

REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

HIGH COURT REF NO: 3918/2003

CASE No: EVS 477/2003

MAGISTRATE'S SERIAL No: 78/2003

In the matter of

THE STATE

and

DALE TENGANA

REVIEW JUDGMENT DELIVERED : 17 OCTOBER 2003

MOOSA, J:

1. The accused was charged with dealing in liquor on 14 February 2003, in contravention of Section 154(1)(a) of Act 27 of 1989. A quantity of liquor was seized by the police in terms of Section 20 of the Criminal Procedure Act, No 51 of 1977 ("the Act"). A written notice (summons) in terms of Section 56 of the Act was issued and served on the accused. In such summons the accused was given the choice of either paying an admission of guilt fine of R750,00 or to appear in court on 19 March 2003 to answer the charge. The accused elected to pay the admission of guilt fine. The fine was paid on the same day as the commission of the offence. The admission of guilt

fine was confirmed by the magistrate in terms of Section 57(7) of the Act on 17 February 2003 on which date he was effectively convicted and sentenced on the particular charge.

2. On 26 February 2003, the magistrate made an order, *extra curia*, that the quantity of liquor seized from the accused be forfeited to the State. The order was made in the rooms of the magistrate by means of an endorsement on the SAP13 form to the effect that all objects seized by the police be confiscated to the State in terms of Section 32(2) of the Act. The magistrate explained that this was a rule of practice in his division. The legal representative of the accused challenged the validity of the order in terms of which the magistrate ordered the liquor to be forfeited to the State.

3. The accused brought an application for the “order” to be set aside and the liquor to be returned to him. The magistrate, with the benefit and wisdom of hindsight, was doubtful whether the procedure was legally permissible and correct and whether he was competent to hear the application. He also conceded that a magistrate is not competent to make an order in terms of the provisions of Section 32 of the Act. He regarded himself *functus officio* and accordingly submitted the matter to the High Court for special review in terms of Section 304(4) of the Act. For the purpose of the application the parties agreed that the order was of an administrative nature and that the forfeiture order was *ab initio* void.

4. Section 32 of the Act specifically provides that where an admission of guilt has been paid, the object seized by the police shall be returned to the person who is legally entitled to possess such items (Section 32(1)). If the person is not legally entitled to possess such object, or where a person legally entitled to claim possession has failed to do so after due notice, such object shall be forfeited to the State (Section 32(2)). In that particular circumstance the authority to deal with the object vests in the police and the magistrate has no jurisdiction to deal therewith.

5. Where, however, the object is required as evidence at the trial or for purpose of a court order, the police official investigating the case shall transfer the object to the safe custody of the clerk of the court where the trial is being heard (Section 33). The presiding officer, after conclusion of the case, can order that the object be returned to the person legally entitled to possess the object or failing that, to be forfeited to the State (Section 34). Where the accused is convicted of any offence the object used in the commission of the offence may, without notice to any person, be declared forfeited to the State (Section 35).

6. Section 57(7) of the Act confers on the magistrate the power to review the conviction and the admission of guilt fine. In the case where an accused is given the option to pay an admission of guilt, the magistrate can interfere with such conviction if he or she is of the view that it is not in accordance with justice. Such power of review does not extend to the case where the police act in terms of Section 32 of the Act with regard to the object seized by the police in terms of Section 20 and held by it in terms of Section 30(c). Firstly, because the object has not been transferred from the control and custody of the police to the control and custody of the clerk of the court for the purposes of the trial in terms of Section 33. Secondly, there was no trial entitling the magistrate at the conclusion thereof, to act in terms of powers vested in him or her in terms of Section 34. The question which arises: Can a magistrate who confirms a conviction and an admission of guilt fine, order the forfeiture of an object used in the commission of such offence in terms of Section 35? Sections 32 and 35 draw a distinction between objects seized during a police raid and objects used in the commission of an offence. HIEMSTRA: **Suid-Afrikaanse Strafbroses** (6e uitgawe) at p 66 says:

“Die verbeurdverklaring kan ook by h erkenning van skuld plaasvind waar daar geen verhoor was nie, en die beslissing in **R v Van der Merwe** 1958 (2) SA 82 (K) val weg. Die beslissing het berus op die aanwesigheid van die word ‘verhoor’ in die ou artikel, maar dit is nou weggelaat.”

I respectfully disagree with the conclusion of the learned author in this regard.

7. The object of giving an offender the election of paying an admission of guilt fine in terms of Section 57(1) is to pre-empt a trial (**S v Shange** 1983 (4) SA 46 (N) at 490D-E). In that case any object seized in terms of Section 20 and held in terms of Section 30(c) is dealt with by the police in terms of Section 32. These objects would include articles used or intended for use in or which may afford evidence of the commission of the offence (Section 20). Implicit in Section 35 is, firstly, that the forfeiture order follows a trial and, secondly, it is confined to any object which was used in the commission of the offence. Therefore the decision in **R v Van der Merwe** (*supra*) is as relevant today as it was at the time and the omission of the word “trial” in the present text had no effect on the application of Section 35. The answer to the question posed earlier is therefore that a magistrate who confirms the conviction and admission of guilt fine in terms of Section 57(6) cannot order the forfeiture of the object used in the commission of an offence by virtue of the provisions of Section 35.

8. I now turn to discuss the question of whether the court is *functus officio* once it had confirmed the conviction and admission of guilt fine in terms of Section 57(7). There is a difference of opinion between the Natal Provincial Division and the other Divisions. The full bench of this Division in **S v Louw** 1982 (4) SA 556 (C) at 560A-F held that the court is precluded from later reviewing its own decision on the basis of “new facts” after it had already confirmed the conviction and fine in terms of Section 57(7) as the court is *functus officio*. I am in agreement with the *ratio decidendi* of the **Louw** case and, in any case, I am bound by the doctrine of *stare decisis*, by the full bench decision of this Division.

9. *In casu* the magistrate, firstly, was *functus officio* and had no authority to order the forfeiture of the quantity of liquor after having confirmed the conviction and the admission of guilt fine. He had effectively completed his reviewing function. Secondly, the magistrate was not competent to entertain an application for the setting aside of his “invalid order” for the same reason, namely, that he was *functus officio*. The magistrate correctly referred the matter for special review in terms of Section 304(4) of the Act, to this court. (See also **R v Van der Merwe** 1958 (2) SA 82 (C).)

10. In the light of my findings, the order of the magistrate, dated 26 February 2003 ordering the forfeiture of the liquor to the State purportedly in terms of Section 32, is set aside.

.....

E MOOSA

DESAI, J: I agree.

.....

S DESAI

