



IN THE HIGH COURT OF SWAZILAND

Civil case No: 2144/2012

In the matter between:

**SALEBONA DLAMINI
SK INVESTMENTS (PTY) LTD**

**FIRST APPLICANT
SECOND APPLICANT**

AND

**THE COMMISSIONER OF POLICE
THE ATTORNEY GENERAL**

**FIRST RESPONDENT
SECOND RESPONDENT**

Neutral citation: *Salebona Dlamini and Another v. The Commissioner of Police and Another (2144/2012) [2013] SZHC40 (2013)*

Coram:

M.C.B. MAPHALALA J,

For applicants :

Attorney Mangaliso Nkomondze

For Respondents:

Senior Crown Counsel V. Kunene

Summary

Civil Procedure – application to restore possession of money and other items seized by the police without a search warrant – sections 47 and 52 of the Criminal Procedure and Evidence Act applicable in the circumstances – held that police are entitled to keep the property pending the conclusion of the criminal trial in terms of section 52 (3) of the Act – application dismissed.

**JUDGMENT
28th FEBRUARY 2013**

[1] This is an urgent application for an order directing and compelling the respondents to restore possession of the first applicant's money in the amount of E26 000.00 (twenty six thousand emalangen) which they unlawfully seized on the 1st December 2012. They further sought an order directing and compelling the respondents to restore possession of the second applicant's business documents including an Order Book and bank deposit slips which the respondents unlawfully seized on the 2nd December 2012. They also sought an order for costs at attorney and own client scale.

[2] The first applicant is the Managing Director of the second applicant. He alleged that on the 1st December 2012 he organised an entertainment event at Bosco Skills Centre in Manzini where members of the public were invited to attend; people who wanted to gain entry to the event had to purchase tickets. There were prizes to be won by those in attendance, and, the winners were to be selected randomly. He argued that the object of the event was to establish an educational trust from which destitute youth could access bursaries to further their education. In addition, the event was intended to launch and promote the second applicant's first ever Swazi Manufactured mayonnaise.

[3] The first applicant further argued that his organizing team could not give out prizes to the winners because their sponsor who had pledged to give them fuel vouchers as prizes pulled out and cancelled the sponsorship on the last minute; hence, the award of the fuel vouchers was postponed to enable them to buy the

vouchers. A commotion ensued when they were giving out cash prizes; those who had won fuel vouchers then demanded cash prizes; and, the police were called to calm the pending violent confrontation.

[4] After rescuing him and his organizing team from the angry winners, the police escorted them to the Manzini Police Station. The police conducted a body-search against him and took his wallet; inside the wallet they took out an Order Document. The police further took E26 000.00 (twenty six thousand emalangeni) which he was carrying together with all the tickets and others documents used during the event.

[5] The police further took the first applicant and his organising team to his rented apartment where they took documents relating to the second applicant. Thereafter, they took him to his factory at Mvutjini area where he manufactures mayonnaise; they took several documents from his office including bank documents and other company documents, after which they released him. Each time he asked for the release of the money, the police told him that they were still investigating the matter.

[6] He also argued that the police did not have a warrant authorising them to seize his money, search his rented apartment or his factory or even to seize the documents belonging to the second respondent. He argued that he has not been

charged of an offence; hence, the police were violating his constitutional rights by depriving him of his property without due process of the law.

- [7] This application is opposed by the respondents. In his answering affidavit the first respondent argued that after the first applicant had been taken to the police station after the commotion, the winners who had not received their prizes laid a criminal charge against him; others were demanding a refund of their money for buying the entry tickets.
- [8] The respondents admitted that the first applicant was searched and certain property taken for further investigation; they further admitted that they obtained a detention order which listed the property seized. The items seized were an amount of E25 260.80 (twenty five thousand two hundred and sixty emalangenani eighty cents), Salad Mayonnaise stickers, thirty-eight tickets stubs, one Channel S receipt, one Shobza Taxi receipt, two Manzini Youth Centre receipts as well as S.K. Investment salary advance for the first applicant.
- [9] The first applicant was subsequently charged with fraud and arraigned before the Magistrate's Court who released him on his own recognisance; a copy of the charge sheet was annexed to the answering affidavit. It was argued on behalf of the respondents that the property which the applicants seek to release is an exhibit in the criminal matter for which the first applicant is charged; and

that it would not be in the interests of justice to have the money released to the applicants. The respondents denied the seizure of the Order Document.

[10] In his replying affidavit the first applicant denied that the prize-winners laid criminal charges against him partly because their names were not disclosed by the respondents and partly because he was charged a month later and not immediately.

[11] He insisted that the police did not have a warrant, and that the detention order was only obtained eleven days after the seizure of the property. He further argued that the detention order was invalid on the ground that it did not stipulate the time-frame for the detention of the property and that it was not obtained within a reasonable time after the seizure of the property.

[12] He denied that the money constituted proceeds of crime and argued that it was obtained through legitimate causes; and that apart from the mayonnaise factory, he conducts training lessons to members of the public on various skills including acting, production of handicraft under a project called “The Billionaires”. In an attempt to prove that the money was obtained by lawful means, he attached to the replying affidavit a receipt of E1 500.00 (one thousand five emalangi) received from Make Thulie Manyatsi on the 2nd August 2012 as a facilitation fee.

[13] The applicants, whilst conceding that section 47 of the Criminal Procedure and Evidence Act No. 67 of 1938 provides for the search and seizure of property without a warrant, they argued that such a seizure is conditional on the requirement that such property once seized should be taken before a magistrate in terms of section 52 of the Act.

[14] Section 47 provides the following;

“47. (1) If a police officer believes on reasonable grounds that the delay in obtaining a search on warrant would defeat the object of the search on any person, premises, other place, vehicle or receptacle of whatever nature, and person found in or upon such premises, other places or vehicle, for anything mentioned in section 46 and may seize such thing if found and take it before a magistrate.

Provided that in the searching of any woman section 40 (3) shall *mutatis mutandis* apply.

(2) Such search shall, as far as possible, be made in the daytime and in the presence of two or more respectable inhabitants of the locality in which such is made.

(3) Any policeman of or above the rank of assistant superintendent, any policeman below that rank having a special written authority from a magistrate or a policeman of or above the rank of assistant superintendent, may enter and inspect, without warrant, any drinking shop, gaming house or other place of resort of loose and disorderly persons....

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.**
- (2) **If anything is so seized or taken, marks of identification shall when practicable, be placed thereon by the person seizing it, at the time of such seizure or taking or as soon thereafter as can conveniently be done.**
- (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 presentation 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 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.”**

[15] It is argued by the applicant that since the respondents did not comply with section 52 of the Act and delivered the property to a magistrate so that he could cause it to be formally detained until the conclusion of investigations or summary trial. However, such an argument overlooks section 52 (3) which

allows for the detention of the property until the conclusion of investigation or summary trial. It is submitted with respect that subsection (3) allows for the detention of the property beyond investigations until the conclusion of the summary trial. There is no need for the respondents to apply for a further detention order in terms of subsection (4) unless the Order specifically provides for detention of the property pending investigations. In any event, the detention order in this matter is in terms of section 52 (3) of the Act; hence, the reliance on subsection (4) by the applicant is misconceived.

[16] Accordingly the application is dismissed. No order as to costs.

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