IN THE HIGH COURT OF SOUTH AFRICA
TRANSVAAL PROVINCIAL DIVISION

DATE: 15/08/2007

CASE NO: 40024/2005
UNREPORTABLE

In the matter between:

BENNET, SARAH WILHELMINA	**First Applicant**
MERENSKY DUAN	**Second Applicant**

AND

CAPTAIN PRETORIUS N.O.	**First Respondent**
INSPETOR MOKWENA N.D.	**Second Respondent**
THE PROVINCIAL COMMISSIONER: SAFETY AND SECURITY FOR THE NORTH WEST PROVINCE	**Third Respondent**
SENIOR SUPERINTENDENT A WAGNER N.O.	**Fourth Respondent**

JUDGMENT .

INTRODUCTION

1. The applicants apply by way of urgency for an order holding the first, third and fourth respondents (hereinafter referred to a "the respondents") in contempt of court and imposing an appropriate prison sentence upon the upon them.

2. They also claim costs on a punitive scale against the individuals concerned personally, alternatively in their official capacity.

3. The first applicant is an adult businesswoman, trading under the name and style of *Pink Panther* at No 2 Auto Street, Potchefstroom.

4. The second applicant is Duan Merensky, a major businessman of 18 Fatima Bhayat Street, Rustenburg.

5. The first respondent is Captain Pretorius, N.D., the police official who executed a search warrant issued in respect of the first applicant's business premises on the 9th December 2005, of c/o Wespol Square, Potchefstroom.

6. The second respondent is inspector Mokwena N.D. cited in his official capacity in a similar capacity as the first respondent. The relief once sought against him having been abandoned, he plays no further part in this affair. The other respondents will in this judgment be referred to collectively as "the respondents".

7. The third respondent is the Police Commissioner for Safety and Security, North West Province, cited in his official capacity as the commanding officer of the South African Police Services in the North West Province, c/o Wespol Square, Potchefstroom.

8. The fourth respondent is Senior Superintendent A Wagner N.D., cited in his capacity as the justice of the peace who authorized the search warrant for search and seizure in terms of section 21 of the Criminal Procedure Act 51 of 1977 of Wespol Square, Pochefstroom.

9. All the respondents are cited through the office of the State Attorney, Pretoria.

10. In order to place the application into its proper perspective, it is necessary to deal in chronological sequence with the events that have given rise to the present proceedings.

THE CHRONOLOGY

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11. The first applicant is the proprietress of a business that allows members of the public to play on gambling machines that do not reward the winner with a multiple of the stake, but only grant free games in the event of a lucky set of numbers or images coming up.

12. The first applicant was in undisturbed possession of her business when the police in the person of the first respondent and some of his underlings raided her premises and gained entry without requesting access from the owner or occupier. The police broke down the doors of the premises although they appear to have had no reason to suspect that any item they were looking for, primarily gambling devices, could be spirited away while first applicant's attorney was on the scene trying to establish the legality of the warrant.

13. In addition, the business would have opened to ply its trade by 10h00 in any event - a fact that was well known to the police officers.

14. At about the same time, the police conducted a similar raid at second applicant's business in Rustenburg. This raid was authorized in the same fashion and by the same person as the one upon the first applicant's business, issued on the grounds of the same alleged offences.

15. The police removed about 95 gambling machines from first applicant's premises. As it turned out later, these machines were removed to a store or warehouse in Mafeking that belongs to, or is under the control of, the North West Gambling Board.

16. The machines were stored at this warehouse, presumably as exhibits to be used in a criminal prosecution, ostensibly having been attached in terms of section 21 of the Criminal Procedure Act 51 of 1977.

17. The machines were kept at these premises together with other machines that had been attached either by the North West Gambling Board's own inspectors, or by the police acting in the manner set out above at the behest of the Gambling Board.

18. The other gambling devices that were stored at these premises included machines attached on the 23rd December 2004 at premises in Stilfontein. These machines belonged to a business in which a certain Mr Rajah and the first applicant in these proceedings held an interest.

19. There is no indication in the affidavits filed by the respondents that the machines were ever booked into the exhibit register of the South African Police Services, and registered as such in form SAP 13, as this register is known colloquially.

20. There is, for that matter, no evidence before this court that any prosecution was ever instituted against the applicants, nor is there proof of a docket having been prepared for the attention of the Director of Public Prosecutions of the North West Province in connection with the allegedly unlawful activities carried out at the premises of the *"Pink Panther".*

21. On the night of the 30th December 2005, two trucks called between 01h00 and 04h30 at the warehouse in Mafeking, allegedly with instructions from a certain Erasmus to collect 200 gambling machines and transport them to a farm in the Rustenburg district.

22. The premises were guarded by a private security firm. When the truck driver and his assistants demanded entry to the warehouse, the guards smelled a rat and alerted the South African Police Services.

23. The police arrived, but were told by the man calling himself "Erasmus" over a cell phone that the removal of the machines was duly authorized. (It appears from the papers in these proceedings and in other matters in which the North West Gambling Board became embroiled that the law enforcement manager of the Board is one J C Erasmus.)

24. Without consulting the public prosecutor, the investigating officer in the matter against the applicants or the station commander of the police station in whose exhibit register the machines ought to have been booked - assuming that the persons responsible for the attachment of the machines had followed the steps that are

prescribed by the law relating to criminal procedure once an attachment of an article providing proof of an alleged offence has been effected - the police allowed the machines to be loaded without as much as confirming the identity of the persons removing the articles. In spite of the unusual hour at which an official warehouse was opened to remove goods held under police attachment, no phone call was made to an official of the North West Gambling Board, no receipt was obtained for the machines that were loaded and no enquiries were made regarding the destination of the goods that were shifted during the hours of darkness.

25. In the police docket that was eventually opened into the disappearance of the machines, an allegation appears that a door at the warehouse was broken into in order to remove the machines - a fact that apparently escaped the attention of the police officers on the scene.

26. A few days later, officials of the Gambling Board realized that the machines were stolen and belatedly the hue and cry was raised.

27. Although the drivers of the trucks in question were traced and although they identified the farm at which the machines were off - loaded, the machines have been missing without trace and no prosecution appears to have been instituted. No arrest has apparently been made of any suspect.

28. Although the North West Gambling Board laid a charge of theft in respect of the stolen machines - which included machines attached from the first and second applicants' premises and those attached from others - neither the Board nor the police or, in particular, any of the respondents - saw fit to inform the applicants that their property had been stolen.

29. Early in 2005, Mr Rajah and the first applicant in these proceedings, together with Mr Sarel Blaauw and Mr Daniel Jacobus Schoeman, launched an application under Case Number 483/2005 for a review and setting aside of the warrants under which the machines had been attached in Stilfontein, and for the return of the devices.

30. The Gambling Board and the third respondent in these proceedings are also involved in Case No 483/2005, together with other respondents.

31. This earlier application was opposed by all the respondents cited therein.

32. Argument was heard before Patel J. Judgment was delivered on the 3rd March 2006, almost two months after the theft of the machines from the warehouse. He held hat the warrants were issued unlawfully and ordered the respondents in that matter to return the machines that had been attached.

33. The name of Mr J C Eramus featured prominently in this application.

34. Even though judgment was only delivered on the 3rd March 2006, neither the police nor the Gambling Board disclosed to Patel J, or the applicants in that matter that machines that might include those forming the subject matter of Case No 483/2005, had been stolen.

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36. An application to hold the respondents in matter 483/2005 in contempt of court was successful, but Claassen J, who gave the judgment, granted leave to appeal against this finding.

37. No disclosure was made during the contempt proceedings that the machines might have been stolen.
To date, no steps appear to have been taken to prosecute the appeal against this contempt judgment.

38. The correspondence that was directed to the applicants in the first contempt application was written on behalf of all respondents in that

39. matter by Mr Matsheke of the State Attorney's office. He offered, in a letter dated the 9th March 2006, to return **all** machines to the lawful owners provided that they were in possession of a license - a clearly untenable defence to the demand for compliance with the court order.

40. During the latter part of 2005, the applicants in these proceedings launched the an application under the same case number under

which the present application is brought, for the setting aside of the warrants in terms of which the machines belonging to the applicants' businesses in Potchefstroom and Rustenburg had been removed, as invalid and *ultra vires,* and for the return of the machines.

41. The respondents opposed the application and filed their answering affidavit through the fourth respondent during December 2005. The

42. application was again heard by Patel J.

43. Judgment was only delivered on the 20th June 2006.

44. At no stage of the proceedings before judgment was given did the respondents disclose that a number of the machines had been stolen.

45. The attachment was held to have been unlawful, both in respect of the extent and legality of the warrant, as well as in respect of the manner and fashion in which the warrant was carried out.

46. It should be mentioned in passing that the Honourable Constitutional Court, in an unanimous judgment handed down on the 8th June 2006 in *Magajane v Chairman, North West Gambling Board and others* 2006 (5) 250 (CC); ((2006 (10) BCLR 1133 CC; 2006 (2) SACR 447 (CC)); held that the provisions of section 65(1) and (2), allowing inspections without warrant by inspectors of the Gambling Board, were unconstitutional.

47. Still failing to disclose the full state of affairs, or informing the applicants of the fate of their goods, the respondents appealed, but did so out of time, thereby failing to comply with the rules of this Court.

48. An application for condonation was dismissed by Patel J, as was the application for leave to appeal. In neither application did the respondents make mention of the fact that the machines had been stolen.

49. Having been refused leave to appeal, the respondents neither took the applicants into their confidence nor did they return the balance of the machines still in their possession. There is no explanation on the papers for this action.

50. The applicants launched an urgent application on the 5th September 2006 for the committal of the respondents for contempt of court based on the continued failure to return the devices.

51. This application was not formally opposed, but the respondents through their legal representatives consented to an order that the machines would be returned on or before the 15th September 2006. They also consented to an order in terms of which they were to pay the costs of that application.

52. The respondents later claimed that they had not consented to the order being made, but took no steps to have the order set aside once they became aware of it. The correspondence that was exchanged between the parties' attorneys in any event contains a clear-cut undertaking to return the machines and to pay the costs of the urgent application.

The respondents failed to comply with the order or to honour their undertaking.

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54. On the 13th September 2006, the applicants' attorney of record proceeded to the warehouse to oversee the delivery of the 144 machines that ought to have been returned. Only then was he informed by the 151 respondent that only 44 machines could be returned as the others had been stolen.

55. Mr Wissing, the attorney concerned, refused to accept delivery, but in spite thereof a truck delivered the 44 items to the first applicant's business.

56. On closer inspection, only seven were the applicant's, while the balance belongs to Mr Rajah.

57. The applicants launched the present application for a declaration of being in contempt of Court and the imprisonment of the first, third and fourth respondents on the 28th September 2006.
It came before the Court on the 9th October 2006.

58.

59. Apart from raising technical points, none of which contributed to the resolution of the issues, the respondents in their answering affidavit, sworn to by the fourth respondent and confirmed in laconic terms by the other respondents, the respondents claim to have been

unaware of the of the disappearance of the attached machines prior to the 13th September 2006. This truly amazing suggestion is couched in the following terms:

" *...A clear report of the breaking in was made by* a *Mr Jacobus Conrade Erasmus of the Gambling Board, North West, to the Respondents in particular, the First Respondent only on* 13 *September 2006. Mr Erasmus reported that there was* a *breaking in around December 2005 and that about* 194 *machines which were stored in the Gambling Board's warehouse in Mafeking belonging to about* 8 *people were stolen.* Mr *Erasmus's confirmatory affidavit is attached hereto marked 'ACW5'"*

"Although the First Respondent knew before 13 *September 2006 that there was* a *breaking in the North West Gambling Board, he was not aware of the exact nature of the breaking in* as *well* as *the nature of the items stolen. Still, after this report, the First Respondent could not identify the machines which were stolen"*

60. These allegations are merely confirmed in the most superficial of terms by the first respondent and by Mr Erasmus.

61. In answer to the charge that the Respondents had deliberately failed to take the applicants into their confidence and had deliberately frustrated their rights to their belongings, the fourth respondent reacts:

"Although the First, Second Respondent and myself had a *vague knowledge that there was* a *breaking in at the North West Gambling Board's warehouse, we did not know exactly the precise nature of the breaking in and the items stolen.* We *later became aware that in fact* a *case of housebreaking with intent to steal and theft was registered with the Mafikeng police under reference number CAS 14/1 06."*

62. It is apparent at first blush that this explanation is designedly vague and superficial and constitutes a deliberate attempt to keep both the court and the applicants as much in the dark as is possible without

mendaciously denying any knowledge of the theft of the items concerned.

63. The explanation falls very far short of a full and frank disclosure, as the fourth respondent, first respondent and Mr Erasmus were in duty bound to make.

64. In the first instance, not one of the three has seen fit to explain when and how they obtained their allegedly vague information about the break in. Mr Erasmus, as the chief law enforcement officer of the Board, was obviously and in the ordinary execution of his functions as such, obliged to launch a full enquiry into any disappearance of attached goods the moment he became aware thereof. In addition, he was obliged to inform the applicants, the police and the Director of Public Prosecutions of the theft. His failure to do so appears to be deliberate and therefore hardly reconcilable with an innocent explanation.

65. The same applies in full measure to the first respondent. It is in any event hardly worthy of credence that he should not have been aware at the earliest stage of the police investigation that exhibits he had attached with a not inconsiderable measure of fanfare and old-fashioned *"kragdadigheid"* had been removed from a store that was guarded by security officers and in the presence of the police without the latter informing the relevant authorities.

66. The failure by all concerned to take the court into their confidence regarding the date upon which their "vague knowledge" of the theft was obtained, reflects an attitude toward the court that is at best disgraceful and at worst deliberately offensive and contemptuous of the third arm of government. To make matters worse, there is no explanation why neither of the respondents attempted to establish the full truth - on the assumption that they had indeed failed to enquire into the theft at the earliest opportunity - once the applications for the return of the machines were launched. It is trite that the respondents were in duty bound to make a full disclosure, however unpalatable the truth may have been.

67. In *Breitenbach v Fiat S.A. (Edms) Bpk* 1976 (2) *SA* 226 *(T),* Colman J. had the following to say about statements under oath designed to reveal less than the full state of affairs:

"The penalty (or one of *the penalties) for making* a *false statement on oath is imposed after* a *trial for perjury. And in such* a *trial* a *man will find it easier to escape conviction if the averment to which swore was brief, bald and vague, than if it was clear and supported by such detail* as *an honest deponent might reasonably have been expected to put forward even in* a *concise reply to a(n).... Application. A dishonest deponent, if he is wise, will present* as *narrow* a *front* as *possible, and (if it is practicable)* a *blurred one."*

The affidavits quoted above are prime examples of brief, bald and vague statements on matters that the deponents had far more knowledge of - or ought to have had far more knowledge of - than the blurred picture painted by their words was designed to reveal.

68. This regrettable attitude toward the court and the rights of other Litigants did not improve when the matter was called on the 9th October 2006.

69. Counsel for the respondents was unable to enlighten the court why no full disclosure of the material facts was made by the respondents at the earliest opportunity. He could not obtain instructions because his attorney, an officer of the court, had discourteously and in transgression of the ethical rules of the organized professions failed to attend court or to send a member of the State Attornev's office to represent him.

70. After argument the Court made the following order:
"…..the matter is hereby postponed to the 23rd October 2006...

…., the respondents are to produce and explain under oath:

(a) When the machines were attached;

(b) Who was involved in the action to attach;
(c) A copy of the inventory of the machines so attached;
(d) When the machines were taken to the store room of the North West Gambling Board;

(e) Affidavits by all persons involved confirming such action and identifying each person who took the machines to the North West Gambling Board and each official who received the machines;

(f) Copies of the inventory made by the officials of the North West Gambling Board when receiving the machines;

(g) When the alleged theft was discovered;

(h) By whom it was discovered;

(i) When and how the matte was reported to the police;

0) A copy of the police docket with all annotations, entries and statements made by every witness and officer;

(k) A full report by the investigating officer of all steps taken to find the machines and the alleged thieves;

(l)....."

71. The respondents were ordered to pay the costs wasted by the postponement on the scale of attorney and client, the one to pay, the other to be absolved.

72. The matter stood down until the 24th October 2006. On this morning mr Tshidzua appeared for the respondents. He informed the court that he had only been briefed that morning.

73. A photostatic copy of the police docket investigating the alleged heft was handed to the court.

74. Mr Tshidzua claimed privilege for the contents of the entire police file from disclosure to the respondents.

75. When asked on what grounds this privilege was claimed, he responded that he had not read the file but a been "instructed" by the investigating officer that the file was privileged in its entirety. He advanced the submission that the identity of informers might be disclosed, but had to admit that there was no reference to any informer in he police file as far as he was aware - which he had admittedly not read.

76. The investigating officer was not in court as he had only been informed of the hearing the day before and was on a family visit to see his ailing father-in-law.

77. Apart from producing a copy of the police docket, which contains an inventory of the machines that were attached, none of the other orders made on the 9th October 2006 were complied with.

78. Mr Tshidzua was unable to deal with any of the queries the court directed to him in an attempt to establish why its orders had been ignored. He had not consulted a single authority on access to the police docket or any privilege that might attach to any of its contents. His attorney was present and explained his absence on the previous date.

79. The Court postponed the matter to the 30th October 2006, ordering the respondents to pay the costs of the further postponement on the scale of attorney and client and giving the applicants unrestricted access to the police docket. The investigating officer was ordered to attend the next hearing.

On the 30th October 2006 first and fourth respondents and the investigating officer filed supplementary affidavits. The investigating

80. officer supplied an explanation for his absence but did not attend court again, in spite of this Court's express order.

81. Mr Tshidzua explained that the investigating officer's objections to the disclosure of he police docket having been overruled by the Court at the previous hearing, there was no cause for him to attend. This explanation is *prima facie* designedly contemptuous of the unqualified order made by the court - it was obvious that the investigating officer might have been of great assistance in answering some of the pressing and hitherto unsatisfactorily explained issues.

82. His absence from the proceedings is *prima facie* contemptuous of this Court. The fact that the State Attorney and counsel did not prevail upon him to attend court is indicative of the fact that there is little or no respect for the Court and its orders, or understanding of their duties and functions as officers of the court, among some members of the legal professions.

83. The "supplementary" affidavits by the fourth and first respondents attempt to show that they only became aware of any theft on the 8th

September 2006 when they were allegedly told by Erasmus that there had been a theft, and that the fact that a case of housebreaking and theft had been opened by the police was only brought to their attention on the 2nd October 2006 when they met the investigating officer for the first time.

84. These versions beggar belief and are in clear conflict with their earlier affidavits discussed in the first part of this judgment.

85. It is in any event clear from the police docket that the theft was discussed at provincial level in police circles.

86. The respondents attempt to explain their alleged lack of knowledge on the grounds that the attachments were made on behalf of the Gambling Board. This does not afford a defence - the machines were attached as part of a police investigation: The very inventory prepared by the first respondent and his colleagues bears the reference number of a police docket evidencing a criminal investigation.

87. Counsel was unprepared as he had been a week earlier. He did not consult the authorities the court had referred him to regarding docket privilege, as the investigating officer had indicated that he was abandoning the point - not counsel. Counsel was of no assistance to the court in respect of any of the issues raised in this matter - he only submitted that the individual respondents should not be convicted of contempt and should not be ordered to pay the applicants' costs out of their own pocket.

The alleged contempt

88. The applicants originally sought an order for the committal of the first, third and fourth respondents on the ground that they had failed to deliver the 144 machines that had been attached.

89. When it became apparent that there had indeed been a theft, they applied for an amendment to hold the respondents in contempt because of their failure to take the court into their confidence and their attempt to hide the truth from the court.

90. It is correct that the respondents, mr Erasmus and the investigating officer are *prima facie* guilty of a gross dereliction of duty toward the court. The failure to comply with several orders of this court as detailed in this judgment amounts to contempt of court, unless the perpetrators are able to show that they were indeed as ill-informed and naive as their affidavits wish to convey. If they deliberately disobeyed the orders of this court, they must suffer the full measure of the law, but such finding cannot be made on the papers without affording the respondents a chance to present evidence.

91. During the last hearing, I expressed myself in very strong terms about the way in which the respondents had acted toward the applicants and the court, describing the attitude of the police officers as reminiscent of the apartheid days, when the police were a law unto themselves.

92. The respondents, Mr Erasmus and the investigating officer cannot complain about the severe criticism leveled against them by the court. If they are innocent of deliberately defying the authority of the third arm of government, they are branded by their own defence to this charge as unbelievably incompetent and indisputably unfit for the responsible positions they hold.

93. It is not for this Court to decide whether they are the rogues the applicants believe them to be, or the bumbling fools their defence claims they are. All the alleged perpetrators that acted in concert with the respondents are not before the court in any event.

94. The court can only act against persons that are *prima facie* contemptuous of it if such contempt is committed during the proceedings: S v *Mamabolo (E TV and others intervening)* 2001 (3) SA 409 CC. In the present instance, the actions that would constitute contemptuous conduct were not all committed *in facie curiae.*

95. The matter will therefore be referred to the appropriate authorities with a request to investigate the respondents' conduct and take appropriate action if it appears to be warranted.

The further delay

96. A court sh... uld ... officer presiding ... should remain ... unfortunately is not always possible as judges are human.

97. I lost my temper when dealing with this matter on the last day, which I regret, although my view of the respondents' actions and attitude has not changed.

98. I reserved judgm... before me. Unfor... received upon Tu... to the transcriber... unhappy state of ...

The order:

1. The application for the incarceration of the first, third and fourth respondents for contempt of court is dismissed;
2. The said respondents are ordered, jointly and severally, the one to pay, the other to be absolved, to pay all the applicants' ... covered by other orders ... the scale of attorney and ...
3. The first, third and fourth ... specifically declared to be ... for the applicants' costs not only in their official, but also in their personal capacities;
4. The matter is referred to the Independent Complaints Directorate of the South African Police Services with the request to investigate the conduct of the police officers concerned and to take appropriate action if this appear to be indicated;
5. The matter is furthermore referred to the offices of the Director of Public Prosecutions to investigate the actions of the respondents and their associates referred to in this judgment with an eye to institute contempt proceedings or other criminal prosecutions against them if such appear to be indicated;
6. The papers and the transcript of these proceedings are furthermore referred to the disciplinary committees of the relevant Bar Council and Law Society having jurisdiction over the advocates and attorneys who acted in this matter, to investigate the professional propriety of their actions and to take appropriate steps if such appear to be indicated.

Signed at Pretoria on this 15th day of August 2007.

E BERTELSMANN
Judge of the High Court