

**IN THE HIGH COURT OF SWAZILAND**

**CIVIL CASE NO. 1194/99**

**In the matter between:**

**RUSSELL DUBE                      PLAINTIFF**

**VS**

**ATTORNEY GENERAL              RESPONDENT**

**CORAM :                              MATSEBULAJ**

**FOR PLAINTIFF**

**FOR DEFENDANT**

**JUDGMENT**

**13<sup>th</sup> MARCH 2005**

By summons issued on the 4<sup>th</sup> May 1999 plaintiff claims the following:

- (a) Payment for the sum of E6 020 00;
- (b) Interest at the rate of 9% per annum ***tempore morae***;
- (c) Costs;
- (d) Further and/or alternative relief.

The plaintiff together with others were arrested by the Royal Swaziland Police on the 25<sup>th</sup> June 1997. At his arrest, plaintiff had in his possession a sum of E6 020 00 which amount was confiscated by the arresting officer to be produced as an exhibit at his subsequent

trial. It is common cause that the Criminal Case under case 118/97 was indeed tried by the High Court by Maphalala AJ, as he then was. The case is annexed to the particulars of claim as annexure "RD1". The learned judge was unable to find on the evidence before him that the amount of E6 020 00 taken from the plaintiff at his arrest formed part of the amount allegedly being the loot of the crime.

The plaintiff discovered a record of proceedings before the Court of Appeal No.20/98 and reference is made to the High Court Case No. 118/97. The Court of Appeal was dealing with one of the accused in Case No. 118/97 who had been convicted by Maphalala J. and the accused in that trial noted an appeal to the Court of Appeal and the proceedings before the Court of Appeal reveals the following as per discovered record of proceedings. The judge had to do with the ruling on application at the close of the Crown case:

DC1: My Lord my instructions are to move the return of exhibit 1(a) and the motor vehicle of the first accused. JUDGE: Mr. Maseko.

CC: Yes My Lord. For now the application is opposed and thus that, property will remain and should be used at the end of the trial.

JUDGE: You still want to use this.

CC: Yes My Lord.

DC1: The maintenance in the meantime, I am going to be excused.

JUDGE: Yes the court will keep that in my mind. I think also, Mr. Manzini that you are going to apply the same *thing*.

DC2: As the court pleases.

JUDGE: Right, let us come back in the afternoon for the third accused. The court will adjourn until 2.15pm."

What I have put in quotation marks above is all that happened before Maphalala J, no subsequent application for the return of the money to the plaintiff was made nor was the matter pursued any further by counsel who appeared for the plaintiff in the trial before Maphalala J.

The return of the exhibits is regulated under Section 23(4) of the **CRIMINAL PROCEDURE AND EVIDENCE ACT 67/1938**. Section 23(4) reads:

"1. After the conclusion of any trial and subject to any provisions contained in any law, the court may make a special order as to the returnable to the person, entitled thereto of the property in respect of which the offence was committed or any property ceased or taken out of this Act at such a trial.

2. If no such order is made, the property shall, on application, be returned to the person from whom whose possession was obtained unless it was proved during the trial that he was not entitled to such property after deduction of 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 revert in the Government."

The provisions of the CRIMINAL PROCEDURE AND EVIDENCE ACT are crystal clear. After the adjournment of the court, counsel for the present plaintiff should have pursued the matter, obtained an order in terms of the provisions of Section 24. This, he did not do. The present action is a non-starter because the proviso to Section 23(4)(1), it enjoins the plaintiff to make an application within a period of three months. Clearly, this application was never moved, the court has no discretion to dispense with the provisions of the proviso to Section 23(4).

It follows that the special plea filed by the defendant succeeds and it is upheld.

Plaintiff's claim is dismissed with costs.

J. M. MATSEBULA

JUDGE