IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED. ✓

15/6/12
DATE

CASE No. 25663/2012

15/6/2012

In the matter between:

POMPO JOSEPH GQOWANA	Applicant
and	
MINISTER OF SAFETY AND SECURITY	First Respondent
PROVINCIAL COMMISSIONER OF THE SAPS, LIMPOPO PROVINCE	Second Respondent
CHAIRPERSON : LIMPOPO GAMBLING BOARD	Third Respondent
LIEUTENANT SEBOLA	Fourth Respondent
MAGISTRATE, PHALABORWA	Fifth Respondent

JUDGMENT : APPLICATION FOR LEAVE TO APPEAL

Van der Byl, AJ:-

[1] In this matter I on 18 May 2012, sitting in the urgent Court, dismissed an application by the Applicant for an order for the return of various articles seized in terms of a search warrant.

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[2] As is apparent from the Notice of Application for Leave to Appeal ("*the Notice*") filed on 22 May 2012, the Applicant now seeks leave to appeal against the whole of my judgment.

[3] As appears from the Notice, it is contended that I erred in 17 respects specified in the Notice, but in none of these paragraphs any reasons are given as to why I erred in the respects set out therein so that I was consequently left completely in the dark as to the respects in which it is contended that I erred.

[4] It has in various decided cases been held that a notice of application for leave to appeal must, in order to comply with the provisions of Rule 49 of the Uniform Rules, specify the findings of fact or rulings of law appealed against and the grounds upon which the appeal is founded (See: ***Tzouras v SA Wimpy (Pty) Ltd 1978 (3) SA 204 (W) at 205E; S v Maliwa and Others 1986 (3) SA 721 (W) at 726E; Molebatsi v Federated Timbers (Pty) Ltd 1996 (3) SA 92 (B) at 94I; Songomo v Minister of Law and Order 1996 (4) SA 384 (E) at 385I***).

In the ***Songomo case, supra,*** it was specifically held *at* ***385I*** as follows:

> "*It seems to me that, by a parity of reasoning, the grounds of appeal required under Rule 49(1)(b) must similarly be clearly and succinctly set out in clear and unambiguous terms so as to enable the Court and the respondent to be fully and properly informed of the case which the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal.*".

In ***Van der Walt v Abreu 1999(4) SA 85 (W)*** the learned Judge dealt with the

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requirements for a valid notice of appeal in terms of Rule 51 of the Magistrate's Courts Rules (which in my opinion equally applies to Rule 49 of the Uniform Rules) at ***94E*** as follows:

> *"(1) It must specify the details of what is appealed against (ie the particular findings of fact and rulings of law that are to be criticised on appeal as being wrong); and*
> *(2) it must also state the grounds of appeal (ie it must indicate <u>why</u> each finding of fact and ruling of law that is to be to criticised as wrong is said to be wrong, ...*
> *Only when both of these requirements have been set out in a notice of appeal has a valid ground of appeal been disclosed according to the language of the Rule."* (My emphasis).

[5] The Notice is in my view on the principles enunciated in the aforegoing judgments not a valid application for leave to appeal and that the application is, for this reason alone, capable of being dismissed.

[6] In the event that I may be wrong in my assessment of the contents of the Notice, I will in any event deal with the contentions raised in the Notice as elaborated on in argument at the hearing of this application.

[7] As is apparent from my judgment I in effect held -

(a) that, if regard is had to the affidavit submitted to the magistrate in support of the application for the issue of the warrant, there can be no doubt that the magistrate must have duly applied his mind to the matter before issuing the warrant;

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(b) that it is apparent from the warrant, if considered together with affidavit on which it was issued, that there existed a reasonable suspicion that the Applicant was acting contrary to the provisions of the National Gambling Act, 2004, and the Limpopo Gambling Act, 1996, and that a search of the premises and a seizure of various articles which may reasonably be connected to or associated with gambling activities;

(c) that the combined effect of the warrant and the affidavit could not have left the Applicant in any doubt of the basis for the search and seizure in question.

[8] As was elaborated in argument at the hearing of this application, it would appear that, notwithstanding the various respects set out the Notice, the application for leave to appeal was in effect limited to the following issues, namely -

(a) **firstly**, that I erred in having indicated that the application was launched under the guise of a *mandament van spolie*;

(b) **secondly**, that I failed in finding that the Third Respondent actually executed the search warrant whilst the warrant was addressed to "*the Station Commander*";

(c) **thirdly**, that the magistrate could not have properly applied his mind to the matter as the affidavit on which the warrant was issued is flawed in various respects in so far as (i) the deponent indicated that he speaks Sepedi which is an indication that he could not speak English; (ii) it is, upon a proper analysis of

the contents of the affidavit, based on hearsay evidence; (iii) it no where specifies the crimes which the Applicant is suspected of having committed.

[9] These submissions are indicative as to how the Notice failed, in the words of the learned Judge in the decision in the ***Songomo case, supra***, to inform the Court and the Respondent "*fully and properly ... of the case which the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal*".

[10] A scrutiny of the Notice does not, for instance, contain any contention that the contents of the affidavit by virtue of which the warrant was issued was based on hearsay evidence which is, incidentally, an issue was not even raised, either in the papers or in argument in the course of the proceedings *a quo*.

[11] I am in any event unpersuaded that another Court may the issues elaborated on in argument in the course of this application or any of the other contentions raised in the Notice come to an conclusion which differs from the findings I made in my judgment.

[12] I deal briefly with those issues.

[13] In so far as it is contended that I erred in finding that the Applicant was not entitled to claim the return of the goods on the basis of the *mandament of spolie* and that he should have approached the Court on the basis of a *rei vindicatio*, it is an incorrect perception of what I held. I in fact indicated in my judgment that the Applicant was in effect challenging the validity of the search warrant and was, in so doing, actually

claiming the return of the various items by way of a *rei vindicatio* and not in terms of a *mandament van spolie*. Mr Avvakoumides who appeared at the hearing of this matter on behalf of the Applicant in effect conceded that this is the legal position and approached the matter on the question whether the warrant was a lawful warrant. In so far as I held that the Applicant was, having regard to the combined effect of te warrant and the affidavit on which it was based, could not have been in any doubt of the basis for the search and seizure in question.

[14] In so far as it is contended that the Third Respondent actually executed the warrant, it was the Applicant's case (**record p. 23, para 7.12**) that the Third Respondent's "*participation ... in the search and seizure*" tainted the lawfulness of the execution of the warrant and not explicitly that the Third Respondent executed the warrant (see: **p., para 19 of the judgment**). Furthermore, as is apparent from the founding affidavit (**record pp. 13 and 14, paras 6.4 to 6.6**) it is stated that they were approached by the Fourth Respondent, who is a police officer, by other police officials and the Third Respondent. From this allegation contained in the founding affidavit it is obvious that the Respondents were not called upon or required to deal with a contention that the warrant was executed by the Third Respondent.

In raising this contention belatedly is inappropriate and in my view nothing but a grabbing at straws.

I am accordingly unpersuaded that another Court will on this issue come to a different conclusion.

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[15] In so far as it is contended that the magistrate for the reasons already referred to failed to apply his or her mind -

(a) there is no substance in the submission that the fact that the deponent to the Affidavit deposed to in support of the search warrant is not able to speak, or deposed to the affidavit in, English since it is apparent from the affidavit itself that the deponent declared that what follows is stated "*UNDER OATH IN ENGLISH*" and it is in any event unimaginable that a person appointed as Law Enforcement Officer of the Gambling Board would be unable to speak English;

(b) that the contention that the affidavit deposed to in support of the search warrant was based on hearsay evidence is, apart from the fact that it was not raised neither on the papers nor during the proceedings *a quo*, a mere inference drawn from the wording of the affidavit which is certainly not the only reasonable inference drawn from the affidavit itself since, as appears from the opposing affidavit (**record p. 58, paras 7.6 and 7.9**), the deponent indeed visited the premises on 2 May 2012 before he prepared his affidavit;

(c) that the search warrant describes in broad terms the offences in respect of which the warrant has been issued and that the search warrant details the offences as contraventions of section 51 of the Limpopo Gambling Act, 1996 (illegal gambling at an unlicensed premises), section 77(b) of that Act (possession of gambling machines or devices and permitting gambling activities) and section 28 of the National Gambling Act, 2004 (employment of employees

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in the gambling industry without an employment licence) etc.

[16] I accordingly fail to see whether there are any merits in any of these contentions and accordingly that any other Court may find that my conclusions were wrong.

[17] In the circumstances I do not need to deal with the other grounds of appeal which were not elaborated upon in argument and which are in any event are of such a general nature that they are not capable of dealing with.

[18] In the result the application is dismissed with costs.

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P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF APPLICANT **ADV G T AVVAKOUMIDES**

On the instructions of: **VARDAKOS ATTORNEYS**

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.../...

Ref: M D Mahlase
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DATE OF HEARING 11 June 2012

JUDGMENT DELIVERED ON 15 June 2012