

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no: CA 09/2017

In the matter between:

THE STATE

APPELLANT

and

JOAO LUIS MARQUES FARIA

1ST RESPONDENT

JORGE MAYER FARIA

2ND RESPONDENT

JOAQUIM DA CONCEICAO MAYER

3RD RESPONDENT

Neutral citation: *S v Faria* (CA 09/2017) [2017] NAHCNLD 100 (17 October 2017)

Coram: TOMMASI J and JANUARY J

Heard on: 12 September 2017

Delivered: 17 October 2017

Flynote: Appeal — Customs and Excise — Forfeiture of goods under s 91 of Act 20 of 1998 — Goods liable to forfeiture thereunder — Court does not have discretion once there has been a conviction of having contravened s 14 of the Act – Magistrate

exercised his discretion in favour of the respondents and declined to order that the goods be forfeited to the State – Appeal of the State upheld and order made that the goods be forfeited to the State in terms of the provisions of s 91 of the Act.

Summary: The respondents were convicted of having contravened s 14 of the Customs and excise Act, 20 of 1998. They failed to declare goods (currency) and the goods were seized at a police checkpoint in Oshivelo. The State appealed against the magistrate’s failure to order forfeiture of the goods to the State. On appeal it is held that once it is established that the offence has been committed, the goods shall be liable for forfeiture to the State and the court has no discretion but to order such forfeiture. Section 103 and 104 provides further avenues for the recovery of goods forfeited in terms of the provisions of the Customs and Excise Act.

ORDER

1. The appeal is upheld;
2. It is ordered that the goods (currency) i.e Two Hundred and Sixty Three Thousand, Three Hundred and Fifty Namibian Dollars (N\$263 350.00), Eighty Four Thousand, Five Hundred and Fifty South African Rand (R84 550.00), One Thousand United States Dollars (US\$1000), 35 Euros (€35) and Four Thousand and fifty Angolan Kwanza (4050 Angolan Kwanza) be forfeited to the State in accordance with the provisions of section 91 of the Customs and Excise Act 20 of 1998.

JUDGMENT

TOMMASI J (January J concurring)

[1] This is an appeal by the State against the learned magistrate's failure to order that the goods (currency) be forfeited to the State.

[2] The respondents were convicted of having contravened s 14(1)(a)(i) of the Customs and Excise Act 20 of 1998, for having failed to declare foreign currency to wit, N\$263 350; R84 550; US\$1000; €35; and Kz4050.00. Each one of the respondents were sentenced to a fine of N\$10 000 or twelve months' imprisonment. The court declined to make a forfeiture order as provided for in terms of s 91 of the Customs and Excise Act. It is against the failure by the learned magistrate to make such a forfeiture order that the State is now appealing.

[3] The respondents were represented by Ms Mugaviri but she withdrew as legal practitioner. Efforts made to locate the respondents proved to be of no avail and the appeal was heard in the absence of the respondents.

[4] The key issue raised by the State is whether the court has a discretion in terms of the provisions of s 91 of the Customs and Excise Act whether or not to order that the goods should be forfeited to the State. The learned magistrate concluded that he has a discretion and declined to order the forfeiture of the currency which was seized by the police at Oshivelo Gate, a police checkpoint where the respondents were arrested.

[5] Section 91 of the Act provides as follow:

'Any person who contravenes or fails to comply with any provision of section 14, shall be guilty of an offence and on conviction be liable to a fine not exceeding N\$8 000 or to an amount equal to three times the value of the goods concerned, whichever is the greater, or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment, and the goods concerned, or any other goods in the container or package containing such goods, including such container or package, shall be liable to forfeiture to the State.' [my underlining]

[6] In *Secretary for Customs and Excise & another v Tiffany's Jewellers (Pty) Ltd 1975 (3) SA 578 (A)* the South African Appeal Court dealt extensively with the

interpretation of s 87 and s 113 of the Customs and Excise Act, 91 of 1964. This Act governed customs and excise in this jurisdiction until it was repealed in its entirety by the Customs and Excise Act 20 of 1998. In referring to this case it is important that the court must be alive to the differences in the current and the repealed legislation. In that case an accused was found in possession of 23 cut and polished diamonds which he failed to declare. He was charged and convicted and the presiding magistrate refused an application by the respondent, the owner of the diamonds, for them to be returned to it. Instead the magistrate ordered that they be kept in the custody of the police until a competent court made an order as to their disposal. The matter was heard in the Local Division and on a further appeal it was held that that s 87(1) and 113(8) had been contravened; that the diamonds were liable to forfeiture that the proper order was to declare the diamonds forfeited as requested by the Secretary. Algot AJA states the following at page 587 A-D:

'In *Vincent and Pullar Ltd. v Commissioner for Customs and Excise, 1956 (1) SA 51 (N)*, the corresponding sections in the 1944 Act were again discussed. The Court *a quo* was not referred to this case. At p. 53 De Wet, J., with whom Holmes, J., concurred said:

"... the only ground upon which the Court could declare a seizure as invalid, would be if it were made illegally. The Court has no discretion in regard to the question as to whether or not the breach of the Customs regulations was one which was so serious as to justify a seizure and forfeiture. The discretion on those questions is clearly vested in the Commissioner under sec. 143".

(This latter section corresponds with sec. 88 of the Customs Act).

If one examines other sections in the Customs Act it will be seen that the statute sets out the requisites which cause goods to become "liable to forfeiture". Secs. 81, 82, 83 and 84 respectively provide that an offence is committed by any person who fails to declare goods or who irregularly exports munitions, or who deals with goods contrary to the Act, or who makes false statements or uses false documents in relation to particular goods. These sections then provide that those goods are liable to forfeiture.'

[7] Section 91 of the current Act similarly stipulates in clear terms that once a person has been convicted of contravening s 14, the person would be liable to the penalty

provided for **and** the goods shall be liable to forfeiture. There is no mistaking the clear wording of this provision. Once the requisites i.e a conviction of contravening s 14 has been established, forfeiture is mandatory and the court has no discretion but to order such forfeiture.

[8] Section 103 and 104 provides an avenue for the recovery of the goods forfeited in terms of the Customs and Excise Act. The court has no discretion regarding the question as to whether such forfeiture would be “fair” under the circumstances (See *Vincent and Pullar Ltd v Commissioner for Customs and Excise, supra*).

[9] The learned magistrate erred by concluding that the court has a discretion not to order forfeiture. In light of this the appeal by the State must be upheld and the goods described in paragraph 2 must be declared forfeited to the State. I pause to highlight that such an order is made in terms of the provisions of s 91 of the Customs and Excise Act, 20 of 1998 and not section 34 of the Criminal Procedure Act, 51 of 1997 which deals with the disposal of articles after commencement of criminal proceedings.

[10] In the result the following order is made:

1. The appeal is upheld;
2. It is ordered that the goods (currency) i.e Two Hundred and Sixty Three Thousand, Three Hundred and Fifty Namibian Dollars (N\$263350.00), Eighty Four Thousand, Five Hundred and Fifty South African Rand (R84 550.00), One Thousand United States Dollars (US\$1000), 35 Euros (€35) and Four Thousand and fifty Angolan Kwanza (4050 Angolan Kwanza) be forfeited to the State in accordance with the provisions of section 91 of the Customs and Excise Act 20 of 1998.

MA Tommasi
Judge

APPEARANCE:

For the Appellant:

Adv Shileka

Of

Office of the Prosecutor General, Oshakati

For the 1st Respondent:

In person

For the 2nd Respondent:

In person

For the 3rd Respondent:

In person