

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No: 1599/2013

In the matter between:

ALBERTO SHADRECH ROSSI
FRANCIS ALBERT HAWKINS
EMILE ROSSI
ENRICO PENTENE
BESA ENGINEERING (PTY) LTD
GEFCO (PTY) LTD

1st Applicant
2nd Applicant
3rd Applicant
4th Applicant
5th Applicant
6th Applicant

and

MINISTER OF SAFETY AND SECURITY
MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT
DIRECTOR OF PUBLIC PROSECUTIONS
K HERBERT

1st Respondent

2nd Respondent
3rd Respondent
4th Respondent

JUDGMENT: DE WET, AJ

HEARD ON: 15 AUGUST 2013

DELIVERED ON:29 AUGUST 2013

- [1] The applicants applied for an order *inter alia* ordering the respondent's to return within 5 days of the order all goods removed from the premises situated at 28th Street, Industrial, Welkom on 6 June 2012 and without limiting the order including the goods listed in annexures B, C and D to the founding affidavit but excluding the goods that were confiscated from the illegal miners. First and second applicants are ordered to identify these goods within 48

hours of this order and the fourth respondent is ordered to facilitate this.

[2] On the 22nd May 2013 a notice by second and third respondents to abide by the decision of this court was filed and no order is hence requested against second and third respondents by the applicant.

[3] From the papers it appears that:

3.1 The premises situated at no 28th Street, Welkom is the property of the 6th applicant;

3.2 First applicant is the sole director and shareholder of the 6th applicant;

3.3 On the same premises but in a different building 5th applicant manufactures electrical motors mainly for the mining industry;

3.4 First applicant approached Standard Bank and the liquidators of an entity known as Kimberley eclipse with a proposal to rehabilitate the ground. They entered into an agreement and first applicant subsequently proceeded with a plan to rehabilitate the ground. During the negotiations preceding the agreement it came to light that the ground on the no 4 Half Street premises contained unacceptably high levels of radio activity and part of the agreement was that the radioactive elements will also be removed.

3.5 Applicant then retained the services of second applicant who is a highly qualified person and an expert in the field of rehabilitation of sites and placed the laboratory of 6th applicant at his disposal to make use of during the environmental impact study to assist in the process to

determine what need to be done to rehabilitate the Half Street premises.

- 3.6 The top-soil could not be removed from the Half Street premises as it was too costly and would only mean that the problem is moved from one premises to another.
- 3.7 First applicant being an engineer by profession therefore designed an elementary plant to scrub the top-soil on the Half Street premises and started to erect the plant on the premises. The idea was that the plant would operate in the form of a filter separating the scrap metal pieces from the foundry sand and leaving the filter to scrub sand that would contain the residue of metals that was too small to stay behind in any of the previous processes.
- 3.7 As the illegal miners was apparently successful in getting gold from the soil the sand would most likely contain gold and in all probability also other metals. The gold and other metals would then still had to be extracted from the sand though a more specialised process that could not be achieved with the scrubbing or the filter the first applicant designed.
- 3.8 The plant was still in the process of being erected when the SAPS took action and that stage the plant had not been operational at all.
- 3.9 During the SAPS raid a number of equipment, such as buckets, spades mats etc. confiscated from the illegal miners were left on the 8th Street premises. These never belong to any of the applicants and should have been removed by the Police as part of their action against the illegal miners.

- [4] On the 6th June 2012 the SAPS as well as a number of private security officials under the command of the fourth respondent raided 8th Street, Industrial Area, Welkom as well as the property being number 4 Half Street, Welkom and seized the attached goods claimed by the applicants in this application.
- [5] The raid was apparently done after a search warrant was obtained in terms of section 20 of the Criminal Procedure Act, no 51 of 1977, as Amended attached to the founding affidavit as annexure "A".
- [6] The search warrant indicates that it was issued to fourth respondent authorising her to seize gold bearing materials, gold processing implements and section 20 meant articles which is in the possession of/under the control of/upon or at a premises/at upon the person of Besa Engineering and Kimberley Clips (sic), 8th Street, Industrial Area, Welkom.
- [7] It is common cause that the goods seized by the members of the SAPS under the command of fourth respondent, in fact were the property of sixth applicant who is not cited in the search warrant and/or the property of the second applicant who is also not cited in the search warrant.
- [8] Some goods were apparently also seized at the premises situated at number 4 Half Street; Welkom although the search warrant does not authorize the seizure at the said premises.

[9] First and fourth respondents oppose the application on the following grounds:

- 9.1 The articles claimed by applicants were seized in terms of section 20 of the Criminal Procedure Act, no 51 of 1977, as amended;
- 9.2 The articles cannot be released to the applicants since the applicant (sic) contravened section 4 of the Precious Metals Act, no 37 of 2005;
- 9.3 The applicant's (sic) equipment were used in the commission of an offence, as a consequence the applicant (sic) may not lawfully possess the seized equipment;
- 9.4 The criminal charges were withdrawn whilst the investigation were in progress and on-going;
- 9.5 First respondent wishes to reinstate criminal charges and add further criminal charges;
- 9.6 The seized items and equipment will afford evidence of the commission of an offence during the trial;
- 9.7 The members of first respondent were armed with a search warrant and only seized items and equipment which on reasonable grounds were believed to be concerned in the commission of an offence and which may afford evidence of the commission of the offence at the trial;
- 9.8 The items were taken to a laboratory and the analysis confirmed that the applicant (sic) was processing gold;
- 9.9 Fifth applicant is not the holder of a refining licence;
- 9.10 SAPS forensic laboratory also confirmed during May 2013 that all exhibits from 5th applicant and "Kimberly Clips" contained traces of gold.

[10] At the hearing of the application on the 15th August 2013 the applicant's advocate with the consent of the advocate on behalf of first and fourth respondents handed to the court a letter dated 13 December 2012 by the National Prosecuting Service, Director of Public Prosecutions, Free State directed to the applicant's attorneys MeressOberholzer Attorneys, Welkom indicating that the Director of Public Prosecutions (third respondent) declined to prosecute the applicants and stating

“Die ondersoekbeampte is opdraggegee om die eiendom, waarop beslag gelê is en wat u wettig mag besit, aan u te oorhandig.”

[11] It was in fact common cause on the papers that the Director of Public Prosecutions on the 11th October 2012 already decided to withdraw prosecution against the applicants but the respondent's allege in their opposing affidavits “... the first respondent wishes to reinstate and add further charges to the indictment.” And further on “I wish to add further that the seized items and equipment will afford evidence of the commission of an offence during the trial.”

[12] I must point out that no information is given by the first or second respondents about:

- 12.1 the investigation conducted against any applicant;
- 12.2 how much time will be needed to complete the investigation;
- 12.3 of the further charges to be faced by any of the applicants;
- 12.4 why the prosecution still needs to keep the seized items and equipment seeing that the analysis had been done.

- [13] I keep in mind that section 31 of the Criminal Procedure Act must be read with section 20 and that both sections were aimed at facilitating the investigation and proof of offences with which the articles confiscated were allegedly connected.
- [14] I also keep in mind that the respondents must act with reasonable expedition in instituting criminal proceedings. The time taken to investigate and to charge the applicants with alleged offences committed must not become so extended as to constitute an act oppressive of the rights of the applicants without any real prospect of further advance by the respondents in the investigation. See **Choonara v Minister of Law and Order** 1992 (1) SACR 239 (W); **Booi v Minister of Safety and Security** 2005 (2) SASW 465 (O). I keep in mind that the withdrawal of the prosecution by the third respondent is not sufficient but that the applicant must make out a case that the matter is one in which no criminal proceedings are instituted as required by section 31(1)(a) of the Criminal Procedure Act. It is clear that the requirements would not be satisfied merely by proof that no proceedings were pending at the time of the institution of the application for return of the articles, but that it was necessary for the applicant to establish that there was no reasonable likelihood of criminal proceedings being instituted in connection with the articles in the foreseeable future. See **Dookie v Minister of Law and Order and Others** 1991 (2) SACR 153 (D) at 156J and **Booi v Minister of Safety and Security and Others** supra.
- [15] The Court is satisfied that the applicant on the papers made out a case that no criminal proceedings were pending for the reason that

there was no reasonable likelihood of any such proceedings being instituted. The fact is that according to the letter refer to above the Director of National Prosecuting Services, Free State on the 13th December 2012 indicated that the fourth respondent after considering the matter carefully decided not to prosecute at this stage. The criminal charges were in fact withdrawn on the 11th October 2012 and at the time of the application 10 months had elapsed without any further steps being taken against the applicants.

- [15] Mr Rathidili, appearing on behalf of the respondents, tried to persuade the Court that the applicants were not entitled to be in possession of the seized items as traces of gold were apparently found on them. Mr Barnard, on behalf of the applicants, pointed out that according to the analysis attached to the founding affidavits no gold dust was found on the property of the applicants but only on the seized property of the illegal miners which appear from the statements to be the correct position.
- [16] Even if gold dust were found on the seized articles I cannot see how that could prevent the respondents from handing back the seized articles to the applicants. The cases quoted by Mr Rathidili in his heads of argument are clearly distinguishable from the present matter. In cases of motor vehicle theft we are dealing with a continuing offence and the stolen motor vehicle remains stolen and can therefore clearly not be handed back to the person from whom it was seized. There was a clear prohibition against the possession of gambling equipment and therefore gambling equipment could not be handed back to the person from whom it

was seized. There is no prohibition against the possession of laboratory equipment and the other items seized from the applicants. If the respondents are worried about the slight traces of gold dust (if such existed at all) the seized items can easily be washed down before being handed back to the applicants.

ORDER

[17] After considering the able arguments on behalf of the applicants and on behalf of the respondents the following order is made:

- 17.1 Prayer 1 of the notice of motion is granted;
- 17.2 First respondent is order to pay the costs of the applicants on a party and party scale.

P. J. T. DE WET, AJ

On behalf of the applicant: Adv. Barnard
Instructed by:
Rossouws Attorneys
BLOEMFONTEIN

On behalf of the respondent: Adv. Rathidili
Instructed by:
State Attorney
BLOEMFONTEIN

/eb