

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

18/5/15

CASE NUMBER: 73681/2013

In the matter between:

MEC FOR DEPARTMENT OF AGRICULTURE

AND RURAL DEVELOPMENT, N.O.

APPLICANT

and

JAN ADRIAAN FREDERIK VENTER

RESPONDENT

IN RE:

JAN ADRIAAN FREDERIK VENTER

APPLICANT

and

ACTING CHIEF MAGISTRATE

PRETORIA NORTH MAGISTRATE'S COURT

THE DISTRICT OF WONDERBOOM

FIRST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS:

PRETORIA

SECOND RESPONDENT

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO	
(3) REVISED.	
18/5/2015 DATE	<i>de la Haye</i> SIGNATURE

MEC FOR AGRICULTURE AND RURAL
DEVELOPMENT

THIRD RESPONDENT

DIRECTORATE OF CONSERVATION:

GAUTENG PROVINCIAL GOVERNMENT

FOURTH RESPONDENT

JUDGEMENT

TLHAPI J

[1] The first application by the applicant is for condonation for failure to comply with rule 53(5)(a) and 53(5)(b) of the Rules of Court and that the applicant be granted leave to deliver its answering affidavit to the main application within five days of the grant of condonation. The second an application is to rescind the orders granted by Louw J on 17 February 2014 .

[2] The respondent served the main application on the applicant on 13 December 2013 and a copy of the application was given to the applicant's Director of Litigation, Mr Harish Jhupsee ('Jhupsee') who consulted with Mr Tshivasi ('Tshivasi') of the State Attorney's Office and gave instructions to oppose the application. This was followed by a letter of 18 December 2013 (annexure 'B') confirming such instruction and enclosing a copy of the Notice of Motion. Jhupsee sent another letter on 20 December 2013 to Tshivasi giving instructions as to whom to brief and confirmed instructions to oppose. There was a request to be informed of who was going to handle the matter in the State Attorneys Office and that he,

Jhupsee would forward further documentation on his return to work on 13 January 2014.

[3] On or after the 19 December 2013 Mr Rabambi ('Rabambi') of the State Attorney's Office was allocated the file to deal with and he only came into possession of the file upon his return from vacation on 14 January 2014. The orders of 17 February 2014 came to the knowledge of the applicant only on 26th of that month. The last communication between the applicant and the office of the State Attorney was the email allegedly sent on 20 December 2013.

The orders of the 17 February 2014 read:

"1 Dat die bevel word toegestaan teen eerste, tweede end vierde respondent ingevolge bedes 1,2,3 en 5 van die konsepbevel "X" soos gewisig.

2 Dat die aansoek teen die derde respondent word uitgestel na 14 April 2015

Konsepbevel

1 Dat die J51 Deursoekings Lasbrief wat deur die Eerste Respondent gemagtig is op 23 Augustus 2013 tersyde gestel en ongeldig verklaar word;

2 Dat die Vierde Respondent gelas word om die besit van die Applikant se 3 Spribokke waarop beslag gele is te herstel en aan hom terug te besorg binne 10 date na betokening van heirdie bevel;

3 By versuim soos vermeld in Paragraaf 2 heirbo, dat die Vierde

Respondent gelas word om toe te sien en te verseker dat vervoer permit aan die Applikant uitgeruik word binne twintig(20) dae na betekening van hierdie bevel ingevolge waarvan die Applikant en/of 'n gevolmagtigde gemagtig word om die 3 springbokke by die Pretoria Dieretuin te gaan afhaal en te vervoer na 'n geskikte bewaringsgebied;

4
 5

Dat die Respondente gelas word om die Applikant se kostes en kostes van doe aansoek gesamentlik en afsonderlik te betaal, die een betaal die ander vrygestel, bereken op 'n skaal soos tussen prokureur en klient."

[4] In an emergency consultation arranged between Jhupsee, Rabambi and others, it appeared that Rabambi had only been furnished with a copy of annexure 'B' and had assumed that Mr Tshivasi had caused an intention to oppose to be served on the respondent's attorneys and he did not consider it necessary to confirm this position because Tshivasi was an experienced attorney.

[5] When Rabambi was requested to give an account of his handling of the matter he took out a letter and explained that he had requested his secretary to forward via e-mail a letter for instructions. He could not furnish proof that the letter had been delivered or sent, a copy of the letter dated 14 January 2014 annexure 'D' was annexed. Rabambi then explained that due his workload no follow up was made. The applicant contended that it was reasonable for it to expect that the offices of the State Attorney would have delivered an intention to oppose on its behalf and

that of the fourth respondent. In his confirmatory affidavit Rabambi contended that having assumed that the letter had been sent to the applicant he awaited instructions from Jhupsee. Tshivase took leave from 10 January 2014 to 10 February 2014.

[6] In its *bona fide* defence to the main application the applicant stated:

- 1 that upon application and upon payment of a fee it may grant or refuse the issue a licence, permit or exemption, or exempt the payment of prescribed fees;
- 2 that in terms of section 39 of the Nature Conservation Ordinance 12 of 1983 it was an offence for any person to keep or convey live game without being the holder of a permit;
- 3 that from the main application the respondent had been the owner of three springbok; springbok being described as ordinary game in terms of section 15 read with schedule 3 of the Ordinance;
- 4 that nature conservators may at any time enter upon any land or premises to carry out any investigation in furtherance of their duties under the Ordinance if there was reason to suspect that there was anything being used in connection with the commission of an offence, and was entitled to seize anything used in connection with the commission of the offence;
- 5 On 6 June 2013 Mr Fhutuwani Netshampofu ('Netshampofu') an employee in the branch delegated to investigate compliance or non-compliances and after he had consulted with the respondent had

established that the respondent had no permit to keep or convey the springbok;

- 6 that on the respondents own allegations that the South African Police ('SAPS') were present during the seizure; the applicant submits that they were entitled to do so as nature conservators and that they had information from Netshampofu relating to the commission of an offence in contravention of the Ordinance and, had reasonable grounds to believe that game was present on the farm 116 Buffelsdrift without a permit keep or convey; this constituted proof of the commission of an offence and the fact that the warrant was set aside did not take away the fact that from February 2013 to December 2013 the respondent did not make an application in the prescribed form for keeping the springbok;

- 7 possession would only be restored if in the main application the applicant is not successful in showing that the conduct of members of the SAPS when it took part in seizing the springbok were not acting in strict compliance with the provisions of the ordinance; the SAPS conducted themselves in strict compliance with the provisions of the Ordinance and that constitutes a *bona fide defence*;

- 8 That the alternative prayer be dismissed because the Ordinance requires an application and payment of the prescribed fee to be made

and that any licence issued contrary to the Ordinance was null and void;

- 9 That the third respondent had not been cited in her representative capacity therefore the allegations alleged did not disclose a cause of action; (a point in limine taken in Annexure 'X')

[7] The respondents contended that the applicants had failed to show *bona fides* and good cause, did not have a defence and were consequently not entitled to condonation or rescission of the court order.

The applicants and the Office of the State Attorney had been grossly negligent and in wilful default in responding to the main application. The tracking report of the e-mail of 20 December 2013 did not show that Tshivase had read it and the applicant had failed to explain why it failed to make any follow up enquiries after that date until 26 February 2014 with the Office of the State Attorney.

It was averred that on 14 March 2014 Jhupsee had called the respondent's attorney indicating applicant's willingness to settle the matter. Jhupsee was requested to e-mail the settlement proposals and he failed to do so. The applicant failed to explain why it took almost another month after this call, before this application was launched and there is no explanation in this application regarding this call.

[8] The respondent averred that he owned the 3 (three) springbok which had been kept in a legitimate nature conservation area in the Buffelsdrift Nature Reserve.

It was denied that 'springbok' is defined as ordinary game in terms of section 15 read with Schedule 3 of the Ordinance.

[9] The respondent denied that it was Netshampofu who contacted him on 6 June 2013 but that Mr Leon Labuschagne of the Nature Conservation contacted him on or about 6 May 2013 to enquire about the springbok.

According to the respondent the search warrant ('warrant') issued on 23 August 2013 the search warrant annexed as 'JAVF2' was declared invalid because *"1) no person is authorised to serve and execute the warrant, 2) no mention was made of any other person/s who are authorised to assist in the execution of the warrant, 3) no criminal charges are mentioned on the warrant, 4) the warrant did not contain any case number whatsoever indicating that there is a criminal case pending against the respondent which entitled the applicant to seize the springbok, 5) the warrant was obtained and issued after the criminal case was withdrawn against the respondent by the senior public prosecutor in the Pretoria North Magistrate's Court"*

[10] The respondent averred that although members of the SAPS were present during the seizure and execution of the warrant. They had not been instrumental in securing such warrant. The SAPS were not involved in the actual seizing or execution of the warrant, they kept their distance of 40 metres from his premises. They did not speak to the respondent and it was denied that their presence was as a result of information received from Netshampofu. The search warrant was obtained at the initiative and strength of an affidavit of Netshampofu who wilfully ignored the withdrawal of criminal proceeding against him.

[11] The respondent denied he failed to apply for a permit and referred to his

interaction with Mrs C Hugo, head of Nature Conservation in Pretoria who informed him that her interest was in removing the springbok from the respondent and that she would not approve any application from him for a permit.

[12] The applicant for its default relies on the same explanations from the office of the applicant and from the office of the State Attorney in moving its applications for condonation and rescission. The applicant has further referred to annexure 'X' in the rescission application which was its answering affidavit to the main application. I am in agreement with the submission by Mr Maritz that such annexure falls outside the ambit of consideration of the rescission application, whose purpose is to allow the filling of such affidavit should this application succeed.

DEFAULT:

Jhupsee:

1. The tracking report of the email he allegedly sent to Tshivase on 20 December 2013 does not show that it had reached or had been read by Tshivase; there is no explanation on this aspect from both officials;
2. Assuming that it had reached Tshivase, Jhupseed confirmed instructions and indicated that further documentation on the matter would be forwarded to the State Attorney on his return from leave on 13 January 2014. There is no explanation why he never delivered the said documents or made a follow up because if he had he would have been enquired after the intention to oppose and would have arranged further consultations to deal

with the applicant's answering papers.

3. The letter of 20 December 2013 was the last communication from his office with the Office of the State Attorney until he was served with the order that is sought to be rescinded on 26 February 2014;
4. The respondent averred that Jhupsee communicated with his attorney on 14 March 2014 regarding possible settlement. The letter of 20 December 2013 does suggest such possibility with the State Attorney. There is no explanation from Jhupsee if this was indeed so and why he never followed up with these proposals.
5. There is no explanation from Jhupsee why it took so long after the 26 February 2014 or after his conversation with the respondent's attorney on 14 March 2014 for the applicant to give instructions to launch the condonation and rescission applications. There is further no explanation that the State Attorney's office was aware of such endeavours or why he had decided to take matter into his own hands;

Rabambi and Tshivase

1. I do not understand how Tshivase could have allocated the file to an official who was going on vacation. There is no indication that he discussed the matter with Rabambi or that Rabambi was aware of such allocation. As I see it, Rabambi became aware of the file only in January 2014. His further explanation on his handling of the matter demonstrates

lack of diligence and gross negligence in attending to the instructions of the applicant and does not deserve further comment. There is no explanation why nothing was done further from 26 February 2014 till these applications were launched during April 2014.

[13] It is my view that Jhupsee, as litigation officer in the office of the applicant was there to oversee and to give support to the Office of the State Attorney in as far as it involved litigation matters of the applicant. This is evident from his choice of which counsel was to be engaged and the fact that he contacted the respondent's attorney after the orders were granted. He cannot shift the entire blame to the State Attorney, his conduct and that of Tshivase and Rabambi should be viewed in same light. It is not in the interest of justice to allow such conduct especially if it has the potential of prejudice to the other litigant. The explanations for the default are not reasonable in the circumstance and should in my view, not be accepted.

RESCISSION

[14] There is concession by Mr Thompson for the applicant that this application does not fall to be determined in terms of rule 31(2)(b) or rule 42 of the Rules of Court. This confirmed the submission by Mr Maritz. Mr Thompson submitted that under the common law the courts powers to consider and to grant rescission extend beyond those rules and, that fairness to both sides demanded that the court exercise its discretion judicially to consider the application. Mr Maritz submitted that the order was not obtained in a fraudulent manner or by *justus error* therefore the common law was not applicable. In *Promedia Drukkers en Uitgewers (Edma)(Bpk) v Kaimowitz and Others* 1996 (4) 411(C) at 417 J -418 A it was stated that the requirements

under the common law would be satisfied if there was sufficient good cause shown, translated to a 'reasonable and acceptable explanation for the default' and a bona fide defence which *prima facie* carries some prospects of success'.

[15] I have already found that the explanation for the default by the applicant was not reasonable and this is exacerbated by the fact that Jhupsee was not a lay person as far as the law was concerned.

[16] Mr Maritz raised the following further aspects relating to the rescission application:

1. The fact that the 4th respondent had not been joined in this application.

Even though the applicant contends that the 4th respondent being the directorate functioning under it, it was in my view necessary to join it in order also to identify the individual responsible for the seizure. I am not in agreement with Mr Maritz that on this basis alone the application should be dismissed. It is still the duty of the court to consider the other requirements relating to prospects, especially because the order affected the fourth respondent.

2. The main application specifically addresses the conduct of an official of the directorate Mr Netshampofu. Firstly the alleged misrepresentation relating to the service of the subpoena in terms of section 56 of Act 51 of 1977 dated 12 June 2013 with date of appearance 22 August 2013. The respondent attended court on that day and there is no explanation in the

rescission application why Netshampofu failed to attend court resulting in the charges being withdrawn.

3. There is no explanation from Mr Netshmpofu why he proceeded to the Magistrate, being the first respondent in the main application, on 23 August 2013 to obtain a search warrant armed with an affidavit without explaining his failure to attend court on the date set by him, which was a day before on 22 August 2013.
4. While the applicant contends that the search and seizure was initiated by Netshmpofu alternatively the SAPS there is no indication on the warrant that the first respondent in the main application was satisfied with an important jurisdictional requirement for the issue of a warrant, in these circumstances being information of pending criminal proceedings and other factors referred to above and upon which grounds it was contended the warrant was declared invalid. The fact that no mention is made in the affidavit of the criminal proceedings which were initiated by Netshmpofu borders in my view on *mala fides*.
5. Alternatively, in as far as the police were concerned since it was contended that they were acting within the strict powers in the Ordinance and, since it was their first encounter with the respondent, it does not appear from information availed to the first respondent in the main application that they had information of a pending criminal case or,

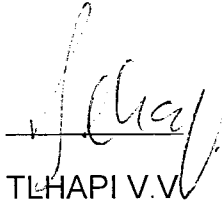
knowledge that the case had been withdrawn and that there were reasonable grounds to believe the commission of an offence was. It was denied that the presence of the SAPS was as a result of information from Netshimpofu. The respondent averred that the SAPS were not involved in the search and seizure; that they did not communicate the reason for their presence to the respondent; that they stood about 40 metres away from his premises while Netshimpofu and others engaged in the search and seizure of the springboks. There were also allegations in the main application regarding the interaction with Mr Labuschagne and Mrs Hugo relating to the permit or licence which were not addressed.

6. The respondent denied that springbok were protected animals as defined in section 15(b) or described in Schedule 3 of the Ordinance and he contends that he was allowed to keep them within legitimate confines of the Buffelsdrift Nature Reserve. These issues are not addressed in the rescission application in such a manner as to indicate that the applicant has *prima facie* prospects in the main application. I also checked the Ordinance and section 15(b) and Schedule 3 do not mention the springbok (*Antidorca marupialis*) as a protected species.

I am therefore not satisfied that the applicant has made out a *prima facie* bona fide defence.

[17] In the result the following order is given.

1. The applications for condonation and rescission are dismissed with costs.



TLHAPI V.V.

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	12 MAY 2015
JUDGMENT RESERVED ON	:	12 MAY 2015
ATTORNEYS FOR THE APPLICANTS	:	THE STATE ATTORNEYS
ATTORNEYS FOR THE RESPONDENTS	:	DU TOIT ATTORNEYS