



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 6310/2022

In the matter between:

DUANE BUCHLER

Applicant

and

THE MINISTER OF SAPS N.O.

First Respondent

WARRANT OFFICER MOLELEKOA JERRY HLAPO N.O.

Second Respondent

THE MAGISTRATE: PARYS N.O.

Third Respondent

HEARD ON: 22 DECEMBER 2022

CORAM: MATHEBULA, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 5 JANUARY 2023. The date and time for hand-down is deemed to be 5 JANUARY 2023 at 14H15.

- [1] The applicant brought an urgent application to set-aside the search and seizure warrants issued by the third respondent. The ancillary relief is the return of the assets specifically mentioned in Annexure “A” of the founding papers seized by members of the first respondent. The warrants were issued on 5 December 2022 on the strength of the affidavits deposed to by the second respondent also on the same date.
- [2] The applicant is the owner of a business called “Chill Net-Internet Café” operating from the address known as 2 Choppies Building, Kruis Street, Parys. The first respondent is cited in his official capacity as the Minister of Safety and Security of the Republic. The second respondent is an employee of the first respondent with the rank of Captain attached to a Directorate colloquially called “The Hawks” who was acting within the cause and ambit of his employment with the first respondent. The third respondent is the Senior Magistrate of the district of Parys. The matter is opposed by the first and second respondent. The third respondent abides. It follows that no order I can make will be against any or all of the respondents in their personal capacities.
- [3] Briefly the facts on which the applicant based his application are as set out in the paragraphs hereunder. The applicant has been conducting a business from the aforementioned premises from 2013. The premises are leased from a third party who is not party to the current proceedings. According to him, it is an internet café. The applicant avers that he is the lawful possessor of the assets seized as per the warrants issued by the third respondent. The version of the opposing respondents is that the applicant is engaged in illegal gambling activities.

- [4] The third respondent issued two warrants for search and seizure of assets belonging to the applicant. One warrant was in terms of section 21 of the Criminal Procedure Act 51 of 1977 and the other warrant was in terms of section 29(1)(a) of the Cybercrimes Act 19 of 2020. These warrants were issued on the strength of the affidavits deposed to by the second respondent. The parties are in agreement that they were the only documents before the third respondent to consider whether to issue the warrants or not. In his affidavits, the second respondent sets out the offences that were investigated quoting the relevant sections of various Acts allegedly transgressed by the applicant. He went further and stated that the information was also gathered through the use of undercover agents who made certain observations and confirm that the applicant is engaged in illegal gambling activities. Therefore, the inescapable conclusion is that there is sufficient information on oath that there are reasonable grounds that the assets involved in the commission or suspected commission of an offence are within the jurisdiction of the third respondent.
- [5] It is common cause that the warrants were executed on 7 December 2022 and items mentioned in paragraph 36 of the founding affidavit were seized. There is no dispute that the applicant was in peaceful and undisturbed possession thereof.
- [6] I pause to mention that the question whether the matter is urgent or not is no longer a contested terrain between the parties. I agreed with them that there are no grounds for urgency.

[7] The applicants relied on four (4) grounds in support of the application. They are as follows: -

1. The third respondent did not apply her mind when he issued the warrant and failed to appreciate the provisions of the Criminal Procedure Act 51 of 1977 that governs the authorisation of warrants. The point raised is that the third respondent failed to appreciate the legal principles underlying the issuing of a valid warrant.
2. The warrants suffer from over broadness and does not comply with the intelligibility principle.
3. The information relied upon contained in the affidavits of the second respondent could not be accepted as establishing a reasonable suspicion.
4. The information placed before the third respondent was not obtained in a lawful manner.

On these grounds the applicant contended that the warrants are bad in law and susceptible to be set-aside. Therefore, should that eventuate, possession of the seized assets must be restored to him.

[8] It is useful to deal, to some great length with all the arguments raised by both counsel primarily because of the order I intend to make. Mr Jagga for the applicant commenced his argument by pointing out that in the matter where the police act under a statute to perform search and seizure, it fits within the stature of a spoliation application. He placed his reliance solely on the decisions of the Supreme Court of Appeal in **Ivanov v North West Gambling Board and Others**¹ and the Constitutional Court in **Ngqukumba v Minister of Safety and Security**.²

¹ 2012 (6) SA 67 (SCA).

² 2014 (5) SA 112 (CC).

[9] In **Ngqukumba's** decision it was said by Madlanga J on paragraphs 12 and 13: -

A spoliation order is available even against government entities for the simple reason that unfortunately excesses by those entities do occur. Those excesses, like acts of self-help by individuals, may lead to breaches of the peace: that is what the spoliation order, which is deeply rooted in the rule of law, seeks to avert. The likely consequences aside, the rule of law must be vindicated. The spoliation order serves exactly that purpose.

It matters not that a government entity may be purporting to act under colour of a law, statutory or otherwise. The real issue is whether it is properly acting within the law. After all, the principle of legality requires of state organs always to act in terms of the law. Surely then it should make no difference that in dispossessing an individual of an object unlawfully, the police purported to act under colour of the search and seizure powers contained in the Criminal Procedure Act. Non-compliance with the provisions of the Criminal Procedure Act in seizing a person's goods is unlawful. This unlawfulness, plus the other requirement for a spoliation order (namely, having been in possession immediately prior to being despoiled), satisfies the requisites for the order. All that the despoiled person need prove is that —

- (a) she was in possession of the object; and
- (b) she was deprived of possession unlawfully.

[10] From these pronouncements of the apex court, it is quite clear that *mandament van spolie* is available even against the police. That will be in situations where they seize assets from people in an

unlawful manner. The remedy is one of the concerted efforts to stop and weed out the repugnant method of resorting to self-help. I agree with his submission and it stands clear that where the requisites for spoliation order have been satisfied, it must simply be granted.

[11] For the applicant it was pointed out that the two warrants that were issued are against four separate entities. The point made is that there is no averment in the statement of the second respondent, that the businesses concerned belong to the same entity or person. Closely connected is the damning shortcomings of the information pertaining to the activities of the undercover agents. The allegations are spread out in general terms without specifics on what they did at different locations.

[12] Mr Jagga urged me to adjudicate the matter in accordance with the test outlined in **Minister of Safety and Security v Van Der Merwe and Others**. Mogoeng J (as he then was) writing for the undivided on paragraph 39 said the following: -

“Secondly, the section requires that the decision to issue a warrant be made only if the affidavit in support of the application contains the following objective jurisdictional facts: (i) the existence of a reasonable suspicion that a crime has been committed; and (ii) the existence of reasonable grounds to believe that objects connected with the offence may be found on the premises or persons intended to be searched. Both jurisdictional facts play a critical role in ensuring that the rights of a searched person are not lightly interfered with. When even one of them is missing that should spell doom to the application for a warrant”.³

³ 2011 (5) SA 61 (CC).

- [13] Turning to the particularity of the warrant, he specifically relied on the judgment of **Goqwana v Minister of Safety NO and Others**.⁴ In that matter the court held that “the need for particularity of the search warrant especially where one is dealing with statutory offence is salutary.” The key requirement is that every relevant section and subsection must be adequately referred to. The court did not find this requirement to be onerous on the magistrates because they are both academically well-equipped and vastly experienced.⁵ He mounted an attack on the warrants under review that they did not make mention of any subsections which also contain various offences. He added that the statement of the second respondent did nothing to show the third respondent why there is some objective jurisdictional facts to suspect the commission of the offences. The point made is that the warrants are invalid because of vagueness and lack reasonable intelligibility.
- [14] He demonstrated that there is no cogent reason why the warrants were issued given the description of some of the assets that were to be removed. Among them were cheques which have not been a legal tender in the Republic for some time. There is no reason put forward why this archaic legal tender should be removed or even feature in offence(s) investigated against the applicant.
- [15] The further point taken was the lack of full description pertaining to the premises. The statement of the second respondent makes it clear that information was collected by making use of undercover agents. This was in contravention of section 252A of the Criminal Procedure Act 51 of 1977. The provision in this Act cannot be

⁴ 2016 (1) SACR 384 (SCA).

⁵ Paragraph 29.

implemented at whim. Stringent requirements must be met and its provisions applied as a measure of last resort. This aspect was not questioned by the third respondent. What is damaging in the case for the respondents, he argued, is that there are no specifications as to the operations that occurred at the four different locations. They were lumped together as though the information is applicable to all of them.

[16] More importantly he argued that the second respondent should have provided an explanation on each and every business site to sustain his assertion of a reasonable suspicion. I am inclined to agree with this submission because one must establish an objective jurisdictional fact. That is the kind of information on oath that should have been placed before the third respondent before the warrants were issued. This is also in line with the established authorities in **Van Der Merwe *supra*** and **Powell NO and Others v Van der Merwe NO and Others**.⁶

[17] The court in **Powell NO and Others v Van der Merwe NO and Others** described the meaning of suspicion in the following terms: -

“This Court has endorsed and adopted Lord Devlin’s formulation of the meaning of ‘suspicion’:

‘Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; ‘I suspect but I cannot prove’. Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end.’”⁷

[18] Counsel for the applicant submitted that the provisions of the Criminal Procedure Act 51 of 1977 in relation to warrants only

⁶ 2005 (5) SA 62 (SCA); [2005] 1 All SA 149 (SCA).

⁷ *Supra* at paragraph 36.

applies insofar as it is not inconsistent with the provisions of the Cybercrimes Act 19 of 2020. In this matter the third respondent was wrong to authorise the search and seizure articles within the definition of the latter Act. He took issue with the fact that the warrants make reference to ships, vehicles, aircraft etc. This is a deviation from the facts in the statement used to obtain them. I agree with this submission.

[19] Ms Ngubeni in reply referred to the affidavits filed by the second respondent which were the only documents placed before the third respondent. She stated that at that stage the second respondent was not in possession of the entire evidence against the applicant. This makes sense because the matter is still under investigation. All he had to do was to make averments to sustain an assertion for a reasonable suspicion. She argued that the applicant knew exactly what offences were levelled against him. She referred to the notices that were sent to the landlord by the Free State Gambling Board which elicited the response from his attorney of record. On that score, he argued that the principle of intelligibility had been satisfied. I have difficulty with this argument. The third respondent is the one who must be appraised with all the facts on oath before issuing the warrants.

[20] According to her the affidavit of the second respondent did explicitly make mention of the equipment suspected to be used to commit the offence(s). The reasons thereof were also made known to the third respondent to consider whether to grant the warrants or not. Counsel for the respondents argued that the submission to the effect that a warrant in terms of the Criminal Procedure Act was bad in law is superfluous. She relied on section 27 of the

Cybercrime Act which specifically permits concurrent operation of the Criminal Procedure Act to the extent that there is no contradiction. Therefore, there is nothing untoward concerning the warrants. Her logic is that the arguments applicable to one warrant are also valid for the other.

[21] Ms Ngubeni with reference to the decision of the court in **Oosthuizen v The Magistrate for the District of Hermanus and Others**⁸ specifically paragraphs 39 to 42 argued the court that reviews a warrant must be satisfied the objective jurisdictional facts for its issue were present. I agree. In that matter the court proceeded to set out the jurisdictional facts required by sections 20 and 21 of the Criminal Procedure Act 51 of 1977 that are reasonable. She contended that the applicant was at all times represented by an attorney. The point made is that it is preposterous for the applicant to now claim that he does not know anything about the offences.

[22] She conceded, and correctly so, that there were anomalies in the warrants. This argument is problematic because it creates a process beyond that enacted in the relevant provisions. The magistrate must only consider what is before him or and nothing else. On this aspect she contended that the court in **Naidoo and Others v Kallianjee NO and Others**⁹ looked at what the effect of the anomalies would be. Similarly, she argued that the warrants in this matter had limitations and were identifying in clear terms the assets to be searched and subsequently seized. Her argument was where something with no force and effect is mentioned, there can

⁸ 2021 (1) SACR 278 (WCC) (29 October 2020).

⁹ 2016 (2) SA 451 (SCA).

be no prejudice. Overall there was sufficient information placed before the third respondent to issue the warrants.

[23] The significance of the role played by warrants of search and seizure in the fight against crime cannot be underestimated. Equally their intrusive nature in the right to privacy entrenched in our Constitution is a cause for concern. This means that a court considering these competing interests has to move ahead applying a fine balancing act. This is the approach followed in a long list of decided cases. A useful barometer to determine a valid and enforceable warrant was succinctly stated in **Powell NO and Others v Van der Merwe NO and Others** by Cameron JA (as he then was) *supra* on paragraph 59. These guidelines were reiterated with some eloquence by the apex court in **Minister of Safety and Security v Van der Merwe** *supra*.¹⁰

[24] It is apposite to discuss in some detail the intelligibility principle as applied to the warrants. Both counsel spent some concerted effort to persuade me that the warrants were valid or invalid purely on this ground. A search and seizure warrant must satisfy the intelligibility principle which is rooted in the founding values of the Constitution. The test underpinning it is an objective one.

[25] On paragraph 44 of the **Van Der Merwe** decision *supra* Mogoeng J (as he then was) described the objective test it in the following: -

“The core issue is whether the warrant would be reasonably capable of that clear understanding, even if the offence were not mentioned in it. Put differently, does the intelligibility principle require the specification of the offence in the s 21 warrant for its validity?”

¹⁰ At paragraph 29.

This principle is in keeping with the requirement that the exercise of state power must be accountable, predictable and understandable. If the warrant falls short of this threshold, it is bound to be declared invalid and set-aside.

[26] The compelling argument made on behalf of the applicant pertaining to the relief sought being a *mandament van spolie* is uncontested. Counsel for the respondents did not, even once, refer to it. The legal principles as submitted for the applicant are correct. The respondents are not immune and this remedy is available to the victims whose assets were seized unlawfully. Therefore, any finding that the warrant is invalid, the concomitant result is that restoration must take place.

[27] I now turn to consider legal challenges launched against the validity of the two warrants. The fact of the matter is that the court issuing warrants must consider what is put before it at the time it is exercising its powers. It cannot consider anything that is not before it. In this matter, it considered the two affidavits deposed to by the second respondent. Nothing else. The case for the respondents stands or falls on these two documents.

[28] For the third respondent to issue a warrant there must be information on oath that there are reasonable grounds for believing that there is an article which may afford evidence of the commission or suspected commission of the offence. Lewis JA in **Minister of Safety and Security v Ndiniso** held that facts must be advanced to justify a finding that the belief was based on

reasonable grounds.¹¹ It is then expected of the magistrate or judge to scrutinize it with great skill and care that it meets the requirement to issue a warrant.

[29] What is required is that the information must be beyond mere assertion. This will include and not limited to, who made the report, the particulars of the information and importantly why it must be considered reliable. This is the difficulty that I encounter with the case for the respondents. It does not go deep enough on the details. That there are other documents like notices issued and letters from the attorneys in response does take their case to any heights. Clearly the third respondent did not have such information when he issued the warrants. Plainly he could not have applied his mind on what was not before him. With the scant information before him, there was not enough to conclude that objective jurisdictional facts existed.

[30] The other attack on their validity is over broadness and that they do not comply with intelligibility principle. I agree with these submissions. It does not do the case for the respondents any good by simply throwing the rule book on the applicant with the hope that something might stick. The respondents must state with clear particularity “verse and chapter” of the relevant Acts they place their reliance on.

[31] The warrants make mention of contravention of sections 118 (1) and (2) of the Free State Gambling and Liquor Act 6 of 2010 and sections 8, 10 and 11 of the National Gambling Act 7 of 2004. The defect on this aspect is that those sections have subsections which

¹¹ 2007 JDR 0185 (SCA).

also create offences. It cannot be assumed that their omission means that they are not part of the offences investigated against him. It must be clear from the outset. As they stand, the warrants lack the offence specification requirement which has been deemed an integral part of the intelligibility principle. I have referred to a long list of cases that stressed the point. The offence, it has been held, must be laid down unequivocally and without qualification. That cannot be said about the warrants under review.

[32] I encounter difficulty with the argument that the mentioning of wide and numerous unnecessary articles does not have any effect or prejudice the applicant. Clearly some of the mentioned articles have no bearing whatsoever with the investigation of the case against the applicant. As a result, one cannot harbour any reasonable suspicion on them. This failure lends credence to the assertion that the third respondent did not apply his mind. He could not have issued such an all-encompassing warrant when there was no information put before him to justify it. It has been stated that the purpose of the warrant is for the police to understand exactly the authority in it and what he has to do. Equally the person against whom it is executed must also be appraised with the reasons why his rights are being overrun. Clearly if the warrant is lacking in this respect, as the two warrants are, they cannot stand.

[33] This brings me to the examination of the argument advanced on behalf of the respondents whether the decision of **Naidoo v Kalianjee NO and Others** finds application in this matter. That question is answered in the negative. The facts are distinguishable. The court in that matter considered the warrants within the context of section 69 of the Insolvency Act 24 of 1936.

[34] The court on paragraph 24 restated the overall purpose of a warrant issued in criminal proceedings that it is to find and seize evidence of the commission of a crime which may be preserved for use, should a prosecution follow. The court in unequivocal terms repeated that the underlying purpose of the warrant issued in terms of the Insolvency Act 24 of 1936 is fundamentally different from the one issued in terms of the Criminal Procedure Act 51 of 1977. Leach JA and Mayat AJA referred with approval to the following dictum by Marais JA in **Cooper NO v First National Bank of South Africa Limited 2001 (3) SA 705 (SCA)** at para 16.

“The decision to issue a warrant is in no sense an adjudication of any substantive issue, existing or potential, between the trustee and the third party or between the insolvent and the third party. Success in obtaining a warrant and success in its execution brings the trustee no more than provisional physical possession of the relevant asset. The trustee's continued possession is open to challenge in the courts and the customary gamut of remedies (review proceedings, prohibitory interdicts, vindicatory actions, declarations of right, etc) is available to the third party. A successful challenge will bring an end to the trustee's possession.”¹²

Therefore, any reliance on this case is misplaced.

[35] For these reasons, I conclude that the application ought to succeed. No argument was made why the losing party should not be liable to pay the costs. In the exercise of my discretion on that aspect, there is also no reason to deviate from the rule to make such as an order.

[36] In the result I make the following order: -

¹² Also reported as [2000] 4 All SA 597.

- 36.1. Condoning the non-compliance with the forms and service provided for in the Uniform Rules of Court and disposing of the application as matter of urgency.

- 36.2. The warrants issued (in terms of section 21 of the Criminal Procedure Act and 29 of the Cybercrimes Act, respectively) by the third respondent (dated 5 December 2022), in respect of the applicant's business at Shop 2, Choppies Building, KrUIS Street, Parys, ("the warrants") and executed on 7 December 2022 by the second respondent are set-aside.

- 36.3. The first and second respondents (including any other person acting as agent on behalf of those respondents and may be in possession of the applicant's articles that were seized (as set out in Annexure A to the Notice of Motion), are ordered to forthwith restore the applicant's possession and return those articles to the applicant's business premises.

- 36.4. Costs of application are to be paid by the first and second respondent jointly and severally, the one paying the other to be absolved.

M.A. MATHEBULA, J

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On behalf of the 3rd respondent:

No appearance