L240/08, Mbabane Magistrate Court. The High Court in*

exercise of the powers conferred by Section 79 of the Magistrate's Court Act 66/1938 (as amended) has already reviewed the decision of 1st Respondent under Review Case No. 18/09.

The Court per Mabuza J. held that the proceedings are in accordance with real and substantial justice.

Wherefore Respondents pray that the application be dismissed with costs.

[8] When the matter initially came before me, the record of proceedings had not been filed. This was on the 11th June 2010. Notwithstanding that the Record had not been filed despite a prayer calling upon the First Respondent to file the said Record within 14 days, Counsel representing both parties informed me that an order had been agreed between them which I was being urged to record an order of Court. The agreement reached was allegedly that I grant the order sought in terms of Prayer 1 by consent of the parties, which generally was to review the decision of the Court *a quo* by setting it aside.

[9] In view of the pleadings or papers filed of record, of which I had already apprised myself, I found it strange that. I could grant such an order without having seen the record to confirm whether or not the point *in limine* raised was not real because if it was, I at the time doubted my competence in Law to grant such an order. My hesitation stemmed from the fact that any order I granted on top of the one allegedly granted by Judge Mabuza in terms of the notice to raise points of law, would be

incompetent strictly speaking. I therefore reserved my Judgment pending receipt of the record together with my consideration of same.

[10] I was eventually availed a document under a filing notice from the Applicant's Attorney on the 30th July 2010. When I considered the document closely, I discovered that it was not a complete record of proceedings but more a decision of the Honourable Magistrate together with his reasons for both the conviction and the sentence imposed.

[11] On or about the 10th August 2010, I duly handed down a brief direction in the matter, which was to the effect, I still had not received a record of proceedings which incorporated the record with decision by Judge Mabuza confirming that the proceedings had been dealt with according to substantial justice. I commented on the said date that if Judge Mabuza had indeed decided as stated above, I may not have the power to review and set aside the decision of the Learned Magistrate, apparently because the proceedings would have been *res judicata* and I would in law be having no power to contradict or overlook Judge Mabuza's decision as a Court of the same rank as her. I therefore could not grant the order concerned unless I found the record to be saying something else.

[12] In fact I have left out that on the initial appearance of the matter before me, and notwithstanding the consensus I was initially advised Counsel had reached for me to grant the application in terms of Prayer 1, Mr. Vilakati for the Respondent started expressing doubts about their agreement. In fact he even undertook to avail me a relevant Judgment on the position in due cause.

[13] Having put aside the file to await the said record, same was not brought to my attention resulting in the file rather sadly taking a back seat and by extension not being attended to until recently when I was shown a letter enquiring about a Judgment. The file was eventually traced and brought to my attention together with the Record of proceedings.

[14] The Record of proceedings had the usual file cover indicating on the face of it, among other entries on it by the Registrar among others, an entry in the handwriting of Judge Mabuza dated the 20th April 2009 and signed by her. The section signed by the Honourable Judge Mabuza reads as follows just above the date and her signature:-

> *"I certify that the annexed proceedings are in accordance with real and substantial justice/vide Review Order dated Mbabane."*
>
> *Date* _____ *(Signed)*_____
> *Chief Justice/Judge*

[15] It is clear ex facie the record that the matter had at some stage been brought before Judge Mabuza for review as a result of which she issued an order confirming that same was in accord with real and substantial Justice.

[16] Having ascertained that indeed as a matter of fact Judge Mabuza had reviewed the proceedings, is it open to me once again to review the proceedings as urged by the Applicant through his application and

endorse what was subsequently referred to as an agreement reached by the parties in Court for me to record and make an order of Court *inter alia* reviewing the said Judgment or order?

[17] Central to the principle of *Res Judicata*, is that a matter between the same parties and relating to the same subject matter cannot be reopened before a Court of the same Jurisdiction as the one that heard it, if it was decided by a Court of the same status or jurisdiction.

[18] It was not disputed that this Court per Judge Mabuza had already reviewed the proceedings and had actually found same to be in accord with real and substantial Justice. If that was the case, it is clear that this Court could not purport to review the same proceedings or decision of the Magistrate Court. Instead the Applicant would only be entitled to appeal the decision by this Court per the Judicial Officer who dealt with it the first time on a review basis. That being the case, I could not review the decision already reviewed by a colleague Judge. This would be the case even where I had reason to believe that the initial Judge was wrong as it is against Judicial Policy for Judges of the same Jurisdiction or level to review each other.

[19] This situation arose in the matter of ***Shadrack Hlophe vs Magistrate Peter Simelane N. O. and The Attorney General Civil Case No. 345/2009***. In the said matter the Applicant instituted application proceedings before the High Court seeking an order inter alia reviewing correcting and setting aside a decision of the Magistrate Court convicting him of contravening the Girls and Women's Protection Act and sentencing him to five years, part of which was suspended.

[20] Prior to the Applicant in the said matter instituting the said review proceedings, the record had already been presented or placed before a Judge of this Court for review in line with section 79 of the Magistrates Court Act 66/1938 (as amended) and the Judge concerned had already dealt with it by way of review. The Judge who reviewed the matter had come to the conclusion that the proceedings concerned were in accord with real and substantial Justice and certified them to be such.

[21] Notwithstanding the numerous grounds raised on review, the High Court per the Principal Judge had come to the conclusion that the application was *res judicata* as the High Court had already reviewed the proceedings and come to the conclusion referred to above. The Court's decision was expressed in the following words:-

> *"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 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 of* ***R v Dislor 1933 CPD 408****."*

[22] These present proceedings not being different from those of the ***Shadrack Hlophe vs Magistrate Peter Simelane N. O***. ***(Supra)*** at least

as regards the question of *res judicata*, I am of the considered view, I cannot come to a different conclusion.

[23] Consequently, the Applicant's application, notwithstanding the agreement purportedly reached by the parties initially, which I am of the view was inappropriate and not binding on this Court, cannot succeed. Accordingly the application is dismissed with costs.

Delivered in open court on this the …..day of November 2013.

N. J. HLOPHE
JUDGE – HIGH COURT