IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL TRIAL NO. 551/03

In the matter between:

JOHN SHONGWE	Applicant
Vs	
THE COMMISSIONER OF POLICE	1st Respondent
THE ATTORNEY GENERAL	2nd Respondent
SWAZILAND UNITED BAKERIES LIMITED	3rd Respondent
Coram	Annandale, ACJ
For 1st and 2nd Respondents	Mr. T. Dlamini
For 3rd Respondent	Mr. N. Hlophe

JUDGMENT

30th April, 2004

The present application is brought under Section 324(2) of the Criminal Procedure and Evidence Act, 1938 (Act 67 of 1938) (hereinafter referred to as "the Act"), wherein there is a "tug of war" between the applicant and the third respondent over a part of a sum of money that was seized by the police during the course of a criminal investigation, which ultimately resulted in the trial of four persons charged with robbery of the third respondent's firm. At the conclusion of the trial in the High Court, presided over by the learned former Chief Justice, the then second accused, now applicant, was convicted of the crime of theft. A custodial sentence of 4 years imprisonment was imposed, half of it being conditionally suspended. The court then ordered as follows, regarding the subject matter of this application:-

"All exhibits of money are to be held by the police for a period of 60 days and unless claimed by anyone entitled thereto after such period of 60 days be forfeited to the state for the benefit of the consolidated revenue."

The section of the Act under which the application is brought reads that:-

"Section 324 (1) After the conclusion of any trial and subject to any special provision contained in any law, the court may make a special order as to the return to the person entitled thereto of the property in respect of which the offence was committed or of any property seized or taken under this Act or produced at such trial.

(2) If no such order is made the property shall, on application, be returned to the person from whose possession it was obtained (unless it was proved during the trial that he was not entitled to such property) after deduction of the expenses incurred since the conclusion of such trial in connection with the custody of such property:

Provided that if within a period of three months after the conclusion of the trial no application is made under this Section for the return of the property, or if the person applying is not entitled thereto or does not pay such expenses, such property shall vest in the Government."

The order now sought by the applicant is to release the sum of E19 519.50, of the sum of E26 104.80, allegedly still in the possession of the 1st and 2nd respondents, to himself. Swaziland United Bakeries Limited, the then complainant in the criminal trial, opposed the application, was joined by consent as the third respondent, and in turn seek the release

of the sum of E26 519.50 (a different figure than that mentioned by the applicant in the current main application) to be released to itself.

From the papers filed herein, it seems that there was some misapprehension as to who may be entitled to seek an order to restore confiscated monies to a complainant in a criminal trial, quite possibly emanating from the established practice in South African courts, which are procedurally regulated to a different extent than what the position is in the Kingdom of Swaziland. Section 300 of the South African Criminal Procedure Act of 1977 (Act 51 of 1977) reads that;

"300 (1) Where a person is convicted by a superior court... of an offence which has caused damage to or loss of property (including money) belonging to some other person, the court in question may, upon the application by the injured person or the prosecutor acting on the instructions of the injured person (my emphasis), further award the injured person compensation for such damage or loss:...

(2) For the purposes of determining the amount of the compensation or the liability of the convicted person therefore, the court may refer to the evidence and the proceedings at the trial or hear further evidence either upon affidavit or orally.

(3) (a)...{

{The effect of such judgment is akin to a civil judgment of the court.} (b)...
(4) Where money of the person convicted is taken from him upon his arrest, the court may order that payment be made forthwith from such money in satisfaction or an account of the award..."

The court has not been referred to any legal provision, nor am I aware of such, whereby an injured party in Swaziland can apply to court for compensation or return of

confiscated exhibits, through the prosecuting authority, as the case is under South African Law. Our own Act states in Section 321(1) that:

"321 (1) If any person has been convicted of an offence which has caused personal injury to some person, or damage to or loss of property belonging to some other person (my emphasis), the court trying the case may, after recording the conviction and upon the application of the injured party (my emphasis) award him the compensation for such injury, damage or loss...

Provided that such compensation shall, subject to any other Act, in no case exceed four hundred Rand."

There is also an inclusion in the Criminal Code, under Section 321(6), which reads that:-

"If any moneys of the accused have been taken from him upon his apprehension, the court may order payment in satisfaction or on account of the award, as the case may be, to be made forthwith from such amount."

This provision is not of real assistance in the present application either. It is also to be noted that the wording of Section 321(1) quoted above, is at odds with the citation of the same Section quoted by

the late learned Dunn J in R V COBRA MSIBI AND 8 OTHERS, (unreported) Criminal Case No. 66/90, in the "Ruling on applications in terms of Sections 321 and 324 of Act No. 67 of 1938," dated the 16th November 1990. Therein, the phrase "upon the application of the injured party", underlined above, was quoted as ".. .upon application made by or on behalf of the injured party". The award made therein is many times more than E400, indicative further that different versions of the same enactment are at hand. Nevertheless, as said below, it is not the determinative issue at hand.

Although there is no provision in our Act that an application be made on behalf of some person or injured party, the Act also does not state that such party is precluded from

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making the application through the Crown's Prosecution Service, or an attorney acting on its behalf. I do not need to determine the issue, which in any event is severely restricted to E400, as that is not the issue to decide. The application brought on behalf of the 3rd Respondent, allegedly by the Crown, has been withdrawn, with costs tendered. There is however a difficulty to find, as is contended by the applicant's attorney, that the withdrawal of the application amounts to a disbandonment of the claim and a forfeiture of any potential right to compensation or restitution. That cannot be so and to argue otherwise, misses the point of the difference between the withdrawal of an application and a concession that no claim exists. The point that has to be decided is whether the 3rd respondents, or the applicant for that matter, is entitled to an order that the money seized by the police, the subject matter of this application, is to be given to anybody, or whether it is to remain forfeited to the state, for the benefit of the Consolidated Revenue Fund.

A further point of contention is whether the applications of either the 3rd respondent or the applicant was brought in time, bearing in mind the order of the trial court, that such application was to be made within a period of 60 days by anyone with a claimed entitlement thereto. The order can only be construed to mean that the period of 60 days commenced on the date of the order, which was made on the 12th December 2002, and that the window period ended 60 days later, on the 11th February, 2003, at best.

From the papers that were filed of record in this matter, it appears that the application by the intervening party, Swaziland United bakeries Limited, wherein both joinder and the release of E26 519.50 was sought, was dated the 10th April 2003. This followed on the judgment on sentence in the criminal trial, leaving a window period of 60 days, commencing on the 12th December 2002, clearly out of time. No condonation for late filing, possibly due to the aforesaid withdrawal of a prior application made on its behalf by the prosecution, was made. No reasons for the late application were advanced either.

Likewise, in the case of the present applicant, he also missed the time constraint placed on an application regarding release of the monies. The applicant's application is dated the 19th day of March 2003, also much later than the 60 days allowed by the trial court,

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and again without seeking condonation for late filing, and an explanation as to why it is out of time.

In his founding affidavit, the applicant refers to the circumstances that resulted in the confiscation of the money by the police and that he wants it returned to him. In paragraph 10 of his affidavit he states that:

"At the conclusion of the trial the court made no specific order about the disposal of the money and indicated that anyone entitled to it would make a claim for it."

The latter contention might be based on the truth but is not in conformity with it. Again, I refer to the apposite paragraph in the judgment on sentence dated the 12th December 2002, whereby the applicant was imprisoned. It clearly and unequivocally states that:

"All exhibits consisting of money are to be held by the police for a period of 60 days and unless claimed by anyone entitled thereto after such period of 60 days be forfeited...".

The applicant clearly fails to appreciate that any claim to money held by the police by anyone entitled thereto, had to be made prior to the expiry of 60 days after the order of court. That was not done by either the applicant or the third respondent. The wording of the order is clear and unambiguous, leaving no room for misinterpretation.

Despite this and without any excuse to seek a deviation from the Order of Court, with the wording of the Order well known, since it was included in the papers, the time frame within which an application had to be brought is merely neatly sidestepped by omission of the period in his affidavit. The same applies to the third respondent.

It is on this ground, the non-compliance with the time limit imposed at the conclusion of the criminal trial, namely that anyone that is entitled to the money concerned, is to claim it within sixty days, that neither of the two applications can be entertained. From the

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date of the Order until the lapse of sixty days, as permitted by the learned Chief Justice, no claim was made to the money.

As a result of the Order of the Court, the money was forfeited to the state, for the benefit of the Consolidated Revenue Fund. It is not in the hands of the Police, the First Respondent, anymore.

As stated above, to further impact on the application, which was brought way out of time and not merely fractionally, no application was made to condone the lateness of either application, either in the papers or from the Bar. I do not deem it to be proper to merely overlook the delay in bringing the applications out of time and summarily condone it. As said, the order of the court directed the money to be forfeited sixty days afterwards, with it being absorbed into the Consolidated Revenue Fund of Government.

In order to have considered an application to condone the lateness of filing a claim to the money, contrary to the order which set a reasonable period of sixty days, (with no such application for condonation at all), would at minimum have required it to be established if it was still possible to ultimately order the Commissioner of Police and the Attorney General to pay over the claimed amounts, it already having been forfeited and taken into the Consolidated Fund. This is however not presently an issue, it does not come into play.

In the event that this matter had to be decided on the actual merits and demerits of the competing claims to the money, adverse remarks would then have been made about the failure of attorneys to file papers they undertook to file, during the course of the hearing. For instance, much has been made about evidence at the trial whereat it was said that the applicant tried his best to disassociate himself from the money that is now the subject of the application, going as far as stating that the money was "planted" by the police to falsely incriminate him. Despite undertakings to do so, no transcript of the evidence heard during the trial has been filed to date. The same goes for various authorities and reference works that are not available to Judges in the High Court library.

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At the hearing of this matter, State's counsel made valuable contributions to assist the court. However, the attitude to support the application of the third respondent goes to the merits of the matter only. It does not advance the case any further as to why the court should overlook the obstacle of the sixty day time barrier in favour of only the third respondent's claim to the confiscated money and at the same time, to reject the applicant's claim on exactly the same basis. Nor was the third respondent able to show why there should be a biased inclination to decide the matter in its own favour, on the merits, and to overcome the same obstacle of being out of time, as against the applicant. What goes for the goose goes for the gander, to quote a hackneyed phrase.

In the event, the claims of both the applicant and the third respondent, to have the money that was confiscated by the police and has since been forfeited to the state, released to them, are dismissed. Costs are ordered to follow the event.

JACOBUS P. ANNANDALE

ACTING CHIEF JUSTICE