IN THE HIGH COURT OF SOUTH AFRICA

(NORTH WEST DIVISION, MAHIKENG)

CASE NO.: M320/15

In the matter between:

ADRIAAN ALBERTUS STOLTZ	**APPLICANT**
and	
THE MINISTER: SOUTH AFRICAN POLICE N.O	**1ST RESPONDENT**
THE PROVINCIAL COMMISSIONER OF THE SAPS, NORTH WEST PROVINCE N.O	**2ND RESPONDENT**
WARRANT OFFICER BERNARDUS VAN STADEN N.O	**3RD RESPONDENT**

JUDGMENT

Landman J:

Introduction

[1] The police searched for a cheetah cub on the farm of Adriaan Albertus Stoltz (the applicant) and found and seized a cub, rifles and accessories and medicine. The applicant launched an application for the return of the items seized on the basis of the mandament van spolie. The application is opposed on the basis that the search and seizure was lawful.

The law

[2] The graceful Cheetah (Acininyx jubatus) appears as a species on the list of threatened and protected species issued in terms of section 56 of the National Environmental Management Biodiversity Act 10 of 2004 (the Act). See Notice R151 of 23 February in GG 29657 of the same date. The effect of its listing is that a person may not carry out a restricted activity involving a Cheetah without a permit issued in terms of Chapter 7 of the Act. See section 57(1).

[3] A "restricted activity" as defined in section 1 of the Act in relation to a specimen of a listed threatened or protected species, means-

> "(i) hunting, catching, capturing or killing any living specimen of a listed threatened or protected species by any means, method or device whatsoever, including searching, pursuing, driving, lying in wait, luring,

alluring, discharging a missile or injuring with intent to hunt, catch capture or kill any such specimen;

…

(vi) having in possession or exercising physical control over any specimen of a listed threatened or protected species;

…

(viii) conveying, moving or otherwise translocating any specimen of a listed threatened or protected species;

(ix) selling or otherwise trading in, buying, receiving, giving, donating or accepting as gift, or in any way acquiring or disposing of any specimen of a listed threatened or protected species; or

(x) any other prescribed activity which involves a specimen of a listed threatened or protected species…"

[4] It is an offence to contravene section 57 of the Act. See section 101(1) of the Act. A person convicted of an offence in terms of section 101 is liable to a fine not exceeding R10 million, or an imprisonment for a period not exceeding ten years, or to both such a fine and such imprisonment. See section 102(1) of the Act.

The facts

[5] At 13:00 on 12 August 2015 Warrant Officer Van Staden of the Vryburg Police received a call from Mr Koos Vermeulen of the Kimberley Organised Crime Unit: Stock Theft Unit. Vermeulen Informed him that the Unit had confiscated two Cheetah cubs from a suspect and that the suspect informed the police officers that he was in the process of acquiring another cub from the applicant, Adriaan Albertus Stoltz. He said that the third Cheetah cub (the cub) was in the custody of the applicant at his farm Dieprivier, Vostershoop, North West Province. Van Staden was informed that the animal had been tamed and was being reared at the farm.

[6] Van Staden set off for the farm and collected Constable Godfrey Setatwe to assist him as he was required to have backup. They arrived at the main gate of the farm which is situated about 1 km from the farmhouse. Van Staden broke the padlock in order to gain entry into the property so that they could conduct the search and seizure.

[7] They proceeded to the farmhouse where they met Ms Rabatho who told them that she cleaned the applicant's house once a month. She said that the applicant had gone to Vryburg and would return later. She had no knowledge of the cub. The police asked her to accompany them as they searched for the cub. In the course of the search the police found a rifle placed in the doorway of a room

in the house. There was a safe in that room with keys in the keyhole. A “gun” and another rifle was placed next to the wall. The police also found a silver suitcase which appeared to contain animal medication. In addition the police also found a firearm silencer, rifle scope, black gun case with a dart gun inside and a telescope.

[8] Van Staden phoned an official of Nature Conservation in Vryburg and spoke to Mr Wimpy Weideman who advised him that it was illegal for the applicant to possess Zoletil. Then Van Staden phoned Warrant Officer Botha of the Vryburg Police who confirmed that it was illegal to leave firearms lying around in terms of “section 86(1)” of the Firearms Control Act 60 of 2000. Van Staden asked Botha to do a computer search to establish whether the applicant was licensed to possess the firearms that had been found. Botha informed him that as far as he knew, the applicant had been declared unfit to possess firearms in 2011 or 2012.

[9] The police heard a high-pitched sound coming out of the side of the garage and found a cub inside the meat room. The police caught it and placed it in a plastic container and took it with them.

[10] The police listed the items which they had seized. See annexure “A”. These are the items listed above. Ms Rabatho signed for the list and was given a copy of the list. The police returned to the Vryburg police station where they opened a docket in regard to the seized items. This case is still ongoing and the investigations are proceeding. See Vorstershoop CAS 01/08/and 2015.

[11] Van Staden says at paragraph 6.15 and 6.16 of his affidavit:

> "When I searched and seized the items at the applicant's residence I entertained a reasonable belief that a search warrant would be issued to me if I had applied for it. I further believe that the delay in obtaining the search warrant could defeat the object of the search, in that, had we delayed, the applicant could have sold or concealed the cheetah cub she as the suspect who is mentioned in paragraph 6.2 above, had already been arrested. I thought it would only take a few if not one phone call to the applicant to know that the South African Police are aware of his possession the Cheetah cub in his possession and then he could sell or conceal it.
>
> I proceeded to search and seize the items in terms of section 22 of the Criminal Procedure Act 51 of 1977..."

[12] An affidavit by Constable Setatwe confirms Van Staden's affidavit to a large but not complete extent.

<u>Defence of lawfulness</u>

[13] The State may, in accordance with the provisions of chapter 2 of the Criminal Procedure Act 51 of 1977 (the CPA), seize 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;

(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. See section 20 of the CPA.

[14] The respondents bear the onus of proving that the search and seizure was lawful. See **City of Cape Town v Rudolph** (2003) 3 All SA 517 (C). The search was conducted without a warrant. The respondents rely only on section 22(b) of the CPA to justify the actions of Van Staden and Setatwe. Section 22(b) reads:

"A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20 –

….

(b) if he on reasonable grounds believes –

(i) that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; and

(ii) that the delay in obtaining such warrant would defeat the object of the search."

[15] The relevant portion of paragraph (a) of section 21(1) reads:"… if it appears to such Magistrate or Justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or upon any person or upon or at any premises within his area of jurisdiction."

[16] Were there reasonable grounds for believing that the cub was on the farm? A suspect, arrested by the Kimberley Organised Crime Unit: Stock Theft Unit, had been found in possession of two Cheetah cubs. The suspect told the police officers that he was in the process of acquiring another cub from Adriaan Albertus Stoltz. This cub was in the custody of Stoltz at his farm Dieprivier, Vostershoop. The animal had been tamed and was being reared on the farm. There were reasonable grounds for Van Staden's belief that the cub was on applicant's farm.

[17] Were there reasonable grounds for believing that a Magistrate or Justice of the peace would have issued a search warrant? This requires consideration whether there were reasonable grounds for believing that the cub was of: concerned in the commission or suspected commission of an offence; or which may afford evidence of the commission or suspected commission of an offence;

or that the cub is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence. See section 20 of the CPA.

[18] The offence or intended offence is:

(a) the possession or exercising physical control over a cub without a permit; or

(b) selling or otherwise trading in, or giving, donating or in any way disposing of a cub, without having a permit issued in terms of the Act.

There is no general exemption applicable.

[19] This brings to the fore the question whether, on objective grounds, there were reasonable grounds for believing that the applicant did not have a valid permit. Van Staden alleges in paragraph 17 of his answering affidavit that the applicant did not have a permit to possess the cub. But Van Staden does not disclose the basis for this belief. A reading of paragraph 6.15 of his answering affidavit, quoted above, does not disclose a basis for any such reasonable suspicion. It is not illegal to keep or sell a cub if the buyer and the seller have a permit.

[20] In the context where a suspect has been arrested in the circumstances described by the Kimberly unit, it would be reasonable for Van Staden to conclude that the buyer did not have a permit to buy and possess the cub. But can a reasonable inference be made that the seller, lacked a permit to engage in a

restricted activity? I think not. And it is significant that Van Staden makes the averment that the applicant does not have a permit separately without explaining how he arrived at his conclusion. That the matter was brought by the applicant as a matter of urgency (and subsequently struck from the roll for lack of urgency) does not cure this lack of information.

[21] The Supreme Court of Appeal had previously ruled, inter alia, in **Pakule and Tafeni v Minister of Safety and Security** (440/10 & 439/10) [2011] 107 (1 June 2011) the Supreme Court of Appeal said at para 32 that:

> "And, as we have said, even if a seizure (of a vehicle or any other article) was initially based on grounds that were not reasonable, where the police discover subsequently that there are indeed grounds for a reasonable belief that an article is concerned in the commission of an offence, they may then seize it lawfully. A return to the person from whom the item was seized would be an exercise in futility, bearing in mind that at the moment of return the article might lawfully be seized again."

[22] However, the Constitutional Court has overruled this line of authority. In **Ngqukumba v Minister of Safety and Security and Others** (CCT 87/13) [2014] ZACC 14; 2014 (7) BCLR 788 (CC); 2014 (5) SA 112 (CC); 2014 (2) SACR 325 (CC) (15 May 2014) the court held at paragraph 21:

> "Possession of the vehicle by the applicant pursuant to its return in terms of a court order would only be unlawful if it were established that he did

not have lawful cause to possess it. That is a conclusion that can only be reached after an enquiry into the facts surrounding the applicant's possession. Before that enquiry, one is not in a position to say the applicant's possession of the vehicle will be unlawful – it may or may not be, depending on the result that the enquiry would yield. The question that arises is: in proceedings for a spoliation order, is it proper to hold that enquiry? I say not. That would be enquiring into the merits of the lawfulness of the applicant's possession. Those merits are irrelevant in proceedings for a spoliation order: the despoiler must restore possession before all else. Self help is so repugnant to our constitutional values that where it has been resorted to in despoiling someone, it must be purged before any enquiry into the lawfulness of the possession of the person despoiled. Earlier I made the point that restoration of possession may even be to a person who might eventually be shown to be a thief or robber. The return to the applicant of the tampered vehicle, which may be possessed lawfully, is no different."

[23] I turn to consider the seizure of the rifles and ancillary equipment. Van Staden says that he concluded that the applicant committed the offence of failing to secure the firearms in terms of section 86(1) of the Firearms Control Act 60 of 2000 (the FCA) and committed the offence of unlawfully possessing the firearms. Section 86(1) of FCA concerns a Firearm transporter's permit. What Van Staden has in mind is Regulation 86(1). It is technically impossible for the applicant to

have committed both offences. The offence of failing to store the firearm at the place specified in the license can only be committed by a license holder.

[24] But Van Staden had a reasonable suspicion that the applicant was not in possession of a valid firearm license as Botha recalled that the applicant had been declared unfit to possess a firearm. The seizure of certain ancillary items firearms was unlawful.

[25] As regards the animal medicine, Van Staden has not referred to any applicable legislation which makes the possession of Zoletil illegal. This aspect is not addressed in the respondent's heads of argument. I am consequently unable to examine the elements of any such crime. I intended to order the respondents to return these items.

[26] Lastly, in view of my finding regarding the cub and the medicine, I only need to briefly consider whether Van Staden had reasonable grounds for believing that a delay in obtaining a search warrant in order to seize the firearms would have defeated the object of the search. It is self-evident that normally if a suspect receives notice of an impending search, it is likely that he or she will remove or destroy the evidence sought. I am satisfied that Van Staden was entitled to adopt the view that he did and that consequently his search and seizure of the firearms, without a warrant, was lawful.

[27] In the premises the applicant is entitled to part of the relief that he seeks. My order does not constitute authority to possess the cub or the medicines.

Order

I make the following order:

1. It is declared that the search without a warrant carried out by the third respondent on 12 August 2015 on the applicant's farm Dieprivier, Vorstershoop was unlawful as regards items (1), (4), (7), (9), (10), and (11) on the list attached as annexure 'A' to the founding affidavit.
2. The respondents are ordered to return to the applicant forthwith the items set out in paragraph 1 of this order.
3. The respondents are ordered to pay the applicant's costs jointly and severally; the one paying the others to be absolved.

A A Landman
Judge of the High Court

APPEARANCES

Date of hearing:	4 February 2016
Date of judgment:	11 February 2016
For the Applicant:	Adv Jagga instructed by Smit Stanton Attorneys
For the Respondents:	Adv Masevhe instructed by State Attorneys