

[2018] JMCA Misc 1

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO 24/2014

BEFORE: THE HON MR JUSTICE MORRISON JA
 THE HON MR JUSTICE BROOKS JA
 THE HON MRS JUSTICE SINCLAIR-HAYNES JA

BETWEEN ANTHONY HENDRICKS APPELLANT
AND COMMISSIONER OF CUSTOMS RESPONDENT

Norman Godfrey instructed by Brown, Godfrey & Morgan for the appellant
Ms Lisa White for the respondent

RESIDENT MAGISTRATE'S MISCELLANEOUS APPEAL NO 1/2015

In the matter of an appeal by way of case stated and In the matter of an application by Pilmar Powell pursuant to section 79 of the Proceeds of Crime Act For forfeiture of seized cash from Patrick Anthony Spence, with interested parties Kurbitron Limited and Frederick Graham

Ms Alethia Whyte and James Glanville for Pilmar Powell, Mrs Denise Senior-Smith, Ms Vanessa Taylor and Ms Olivia Derrett instructed by Oswest Senior-Smith & Co for Kurbitron Limited and Frederick Graham

16, 17, 18 March 2016 and 28 May 2018

MORRISON JA

[1] I have read in draft the judgment of my sister Sinclair-Haynes JA. I agree with her reasoning and conclusion and have nothing to add.

BROOKS JA

[2] I too have read the draft judgment of Sinclair-Haynes JA and agree with her reasoning and conclusion.

SINCLAIR-HAYNES JA

Introduction

[3] The foremost issue in both these appeals is whether an application to the Resident Magistrate's Courts (now Parish Courts) for forfeiture of cash pursuant to section 79 of the Proceeds of Crime Act (POCA) can properly be made by way of a notice of application for court orders, supported by an affidavit.

[4] In the case of Mr Anthony Hendricks, an application made by the Commissioner of Customs by that means was granted by Her Honour Miss Jennes Anderson, a Resident Magistrate (now referred to as a Parish Court Judge) for the Corporate Area. An application by Mr Hendricks for the release of the forfeited cash pursuant to section 78 of POCA was dismissed. This is therefore Mr Hendricks' appeal from those decisions. In addition to the issue I have referred to at paragraph [3] above as "the foremost issue", Mr Hendricks also takes two other points on appeal. However, given that a

decision on the first issue may be dispositive of the appeal, I will make no further reference to the others for the time being.

[5] In the case of Pilmar Powell, an application made by the same means by Ms Powell, a Detective Sergeant of Police assigned to the Transnational Crime and Narcotics Division, for forfeiture of cash pursuant to section 79 of POCA, was dismissed by His Honour Mr Dale Staple, a Resident Magistrate for the parish of Manchester. An application by the defendants, Kurbitron Limited and Frederick Malcolm Graham (Kurbitron Ltd), for the release of seized cash pursuant to section 78 of POCA, was also dismissed. The learned Resident Magistrate held that neither the relevant statutory provisions nor the rules permitted the making of such applications by way of notice of application for court orders supported by affidavit and that the proceedings before him were accordingly a nullity.

[6] The latter case now comes before this court by way of (i) case stated by the learned Resident Magistrate, to determine, among other things, what is the correct procedure for the commencement of proceedings under POCA; and (ii) appeal by the Assets Recovery Agency on behalf of Pilmar Powell, for an order that, among other things, the order of the Resident Magistrate be set aside.

[7] The legal context in which the issue arises is as follows. First, sections 78 and 79 of POCA respectively authorise a Resident Magistrate to release detained cash and forfeit detained cash on an "application" made to that court under the relevant section.

[8] Second, section 143 of the Judicature (Resident Magistrates) Act (RM Act) provides that:

“All actions and suits in a Court which, if brought in the Supreme Court, would be commenced by writ of summons, shall be commenced by the party desirous of bringing such action, or some person on his behalf, lodging with the Clerk or Deputy Clerk or any Assistant Clerk, at the office of the Clerk of Courts or at any Court held within the parish, a plaint, stating briefly the names and last known places of abode of the parties and naming a post office to which notices may be addressed to the plaintiff.....and accompanied by particulars of claim if any, and stating the plaintiff’s place of abode and address for service, and bearing the number of the plaint on the margin thereof,...”

[9] Third, Order XXXVI Rule 19 of the Resident Magistrate's Court Rules (RMC Rules) states as follows:

“Where by any Law not before-mentioned in these Rules, proceedings are directed to be taken, in a Resident Magistrate’s Court, such proceedings shall commence by action wherever there is a person against whom it can be brought, and if there is no such person, then the proceeding shall be commenced by petition.”

[10] The question is therefore whether the matters, not having been brought by the filing of a plaint or a petition, fall to be treated as nullities.

[11] Both matters were heard on 18 March 2016. We apologise for the delay in delivering our decision. The delay was entirely beyond our control.

[12] Mr Anthony Hendricks' complaint at ground three, the questions posed by the learned Resident Magistrate and Ms Powell's three complaints in respect of the case stated in her matter, contain essentially two issues: whether the matter was properly commenced and, if not, whether it is a nullity. An answer in the affirmative will render further consideration of Mr Hendricks' case otiose. In the circumstances ground three, the case stated and Ms Powell's complaints will be considered jointly. Ms Powell, for convenience, will be referred to along with the Commissioner of Customs as "the respondents".

Ground three

[13] Ground three reads as follows:

"The proceedings are a nullity as it [sic] was not brought in conformity with the Judicature (Resident Magistrates) Act or the Resident Magistrates Court Rules. It was not commenced by Action or Petition."

The case stated

[14] The learned Resident Magistrate's ruling on the applications made by Ms Powell and Kurbitron Ltd respectively was as follows:

- "a. The Application for Forfeiture and the Application for Release are dismissed as neither matter commenced by plaint supported by particulars of claim and ought not to have commenced by way of notice supported by affidavit;
- b. Neither application can be remedied pursuant to section 190 of the Judicature (Resident Magistrate's) Act or

Order XXXVI Rule 23 of the Resident Magistrate's Court Rules as there is nothing before the court."

[15] In the case stated, the learned Resident Magistrate sought this court's guidance on the following questions:

- "a. What is the correct procedure for the commencement of proceedings for either Forfeiture or Release of Seized Cas under the Proceeds of Crime Act in the absence of Procedural Rules?
- b. Was the correct procedure followed in the instant case?
- c. If the correct procedure was not followed, what is the ultimate effect?
- d. If there is a defect in the commencement procedure, can the procedure be cured?"

Ms Powell's complaints in respect of the case stated

Complaint one

"The learned magistrate erred when he determined that the failure to comply with section 143 of the Judicature (Resident Magistrate's) Act was not merely a matter of form but of substance."

Complaint two

"The learned Resident Magistrate erred when he determined that because the proceedings were not commenced in accordance with section 143 of the Judicature (Resident Magistrate's) Act, the proceedings did not exist and he was therefore precluded from exercising his jurisdiction to cure the defect in the proceedings pursuant to section 190 of the Judicature (Resident Magistrate's) Act or Order XXXVI Rule 23 of the Judicature (Resident Magistrate's) Rules."

Complaint three

"The learned Resident Magistrate erred when he determined that the notice and affidavit could be treated as the lodging of a plaint."

The appellants' submissions

[16] Placing reliance on **Metalee Thomas v The Assets Recovery Agency** [2010] JMCA Civ 6, counsel for both Mr Hendricks and Kurbitron Ltd submitted that in the absence of regulations or court rules for proceedings brought in the Resident Magistrate's Courts, the commencement of proceedings in the Resident Magistrate's Courts must be governed by the RM Act and the RMC Rules. They pointed the court's attention to section 143 of the RM Act and submitted that the matter ought to have commenced by way of plaint. They posited that the Resident Magistrate's Court is a creature of statute and its proceedings are to be governed by the RM Act and the RMC Rules. The commencement of the matter by application was a process which is alien to the Resident Magistrate's Court. The defect is not merely one of form. It is therefore fatal to the proceedings thereby rendering the proceedings void *ab initio* and a nullity.

[17] Counsel Mr Godfrey, for Mr Hendricks, postulated that the proceedings are void *ab initio* having commenced by way of notice of application which is alien to the RM Act and the RMC Rules. He relied on:

- a. The interpretation provisions of the RM Act which states that "Actions shall mean every proceeding commenced by plaint";

- b. Section 143 of the RM Act which stipulates how an action in the Resident Magistrate's Court ought to commence; and
- c. Order XXXVI rule 19 (quoted above at paragraph [9]).

[18] Counsel referred to Order XI Rule 7, Order XIII Rule 8 and Order XIV Rules 1, 2, 3 and 4. These rules, he submitted, are concerned with interlocutory applications and do not provide for the commencement of proceedings. He relied on Harrison JA's statement in **Metalee Thomas v Assets Recovery Agency**. At paragraph [33] the learned judge of appeal expressed the view of the court thus:

"We are without the benefit of Regulations or Court Rules for POCA matters that are brought in the Resident Magistrate's Court, so in the absence of rules and regulations, it is our view that provisions relating to commencement of actions in that court must be governed by the Judicature (Resident Magistrate's) Act (R.M. Act) and Resident Magistrate's Court Rules (R.M. Court Rules)."

The response

[19] Both Ms Lisa White, on behalf of the Commissioner of Customs and Ms Alethia Whyte, on behalf of Pilmar Powell, responded to these grounds. Ms White in her written submissions addressed the following questions:

- "a. What is the correct procedure for the commencement of proceedings for either the Forfeiture or Release of Seized Cash under the Proceeds of Crime Act?

- i. The learned Resident Magistrate is correct that an authorised officer or a defendant, in order to commence an application for forfeiture or for the release of seized cash should file a Plaintiff and Particulars of Claim.
- b. Was the correct procedure followed in these cases?
 - i. The correct procedure was not followed in either case by any party as the authorised officers, defendants and/or interested parties lodged Notices along with supporting affidavits at the relevant Resident Magistrate's Court.
- c. If the correct procedure was not followed, what is the ultimate effect?
 - i. The learned Resident Magistrate concluded that no valid claim or application for return of seized cash has been commenced before the Court to invoke the Court's jurisdiction. We disagree with the learned Resident Magistrate and opine that proceedings pursuant to the **Proceeds of Crime Act** were/are extant in relation to either matter. The matters therefore were before the Court.
- d. If there is a defect in the commencement procedure, can the defect be cured?
 - i. Further to the erroneous conclusion that none of the matters would be extant, the learned Resident Magistrate erroneously concluded that should the Court allow the litigants to regularise the procedure, it would have the effect of commencing the matter *de novo*. It is submitted that the more reasonable and correct view is that improper procedure employed by all parties in both matters did not /does not invalidate the proceedings before the Court which were/are not a nullity."

[20] Both counsel contended that this ground ought not to be countenanced and the authorised officers should be allowed to regularise the procedure where the wrong documents were filed before the respective Resident Magistrates' Courts. As stanchion for her argument, Ms White made the following points:

- “1. The challenge is not in relation to the basis for the proceedings or the process prescribed under POCA but the form of the documents filed in the court below;
2. The provisions in the POCA set out the 'specifics of the proceedings' while the procedure to be utilised is determined by the Resident Magistrate Court Rules;
3. The time allowed for instituting proceedings is set out in POCA and the Resident Magistrate has no discretion to enlarge the time or jurisdiction to adjudicate on a matter where the proceedings were commenced contrary to the POCA;
4. However, in contrast a Resident Magistrate has jurisdiction in relation to matters of procedure pursuant to the rules and could therefore order amendments in relation to matters of procedure;
5. No time limit is imposed under the Judicature (Resident Magistrate) Act or the Resident Magistrate Court Rules where errors of procedure may be corrected.
6. Based on section 143 of the Resident Magistrate Act and Orders V, VI and VII of the Resident Magistrate Court Rules the appropriate procedure to be used to commence an application for forfeiture pursuant to section 79 of the POCA is by way of plaint and Particulars of Claim.”

[21] Both counsel pointed the court to section 143 of the RM Act and the RMC Rules and argued that if the purpose of those requirements was met, the proceedings will not automatically be invalid.

[22] It was counsel's further submission that the documents filed in the court below in relation to both matters were in compliance with section 143 of the RM Act; but not in accordance with the RMC Rules as it concerns the prescribed form which the plaintiff must take.

[23] There is a general principle of law, Ms White argued, that where there has been an error of procedure such as a failure to comply with a rule or practice direction, the error does not invalidate any other step taken in the proceedings unless so ordered by the court. This principle, she submitted, is reflected in Order XXXVI Rule 23 of the RMC Rules and cemented by the discretion given to the Resident Magistrate to allow amendments to correct errors in procedure.

[24] According to counsel, Mr Hendricks and Kurbitron Limited could not properly argue that they were prejudiced by the use of the incorrect 'form' to make the application for forfeiture.

[25] Ms White further contended that Mr Hendricks did not raise the issue of jurisdiction before the Resident Magistrate. The Resident Magistrate was therefore not afforded the opportunity to consider and respond to the allegation that the proceedings were a nullity. Consequently, having submitted to the jurisdiction of the court below, Mr Hendricks ought to be precluded from advancing this ground for the first time.

[26] In the light of sections 75 to 77 of POCA and paragraphs [25] to [28] of this court's decision in **Metalee Thomas v The Asset Recovery Agency**, Ms White submitted that this court must resolve the tension between the general right to property held by individuals, and the national interest that those who participate in crimes or transport money across borders illegally should be deprived of their ill-gotten gains.

[27] If seized cash is returned to Mr Hendricks, Kurbitron Ltd and other litigants whose cases were commenced by way of notice and affidavit, the due administration of justice and national security would be jeopardised.

[28] Ms Whyte submitted that the very purpose and intent of POCA would be defeated by the refusal to cure a procedural error. Both counsel postulated that the commencement by way of notice and affidavit was not an irregularity which caused substantial injustice and which cannot be remedied by an order of the court. The third ground of appeal should therefore be dismissed.

Law/Discussion

[29] Section 56(1)(b) of POCA enables a Resident Magistrate's to order the forfeiture of cash unlawfully obtained or intended for unlawful use. The section reads:

"This Part has effect for the purposes of-

- (a) ...
- (b) enabling cash which is, or represents property obtained through unlawful conduct or which is intended to be used in unlawful conduct to be

forfeited in civil proceedings before a Resident Magistrate's Court."

[30] The commencement of matters instituted in the Resident Magistrate's Courts is governed by section 143 of the RM Act. Contrary to section 143, both Anthony Hendricks' and Pilmar Powell's matters were commenced by way of notices of application which were filed in the Resident Magistrate's Court. The applications were supported by affidavits.

[31] The Resident Magistrate's courts are, as pointed out by Harrison JA, in **Metalee Thomas v Assets Recovery Agency**, creatures of statute. The Resident Magistrate's jurisdiction is therefore circumscribed by the power conferred by statute, and the Resident Magistrate must act within the confines of the statutes and rules. That fact was plainly stated in the judgment of the Full Court of the Supreme Court in **Lindo v Hay** (1923) Clarke's Reports 118, paragraph 9 (quoted by Harrison JA at paragraph [34] of his judgment), which states that:

"Resident Magistrates Courts are creatures of statute; they are inferior courts without any inherent jurisdiction and with only such jurisdiction as is conferred upon them by statute."

[32] Harrison JA differentiated between the recovery process in the Supreme Court and the Resident Magistrate's Court. He pointed to part IV of POCA section 56(1)(a) and section 2 which defines "Court" to mean Supreme Court and section 56(1)(b) which specifically deals with matters instituted in the Resident Magistrate's Court.

[33] The learned judge of appeal observed at paragraph [25] that:

“Immediately above section 72 there is the heading:
‘Recovery of cash in summary proceedings’.”

And commented that:

“One gets the distinct impression that from section 72 onwards the procedure is laid down for cash forfeitures as well as the powers of the Magistrate when he or she deals with matters concerning cash forfeiture applications.”

[34] Harrison JA rightly concluded that matters brought in the Resident Magistrate’s Court must be governed by the RM Act and the RMC Rules. Section 183 of the RM Act provides that:

“Except where otherwise provided by these rules, the evidence of witnesses on the trial of any action or hearing of any matter shall be taken orally on oath; and where by these rules evidence is required or permitted to be taken by affidavit such evidence shall nevertheless be taken orally on oath if the Court, on any application before or at the trial or hearing, so directs.”

[35] Harrison JA opined that, by virtue of section 183, the Act envisaged that in the Resident Magistrate’s court, “witnesses must be examined upon oath or affirmation when they give evidence in court”.

[36] Although the learned Resident Magistrate, in Mr Hendricks’ case, sought to rectify the procedure by having the witnesses testify on oath and their affidavits tendered into evidence, the action having been commenced by notice and affidavit, this

was indeed a procedure entirely alien to the RM Act. The learned Resident Magistrate was therefore bereft of the authority to proceed as she did, thus rendering the proceedings a nullity.

[37] The points posed by His Honour Mr Dale Staple have been reviewed and this court concurs that the matter ought to have commenced by way of plaint supported by particulars of claim. Not having been so commenced, the matters are nullities and cannot be remedied pursuant to section 190 of the RM Act or Order XXXVI Rule 23 of the RMC Rules. Section 190 of the RM Act provides:

“The Magistrate may at all times amend all defects and errors in any proceeding, civil or criminal, in his Court, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made, with or without costs, and upon such terms as to the Magistrate may seem fit; and all such amendments as may be necessary for the purpose of determining the real question in controversy between the parties shall be so made.”

Order XXXVI Rule 23 of the RMC Rules reads:

“Non-compliance with any of these rules or with any rule of practice for the time being enforced shall not render any proceedings void unless the Court shall so direct, but such proceeding may be set aside either wholly or in part as irregular, or amended or otherwise dealt with in such manner and upon such terms as the Court shall think fit.”

[38] The power to amend, conferred on the Resident Magistrate by section 190 and Order XXXVI Rule 23, is confined to matters properly commenced. These matters were not properly commenced. In the circumstances, ground three of Mr Hendricks’ appeal

must succeed and the Assets Recovery Agency's appeal brought on behalf of Ms Powell must fail.

[39] In the result of this finding, it is unnecessary to consider the other grounds of Mr Hendricks' appeal.

[40] Any application under section 78 of the POCA has to be properly considered in the court below (see **Wilton Wilson v Commissioner of Customs** [2011] JMCA Civ 23).

[41] In the circumstances I would allow the appeal by Mr Hendricks and dismiss the appeal brought on behalf of Ms Powell. In relation to the questions posed by the learned Resident Magistrate in the case stated, I would propose the following answers:

- (a) In the absence of any dedicated procedural rules under POCA, the correct procedure for the commencement of proceedings for either the forfeiture or release of seized cash under POCA is, as prescribed by the RMC Rules, by way of plaint accompanied by particulars of claim.
- (b) The parties did not use the correct procedure in this case.
- (c) The ultimate effect of the failure to use the procedural rules is that, as the learned Resident Magistrate determined, neither application was properly before him in this case.
- (d) The parties' failure to use the correct procedure in this case was, as the learned Resident Magistrate held, irremediable.

MORRISON P

ORDER

1. The appeal by Mr Anthony Hendricks in RMCA No 24/2014 is allowed, with costs to be paid by the Commissioner of Customs, fixed at \$100,000.00.
2. The appeal brought by the Assets Recovery Agency on behalf of Ms Pilmar Powell in RMMA No 1/2015 is dismissed, with no order as to costs.
3. The court answers the questions posed by the learned Resident Magistrate in the case stated in RMMA No 1/2015 as follows:
 - (a) In the absence of any dedicated procedural rules under POCA, the correct procedure for the commencement of proceedings for either the forfeiture or release of seized cash under POCA is, as prescribed by the RMC Rules, by way of plaint accompanied by particulars of claim.
 - (b) The parties did not use the correct procedure in this case.
 - (c) The ultimate effect of the failure to use the procedural rules is that, as the learned Resident Magistrate determined, neither application was properly before him in this case.
 - (d) In the circumstances of this case, the parties' failure to use the correct procedure was, as the learned Resident Magistrate held, irremediable.