IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 2023-064414

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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In the matter between:

SELONA ETHYPERSADH	Applicant
and	
THE MINISTER OF POLICE N.O.	First Respondent
SERGEANT SYDNEY PHAHLANE	Second Respondent
THE ACTING SENIOR MAGISTRATE PRETORIA NORTH: T V THELEDE N.O.	Third Respondent

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JUDGMENT

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van der Westhuizen, J

[1] The applicant approached this court on an urgent basis and sought the following relief in the Notice of Motion:

> "1. the forms, time periods and service in terms of Rule 6(12) of the Uniform Rules of Court are dispensed with and this matter is heard as one of urgency;
>
> 2. the warrant issued by the Third Respondent on 24 May 2023 (the search warrant) being annexure FA2 to the founding affidavit and executed on 26 June 2023, is set aside;
>
> 3. in the alternative to paragraph 2, the decision of the Third Respondent in authorising and issuing the search warrant is reviewed and set aside and/or the search warrant is declared unlawful and void and is set aside;
>
> 4. the Second Respondent and any other person acting as agent on his or the First Respondent's behalf (including the SAPS) who is in possession or control of the Applicant's goods/items that were seized (as set out in Annexure A to the notice of motion) shall forthwith restore to the Applicant possession of such goods/items and forthwith return same to the Applicant at her business premises, which are situate at Shop 23, Northpark Mall Shopping Centre, Rachel De Beer and Burger Street, Pretoria North;
>
> 5. the First Respondent shall pay the costs of this application on the scale as between attorney and client;
>
> 6. in the event that the Second and/or the Third Respondent opposing this application, such Respondent/s shall pay

> the costs hereof jointly and severally with the First Respondent;"

[2] This application was opposed by the first and second respondents, the Minister of Police and Sergeant Phahlane, the police officer who applied for the search and seizure warrant and who executed it. The third respondent, the magistrate who issued the vexed warrant, did not join issue.

[3] Certain points *in limine* were raised on behalf of the respondents. Those were: the issue of non-urgency; alleged misleading averments by the applicant; failure to meet the requirements for spoliation; non-joinder of the Gambling Board; non-compliance with the provisions of Rule 41A.

[4] There is no merit in the submission that the applicant had not made a case for an urgent hearing of this matter. The execution of a search and seizure warrant where goods or items were attached and removed from the premises, may require urgent consideration by the courts and such would be dictated by the particular circumstances of the matter. In the present instance, I am of the view that the applicant has shown cause why this matter was to be considered on an urgent basis.

[5] The issue of spoliation is interlinked with the merits of an application for the setting aside of a search and seize warrant. It the warrant is found to be invalid or unlawful, it would follow that the goods or items seized should be returned. In that sense spoliation may be relevant. If however, the warrant was found to be valid and lawful, spoliation would not have occurred. The seizing of the goods or items would have occurred lawfully.

[6] The issue of the alleged non-joinder of the Gambling Board is a non-issue. The object of consideration in this matter is solely that of whether the issued searched and seizure warrant was lawfully issued

and whether it was valid. The interests of any other party is of no consequence. There is no merit in that pointe *in limine*.

[7] In respect of the alleged non-compliance with the provisions of Rule 41A, the point is without merit. An application brought on an urgent basis would of necessity not be subject to the provisions of Rule 41A. To require an applicant to state that there could be no compliance with the provisions of that Rule would be stating the obvious. There is no merit in that pointe *in limine*.

[8] The issue of the alleged misleading averments is not a true point *in limine*. It forms part of the consideration of the merits of the application and will be dealt with in that regard.

[9] A summary of the events that led to the launching of this application would suffice. From the evidence it is to be gleaned that during September/November 2022, the premises upon which the applicant conducts her business was visited by a police officer together with a person on behalf of the Gambling Board. Their apparent impression was that illegal gambling occurred on the premises. That situation remained at the time when the application for a search and seizure warrant was made.

[10] Sections 19, 20, and 21 of the Criminal Procedure Act, 51 of 1977 (CPA) provide for the issuing of a search and seizure warrant and stipulate the requirements therefor. Such warrant can also be applied for in terms of the provisions of section 29 of the Cybercrimes Act, 19 of 2020 (CCA). The provisions of that section read on to those contained in section 21 of the CPA. The mechanism to obtain a search and seizure warrant in terms of the latter act is through the provisions of section 21 of the CPA.

[11] In *Minister of Safety and Security v van der Merwe*[1] the court stipulated the requirements for a valid search and seizure warrant. The requirements for a search warrant was restated to that provided for in sections 20 and 21 of the CPA. An additional requirement as stipulated in the common law was considered and dealt with, namely that of intelligibility of the warrant. The Constitutional Court held that the core issue of that requirement was whether the warrant would be reasonably capable of a clear understanding of the warrant by the person tasked to execute the warrant and the person whose property was to be searched. The true issue being whether the warrant was valid despite the fact that the offences were not stipulated therein as required by section 21 of the CPA.

[12] In this regard, it was submitted on behalf of the applicant that the warrant did not stipulate the offences allegedly committed. The submission was that the various sections of the respective statutes that were stipulated were not offences in that those sections did not record an offence. That omission rendered the warrant unintelligible thus failing the requirement stipulated by the Constitutional Court in *van der Merwe, supra.* There is no merit in that submission. The relevant sections of the Gambling Acts clearly state, for instance, that to conduct a gambling operation a licence is required. It is clearly stated in the negative, namely that no gambling may be conducted on the premises without a licence. There is thus no merit in that submission.

[13] A further issue relied upon by the applicant was that the person who was authorised to conduct the search was not specified and neither was the premises identified upon which the search was to be conducted. The search warrant specifically recorded that the warrant was issued to the second respondent in order to conduct the search. The names of other persons who were authorised to assist the second respondent were clearly recorded. The premises to be searched is clearly stated in the annexures to the warrant. The specific premises of

[1] 2011(5) SA 61 (CC) [55] –[56]

the applicant's business is stipulated therein. Consequently, there is no merit in those submissions. The warrant clearly stipulated which items were to be seized. In my view the warrant was not overboard. A search and seizure warrant is directed to gather evidence for a possible prosecution.

[14] In my view, there was compliance with the requirements of sections 20 and 21 of the CPA, as well as the provisions of the stipulated sections of the Cybercrimes Act. In respect of the intelligibility requirement, as required by the common law and endorsed by the Constitutional Court, there was compliance with that requirement too. All the requirements in terms of the intelligibility requirement were met. The warrant was not overboard. It was clear and precise. The warrant was directed at possible illegal gambling activities. Those activities were observed during September/November 2022. On a further visit during May 2023, those activities were continuing, albeit that the applicant had taken over the business as a going concern earlier this year.

[15] In *van der Merwe, supra,* the Constitutional judgment, it was held that compliance with two objective jurisdictional facts should be met, namely, the existence of a reasonable suspicion that a crime has been committed, or is to be committed or may in future be committed, and secondly, the existence of reasonable grounds that the objects used or to be used in the committing of the crime will be found on the premises to be searched. It follows from the foregoing that the said two jurisdictional facts were in fact met.

[16] The test to be applied when determining whether there were reasonable grounds upon which the issuing authority could rely in determining whether or not to issue a warrant, is succinctly set out in *van der Merwe v Minister van Justisie et al.*[2] It was held that the test was a subjective test and not an objective one.

[2] *Van der Merwe v Minister van Polisie et al* 1995(2) SASV 471 (O) at 476f – 481d

[17] In that regard, the applicant alleges that the magistrate who issued the warrant could not have applied her mind appropriately for the following reasons:

(a) The application was premised upon unsigned “affidavits” that were allegedly mere statements and hearsay;

(b) The magistrate did not properly consider the facts and documents that were placed before her.

[18] In respect of the submission that the application was premised upon unsigned “affidavits” it related to two documents apparently attached to the founding affidavit of the application for a search and seizure warrant. Those documents, one by an inspector, Sello Makobane, employed by the Gauteng Gambling Board, and one by Sergeant Lolo Nkonyane of the SAPS. On the face thereof, both those documents bear a signature purporting to be that of the aforementioned gentlemen respectively. However, those documents appear not to have been commissioned. The founding affidavit by Sergeant Phahlane, appears to have been commissioned.

[19] In so far as the affidavit by Sergeant Phahlane relied upon the non-commissioned statements of the two aforementioned gentlemen, it may well be hearsay. He was informed of the dealings at the said premises and stated clearly that he suspected the committing of offences under the stated Gambling Acts. All that is required is a suspicion of the committing of an offence. The very purpose of the search and seizure warrant is to gather information with a view of possible prosecution. Even if those statements only constituted hearsay, such hearsay was sufficient to create a suspicion.

[20] It was held in the *van der Merwe* judgment referred to above in the Free State High Court (the second van der Merwe judgement) that no *onus* rested upon the issuing authority to show cause why reasonable

grounds existed for the issuing of the warrant. In *R v Ndabeni v The Minister of Law and Order*[3] it was held,

> *"The section empowered the magistrate or justice of the peace to issue the warrant once such grounds appeared to him to exist, not when they did exist."*[4]

[21] The aforesaid *dicta* supports the view that the approach is a subjective one, and not an objective one.

[22] It was further held in the second *van der Merwe* judgment, relying upon the *dicta* in *National Transport Commission and another v Chetty's Motor Transport (Pty) Ltd,*[5] that proving that the magistrate failed to apply his or her mind to the issues in accordance with the statue and the tenets of natural justice, or that the decision was grossly unreasonable to such a striking a degree, to warrant interference by the court, was a formidable onus.

[23] The applicant merely submitted broadly, and without specific grounds, that the magistrate did not apply her mind in a proper manner. That is not the approach to be taken as recorded earlier. It is to be shown on a preponderance of probability that the magistrate subjectively did not apply her mind appropriately.[6]

[24] It follows that the applicant has not discharged its *onus* on a preponderance of probabilities that subjectively the magistrate failed to apply her mind appropriately. There is no merit in the applicant's submission that the magistrate had simply rubberstamped the application.

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[3] 1984(3) SA 500 (D) at 513C
[4] That finding supports the view that even hearsay evidence may be considered.
[5] 1972(3) SA 726 (A) at 735F-H
[6] See *Ndabeni, supra,* at 513C

[25] Consequently, the application cannot succeed. It stands to be dismissed.

I grant the following order:

1. The application is dismissed with costs.

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C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

On behalf of Applicant:	M D Silver
Instructed by:	David Kotzen Attorneys
On behalf of Respondent:	Ms S Buthelezi
Instructed by:	State Attorney
Date of Hearing:	19 July 2023
Judgment handed down:	25 July 2023