



SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

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STATUS Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Svetlov Ivanov v North West Gambling Board

Today the Supreme Court of Appeal (SCA) upheld an appeal against an order of the North West High Court, Mafikeng (Leeuw JP). The learned judge president found that Mr Svetlov Ivanov (the appellant), was not entitled to a spoliation order. She ordered the appellant to return the machines to the police and the North West Gambling Board (the respondents), with the qualification that he was only entitled to the return of the items which he might lawfully possess.

The background to the litigation was as follows:

Mr Wilfred Pitso, an inspector employed by the North West Gambling Board, inspected the business premises of the appellant. He thereafter requested members of the South African Police Service (SAPS) to conduct further investigations and to apply for a search warrant. Pursuant thereto, the police applied for the search warrant, which was eventually issued by the Magistrate of Rustenburg, the sixth respondent. A search at the appellant's business premises revealed gambling machines. These were seized by the police as the appellant did not have a licence, issued in terms of the North West Gambling Act, to possess them. The appellant subsequently applied in the high court for an order declaring the search warrant null and void and directing the respondents to restore possession of the machines to him. A rule

nisi was granted in terms of which the search warrant was declared null and void and the respondents were ordered to restore the machines to the appellant with immediate effect. The respondents complied with the order.

On the return day, the matter came before Leeuw JP, who declared the search warrant invalid, but held that the search and seizure were not unlawful as the search warrant had not been set aside when the police executed it. The judge president stated that the police were empowered to conduct the search and seizure operation. She further held that the appellant had adopted the wrong procedure and relied on a wrong cause of action. In addition, the judge president ordered the appellant to pay costs on a punitive scale on the basis that he had failed to disclose material facts in his founding affidavit and give notice to the respondents.

The SCA had to consider two issues, namely, the effect of the declaration of invalidity of the search warrant and whether the appellant was entitled to a spoliation order. Regarding the first question, the court concluded that the judge president was correct when she declared the search warrant invalid but had erred when she held that the order of invalidity had not affected the lawfulness of the search and seizure. The court held that the lawfulness of the search and seizure was dependent on the legality of the search warrant and that once the order of invalidity was issued, the necessary consequence was that the police had acted unlawfully as they had no power to search in terms of that warrant. The SCA accordingly held that it was competent for the appellant to apply for a spoliation order.

In respect of the second issue, the SCA held that the appellant had established that he was in peaceful and undisturbed possession of the machines and that he was wrongfully deprived of that possession. The fact that his possession was unlawful or illegal was irrelevant as that would go to the merits of the dispute. The SCA accordingly held that the appellant was entitled to a spoliation order and consequently to restoration of the machines.

In conclusion the SCA stated that the Board had various remedies at its disposal and nothing precluded it from taking steps to obtain a new search warrant immediately after the judge president had declared the warrant invalid. With regard to the allegation that the appellant had abused the court process, the court held that the appellant had a duty to disclose only what might influence the outcome of the spoliation application and had no duty to prove the lawfulness of his possession. The only legitimate criticism that could be levelled against the appellant related to his failure to give notice to the respondents before the application was heard. The appellant, however, could not be non-suited because of this. Consequently, the SCA upheld the appeal with costs.

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