

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO. 14709/20

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO

DATE

SIGNATURE

In the matter between:

IMPERIAL RESTAURANT

Applicant

and

THE MINISTER OF POLICE

First Respondent

**THE STATION COMMANDER
MOFFATVIEW POLICE STATION**

Second Respondent

JUDGMENT

NOCHUMSOHN AJ

1. This is an application for:
 - 1.1. A declaratory order to the effect that the 'search without a warrant' effected on 16 December 2019, and seizure of the Applicant's alcohol, be declared unlawful, unconstitutional, invalid and set aside;
 - 1.2. The return of the alcohol to the Applicant;
 - 1.3. In the alternative to 1.2 above that the First and Second Respondent be ordered to pay R135 213.00 to the Applicant, in respect of the value of the alcohol.
2. The Applicant is the Imperial Restaurant of 26a Augusta Road, Regents Park, Johannesburg. The application is based upon the Founding Affidavit of its manager, Mr Lambert Chike Amadi.
3. The First Respondent is the Minister of Police, and the Second Respondent is the Station Commander for the Moffatview Police Station.
4. The cause of action arises out of a search at the restaurant on 16 December 2019, and seizure of its stock of alcohol, by members of the South African Police, who acted without a warrant.

5. On the Applicant's version, the value of the stock seized was R135 213.00.
6. Attached to the Founding Affidavit as annexure "ALC2" (CaseLines 001/22) is the 2019 renewal certificate issued in terms of section 98 of the Gauteng Liquor Act 2 of 2003. Such certificate indicates that the restaurant is the holder of liquor licence number GAU100292C, originally issued on 29 December 2010, now valid until 2019/2020. The certificate reflects further that R6 750.00 was paid with a date appearing, being 6 January 2020. Pertinent to note, such certificate bears the stamp of the Gauteng Liquor Board.
7. During the search and seizure, the deponent to the Founding Affidavit, Mr Amadi was arrested. He was subsequently served with a notice under section 56 of the Criminal Procedure Act (annexure "LAC3A", CaseLines 001/23).
8. Subsequently, per "LAC3B" (CaseLines 001/24), and on 28 January 2020, the prosecutor issued a handwritten note, which reads "*Nolle prosequi. Accused has provided his licence compliance checklist. Also provided that shows that everything was in order on the day in question. As inspected by Columbus Ncuthe. No document brought to court either.*"
9. There is a handwritten inventory of the stock of alcoholic beverages allegedly seized, coupled with invoices from Bootleggers Liquor Merchants in favour of the Applicant attached to the Founding Affidavit.

10. On the Applicant's version, when the police officers arrived at the premises, they did not ask Mr Amada or any staff members whether or not the restaurant was licenced to trade in alcohol. They did not inspect the liquor licence which was hanging on the wall. They searched the premises and seized the alcohol, without a search warrant.
11. In annexures "LAC5", "LAC6", "LAC7" and "LAC8", the Applicant has provided proof of purchase on 13 December 2019, 14 December 2019 and 15 December 2019 of stock to the value of R3 942.54, R13 671.87, R486.76 and R4 066.90 respectively.
12. Whilst the Applicant avers that the value of the stock seized and described in annexures "LAC4A", "LAC4B", "LAC4C", "LAC4D" and "LAC4E" totalled R135 213.00, Mr Amadi alleges that he has been unable to locate the remaining proofs of purchase, as the police "*ransacked*" the premises. He has been unable to locate the file which contained the remaining proofs of purchase.
13. Mr Amadi alleges further that after the search and seizure, an official, Mr Columbus Ncuthe from the Gauteng Liquor Board arrived and compiled a checklist ("LAC9") indicating that the licence was renewed on 4 February 2019 and that "*the police confiscated liquor before my arrival*".

14. Mr Amadi avers further that the said licence was valid until 29 December 2019. He submits that as such, the search and seizure should be declared unlawful, coupled with an order for the return of the seized alcohol.
15. A copy of the 2019 liquor licence was annexed as "LAC10" (CaseLines 001/38), from which it is apparent that the Applicant is the holder of a licence renewed on 4 February 2019, valid for 2019/2020 and expired upon 29 December 2019, for which fees, including a 100% penalty was paid in the sum of R9 000.00. Pasted to such annexure is the proof of payment at FNB, Southdale date-stamped 4 February 2019.
16. I find that it is thus beyond any doubt that the premises was licenced to trade in alcohol, at the time of the search and seizure on 16 December 2019.
17. Mr Amadi attended at Moffatview Police Station on 29 January 2020 to inquire as to when the seized alcohol would be returned to the Applicant. He requested a copy of the SAP13 form, confirming the items that had been booked into safe storage at the Police Station. He alleges that such visit did not yield any positive results. He was merely sent from pillar to post.
18. On 4 March 2020, the Applicant's attorneys of record issued demands to the Minister of Police, the National Commissioner of the South African Police and the Provincial Commissioner of the South African Police. Such demands were for the release of the seized alcohol within fourteen days.
19. In response to the Founding Affidavit, the Station Commander of the Brixton Police Station, Mkhacani Maluleke deposed to an Answering Affidavit in which

he alleged that the Brixton and Moffatview Police Stations had conducted a joint operation, "*Operation Okae Molao*" "the operation". The operation was targeted at liquor outlets and second-hand dealers to check for compliance with liquor laws.

20. In fulfilment of the purpose of the operation, Maluleke, with some SAPS members attended at the Applicant's premises to inspect and check for compliance with the Liquor Act.
21. Maluleke alleges that the Liquor Licence was not displayed anywhere on the premises. He alleges further that he approached Mr Amadi, who could not furnish him or any of the SAPS members with the required liquor licence.
22. Mr Maluleke avers further that Mr Amadi was afforded an opportunity for a representative to bring the liquor licence.
23. Mr Maluleke alleges further that a few minutes later a gentleman arrived and introduced himself as an official from the Gauteng Liquor Board who could not produce a licence and asked "*If we could talk and come to an arrangement of some sort.*" Maluleke alleged that he refused to have any arrangements, that when he realised that a liquor licence was not forthcoming, he proceeded to confiscate all the liquor.
24. Mr Maluleke alleged further that before the liquor was removed, Mr Amadi counted the liquor with him and compiled a record annexed to the Answering Affidavit as "AA2" (CaseLines 009/32), constituting a handwritten inventory on

official SAPS documentation. Pertinent to note, alongside each item, a value appears in the far-right column of such inventory.

25. Mr Maluleke alleges further that the Applicant's "LAC2" bears a date-stamp of 6 January 2020, whereas the incident subject to this litigation occurred on 16 December 2019. In making this allegation (paragraph 29 of the Answering Affidavit (CaseLines 009/09), Mr Maluleke avers further "*In this regard, the Applicant has failed to produce any evidence showing that it had a licence as and when such was required on 16 December 2019.*"

26. Mr Maluleke alleges further in paragraph 31 of the Answering Affidavit that "*The Applicant has provided annexure "LAC10". The document attached as "LAC10" attached to the Applicant's Founding Affidavit is titled "Advice of Annual Renewal Fees payable in respect of a Liquor Licence for the year 2019/2020... This document is not a liquor licence as required under the Act but just an advice of annual renewal fees. A licence will be in the form of LAC2."*

27. Most disturbingly, Mr Maluleke goes on to allege at paragraph 32:

"Because the Applicant failed to provide the liquor licence for the period in question, the SAPS has subsequently destroyed the confiscated liquor."

28. There is no further evidence from the Respondents as to when a decision was taken to destroy the liquor, by whom such decision was taken, on whose

authority such decision was taken, the enabling legislation authorising such decision, or the reasons for the taking of such decision.

29. At paragraph 46.2 of the Answering Affidavit, Mr Maluleke alleges further:

“Even if the Honourable Court were to find that the Applicant is entitled to the return of the confiscated alcohol, I plead that the confiscated alcohol has since been destroyed.”

30. Again, Mr Maluleke failed to disclose any details surrounding the destruction of the alcohol.

31. Given the two conflicting versions before the court as to whether or not there was a licence on display at the Applicant’s premises on 16 December 2019, and, whether or not the SAPS had asked to inspect such licence prior to the search and seizure, it is not competent for this court to grant the declaratory order sought.

32. This court cannot grant such order in the face of two mutually destructive versions, on Affidavit. If the version of the Respondent is true, the police would then have been entitled to seize the alcohol.

33. The failure to grant such declaratory order is not to be construed to mean that the search and seizure was lawful. On the contrary, on the Applicant’s version,

the search and seizure was most certainly unlawful. Converse to this position, on the Respondents' version, the search and seizure was lawful. The only way in which the Applicant could pursue its relief for such declaratory order, would be by way of trial action, where *viva voce* evidence could be led, witnesses could be called who could be examined and cross-examined with reference to the annexures attached to the Affidavits filed of record herein.

34. Whilst the Applicant fails in its relief for the declaratory order sought, I am nevertheless satisfied that the SAPS had no right to destroy the liquor seized. The alcohol seized was the property of the Applicant, who is entitled to the return thereof. The destruction of the alcohol leads to an impossibility for it to be returned.
35. Whether or not the Applicant's licence was on display, is not relevant for determination as to whether the Applicant is entitled to the return of the goods. From the full conspectus of the evidence, it is clear that the Applicant was a lawful licence holder. Even if the licence could not be produced at the time of the search, its existence and legitimacy was made known to all parties concerned very shortly after the search and seizure.
36. There was no reason for Mr Amadi to have been shunted from pillar to post, during the course of his inquiry at the Moffatview Police Station in January 2020, when seeking its return. There was no reason for a failure to abide by the demands effected by the Applicant's attorneys.

37. There was no good reason for the Respondents to have destroyed the liquor, least of all without a competent investigation and inquiry with the Applicant, prior such destruction. To such end, the destruction of the liquor was unlawful, leaving the Respondents liable to pay the Applicant for its value.
38. The disposal of property seized by the police is regulated, *inter alia*, under section 31(1)(a) of the Criminal Procedure Act. In terms of this section, if no criminal proceedings are instituted in connection with any seized article, the articles shall be returned to the person from whom it was seized, if such person may lawfully possess it.
39. Under sections 31(1)(b) and 31(2), in circumstances where the person who may lawfully possess the property is unknown or cannot be reached (and this is not the case), the property shall be forfeited to the state. No provision is made for the destruction of the property by the SAPS.
40. The only issue which remains for determination is the quantum of the Applicant's claim.
41. The Respondents dispute the amount of R135 213.00 claimed by the Applicant in respect of the value of the alcohol seized. The Respondents allege that they counted the alcohol in the presence of Mr Amandi, before it was seized and that the estimated value was R18 950.75. In support of this allegation, the Respondents rely on annexures "AA2" and "AA3" to the Answering Affidavit.

42. In the Applicant's Heads of Argument, it is correctly pointed out that annexures "AA2" and "AA3" are not receipts contemplated in section 121 of the Criminal Procedure Act, but mere SAP13 forms, which are completed upon arrival at the police station. Section 121 of the Criminal Procedure Act requires the Respondents to issue to the Applicant a receipt of the liquor that was seized. No such receipt has been adduced.
43. The Applicant's argument was that "AA2" and "AA3" do not in any way reflect what was seized at the restaurant but rather what arrived at the police station. The Applicant argued that the SAP13 could not be used to prove the record and value of the items that were seized.
44. Converse to this position, the Applicant, in "LAC4" ('LAC4A to "LAC4E') as well as "LAC5" to "LAC8" indicate the items seized as well as their value in the far right column. On the Applicant's version, the values total R135 213.00. A total is not reflected upon these annexures. The Applicant relies on its inability to produce the remaining receipts, as on its version, they were lost or misplaced when the premises was "ransacked" by the police.
45. On the Respondents' version, the Applicant has not proved its claim for R135 213.00 and that if the court determines that the Respondents are liable, the value of the items proved, per the receipts annexed, of R18 950.75, should be the amount refunded.

46. Claims cannot be quantified upon a speculative basis. A court relies on evidence. There is no evidence to support the balance of the Applicant's claim for the difference between R135 213.00 and R18 950.75. Accordingly, the court is only in a position to grant judgment for payment of R18 950.75, as such amount is proved to be the value of the stock that was seized, on a balance of probabilities.

47. Accordingly, I make the following Order:

47.1. The Respondents are jointly and severally ordered to pay to the Applicant, the sum of R18 950.75, plus interest thereon *a tempore morae*, from 16 December 2019, to date of payment;

47.2. The Respondent are to pay the costs of the application, on the scale as between party and party.

NOCHUMSOHN, G

ACTING JUDGE OF THE HIGH COURT

On behalf of Applicant: Advocate

Instructed by:

On behalf of the Respondents: Advocate

Instructed by:

Date of Hearing:

Date of Judgment: