REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 12880/19

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

06 MAY 2019
DATE

.....
SIGNATURE

In the matter between

LESLIE NORMAN NIELSON
t/a PLAYTIME INTERNET CAFE — Applicant

and

MINISTER OF POLICE — First Respondent
DETECTIVE COLONEL KHOROMBI N.O — Second Respondent

J U D G M E N T

MAHALELO, J:

INTRODUCTION

[1] The applicant brought an application against the respondents on an urgent basis where it seeks an order setting aside or declaring as invalid a warrantless search and seizure at its premises, and the return of the following movable properties which were seized by the employees of the first respondent namely;

1.1 60 (sixty) computers

1.2 2 (two) routers

1.3 2 (two) dlinks

1.4 undisclosed amount of money

1.5 various documents

[2] The applicant's cause of action is based on Mandament van Spolie.

[3] As is apparent from the applicant's papers the applicant does not only rely on this possessory remedy but also seeks a declaratory order as to the wrongfulness of the search and seizure.

[4] The application is opposed.

[5] In this judgment the first respondent is the Minister of Police and the second respondent is Detective Colonel Khorombi in his official capacity. Where appropriate, the first and second respondents, represented by the same counsel, are jointly referred to as the respondents.

[6] The following facts are common cause between the parties;

6.1 The aforementioned goods were confiscated on 5 April 2017 from the applicant's premises situated at shop 10B, Elizabeth Centre, President Kruger Street, Westonaria ("the premises").

6.2 The applicant is the lessee of the premises from which he operates an internet café under the name Playtime Internet Café.

6.3 The applicant was in peaceful and undisturbed possession of the items prior to the attendance of the second respondent.

6.4 The second respondent together with other members of the first respondent searched the applicant's premises without a warrant and seized the abovementioned goods.

6.5 Four people were found in the premises namely David Ncwaba, allegedly employed as a security guard, Bongile Madikizela, allegedly employed as a cashier, Thandeka Dinakwe and Tshepiso Maureen Ramanyai.

6.6 After the second respondent had requested an operating license for the business and was not furnished with one, he arrested the four people he found in the premises for contravention of the Gauteng Gambling Act no. 4 of 1995 and the National Gambling Act no. 7 of 2004.

[7] As aforesaid the applicant challenges the lawfulness of the search of its premises on 5 April 2017 and the seizure of the goods mentioned above and therefore claims the return of all the goods.

URGENCY

[8] It is trite that the relief sought by way of Mandament van Spolie is one considered by its very nature to be a matter that is urgent. This much has been conceded by the respondents. I do not intent to dwell much on the question of urgency except to say that the applicant has set out in detail in the founding affidavit reasons why this matter should be considered urgent. Having considered the matter and the reasons given I am satisfied that the applicant meets the requirement of Rule 6(12)(6) of the Uniform Rules of Court in that he has set out circumstances explicitly which render the matter urgent and has stated reasons why the application cannot be heard in the normal cause.

[9] On behalf of the respondents, counsel raised a *point in limine* on non-joinder.

POINT IN LIMINE

[10] The respondents contend that the National Director of Public Prosecutions ought to have been joined in the proceedings because he has a substantial and direct interest in the matter by virtue of the pending criminal charges against the four people who were arrested at the premises and charged under case number A274/2019, Westonaria Magistrate Court. Further that, the items seized constitute exhibits in the pending trial in terms of Section 30 and 31 of the Criminal Procedure Act 51 of 1977 ("the Act") and are required to be retained as such for the pending criminal trial.

[11] The applicant, in response to this submission contended that the dispossession was perpetrated by the second respondent who thereafter entered the items in the SAP13 register. At no stage did the items pass onto another entity or functionary. The Director of Public Prosecution may make a decision to prosecute regardless of whether the items are in the possession of the respondents and most importantly, the dispute, above all else, is between the dispossessor and the dispossessed and any argument to the contrary will undermine the principles underlying spoliation relief.

[12] When one considers the law on Mandament van Spolie one is bound to agree with the applicant. In my view non-joinder of the National Director of Public Prosecutions is not fatal to the application and the relief sought. There is therefore no merit in the *point in limine* raised and it stands to fail.

[13] The case for the applicant is that he has been unlawfully dispossessed of the use of his business premises and the electrical equipments which were therein. This, according to him, is as a result of an unlawful search and seizure without a warrant which is in contravention of Section 22 of the Act. Section 22 provides that;

"22 Circumstances in which article may be seized without search warrant:

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) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or

(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."

[14] The respondents justify the search and seizure in question by reliance on the provisions of Section 20 read with Section 22(b) of the Act. They contend that the items in question were liable for seizure as they were on reasonable grounds believed to be concerned in the commission or suspected

commission of offences in contravention of the Gauteng and National Gambling Legislation. In addition they content that based on their observations, the items afforded evidence of the commission of such contraventions which are clearly depicted on photographs of the scene.

[15] The respondents state that on the morning of 05 April 2019 the second respondent and other members of the SAPS visited the premises of the applicant looking for a suspect on an unrelated matter. They were permitted into the premises when a security gate was opened for them. They found three females and a male inside the premises. The male identified himself as a security guard at the premises.

[16] The second respondent and his colleagues then observed more than 50 operational computers depicting different gambling games or images on the screens. The second respondent recognised one of the persons, Thandeka Dinakwe, who was previously accused in a case relating to illegal gambling which was still pending. He requested the gambling licence for the premises which was not produced. He also requested to know the details of the manager or the owner which was also not provided. He observed cash, notes and coins to the value of R360.00 in an ash tray next to one of the computers at the counter where one of the females, Madikizela was seated. He further discovered an invoice book and a two quire hardcover book under the counter where Madikizela was seated with the endorsement on the cover; "Name: Gambling Lounge, subject: Panda Pusha Play, school: Gambling Secondary."

[17] The second respondent further states that the above mentioned books were perused and it was noted that they contained transactional history relating to gambling activities. They then took pictures of what appeared on the computer screens and called the gambling board to enquire if the premises had a gambling license to which he was answered in the negative. The items mentioned above together with the computers were seized, the three females and a male person were arrested.

THE ISSUE FOR DETERMINATION

[18] This court is called upon to decide whether the respondents were lawfully entitled to search and seize the applicant's goods in terms of Section 22(b) of the Act.

APPLICABLE LEGAL PRINCIPLES

[19] It is necessary at this stage to briefly set out the law relating to Mandament van Spolie.

> *"Two factors are required to found a claim for an order for the restitution of possession on an allegation of spoliation. The first is that the applicant was in possession and the second,that he has been wrongfully deprived of that possession and against his wish. It has been laid down that there must be clear proof of*

possession and of the illicit deprivation before an order should be granted....It must be shown that the applicant had had free and undisturbed possession.... When it is shown that there was such possession in physical fact and not in the juridical sense, and there has been such deprivation, the applicant has the right to be restored in possession ante omnia." See *Scoop Industries (Pty) Ltd v Langlaagte Estate and GM Co Ltd 1948 (1) SA 91 (W)."*

[20] The question as to who bears the onus of proving spoliation was settled in Yeko v Qana 1973 (4) SA 735 (A);

"In order to obtain a spoliation order the onus is on the applicant to prove the required possession and that he was unlawfully deprived of such possession."

[21] The applicant's possession of the premises on 05 April 2019 is not in question.

[22] The respondents have justified the seizure of the items in question by Colonel Khorombi, *inter alia,* by reliance on the provisions of Section 20 read with Section 22 of the Act.

[23] Section 20 reads as follows;

" 20 State may seize certain articles

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."

[24] Section 21 of the Act requires a search warrant for the seizure of articles. A magistrate or judge is empowered under the section to issue such a warrant where it appears from the 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.....within his area of jurisdiction.....section 21(1)(a).

[25] Articles may be seized from a person without a warrant only if the person concerned consents to the seizure, or, under section 22(b) where the police officer believes on reasonable grounds that a search warrant will be issued to him in terms of section 21 and that the delay in obtaining a warrant would defeat the object of the search.

[26] It is clear from the facts of this matter that the search and seizure occurred without consent and therefore it only leaves the fact that the respondents were of the belief that on reasonable grounds they would have been able to satisfy the Magistrate or Judge to grant a warrant.

[27] The respondents, in trying to explain what culminated into a reasonable belief of an offence being committed in paragraph 15 to 19 of the answering affidavit states:

> *"15. I then observed the many computers, more than 50, depicting gambling images/games on the screen. There were three females inside the premises.*
>
> *16. I recognised Dinakwe, as one of the suspects under Westonaria case number 154/01/2019 and 155/01/2019 which is being investigated by me. The offence therein relates to gambling activities. The case is pending. She was sitting at one of the computers and stood up when we entered the premises.*
>
> *17. Having seen Dinakwe and observed the surroundings, I requested the name of the owner of the premises from her. She looked at the lady seated at the counter later identified as Bongile Madikizela. The latter responded that she does not know the owner and does not have a contact number*
>
> *18. Seated next to Madikizela, was another female identified as Tshepiso Maureen Ramanyai. Ramanyai together with Dinakwe*

denied being employed at the premises. Neither Ncwaba, (who later confirmed that he was a security guard), nor Madikizela, acknowledged being in charge of the premises, when questioned. Neither were able to produce a license upon request by myself.

19. My suspicious were further raised as a result of the answers provided and the failure to produce a license. I then proceeded to the computers and observed that all were operational and the screens depicted games relating to gambling activities. I took my cell phone and captured images of different games offered as well as the entire set up of the premises."

[28] The respondents have not explained what form of gambling was taking place at the applicant's premises. Other than stating that games or images depicting gambling activities appeared on all computer screens they failed to explain why according to them the games or images constituted gambling. Based on the above the second respondent states "as a consequence of the above, I had reasonable suspicion that gambling was being conducted at the premises in the absence of a license and that criminal offences in contravention of Section 87 of the Gauteng Gambling Act and Section 8(a) of the National Gambling Act were being committed...I had reasonable ground to belief that a search warrant would be issued if I applied for same. I also on reasonable grounds believed that the delay in obtaining such warrant would defeat the object of the search."

[28] The answering affidavit is silent with regard to where Dinakwe was previously arrested and charged with gambling related activities. The fact that she was found at the applicant's premises on 05 April 2019 does not in my view advance any belief or suspicion that gambling activities were taking place there.

[29] It should be borne in mind that the question is not whether the applicant's alleged business operation was lawful or unlawful in order to claim the relief under spoliation, it is whether the respondent at the time of execution of the search and seizure did indeed have the reasonable belief, based on suspicion, facts and evidence that a search warrant will be issued under the circumstances if such facts are presented to a magistrate when applying for a search warrant prior to a search and seizure and that the delay in obtaining such an order will defeat the object of the search. The respondents failed to advance information relating to the form, method and type of gambling that was taking place.

[30] On analysis of all the facts I am of the view that with the information the respondents had at the specific time they would not have satisfied the Magistrate or Judge in obtaining a warrant. The suspicion that gambling was taking place based on what appeared on the computer screens and a book containing transactional history is not sufficient to conclude that gambling was taking place there more so that it is not clear what led the second respondent to belief that the transactions in the book depicted gambling activities. It is my view that no sufficient facts have been put forward to justify reasonable

grounds existing to search the applicant's premises and seize the property without a warrant. The search and seizure that took place on 05 April 2019 at the applicant's premises is therefore found to have been unlawful.

COSTS

[31] The applicant contended that the respondent should be ordered to pay attorney and own client costs, should the application be opposed. In my view, the opposition by the respondents was not unreasonable, however there is no reason why costs should not follow the result

[32] In the result, the following order is made:

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 05 April 2019 by the second respondent without a search warrant in terms of Section 22 of the Act in respect of the Applicant's premises was unlawful and is set aside.

3. The respondents and any other respondent who is in possession or control of the applicant's movable goods and monies as follows:

   3.1 60 (sixty) computers

3.2 2 (two) routers

3.3 2 (two) dlinks

3.4 undisclosed amount of money

3.5 various documents; are ordered to forthwith return and restore possession of the movable goods and monies that were removed by the SAPS representatives and employees of the first respondent, who were under the control of the second respondent from the applicant's business premises, which are situated at Playtime Internet Café, Erf 1679/4 Westonaria, Shop 10B, Elizabeth Centre, President Kruger Street,Westonaria.

4. Cost of suit on party and party scale.

M. B MAHALELO

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

FOR THE APPLICANT: ADV LOWIES
INSTRUCTED BY: VARDAKOS ATTORNEYS

FOR THE RESPONDENTS: ADV RAMLAAL
INSTRUCTED BY: THE STATE ATTORNEY

DATE OF HEARING: 17 APRIL 2019
DATE OF JUDGMENT: 06 MAY 2019