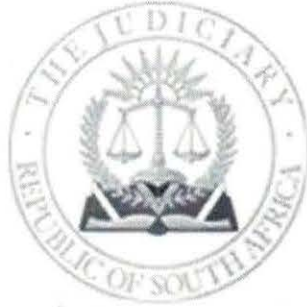




IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED: YES

DATE: 28 APRIL 2022

SIGNATURE:

Case No. 19626/2022

In the matter between:

KAPEEL BECHAN

First Applicant

BECHAN CONSULTING (PTY) LTD

Second Applicant

And

SARS CUSTOMS INVESTIGATIONS UNIT

First Respondent

SARS TACTICAL INVESTIGATIONS UNIT

Second Respondent

TANYA POTGIETER – SARS ILLICIT ECONOMY UNIT

Third Respondent

LINDIWE SHIBINDI – TACTICAL INVESTIGATIONS UNIT

Fourth Respondent

MINISTER OF POLICE

Fifth Respondent

HAWKS SPECIAL INVESTIGATION UNIT

Sixth Respondent

Coram: Millar J

Heard on: 26 April 2022

Delivered: 28 April 2022 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 11H00 on 28 April 2022.

Summary: *Mandament van spolie* – not available as a remedy to defeat the execution of a lawfully issued warrant – bare denial by applicant that relevant material found in vehicle notwithstanding contemporaneous photographic record of search establishing this – correct procedure for return of seized property to be followed set out in section 66 of The Tax Administration Act 28 of 2011 – application dismissed with costs.

ORDER

It is Ordered:

1. The application is dismissed.
2. The First and Second Applicants are ordered to pay the costs of the application jointly and severally.

JUDGMENT

MILLAR J

1. On 28 March 2022, a warrant was issued in terms of sections 59 and 60 of the Tax Administration Act¹ in terms of which the Respondents (collectively referred to in this judgment as 'SARS') were authorised to seize information and documentation, including information saved or stored on electronic devices at the premises of a particular taxpayer.
2. On 29 March 2022, SARS arrived at the premises of the taxpayer at approximately 11h25 in order to execute the warrant. The particular premises were in an office park shared with a number of other companies. Access to the office park was controlled. SARS were not immediately granted access and were delayed in entering the premises. During the period of delay, SARS observed various people carrying items from the office premises to motor vehicles parked in the parking area.
3. When SARS eventually obtained access to the premises, besides finding the directors of the taxpayer, they also found the applicant ('Mr. Bechan') on the premises. He was there purportedly to do business with a different entity but in respect of whom one of the directors of the taxpayer was also a director.
4. In executing the warrant, SARS also had cause to look into the vehicles parked in the parking lot and observed in a number of these what appeared to be documents relating to the taxpayer and which fell within the ambit of the warrant that they were executing.

¹ 28 of 2011

5. It is the case for SARS that they asked Mr. Bechan to open his motor vehicle, a Toyota Fortuner and that he had informed them that he was unable to do so as he did not have the keys. Mr. Bechan for his part denied that he had ever refused to open his vehicle or that he had said that he did not have his keys and asserted that he had immediately, when asked by SARS, handed both his cell phone and his vehicle's keys to SARS.
6. The execution of the warrant did not proceed as smoothly or without incident as SARS had anticipated. The result was that the execution of the warrant was protracted. Both the South African Police Service and the Hawks had to be called in to assist SARS due to the difficulty they were experiencing in the execution of the warrant.
7. Despite Mr. Bechan's assertion that he had handed his keys to SARS, SARS for reasons unknown to him, had elected to procure the services of a locksmith who had then proceeded to open not only Mr. Bechan's vehicle but other vehicles also whose owners had refused to open them. The vehicles were only opened many hours later, after 22h00 that night, and the execution of the warrant only concluded sometime thereafter.
8. Once Mr. Bechan's vehicle was opened items were removed from the vehicle and taken into custody and inventoried by SARS. Mr. Bechan denied being present when the vehicle was opened and also that most of what was contained in the inventory was in fact taken from his vehicle and contended rather that the only items that had been found there or removed were his or the Second Applicant's property – the 15 items specifically listed in the Notice of Motion.

9. This contrasted with the specific inventory made by SARS as items were removed from the vehicle and substantiated with photographs which showed his vehicle full of lever arch files relating to the taxpayer and other businesses as well as various lap top computers laid out on the ground outside the vehicle. The SARS inventory of electronic devices taken from Mr. Bechan's vehicle listed 10 laptops and 4 cellular telephones as well as 8 chargers.
10. By the time the application was heard, all the items originally claimed, as his property, by Mr. Bechan save for 4 had been made available for return to him. The present application proceeded for an order seeking the return of the remaining 4 items – 2 laptop computers and 2 cellular telephones.
11. Mr. Bechan for his part disavowed any knowledge of the other 8 laptops and 2 cellular telephones, maintaining that these had not been found in his vehicle.
12. It is against this background that Mr. Bechan brought an application for return of the 2 laptops and 2 cellular telephones claimed by him. SARS for its part, when it became apparent that Mr. Bechan was claiming the return of those items, indicated that if it were furnished with proof of ownership of those devices by either Mr. Bechan or the Second Applicant, the devices would be returned to him.
13. Notwithstanding the assertion by Mr. Bechan that he was the owner of the property and required it in order to make his living and to conduct the business of the Second Applicant, he was either unable or unwilling to furnish the proof of ownership requested by SARS and chose rather to proceed by way of urgent application for a '*mandament van spolie*' in order to obtain for the return of the 2 laptops and 2 cellular telephones.

14. It was held in *Anale Ngqukumba v The Minister of Safety and Security and Others*² case number that:

‘10. The essence of the *mandament van spolie* is the restoration before all else of unlawfully deprived possession of the possessor. It finds expression in the *maxim spoliatus ante omnia restituendus est* (the despoiled person must be restored to possession before or else). The spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. Its underlying philosophy is that no one should resort to self-help to obtain or regain possession. The main purpose of the *mandament van spolie* is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due processes.’

15. The basis upon which the application was advanced was that the 2 laptops and 2 cellular telephones had been in Mr. Bechan’s undisturbed possession and that SARS had unlawfully, in entering into his vehicle and removing the items, dispossessed him of them.
16. It was not disputed that the 4 particular items were in Mr. Bechan’s vehicle when they were seized by SARS. Is it questionable whether Mr. Bechan was in possession of the vehicle or the items in the vehicle at the time that SARS opened it and seized what was within? On his version, he had handed the keys to SARS when they had requested them from him. On this basis he may have voluntarily relinquished possession of the vehicle and if this is so, then the fundamental requirements for the *mandament van spolie* being peaceful and undisturbed possession would not be met – on this version.

² 2014 (5) SA 112 (CC) at 117D – 118A, see also *Sithole v Native Resettlement Board* 1959(4) SA 115 WLD at 117

17. Having regard however to the version of SARS, it is inherently more probable that Mr. Bechan did not relinquish possession of the motor vehicle and its contents voluntarily by handing over his keys to SARS – the involvement of both the SAPS and the Hawks and the delay of at least 10 hours before the vehicle was finally opened by the locksmith militate against Mr. Bechan's version.
18. There is simply no other plausible reason why SARS, in possession of a warrant and being able to prevent persons and vehicles from leaving the premises, would have delayed hours, put themselves to additional and unnecessary administrative procedures and costs to procure a locksmith to open a vehicle for which they already had the keys in their possession.
19. On the probabilities, Mr. Bechan, notwithstanding his version³, which I do not accept, did not voluntarily relinquish possession⁴ of the keys or the vehicle or its contents for that matter⁵. There can be no doubt that Mr. Bechan was deprived of possession by SARS.
20. Was SARS deprivation of Mr. Bechan's possession of the 4 items in his vehicle lawful or not? It is well established that the *mandament van spolie* will only succeed in circumstances where the dispossession was unlawful. If the

³ Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E 635C.

⁴ "possession" – "The action or fact of possessing something; the holding or having something as one's own or in one's control; actual holding or occupancy as distinct from ownership; *law* visible power or control over a thing" The Shorter Oxford English Dictionary, Volume 2, 6th Ed, Oxford University Press, 2007

⁵ Stocks Housing (Cape Pty Ltd) vs Chief Executive Director, Department of Education and Cultural Services and Others 1996 (4) SA 231 (C) at 240B-C where the court said: 'The element of unlawfulness of the dispossession which must be shown in order to claim a spoliation order relates to the manner in which the dispossession took place, not to the alleged title or right of the spoliator to claim possession. The cardinal enquiry is whether the person in possession was deprived thereof without his acquiescence and consent. Spoliation may take place in numerous unlawful ways. It may be because it was by force or by stealth or deceit or by theft . . .'

dispossession of the property was lawful, then the *mandament van spolie* will not be granted⁶.

21. It was contended by SARS that although neither Mr. Bechan nor his vehicle were specifically identified in the warrant, the provisions of section 62(1) of the Tax Administration Act was applicable.

22. The section reads as follows:-

'62 Search of premises not identified in warrant

(1) If a senior SARS official has reasonable grounds to believe that

- (a) the relevant material referred to in section 60 (1) (b) and included in a warrant is at premises not identified in the warrant and may be removed or destroyed;*
- (b) a warrant cannot be obtained in time to prevent the removal or destruction of the relevant material; and*
- (c) the delay in obtaining a warrant would defeat the object of the search and seizure,*

a SARS official may enter and search the premises and exercise the powers granted in terms of this Part, as if the premises had been identified in the warrant.'

23. With this section being applicable, SARS was entitled, in the execution of the warrant to ascertain whether Mr. Bechan had in his possession or under his control any of the taxpayer material specified in the warrant. Their decision to search him and his vehicle was, in the circumstances of their earlier observations of material being carried to motor vehicles while their entry to the premises was delayed, not unreasonable. It was argued by SARS that in consequence Mr. Bechan was obliged to follow the procedure set out in section

⁶ Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA)

66 of the Tax Administration Act for the return of his property. The section reads as follows:

'66 Application for return of seized relevant material or costs of damages

- (1) A person may request SARS to
 - (a) return some or all of the seized material; and
 - (b) pay the costs of physical damage caused during the conduct of a search and seizure.
- (2) If SARS refuses the request, the person may apply to a High Court for the return of the seized material or payment of compensation for physical damage caused during the conduct of the search and seizure.
- (3) The court may, on good cause shown, make the order as it deems fit.
- (4) If the court sets aside the warrant issued in terms of section 60 (1) or orders the return of the seized material, the court may nevertheless authorise SARS to retain the original or a copy of any relevant material in the interests of justice.'

24. Counsel for Mr. Bechan argued that the warrant had to be construed as narrowly as possible and that only those individuals and items referred to in the warrant were subject to its execution by SARS. In pursuing this argument, counsel argued that since the Tax Administration Act contained no definition of 'person', applying the ordinary rules of interpretation, 'person' properly interpreted in the Act should be read interchangeably with 'taxpayer'⁷ and that properly construed the reference to 'premises' in section 62 ought to be read to mean the premises of the taxpayer in respect of whom the warrant had been issued. If this argument is correct then it would follow that the vehicle of Mr.

⁷ A 'taxpayer' is defined in Section 151 as follows

'151 Taxpayer

In this Act, "taxpayer" means

- (a) a person who is or may be chargeable to tax or with a tax offence;
- (b) a representative taxpayer;
- (c) a withholding agent;
- (d) a responsible third party; or
- (e) a person who is the subject of a request to provide assistance under an international tax agreement.'

Bechan, parked in a general parking area, was not on the premises of the taxpayer and SARS opening of the vehicle and seizure of the items therein unlawful.

25. The warrant provides for the seizure of material relevant to the taxpayer at the specified premises. In its terms, the warrant refers to the physical street address where the taxpayer conducted business and where Mr. Bechan found himself on the day in question. The description in paragraph 1 of the warrant of the address/es where it was to be executed together with the description of the material forming the subject of the warrant in paragraph 7 make it clear that it is material relevant to the taxpayer that is sought.
26. In my view, the warrant in its terms provides for the search anywhere on the premises identified in the warrant – and this would include vehicles parked on the premises. To interpret the warrant as restrictively as in the manner argued on behalf of Mr. Bechan would serve to undermine its efficacy – the very situation encountered by SARS in being delayed entry to the premises. However, even if it could be argued that the warrant was not wide enough to cover Mr. Bechan's vehicle, the provisions of section 62 would in any event in my view, have entitled SARS to open the vehicle and take possession of the taxpayer information in it.
27. The parties were agreed that the costs should follow the result.
28. In the circumstances, I make the following order: -
 - 27.1 The application is dismissed.

- 27.2 The First and Second Applicants are ordered to pay the costs of the application jointly and severally



A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON: 26 APRIL 2022

JUDGMENT DELIVERED ON: 28 APRIL 2022

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