

**IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA**

Case No: 5682/2013

In the matter between:

**ELIAS DUNIAS trading as
COLOSSEUM INTERNET LOUNGE**

Applicant

and

THE MINISTER OF SAFETY & SECURITY

First Respondent

**THE PROVINCIAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICE,
KWAZULU-NATAL**

Second Respondent

CAPTAIN COLETTE BRUWER

Third Respondent

THE MAGISTRATE, EMPANGENI

Fourth Respondent

JUDGMENT

Delivered on 17 October 2013

Vahed J:

[1] Employing the *mandament van spolie* the applicant seeks an Order that he be restored with possession of certain cash, equipment and documents seized by the third respondent, on 16 May 2013, from certain business premises situated at the

LAC Centre in Meerensee, Richards Bay (“the premises”), and from where he traded as the Colosseum Internet Lounge.

[2] The seizure, and the search which preceded it, was effected and conducted by the third respondent together with other members of the South African Police Service. The search and seizure took place in terms of a search warrant (“the warrant”) issued by the fourth respondent on 16 May 2013 in terms of sections 20, 21 and 25 of the Criminal Procedure Act, 51 of 1977. The application for the warrant which served before the fourth respondent was supported by an affidavit, deposed to by one Havenga who was a senior inspector employed by the KwaZulu-Natal Gaming and Betting Board, which suggested that certain offences specified in the National Gambling Act, 7 of 2004 and/or The KwaZulu-Natal Gaming and Betting Act, 8 of 2010 were suspected of being committed at the premises.

[3] As indicated in the introduction to this judgment, the applicant has employed the *mandament van spolie* to secure the return of that which was seized. Indeed, he describes this case in his founding affidavit thus:

‘I have been advised that the purpose of this application is to seek a mandament van spolie order, the only issue is whether I have been unlawfully dispossessed of the goods listed hereunder, which goods were in my peaceful and undisturbed possession prior to the search and seizure.’

[4] In *Ivanov v North West Gambling Board and Others* 2012 (6) SA 67 (SCA) 67at para 19 the requirements for a *mandament van spolie* were described as follows:

“The historical background and the general principles underlying the mandament van spolie are well established. Spoliation is the wrongful deprivation of another’s right of possession.

The aim of spoliation is to prevent self-help. It seeks to prevent people from taking the law into their own hands. An applicant upon proof of two requirements is entitled to a mandament van spolie restoring the status quo ante. The first is proof that the applicant was in possession of the spoliated thing. The cause for possession is irrelevant – that is why possession by a thief is protected. The second is the wrongful deprivation of possession. The fact that possession is wrongful or illegal is irrelevant, as that would go to the merits of the dispute.”

[5] It is common cause in this case that the applicant was in possession of that which was seized by the third respondent.

[6] In seeking to address the second requirement, Mr *Jagga*, who appeared for the applicant, submitted in his heads of argument that “[i]t is the case for the applicant that he was unlawfully dispossessed of certain items on 16 May 2013, under the authority of an invalid search and seizure warrant”. That theme was developed fully in his heads of argument and in oral argument before me.

[7] However, it seems to me that what needs to be addressed first is whether, without further ado, the *mandament van spolie* is an appropriate remedy in the circumstances of this case.

[8] The court *a quo* in *Ivanov*’s was also dealing with the *mandament van spolie* against the background of a search and seizure warrant. In that case however an Order was specifically sought declaring the warrant to be null and void, which was granted. On appeal the Supreme Court of Appeal had the following to say:

‘[14] Counsel for the respondents submitted that the search and seizure were lawful, as the warrant had not been declared invalid when the police executed it, and that it remained valid until set aside on review. In my view this submission cannot prevail. ‘A warrant is no

more than a written authority to perform an act that would otherwise be unlawful.'It must comply with the statutory provisions. If it is subsequently declared invalid, the invasion of privacy and the search and seizure cannot retain the lawfulness thereof, as the essence of what made the dispossession lawful, falls away. As Harms DP stated in *Cadac (Pty) Ltd v Weber-Stephen Products Co and Others* [2011 (3) SA 570 (SCA) para 18]: 'The declaration of invalidity operates retrospectively and not prospectively. This means that once a warrant is set aside it is assumed that it never existed, and everything done pursuant thereto was consequently unlawful.'

[15] Put differently, the lawfulness of the search and seizure is dependent on the legality of the search warrant. This must necessarily be so, as the warrant provides the justification for the search and seizure. If the warrant is declared null and void, it means that there was no basis in law for the search and seizure, which were therefore invalid *ex tunc*. In this case the police had no authority to seize the appellant's goods, albeit that they acted in good faith and believed that they had the power to search in terms of the warrant. Once the order of invalidity was issued, the necessary consequence was that the police acted unlawfully.

[16] The matter was put beyond doubt by the decision of the Constitutional Court in *Betlane v Shelly Court CC* [2011 (1) SA 388 (CC)]. In that case the registrar had issued a writ of execution in favour of the respondent, contrary to rule 49(11) of the Uniform Rules of Court, which requires it to be issued by the court which granted the order. The applicant was evicted on the strength of the writ of execution which was later declared unlawful and set aside. The applicant applied for a spoliation order. Mogoeng J held in para 36: 'Ordinarily, an eviction that is carried out pursuant to an invalid writ of execution amounts to spoliation. The evictee would therefore be entitled to restitution.' However, a restoration order was not granted, as the premises were already occupied by a bona fide third party.

[17] It follows that it was competent for the appellant in this case to apply for a spoliation order. The court below accordingly erred when it concluded that the appellant had used a wrong procedure and relied on a wrong cause of action. I now turn to the issue of spoliation.'

[9] Both Mr *Jagga*, and Mr *Mthembu*, who appeared for the respondents, sought to rely upon *Ivanov* as authority for their respective contentions concerning the applicability of the *mandament van spolie* in the present matter.

[10] Mr Jagga's reliance upon *Ivanov*, and more particularly paragraph 17 thereof, is, in my view, misplaced. It loses sight of the fact that a specific Order was sought and granted declaring the warrant to have been invalid. Once that declaration had been made, as the court was at pains to point out, the invalidity operated retrospectively. That is something far different from what is sought in this case. Here reliance is placed on the *mandament van spolie* as a distinct and stand-alone remedy.

[11] Mr Jagga referred me to a number of cases where he contended that the *mandament van spolie* was employed in similar or almost identical circumstances as obtain here.

[12] In *Zoeco System Managers CC v Minister of Safety and Security NO and Others* (54447/12) [2012] ZAGPPHC 353 (6 December 2012) (also at 2012 JDR 2500) the Court was also dealing with a claim under the *mandament van spolie* for the return of goods seized in terms of a search warrant. Although it is not clear from the body of the judgment whether an Order was specifically sought declaring the warrant to be invalid and null and void, *Teffo J* concluded the judgment with a specific Order declaring the warrant invalid and setting it aside, before proceeding to issue an Order for restoration of the goods seized. It is clear also from the judgment that the applicability of the *mandament van spolie*, in the absence of an Order setting aside the warrant, was not in issue, or dealt with, in that matter.

[13] *P J Goqwana v Minister of Safety & Security &Ors*, North Gauteng High Court Case No. 26432/2012, unreported, 07 June 2012, concerned identical facts.

From a reading of the judgment it is not clear whether an Order as to the invalidity of the warrant was sought, but no Order in that regard was made. The Court simply directed that possession be restored. However, in that case too, it is clear from the judgment that the applicability of the *mandament van spolie*, in the absence of an Order setting aside the warrant, was not in issue or dealt with.

[14] *BelaBela Lounge (Pty) Ltd v Minister of Safety & Security &Ors*, North Gauteng High Court Case No. 37440/2013, unreported, 13August 2013,also concerned identical facts. There however an Order was specifically sought setting aside the warrant in that case and in the course of the judgment it was found to be invalid although no specific Order was made in that regard. Again, however, it is clear from the judgment that the applicability of the *mandament van spolie*, in the absence of an Order setting aside the warrant, was not in issue or dealt with.

[15] None of those decisions are authority for the view that where a possessor is dispossessed of goods under the authority of a warrant the *mandament van spolie* is available as a remedy for the restoration of possession in the absence of an Order setting aside the warrant.

[16] In my view, unless and until an Order is sought and obtained declaring the warrant in the present case to be invalid and null and void, it (i.e. the warrant) remains effective clothing the search and seizure with judicial legality. No such Order is sought in the present case.

[17] For so long as the warrant remains extant everything and anything done pursuant thereto remains lawful. It follows therefore that the second leg in the test for spoliation has not been satisfied by the applicant. I am fortified in that view by what was said at paragraph 20 in *Jacobs and Others v Baumann NO and Others* 2009 (5) SA 432 (SCA). There the court relied on *Smith v East Elloe Rural District Council and Others* [1956] 1 All ER 855 (HL) at 871G – H where Lord Radcliffe said:

‘An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity on its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it would remain as effective for its ostensible purpose as the most impeccable of orders.’

[18] The Court below in *Ivanov* relied upon *Oudekraal Estates (Pty) Ltd v City of Cape Town & Ors* 2004 (6) SA 222 (SCA) para 26 to hold, notwithstanding its declaration that the warrant was invalid, “...that the search and seizure were not unlawful as the search warrant ... had not yet been set aside when the police executed it, and that it had empowered them to conduct the search and seizure”. (at para 9 of *Ivanov*). In para 13 in *Ivanov* the Supreme Court of Appeal dealt with this aspect thus:

‘[13] As indicated earlier in my judgment, the Judge President found support in *Oudekraal* when she held that an unlawful act was capable of producing legally valid consequences for as long as the unlawful act was not set aside. Counsel for the respondents correctly conceded that the court below’s reliance on *Oudekraal* was misplaced, as that case dealt with the validity of administrative acts. The issue of a warrant is not an administrative act. It was so held by Langa CJ in *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions*, where he stated:

“In supplementary written submissions filed after the close of the hearing, the State submitted that the decision to issue a search warrant is an administrative one which falls within the terms of the Promotion of Administrative Justice Act. The applicants, on the other hand, submitted that it is a judicial discretion and does not fall within the scope of administrative action. This latter approach accords more with the jurisprudence of this court.” ‘

[19] One of the principal issues in the appeal in *Ivanow* was "...whether the declaration of invalidity of the search warrant could transform a bona fide search that was executed under a warrant into a spoliation...". (at para 11) That question was answered by the Court in the affirmative.

[20] In my view, until set aside, the warrant in the present matter remains a valid exercise of a judicial discretion by the fourth respondent. As I have said, the applicant did not seek that relief and consequently he is non-suited.

[21] The application is dismissed with costs.

Vahed J

CASE INFORMATION

Date of Hearing: 19 September 2013
Date of Judgment: 17 October 2013

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