Reportable:	**NO**
Circulate to Judges:	**NO**
Circulate to Magistrates:	**NO**
Circulate to Regional Magistrates	**NO**

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: 3836/2024

In the matter between: -

ZESHUN ZHAO	Applicant
And	
THE MINISTER OF POLICE	1st Respondent
SERGEANT RALEPODISE KOKI N.O	2nd Respondent
ACTING MAGISTRATE SELOKELO N.0	3rd Respondent

*This judgment is handed down by means of electronic communication to the parties' representatives. The date of hand down is deemed to be **25 September 2024**.*

CORAM: MFENYANA J

ORDER

(i) The usual forms, time limits and requirements relating to service as provided for in the Uniform Rules of court are dispensed with and this matter is heard as one of urgency.

(ii) The search and seizure conducted by the first and second respondents on 19 July 2024 in terms of a search and seizure warrant issued by the third respondent in terms of section 21 of the Criminal Procedure Act is declared invalid and set aside.

(iii) The first and second respondents are ordered to immediately restore possession of the items seized during the said search and seizure to the applicant.

(iv) Should the items have been handed over by the respondents to any other person or entity, such other person or entity shall immediately restore possession of the items to the applicant.

(v) In the event of the respondents refusing to comply with paragraph (iii) above, the sheriff of this court is authorised to take the necessary steps and give effect thereto.

(vi) The first and second respondents shall pay the costs of the application on a party and party scale on Scale C.

JUDGMENT

MFENYANA J

Introduction

[1] The applicant approached this court on an urgent basis seeking an order setting aside and declaring invalid a search and seizure conducted at the applicant's premises by police officials, under the command of the second respondent in terms of section 21 of the Criminal Procedure Act 51 of 1977 (CPA).

[2] The applicant further seeks an order directing the first and second respondents or any person or entity to whom the respondents may have handed over the items seized during the search and seizure, to return to them to the applicant.

[3] In the event that the first and second respondents refuse to adhere to an order of this court, authorising them to return the items and restore possession thereof to the applicant, the applicant seeks an order authorising the sheriff of this court to

take the necessary steps to give effect thereto.

[4] Lastly, the applicant seeks costs on scale C against the first and second respondents.

[5] In his founding affidavit the applicant asserts that he is a businessman, carrying on business at 8 Jan Cilliers Street, Vryburg, a property which he is in the process of purchasing. On 19 July 2024 while Gui, Zhuang (Zhuang) was at the property, a group of people including members of the South African Police Service (SAPS) gathered outside the property. Zhuang contacted him telephonically and informed him of the gathering. As he was not on the premises, he instructed Zhuang to inform the group of people to wait for his attorney (Renoster). When Zhuang attempted to convey the message the police officers showed him a piece of paper and asked him to open the gate, which he did. According to the applicant, Zhuang can barely converse in English. Zhuang was provided with a bundle of documents including the warrant and accompanying documents which served before the third respondent. They proceeded to search the property and seized 130 electronic devices which contain computer

software and hardware used for electronic games.

[6] While still searching, Renoster arrived and was informed by Colonel Nhlati that they were executing a search and seizure warrant. They served a copy to Renoster after exhibiting the original. Among the people in attendance at the property was Mosepele, an official of the Gambling Board. Mosepele was assisting in the search and seizure. The police seized the items and arrested Zhuang. He was detained in the holding cells and released on 22 July 2024 on R5 000.00 bail after being denied an opportunity to consult with Renoster.

[7] It is the applicant's contention that he was in peaceful and undisturbed possession of the items seized at his property before the execution of the warrant.

[8] With regard to the warrant, the applicant contends that it is bad in law as it is *ultra vires* the authorising statute. In this regard the applicant contends that the third respondent did not apply his mind in issuing the warrant, and merely acted as a 'rubber stamp'. Had he done so he would have realised that the Cybercrime Act 19 of 2020 (CCA), and not the CPA, is applicable, as electronic devices were to be seized, so

contends the applicant. He would have also realised that some of the information provided to him was not on oath, and that the information on oath made no mention of Van Huysteen who is cited as the person in control of the items to be seized, and that the statement on oath by the second respondent did not satisfy the necessary jurisdictional facts to justify the issuing of the warrant.

[9] Essentially, the applicant contends that the information considered by the third respondent was incoherent and did not establish any basis for an offence or a suspected offence.

[10] According to Renoster the third respondent informed him that he merely signed the warrant as it had already been completed when it was brought to him. He further confirmed that the all the documentation provided to Renoster during the search and seizure was all that was before him when he considered the warrant.

[11] It is thus the applicant's contention that the third respondent did not consider the provisions of the CPA and the CCA, as well as the underlying legal principles for issuing of a valid warrant. For these reasons, the applicant avers that the

warrant stands to be set aside.

[12] The applicant challenges the presence of Mosepele, as an affront to his right to privacy, and the instructions of the third respondent who issued the warrant. The presence of a person who is not a member of the SAPS and who was not authorised to assist in the search and seizure during the execution of the warrant, also tainted the execution of the warrant, contends the applicant. Consequently, the seizure of the items becomes unlawful and entitles the applicant to speedy restoration of the items.

[13] The application is opposed by the first and second respondents (respondents). The third respondent did not oppose the application.

[14] In opposing the application the respondents raised two points in *limine*. First, they assail the urgency of the matter. They contend that the applicant failed to satisfy the requirements for urgency as set out in rule 6(12)(b), and merely paid lip service to them. Notably, the respondents aver that the fact that there may have been an abuse of the respondents' powers of search and seizure does not in itself render the matter urgent,

neither does the applicant's assertion that his rights to privacy and dignity were 'purportedly violated' during the search and seizure. According to the respondents, such violations occur regularly in our society in cases of unlawful arrest and loss of property, but nothing prevents the applicant from obtaining relief in the ordinary course.

[15] Interestingly, the respondents draw parallels between the present application and a spoliation application and argue that the fact that the applicant seeks spoliatory relief does not translate to the matter being automatically urgent in the absence of any prejudice to the applicant. They rely on the decision in *Volvo Financial Services Southern Africa (Pty) Ltd v Adamas Tkolose Trading CC*[1] for their proposition that inherent urgency does not exist. They contend that, apart from suffering economic prejudice, the applicant does not aver what prejudice he would suffer if the matter were to be heard in the ordinary course.

[16] Second, the respondents aver that the applicant failed to comply with rule 53(1)(b) in that he has not requested reasons

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1 (2023/067290) [2023] ZAGPJHC 846 (1 August 2023).

for the decision of the third respondent or called upon the third respondent to file the record. As to the applicant's contention of what the third respondent informed Renoster, the respondents aver that the third respondent ought to have recorded his response in a letter. In this regard, I must immediately state that the conduct of the third respondent has no bearing on the applicant. On the contrary, it was incumbent on the first and second respondents to ascertain the stance of the third respondent who has not opposed the application. Of particular relevance is that the respondents' case largely rests on the conduct of the third respondent. Curiously, they have not disputed what is stated by Renoster. They contend that the application should be dismissed purely on this basis.

[17] The first issue I must consider is whether the matter is urgent to warrant a departure from the normal rules of court relating to procedure and timeframes applicable in applications. Urgency is predicated on the provisions of rule 6(12) which requires a party to satisfy the court that non-compliance with the rules is justified, and that it would not be afforded substantial redress if the matter were to be entertained in the ordinary course.

[18] Dealing with urgency, Plasket AJ (as he then was) stated in *Nelson Mandela Metropolitan Municipality & Others v Greyvenouw CC and Others*[2],

> "It is trite that applicants in urgent applications must give proper consideration to the degree of urgency and tailor the notice of motion to that degree of urgency. It is also true that when Courts are enjoined by Rule 6(12) to deal with urgent applications in accordance with procedures that follow the Rules as far as possible, this involves the exercise of a judicial discretion by a Court 'concerning which deviations it will tolerate in a specific case".

[19] In the present application the applicant states that the matter is urgent on the basis that the search and seizure of the items is unlawful and invalid, and there is a need for the respondents to restore possession of the items. He further pointed out the prejudice he is to suffer, stating that the actions of the respondents amount to an abuse of state power. The applicant further states that being a spoliation application, the matter is inherently urgent.

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2 2004 (4) SA 81 (SE).

[20] There is thus no merit to the respondents' submission that the applicant has failed to demonstrate urgency, or that he would suffer prejudice or that he would not obtain substantial redress in due course.

[21] The respondents' reliance on the *Volvo* judgment is selective. In the same judgment the court observed that some types of cases that are more urgent than others owing to the nature of the prejudice and the kind of right being pursued. Spoliation is one of those cases. I am satisfied that the application is indeed urgent and warrants a deviation from the ordinary rules.

[22] With regard to the second point in *limine* that the applicant failed to provide the record of proceedings in terms of rule 53, the warrant itself, together with the accompanying documents constitute the record of the proceedings. Moreover, the applicant's attack of the warrant pertains only to the contents of the warrant. The entire contents of the warrant and what was before the third respondent are before this court. Any determination of the validity of the warrant in these circumstances, is limited to the warrant itself. There can thus,

be no merit to this point in *limine*.

[23] On the merits, the respondents aver that in applying for a search and seizure warrant, the "respondent" filed a statement under oath. They further contend that the search and seizure followed on information received by members of the crime intelligence about a suspected crime as contemplated in section 82(1)(xi) of the North West Gambling Board Act supported by a letter from the Vryburg crime intelligence that parts of gaming / gambling machines were assembled at the applicant's premises. They further contend that an inspector from the North West Gambling Board made a statement under oath setting out details of the investigation which was conducted by crime intelligence. The remainder of the respondents' submissions pertains to the process followed by the respondents in approaching the applicant's property and the reasons for their belief that a crime had been committed at the applicant's premises. Importantly, the respondents contend that they are not required to strictly comply with the rules of evidence for a search and seizure warrant, and that hearsay evidence and anonymous tips are acceptable. In this submissions lies a concession that the respondents did not

comply with the requirements for the issuing of a search and seizure warrant.

[24] In order to succeed in obtaining spoliatory relief, the applicant must prove that he was in peaceful and undisturbed possession, and that he was unlawfully deprived of such possession.

[25] It is not in dispute that the applicant was in possession of the electronic equipment and devices seized by the respondents during the search and seizure. The main point of contention by the respondents is that they were entitled to conduct the search and seize the items as the applicant was suspected to have committed an offence in terms of section 82(1)(xi) of the North West Gambling Board Act. According to the respondents the warrant was lawfully obtained. On that basis they aver that the dispossession was lawful, and that the applicant did not satisfy the requirements for spoliation.

[26] The law is settled in this regard. The *mandament van spolie* is available even to a person who has no existing right to the property in question. The rule is concerned with the possession of the property, and not the title thereto. It is further

concerned with the fact that the possession may not be removed without due legal process.

[27] In *Ngqukumba v Minister of Safety and Security and Others (Ngqukumba)*[3] the Constitutional Court (CC) stated that the remedy is available "even against the police where they have seized goods unlawfully." The court went further to state that:

> "… it should make no difference that, in dispossessing an individual of an object unlawfully, the police purported to act under colour of the search and seizure powers contained in the Criminal Procedure Act. Non- compliance with the provisions of the Criminal Procedure Act in seizing a person's goods is unlawful. This unlawfulness, plus the other requirement for a spoliation order (namely, having been in possession immediately prior to being despoiled) satisfy the requisites for the order. "[4]

[28] It does not matter, in the present circumstances, that the section 82(1)(xi) of the North West Gambling Act makes it an offence for any person to be in possession of gambling machines or devices. The provision does not alter the law in this regard and does not stand in the way of restoration of

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3 [2014] ZACC 14.
4 *Ngqukumba* at para 13.

possession as to oust the 'normal operation of the *mandament van spolie'*.[5] Section 82(1)(xi) must "be read in a manner that is harmonious with the *mandament van spolie"* and the law. 'The merits are irrelevant in proceedings for a spoliation order: the despoiler must restore possession before all else.'[6]

[29] As regards the validity of the search and seizure warrant, the law requires that it be issued pursuant to the consideration by the magistrate or justice, of information under oath. For a warrant to be valid, it must comply with the following two objective jurisdictional facts as set out *in Minister of Safety and Security v van der Merwe and Others*[7]*,* namely; (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.

[30] According to the applicant, the fact that the third respondent considered information that was not made under oath in issuing the warrant, renders the warrant invalid. The

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5 Para 18.
6 *Ngqukumba* at para 21.
7 [2011] (5) SA 61 (CC), para. 39.

respondents do not dispute that some of the information considered by the third respondent was not under oath. They however aver that the law does not require that all the information should be under oath. This is incorrect. In *Nicolor (Pty) Ltd and Another v Minister of the South African Police Services N.O and Others*[8], the court noted that section 21(1)(a) makes it clear that that a warrant "must be issued only on the basis of information on oath". - (my emphasis). I align myself with this interpretation. The provision admits of no ambiguity. The decision to issue or not issue a warrant must be based on information on oath. I am therefore in agreement with the applicant that all the third respondent could have based his decision on is the statement of the second respondent, and the statement of Mosepele. On its own, the second respondent's statement did not establish a basis for a reasonable belief that the articles seized by the respondents were in the possession or under the control of the applicant or Zhuang. There is no reference on the statement of the second respondent to van Huysteen as the person under whose control the articles were, contrary to what is stated in the

8 (618/2024) [2024] ZAFSHC 134 (6 May 2024).

warrant. There appears to be no correlation in my view, between the information provided under oath, and the warrant issued by the third respondent which states that the articles are under the control of J van Huysteen.

[31] There also appears to be contradictions between the statement of the second respondent, and that of Mosepele. On the one hand, the second respondent asserts that the devices are stored and kept at the address stipulated in the warrant. In his statement, Mosepele states that the devices are manufactured and distributed at the target address.

[32] The import of the above, is that the above information, contradictory as it is, could not have been the basis for the issuing of the warrant, nor could it have led to a reasonable belief that an offence had been committed either by the applicant or Zhuang. In contrast, the warrant stipulates that the suspected offence, presumably against J van Huysteen is possession of gambling machines or gambling devices which is used without an appropriate licence or registration. As the court stated in *Ngqukumba*, "(p)ossession … by the applicant … 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."[9]

[33] The respondents' contention that the third respondent may or may not have considered the statement by Mosepele is not only speculative, but also mischievous. First, it disregards the fact that what was before the third respondent for consideration is all that is relevant for the present enquiry, and no extrinsic information to the record be considered. Second, what was considered or not considered by the third respondent should fall within the knowledge of the second respondent as the person who applied for the warrant.

[34] It was incumbent on the third respondent authorising the warrant to satisfy himself that the second respondent's affidavit contains sufficient information on the existence of the jurisdictional facts. In the circumstances of this case, he ought to have refused to issue the warrant.

[35] Regarding the applicability of either the CPA or the CCA, it is now clear from the wording of the CCA that where cybercrime

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9 Para 21.

is concerned, the CCA applies. It is not difficult to understand why. The purpose behind the CCA is i*nter alia* to regulate cybercrime and address the specialised procedures applicable in investigating cyber-crimes and offences involving electronic devices, which are not covered by the CPA.

[36] Section 29 of the CCA provides for the search and seizure of articles. Within the meaning and contemplation of the CCA, "articles" is confined to electronic articles, including data, computer programs and systems. These are not covered by the CPA.

[37] The Supreme Court of Appeal in *Powell v Van der Merwe*[10] noted that a warrant that is overbroad may be set aside in whole or in part depending upon on the extent of its invalidity."

[38] Regarding the presence of Mosepele at the search and seizure, the legal position is clear; that both in terms of the CPA[11] and the CCA[12] only a police official may be authorized by a search warrant to conduct a search. Private persons are permitted only if they are authorized and their role clearly

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10 [2005] 1 All SA 149 (SCA).
11 Section 21(2).
12 Section 29(2)

defined.

[39] In *Keating v Senior Magistrate*[13], Kollapen J held that the courts should take a realistic approach to the issue. The learned judge held that there may be instances where the presence of private persons such as forensic investigators and computer experts is required. In those instances, the court held that they may be permitted, provided, first, they are properly authorized to be there, and secondly, their role is clearly defined and does not relate to the actual execution of search and seizure activities, and that their presence is properly supervised. (my emphasis)

[40] There is no suggestion from the respondents that Mosepele was properly authorized to be there, nor was role he played. There does not seem to be any indication that any of the considerations relevant for his authorization were placed before the third respondent. To the contrary, the warrant does not include Mosepele as a person authorized to assist in the search and seizure. In the circumstances, his presence during the search and seizure was not authorized and renders the

13 2019 (1) SACR 396 (GP).

warrant invalid. This also accords with the finding in *Extra Dimensions v Kruger*[14] that warrants authorizing private individuals to search and seize are invalid.

[41] It therefore follows that the applicant is entitled to restoration of the items seized by the respondents.

Costs

[42] The general principle when it comes to costs is that the successful party is entitled to its costs. There exists no reason, in my view, to deviate from this trite principle. The applicant however contends for a cost order on scale C, owing to the complexity of the matter, and the flaws in the search and seizure warrant.

[43] I do not agree with the applicant's submission with regard to the complexity of the matter. As to the discrepancies in the warrant, while there may be merit in noting that the warrant itself was issued by the third respondent who has not opposed that application, there seems to be no reason for the first and second respondents, in the face of the glaring incongruities in

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14 2004 (2) SACR 493 (T).

the warrant, to persist in their opposition of the matter. In my view such conduct justifies the granting of a cost order on Scale C.

Order

[44] In the result I make the following order:

(i) The usual forms, time limits and requirements relating to service as provided for in the Uniform Rules of court are dispensed with and this matter is heard as one of urgency.

(ii) The search and seizure conducted by the first and second respondents on 19 July 2024 in terms of a search and seizure warrant issued by the third respondent in terms of section 21 of the Criminal Procedure Act is declared invalid and set aside.

(iii) The first and second respondents are ordered to immediately restore possession of the items seized during the said search and seizure to the applicant.

(iv) Should the items have been handed over by the

respondents to any other person or entity, such other person or entity shall immediately restore possession of the items to the applicant.

(v) In the event of the respondents refusing to comply with paragraph (iii) above, the sheriff of this court is authorised to take the necessary steps and give effect thereto.

(vi) The first and second respondents shall pay the costs of the application on a party and party scale on Scale C.

S MFENYANA
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG

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DATE OF ARGUMENT: **1 AUGUST 2024**

DATE OF JUDGMENT: **25 SEPTEMBER 2024**
