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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG.**

Case Number: 2024/080512

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
22. August 2024	_____
DATE	SIGNATURE

In the matter between:

SHEREEN MATHESON

Applicant

and

MINISTER OF POLICE

Respondent

JUDGMENT

Noko J

Introduction

1. The applicant launched an urgent application for an order directing the respondent to return goods which were seized without a warrant on 17 June 2024. The applicant contends that the search and seizure were unlawful and should be set aside.

Background

2. The members of the respondent (“*members*”) were on their normal patrol in P[...] D[...], M[...] on 17 June 2024 and saw two young males (“*children*”) who were fighting. They approached and stopped the brawl. On enquiries the children stated that the fight was over the robberies they committed against each other during gambling which took place in a shipping container (“*container*”) nearby. The children pointed the container to the members who immediately proceeded to it. The members were seen approaching by a security guard who then ran into the container and locked himself in it. Members of SAPS demanded that the security guard open the container and he refused. Members requested to speak to the owner and in retort were told that the owner is on her way and they can wait for her.

3. The attempt to access the container was at around 22:00 and members awaited the owner until 3 am in the morning and failed to show up. Having called for more back up, two other members of SAPS came and the container was opened with crowbars. There were 4 individuals inside the container, two staff members and two individuals who were on the computers. The members of the respondent demanded gambling certificates and none were provided. They then seized 21 computer boxes and tablets, together with TV and cash in the sum of R600 as per respondent¹.

Submissions by the parties.

Urgency

¹ The applicant contended that the amount seized was R4500.00. the list of all items are as indicated on annexure to the Respondent's Answering Afifavit.

4. The applicant contends that the application is urgent and court proceedings were launched without a delay. The assets were seized early on 17 June 2024 and employees and members of the applicant went to the station on the same day. The court process was launched two days later on 19 June 2024. On this basis urgency was not self-created. In addition, ordinarily spoliation applications are inherently urgent.

5. The counsel for the applicant further contended that conduct of seizure by the respondent negatively affects the internet business of the applicant who is unable to generate income. The said seizure and keeping of the items would lead to the employees being retrenched. The applicant is renting the container and seizure of the business equipment meant that the rental for the container is being paid with no benefit to the applicant. In addition, there is no guarantee that the items seized are safe and further that they would not be damaged. There is a tendency of such goods being stolen in the hands of the members of the respondent, counsel argued.

6. The conduct of the respondent's members amount to abuse of powers and invasion to privacy. Further that each day which passes amount to continued infringement and same should be arrested pronto.

7. The respondent on the other hand contended that the basis of financial urgency cannot be used as a basis for the applicant to demand audience of the urgent court. Secondly, the ground for urgency that the applicant does not know where the seized goods are located is unfounded and is equally unsustainable since the applicant was given SAP 13 which clearly identifies where the seized assets are kept. Finally, the argument with regard to invasion of privacy is equally unfounded and was not raised in the papers.

Non-joinder.

8. The respondent contended further that the Director of Public Prosecution (“DPP”) is seized with the matter and is currently under investigation. To this end the of the DPP should have been joined. Under the circumstances the court is impressed to uphold the point *in limine* of non-joinder and dismisses the application.

9. The applicant on other hand contended that the spoliation proceedings are primarily aimed at a party who dispossessed the applicant. These are the members of the respondent and not the DPP. There is also no evidence to demonstrate that the items seized have changed hands. Further that the same point was taken in *Leslie*² and was ruled unsustainable and dismissed. In the premises the point *in limine* raised *in casu* should suffer the same fate.

Merits

10. The applicant contends for the purposes of search and seizure without a warrant the respondent should satisfy the requirements set out in section 22(b) of the Criminal Procedure Act (“CPA”). This section requires that the members of the respondent would be entitled to search and seize without a warrant in instances where there is a reasonable suspicion that a crime is being committed. Further that if they were to first procure the warrant evidence may be hidden and/or destroyed. In addition, and importantly so, the members of the respondent should be armed with information that there is a likelihood that a magistrate would have issued a warrant.

11. In this case, so the applicant contends, the statement made by Mr Hadebe has insurmountable shortcomings, first, it fails to identify the children who directed them to the container or at least to attach their supporting/confirmatory affidavits. Second, it fails to indicate what was the nature of the crime being committed by stating the form and the methods of gambling which were allegedly

² Nielson t/a Playtime Internet Café v Minister of Police

embarked upon. Third, it fails to mention as to how the computers, TV and the tablets were used in the commission of the crime. Without this information no magistrate would have granted a warrant of search and seizure. The contention that there was a reasonable suspicion is therefore unfounded.

12. The applicant's counsel contended further that members of the respondent have further made reference to the search and seizure in terms of the CPA which does not authorise seizure of computers. Instead, the applicable statute is Cyber Crime Act which provides in terms of section 29 and 32 that computers maybe seized under certain circumstances. Without the correct legal foundation, the search and seizure would *ipso facto* not be lawful and therefore stand to be set aside.

13. The respondent in retort contends that on the available statements by the members of SAPS there was a reasonable suspicion of the commission of the crime. The children who were fighting pointed at the container as the place where the gambling offence was committed. The security guard swiftly ran into the container on seeing members of SAPS approaching. The SAPS members were refused entry into the container. There was a promise that the owner of the business will come and after three hours the said owner failed to show up. A demand was made after entering the container for a gambling certificate and none was produced. In the premises and armed with this information the members had reasonable suspicion that the magistrate would have granted a request for a warrant of search and seizure.

14. In retort the applicant contended that the argument advanced by the respondent lacks sound legal foundation. There are instances where criminals disguises as police officials with the intention of committing robberies. The visit by the members of SAPS was very late at night. It is not clear that the kind of gambling, if any, which was being carried out even require a certificate as requested and or the licence.

Legal principles and analysis

Urgent applications

15. Applications for *mandament van spolie* are generally considered urgent. The SCA held in *Blendrite*³ that “... *mandament van spolie* is designed to be a robust, speedy remedy which serves to prevent recourse to self-help.”

16. I had regard to the conduct of the applicant to determine if urgency could have been self-created and found that her conduct is not consistent with a party who adopted a supine posture when the need to approach court became apparent.

17. Though it is trite that financial urgency is generally not an acceptable basis to predicate a case for urgency, where undue hardship will ensue coupled with exceptional circumstances the court may entertain such a matter in an urgent court. The applicant has demonstrated that in addition to the loss of profit, she is required to pay rental for the rented property and may ultimately be forced to retrench employees. To this end I am persuaded that there are exceptional circumstances and the applicant may not obtain substantial redress⁴ in due course. The case has therefore been made for the matter to be accorded an audience in an urgent court.

Non-joinder

18. The SCA in *Naude*⁵ held that the “... *test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject*”

³ *Blendrite Pty Ltd and Another v Moonsami and Another* (227/2020) [2021] ZASCA 77 (10 June 2021).

⁴ See also *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Greek (Pty) Ltd* [2011]ZAGPJHB 196 (23 September 2011), regarding absence of substantial redress being of paramount importance in the determination of the question of urgency.

⁵ *Absa Bank Ltd v Naude NO* (20264) [2015] ZASCA 97 (1 June 2015).

*matter of the litigation which may prejudice the party that has not been joined.”*⁶ The SCA further quoted with approval *Gordon’s*⁷ judgment where it was “... *held that if an order or judgment cannot be sustained without necessarily prejudicing the interest of the third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined*”. The counsel for respondent submitted during argument that the applicant was made aware that the items seized were booked in with the SAP 69 office and has not demonstrated that same may have changed hands and now handed over to the DPP. There appears to be no basis to contend that DPP should have been joined without presenting any evidence that the items could be in the possession of the NDPP.

19. The respondent has also failed to demonstrate the alleged prejudice which may visit the DPP if the order sought is granted. Such information, if any, would have readily been obtained from the relevant functionaries.

20. In the premises the contention by the respondent is unsustainable and falls to be dismissed.

Spoliation.

21. Spoliation is a recourse available to a party who can demonstrate that he was in possession of a property and was unlawfully dispossessed thereof.⁸ There are no qualms between the parties with the first aspect that the applicant was in possession of the items. What therefore needs to be determined is whether the dispossession was lawful. Such dispossession would be lawful if it was preceded by consent or executed pursuant to the warrant being issued alternatively without a warrant but in compliance with the requisite prescripts.

⁶ Id at para [10].

⁷ *Gordon v Department of Health, Kwazulu-Natal* 2008 (6) SA 533 (SCA).

⁸ See fn 2 “*All that must be proved is the fact of prior possession, and that the possessor was deprived of that possession and that the possessor was deprived of that possession unlawfully. Unlawfully here meant without agreement or recourse to law.*”

22. The right to privacy is guaranteed in the Constitution of the Republic of South Africa in terms of section 14⁹. The Constitution further provides in section 36 that the rights enshrined may be limited in accordance with, *inter alia*, the laws of general application. Ordinarily searches and seizure are executed pursuant to a warrant issued in terms of section 21 of the CPA. Under certain circumstances it may be warranted that premises be searched and items be seized without a warrant. Section 22 of the CPA which sanctions searches without warrant is the law of general application¹⁰ as envisaged in section 36 of the Constitution.

23. There are requirements to be fulfilled for a warrantless search and seizure as provided for in terms of section 22(b) of the CPA which states that the State must prove that, at the time when the search was executed, the police officer concerned had information which, viewed objectively, was sufficient to ground a reasonable belief¹¹:

- a) that an offence had been committed or would be committed, and that an article connected with the suspected offence was on a particular person or premises;
- b) that a search warrant would be issued in terms of s 21(1)(a) of the CPA if it were sought; and
- c) that the delay in obtaining the warrant would defeat the object of the search.

24. The grounds upon which the search and seizure is based must be objectively assessed. The facts put out forward by the respondent in this instance as the bedrock of the respondent's case is based on what the children stated but

⁹ "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."

¹⁰ *Ngqukumba v Minister of Safety and Security and Others* 2014 (5) SA 112 (CC) at para [19]; *Minister of Police and Others v Kunjana* 2016 (2) SACR 473 (CC) at paras [30] – [31].

¹¹ *Mnyungula v Minister of Safety and Security and others* 2004 (1) SACR 219 (Tk) para [12].

their evidence or their affidavits are not placed before the court. It is therefore based on hearsay evidence. The respondent failed to mount a case to justify that hearsay evidence regarding what the children told them should be accepted in accordance with section of 3 of the Law of General Amendment Act. The state further contends that there was contravention of the National Gambling Act 7 of 2004 or Gauteng Gambling Act 4 of 1998 without making any specific clauses which are being implicated.¹² No evidence has been presented with regard to the form, method or type of gambling which allegedly took place.¹³ As a result there is no evidence which could have persuaded the magistrate.

25. Counsel for the applicant made further submission that invoking the provisions CPA was incorrect and ill-advised as the applicable statute was the Cyber Crime Act 19 of 2020 in terms of section 29 and 32. The respondent was unable to present any evidence or argument to gainsay this submission except to deny the import and interpretation of the provisions referred therein.

26. It is also clear that the members waited for a period of more than three hours for the owner and other members to provide back up. This time was also sufficient to allow the members to request and obtain a warrant of search and seizure.

Conclusion

27. The facts presented clearly satisfy the requirements for *mandament van spolie* and the contentions by the respondent failed to meet the requirements as set out in section 22 of the CPA. The conduct by the members of the respondent is therefore unlawful and it also follows that the continued possession is tainted.

¹² Specific reference of specific sections is made in the Respondent Answering Affidavit and not in the statement which Mr. Hadebe submitted to found basis to proceed without warrant.

¹³ See also *Ngobeni v Minister of Safety and Security* (957329/2014) [2014] ZAGPPTA (22 August 2014), at para [17].

28. There was a dispute with regard the exact amount which was seized by members of the respondent and it was submitted on behalf of the applicant that is reluctantly accepted that the order should be limited to the amount which the respondent admitted having seized.

Costs

29. The legal costs are ordinarily within the discretion of the court which must be exercised judicially having regard to the relevant factors. It was held in *Affordable Medicines Trust and Others*¹⁴ that “[T]he award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all relevant considerations.” It is also trite that the costs follow the result, and, in this instance, no persuasive argument was mounted warranting deviation therefrom.

Order

30. In the result I make the following order.

1. The court dispenses with the forms and service prescribed by the Rules of Court and disposes of this matter as one of urgency in terms of Rule 6(12).
2. It is ordered that the search and seizure which took place on 17 June 2024 by the members of the respondent without a search warrant is unlawful and set aside.
3. The respondent and or any party in possession and control of the applicant’s movable goods and monies set out below be returned forthwith and restore possession of the movable goods and monies which were removed by members of SAPS or employees of the respondent from the

¹⁴ *Affordable Medicines Trust and Others v Minister of Health and Others* 2006(3) SA 247 (CC)

applicant's business premises situated at P[...] D[...] I[...] C[...], [...] P[...] D[...], M[...], Johannesburg. The items are:

- 3.1. 1 x Television set;
- 3.2. 21 x Computer monitors;
- 3.3. 22 x monitor screens;
- 3.4. 1 x Safe;
- 3.5. 1 x cash register;
- 3.6. 28 x diamond cards;
- 3.7. 3 x keyboards;
- 3.8. 18 Tablets and
- 3.9. R600.00 in cash.
4. Costs of suit.

M V Noko
Judge of the High Court.

Dates:

Hearing: 30 July 2024.

Judgment: 22 August 2024.

Appearances:

For the Applicant: Mr V Vardakos.

Instructed by : Vardakos Attorneys, Germiston.

For the Respondent: Adv M Amojee.

Instructed by : Office of the State Attorneys, Johannesburg.