

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)

Date heard: **01/12/2006**
Date delivered: **15/12/2006**

Case number: **1445/06**

In the matter between:

FARMER, SUZAINÉ ANTONICIA
Applicant

and

THE PROVINCIAL COMMISSIONER
FOR THE SAPS, NORTHERN CAPE
Respondent

1st

CAPTAIN MATHEE N.O
Respondent

2nd

CAPTAIN VAN DER WESTHUIZEN N.O
Respondent

3rd

INSPECTOR SWANEPOEL N.O
Respondent

4th

Coram: **Lacock J**

JUDGMENT

LACOCK J:

- 1] The applicant is the manageress of a business conducted under the name *"The Amusement Centre"* at 211 Main Road, Port Nolloth, Northern Cape Province. It is common cause that the sole activity of the said business is that of – as contended by the applicant – legal *"gambling"* on electronic equipment *"what was traditionally known as gambling machines (although it is submitted that due to the conversions thereto and the manner of operation thereof) it can no longer be described as such."*

On Friday, 17 November 2006, at approximately 15:30, members of the South African Police Services, accompanied by two inspectors in the employ of the Northern Cape Gambling Board, entered the aforesaid premises of the applicant, and requested all patrons present to vacate the premises. What ensued is described as follows by the applicant:

"They informed me and my cashier, Gloria Louw, that illegal gambling has taken place on the premises and that the two members of the Northern Cape Gambling Board in fact attended upon the premises earlier, played the electronic equipment on the premises and as a result thereof was paid out a certain amount in cash.

They did not have a search and seizure warrant in terms of the Criminal Procedure Act to perform the search and seizure which then proceeded.

I was instructed by the third respondent to show him where the safe was on the business premises. He did not explain to me why he wanted to have access to my safe. I showed him the safe, whereupon I was instructed to open the safe. Everything inside the safe was removed, including cash as well as cleaning products.

Gloria Louw was in the meantime instructed to hand over all the cash she had on hand and the police officials searched for the R20.00 that was

allegedly used during the undercover operation.

The members of the SAPS proceeded to remove all the keys from the premises, including the keys of the electronic equipment.

They also took the keys to the premises.

They furthermore took all the books and all the equipment found on the premises.

They informed me that they are leaving the electronic equipment on the premises but that they are locking up the premises."

2] It is common cause that the aforesaid search and seizure operations were carried out by the police without a search and seizure warrant issued in accordance with the applicable provisions of the Criminal Procedure Act, no. 51 of 1977 (the CPA).

3] The applicant has approached this Court for the following relief:

"2. *Setting aside the search and seizure carried out by the second, third and fourth respondents at the Amusement Centre, 211 Main Road, Port Nolloth, on 17th November 2006.*

3. *Ordering the respondents to forthwith restore to the applicant the possession of the:*

31 *premises situated at 211 Main Road, Port Nolloth;*

32 *items (including the money) seized during the search and seizure on Friday, 17th November 2006 at the abovestated premises.*

4. *Costs on an attorney/own client scale against those respondents who oppose this application."*

Although a number of preliminary points were taken by the

respondents in the answering papers, Mr Botha, appearing for the respondents, abandoned all these points, and these are of no further relevance for purposes of this judgment.

- 4] Mr. Jagga for the applicant, submitted in the first place that the conduct of the police in failing to first obtain a search and seizure warrant was unreasonable and unjustified, and resulted in an unwarranted invasion of the applicant's fundamental constitutional right to privacy as enshrined in sec. 14 of the Constitution. Secondly, Mr Jagga submits that the provisions of the CPA in any event does not authorise the Police to close a business by denying the occupant access to the business premises. They should have, so argues counsel, removed the machines and restored possession of the premises to the applicant.

Sec. 14 of the Constitution reads as follows:

"14. Privacy

Everyone has the right to privacy, which includes the right not to have-

(a) their person or home searched;

(b) their property searched;

(c) their possessions seized; or

(d) the privacy of their communications infringed."

Sec. 22 and 25(1) of the Constitution is also of relevance. These sections enact as follows:

"22. Freedom of trade, occupation and profession

Every citizen has the right to choose their trade, occupation or

profession freely. The practice of a trade, occupation or profession may be regulated by law."

"25. Property

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

5] The first issue for determination is therefore whether the police acted reasonably and justifiably when they carried out the aforesaid search and seizure operations. (See sec. 36(1) of the Constitution read with sec. 22 of the CPA.)

6] Sec. 22(b) of the CPA reads as follows:

"22. 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."

Sec. 20 of the CPA reads as follows:

"20. 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."

The aforesaid provisions of the CPA are not unconstitutional. See **S v Gumede & Others 1998(5) BCLR 530 (D)**. The question is therefore whether the concerned police officer in charge of the said operation had, objectively determined, reasonable grounds to believe that a search warrant would be issued to him under sec. 21(1)(a) of the CPA if he applied for such warrant, and that the delay in obtaining such warrant would have defeated the object of the search. See **Ndabeni v Minister of Law and Order & Another, 1984(3) SA 500 (D) at 511 E; S v Mayekiso & Others, 1996(2) SACR 298 (C) at 305 f.**

- 7] The undisputed evidence deposed to by inspector Swanepoel, the fourth respondent, and supported by Messrs. Mabilo and Makgoka, inspectors employed by the Northern Cape Gambling and Racing Board (the Board) revealed the following factual circumstances that lead to the search and seizure operations:

[71] Inspector Makgoka visited the aforesaid premises of the applicant approximately three months prior to 17 November 2006, and suspected that illegal gambling activities were conducted on the premises.

[72] Both the aforesaid inspectors of the Board again visited the premises on 17 November 2006 at

approximately 12:30. Mr Makgoka changed two R20.00 notes for 50c coins, and played two different electronic machines. In the process, he won 38 “credits” of 50c each on one of the machines. Since the machine is apparently converted not to pay out any cash credits or winnings, the applicant paid an amount of R19.00 to Mr Makgoka. He thereupon approached the local police and related the aforesaid events to the police in an affidavit.

[73] This affidavit was thereafter handed to Swanepoel. On the strength of this information Swanepoel suspected that illegal gambling in contravention of sections 81(1)(a) and (4) and 88(8) of the Northern Cape Gambling and Racing Act, no. 5 of 1996 (the Act), was conducted on the premises of the applicant, and which conduct warranted police action. It was never in dispute that the applicant is not a holder of a gambling licence, nor was she authorised to allow any gambling activities on her premises in terms of the Act or any other statutory provisions.

[74] For purposes of gathering evidence in his investigation of the matter, Swanepoel had photocopies made of *inter alia* two R20.00 notes which were thereafter exchanged by inspector

Mabilo at the applicant's premises for 50c coins. He played one of the machines, won 70 credits and was paid an amount of R35.00 by the applicant's cashier. Mabilo conveyed to Swanepoel what transpired and confirmed this information in an affidavit. According to the undisputed contents of this affidavit, Mabilo on this day entered the premises of the "*The Amusement Centre*" at 15:50, and signed the affidavit at 17:40.

By reason of the aforesaid information Swanepoel's believe that illegal gambling was conducted on the applicant's premises, was further strengthened. He was furthermore convinced that the electronic machines were used for purposes of illegal gambling and that these machines were concerned in the commission or suspected commission of an offence (illegal gambling) and might afford evidence of the commission or suspected commission of an offence as contemplated in sec. 20 of the CPA.

[75] Swanepoel and other members of the Police Services as well as the two inspectors of the Board then proceeded to the premises of the applicant where, after all members of the public present were requested to leave the premises, he seized all articles on the premises which included all

electronic machines and all cash at hand.

8] Sections 81(1)(a) and 88(8) of the Act provides,

“81. (1) no person shall without a licence –

(a) conduct or permit the playing of any gambling game or conduct or permit any betting or racing in or on any premises under his or her control or in his or her charge.”

“88. Any person who –

(1) ...

(2) ...

(3) ...

(4) ...

(5) ...

(6) ...

(7) ...

(8) is in possession of any gambling device, other than playing cards or dice, which is not used under a licence in or in accordance with the provisions of this law, and

(9) ...

shall be guilty of an offence”

A “gambling game” is defined in the Act as, “any game played with or by means of cards or dice or any mechanical, electro-mechanical or electronic device, component or machine or computer hardware or software for money, property, cheques, credit or anything of value and includes, without derogating from the generality of the foregoing, roulette, bingo, twenty-one, blackjack, chemin de fer, baccarat, poker, craps and punto banco.”

A “gambling device” is defined as “any equipment or thing used, or designed to be used, directly or indirectly in

connection with a gambling game."

- 9] It therefore *prima facie* seems that the applicant contravened the above quoted section of the Act. I am convinced that all requirements referred to in sec. 20 of the CPA had been met, and that the State acted within the ambit of this section when the aforesaid seizure was executed. Mr Jagga did not argue to the contrary. It therefore follows that, objectively viewed, Swanepoel's believe that, had he applied for a search and seizure warrant under sec. 21(1)(a) of the CPS, a warrant would be issued to him, was founded on reasonable grounds.
- 10] The main gist of Mr Jagga's argument on this issue was, however, directed at the second requirement contained in sec. 22(b) of the CPA. He argued that the police had more than sufficient time to obtain a warrant and could therefore not hide behind the provisions of sec. 22(b)(ii) of the CPA for the failure to apply timeously for a warrant in terms of sec. 21 of the CPA. This failure to apply for a search warrant, so argued Mr Jagga, rendered the seizure process unreasonable and consequently unlawful.
- 11] The reasons for failing to apply for a search warrant in terms of sec. 21(a) of the CPS are explained by Swanepoel as follows:

"Dit is inderdaad korrek dat daar nie 'n deursoekings- en visenteringslasbrief verkry is alvorens die visentering en beslaglegging gedoen is nie. Die rede daarvoor was dat daar nie 'n

Landdros op Port Nolloth gestasioneer is nie. Die naaste Landdros is op Springbok gestasioneer. Die inligting wat ek vanaf die lede van die Dobbelaar het tot my beskikking gekom ongeveer 15:30. Die enigste Offisiere van die Suid-Afrikaanse Polisie wat te Port Nolloth beskikbaar was, het aan die optrede deelgeneem en kon gevolglik ook nie 'n lasbrief magtig en uitreik nie.

Dit sou ongeveer 1 uur 45 minute neem vanaf Port Nolloth per voertuig na Springbok om die oorspronklike eedsverklarings aan die Landdros voor te lê ten einde 'n lasbrief te verkry. Uit ondervinding weet ek dat die Landdroste te Springbok nie na 16:00 lasbriewe magtig en laat uitreik nie. Dit sou 'n verdere 1 uur 45 minute geneem het om met die oorspronklike lasbrief te Port Nolloth te kom sodat dit aan die applikante getoon kon word. Nadat Mabilo met die gefotostateerde note kleingeld gekry het om aan die dobbel-aktiwiteite deel te neem, moes die perseel so spoedig moontlik gevisenteer word terwyl die note nog in besit van die applikant en op die perseel was. Daar was net 'n beperkte tyd beskikbaar waarna die risiko bestaan het dat die note aan ander lede van die publiek uitbetaal sou word wanneer hulle kleingeld sou maak. Dan sou die bewysstuk deur Mabilo gebruik, verlore gaan. Dit het inderdaad ook toe so gebeur dat daar tydens die ondersoek van die geldnote op die toneel, nadat die optrede begin het, gevind is dat slegs Bewysstuk 'S4' nog tussen die note was en dat Bewysstuk 'S5' nie meer daar was nie en gevolglik reeds uitbetaal was.

Op die inligting tot my beskikking het ek 'n redelike vermoede gehad dat daar 'n misdryf op die perseel gepleeg word en dat daar bewysstukke op die perseel is wat kan dien as bewys van sodanige misdryf en moontlik ander misdrywe. Ek het geweet dat indien ek wel om 'n lasbrief aansoek doen, 'n lasbrief deur die Landdros aan my uitgereik sou word. Om eers na Springbok en terug te ry sou dus die hele doel van die optrede en beslaglegging nutteloos maak."

[111] The applicant endeavoured to counter the aforesaid allegation by Swanepoel that no magistrate is stationed at Port Nolloth by filing an affidavit of attorney Vardakos in which he stated,

"I confirm that I telephonically contacted the department of Justice on 1 December 2006 and confirmed with them that there is a Magistrates Court in the district of Port Nolloth, and there is a magistrate allocated to that Honourable Court."

Mr Jagga was, however, constrained to concede that the contents of this affidavit is no answer to

Swanepoel's aforesaid assertion. There is a vast difference between a magistrate "*stationed*" at a town and a magistrate "*allocated*" to a court in that town.

On the authority of **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd, 1984(3) SA 623 (AD)**, I am bound to accept that no magistrate or other authorised official were available at Port Nolloth to issue a search warrant at the relevant time.

- 12] According to the contents of the affidavits of inspectors Makgoka and Mabilo, they are both resident in Kimberley. One can therefore on a balance of probability accept that they visited Port Nolloth on 17 November 2006 for the very purpose of establishing whether gambling activities were conducted at "*The Amusement Centre*", Port Nolloth. The police were only engaged at some time after 12:30 on that Friday afternoon. Swanepoel reacted immediately by photocopying the R20.00 notes and instructing the inspectors of the Board to return to the "*The Amusement Centre*" to do the necessary to collect evidence on which the police could react. Mabilo entered the premises of "*The Amusement Centre*" at 15:50 and thereafter signed his affidavit at 17:40 that afternoon.
- 13] To expect from a reasonable police officer under these

circumstances and with knowledge of the information alluded to hereinbefore, not to act in terms of sec. 22 of the CPS, but rather to travel to Springbok to apply for a search warrant, would be – to my mind – nothing else but to expect from him not to comply with his duties as a law enforcement officer. Swanepoel had reason to believe that illegal gambling was allowed on the premises of the applicant; had properly identified the bank notes used in the suspected gambling activities by the inspectors; had reasonable grounds to believe that the retrieval of the bank notes may afford evidence of the commission of the offence of illegal gambling; and had to act speedily to seize the notes since he knew that the notes would in all probability be used for payment to other customers. In these circumstances a delay of several hours in obtaining a search warrant would most certainly have defeated the object of the search.

- 14] I therefore conclude that Swanepoel acted reasonably when he decided to seize the articles on the premises of *“The Amusement Centre”* without first obtaining a search warrant.
- 15] This, however, is not the end of the matter. The further issue is whether the police were entitled to deprive the applicant of the possession of the premises as a means of retaining the seized articles under police custody.

- 16] Mr Jagga relied in this regard on the judgment in **Goncalves v Minister of Law and Order & Another 1993(1) SA 161 (W)** for his contention that Swanepoel was not entitled to, as he put it, *“close the business of the applicant”* by locking the doors to the premises and retaining the keys thereof (as he did), thus depriving the applicant of possession of the premises.

The reason for his aforesaid conduct is explained by Swanepoel as follows:

“Daar is ook op die sleutels vir die perseel beslaggelé ten einde die dobbelmasjiene in die perseel te kan toesluit en op daardie wyse te beveilig. Die dobbelmasjiene sal belangrike bewysstukke wees by die kriminele vervolging wat later ingestel gaan word. Soos blyk uit foto 1, ‘n foto van die ingang tot die perseel, is daar veiligheidshekke aangebring waarmee toegang tot die perseel beheer word”

Soos gesien kan word op onder andere foto’s 11, 12, 13, 14 en 16, en soos deur die applikant self verduidelik in paragraaf 29.4 van die funderende verklaring, is die dobbelmasjiene groot en swaar en moeilik om te skuif. Daar bestaan verder die risiko dat hierdie masjiene beskadig kan word indien hulle van die perseel verwyder word. Die SAPD te Port Nolloth het nie op daardie stadium, en nou steeds, beskik oor die nodige spasie om die dobbelmasjiene veilig te stoor nadat dit van die perseel verwyder is nie. Die SAPD het ook nie beskik oor geskikte masjinerie soos vurkhyzers en oopbakvoertuie om die dobbelmasjiene veilig mee te laai en te vervoer nie. Daar bestaan ‘n moontlikheid dat die elektronika van die masjiene beskadig kan word indien dit verskuif word. Ek het gevolglik besluit dat dit veiliger is om die dobbelmasjiene op die perseel toe te sluit.

Ek het geen twyfel dat indien ek meer as drie ure per pad moes spandeer na Springbok en terug om ‘n lasbrief by die Landdros na-ure te bekom die verdere R20.00 noot wat as bewysstuk moet dien, reeds uitbetaal sou wees nie. As gevolg daarvan dat ‘The Amusement Centre’ nie ver van die Polisiestasie geleë is nie, en Port Nolloth ‘n klein dorp is waar ek as Polisiebeampte gereeld rondbeweeg, is ek bewus daarvan dat daar heelwat meer lede van die publiek by ‘The

Amusement Centre' dobbel gedurende die aand en veral oor naweke as gedurende die oggende en middag en gedurende weeksdae. Die kanse dat die R20.00 bewysstuk gouer, eerder as later op 'n Vrydagaand uitbetaal sou word, was baie goed. Ek kon nie begin om reëlins te tef om'n lasbrief te verkry voordat ek 'n skriftelike verklaring van Mabilo gehad het, dat hy die gefotostateerde note geruil het en gedobbel het en dat daar wel geld aan hom uitbetaal is as gevolg van die dobbelary nie. By gebreke aan die geld wat op die toneel gevind is, sou daar nie direkte en onafhanklike staving gewees het vir Mabilo se getuienis dat hy inderdaad daar gedobbel het nie.

Makgoka en Matsage, die werknemers van die Dobbelaarad verantwoordelik vir wetstoepassing, het reëlins getref met onafhanklike deskundiges om die dobbelmasjiene op die perseel waar dit gevind is, te ondersoek ten einde te sertifiseer of dit inderdaad nog dobbelmasjiene is soos bedoel in Artikel 1 van die Noord-Kaap Dobbelwet. Matsage het in verbinding getree met Thapelo van GLI & BMM Testing Lab te Johannesburg, wie 'n deskundige op die gebied is. Hy het Matsage meegedeel dat die vroegste tyd wat hy na Port Nolloth kan reis ten einde heirdie ondersoek te doen, sal wees op Woensdag, 6 Desember 2006. Die rede daarvoor is dat hy met ander werk besig is en daar geen direkte vlugte vanaf Johannesburg na Port Nolloth en terug is nie.

Hierdie ondersoek wat deur die deskundige op die masjiene gedoen moes word en die uitslag daarvan vorm 'n belangrike onderdeel van die ondersoek wat gedoen moet word deur die Dobbelaarad sowel as die Suid-Afrikaanse Polisie diens ten einde die ondersoek van die klagtes af te sluit. Totdat dit gedoen is, is die ondersoek nog nie afgehandel nie en kan die masjiene nie geskuif word nie."

[16.1] **Goldstone J** had the following to say in **Goncalves (supra) at 162:**

"On 1 October 1991 the applicant brought the present application urgently seeking an order that the respondents restore his possession of a business known as 'Mayberry Park Supermarket'. It is common cause that Sergeant Viljoen of the South African Police caused the business to be closed from Sunday, 29 September 1991, to Thursday, 3 October 1991. The single question I have to answer is whether he was entitled to do so. The respondents rely for such closure on the provisions of s 22 of the Criminal Procedure Act 51 of 1977 ('the Act')

read with s 20 of the Act. Insofar as it is relevant to this judgment, s 22 empowers a police official to 'search . . . any . . . premises for the purpose of seizing any article referred to in s 20 . . .'. Section 20 in its turn inter alia authorises the seizure of articles believed 'on reasonable grounds . . . to be concerned in the commission . . . of an offence . . .'. Thus, articles which are on reasonable grounds believed to be stolen may be searched for and seized. It is conceded by the applicant that Viljoen had the necessary belief at the material time. Viljoen's reason for closing the business was his inability immediately to conduct an efficient search of the premises and seizure of the large quantity of goods involved. To do so he needed assistance from others and such assistance could not be obtained without the lapse of some days. And if he allowed the business to remain open, he reasoned, his intended search and seizure might be wholly or partially thwarted by the suspected thieves.

Mr Grobler, who appeared for the respondent, contended that in the circumstances of the present case the search Viljoen was entitled to conduct could not be properly effected without the closure. Thus Viljoen's right to shut the business was to be implied in the provisions of the Act authorising search and seizure. Mr Grobler's argument has to be rejected for the following reasons. It is clear that ss 20 and 22 presuppose a police official able to conduct the search or seizure concerned. The sections do not concern a situation where the police official is for some reason unable to do so and in fact needs to exercise additional powers to place himself in a position to act in terms of such sections. And that was Viljoen's situation; he was unable to conduct a search and seizure and, therefore, needed the power to shut the business to ensure an effective search and seizure later."

It immediately becomes clear that the circumstances in **Goncalves** differ substantially from the circumstances in the matter under consideration. In **Goncalves** it was found that the police officer was not able to conduct a search and seizure at the time the business of the applicant in that matter was closed, and he caused the business to be closed to prevent the removal of the suspected stolen goods until such time a

proper search and seizure could be conducted with the assistance of others. The learned Judge quite correctly found that sections 20 and 22 of the CPA did not authorise the closure of the business for that purpose.

In this matter however Swanepoel in fact completed his search and seizure activities and thereafter locked the premises for purposes of retaining the seized articles under police custody. **Goncalves** is therefore no support for Mr Jagga's argument.

I was unable to find any authority on this issue during the short time at my disposal.

17] It appears to me that a convenient starting point for determining this issue would be the provisions of sec. 30 of the CPA. The relevant portion of this section provides that,

"A police official who seizes any article referred to in section 20 or to whom any such article is under the provisions of this Chapter delivered-

(a) ...

(b) ...

(c) shall, if the article is not disposed of or delivered under the provisions of paragraph (a) or (b), give it a distinctive identification mark and retain it in police custody or make such other arrangements with regard to the custody thereof as the circumstances may

require.

[171] In the normal cause of events articles seized by the police under sec. 20 or 22 of the CPA must be kept under police custody (which is usually in a police station or on premises under the control of the police). This much is clear from the reading of the above quoted section of the CPA. However, provision is also made for “other arrangements with regard to the custody (of seized articles) as the circumstances may require.” (Own emphasis).

The quoted portion of the section is cast in wording denoting of a wide and general application. This is intelligible since it would be an impossible task for the Legislature to cater statutorily for all possible situations where seized articles, by reason for instance of its size, weight or other feature, cannot be retained in direct police custody.

[172] However, Courts of Law should never lose sight of the fundamental rights to privacy and property enshrined in sections. 14 and 25 of the Constitution, when the aforesaid provisions of sec. 30 of the CPA are considered or applied.

18] To my mind, the proper approach for determining the lawfulness of the application of the aforesaid provisions of sec. 30(c) of the CPA would be to balance the public

interest in the prevention of crime by law enforcement officials (like the South African Police Service) on the one hand, against the fundamental constitutional rights to privacy and property of the person whose articles had been seized and/or the person whose said rights may be encroached upon as a consequence of the “*other arrangements*” for the safe keeping of the seized articles on the other hand, and to then ask oneself whether, on the factual circumstances of the matter under consideration, the method of safekeeping invoked, reasonably justifies the limitation of the individual rights concerned in an open and democratic society. The answer to the aforesaid exercise will of necessity depend upon the circumstances pertaining to each individual case.

Far from suggesting that the list is an exhaustive one, the following aspects may be of relevance when considering this issue: the nature and gravity of the alleged offence; the necessity of safeguarding the articles forthwith; a reasonable apprehension that the articles may be tampered with or destroyed; the location of the goods; the practicality of removing the goods by reason of, for instance, the size or weight of the goods; the availability of storage facilities; the nature and duration of the encroachment; the consequences of the encroachment for the persons concerned; and any prejudice that may or may not be suffered by any person.

- 19] When applying the aforesaid approach to the undisputed

facts of the present matter, I am convinced that the arrangements by Swanepoel for the safekeeping of the machines i.e. to lock up the machines in the business premises of the applicant, was, subject to par. 20 of this judgment, reasonable and justifiable under the given circumstances.

[191] It is common cause that the said premises were used for the sole purpose of accommodating the aforesaid electronic “*gambling*” machines and for no other purpose. The applicant did not utilise the premises for any other business but as an amusement centre, whereby members of the public are free to play the machines. There is nothing before me indicating that the applicant intends to use the premises for any other purpose. The applicant will therefore suffer no prejudice if the machines are, for the time being, kept under police custody on the premises.

[192] The additional purpose of the seizure of the machines, as explained by Swanepoel, was to enable the police to have the machines inspected by an expert for the very purpose of establishing whether the machines are in fact gambling machines. This would be vital evidential material in the prosecuting process. Again, as explained by Swanepoel and which explanation is undisputed,

this inspection needs to be done on the premises while the machines are still connected to the existing power supply. The removal thereof will render this exercise futile.

[193] The police were in any event not able to accommodate the machines elsewhere in Port Nolloth at the time of the seizure thereof and were unable to move the machines.

[194] I have already found that the seizure of the machines without a warrant was reasonable and justified.

[195] It appears that no other person has an interest in the use of the premises.

20] However, once the safekeeping of the machines on the premises of the applicant has served its purpose, I can see no reasonable justification for further denying the applicant access to her premises. To my mind it will be unreasonable to deny her further access to the premises and to allow the police to utilise the premises indefinitely simply as a convenient storeroom at no costs. Once the aforesaid inspection of the machines had been completed, the police should restore possession of the premises to the applicant and either remove the machines or return same to the applicant. Swanepoel indicated that he inspection

of the machines could be done by 6 December 2006.

21] What remains to be decided is the matter of costs.

The main thrust of the applicant's application was directed against the seizure of the articles in her business premises without a warrant. In this regard, the application failed.

The second leg of the application was directed against the closure of the business premises. In this regard the applicant was to a limited extent successful.

The opposite is valid in respect of the respondents.

Although Swanepoel alleged in his affidavit that negotiations ensued between the police and the applicant regarding the safe keeping of the machines on the premises of the applicant until the machines could be inspected by an expert, no such condition was conveyed to the applicant at the time of the seizure of the machines. Even during the said negotiations, no undertaking was given to the applicant that the premises would be restored to her once the inspection had been completed.

In these circumstances, I hold that, in fairness to both sides, no order as to costs should be made.

22] By these premises, the following order is made:

- I) **Save for par. 2 of this order, the application is dismissed.**
- II) **The respondents are directed to restore to the applicant the possession of the premises situate at 211 Main Road, Port Nolloth, Northern Cape, by not later than 12:00 noon on 18 December 2006.**
- III) **No order as to costs is made.**

Hj Lacock
JUDGE

For the applicant:	Adv Jagga (instructed by Van de Wall Attorneys, Kimberley)
---------------------------	---

For the respondents: Adv CH Botha