IN THE HIGH COURT OF ESWATINI

Held at Mbabane Case No.:1424/2019

In the matter between

THE DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

AND

LINDA MAGAGULA 1ST RESPONDENT

SYED ABUTALIB 2ND RESPONDENT

Neutral Citation: *The Director of Public Prosecutions* Vs *Linda Magagula and Another (1424/2019) [2020] SZHC 28 (26 February 2020)*

Coram: Hlophe J.

For the Applicant: Mr T. Mamba with Miss E. Matsebula

For the Respondents: Mr S. Gumedze and Mr N. Piliso

Date Judgement Delivered: 26th February 2020

Summary

Application proceedings – Prevention Of Organized Crime Act of 2018 – Preservation Order – When order should be granted in law – Purpose of Act discussed – Applicant found in possession of undeclared cash at the border in a car that allegedly had a strong dagga smell – Motor Vehicle seized under the Prevention Of Organized Crime Act for preservation purposes pending application for forfeiture – Whether case made for the relief sought in the circumstances.

JUDGMENT

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[1] On the 5th day of September 2019, in the course of hearing urgent applications for that week, I heard the above matter which was brought on an urgent basis as an exparte application by the Applicant, the Director of Public Prosecutions, who sought what I may loosely term a "preservation order" as envisaged by the Preservation Of Organised Crime, Act 2018.

[2] In that application the applicant sought a relief inter alia empowering and or authorizing the applicant or the Commissioner of Police to obtain an order restraining anyone from dealing in any way with a certain motor vehicle fully described as: a Grey Honda Fit, Engine Number L13A2161117; Chassis Number GD12242895 and Registration No. XSD 062 AL, pending the outcome of an application for the forfeiture of same on the grounds that it was an alleged instrumentality in the commission of crime as envisaged by

the Prevention of Organised Crime Act (POCA) 2018. This order and the ancilliary ones were sought as a rule nisi operating with immediate and interim effect pending the return date.

[3] Although I recorded my misgivings about the citation of the parties in so far as it purported that the Applicant, the Director of Public Prosecutions, brought the proceedings against a certain Honda Fit Motor Vehicle, instead of it reflecting the person from whose possession the car was taken as a Respondent, in which case the motor vehicle would have been cited only as the subject matter of the proceedings, I issued the rule nisi concerned after expressing my unhappiness with the citation. I did that because in my view the apparent irregularity in the citation did not affect the merits of the matter in any way and there was no one occasioned prejudice as a result.

[4] This judgement is a sequel to the hearing of the matter during the return date after all the papers had been exchanged and filed of record by and between the parties.

[5] The applicant contends as a basis for his application that on the 9th day of July 2019, the Respondent, who was driving the motor vehicle forming the subject matter of these proceedings, the grey Honda Fit, into the country at the Ngwenya Border gate failed to declare that he had in his possession a sum of R20138.00, with the customs officials as required of him by law.

[6] It is not in dispute that the law required that any person having in his possession a sum of money exceeding E15000 – 00 (Rands) was obliged to declare such an amount to the customs officials at the Border gate. It is worth mentioning that although the law allows up to E15000 – 00 not to be declared at the border, such does not seem to come out in the applicants case. It seems as if the accusation was now a failure to declare E20138.00 instead of a failure to declare a sum of E5138 – 00 as the balance between what is allowed in law and what was actually found above that allowed in law.

[7] According to the Police Officer who conducted the search that resulted in the discovery of the amount of money in question, he also allegedly

discovered that the said motor vehicle had an acrid or strong dagga smell in it. Owing to the combination of these factors namely the undeclared sum of money and the alleged acrid dagga smell of dagga he concluded that the Respondent dealt in dagga and that the money in question comprised the proceeds of crime.

[8] His suspicions were apparently rendered stronger by his allegation that when he enquired from Respondent about the source of the undeclared sum of money found in his car, he was given an alleged untruthful answer. In fact the Respondent had allegedly said that a sum of E10,000.00 of that money had been given to him by a friend of his from Luve who worked in the Republic of South Africa, while a sum of E3000.00 was given him by his brother to handover to his wife; while a sum of E10,000.00 had been received by him as a payment for work done in South Africa where he had a business of producing or making window frames and such like for sale to his customers or clients based there.

[9] According to the affidavit of the applicant deposed to by Counsel, Miss Elsie Matsebula, it was discovered, as that information was followed up, that

it was not truthful. For instance, it was contended that, the First Respondent's brother denied having given him such a sum but only confirmed his having given him an even bigger sum than that revealed. It was allegedly further discovered that there was no evidence that the Respondent had ever manufactured and sold the window frames and the like as claimed by him.

[10] It was as a result of this discovery and the incorrect answers given to the questions posed that the applicant instituted the current proceedings under the Prevention of Organised Crime Act (POCA) 2018, where upon he sought the reliefs referred to above.

[11] The Applicant had noted on its own, and had gone on to bring to the Court's attention, the fact that the motor vehicle actually belonged to one Syed Abutalib of " Japanez Motors" in Manzini and not to the Respondents given that it had been sold to the Respondent. As at the time of the incident in question, a sum of E18000 – 00 was still outstanding.

[12] Both the First Respondent (Mr Linda Magagula) and the Second Respondent (Mr Syed Abutalib) had joined issue and opposed the grant of the order sought. According to the First Respondent the application could not be granted firstly because it was allegedly based on speculation or assumption over and above the fact that it was, as a matter of fact, the property of Syed Abutalib. The Second Respondent on the other hand contended that the property could not be dealt with in terms of the order sought because it did not belong to the First Respondent but to him (Syed Abutalib).

[13] The question is whether in the circumstances of the matter, it was open to the Applicant to obtain an order prohibiting or preventing anyone from using the motor vehicle pending a forfeiture application; in other words whether it was open to the applicant to obtain a preservation order in the circumstances. Before answering this question, it is important for me to express my observation that the Motor vehicle was actually seized following the alleged finding of the undeclared sum of E20138.00 in it. Otherwise the conclusion that it was an instrumentality in dagga dealing is merely based on the alleged acrid smell felt or smelt in the motor vehicle in question. The amount of money found ended up being attributed to the smell of dagga as proceeds from the sale of dagga. Otherwise the assertion that the Respondent was

involved in dagga dealing is not a result of any direct evidence than it is a conclusion sought to be drawn from the facts of the matter. This begs the question whether based on the circumstances herein revealed it would be proper in law to draw such a conclusion. In other words can it be so concluded through reasoning by inference.

[14] The reality in such a case is that the principles of the law on reasoning by inference have been called to the fore. In our law such an inference can only be made if it is the only reasonable one to be drawn from the set of facts and if it is consistant with all the proved facts (See **Rex Vs Blom 1939 AD 288)**.

[15] It does not seem a reasonable inference to me to construe that simply because someone is found with a sum of E20 138.00, which he has not declared at the Border gate, in a motor vehicle that smells of dagga, then that sum of money is proceeds from the sale of dagga just as is the case with the vehicle itself which it is contended was bought through proceeds from the sale of dagga.

[16] There is no concrete expert evidence on what that alleged acrid smell of dagga was consistent with assuming its existence there was not being

disputed. In other words was it one from a casual dagga smoker or from the ferrying of dagga for sale purposes using the motor vehicle concerned. There is no explanation on why the money and the motor vehicle are both associated with dagga dealing, so as to necessarily follow that the sum of money found in the car amounted to proceeds from that particular crime and that the vehicle was also an instrumentality of same. The pieces of information joined together to eventually come up with the conclusion that they are indicative of dagga dealing seem to me to be disjointed and far remote from each other to justify the drawing of such a conclusion. I am not convinced that the conclusion is reasonable in the circumstances.

[17] It is not a plausible conclusion to me to say that simply because one purchased a car in instalments then he was using proceeds from dagga dealing in the absence of credible information or evidence to enable one to so conclude. It is difficult to conclude that there are reasonable grounds for concluding that the court would convict such a person let alone grant a forfeiture order.

[18] As a starting point I accept that the conventional criminal law penalties are not adequate to deter organized crime whose perpetrators derive financial and material gains from it even if they were later brought to justice. See in this regard **National Director of Public Prosecutions and Another V Mohammed and Others 2002 (4) SA 843 (CC)**. I agree that it is necessary in an appropriate case to preserve the property used in the commission of the crime, including proceeds from it so as to ensure that same was later liquidated and had its proceeds either go to compensate the victims of crime or were to be paid to the state in circumstances where the accused was convicted of the organized crime concerned or where it is established in an appropriate case that such property should be forfeited to the state. See in this regard **National Director of Public Prosecutions Vs Rautenbach 2005 (1) All SA 412 (SCA) at Paragraph 24**. In that judgement the position was ably captured in the following words:-

> *"The purpose of a restraint order is to preserve property in the interim so that it will be available to be realized in satisfaction of such an order."*

[19] At paragraph 25 of the same judgement the following was said on how or when the court would find it appropriate to grant a preservation order

> *"A court from which such an order is sought is called upon to assess what might occur in future where it is satisfied that a person is to be charged with an offence and that there are reasonable grounds for believing that a confiscation order may be made against such a person."*

[20] In **National Director of Public Prosecutions V Kyriacon 2004 (1) SA 379 (SCA)** at Paragraph 10, the foregoing position was put in the following words:-

> *"Section 25 (1) (a) confers a discretion upon a Court to make a restraining order if, inter alia, there are reasonable grounds for believing that a confiscation order may be made… while a mere assertion to that effect by the appellant will not suffice (See **National Director of Public Prosecutions Vs Bosson 2002 (1) SA 419 (SCA) at 428 B – C)**. On the other hand the appellant is not required to prove as a fact that a confiscation order will*

be made and in those circumstances there is no room for determining the existence of reasonable grounds for the application of the principles and onus that apply in ordinary motion proceedings. What is required is no more than evidence that satisfies a court that there are reasonable grounds for believing that the court that convicts the person concerned may make such an order."

[21] The test confirmed in all the above – cited cases is that the court must be satisfied that a person is to be charged with an offence and that there are reasonable grounds for believing that a confiscation order may be made – against such a person. This test is also expressed in words to the effect that there should be evidence that satisfies the court that there are reasonable grounds for believing that the court that convicts the person concerned might make an order for confiscation.

[22] Upon considering closely the circumstances of the matter, I am not convinced that on the facts before me, which are scant, I can say I am satisfied that there exists reasonable grounds for believing that the court

would make a confiscation order against the respondent. It complicates it further that the motor vehicle in question belongs to a neutral third part who has not been shown to have partaken in the crime the First Respondent is suspected or accused of having committed. As I understand it this party is content with the car remaining in the possession of the First Respondent.

[23] There is also the question whether in the circumstances of the matter, it can be said that the motor vehicle in question was an instrumentality of the crime. An instrumentality in the commission of the crime was described in the following words in **National Director of Public Prosecutions V R.O. Cook Properties (PTY) LTD (2004) SCA 36 at Paragraph 31**:-

> "*The words concerned in the commission of an offence must in our view be interpreted so that the link between the crime committed and the property, is reasonably direct, and that the employment of the property must be functional to the commission of the crime. By this we mean that the property must play a reasonably direct role in the commission of the offences. In a real or substantial sense the property must facilitate or make*

possible the commission of the offence. As the term "instrumentality' itself suggests (albeit that it is defined to extend beyond its ordinary meaning), the property must be instrumental in, and not merely incidental to, the commission of the offence. For otherwise there is no rational connection between the deprivation of property and the objective of the Act." (underlining added)

[24] Other than that the motor vehicle was incidental in the commission of the offence of failure to declare the money at the border by the First Respondent, it has not been shown that it was instrumental in the commission of any offence. I cannot say that it has been shown in these circumstances that the motor vehicle played a reasonably direct role in the commission of any crime. In so far as the motor vehicle was only connected to the crime by the money found in it, I do not think more than an incidental connection between the motor vehicle and the money crime committed (failure to declare the money) has been established.

[25] The circumstances of this matter closely resemble what was found to have happened in **National Director of Public Prosecutions Vs Bissessue 1990(7) SACR 228 (C)**. In that case the Respondent who had been charged with fishing without a licence had the motor vehicle found with the fishing rods on it, ordered forfeited to the state by the presiding Magistrate. On appeal to the Supreme Court, it upheld the appeal and set aside the forfeiture of the motor vehicle whilst confirming that of the fishing rods on the ground that the motor vehicle had not been shown to have played a part in a reasonably direct sense in the commission of the crime.

[26] Similarly in casu, it has not been shown that the motor vehicle had played a part in a reasonably direct sense in the commission of the offence complained of. I am therefore convinced that the application cannot succeed; it is dismissed with no order as to costs.