

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 33441/21

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

Date: 20 July 2021 E van der Schyff

WYN SUN 666 (PTY) LTD

FIRST APPLICANT

IBUBESI TRADING (PTY) LTD

SECOND APPLICANT

and

THE MINISTER OF POLICE

FIRST RESPONDENT

WARRANT OFFICER SIMON
FREDERIK ERASMUS

SECOND RESPONDENT

WARRANT OFFICER WAYNE
BRITTION

THIRD RESPONDENT

DIRECTORATE FOR PRIORITY
CRIME INVESTIGATION
PRETORIA

FOURTH RESPONDENT

NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS

FIFTH RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

- [1] This is an application based on the *mandament van spolie*. The parties are *ad idem* that the application turns on the question as to whether the applicants were unlawfully deprived of possession of the goods, to which I shall refer later in this judgment, in that the respondents unlawfully seized and removed the said goods. In light of the factual dispute regarding the dates on which the respective articles were seized by the respondents (SAPS), it is necessary to deal with the parties' respective versions separately.

The applicants' version

- [2] Both applicants are in the business of purchasing, processing, and selling various grades of scrap metal. Both are authorised and registered to conduct such business in terms of the Second Hand Goods Act, 6 of 2009. The applicants are also involved in the transportation and hiring of plant and yellow equipment as well as bin and container hiring across the country. These businesses are conducted from the same premises. A third company, Brass Investments (Pty) Ltd, also conducts a separate business from the same premises.
- [3] The applicants aver that the matter is inherently urgent. The applicants utilise the articles that were seized daily to run their respective businesses. Without these articles, the applicants cannot generate their monthly income and will be left destitute and unable to pay their staff and creditors. They submit that the Criminal Procedure Act, 51 of 1977 (the 'CPA') provides that the applicants may obtain and then retain the seized articles and make them available to the court if and when required.

- [4] It is the applicants' case that the SAPS raided their business premises on 12 May 2021. They unlawfully and without any warrant seized and removed the following goods on 12 May 2021:
- i. 2019 Ford Transit Custom vehicle with registration no. HZ 34 FH GP;
 - ii. 2019 Mercedes-Benz Actros vehicle with registration no. JB 95 JF GP
 - iii. Slidelifter with registration no. DX 36 JW GP;
 - iv. 2021 UD Quon vehicle with registration no. JV 99 ML GP;
 - v. 12m Flatdeck trailer, registration no. DC 74 DG GP;
 - vi. 2021 UD Quon vehicle with registration no. JV 99 MM GP
 - vii. A skeletal trailer;
 - viii. 3-ton Manhand forklift;
 - ix. 4 x 6m containers;
 - x. Driver logbooks and delivery notes from each of the trucks described above;
 - xi. 2 x 2019 Apple iMac 21inc computer;
 - xii. 2020 Apple 1Mac 27inc computer;
- [5] The deponent to the founding affidavit, her daughter, and three truck drivers employed by the applicants were arrested. They were charged and appeared in the Magistrate's Court on 14 May 2021. Some of them were released on bail on 17 and 24 May 2021. On 18 May 2021, the respondents allegedly removed 'other articles', listed in the founding affidavit as files, documents, and surveillance equipment. The respondents allege that the goods were removed pursuant to a search and seizure warrant, dated 17 May 2021. The applicants however, say that the warrant was 'belatedly' obtained and that the respondents continued to remove articles beyond the warrant's scope. The applicants claim that documentation was removed that was not referred to in the annexure to the warrant. On 18 May 2021, the warrant was presented, but the respondents failed to provide the affidavit made in support thereof. CCT video footage was downloaded on 18, 19, and 20 May 2021.

- [6] The search and seizure warrant was attached to the founding affidavit. In terms of Annexure B of the warrant, the respondents were authorised to seize train wheels and wagons wheels; all documentation, including invoices, pertaining to the sales and collection of train wheels and wagon wheels; downloading of surveillance footage on sites as well as C-Track Video and audio recordings; all truck logbooks and any documentation relating to transactions between Go-Dove and the companies I have referred to above.
- [7] The applicants aver that they have been unlawfully spoliated of their possession of the said goods and are entitled to their immediate return. The articles, they add, are not suspected of having been stolen, and there is no justification for respondents to retain and control these articles pending any criminal investigation. During argument counsel for the applicants indicated that the applicants no longer require the return of the containers containing the allegedly stolen goods.

The respondents' version

- [8] The respondents dispute the urgency of the application. They aver that the applicants are not with clean hands before the court. The application was instituted eight weeks after the articles were seized. The application should have been instituted at the first opportunity when it became clear that the respondents did not intend returning the seized goods.
- [9] The respondents sketch a different picture of the events that led to the seizure of the articles. They aver that an inquiry against the applicants commenced on 2 May 2021 after information of possible fraudulent and corrupt activities was received. They received a complaint from a Transnet Protection Officer, who stated under oath that she was offered a bribe on several occasions and later threatened for not co-operating. As a result of the information, the respondents obtained authorisation in terms of s 252A of the CPA to conduct a trap and raid. They set a trap for the suspects. The applicants' employee was arrested while attempting to bribe the Transnet officer. The applicants

loaded three trucks with train wheels and wagon wheels, despite having a contract permitting them to only one truckload. They used fake documents to allow the other trucks to pass and stole wagon and train wheels. No 'G16 clearance document of way bridge document' existed for the trucks. The respondents aver that this is a case of theft, fraud, and corruption. The articles seized were used in the commission of the crime.

[10] The respondents, however, aver that only the applicants' computers were seized on 12 May 2021. Despite not having obtained a warrant, they allege, the seizure was lawful as the computers were reasonably suspected of having been used to commit fraud and corruption in respect of which the charges are brought against the accused. Reasonable suspicion existed that the applicants were running their business in a corrupt manner and that the computers were used to run the corrupt activities. The respondents were concerned that incriminating evidence might be removed from the computers if they did not seize it immediately, although they did not obtain a warrant. A possibility existed that the suspects would have been alerted had they sought a warrant before executing the s 252A operation. The respondents had a reasonable concern and believed that the computers would have been erased to remove the electronic trail of corruption and fraud if it was left at the premises after the operation. The computers were instrumental in forging documentation, and it is suspected that it contains information that can reveal the true extent of the applicant's corruption and fraudulent activities. The computers were booked into the SAP 13, and nothing else was seized on the day.

[11] The respondents then obtained a warrant and seized the remaining goods on 18 May 2021. The seizure of the articles on 18 May 2021 was pursuant to a lawful warrant. The trucks, trailers, and forklifts were used in the theft of the train and wagon wheels. The respondents also dispute that the affidavit was not shown to the respondents when the warrant was presented on 18 May 2021. They submit that if the applicants have an issue with the warrant, the legal remedy of a review thereof should have been followed. Counsel

reiterated during argument that the seizure of goods on 18 May 2021 was lawful and permitted in terms of Annexure B of the warrant. The respondents deny the allegation that the warrant was belatedly obtained after the articles had been seized.

- [12] The respondents further state that it is practically impossible to hand the respective properties back to the applicants at this stage without compromising sensitive and incriminating information having been uncovered as the investigation is continuing. They submit that it will not be in the interest of justice to grant the applicants the relief they seek as it will frustrate the investigation. The respondents indicated that the applicants would receive the property, excluding the stolen items, once the investigation is concluded.

Discussion

- [13] In considering whether the applicants made out a case that the application is heard as an urgent application, the court takes into consideration the fact that the applicants' attorney attempted to negotiate the return of the articles before resorting to litigation. This approach cannot be faulted. In light of the devastating effect that Covid 19 has on the country's economy, I am of the view that the applicants, who are, resulting from the seizure, prevented from conducting business and earning a livelihood, and moreover are responsible to pay creditors and employees, made out a case that the application should be heard on an urgent basis. Having said that, the applicants approached the court on the basis of extreme urgency and left the respondents with very little time to respond. This necessitated the application to be rolled over to be heard on the 15th of July 2021 instead of on 13 July 2021, to allow the applicants to file a replying affidavit.
- [14] A factual dispute exists as to the date on which the items listed under paragraph 4(i)-(x) were seized by the respondents. The applicant avers that the items were seized on 12 May 2021 without the respondents having a warrant. The respondents submit the seizure of the articles occurred on 18 May 2021 after a warrant was obtained. It is trite that a party should refrain from seeking final relief

in the motion court when a material factual dispute exists. However, in *Da Mata v Otto NO*¹ the Supreme Court of Appeal explained that a court must examine the alleged dispute and ascertain whether it is a genuine dispute or fictitious. In *Plascon-Evans Paints v Van Riebeeck Paints (Pty) Ltd*,² the Supreme Court of Appeal again reiterated that in certain instances, the denial by a respondent of a particular fact alleged by the applicant might not be such as to raise a 'real, genuine or *bona fide* dispute of fact'. The court continued:

'If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks.'

- [15] In *Room Hire Co (Pty) Ltd v Jeppe street Mansions (Pty) Ltd*,³ the court explained that a bare denial of an applicant's material averments cannot be regarded as sufficient to defeat an applicant's right to secure relief by motion proceedings in appropriate cases. In *Soffiantini v Mould*,⁴ the court held that a court must follow a 'robust, common-sense approach' when considering a dispute on motion.

¹ 1972 (3) SA 858 (A) at 865G-H.

² 1984 (3) SA 623 (A) at 634E-635D.

³ 1949 (3) SA 1155 (T) at 1165.

⁴ 1956 (4) SA 150 (E) 154 E-H.

- [16] From the supporting documentation filed on CaseLine, it is evident that the computers were indeed seized on 12 May 2021. This is evident from an extract of the SAP 13 logbook, filed by the respondents. There is, however, no supporting SAPS 13 logbook entry regarding the goods listed under paragraph 4(i)-(x) above. The respondents were aware of the factual dispute as to whether the articles listed in paragraph 4(i)-(x) above, were seized on 12 May 2021 or 18 May 2021. They were in the position to lay the dispute to rest by merely annexing a copy of the SAP 13 logbook reflecting the date on which the goods were received in custody at the SAP premises. They failed to do so and merely rely on a bare denial. A court is obliged to adjudicate an application on the papers before it. I accordingly hold that no *bona fide* dispute of fact has arisen regarding the date on which the said goods were seized, and I accept that the goods were seized on 12 May 2021 without a valid warrant, as alleged by the applicants.
- [17] Section 20 of the CPA empowers the state to seize anything which is concerned in, or is on reasonable grounds believed to be concerned with the commission or suspected commission of an offence, which may afford evidence of the commission or suspected commission of an offence, or which is intended to be used or is on reasonable grounds believed to be intended to be used in the commissioning of an offence. However, this power is subject to the *proviso* that the seizure must be done in accordance with the provisions of chapter 2 of the CPA. Section 21 of the CPA limits the seemingly broad power of the state by providing that an article referred to in s 20, shall be seized only by virtue of a search warrant, subject to ss 22, 24, and 25 of the CPA. Section 22 of the CPA is the first of the exclusionary provisions. Section 22 empowers a police official to seize an item if the person concerned consents to the search for and seizure of the item, if the person who may consent to the search of the premises and container consents to the search and seizure, or if the police official on reasonable grounds believes that a search warrant will be issued to him under s 21(1)(a) if he applies for such warrant, and that the delay in obtaining such warrant would defeat the object of the search. It is evident from the facts leading up to the seizure of the articles that reasonable grounds existed for the police officials to believe that a warrant would be issued. However, with the exception

of the computers, the respondents did not make out a case in the affidavit that the delay that would follow if they first had to obtain a warrant would thwart their investigation. The respondents also do not explain why they did not obtain the necessary warrants before the s 252A operation was conducted, in light of the fact that their investigations already commenced almost 10 days prior.

- [18] Even if the respondent is given the benefit of the doubt, and it is accepted that a valid warrant was obtained to seize the items listed under paragraph 4(i)-(x), the respondents still face a dilemma. With the exception of item (x) none of the items are identified in Annexure B of the warrant as articles that could be seized in terms of the warrant. The respondents' submission that the seizure of goods listed in paragraph 4(i)-(ix) was permitted in terms of Annexure B of the warrant is not supported by a reading of Annexure B. Irrespective as to whether the articles were used in the commissioning of a crime, the respondents are to follow the provisions of the CPA if they want to seize the articles lawfully. As stated above, the respondents failed to refute the allegation that the items listed in 4(i)-(x) were seized on 18 May 2021 after the warrant was obtained. This means that although the warrant authorises the seizure of the truck logbooks, the seizure thereof prior to the warrant being obtained remains unlawful.
- [19] As far as the seizure of the computers are concerned, I am of the view that the seizure thereof meets the requirements of s 22 of the CPA. The respondents indicate that the computers were seized for fear that information contained on the computers would be wiped if not seized during the operation. The submission is also made that the computers were used in the commissioning of fraudulent and corrupt activities. As such, the computers fall within the description of s 20 of the CPA, and the respondents met the requirements stated in s 22 of the CPA. Where goods were lawfully seized a court other than the court presiding over the criminal matter should be hesitant to order its return to an accused where criminal proceedings are pending, if it is empowered at all to do so. The CPA regulates the procedure for the disposal of articles after seizure. Section 34(6) of the CPA provides that if the circumstances require, the judge or judicial officer presiding

at the criminal proceedings may make any order regarding the disposal of the asset, inclusive of returning it to the person from whom it was seized.

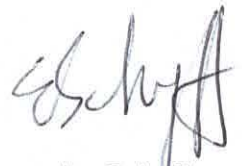
[20] As far as costs are considered, the applicants are substantially successful in obtaining the relief sought. In the result, they are entitled to the costs of the application.

Order

In the result, the following order is granted:

1. The application is dealt with on a basis of urgency and non-compliance with the Uniform Rules of Court are condoned;
2. The respondents are directed to restore the first and second applicants' possession of the following goods:
 - 2.1. 2019 Ford Transit Custom vehicle with registration no. HZ 34 FH GP;
 - 2.2. 2019 Mercedes-Benz Actros vehicle with registration no. JB 95 JF GP
 - 2.3. Slidelifter with registration no. DX 36 JW GP;
 - 2.4. 2021 UD Quon vehicle with registration no. JV 99 ML GP;
 - 2.5. 12m Flatdeck trailer, registration no. DC 74 DG GP;
 - 2.6. 2021 UD Quon vehicle with registration no. JV 99 MM GP
 - 2.7. A skeletal trailer;
 - 2.8. 3 ton Manhand forklift;
 - 2.9. 4 x 6m containers, with the exception of the containers containing allegedly stolen train and wagon wheels;
 - 2.10. Driver logbooks and delivery notes from each of the trucks described above;
 - 2.11. All documentation seized on 18 May 2021 that are not listed in Annexure B of the search and seizure warrant dated 17 May 2021.
3. The respondents are to pay the costs of the application jointly and severally, the one to pay the other to be absolved.





E van der Schyff

Judge of the High Court, Gauteng, Pretoria

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The date for hand-down is deemed to be 20 July 2021.

Counsel for the applicants:	Adv. DJ Joubert SC
Instructed by:	Ulrich Roux & Associates
Counsel for the respondents:	Adv. T Madileng
Instructed by:	State Attorney, Pretoria
Date of the hearing:	15 July 2021
Date of judgment:	20 July 2021