NORTH WEST HIGH COURT, MAFIKENG

CASE NO.: 154/2010

In the matter between:

SVETLOV IVANCMEC IVANOV	**APPLICANT**
and	
NORTH WEST GAMBLING BOARD	**1ST RESPONDENT**
INSPECTOR FREDDY	**2ND RESPONDENT**
INSPECTOR PITSE	**3RD RESPONDENT**
THE STATION COMMANDER OF THE RUSTENBURG POLICE STATION	**4TH RESPONDENT**
MINISTER OF SAFETY AND SECURITY	**5TH RESPONDENT**
THE MAGISTRATE OF RUSTENBURG	**6TH RESPONDENT**

DATE OF HEARING	:	**03 MARCH 2011**
DATE OF JUDGMENT	:	**7 APRIL 2011**
FOR THE APPLICANT	:	**ADV N JAGGA**
FOR THE RESPONDENT	:	**ADV DONEN SC with Adv Matebese**

JUDGMENT

<u>LEEUW JP</u>:

Introduction

[1] This is an application for leave to appeal against my judgment handed down on 20 January 2011.

[2] The grounds of appeal are set out in the notice of appeal as follows:

> "1 The Court erred by holding that the declaration of invalidity vis-à-vis the search warrant does not necessarily meant that the consequential acts committed should also be invalidated;
>
> 2. The Court in this regard erred in relying on **Zuma v National Director of Prosecutions and Others; Thint (PTY) LTD v National Director of Public Prosecutions** 2008 (2) SACR 421 CC;
>
> 3. The Court erred by holding that the Applicant had to state why he would be lawfully entitled to possess Gambling Machines;
>
> 4. The Court erred by not holding that an unlawful act is capable of producing legally valid consequences only for as long as the unlawful act is not set aside.
>
> 5. The Court ought to have considered **Majola v Ibhayi City Council** 1990 (3) SA 540 ECD;
>
> 6. In the event of the search warrant being invalid there was not statutory justification for the invasion of privacy that constituted the search seizure;
>
> 7. It follows that where the stationary justification has been declared to be unlawful that the search and seizure had to be unlawful;
>
> 8. The Court erred by holding that had Moloto AJ had the benefit of the Respondents version a spoliation order would not have been granted;
>
> 9. In a spoliation application the lawfulness or otherwise of the possession to be restored could not be taken into consideration;
>
> 10. The court erred by relying on **Schoeman v The Chairperson of the Gambling Board and Five Others** Civil Appeal 6 / 2005 and

Abraham Sello v Inspector Grobler and Others Case 623 / 2009. In both those cases the relief sought was not a spoliation application although the Court looked into the validity of search warrants. The court in this regard ought to have followed the principles outlined in the full bench judgment of **Sithonga v Minister of Safety and Security and Others** 2008 (1) SACR 376 (TK);

11. The Applicant merely sought a restoration of possession and did not seek any relief on the merits in other words whether his equipment were gambling machines or not. On a claim for mere restoration it is not a valid defense to set up a claim on the merits;

12. The Court erred by holding that the Applicant was not wrongfully dispossessed of the machines because the Respondent were authorized by a valid search warrant to search and seize the machines;

13. The Court erred by holding that the declaration of the warrant to be invalid is immaterial;

14. The Court erred by holding that there was an abuse of process;

15. The Court ought to have held that the Applicant was entitled to an order of mandament van spolie as well as the restoration of the machines seized;

16. The Court accordingly erred by not granting the prayers 4, 5, 6 of the Applicants Notice of Motion."

[3] These grounds are not clearly and succinctly set out but I will paraphrase them by setting out the main grounds relied upon for the appeal, namely that the Court erred in finding that:

3.1 a declaration of invalidity of a search and seizure warrant does not necessarily invalidate the consequential acts conducted as a result thereof;

3.2 the applicant was not entitled to a spoliation order;

3.3 and that he applicant would not be entitled to restoration of the machines unless he produced a licence issued by the North West Gambling Board, authorizing him to possess the machines.

[4] I dealt extensively with the above issues in the main judgment and the reasons for arriving at the decision were fully stated therein. I will however remark on certain issues raised by counsel for the applicant in his submissions.

[5] Mr Jagga argued that the principles applied in the common law remedy of ***mandament van spolie***, ought to be developed and finally decided by the Supreme Court of Appeal, especially with regard to the question of whether or not articles seized from an applicant on the basis of search and seizure warrant which has been declared invalid or unlawful after the execution thereof, ought to be returned to the possessor only if he or she is lawfully entitled to possess same.

[6] He submitted that there are conflicting decisions in the different Divisions of our Court and referred to the following cases:

6.1 ***Rich and Another v Orthopeadic Buildings (Pty) Ltd*** 1979 (4) SA (TPD) at p 24. The issue in this case did not relate to articles seized in terms of a search warrant authorized in terms of the Criminal Procedure Act, but rather this ejectment of a tenant (applicant) which was executed with a defective warrant of ejectment.

6.2 ***Bennet and Another v Pretorius N O and Others*** unreported case No (40024/2005) 2007 ZAGPHC 148 (15 August 2007) of the then Transvaal Provincial Division. This case dealt with an application for Contempt of Court brought against the respondents for their failure to restore gambling machines as per order of Court. This case does not deal pertinently with restoration of the property in the context in which this question is dealt with in this appeal;

6.3 ***Rajah and Others v Chairperson : North West Gambling Board and Others*** [2006] 3 All SA 172 (T).

a) In this case, the applicants sought, amongst others, a declaratory order in respect of section 9 (1) (a) of the National Gambling Act No 7 of 2004, which question was whether or not this section prohibits the possession of gambling machines in the North West Province alternatively that if it does, that it be declared unconstitutional; the applicants also sought an order restoring possession of the items seized in terms of a search warrant which was defective and consequently declared invalid and unlawful.

b) The issue of the constitutionality of section 9 (1)(a) of the National Gambling Act was referred to oral evidence due to the dispute of fact that arose on papers, regarding the nature of the applicant's business and the operation of the machines; However, the search warrant was declared invalid and the machines restored to the applicants.

c) The Court did not deal with the principles of ***mandament van spolie*** and it would seem the applicants did not place any reliance on this remedy.

6.4 ***Polynyfis v Provincial Commissioner: SAPS: NC and Others*** (245/2008) [2008] Northern Cape Division (unreported).

a) The issue pertained to the seizure of gambling machines or devices as envisaged in section 88 (8) of the Northern Cape Gambling and Racing Act No 5 of 1996 which were seized on the authority of a search warrant issued by a Magistrate and set aside because it was defective and therefore unlawful.

b) The applicants, as in the present case, applied for the restoration of the machines on the basis of ***mandament van spolie***. It was argued on their behalf, that the question whether or not applicant had the right to possess the machines could not be raised as a defence by the respondents because the unlawfulness of their possession was immaterial.

c) In this case, the Court, having considered several authorities and cases which were for and against the view that the element of lawfulness of possession is crucial in certain circumstances held the following view in ***obiter:***

> "19. It is not difficult to conceive of situations where the potential harm or consequences inherent in restoring possession may outweight the

> consequences and general disapproval of unlawful dispossession; particularly where the circumstances under which the unlawful dispossession had taken place had not amounted to blatant self-help, but rather to a failure to fully comply with procedural requirements. In such a case it may become necessary to develop the common law principles applicable to the remedy of **mandament van spolie**, and more specifically the defences thereto (see section 39 (2) of the **Constitution** Act 108 of 1996); especially where the prejudice to a fundamental right or to the execution by the Police of the objects set out in section 205 (3) of the Constitution would outweight the potential consequences of "condoning" unlawful dispossession in a particular case."

d) However, the Court ordered the restoration of the devices on the basis amongst others, that a valid search warrant could be obtained if necessary and further that to postpone the matter in order to allow the respondents to obtain a fresh search warrant "would unjustifiably frustrate the applicant's right to spoliatory relief," because the applicant had made out a case that he had been unlawfully dispossessed of his property.

6.5 ***Sithonga v Minister of Safety and Security and Others*** 2008 (1) SACR 376 (TKHC):

In this case, the Court declared a search warrant invalid and unlawful and ordered restoration of the seized property to the applicant on the basis of ***mandament van spolie***.

[7] I held the view that ***mandament van spolie*** is not available to the applicant

but rather that the Court has a discretion to order the preservation of the property seized in the interests of justice. In that regard, I held a different view from those cases referred to by Mr Jagga decided by other Divisions. I adopted the principles applied by the Court in ***Zuma v NDPP and Others; Thint (Pty) Ltd v NDPP*** 2008 (2) SACR 421 (CC) when I ordered the retention of the machines seized by the respondent. Counsel for the applicant argued that I was wrong to rely on the **Zuma** case because this case dealt with a different type of a search and seizure warrant and that the focus in that case was on section 29 of the National Prosecuting Act No. 32 of 1998. I find no merit in this submission because the general principles applied in determining the validity of a search warrant are the same in respect of all search and seizure warrant.

[8] In the case of ***Minister of Safety and Security v Van der Merwe*** 2011 (1) SACR 211 (SCA) at par [28] with reference to the principles applicable in determining the validity of a search warrant issued under section 29 of the National Prosecuting Act 32 of 1998 and that issued in terms of the Criminal Procedure Act No 51 of 1977, Nugent JA in paragraph [32] stated amongst others that "the requirement that the offence must be specified, (in the search warrant) was laid down unequivocally and without qualification in **Thint** in the context of the intelligibility of the warrant, and in that respect, I see no material distinction between a warrant that is issued under that statute and a warrant issued under the Criminal Procedure Act 51 of 1977" (emphasis added).

[9] In ***Mistry v Interim Medical and Dental Council of South Africa*** 1998 (4) SA 1127 (CC), the issue was the validity of a search and seizure conducted in terms of section 28 (1) of the Medicines and Related Substance

Control Act 101 of 1965. The Court in this case declared section 28(1) of the Medicine Control Act invalid on the basis that it was inconsistent with section 13 of the Interim Constitution. Despite such declaration, it did not order the return of all the goods searched and seized on the basis of the invalid section. The Court, through Sachs J, held the view that the inspection or search was lawfully conducted in terms of the powers granted by statute which at the time of the search was still in force. With regard to the goods seized, it is important to paraphrase what the court said in paragraph [43] page 1153 A – C thereof:

> ". . . . .There is nothing before the Court to show that the other items could have significant probative value as exhibits in themselves should proceedings one day be brought against the applicant. They constituted real evidence, and no-one disputes that they were found on and taken away from the applicant's premises. They are presently in the possession of Mr Coote as a result of a search which has not been retrospectively invalidated. Whether or not they could be relevant to or admissible in future proceedings is not a matter before this Court, but one to be determined by the relevant court or disciplinary body should the need arise. If no proceedings take place, applicant will be able to pursue normal possessory remedies to get them back. The interests of justice would be appropriately secured." (emphasis added).

[10] The Supreme Court of Appeal endorsed the principle that once the seizure of property or goods is found to be unlawful by virtue of an invalid search and seizure warrant, the evidence seized in the process may be preserved in the interests of justice. See ***National Director of Public Prosecutions and Another v Mahomed*** 2008 (1) SACR 309 (SCA). In this case, Nugent JA (with Mlambo JA concurring and Farlam JA and Cloete JA concurring to the order), stated the following in paragraph [34] thereof with regard to the power of the Court to order preservation of property or goods seized with an invalid warrant.

> "[31] Those powers of a court that existed before the Constitution took effect seem to me to be preserved by s 34 of the Constitution. That section accords to everyone (which includes the State) the right, amongst others, to have any dispute that can be resolved by the application of law decided in a fair hearing. I have little doubt that the right to a fair hearing before a court of law includes the right to have factual disputes resolved expeditiously and justly. That seems to me to provide ample authority to a court in appropriate circumstances to order the preservation of evidence so as to achieve that end. Indeed, it seems to me that a court, which is under a constitutional duty to ensure that legal disputes are resolved fairly and justly, may order the preservation of evidence on its own initiative if that will serve the proper administration of justice" emphasis added.

[11] In paragraph [32] on p 6 of the **Mahomed** judgment, Nugent JA went further to state that "….. It is sufficient to say that where exercise of those powers intrudes upon other protected rights, as making a preservation order will do in this case, a Court is bound to exercise those powers only within the constraints of s 36. That requires the benefit that will flow from allowing the intrusion upon protected rights to be weighed against the loss that the intrusion will entail, and only if the loss is outweighed by the benefit to an extent that meets the standard that is set by s 36 will it be permitted to order an intrusion." He referred to and applied the views of the dissenting judgments of O'Regan and Cameroon AJ in ***S v Manamela and Another*** (Director-General of Justice Intervening) 2000 (1) SACR 441 (CC) at par [66] and ***Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)*** 2007 (2) SACR 493 (SCA) at paras [10] and [11].

[12] In the case of ***Sello v Grobbler and Others*** 2011 (1) SACR 310 (SCA) referred to in my main judgment, the Court, despite having declared the

search to be unlawful, ordered the return of the goods seized which the applicant would lawfully be entitled to possess. The appellant's contention was that the declaration of the search and seizure as unlawful entitled him to the return of all the items seized. The items seized would be required as exhibits in the pending criminal case proffered against the appellant and it was alleged that some of the drugs seized had expired and others stolen. The appellant had failed to deal with his lawful entitlement to possess the property seized, but rather alleged that he was "in peaceful and undisturbed possession of the seized items." The Court held that "that would have sufficed, had this been a spoliation application. But it is not." See paragraph [10] of the judgment.

[13] It is clear from this judgment that where goods have been seized through a search and seizure warrant, for the purpose of being used as evidence against an accused person in a subsequent or pending criminal case, a spoliation application for the return of the goods would not be appropriate. See in that the remarks of Poonan JA in applying the views held by Krigler J, in ***Key v Attorney-General, Cape Provincial Division and Another*** 1996 (2) SACR 113 (CC) in para [13], where he said the following with regard to the actions of the officers who executed a defective search warrant issued in terms of section 21 of the Criminal Procedure Act:

> "[23] Here the investigating team did not act in flagrant disregard of the first appellant's constitutional rights. On the contrary, they sought judicial authority for their conduct. That judicial imprimatur was an attempt to uphold the law in spirit and letter. None of those executing the warrant knew that it suffered a defect…….."
>
> [24] In those circumstances it is plain that the task team was

> not attempting to garner any unfair advantage for themselves. Rather it plainly was an endeavour to protect the interests of the first appellant. For that they should be commended, not penalised by having the evidence that has been secured pursuant to that warrant excluded. To exclude the evidence in those circumstances would not conduce to a fair trial. Nor for that matter would it serve to advance the administration of justice. To exclude the evidence simply because the wrong magistrate had been inadvertently approached would run counter to the spirit and purport of the Constitution. In my view, on the facts of this case s 35 (5) could hardly countenance the exclusion of the impugned evidence. Accordingly the conclusion reached by the trial court on this score cannot be faulted."

[14] I find these remarks apposite to the present application. The respondents, in executing the warrant which was subsequently declared invalid because it did not pass muster with the principles required for a valid search warrant, did not take the law into their own hands. A spoliation order was not appropriate in the circumstances. The search and seizure warrant was valid and would remain valid until set aside by a Court of law. The Court in the interests of justice was entitled to exercise its discretion in ordering the retention of the machines by the respondents.

[15] The applicant in his founding affidavit stated that he was served with a written warning to appear in a Criminal Court. The machines were seized on the basis that the applicant breached section 9 of the National Gambling Act read with the provisions of the North West Gambling Act, which make it an offence to possess gambling machines without a valid licence. See paragraphs [57] – [58] of my judgment.

[16] On the facts, I made a finding that on his own admission, the applicant conducted a Casino business without the required licence. The applicant

wanted the equipment returned to him in order to continue with his casino business. Section 31 of the Criminal Procedure Act No 51 of 1977 provides for the return of the seized articles, if not required at the trial for the purpose of evidence, to a person including the person from whom the article(s) were seized, only "if such person may lawfully possess such article". See section 31 (1) (a) and (b) of the Act. Compare ***Guiliano v Minister of Law and Order*** 1990 (4) SA 308 (W).

[17] The Full Bench decision of this Court in ***The Chairperson of the North West Gambling Board and 5 Others***, cited in my judgment in para [61], held that the applicant would not be entitled to the restoration of the gambling machines seized unless he produced an appropriate licence authorizing him to possess same.

[18] In view of the conflicting decisions of the various Division on this issue, I am of the view that another Court may come to a different conclusion other than the one arrived at.

Order:

1. The application for leave to appeal to the Supreme Court of Appeal is granted.

2. Costs will be costs in the appeal.

M M LEEUW
JUDGE PRESIDENT