



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

CASE NO: 2023 - 100218

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

DATE
SIGNATURE

In the application by

**ALEKOS VONOPARTIS, t/a LUCKY HAVEN
ENTERTAINMENT LOUNGE**

Applicant

And

**THE MINISTER OF POLICE
SERGEANT RAGOGO N.O.
THE STATION COMMANDER: SAPS EDENVALE N.O.**

First Respondent
Second Respondent
Third Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Mandament van spolie – requirements – unlawful deprivation of undisturbed and peaceful possession

Order

[1] In this matter I make the following order:

1. *The application is dismissed;*
2. *The applicant is ordered to pay the costs of the application.*

[2] The reasons for the order follow below.

Introduction

[3] This is a spoliation application brought in the urgent court. It is common cause that members of the South African police accompanied by the second respondent seized computers and other items at the applicant's premises on 28 or 29 September 2023 and that they did so without a warrant and without consent. The date of 28 September 2023 appears in the notice of motion but in the founding affidavit reference is made to 29 September 2023. The date in the answering affidavit is also the 28th.

[4] The requirements for a spoliation order is that the applicant must be unlawfully dispossessed of his or her peaceful and undisturbed possession. The *mandament van spolie* originated in the canon law.¹ The remedy was described in the following terms by Van Blerk JA in *Yeko v Qana*:²

“The fundamental principle of the remedy is that no one is allowed to take the law into his own hands. All that the spoliatus has to prove, is possession of a kind which warrants the protection accorded by the remedy, and that he was unlawfully ousted.”

[5] In *Bisschoff and Others v Welbeplan Boerdery (Pty) Ltd*³ Dlodlo JA described the requirements of the *mandament van spolie* as follows:

“[5] The requirements for the mandament van spolie are trite: (a) peaceful and undisturbed possession of a thing; and (b) unlawful deprivation of such possession. The mandament van spolie is rooted in the rule of law and its main purpose is to preserve public order by preventing persons from taking the law into their own hands.” [footnotes omitted]

[6] In this matter dispossession is common cause and the respondents dispute the applicant’s entitlement to the relief sought on the basis that the disposition was not unlawful.

[7] The first respondent is the Minister of Police, inaccurately described as the Minister of the SAPS in the founding affidavit. Nothing turns on this misdescription.

The second respondent is cited *nomine officio* as A police officer but he is in fact an

¹ Kleyn 'Possession' in Zimmermann & Visser (eds) *Southern Cross-Civil Law and Common Law in South Africa* (1996) 835 – 46, referred to with approval by Cameron JA the Supreme Court of Appeal in *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA) para 21.

² *Yeko v Qana* 1973 (4) SA 735 (A) 739G.

³ *Bisschoff and Others v Welbeplan Boerdery (Pty) Ltd* 2021 (5) SA 54 (SCA). See also *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA) para 22; *Ngqukumba v Minister of Safety and Security and Others* 2014 (5) SA 112 (CC) paras 10 to 12, *Blendrite (Pty) Ltd and Another v Moonisami and Another* 2021 (5) SA 61 (SCA) paras 6 to 8, and Van Loggerenberg Erasmus: *Superior Court Practice* RS20, 2022, D7-1. (Mandamenten van Spolie)

officer of the Boksburg Specialised Services Unit of the Ekurhuleni Metro Police, a Division of the Ekurhuleni Municipality. He deposed to a confirmatory answering affidavit.

His employer, the Municipality, is not cited. I do not find it necessary to decide whether the non-joinder of the municipality constitutes a non-joinder. The issue of non-joinder was not raised by the first respondent.

The third respondent is the station commander, *nomine officio*, of the Edenvale police station where the confiscated items were booked into the SAP13 register.

[8] The applicant operates the business of an Internet cafe and has been doing so at these premises since 2015. He has a written lease with the landlord. He explains that on Friday, 29 September 2023 at 14h00 a 'warrantless search and seizure' was carried out by members of the South African police and the Ekurhuleni metropolitan police. The police confiscated 46 computer screens and computer boxes, an undisclosed amount of money, and five 32-inch television sets. He disputes the allegation that gambling happens at the premises.

[9] The applicant states that two police officers entered the premises without his consent or the consent of the employee then in charge of the premises. Her name is Ms Matle. They did not explain what the purpose of the visit was but they asked what business she was conducting. Ms Matle telephoned the applicant to inform him of the presence of the police officers and more police officers arrived. The police officers refused to identify themselves and when asked for a warrant said that they did not need a warrant.

[10] He was asked for a bribe and refused to pay. The items listed above were then seized. The police officers never produced a warrant and seized the items without consent. No explanation for the decision to seize the items was given but at some point in time reference was made to '*illegal gambling.*' The police officers refused to believe the explanation given that patrons of the business '*play games.*'

[11] He therefore brings a *mandament van spolie*, and seeks costs on the attorney and client scale.

[12] Sgt T Nengovhela deposed to an answering affidavit on behalf of the first respondent. He is the investigating officer and is stationed at the Provincial Investigation Unit of the Serious and Violent Crime Investigating Unit in Johannesburg. He states that the search and seizure was lawful in terms of section 22 of the Criminal Procedure Act 51 of 1977 and section 32 of the Cybercrimes Act 19 of 2020. The deponent relies also on the confirmatory affidavit by the second respondent who is, as already stated above, an officer of the metro police in Ekurhuleni. The second respondent was one of the officers present when the events outlined in the affidavits occurred.

[13] Sgt Nengovhela states that on the 28th members of the Ekurhuleni Metro Police received a tip off from an informant that illegal gambling was being conducted at the premises. They went to the premises pointed out by the informant. When they entered they noticed people gambling at machines. They noticed one female patron who had run out of tokens and who then went to the counter where she told the lady behind the counter that she had run out of tokens but that she would load tokens directly to her machine.

Officers then identified themselves and asked whether the business had a gambling licence to which the lady replied that she knew nothing and that she was merely doing her job and that she did not know that the activities were illegal. She explained that patrons would buy vouchers or tokens or load tokens onto their machines and when they won she would pay them from her counter.

[14] When she was asked to produce a gambling licence she called someone she referred to as her boss on the telephone and put him on speaker. This was obviously the applicant. This person instructed her to close the shop and he started disabling the machines remotely. Police officers and metro police officers then informed them both that the items would be seized for further investigation.

[15] The police members believed that they had a reasonable suspicion that a crime was being committed and that a warrant would be issued if they applied for it, but it would defeat the purpose to do so because by the time they got a warrant the evidence would have been removed. They were informed that the owner of the business was already removing the evidence remotely.

[16] The employee identified herself as Ms M Ndlovu. The inference is that she is the Ms Matle referred to by the applicant.

[17] The deponent to the main answering affidavit also explains why the answering affidavit was filed later than anticipated. It was difficult to obtain instructions as the operation was a joint operation by the South African police and to the Ekurhuleni metro police. Furthermore the procurement process for the appointment of counsel unavoidably took time.

[18] In respect of urgency I am satisfied that the case for urgency is made out in the founding papers and that the explanation by the first respondent's deponent is an acceptable explanation. I do not lose sight of the fact that the affidavits and particularly those of the respondent were prepared in great haste and are less than perfect. I am however indebted to both counsel for their helpful heads of argument.

[19] I now turn to the legal principles.

19.1 The so-called Plascon-Evans rule applies to determining the facts on affidavit.⁴

19.2 The onus is on the respondents to justify the seizure. The Plascon-Evans rule is not affected by the onus.

19.3 The crisp question is whether the items were removed lawfully or lawfully.

19.4 A police officer may seize any article which on reasonable grounds are suspected of being used in the commission of an offence and may do so without a warrant if he or she on reasonable grounds believed that a search warrant will be issued under section 29 (1) (a) of the Cybercrimes Act or section 21 of the Criminal Procedure Act if applied for and that the delay in obtaining such warrant would defeat the object of the search and

⁴ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634C to 635B and *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) para 12.

seizure.⁵

- 19.5 The police officer's belief must be viewed objectively. In "*L.S.D." Ltd . & Others v Vachell & Others*⁶ Bristowe J said:

"I think a policeman has to show to the satisfaction of the Court that he believes that reasonable grounds exist. It is not enough for him to say that he believes. He must show why he believes. It is said that the police are not bound to disclose their information. I agree with that. I do not desire to compel the police to disclose their information, but at all events a man cannot be held to have reasonable grounds for believing that his warrant is going to be defeated merely because he says that he believes it. He has to state the reason why he believes it."

- 19.6 The court must jealously guard the Constitution and must strive to uphold the rights guaranteed in the Constitution.
- 19.7 In a Constitutional state the rule of law must be upheld and the ability of the authorities to investigate possible criminal conduct must be pursued with vigour.

[20] In this matter they police received information from an informant and the premises were pointed out to them. From the totality of the evidence I make the inference that the premises were open to the public.

There is no evidence to suggest that the police officers had information in their possession at the time when the premises were identified to them that would have justified the issuing of a warrant before they went there.

[21] The police officers entered, and once inside they made certain observations. They observed events that raised the suspicion that patrons were not merely playing games but were gambling at the internet café.

⁵ See section 32 of the Cybercrimes Act and section 22 of the Criminal Procedure Act.

⁶ "*L.S.D." Ltd . & Others v Vachell & Others* 1918 WLD 127 at 134.

Gambling is regulated and requires a licence. They asked for a licence and none could be produced.

[22] It was only at that point in time that the officers had information to justify a reasonable belief that unlicensed gambling was being carried on, and that a search warrant would be issued to them if they applied.

The question that now arises is whether they ought to have gone to a magistrate for a warrant before seizing the items, or whether they had reasonable grounds to believe that the delay in obtaining the warrant would defeat the object of the search.

I conclude that there were reasonable grounds so to believe.

[23] It follows that the disposition was not unlawful and that the application must fail. Cost must follow the result.

[24] For the reasons set out above I make the order in paragraph 1.

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **24 OCTOBER 2023**.

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INSTRUCTED BY:

N XENOPHONTOS ATTORNEYS

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T N MLAMBO

INSTRUCTED BY:

STATE ATTORNEY

DATE OF ARGUMENT:

20 OCTOBER 2023

DATE OF JUDGMENT:

24 OCTOBER 2023