IN THE HIGH COURT OF SWAZILAND

RULING

Case No. 1694/2013

In the matter between:

DUMISANI VILAKATI		**Applicant**
And		
MAGISTRATE (PIGG'S PEAK)	**1st**	**Respondent**
NATIONAL COMMISSIONER OF POLICE	**2nd**	**Respondent**
ATTORNEY GENERAL	**3rd**	**Respondent**
DIRECTOR OF PUBLIC PROSECUTIONS	**4th**	**Respondent**

Neutral citation: ***Dumisani Vilakati v Magistrate (Pigg's Peak) & 3 Others (1694/2013) [2014] SZHC 40 (13th March, 2014)***

Coram: **M. Dlamini J.**

Heard: **21st February 2014**

Delivered: **13th March, 2014**

Summary: Serving before court is a review application for the setting aside of first respondent's decision wherein a motor vehicle used in the commission of crime was ordered to be forfeited to the Crown. The basis is that the applicant was not called to join issue before the order was issued.

Background

[1] On 15th October 2013 two accused persons were found driving the motor vehicle under issue *viz.* Toyota Fielder registered CSD 248 AL. The motor vehicle contained 21kg of dagga. They were subsequently charged and after a full blown trial, convicted by first respondent. They were each ordered to pay a fine of E8,000.00 and the motor vehicle forfeited.

Applicant's case

[2] In support of his application, applicant asserts:

> "*9. On the 12 October 2013, I asked my neighbor, Ndabenhle Mkhonta to help drive me to a traditional healer at Lavumisa and he agreed and went and came back. I allowed him to go home with my motor vehicle as we came back late.*
>
> *10. On or about 14th October 2013, I got a call from Ndabenhle that my motor vehicle was impounded by Pigg's Peak Police. I could not get what exactly had happened as he then cut the call and was calling me from a landline phone.*
>
> *11. In the evening, Ndabenhle's elder brother came to tell me that Ndabenhle was arrested and convicted for being found with dagga in my car. He was transporting some people whom I did not know and that my motor vehicle had been forfeited to the state.*

12. *A few days later I went to Pigg's Peak Court to find out what really happened and to try get back my car and I was advised that the Magistrate had issued an order that the car be forfeited to the state and that order she cannot reverse unless I approach this court.*

13. *I submit that I own the motor vehicle and did not give Ndabenhle authority to transport dagga with my motor vehicle. I had actually anticipated him to bring my motor vehicle on the day of his arrest and was worried when he did not return it. Due to the cordial relations between our families I did not raise an alarm and thought the car was at his homestead.*"

Adjudication

[3] The first respondent was guided by **Section 12 (3) (b)** of the **Pharmacy Act No. 38 of 1929 (Act)** in her decision ordering forfeiture of the said motor vehicle. The said legislation stipulates:

> *"12 (3) The Court convicting a person under this section may order to be forfeited to the Government –*
>
> *(b) any motor vehicle, conveyance, receptacle or thing which was used for the purpose of or in connection with the contravention of this section.*

[4] First Respondent was further influenced in her decision by the evidence presented by accused No.1 which was as follows:

"***Submission by 1***

I use the dagga for medication. My grandmother makes medicine with it. She used to fetch it herself but his time she sent me."

[5] From the said evidence first respondent concluded:

"*A1 in his mitigation, told this court that he had been sent by his grandmother to get this dagga for her from Swaziland and that it was his first time doing same. Otherwise his grandmother used to get it herself but now that she is old, she sent him. It is evident that accused obviously comes from a family of offenders and the court believes. A1's grandmother must have admonished A1 about the dangers of this illegal trade and the court is of the view that A1 must have been aware of the offence he was committing. It is the court's view that in the many occasions A1's grandmother had crossed the border into Swaziland to get dagga and back, she must have been caught several times and this she must have related to her trusted grandson who is A1."*

[6] In the present case, as accused No.1 demonstrated, first respondent correctly concluded that the instrumentality of crime was given to accused No.1 by his grandmother. She correctly inferred that the said instrumentality belonged to accused No.1 or his grandmother who, by accused No.1 had common purpose to the commission of the offence. It was for this reason that she ordered forfeiture of the said motor vehicle to the Government.

[7] Case law further supports first respondent's decision. **Theron J** in **S. v Swart and Others 1963 (4) S.A. 981** at 986 stated:

"*The main principle to be borne in mind, then, is that confiscation should not be ordered unless there is a likelihood that the vehicle, weapon or article in question would otherwise be used again in the future for illegal purpose*."

[8] *In casu*, the first respondent was faced with evidence from accused No.1 that the dagga was medication for his grandmother who usually collected it herself but at that particular time she had sent accused No.1. From these facts, it was likely that the motor vehicle would be used again to convey dagga, an illegal act as it had been used over and over in the past. It is my considered view that the 1st respondent was correct in so holding in the view of the circumstance that applicant although fully aware of the trial, did not assert his rights. This is gathered from applicant's attestation that:

> "*On or about the 14th October 2013, I got a call from Ndabenhle that my motor vehicle was impounded by Pigg's Peak Police*"

[9] This matter was heard the following day of the arrest being 16th October 2013. The applicant then avers:

> "*A few days later I went to Pigg's Peak Magistrates' Court to find out what really happened and to try to get back my car and I was advised that the Magistrate had issued an order that the car be forfeited to the State…"*

[10] From the above, no application was serving before the first respondent claiming the said motor vehicle. Applicant, in other words, decided to fold his arms and not claim the motor vehicle. With the evidence that Accused No.1 was sent by his grandmother, the first respondent cannot be faulted for ordering forfeiture.

[11] Section 12 (4) and (5) reads:

"*12 (4) An order of forfeiture under subsection 3 (b) shall not affect the rights of any person other than the person convicted to recover*

the motor vehicle, conveyance, receptacle or thing if it is proved that he did not know nor had reason to believe that it was or would be used for committing the offence or that he could not prevent such use.

(5) The court may, during the trial resulting in the order of forfeiture under subsection 3 (b) or at any time after the order has been made, inquire into and determine any person's rights to the motor vehicle, conveyance receptacle or thing and if such inquiry or determination is against any person, the person may appeal there-from as if he were appealing from a conviction and sentence and such appeal may be heard either jointly with or separately from the appeal, if any against the conviction for contravention of this section."

[12] It appears from subsection (5) that first respondent may enquire on the rights of third party on the *merx*. This may be before or after the order of forfeiture.

[13] As the legislature provides (Section 12 (5)) that "*or at any time after the order (i.e. forfeiture) has been made the court may inquire into and determine any persons' rights to the motor vehicle …*" first respondent ought to have given applicant the right to be heard. Holding a similar view **Classen JP** in **R v Samuel 1958 (4) S.A. 314** at 318 stated:

"*Where legislation confers a discretion on a judicial officer to make an order for forfeiture, the maxim of audi alteram partem should be justly observed …"*

[14] From applicant's assertion, it is clear that when he approached first respondent's court, he was advised:

"*that the Magistrate had issued an order that the car be forfeited to the State and that order she cannot reverse unless I approach this court*."

[15] This advice was incorrect in the light of the enactment cited above to the effect that the court may entertain an application claiming right over the *merx* even after the order of forfeiture has been made.

[16] Before I enter the necessary order, it is apposite to highlight the elements in forfeiture applications as per their Lordships in **National Director of Public Prosecutions v Parker 2006 (3) S.A. 198** where it was held:

"…forfeiture proceedings entail two stages; firstly, a determination of whether the property was "an instrumentality of an offence", and, secondly," whether the owner of the property knew or had reasonable grounds to suspect that the property was instrumentality in an offence"."

[17] Their Lordships then elaborated on this view at page 205 as follows:

"*Chapter 6 provides for forfeiture in circumstances where it is established, on a balance of probabilities, that property has been used to commit an offence … even where no criminal proceedings in respect of the relevant crimes have been instituted …Chapter 6 is therefore focused, not on wrongdoers, but on property that has been used to commit an offence or which constitutes the proceeds of crime. The guilt or wrongdoing of the owners or possessors of property is, therefore, not primarily relevant to the proceedings.*

There is, however, a defence at the second stage of the proceedings, when forfeiture is being sought by the State. An owner can at that stage claim that he or she obtained the property legally and for value, and that he or she neither knew nor had reasonable grounds to suspect that the property….had been an instrumentality in an offence ("the innocent owner" defence)"

[18] Turning on the question of costs, I am not inclined to grant applicant costs for the reason that applicant states that he was advised that first respondent could not deal with his application. As already indicated, applicant was ill-advised. He ought to have filed his application before the same court as clearly stipulated in section 12 (5) of the Act instead of rushing to this court. No order of costs was pursued on behalf of respondents.

[19] In the totality of the above, the following orders are entered:

1. Applicant's application is remitted to the first respondent for determination.

2. No order as to costs.

M. DLAMINI
JUDGE

For Applicant	**:**	**V. M. Kunene**
For 1st -3rdRespondents	**:**	**N. Nkambule**
For 4thRespondent	**:**	**N. Masuku**