



**IN THE HIGH COURT OF ESWATINI**

**HELD AT MBABANE**

CASE No. 1737/17

In the matter between:

**PATRICK MKHATSHWA**

APPLICANT

And

**SENIOR MAGISTRATE SIPHOSINI DLAMINI N.O.** 1<sup>st</sup> RESPONDENT

**DIRECTOR OF PUBLIC PROSECUTIONS** 2<sup>nd</sup> RESPONDENT

**ATTORNEY GENERAL** 3<sup>rd</sup> RESPONDENT

**Neutral Citation:** *Patrick Mkhathswa v Senior Magistrate Siphosini Dlamini N.O. and 2 others(1737/17) [2018] SZHC147 [10<sup>th</sup> July 2018]*

**Coram: MAPHANGA J**

Date Heard: 29/06/2018

Date Delivered: 10/07/2018

Summary: *Criminal Procedure – Application Review Application – Applicant challenging magistrate’s order invoking Section 12 (3) of the Pharmacy Act dismissing an application by Appellant for release of a motor vehicle confiscated by Police and Appellant seeking review and setting aside of magistrate Order and release of motor vehicle to him on grounds of irregularities; interpretation and application of Section 12 (3) of the Pharmacy Act interpretation of penal statutory provisions and applicable principles discussed; Section 19 of the Constitution and Bill of Rights applicable held: Order of magistrate’s Court dismissing Application for release of Motor vehicle irregular on account of excess and misapplication of powers conferred under Section 12 (3) (b) is the Pharmacy Act.*

**JUDGEMENT**

[1] This is a motion for the review and setting aside of an order issued by the 1<sup>st</sup> Respondent in an application *a quo* for the release of a certain motor vehicle

that was found to have been used in the conveyance of contraband consisting of dagga. In that event the court a quo refused the applicant the relief sought. Naturally in this application the applicant in addition to the setting aside of the learned magistrate's order, also approaches this court for the release of the said motor vehicle.

- [2] The circumstances giving rise to the present proceedings; which facts are common cause are that the applicant together with 3 others was charged with contravention of Section 12 (1) a of the Pharmacy Act 38 of 1929 and was arraigned before the Piggs Peak Magistrates Court on the 30<sup>th</sup> September 2016. They all pleaded guilty to the charge and the court having taken in evidence of the commission of the offence, convicted all four including the applicant presently and sentenced each of them to a fine of E 6000.00 on default of payment of which, a three year term of imprisonment. Having paid the requisite fine the applicant was released from custody.
- [3] It is common ground that subsequent to his release, on the 3<sup>rd</sup> October 2016 the applicant then approached the court a quo and moved an application for the release of the motor vehicle which is now the subject matter of this review application. The application was not opposed by the Crown. It is common cause also, as evident from the record of proceedings a quo, that the motor vehicle concerned had been confiscated by the police upon the arrest of the accused on account of having been used in the conveyance of 8 bags of dagga which were found concealed therein by the Police upon searching the vehicle. The applicant together with his co-accused were occupants of the said vehicle at the time of the arrest.
- [4] It was then upon hearing the application that the court a quo in effect dismissed the application for the release of the vehicle citing, as its reason Section 12 (3) (b) of the Pharmacy Act. That section reads as follows:

**(2) A person who unlawfully deals by way of sale or similar transaction in poisons or potentially harmful drugs shall be guilty of an offence and liable on conviction —**

**(a) for a first offence to a fine not exceeding 10,000 emalangeni or imprisonment for a term not exceeding ten years;**

**(b) for a second or subsequent offence to a fine not exceeding 15,000 emalangeni or imprisonment for a term not exceeding fifteen years.**

**(3) The court convicting a person under this section may order to be forfeited to the Government —**

**(a) any poison or potentially harmful drug;**

**(b) any motor vehicle, conveyance, receptacle or thing which was used for the purpose of or in connection with the contravention of this section.**

- [5] Now the applicant refers to the 1<sup>st</sup> Respondent's decision as an 'order for forfeiture' of the vehicle in question. I think that reference is imprecise and for the reasons that I shall come to, it is a misnomer. From the record of the proceedings what appears is that the precise terms of the order pronounced by the court *a quo* was as follows:

**“.....Though the crown is not in opposition to the application, however, as a court that.....(omitted word/s) justice and also taking into account the provision of section 12 (3) (b) of the Act 38 of 1929 where the court is given discretion to exercise, I opt to exercise that discretion judicially by not granting the order being sought”**

(my emphasis, parenthesis and underscore)

- [6] In effect, by declining to grant the application I think the court ultimately left the pre-trial status of the vehicle intact and unchanged— namely as an exhibit in the proceedings. This I say because it is patently clear that at the conclusion of the trial the Crown did not apply for the forfeiture of the said vehicle to the State nor did the court *sua motu* order such forfeiture. Thus the court did not dispose of the detained or confiscated vehicle. Certainly it is common cause that it did not order its forfeiture then. This, perhaps, may have been an oversight. It is also equally true that the State did not apply for the forfeiture of the vehicle.

- [7] On a plain reading of the section and in particular subsections (4) and (5) it becomes clear that the legislature envisaged that the determination to forfeit a thing to the state would be conducted in the course and within the scope of the trial. Further provision is made for an enquiry into any other persons rights to the said thing but also for due redress by any person adversely affected by such order on appeal for the variation or setting aside of that order. Clearly the remedial provisions are premised on those instances where such forfeiture has been ordered.

- [9] The relevant provisions of the statute as regards the rights enquiry under Section 12 (4) and (5) are as follows:

**“(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 therefrom 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.**

- [10] From the wording 'during the trial resulting in the order of forfeiture' it is [9] clear to me that the order of forfeiture under subsection (3) (b) was in the words of the provision intended to be a decision or measure made “during the trial” and not after the trial.

- [11] Equally clear is that during the application *a quo* for the release of the vehicle, the Crown perhaps mindful of the lapse did not move a counter application for the forfeiture. On the contrary the Crown is on record as having expressly conceded to the application and unequivocally indicated that it was not in opposition to the same.

*This Application*

- [12] The applicant grounds his application for review on the premise that the learned court a quo in his decision refusing the applicant's application acted irregularly in that he did not exercise his statutory powers judiciously in accordance with the statutory provision. I understand the applicants submission made through his attorney Mr Sithole, to essentially amount to this; that the learned court exceeded its powers in that it did not exercise the said power in the manner it was intended by the legislature. Secondly he contends as a second ground and another irregularity in the proceedings that he was not afforded a fair hearing by the learned magistrate before the order for the forfeiture of the vehicle.
- [13] As authority for his submissions I was referred by Mr Sithole to certain obiter remarks of this court in the case of ***Vusumuzi Malinga and Another v Rex SZHC Case No.*** in support of his proposition that the powers of the court to order forfeiture conferred by in the forfeiture clause in the Act are to be exercised judiciously. That cannot be gainsaid. I find the case under reference and the authorities referred to therein instructive and highly persuasive on the principles given the circumstances of this case. In that case this court in the judgment of the her Ladyship, the learned Sey J, referred to the case of the *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd* 2004 (2) SACR 208 (SCA) and the process that the court outlined ought to be taken in rendering forfeiture of assets associated with the commission of a crime. I must caution that that court was of course speaking in relation to the relative legislation sanctioning such forfeiture under South African law. What is of value instantly are the principles.
- [14] In that regard in reference to the *NDPP v Cook* case this court emphasised the judicious nature of the procedures to be followed in forfeiture proceedings as well as the need to follow due process had this to a deliberate two stage process a court ought to follow in the determination of a forfeiture matter. That process entails firstly ascertaining whether the property in issue was an 'instrumentality' of an offence in the sense of it being used as an accessory or instrument in the commission of the offence. That much I must say was established during the trial and therefore is not in doubt in the instant case. The second stage the court referred to is:
- “Once that has been confirmed the property is liable to forfeiture and the Court then proceeds to the second stage of the enquiry, viz, whether certain interests in the property would be excluded from the operation of the forfeiture order”.***
- [15] Of course these procedural requirements are predicated on and apply to proceedings where an application for forfeiture is under consideration. In the circumstances it is common ground that no such application was before the court a quo. It may be arguable whether in the absence of such application by the Crown the court, may as contended by Mr Nxumalo, *meru motu* order forfeiture in the absence of a specific application in this regard for the forfeiture of the vehicle 'in the interests of justice'. I do not find it necessary to venture into that aspect of the matter for the following reasons.
- [16] As mentioned earlier in this judgment I do not think the learned magistrate did make such an order for the forfeiture and in my opinion this is a crucial fact that goes into the heart of the difficulty in appreciating what order, if any the court did in fact make concerning the vehicle. An order refusing the release to the applicant of the vehicle cannot by any stretch of the language be a forfeiture order.

### *The Crowns Case*

- [17] Mr M. Nxumalo who appeared for the Respondents, contends that the court properly exercised its discretion in terms of Section 12 (1) (a) of the Pharmacy Act, in that the said provision empowers the court to order the forfeiture of such a vehicle. He further submitted that it was in the interests of justice for the court to order the forfeiture of the motor vehicle in question despite the crowns concession to the application for its release; that the court was entitled to overrule that concession.
- [18] It was further submitted that the applicant was afforded a right to a fair hearing during the proceedings a quo because, as it appears from the record of the proceedings the court did enquire into the ownership of the motor vehicle. What the learned counsel is referring to is what appears from the transcript of the record where the court a quo merely asked 'in whose name the vehicle was registered'. I do not think that when the legislature referred to an enquiry into the rights of a person either during or after or forfeiture order had in mind the mere ascertaining of registration particulars of a motor vehicle. It is clear from the wording of the subsection that the court had a deliberate and involved process of enquiry.

### *Nature of the proceedings before the court- application for release*

- [19] It appears plain to me that what the Court, perhaps unwittingly, did was to purport, without so much as due notice to the parties concerned or that might be interested, converted an application before it for release of the motor vehicle, to proceedings or an enquiry as envisaged under the said Section 12 and thus conflating two separate types of proceedings.
- [20] Certainly the Applicant was not given an opportunity in terms of advance notice of the conduct of section 12 proceedings and hence not afforded an opportunity to prepare his case and make appropriate submissions. In my judgment the mere posing of a question by the court as to the ownership of the vehicle during what was essentially an unopposed application for its release could hardly be considered a proper means enquiry as intended in terms of the section that the Court purported to invoke.
- [21] In any event even if the intent of the court was to bring the proceedings within the fold of Section 12 process, the court failed to determine the matter and make a decisive and unequivocal order for the forfeiture of the vehicle to the State. It merely purported to do so. I say this with due diffidence for in the hurly burly of criminal proceedings it is possible to inadvertently fall into error especially in respect of such ancillary proceedings sui generis such as the adverse provisions in the Pharmacy Act. No such order for the forfeiture of the motor vehicle was made nor is the same apparent on the face of the record.

### *Principles*

- [22] The security of the right and title to property is one of the basic rights of the person especially protected and entrenched by the Constitution. It can only rightfully taken away only but in the most exceptional circumstances sanctioned by law of general application expressed in the clearest of terms for

the advancement or protection of a greater public good or interest where such deprivation is necessary for those ends.

[23] Section 19 of the Constitution guarantees proprietary protection in the following terms:

***“19. (1) A person has a right to own property either alone or in association with others.***

***(2) A person shall not be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied***

***(a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health;***

***(b) the compulsory taking of possession or acquisition of the property is made under a law which makes provision for***

***(i) prompt payment of fair and adequate compensation; and***

***(ii) a right of access to a court of law by any person who has an interest in or right over the property;***

***(c) the taking of possession or the acquisition is made under a court Order”.***

#### *The Three Part Test*

[24] On the basis of these constitutionally enshrined protection it is a mandatory requirement that any confiscation or deprivation of a person of property must at the very least meet a three part test to be valid.

- a) It must be sanctioned or prescribed by law of general application;
- b) It must be necessary in the interest of public order, morality or public health;
- c) Such seizure or deprivation must be made by a court of law.

#### Interpretation of Forfeiture Provisions.

[25] This matter concerns the interpretation of the relevant statutory provisions for the forfeiture of assets or things which are collateral, receptacles or instruments in the commission of offences under the Pharmacy Act. For that

reason we are called upon to recall and apply the pertinent principles of interpretation of statutes. The first principles in the construction of statutes is that words in a statute must be given their ordinary grammatical meaning in the right context; which 'context includes the language of the rest of the statute, the matter of the statute, the apparent scope and purpose, and within limits, its background. When interpreting the words in the statute, the Court must from the outset consider the language and the context together'<sup>1</sup>.(See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC) para 89; *Jaga v Donges NO & another; Bhana v Donges NO & another* 1950 (4) SA 653 (A) at 662G-663A) Secondly and as an integrated rule, the courts must also seek to assign such meaning to the words of a statute that will give effect to the object and purpose of the legislation (See *Standard Bank Investment Corporation Ltd v Competition Commission and Others; Liberty Life Association of Africa and Others v Competition Commission and Others* 2000 (2) SA 797 (SCA) paras 16-22)

- [26] In this context given the prejudicial and drastic effect of forfeiture of property to the person, I think with the advent of our new Constitution and the Bill of rights enshrined therein, as part of the Courts duties, it is important to interpret such provisions in such a way as will optimally accord with the spirit, ethos and object of the Consitution vis the protected rights of the individual and the constitutional precepts as regards safeguards against the derogation of such rights.

#### *Application of Statutory Forfeiture Provisions*

- [27] There is a further principle that comes into play given the penal effect of the provision in question. It is a well-established fundamental principle of our common law that where a law provides for the forfeiture of property then on account of the penal effect of such deprivation such laws are to be strictly construed in favour of the person whose rights stand to be adversely affected thereby. The interpretation of statutes must be done in such a way as to bring it in conformity with constitutional precepts so as to give the greatest protection to constitutionally protected rights.
- [28] Consistent with the above principles our courts have, generally adopted a particular approach in the construction of penal provisions. This perception has been with us since time immemorial as can be seen from the apposite expression of this approach in the remarks of the court in *Dadoo Ltd and Others v Krugersdoorp Municipal Council* 1920 530 at 552 where the court referred to the principle as “*the most wholesome rule of our law.....which requires a strict a strict interpretation to be placed upon statutory provisions which interfere with elementary rights*”
- [29] With the above in mind I now turn my attention to the forfeiture provisions invoked by the court during the deliberations a quo.

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<sup>1</sup> *Corplo 2290 CC t/a U-Care v Registrar of Banks (755/2011) [2012] (755/2011)* per Southwood AJA at paragraph 20 of that judgment.

- [30] Firstly upon a reading of Section 12 of the Pharmacy Act it is clear that exercise of the power to order the disposition of any assets and or articles used as accessories in the commission of the offence by the court was intended to be conterminous with the sentencing upon conviction of the offenders in regard to the offences, at the close of the trial by the court. I do not think it was open to the court to open and seek to determine such disposition outside of the confines of the trial proceedings.
- [31] The commission of the offence concomittant with the sentence and in the former regard an enquiry to determine the interests of persons to that property and or their complicity knowledge or role or otherwise of the use of that property as considerations before the grant of a forfeiture order. It is therefore conviction-based. That is the context of the process or proceedings provided for in the Act. I do not think the legislature intended the powers conferred by the forfeiture provisions to be applied in the manner evidenced in the proceedings.
- [32] Secondly the court even when it purported to re-open the process did not in any event dispose of the vehicle or assets in a definitive way by ordering its forfeiture or otherwise as contemplated in the section. No such order was in fact made. All the court contents itself with is an order 'NOT TO GRANT THE RELEASE'. Consequently, in the absence of an unequivocal order of forfeiture, no disposal by way of forfeiture of the vehicle was in fact made by the court. That is another reason why the order was a nullity if it was intended to be a forfeiture order.

#### *DISPOSITIVE*

- [33] In sum and taking into account the issues and the record of the proceedings it appears in my judgment that the court a quo committed a series of significant misdirections and serious irregularities warranting the review and correction of the decision not to grant the application for the release before it.
1. A convenient place to start is firstly is that the court misconceived the process true nature of the proceedings before it. The court was not seized with an application for forfeiture either as contemplated in Section 12 of the Pharmacy Act or at all. The criminal proceedings wherein the instrumentality of motor vehicle was concerned and where it could have been competent to make such an order in the conduct of the proceedings envisaged in Section 12 (3) (b) had been concluded or closed and the court could not presume to reopen the case once concluded.
  2. The second irregularity which rendered the purported forfeiture a nullity is that the decision or determination of the court was not a forfeiture order at all because it does not expressly declare the said motor vehicle forfeited to the Government as provided for in the statute;



3. Thirdly even if the proceedings purported to constitute a Section 12 (3) (b) procedure, in any event the process itself was fraught with inherent irregularities in that the Applicant was not given a proper and fair hearing in the course of the proceedings. The court could not presume to afford him a hearing in respect of proceedings he did not have due notice of.

[34] It is for these reasons that upon careful consideration of the circumstances of the matter and regard being had to the record of the proceedings and having heard the parties submissions it is my considered view that there was thus a material procedural misdirection or irregularity in the application proceedings before the court *a quo* on the basis of which I am prepared to order the review and setting aside of the decision of the court *a quo* dismissing the application for the release of the motor vehicle concerned and to substitute the same with an appropriate order which I now make:

It is ordered:

1. The Order issued by the 1<sup>st</sup> Respondent on the 3<sup>rd</sup> October 2016 is hereby reviewed and set aside;
2. That the motor vehicle:

Make or Model: Opel, Corsa;

Registration Number: VYN 896 GP be hereby released to the Applicant forthwith.



**MAPHANGA J**

Appearances:

For the Applicant: Mr. S. Sithole

For the Respondents: Mr. M. Nxumalo