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FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Application no. 141/2012

In the application between:

AC ROSSOUW	Applicant
and	
THE MINISTER OF POLICE	1st Respondent
THE MINISTER OF JUSTICE	2nd Respondent
THE STATION COMMISSIONER, SAPS, VIRGINIA	3rd Respondent
COMBINED PRIVATE INVESTIGATIONS	4th Respondent

HEARD ON: 10 MAY 2012

CORAM: MURRAY, AJ

JUDGEMENT BY: MURRAY, AJ

DELIVERED ON: 5 JULY 2012

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[1] This is an application to have a search warrant and the search and seizure pursuant to the warrant set aside and to have the seized items returned to the applicant.

[2] Adv P Zietsman S C appeared for Combined Private Investigations ("CPI"), a private company contracted by

Transnet and Eskom to recover their stolen property and the fourth respondent herein, and Adv W Groenewald appeared for the applicant.

[3] The relevant search warrant was issued by a Virginia Magistrate on 28 November 2011. On 5 December 2011 the premises of Vaalkrantz Scrap Metal, a second-hand scrap metal dealer in Virginia, was searched by members of the South African Police Services and three CPI members.

[4] Various items such as 658 kg copper, railway components, corrugated iron sheets, and so forth, were seized during the operation and are presently being held in the SAPS13 store in Virginia. The applicant, her partner, and one of the employees were arrested on suspicion of the possession of stolen goods.

[5] The applicant alleges that the search warrant was invalid and that the search and seizure was unlawful and that she is therefore entitled to the return of all the seized items.

[6] She attacks the validity of the search warrant on the

following grounds:

6.1 The warrant was addressed to *"All police officers"*;

6.2 The premises authorised to be searched was "*Gusmec Scrap Metal"*;

6.3 The items authorised to be searched for and seized was *"Copper"*;

6.4 The offence/s were not specified; and

6.5 The search and seizure operation was conducted under the control of CPI's Adv Wessels and not under the control of a Police Officer.

[7] The applicant alleges that she had lawfully obtained most of the items listed in the Notice of Motion, either from the SAPS (the railroad rails) or from Harmony Mine. To substantiate her claim, she, however, annexes two illegible General Waybills which do not mention any of the seized items and an SAPS 13 Form which merely indicates that she had submitted a quote for seven railroad rails, but which mentions neither an amount nor a sale. No receipt is annexed. Regarding the 758 kilogram of copper, she avers in general that they purchase copper on a daily basis and that they make proper entries into the register.

[8] As further proof of her entitlement to the return of the seized items, she annexes a certificate issued under Section 4(2) of the Second Hand Goods Act, 23 of 1955, as the license which authorised her to *'carry on business in connection with specified classes or kinds of second-hand goods'* from 3 February 2011 until 31 December 2011.

[9] That she had a valid license to deal in specified second-hand goods at the time of the search and seizure is not in dispute. Neither is the fact that the said license expired on 31 December 2012 and that renewal thereof was refused in 2012.

[10] What is in dispute, however, is what exactly she was authorised to deal in. According to the single page of her s 4(2) certificate annexed to her founding affidavit, she is authorised to deal in *"all metals".* Fourth respondent, however, annexed to the opposing papers what they claimed to be the second page of the applicant's s 4(2) certificate which stipulates which metals are excluded from her license, such as copper.

[11] The applicant therefore no longer had a valid licence to operate as a second-hand dealer when she brought this application.

[12] Fourth respondent avers that several of the seized items were suspected of being the stolen property of Harmony Mine, Transnet and Eskom. Officials from these entities were called to the premises during the search to identify property belonging or suspected of belonging to these entities. The suspected stolen items were then seized and placed in the SAPS 13 store.

[13] The applicant's partner used to be the license holder of Gusmec Scrap Metal which is situated on the same premises as Vaalkrantz. He is also the owner of the said plot.

[14] The fourth respondent opposes the application, disputes the alleged unlawfulness of the search and seizure and denies any obligation to return the seized items to the applicant.

[15] Before the fourth respondent could file its opposing papers, however, the first respondent (the SAPS), without prior notice to any of the other respondents or the Director of Public Prosecutions, decided that the search and seizure had been unlawful and notified the applicant that it was returning all the seized items to her.

[16] The fourth respondent then promptly launched an urgent application (under case **no 448/2011**) to stay the return of the seized items pending finalisation of this application. By agreement between the parties the Director of Public Prosecutions (the "DPP") was joined as the second applicant therein and a rule *nisi* was granted. The present applicant and the first respondent opposed only the costs order being asked against them. The said rule *nisi* also serves before this Court to be confirmed or discharged.

[17] The deponent on behalf of the fourth respondent then asked the Court to read her founding affidavit in the said urgent application into her opposing affidavit in this application. Her objection to the applicant's right to the return of the seized items is backed by three supporting affidavits annexed to that affidavit, namely:

17.1 That of the investigating officer in the DPP's office, Adv Claassens, who confirms that criminal proceedings had already been instituted against the applicant and her co-arrestees and that the seized items are needed for

evidence. She states that there is a strong *prima facie* case against the applicant and her co-accused and that the criminal case and concomitant forfeiture orders in terms of the Criminal Procedure Act, 51 of 1977 could be compromised if a premature order were to be made before the criminal case had been concluded;

17.2 That of a Transnet investigator, Joubert, who was called to the scene to identify Transnet property and who confirms that a docket, Virginia CAS 32/12/2011, has been opened for investigation into the various suspected stolen Transnet railway items; and

17.3 That of the Warrant Officer van den Bergh who made the arrests and who confirms that some of the seized items had already been positively linked to other dockets opened regarding Eskom and Harmony Mine property, namely Virginia CAS 81/11/2011 in respect of copper earthing stolen from the Transnet Merriespruit Vent and Virginia CAS 189/11/2011 in respect of 698 sheets of corrugated iron stolen from Harmony Mine.

[18] The fourth respondent denies that the search and seizure was unlawful and avers:

18.1 that Lt Col Liebenberg of the SAPS was in charge of the operation;

18.2 that the CPI members were invited by the SAPS to assist them;

18.3 that the warrant on which the search and seizure was based, and which is annexed to the opposing papers, contained more information than the one which the applicant attaches:

18.3.1 in that it was addressed to Lt. Col. GDM Liebenberg as the designated officer to conduct the operation;

18.3.2 in that it listed, on the back, the 16 police officials involved in the search;

18.3.3 in that it defined the assets to be searched for as *"enige koper of enige onwettige skroot";*

18.3.4 in that it was one of 5 warrants obtained on 28 November 2011 by Lt. Col. Van der Merwe in preparation for a police

sting against 5 different second-hand dealers in the Virginia district planned for 5 December 2011;

18.3.5 in that the additional information was then added by Col. Liebenberg on the morning before the Vaalkrantz operation.

[19] Mr Zietsman averred that the mere fact that information was added later on, did not *per se* render the warrant invalid. Be that as it may, however, there are still all the grounds raised in the founding affidavit regarding the alleged invalidity of the warrant that need to be considered.

[20] The warrant was issued in terms of s 20, s 21 and s 23 of the Criminal Procedure Act, Act 51 of 1977. It is not in dispute that when the warrant was issued on 28 November 2012, it contained only the information set out in the applicant's founding affidavit. The fourth respondent's version is that the additional information was inserted by Col. Liebenberg of the SAPS on the warrant on 5 December 2011 during the SAPS parade preceding the seizure.

[21] It is also common cause that on that day, besides the 758kg copper, numerous non-copper items were seized, *inter alia,* railway sleeper screws, corrugated iron sheets, railway leg plates, a railhead, 6x6m railing, a steel chevron, and so forth.

[22] In **MINISTER OF SAFETY & SECURITY v VAN DER MERWE,** 2011 (1) SACR 211 (SCA) at 216g – 217a [13] – [14] it was held that a challenge to the validity of a warrant called for scrutiny of the information that was before the official who had issued it in order to determine whether such information sufficiently disclosed a reasonable suspicion that an offence had been committed and whether it authorised no more than was strictly permitted by the statute in terms of which it was issued.

[24] In **THINT (PTY) LTD v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS & OTHERS; ZUMA v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS & OTHERS**, 2009 (1) SA 1 (CC*)* it was stated that the Constitutional Court

> "had laid down unequivocally that intelligibility required that the alleged offences had to be specified in the warrant".

[25] *In casu* the original warrant authorised by the magistrate did not disclose either such a suspicion or the offences committed.

[26] In **CLUR v KEIL** 2012(3) SA 50 (ECG) at 53H - 54 A it was reiterated that the South African Constitution is founded, *inter alia*, on the rule of law and that:

> "as far as those who exercise public powers are concerned, the rule of law 'requires that they act within the powers that have been conferred upon them' and that all of their decisions and acts must be authorised by law."

[27] It is vital, therefore, that a warrant be executed within the boundaries set out in the warrant itself. *In casu* the original warrant only authorised the police to search for and seize copper and authorised a search of Gusmec Scrap Metal, yet the search was conducted at Vaalkrantz and the items seized from Vaalkrantz.

[28] In **MINISTER OF SAFETY & SECURITY v VAN DER MERWE,** (SCA) *supra,* it was stated that the court generally needs to ask two further questions, namely:

> "Firstly, whether the warrant was sufficiently clear as to the acts it permitted, for if it were vague, it would not be possible to demonstrate that it went no further than what the Statute permitted" and
>
> Secondly, even if the warrant were clear in its terms, whether the acts it permitted went beyond what the Statute authorised, in which case the warrant could be said to be overbroad and thus invalid."

[29] In **MINISTER OF SAFETY & SECURITY v VAN DER MERWE** at 221i – 223a [30] – [33] it was held, furthermore, that although the validity of a warrant must be tested against the particular Statute under which it was issued, there were nonetheless other universal criteria to take into account, such as, for instance, that the warrant must be intelligible in the sense that the terms must be neither vague nor overbroad.

[30] In **MINISTER OF SAFETY & SECURITY v VAN DER**

MERWE *supra,* at 216c – f [12] the Court stated that the authority conferred by a search warrant to search and seize what is found, makes material inroads upon rights that have always been protected, amongst which are rights to privacy and property and personal integrity. They concluded that therefore the Courts in this country

> "have always construed Statutes that authorised the issue of warrants strictly in favour of the minimum invasion of such rights."

[31] In **POWELL NO & OTHERS v VAN DER MERWE NO & OTHERS,** 2005 (5) SA 62 (SCA) at [50] it was stated that such common law rights are now protected by being enshrined, subject to reasonable limitation, in Section 14 of our Constitution. At 217b [15] Nugent, JA, said:

> "Needless to say, a warrant may be executed only in its terms."

[32] In **MINISTER OF SAFETY & SECURITY v VAN DER MERWE & OTHERS,** 2011 (2) SACR 301 (CC) the Constitutional Court confirmed that the

"common law principle of intelligibility requires search warrants issued under Section 21 of the Criminal Procedure Act, 51 of 1977 to specify the offences in respect of which they are issued".

A valid search warrant must therefore, in a reasonably intelligible manner:

"(i) state the statutory provision in terms of which it is issued;

ii) identify the searcher ;

iii) clearly mention the authority it confers upon the searcher;

iv) identify the person, container or premises to be searched;

v) describe the article to be searched for and seized, with sufficient particularity; and

vi) specify the offence which triggered the criminal investigation and name the suspected offender."

[33] Further guidelines were specified at 316b – 317e [54] – [56], to be observed by Courts in considering the validity of warrants including the following:

"(i) that the person issuing the warrant must have authority and jurisdiction;

(ii) that the person authorising the warrant must satisfy herself that the affidavit contains sufficient information on the existence of the jurisdictional facts;

(iii) that the terms of the warrant must be neither vague nor overbroad;

(iv) that a warrant must be reasonably intelligible to both the searcher and the searched person;

(v) that the Court must always consider the validity of the warrant with a jealous regard for the searched person's constitutional rights; and

(vi) that the terms of the warrant must be construed with reasonable strictness."

[34] From the preceding, it is clear that the warrant of execution failed in at least three respects the requirements set out by the Constitutional Court namely:

34.1 by not identifying the correct premises to be searched, although that may be open to debate in view of Col. Coobi's averment that Vaalkrantz merely replaced Gusmec when its owner was refused a new licence and his allegations that Mr Beukes was actually *de facto* in control of

Vaalkrantz on all the occasions when he visited Vaalkrantz, as well as the averment that in 2010 the applicant was investigated for suspected stolen goods found at Gusmec under Virginia CAS 53/10/10;

34.2 by the item to be searched for and seized on the original warrant being merely described as “copper”;

34.3 by failing to specify the applicable offences.

[35] In my view, then, there can be no doubt that the warrant as originally issued was indeed invalid, more so if one takes into consideration that, as was found in **MINISTER OF SAFETY AND SECURITY (A),** *supra,* one of the aspects one has to consider to determine the validity of the warrant, is the information before the issuing official, which in the instant matter is obviously insufficient to render the warrant valid.

[36] The next question to determine, then, is whether the seizure itself could have been lawful in view of the invalid warrant.

[37] Regarding the alleged unlawfulness of the operation, the

fourth respondent averred, without saying that they indeed relied on it, that section 10(e) of the Second-hand Goods Act, 23 of 1955, allows for a discretion to conduct a search and seizure without a warrant and that the corresponding provision in the new Act, Act 6 of 2009, which does require a warrant, only became effective on 10 December 2011.

[38] Mr Zietsman averred that s10 of the Second-Hand Goods Act, 23 of 1955, should be read with s19 of the Criminal Procedure Act as authorising a police officer to conduct a search and seizure without a warrant. He maintained that on the facts, the SAPS must have exercised a discretion since they knew that the warrant was issued for Gusmec Scrap Metal, yet they seized the items at Vaalkrantz.

[39] He argued that since the Second Hand Goods Act, Act 23 of 1955, makes provision for a certificate which could authorise a dealer to possess and deal in copper or to prohibit her possession of copper, and since 758 kg of copper was seized, Act 23 of 1955 is applicable in the instant matter. On that basis, then, he submitted that it could be argued that the SAPS indeed exercised their discretion in terms of s 10

of that Act.

[40] Based on that, he submitted that it was clear that Liebenberg did exercise his discretion and that the seizure was indeed valid, and if that were true, it was academic whether the warrant was valid or not.

[41] As Mr Groenewald, in my view correctly, pointed out, however, none of the necessary averments to that effect were made in the papers and on the facts there was no justification for a search without a warrant. The view that a warrantless search must be justified in the papers, is confirmed in **SELLO v GROBLER** 2011(1) SACR 310 (SCA) in which it was found that if the police had indeed relied on a s 22 right to a warrantless search, averments to that effect should have been made. To my mind there is no reason to accept that it should be otherwise if they relied on a s 10 discretion.

[42] Mr Zietsman averred, furthermore, that any submission that the SAPS were not responsible for the seizure, was untenable since it was obvious that Lt. Col. Liebenberg was

present during the operation, that the items were seized, and that they were removed by the police officers at the scene and received in the SAPS 13 Store.

[43] On the facts before this Court, I can certainly not find that the SAPS were not responsible for the seizure. The real issue, however, is whether that seizure was lawful.

[44] But, in the absence of any averments to that effect, I cannot find that the SAPS indeed relied on either s 22 of the Criminal Procedure act, or on s10(e) of the Second Hand Goods Act to conduct a warrantless search. From the facts it is clear that they did use the invalid warrant to gain entry. I therefore agree with Mr Groenwald's submission that the seizure was therefore also invalid, based as it was on the invalid warrant.

[45] Regarding the question whether the applicant was therefore entitled to the return of the seized goods, Mr Zietsman pointed out that the Criminal Procedure Act has its own procedure in s 31 and s 32 with which to handle evidence intended for a pending criminal trial and that this Court

should allow the Criminal Court to decide whether the assets should indeed be returned to the applicant, especially in view of the fact that she no longer has a license to deal in second hand goods.

[46] Mr Groenewald maintained, furthermore, that the fourth respondent never averred that the copper was the property of either Transnet or Eskom and that, although the warrant authorised the seizure of copper, items other than copper were also seized. These, he argued, should be returned to the applicant since she had been in possession of the seized items and was now asking for her possession to be restored. He also alleged that although Section 3 of Act 23 of 1955 prohibits a second-hand dealer from trading without a license, such dealer's right to possession of the items is not lost when the licence expires.

[47] He submitted, furthermore, that the DPP would be unable to use unlawfully seized items for evidence in the criminal trial and could simply lawfully re-seize them if the Court orders their return and that Transnet and Harmony could use the *res vindicatio* to recover their alleged possessions.

[48] In **SELLO v GROBLER,** *supra,* the facts were very similar to the ones in the instant matter. There the members of the Medicines Regulatory Affairs Inspectorate ("MRAI") assisted the police in conducting a search of a pharmacy belonging to the appellant, followed by a search of his motorcar and his home. Various items were seized, including allegedly stolen items and expired medication, all without a search warrant.

[49] In that case the appellant also applied for an order declaring the searches unlawful and for the return forthwith of all items seized since the search and seizure operation was conducted in violation of his *"right to privacy, his right to trade freely and without a lawful basis."*

[50] Despite declaring the searches of the Applicant's pharmacy and home unlawful, the Court at 313e – f [11] directed the Respondents forthwith to return to the Applicant only those items seized pursuant to the unlawful search that the appellant may lawfully possess.

[51] To my mind such an order would not be practical or feasible in the instant case, however, since it is not clear which of the seized items the applicant may indeed lawfully possess and such an order would simply cause a further factual dispute. I wish to make it very clear, though, that an order to return the seized items is not to be construed as a declaratory order that the applicant is indeed lawfully entitled to those items.

[52] Should the items be returned and the applicant not be lawfully entitled thereto, the respondents will not be left remediless since the SAPS has statutory powers provided by the Criminal Procedure Act and by the Second-Hand Goods Act which they can properly exercise and execute immediately upon their return of the seized items.

[53] Such return would in my view comply with the Constitutional principles of the rule of law, as set out in **CLUR v KEIL,** *supra,* where it is stated on 55A-C that

> "any action taken by a public body 'must be justified by positive law' "

and as said in footnote 9, most fundamentally,

> "requires government officials to exercise their authority according to the law, and not arbitrarily."

[54] As stated in **GROENGRAS EIENDOMME (PTY) LTD v ELANDSFONTEIN UNLAWFUL OCCUPANTS,** 2002(1) SA 125 (TPD) at 142D:

> "The rule of law means that everyone must respect and adhere to the law. One cannot ride roughshod over the law, not even when the need is great."

[55] In my view, then, there is no reason for the respondents to be allowed to flout the law, while the SAPS can use the ordinary statutory powers conferred on them by the Criminal Procedure Act and the Second Hand Goods Act to do a proper seizure, following the correct procedures.

[56] I therefore consider it to be in the interests of justice and in compliance with the spirit of the Constitution regarding the rule of law to order that the seized items be returned to the

applicant.

[57] In my view there is no reason to order costs not to follow the outcome.

WHEREFORE the following order is made:

1. The warrant issued for Vaalkrantz Scrap Metal on 28 November 2011 by the Magistrate of Virginia is set aside.
2. The search and seizure pursuant to the abovementioned warrant is declared unlawful.
3. The first respondents are directed forthwith to return the items seized pursuant to the unlawful search.
4. The first and fourth respondents are ordered to pay the costs of the application, jointly and severally, the one to pay, the other to be absolved, with the first respondent's obligation to pay stretching only up unto the date on which they notified the applicant of their decision to return the seized items.

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H. MURRAY, AJ

On behalf of applicant:	Adv. W.J. Groenewald Instructed by: EG Cooper Majiedt Inc BLOEMFONTEIN
On behalf of fourth respondent:	Adv. P. Zietsman SC Instructed by: Naudes BLOEMFONTEIN