Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

CASE NO: 1069/2021

In the matter between:

KENAKOBIZ TRADING 104 CC	Applicant
and	
THE MINISTER OF POLICE	First Respondent
THE COMMISSIONER OF POLICE, NORTHERN CAPE	Second Respondent
COL DANIE BRUWER	Third Respondent
THE DIRECTOR OF PUBLIC PROSECUTIONS NORTHERN CAPE	Fourth Respondent

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JUDGMENT

CHWARO AJ:

Introduction

[1] This is an application for the return of the items that were seized by members of the South African Police Service at the premises of the applicant on 26 February 2021. The application is premised on the provisions of section 31(1)(a) of the Criminal Procedure Act 51 of 1977, ("*the CPA*").

[2] The application is opposed by the Minister of Police, the Commissioner of Police, Northern Cape province and Colonel Danie Bruwer, ("*the first three respondents*"). Despite having been joined as the fourth respondent pursuant to a Court order granted on 10 June 2022, the Director of Public Prosecutions, Northern Cape, elected not to participate in the application.

Application for postponement

[3] At the commencement of the proceedings, *Mr Ramabula*, attorney for the first three respondents, sought to move an application for postponement of the matter. The application was opposed by the applicant. The first three respondents sought to postpone the matter on the ground that there was some material information that ought to be placed before the court before the determination of the merits. In the founding affidavit filed in support of this application, it was indicated that such information relates to the fact that the criminal proceedings against the accused persons mentioned below has been re-enrolled.

[4] After hearing the parties on the application for postponement, I dismissed the application and ordered the first three respondents to pay the necessary costs incurred by the applicant in opposing the application. My ruling was informed by the trite principles involved in applications for postponement, being that an applicant seeks an indulgence from the court, and the court is expected to exercise a judicial discretion after having due regard to the full and satisfactory exposition of the circumstances warranting such an application.[1]

[5] The notice of set down for the main application was served on the first three respondents on 30 August 2022, after the filing of heads of argument by both parties.

[1]Erasmus, Superior Court Practice, Vol 2, pp D1-552A and Herbstein and Van Winsen: The Civil Practice of the Superior Courts in South Africa, Vol 1 (5th ed) ,pp751-762

On 18 January 2023, the first three respondents' attempt to obtain an agreement from the applicant to postpone the matter was unsuccessful. On 19 January 2023, a substantive application was then served on the applicant, requiring of them to file an opposing affidavit by 08h00 on the day of the hearing of the main application.

[6] In the affidavit filed in support of the application for postponement, it was stated that it was only on 18 January 2023 that the deponent became aware of the fact that the criminal case against the below-mentioned accused was re-enrolled and that they appeared in court on 11 October 2022 and 5 December 2022 respectively. The criminal matter was remanded to 30 January 2023.

[7] It was further contended that the previous investigating officer in the matter passed away and the deponent was never informed about the details of the new investigating officer until their meeting on 18 January 2023. The workload of the attorney assigned the matter at the State Attorney's office was also mentioned as one of the reasons for launching the application on the eve of the hearing on the merits.

[8] The essence of the request for postponement, being that the criminal case has since been re-enrolled, is not an issue warranting postponement of the application for purposes of filing a supplementary affidavit to that effect. This aspect could have been narrated in a supplementary affidavit with an application to admit same being pursued during the hearing of the merits. In any event, the applicant does not solely rely on the fact that the criminal proceedings against the accused persons have been struck off the roll for its case for the return of the seized items.

[9] In the end, the belated application for postponement is as a result of miscommunication between the first three respondents, their legal manager and their legal representatives. The issue that they seek to place before this court is immaterial to the determination of the application and in my view, the prejudice that the applicant and the administration of justice stand to suffer far outweighs the prejudice that the first three respondents fell to suffer in refusing the application. In the premises, the application for postponement was refused on these grounds.

Merits of the application

Brief background

[10] Kenakobiz Trading 104 CC, ("*the applicant*") is a registered close corporation with three members, namely Khalil Habib, Georges Habib and Gladness Nkabinde. The applicant conducts business of purchasing and selling unpolished diamonds from its premises situated at 149 Phakamile Mija Road, Kimberley, where one of its members, Georges Habib, is an authorised representative by virtue of a licence issued to him in terms of the provisions of section 54 of the Diamonds Act 56 of 1986, ("*the Diamonds Act*").

[11] During early February 2021, members of the South African Police Service attached to the Serious Organised Crime Unit of the Directorate for Priority Crimes Investigation received a tip-off about an individual who was prepared to purchase uncut diamonds from illegal miners. An undercover operation pursuant to the provisions of section 252A of the CPA was put in place and duly authorised.

[12] On 26 February 2021, the sting operation involving the use of uncut diamonds belonging to the State was executed by two undercover police agents who targeted Georges Habib, as the person interested in purchasing uncut diamonds from illegal miners. They presented three uncut diamonds for sale to Georges Habib and Fady Farag at a place known as Fady Auto Repairs. Prior to the conclusion of the sale agreement, Georges Habib utilised certain equipment to test the three uncut diamonds that were presented to them and eventually offered to purchase one of these uncut diamonds at a price of R38 000-00.

[13] As soon as the sale agreement was concluded and the exchange of the money and the diamond completed, other members of the SAPS arrived at the scene after having received a pre-arranged signal from one of the undercover agents. An amount of R38 000-00 was handed over to the police captain who arrived at the scene by one of the undercover agents, as being the proceeds of the sale of

one uncut diamond. Georges Habib and Fady Farag were arrested for dealing in uncut diamonds, and the police proceeded to seize items that were allegedly utilised during the undercover operation, namely, a loop diamond tester, a tweezer, a scale, a colour machine and cash that was found at the premises amounting to R182 000-00.

[14] Messrs Georges Habib and Fady Farag made their first appearance in court on 1 March 2021 and were released on bail. Their criminal trial was postponed to 7 April 2021 for further investigations. On 7 April 2021, the criminal case was struck from the roll.

Contentions by the parties

[15] On 25 May 2021, the applicant launched the present application against the police for the return of the seized items. The police respondents oppose the application and the DPP, Northern Cape was subsequently joined as the fourth respondent following a preliminary point taken by the police premised on non-joinder and a Court order to that effect handed down on 10 June 2022.

[16] The applicant is the owner of the seized items. It contends that if indeed Georges Habib bought unpolished diamonds contrary to the provisions of section 19 of the Diamonds Act 56 of 1986, he was acting on a volition of his own as he was not authorised by the applicant to do so.

[17] The applicant further appreciates that the DPP, the fourth respondent, might decide to proceed with the criminal case against Georges Habib and Fady Farag at any stage but contends that it is unable to proceed with its normal business without the seized items and undertook to keep and avail them to the police and the prosecution to be used as evidence, should the need arise.

[18] The police respondents oppose the relief sought by the applicant on the basis that the items which form the subject matter of this application were seized in accordance with the provisions of section 20 of the CPA as they constitute an instrumentality of an offence in contravention of sections 21(b) read with sections

19(1), 20 and 82(a) of the Diamonds Act 56 of 1986 and may possibly be forfeited to the State in the event that the charged individuals are convicted.

Discussion

[19] Section 20 of the CPA reads as follows:

> "The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article) –
>
> (a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence whether within the Republic or elsewhere;
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> (b) which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or
>
> (c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence."

[20] On the other hand, section 31(1)(a) of the CPA provides as follows:

> "(1)(a) If no criminal proceedings are instituted in connection with any article referred to in section 30(c) or if it appears that such article is not required at the trial for purposes of evidence or for purposes of an order of court, the article shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such an article, to the person who may lawfully possess it."

[21] The interpretation and application of the above sections of the CPA has been a subject of numerous cases. An analysis of these decisions reveals that in general, section 20 of the CPA was enacted to facilitate the ability of the police to investigate and present evidence before a court of law for possible prosecution. However, the provisions of section 20 do not, without much ado, provide the police with a licence to retain possession of the seized goods for an indefinite period. The requirements of fairness and reasonableness would have to be applied to assess whether the seized

items ought to be released or not in accordance with the provisions of section 31(1)(a) of the CPA.[2]

[22] In **Van der Merwe and Another v Taylor NO and Others**[3], after having analysed the provisions of section 20 of the CPA, the Constitutional Court held that this section authorises the seizure of "anything" concerned with the commission or suspected commission of an offence.

[23] The authorities also dictate that in considering an application brought in terms of section 31(1)(a) of the CPA, a court ought to conduct a two-stage enquiry in determining whether the seized items may be returned to the person or entity claiming them. The first enquiry pertains to whether there are criminal proceedings that have been instituted or likely to be instituted. Once an answer to the above question is in the negative, then the second enquiry is whether the person claiming the return of the items, can lawfully possess such items.[4]

[24] In ***Van der Merwe***[5], the Constitutional Court further held that an application brought in terms of the provisions of section 31(1)(a) where there are pending criminal proceedings may turn out to be premature as the seized items may be required for trial purposes unless the applicant can demonstrate, on a balance of probabilities, that the seized article will not be needed for purposes of a subsequent trial.

[25] It is against the backdrop of the above authorities that the present application ought to be decided. It is common cause that at the time when this application was launched, the criminal proceedings against the accused persons were struck off from the roll. The applicant thus had a duty to adduce evidence, on a balance of probabilities, that there exists no possibility that the prosecution may be reinstituted or that the seized items might not be required during the ensuing criminal proceedings, if the prosecution decides to proceed.

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[2]Ntoyakhe v Minister of Safety and Security and Others 1999 (2) SACR 349 (E) at 355h-356a
[3]2008 (1) SA 1 (CC) at para 54
[4]See in this regard Dookie v Minister of Law and Order 1991 (2) SACR 153 (D) at 156c-g
[5]Footnote 2 above at paras 51 and 55. Se also Minister of Police and Another v Stanfield and Others 2020 (1) SACR 339 (SCA) at para 12

[26] The applicant has not suggested that there is no possibility of the criminal proceedings being re-enrolled or that the seized items may not be required. The applicant's case is simply that it is unable to conduct its operations without the seized items and thus would be prepared to provide an undertaking to keep and avail the items to the police and prosecution should it be required to do so for purposes of such criminal proceedings.

[27] The fact that the fourth respondent opted not to participate in the present application is of no assistance to the applicant. If indeed the applicant wanted to establish a case that the seized items might not be needed in the ensuing criminal case, it was incumbent on the applicant, as a party bearing the onus, to have sought and obtained confirmation from the fourth respondent to that effect.

[28] The return of the seized items to the applicant, whose ownership has not been placed in dispute, does not pass the hurdle of what is expected of a party seeking the return of the items in terms of section 31(1)(a) of the CPA. The applicant has not demonstrated that there might not be criminal proceedings being instituted or that the items might not be utilised in the possible criminal case.

[29] Even if this Court was to consider the dictates of fairness and reasonableness in relation to the business interests of the applicant, one cannot ignore the allegation that the applicant's authorised representative was the person involved in the alleged commission of the offence relating to the sale of uncut diamonds despite the contestation by the applicant that he was not authorised and thus acting on his own volition. There is no evidence suggesting that the applicant has appointed another person than its authorised representative referred to above, who would be more circumspect in dealing with items belonging to the applicant and utilised in the sale of uncut diamonds.

[30] An offer for an undertaking to keep and avail the seized items for purposes of the criminal trial is in my view, not sufficient to preserve the seized items in accordance with the spirit and purport of section 20 of the CPA seen against the

possible prejudice which the State may endure if such items are, for whatever reason, not availed in future.

[31] In the premises, the application falls to be dismissed with the consequent costs order.

ORDER

[32] The following order is made:

1. The application for postponement is dismissed.

2. The first to third respondents are ordered to pay the costs occasioned by the opposition of the application, jointly and severally, the one paying the other to be absolved.

3. The application for the return of the seized items is dismissed.

4. The applicant is ordered to pay the costs of the first to third respondents.

O.K. CHWARO
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISON, KIMBERLEY

DATE OF HEARING:	**20 January 2023**
DATE OF JUDGMENT:	**27 January 2023**

REPRESENTATIONS:

For the Applicant:	Adv W J Coetzee SC Instructed by: Engelsman Magabane Inc. Kimberley
For the First to Third Respondents:	Mr M Ramabulana Office of the State Attorney Kimberley