15-6-71

G.P.-S.33967—~~1968-69~~—1,000. J. ~~319.~~ 32/71

In the Supreme Court of South Africa.
In die Hooggeregshof van Suid-Afrika.

(APPELLATE Provincial Division.)
(Provinsiale Afdeling.)

Appeal in Civil Case.
Appèl in Siviele Saak.

CRESTIO MACHINES (EDMS.) BPK. *Appellant,*

versus

DIE AFDELINGS-SUPERINTENDENT S.A.POLISIE N.TVL. *Respondent*

Appellant's Attorney / Prokureur vir Appellant McIntyre & v.d.Post *Respondent's Attorney / Prokureur vir Respondent* [illegible]

Appellant's Advocate / Advokaat vir Appellant [illegible] *Respondent's Advocate / Advokaat vir Respondent* [illegible]

Set down for hearing on / Op die rol geplaas vir verhoor op 3 - 9 - 1971

T.P.A.

Bills Taxed.—Kosterekenings Getakseer.

Date. Datum.	Amount. Bedrag.	Initials. Paraaf.

Writ issued / Lasbrief uitgereik

Date and initials / Datum en paraaf

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA.

(APPÈLAFDELING)

In die saak tussen:

CRESTO MACHINES (EIENDOMS) BEPERK .....Appellant.

EN

DIE AFDELING SPEUROFFISIER S.A.
POLISIE, NOORD TRANSVAAL .....Respondent.

Coram: RUMPFF, WESSELS, POTGIETER, JANSEN ET TROLLIP, A.RR.

Verhoor: 3 September 1971. Gelewer: 1 Oktober 1971.

U I T S P R A A K.

POTGIETER, A.R.:

Ek stem saam dat die appèl met koste van die hand gewys moet word om die redes soos verstrek in die uitspraak van my kollega Trollip.

Ek stem egter saam met my kollega Rumpff dat Kennisgewing R. 571 ongeldig is om die redes vervat in sy uitspraak.

POTGIETER, A.R.

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA

(APPÈLAFDELING)

In die saak tussen:

CRESTO MACHINES (EIENDOMS) BEPERK ..... Appellant

en

DIE AFDELING SPEUROFFISIER S.A. POLISIE,
NOORD-TRANSVAAL ..... Respondent

CORAM: RUMPFF, WESSELS, POTGIETER, JANSEN et TROLLIP, A.RR.

VERHOOR: 3.9.1971. GELEWER: 1.10.1971.

U I T S P R A A K

RUMPFF, A.R. :

In hierdie saak het die appellant oorspronklik n dringende aansoek gedoen met kennisgewing van mosie in die Transvaalse Provinsiale Afdeling om n bevel met koste waardeur die respondent verbied word om „goedere van die appellant waarna verwys word in die aansoek" te verwyder. Hierdie goedere was 36 sg. vermaaklikheidsapparate waarvan die appellant die eienaar is maar wat hy verhuur aan n aantal kafeehouers. n Bevel nisi is op 1 Julie 1969 toegestaan waarin

die/.....

die respondent aangesê is om redes aan te voer waarom n finale bevel nie toegestaan sou word nie. Die respondent het die aansoek teengestaan en na aanhoor van die partye is die bevel nisi opgehef met koste. n Appèl van die appellant na n Volle Hof van die Transvaalse Provinsiale Afdeling het nie geslaag nie en n aansoek by daardie Hof om verlof om te appelleer is afgewys. Hierdie Hof het na aansoek verlof tot appèl toegestaan. Byna al die relevante feite en wetsbepalings wat in hierdie saak ter sprake is, verskyn in die volledig-gemotiveerde uitspraak van die Transvaalse Volle Hof soos gerapporteer in Cresto Machines (Edms.) Bpk. v. Die Afdelings-Speuroffisier S.A. Polisie, Noord-Transvaal, 1970 (4) S.A. 350 (T), en dit is m.i. onnodig om daardie feite en wetbepalings in hierdie uitspraak te herhaal.

Dit is nodig om kortliks te verwys na die standpunte ingeneem deur die applikant en die respondent in die twee Howe a quo en in hierdie Hof aangaande die lasbrief waarna respondent verwys het. In paragraaf 14 van die beantwoordende verklaring van respondent, onderteken deur Luitenant-Kolonel Stander, verbonde aan die staf van die Hoof

Speuroffisier, Noord-Transvaal, meld hy dat daar voldoende feite is om die appellant en die huurders te vervolg, dat hy 'n dossier aangelê het, dat hy op die punt was om ingevolge die bepalings van Wet No. 56 van 1955 en in besonder artikel 50 daarvan op te tree en dat hy „in besonder" in besit was van die nodige beslagleggingsbevel vir die masjiene, wat hy van 'n landdros gekry het. Namens appellant is in die repliserende verklaring die volgende gestel: „Ek dra geen kennis van die beslagleggingsbevel waarna deur die respondent verwys word nie en ontken dit". Verder word aangevoer in die verklaring dat indien die lasbrief vóór of op 30 Junie 1969 verkry is, dit ongeldig sou wees omdat Wet 51 van 1965 toe nog nie in werking getree het nie. Ook word aangevoer dat indien 'n lasbrief verkry is vóór die voorlopige interdik toegestaan is, die lasbrief ongeldig sou wees omdat daar geen redelike gronde was om te vermoed dat 'n misdaad gepleeg is ten aansien van die gemelde masjiene nie, dat die landdros nie in staat was om sy oordeel te laat geld oor die feite nie, dat respondent die landdros moes ingelig het dat die respondent die

beslaglegging sou bestry, weens en/sekere ander feite wat die landdros sou verhinder het om n regsgeldige oordeel te vel. Die respondent het nie probeer om die beweerde lasbrief of n afskrif daarvan voor die Hof te lê nie en die appellant het nie aansoek gedoen vir blootlegging daarvan onder reël 35 van die Hofreëls nie, en die Hof self het nie gelas onder reël 35 (11) dat die lasbrief voorgelê word nie. In hierdie Hof het die appellant se advokaat aangevoer dat die Volle Hof gefouteer het deur hom uit te laat oor die kwessie van die betrokke lasbrief omdat Regter Human hom nie daaroor uitgespreek het nie en die kwessie nie in die Volle Hof beredeneer is nie. Hy voer aan dat die respondent die lasbrief moes bewys het en dit nie gedoen het nie en dat die enigste twee punte voor die Volle Hof was die versuim van Regter Human om viva voce-getuienis te gelas en die regsgeldigheid van Kennisgewing R.571. In sy skriftelike betoogpunte het die advokaat van die respondent hom nie uitdruklik beroep op die bestaan van n geldige lasbrief nie maar alleen die bewerings van die appellant omtrent die bewyslas ontken. By navraag deur hierdie Hof het die advokaat

mondelings verklaar dat hy hom „in die alternatief" op die lasbrief verlaat. Die Volle Hof het, soos uit sy uitspraak blyk, die kwessie van die betrokke lasbrief behandel en op bl. 366 gesê:

> „Hoe dit ook al sy, die Hof a quo het geen bevinding oor die bestaan al dan nie van die beweerde lasbrief gemaak nie, en dit word ook nie nou gedoen nie. Al wat ek wil aandui met wat ek in verband met die lasbrief gesê het, is dat, vir solank as wat daar onsekerheid heers oor die vraag of dit bestaan of nie, die verlening van n permanente interdik klaarblyklik buite die kwessie is."

Uit die uitspraak van Regter Human, en uit wat aan ons in hierdie Hof meegedeel is, wil dit voorkom dat by die aanvang van die verhoor van die aansoek die appellant se advokaat die geldigheid van Kennisgewing R.571 aangeveg het en ook aanvaar het dat daar n feitegeskil was, en dat die advokate hulle toegespits het op die geskil wat ontstaan het in verband met die vraag of die apparate as n gelukspel beskou kan word en of daar op verwed word. Die houding van die advokaat van die respondent was dat die Hof die aansoek moes

afwys/.....

afwys vanweë die feit dat n feitegeskil ontstaan het van so n aard dat dit deur n verhoor beslis moes word. Dit skyn asof nòg die advokaat van appellant, nòg die advokaat van respondent die lasbrief as afsonderlike geskilpunt beredeneer het. Regter Human het in sy uitspraak ook nie daarna verwys nie. Vir doeleindes van hierdie uitspraak is dit m.i. onnodig om te spekuleer oor wat in verband met hierdie geskilpunt sou kon gebeur het, indien die Hof sou beslis het onder Reël 6 (5) (g) dat mondelinge getuienis oor bepaalde geskilpunte aangehoor word. In verband met die vraag op wie die bewyslas ten opsigte van die lasbrief gerus het, het ek die uitspraak van my kollega Trollip gelees, maar ek is nie oortuig dat in die omstandighede van hierdie saak daar n afstanddoening deur die appellant was van die vereiste dat die lasbrief of n afskrif daarvan, deur die respondent voor die Hof gelê moes gewees het nie, en dat weens n afstanddoening die bewyslas op appellant gerus het om te bewys dat die lasbrief nie bestaan het nie. Dit is egter onnodig om verder op hierdie probleem in te gaan omdat ek van mening is, soos ek later sal aantoon, dat, afgesien van die lasbrief, die appellant nie kan slaag nie.

Voordat/..

Voordat die betoogpunte wat in hierdie Hof aangevoer is, behandel word, is dit nodig om te meld dat namens respondent aangevoer is dat daar by 'n aansoek om 'n interdik geen bewyslas op 'n respondent berus nie. In die twee Howe a quo is hierdie vraagstuk nie aangeroer nie. In sy betoogpunte omtrent die bewyslas beroep die respondent hom op wat deur Regter Williamson in Free State Gold Areas Ltd. v. Merriespruit (Orange Free State) Gold Mining Co. Ltd. and Another, 1961 (2) 505 op bl. 524 (T), gesê het, nl.:

> „Whatever the position may be in Scotland and may have been in Holland, it must be accepted on the authorities in this case that to succeed in its application in the present proceedings for an interdict the applicant must show on the papers that on a balance of probabilities it has a clear right, that its apprehension of damage to that right being caused by the respondents' acts is a reasonable apprehension in the circumstances and that no other adequate remedy is available. No onus rests on the respondents to establish any fact or facts in order to negative the applicant's right to an interdict."

Ek dink nie dat hierdie woorde sonder meer van toepassing gemaak kan word op die geskilpunte in die

onderhawige/...

onderhawige saak nie. 'n Aansoekdoener wat sou beweer dat hy eienaar is van 'n saak, dat die respondent dreig om sonder sy toestemming die saak weg te neem, sou 'n interdik kon bekom tensy die respondent sou bewys dat hy geregtig is om die saak weg te neem. Dieselfde bewyslas rus op 'n party teen wie beweer word dat hy 'n wederregtelike arrestasie wil pleeg. Aan die ander kant is die onderhawige geval m.i. nie so eenvoudig soos die hierbogenoemde voorbeelde nie. Daar is geen bewering dat die applikant verwag het dat die Polisie sonder lasbrief sou poog om beslag te lê op die masjiene nie, sodat die appellant moes verwag het dat voordat beslaglegging sou plaasvind, 'n lasbrief onder artikel 42 van Wet No. 56 van 1955 verkry sou gewees het. Op 'n stadium voordat beslaglegging plaasvind gaan appellant na die Hof en beweer dat geen geldige beslaglegging kan plaasvind nie omdat daar geen redelike gronde bestaan vir die vereiste vermoede nie.

Dis gemene saak dat wanneer 'n lasbrief uitgereik is, beslaglegging alleen gestuit kan word deur 'n tersydestelling van die lasbrief en dat die bewyslas op die

persoon rus wat beweer dat die lasbrief om een of ander rede ongeldig is. Wanneer die appellant in die onderhawige geval beweer dat daar geen redelike gronde vir die vereiste vermoede bestaan nie, beweer hy by voorbaat dat 'n geldige lasbrief nie uitgereik kon word nie. Trouens, 'n finale bevel op die bestaande feite sou die Polisie belet om 'n lasbrief te verkry. Dis egter onnodig om te beslis of die bewyslas op die appellant gerus het of op die respondent, omdat ek, van mening is, soos later sal blyk, dat, al sou die bewyslas op die respondent gerus het, die feite volgens die stukke aantoon dat daar prima facie wel redelike gronde vir die vereiste vermoede bestaan het.

Wat die eerste vermoede in artikel 42 (1) betref, nl. die vermoede dat daar op 'n sekere perseel iets is, is daar geen probleem nie. Die bestaan van die masjiene is gemene saak. Wat die tweede vermoede betref, is dit 'n vermoede wat ontstaan uit redelike gronde dat die masjiene tot bewys van die pleeg van 'n misdryf sou strek of bestem is om gebruik te word om 'n misdaad te pleeg. Artikel 42 dien klaarblyklik om willekeurige optrede van polisiebeamptes in verband met beslag-

legging/.....

legging uit te skakel. Wat vereis word is die mening van o.a. n landdros dat redelike gronde bestaan om tot n vermoede te kom. Die Engelse teks gebruik die woorde „reasonable grounds for suspecting". Daar hoef geen getuienis te wees wat die uitreikende beampte oortuig dat n misdryf plaasgevind het of sal plaasvind nie. Die voorgelegde feite moet voldoende in die rigting van n misdryf wys om n vermoede te laat ontstaan en die Wetgewer het m.i. bedoel dat „redelike gronde" gronde is wat volgens die mening van n redelike man bestaan. In die onderhawige saak het Luitenant-Kolonel Stander in sy beëdigde verklaring hom nie alleen op Kennisgewing R.571 en die feit dat die masjiene volgens die beëdigde verklaring van Britz voldoen aan die beskrywing in Kennisgewing R.571, beroep nie, maar hy het ook uitdruklik dit soos volg gestel in paragraaf 11 van sy verklaring:

> „(d) Ek het die speel van gemelde masjiene self dopgehou en het ook op masjiene wat in my amptelike besit is gespeel; ek sal nie sê dat daar geen element van vaardigheid met die speel van gemelde masjiene is nie. By enige sulke spel is daar n element van vaardigheid om dit in werking te stel en in werking te hou, maar met die speel daarvan is geluk die grootste, deurslaggewende en oorwegende faktor. Wat gewone lede van die publiek betref is daar met

submissie geen kwessie dat vaardigheid 'n baie klein rol met die spel van gemelde masjiene is nie. Daar mag sekere persone wees wat baie op gemelde masjiene gespeel en geoefen het, maar ook met hulle sal die grootste en deurslaggewende faktor geluk wees.

(e) Daar is met die speel van gemelde masjiene 'n prys aangebied in die vorm van 'n vrye herspeling as die speler 'n sekere telling met sy eerste spel kry.

(f) Ek ontken dat niks op die speel van gemelde masjiene verwed word nie. Gemelde masjiene staan oop vir die publiek om daarop te speel en die lede van die publiek wat hulle gebruik kan maklik in die speel daarvan geld daarop dobbel óf teen mekaar vir geld speel. Ek ontken dat die Applikant óf die huurders van die Applikant se masjiene in staat is om beheer óór die masjiene tot so 'n mate uit te oefen óm te sien dat geen dobbelary daarmee plaasvind nie."

Verder het hy uitdruklik in paragraaf 14 van sy verklaring o.a. gesê:

„Ingevolge die bepalings van artikel 6, 7 en 8 van Wet No. 51 van 1965 veral gelees met die vermoedes daarin geskep, is daar voldoende feite om die ~~applikant~~ Applikant te laat vervolg en/of die persone op wie se persele die masjiene staan te laat vervolg."

Die bewering van Luitenant-Kolonel Stander in paragraaf 11 (d) hierbo genoem staan geheel-en-al los van Kennisgewing R.571. Op sigself is dit 'n redelike grond om te vermoed/.....

vermoed dat die masjiene in verband met 'n misdryf gebring kan word. Daardie misdryf word gevind in artikel 6 (1) van Wet No. 51 van 1965 saamgelees met artikel 6 (3), artikel 6 (5) en artikel 6 (6). Artikel 6 (1) bepaal dat die speel en die toelaat om te speel van 'n gelukspel waarop iets verwed word verbode is met sekere uitsonderings wat nie hier ter sprake is nie. Artikel 6 (3) bepaal o.a. dat wanneer instrumente wat by die speel van 'n gelukspel gebruik kan word aangetref word, dit op sigself prima facie getuienis is dat speel van 'n gelukspel waarop iets verwed is toegelaat is en plaasgevind het. Art. 6 (5) bepaal dat by bewys by die verhoor van 'n weens oortreding van artikel 6 (1) aangeklaagde persoon dat 'n gelukspel gespeel was of sou word, word daar vermoed, totdat die teendeel bewys word, dat bedoelde spel gespeel was of sou word met iets daarop verwed. In antwoord op paragraaf 11 (c) en (d) van die verklaring van Luitenant-Kolonel Stander het Pretorius wat namens die appellant in die aansoek optree die volgende verklaar:

> „11 (a) Ek herhaal eerbiediglik dat daar nie geluk betrokke is by die speel van die gemelde masjiene nie. In besonder ontken

ek/....

ek dat vaardigheid n baie geringe faktor is by die speel van die masjiene. Ek het dikwels self met die masjiene gespeel en het dikwels ander persone gesien speel daarmee.

(b) Soos met enige spel, in my eerbiedige submissie, is ervaring n faktor en is daar spelers wat beter aanleg het vir die spel as andere. n Onervare speler kan nie opweeg teen n ervare speler nie. Die vaardigheid wat n element is by die speel van gemelde masjiene bestaan ondermeer in vlugge waarnemingsvermoë, vinnige reaksie en doeltreffende spierbeheer en koördinasie.

Die speler moet sy oog op die bal hou en moet by wyse van die elektriese kontrole-knoppies sorg dat die bal op presies die regte tydstip teruggeskiet word sodat dit in aanraking kom met die elemente wat die meeste punte inoes. Selfs die krag waarmee die bal aanvanklik in die speelruimte geskiet word, bepaal waar die bal gaan val, en hierdie krag is substansieel binne die beheer van die speler. Ek verwys beleefd na Klousule 3 (1) van die Bylae tot die verklaring van RUDOLPH JOHANNES BRITZ.

(c) Van groot belang is ook dat spelers die stand van die masjien kan verander deur hom te skud. Deur die masjien op n besondere wyse te skud en op sekere tydstippe te skud word die loop van die bal dienooreenkomstig beïnvloed sodat die speler die bal in sekere gunstige posisies kan plaas wat die uitslag van die spel gunstig affekteer. Dit is in my persoonlike ervaring algemeen dat spelers die masjiene aldus skud.

(d) Ek het gesien hoedat spelers met aanleg vir die spel en vaardigheid vir n onbepaalde tyd op n masjien kan speel. Ek het dikwels gesien hoedat vaardige spelers meer punte

verwerf/...

verwerf as onvaardige spelers. Ek begryp eerbiediglik nie wat die Respondent bedoel met 'gewone lede van die Publiek' nie en ek verklaar dat dit slegs natuurlik is dat n beginner in enige spel nie met dieselfde vaardigheid kan speel nie as persone wat baie op gemelde masjiene gespeel en geoefen het."

Geen getuienis van ander persone (behalwe die van Britz omtrent die werking van die masjiene) is voor die Hof gelê nie en dis m.i. duidelik dat, indien die bewyslas op die respondent rus, soos aanvaar word, daar getuienis is wat, prima facie as redelike gronde beskou kan word vir die vereiste vermoede, afgesien van Kennisgewing R.571, en dat op grond daarvan die eerste Hof nie verplig was om n finale interdik toe te staan nie. Die eerste Hof kon m.i. die saak nie op die stukke beslis nie omdat n dispuut ontstaan het wat alleen deur mondelinge getuienis opgelos kon word. Op bl. 365 van die uitspraak van die Hof a quo word die betoog behandel, wat ook voor hierdie Hof gelê is, nl. dat Regter Human gefouteer het deur nie gebruik te maak van mondelinge getuienis by die aanhoor van die aansoek nie. Ek stem saam met die Hof a quo dat dit nie aangetoon is dat Regter Human sy diskresie nie

op/.....

op regterlike wyse uitgeoefen of n verkeerde beginsel toegepas het nie.

By wyse van repliek het appellant in die eerste Hof die regsgeldigheid van Kennisgewing R.571 in geskil geplaas. Voor ons is deur respondent aangevoer dat appellant nie geregtig was om n nuwe skuldoorsaak in sy repliek to opper nie. Hierdie argument gaan nie op nie wanneer die regsgeldigheid van n wetlike bepaling ter sprake is. So kan n Hof selfs mero motu die statutêre geldigheid van n kontrak oorweeg, kyk Cape Dairy and General Livestock Auctioneers v. Sim, 1924 A.D. 167. Namens appellant is in hierdie Hof betoog dat respondent sy hele voorgenome optrede teen respondent gebaseer het op Kennisgewing R.571. Hierdie argument gaan m.i. ook nie op nie. Hoewel respondent homself terdeë op Kennisgewing R.571 beroep het, is dit m.i. duidelik uit wat in paragraaf 11 van sy antwoordende verklaring verskyn, en wat hierbo aangehaal word, dat hy hom nie alleen op Kennisgewing R.571 beroep nie maar in besonder op die feit dat hy beweer dat daar met n gelukspel gespeel is. Dis gemene saak dat Kennisgewing R571 geen

misdaad/....

misdaad skep nie maar n vermoede ten gunste van die Staat wat by n vervolging onder artikel 6 aangewend kan word.

Onder artikel 7 (1) kan die Minister (d.w.s. die Minister van Justisie) by kennisgewing in die Staatskoerant die aanhou of gebruik verbied op deur hom bepaalde plekke van alle spykertafels hetsy vir die speel van gelukspele bestem al dan nie of van alle spykertafels van n omskrewe klas wat na sy oordeel vir die speel van gelukspele bestem is. Die Wet self beoog dus dat die Minister alle spykertafels of sekere soorte daarvan kan verbied. Artikel 14 van die Interpretasiewet No. 33 van 1957 bepaal dat wanneer n wet n bevoegdheid verleen om o.a. „kennisgewing uit te reik" of „om vir doeleindes van die Wet enige ander handeling te verrig of enigiets anders te doen" kan daardie bevoegdheid, tensy n ander bedoeling blyk, te enige tyd na die aanname van die wet uitgeoefen word vir sover dit nodig is om die wet by die inwerktreding daarvan in werking te stel. Die vraag ontstaan wat behels word onder die uitdrukking „vir sover dit nodig is om die wet by die inwerkingtreding daarvan in werking te stel". In die Engelse teks word

die/....

die lelike herhaling van „in werking" vermy deur die woorde: „so far as may be necessary for the purpose of bringing the law into operation at the commencement thereof". Die bedoeling skyn duidelik te wees dat kennisgewings uitgereik kan word en ander handelinge verrig kan word ná aanname van die wet vir sover dit nodig is om die wet by sy inwerkingtreding te laat funksioneer. Dit gebeur gereeld dat artikels van 'n wet voorsiening maak vir die aanstelling van persone in sekere ampte, vir die uitvaardiging van regulasies en reëls en die doen van ander handelinge. Indien so 'n wet in werking gestel sou word sonder voorafgaande aanstellings, uitvaardiging van regulasies of kennisgewings sou die wet óf sekere artikels daarvan wesenlik nie funksioneer nie totdat die nodige aanstellings gedoen is en die regulasies en kennisgewings uitgevaardig is. Klaarblyklik sou dit 'n ondoeltreffende proses wees om die wet in werking te stel terwyl die geheel óf dele daarvan nie funksioneer nie en daar gewag moet word op toekomstige administratiewe handelinge. Dit is dus te verstaan dat die Interpretasiewet voorsiening maak om 'n wet behoorlik te laat funksioneer wanneer dit in werking tree. In die onderhawige saak blyk dit m.i.

dat/.....

dat by sy inwerkingtreding die hele wet No. 51 van 1965 met inbegrip van artikel 7 kon funksioneer. Artikel 7 gee aan die Minister die bevoegdheid om van tyd tot tyd na vereiste van omstandighede (sien artikel 10 (1) van die Interpretasiewet) spykertafels of sekere soorte spykertafels te verbied en dit kan m.i. nie gesê word nie dat dit nodig was vir die funksionering van artikels 6 en 7 om reeds vóór inwerkingtreding van die Wet n kennisgewing van n verbod uit te reik nie. Die woorde „vir sover dit nodig is om die wet by die inwerkingtreding daarvan in werking te stel" het ook in artikel 14 (3) van die Interpretasiewet No. 5 van 1910 verskyn nl.: „voor zover zulks nodig is voor 't in werking stellen van de Wet by haar invoering". Hierdie hele nuttige begrip kom woordeliks uit die Engelse statuutreg behalwe dat die Engelse Wet (artikel 37, Interpretation Act 1889) hieromtrent soos volg lui:

> „..... so far as may be necessary or expedient for the purpose of bringing the Act into operation at the date of the commencement thereof....."

Uit die feite van n Engelse appèlsaak Usher v. Barlow, 1952 Ch.D. 255, blyk dit dat die Registered Designs Act 1949, n artikel bevat het wat bepaal:

„Rules/.....

„Rules made by the Board of Trade under this Act may provide for excluding from registration thereunder designs for such articles being articles which are primarily literary or artistic in character as the Board think fit."

Die Wet is aangeneem op 16 Desember 1949 en op dieselfde dag is kennis gegee dat die Designs Rules 1949 op 2 Januarie 1951 in werking sou tree 'n dag nadat die Wet in werking sou tree. Reël 26 het die registrasie van sekere muurplakette belet. In die hoofuitspraak van die Hof het Jenkins, L.J., o.a. verwys na 'n vorige Engelse saak Rex v. Minister of Town and Country Planning, 1951 (I) K.B.1, en o.a. 'n passasie aangehaal uit die uitspraak van Tucker, L.J., in laasgenoemde saak. Met verwysing na Tucker, L.J., se uitspraak sê Jenkins, L.J., in eersgenoemde saak te bl. 262 o.a.:

„As pointed out by Tucker L.J. in the passage cited above, the section extends to a comprehensive enumeration of matters: 'order in council, order, warrant, scheme, letters patent, rules, regulations, or byelaws.' Clearly many of these matters are matters requiring to be dealt with under the Act when in operation, in order that it may operate effectively, rather than matters without which the Act cannot come into operation at all. Further, the vital words of the section are 'so far as may be necessary or expedient for the purpose of bringing the Act into operation at the date of the commencement thereof.' If the section had been

confined to matters without which the Act could not come into operation at all, the words 'or expedient' would, so far as I can see, have been not only otiose but wholly inappropriate. A matter without which an Act cannot come into operation at all is necessary for the purpose of bringing it into operation, and cannot be anything less than that. A matter which is merely expedient for the purpose of bringing an Act into operation is by definition not necessary for that purpose. It is a matter without which the Act can come into operation, but with which the Act will come into operation more conveniently or effectively."

En verder te bl. 263:

„The truth is, I think, that 'operation' is used in the section in two different senses, namely, the sense in which it appears in the definition of 'commencement' and the sense of 'effective operation', and I think that in the phrase 'bringing into operation' it is used in the latter sense. On this view section 37 should be construed as extending to whatever is necessary or expedient for the purpose of bringing the Act into effective operation at the date fixed or prescribed as the time at which the Act comes into operation."

Evershed M.R., het in sy uitspraak o.a. op bl. 259 gesê:

„My difficulty in the present case has been caused by the fact that the rule-making power in section 1 (4) of the Registered Designs Act, 1949, clearly contemplates that from time to time, as the Board of Trade may think proper, provision may be made, while the Act is in operation, for excluding from registration certain types of design; and I have not found it easy to persuade myself that in order to enable the Act effectively to operate, it was

requisite/...

requisite to exclude from registration a type of design which for many years had apparently been within the ambit of the previous legislation, but which the registrar had in practice not accepted for registration. I should, therefore, for myself have felt difficulty in treating as valid a rule made by virtue of section 1 (4) and solely relating to an exclusion under that sub-section. And if such a rule were validated by the language of section 37 of the Act of 1889, it would appear to me difficult to give any sensible effect to the words "for the purpose of bringing the Act into operation". In the present case, however, the rule in question is part of a larger body of rules made under the general powers of section 36 of the Act and clearly justifiable as 'expedient', if not 'necessary', so as to give the new Act a working machinery when it came into operation. And this being so, I do not think it would be right to pick out one rule because, taken in isolation, that rule might be said to fail to satisfy the requirements of section 37 of the Act of 1889. In other words, I have been satified on the whole that in its context, as part of a general body of rules providing the machinery for the effective operation of the new Act, this rule can fairly be said to satisfy the conditions of validity."

Die opvatting in die Engelse saak strook met wat m.i. die betekenis van die woorde in ons eie Wet is, wat om een of ander rede nie die woorde „or expedient" bevat nie, en ek is derhalwe van mening dat weens die redes hierbo genoem, Kennisgewing R.571 ongeldig is.

Die/.....

Die advokaat van die respondent het in hierdie Hof verklaar dat hy inderdaad namens die Minister van Polisie verskyn, maar hy het hier dieselfde beswaar aangevoer as wat in die Hof a quo genoem is nl. dat in die onderhawige proses daar 'n voeging van die Minister van Justisie moet wees. Die Staat word deur die Minister van Polisie verteenwoordig en na my mening is die funksie wat deur die Minister van Justisie onder artikel 7 van Wet No. 15 van 1965 uitgeoefen word, wesenlik van wetgewende aard sodat hy m.i. nie in sy amptelike hoedanigheid gevoeg hoef te word nie. In elk geval kan verwys word na wat in 1935 in hierdie Hof in Morgan and Another v. Salisbury Municipality, 1935 A.D. 107 te 173, o.a. gesê is:

> „.....it must be borne in mind that in South Africa, in numberless cases, Government notices and proclamations and regulations have in the past been declared void in proceedings in which the Government concerned was not joined as a party. No grievance has been voiced by Governments on this score, which rather seems to me to show that Governments do not think it necessary to be parties to such proceedings and are not embarrassed by the practice of not joining them as parties."

Na my mening is die posisie in die praktyk nog dieselfde.

Namens appellant is ten slotte aangevoer dat die beslaglegging van al die apparate onredelik is en dat so/....

so 'n optrede in terrorem sou wees. Die masjiene is natuurlik verhuur aan 'n aantal kafeehouers wat dit waarskynlik op hul persele aanhou. Dit is nie bekend hoeveel kafeehouers betrokke is nie, maar indien daar ten opsigte van elke masjien redelike gronde tot die vereiste vermoede bestaan, sou dit die reg en waarskynlik ook die plig van die Polisie wees om elke masjien in beslag te neem en redelikheid sou m.i. in 'n saak soos die onderhawige nie 'n verpligte oorweging wees wat by die Polisie moet geld nie. In ieder geval is elke huurder onderhewig aan die moontlikheid van vervolging en wat onredelikheid teenoor die appellant mag skyn, is nie noodwendig onredelikheid teenoor elke betrokke huurder nie.

Weens die hierbogenoemde oorwegings is ek van mening dat hoewel Kennisgewing R.571 as ongeldig beskou moet word, die appèl nie kan slaag nie en afgewys moet word met koste.

RUMPFF, A.R.

JANSEN, A.R.) Stem saam.

IN DIE HOOGGEREGSHOF VAN SUID - AFRIKA.

(APPÈLAFDELING)

In die saak tussen:

CRESTO MACHINES (EIENDOMS) BEPERK ..... APPELLANT

EN

DIE AFDELING SPEUROFFISIER S.A.

POLISIE, NOORD TRANSVAAL ..... RESPONDENT

Coram: Rumpff, Wessels, Potgieter, Jansen et Trollip, A.RR.

Verhoor: 3 September 1971. Gelewer: 1 Oktober 1971.

J U D G M E N T .

Trollip, J.A.:-

I agree that the appeal must be dismissed with costs, but for different reasons. In my view the appellant's ship founders on the rock of the search warrant (lasbrief), however hard its pilots tried to circumnavigate it in each of the Courts. My reasons are as follows.

The factual background is set out in the judgment of Rumpff, J.A., and need not be repeated here.

It .... /2

It suffices to say that the appellant alleged in its application that the respondent was not authorised or justified in disturbing its right of ownership or possession of the "Flipper Machines" by seizing or attaching them. As it was admitted on respondent's behalf that that is precisely what the police intended doing, I think that initially the onus rested on respondent to establish that the action of the police would be legally justified (Hoosen v. Bourne & Co. Ltd. 1962 (3) S.A. 182 (N); Ingram v. Minister of Justice 1962 (3) S.A. 225 (W) at p. 227 D-E). The respondent, in the answering affidavit filed on his behalf, alleged that the appellant or its lessees of the machines were permitting the machines to be used for the playing of games of chance for stakes at places under its or their control, in contravention of section 6(1) of the Gambling Act, No. 51 of 1965, that the police accordingly intended prosecuting them, and that they intended using the machines as evidence in such prosecutions. With that end in view, the deponent for the respondent, Lt. Col. Stander, testified that he was already in possession of the requisite warrant to search for and seize the machines, which he had obtained from a magistrate, and

he .... /3

he was about to execute it when the appellant launched its application. It is clear, I think, that that warrant could only have been granted under section 42(1) of the Criminal Procedure Act, No. 56 of 1955. The relevant part of that sub-section reads as follows:-

"If it appears to a judge of a superior court, a magistrate or a justice on compliant made on oath that there are reasonable grounds for suspecting that there is .. at any premises .. within his jurisdiction -

(a) ...

(b) anything in respect of which there are reasonable grounds for believing that it will afford evidence as to the commission .. of any offence or that it was used for the purpose of or in connection with such commission of any offence; or

(c) anything in respect of which there are reasonable grounds for believing that it is intended to be used for the purpose of committing any offence,

he may issue a warrant directing any policeman named therein or all policemen to search such ... premises ... and to seize any such thing if found, and to take it

before .... /4

before a magistrate to be dealt with according to law".

Consequently the issue to and possession by the police of such a warrant would legally justify their proposed action of seizing the appellant's machines and would ordinarily serve to discharge the onus of proof initially resting upon the respondent. (See S.A. Police & Others v. S.A. Associated Newspapers Ltd. & Another 1966 (2) S.A. 503 (A.D.) at p. 510 F-G, and cf. Hart v. Cohen 16 S.C. 363; Cohen Lazar & Co. v. Gibbs 1922 T.P.D. 142 at pp. 146, 148; Begeman v. Cohen 1927 T.P.D. 674 at p. 676.) The difficulty is that the warrant itself was not adduced in evidence in the proceedings. Now in accordance with the best evidence rule, parol evidence of the warrant was inadmissible and the respondent should have produced or tendered the production of the original warrant in order to prove its issue and contents. But in civil cases compliance with that requirement of the best evidence rule can be waived, expressly or by conduct, by the party against whom the evidence is sought to be adduced (see Wigmore on Evidence, 3rd Ed., Vol., 1 section 18, pp. 321, 344, 346; Best on Evidence, 10th Ed., p. 83; section 42 of the Civil Proceedings Evidence Act, No. 25 of 1965, read with section 26 of the Transvaal Evidence Proclamation No. 16 of 1902). In that event, the original

document .... /5

document need not be adduced in evidence, and secondary evidence of its contents is admissible. The absence of the document then merely affects the probative value and not the admissibility of the secondary evidence. Did the appellant waive the need for respondent to produce or tender the original warrant? I have no doubt that it did. It did not object to the parol evidence about the warrant, nor did it apply to have it struck out; in its answering affidavit it dealt, not with the form of that evidence, but with its substance; it did not apply, prior to the first hearing, for the respondent to produce the warrant for its inspection, nor did it, during the hearing, move the Court of first instance to order its production, which it could have done under Rule 35(11) and (12) of the Rules of Court; and, finally, it did not object to its absence during that hearing or, indeed, in the Court a quo. Hence, the appellant cannot at this belated stage before us complain about the absence of the warrant. Lt. Col. Stander's statement on oath that he was issued with and had the warrant must therefore stand. It cannot be ignored or disregarded, as counsel for the

appellant .... /6

appellant contended. And while it stands it is a good defence to appellant's claim to an interdict. In that regard I should add here that respondent's counsel, Mr. Kirk-Cohen, did not abandon the existence of the warrant as a defence to appellant's application; on the contrary, he relied on it, albeit only as an alternative defence.

Consequently, I think that the ultimate onus rested on the appellant to demolish the defence of the existence of the warrant (cf. Rieseberg v. Rieseberg 1926 W.L.D. 59). In its answering affidavit, appellant stated

(a) that it had no knowledge of the warrant and denied it ("en ontken dit"), meaning, I assume, that it denied its existence;

(b) that, alternatively, the warrant was invalid since it must have been issued before the Gambling Act came into operation on 1 July 1969; or

(c) that, alternatively, the warrant was invalid since the magistrate must have granted it on insufficient evidence concerning the commission of the alleged offence or on an inadequate description of the machines or without having been informed about appellant's intention of contesting the attachment.

Dealing .... /7

Dealing with (c) first, I do not think that that ground/ avails appellant. Even if true, those allegations would not invalidate the warrant but merely, at most, render it voidable. Consequently, until it is set aside, it continues to have the effect of justifying the proposed attachment (see the cases of Hart v. Cohen, Cohen Lazar & Co. v. Gibbs, and Begeman v. Cohen, supra, and cf. Majiet v. Zuckerman & Carroll 24 S.C. 608; Susman v. Kark N.O. 1917 T.P.D. 437), and, without more, the appellant cannot obtain the interdict it seeks. Appellant's present application cannot be regarded or treated as including a claim to have the warrant set aside, since the allegations of invalidity were made for the first time in appellant's answering affidavit, the respondent has not in consequence replied to them, and in any event the appellant has not incorporated such a claim in its application, by amending the notice of motion or otherwise. I should also add that, even if the appellant could show that no reasonable grounds existed justifying the magistrate's belief in terms of section 42 (1) of

the .... /7(a)

the Criminal Procedure Act, that alone would not suffice for having the warrant set aside. For in S.A. Police v. S.A. Associated Newspapers 1966 (2) S.A. 503 (A.D.), which concerned the setting aside of a similar warrant, Beyers, A.C.J. said at p. 511/2:

> "I am persuaded that an objective approach to the matter by the Courts is excluded because of the following considerations; The persons who are entrusted with the important duty of issuing search warrants are responsible officers. I cannot think that it was intended that the discretion allowed to them should be justiciable in a court of law, save in very exceptional circumstances."

The exceptional circumstances would include the mala fides of the magistrate or the failure to apply his mind to the matter or exercise his discretion at all. No such circumstances were alleged by the appellant.

As to (b), if the warrant was granted before 1 July 1969, it would probably have been invalid and a nullity - at any rate, I shall assume that to be so in favour of the appellant, without deciding it. There would then

have .... /8

have been no need for appellant to have the warrant set aside before launching its present application (cf. Cohen Lazar & Co. v. Gibbs, supra, at p. 147/148; Begeman v. Cohen, supra, at p. 677.) Now it is true that Lt. Col. Stander does not mention when the warrant was granted or issued. It is, of course, possible that it was issued before 1 July 1969, but that seems most unlikely. For then it would have been mentioned at the interview on 30 June 1969 between appellant's managing director and Brigadier Venter, head of the regional division of the police concerned. The appellant admitted that it was not. Moreover it is improbable that a police officer of the rank of Lt. Col. Stander would have applied for it and that a magistrate would have granted it before the Gambling Act came into operation. In respect of that requirement, I think, it can be inferred that those officers would probably have acted with due regularity, especially as Lt. Col. Stander must have been aware of appellant's intention, expressed at that interview, to contest the attachment. However, it suffices to say that the validity of the warrant in that respect is disputed and that that issue cannot be decided on the affidavits.

In .... /9

In regard to (a) - the appellant's denial that the warrant was granted and issued - as the warrant was not produced, that dispute, too, cannot be decided on the affidavits. But I think that it is improbable that a police officer of the rank of Lt. Col. Stander would falsely state on oath that he was in possession of such a warrant when in fact he was not.

In view of the disputes on the affidavits on issues (b) and (c) and the fact that ex facie the affidavits the balance of probabilities on those disputes appear to be against the appellant, the Court cannot grant a final interdict, which is what appellant claims. The Court a quo inter alia came to a similar conclusion, correctly in my view. The simple reason is that it has not proved in all the circumstances that it has a clear right not to be disturbed in its ownership or possession of the machines (see Setlogelo v. Setlogelo 1914 A.D. 221).

It is appropriate here to add some observations about Government Notice R571. There is much to be said for the view that, having regard to the provisions of the

Gambling .... /10

Gambling Act and the Notice, the enactment of the latter prior to 1 July 1969 was not necessary, or even "reasonably necessary" (if the dictum in R. v. Magana 1961 (2) S.A. 654 (T) at p. 658 B is correct), for bringing the Gambling Act or sections 6 and 7 thereof into operation at its commencement on that date (see section 14 of the Interpretation Act, No. 33 of 1957), and that the Notice is therefore invalid. However, whether it was so necessary or not might be a matter for evidence - see Magana's case, supra, at p. 656 G. Here the appellant only raised the question of the validity of the Notice in its answering affidavit, and neither it nor respondent adduced any evidence on that aspect. I hesitate, therefore, to express a firm opinion on its invalidity. It suffices for me to assume without deciding that the Notice was invalid. That would not affect the efficacy of section 6 of the Gambling Act, which creates the offence and which respondent alleges the appellant and his lessees have contravened; it would merely mean that the presumption, created by the Notice under section 7 to the effect that appellant's machines were being permitted to be used for playing games of chance for stakes in contravention of section 6, would not

operate .... /11

operate and assist in proving the alleged offence. Hence, even if the magistrate relied on that presumption in granting the warrant, that would not render the warrant invalid and a nullity but, at most, merely voidable for insufficient evidence, with the same consequences as mentioned above.

To advert again to the disputes on the affidavits concerning the warrant in respect of (a) and (b) above-mentioned. Those disputes could have been easily resolved, one way or the other, by moving the Court of first instance to order the respondent to produce the original warrant under Rule 35 (11) of the Rules of Court. The appellant, on whom the final onus lay and against whom the balance of probabilities on those disputes pointed, should have done so but did not. Nor did it ask the Court a quo to remit the matter for that to be done or itself to make such an order. Consequently, I do not think that this Court should at this belated stage adopt any such course. In any event, I did not understand appellant's counsel to ask for a remittal solely for that purpose. Mr. Strauss's main concern, if not his only concern, was to have the matter remitted for viva voce evidence on the issue of the nature of the machines and their potentiality for being used for gambling. Such

relief .... /12

relief cannot, in my view, be granted, since on my approach to the present proceedings that issue is irrelevant. For if, as Lt. Col. Stander deposed, he is in fact in possession of a warrant, and it is valid, i.e., issued on or after 1 July 1969, then, even if it might be voidable, it would be a complete answer to the present application for a final interdict. Moreover, the appellant's case is not that viva voce evidence would prove mala fides or any other "very special circumstance" affecting the issue of the warrant by the magistrate, as mentioned in S.A. Police v. S.A. Associated Newspapers, supra; at the very most it would merely go to show that on the merits the warrant ought not to have been granted. That would not be sufficient to render the warrant justiciable or ignorable (even if that were possible) in these proceedings (ibid.). That evidence, therefore, would not take the matter any further. On the other hand, if Lt. Col. Stander is not in possession of any warrant, or if he is in possession of a warrant issued prior to 1 July 1969, which is therefore invalid on the assumption made above, then the appellant would be entitled to a final interdict without the need for any further evidence. Such an interdict would by law

operate .... /13

operate until the police procure a proper and valid warrant. And appellant's proposed viva voce evidence to show that a magistrate should not grant such a warrant would be quite unproductive. For as the grant or refusal of a warrant is entirely within the discretion of the magistrate and its exercise is not justiciable by a court except ~~for~~ in "very special circumstances" (see S.A. Police case, supra), no Court involved in the present proceedings can usurp that discretionary power and determine in advance how it should be exercised, except perhaps in "very special circumstances" of which there are none. In other words, the whole case in its present form turns, I think, on the warrant. As the appellant has not resolved the dispute about its existence and date of issue in its favour, a final interdict cannot be granted.

I therefore agree that the appeal should be dismissed with costs.

W.G.Trollip, J.A.

Wessels, J.A.) concurs.