



IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 3580 / 2021

In the matter between:

VORSTER INTERIOR PRODUCTS CC

Applicant

and

THE MINISTER OF POLICE

First Respondent

WARRANT OFFICER FRANCOIS STEYN N. O.

Second Respondent

THE MAGISTRATE (GEORGE)

Third Respondent

THE CHAIRPERSON

Fourth Respondent

(The Western Cape Gambling and Licensing Board)

Coram: Wille, J

Heard: 17th of August 2021

Delivered: 31st of August 2021

JUDGMENT

WILLE, J:

INTRODUCTION

[1] This is an opposed application. A dispute exists as to the precise nature of the application. The applicant contends for the position that the application is akin to that of a review coupled with a *mandamus*. Conversely, the first and second respondents¹, in turn contend for the position that this is merely an application to set aside the search and seizure warrant², issued by the third respondent. This to search the property of the applicant and seize various items relating to some alleged unlawful gambling activity.³

[2] The applicant's case is that the warrant falls to be reviewed and set aside primarily because the warrant is *ultra vires* the provisions of section 21 of the Criminal Procedure Act.⁴

¹ The first and second respondents shall be referred to as the respondents, unless otherwise indicated.

² The 'warrant' issued on the on the 9th of December 2020.

³ Allegedly in contravention of section 67(1)(b) of the Western Cape Gambling Act 4 of 1996 ('the Gambling Act').

⁴ Act 51 of 1977, the 'CPA'.

This because it permitted (2) members of the Western Cape Gambling and Racing Board⁵, to be present during the search and seizure operation authorized by the warrant.

[3] The applicants also submit that the warrant itself is unintelligible and therefore unlawful. The respondents resist this assertion, and further sequence the position, that if the court indeed finds that the warrant does fall to be reviewed and set aside, then in that event, it would be just and equitable, in the alternative, to grant a preservation order as formulated in the respondents' provisional counter application.

THE FACTUAL MATRIX

[4] During November 2020, the second respondent became mindful of some suspected illegal gambling activity at an 'Internet Café' situated in George.⁶ He had received certain information in this connection, from members of the Gambling Board. Further investigation followed and he endeavoured to detect whether there was indeed unlawful gambling activity piloted at these premises. This proved elusive as the premises were fortified by a security gate which proscribed general entry.

[5] Thereafter, the second respondent made an application to the police to conduct a clandestine operation as this was the preferred mechanism to establish whether there was indeed unlawful gambling activity conducted on the premises. Ultimately, such approval was granted subject to two qualifications, namely: that section 252A of the CPA should be always complied with and that the authorisation was valid only as from the 30th of November 2020 until the 30th of January 2021. The initial covert operation was piloted in the beginning

⁵ The 'Gambling Board'.

⁶ This at 'Unit 8A Market Mall' - 83 Market Street, George (the 'premises').

of December 2020 and Mr Petersen, a member of the gambling board, was to be utilized as the snare in this covert route.

[6] Mr Petersen was provided with a distinctive R100 note⁷, for purposes of conducting his investigation. He approached the security gate to the premises and was afforded entry. He marked that there were approximately (50) computer monitors on the premises. Presently, there were also approximately (10) personages at the premises gambling on these computers. He handed to an employee of the applicant⁸, the distinct note and in turn he was given (100,000 credits), for the purposes of gambling.

[7] Mr Petersen proceeded to gamble on a computer situated on the premises by playing an interactive game and he lost (29000) credits. He retained (71000) credits which he 'cashed-out'. He was given R71.00 when he 'cashed-out'. The following day⁹, a further covert operation proceeded and after being satisfied that the applicant's premises were being used for some unlawful gambling activity, the second respondent deposed to an affidavit for the purposes of obtaining warrant from the third respondent.

[8] This affidavit formed an annexure to the affidavit by the second respondent which, in turn, formed part of the bundle of documents¹⁰, that presented before the third respondent for the purposes of acquiring the warrant. In summary, the warrant documentation revealed the following: that some unlawful gambling activity was taking place at the applicant's premises: that this unlawful gambling activity was directed by Mr Engelbrecht and that Mr Engelbrecht was in contravention of section 67(1)(a) – (c) of the Gambling Act, because the applicant's premises were not licensed to conduct gambling or gaming activities and, there

⁷ Bearing serial number QA 7562516D.

⁸ Mr Engelbrecht.

⁹ On the 9th of December 2020.

¹⁰ The warrant documentation.

was no authorisation for the possession of these devices used for this gambling and gaming activity. The warrant documentation also set out the items to be seized in the execution of the warrant.

[9] The warrant was consequently issued by the third respondent. Meanwhile, a third and final covert operation was shepherded which, again confirmed that some unlawful gambling activity was being conducted on the premises. Mr Engelbrecht was directing this unlawful activity.

[10] Ultimately, the second respondent entered the premises in order to execute the warrant. His affidavit confirmed, inter alia, the following: that Mr Petersen pointed out Mr Engelbrecht: that the second respondent introduced himself to Mr Engelbrecht who was then informed of the existence of the warrant at the hand of the third respondent: that the nature, extent and content of the warrant was explained and a copy thereof was handed to Mr Engelbrecht: that he was informed of his rights: that he conceded that the premises were used for the purposes of some illegal gambling activity inasmuch as the premises were not licensed to conduct any gambling or gaming activity. Thereafter, Mr Engelbrecht was formerly placed under arrest.

[11] In a control room, on the subject premises, was housed a computer server capable of mastering all the other computers on the premises. Furthermore, there was a safe in this control room. Mr Engelbrecht was requested to open the safe. He did not object and opened the safe. The contents of the safe revealed a quantity of packets of cash money that was seized and enlisted under an inventory. Members of the police together with Mr Petersen and Mr Fischer¹¹ assisted in the unplugging of the computers used for the illegal gambling

¹¹ A member of the Gambling Board.

activity on the premises. An inventory was compiled which listed the following items: approximately (30) computer screens: approximately (50) power supplies for the computers: (2) routers: approximately (5) surveillance cameras: some speakers and mouse pads: (1) mobile phone: a DVD recorder and certain cash packets totalling approximately R15 000,00.

DISCUSSION

THE TIMING OF THE APPLICATION

[12] As a general rule, an application to review and set aside an order of a lower court touching pending criminal proceedings, will not be accommodated.¹² This must be so, because it exiles a lower court from shepherding the appropriate ‘interests of justice enquiry’ in connection with any seized exhibits under section 35(5) of our Constitution.¹³ This principle was re-affirmed in *Thint*¹⁴, to the extent that the general rule will only be departed from:

‘...where injustice might otherwise result or where justice might not by other means be attained’¹⁵

[13] It is undoubtedly so that the current status of the applicant is that of an accused person. This because, inter alia, he was arrested and charged with contravening the Gambling Act.¹⁶ Notwithstanding that the criminal proceedings against him were provisionally withdrawn for the purposes of further investigation and the furnishing of a forensic report in connection with the seized goods, he remains an accused person. It is contended by the respondents that the integrity of this evidence and its admissibility may only

¹² *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another* 1959 (3) SA 113 (A) at 120B.

¹³ The Constitution of the Republic of South Africa.

¹⁴ *Thint (Pty) Ltd v NDPP and Others; Zuma v NDPP and Others* 2009 (1) SA 1 (CC) at [65].

¹⁵ *Wahlhaus* op cit at 120B.

¹⁶ Section 67(1)(a) – (c), read together with Schedules 1, 4, 5 and 6 thereof.

be assured after careful forensic examination by digital experts. Further, absent is any evidential material to support a case of any - *substantial injustice* – to the applicant, should this court not set aside the warrant. Indeed, - *exceptional circumstances* - are also absent the factual matrix.

[14] Moreover, in this matter there exists on the papers as they now position, a material dispute of fact on the role performed by the members of the Gambling Board, when the warrant was executed. The applicant contends for an identifying and ‘non-operational’ role. This is precisely the species of dispute that falls to be determined in the lower court.¹⁷

WAS THE WARRANT ITSELF UNLAWFUL ?

[15] Two objections are chartered against the warrant, namely: that it is *ultra vires* as it permitted (2) members of the Gambling Board to participate in the search operation¹⁸, and that the warrant fails to meet the intelligibility requirement.¹⁹ I will in turn deal with these (2) objections. Two issues bear scrutiny in this connection namely: whether the warrant was unlawful *per se* because it authorised (2) members of the Gambling Board to be part of the search and seizure operation or whether the warrant was unlawful because it allowed these (2) members to provide advisory assistance in the execution of the warrant.

[16] It surely cannot be seriously contended that just because the names of the (2) Gambling Board officials were recorded on the warrant that this - *on its own* - renders the warrant to be struck down for want of compliance with the relevant provisions of the CPA. It

¹⁷ *BK and Another v Minister of Police and Others* 2020 (1) SACR 56 (WCC).

¹⁸ Section 20 of the CPA.

¹⁹ *Minister of Safety and Security v Van der Merwe* 2011 (5) SA 61 (CC) at [55 – 56].

is so that the (2) Gambling board members are not - *police officials* – as defined²⁰, but they are clothed with certain powers for the purposes of search and seizure operations in terms of the Gambling Act.

Section 14(4)(A) of the Gambling Act permits an authorised member of the Gambling Board to conduct a search and seizure operation in relation to suspected unlawful gambling activity, if they are accompanied by a police official, in terms of a warrant.

[17] Both the said members were authorised officers in terms of the Gambling Act and were thus empowered to conduct a search and seizure operation as appears from their certificates of authorisation. The *ultra vires* objection is accordingly euthanized. No doubt there are a host of cogent reasons for only the police to conduct search and seizure operations. This, inter alia, precisely because police officials who are cloaked with this vital statutory power may be held to account for the exercise of this power in a manner that does not find application with a civilian.

[18] In my view, the ultimate test is whether the police official who is authorised to execute the warrant remains in effective and overall control over the search and seizure operation. This ensures that there can be no room for abuse²¹. No doubt exists on the facts that the warrant dictated that the second respondent was to be in effective and overall control of the search and seizure operation. The correct approach to be adopted was eloquently indicated by Rogers J, to be the following:

‘The execution of the warrant was attacked on the basis of the participation of unauthorised officials. I have already dealt with the facts. There is no substance in the complaint, even though the use of such large contingent was heavy-handed. The one unnamed police officer who accompanied the

²⁰ In terms of section 20 and 21 of the CPA.

²¹ *Goqwana v Minister of Safety and Security and others* 2016 (1) SACR 386 (SCA) at [25].

*search team did not participate in the search. In any event, a search is not rendered unlawful because a person not named in the warrant assists the named officer provided the named officer remains in control of the operation*²²

[19] Significantly, absent before this court are any facts to demonstrate that the (2) members of the Gambling Board played any operational role when the warrant was executed. On this factual basis the - *ultra vires*- challenge is doomed to failure.

WAS THE WARRANT UNINTELLIGIBLE ?

[20] The applicant's core protest is that the warrant is overboard because it does not prescribe with any exactitude what or who must be searched in terms of the warrant. I disagree because in my view the warrant carefully regulates what must be searched. Its limitation is to the searched items used to conduct illegal gambling activities, inter alia, listed as trap money, electronic devices such as computers, computer software, computer hardware, cash registers, surveillance equipment, financial records, books, compact discs, or any storage devices such as flash drives, hard drives, receipts for money received, records of winnings, losses, pay-outs to players, employee records, banking details and all mobile phones on the premises used to conduct illegal gambling activities.

[21] Besides, there is no value in the applicant's contention that the warrant is silent on the identity of the person to conduct the search. This contention is simply incorrect as the warrant identifies the second respondent in terms. In a final throw of the dice the applicant contends that the warrant was somewhat 'overboard' in that it did not specify a timeframe within which same was to be executed. This complaint may be dealt with swiftly as the

²² *Mineral Sands Resources v Magistrate, District of Vredendal* [2017] 2 All SA 599 (WCC) at [210].

warrant was executed one day after it was issued. Furthermore, there was no prospect of the cancelling of the warrant at the instance of the third respondent.

[22] As a consequence I am unable to find favour with any of the (3) core arguments advanced on behalf of the applicant as reference above. I find no cogent factual or lawful basis to review and set aside the warrant. Accordingly, I find it unnecessary to deal with the ‘just and equitable’ debate in connection with the provisional counter application for a preservation order.

ORDER

[23] For these reasons, the following order is granted, namely:

1. That the application is dismissed.
2. That in as much as same may be necessary, the provisional counter application is also dismissed.
3. That the applicant is ordered to pay the costs of and incidental to this application on the scale as between party and party, as taxed or agreed.

E. D. WILLE

(Judge of the High Court)