IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

22/3/17
DATE

SIGNATURE

22/03/2017.

CASE NUMBER: 8694/17

In the matter between:

GRAMMATICUS (PTY) LTD	Applicant
and	
THE MINISTER OF SOUTH AFRICAN POLICE	First Respondent
CAPTAIN PETRUS SIBEKO	Second Respondent
THE MAGISTRATE: BRITS	Third Respondent
THE CHAIRPERSON: NORTH WEST GAMBLING BOARD	Fourth Respondent

JUDGMENT

MOTHLE J

1. This application came before court by way of urgency in terms of Rule 6(12) of the Uniform Rules of Court. The application concerns an attack on the validity of two warrants issued by the Magistrate: Brits, authorising searches and seizure at two separate premises.

2. The applicant seeks relief as follows:

2.1 That the matter be adjudicated as an urgent application in terms of Rule 6 (12) of the Rules of this court;

2.2 A reconsideration, in terms of Rule 6(12)(c), of warrants issued by the Magistrate, Brits on 2 February 2017 in respect of searches and seizure conducted at two premises where the applicant claims to be the tenant;

2.3 That the Court should set aside/declare as invalid the said warrants;

2.4 That the Court should direct and order the second respondent and any other respondents in possession of the items removed from the applicant's business premises, to forthwith return such goods or items; and

2.5 Costs of suit against any respondents who oppose the application.

3. All respondents, except the third respondent i.e. the Magistrate Brits, oppose this application. The Magistrate did not participate. In this judgment, the first respondent is referred to as the Minister; the second respondent as Captain Sibeko and the Gambling Board of the North West Province, cited as the fourth respondent, is referred to as the Gambling Board. Where appropriate, the first and second respondents, represented by the same counsel, are jointly referred to as the respondents.

4. The facts, which appear from the applicant's founding affidavit and the respondents' answering affidavits, are briefly that on 2 February 2017, members of the South African Police approached the Magistrate; Brits, with a request to authorise two warrants for searches and seizure at two different premises.

The warrants were authorized and on 3 February 2017, the officer authorised in the warrant proceeded to the premises and removed certain goods. It is common cause that during the execution of these warrants, the applicant's attorney was present on the premises.

5. On 6 February 2017, after the warrants were executed, the applicant lodged this application for hearing in the urgent court. The application was set down for 21 February 2017.

6. The respondents and the Gambling Board filed answering affidavits shortly before the hearing of the application. The applicant failed to file a replying affidavit and its attorney confirmed in Court during the hearing that the applicant does not intend to do so. The application was argued fully on the points *in limine* and the merits.

7. The procedural issues raised *in limine* by the respondents in this application are urgency, improper service and non-compliance with the provisions of Rule 53. The substantive issues involve an attack on the validity of the warrants as issued by the magistrate and a relief in a form of spoliation for the return of the goods. I now turn to deal first with the points in *limine.*

Point in Limine: Improper service

8. This application, dated 6 February 2017, was set down for 21 February 2017 at 10H00 in the Court for urgent applications. It called upon the respondents who intend to oppose the application to notify the applicant's attorneys in writing not later than "*14H00, THURSDAY, 9 JANUARY 2017" (sic).* It further went on to state that if those opposing the application and desire to file any answering affidavit, should do so not later than "*14H00, TUESDAY, 14 JANUARY 2017*" (sic). In its haste to prepare the papers, the applicant, as stated above, erroneously referred to the month of "JANUARY" instead of "FEBRUARY" in the periods stated for the opposition to file papers.

9. The respondents contend that the applicant failed to effect proper service when it served the application electronically on Colonel B J Van Wyk on 7 February 2017 at the Provincial Offices of the South African Police in Potchefstroom. The Respondents further contend that the Applicant's attorney, Mr Vardakos was present at the search and seizure at the two premises and he knew that Captain Sibeko, who was authorised to execute the warrants, was stationed at Brits Police Station.

However, he chose to avoid serving the application on the Captain but rather on the provincial commanding officer, stationed at Potchefstroom, who was not remotely involved with the warrants issued in this case. The net effect is that by serving the document at the Provincial Office as he did, this prejudiced the respondents in that there was a considerable delay before the Respondents could arrange a consultation and prepare their response to the application accordingly.

10. It is indeed correct that the abridged period of service provided to the Respondents, coupled with the fact that the application was served at the provincial office and not the Brits Police Station, resulted in the respondents being placed unnecessarily under considerable pressure to prepare and file their answering affidavit.

11. The approach in determining the truncated periods of service in urgent applications has been set out succinctly in ***Luna Meubel Vervaardigers (Edms) Bpk v Makin (Trading as Makin Furnisher Manufacturers) 1997 (4) SA 135(W)***. This application does not present a life threatening situation which would cause the applicant to subject the respondents under highly prejudicial time periods. The respondents are organs of

State whom, in terms of Rule 6(13) are entitled to be given sufficient notice.

12. The applicants in response to this contention, referred the Court to a number of decisions by various courts, including the matter of ***Kosmas Tshilas v Minister of SAPS and Others: Case Number: 96217/2016***, an unreported judgment of this Court by Mavundla J. The essence of the decision in this judgment is that if the matter is urgent, the applicant need not strictly wait for the time periods stipulated in Rule 6(13) before they can launch an application. However, I do not find this judgment to be an authority that reasonable time periods in line with the Luna Meubels case should not be provided to the respondent in a matter that is not life threatening.

13. I am thus of the view that the applicant provided the respondents with an unreasonable time to respond to the papers. However, the respondent managed to prepare an answering affidavit, comprehensively setting out its reasons for opposing the application. As at 21 February 2017 when the matter was called in Court, the respondents had filed a full answering affidavit and were ready to argue the matter. As the applicant correctly contends, the respondents did not apply for postponement to prepare further documents to address any prejudice they might

have suffered as a result of the short service. I am thus unable to agree that the application should be dismissed on the basis of this point in *limine.*

Point in *limine*: Urgency

14. The respondents contend that the matter is not urgent and should be struck from the roll of the urgent applications. In response, the applicant again referred the Court to a number of decisions wherein applications of this nature were held to be urgent. The rationale for these decisions is that since searches and seizure invades one's privacy, where such invasion is imminent, relief may be obtained by an applicant approaching court by way of an urgent application. In addition, where the warrant has been executed, a party whose goods and items have been seized has a right to launch an application for spoliation, for the return of those goods. These are the principles that underpin the notion that such applications would be urgent.

15. However, I do not understand the decisions to mean that the jurisdiction of a Court is ousted from enquiring into the circumstances of each case. Urgency, in terms of rule 6 (12), is

found on the factual circumstances that should demonstrate, amongst others, the following:

15.1 The applicant setting forth before court explicitly the circumstances that it contends render the matter the urgent;

15.2 Indicating to the Court that the circumstances of the case are such that it/he/she will not be able to obtain relief if the matter were to be heard in due course.

16. The applicant, however, fails to meet with the second requirement of urgency as stated above. Nowhere in its papers does the applicant allege that the prejudice suffered as a result of the removal of those goods is irreparable to the extent that no alternative relief can be found in due course. The applicant is not absolved from placing before Court these jurisdictional facts necessary in support of urgency.

17. In the founding affidavit as well as in the heads of argument, the applicant's attorney argues that reasons were given as to why the matter is urgent. In support of this argument, he referred the Court to decisions of other Courts which in my view, determined urgency on the facts based on different set of circumstances. I do not agree that by furnishing only the reasons for urgency, let

alone these being explicit; the applicant is absolved from placing before Court the circumstances which demonstrates that he would not obtain relief or alternative relief in due course.

18. Consequently, I find that the application is not urgent and that the applicant will indeed find alternative relief in due course. However, having heard full argument in this matter, I am inclined to deal with the merits of this application.

Point in *Limine*: Non-compliance with Rule 53:

19. The respondents contend that the applicant in challenging the issuing of the two warrants issued by the Magistrate Brits, did not request a record of proceedings from the Magistrate as to which documents he considered in the course of the issuing of the warrants.

20. The attack on the warrants is based partly on *ex facie* its content and partly on the documents which the applicant allege were before the Magistrate when he issued the warrant. The applicant contends that the documents were identified by Captain Sibeko when he executed the warrants.

21. There is merit in the respondents' contention that the record of proceedings before the Magistrate in issuing the warrants was

not made available to this Court. It seems to me that the applicant assumes that the Magistrate had sight only of the documents that were presented to her by Captain Sibeko. Consequently the Court is requested to assume that there was nothing further that the Magistrate had before her. Further, the reasons for the issuing of those two warrants were not placed before this Court, for it to exercise its mind independently as to whether the Magistrate misdirected herself or just went through the motions to approve the warrants, without applying her mind.

22. It remains the obligation of an applicant seeking relief of review of a decision, to request from the decision maker and produce before Court, a full record of proceedings that served before the decision maker. The founding affidavit has attached to it a copy of the warrant and annexures as well as the affidavit deposed to by Captain Sibeko which was placed before the magistrate.

23. Rule 53 further authorises an applicant to request not only the record of proceedings that served before the decision maker but also the reasons why such decision was taken. These were not placed before this Court. The applicant expects the respondents to explain to this Court what the Magistrate had in mind in arriving at the decision to issue the warrants and also the manner in which she went about doing so.

24. This is illustrated by one of the grounds of attack on the warrant, raised by the applicant. The warrant indicates that it may be executed during "*day/night*". The applicant contends that an officer issuing warrants to be served at night has to be circumspect. It is thus not clear, so the argument goes, whether these warrants were authorised to be issued during the day or at night or both. I will deal in detail with the day/night argument later in this judgment.

25. The day/night is an issue which the magistrate would have been able to explain as part of the record of proceedings as well as the reasons for her decision.

26. The applicant further advances an argument that the Magistrate was served with the application and chose not to oppose. Therefore, so goes the argument, everything that is alleged by the applicant in the founding affidavit concerning the magistrate should be accepted as true and fact. The logic behind this argument is that allegations in the founding affidavit, if uncontested, absolves the applicant from placing before Court the record of proceedings and the reasons for a decision in terms of Rule 53. It is thus expected of the Court to declare as invalid the decision of the Magistrate on the assumption that

failure to oppose the allegations raised by the applicant implies that these are fact. This argument cannot be correct. A decision to oppose or not oppose an application is not a substitute for request of record of proceedings and reasons for a decision as envisaged in Rule 53. There are many instances where a decision maker would choose for whatever reasons, not to oppose an application but nevertheless provide the record as well as the reasons for a decision.

27. I therefore conclude that the applicant failed to place before this Court the record of decision and the reasons for such decision, in support for relief requesting the invalidation of the warrants. However the fact that some of the attack on the warrants are based ex facie the documents, I am of the view that this application cannot be dismissed on this ground alone.

28. I now turn to deal with the substantive objections against the warrants *ex facie*.

The assistance by the officials of the Gambling Board and private individuals.

29. The applicant contends that the warrants issued were *ultra vires* the provisions of sections 20 and 21 of the Criminal Procedure

Act 51 of 1977, as they did not limit the authorization and execution thereof to police officers but allowed civilians to participate therein. This is denied by the respondents.

30. *Ex facie* the warrants, the authority to execute them is granted to Captain Sibeko. The warrants further indicate that Captain Sibeko will be assisted by Sergeant S J Mosiamedi, Constable M.I. Phooko and Constable P D Baloyi, all police officers stationed at Brits. The warrants further refers to a list of peace officers and computer experts identified in the affidavit of Captain Sibeko as inspectors of the Gambling Board, who will assist members of the police as follows: Mr Vincent Mothiba, North West Gambling Board, Edwin Ramokhuwa, North West Gambling Board, Mr. Hibbert, a Computer Forensics, Mr. J Roux, a Computer Forensics and Mr. F R Paxton also a Computer Forensics.

31. The annexure to the warrants further deals with articles to be seized which includes computer screens and boxes, hard drives, server equipment, software, close circuit television security device, cellular phones of employees found on the premises mentioned in the search warrant. The annexure concludes by

mentioning the applicable legislation in terms of which the warrant is being issued.

32. The applicant refers this court to the matter of ***Ruskopoint (Pty) Ltd t/a The Old Mill Gaming Centre v Minister of SAPS and others (1427/2016) [2016] ZAECGHC 74 (8 September 2016),*** as authority that the warrant should only authorize the police officers and not members of the Gambling Board. I have also taken note of reference to the decision of ***Extra Dimensions and Others v Kruger N.O. 2004 (2) SACR 493 (T)*** which the Applicant has cited as authority that any reference to private individuals in a warrant offends Section 21(2) of the Criminal Procedure Act.

33. I carefully considered these judgments and in particular the ***Ruskopoint*** case. I noticed that the court in that case was dealing with the instance where non-police officers were authorised in the warrant to carry out searches and seizures. This is not the position in the matter before this Court. The cases are thus distinguishable.

34. In the affidavit of Captain Sibeko, a request is made to the Magistrate to authorize *only Captain Sibeko*. This is also stated clearly in the warrants. The affidavit as well as the warrants

further refers to the specified police officers who are authorized to assist the Captain *in the execution of the warrant.* The peace officers and computer forensics referred to in the warrant and named in the annexure are not *authorized* to execute the warrants. Their role as stated in paragraph 18 of Captain Sibeko's affidavit, is described thus:

"Due to the nature of the business alleged to be taking place and the envisaged complexity of correctly harvesting the electronic evidence from the computer terminals and any associated devises and identifying the gambling and related equipment, the specialists from CSFS and the inspectors of the NWGB as appearing in annexure G will be required to assist in the search and seizure."

35. The person authorized in the warrants is a police officer. The others that appear on the annexure attached to the warrants are persons who have been listed to be available to offer their expertise in ensuring the correct harvesting of the electronic evidence.

36. My understanding and interpretation of s20 and s21 of the Criminal Procedure Act is that it does not dis-empower the police

officers authorized to execute a warrant from summoning assistance from experts in order to correctly identify and not to damage or seize electronic evidence that is not connected to the investigation. The police officer authorized to conduct searches and seizures in a warrant would ordinarily not be an expert in electronic devices. In order to act in the least intrusive manner in the execution of the warrants, they would, where applicable and necessary, require assistance.

37. It must further be understood that the experts appearing in Annexure "A" to the warrants are not by themselves authorized to execute any part of the warrants in the absence of members of the South African Police. Only Captain Sibeko is so authorized. The objections raised by the applicants in regard to the warrants that they authorised other people other than police officers is incorrect. There is thus no merit in this ground of attack.

Cellular phones

38. The applicant objects that the warrants did not specify the cellular phones which were supposed to be confiscated and the specific information sought. This alleged failure by the

Magistrate to specify and limit the information to be harvested, so goes the argument, may lead to an invasion of privacy.

39. Neither the police nor the Magistrate may in some instances know in advance as to what information would be found in a cellular phone so as to isolate such information linked to the investigation, from other confidential matters and name it in the warrant. It would be a different matter if, after the execution of the warrant and analysis of the information in the cellular phone, the police make public, confidential information which may not be relevant to the commission of the alleged offences. This ground of attack has no merit and is dismissed.

Day/night

40. The applicant contends that the warrants do not limit the search to a day search only. It contends further that the Magistrate did not state any justification why it may be possible to execute the warrants at night as well, where no exceptional circumstances existed.

41. The warrants were issued on a pro-forma document where, amongst others, it is stated that the warrant will be executed during the *"day/night time"*. The phrase means day or night. The

Magistrate did not cross out the "*night*' part as Captain Sibeko clearly spelled in the affidavit that the warrant will be executed "*on 2017-02-03 between 10; 00 and 18;00".* This omission by the Magistrate is not, in my view material and fatal to the validity of the warrants, seen in the context of Captain Sibeko's affidavit. It would become relevant if the police would execute the warrant at night without exceptional circumstances being present and stated in the warrants.

42. It is common cause that the warrants were executed during the day and this fact was known to the applicant even before this application was prepared. While I agree that the omission by the Magistrate to cross out "night" might in the absence of any other evidence, create ambiguity and confusion, it is not, in my opinion and in the context of this case material and fatal to the validity of the warrants. I therefore conclude that the warrants cannot, on this ground alone, be declared invalid.

Objective jurisdictional facts

43. The applicant contends in the founding affidavit that Captain Sibeko did not provide its attorney with all the documents, mainly the annexures referred to in his affidavit requesting the warrants.

It is further contended by the applicant that in the absence of opposition from the Magistrate, it is not clear whether the documents handed to the attorney with the warrants are all the documents that served before the Magistrate. In support of this contention, the Court is referred to the seminal judgment of the Constitutional Court on searches and seizures in the ***Minister of Safety and Security v Van der Merwe and Others,*** where the Chief Justice Mogoeng, writing for the Court, stated the objective jurisdictional facts required for the issuing of a valid warrant for the conduct of search and seizure. In particular, the Chief Justice stated as follows:

"*..the section requires that the decision to issue a warrant be made only* if the *affidavit in support of the application contains the following objective jurisdictional facts: (i) the existence of a reasonable suspicion that a crime has been committed and (ii) the existence of reasonable grounds to believe that objects connected with the offence may be found on the premises or persons intended to be searched. Both jurisdictional facts play a critical role in ensuring that the rights of a searched person are not lightly interfered with. When even one of them is missing that should spell doom to the application for a warrant."*

44. I am of the view that the Magistrate did not err in finding that both objective jurisdictional facts exist in Captain Sibeko's affidavit, sufficient to issue the warrants. The applicant further states in argument that the affidavit of Captain Sibeko refers to section 8(a) and not section 8 where the offence in outlines. A subsection to a section in a statute is not interpreted in isolation, but within the context of the main section. There is no merit in this ground of attack and it is rejected.

Cash not specified in the warrants

45. The applicant further contends that in executing the warrants, the police officers took an undisclosed amount of cash which was not specifically authorized in the warrants. The very same applicant states in paragraph 20 of the founding affidavit that the Court is not invited to deal with what transpired during the execution of the warrants.

46. Adjudicating on such matters would require evidence from a list of witnesses who were present and witnessing or participating in the search and seizures. I agree that for purposes of an urgent application, also in view of the fact that where there are arrests following such warrant, the Criminal Court may be seized with

such matters. It will thus be inappropriate for the parties to expect a court hearing urgent applications to traverse the factual matrix of what transpired in the execution of the warrant.

47. However, it will, in some instances, be impractical to expect the police officers and those authorized to issue warrants to speculate, in the absence of evidence, as to how much money would be found on the premises so as to specify it in the warrant. That is the reason why warrants would authorize search and seizure by making reference generally to *any article that is connected to the suspected crime.*

Conclusion

48. Having regard to all the findings and conclusions expressed in this judgment, I am of the view that the applicant has not provided this Court will sufficient grounds upon which these warrants should be set aside. In particular, the applicant failed to file a replying affidavit to the answering affidavit by the respondents. In applying the ***Plascon Evans Rule***, the respondents' version should prevail to the extent that the applicant has not disputed these in the replying affidavit.

49. During argument the Court invited both parties to submit heads of argument, citing the authorities in support of their contentions, where necessary. Both parties submitted the heads of argument. However the attorney for the applicant seized that opportunity to deal with the issues raised in the respondents' answering affidavit. This is clearly not in accordance with the motion court rules and is unacceptable.

50. The application must thus fail and the costs should follow the result.

51. In the premises, I make the following order:

1. The application for the setting aside or declaration of invalidity of the warrants issued is dismissed. Further, the consequential relief that the goods be returned is also dismissed.

2. The Applicant is ordered to pay the costs of this application to the respondents and the Gambling Board.

S P MOTHLE
Judge of the High Court.
Gauteng Division Pretoria

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