


IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

Case Number: 57329/2014

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: <del>YES</del> / NO.
(2)	OF INTEREST TO OTHER JUDGES: <del>YES</del> / NO.
(3)	REVISED.
22/8/2014	
DATE	SIGNATURE

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67 PRETORIA 0001
2014 -08- 2 2
JUDGE'S SECRETARY REGTERS KLERK
GRIFFIER VAN DIE HOË HOF VAN SUID AFRIKA GAUTENG AFDELING, PRETORIA

In the matter between:

NDUMA SAMUEL NGOBENI t/a  
INTERNET LOUNGE

22/8/2014  
APPLICANT

and

THE MINISTER OF SAFETY AND  
SECURITY N. O.

1<sup>ST</sup> RESPONDENT

THE PROVINCIAL COMMISSIONER OF  
THE SAPS, GAUTENG PROVINCE N. O.

2<sup>ND</sup> RESPONDENT

CONSTABLE WENDY ADAMS

3<sup>RD</sup> RESPONDENT

Coram: HUGHES J

---

JUDGMENT

---

Delivered on: 22 August 2014

Heard on: 19 August 2014

HUGHES J

[1] The application came before me in the urgent court on 19 August 2014. The applicant as per the notice of motion sought the following relief:

- “1. *Dispensing with the forms and services in terms of Rule 6(12) of the Rules of the High Court and disposing of a matter as one of urgency in terms of this Rule.*
2. *setting aside the seizure that took place on 2 August 2014 by the third respondent without any search warrant in terms of Section 22 of the Criminal Procedure Act, Act No. 51 of 1977 in respect of the applicant's business.*
3. *Directing and ordering the Respondents and any other Respondent who is in possession or control of the Applicant's movable goods and monies listed in Annexure A hereto, to forthwith return and restore possession of the movable goods and monies that were removed by the SAPS representatives, who were under the control of the Third Respondent from the Applicant's business premises, which are situated at Internet Lounge, Shop 22, Florida Lake Plaza, 3<sup>rd</sup> Avenue, Florida, Roodepoort.*
4. *Costs of this suit.*

[2] The applicant traded as Internet Lounge at shop 22 Florida Lake Plaza, 3<sup>rd</sup> Avenue Florida on 2 August 2014 when he was disturbed of his lawful possession to wit, Annexure A:

- 21 X MSI all in one computers;
- 1 X office computer box with screen and printer;
- 2 X memory sticks;

- Envelopes;
- Cash register box;
- 1 X router
- All the cables and connections to the computer boxes and screens;
- Cash in the amount of R6 000.00;
- Keys to the premises.

[3] Briefly on Saturday 2 August 2014 at 23H00 fifteen (15) police officials and others entered the applicants premises whilst his general worker Kyle Xadier Mayuka performed his duties and oversaw the premises. One of the police officers was the third respondent who identified herself and her colleagues as South African Police Service officials. The third respondent enquired and was advised by Mayuka that he was not the owner and the owner was not present.

[4] The third respondent states that on the day in question whilst on duty busy patrolling Florida they were approached by members of the public who complained that illegal gambling was taking place at the premises of the applicant. On their arrival at these premises she duly informed Mayuka of these allegations and states that she entered the premises to verify the allegations.

[5] The third respondent and her colleagues took pictures of what appeared on the computer screens, enquiries were made from Mayuka if the premises had a gambling license and he responded in the negative. The items mentioned above were numbered, removed and Mayuka was arrested. Mayuka was instructed to lock the premises and the keys were taken from him by the police officials.

[6] The case of the applicant is that he has been unlawfully dispossessed of the use of his business premises together with the electrical equipment which was therein. This he contends eventually led to the closure of his business. The applicant further contends that this dispossession is as a result of an unlawful search and

seizure without a warrant and in contravention of section 22 of the Criminal Procedure Act 51 of 1977 which I set out for easy reference:

*"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."*

[7] It is trite that relief sought by way of a mandament van spolie is one considered to be a matter that is urgent. It is further trite that a spoliation order amounts to a final order. See **Reck v Mills 1990(1) SA 751(A)**.

[8] The applicant has set out in detail ad para 54 of his founding affidavit the reason why this matter is one that should be considered as urgent. I do not intend to numerate all seventeen reasons set out save to crystalize his submissions. The applicant stated he was in undisturbed peaceful possession of the premises that he leased paying rental of R15 700.00 per month. These premises which he ran his internet café business were for his livelihood. The removal of electrical equipment and other items together and the fact that the police retained the keys to the premises after they were locked, ultimately led to the closure of the applicants business.

[9] The applicant states that the search and seizure that took place was unlawful and not in terms of the statute section 22 of the Criminal Procedure Act and resulted in an infringement of his constitutional rights to privacy, his right to possess the property and conduct his business peacefully.

[10] It is evident to me after hearing argument from both counsel and perusal of the documents before me that the applicant meets the requirements of Rule 6(12)(6) of the Uniform Rules of Court in that he has set out the circumstances explicitly which render the matter urgent and has explained the reason why the matter cannot be afforded a hearing in the normal cause. I am therefore satisfied that in these circumstances the matter is such that it be dealt with on an urgent basis.

[11] I now turn to deal with the process sought in the form of a mandament van spolie to attain the applicant's relief. An apt passage as regards the nature of a mandament van spolie was quoted from Wille *Principles of South African Law* 7<sup>th</sup> edition at page 198 in ***Willowvale Estates CC and Another v Bryanmore Estates Ltd* 1990 (3) SA 954 W at 956 D-I**:

"Possession is regarded by the law with such significance that a person who is in possession of a movable thing is presumed to be the owner of it. As a consequence of this importance, the law affords a possessor every possible protection and assistance; not only in retaining his physical control, but also in regaining it when he has been unlawfully dispossessed. The result is that a possessor may resist anyone who attempts to deprive him of possession; he may remain in undisturbed possession until another person has legally established a better title than his to own or possess the property in question; and if he is despoiled of possession he may then and there( ie before the disposition is complete) eject his adversary or he may by summary legal process, known as a mandament van spolie, obtain immediate restitution of possession without regard to his want of title. These remedies are available to any possessor, whether civil or natural or bona or mala fide; to a possessor of moveable or immovable property, or of an incorporeal right, such as a right to have a nameplate affixed to a wall, or a servitudal right even to a possessor of property which he has stolen.

If a possessor has been deprived of possession by violence, fraud, stealth or some other illicit method, he may obtain from the court a mandament van spolie, or spoliation order, commanding the dispossessor to restore the possession to himself, the applicant. It is a fundamental principle that no man is allowed to take the law into his own hands. *Consequently if a person without being authorised by a judicial decree, dispossesses another person, the court, without inquiring into the merits of the dispute, will summarily grant an order for restoration of possession to the*

*applicant, as soon as he has proved two facts; namely, that he was in possession, and that he was despoiled of possession by the respondent. The policy of law is neatly summed up in the maxim, spoliatus ante omnia restituendus est."*

[12] In this matter the applicant has put up evidence that he was in possession of the property by virtue of the rental he paid as a lessee. He had been in occupation of the premises for some two months prior to the incident taking place. To me he was therefore the person in lawful possession as he was holding the premises for his benefit and therefore the fact that Mayuka was on the premise as a general employee at the time of the incident, is of no consequence. The rightful possession at the time of the incident should not be considered as possession in the strict juridical sense, it is sufficient if the possession is with the intention of securing a benefit. Which in this matter seems to be the case. See **Stocks Housing v Department of Education and Culture Services 1996(4) SA 231 at 239 D-E** where this dictum in **Yeko v Qana 1973(4) SA 735(A) at 739 F** was applied.

[13] Having established that the applicant was in possession of the premises I now turn to deal with the dispossession that took place on 2 August 2014. As stated above the respondent's allege that the search and seizure was lawful in terms of Section 22 of the Criminal Procedure Act 51 of 1977.

[14] The respondents have advanced that they "were approached by member of the public who complained" that illegal gambling was taking place at the applicant's premises. No other information is at hand with regards to the names of the people who made the complaint, the content of their complaint or even whether the complaint was reliable in the circumstances. I am told that on proceeding to verify the allegations the third respondent established "upon closer look at the computer screens we indeed discovered that gambling was taking place in the premises". No elaboration on what form of gambling was taking place and what appeared on the screens of the computers that constituted gambling. Based on the above the third respondent states "*...the action taken by myself and my colleagues were based on reasonable suspicion that illegal online gambling was taking place in the premises, and that our failure to obtain the search warrant was motivated by the fact that the*

*illegal operator would have found an opportunity to delete evidence in relation to the illegal gambling...”*

[15] For the applicant to succeed in the application he must show that the dispossession in the circumstances was unlawful, that being without his consent or without due legal process..

[16] Since the search and seizure occurred without his consent it only leave the fact that the respondents were of the opinion or believe that on reasonable grounds they would have obtained a warrant as they would have been able to satisfy the Magistrate or Judge in obtaining said warrant.

[17] On examination of the facts of this case I am not convinced that with the information the respondents had at that the specific time they would have satisfied a Magistrate or Judge in obtaining a warrant. The reliability of the source from which they received the complaint is problematic for the respondents. Further, the fact that gambling seems to have taken place via what appeared on the screens of the computers, to my mind is not sufficient to conclude that gambling was in fact taking place. No information is advanced with regards to the form, method and type of gambling that was taking place. See unreported case of the Supreme Court of Appeals where by Lewis JA said in **Minister of Safety and Security v K. Ndiniso (286/06) [2007] ZASCA 29**:

*“[7] A police officer may seize an article, without a warrant, only where he believes on reasonable grounds that he would be able to satisfy a magistrate or judge that the vehicle may afford evidence of the commission or suspected commission of an offence. The only ground for such reasonable belief advanced by the State is that a report had been received by Somana about the disparity between the model of the vehicle itself and that reflected on the registration papers. The court below considered that this was insufficient evidence to determine whether Somana's belief that he would obtain a search warrant was based on reasonable grounds.*

*[8] The real difficulty with the State's case is that no evidence is proffered by it as to the nature or the status of the 'report' made to Somana: there is no information provided by the State as to who made the report; what the capacity and status of the person was; where the information had been obtained or why it should be regarded as reliable. There is a mere assertion that a report indicated that there was a difference between the model of the vehicle seen by Somana and its description on the registration papers. Would that satisfy the magistrate or judge apprised of an application for a search and seizure warrant under s 21 think not. No facts were advanced to justify a finding that Somana's belief was based on reasonable grounds.*

*[9] In the circumstances I consider that the vehicle was unlawfully seized: there was no compliance with the provisions of ss 20 and 22 of the Act. Ndiniso is thus entitled to the return of the vehicle."*

[18] In my view no facts have been advanced to justify reasonable grounds existing to search and seize the applicants premises and property without a warrant. In the circumstances, I consider the search and seizure that took place on 2 August 2014 at the applicant's premises unlawful.

[19] It stand to reason that the applicant was dispossessed of his premises and property without due legal process.

[20] In the circumstances the following order is made:

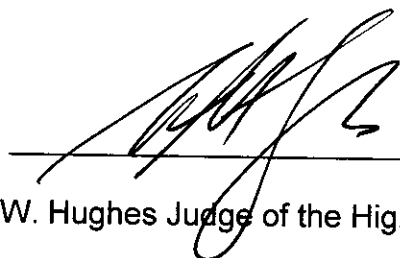
[20.1] It is ordered that the seizure that took place on 2 August 2014 by the third respondent without any search warrant in terms of Section 22 of the Criminal Procedure Act, Act No. 51 of 1977 in respect of the applicant's business was illegal and is set aside.

[20.2] It is ordered that the respondents and any other respondent who is in possession or control of the applicant's movable goods and monies listed in Annexure A, return and restore possession of the movable goods and monies that were removed by the SAPS representatives,



who were under the control of the third respondent from the applicant's business premises, which are situated at Internet Lounge, Shop 22, Florida Lake Plaza, 3<sup>rd</sup> Avenue, Florida, Roodepoort.

[20.3] It is ordered that respondents are to pay the costs of this application.

  
W. Hughes Judge of the High Court

Delivered on: 22 August 2014

Heard on: 19 August 2014

Attorney for the Applicant:

VARDAKOS ATTORNEYS

371 Queens Crescent

Sunwood Park

Lynnwood

PRETORIA

Tel: 012 454 0499

Ref: Mr. V. Vardakos/Florida/ev

Attorney for the Respondents:

THE STATE ATTORNEY PRETORIA

255 Schoeman Street,

PRETORIA

Tel: 012 309 1623

Ref: R. S. Mosito