

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 378/2010

In the matter between:-

POGISO GODFREY KWAGILE

Plaintiff

and

THE MINISTER OF SAFETY & SECURITY

First Defendant

SNR SUPERINTENDENT E.S. MOFOKENG

Second Defendant

JUDGMENT BY:

MATLAPENG, AJ

HEARD ON:

2 NOVEMBER 2012

DELIVERED ON:

28 FEBRUARY 2012

INTRODUCTION

[1] This matter started life as a civil suit wherein the plaintiff sued the defendant for damages in respect of an alleged malicious prosecution and wrongful attachment of goods. However on the day of trial and pursuant to an agreement by the parties the matter proceeded by way a stated case in terms of rule 33(1) and (2) of the Uniform Rules of Court. This was primarily because to a large extent the facts of this matter are common cause between the parties.

- [2] In an attempt to expedite the resolution of this matter the parties agreed further that the issue of merits be separated from quantum in terms of rule 33(4). After a careful consideration of the submissions made by both counsel, I duly made an order for the separation in terms of the rule aforesaid. This judgment deals with the merits only. The issue of quantum was postponed sine die.

THE PARTIES

- [3] 3.1 The plaintiff is Pogiso Godfrey Kwagile, an adult male qualified civil engineer and a businessman.
- 3.2 The first defendant is the Minister of Safety and Security cited in his capacity as the head of the South African Police Service.
- 3.3 The second defendant is Superintendent Mofokeng, a major male policeman employed by the South African Police Service and who was acting at all relevant times within the course and scope of his employ with the first defendant.

FACTUAL BACKGROUND:

[4] The factual background and time line in this matter as agreed to by the parties is as follows:

4.1 The immovable property known as site 3074 Selosesha, Thaba Nchu (the property) was sold at a sale in execution on 12 February 2008 to one Boitumelo Molosiwa. On 28 August 2008 Molosiwa sold the property to Batshweneng Family Trust. The property was at all relevant times licensed premises in terms of the Liquor Act 27 of 1989 (the Act). The property consisted of the following licensed premises: Tshwaraganang Bar Lounge (on consumption) with Licence No FSP/022570 and Tshwaraganang Liquor Store with Licence No FSP/022329.

4.2 On 28 October 2008 Molosiwa made an application in terms of s113 of the Act to transfer the licences of the licensed premises which were situated on the property to the plaintiff. The plaintiff at all relevant times conducted business from the premises known as Tshwaraganang Lounge (Letabong Jazz Oasis). The

licensee on the licence was Tshwaraganang Trading Co (Pty) Ltd. The holder of the two licences was an entity known as Tshwaraganang Trading CC. During March 2009 an entity known as Bloemwater obtained judgment against Tshwaraganang CC as a result of which the Sheriff Magistrates' Court Thaba Nchu attached the said liquor licences.

4.3 On 3 April 2009 the plaintiff launched a new application in terms of s19 of the Act for a special licence. On 20 April 2009 the plaintiff purchased the liquor licences from the Sheriff in consequence of which on 23 April 2009 the Sheriff Thaba Nchu applied to the Free State Liquor Board for the transfer of the licences in terms of s113 of the Act to the plaintiff.

4.4 On 28 April 2009 the plaintiff's attorney forwarded a letter to the second defendant as confirmation of the fact that the plaintiff has made an application for the transfer of the liquor licence in terms of s113 of the Act.

4.5 On 21 June 2009 the second defendant in the company of various police officers seized the plaintiff's liquor supply on the property and in respect of Letabong Jazz Oasis. He claims that he was acting in terms of the provisions of the Act and the Criminal Procedure Act, 51 of 1977. The plaintiff disputes this authority. The seizure was conducted without a warrant of seizure and without the plaintiff's consent.

4.6 Neither the plaintiff nor any of his employees were arrested during this operation. The second defendant laid a charge against the plaintiff on 21 June 2009 (same day that the liquor was impounded for contravening s154(1)(a) of the Act).

4.7 In July 2009 the public prosecutor (PP) of Magistrate Thaba Nchu and the Director of Public Prosecutions (DPP) Free State declined to prosecute the plaintiff. When the seizure took place on 21 June 2009 the application for the transfer of licences to the plaintiff had not been finalised. It was only effected on 21

September 2012 after this court issued a mandamus against the Free State Liquor Board.

4.8 The plaintiff avers (which is disputed) that a practice has developed since the inception of the Act in terms whereof prospective licence holders could trade pending the finalisation of the application for the transfer of the licence in terms of s113 of the Act.

[5] The questions to be determined in this matter as agreed to by the parties are:

5.1 *Whether the plaintiff, as the prospective licence holder of licence number 022570 awaiting transfer of the licence in terms of s113 of the Act, is entitled to conduct the business of the sale of liquor in terms of the said licence pending the transfer of the licence into his name from the licensed premises as at 21 June 2009;*

5.2 *Whether the defendants were entitled to seize the liquor on the premises from a prospective licence holder who is awaiting transfer in terms of s113 using*

the provisions of the Act and the Criminal Procedure Act;

5.3 Whether the defendants required a warrant to seize the liquor on 21 June 2009; and

5.4 Whether s154(1)(a) of the Act, on a proper interpretation thereof, determined that only a licence holder in terms of the Act may sell liquor.

[6] The questions posed above are interrelated. However, in my view the question posed in 5.4 above is central to the dispute herein and can be dispositive of this matter. I will deal with the questions raised in 5.1 to 5.3 above in so far as they may be relevant to the resolution of this matter.

THE ISSUES RAISED

[7] In a nutshell this case raises two crisp legal issues:

(a) was the attachment of the liquor belonging to the plaintiff by members of the South African Police Service acting in their capacity as such and within their

scope of employment and duties with the second defendant wrongful.

- (b) whether the subsequent prosecution of the plaintiff in the circumstances of this matter can be said to have been malicious.

THE LAW

[8] The authors Neethling *et al* **LAW OF DELICT**, Fifth Edition state that a defendant who, without any justification or judicial authority whatsoever, attaches another person's property, is liable without further ado. It therefore follows in my view based on Neethling that a defendant is saddled with the onus of justifying his action.

[9] In respect of malicious prosecution it is trite that in order for the plaintiff to succeed with this claim, he has to allege and prove the following:

- (a) that the defendants set the law in motion;
- (b) they acted without reasonable and probable cause;
- (c) they acted with malice and;
- (d) that the prosecution has failed. See **MINISTER FOR**

JUSTICE AND CONSTITUTIONAL DEVELOPMENT v

MOLEKO [2008] 3 ALL SA 47 (SCA) paragraph 8.

[10] I have already indicated in paragraph 6 above that s154 of the Act is central to the resolution of this matter. Section 154 (1)(a) of the Act provides as follows:

“(1) Any person who –
(a) sells any liquor otherwise than under a licence or an exemption by or under section 3 or 4, shall be guilty of an offence.”

[11] It is trite law that in any process of interpreting legislation the primary objective is always to ascertain the true intention of the legislature. Amongst others this is normally achieved by asking oneself what is the mischief which the legislature intended to combat. It is in this context that in many instances it becomes imperative in addition to interpreting the Act as a whole to have regard to its preamble.

[12] From a careful reading of the Act it should be clear that the mischief identified by the legislature is the prohibition of the sale of liquor without an appropriate licence or an exemption

as clearly spelled out in s154 (1)(a). It is important to note that this section does not only prohibit the sale of liquor without the appropriate licence or exemption but in fact makes it an offence. Ordinarily such a contravention would attract a criminal sanction.

[13] In my view this makes it abundantly clear that for anybody to sell liquor lawfully, such a person is required by law to have an appropriate licence or permit issued in terms of the Act. It follows inevitably that as it is common cause that at the time of his arrest by the employees of the second defendant, the plaintiff was neither a holder of a licence nor an exemption issued in terms of the Act, and by so doing, he was committing an offence.

[14] I hereunder proceed to deal with 2 legal issues identified in paragraph 7 above. Insofar as the first question is concerned it is not in dispute that as at the relevant time, the plaintiff was neither a holder of a licence nor an exemption issued in terms of the Act. I therefore find that the argument raised on plaintiff`s behalf to the effect that because he had purchased the business as a going concern and had already applied for

the transfer of the liquor licence into his own names should be used as justification for his conduct is not only fallacious but is without substance. The mere application of the transfer of a licence does not give the prospective licence holder namely plaintiff the right to trade. All that it confers on the plaintiff is a *spes*. It is trite that the mere application of the transfer of a licence in terms of s 113 does not necessary mean that the licence will be transferred to him. There are still qualifications huddles that he needs to satisfy in terms of s25. It is therefore beyond dispute that the plaintiff was committing an offence in the presence of the police officers.

[15] Plaintiff raised as an alternative defence in addition to the fact that he has applied for a licence, that there was a practice that was common in terms whereof he could continue to trade whilst awaiting the ultimate transfer of the licence. It is however, clear that the plaintiff was not a person appointed by the licence holder Tshwaraganang Trading CC in terms of s39.

[16] In this context I was referred to an unreported case 14363/93 *sub nom* **HERMAN RONALD RICHARD AND 2 OTHER v**

LIEUTENANT PIETERSE & 2 OTHERS as an authority for the plaintiff. In my view, the **Herman Ronald** case is different from the matter under discussion and does not lend any support to the plaintiff's assertions. In that case, firstly, the court held that there was a licence holder, namely the seller, and further that the agreement of sale was subject to conditions. Should those conditions not be met, the liquor business would revert to him. Secondly, the matter also dealt with the provisions of s39(4). The court found that the reason for appointing a person in terms of s39(1) is irrelevant. It went on to pronounce at page 8 of the judgment:

"In terme van artikel 39(4) van die Wet het die aangestelde verantwoordelike persoon dieselfde verpligtinge as die lisensiehouer en word laasgenoemde ook nie onthef van sy verpligtinge in terme van die Wet nie. In terme van beide ooreenkomste het die lisensiehouer die koper gemagtig om 'n verantwoordelike persoon aan te stel, klaarblyklik met die doel dat in terme van die lisensie en ooreenkomstig die bepaling van die Wet met besigheid voortgegaan kan word."

[17] The plaintiff was never appointed in terms of s39 of the Act to be the responsible person. It is common cause that the liquor licence was in the name of a juristic person. In the current matter the person who was appointed by the juristic person to be the responsible person, does not play any role and features nowhere in the applications that the plaintiff made in terms of s113.

[18] It would be remiss if I do not comment about the conduct of the plaintiff`s attorneys in this matter. It is to me a serious cause for concern that by a letter dated 29 April 2009 the plaintiff`s legal representative fully aware that the plaintiff did not have an appropriate licence or an exemption, advised members of second defendant that they would advise their client to continue to conduct business notwithstanding the fact that it was common cause that he did not have the requisite licence or exemption.

[19] However, this is not the end of the matter the next enquiry relates to the following critical questions that are linked up with what I discussed above namely whether in impounding and removing the goods involved in this matter without a

warrant, in the circumstance of this matter, can be said to be wrongful. The most direct answer to this question lies in s20 read with s22 of the Criminal Procedure Act. These sections in so far as it is relevant to this case provide as follows:

“Section 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.

Section 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)
- (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.”

[20] It should be clear from the reading of the section that members of the police are under certain circumstances permitted and authorised by law to seize certain articles even in circumstances where they are not in possession of a warrant. The question to be answered in this matter is whether the police were justified to proceed to seize the goods without a warrant. It is not in dispute that the plaintiff was at the material time selling liquor without the requisite licence or exemption. The police went to the plaintiff `s premises to ascertain whether the plaintiff was selling liquor without a licence or not. It cannot be disputed that in so doing, the police were acting in accordance with their constitutional and legal obligation to combat crime and maintain law and order. They found the plaintiff busy selling liquor without a licence. In terms of the Act this is criminal offence. In the circumstances the police had a legal obligation to arrest the plaintiff and put a stop to his unlawful

conduct. Whilst executing their duties the police charged the plaintiff of selling liquor without licence in contravention of the Act.

[21] The liquor in issue was an article used in the commission of an offence. In other words it is the instrumentality of the offence. Upon conviction there is a possibility that it may be forfeited to the state. It is evident that liquor being a consumable can easily be disposed of. It was expedient under the circumstance for the police to secure the goods in issue which would have been used as exhibits in the criminal trial. Section 20 allows the police to seize liquor without a warrant. In the circumstances of this matter, I do not think that the police acted unreasonably. Given the exigency of this matter I have no doubt that any magistrate faced with the facts of this matter would not have issued a warrant of seizure. It is clear to me that time was of the essence in this matter, and the police have to act proactively. In my view the argument proffered by the plaintiff that the seizure of the goods by the police without a warrant amounts to spoliation is without merit. I therefore find that the police acted properly and lawfully under circumstances.

[22] It is common cause that the plaintiff was supposed to appear in court on a criminal charge. It is not in dispute that the prosecution declined to prosecute. I am not aware of any reason for this decision. On the common cause facts I am of the view that it cannot be that the prosecution intended to say that the plaintiff was justified in law to trade in liquor without the requisite licence. In my view at best this decision by the public prosecutor is neutral. However, what is not in dispute is that at the time of his arrest and subsequent prosecution the plaintiff was not the holder of a licence issued in terms of the Act. As this is a criminal offence the police were in law entitled to arrest and charge him. In simple terms the police had reasonable and probable cause to prosecute. Based on **Moleko`s** case above I hereby find that the very substratum of claim for malicious prosecution is missing. I therefore find that in the circumstances the police acted lawfully in the execution of their lawful duties.

In conclusion I am of the view that plaintiff has failed to make out a case for the relief in respect of both claims.

ORDER

In the result the plaintiff`s claims are dismissed with costs.

D.I. MATLAPENG, AJ

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