

SOUTH AFRICA / JUDGMENT

Minister of Police v Khoeli (241/2020) [2021] ZASCA 146 (18 October 2021)

[2021] ZASCA 146

COURT

Supreme Court of Appeal

BEFORE

Petse, Mathopo, Mbatha, Carelse, Mothle

CASE / FILE NUMBER

241/2020

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 241/2020

In the matter between:

MINISTER OF POLICE

APPLICANT

and

MPHALE ALBERT KHOELI

RESPONDENT

Neutral citation: Minister of Police v Khoeli (241/2020) [2021] ZASCA 146 (18 October 2021)

Coram: PETSE AP and MATHOPO, MBATHA, CARELSE and MOTHLE JJA

Heard: This appeal was, by consent between the parties, disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down of the judgment is deemed to be 09:45 on 18 October 2021.

Summary: Criminal Procedure – s 32 of the Criminal Procedure Act 51 of 1977 – search and seizure – whether decision declaring livestock seized by police forfeited to the State lawful.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Mbhele J and Mhlambi J sitting as court of first instance):

The application for leave to appeal is dismissed with costs.

Mbatha JA (Petse AP and Mathopo, Carelse and Mothle JJA concurring):

- [1] This is an application for leave to appeal by the Minister of Police (Minister) against a judgment of the Free State Division of the High Court, Bloemfontein (the high court) in terms of which the decision of the members of the South African Police Service (SAPS) to declare forfeited to the State 44 cattle belonging to Mr Mphale Albert Kgoeli (the respondent) was reviewed and set aside. The high court subsequently refused leave to appeal. On petition to it, this Court referred the application for oral argument in terms of s 17(2)(b) of the Superior Courts Act 10 of 2013 (the Superior Courts Act). The Court further ordered the parties to be prepared, if called upon to do so, to address it on the merits. By agreement between the parties, the application was disposed of without hearing oral argument in terms of s 19(1)(a) of the Superior Courts Act 10 of 2013 (the Superior Courts Act). >
- [2] The facts are largely common cause. On 15 May 2017, 44 cattle branded with the animal identification mark registered in the name of the respondent were seized by Captain Wessels in Hobhouse, Free State. The seizure was in terms of s 20 of the Criminal Procedure Act 51 of 1977 (the CPA). The next day the respondent and two others were arrested and charged for contravening s 32(1)(m)(iii) read with s 6(1)(a) of the Animal Diseases Act 35 of 1984 (the Diseases Act). It was alleged that the respondent and his companions imported into or conveyed in the Republic of South Africa 44 cattle found in their possession without the requisite permit prescribed in terms of s 6(1)(d) of the Diseases Act. On 17 May 2017, the respondent paid an admission of guilt fine in terms of s 57A of the CPA.
- [3] On 30 May 2017, without any notice to the respondent, the SAPS declared all 44 cattle forfeited to the State. Unaware that the cattle had in the interim been declared forfeited to the State, the respondent sought and obtained an order in the magistrate's court in terms of which the cattle were restored to him. On learning of this order, the SAPS challenged the validity thereof in the high court. On 6 November 2017, the high court (per Reinders and Naidoo JJ) reviewed and set aside the magistrates' court order on the basis that the magistrates' court did not have jurisdiction to entertain the matter.

- [4] On 7 November 2017, pursuant to the high court's order, the SAPS again declared the 44 cattle forfeited to the State. On the same day 42 of the cattle were sold by public auction for R286 900. It was common cause between the Minister and the respondent that two of the 44 cattle died before the public auction whilst in the custody of the SAPS.
- [5] Dissatisfied with the forfeiture order and the consequent sale of the cattle, the respondent instituted proceedings in the high court for an order reviewing and setting aside the decision of the SAPS. The high court, per Mbhele and Mhlambi JJ, declared the decision of the SAPS, taken on 07 November 2017, declaring the respondent's 44 cattle forfeited to the State, unlawful and set it aside.
- [6] The high court found that on a proper interpretation of s 31(2) of the CPA, the items seized (cattle) should have been returned to the person (the respondent) from whom they were seized, provided that he may lawfully possess them. The high court reasoned that the cattle in question bore a brand identification mark lawfully assigned to the respondent and that the respondent had provided the police with documentation proving his ownership or lawful possession thereof. Therefore, his possession was lawful but notwithstanding this the SAPS had failed to give the respondent 30 days' notice as required by s 32(1) read with s 31(2) of the CPA before declaring the cattle forfeited to the State. This then raises the question whether the Minister's envisaged appeal enjoys a reasonable prospect of success or whether there is some other compelling reason why the envisaged appeal should be heard. The application for leave to appeal therefore turns on the following issues. First, whether the respondent's cattle could be forfeited to the State without affording the respondent the opportunity to be heard prior to such decision being taken. Second, whether such failure to afford him an opportunity to be heard was arbitrary. Third, whether the decision declaring the cattle forfeited to the State was inconsistent with the provisions of s 32 of the CPA and thus unlawful.
- [7] As already mentioned, the high court upheld the respondent's application on the basis that the SAPS made fundamental errors on the material aspects. First, it held that the SAPS failed to notify the respondent of the decision to forfeit his cattle to the State. Second, the SAPS failed to invite the respondent to make representations to them regarding the question as to whether his possession of the seized cattle was lawful. Third, the SAPS failed to ascertain if there was any other person who may lawfully possess the cattle before declaring them forfeited to the State. Lastly, the provisions of s 32 impose a positive duty on the investigating officer to take reasonable steps to ensure that the article is returned to the person from whom it was seized or anyone who may lawfully possess the article. In my view and for reasons that will become apparent later in this judgment the high court's underlying reasoning can hardly be faulted.

- [8] In this Court, the Minister asserted that the cattle were seized because there was no one lawfully entitled to possess them. This contention was based on the grounds that first, properly construed, s 32 does not place a duty on the Minister to afford any person a hearing before declaring an article seized by the police forfeited to the State. Secondly, releasing the cattle to the respondent after the payment of the admission of guilt fine would result in him committing a further offence.[1]
- [9] Accordingly, this application turns on the interpretation of the provisions of s 32 of the CPA, which provides as follows: '(1) If the criminal proceedings are instituted in connection with any article referred to in s 30 (c) and the accused admits his guilt in accordance with the provisions of section 57, the article shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess it, whereupon the provisions of section 31 (2) shall apply with reference to any such person. (2) If no person may lawfully possess such article or if the police official charged with the investigation reasonably does not know of any person who may lawfully possess such article, the article shall be forfeited to the State.'
- [10] It is trite that when interpreting a statutory provision, what must be considered is the language, context and purpose of the statute, and the material known to those responsible for drafting it.[2] Applying those principles to the present case, the language of s 32 is clear and explicit and must be given effect to. It requires that the article be returned to the person from whom it was seized if such person may lawfully possess it. It therefore places a duty on the Minister to enquire if the would-be possessor may lawfully possess the article. If he may not lawfully possess it, it must be returned to the person who may lawfully possess it. Section 32 explicitly provides for procedural fairness prerequisites, for the determination of who may lawfully possess an article that has previously been seized by the police before such an article may be declared forfeited to the State. The process requires the weighing up of the competing interests before a declaration for forfeiture is made. The approach espoused by the Minister in this case, namely that an enquiry into this issue is unnecessary once an admission of guilt fine is paid, is devoid of merit.
- [11] Section 32 clearly contemplates the applicability of the audi alteram partem rule, a fundamental principle of administrative justice as decreed by s 33 of the Constitution. It seeks to prevent arbitrariness on the part of functionaries exercising public power. These considerations, which I endorse, were reiterated in *S v Tengana*,[3] in which the court held that: even where the article was used in the commission of a crime, an enquiry should still be conducted before a declaration to forfeit an article to the State is made; the accused must be afforded an opportunity to lead evidence; the court must consider the nature and value of the item and the role played by the item in the commission of the offence. Thus, the approach for which the Minister contends, namely declaring a seized article forfeited to the State without any reference to interested parties, is antithetical to the fundamental principle of the audi alteram partem rule.

[12] This brings me to s 31(2) of the CPA, which sets out the procedure as to how the process should unfold before a forfeiture order is made. It provides as follows: ‘The person who may lawfully possess the article in question shall be notified by registered post at his last-known address that he may take possession of the article and if such person fails to take delivery of the article within thirty days from the date of such notification, the article shall be forfeited to the State.’ As is apparent from the record, the Minister paid no regard to the prescripts of s 31(2), which are referred to in s 32 of the CPA.

Section 31(2) provides that the lawful possessor of the article must be notified that he or she may take possession of the article.

Forfeiture can only take place after the expiry of the mandatory 30 days’ period. In this case the SAPS heedlessly went ahead to declare the cattle forfeited to the State and thereafter disposed of them by public auction without first complying with the strictures of the CPA. The applicant has not advanced any reason why they failed to comply with the prescripts of s 31(2) of the CPA.

[13] Although made in a different context, the remarks of the Constitutional Court in *Ngqukumba v Minister of Safety & Security and Others* [2014] ZACC 14; 2014 (7) BCLR 788; 2014 (5) SA 112 (CC) (*Ngqukumba*) are instructive. The Court there said (para 18):

‘... [P]ossession is closely associated with and is often an incident of ownership. In some instances the protection of possession will guarantee wholesome enjoyment of the right to property’.[4]

[14] As stated earlier, the respondent paid an admission of guilt fine for contravening s 32(1)(m) (iii) read with s 6(1)(a) of the Diseases Act. Section 32 (1)(m)(iii) provides that: ‘(1) Any person who –

...

[m] (iii) is found in possession of any animal or thing in respect of which a permit referred to in section 6 (1) (a) is required to be obtained and in respect of which there is a reasonable suspicion that it was imported into the Republic without such permit or contrary to a condition of such permit, and is unable to give a satisfactory account of such possession; ...

shall be guilty of an offence. . . ’

And s 6(1)(a), in turn, provides that such permit should be obtained before the importation and conveyance of such cattle or stock into or through the Republic.

[15] The Minister sought to justify the forfeiture order by contending that it came about by simple operation of the law. This contention is plainly untenable. Nothing much need be said about it. It is sufficient to say that it behoved the SAPS to conduct an inquiry to determine as to whether the respondent could lawfully possess the 44 cattle previously seized from him and if so, to return the cattle to him. It therefore goes without saying that no decision declaring the cattle forfeited to the State could lawfully be taken before an enquiry into the facts surrounding the respondent's possession of the cattle was conducted.

[5]

- [16] The SAPS were at all times aware that the respondent had between 17 May 2017 and 30 May 2017 been trying to secure the release of his cattle into his possession. Notwithstanding this, the SAPS forged ahead, without reference to the respondent, to secure an indemnity from the Department of Agriculture, Forestry and Fisheries against any claim by the owner of the cattle in the event that the envisaged forfeiture of the cattle to the State was successfully impugned. Once the Department furnished the required indemnity, the SAPS wasted no time to declare the cattle forfeited to the State and hastily sold them by public auction on the same day. No thought was given to the fact that the permit in issue here was not required to prove the respondent's lawful possession of the cattle but solely for the importation into or conveyance in the Republic of the cattle in question. All of this was done in the face of s 17(2B) of the Diseases Act which empowers the Director therein referred to, to return the animals seized in terms of s 17(1) (of the Diseases Act) to the person who imported them into the Republic if the Director is of the opinion that a permit would have been issued to such a person if an application therefor had been made.
- [17] It must by now be obvious that in the light of what is stated above the Minister's envisaged appeal has no reasonable prospect of success. Nor has the Minister established that there is some other compelling reasons why the appeal should be heard.[6] Accordingly, the application for leave to appeal falls to be dismissed.
- [18] In the result the following order is made: The application for leave to appeal is dismissed with costs.

Y T MBATHA JUDGE OF APPEAL

Appearances

For applicant:

G J M Wright Instructed by:

The State Attorney, Bloemfontein

For respondent:

A I B Lechwano

Instructed by:

Monyamani & Ngcangiso Inc, Bloemfontein

[1] This is manifestly a reference to the offence created by s 32(1)(m)(iii) read with s 6(1)(a) of the Animal Diseases Act 35 of 1984 as mentioned in paragraph 4 above.

[2] Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13;

[2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

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- [3] S v Tengana [2003] ZAWCHC 55.
- [4] Ngqukumba v Minister of Safety & Security and Others [2014] ZACC 14; 2014 (7) BCLR 788 (CC); 2014 (5) SA 112 (CC) para 18.
- [5] Compare: Ngqukumba footnote 4 above para 21.
- [6] See, in this regard, S 17(1)(a)(i) and (ii) of the Superior Courts Act 10 of 2013.
- [1] This is manifestly a reference to the offence created by s 32(1)(m)(iii) read with s 6(1)(a) of the Animal Diseases Act 35 of 1984 as mentioned in paragraph 4 above.
- [2] Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.
- [3] S v Tengana [2003] ZAWCHC 55.
- [4] Ngqukumba v Minister of Safety & Security and Others [2014] ZACC 14; 2014 (7) BCLR 788 (CC); 2014 (5) SA 112 (CC) para 18.
- [5] Compare: Ngqukumba footnote 4 above para 21.
- [6] See, in this regard, S 17(1)(a)(i) and (ii) of the Superior Courts Act 10 of 2013.
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