

IN THE HIGH COURT OF SOUTH AFRICA



(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
1. REPORTABLE : YES/NO	NO
2. OF INTEREST TO OTHER JUDGES: YES/NO	NO
3. REVISED	
2.2.16/26/24	
DATE	SIGNATURE
GAUTENG DIVISION, PRETORIA	

24/6/2016

Case no. 41422/2016

IN THE MATTER BETWEEN:

IDEAL TRADING 458 CC

(REGISTRATION NUMBER: (2011/048778/23)

and

THE MINISTER OF SAFETY AND SECURITY N.O

THE PROVINCIAL COMMISSIONER OF THE SAPS,

GAUTENG PROVINCE N.O

THE ADMINISTRATOR FOR THE NATIONAL

GAMBLING BOARD N.O

APPLICANT

1st RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

And

ARSTIDES ZANGAS

(REGISTRATION NUMBER : 2011/048778/23)

and

Case no: 41421/2016

APPLICANT

THE MINISTER OF SAFETY AND SECURITY N.O	1 st RESPONDENT
THE PROVINCIAL COMMISSIONER OF THE SAPS, GAUTENG PROVINCE N.O	2 ND RESPONDENT
THE ADMINISTRATOR FOR THE NATIONAL GAMBLING BOARD N.O	3 RD RESPONDENT
THE STATION COMMANDER, BOSBURG NORTH SAPS, SAPS. N.O	4 TH RESPONDENT
LIEUTENANT MATHEBULA	5 TH RESPONDENT

REASONS FOR THE ORDER

LEGODI J:

HEARD ON: 8 June 2016

JUDGMENT HANDED DOWN ON: 24 June 2016

[1] On 8 June 2016 and during urgent motion roll proceedings, this court made an order in these two matters as follows:

IDEAL TRADING 458 CC

- "1. *Dispensing with the forms and services in terms of Rule 6 (12) of the Rules of the High Court and disposing of the matter as one of urgency in terms of this Rule.*
2. *Setting aside\declaring as invalid the warrantless search and seizure that took place on 20 May 2016 conducted under the scope and control of employees of the First and Third Respondents, without any search and seizure warrant in terms of Section 22 of the Criminal Procedure Act, No. 51 of 1977 in respect of the applicant's business.*
3. *That the Respondents and any other Respondent who is possession or control of the Applicant's movable goods and monies listed in Annexure A hereto, to*

forthwith return and restore possession of the movable goods and monies that were removed by the SAPS representatives and employees of the Third Respondent, who were under the control of the First and Third Respondents from the Applicant's business premises, which are situated at Skynet Internet Café, Navarino City, Shop 6, O'Reilly Merry Street, Runfiled, Benoni.

4. Costs of suit on attorney and client scale.
5. Reasons will follow".

ARISTIDES ZANGAS

- "1. *Dispensing with the forms and services in terms of Rule 6 (12) of the Rules of the High Court and disposing of the matter as one of urgency in terms of this Rule.*
2. *Setting aside\declaring as invalid the warrantless search and seizure that took place on 20 May 2016 conducted under the scope and control of employees of the First and Third Respondents, without any search and seizure warrant in terms of Section 22 of the Criminal Procedure Act, No. 51 of 1977 in respect of the applicant's business.*
3. *That the Respondents and any other Respondent who is possession or control of the Applicant's movable goods and monies listed in Annexure A and B hereto, to forthwith return and restore possession of the movable goods and monies that were removed by the SAPS representatives and employees of the Third Respondent, who were under the control of the First and Third Respondents from the Applicant's business premises, which are situated at Netcafe. Shop 104, Safeway Center, corner Bartlett and Adrian Road, Beyer Park, Boksburg.*
4. *Costs of suit on attorney and client scale.*
5. *Reasons will follow"*

[2] I did not give reasons when the order was made. I now do so. The two matters were consolidated as the facts were almost similar. On 13, 20 and 21 May 2016 the business premises of the applicants in both matters were searched and several movables including computers were attached and seized without a warrant. The police with regards to the events of 20 May 2016 contended that they did so in terms of section

22 of the Criminal Procedure Act no. 51 of 1977. For its relevance, section 22 is quoted in its entirety as follows:

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

(a) if the person concerned consent to such 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 consent 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 "

[3] The applicants are challenging the lawfulness of the search and seizure relied upon by the respondents in terms of section 22. Everyone has the right to privacy. The right not to have one's property searched and one's possessions seized is part and parcel of the right to privacy.¹ Therefore, section 22 has to be interpreted and applied in the context of the Constitution of the Republic of South Africa, taking into account any reasonable limitation as envisaged in section 36 of the Constitution.

[4] On Friday 20 May 2016 at Skynet Internet Café, Navarino City, Shop 61 O'Reilly Merry Street, Rynfield Benoni members of the South African Police, entered the business premises of the applicant, Ideal Trading 456 CC, and then searched and seized several items from the premises without a warrant. Similarly, on 13 and 21 May 2016 at Netcafe, shop 104 Safeway Centre, corner Barlett and Adriaan Road, Beyers Park, Boksburg, being the business premises of the applicant, Mr Aristides Zangas who is also a deponent to the application instituted by Skynet Internet Café, the police entered, searched and seized from the premises without a warrant several items.

[5] Section 21 referred to in Section 22 provides:

"(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-

¹ Section 14 (b) and (c) of the Constitution.

- (a) by magistrate of 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 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.

(2) A search warrant issued under subsection (1) shall require a police official to seizure the article in question and shall to that end authorize such police official to search any person identified in the warrant, or to enter and search any premises identified in the warrant and to search any person found on or at such premises.

(3) (a) A search warrant shall be executed by day, unless the person issuing the warrant in writing authorizes the execution thereof by night.

(b) A search warrant may be issued on any day and shall be of force until it is executed or is cancelled by the person who issued it or, if such person is not available, by a person with like authority.

(4) A police official executing a warrant under this section or section 25 shall, after such execution, upon demand of any person whose rights in respect of any search or article seized under the warrant have been affected, hand to him a copy of the warrant."

[6] The provisions of section 25 must be seen in the context of section 20 which provides:

"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."

[7] Relevant legislative frame work in these proceedings is such that it authorises search and seizure without a warrant only in special circumstances. Jurisdictional factors must be met to make a search and seizure without a warrant lawful. Paragraphs (a) and (b) of the section 22 clearly spell out such factors.

EVENTS OF 20 MAY 2016.

Alleged consent to search and seizure

[8] The respondents, Minister of Safety and Security, the Provincial Commissioner of the SAPS, Gauteng Province, and the Administrator for the National Gauteng Board in seeking to avert the unlawfulness of the police search and seizure without a warrant, seem to rely on the averments hereunder made by Colonel Arikum who is also the deponent to the answering affidavit in Zangaz case.

[9] Colonel Veeshane Arikum in the answering affidavit filed on behalf of the Minister and the Provincial Commissioner and in dealing with the events of 20 May 2016, started by stating that 'there was a lawful entry, search and seizure into the applicant's premises', after applicant's employees had allegedly consented thereto.

[10] The assertion is worrisome in a number of respects. First, no particulars of the employees who allegedly consented to the search and seizure are provided. This is not a minor issue, more so that the first and second respondents seek to rely on the employees' alleged consent. Why the police would be given consent to search and seize by the applicant's employees, the number of which is not specified? Why not obtain consent from one person or employee in charge of the premises at the time the search was conducted? Generalisation of the applicant's employees having given consent gives the impression that the police did not regard 'consent' as a serious jurisdictional factor for lawful search and seizure. The police were remiss in this regard, more so to the constitutional imperative of the provisions of section 14 of the Constitution dealing with the right to privacy.

[11] But even more telling story is, what is stated in paragraphs 3.1.9.1 to 3.1.9.3 of Colonel Veeshani Arikum's answering affidavit regarding the events of 20 May 2016 in which he stated:

"3.1.9.1 Employees of the Applicant have previously refused members of the 1st Respondent entry into the Applicant's premises;

3.1.9.2 Employees of the Applicant have previously refused members of the 3rd Respondent entry into the Applicant's premises;

3.1.9.3 Where members of the 1st Respondent managed to gain entry, employees of the Applicant saw it that the latter members were sufficiently delayed for any evidence of the commission of any offence upon the premises to be removed."

[12] Having said what is quoted above, the first and second respondents proceeded to deal with other issues to which I revert to later in this judgment. What is striking is the absence of information why this time, that is, 20 May 2016 the employees who were previously so obstructive, would all suddenly decide to give their cooperation by allowing entry into the premises, and without much ado, consented to the search and seizure. The probabilities in this regard are against consent having been given.

[13] This kind of an attitude by the police reminds one of how the police in the past and before the constitutional imperative used to disregard people's rights, in the particular, of privacy by abusing the provisions of section 22 and also disguising of consent thereto when in actual fact it did not exist. Our court need to be vigilant when dealing with any tendency to resort to self-help by the police under the disguise of section 22 of the Criminal Procedure Act. Otherwise, it will be business as usual for the police. That is, you do not have to obtain a search and seizure warrant as is better and easy to resort to self-help. The facts of the present case in my view, display that tendency and it has to be discouraged. For this, I also decided to deal with the matter as urgent. I was not satisfied that consent to the search and seizure was given. On this ground alone, the search and seizure was destined to be set aside.

Reasonable grounds for belief that search warrant will be granted.

[14] Section 21(1) requires a search and seizure to be authorised, but when pressing circumstances prevail, the requirements can be dispensed of provided that there are good grounds, to conduct a search and seizure without a warrant. The provisions of

paragraph (b) (i) of section 22 must be seen in the context of sub-paragraph (ii). It is not either of the two. Both jurisdictional factors must be present if consent under paragraph (a) is not obtained. Failure to prove compliance with what is envisaged in sub-paragraph (ii) will cause reliance on paragraph (b) to be a futile exercise.

[15] The intention of the legislature in section 22 (b) must be obvious and sub-paragraphs (i) and (ii) goes along with reasonable grounds forming a view that an offence is or was committed. I say so, because for the issue of any warrant under the provisions of Act 51 of 1977, a reasonable ground for commission of an offence ought to exist. I do not think that in the present case, the respondents had difficulty in establishing the requirements under paragraph (b) (i). The real issue however is why the police did not apply for a search warrant. This then brings me to the third jurisdictional factor under paragraph (b) (ii).

Defeating the object of the search.

[16] Any delay in seeking to obtain a search warrant would be disposed of if it was to defeat the purpose of the search. Clearly sub-paragraph (ii) of section 22 (b) is intended to deal with situation where a need to search arises as a matter of now. Moving from this premise, one needs to consider the facts of the present case about the events of 20 May 2016.

[17] Colonel Arikum in dealing with the case of Idea Trading stated in the answering affidavit:

"3.1.7 The 1st respondent's servants entered the Applicant's premises in terms of section 22 of the Criminal Procedure Act, 51 of 1977, after obtaining reliable information to the effect that the Applicant was conducting illegal gambling activities upon the premises."

[18] What is quoted above must be seen in the context of what is quoted in paragraph 11 of this judgment. The respondents clearly knew long before Friday 20 May 2016 that unlawful activities were being performed at the premises aforesaid based on 'reliable information'. Most importantly, before 20 May 2016 members of the respondents tried to get into the premises solely for the purpose of investigation, search and seizure. With

this information at their disposal, they still failed to apply for a search warrant which they reasonably believed would be granted.

[19] The story is taken further as follows in paragraphs 3.1.8.1 and 3.1.8.2 of Colonel Arikum's answering affidavit:

"3.1.8.1 There had been numerous complains about criminal activities in and around the Applicant's business from the community of Rynfield, Benoni in general and from members of the Community policing Forum. I would have liked to provide the above honourable court with affidavits in this regard. However, the Applicant provided the Respondents no adequate time to do so.

3.1.8.2 These complaints included but are not limited to:

3.1.8.2.1 unauthorised gambling;

3.1.8.2.2 drug use and trafficking;

3.1.8.2.3 a plethora of other related crimes and offences;

3.1.8.2.4 many other social menaces and nuisances."

Then in paragraph 3.1.9 the Colonel Arikum stated:

"3.1.9. The first respondent's servants also verily believe that any delay in obtaining a warrant of search and seizure would have defeated the object of the search..."

[20] It was one thing to state the law, but another to give facts to support the applicability of the law in a particular case. Two things are easily discernable from the answering affidavit. The police did not seem to have been pressed for time to conduct the search. On their own version they were not at the premises for the first time and for the purpose of search. They had been there before, but could not gain entry because the employees of the applicant refused them access. What did they then do? Or put differently, did they then apply for a search warrant? They did not. The question is why the police did not apply for a search warrant. This information is conspicuously absent from Colonel Arikum's answering affidavit, perhaps understandably so. In the circumstance of this case, there can be no explanation. You cannot talk about defeating the object of the search when the police had information at their disposal before the

search about what was happening inside or at the premises aforesaid. Failure to apply for a search and seizure warrant in the instant case was fatal to the lawfulness of the search. It was on the basis of what is stated in the preceding paragraphs that the court found for Ideal Trading.

EVENTS OF 13 MAY 2016

[21] On 13 May 016 members of the South African Police Services in Boksburg together with the Ekurhuleni Metro Police embarked jointly on an operation targeted at what they referred to as 'drug dens and wells' criminal activities. During the operation they received "a tip off from one of the police forum members that there were illegal gambling activity as well as drugs at the premises of the applicant" (My emphasis)

[22] The statement as underlined suggests that there were reasonable grounds to believe that an offence or offences were being committed at the premises of the applicant. 'Illegal gambling activities as well as drug', was a continuous commission of an offence and therefore fear of destruction of information or evidence supporting the commission of the offences was minimal, if any. For this, the police could have applied for search and seizure warrant without defeating the purpose of the search. But that did not appear to have been any of the police's concern. I say so, because in the answering affidavit Col Arikum stated:

"22... Acting on the tip-of we then went to investigate. Upon arrival we requested permission to enter but the lady in charge informed us the owner had given her strict instruction not to let the police into the place.

23. As a result , this left us with no choice but to forcefully gain entry into the premises, we discovered approximately over 30 touch screen computers with part one busy gambling on the computers.

24. What was more startling was that the lady whilst we were conducting the investigation ran to the toilet to dispose of the drugs which were in her possession. Fortunately one of our members apprehended her before she could do so. Upon searching her she was found in possession of illegal substances."

[23] What is quoted above appears to be a case for the police with regard to the events of 13 May 2016. It is the lawfulness of the search and seizure of items indicated in annexure A of the draft order which is questioned. Section 27 of Act 51 of 1977 deals with resistance against entry and search and it provides:

"27. Resistance against entry or search

- (1) *A police official who may lawfully search any person or any premises or who may enter any premises under section 26, may use such force as may be reasonably necessary to overcome any resistance against such search or against entry of the premises, including the breaking of any door or window of such premises: Provided that such official shall first audibly demand admission to the premises and notify the purpose for which he seeks to enter such premises.*
- (2) *The proviso in subsection (1) shall not apply where the police official concerned is on reasonable grounds of the opinion that any article which is the subject of the search may be destroyed or disposed of if the provisions of the said proviso are first complied with."*

[24] Col. Veeshane Arikum in his affidavit says nothing about the proviso in subsection (1). That is, he does not spell out how he dealt with the resistance as contemplated in section 27. All what he said was that, "this left us with no choice but to forcefully gain entry into the premises..." as deposed to in paragraph 23 of the answering affidavit. Secondly, there is nothing in the answering affidavit suggesting that the police did not comply with the proviso because of their fear as envisaged in subsection (2) (b) (ii) of section 22.

[25] Lastly section 26 referred to in subsections (1) of section 27, does not entitle the police to enter the premises for the purpose of search and seizure, but rather for the purpose of interrogation. Section 26 provides:

26 Entering of premises for the purpose of obtaining evidence

"Where a police official in an investigation of an offence or alleged offence reasonably suspects that a person who may furnish information with reference to any such offence is on any premises, such police official may without warrant enter such premises for the purpose of interrogating such person and obtaining a

statement from him: Provided that such police official shall not enter any private dwelling without the consent of the occupier thereof."

[26] The police therefore could not have relied on section 26 for entering the premises by force. Inasmuch the entry might have been intended to search for any article, the police were expected to have regard to the provisions of section 22 and I am not satisfied that the jurisdictional factors, in particular as contemplated in paragraph (b) (ii), were met. It was on a Friday and a group of police officials comprising of police officials from Boksburg police station and Ekurhuleni Metro Police Services decided to have a joint operation. In the course the operation, they got a tip-off the particulars of which as to time and place not given. They then proceeded to the premises in question. Thereafter, they forced entry after a request to enter was declined.

[27] The moment they entered the crime scene, the premises was secured. There were many police officials. Having been refused entry, it must have been clear to the police that for lawful search and seizure, they had to find the applicability of section 22(b) (ii).

[28] In my view, once they had entered, and secured the crime scene, obtaining a search warrant would not have defeated the object of the search. It appears that every police official was on the alert. For example, as indicated earlier in this judgment, a lady who tried to run to the toilet was stopped and drugs were found in her possession.

[29] The difficulty for the respondents is that it is not disclosed in the affidavit whether it was easy or difficult to apply for the search warrant. Seen in context, it was never the police priority to obtain a search warrant. I say so, because even after the 13 May 2016 they did nothing to obtain a search warrant before conducting the searches on 20 and 21 May 2016. That displayed a tendency on the part of the police to have had no serious regard on the correct implementation of the provisions of section 22. Condonation of their conduct without more can only encourage laxity on their part.

[30] Of more concerning is the frequent disregard of the provisions of section 22 despite section 28 of the Criminal Procedure Act 51 of 1977 which provides:

"28 Wrongful search an offence, and award of damages

(1) A police official-

- (a) who acts contrary to the authority of search warrant issued under section 21 or a warrant issued under section 25(1); or
- (b) who, without being authorized thereto under this Chapter-
 - (i) searches any person or container or premises or seizes or detains any article; or
 - (ii) performs any act contemplated in subparagraph (1) (ii) or (iii) of section 25(1). Shall be guilty of an offence and liable on conviction to a fine not exceeding R600 or to imprisonment for a period not exceeding six months and shall in addition be subject to an award under subsection (2).

The section is intended to deal with police officials who act unreasonably or unlawfully when conducting the search or entering the premises. The section illustrates the desire of the legislature to ensure that the powers of search, entry, and seizure are carefully exercised within the boundaries of the empowering legislation.² The conduct of the police in the present cases was far from being within the confine of the law. For this, I granted the relief sought as indicated earlier in this judgment.

Events of 21 May 2016.

[31] Colonel Arikum in dealing with the events of the 21 May 2016 as follows:

"29. I am advised that on 21 May 2016, the Visible Policing Unit embarked on the follow up operation. The operation was targeted at those hotspots which amongst others were raided on the previous occasion i.e 13th May 2016.

30. During a visit at Applicant's premises, it was again discovered that the Applicant had purchased a further 30 computers which were also being used to conduct the same gambling activities as it was discovered on the 13th May 2016. What was furthermore startling was that the place was full of empty packets which appeared to have been illegal substances i.e mandrax. Unfortunately no one could be held accountable for the illegal substance as no one could accept responsibility.

² Commentary on the Criminal Procedure Act by Du Tiot, De Jager, Paizes, Skeen and Van Der Merwe at 2.33

31. After having exercised his discretion, Lieutenant Mathebula then seized again the Applicant's computers. This was on the basis that the Applicant was continuing with illegal activities. In this regard I invite the Honourable Court to a confirmatory affidavit by LTCol Mathebula annexed hereto marked "SAPS2"

[32] What is stated above emphasises what I was talking about earlier. It is all disregard to human rights, in particular, as enshrined in section 14 of the constitution and disregard to the legislative provisions dealing with the search and seizure. Having targeted the hotspots and those raided on 13 May 2016, it was incumbent on the police that this time they do it right, but of course that was not part of their *modus operandi*. They did it twice, that is, 13 and 20 May 2016 without the warrant, and I want to imagine that they can do it again and again without a warrant. It is this kind of conduct that needs to be discouraged and rooted out.

[33] Our constitutional dispensation and human rights entrenched in the Constitution will become worthless if those who are to enforce the law, are encouraged to act unreasonably and unlawfully.

[34] The manner in which the events of 21 May 2016 are dealt with as quoted in paragraph 31 above gives the impression that authorisation for search and seizure as contemplated in section 21 was never on the police agenda. Whilst the police are there to combat crime, and ought to be commended and encouraged when they do so, they should at all times strive to act within the law. In the present case, they have failed to do so. In the result, I made orders as I did on 8 June 2016.



JUDGE OF THE HIGH COURT

MF LEGODI

INSTRUCTED BY APPLICANT : VARDAKOS ATTORNEYS

COUNCEL FOR APPLICANT : ADV N JAGGAR

INSTRUCTED BY RESPONDENT: STATE ATTORNEY

COUNCEL FOR RESPONDENT : ADV OWEN MATJILA