# IN THE HIGH COURT OF SWAZILAND

## HELD AT MBABANE

**CIV. CASE NO. 1075/09**

**In the matter between:**

**MBONGISENI NHLABATSI** **Applicant**

**And**

**THE NATIONAL COURT PRESIDENT SHISELWENI DISTRICT** **1st Respondent**

**THE ATTORNEY-GENERAL** **2nd Respondent**

**Date of hearing: 27 March, 2009**
**Date of judgment: 30 March, 2009**

**Mr. Attorney Bongani S. Dlamini for the Applicant Mr. Attorney Thabo Dlamini for the Respondents**

**J U D G M E N T**

**MASUKU J.**

[1] The Applicant has approached this Court on an urgent basis, seeking *inter alia:* an Order:-

(1) Dispensing with the normal forms of service and time limits and hearing the matter on an urgent basis;

(2) Calling upon the 1st Respondent to dispatch on or before Wednesday 25th March, 2009 the record of proceedings in respect of the criminal matter and forward the same to the Registrar of the above Honourable Court;

(3) Reviewing, correcting and/or setting aside the 1st Respondent's conviction of the applicant on the basis that the same matter involving the same parties was deliberated and concluded by the Ngcoseni Umphakatsi and therefore that the 1st Respondent had no jurisdiction over the matter.

(4) Reviewing, correcting and/or setting aside the conviction of the applicant by the 1st Respondent on the basis that the animal in question was a domestic animal, the killing of which could only give

rise to a civil claim in favour of the owner as opposed to criminal proceedings;

(5) Reviewing, correcting and/or setting aside the sentence imposed by the 1st Respondent on the basis of such sentence being so unreasonable so as to lead to the

conclusion that the 1st Respondent did not properly apply his mind to the issues before him in imposing such sentence and the legal requirements for imposing a lawful sentence;

(6) Substituting the sentence imposed by the 1st Respondent upon the applicant with a lawful sentence taking into account the circumstances of the matter;

(7) Costs of the application.

Before I can proceed to recount the salient facts giving rise to the present application, I am compelled to make an observation regarding the manner in which the Notice of Motion, reproduced above was crafted. A notice of motion serves one principal purpose. It is to set forth for the Court and other interested parties the relief or order sought from the Court. The bases upon which the orders sought are and should not be included in the notice of motion. These are to be found in the founding affidavit and possibly other affidavits filed in accompaniment to the notice of motion.

From what I have said above, it becomes immediately clear that the Applicant has abused the purpose of the

notice of motion by unnecessarily burdening it with the bases upon which the respective orders sought are predicated. This is obviously wrong and should not be done. The notice of motion must be confined to the above purpose and the particulars of the bases upon which the orders are sought should be left to the affidavits accompanying the same. The learned authors Lansdowne & Campbell, South African Criminal Law and Procedure, Vol V, Juta, 1982, say the following at p 699:

> "The notice of motion setting out the decision or proceedings sought to be reviewed must be supported by an affidavit giving the grounds and the facts upon which the applicant relies to have the decision or proceedings set aside or corrected." (Emphasis added).

[4] I now turn to the facts that give rise to the present application. They are these: The Applicant is a Swazi male adult of Siyendle area in the Shiselweni District. He states, and this appears not to be controverted, that sometime in March, 2009, on unspecified dates, an animal surreptitiously went into his maize fields and spoilt his crop on a number of instances. He did not see it however. Still, during the same month and on a later date he could not recall, he saw some

movements in his maize fields and upon a close examination of the fields, he noticed that there was a pig which was helping itself to his crop, destroying fully grown maize in the process.

[5] Out of anger and frustration at the sight he was beholding, he took a spear and stabbed the pig and it succumbed to the injuries he inflicted. The pig in question belonged to Badumile Nkambule, who on learning of the fate of his pig, went to lay a report at the Ngcoseni Umphakatsi. The matter was deliberated upon and the Applicant was ordered to compensate the complainant in money for the value of the pig in question. On the other hand, the Applicant was also ordered to compute his own losses suffered as a result of the marauding pig, which destroyed his crop aforesaid.

[5] Whilst preparing to comply with the order issued at the Umphakatsi, the Applicant was summoned by the 1st Respondent to answer to a charge of malicious damage to property. He pleaded guilty thereto.

Evidence was thereafter led by the complainant as to how his pig went missing and that he sent some boys in search of it. They met the Applicant, who showed them where the carcass of the pig lay and told them that he had killed it. There was nothing material raised in cross-examination by the Applicant. The Applicant, after what must have been the close of prosecution's case, (I say so because it is not clearly stated in the record of proceedings) was advised of his rights and he chose to lead sworn evidence.

[6] I interpolate to observe that all this occurred in the context of a plea of guilty. The Applicant adduced sworn testimony and stated that he found the pig *in flagrante delicto* as it were, destroying his maize and pumpkins and he stabbed it three times with a spear. This, he testified, he did out of anger. The complainant's boys came and he told them that he had killed the pig and the matter was reported to Umphakatsi and later to the police. The Applicant was ultimately found guilty and was sentenced to six (6) weeks imprisonment without the option of a fine.

It is this conviction and sentence that he seeks this Court to review, correct and set aside.

[7] The Respondents oppose the application for review and to that end, filed an affidavit deposed to by the 1st Respondent. The propriety of a judicial officer filing an affidavit in review proceedings is in my view very doubtful. It should be avoided at all costs, unless there are matters alleged in the papers which tend to cast aspersions on the said officer's credibility in handling that matter. It suffices, in most of such matters, for the record to be availed and for any matters arising therefrom to be dealt with on the basis of the record. In any event, in the majority of cases, the issues that arise are legal and need no factual allegations which would necessitate that the presiding officer should file an affidavit. In the instant case, there is nothing substantial that arises from the affidavit filed by the 1st Respondent and I shall not have much regard to his depositions as the matters that arise are purely legal in nature and character.

From reading of the Applicant's papers, there are basically three issues which require this Court's determination. First is whether the matter could be properly regarded as *res judicata* on the grounds that it had been dealt with by the Umphakatsi and some decision handed down thereat. Second, whether it was wrong to charge the Applicant with malicious injury to property, considering that the animal in question was a domestic animal and last, whether the trial Court was correct in meting out the sentence it did, considering that the then accused was not given the option to pay a fine.

[9] Having fully set out the matters in contention and to the extent that I have, there is one matter that sticks out like a sore thumb and it deserves to be answered ahead of the issues raised by the Applicant for this Court's determination. The question is whether the Applicant is properly before Court on review, considering the nature, character and effect of the orders he seeks? This, is in my view, a fundamental issue, which if held against the Applicant could serve to non-suit him.

[10] In this regard, and in order to answer the question that I have raised above, it becomes imperative for the Court to properly delineate the boundaries between the two procedures of appeal and review. For an authoritative

distinction, I can do no better than to have regard to the writings of the learned Judge L.C.T Harms, Civil Procedure in the Supreme Court, Butterworths, 1998, at p 477, where the learned Judge said:

> "An appeal involves a re-hearing on the merits but limited to the evidence or information before the lower tribunal and the only question is whether the decision was right or wrong. A review involves a limited re-hearing and the question is rather whether the procedure adopted was formally correct. An appeal is directed at the result of a trial, whereas a review is aimed at the method by which that result was obtained."

1. In *Home Defenders Sporting Club v Botswana Football Association* [2005] 2 B.L.R. 400 at 403 Lesetedi J. dealt with the question of review in the following terms:

> "Unlike an appeal, a review is not concerned with whether the decision complained of was right or wrong. It is concerned with the decision making process itself, that is, whether the manner in which the decision was reached was proper or not. See *Chief Constable of the North Wales Police v Evans* [1982] 3 All E.R. 141 (HL)". See also *Krum & Another v The Master and Another* 1989 (3) S.A. 944 (D).

A brief consideration of the prayers sought by the Applicant, considered *in tandem* with the grounds upon which the complaints are predicated, should provide an answer as to whether the Applicant has correctly approached the Court on review or would, on the other hand, show that he had to bring the complaints or some of them on appeal.

On the question of the application of the doctrine of res *judicata,* it is clear that he is attacking the competence of the Court to hear the matter. That is, however, a legal matter that was clearly not before the trial Court and it did not, in the event, have to decide on it. Acording to the authors Lansdwne & Campbell at 695, issues of absence of jurisdiction, which includes the above plea are matters that can properly be brought on review. This is based on section 24 of the Supreme Court Act, 1959 of the Republic of South Africa, whose scope of jurisdiction is brought into operation in this country by section 2 (1) of the High Court Act, 20 of 1954. I am of the view therefore that on this score, the Applicant is on firm ground.

(8) Regarding the question whether it was proper to charge the Applicant in a criminal forum for killing the beast in question, considering, as it is claimed that it is a domestic animal has nothing to do with the procedure followed by the trial Court in reaching the decision it did, it is my view that this is a matter fit for appeal. Whether the proper forum that should have decided the matter was a civil court, as the Applicant contends, is clearly a matter for appeal as opposed to review. I however do not state my views authoritatively in this wise for the reason that Mr. Dlamini decided to abandon this argument.

(9) The last issue on which the Court is required to intervene relates to the question of sentence. In this regard, the Court is required by the Applicant to review, correct and/ or set aside the sentence. The grounds upon which the Court's interference is sought is that the 1st Respondent did not apply his mind properly to the question of sentence and disregarded the legal requirements for imposing a lawful sentence. In this regard, I agree that the sentence imposed clearly shows that the 1st Respondent did not properly apply his mind to

the facts before him and failed to take into account relevant considerations.

In this regard, the following matters come to the fore. Firstly, the Applicant pleaded guilty to the offence. This, in the circumstances of the instant case, was to be properly regarded as a sign of contrition, warranting that plea to be accorded due weight at the stage of sentencing by adjusting the sentence downwards. Evidently, the Court *a quo* did not take this issue into account at all. Second, the element of anger caused by the complainant's pig destroying the Applicant's crop was a major factor that deserved to have been taken into consideration by the Court in sentencing the Applicant.

> That would have amounted to provocation. See S *v Beaule* 1984 [Part 2] Z.L.R. 145 at 149.

(10) Furthermore, it was clear on the facts that the Applicant was a first offender who, as demonstrated by the evidence, does not appear to have had any premeditation before committing the offence. This should have enured to his benefit. Furthermore, the Courts have

time and again generally emphasised the need, where circumstances justify, not to send first offenders to a custodial sentence. In the instant case, it would appear that a fine would have appropriately met the justice of the case.

(11) There are other issues that the Applicant has mentioned in his papers, obviously with the belated benefit of legal advice. They are directly relevant to mitigation but were not elicited from him during the trial, considering in particular that he was and could not be represented before that Court. It is my view that Courts in which accused persons are not represented should be particularly sensitive and ensure that the accused person is assisted in conducting his or her defence and if need be, ask pertinent questions that may serve to assist him or her. In this regard, the Applicant has now deposed, and this is not controverted, that he is employed and stands to lose his means of livelihood as a result of the sentence imposed.

Mr. Dlamini, for the Respondents, contended that the Applicant should have brought his complaint about the sentence on appeal and not review. I do not agree. Given the particular circumstances of this case, the appeal would have come a little too late for his benefit, considering the relatively short but effective sentence imposed on him. By the time the appeal would have served before Court, he may well have served the sentence and his situation could not be undone by a finding in his favour at that stage and whatever success he may achieve on appeal could not cause him to

"unserve" the sentence he will have served. I have also found support from Lansdowne 8B Campbell *(supra)* for the view that sentence may be set aside on review and that it is not a matter that is amenable to being set aside only pursuant to an appeal. See pp 682-690 of Lansdowne & Campbell *(op cit).*

Before I conclude this matter, I should mention that it would appear to me that if the matter that I have found was to be brought on appeal, the Appellant does not have bright or any prospects of success. I say so considering

that I was addressed by Counsel at length in relation to same. Significantly, Mr. Dlamini for the Applicant abandoned his argument on prayer 4. This was indeed very wise. I say so considering the case of *Beaule (supra)* in which a bull was shot dead by the appellant for destroying his crop over a very long period of time. The Supreme Court of Zimbabwe, per McNally J.A., found that he had been correctly found guilty of malicious damage to property.

In this regard, I should mention that although I had some reservations about the propriety of the charge, which I readily expressed in Court during the hearing, my restlessness was removed and I was pacified by the *Beaule* case together with the writings of Hunt, The South African Criminal Law and Procedure, Vol II, upon which Mr. Dlamini for the Respondents monotonously harped in argument. There appears to have been nothing wrong in my judgment with the Applicant being subjected to both civil and criminal proceedings in relation to his unlawful conduct for it is known that one set of circumstances may give rise to more than one set of proceedings e.g. civil and criminal or even disciplinary. In this regard, there is no

need to interfere with the judgment of the Court *a quo* on this score.

In any event, it is clear that the Applicant has not complied with the order of the Umphakatsi to compensate the complainant. It would still be open to him, if I am not correct on this, to raise the issue that he has been already convicted for the same offence when compliance is required of him by the Umphakatsi and it is at that stage that the matter can be fully argued and definitively decided one way or the other.

(12) The proper order, in my view, is to set aside the sentence of imprisonment imposed on the Applicant by the trial Court. Just at that juncture, I have to answer one major and critical question *viz:* do I remit the matter back to the trial Court or this is a proper case in which to substitute the decision of the Court *a quo* as the Applicant has prayed?

(13) The general position relating to such matters is that the reviewing Court does not ordinarily substitute its

decision for that of the board, tribunal or functionary whose decision it was called to put under the spotlight of review. It is only in exceptional circumstances that the Court will resort to the extra-ordinary step of making the decision itself, rather than remitting it to the court, tribunal, functionary or board concerned.

The leading authority on the circumstances in which the Court can be at large to take that extra-ordinary step is to be found in the words of Hiemstra J. in *Johannesburg City Council v the Administrator of the Transvaal* 1969 (2) S A 72 (T) at p 76, where His Lordship had this to say:

> "(i) Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter. This applies more particularly where much time has already been lost by an applicant to whom time is in the circumstances valuable, and further delay which would be caused by the reference back is significant in the context.
>
> (ii) Where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again."

This position applies with equal force in this jurisdiction and I have in mind a judgment by Dunn J. where he quoted the above statement with approval. I was,

however, on account of time constraints, considering the urgency attaching to this matter and the difficulty associated with locating previous judgments of this Court, particularly the unreported ones, which are in the majority, unable to lay my hands on the said judgment.

What I do need to stress, however, is that the learned Hiemstra J. did not, by stipulating the above exceptional conditions purport to lay down a *numerus claussus* of the exceptional circumstances where the Court may substitute its decision for that of the court, tribunal, functionary or board in question. I am of the view that it would be dangerous in any event to purport to lay down any such limitations and to consider same cast in stone. I say so in recognition of the obvious fact that societal intercourse and development throw up a vagary of situations which may not have been within the contemplation of the learned Judge when he made the landmark statement 30 years ago. The Court may be faced with a novel situation now, which may appear to it

to be of an exceptional nature as to justify the excursion referred to above.

(14) Reverting to the instant matter, there is no gainsaying that the Applicant is in custody serving sentence as I read this judgment. It common cause that any further delay that may be incurred by referral of the matter to the Court *a quo* for that Court to reconsider the appropriate sentence may yield grave injustice to the Applicant and to members of his immediate family with each passing day. I say the latter because prospects of his losing employment are overwhelmingly high. In short, it is abundantly obvious that to him, time is of the essence, within the first exception mentioned by Hiemstra J.

(15) Secondly, I am of the opinion that the manner in which the trial was handled by the Court *a quo,* was not entirely competent. I say so for the reason that although he had pleaded guilty, he was still subjected to a fully blown

trial; no ruling was made as to the fact that he had a case to answer; the Court "cross-examined" him, to mention but a few anomalies. These were not however serious anomalies that can be said to have resulted in a failure of justice in the circumstances, particularly considering that the Applicant had pleaded guilty to the offence.

More telling, however, are the issues that I mentioned in paragraphs 15 and 16 above, regarding the myriad of issues the trial Court failed to take into account in assessing the condign sentence. In short, the Court *a quo* dismally failed to exercise its sentencing discretion properly. In particular, it failed to balance the three competing interests in sentencing, referred to in legal parlance as the *triad.* To send a person in the Applicant's position to jail for such an offence, committed in such circumstances, was shocking and it would not be out of place to surmise, in view of the foregoing, that some other equally unjust but different sentence may still be meted out to him should this Court refer this matter for a fresh sentence. That Court does not seem, from the record, to believe that there are other effective ways of meting out sentence than sending the offender to prison and this

appears to be so regardless of the attendant circumstances which may inexorably point otherwise.

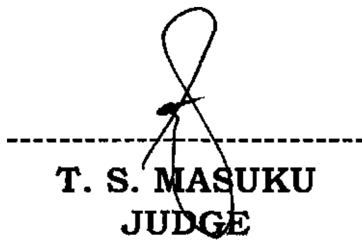
In the premises, I hereby order as follows:

(16) The sentence of six (6) weeks' imprisonment imposed upon the Applicant by the 1st Respondent on 18 March, 2009, be and is hereby set aside.

(17) I accordingly substitute therefor the following sentence: the Applicant is sentenced to a fine of E500.00 which is wholly suspended for a period of three years subject to the condition that he is not, within the period of suspension, found guilty of an offence in which damage to the property of another is an element.

29.3 The Respondents be and is hereby ordered to pay the costs of this application on the scale between party and party. Such costs are not, however, levied against the 1st Respondent in his personal capacity.

**DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 30th DAY OF MARCH, 2009.**




**Messrs. B.S. Dlamini Attorneys for the Applicant**

**The Attorney-General's Chambers for the 1st Respondent**