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 — First Respondent
SERGEANT RAGOGO N.O. — Second Respondent
THE STATION COMMANDER: SAPS EDENVALE N.O. — Third Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Application for leave to appeal – section 17(1)(a)(i) and (ii) of the Superior Courts Act, 10 of 2013 – reasonable prospect of success or other compelling reason why appeal should be heard

Order

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

1. *The applicant is granted leave to appeal to the Full Court of the Gauteng Division, Johannesburg;*
2. *The costs of this application shall be costs in the appeal.*

[2] The reasons for the order follow below.

Introduction

[3] This is an application for leave to appeal against a decision[1] handed down on 24 October 2023.

[4] The applicant brought a spoliation application arising out the seizure of electronic equipment by the South African Police at the Lucky Haven Entertainment Lounge where he carries on business as an internet cafe. The police members suspected that illegal gambling was being carried on at the venue and the purpose of the seizure was to analyse the computers seized from Lucky Haven to determine if there were gambling programs on the computers.

[5] It was common cause that the applicant had been deprived of possession and that the search and seizure was carried out without a warrant. The respondent relied on section 22 of the Criminal Procedure Act 51 of 1977 and section 32 of the Cybercrimes Act 19 of 2020.

[6] Mr Jagga who appeared for the applicant argued that the threshold for reliance on the two sections is higher than I found it to be in the judgment.[2] The police officials should have done more to place evidence before the Court to illustrate why –

> 6.1 they could not obtain a warrant on the information at their disposal before attending at the applicant's premises;

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[1] *Alekos Vonopartis t/a Lucky Haven Entertainment Lounge v Minister of Police and others* [2023] JOL 61440 (GJ).

[2] Judgment paras 12 to 15, 19.4 to 19.7,

6.2 they formed the opinion that the premises and the equipment seized were used to illegal gambling activities;

6.3 they believed that a delay in obtaining such warrant would defeat the object of the search and seizure.

[7] He referred me to judgments by Hughes AJ (as she then was) in *Ngobeni t/a Internet Lounge v Minister of Safety and Security N.O. and Others*[3] and by van der Westhuizen J in *Ethypersadh v Minister of Police N.O and Others.*[4] In the first-mentioned judgment Hughes AJ said with reference to the facts then before the Court:

> *"[14] The respondents have advanced that they "were approached by member of the public who complained" that illegal gambling was taking place at the applicant's premises. No other information is at hand with regards to the names of the people who made the complaint, the content of their complaint or even whether the complaint was reliable in the circumstances. I am told that on proceeding to verify the allegations the third respondent established "upon closer look at the computer screens we indeed discovered that gambling was taking place in the premises". No elaboration on what form of gambling was taking place and what appeared on the screens of the computers that constituted gambling. Based on the above the third respondent states "...the action taken by myself and my colleagues were based on reasonable suspicion that illegal online gambling was taking place in the premises, and that our failure to obtain the search warrant was motivated by the fact that the illegal operator would have found an opportunity to delete evidence in relation to the illegal gambling..."*
>
> *[15] For the applicant to succeed in the application he must show that the dispossession in the circumstances was unlawful, that being without his consent or without due legal process..*
>
> *[16] Since the search and seizure occurred without his consent it only leaves the*

[3] *Ngobeni t/a Internet Lounge v Minister of Safety and Security N.O. and Others* [2014] ZAGPPHC 629

[4] *Ethypersadh v Minister of Police N.O and Others* [2023] ZAGPPHC 595.

fact that the respondents were of the opinion or believe that on reasonable grounds they would have obtained a warrant as they would have been able to satisfy the Magistrate or Judge in obtaining said warrant.

[17] On examination of the facts of this case I am not convinced that with the information the respondents had at that the specific time they would have satisfied a Magistrate or Judge in obtaining a warrant. The reliability of the source from which they received the complaint is problematic for the respondents. Further, the fact that gambling seems to have taken place via what appeared on the screens of the computers, to my mind is not sufficient to conclude that gambling was in fact taking place. No information is advanced with regards to the form, method and type of gambling that was taking place. See unreported case of the Supreme Court of Appeals where by Lewis JA said in Minister of Safety and Security v K. Ndiniso (286/06) [2007] ZASCA 29:

> *"[7] A police officer may seize an article, without a warrant, only where he believes on reasonable grounds that he would be able to satisfy a magistrate or judge that the vehicle may afford evidence of the commission or suspected commission of an offence. The only ground for such reasonable belief advanced by the State is that a report had been received by Somana about the disparity between the model of the vehicle itself and that reflected on the registration papers. The court below considered that this was insufficient evidence to determine whether Somana's belief that he would obtain a search warrant was based on reasonable grounds.*
>
> *[8] The real difficulty with the State's case is that no evidence is proffered by it as to the nature or the status of the 'report' made to Somana: there is no information provided by the State as to who made the report; what the capacity and status of the person was; where the information had been obtained or why it should be regarded as reliable. There is a mere assertion that a report indicated that there was a difference between the model of the vehicle seen by Somana and its description on the registration papers. Would that satisfy the magistrate or judge apprised of an application for a search and seizure warrant under s 21 think not. No facts were advanced to justify a finding that Somana's belief was based on reasonable grounds.*
>
> *[9] In the circumstances I consider that the vehicle was unlawfully seized: there was no compliance with the provisions of ss 20 and 22 of the Act. Ndiniso is thus entitled to the return of the vehicle. "*

[18] In my view no facts have been advanced to justify reasonable grounds existing to search and seize the applicants premises and property without a warrant. In the circumstances, I consider the search and seizure that took place on 2 August 2014 at the applicant's premises unlawful."

[8] In this application for leave to appeal I need not decide whether I was right or wrong; what I have to decide is whether there is a "*sound rational basis for the conclusion that there are prospects of success"* on appeal.[5] Without losing sight of the fact that each case must be determined on its own facts, I conclude that another court might come to a different conclusion on the facts of this case and that leave to appeal is therefore merited.[6]

[9] I debated with both counsel whether the application is not moot or about to become moot, as the equipment was seized to permit the authorities to conduct certain tests to determine whether or not the equipment was used for illegal gambling purposes – an allegation denied on the applicant's affidavits. Once the tests are done the equipment will either be returned to the applicant as possessor, or form the subject of further litigation.

[10] Counsel assured me however that the matter is not moot and not about to become moot.

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

J MOORCROFT

[5] *Ramakatsa and others v African National Congress and another* [2021] JOL 49993 (SCA), also reported as *Ramakatsa v ANC* 2021 ZASCA 31. Section 17(1)(a)(i) and (ii) of the Superior Courts Act provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

[6] See also Van Loggerenberg *Erasmus: Superior Court Practice* A2-55, *Shinga v The State and another (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae); S v O'Connell and others* 2007 (2) SACR 28 (CC), *Member of the Executive Council for Health, Eastern Cape v Mkhitha and another* [2016] JOL 36940 (SCA) para 16, and *KwaZulu-Natal Law Society v Sharma* [2017] JOL 37724 (KZP) para 29.

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 **20 NOVEMBER 2023**.

COUNSEL FOR THE APPLICANT:	N JAGGA
INSTRUCTED BY:	N XENOPHONTOS ATTORNEYS
COUNSEL FOR THE RESPONDENTS:	T N MLAMBO
INSTRUCTED BY:	STATE ATTORNEY
DATE OF ARGUMENT:	16 NOVEMBER 2023
DATE OF JUDGMENT:	20 NOVEMBER 2023