IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Case No.: 1547/2014

In the matter between

THEMBA DLAMINI **Applicant**

And

THE COMMISSIONER OF POLICE **1st Respondent**

THE DIRECTOR OF PUBLIC PROSECUTIONS **2nd Respondent**

THE HONOURABLE MAGISTRATE LUCIA LUKHELE **3rd Respondent**

THE ATTORNEY GENERAL **4th Respondent**

Neutral Citation: *Themba Dlamini Vs The Commissioner of Police & 3 others (1547/2014) [2017] SZHC 108 (08th June 2017)*

Coram: Hlophe J.

For the Applicant: Mr M. Nkomondze

For the Respondents: Mr S. Khumalo

Date Delivered: 08th June 2017

Summary

Application Proceedings –Applicant seeks an order reviewing and setting aside the decision of a learned Magistrate ordering the seizure of a firearm allegedly used in the commission of an offence and a release of the said firearm –Whether appropriate to review incompleted proceedings before a lower court –Whether the seizure of the firearm in the circumstances of the matter was irregular –Seizure apparently authorized by statute and therefore not irregular.

JUDGMENT

[1] The Applicant instituted these proceedings effectively seeking the following orders after the two usual and formal prayers in urgent applications;

(a) Reviewing, correcting and or setting aside the decision of the 3rd Respondent made on the 20th October 2014 refusing the Applicant's application for release of Applicants licensed firearm described as follows:

Type: Pistol

Calibre: MMG

Make: Browning

Serial No: 9324631

(b) Directing the Respondents to restore possession of the said firearm as described in prayer (a) herein above, to the applicant.

(c) That prayer 4 (i.e prayer (b) hereinabove) operates with immediate and interim effect pending finalization of this application as well as the criminal proceedings under criminal case no. MF. 84/2014 at the Manzini Magistrate Court.

(d) Should the media be inclined to publish a story about these proceedings they should be barred from publishing the identity or any facts pertaining to the identity of the applicant herein.

(e) Costs of suit in the event of unsuccessful opposition.

(f) Further and or alternative relief.

[2] The background facts to the application are common cause and are that on the 19th October 2014, the applicant, whilst at an area called Mafutseni

Shopping Complex, had a misunderstanding with a certain Mbhamali, who happened to be a Police Officer. As a result of the misunderstanding the Applicant produced a firearm causing the said Mbhamali to run for cover. The relevant facts on what exactly happened including what was done with the firearm, if anything was done with it, are very scanty in the application.

[3] An attempt to have them amplified by means of statements from witnesses who were at the scene, annexed to the replying affidavit, did not help much in this area as they are themselves not consistant with each other and they each do not go far enough in describing the said circumstances. Ofcourse determining this area is not germane to the current application; it sufficing that what seems a common position is that the incident resulted in criminal charges being preferred against the applicant at some stage.

[4] In terms of these charges, the applicant was allegedly accused of having violated Section 23(2) of the Arms and Ammunition Act, the particulars of which are that the applicant pointed a firearm at the complainant. It is important however to record that the applicant disputes the charges of pointing a firearm at anyone on the said day. I note that the determination

whether or not the firearm was pointed at anyone during the misunderstanding is a matter pending before the Manzini Magistrate's Court where the criminal proceedings in question are pending.

[5] After the incident giving rise to the charges it is not in dispute that the applicant was, on the 20th October 2014, called by the Mafutseni Police, who allegedly interrogated him about the incident. Applicant claims that after the interrogation he was asked to hand over his licensed firearm, which he did. He contends further that as no charges were preferred against him then he, on the 24th October 2014, through his attorneys, wrote to the Police and demanded a release of his firearm to him. This he alleges triggered the preferment of charges against him because on the 26th October 2014, he says he was called by the police and informed to present himself at the Manzini Magistrate Court on the 27th October 2014, to answer to the charges referred to above. He was otherwise remanded out of custody pending the setting of a trial date. The applicant avers that his attorney moved an oral application for the release of his firearm as he allegedly needed it with him at all times given what he termed the nature of his business which he said was money lending. The third Respondent, he alleges, refused the application telling him to apply for a police escort whenever that was necessary.

[6] It was in reaction to this decision by the learned Magistrate that he instituted the current proceedings seeking the reliefs spelt out above, which are a review of the decision by the learned Magistrate together with an order for the return of or the restoration of possession of the firearm to him. He prayed that this operates with immediate and interim effect pending finalization of both this application and the criminal proceedings instituted against him. He had, as set out above as well, sought an order restricting the publication of his story by the media or in other words directing how his story had to be published by the media if it was going to be published.

[7] An apology on the delay in preparing and handing down this judgement is necessary at this point. This was occasioned by an otherwise heavy roll this court has had to deal with in the past which included some long and involved matters which owing to their nature called for this court to put everything aside, and finalized them.

[8] I must say from the outset that several comments need to be made about the orders sought. Firstly in so far as a review of the decision of the learned

Magistrate is concerned, it is noteworthy that same is apparently done before finalization of the proceedings pending before the Magistrate's Court concerned. The general rule of our law is that a Superior Court will not interfere with incompleted proceedings before a lower court. The case of **Abel Sibandze VS Liberty Life and Another** decided by the Supreme Court is instructive in this regard. See also **Lawrence VS Assistant Resident Magistrate Johannesburg 1908 TS 25; Ginsberg VS Additional Magistrate, Cape Town 1933 CPD 357 at 361 and Mendez VS Kitching N.O. 1996(1) SA 259 (E) at 269 (A)**.

[9] Whereas this general rule may be deviated from in instances where the Superior Court seeks to restrain illegalities in the lower court where an injustice may otherwise occur or where justice can by no other means be served. This should happen in very rare instances though. I am not convinced that from the allegations made in the applicant's papers, and this I must indicate at this point, this muster has been met.

[10] In so far as the subsequent reliefs to the review are concerned, it is a misnomer to seek them in the course of review proceedings given that by

their very nature such proceedings (review) are normally confined to whether the proceedings are reviewable or not, that is to say whatever or not there was any irregularity in the process leading up to the decision complained of. If there was such an irregularity, meaning that the proceedings are reviewable, the outcome would normally be, to refer the matter back to the court a quo for the proceedings to be reheard so that an appropriate order can be made. It is only in very limited instances where the High Court would be required to substitute its decision for that of the lower court. This will for instance be the case where the referral of the matter to the court a quo will only be a waste of time as the decision is a foregone conclusion where to refer the matter; where the interests of justice so require and would be an exercise in futility or where there are cogent reasons why the exercise its discretion in favour of the Applicant and substitute its decision for that of the Lower Court. See in this regard **Herbstein and Van Winsen's The Civil Practice of The Supreme Court of South Africa, 4th Edition, Juta and Company, Page 959**. I am convinced this one matter where there are cogent reasons for this court to substitute its decision for that of the Magistrate. Otherwise the decision to make in this matter should be an obvious one or one that is a foregone conclusion. This shall become apparent in the last paragraphs of this judgement.

[11] The Third point for comment is the relief sought in terms of Prayer 6 to the application, (prayer 1(d) hereinabove) which urges this court to bar the melia from reporting on the application or any issues or facts pertaining to the applicant's identity. This relief engenders several difficulties of its own. For starters, the media houses sought to be interdicted, have not been cited and served with the application contrary to an entrenched practice holding in this jurisdiction, that a court would be loathe to issue an order where interested parties have not been served and therefore have not been heard.

[12] This practice is very important in that it ensures that the Court does not issue orders that may have a prejudicial effect on other interested parties, without the said parties being cited and served for them to be heard before an adverse order could possibly issue against them.

[13] Of course at the heart of this rule of practice is the right to a hearing which is not only sacrosanct because it is covered in the Bill of Rights but also because it has for centuries been found by our courts to be so. Section 21 of our constitution is testimony to this aspect just as does numerous judgements

of the courts in this jurisdiction and those from beyond. With regards the Common Law position the case in point is that of the **Swaziland Federation of Trade Unions Vs The President of The Industrial Court And Another, Court of Appeal Case No.11/1997**. In this case the position was the position was set out as follows at page 10 of the unreported Judgement:

> *"The Audi Alteram Parterm Principle, i.e. that the other party must be heard before an order can be granted against him, is one of the oldest and most universally applied principles enshrined in our law. That no man is to be judged unheard was a precept known to the Greeks, was asserted by an 18th Century English Judge to be a principle of devine justice and traced to the events in the Garden of Eden, and has been applied in cases from 1723 to the present time* ***(See De Smith: Judicial Review of Administrative Action,*** *Page 156****, Chief Constable, Pietermaritzburg Vs Ishini (1908) 29 NLR 338 at 341)***. *Embraced in the Principle is also that an interested party against whom an order may be made must be informed of any possibly prejudicial facts or considerations that may be raised against him in order to afford him the opportunity of responding to them or defending himself against them.* ***(See***

Wichers: Administratief reg 2nd coln.Page 237). *(Underlining added).*

[14] The other difficulty in granting this particular order in the manner in which it is sought is that it seeks to have this court trammel the Right to Freedom Of Expression which is a right guaranteed in the constitution. There can be no denial that the centre piece of this right is the entitlement of media houses to publish news freely within the confines set out in the constitution and the common law. There would therefore be no basis for this court to restrict the publication of a story they otherwise would have published simply because the applicant would not like his identity to be published, apparently because he feels it would be embarrassing or because he feels it would not be to his interests to publish same. This is certainly not the yardstick the law uses to assess whether or not a publication can or cannot be made.

[15] I must therefore hasten to clarify at this point of my judgement that a case has not been made at all for that particular relief; that is the one urging this court to restrict the publication of whatever story arising from the circumstances of this matter, that the media could find to be newsworthy.

[16] Otherwise on the merits of whether or not the decision by the learned Magistrate to refused to release the firearm in question to the applicant, this court has to consider the facts surrounding the confiscation of the firearm in the first place. When the matter was argued before me, there was painted a picture of the firearm having been taken as some form of self help from the applicant. The picture painted went further to suggest that the charges preferred against the applicant were so preferred as a coverup. This picture went along with the fact that after these proceedings had already been instituted for the recovery of the firearm, the learned Magistrate had issued an order detaining the said firearm without the applicant having been heard nor even being given an opportunity to contest the order. This portrayal of the matter clearly pointed to some irregularity. It is the one that prompted this court to comment that this aspect of the matter was irregular and went on to direct that the parties file further heads of argument and address this court on what it should possibly order in light of the said irregularity. It is however worthy of note that clearly, all the papers having been looked at closely including the applicable law, it would be difficult to fault the decision of the Magistrate on Law. This is the premise from which I will proceed therefore going forward. I cannot foresee any prejudice being

suffered by any of the parties particularly because this approach is legally correct.

[17] Whereas the applicant does not seem to have filed any further Heads of Argument in this regard, the Respondents did. The question as then framed was the action by the Learned Magistrate to grant an order confiscating the firearm in the face of an application seeking to have it released to the applicant lead to the release of the firearm to the applicant in the circumstances of this matter? In answering this question, this court needs to revisit the facts of the matter and consider them closely.

[18] It was argued on behalf of the Respondents that the firearm was seized by the Police and that this was in terms of the Criminal Procedure and Evidence Act No.67 of 1938. I agree when considering Section 47(1) of the said Act that the taking of the firearm was pursuant to a seizure. This section provides as follows:

Search by Police without a warrant.

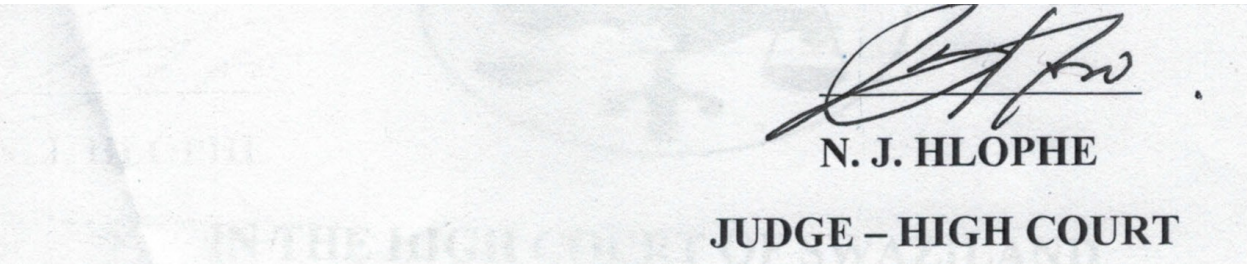
"If a Police Officer believes on reasonable grounds that the delay in obtaining a search warrant would defeat the object of the search he may himself search any person, premises, other places, vehicle or receptacle of whatever nature, and any person found in or upon such premises or other place or vehicle, for anything mentioned in Section 46 and may seize such thing if found and take it before a Magistrate."

[19] The thing mentioned in Section 46, in so far as it is relevant to the facts of the matter is described as "*anything to which there are reasonable grounds for believing that it will afford evidence as to the commission of any offence"*. This description in my view fits the firearm forming the subject matter of the proceedings considering the charges levelled against the applicant eventually. It is for this reason I cannot agree with the applicant that the taking or seizure of the firearm by the Police amounted to spoliation. Clearly the seizure in question was lawful and was authorized by Section 47(1) of the Criminal Procedure and Evidence Act as read with Section 46 thereof. It therefore cannot be said to be a spoliation.

[20] Whilst there may be questions with the detention order of the firearm having issued in circumstances where all the parties were aware the seizure was being challenged, without an interested party being heard, could the firearm have been released to the applicant on this ground alone? In so far as the firearm was seized for evidential purposes in criminal charges that were eventually preferred against the applicant, it seems to me that the seizure having been lawful, and the criminal proceedings with regards to which it was seized not having been finalized, it would be inappropriate for the release of the firearm to be dealt with at this stage. Consequently, until the proceedings are finalized, whereupon the court seized with the matter would determine whether or not it was appropriate to release it taking into account the totality of the circumstances, the firearm should remain kept as an exhibit. This is covered in Section 52(5) of the Criminal Procedure and Evidence Act.

[21] In this sense the order that refused to have the firearm released to the Applicant was in my view a competent one to make in those circumstances. I am further convinced that the continued seizure and detention of the firearm as an exhibit in the criminal case against the applicant was covered by Sections 52(3) and (4) of the Act.

[22] This being the case, I have come to the conclusion that the applicant's application cannot succeed and same is dismissed with no order as to costs given the nature of the application. I therefore order that the question whether the firearm may be released to the Applicant, shall be addressed by the Learned Magistrate, who heard the evidence on the circumstances surrounding its seizure, at the end of the criminal matter before her.



N. J. HLOPHE

JUDGE – HIGH COURT