



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GQEBERHA**

CASE NO.: 3286/2024

In the matter between:

LUFEFE ZIBOTI

FIRST APPLICANT

BABALWA NDWALANE

SECOND APPLICANT

and

MINISTER OF POLICE

FIRST RESPONDENT

STATION COMMANDER, KABEGA

POLICE STATION

SECOND RESPONDENT

MINISTER OF CORRECTIONAL

SERVICES

THIRD RESPONDENT

AREA COMMISSIONER:

CORRECTIONAL SERVICES

FOURTH RESPONDENT

HEAD OF MEDIUM B, ST ALBANS

CORRECTIONAL CENTRE

FIFTH RESPONDENT

JUDGMENT

ZONO AJ

Introduction

[1] The application is divided into two parts; “*namely*”, Part A which is in the form of an urgent application. The application is for the return of applicants’ cellular phones, “*to wit*”, a Samsung S23 and a Samsung S21. The relief is apparently sought against all the respondents. The applicants seek costs on a punitive attorney and client scale C.

[2] The application is opposed by the respondents. In so doing the respondents have file their Notice to Oppose and answering affidavit deposed to by Mr Madikane, who describes himself as an Assistant Director and a Correctional Official at Old Cape Road, St Albans, Gqeberha.

[3] The first applicant is a prison warder in the employ of the Department of Correctional Services. On the 8 August 2024 the first applicant was on duty performing his normal duties as a prison warder. Members of the Third Respondent demanded to search the first applicant, to which search he did not consent. When the search was taking place there was no search and seizure warrant. The search took place in the presence of the fifth respondent who is the Head of Medium B, St Albans Correctional Centre, and he supported what other officials were doing. Nothing was found from the body of the first applicant.

[4] After having been searched he was thereafter taken to his private residence which is within the premises of the Correctional facility. The Correctional Official demanded the first applicant to open the door of his private residence. Having announced his inability to do so, they forcefully entered first applicant's private residence. They found the second applicant inside the house. Among the things they confiscated in the first applicant's residence were the two cellular phones mentioned in the preceding paragraphs, belonging to the first and the second applicants respectively. The two cellular phones were lawfully owned and possessed by the respective applicants. The applicants have been in an undisturbed possession and enjoyment of their cellular phones.

[5] The applicants conclude their case by contending that the deprivation of possession of their cellular phones was unlawful. They are using their cellular phones for Job searching.

[6] In justifying their conduct, namely, that the dispossession was lawful, the respondents place the following version to assail applicants' case. Mr Madikane, the deponent to the answering affidavit states that, on the 8th of August 2024, when he was on duty received a Security Intelligence Report from his Area Commissioner instructing him to arrange a search at Room 15, Single Quarter East Side. On that basis they formed a reason to suspect that the applicant was used to transport illegal Contraband into the Correctional Centre.

[7] When the first applicant reported for duty, Mr Madikane requested to search first applicant's body for the suspected Contraband but they could not find anything. They proceeded to first applicant's room with applicant. Mr Madikane was with the members of their Emergency Security Team. The first applicant did

not open the room for them but they ultimately managed to open the room, and they found the second applicant inside the room. He explained to the applicants the purpose of their search.

[8] Having discovered the illegal drugs he called the Members of the South Africa Police Service and the first and second applicants were arrested for possession of drugs and subsequently released on bail.

[9] Cellular phones are part of the articles that were seized as they form part of the Criminal Investigations as they might contain information necessary for prosecution in the case relating to drugs and other potential charges after investigations are complete. They expect to receive incriminating evidence from the cellular phones. Their contention goes.

[10] The respondents refuted that the dispossession was unlawful as they place reliance on the provisions of Correctional Services Act 111 of 1998¹ (CSA). No specific provision(s) of the Section is identified in the respondents' papers to be the one(s) relied on. What the respondents do, they quote verbatim the whole provisions of Section 111 of CSA.

[11] Where a litigant relies upon a statutory provision, it is not necessary to specify it, but it must be clear from the facts alleged by the litigant that the Section is relevant and operative². It is desirable for litigants who seek to justify their conduct that violated individuals' rights to clearly identify both the facts upon

¹ Section 111 of Correctional Services Act 111 of 1998

² *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) Para 27; *Yannaku v Apollo Club* 1974 (1) SA 614 (A) at 623f

which they base their defence, and the legal basis for their defence. Generic reference to a provision dealing with wide ranging issues is insufficient.

[12] Section 101 of the CSA provides for entry, search and seizure I the following terms:

101. Entry, search and seizure—

“(1) In addition to the powers of a correctional official to search inmates, their cells and their property and to seize articles in terms of section 27, a correctional official also has the power to enter any premises, to search without warrant any other person or place and seize any article when this is reasonably necessary for—

(a) maintaining the safe custody of an inmate, the security of a correctional centre and controlling access of persons to and permissibility of goods in a correctional centre;

(b) carrying out any sentence or order in terms of which a person is subject to community corrections;

(c) preventing, or gathering evidence of, the commission of any offence under this Act;

(d) investigating theft, fraud, corruption and maladministration by correctional officials.

(2) Despite the provisions of subsection (1)—

(a) a correctional official may not search another correctional official or seize his or her property without his or her consent or being authorised to do so by the National Commissioner but a general authorisation to search other correctional officials may be granted to a correctional official who is required to act in order to control access to or maintain secure custody within a correctional centre, or to give effect to subsection (1) (d); and

(b) action cannot be taken in terms of subsection (1) (c) or (d) outside a correctional centre unless a search warrant has been issued by a magistrate but

a correctional official may act in terms of subsection (1) (c) or (d) without a warrant when he or she on reasonable grounds believes that—

(i) a warrant will be issued authorising action in terms of sub-section (1) (c) or (d); and

(ii) the delay in obtaining such a warrant would defeat the object of the search.

(3) (a) The provisions of section 21 of the Criminal Procedure Act, relating to the Issue of a warrant to a police official apply, with the necessary changes, to a correctional official acting in terms of this section.

(b) The provisions of section 27 of the Criminal Procedure Act, relating to resistance to entry or search by a police official apply, with the necessary changes, to a correctional official acting in terms of this section.

(c) The provisions of section 29 of the Criminal Procedure Act, relating to the manner in which a search must be conducted by a police official apply, with the necessary changes, to a correctional official acting in terms of this section.

(4) (a) The National Commissioner may sell any property seized in terms of this Act or the property of a deceased or escaped offender which is in the care of the Department by public auction, if it is not lawfully claimed within six months after being seized or after the death or escape.

(b) The proceeds of the sale may be appropriated in settlement of any claims by the State against the applicable person and the balance, if any, must be paid into the National Revenue Fund.

(c) If, after the period of six months referred to in paragraph (a), a person proves to the National Commissioner that he or she is lawfully entitled to the balance of the proceeds, the balance must be paid to that person.”

[13] Provisions of Section 101 provides for different things in relation to different circumstances and persons. A proper interpretational exercise is

required in the circumstances of this case, so that the aforesaid provisions be properly applied to the facts of this case.

[14] In *Cool Ideas*³ Majiedt AJA (as he then was) held that:

“28 A fundamental tenet of statutory interpretation is that the words in a statute must be given their grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

- (a) That statutory provisions should always be interpreted purposively;*
- (b) The relevant Statutory provision must be properly contextualised;*
and
- (c) All statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their Constitutional validity. This proviso to the general principle is closely related to the purposive approach refer to in (a)”.*

Discussion

[15] The applicants rely on a Common Law principle of *Mandament van spolie* which is designed as a speedy remedy⁴ providing a summary relief⁵. All that the despoiled person need prove is that, firstly he or she was in possession of the object; and secondly, he or she was deprived of possession unlawfully⁶. An applicant upon proof of two requirements is entitled to a *Mandament van spolie* restoring the *Status quo ante*⁷. Anyone illicitly deprived of property is entitled to be restored to possession before anything else is debated or decided. The principle

³ *Cool Ideas* 1186 CC v Hubard and Another 2014 (4) SA 474 (CC) para 28

⁴ *Mangala v Mangala* 1967 (2) SA 415 (E) at 416D

⁵ *Amina Bee v Shaik Hoosen* 1946 NPD 59 at 61

⁶ *Yeko v Qana* 1973 (4) SA 735 (A) at 739E

⁷ *Ivanov v North West Gambling Board and Others* 2012 (6) SA 67 SCA Para 19.

is that illicit deprivation must be remedied before the Courts will decide competing claims to the object or property⁸.

[16] It is a fundamental principle of our law that a person may not take law into his own hands and a statute should be so interpreted that it interferes as little as possible with this principle⁹. A spoliation order is available even against government entities for the simple reason that excesses by those entities do occur. Those excess may lead to breaches of the peace, that is what the spoliation order, which is deeply rooted in the rule of law, seeks to avert¹⁰.

[17] It matters not that a government entity may be purporting to act under colour of law, statutory or otherwise. The real issue is whether it is properly acting within the law. After all, the principle of legality requires of state organs to act in terms of the law¹¹. It should make no difference that a government official in dispossessing an individual of an object unlawfully, the official purported to act under colour of the search and seizure powers contained in Correctional Services Act¹². Even the unlawful possessor- a fraud, a thief or a robber is entitled to the *Mandament*'s protection¹³.

[18] Reliance is placed by the respondents on the provisions of Section 101 of CSA. It is this provision that must be interpreted that it interferes as little as possible with the Common law principle of *Mandament van spolie*. It must be

⁸ Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others 2007 (6) SA 511 SCA Para 21

⁹ George Municipality v Vena and Another 1989 (2) SA 263 (A) at 271H-272B

¹⁰ Ngqukumba v Minister of Safety and Security and Others 2014 (5) SA 112 (CC) para 12

¹¹ Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC) Para 49

¹² Ngqukumba v Minister of Safety and Security and Others 2014 (5) SA 112 Para (13)

¹³ Tswelopele Non-Profit Organisation and Others v City of Tshwane Municipality and Others 2007 (6) SA 511 (SCA) Para 21

read in a manner that is harmonious with the *Mandament van spolie*. It must be read in conformity with the Common Law¹⁴. Where harmonious reading is not possible, statute must trump the Common Law. It must be clear that the statute intended to alter the Common Law¹⁵. So too the statute must be interpreted to preserve its Constitutional validity¹⁶. The reading of the provisions must promote the spirit, purport and object of the bill of rights¹⁷. Not surprisingly Section 39 (3) of the Constitution recognises the existence of rights and freedoms created by the Common Law if they are not inconsistent with the Constitution.

[19] It does not appear to me that the provisions of Section 101 of CSA intended to alter the Common Law. There would be disharmony between Section 101 of CSA, on the one hand, and the remedy of *Mandament van spolie*, on the other, if the Section did not have Subsection 2 and the phases like *reasonable necessary*, *reasonable grounds*. I deal herein after with Section 102 (2) of the CSA.

[20] Section 101 (2) of CSA provides:

“2. Despite the provisions of Subsection 1-

(a) A Correctional official may not search another Correctional official or seize his or her property without his or her consent or being authorised to do so by the National Commissioner but a general authorisation to search other Correctional officials may be granted to a Correctional official who is required to act in order to control access to or maintain secure custody within a correctional centre, or to give effect to Subsection 1(d)”

¹⁴ Dhananakium v Subramaian and Another 1943 AD160 at 167; Ngqukumba v Minister of Safety and Security and Others 2014 (5) SA 112 Para 16

¹⁵ Law Society of South Africa and Others v Minister for Transport and Another 2011 (1) SA 409 (CC) Para 69

¹⁶ Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC) Para 28

¹⁷ Section 39 of the Constitution

The subsection appears to be a standalone provision with regard to what it provides for.

[21] The search and seizure of a Correctional official by another Correctional official is generally prohibited. The power to search and seize may only be exercised in very restricted and circumscribed circumstances. It may be exercised only when statutorily prescribed or certain pre-conditions or jurisdictional facts are in existence. The first applicant falls within the definition of a Correctional Official as defined in section 1 of Correctional Services Act. He is an employees of the Department of Correctional Services appointed in terms of Section 3(4).

[22] Under Common Law, necessary pre-conditions that must exist before an administrative power can be exercised, are referred to as jurisdictional facts. In the absence of such pre-conditions or jurisdictional facts, so it is said, the administrative authority effectively has no power to act at all ¹⁸. Jurisdictional facts refer broadly to pre- conditions or conditions precedent that must exist prior to the exercise of the power and procedures to be followed, or formalities to be observed when exercising the power¹⁹. Those facts are jurisdictional because the exercise of power depends on their existence or observance as the case may be²⁰.

[23] A valid exercise of power to search and seize a Correctional official can only take place when one of the two pre-conditions or jurisdictional facts is in existence:

¹⁸ *Kimberly Junior School and Another v Head of the Northern Cape Education Department and Others* 2010 (1) SA 217 (SCA) Par 11

¹⁹ *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA (C) Para 98; *E.M. v Minister of Home Affairs and Another* (3153/2024) [2024] ZAECHMHC 65 (27 august 2024) Para 13

²⁰ *Cora Hoxter: Administrative Law in South AFRICA*, Second Edition, page 290; *Paola v Jeeva* N.O 2004 (1) SA 396 SCA Para 11, 14 and 16

“(a) Consent of the Correctional official sought to be searched;

(b) Correctional official to conduct search and seizure must be authorised by the National Commissioner.’

[24] Parties in their papers are “*Ad idem*” that there was no consent secured from the applicants to search and seize their cellular phone. The first applicant in his founding affidavit state as follows:

“5.2 On 8 August 2024 I was on duty busy performing my duties as a prison warden. The members of the third respondent demanded to search me. I did not consent to the search. They threatened to assault me if I refuse to be searched....”

Those allegations are not denied.

[25] On the other hand Mr Madikane in his answering affidavit makes the assertion:

“24. When the first applicant reported for duty after his lunch break, I requested that I search his body for the suspected Contrafraud, which was not found on him. This led us to want to search his premises

25. I was accompanied by the first applicant and members of an Emergency Security Team to his room. The first applicant told us that he has no entry because he had left the second applicant behind who he said had gone away (sic).

26. We managed to gain entry and we found applicant inside. I explained to them the purpose of the search”.

From there they continued with their search which ultimately resulted, *inter alia*, in the applicants’ cellular phones being seized.

[26] About entering first applicant's private residence the first applicant asserts as follows:

"5.5 They forcefully and unlawfully entered my place of residence. In essence they trespassed and intruded. They ransacked my place under the pretext of looking for drugs.

5.6 My girlfriend, the second applicant was present when they entered and forcefully searched my place. They also verbally abused my girlfriend. They demanded to search her on her person even though, they were all men. These men were demanding to forcefully search a woman and physically touch her"

[27] In the whole tenor of his affidavit Mr Madikane does not say anything about the fact that they obtained or not the consent of the applicants to search and seize their property. It must therefore be accepted that the version of the applicants in this regard is admitted. In *Mc Williams*²¹ it was held:

"Whilst quiescence is not necessarily acquiescence, a party who does not make a firm repudiation of an allegation when bound to do so incurs the risk of an adverse inference being drawn against him"

The *dictum* was quoted with approval in *Makhuva*²².

[28] The first jurisdictional fact for a lawful and a valid search and seizure of a Correctional official by another is plainly absent and was not satisfied. That leaves us with the second jurisdictional fact requiring that the search and seizure must be authorised by a National Commissioner. From the onset I observe that this jurisdictional fact was not satisfied.

²¹ *Mc Williams v First Consolidated Holdings (Pty) Ltd* 1982 (1) SA 1 (A) at 10

²² *Makhuva and Others v Lukoto Bus Services (Pty Ltd and Others* 1987 (3) SA 376 (V) at 386E-F

[29] What prompted the search and seizure of applicants' cellular phones is the Security Intelligence Report from the Area Commissioner instructing Mr Madikane to arrange a search at room 15, Single Quarters, East Side. That is captured in paragraph 23 of respondent's answering affidavit in the following words:

“On the 8th of August 2024 I was on duty when I received a Security Intelligence Report from my Area Commissioner instructing me to arrange a search at Room 15 Single Quarters, East Side. The report gave us reasons to suspect that the first applicant was used to transport legal Contraband into our Correctional Centre.”

[30] A report came from the Area Commissioner. It was a mere report purpose of which is unknown. Report was not an authorisation of any form. It is pivotal that it did not come from the National Commissioner who is a statutorily designated official to authorise that kind of search and seizure. The report does not even purport to have been written on the instruction of the National Commissioner. The National Commissioner has at no stage fathomed of authorising the search and seizure of applicants' cellular phones. The little that is said to be contained in the report is transportation of an unmentioned illegal Contraband into the Correctional facility. Surely applicants' cellular phones were and are not contemplated in that report.

[31] A Functionary, in whose power the legislation has conferred, must himself or herself exercise the power unless such power has been delegated to someone else. The Functionary may not abdicate this power to any other Functionary²³. There is no allegation that there was an exercise of power based on delegation of

²³ Hofmeyer v Minister of Justice and Another 1992 (3) SA 108 (C) at 117 F-G; Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Ltd 2005 (6) SA 182 SCA Para 20

authority to search and seize. In any event I find that no authorisation was issued by the National Commissioner at all. The search and the resultant seizure of applicants' cellular phones was not authorised.

[32] State functionaries, no matter how well intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, and has long been enshrined in our law.²⁴

[33] The provisions of Section 101 (2) of CSA are couched in imperative terms. The provisions are couched in negative terms, namely, “*May not*”, which is an indication that they are peremptory provisions²⁵. Peremptory provisions require exact compliance for it to have the stipulated legal consequences²⁶. Any purported compliance falling short of exact compliance with the statutory requirement construed as peremptory is a nullity²⁷. Therefore the search and resultant seizure of applicants' cellular phones is a nullity and it is of no force and effect.

[34] In Schierhout²⁸ Innes CJ observed:

“It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is Void and of no effect”

²⁴ Head of Department, Department of Education Free State Province v Welkom High School and another; Head of Department, Department of Education, Free State Province v Harmony High School and another 2014 (2) SA 228 (CC) Para 1

²⁵ Moroka v Premier of Free State Province and Others (295/20) [2022] ZASCA 34 (31 March 2022) Para 21-22; 82 LAWSA, Vol 25, Part 1 Page 399 Para 366, Cora Hoxter: Administrative Law in South African, 2nd Edition, Page 50

²⁶ Shalala v Klerksdorp Town Council and Another 1969 (1) SA 582 (T) at 587A-C

²⁷ GM. Cockram, 3rd edition Page 163

²⁸ Schierhout v Minister of Justice 1926 AD 99 at 109

The Constitutional Court²⁹ quoted with approval Innes CJ's observation as follows:

“What is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done- and that whether the Lawgiver has expressly decreed or not the mere prohibition operates to nullify the act”.

The prohibited seizure of applicants' cellular phones is a nullity.

[35] When reading the words “*May not*” and “*without*” in Section 101 (2) of CSA an ineluctable construction of the Statutory provisions is that search and seizure without consent or authorization referred to above is prohibited. It is that prohibition that operates to nullify the search and resultant seizure of applicants' cellular phones.

[36] The power to search and seize applicants' cellular phones was not sourced in law. Doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised. Public power can be validly exercised only if it is clearly sourced in law³⁰. It is on this basis I find that generic reliance on the provisions of Section 101 of the CSA is misplaced. Those provisions were not complied with.

[37] The Law cannot and does not countenance an ongoing illegality. The Court has a concomitant duty to uphold the doctrine of legality by refusing to countenance an ongoing Statutory contravention. Court have a duty to ensure that the doctrine of legality is upheld³¹. On this score there is simple no basis to

²⁹ Cool Ideas CC v Hubbard and Another 2014 (4) SA 474 (cc) Para 90

³⁰ AAA Investments (Pty) Ltd v Micro Finance Regularly Council and Another 2007 (1) SA 343 (CC) Para 58

³¹ Lester v Ndlambe Municipality 2015 (6) SA 283 (SCA) Para 23, 24, 27 and 28

allow the respondents to keep applicants' cellular phones which were glaringly unlawfully seized. It is a common cause that those phones were seized without a warrant. Accordingly, this application must succeed. An interpretational maxim *Ex Consequentibus* applies, where a provision proscribes a certain consequence it proscribes, by implication, everything that may occasion such a consequence. Seizure without consent or authorization is proscribed.

[38] It appears that the cellular phones are in the hands, possession or control of the second respondent, Station Commander Kabega Police Station, an employee of the first respondent, the Minister of Police. The first and second respondents are the real parties to be directed to return the cellular phones to the applicants.

Costs and Urgency

[39] Upon undertaking to return the cellular phones having been made by the second respondent on 15 August 2024, effectively four days after they were seized, the applicants were invited to go to the police station ostensibly to receive their cellular phones during the week days. It is not gainsaid that at that time the applicants were ready to approach this Court on Urgent basis, but halted that legal process at the instance of the second respondent; on the basis that an undertaking has been made to return the cellular phones.

[40] On their first visit at second respondent's police station, the second respondent furnished them with a number of investigating officer. He deliberately did not assist them to call his subordinate, the Investigating Officer knowing fully well that they had no phones, and he was enjoying the use of public

resources including government phones in his office. After having pushed from pillar to post the applicants were advised on 22 August 2024 that they were not going to be given their cellular phones. It is unclear why the second respondent failed to give the applicants their cellular phones as promised as it is clear that the cellular phones were kept in the police station and not in the body of the Investigating Office.

[41] The applicant came to this Court on 26 August 2024 by means of a Certificate of Urgency. It is in terms of that Certificate of Urgency that the applicants caused this matter to be enrolled in this court. In these circumstances a point of lack of Urgency is preposterous and is accordingly without merit. A glaring unlawful conduct of the respondents cannot be foiled in the guise of lack of Urgency when the second respondent wittingly frustrated the applicants. Urgency of this matter was sufficiently explained and on that score the matter is sufficiently Urgent to be heard on a Motion Court day. The respondents cannot hide behind their conduct of frustrating, making mocking of the applicants and later lament about the lack of Urgency. The second respondent was aware at the time he was making a promise to return the cellular phones that he was not going to do that.

[42] The vexing part of the application lies with the abuse of power and deliberate frustration of the applicants by the respondents. To start with, there was no reference made in the so call “*Security Intelligence Report*” to the second applicant. The fifth respondent did not mention the name of the second applicant either. The second applicant is not a member of Correctional Services Department. She is just an unemployed South African Citizen, depending on her cellular phone to receive important messages like job offers and calls for job

interviews. It is not at all decipherable and cannot be fathomed on a reasonable standard of intelligence why her cellular phone was taken.

[43] No contrition or penitence was shown by the respondents for the gross disregard of applicants' rights. When the second respondent was promising the applicants the return of their cellular phones, he knew that they are unlawfully retaining applicants' cellular phones. Refusal to return applicants' cellular phones in those circumstances, amounts to an abuse of power by those exercising public power. Malice was manifest when the applicants were being push from pillar to post, when it was known that they were not going to be given their cellular phones. The promise of return of cellular phones was never intended to be fulfilled at the time the second respondent was making it.

[44] The appalling manner in which the seizure of applicants' cellular phone was conducted is not meaningfully dealt with in the Answering Affidavit. It must be accepted that applicants' cellular phones were seized in a manner that undermines their applicants' privacy and dignity. A contingent of male Correctional officials descended upon a female who could not help herself. That was the grossest abuse by male public official with attributes of not respecting a woman's body whom they had no reason to search in the first place.

[45] In *Kirland*³² Cameron J aptly held:

“82....On the Contrary, there is a higher duty on the Sate to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant adrift on a sea of

³² MEC for Health, Eastern Cape and Another v *Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) Para 82

litigious Uncertainty, to whom Courts must extend a procedure- Circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly."

Respondents' conduct is antithetical to this Constitutional Court *dictum*.

[46] In Kalil N. O.³³ Leach JA, has not been quiet and he had this to say:

".....Thus where, as here, the legality of their actions is at stake, it is crucial for public servants to neither be coy nor to play fast and loose with the truth. On the contrary, it is their duty to take the Court into their confidence and fully explain the facts so that an informed decision can be taken in the interests of the public and good goverances.....our present Constitutional order imposes a duty upon Sate Officials not to frustrate the enforcement by Court of Constitutional rights."

[47] The respondents, when seizing applicants' cellular phones did not have respect to applicants' (especially second applicant) rights to dignity and privacy. They did not have regard to the rule of law. When applicants came to this Court to enforce their rights the respondents clinged tightly onto unmeritorious procedural nicities, (Urgency) solely to frustrate enforcement of applicants' rights.

[48] In the amalgam of all the circumstances of this case, this application succeeds with costs on a punitive attorney and client costs.

Order

³³ Kalil N.O. and Others v Mangaung Metropolitan Municipality and Others 2014 (5) SA 123 (SCA) Para 30

[49] I the result I make the following order:

49.1 Applicants' noncompliance with the form and time limits relating to service of papers is hereby condoned, and that this application is hereby heard as an Urgent matter in terms of Rule 6 (12) of the Uniform Rules of Court.

49.2 The first and second respondents are hereby directed to forthwith return to the applicants two cellular phones, *to wit, a Samsung S23 and a Samsung S21.*

49.3 The respondents are directed to pay costs of this application on a Scale as between attorney and Client (Scale C).

A S ZONO

ACTING JUDGE OF THE HIGH COURT

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