



**IN THE HIGH COURT OF SWAZILAND**

Case No: 30/2014

In the matter between:

**DUMISANI WISEMAN SHONGWE**

**APPLICANT**

**AND**

**THE PRINCIPAL MAGISTRATE SITEKI NO**

**FIRST RESPONDENT**

**THE NATIONAL COMMISSIONER**

**SECOND RESPONDENT**

**OF POLICE**

**THE ATTORNEY GENERAL**

**THIRD RESPONDENT**

Neutral citation:

*Dumisani Wiseman Shongwe v. The Principal Magistrate Siteki NO and Two Others (30/2014) [2014] SZHC57 (3 April 2014)*

**Coram:**

**M.C.B. MAPHALALA, J**

**Summary**

Criminal Procedure – Review of a Magistrate’s Court Order – application to detain items in terms of section 52 (3) of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended – Detention Order accordingly issued – section 52 of the Act considered – held that the Magistrate did not misdirect himself in any respect and that there was no legal basis upon which the Detention Order could be set aside – application dismissed with costs.

---

**JUDGMENT  
3 APRIL 2014**

---

[1] This is an urgent application brought on a certificate of urgency for an order reviewing, correcting and setting aside of the order issued by the Siteki Magistrate's Court on the 7 January 2014. The applicant further sought an order for the release of an amount of E40 500.00 (forty thousand five hundred emalangeni) a driver's licence as well as a National Identity Card seized by the police from the applicant. The applicant also sought an order for costs.

[2] It is common cause that the applicant was arrested by the police on the 31<sup>st</sup> December 2013 at Siphofaneni area in the Lubombo region. The applicant was further taken to his residence where certain items were seized including an amount of E40 500.00 (forty thousand five hundred emalangeni), driver's licence, a National Identity Card as well as two Samsung cellular phones. The police deny taking the driver's licence, the laptop as well as the motor vehicle; the police contend that they merely took the motor vehicle for purposes of taking photographs of the motor vehicle as an exhibit. However, it is not in dispute that the applicant was arrested and subsequently charged for the offences of rape, kidnapping and unlawful escape from lawful custody.

[3] It is not in dispute that on the 7<sup>th</sup> January 2014, the police lodged an *ex parte* application for a Detention Order in terms of section 52 (3) of the

Criminal Procedure and Evidence Act No. 67 of 1938 as amended. The police deposed to an affidavit in which they contend that they are investigating an offence of Theft by False Pretences which was reported by Gideon Jabulani Mahlalela. According to the police the offence was committed between September 2012 and December 2013; and, that the applicant committed the offence on false pretences that he would take care of his DSTV Services. The money allegedly stolen by the applicant amounts to E380 000.00 (three hundred and eighty thousand emalangeni).

[4] According to the police affidavit items seized from the applicant include a cash amount of E40 500.00 (forty thousand five hundred emalangeni), two Samsung cellphones, the Swaziland National Identity Card of the applicant, original Nedbank Statements of Gideon Mahlalela dated 2012 and 2013 as well as twenty Nedbank original cheques drawn in favour of the applicant for various amounts valued at E312 204.00 (three hundred and twelve thousand two hundred and four emalangeni). The Magistrate's Court accordingly issued the Detention Order.

[5] The applicant seeks a review of the Detention Order on the basis that the application was made *ex-parte*. To that extent he contends that the Order was in breach of the Rules of Natural Justice on the basis that he was not afforded an opportunity to be heard notwithstanding knowledge by the

police and the prosecution that he was legally represented by an Attorney. He further contends that the Detention Order is highly prejudicial to him on the basis that it is final in nature.

[6] Contrary to submissions made by counsel, this application does not involve constitutional issues in general or section 33 of the Constitution in particular or the rules of Natural justice. If that were the case the intention of the legislature as reflected in section 52 (3) of the Criminal Procedure and Evidence Act would be defeated. The purpose of this legislative provision is to control and eradicate crime; the police are empowered by the Act to institute the proceedings ex parte in order to obtain all the requisite exhibits pertaining to the offence. Giving notice to the applicant would defeat the whole purpose of the Act because the exhibits may not be found subsequently.

[7] The applicant has argued that section 52 (3) of the Act is in conflict with section 33 of the Constitution which provides the following:

**“33. (1) A person appearing before any administrative authority has a right to be heard and to be treated justly and fairly in accordance with the requirements imposed by law including the requirements of fundamental justice or fairness and has a right to apply to a court of law in respect of any decision taken against that person with which that person is aggrieved.”**

[8] The applicant further argues that the rules of natural justice and in particular the *Audi Alteram Partem* rule requires that the other party must be heard before an order is granted against him. It is therefore apparent that this case presents two conflicting interests, that is the protection of individual rights and the mandate of the state to fight crime. *Langa CJ in Thint (Pty) Ltd v. National Director of Public Prosecution: Zuma v. National Director of Public Prosecutions and Others* 2009 (1) SA 1 CC at para 74 quoted with approval the Court's earlier judgment in *Investigating Directorate: Services Economic Offences and Others v. Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v. Smit NO and Others* 2001 (1) SA 545 (CC) (2000) 2 SACR 349.

**"74. ....**

**There is no doubt that seizure provisions in the context of a preparatory investigation, serve an important purpose in the fight against crime. That the state has a pressing interest which involves the security and freedom of the community as a whole is beyond question. It is an objective which is sufficiently important to justify the limitation of the right to privacy of an individual in certain circumstances. The right is not meant to shield criminal activity or to conceal evidence of crime from the criminal justice process. On the other hand, state officials are not entitled without good cause to invade the premises of persons for purposes of searching and seizing property; there would otherwise be little content left to the right to**

**privacy. A balance must therefore be struck between the interest of the individual and that of the state.”**

[9] His Lordship Chief Justice Langa acknowledged that in the Hyundai case, the Court was dealing with the issue of a search warrant in the context of a preparatory investigation; however, His Lordship correctly stated that these considerations are equally applicable where the warrant is sought in the context of a criminal investigation. His Lordship further quoted with approval the principle in the Hyundai case at para 89 where the court concluded as follows:

**“The warrant may only be issued where the Judicial officer has concluded that there is a reasonable suspicion that such an offence has been committed, that there are reasonable grounds to believe that objects connected with an investigation into that suspected offence may be found on the relevant premises, and in the exercise of his or her discretion, the judicial officer considers it appropriate to issue a search warrant. These are considerable safeguards protecting the right to privacy of individuals. In my view, the scope of the limitation of the right to privacy is therefore narrow.”**

[10] His Lordship then summarised the grounds upon which a search and seizure warrant should be issued as follows: firstly, a reasonable suspicion that an offence has been committed; secondly, reasonable grounds to believe that the property has a bearing or might have a bearing on the investigation and

that the property is on the premises; thirdly, the judicial officer must consider whether it is necessary to issue the warrant on the basis of the facts set out in the affidavit, and, this involves the exercise of discretion and the balancing of the fundamental rights and the constitutional mandate of the state to fight crime.

[11] Section 52 of the Act provides:

**“52. (1) If on the arrest of any person on a charge of an offence relating to property, the property in respect of which the offence is alleged to have been committed is found in his possession, or if anything is seized or taken under this Act, the person making the arrest or (as the case may be) the person seizing or taking the thing shall deliver such property or thing, or cause it to be delivered to a magistrate within such time as in all the circumstances of the case is reasonable.**

....

**(3) The magistrate shall cause the property or thing so seized or taken to be detained in such custody as he may direct, taking reasonable care for its preservation until the conclusion of a summary trial or of any investigation that may be held in respect of it.**

**(4) If any person is committed for trial for any offence committed with respect to the property or thing so seized or taken, or for any offence committed under such circumstances that the property or thing so seized or taken is likely to afford evidence at the trial, the magistrate shall cause it to be further detained in like manner for the purpose of its being produced in evidence at such trial.”**

[12] It is apparent from the evidence that the Detention Order was issued for the purpose of police investigations in a complaint lodged with the police relating to Theft by False Pretences against the applicant by Gideon Mahlalela. Similarly, the Detention Order incorporates section 52 (4) of the Act in so far as it provides that the property would be detained pending finalisation of the criminal proceedings.

[13] At the time of the seizure of the property, the Detention Order was required for purposes of criminal investigations. However, the police have since charged the applicant with the offence of Theft by False Pretences in addition to the other offences; hence, the exhibits are now required for the criminal trial. The applicant will have an opportunity during the criminal trial to defend himself; if he succeeds on the charge relating to the property seized, he will secure the return of his property in accordance with section 52 (5) of the Act.

[14] Section 52 (5) of the Act provides the following:

“52.

....

**(5) (a) At the conclusion of a summary trial or if the Director of Public Prosecutions declines to prosecute, the Magistrate shall, in**



**respect of the property or thing seized make one of the following orders:**

- (i) that the property or thing be restored to the person from whom it was seized if that person satisfies the Magistrate that he is lawful owner of the property or thing or that he is lawfully in possession of the property or thing;**
- (ii) if that person fails to prove that he is the lawful owner or has lawful possession of the property or thing, that the property or thing be restored to any other person who is lawfully entitled to it upon proof to the Court;**
- (iii) if no person claims ownership or possession of the property or thing or if the person lawfully entitled to it cannot be traced or is unknown, that the property or thing be forfeited to the Crown.**

**(b) The Court shall for the purposes of an order under paragraph (a) hear such further evidence (whether by affidavit or orally) as it may consider necessary.”**

[15] The Magistrate did not misdirect himself in granting the Detention Order; hence, there is no legal basis upon which this Court could set aside the Detention Order. The applicant does not dispute that the items seized were found in his possession or that they form the basis of a complaint laid against him by Gideon Jabulani Mahlalela. It is also not in dispute, and it

is common cause, that the applicant has since been charged with the offence of Theft by False Pretences in respect of the property seized.

[16] Accordingly the application is dismissed with costs.

---

---

**M.C.B. MAPHALALA**  
**JUDGE OF THE HIGH COURT**

For Applicant

---

Attorney Z. Dlamini

For Respondents

Senior Crown Counsel V. Kunene