

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2023/049713

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED: YES/ NO (Date of revised version: August 2023)

7 June 2023

RM Heighley
JUDGE RM HEIGHTLEY

In the matter between:

IZIMPONDO ZE-AFRICA SECURITY SERVICES CC

First Applicant

VUSIZWE SECURITY & CLEANING SERVICES

Second Applicant

AND

THE MINISTER OF POLICE

First Respondent

THE STATION COMMANDER OF JHB SAPS CENTRAL

Second Respondent

Summary:

EX TEMPORE JUDGMENT

Keightley J:

Introduction

[1] This is an application brought in the urgent court for an order declaring the confiscation of the applicants' firearms, firearm magazines, licences and permit book unlawful and unconstitutional. They seek an order that the respondents be directed to restore to these items to the applicants', and they ask for costs. The respondents are the Minister of Police and the Station Commander of Johannesburg SAPS Central (the police).

[2] The first applicant in the matter is Izimpondo Ze Africa Security Services CC. The second applicant is Vusizwe Security and Cleaning Services. The deponent to the founding affidavit is the managing director or member of the first applicant. A confirmatory affidavit is filed by her counterpart representing the second applicant. A question was raised about the fact that the second applicant had not deposed to an affidavit authorising the first applicant to depose on his behalf. In the circumstances of this case, where the two applicants shared offices and employees etcetera, it seems to that this is an overly technical point to take. Clearly the second applicant is fully aware of the application and supports it, as is confirmed by the confirmatory affidavit.

[3] The facts of the matter in brief are that on 26 April certain customs officials assisted by the police conducted a raid on the premises where the applicants have their offices. They are security companies. They have contracts which require them to place armed guards at their clients' premises. One contract as an example is attached to the founding affidavit, and this is not placed in material dispute.

[4] The applicants issue the firearms to the guards in their employ when they go on duty. Otherwise, the firearms are kept in a safe on the premises. The applicant's offices are on the 12th floor of the building. The building houses, it is not disputed, shops and storage space on other floors of the building which are in possession of other tenants.

[5] On the day in question the police came into the applicants' offices. They, amongst other things, seized all the firearms in the offices of the applicants. They seized the permits, the licences for the firearms, they seized ammunition, and they seized the firearms registration book. That was on 26 April. Despite requests by the applicant for these items to be released, the police have refused.

[6] That was not the only thing that happened on that day. The deponent to the founding affidavit, Ms Ndlovu was also arrested. She was charged with illegal possession of firearms.

[7] The next day was 27 April, which was a public holiday. On 28 April a certificate of nolle prosequi was issued by the Deputy Director of Prosecutions in the prosecutor's office, and that was the end of the charges against Ms Ndlovu. Notwithstanding this, the police have not released the firearms and the other related equipment and items that were taken at the time.

[8] A request for the items to be released was first made to the police on 10 May. The police did not accede to the request. As a result, the applicants brought this urgent application just short of a month after the seizure, and it was placed on the roll for hearing on Tuesday this week.

[9] The matter did not proceed on Tuesday. On Wednesday morning an answering affidavit was filed by the police, and the applicants filed a short reply.

[10] What the applicants seek is an interdict in final form securing the release of their firearms. They say that they have a clear right amongst other things to privacy under the Constitution, and one of the rights which is guaranteed in that section of the Constitution is protection from having property seized.

[11] The applicants accept that there may be circumstances in which the police are lawfully authorised to seize property connected or reasonably apprehended to be connected to criminal activity. That is in terms of section 20 of the Criminal Procedure Act which permits both search and seizure.

[12] The applicant's case is that the conduct of the respondents on that day and the seizure of the property, was not lawful. It did not fall within the confines of the police's lawful powers.

[13] Let me start with the issue of urgency because the respondents have taken issue with it. The applicants submit that there are certain critical reasons why this matter is urgent. Firstly, the applicants are in danger of losing their contracts with their clients in that unless

the firearms and licences are released, they will not be able to comply with their contractual obligations to supply armed guards to their customers. Secondly, should they fail to comply with this obligation they may be held liable for damages to their clients arising out of the breach of their obligation to have armed guards present as part of their undertaking to provide the agreed level of security services.

[14] The applicants point out that they have tried to obtain redress in other ways, and this has come to nothing.

[15] The respondents suggested that by waiting for approximately a month to institute proceedings, the applicants delayed. One must remember that Miss Ndlovu was only released from custody on 29 April. The founding papers were signed and in fact uploaded onto caselines on 25 May. I understand service at the state attorney was on 26 May. So that is about 4 weeks.

[16] The applicants explained to the Court that they had a shortage of funds and that it took them a while to secure the services of attorneys. They then sent letters of demand hoping to avoid having to come to court, but unfortunately that did not meet with any success.

[17] It is well known, as stated in the case of *East Rock Trading 7*, that while an applicant in urgent proceedings is required to explain their delay, the Court must always have an eye open to the question of whether, if the matter is not heard urgently, the applicant will be able to obtain substantial redress if it were heard in the ordinary opposed motion court. In this case there is clear urgency. These are tools of the applicant's trade. They clearly stand to suffer the prejudice to their business and their employees if this matter is not heard urgently. I am satisfied that there was not any undue delay.

[18] The applicants did not seek to come to Court on an extremely urgent basis. They filed their papers on the 25th, served them on the 26th. They gave the respondents attorney until 30 May to deliver any notice of intention to oppose, and to file their answering affidavits on 2 June. In my view this was an appropriate degree of urgency that was elected by the applicants, and they cannot be faulted there. I find the matter is urgent, and there has been no breach of the applicants' obligations to comply with the practice directive in terms of the degree of urgency and the explanation for why the matter is urgent.

[19] I proceed then to the merits. I have already explained what the applicants say is their clear right. It is not disputed that they are the owners of the firearms, or that they are the holders of the permits. It would seem to me that a clear right is established. They are protected from unlawful seizure and search, and that of course goes hand in hand with their rights of ownership in their property.

[20] The respondents submitted that the applicants were not specific enough on what their clear right is in their founding affidavit. It is pure common sense that if your ownership in firearms and holding of permits is not contested, that is a very clear right. You do not have to spell it out in chapter and verse in your founding affidavit.

[21] I think in terms of the harm and the ongoing harm, that has been established. The applicants cannot conduct their business, cannot fulfil their contracts to their clients, unless their firearms are released. And they really do not have an alternative remedy. And so, it seems to me to be obvious that not only are they entitled to say that they want their firearms back, but there is no other remedy that they can possibly have. They would have to buy new ammunition and firearms and obtain permits in order to continue to provide the services to their clients. And that simply is not a practical solution to their problem.

[22] The only issue one needs to consider is whether the respondents have a defence on the basis that they were acting under lawful authority. The respondents are a little bit shy as to what lawful authority they have. But we do know from the answering affidavit that they rely on a search and seizure warrant that was issued in the Johannesburg Central Magistrate's Court. It was a search and seizure warrant in terms of section 4(4)(a) and section 4(4)(d) of the Customs and Excise Act 91 of 1964. The search and seizure warrant was issued in connection with a raid that was to be conducted by members of customs and excise, assisted by members of the SAPS.

[23] The search and seizure warrant was based on the issuing magistrate's conclusion that there were reasonable grounds to suspect that an offence in terms of the Customs Act had been committed, and that the search of the premises was likely to yield the uncovering of illegally manufactured imported stored and or smuggled illicit goods and products; that the search was reasonably necessary to enforce the purposes of the Customs and Excise Act, and that the right to gain access to the premises is necessary to combat these contraventions.

[24] Now what the respondents say is that while they were conducting this search, they came across the applicants' firearms in the office and in the safe and on their guards' persons. According to the respondent "a large quantity" of illegal counterfeit goods were found. However, it is never alleged that the applicants had any of those goods in their possession. Nor was Ms Ndlovu arrested on charges relating to counterfeit goods. That they found counterfeit goods elsewhere on the premises has got nothing to do with what happened in the offices of the applicants.

[25] The respondents say the firearms were locked in safes and that the applicants contravened regulation 86(4)(a) of the Firearms Control Regulations, because Miss Ndlovu states that the director of the 2nd applicant provided her with an appointment letter in the absence of Mr Tulu, who is associated with the 2nd applicant. However, this contention seems to be clearly based on the wording of the Ms Ndlovu's affidavit filed in these proceedings. It is something that has been added in hindsight, and not something that happened on the day in question. It does not provide the respondents with a lawful reason to refuse to release the applicants' property.

[26] The respondents go on to say in their answering affidavit that:

"Miss Ndlovu was in charge of the premises. Some firearms did not belong to the 1ST applicant. And licences of some firearms had expired. I found that Miss Ndlovu booked out firearms to security guards for a period of 2 weeks. By law a firearm can be booked out for 12 hours at a time. The firearms which I and other members confiscated have been taken for ballistic testing."

There is no indication of what crimes they might have been connected to. They go on to say:

"The applicants operated illegally in contravention of the Private Security Industry Regulation Act because their certificates were valid until 7 April 2023."

In addition, the respondents take issue with the registered address of the applicants, and that aver that they were trading illegally. That is the explanation that we have for why they are holding onto the applicants' property. They also say that they are continuing to conduct investigations, and the docket is still open.

[27] Well quite frankly none of this warrants the seizure of the firearms. We do not know which of the firearms did not have permits. The applicants in reply concede that there were three firearms in respect of which the permits had expired. Those were in the safe, and the applicants explain that as long as they are in a safe they do not have to be surrendered to the police. They aver that they are awaiting the new permits for the firearms. In my view, this was not a reason to seize the firearms. Furthermore, it is no reason to refuse to release them.

[28] There is absolutely no evidence that Miss Ndlovu booked out firearms to security guards for a period of 2 weeks. The police are not involved in this business; they do not say how they know this. One cannot avoid the inference that perhaps in preparation for this affidavit they looked at the firearms register that they have got in their possession, and added something along these lines. But there is no evidence to support this. And in any event even if they had, where is the offence? And the reasonable apprehension that these are related to offences?

[29] As to the averment that they are operating illegally because their certificates had expired. The applicants point out in reply that this does not make the operations illegal. You apply for a new one, and that is what they were awaiting at the time.

[30] So, none of this quite frankly provided the police with a jot of lawful authority, under a search warrant for counterfeit goods, to go into an office of a security company and to go straight for the firearms safe and the permits, to seize them and to refuse to release them even when no charges have been pressed against Ms Ndlovu.

[31] It is really difficult to avoid the suspicion that this was underhand activity on the part of the police. And I say this because counsel for the applicants provided to me and to his learned friend with a judgment previously handed down in this Division. In defence of counsel for the respondents, he indicated to the court that he was not aware of this judgment when he consulted with his clients earlier today.

[32] On 4 October 2019 my brother the learned Adams J gave a judgment where, in spoliation proceedings, involving the same parties, he ordered the police to hand back firearms and the associated items, which had been seized in virtually identical circumstances to those precipitating today's proceedings. I do not know if there was a

counterfeit goods search and seizure. But Miss Ndlovu was also arrested in that case, and again was released without charge. As in the present matter, the police thereafter refused to release the firearms, ammunition, and associated items.

[33] I do not have to find this to have been proved, but the suspicion is there that the police are targeting the applicants for whatever reason. Police should not abuse their powers. This Court unfortunately sits in countless civil trials where people are suing the police, because they have been wrongfully arrested. And the difficulty is that it is the taxpayers, that is all of us sitting here, who have to end up paying damages in these matters.

[34] I am very concerned that this seems to be a pattern, and that the applicants seem to be targeted. If the police have a reasonable apprehension that the applicants are involved in proper unlawful and criminal activity of any sort, they are not powerless to exercise their power, in fact their duty, to investigate. But they are not achieving that end by exceeding the powers of a search and seizure warrant. And then keeping hold of what they seized beyond when the items were genuinely needed. This is particularly so in circumstances where prosecutor declined to proceed with the charges against Ms Ndlovu.

[35] I find that the applicant has made out a very clear case for the relief they seek.

[36] As to the question of costs, although it was not included in the order sought, the applicants made it very clear in the founding affidavit that they would seek costs on an attorney and client basis. I have heard the respondents' submission that this would unfairly burden the taxpayer. Unfortunately, in this case, we must all carry that burden. The police clearly overreached their powers, and it was a repeated overreach in respect of the same applicants. For this reason, I can come to no other conclusion but that attorney and client costs are warranted.

Accordingly, an order in the following terms is made:

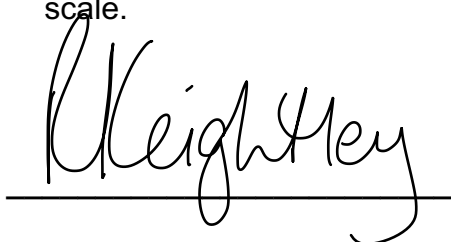
1. The Applicants are granted leave to move this application as one of urgency;
2. The seizure of the Applicants' fire arms, fire arm magazines, ammunition, fire arms licenses and permit book is unlawful;
3. The Respondents shall return to the Applicants' possession all the fire arms, fire arms magazines, ammunition, licenses and permit books which they seized on the 26th

April 2023 from the business premises of the applicant at 1201 Corner Jeppe and Delvers Street, Medical Centre Office no: 201, Johannesburg, no later than the 13th June 2023;

4. The fire arms with serial numbers and type which must be returned to the Applicant are listed hereunder:

- 4.1 T6368-AV25488 Handgun
- 4.2 T6368-AV25489 Handgun
- 4.3 T1102-16G06675 Handgun
- 4.4 T1102-16E851 Handgun
- 4.5 1626779 Handgun
- 4.6 628102 Shotgun
- 4.7 628103 Shotgun
- 4.8 628104 Shotgun
- 4.9 628105 Shotgun
- 4.10 3610256 Rifle
- 4.11 3622039 Rifle
- 4.12 BA232944 Handgun
- 4.13 59101195 Handgun
- 4.14 48201035 Handgun
- 4.15 59101342 Handgun

5. The First Respondent shall pay the costs of this application on an attorney and client scale.

A handwritten signature in black ink, appearing to read 'R. Keightley', is written over a horizontal line.

R M KEIGHTLEY

JUDGE OF THE HIGH COURT

Delivered: This judgment was delivered *ex tempore* on the record on 7 June 2023.

A revised version of the transcript that was captured from the record was provided to the parties and uploaded onto Case Lines on 01 AUGUST 2023

APPEARANCES

COUNSEL FOR THE APPLICANT	B MATHEBULA
APPLICANTS' ATTORNEYS	B MATHEBULA INC
COUNSEL FOR THE RESPONDENTS	ADVOCATE D MAKHUBELE
RESPONDENTS' ATTORNEYS	THE STATE ATTORNEY

DATE OF HEARING: 07 June 2023

DATE OF JUDGMENT: 07 June 2023