

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape Division)

Case Nr: 245/2008
Case Heard: 18/04/2008
Date delivered: 25/04/2008

In the matter between:

E Polonyfis

PLAINTIFF

and

The Provincial Commissioner: SAPS: NC	1 st RESPONDENT
Insp K P Motshebe NO	2 nd RESPONDENT
Insp K Williams NO	3 rd RESPONDENT
Const B S Tawanyawe NO	4 th RESPONDENT
T Mabílo NO	5 th RESPONDENT
Insp B M Motshebe NO	6 th RESPONDENT
Const G G Bogosi NO	7 th RESPONDENT
The Magistrate, Kuruman NO	8 th RESPONDENT

Coram: Olivier J

JUDGMENT

Olivier J:

1. During January 2008 members of the South African Police Services and of the Northern Cape Gambling Board seized various items at the applicant's business premises in Kuruman.

In doing so, the particular members acted upon search warrants which had been issued by the magistrate, Kuruman.

2. The applicant, mr Elefterios Polonyfis, applied for the review and setting aside of both search warrants, as well as the setting aside of the execution thereof, and for an order that his possession of the seized property be restored.
3. The provincial commissioner for the South African Police Service, Northern Cape, was cited in his capacity as such as the first respondent, the members of the Police and of the Northern Cape Gambling Board involved in obtaining the search warrants and executing them as second to seventh respondents and the Magistrate, Kuruman, as the eighth respondent.
4. On behalf of the respondents it was conceded that both search warrants fall to be set aside. I agree and accordingly will not deal with the reasons therefor in any detail, suffice to say that it appears that the information relied upon in issuing the search warrants did not even include allegations to the effect that it was suspected that the particular property on the applicant's premises constituted articles as envisaged in section 20 of the Criminal Procedure Act, 51 of 1977 (compare **Toich v The Magistrate, Riversdale and Others** 2007 (2) SACR 235 (CPD)).
5. The respondents have furthermore tendered to return the seized property to the applicant, with the exclusion, however, of those articles which, according to the respondents, **prima facie** are gambling devices as envisaged in section 88(8) of the Northern Cape Gambling and Racing Act, 5 of 1996 ("*the NCGR Act*"). Their case is that section 88(8) would render mere possession of

such devices by the applicant illegal and that an order compelling them to place the applicant in possession of such devices would have the effect that the respondents would contravene section 88(8) themselves.

6. The respondents requested a postponement of the application to enable them to have the devices examined by an expert with a view to determining whether they are indeed gambling devices or machines.
7. On behalf of the applicant it is, however, argued that the application is essentially based on the **mandament van spolie**, that the question whether the applicant has the right to possess the devices therefore cannot be raised as a defence and that the particular items should therefore also be returned to the applicant.
8. It is indeed so that the unlawfulness of the possession of an applicant relying on the **mandament van spolie** would generally not be a valid defence (see **Willowvale Estates CC and Another v Bryanmore Estates Ltd** 1990 (3) SA 954 (WLD) and **Silverberg and Schoeman's The Law of Property**, 5th edition, Badenhorst **et al**, pp 289, 302 and 303).
9. The rationale for this approach is the fact that the remedy is aimed at "*the reversal of the consequences of interference with an existing state of affairs otherwise than under authority of the law, so that the **status quo ante** is restored*" and to protect society "*against self-help*", even if it would require of a Court "*to assist a party who should not have possession*" (see **Mbangi and Others v Dobsonville City Council** 1991 (2) SA 330 (WLD) at 336).

10. The applicant does not deny the allegation that the particular devices are gambling devices. He also does not deny not having a valid licence in respect of the devices. He merely claims to be using the devices in a way that would, according to him, constitute “*amusement games*” as envisaged in section 1, read with section 47, of the National Gambling Act, 7 of 2004 (“*the NG Act*”; an activity which has, however, on the applicant’s own version not yet been regulated or licensed as envisaged in section 1 of the NG Act.

11. The argument for the applicant is that, even if possession of the devices by the applicant under these circumstances would be not only unlawful, but in fact illegal (and a contravention of section 88(8) of the NCGR Act), the respondents should nevertheless be ordered to return them to the applicant. The argument is that the principle that the unlawfulness of the applicant’s possession could not be a valid defence to a spoliatory claim would still apply, regardless of the fact that such possession might constitute a criminal offence.

12. In this regard the applicant relies, in the first place, on the case of **Yeko v Qana** 1973 (4) SA 735 (AD), where van Blerk JA at 739 remarked as follows:

*“... the injustice of the possession of the person despoiled is irrelevant as he is entitled to a spoliation order even if he is a thief or a robber. The fundamental principle of the remedy is that no one is allowed to take the law into his own hands. All that the **spoliatus** has to prove, is possession of a kind which warrants the protection accorded by the remedy and that he was unlawfully ousted.”*

13. The **Yeko** case is to some extent distinguishable. I don't think that the conduct of the second to seventh respondents, in obtaining warrants before seizing the property, can be equated with self-help in the sense involved in the **Yeko** case (see **Polonyfis and Others v The Provincial Commissioner for the SAPS, Northern Cape and Others**, an unreported judgment by Kgomo JP in this division, delivered on 15 June 2007 under cases numbers 1573/06, 1590/06 and 103/07). Also mere possession would not have constituted an offence on the facts in the **Yeko** matter.

14. The case of **Dyani v Minister of Safety and Security and Others** 2001 (3) All SA 310 (Tk) also appears to be distinguishable. Although the Court in that matter concluded that it would have been competent to order the return of the motor vehicle, this conclusion was based upon the particular facts of that case, and more specifically on the fact that it had not been shown that the mere possession of the motor vehicle would constitute an offence. In terms of s 125(5)(b) of the Road Traffic Act of 1989 possession "*without lawful cause*" would have been required to constitute the particular offence.

15. The cases of **De Jager and Other v Farah and Nestadt** 1947 (4) SA 28 (WLD) and **Ntshwaqela and Others v Chairman, Western Cape Regional Services Council** 1988 (3) SA 218 (CPD), on which Mr Jagga also relied on behalf of the applicant in this regard, do however appear to support his argument (see also **Vena and Another v George Municipality** 1987 (4) SA 29 (CPD) and **Bennet and Another v Pretorius and Others**, an unreported judgment delivered on 20 June 2006 in the

Transvaal Provincial Division under case no 40024/2005, paragraphs [29] and [30]).

16. On the other hand there is the case of **Parker v Mobil Oil of Southern Africa (Pty) Ltd** 1979 (4) SA 250 (NCD) in this division. There van den Heever J (as she then was) made the following remarks at 255 (**albeit obiter**):

*"moreover, the rule that goods dispossessed against the will of the possessor must be restored forthwith, is not an absolute one. The reason for the rule is, according to the authorities, certainly not because the fact of possession is elevated to a right stronger than **plenum dominium**, but to discourage breaches of the peace by self-help in the case of dispute. Despite generalizations that even the thief or robber is entitled to be restored to possession, I know of no instance where our Courts, which disapprove of metaphorical grubby hands, have come to the assistance of an applicant who admits that he has no right vis-à-vis the respondent to the possession he seeks to have restored to him. (Cf **Judelman v Colonial Government** 3 BAC 446 (19 CTR 442 at 444).)*

*Certainly the existence of spoliation procedure does not abrogate common law rules that dispossession may be lawful by virtue of one's right to protect oneself or others against serious harm, where immediate action is required, any more than it renders nugatory statutory authority to dispossess, cf **Moleta en 'n Ander v Fourie** 1975 (3) SA 999 (O) and the cases dealing with the impounding of livestock. Public policy may not require immediate action to prevent trading without a licence (**Yeko v Qana** 1973 SA 735 (A)); but different considerations may apply where respondent's action prevented the commission*

*of a more serious offence (**Scoop Industries (Pty) Ltd v Langlaagte Estate and Gold Mining Co Ltd (in Voluntary Liquidation)** 1948 (1) SA 91 (W)); and must apply where respondent's action is aimed at preventing serious injury. (Cf **Nisenbaum and Nisenbaum v Express Buildings (Pty) Ltd** 1953 (1) SA 246 (W))."*

17. Although this attitude was criticised by some (see "**Spoliation Proceedings and the 'Grubby-handed' Possessor**", **South African Law Journal** vol 98, 1981, page 36 and **The Law of South Africa** First Reissue, vol 27, paragraph 272), it was referred to with apparent approval in **Coetzee v Coetzee** 1982 (1) SA 933 (CPD) at 935D-E (see also **Ngewu and Others v Union Co-operative Bank and Sugar Co Ltd; Masondo and Others v Union Co-operative Bank and Sugar** 1982 (4) SA 390 (NPD) at 406F).
18. Although distinguishable because they did not concern spoliatory relief, regard could nevertheless also be had to the more recent cases of **Marvanic Development (Pty) Ltd v Minister of Safety and Security** 2007 (3) SA 159 (SCA) and **Basie Motors Bk t/a Boulevard Motors v Minister of Safety and Security** [2006] SCA 35 (RSA). In both these cases the majority judgements were based on a finding that, although the applicants would otherwise as owners have been entitled to the return of their property in terms of section 31(1)(a) of the Criminal Procedure Act, this could not be ordered if their possession would constitute an offence under the provisions of the National Road Traffic Act, 93 of 1996.
19. It is not difficult to conceive of situations where the potential harm or consequences inherent in restoring possession may

outweigh the consequences and general disapproval of unlawful dispossession; particularly where the circumstances under which the unlawful dispossession had taken place had not amounted to blatant self-help, but rather to a failure to fully comply with procedural requirements. In such a case it may become necessary to develop the common law principles applicable to the remedy of **mandament van spolie**, and more specifically the defences thereto (see **section 39(2)** of the **Constitution**, Act 108 of 1996); especially where the prejudice to a fundamental right or to the execution by the Police of the objects set out in section 205(3) of the Constitution would outweigh the potential consequences of “*condoning*” unlawful dispossession in a particular case.

20. It is not, however, in this case necessary to go to such lengths. There is no reason why, if renewed possession of the devices would constitute an offence on the part of the applicant in this matter, that could not be addressed through due criminal process. There is on the respondents’ papers also no reason why a proper and valid search warrant could not be obtained if necessary. No case has been made out to the effect that the devices, which can be seen on the photographs forming part of the respondents’ papers, could easily and swiftly be concealed if returned to the applicant.
21. To postpone the matter to enable the respondents to prove that the devices are indeed gambling devices would therefore serve no purpose and would unjustifiably frustrate the applicant’s right to spoliatory relief. The applicant has made out a case that he has been unlawfully dispossessed of his property (including the devices) and, even if a case had been made out that a postponement would preserve the articles to assist the criminal

investigation, it would not be desirable for this Court to deny the applicant the relief that he is entitled to under these particular circumstances (compare **National Director of Public Prosecutions and Another v Mahomed** 2008 (1) SACR 309 (SCA) at paragraphs [19] to [22], but see also **National Director of Public Prosecutions v Zuma and Another** 2008 (1) SACR) 258 (SCA) at 278g-282d).

22. It follows that the applicant is entitled to the relief claimed in paragraphs 2 and 3 of the notice of motion. Whether or not the application was urgent when initially moved on 14 March 2008 was not argued and has become moot.
23. Whereas the applicant had initially, in his notice of motion, only claimed costs on a party and party scale against those respondents who would oppose the application, he has since taken the stand that the respondents should be ordered to pay the costs of the application on the scale of attorney and own client. The applicant claims that *"the respondents are merely attempting to frustrate the due process of law and to utilise this as a further attempt to do so in a forum and through a process which is not the correct forum or process to do so"*.
24. The respondents have not at all been unreasonable or obstructive in their attitude. I also fail to see how the abovementioned unreported **Polonyfis** judgment of Kgomo JP could provide any support for this contention by the applicant. In my view there is no basis at all for a punitive costs order.
25. On the contrary, had mr Coetzee, who appeared on behalf of the respondents, not suggested (and argued) that costs should follow suit, I would have been very tempted to consider ordering

each party to pay its own costs. The fact that I may be constrained to order the return of the devices to the applicant, would not mean that I would not have the normal discretion as regards costs.

26. On the applicant's own version he conducted so-called amusement games while it had not yet been legalised and regulated by means of provincial legislation, as envisaged in s 1 of the NG Act. It is quite clear that the applicant wants the devices returned for purposes of the "*business*". I have serious doubts about whether the province's "*failure*" to regulate the conducting of amusement games would constitute a defence to a charge in terms of s 88(8) of the NCGR Act.
27. The respondents have also gone a long way in making out a case that the activities conducted at the applicant's businesses did in any event not amount to amusement games as envisaged in the NG Act and its regulations, and the applicant chose not to deal with those allegations.
28. In view of mr Coetzee's attitude I have, however, decided to refrain from coming to a conclusion in this regard and will adopt the normal approach that costs follow suit.
29. The following orders are therefore made:
 1. The respondents' application for postponement, as set out in its notice of motion dated 7 March 2008, is dismissed with costs on a party and party scale.
 2. 2.1 The search warrant issued by the 8th respondent on 14 December 2007 in respect of the business African

Entertainment Centre, Voortrekker Road, Kuruman,
is reviewed and set aside.

2.2 The execution of the said search warrant is set aside.

3. 3.1 The search warrant issued by the 8th respondent on
14 December 2007 in respect of the business Oasis
Private Club, Livingstone Street, Kuruman, is
reviewed and set aside.

3.2 The execution of the said search warrant is set
aside.

4. The 1st to 7th respondents are ordered to forthwith restore to
the applicant the possession of the items seized at the
abovestated business premises during the execution of the
warrants referred to above.

5. The respondents are ordered to pay the costs of the
applicant's application on a party and party scale.

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

For the Plaintiff:	Adv N Jagger
Instructed by:	Van der Wall & Vennote, KIMBERLEY
For the Respondent:	Adv W Coetzee
Instructed by:	State Attorney KIMBERLEY