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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION. BLOEMFONTEIN

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

Application no: 618/2024

In the matter between:

NICOLOR (PTY) LTD

First Applicant

(Registration no: 2012[...])

LUKISA LOGISTICS (PTY) LTD

Second Applicant

(Registration no: 2021[...])

and

MINISTER OF SAPS N.O.

First Respondent

W/O MUZIKAVISE AMON MAZIBUKO N.O.

Second Respondent

THR MAGISTRATE: WELKOM

Third respondent

CORAM:

VANZYL, J

HEARD ON:

7 FEBRUARY 2024

DELIVERED ON:

6 MAY2024

[1] This application served before me on an urgent basis during my duty week which was packed with opposed urgent applications.

[2] The applicants are seeking the following relief:

"1. Dispensing with the forms and services in terms of Rule 6(12) of the Uniform Rules of Court and disposing of the matter as one of urgency in terms of the Rules;

2. Setting the warrant for search and seizure issued by the Third Respondent on 26 January 2024 in respect of the Applicant's business and executed by the Second Respondent on 27 January 2024 aside;

3. Directing and ordering the Second Respondent and any other Respondent who is in possession or control of the Applicant's moveable goods listed in **paragraph 7.3 of the founding affidavit** hereto, to forthwith return and restore possession of the moveable goods that were removed by the Second Respondent and other members of the SAPS (who were at all relevant times under the control of the Second Respondent) within **1 (one) hour** after service of this order;

4. Costs, on a scale as between Attorney-and- Client to be paid by the Respondents, jointly and severally, pay the one the other to be absolved."

[4] The respondents raised a number of points in *limine* in its Amended Notice to Oppose, subsequent to which it also filed an answering affidavit. This is a peculiar procedure which the respondents adopted; however, I will deal with the respective points as well as with the merits of the application and the opposition thereto.

[5] The applicants are seeking a spoliation order on the basis that the warrant for search and seizure issued by the third Respondent on 26 January 2024 and executed by the second Respondent on 27 January 2024 ('the warrant') should be

set aside as being unlawful and invalid, with the result that the search and seizure of the relevant goods, constituted spoliation.

Urgency:

[6] Mr Jonase, on behalf of the respondents, submitted that the alleged urgency of the application is self-created. He, however, conceded that should I find that the warrant is unlawful and consequently invalid, the application is indeed to be considered urgent.

[7] As pointed out by the applicants, the search and seizure effectively crippled the businesses of the applicants. A spoliation application is in any event by its very nature urgent. The applicants are unaware where the seized items are being kept and whether they are safe and secure. This is in the circumstances very important, especially considering that most of the vehicles and machinery are contracted through third parties.

[8] I am satisfied that the applicants made out a proper case for urgency and this point in *limine* cannot be upheld.

Section 35 of the General Law Amendment Act, 62 of 1955:

[9] I accept that the mentioned section is applicable to the present application. See **Jaffa v Minister of Law and Order** 1991 (2) 286 (A) 294G-294H. However, I'm of the view that condonation is to be granted for the non-compliance thereof because of the urgency of the application. I therefore consider the lesser period of time reasonable in the circumstances of this matter.

The applicants' authority:

[10] This point in *limine* is being raised on the basis that "*the applicants do not specify the necessary instructions to be given for signing of any necessary documents*".

[11] Although the wording of the resolution is open ended, I do not consider it to be invalid or fails to provide the deponent to the founding affidavit, Mr Buthelezi, the necessary authority to have instructed the applicants' attorney of first instance to have launched the present proceedings.

[12] In so far as the objection is against the deponent's authority to have signed the affidavit on behalf of the first applicant, it is neither here nor there. No such authority is necessary. In **Ganes and Another v Telecom Namibia Limited** 2004 (3) SA 615 (SCA) at para [19] the Supreme Court of Appeal determined as follows:

" In my view, it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised."

[13] Insofar as the respondents attempted to challenge the authority of the deponent to the founding affidavit to have launched/instituted the application on behalf of the first applicant, it is now trite that any dispute regarding authority is to be raised in terms of Rule 7 procedure.

[14] The judgment in the matter of **ANC Umvoti Council Caucus and Others v Umvoti Municipality** 2010 (3) SA 31 (KZP) dealt with **Ganes and Another v Telecom Namibia Limited** 2004 (3) SA 615 (SCA) and with **Unlawful Occupiers, School Site v City of Johannesburg** 2005 (4) SA 199 (SCA) and determined as follows at paras [14] and [27] to [29]:

"[14] The question is, rather, whether an applicant is obliged to prove, on the papers, that authority has been given to initiate litigation where the applicant is an artificial person....

[27] ... Whether or not the litigation has been properly authorised by the artificial person named as the litigant would not be dealt with by means of evidence led in the application. If clarity is required, it should be obtained my

means of Rule 7(1) since this is a procedure which safeguards the interests of both parties.

[28] ... It is further my view that the application papers are not the correct context in which to determine whether an applicant which is an artificial person has authorised the initiation of application proceedings. Rule 7(1) must be used. This means that I disagree with Mr Gajoo's submission that Rule 7(1) provides only one possible procedure and that, if the respondents elects to challenge the matter of authority on the application papers, the applicant is required to prove such authority on the papers.

[29] There was no challenge in terms of Rule 7(1) in the application which is the subject of this appeal. The appropriate procedure was therefore not used by the appellants. It was accordingly not necessary for the applicant to prove the authority to initiate the application, nor appropriate to attempt to do so on the papers. It was also not necessary for the court a quo to make a finding relating to authority on affidavits delivered in the matter. Since there was no challenge in the required manner to the authority of the respondent's attorney who signed the notice of motion and initiated the application in the accepted way, this court does not have to deal with the question of authority. I am therefore of the view that the appeal on this issue must fail."

[15] In the present matter there was no challenge of the deponent's authority by means of Rule 7(1) and I therefore do not have to deal with the question of authority any further.

[16] This point *in limine* can consequently not be upheld.

Non-joinder:

[17] Mr Jonase submitted that the Minister of Justice has a direct and substantial interest in the subject matter of this litigation which may prejudice him since he has not been joined. In this regard he pointed out that the Constitutional Court held in **Van Rooyen v The State** 2002 (5) SA 246 (CC) that magistrates are appointed and

employed by the Minister of Justice. It was held that in carrying out their functions independently and impartially, they still act within the course and scope of their employment and in accordance with the basis on which they were appointed.

[18] Mr Jonase consequently submitted that the Minister may be prejudiced should a costs order be granted against the third applicant in the absence of the Minister.

[19] However, Mr Grobler, on behalf of the applicants, indicated that the applicants will not be seeking a costs order against the third respondent. Considering the finding I will be making on the merits of the judgment, there is in my view no risk of a costs order being made against the third respondent.

Requirements for a valid warrant for search and seizure:

[20] In terms of section 21(1)(a) of the Criminal Procedure Act, 51 of 1977, *"an article referred to in section 20 shall be seized only by virtue of a search warrant issued by a magistrate or justice, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or upon any person or upon or at any premises within his area of jurisdiction"*. (My emphasis)

[21] The validity of a search warrant must be examined with a jealous regard for the subject's right to privacy and property. See **Toich v The Magistrate, Riversdale & others** 2007 (2) SACR 235 (C) at 242d-e.

[22] In **Gogwana v Minister of Safety and Security NO & others** 2016 (1) SACR 384 (SCA) at para [30] it was stressed that a 'search warrant is not some kind of mere "interdepartmental correspondence" or "note" ' but 'as its very name suggests, a substantive weapon in the armoury of the state'. It 'embodies awesome powers, as well as formidable consequences'; it 'must be issued with care, after careful scrutiny by a magistrate or justice, and not reflexively upon a mere "checklist approach"'. My emphasis)

[23] The following essential requirements are stated with reference to applicable authority in **Commentary on the Criminal Procedure Act**, Du Toit *et al*, at RS 71, 2023 ch2-p23;

"The warrant must, according to the provisions of s 21(1)(a), be issued on the strength of 'information on oath'. This, said Laubscher AJ in *Strauss v Minister of SAPS NO & others* (unreported, NWM case no UM30/2019, 2 May 2019) at [16], means that the magistrate or justice must duly apply his or her mind to the 'information on oath' and, in doing so, exercise a judicial discretion as to (1) whether the warrant should be issued or not, and (2) what the contents and terms of the warrant should be. Both must be informed by the 'information on oath', so that any 'discord' in that information taints the exercise of the discretion in respect of (1) and (2)....

Section 21(1)(a) makes it quite clear that search warrants must be issued only on the basis of 'information on oath'. In *S v Malherbe* 2020 (1) SACR 227 (SCA) it was held that an unsworn statement made by a police officer did not satisfy the requirements of s 21(1)(a), since the law requires 'strict adherence' to these requirements (at [8]). The search warrant was thus invalid (see too *Toich v The Magistrate, Riversdale & others* 2007 (2) SACR 235 (C))."
(My emphasis)

[24] At RS 71, 2023 ch2-p24 of **Commentary on the Criminal Procedure Act**, *supra*, the following is also stated:

"The information on oath required is usually submitted in the form of affidavits by the investigating officer or other persons, and must be perused by the magistrate or justice before a warrant is issued." (My emphasis)

[25] Very importantly the following is stated at RS 70, 2023 ch2-p30B of **Commentary on the Criminal Procedure Act**:

"Where a supporting affidavit is attached to a warrant, there are requirements that a commissioner of oaths is to satisfy himself or herself of the *identity* of the

deponent. The deponent must sign in the commissioner's presence. This was not done in *Mogale & others v Minister of Safety and Security & others* 2016 (2) SACR 682 (GP), where the affidavit was signed by the deponent before it was presented to the commissioner of oaths. This defect, said the court, could not be condoned, and the warrant was found to be invalid and was set aside. (My emphasis)

[26] The aforesaid stance of the court is in accordance with regulation 3(1) issued in terms of section 10 of the Justices of the Peace and Commissioners of Oaths Act, 16 of 1963, in terms whereof *"the deponent shall sign the declaration in the presence of the commissioner of oaths"*.

[27] In the present matter the "affidavit" of the second respondent which formed the basis of the issuing of the warrant, was signed by the second respondent in Welkom, whilst the Commissioner of Oaths, on face value thereof, commissioned same in Kroonstad. According to me this defect cannot be condoned. The failure to have had the statement properly commissioned, has the result that it is a mere statement and not an affidavit deposed to under oath. The issuing of the search and seizure warrant was consequently issued not based on information under oath, which makes it fatally defective.

[28] In addition to the problem with the commissioning of the statement (the so-called "affidavit"), the statement also contains hearsay evidence in respect of both Sergeant Phahlametsing and Mr Van Rensburg, without confirmatory affidavits having been attached to the statement of the second respondent, which hearsay evidence is inadmissible. The whole basis of the "affidavit" of the respondent therefore in any event falls away.

[29] In the circumstances I deem it unnecessary to deal with the other shortcomings of the warrant.

[30] The search and seizure warrant is consequently unlawful, invalid and stands to be set aside.

Relevant authority in respect of the merits of the application:

[30] Mr Grabler relied on the judgment of **Ivanov v North West Gambling Board and Others** 2012 (6) SA 67 (SCA) in support of the relief he is seeking. The Supreme Court of Appeal held as follows at paras [14] to [17]:

"B. Effect of the declaration of invalidity of the search warrant

[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*: '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*. ...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. "

[31] In the same judgment, at paras [18] - [19], the Court dealt with the trite principles regarding and requirements for spoliation:

"C. Spoliation application

[18] Counsel for the appellant submitted that the court below applied the wrong principles when considering the application. He contended that, in spoliation proceedings, the lawfulness of the possession of the applicant for the spoliation order is irrelevant. All that is required of the applicant is for him or her to prove that he or she was in peaceful and undisturbed possession of the disputed property and that he was deprived of his possession against his will. Counsel for the respondents, on the other hand, supported the finding of the court below. He submitted that the lawfulness of possession had to be considered as the appellant is prohibited by the Act as well as the National Gambling Act from possessing gambling machines or gambling devices without a licence. In support of this submission counsel called in aid the decision of the full court of the North West High Court in *Schoeman v Chairperson of the North West Gambling Board*.

[19] In my view the submission on behalf of the respondents is devoid of merit. 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." (My emphasis)

[32] There can be no dispute on the facts of this matter that the applicants were in peaceful and undisturbed possession of the disputed property prior to the seizure thereof and that they were deprived of their possession against their will.

[33] The applicants are consequently entitled to an order that their possession be restored.

Costs:

[34] In my view there is no reason why the first and second respondents should not be ordered to pay the costs of the application. Although the applicants initially sought an order on attorney and client scale, Mr Grabler indicated that the applicants are only seeking party and party costs.

Order:

[35] I consequently make the following order:

1. Condonation for the non-compliance with the forms and services prescribed by the Rules and by Section 35 of the General Law Amendment Act, 62 of 1955, is granted and the application is heard as one of urgency in terms of Rule 6(12).
2. The warrant for search and seizure issued by the third respondent on 26 January 2024 and executed by the second respondent on 27 January 2024 is unlawful and therefore declared to be invalid, null and void and is consequently set aside.
3. The first and/or the second respondents and/or anybody else who are in possession or control of the first and/or second applicants' moveable goods seized and removed on 27 January 2024, as listed hereunder, are directed

and ordered to forthwith return and restore possession of the said moveable goods to the first and/or. the second applicants within 24 (twenty-four) hours after service of this order:

- 3.1 Quester Truck Head, LG 4[...]
- 3.2 Trailer 1, FZK [...]
- 3.3 Trailer 2, FZK [...]
- 3.4 Volvo Truck Head, HV 7[...]
- 3.5 Trailer 1, LF 8[...]
- 3.6 Trailer 2, LF 8[...]
- 3.7 Volvo Truck Head, LF 1[...]
- 3.8 Trailer 1, LF 8[...]
- 3.9 Trailer 2, LF 8[...]
- 3.10 Volvo Truck Head, LF 1[...]
- 3.11 Trailer 1, LF 8[...]
- 3.12 Trailer 2 LF 8[...]
- 3.13 One grader
- 3.14 One excavator
- 3.15 One JCB front end loader
- 3.16 One dumper truck
- 3.17 Any other items seized not mentioned above.

4. The first and second respondents are ordered to pay the costs of the application, payment by the one the other to be absolved.

C. VAN ZYL, J

On behalf of the applicants:

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