

IN THE HIGH COURT, BLOEMFONTEIN
FREE STATE DIVISION, BLOEMFONTEIN

Application No.: 2273 / 2015

In the matter between:

ELEFTERIOS POLONYFIS T/A LITTLE MANHATTAN Applicant

And

**THE MINISTER OF SAFETY AND
SECURITY N.O.** First Respondent

**THE PROVINCIAL COMMISSIONER OF
THE SAPS** Second Respondent

**SAPS, FREE STATE PROVINCE N.O
BRIGADIER K.J RAMOKOTJO N.O** Third Respondent

LIEUTENANT COLONEL JOUBERT N.O Fourth Respondent

HEARD ON: 28 MAY 2015

JUDGMENT BY: MBHELE, AJ

DELIVERED ON: 18 SEPTEMBER 2015

REASONS

INTRODUCTION AND BACKGROUND

[1] On 28 May 2015 the Applicant and Respondents appeared before me and I made the following order:

That:

- 1.1 The forms and services in terms of Rule 6 (12) of the Rules of High Court are dispensed with and the matter is disposed of as one of urgency in terms of this rule;
- 1.2 Mandamant Van Spolie;
- 1.3 The immediate return of all the items seized from the Applicant's premises;
- 1.4 Respondent to bear costs of the application including costs for one counsel;
- 1.5 Reasons for judgement for to be furnished upon request by either party;

[2] The respondents have since requested reasons for judgement. These are my reasons.

[3] The Applicant is a business man trading as Little Manhattan internet lounge.

[4] The first Respondent is the Minister of Safety and Security N.O. and is cited in his official capacity as the political functionary responsible for the South Africa Police Services in the Republic of South Africa.

[5] The second Respondent is cited in his official capacity as the officer who in terms of the provisions of Section 12 of the South African Police Service Act 68 of 1995 (the Act) has command of and control over the police service in the Free State Province.

- [6] The third Respondent is cited in his capacity as the member of South African Police Service who:
- (a) At all times acted within the scope and ambit of his appointment as an officer of the South African Police Service;
 - (b) Who was designated in the section 13 (7) Authorisation issued by the second respondent as the officer under whose command the are described in the authorisation had to be cordoned off;
- [7] The fourth Respondent is cited herein in his official capacity as the official who proceeded to carry out search and seizure at the Applicant's premises.

ISSUES NOT IN DISPUTE

- [8] It is common cause that on 10 May 2015 the second Respondent issued an Authorization in terms of Section 13(7) of the Act, authorizing that the area bordered by St Georges Street to the South, Power street to the East, Douglas street to the North, and Harvey road to the West in Bloemfontein be cordoned off by the members of the South African Police Service on 11 May 2015 from 08h00 - 13h00.
- [9] The Applicant is running his business at Victoria Hotel, a building situated within the area mentioned under the Authorization.

[10] The authorization directs in addition to cordoning off of the area described therein for purpose of ensuring the safety of the public at Victoria Hotel, that all members acting in terms of the authorization must:

- (i) Without warrant search persons, premises, vehicles, receptacles or objects of whatsoever nature in order to seize illegal firearms, ammunition, dangerous weapons and any object referred to in Section 20 of the Criminal Procedure Act (the CPA).
- (ii) Seize any article referred to above and deal with it in terms of the CPA or any other applicable legislation.
- (iii) Upon demand of any person whose rights are or have been affected by the search;
- (iv) Exercise any of the powers authorization thereby with due regard to the Fundamental rights of every person.

[11] The authorization was used to carry out a raid at the Applicant's business on 11 May 2015.

[12] In the process of the raid at the Applicant's place of business the following items were seized:

- (i) 14 MSI touch screen with built in processor and speakers
- (ii) 1 Router
- (iii) 1 Laptop
- (iv) 1 CCTV recording device

[13] All these items belong to the Applicant.

DISPUTE

- [14] Parties are in variance on whether or not the Section 13(7) authorization was valid and whether it was executed in terms of the law. They are further not in agreement on whether the respondents committed an Act of spoliation or not.

CONTENTIONS BY THE PARTIES

- [15] Mr Jagga submits for the applicant that the applicant is entitled to bring an urgent application as continued dispossession of his property resulted in huge loss of income and costs for rental. The Applicant is of the view that the search and seizure constituted the infringement of the Applicant and his employees' right to privacy. It is further submitted that the Applicant would suffer real loss or damage if he were to rely on the normal procedure provided for in the rules of court. The Applicant is of the view that commercial urgency justifies a departure from the rules of court regarding time and service.

It is further submitted that the Respondents failed to bring facts to justify the issuing of the authorization. It is further argued that the authorization exceeded the boundaries set by Section 13(7) (c) of the South African Police Services Act.

- [16] It is further argued that even if the authorization was valid, the search and seizure of applicant's computers was not related to the object of the authorization and therefore unlawful. The items seized during the search did not fall within the object of the authorization. There was no allegation that on the date of the raid

there was any observation of illegal gambling taking place in the premises.

- [17] It is further argued that the items seized from the applicant's business constituted no threat to security and confiscation of the said items was unlawful, making spoliation proceedings apposite. It is further argued that the fact that the National Prosecutions Authority declined to prosecute is an indication that there was no gambling activity in the premises.
- [18] Bhana. SC for the respondents, contends that the applicant failed to make a case for urgency. He further argues that the applicant used the wrong platform to challenge the authority as it must be challenged in review proceedings. It is further contended that the authority is an administrative act, and such actions stand until set aside. Even an unlawful administrative Act may produce lawful results.
- [19] It is contended further that Applicant failed to show how his business that has only been running for two months would be crippled by the confiscation of the goods seized.
- [20] It is contended further that the raid was done as part of "Operation Fiela" targeting illegal immigrants, organised crime and illegal businesses, and the Applicant's business fell within the scope of the operation.

LEGAL PRINCIPLES

[21] The reference to Section 20 of the Criminal Procedure Act in subsection (7) (c) of Section 13 of the Act does not widen the ambit of the provision so as to render lawful the seizure of articles falling outside the specified object of the written authorization. The articles seized in terms of the above section must meet the requirement of paragraphs (a), (b) or (c) of Section 20 (see **Worali v Minister of Safety and security 2008 JDR0764(TK)**).

[22] Rule (6) (12) (a) and (b) provide as follows:

- (a) “In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to it seems meet,
- (b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at hearing in due course”

[23] The respondents are correct in pointing out that the applicant must show a proper degree of urgency for the court to allow deviation from the rules.

1. The rules are designed to ensure a fair hearing and should be interpreted in such a way as to advance and not to reduce the scope of the entrenched right to a fair trial contained in Section 34 of the constitution see (**Scott v Golden Valley Supermarket 2002 (3) All SA 1 (SCA)**

In **Federated Trust v Botha 1978 (3) SA 645 (A)** it was held that:

‘The rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the courts’.

APPLICATION OF LAW AND FINDINGS

- [24] The Applicant disputes that there was any gambling activity operating in the premises in so far as he contends that the premises were used as an internet lounge.
- [25] It is clear from De Bruyn’s affidavit that on the date of search and seizure there was no gambling activity observed in the Applicant’s premises. The only gambling activity he alleged to have observed was on a slot machine 17 days before the raid was carried out. There is no allegation that the computers were used to carry out illegal activities.
- [26] Although the police have a right to act proactively to combat criminal activities I am of the view that in the instant case evidence before me does not show that confiscation of the goods afore mentioned was justified.
- [27] It is clear from the papers before me that the Applicant is renting the premises from which his business is operating.

- [28] The first respondent had on the date of the hearing been in possession of the seized goods for over 15 days but there is no evidence that gambling material was retrieved thereon.

A laptop is a generic item which is most of the time kept for personal use. Confiscation of such an item for the reason advanced by the respondent is in my view, violation of one's privacy as guaranteed by Section 14 of the constitution.

- [29] There is no doubt that the 1st respondent's continued possession of the goods is causing irreparable harm to the Applicant's business in that the Applicant continues to loose profit, money towards rental and goodwill due to deprivation of his tools of trade.

- [30] I have no doubt in my mind that the issuing of the authorization was appropriate in the circumstances regard being had to the prevailing circumstances at the time of its issue as there were a number of operations carried out to rid buildings of illegal immigrants and other illegal activities. It is its execution that, in my view, failed to meet the object set out in Section 13 (7) of the Act.

- [31] The applicant's goods were seized on a mere suspicion that they were used in furthering gambling activities although such suspicion could not be substantiated.

- [32] The execution of the authorization in the instant case went beyond the object specified in terms of Section 13(7) of the Act.

[33] It is also not clear how seizure of the aforementioned goods would have achieved the object of the authorization.

[34] I am persuaded that continuous loss of income and good will by the Applicant is a reason sufficient enough to justify departure from the Rules of this court relating to urgency and to justify the applicant approaching this court on an urgent basis.

COSTS

[35] The Applicant was successful. The Applicant requested that the respondents who choose to oppose the application should be ordered to pay the costs of the application on a punitive scale of attorney and own client. All the respondents opposed the application. There is no reason why the costs should not follow the event in this matter.

[36] It is for the above reasons that I made the following order:

- (i) That the forms and services in terms of Rule 6(12) of the Rules of High Court be dispensed with and the matter to be heard as one of urgency in terms of this rule.
- (ii) Mandamant Van Spolie.
- (iii) Immediate return of all the items seized from the Applicant's premises.
- (iv) Respondents to bear the costs of the application including costs for one counsel.
- (v) Reasons for judgment to be furnished upon request by either party.

NM MBHELE. AJ

On behalf of applicant: Adv. Jagga
Instructed by:
Eugene Attorneys
BLOEMFONTEIN

On behalf of 1st, 2nd, 3rd & 4th respondents: Adv. Bhana
Instructed by:
State Attorney
BLOEMFONTEIN

/PC