

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE No. 5475/2016

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE <u>20.4.2017</u> SIGNATURE: <u>[Signature]</u>	

In the matter between:

**THE INTERNET LOUNGE SCHOEMAN
(PTY) LTD (REG NO: 2016/059578/07):**

APPLICANT

And

THE MINISTER OF SAPS N.O:

1ST RESPONDENT

**THE PROVINCIAL COMMISSIONERSAPS,
LIMPOPO PROVINCE N. N.O:**

2ND RESPONDENT

**DETECTIVE SERGEANT M. S.
RAMOROKA N.O:**

3RD RESPONDENT

THE MAGISTRATE: POLOKWANE N.O:

4TH RESPONDENT

**THE CHAIRPERSON LIMPOPO
GAMBLING BOARD N.O:**

5TH RESPONDENT

JUDGEMENT

SEMENYA J

1. This application was initially placed on an urgent roll on the 28th of November 2016. It was removed from that roll and placed on the normal roll on the 27th of February 2017.
2. The applicant seeks the following orders:
 - 2.1. Reconsideration of the warrant issued by the fourth respondent on the 7th of November 2016 in respect of the applicants business situated at Limpopo Internet Entertainment Lounge, no. 53C Schoeman Street, Polokwane, and Limpopo Province and executed on 8 November 2016.
 - 2.2. Setting aside/declaring as invalid the search warrant issued by the fourth respondent.
 - 2.3. Directing and ordering the third respondent and any other respondent who is in possession of all the applicant's movable goods and monies, to forthwith restore possession of the movable goods that were removed by SAPS representatives, who were

under the control of the third respondent from the applicants' business premises.

3. The facts that led to the application are that on the 5th of September 2016 the third respondent received a statement under oath from a member of the Limpopo Gambling Board one Inspector TE Mathotse (Ins Mothotse). In the said statement, Ins Mathotse complained that he had visited the applicant's premises in which he suspected that online/interactive gambling activities were taking place and made available to members of the public without a licence.
4. This suspicion made Ins Mathotse to enquire from a cashier about the type of business they were conducting and was informed that they offer gambling games to their customers. The cashier further explained how the said gambling is conducted. Ins Mathotse was further informed that the customer has the potential of winning up to twenty thousand Rand.
5. After opening an enquiry as per Polokwane Enquiry 03/09/2016 for purposes of further investigations, the third respondent proceeded to the applicants premises to verify the allegations made by Ins Mathotse.

6. Inside the applicants' premises, the third respondent observed that the place resembled a casino with members of the public seated behind computers. She stood next to a woman who had her finger on a bet button with the screen in front of her reflecting credits which increased and decreased. She concluded that further investigations are necessary.
7. An undercover operation, conducted in terms of section 252A of the Criminal Procedure Act 51 of 1977 (the Act) was set up with the authorization of the Director of Public Prosecutions, North Gauteng on the 12th of September 2016. The said operations were held on the 16th September 2016.
8. Warrant Officer Karabo Brian Mocheko, who was used as a trapping agent, proceeded to the applicants' premises where he used the money that was given to him to gamble. He loaded 10 000 credits that was given to him by the cashier at a price of R100-00 to gamble on one of the computers. He however lost all of the credits.
9. With this information at his disposal, as well as one already received from Ins Mathotse, third respondent made a statement under oath and approached the fourth respondent with an application for a search and

seizure warrant. The warrant was intended to be used at the applicant's premises.

10. Included in the search and seizure warrant subsequently granted by the fourth respondent is a list of 19 statutory offences which appeared to the fourth respondent that there are reasonable grounds for believing they have been committed on the 16 September 2016 and are being committed at the applicant's premises. In addition to stating the statutory provisions (contravention of certain sections of the Limpopo Gambling Act 3 of 2013, the National Gambling Act 7 of 2004 and Prevention of Organized Crime Act 121 of 1998) of the offences believed to have been so committed, the warrant further states a brief description, in words, of such offences.
11. Attached to the warrant in the form of Annexure "B," is a list of articles said to be capable of seizure from the applicant's premises. It is stated in the warrant that the said articles are concerned and may afford evidence to be used in the commission or suspected commission of offences listed therein.
12. Due to the nature of the argument in support of the application, it is necessary to mention the list of articles included in Annexure "B" of the statement of third respondent and it is as follows:

- i. All information system as defined in section 1 of the Electronic Communication and Transaction Act No. 25 of 2002 (ETC), including data and data messages stored thereon. The information system include computers, cellular telephones, flash drives, "usb" devices, compact discs and digital photographs and /or video discs or cards and routers.
- ii. All documents and registers, including financial records, books, receipts, pay-outs/winnings/losses, employee records & banking information.
- iii. All cash registers.
- iv. All cash pertaining to business activities
- v. All safes on the premises
- vi. Camera/s or surveillance equipment (CCTC) and footage.

13. The fourth respondent further authorized third respondent and other police officers whose names are included in Annexure "C" attached to the search and seizure warrant to enter and search the premises and any person found therein and through any data messages and examination thereof.

14. In the answering affidavit filed on behalf of first, second and third respondents it is stated that there is a huge sign above the entrance that declares that people under the age of 18 years are not allowed on the premises. The inside is covered with a cloud of darkness. There is no copier, fax machine or working printers which are normally found in an internet café. The respondents state that the search and seizure warrant is valid. It is important to note that these facts were not before the fourth respondent at the time she authorized the warrant and are therefore irrelevant.

15. It is common cause that the issues to be decided upon in this application are whether the search and seizure warrant is overboard and unintelligible as submitted by the applicant. The court is tasked to further determine whether the fourth respondent has applied her mind to the facts or has just rubber-stamped the application for a search and seizure warrant.

16. The fact that there is no licensed internet gambling in South Africa is not disputed. This court is in any event not tasked to determine whether illegal gambling did take place or not at the applicant's premises.

17. The search and seizer warrants was authorized in terms of section 21 read with section 20 and relevant sections of the Criminal Procedure Act 51 of 1977 which provide 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
- (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.

21 Articles to be seized under search warrant

- (1) Subject to the provisions of section 22, 24, and 25, an article referred to in section 20 shall be seized only by virtue of a search warrant issued –
 - (a) By a magistrate or justice if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or upon any person or upon or at any premises within his area of jurisdiction; or
 - (b) By a judge or judicial officer presiding at criminal proceedings, if it appears to such judge or judicial officer presiding at criminal proceedings, if it appears to such judge or judicial officer that any such

article in the possession or under the control of any person or upon or at any premises is required in evidence at such proceedings.”

18. In **Minister of Safety and Security v van der Merwe and Others** (CCT90/10) [2011] ZACC 19 (van der Merwe) at paragraph 10 under the heading “An overview of the search and seizer warrants” Mogoeng J as he then was stated that-

“... the section requires that the decision to issue a warrant be made only if the affidavit in support of the application contains the following objective jurisdictional facts: (i) the existence of a reasonable suspicion that a crime has been committed and (ii) the existence of reasonable grounds to believe that objects connected with the offence may be found on the premises or persons intended to be searched...”

19. The applicant contended that the court should approach the matter from the premise that the fourth respondent has stated as a matter of fact and not as a suspicion that the offences listed in the warrant were committed on the 16 September 2016. It was argued on behalf of the applicant that had the fourth respondent applied her mind to the statement served before her, she would have realized that no offence was committed on the 16 September 2016.

20. The applicant's contention is made on the basis that nowhere in the statement does it appear that any of the applicant's employees informed W/O Mocheko (the section 252A of the Act agent) that he may win cash or that he was actually paid out any cash. This contention loses sight of the fact that the fourth respondent relied on the statement made under oath by Detective Sergeant Ramoroka and not that of W.O Mocheko. The argument made by the respondent that the warrant should not be read in isolation as all the evidence presented to the fourth respondent forms part of the warrant itself is found to be correct.
21. Proper reading of the said statement shows that the conduct of W/O Mocheko was a process and not an event. It started with the report made to SAPS by a member of the Gambling Board (Ins Mathotse). Fourth respondent therefore had information that an employee of the applicant had already furnished information to this member that a gambling business is carried out in the applicant's premises and that there are chances of winning an amount of R20000.
22. W/O Mocheko and other members of the entrapment team also had this information at their disposal and the former was aware that there was a potential of winning R20000. These facts, when viewed objectively,

create reasonable grounds for believing that the offences have been committed. I am in agreement, though that the conduct of W/O Mocheko in continuing to gamble until he lost all the money instead of cashing the credits was improper.

23. In the search and seizure warrant, the fourth respondent states that there are reasonable grounds for believing that the offences listed have been committed on the 16 September and are being committed. My understanding of the wording of this paragraph is that the commission of the offences is ongoing and is not restricted to the 16 September 2016. The contention that the warrant relates to the conduct of W/O Mocheko only cannot be accepted as correct.

24. The contention that the description of the articles that are to be seized is overboard is equally faulty. In **Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others [2000] ZACC 12; 2001 (1) Sa 545 (CC)** at 52 it was stated that-

"...the warrant may only be issued where the judicial officer has concluded that there is a reasonable suspicion that such an offence has been committed, that there

are reasonable grounds to believe that objects connected with an investigation into that suspected may be found on the relevant premises...”

25.Paragraph C of the warrant, which refers to articles that are to be seized, states specifically that the said articles (Annexure “B”) are concerned the commission of offences listed in the search and seizure warrant. It is alleged that the offences were committed electronically on computers. Money is also involved which will make cash registers relevant to investigations as well. There is no better way of describing the items to be seized other than in the manner in which it was done in the warrant. The objects which are to be seized are connected to the investigation to be conducted by Ramoroka. Furthermore, as already stated above, the warrant refers to the conduct that was ongoing as such the fourth respondent could not be expected to restrict the search and seizure to one specific date. The warrant was perfectly tailored for the occasion and not simply taken from the stock- **Mohammed v NDP and Others 2006 (1) SACR 495 (W)**.

26.In van der Merwe (*supra*) at 18 referring to the intelligibility test, it was stated that intelligibility requires that a warrant be reasonably intelligible in the sense that it is reasonably capable of being understood by a reasonably well-informed person who understands the relevant

empowering legislation and the nature of the offences under investigations. The applicant alleges that the fourth respondent failed to apply her mind to the matter in that she did not realize that some of the offences listed could not have been committed. It is noteworthy that all offences listed in Annexure "B" are offences that are ordinarily committed during illegal gambling. The fourth respondent was not tasked with deciding whether they were indeed committed or not.

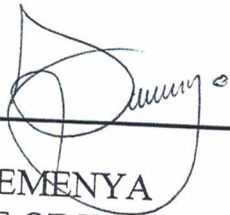
27. In any event, it is the function of the prosecutor to finally decide as to whether to charge the applicant with all listed offences or not. As it now stands the warrant is intelligible in that the applicant can, with the help of the annexures attached to the warrant, be able to understand what is expected of the person doing the search. The person who is supposed to do the searching can also understand what he/she needed to do.

28. I find that the warrant is neither overboard nor fails to pass the intelligibility principle test and it is therefore valid. I am in agreement with the respondents' argument that the search conducted according to the applicant's views will make the SAPS's work impossible. It is not what examining the validity of the search and seizure warrants with jealous regard to the liberty of the subject and his or her rights to privacy

and property entails-**Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma and Another v National Director of Public Prosecutions and Others [2008]ZACC 13.**

29. It is ordered:

- 29.1. Application for the setting aside of the search and seizure warrant issued by Polokwane Magistrate on the 7 November 2016 against the applicant is dismissed.
- 29.2. The SAPS Limpopo Province is ordered to retain the articles seized by its members during the execution of the warrant on the 8 November 2016 at the business premises of the applicant.
- 29.3. No cost order is made.



M V SEMENYA
JUDGE OF THE HIGH COURT OF
SOUTH AFRICA; LIMPOPO
DIVISION.

APPEARANCE:

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INSTRUCTED By :

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