

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION : MTHATHA

CASE NO: 2746/2018

BATABO TSEGEYA

Applicant

and

MINISTER OF POLICE

1st Respondent

THE STATION COMMISSIONER,

CENTRAL POLICE STATION : MTHATHA

2nd Respondent

JUDGMENT

GRIFFITHS, J

[1] The applicant seeks an order in the following terms:

“1. That the applicant be granted leave to bring this application as one of urgency in terms of Rule 6(12)(a) and (b) of the Uniform Rules of this Honourable Court and that the forms and services provided for in the rules of this Honourable Court be dispensed with.

2. That the search and seizure of the applicant’s stock (stock listed at annexure BT 7) at Mthatha Police Club which consists of perishable food, intoxicating beverages and soft drinks be declared unconstitutional and unlawful.

3. That the second respondent be directed to release the stock to the applicant forthwith;

4. That the members of the first and second respondents be interdicted from further unlawfully interfering with the applicant’s business at Mthatha Police Club;

5. That the respondents be directed to pay costs of the application on attorney and own client scale jointly and severally, the one paying the other to be absolved from liability.”

[2] The application has been opposed by the respondents.

[3] The applicant’s cause of action appears to have been based on the *mandament van spolie*. As may be noted, the applicant did not content himself solely with reliance on this possessory remedy but also sought a declaratory order as to the wrongfulness of the seizure together with an interdict restraining further unlawful interference with the applicant’s business.

[4] The application had its genesis in a visit by one Colonel Naidoo, the station commander of the Mthatha Central Police Station on 8 June 2018 to what has been referred to as the “Mthatha Police Club”. It is common cause that during the course of this visit Colonel Naidoo seized a quantity of liquor, an inventory of which is attached to the founding affidavit. This liquor was seized, as alleged by Naidoo, because it was being sold illegally in contravention of the Eastern Cape Liquor Act¹ (“the Liquor Act”). Thereafter, by way of letter dated 11 June 2018 the applicant’s attorneys demanded return of the liquor on the basis, *inter alia*, that the applicant had been in undisturbed possession thereof until he was unlawfully dispossessed by the police. No response was forthcoming to this and the application was launched as a matter of urgency on 18 June 2018.

[5] The applicant’s case is that he is, what is referred to as, the caretaker of the Mthatha Police Club. He holds this position by virtue of a written agreement (dated 5 July 2017) appointing him as such for a period of five years. He has further contended that the club, and indeed he himself, are entitled to lawfully sell liquor by virtue of an authorization issued by the Ministry for Safety and Security on 17 August 1999. This authorization reads as follows:

“I VINCENT JOSEPH MATTHEWS, Minister for Safety and Security hereby grant authority, under the Liquor Act, 1989 (Act No 27 of 1989), Section 3 (1) (g), for liquor to be sold on the premises situated at Vukazana Street, Police Camp, Umtata to members of the Service and their bona fide guests, for consumption on these premises.”

¹ No. 10 of 2003.

[6] When the club was invaded by the police on 8 June 2018 they, according to the applicant, unlawfully searched his premises, unlawfully seized his liquor stock and unlawfully arrested him and his family members on a charge of selling liquor without a license. When this occurred, he informed the police that he had been operating in terms of the aforementioned authority and was thus exempt from the requirements of a liquor license. He furthermore produced certain judgments of this Court relating to previous search and seizure operations which spawned applications of a similar nature to this and in which he had been successful.

[7] The response by the respondents was that, whilst they admitted the search, seizure and arrests, these were all done within the ambit of the law and, more particularly, the provisions of Criminal Procedure Act² relating to search, seizure and arrest. In this regard, Colonel Naidoo³ stated that whilst on general patrol he lawfully attended upon the premises having been attracted thereto by the loud noise levels in and around the club area. He accordingly entered the club where he found people in and about such premises consuming alcohol. It appeared to him that the premises were being used as a tavern and were also illegally operating as an off sales outlet. Present were general members of the public and members of the South African Police Service.

[8] Whilst inside he witnessed the ongoing sale of liquor as against payment of money to employees of the Iapplicant. As a consequence, Colonel Naidoo (who is also a duly appointed liquor licence inspector in terms of section 46 of the Liquor Act) requested that such employees produce a liquor licence. None was forthcoming. It was however contended by such employees that the

² No. 51 of 1977.

³ The deponent to the Answering Affidavit.

applicant was entitled to sell liquor from the premises by virtue of the authorization quoted above. Colonel Naidoo, upon being shown such documentation, formed the view that such was outdated and irrelevant and sought from one Vikilahle (one of applicant's employees) permission to inspect the premises. Such permission was granted and on completion thereof, Colonel Naidoo informed Vikilahle that such sale of liquor in the absence of a valid liquor licence was illegal, and he accordingly seized the liquor.

[9] Before he could complete such seizure, the applicant arrived from a nearby room and admitted to being in charge of the premises. He too could not produce a valid liquor licence as a result of which the Colonel informed him that he was entitled to arrest both the applicant and Vikilahle in terms of the Criminal Procedure Act and that he was entitled to seize the liquor.

[10] Colonel Naidoo furthermore maintained that the Mthatha Police Club had become defunct in 2010 and was no longer operative. As regards the written lease put up as an annexure to the papers, he contended that as the club had clearly stopped operating many years before, it was most improbable that there was any validity whatsoever to this lease and indeed challenged the applicant to produce evidence thereof in reply

. This was not done.

[11] The respondent raised certain points *in limine* which, because of the view I take on the merits, it is not necessary for me to deal with.

[12] It is the applicant's contention that he was, at the time of the seizure, exempt from selling liquor without a licence by virtue of the aforementioned authority and that such authority remains valid and has not been set aside by a court of law. In contrast, the respondents contend that the exemption is invalid, outdated and irrelevant.

[13] With regard to the question of the return of the liquor, the crisp question which, in my view, arises from this is as to whether or not Colonel Naidoo was lawfully entitled to search and seize the liquor stock in question. If he indeed was, then it cannot be said that the applicant has established the second requirement of the *mandament van spolie*, namely, that he was wrongfully deprived of his possession of the liquor against his wish.

Mandament van spolie

[14] Before dealing therewith, it is necessary to briefly set out the law relating to the *mandament van spolie* insofar as it is applicable to this matter. This is succinctly summarized in the following passage taken from *Scoop Industries (Pty) Ltd v Langlaagte Estate and GM Co Ltd*⁴:

“Two factors are requisite to found a claim for an order for restitution of possession on an allegation of spoliation. The first is that applicant was in possession and, the second, that he has been wrongfully deprived of that possession and against his wish. It has been laid down that there must be clear proof of possession and of the illicit deprivation before an order should be granted... It must be shown that

⁴ 1948 (1) SA 91 (W).

the applicant had had free and undisturbed possession... When it is shown that there was such possession, which is possession in physical fact and not in the juridical sense, and there has been such deprivation, the applicant has a right to be restored in possession *ante omnia*.”⁵

[15] The question as to who bears the onus of proving spoliation was settled in the case of *Yeko v Qana*⁶:

“In order to obtain a spoliation order the *onus* is on the applicant to prove the required possession, and that he was unlawfully deprived of such possession.”⁷

[16] Should an applicant relying on the *mandament* fail to establish that the dispossession was unlawful, he would be non-suited:

“As die ontneming van die besitter se besit egter regmatig geskiet het, dan was daar nie spoliassie nie: sien *Judelman v Colonial Government* (1909) 3 Buch AC 446 en 19 CTR 442; *Sillo v Naude* 1926 AD 21 op 26; *Moleta en n’ Ander v Fourie* 1975 (3) SA 999 (O) op 1002A; *Malan v Dippenaar* 1969 (2) SA 59 (O) op 62H.”⁸

Disputes of fact

⁵ Ibid at pages 98 – 99.

⁶ 1973 (4) SA 735 (A).

⁷ Ibid at page 739E.

⁸ *Van der Merwe v Minister van Justisie en ‘n Ander* 1995 (2) SACR 471 (O) at p 489 B – D. See also generally with regard to the *mandament Van spolie*; *Ngqukumba v Minister of Safety and Security and Others* 2014 (2) SACR 325 (CC) paragraphs 10 – 14.

[17] At the outset of the argument in this matter Mr. Notyesi, who appeared on behalf of the applicant, accepted that I must decide the question of lawfulness of the seizure on the basis as set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*⁹ where Corbett JA stated:

“It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact (see in this regard *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*, 1949 (3) SA 1155 (T), at pp 1163-5; *Da Mata v Otto, NO*, 1972 (3) SA 858 (A), at p 882 D - H).

If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court (*cf. Petersen v Cuthbert & Co Ltd* 1945 AD 420, at p 428; *Room Hire* case, *supra*, at p 1164) and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg. *Rikhoto v East Rand Administration Board and Another*, 1983 (4) SA 278 (W), at p 283 E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the

⁹ 1984 (3) SA 623 (A).

papers (see the remarks of Botha AJA in the *Associated South_African Bakeries* case, *supra*, at p 924 A).”¹⁰

[18] In my view this concession was properly made particularly because there are a number of disputes of fact on the papers relating to pertinent questions such as whether or not consent was granted and the validity of the exemption relied on by the applicant.

Was the seizure lawful?

[19] The respondents have justified the seizure of the items in question by Colonel Naidoo, *inter alia*, by reliance on the provisions of section 20 as read with section 22 of the Criminal Procedure Act. Section 20 reads as follows:

“20 State may seize certain articles

The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article)-

(a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere;

(b) which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or

¹⁰ Ibid at pages 634 – 5.

(c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.”

[20] Section 21 of the Act requires such search and seizure to be performed under a valid search warrant. Section 22 provides a peace officer with the right to search and seize without a warrant in certain circumstances as follows:

“22 Circumstances in which article may be seized without search warrant

A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20-

(a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or

(b) if he on reasonable grounds believes-

(i) that a search warrant will be issued to him under paragraph (a) of section 21 (1) if he applies for such warrant; and

(ii) that the delay in obtaining such warrant would defeat the object of the search.”

[21] In alleging that the search and seizure was lawful the respondents rely on three separate contentions; firstly, they contend that the goods were seized as a consequence of the consent given by Vikilahle; secondly, and if such consent is

found for one reason or another to be wanting, they rely on Colonel Naidoo's evidence to the effect that the liquor in question was concerned in or was on reasonable grounds believed to be concerned in the commission or suspected commission of the offence of sale of liquor without a licence and, thirdly, if the consent was not valid they justify the failure to obtain a warrant on the basis that a search warrant would have been issued, but the delay would have defeated the object of the search.

[22] Mr. Notyesi has argued, *inter alia*, that irrespective of any possible consent which might have subsequently been given, Colonel Naidoo simply did not have the right to commence the inspection and search the premises because no warrant would have been issued in any event. In this regard, his contention is that Colonel Naidoo, when he heard a noise emanating from the premises, could never have had a reasonable belief that an offence was being committed. For this contention he has relied upon the case of *Magobodi v Minister of Safety and Security and Another*¹¹ where Miller J found that the police concerned in that matter (where search and seizure was conducted without a warrant) were not justified in their actions by virtue of the fact that they had searched a series of vehicles without any belief whatsoever that the occupants or indeed the vehicles concerned were involved in any form of offence, or that the vehicles might afford evidence of the commission or suspected commission of an offence, or that they were intended to be used in the commission of an offence. In that matter, the police had moved down the street going from one parked vehicle to another asking for permission to search each vehicle by inspecting its engine. They were, as Miller J put it “...on a fishing expedition.”¹²

¹¹ 2009 (1) SACR 355 (Tk).

¹² Ibid at paragraph 10.

[23] Colonel Naidoo's version in this matter is vastly different. When he was alerted to the noise, he entered the premises which he was legally entitled to do. Whilst on the premises he observed the various actions of the patrons and the employees of the applicant which indicated that liquor was being sold not only for consumption on the premises but also in the nature of an off sales. These actions, in the absence of a valid liquor licence, would clearly have amounted to an offence being committed in his presence, or at least a reasonable suspicion thereof.

[24] When such employees were asked to produce a licence, the alleged authorization was shown to him. As a liquor licence inspector and an officer in the police service, he was fully aware of the legal situation relating to such an authorization. He was, accordingly, fully aware that, firstly, the authorizations attached to the club and that the club had become defunct some years before. Secondly, he was aware that the applicable Liquor Act (which came into being on 13 May 2004) provided as part of its transitional arrangements that such an authorization or exemption would remain valid for a period of five years subsequent to the commencement of that Act¹³. On these two bases alone, tested objectively, Colonel Naidoo must have formed what could only have been a reasonable suspicion or belief that such authorization under colour of which the applicant maintained he was entitled to sell liquor, was no longer valid. In my view, therefore, Mr. Notyesi's submission in this regard carries no weight.

[25] As regards the question of consent, there is little doubt on Colonel Naidoo's evidence that such consent was indeed granted by Vikilahle who indicated to him that she was in charge of the premises. Not only did she

¹³ Liquor Act (note 1 above) section 71 (2) as a read with the schedule thereto.

indicate this to him, but her actions as described by Naidoo clearly substantiated this in that she took over the discussion with Naidoo from another employee whom he had first approached, and ordered the patrons to leave the premises. Naidoo clearly explained to Vikilahle the purpose of his visit and the difficulty he had with the alleged validity of the authorizations produced by her. In all the circumstances, I am satisfied that Colonel Naidoo had received a valid consent from Vikilahle, an employee of the applicant who was clearly in charge of the premises at the time, for the search and seizure.

[26] Even, however, if I may be wrong in this approach, it seems to me that Colonel Naidoo had, at the very least, reasonable grounds to believe that the liquor was indeed being sold illegally. On this basis, had Naidoo applied for a warrant there seems little doubt that he would have obtained one. Furthermore, Naidoo gave extensive evidence as to his reasoning for believing that any delay in pursuing such a warrant would have defeated the very purpose of obtaining it. In my view, his reasoning is not subject to criticism and satisfies the criteria set out in section 22(b) of the Act.

[27] Finally in this regard, I should mention that Mr. Notyesi has submitted that certain earlier judgments delivered by this Court relating to seizure of liquor at the club premises during August 2013 disposed of most of the issues raised in this matter. Without precise reference thereto, it seems that he was raising a question of issue estoppel. In my view there is no basis for this submission. The judgments concerned were those of the court *a quo*, which upheld an application based on the *mandament van spolie*, and a full bench decision which, in turn, upheld the decision of the lower court. A reading of those judgments however (the files not having been placed before me) makes it

clear that the facts were entirely different and in particular the facts relied on by the respondents, being the same respondents as in this matter. Furthermore, the legal arguments differed and no reliance was placed by those respondents on the provisions of the Criminal Procedure Act.

[28] In all the circumstances I am satisfied that the actions of Colonel Naidoo fell within the purview of the relevant sections of the Act and were, on his version, justified. Accordingly, the applicant has not established that he was wrongfully deprived of his possession of the liquor and his quest for the return thereof cannot succeed. Prayers one, three and four must therefore be dismissed.

The declaratory order

[29] In prayer two of the notice of motion the applicant seeks a declaratory order to the effect that the search and seizure was unlawful. It seems to me, by parity of reasoning, that this is likewise doomed to failure.

[30] In this regard, however, there are further compelling reasons as to why the court should not consider granting the same. It is clear that the sale of liquor without a valid license to do so is illegal¹⁴. As set out earlier, the offence in issue was perpetrated in the presence of a peace officer. Accordingly, not only was Colonel Naidoo entitled to arrest the suspects, he was also entitled to seize the liquor and keep it as an exhibit in terms of sections 30 and 31 of the Criminal Procedure Act for the pending criminal trial against the applicant. In

¹⁴ Ibid section 59 (1) (a).

this regard, it was said in *Mngomezulu and Another v National Director of Public Prosecutions*¹⁵:

“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: see e.g. *Attorney-General of Natal v Johnstone and Co Ltd* 1946 AD 256; *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another* 1959 (3) SA 113 (A)”¹⁶

[31] In the *Wahlhaus*¹⁷ matter the following was also stated:

“The appellants are alleged to have committed a crime. The normal method of determining the correctness, or otherwise, of that allegation is by way of the full investigation of a criminal trial.”¹⁸

[32] Accordingly, the applicant has not made out a case for the grant of a declaratory order.

Costs

[33] Mr. Joubert, who appeared together with Mr. Bodlani on behalf of the respondents, has submitted that these proceedings amounted to an abuse of the process of the court and were frivolous and vexatious. Whilst I accept that there

¹⁵ 2008 (1) SACR 105 (SCA).

¹⁶ Ibid at paragraph 12.

¹⁷ *Wahlhaus and Other v Additional Magistrate, Johannesburg and Another* 1959 (3) SA 113(A).

¹⁸ Ibid at page 119.

may well be some merit in this submission, one must accept that the final say will be made in the criminal court in this regard after hearing *viva voce* evidence. In the circumstances, I am not prepared to grant a costs order on the attorney and client basis, as sought by the respondents. However it is clear that there is sufficient merit in the submission that the use of two counsel by the respondents was warranted.

[34] In all the circumstances:

The application is dismissed with costs, such costs to include the costs of two counsel.

R E GRIFFITHS

JUDGE OF THE HIGH COURT

ATTORNEY FOR APPLICANT	:	Mr Notyesi
INSTRUCTED BY	:	Mvuzo Notyesi Inc.
COUNSEL FOR RESPONDENTS	:	Mr Joubert SC with
	:	Mr Bodlani
INSTRUCTED BY	:	State Attorney

HEARD ON : 02 AUGUST 2018

DELIVERED ON : 21 AUGUST 2018