REPUBLIC OF SOUTH AFRICA

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

(1) REPORTABLE: YES (2) OF INTEREST TO OTHER JUDGES: YES (3) REVISED YES	**CASE NO: 2023-053299**
Date	**Signature**

In the matter between:

THC THE HEALTH CENTRE (PTY) LTD t/a THC PHARMACY Applicant

and

THE SOUTH AFRICAN HEALTH PRODUCTS REGULATORY AUTHORITY 1st Respondent

THE MINISTER OF POLICE 2nd Respondent

DIRECTORATE FOR PRIORITY CRIME INVESTIGATION GAUTENG 3rd Respondent

CAPTAIN JOHANNES HENDRIK LAST OF THE GAUTENG SERIOUS ORGANISED CRIME INVESTIGATION UNIT, OF THE DIRECTORATE FOR PRIORITY CRIME INVESTIGATION 4th Respondent

SOUTH AFRICAN PHARMACY COUNCIL 5th Respondent

Summary

The applicant is licensed to operate a community pharmacy. Although it is licensed as a general pharmacy, it only in fact trades in medicinal cannabis and related products. The

*applicant and the pharmacy it operates was subject to an inspection by the South African Health Products Regulatory Authority ("**SAHPRA**") and the South African Pharmacy Council ("**the Council**"). Following on the inspection, SAHPRA and the Council identified various alleged transgressions of legislation, and SAHPRA believed there was a basis for exercising its powers to seize various items pursuant to the inspection. SAHPRA produced a detailed report which set forth the facts surrounding the inspection and its findings. These included breaches of the prohibition against repeat prescriptions of schedule 6 medication (scripts for all 700 clients of the pharmacy were issued under the hand of one medical practitioner, many of the scripts were postdated, the medical practitioner did not conduct in-person consultations), unlawful manufacturing of medicines on the premises, repackaging of medicines appears to have been done by unauthorised staff and a failure to keep proper records. Given, however, that SAHPRA and the Council also considered that there was a basis for criminal charges to be brought against the applicant, they contacted the South African Police Service ("**SAPS**") and handed over the scene to the latter. The SAPS took control of the premises where the inspection took place and seized, without a warrant, a number of items, including cannabis flowers, medical cannabis, cannabis edibles and pharmacy records ("**the relevant articles**").*

*The applicant claims that its rights have been infringed and that the SAPS engaged in self-help. It thus sought the restoration of possession of the relevant articles by way of a mandament van spolie, from the SAPS and SAHPRA, against the broader rights to privacy and property. The SAPS and SAHPRA opposed the relief. SAPS argued that the dispossession was lawful, having been authorised in terms of sections 20 and 26 of the Criminal Procedure Act, 1977 ("**CPA**"). SAHPRA submitted that, placing substance over form, there was no basis to impugn the seizure of the relevant articles, and that in any event any articles sought to be returned to the applicant should instead be handed over to it.*

The case raises important issues involving the common law, statutory interpretation and the remedial powers of courts in constitutional and spoliation matters. On a proper construction of the CPA and application of the spoliation principles, the applicant's case had to succeed. The SAPS did not set forth in a reasoned fashion the basis on which seizure was justified, as contemplated in section 20 of the CPA. Moreover, the SAPS had not established compliance with the requirements in section 22(b) of the CPA and

appeared oblivious to its obligation to do so. Those requirements are peremptory and provide an important check on, and ensure the disciplined application of, law enforcement powers. On the other hand, no case for substantive relief has been made out against SAHPRA or the Council.

This was not, however, the end of the matter and the Court retained the power, and in fact had a duty, to grant just and equitable relief in terms of section 172 of the Constitution, taking into account the circumstances of the case, both in relation to the substantive remedy and the costs order.

In circumstances where there were overlapping powers by regulators and enforcement agencies and where two of the agencies (SAHPRA and the Council) conducted a thorough and lawful inspection, and considered at the time that there was a proper basis for seizing some of the relevant articles in terms of the Medicines and Related Substances Act, 1965, it was just and equitable to afford those agencies the opportunity to exercise their statutory powers prior to the relevant articles being returned to the applicant.

The SAPS was declared liable for the applicant's costs, save any costs incurred by virtue of SAHPRA's opposition.

Heard: 7 July 2023
Judgment: 3 April 2024

JUDGMENT

MOVSHOVICH AJ:

Introduction

1. This is an application for the restoration of possession of the articles listed in annex marked "**NOM1**" to the notice of motion and any other articles removed on or about

22 May 2023 from the applicant's premises, together with any copies thereof (collectively, "**the relevant articles**"). The relevant articles include:

1.1 medical cannabis, packaged and in bulk packaging;

1.2 cannabis "edibles", including strips, toffees and gummies;

1.3 cannabidiol skin and beauty care products;

1.4 cannabis flowers or "pre-rolled cannabis";

1.5 pharmacy records, including patient information, doctor scripts and invoices.

2. The application is based principally on the *mandament van spolie*. The applicant alleges that it is entitled to the order as it was in possession of the relevant articles at the time of dispossession and the dispossession was unlawful. In the latter regard, the applicant alleges that the search and seizure pursuant to which the dispossession occurred was not conducted in accordance with legal requirements.

3. In those circumstances, the applicant avers, the Court must order the return of the relevant articles without more.

Parties

4. The applicant is THC The Health Centre (Pty) Ltd t/a THC Pharmacy. In this judgment, I shall continue to refer to it as "**the applicant**", to avoid any confusion with tetrahydrocannabinol, also referred to as THC, a chemical found in cannabis.

5. The first respondent is the South African Health Products Regulatory Authority ("**SAHPRA**"), the statutory body which regulates health products in South Africa.

6. The second respondent is the Minister of Police, the Minister of State responsible for policing in the Republic and the executive authority responsible for the South African

Police Service and the third and fourth respondents are, respectively, the directorate and the investigating officers within the Police Service who represented the Police Service at all relevant times in this matter. I shall refer to the second to fourth respondents as the "**SAPS**".

7. SAHPRA and SAPS oppose the relief sought.

8. The fifth respondent is the South African Pharmacy Council ("**the Council**"). The Council regulates pharmacists and pharmacy premises in the Republic. It abides the decision of this Court.

Key factual background

9. The facts are largely common cause. Insofar as they are not, in accordance with trite principles governing motion proceedings, I am bound to accept the respondents' version, unless it is so "*palpably implausible, far-fetched or clearly untenable*" that it may be rejected on the papers.[1]

10. The applicant was, in December 2021, licensed by the Council to operate a community pharmacy in Glenanda, Johannesburg ("**the premises**").

11. According to the applicant, it serves principally as a dispensary for users of medical cannabis, although this was not disclosed during the application process for the applicant to be licensed as a community pharmacy.

12. The applicant's primary supplier of cannabis is CBD Full Spectrum Manufacturers International (Pty) Ltd ("**FSMI**"), which is a holder of a licence to cultivate cannabis, issued by SAHPRA.

13. The applicant serves some 700 patients monthly and dispenses medical cannabis to them pursuant to scripts from a medical practitioner.

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1 *Monde v Viljoen NO and Others* 2019 (2) SA 205 (SCA), para [7].

14. On 22 May 2023, SAHPRA and the Council entered the premises and conducted a joint inspection of the applicant and the premises in terms of section 28(1) of the Medicines and Related Substances Act, 1965 ("**the Medicines Act**") and section 38A(1) of the Pharmacy Act, 1974 ("**the Pharmacy Act**").

15. SAHPRA's report dated 25 May 2023 issued pursuant to the inspection details what was found, according to SAHPRA:

> "*On arrival, the inspectors introduced themselves by producing their appointment cards to Mr. Kyle Van Wyk (salesperson) who was standing behind the pay-point counter. Mr. Kyle Van Wyk went into the dispensary to call the Responsible Pharmacist (RP) Ms. Cheryl Brocklebank . ... The inspectors introduced themselves to Ms. Brocklebank and explained the purpose of the visit. On arrival, inspectors noticed packing activities taking place at the ground floor of the pharmacy. The inspectors asked Ms Brocklebank if the activities at the ground floor were part of the pharmacy business and she agreed. Inspectors requested Ms. Brocklebank to accompany them to the ground floor for inspection. During the inspection, bulk of cannabis flowers were found in plastic bags, containers and 20 [litre] buckets. Non-qualified personnel were also found weighing and packing the cannabis flower into small packages of 1 grams. The personnel were packaging on a wooden table unsupervised and in a non-compliant Good Manufacturing Practice (GMP) area. The packaging was taking place in a room without temperature and humidity control. The room also had kitchen weighing scales. The [Registered Pharmacist ("RP")] Ms. Brocklebank stated that another bulk of the THC flower was kept in the dispensary of the pharmacy [o]n the first floor. The inspectors together with Ms. Brocklebank proceeded to the dispensary where she showed the inspectors cannabis flower packaged into unlabelled*

transparent bags, placed directly on the floor. 54 bags weighing 500g were counted in the presence of the RP.

The inspectors asked the RP how and where she obtained the cannabis flower. Ms. Brocklebank stated that, she order[s] the flower from two SAHPRA licen[s]ed cannabis cultivating facilities namely: CBD Full Spectrum Manufacturer International (Pty) Ltd and CannaBudGrow (Pty) Ltd. She provided an invoice from CBD Spectrum where different strains were purchased. During the inspection, it was found that the pharmacy is linked to THC Africa which is an illegal online pharmacy. THC Africa has 13 shops located in Western Cape, Gauteng and KZN provinces. THC Pharmacy suppl[ies] cannabis flower to [these] 13 shops, patients from [these] provinces will then collect their cannabis products from 13 shops. The names and location of the shops were provided to Inspectors. These shops are not licensed pharmacies but they keep the packaged cannabis flower packaged and supplied by THC Pharmacy.

The Inspectors also looked at the pharmacy files and realised that there are some scripts ... signed but with no patient details. These scripts were written 6 months in advance. The SAPC Inspector also checked the schedule 6 register and found that strain names of cannabis . . . were entered instead of the chemical non-proprietary names Tetrahydrocannabinol (THC) as it appear[ed] in the consolidated schedules. This discrepancy was ... show[n] to the RP.

The schedule 6 register was inspected and found to be not balancing as required in terms of section 22A of the Medicines Act.

While busy with inspection, the prescribing Doctor . . . arrived at the pharmacy and introduced himself as the prescribing doctor for cannabis section 21 authorisations. He indicated that he is there to consult with patients on video call

in the Pharmacy. He stated that he normally consult[ed] with patients on video call and he will take notes and write a prescription for 6 months in advance . ... The Doctor was told that he is not allowed to write prescriptions in advance and also no repeats are allowed for schedule 6 substance. The Doctor was also questioned how ... he diagnose[d] the patient online without physically examining patients."

16. As a result, SAHPRA concluded that the inspectors observed numerous contraventions of the Medicines Act, which according to SAHPRA also constitute criminal offences, including the following:

16.1 the unauthorised manufacturing of medicines as contemplated by section 22A(9)(a)(i), read with section 22C(1)(b) and regulation 23. According to SAHPRA, FSMI's licence is limited to "*cultivation of cannabis and prohibits further manipulation of the dry flower … and subsequent production of finished product*" and "*does not permit the sale of bulk product to an entity such as the applicant for purposes of repacking and then selling and/or dispensing to patients*".

16.2 the failure to keep a register recording prescribed information in relation to the schedule 6 medicines sold, in contravention of section 22A(6)(p) and regulation 36;

16.3 breach of the prohibition against repackaging the medicines other than by a pharmacist, pharmacist's intern or pharmacist's assistant, as contemplated in regulation 39;

16.4 violations of sections 22A(6)(i) and 22A(6)(o), which prohibit repeat (or postdated) scripts on Schedule 6 medicines and sale of Schedule 6 medicines where the course of treatment exceeds 30 days.

17. The SAHPRA report continues as follows: *"The inspectors had a quick meeting with Ms. Mokgadi Fafudi (Regulatory Compliance Manager), Shyamli Munbodh (Section 21 Manager) and Mr. Deon Poovan (Senior Manager: Inspectorate and Regulatory Compliance). A decision to seize the THC products and open a criminal charge was taken because the THC Pharmacy is not licen[s]ed as a manufacturer to package THC products."*

18. The inspectors concluded that they were likely dealing with a scene of a crime and then contacted the fourth respondent and briefed him on the activities which were observed at the premises. Although the inspectors concluded that the cannabis products should be seized, they believed that there would be no point in doing so in terms of section 28(1) of the Medicines Act in circumstances where the SAPS would be taking charge of the scene or where the cannabis products were simply immediately to be handed over to the SAPS.

19. Thereafter, the SAPS took over the scene from the inspectors and seized the relevant articles. The SAPS purported to do so in terms of sections 20 and 26 of the Criminal Procedure Act, 1977 ("**CPA**").

20. The fourth respondent states in his answering affidavit as follows:

20.1 "*I acted on a reasonable suspicion that the cannabis items and documentary evidence I seized could possibly have been used in the commission of an offence and that the evidence had to be seized and send to a laboratory for testing.*"

20.2 "*We, as SAPS members, explained to the Applicant the transgressions of the law and the fact that their[ ] operations were the manufacturing of slush puppies and sweets as well as working with Tetrahydrocannobinol ("THC") containing*

substances with no labelling. I respectfully submit the Applicant was fully informed about the purpose for our presence and actions."

20.3 "*I am advised that this was part of the prima facie illegal activity of the Applicant, as cannabis products were bought in bulk and repacked. This illegal activity, I am advised, falls outside the licensing of the Applicant.*"

21. Save for the above, the fourth respondent's answering affidavit is sparse insofar as the background to and the justification for the seizure of the relevant articles is concerned.

22. After some exchange of correspondence, the current application was launched on 5 June 2023.

Legal principles

23. The *mandament van spolie* has a long jurisprudential pedigree in South African law. As emphasised by the Constitutional Court, it and its application are rooted in the rule of law, a key objective of which is to prevent self-help.[2] Possession is also an incident of the right to property, which is constitutionally protected, and special care should be taken to ensure that this right is not subverted without proper legal processes. Moreover, search and seizure processes centrally implicate the rights to privacy and, in certain instances, human dignity.

24. Thus, quite apart from common and statutory law principles, the current matter gives rise to constitutional questions and issues. This matter should be assessed in that context.

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2 *Ngqukumba v Minister of Safety and Security and Others* 2014 (5) SA 112 (CC), para [9].

25. Given its philosophical foundations, the *mandament* is centrally concerned with restoring the factual position, being possession of the property in question.[3] In this context, an applicant for a spoliation order has to establish two requirements:

25.1 peaceful and undisturbed possession of the property immediately prior to the spoliation;

25.2 unlawful dispossession by the respondent (and that the property is still in possession of the respondent in question).

26. The above ordinarily does not involve any consideration of the lawfulness of the applicant's possession. The focus of the first criterion is on whether there was, as a matter of fact, possession by the applicant. Under the second criterion, the emphasis is again not on the legality or otherwise of the applicant's possession, but on whether the dispossession by the respondent was carried out under the colour of law.

27. It is noteworthy, however, that the nature of the applicant's possession is not always irrelevant to the matter. The current case provides an illustration.

28. In the present matter, the SAHPRA/Council inspectors as well as the SAPS entered and inspected the premises. The SAPS also seized the relevant articles. No challenge is mounted against SAHPRA/Council and the legality of their inspection. The focus in the founding papers is on the conduct of the SAPS and its retention of the relevant articles.

29. Whether the dispossession by the SAPS was lawful is a question as to whether it was lawfully entitled to exercise its powers in terms of chapter 2 of the CPA. When interpreting statutes, it is important to give a holistic meaning to the statutory

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[3] *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1) SA 508 (A), 512, and *Yeko v Qana* 1973 (4) SA 735 (A), 739.

language, which takes proper account of the text, internal and external context as well as purpose.[4] Legislation should also be interpreted to further the implementation of, and protect, constitutional rights.[5]

30. The SAPS relied specifically on sections 20 and 26 of the CPA. It averred that it entered the premises on the basis of section 26 and then was allowed to seize the relevant articles in terms of section 20. While both of those sections may be relevant to SAPS officials' actions, section 20 is not a self-standing empowering provision, in my view. It must be read within the context of chapter 2 as a whole. The section provides that:

> "*The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article)- (a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere; (b) which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or (c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.*" (emphasis added)

31. It is apparent from the above that section 20 expressly provides that the "seizing" contemplated in that section must be done in accordance with the balance of the provisions of chapter 2. In this regard, sections 21 to 25 of the CPA provide specific circumstances in which articles described in section 20 may be seized. As a general proposition, such articles may only be seized pursuant to a warrant issued in terms of sections 21 and 25. This is apparent from the wording of section 21(1): "*Subject to the provisions of sections 22, 24 and 25, an article referred to in section 20 shall*

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4 *Tuta v The State* 2024 (1) SACR 242 (CC), para [63].

5 *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC), paras [46], [47], [84], and [107].

be seized only by virtue of a search warrant …". Thus, ordinarily, a warrant in terms of section 21 is required. But it may not be required if section 22, 23, 24 or 25 is applicable. Section 23 deals with seizure of property upon the arrest of a person; section 24 concerns theft of stock or produce; section 25 deals with a situation where a magistrate issues a warrant. Those sections are thus inapplicable *in casu*. To come within the remit of section 20, the SAPS was thus, in this matter, also required to comply with section 22, which deals specifically with the seizure of property pursuant to warrantless searches.

32. Our courts have emphasised that, should any seizure of property be contemplated, police officials should obtain a warrant, if this is at all possible. In the context of the exercise of law enforcement powers by the SAPS, warrantless seizure is the exception.

33. There are important constitutional considerations in this context, which highlight the importance of the discipline of obtaining a warrant. In this regard, the Constitutional Court held as follows: "*Exceptions to the warrant requirement should not become the rule. A warrant is not a mere formality. It is a mechanism employed to balance an individual's right to privacy with the public interest in compliance with and enforcement of regulatory provisions. A warrant guarantees that the state must be able, prior to an intrusion, to justify and support intrusions on individuals' privacy under oath before a judicial officer. Further, it governs the time, place and scope of the search. This softens the intrusion on the right to privacy, guides the conduct of the inspection, and informs the individual of the legality and limits of the search. Our history provides evidence of the need to adhere strictly to the warrant requirement unless there are clear and justifiable reasons for deviation.*"[6]

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6 *Gaertner and Others v Minister of Finance and Others* 2014 (1) SA 442 (CC), para [69].

34. The Court in *S v Murphy and Others - Search and Seizure*[7] recently summarised the relevant principles to be applied should the SAPS wish to proceed in the absence of a warrant:

> "*17. In order to justify a warrantless search under s 22(b) of the CPA, the State is required to prove that, at the time when the search was executed, the police officer concerned had information which, viewed objectively, was sufficient to ground a reasonable belief:*
>
> *a) that an offence had been committed or would be committed, and that an article connected with the suspected offence was on a particular person or premises;*
>
> *b) that a search warrant would be issued in terms of s 21(1)(a) of the CPA if it were sought; and*
>
> *c) that the delay in obtaining the warrant would defeat the object of the search.*
>
> *18. Reasons must be advanced for the police official's belief in these regards, and the court evaluating the legality of the search must be satisfied that the grounds justifying the search are objectively reasonable, i.e., reasonable in the judgment of the reasonable person.*"

35. I would only note in relation to paragraph 17(a) of the above quotation that the criterion is too narrowly stated. The connection between the article in question and the offence or suspected offence may take any of the forms set forth in section 20. In this regard, section 20 provides that property:

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[7] 2024 (1) SACR 138 (WCC), paras [17] and [18] (footnotes omitted).

35.1 which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere; or

35.2 which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or

35.3 which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence,

may be seized in accordance with the provisions of chapter 2 of the CPA.

36. Section 26 of the CPA is only of passing relevance to the present matter. That section allows a police officer to enter onto a premises without a warrant in circumstances where s/he reasonably suspects that a person at such premises may provide relevant information which may then form the subject matter of a sworn statement. It does not expressly deal with any aspects other than interrogation of such person and the obtaining of a statement. It does not expressly or implicitly authorise the seizing of property. In this case, the dispute does not revolve around the lawfulness of the SAPS entry onto the premises, but the seizing of the relevant articles.

37. The focus to determine the lawfulness of the dispossession must thus be sections 20 and 22 of the CPA.

38. Should any of the requisites for a lawful seizure be absent, the seizure is unlawful.

39. If the two requirements set forth in are satisfied in relation to the dispossession of one or more of the relevant articles, then the spoliation order should issue in respect

of such articles. In this regard, the merits of the applicant's possession of the articles are irrelevant.[8]

40. In granting a remedy, the Court is not, however, divested of its constitutional powers, and in my view duty, in terms of section 172(1)(b) of the Constitution, to grant relief which is just and equitable, in all the circumstances. This is a principle which applies in all constitutional matters, irrespective of whether the matter hinges on the constitutional invalidity of any conduct or legislation, and regardless of whether the Court is required to exercise its power in terms of section 172(1)(a) of the Constitution.[9] The power of the Court to order just and equitable relied is a wide one, bounded only by what justice and equity may demand.[10]

Discussion

The position of SAHPRA (and the Council)

41. In the current matter, it is common cause that the relevant articles were seized by the SAPS, not the inspectors of SAHPRA and the Council, and are currently in the possession of the SAPS. No case has been made out against SAHPRA and the Council that there was any illegality associated with SAHPRA and the Council entering and searching/inspecting the premises. In fact, in my view, it is apparent that the entry and inspection were in line with SAHPRA and the Council's statutory authority under the Medicines Act and the Pharmacy Act, respectively. In relation to SAHPRA (which is the relevant party opposing the relief), its inspector was permitted "*at all reasonable times*" to enter a place from which a person is authorised to dispense medicines to conduct an inspection. SAHPRA did not need evidence of a

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8 *Ngqukumba* (op cit, fn 2), para [21] and *Ivanov v North West Gambling Board and Others* 2012 (6) SA 67 (SCA), paras [25] and [27].

9 *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC), para [97].

10 *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC), para [53].

specific transgression to do so. As regulators, it and the Council were entitled to conduct occasional inspections for the purposes of checking compliance with regulatory requirements. This is especially so, however, where, as in this case, a complaint had been received in relation to the applicant and there was a past history of potential transgressions.

42. The applicant simply has not made out a case (and did not advance one in argument) that SAHPRA and the Council acted unlawfully. In all the circumstances, no basis has been made out for the spoliation relief and costs against SAHPRA. In my view, for this reason alone, SAHPRA was justified in its opposition. There is, however, a further reason why SAHPRA's participation in this matter and its evidence was of import for the purposes of the Court exercising its remedial powers. I return to this topic, as well as the issue of costs, later in the judgment.

Who was in possession of the relevant articles?

43. At the time when the relevant articles were seized by the SAPS, the relevant articles were, in my view, in the applicant's possession. The premises were those of the applicant and its staff members operated the pharmacy. The relevant articles consisted of the products stored or sold, or the records kept, by the pharmacy.

44. It is true that immediately prior to the seizure by the SAPS, the relevant articles, and the premises, were being inspected by SAHPRA/Council, but, while SAHPRA apparently decided to seize some or more of the relevant articles, it did not in fact do so and deferred the further fate of the articles to the SAPS, who took control of the scene. As such, at the relevant time of dispossession, the applicant was in possession of the relevant articles.

Who is in possession of the relevant articles now?

45. On the available evidence, it is not in dispute that the SAPS is presently in possession of the relevant articles.

Was the dispossession unlawful?

46. This is the critical element in the current matter.

47. In this regard, while the evidence of SAHPRA's inspection is important as background, it is the SAPS answering affidavit (deposed to by the fourth respondent) which is key. It must set forth a sufficient basis to satisfy the test for warrantless seizures as indicated above.

48. Regretfully, the affidavit is parsimonious on detail. It speaks in vague generalities. It is not sufficient for the police officer seeking to justify reliance on a warrantless seizure simply to restate the statutory provisions, to offer no reasoned justification for why the provisions were invoked or not to explain why the two requirements set forth in section 22(b) of the CPA are satisfied in this matter, and why the exceptional, warrantless procedure was justified in this matter. Yet, this is precisely the nature of the answering affidavit presented by the SAPS respondents in this matter. It falls far short of what is required and what would be expected.

49. It does not take this Court into the SAPS's confidence in at least the following respects:

49.1 it does not explain what precise offences were being investigated by the SAPS and why the fourth respondent formed the view that the relevant articles were concerned or reasonably suspected to be concerned in, or provided evidence of or were intended to be used in, the commission of such offences;

49.1.1 It is simply not enough baldly to assert that "*I acted on a reasonable suspicion that the cannabis items and documentary evidence I seized*

could possibly have been used in the commission of an offence and that the evidence had to be seized and send to a laboratory for testing." What was that offence and how were they used in this regard?

49.1.2 The second statement was "*We, as SAPS members, explained to the Applicant the transgressions of the law and the fact that their[ ] operations were the manufacturing of slush puppies and sweets as well as working with Tetrahydrocannobinol ("THC") containing substances with no labelling. I respectfully submit the Applicant was fully informed about the purpose for our presence and actions.*" Again, it is unclear what offence is being committed (how the manufacturing of slush puppies or sweets is an offence) and the relevance of the relevant articles to that offence.

49.1.3 The SAPS also alleges that "*cannabis products were bought in bulk and repacked. This illegal activity, I am advised, falls outside the licensing of the Applicant.*" It is not explained what offence is being committed and on what basis such a conclusion is reached.

49.1.4 I agree that the SAPS may well have been entitled to rely for its suspicion of illegal activity on the evidence or statements provided by SAHPRA. But the the fourth respondent does not provide any detail as to what findings of SAHPRA, if any, he actually relied on, on what basis he believed that there was *prima facie* proof of criminal activity and how the relevant articles were related to this. This is all critical information for the purposes of justifying the invocation of the warrantless seizure procedure.

49.2 Similarly absent from the SAPS answering affidavit is any attempt to explain how the two requirements of section 22(b) are satisfied. This may be unsurprising, as the SAPS appears to have been oblivious to the fact that, in

addition to sections 20 and 26, the police official in question had to satisfy himself and the Court that he had reasonable grounds to believe "*that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; and that the delay in obtaining such warrant would defeat the object of the search.*" Nothing is said on this score at all in the answering papers. These sections require the police official in question (in the current matter, the fourth respondent) to set forth the reasoning in sufficient detail for the Court to conclude that he indeed had reasonable grounds which founded his belief. This means setting out clearly the facts underlying the conclusions he reached as well as the reasoning process whereby those conclusions were reached.[11] The test for the reasonableness of the grounds on which the police official relies is objective and justiciable.[12]

50. Unfortunately, the SAPS answering papers are laconic and, at best, Delphic, and do not assist this Court to come to a conclusion that the warrantless seizure was executed in accordance with the requirements in chapter 2 of the CPA.

51. In those circumstances, the seizure, and dispossession, of the relevant articles by the SAPS was unlawful.

Concurrence of investigative mandates and appropriate remedy

52. This, however, is not the end of the matter. The Court is empowered in all constitutional matters to grant an order which is just and equitable. The Court's assessment of what justice and equity demands must be made taking into account all the relevant circumstances. For example, this "*ample and flexible remedial*

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[11] Cf *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA), para [40].

[12] In addition to the authorities cited above, see *MEC Responsible for Local Government, Western Cape v Matzikama Local Municipality and Others* 2023 (3) SA 521 (SCA), para [13], citing *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at 578 and 579, and other well-worn authorities dealing with the proper interpretation and application of the "reasonable belief" or "reasonable grounds" empowering provisions.

jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form".[13] The Court often crafts a remedy to suit the circumstances of the case to ensure that just and equitable relief is issued.

53. Ordinarily, in spoliation cases, the standard remedy is a return of the property to the despoiled party before any assessment of the merits of the applicant's possession.[14] The Constitutional Court in *Ngqukumba* stated that "*[s]elf help is so repugnant to our constitutional values that where it has been resorted to in despoiling someone, it must be purged before any enquiry into the lawfulness of the possession of the person despoiled.*"[15] That appears to be the default position as between the dispute between the despoiler and the despoiled.

54. It is, however, important to note that the facts in this case are somewhat different from many spoliation cases. There is not only a concurrence of regulatory or enforcement mandates over the same premises, products and set of facts, but SAHPRA as the regulator in fact conducted a lawful inspection of the premises and the applicant, has set forth in detail in its report the transgressions by the applicant of the legislative framework which it has identified, has made a decision to seize some or all of the relevant articles on the basis of what it has observed and found, but deferred action on the relevant articles on account of its referral of the matter for criminal investigation and action to the SAPS. The SAHPRA report clearly details what was observed, and how this materially deviates from the standards required of the applicant and enshrined in legislation. Once the relevant articles were seized by the SAPS, SAHPRA was no longer (practically, and in all probability in law) in a position to exercise its seizure powers in terms of section 28 of the Medicines Act.

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13 *Hoërskool Ermelo* (op cit, fn 9), para [97].

14 *Ivanov* (op cit, fn 8), para [24].

15 (op cit, fn 2), para [21].

55. SAHPRA requested that, in case this Court decides to uphold the spoliation application, this Court should order that such of the relevant articles as would otherwise have to be handed back to the applicant are handed over to SAHPRA.

56. I do not think that it would be appropriate for me, especially in the absence of a counter-application by SAHPRA, and full pleading on the point, to order the transfer of the relevant articles *en masse* to SAHPRA. The facts pertaining to the SAHPRA/Council inspection and role, as set forth above, are, however, not without significance.

57. It seems to me that where there are concurrent inspection and seizure mandates and particularly where one agency, such as SAHPRA, (i) has already conducted an inspection, which has not been impugned, and (ii) had concluded pursuant to such inspection that it would or may wish to exercise its seizure powers, but (iii) deferred this issue on account of the action of the other regulatory or law enforcement body, such as the SAPS, it would ordinarily be just and equitable, when the legality of the SAPS's conduct has been placed in issue and the seizure is declared unlawful and retrospectively set aside, to place the despoiled and third parties, including SAHPRA, (as far as possible) in the position they would have occupied but for the unlawful conduct of the SAPS.

58. It is important to note in this case that SAHPRA is not the despoiler but a party which is unconnected to any illegality on the part of the SAPS. SAHPRA and the Council did not attempt unlawfully to invoke self-help. They are vested with critical regulatory mandates, and they should be afforded a reasonable opportunity to exercise their statutory powers. Whether there is in fact or in law a proper basis for them to do so is not an issue which this Court is called upon to decide, nor would it be appropriate at this stage to do so. This is a matter which, in the first instance and

in accordance with the statutory framework and principles of deference, is for the regulator in question to consider.

59. The above approach also accords with the corrective principle, which is applied as the default remedial objective in the different, but comparable, context of declarations of constitutional invalidity.[16]

60. At the time when the SAPS took over the scene, SAHPRA and the Council had just concluded their joint inspection and were in the process of deciding on the next steps. They were effectively (from a practical and probably legal perspective) precluded, to date, from making and communicating any decision on the seizure of the relevant articles. They should now be afforded the opportunity to make that decision and take whatever other steps in relation to the relevant articles they are permitted to do in law, within a reasonable time, as though the relevant articles are now on the premises and the joint inspection had just been concluded. The order for the SAPS to return possession of the relevant articles to the applicant should thus be made subject to any steps that SAHPRA and/or the Council may decide to take.

61. I am *prima facie* of the view that an order in those terms would be just and equitable in the current circumstances. I thus intend to issue such an order. I am mindful, however, of the fact that such an order was not specifically prayed for by the applicant or the respondents. In my view, the parties should have the opportunity to make written submissions to me on the proposed just and equitable relief within 10 days of the date that the order is handed down. Should any submissions be received, I shall then make a final order taking into account the additional

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[16] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* 2014 (4) SA 179 (CC), paras [30] to [32].

submissions. Should no submissions be received by the deadline, the proposed just and equitable order shall become final.

Costs

62. It remains to deal with the issue of costs, before briefly touching on the questions of urgency and condonation.

63. The application against the SAPS substantively succeeds and thus the SAPS should bear the costs of the applicant, including the costs of two counsel where so employed.

64. There was no sustainable case made out against SAHPRA and SAHPRA should thus not be bear any of the applicant's costs. A spoliation order and costs were sought against SAHPRA and, in those circumstances, it was justified in opposing the application. SAHPRA produced answering papers which were of substantial assistance to the Court in explaining the circumstances of the entering of the premises and the inspection, as well as the applicant's activities. This provides important context for the Court to exercise its remedial powers.

65. SAHPRA's request that the relevant articles should be transferred into its custody was, however, not something that I was prepared to grant, particularly without a fully substantiated counter-application. Similarly, while SAHPRA did not press the point, its opposition on the question of urgency was not successful. On the other hand, SAHPRA's submissions in relation to the potential exercise of SAHPRA's seizure powers is something which I did take into account in formulating the just and equitable relief in this matter.

66. Ultimately, the applicant's claim, while seeking specific spoliation relief in its own interests, also concerned constitutional issues and entailed at least in part a

consideration of novel remedial and other measures in circumstances where there were overlapping regulatory powers. In constitutional matters, the default position is that in cases where the applicant fails, unless the litigation is frivolous or vexatious, each party should bear its own costs. While the current case is not purely constitutional in nature, it ultimately, *inter alia*, sought the enforcement of constitutional rights and enveloped constitutional considerations.

67. Costs are within the discretion of the Court, a discretion which must be exercised with due regard to all the circumstances, the *Biowatch* principle[17] and the requirement for the Court to grant a remedy which is just and equitable.[18] While the relief against SAHPRA did not succeed, this was not the principal thrust of the case. SAHPRA was integrally involved in the factual matrix which led to the seizure of the relevant articles by the SAPS. SAHPRA's claim arising from overlapping regulatory powers also made its participation critical in the determination of just and equitable relief. The precise detail of what had transpired as between SAHPRA and the SAPS was not known to the applicant at the time of launching the application, and emerged from the answering papers. In my view, it cannot be said that, in all the circumstances of the case, it was frivolous or vexatious for the relief against SAHPRA to be pursued.

68. In the exercise of my discretion, I think it would be appropriate for SAHPRA and the applicant to bear their own costs insofar as SAHPRA's opposition was concerned.

69. Again, mindful that submissions on costs may be influenced by the nature of the substantive relief I ultimately grant, I intend to afford the parties an opportunity to make written submissions, within a reasonable time, in relation to any influence of my substantive order on the proposed allocation of costs. The costs order will then

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17 *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC).

18 *Hotz and Others v University of Cape Town* 2018 (1) SA 369 (CC), para [21].

be finalised with due regard to any further submissions. Should no such submissions be received by the deadline, the costs order shall be deemed to be final.

Urgency and condonation

70. The urgency of the matter was not placed seriously in dispute in oral argument before me. SAHPRA did not, however, formally abandon its objection to the issue of urgency. In my view, on the basis of the applicant's pleaded case (which is the basis on which I am required to decide this initial issue) and despite the fact that this is not a case involving extreme urgency, a case has been made out for this matter to be heard on the urgent roll and for non-compliance with the time periods and forms in the Rules to be condoned. No material prejudice has been suffered by the respondents as a result of the hearing of this matter on the urgent roll.

71. It will be apparent from I set forth above that I was also prepared to have regard to the SAPS answering affidavit, which was deposed to and uploaded on Caselines two calendar days before the hearing of this application. Although its delivery was belated, it at least enabled me to make a ruling on the lawfulness of the dispossession, and does not appear to have materially prejudiced the applicant. Its late delivery and filing will be condoned.

Order

72. I thus make the following order:

72.1 the application is enrolled on the urgent roll and the applicant's non-compliance with the time periods and forms prescribed under the Rules is condoned;

72.2 the late delivery of the SAPS answering papers is condoned and any costs occasioned by such late delivery are costs in the cause of the application;

72.3 subject to what is set forth in below, the second and third respondents are ordered to restore possession of the relevant articles to the applicant within 10 days of 17 April 2024;

72.4 the first and fifth respondents and the persons who conducted the inspection of the premises on their behalf on 22 May 2023 are afforded an opportunity to exercise their powers (including any seizure powers) in relation to some or all of the relevant articles within five days of 17 April 2024. For those purposes, the relevant articles will, at all relevant times, be deemed to be in possession of the applicant and not in the possession of the SAPS. The first and fifth respondents shall communicate their decisions in respect of the exercise of their powers in writing to the SAPS and the applicant within the aforesaid five day period, so as to afford the second and third respondents an opportunity to restore possession to such of the relevant articles as will not be seized by the first and/or fifth respondent within 10 days of 17 April 2024;

72.5 the second to fourth respondents shall bear the costs of the applicant in the application, including the costs of two counsel where so employed, save for any costs occasioned by the first respondent's opposition to the relief sought against it;

72.6 save as aforesaid, each party will bear its own costs in the application;

72.7 the orders in to ("**the relevant orders**") will come into effect in the manner set forth in below;

72.8 the applicant and the first to fourth respondents are afforded the opportunity make written submissions in relation to the orders set forth in and (and any impact thereof on the costs orders in and) by no later than 17:00 on 17 April 2024. Should no written submissions be received by the aforesaid time and date, the relevant orders will become final and come into effect immediately after 17:00 on 17 April 2024. Should written submissions be received by the aforesaid time and date, the relevant orders will not come into effect until this Court has considered the further submissions and handed down final orders, with or without modifications to the relevant orders.

Hand-down and date of judgment

73. This judgment is handed down electronically by circulation to the parties or their legal representatives by email and by uploading the judgment onto Caselines. The date and time for hand down of the judgment are deemed to be 17:00 on 3 April 2024.

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VM MOVSHOVICH

ACTING JUDGE OF THE HIGH COURT

Applicant's Counsel:	E Kilian SC and C Cremen
Applicant's Attorneys:	Symes Inc
First Respondents' Counsel:	JM Berger and EC Chabalala
First Respondents' Attorneys:	Maluleke Inc

Second to Fourth Respondents' Counsel:	CR Minnaar
Second to Fourth Respondents' Attorneys:	State Attorney

Date of Hearing:	7 July 2023
Date of Judgment:	3 April 2024