REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2013/34445

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

……………………… DATE ………………………… SIGNATURE

In the matter between:

ABUBAKAR, MUHAMMED	Applicant
and	
MINISTER OF POLICE	First Respondent
NATIONAL POLICE COMMISSIONER	Second Respondent
GAUTENG PROVINCIAL POLICE COMMISSIONER	Third Respondent
STATION COMMISSIONER, DOUGLASDALE POLICE STATION	Fourth Respondent
STATION COMMISSIONER, RANDBURG	

POLICE STATION Fifth Respondent

J U D G M E N T

<u>N F KGOMO, J</u>:

<u>INTRODUCTION</u>

[1] The applicant launched an application on 18 September 2013 for the following orders:

1.1 Declaring his arrest on 27 February 2013 and his subsequent detention until 4 March 2013 to be unlawful;

1.2 Directing the first respondent to return to the applicant within 10 (ten) days of the grant of the order sought, the following items listed hereunder seized during the unlawful search conducted at […….]; which items are:

1.2.1 R2 206 000,00 (two million, two hundred and six thousand rand);

1.2.2 One blackberry Z.10 cellphone;

1.2.3 One white blackberry bold cellphone;

1.2.4 One silver Apple MacBook laptop;

1.2.5 One grey HP laptop;

1.2.6 One Toshiba laptop (black); and

1.2.7 A jewellery set comprising of a wedding ring set and a set of gold chains and earrings.

1.3 Directing the fourth and fifth respondents, within 10 (ten) days of the grant of this order sought, to furnish the applicant with the names and ranks of the eight (8) officers who conducted the unlawful search on 27 February 2013; and

1.4 For costs of this application on a scale as between attorney and client.

[2] The respondents are opposing the application.

[3] When this matter served in court on 02 June 2014 both parties put it on record that the applicant has in the meantime been served or issued with a criminal court case summons, which at the moment is still in its skeletal stage, with only the charge of contravening sections 1, 13, 17-24 and 64 of the Drugs and Drug Trafficking Act[1] ("*the Act*") being found in possession and/or

[1] Act 140 of 1992, (as amended).

use of – undesirable dependence producing substances as listed in Part III of Schedule 2 of the Act, to wit 370.28 grams of methcathinone – being set out or merely mentioned in the summons in a criminal case.

[4] It is common cause that a summons in a criminal case is not a complete and/or final charge sheet for purposes of trial.

[5] This summons was issued on 29 May 2014 and the applicant is called upon therein, to appear before the Randburg Magistrate Court to answer to the charge or charges, as the case may be.

[6] The applicant's counsel conceded at court that in the light of the now imminent prosecution of the applicant, the first part of his application, namely, the declaration of his arrest to be unlawful, as well as the prayer for further and detailed particulars of the police officers who searched his premises and arrested him on 27 February 2013, should fall away. However, he insisted vehemently that the applicant is still persisting with the application for the return of the money and goods listed in paragraphs 1.2.1 to 1.2.7 above.

RESPONDENTS' DEFENCE(S)

[7] In addition to a general denial of liability accompanied by a prayer for the application to be dismissed with costs on the grounds of same being ill-thought, capricious and an abuse of process; the respondents raised a point *in limine* of lack of joinder of the National Director of Public Prosecutions

("*NDPP*"), who they averred was a material, relevant and interested party to the proceedings.

SHORT HISTORY AND FACTUAL MATRIX

[8] Acting on information received, the police went to and conducted a search at the applicant's residence or place on 27 February 2013. According to the applicant the money and items listed in the Notice of Motion were taken and/or confiscated by the police. It is the applicant's case that the search and seizure was unlawful, entitling him to the return of the money and goods.

[9] According to the respondents, apart from the items listed on or in the applicant's Notice of Motion, also found during the search at the applicant's home were several sealed G4 Security bags containing large amounts of money/cash as well as drugs. The bag had serial numbers. A G4 Security person was called and he confirmed that those bags with money were the property of G4 Security and that the serial numbers on the looked like those that were taken from their guards in an armed robbery during September 2012 near Vryburg in the North West Province where an amount of R2 700,00 in cash was robbed. G4 Security is investigating these aspects and would and should possibly report to the relevant branches of the criminal justice system.

[10] According to the respondents further, the total cash seized from the applicant during the search was R1 053 800,00 plus a further R465 000,00 in

a white bag. They denied taking the amount of R2 206 000,00 as alleged by the applicant.

[11] A case docket under CAS No 726/02/2013 was registered at Douglasdale Police Station and the applicant was charged with dealing in and possession of illegal drugs, money laundering, possession of suspected stolen property and armed robbery. He was taken to court on 1 March 2013 and the case was postponed to 4 March 2013 for further investigation. On 4 March 2013 the public prosecutors at the Randburg Magistrate's Court provisionally withdrew the charges against the applicant so that further and in-depth investigations could be conducted and for forensic investigations to be done on the drugs to determine their identity in terms of the relevant legislation.

[12] The lawfulness of the search and seizure operation and the concomitant arrest was explained in full by Sgt Dasrath Govind in a Confirmatory Affidavit attached to the papers herein. I am satisfied from the explanation given that the search, seizure and arrest in this case were executed in accordance with the applicable laws and Act after the provisions of other applicable and relevant laws relating to drug trafficking and organised crime among others were considered.

IS APPLICANT ENTILTED TO RETURN OF GOODS TAKEN

[13] It is interesting that the applicant is not mentioning the drugs found during the search in his prayer for the return of the goods set out in the Notice of Motion. Even his counsel made cursory reference to them in argument: He stated that if the applicant was charged with dealing in drugs, then the respondents would have had a case for keeping the goods sought to be returned.

[14] What counsel for the applicant have failed to take into consideration or account is that no formal charge sheet has yet been drawn up. What has happened is that the applicant is being called upon, through a summons, to appear before the Randburg Magistrate's Court on 25 June 2014 to be formally handed a charge sheet. In addition hereto, the charges withdrawn by the court provisionally on 3 March 2013 included dealing in drugs, money laundering and possession of property suspected to have been stolen. Furthermore, the quantity of drugs involved here justifies the invocation of a presumption of dealing in terms of the Drugs and Drug Trafficking Act 140 of 1992. As such by the respondents' version alone, the seized goods and money ought not to be returned at this stage.

[15] The other problem with this application is the fact that the parties are not agreed as to what amount was seized or confiscated by the police. The applicant talks about R2 206 000,00 while the respondents talk of R1 053 800,00. This at face value evidences a dispute of facts. Similarly, the

applicant denies seeing the G4 money bags which the police aver were found at his home. This denial I dare say, came out during argument in court.

[16] The law and practice in relation to disputes of fact is clear and settled: the court should take the version of the respondent as well as those aspects in the applicant's version that are not in dispute. If on all the probabilities the preponderances point to the version of the applicant being weak, the applicant should fail.[2]

[17] The applicant submitted that the respondents have not advanced any cogent reasons why the seized goods as listed in the Notice of Motion should not be returned irrespective of the fact that the applicant is now to be formally re-charged. He relied on *Ntoyakhe v Minister of Safety and Security and Others*[3] and *Choonara v Minister of Law and Order*.[4]

[18] The headnote of *Ntoyakhe v Minister of Safety and Security and Others* ("*Ntoyakhe*") reads in part as follows:

> "*In the context of s. 20 of the Criminal Procedure Act 51 of 1977 (which permits the seizure of certain articles by the State) the word 'seize' encompasses not only the act of taking possession of an article, but also the subsequent detention thereof … However, the right of the State to keep the seized article is not unlimited: That right must also (as in the case of the initial seizure itself) be exercised 'in accordance with the provisions' of Chapter 2 of the Act. One such provision is s. 31(1)(a) of the Act (which provides that 'if no criminal proceedings are instituted in connection with any* [seized] *article … or if it appears that such article is not required at the trial for purposes of evidence or for purposes of an order of court, the article shall be returned to the person*

[2] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).
[3] 1999 (2) SACR 349 (E).
[4] 1992 (1) SACR 239 (W).

> *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.*"

[19] As the honourable judge (Erasmus J) held in the above case, the provisions of s. 20 read with s. 31, indicate that the main objective of the seizure authorised by Chapter 2 is to enable the police to obtain possession of the articles for the purposes of investigating crime and prosecuting suspected offenders.

[20] It is so that the provisions of Chapter 2 do not confer on the state the right to deprive a person of the <u>lawful possession</u> of an article indefinitely (my emphasis).

[21] It is also so that considerations of fairness and reasonableness, which underlie our criminal justice system, dictate that criminal proceedings contemplated in 2. 31 must be instituted within a reasonable time.

[22] What constitute a reasonable period will, of course, depend on the facts of each case.

[23] The length of the period during which the article has already been detained is obviously an important factor. Another factor related to the above, is the diligence with which the police had, during the period of the detention of the article(s), conducted their investigation in connection with the seized article.

[24] Where the reasonableness of the further detention of the article is challenged, as *in casu*, general principles dictate that the *onus* is on the state to place facts and circumstances before the court on which such reasonableness may be adjudged.

[25] In *Choonara v Minister of Law and Order* ("*Choonara*") Kuper AJ held among others[5] that s. 31 must be read as an adjunct to s. 20 and that both sections in turn are aimed at facilitating the investigation and proof of some offence with which the article confiscated is connected, and an accused person must be brought to trial without undue delay.[6]

[26] As regards the issue of the point *in limine* of non-joinder of the NDPP, the applicant avers as follows: There was no prosecution pending between 27 February 2013 and 2 June 2014. He only received a copy of the Criminal Summons Notice this morning of 2 June 2014. As such, prior to 2 June 2014 there was no need or duty on him to cite or join the NDPP.

[27] In substantiation of their submission that the application should be dismissed with costs the respondents relied on *Mgomezulu v National Director of Public Prosecution*[7] which found among others that during the currency of criminal proceedings, unless exceptional circumstances exist justifying such an action, courts should refrain from entertaining civil proceedings or issuing declaratory orders affecting such criminal proceedings.

---

[5] At 246a-c.
[6] *Riddock v Attorney-General and Another* 1965 (1) SA 817 (T); *Kabe and Others v Attorney-General and Another* 1958 (1) SA 300 (W) at 302.
[7] 2008 (1) SACR 105 (SCA).

[28] In the above case the Supreme Court of Appeal held as follows at p 112 paragraph [12]:

> "*There are several decisions of this Court which hold that, save in an exceptional case, a Court will not issue a declaratory order affecting criminal proceedings.*"

[29] I have not come across any exceptional circumstances in this application that can justify interfering with the impending criminal proceedings against the applicant.

[30] It is the applicant's contention that there was undue delay in the prosecutorial chain between the applicant's arrest and the confiscation of money, property and drugs found in his possession and the date on which he launched this application.

[31] A delay in the investigations of a case may be due to a variety of reasons. The mere length of time the investigation is taking on its own does not in my view constitute unreasonable delay. There may be a variety of reasons for this, for example, the complexity of the investigation, the verification of the articles seized during an arrest and some sort of specialised investigations, like those required when drugs are involved and forensic tests should first be conducted to determine their nature and/or composition.

[32] According to one of the investigators in the case involving the applicant, Warrant Officer ("*WO*") Thomas Moloto, part of the investigations

were for G4 Security to trace and report on the serial numbers on the money bags bearing its names. The Police laboratory in Pretoria was also to analyse and report on the drugs found with the applicant. There is evidence that the laboratory report relative to the drugs was only received recently.[8] That in my view explains why a decision was only recently taken to reinstate the charges against the applicant. What the charge sheet will look like will only be known after 25 June 2014.

[33] When all the circumstances are taken into account, it is my finding that there was no unreasonable delay in the institution of the criminal proceedings herein. Charges cannot be reinstituted piece-meal. If that is done and the accused person is charged while other aspects of the investigation are not yet ready or complete, the accused person may have a justification to ask that the prosecution be proceeded with in that incomplete state or the charges be quashed against him. That may, in my view, amount to a miscarriage of justice. Justice is not only the preserve of accused persons. State institutions, in this case, the prosecuting authority, is also entitled to a fair trial and consequently justice.

[34] As a consequence of the above, *Ntoyakhe* and *Choonara* cannot avail the applicant.

[8] Respondents' Answering Affidavit, p 116, paragraph 12.

[35] In *Dookie v Minister of Law and Order and Others*[9] Page J held among others that in the case of an application in terms of s. 31(1)(a) of the Criminal Procedure Act 51 of 1977 for the return of a vehicle seized in terms of s. 20 of the Act, provided no criminal proceedings have been instituted or there existed a reasonable likelihood that such proceedings are to be or are going to be instituted in the foreseeable future, the applicant should be returned his vehicle provided he has a right to possess it. In this case the court found that there were no reasonable prospects of foreseeing criminal proceedings being instituted within a reasonable or foreseeable future. However, the applicant could not retrieve the vehicle because the registration documents thereof reflected false numbers evincing a strong inference that the vehicle had been stolen – all pointing to the fact that he could not lawfully possess such a vehicle.

[36] *In casu*, a criminal prosecution process has already been started. As I have already found, there was no unreasonable delay in doing so. The applicant was not in custody throughout this period of investigations.

[37] Another aspect relevant to this whole process is that of the incidence of the *onus*. In *Booi v Minister of Safety and Security and Another*[10] the court held that the applicant bore the *onus* of proving that no criminal proceedings has been instituted as required by s. 31(1)(a) and that the time lapse between the seizure and the application for release was but one of the factors to be taken into account.

[9] 1991 (2) SACR 153 (D).
[10] 1995 (2) SACR 465 (O). See also *Dookie v Minister of Law and Order (supra).*

[38] In *Ngxongxela v Minister of Law and Order and Others*[11] the honourable judge held among others that –

> "*… delay may be explained: but even if there is no satisfactory explanation forthcoming, its effect may be discounted by proof that a prosecution is to be instituted in the immediate future …*"

[39] The next question is whether or not the applicant was spoliated. This cannot be especially when *Van der Merwe v Minister van Justisie en 'n Ander*[12] is anything to go by. The court put it as follows among others:

> "*As die ontneming van die besitter se besit egter regmatig geskied het, dan was daar nie spoliasie nie: Sien Judelman v Colonial Government (1909) 3 Buch AC 446 en 19 CTR 442; Sillo v Naude 1926 AD 21 op 26; Maleta en 'n Ander v Fourie 1975 (3) SA 999 (O) op 1002A, Malan v Dippenaar 1969(2) SA 59 (O) op 62H.*"

[40] In the light of what I have already said hereinbefore, I agree with the above finding of that court.

[41] The applicant is asking for a final relief in motion proceedings. Taking into account the nature of the relief claimed, the well known test in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[13] is applicable. This matter should be decided on the basis of –

[11] Unreported Case No 413/89 handed down on 5 October 1989 in the Eastern Cape Division.
[12] 1995 (2) SCR 471 (O). See also *Cine Films (Pty) Ltd and Others v Commissioner of Police and Others* 1971 (4) SA 574 (W).
[13] *Supra.*

> "*… those facts averred in the applicant's affidavit which have been admitted by the respondent together with the facts alleged by the respondent. This approach is to be followed even when the onus to prove any fact in issue rests with the respondent.*"[14]

[42] When the above test is applied, the applicant falls by the way-side.

[43] That the National Prosecuting Authority has a direct and substantial interest in this matter cannot be questioned. The initial charges against the applicant were provisionally withdrawn by the prosecution with specific purposes of conducting further investigations. The applicant's contention that he did not know of the Prosecuting Authority's interest cannot hold any water. The fact that a summons for the applicant to appear in court on 25 June 2014 only emerged on the day of the hearing of this application does not, in my view, derogate from the fact that the applicant knew of the prosecuting authority's involvement in this matter. As such, the latter's non-joinder constitutes a material misjonder.[15]

[44] When some of the previously provisionally withdrawn charges are considered, charges under the organised crime legislation and the drugs

---

[14] See also *Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235F-G; *Ngqumba en 'n Ander v Staatspresident en Andere* 1988 (4) SA 224 (A) at 262B.

[15] See *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd* 2004 (2) SA 535 (W); *Home Sites (Pty) Ltd v Senekal* 1948 (3) SA 514 (A); *Sheshe v Vereeniging Municipality* 1951 (3) SA 861 (A).

legislation are relevant. The principle of "*instrumentality to the commission of a crime*"[16] becomes an issue.

[45] Furthermore, in terms of the Drugs and Drug Trafficking Act 140 of 1992[17] any person found in possession of drugs exceeding a certain limit, dealing is presumed. The applicant was found in possession of 370,28 grams of methcathinone. Section 21(1)(a)(iii) states that in a prosecution, any person found in possession of any undesirable dependence producing substance shall be presumed until the contrary is proved, that that person dealt in such dependence producing substances.

CONCLUSION

[46] The fate of the articles and money seized by the police from the applicant lies in the hands of the court dealing with the criminal case. Such case is already in the pipe-line. At the start of the proceedings herein I suggested to the parties that this matter be postponed *sine die* to await the production and service of the charge sheet to or on the applicant. After taking instructions from his clients who were in court, counsel for the applicant insisted on arguing the release of the seized property.

[47] As is clear from the above, the applicant cannot succeed.

ORDER

[16] See sec. 38 of Prevention of Organised Crime Act 121 of 1998 among others.
[17]Section 21(1)(a)(iii).

[48] The following order is made:

"*The application is dismissed with costs*."

N F KGOMO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

FOR THE APPLICANT	:	ADV N FELGATE
INSTRUCTED BY	:	RANAMANE MAKUYA ATTORNEYS JOHANNESBURG TEL NO: 011 – 331 7283
FOR THE RESPONDENT	:	ADV DAWIE JOUBERT
INSTRUCTED BY	:	STATE ATTORNEY JOHANNESBURG TEL NO: 011 – 330 7655
DATE OF HEARING	:	02 JUNE 2014
DATE OF JUDGMENT	:	06 JUNE 2014