

IN THE HIGH COURT OF SOUTH-AFRICA (NORTHERN CAPE DIVISION)

KIMBERLEY
CASE NO.: 1516/06 & 1517/16
DATE HEARD:13-12-2006
DATE OF JUDGMENT:13-12-2006

In the matter between:

PATRICK MOREKISI GABAATHOLE

Applicant

vs

THE PROVINCIAL COMMISSIONER OF THE
SAPS, NORTHERN CAPE N.O
INSPECTOR P I VAN RENSBURG N.O
CONSTABLE J STRYDOM N.O
INSPECTOR BOOYSEN N.O
CONSTABLE MOLELEKOA N.O
CONSTABLE MARKGRAAF
THE MAGISTRATE, COLESBERG N.O

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent
6th Respondent
7th Respondent

AND

MARALIZE STANDER

Applicant

vs

THE PROVINCIAL COMMISSIONER
OF THE SAPS, NORTHERN CAPE N.O
INSPECTOR MOUTON N.O
CONSTABLE PETERS N.O
CONSTABLE MPHULANYAE N.O
INSPECTOR MATSHEBE
CONSTABLE BARNS
THE MAGISTRATE, DE AAR N.O

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent
6th Respondent
7th Respondent

CORAM: C.C WILLIAMS J:

J U D G M E N T

WILLIAMS J:

1. These two applications served before me as a matter of urgency on 13 December 2006. After hearing argument on certain *points in limine*, I dismissed both applications with costs. My reasons therefor follow.

2. The applicants in both these matters sought the following relief:
 - 2.1 The setting aside of a search and seizure warrant (issued in case number 1516/06, the "*Gabaathole application*", by the Magistrate, Colesberg and in case number 1517/06, the "*Stander application*", by the Magistrate, (De Aar) in respect, of business premises in both towns operating under the name "*The Entertainment Centre*".
 - 2.2 The setting aside of the execution of the search and seizure warrants.
 - 2.3 The restoration by the 1st to 6th respondents of the possession of the items seized at the premises during the execution of the search and seizure warrants, *inter alia* gambling machines, money, books and documents.

3. The applicants allege that the search and seizure warrants are too wide and vague and that the 7th respondents in both instances did not apply their minds when issuing the warrants.

4. The applicants brought the applications in their capacities as managers of the businesses, alleged that they were in peaceful and undisturbed possession of the seized items and that such dispossession was unlawful therefore entitling them to restoration of possession.
5. The first point *in limine* taken by the respondents, (which applies to both these applications), is one of *locus standi*. Mr. Botha, who appeared for both sets of respondents, argued that since the applicants possessed the seized items merely as employees they were not entitled to spoliatory relief.
6. It is well known that in order to succeed in spoliatory relief, an applicant must prove the two elements of possession ie. detentio (the physical holding of and control over the thing) and animus (the intention of securing some benefit for oneself). See *Ness and another v Greef* 1985(4) 641 (CPD) at 647E.
7. *In casu* the detentio element of the applicants' possession is not in dispute. There are however no allegations in the founding affidavits that they possessed the seized items with the intention of securing some benefit for themselves over and above their interest as employees.

8. In *Mpunga v Malaba* 1959(1) SA 853(W) Steyn AJ said the following at 861F:

“It seems to me that the authorities have established that a servant or a person who holds no rights on his own behalf, except insofar as such rights derive from an authority given to him by the master, is not entitled to bring proceedings for a spoliation order, but that only the employer can do so. In other words, it seems to me that before a person can bring spoliation proceedings, he must show that the right of which he has been spoliated is something in which he has an interest over and above that interest which he has as a servant or as a person who is in the position of a servant or a quasi-servant”.

9. The mere detentio of a thing for the benefit of someone else is not sufficient for a person to claim the relief of a *mandament of spolie*. See *Mbuku v Mdinwa* 1982(1) 219(TKSC) at 222 F-G where Hefer CJ has the following to say:

“In any event, I am of the view that an agent who has no interest in the property which he holds for his principal, or who derives no benefit from holding it, is not entitled to claim the relief of a mandament van spolie. One should not forget that it is a remedy which is available to a possessor; it has never, to my knowledge, been extended, except perhaps inadvertently, to a mere detentor. But the animus possidendi which is required to transform detentio into possession is not the intention required of old for so-called civil possession; it is no more than the intention to hold the thing in question for one's own benefit and not for another. And a detentor who does not have that intention is indeed merely a detentor. I am in full agreement with the view expressed in Wille Principles of SA Law 7th ed at 196 - 7 that

'... if the person who has detentio of a thing has the intention of holding it not for himself but for another person, he does not have possession, he is a custodian merely and the possessor is the person on whose behalf he is holding.'

10. In the light of the authorities cited above, I could not find myself in agreement with the contentions made by Mr. Jagga, who appeared for the applicants. His argument is that the benefit derived by the applicants which would constitute the *animus* element of their possession is the fact that they as managers

had a custodial duty to look after the goods with a view of receiving a salary for their efforts.

11. The fact that the applicants had custody and control over the goods constitutes the *detentio* element of possession which, as stated hereinbefore, is not sufficient on its own for spoliatory relief. The benefit of earning salaries as a result of such custody and control, to my mind, does not place the interest the applicants' have in possessing these goods anywhere over and above their mere interests as employees and as such they have no right to spoliatory relief.

12. Mr. Jagga referred to two more of less similar applications in the TPD, one the as yet unreported matter of *Sara Wilhelmina Bennet and another v Captain Pretorius NO and others* case no. 40024/2005 and *Rajah and others v Chairperson: North West Gambling Board and Others* 2006(3) All SA 172(T) where managers of businesses similar to the businesses *in casu* had been successful in applying for similar relief. Besides the fact that those decisions are not binding hereon, the issue of *locus standi* had not been raised in either of those matters – and it therefore can hardly be held as precedent for a view other than that held in the authorities cited herein.

13. Therefore on the basis of lack of *locus standi* alone the

applications had to be dismissed.

14. In the Stander application a further *point in limine* was taken by the respondents therein. The founding affidavit does not comply with the requirements of Regulation 4(2) or 7(1) of the Regulations governing the administering of oaths and affirmations, Regulations 1258 of 21 July 1972 as amended.

Regulation 4(2) states that *“the commissioner of oaths shall;*

- a) Sign the declaration and print his full name and business address below his signature; and*
- b) State his designation and the area for which he holds appointment or the office held by him if he holds his appointment ex officio.”*

Regulation 7(1) states that;

“A commissioner of oaths shall not administer an oath or affirmation relating to a matter in which he has an interest.”

15. *In casu*, all that appears in compliance with regulation 4(2) is that an illegible signature appears above the words *“commissioner of oaths”*. The parties appear to be in agreement however that the person who attested Stander’s affidavit is attorney Harry Rich from De Aar. This being the case I would not hesitate to allow the applicant the opportunity to rectify which in my mind is an obvious oversight.

16. The matter does not end there however. The respondents, in their opposing affidavit, aver that while the search and seizure operations took place the applicant had contacted attorney Rich who made an appearance at the premises and consulted with the applicant and the investigating officer in his capacity as the applicant's legal representative. He had even enquired as to whether the applicant would be allowed bail and had left the premises after informing the applicant to call him again if necessary.
17. This being an application for final and urgent relief I am bound to adjudicate the matter on the facts as set out by the respondent together with those facts averred in the applicant's affidavit which have been admitted by the respondent. *Plascon-Evans v Van Riebeeck Paints* 1984(3) 623H-635C.
18. Mr. Jagga contends that attorney Rich is not affected by the prohibition contained in regulation 7(1) in that he does not have an interest in the application before court. His reasoning seems to be that since attorney Rich is not the instructing attorney in the present application nor does he feature in his role as attorney in any other form in this application, besides attesting to the affidavit of the applicant, that his role as commissioner of oaths has not been compromised. An affidavit by the applicant's instructing attorney, Mr. Vasilios Vardakos,

confirming that: “. . .*Mr. Henry Robins Rich, is not the instructing attorney, nor an associate of the instructing attorney and not the correspondent attorney in the matter. . . .*

Mr. Henry Robins Rich is a commissioner of oaths that is impartial, unbiased and entirely independent from my office, which has drawn the founding affidavit and that are annexed to the Notice of Motion.”, has been handed up in court.

19. It seems to me, regard being had to the affidavit of the applicants instructing attorney herein, that attorney Rich is independent of the offices of the instructing attorney in this application. Whether he can however in the circumstances of this matter, be considered to be impartial and unbiased is an entirely different matter.

20. Mr. Jagga has referred to *Radue Weir Holdings Ltd v Galleus Investments C.C* 1998(3) SA 677(ECD) in support of his contention that the interest referred to in the specific regulation relates to an interest in the application (these proceedings) itself or an interest in the offices of the applicant's attorneys. On a proper reading of the *Radue* case *supra*, it in my view, in fact lends support for the argument of the respondents - that attorney Rich was involved as applicants attorney in the subject matter which formed the basis of this application (the search and seizure operations) and as such his independence is

questionable. See also *Noordkaaplandse KO-OP Lewende Hawe v Van Rooyen* 1997(1) SA 403 (NCD) at 407. It follows thus that I am of the view that the founding affidavit in the Stander application is invalid and on this basis also the application had to fail.

C.C WILLIAMS

JUDGE

For Applocants: Adv. Jagga
Vardakos Attorneys

For Defendant: Adv Botha
State Attorney, Kimberley