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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No 312/2011

In the matter between

SVETLOV IVANCMEC IVANOV	**Appellant**

and

NORTH WEST GAMBLING BOARD	**1st Respondent**
INSPECTOR FREDDY	**2nd Respondent**
INSPECTOR PITSO	**3rd Respondent**
THE STATION COMMANDER OF THE RUSTENBURG POLICE STATION	**4th Respondent**
MINISTER OF SAFETY AND SECURITY	**5th Respondent**
THE MAGISTRATE OF RUSTENBURG	**6th Respondent**

Neutral citation: *Ivanov v North West Gambling Board* (312/2011) [2012] ZASCA 92 (31 May 2012)

Coram: CLOETE, HEHER, SNYDERS and MHLANTLA JJA and McLAREN AJA

Heard: 14 May 2012

Delivered: 31 May 2012

Summary: Search warrant - search and seizure - declaration of invalidity of search warrant - operates retrospectively - search and seizure invalid *ex tunc* - application for a *mandament van spolie* appropriate − appellant entitled to restoration of machines even though his possession without a licence would be illegal.

ORDER

On appeal from: North West High Court, Mafikeng (Leeuw JP sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court below is set aside and replaced with the following:

'(a) the rule nisi issued by Moloto AJ on 30 January 2010 is confirmed;

(b) the search warrant issued by the sixth respondent on 22 January 2010 is declared unlawful;

(c) the first, third and fourth respondents are ordered forthwith to restore the assets referred to in annexure 'WGP1' to the first respondent's answering affidavit, to the applicant;

(d) the first, second, third and fourth respondents are ordered to pay the applicant's costs jointly and severally, the one paying the others to be absolved, such costs to include the costs consequent upon the employment of two counsel.'

JUDGMENT

MHLANTLA JA (Cloete, Heher and Snyders JJA and McLaren AJA concurring):

Introduction

[1] This appeal, with the leave of the court below, turns on the effect of the declaration of invalidity of a search and seizure warrant. It also involves the question whether the appellant was entitled to institute a spoliation application and more particularly whether the fact that his possession of the goods was and remains illegal, is a bar to his being restored to possession thereof. The issues arising on appeal will best be understood in the light of the background facts that follow.

Background

[2] The North West Gambling Board, the first respondent, is a juristic person established in terms of section 3 of the North West Gambling Act 2 of 2001 (the Act). I shall hereafter refer to the first respondent as the Board. The Act provides for the regulation of gambling activities in the North West Province. The Board has, in terms of section 4, certain powers, including the powers to oversee gambling activities and investigate illegal gambling throughout the Province and to exercise such powers and perform such functions and duties as may be assigned to it in terms of the Act and any other law. The Board and the South African Police Service (SAPS) agreed to co-operate with regard to the investigation of illegal gambling in the Province.

[3] On 22 January 2010 Mr Wilfred Pitso, the third respondent, who is

an inspector in the employ of the Board, inspected the business premises of Mr Svetlov Ivanov, the appellant. As it appeared to the third respondent that gambling activities were taking place in contravention of the Act, he requested members of SAPS to conduct further investigations and to apply for a search warrant. Pursuant thereto, members of the SAPS applied for a search warrant from the magistrate, the sixth respondent, who serves in the court which has jurisdiction over the appellant's business premises in Rustenburg. The sixth respondent issued the search warrant in terms of sections 20, 21 and 25 of the Criminal Procedure Act 51 of 1977 (the Criminal Procedure Act) read with section 65 (6) to (8) of the Act.

[4] On 29 January 2010, Inspector Freddy (the second respondent) and other members of the SAPS, as well as the third respondent and some employees of the Board, went to the premises of the appellant to execute the search warrant. They confirmed that the appellant was in possession of gambling machines and other gambling devices despite the fact that he did not have the requisite licence and was not authorised by the Board to possess the machines − in effect contravening the provisions of section 9(1) of the National Gambling Act 7 of 2004.[1] Possession and use of machines without a valid licence are offences under section 82 of the Act.[2]

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1 Section 9(1) of the National Gambling Act 7 of 2004 provides:
'(1) Despite any other law, a person must not–
(a) import, manufacture, supply, sell, lease, make available, possess, store or alter a gambling machine or gambling device, or transport or maintain such a machine or device except to the extent contemplated in section 23(4), unless that person is authorised to do so in terms of this Act or applicable provincial law;
(b) possess or make available for play a gambling machine or gambling device for use in a gambling activity unless registered ownership or possession of the machine or device has been transferred to that person in terms of section 23(6).'

2 Section 82(1) of the Act provides:
'(1) Any person who–
…
(xiii) is in possession of any gambling machine, table or device contemplated in section 66(1) and this

[5] As these events were unfolding, the appellant launched an ex parte application in the Rustenburg Magistrates' Court on an urgent basis. He sought an order, inter alia 'cancelling' the search warrant and directing the members of SAPS to restore possession of his business premises to him. In his affidavit, he averred that he was the owner of Max-a-Million Casino and that the warrant was invalid. The magistrate granted an order for the restoration of his business premises but – correctly – made no order that affected the validity of the warrant. The order was brought to the attention of the police officers who were still in the process of executing the search warrant but they continued with the search and seizure operation. They locked the premises and informed the appellant that they would continue the following day. The appellant was arrested and taken to the Rustenburg police station where he was given a written notice to appear in court on 1 February 2010 on a charge of illegal gambling.

[6] On 30 January 2010, the second and third respondents as well as other police officers and employees of the Board returned to the appellant's premises and seized the machines and equipment which appeared to be gambling machines. This caused the appellant to institute an ex parte application in the North West High Court, Mafikeng against the first to fifth respondents, on an urgent basis. In his founding affidavit,

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section and is not-

a) the holder of an appropriate licence;
b) registered in terms of section 60(1);
c) authorised by the Board to use such device for social gambling; or
d) authorised by the Board to transport such machine, table or device in or through the Province as contemplated in section 66C(2);

(xiv) uses gambling device or amusement machine otherwise than in accordance with the provisions of the Act;

…

is guilty of an offence and on conviction (unless otherwise expressly provided elsewhere in this Act) be liable to a fine or to imprisonment for a period not exceeding 10 years or to both a fine and such imprisonment.'

the appellant attacked the validity of the search warrant. He averred, inter alia, that he was 'conducting a business' at the premises; that the magistrate had issued a spoliation order on 29 January; that the police officers had ignored the court order and had seized some of his goods; and that they had returned on that day and were in the process of loading machines into the truck. He stated that he would be obliged to obtain permits from the Board to transport the machines back to the premises – thereby tacitly admitting that the machines were gambling machines.[3] The appellant sought an order, inter alia, declaring the search warrant null and void and directing the respondents to restore the machines to him with immediate effect.

[7] The matter came before Moloto AJ, who granted a rule nisi with immediate effect pending the return day, declaring the search warrant null and void and ordering the first to fifth respondents to restore possession of the machines to the appellant. The respondents complied with the order and returned the machines to the appellant. These machines are still in his possession.

[8] The respondents opposed the confirmation of the rule nisi. The third respondent deposed to an affidavit on behalf of the respondents save for the sixth respondent. He objected to the manner in which the appellant had launched the application. He stated that the appellant had failed to

3 Section 66A(1) of the Act provides:
'A person shall not-
(a) conduct or permit the playing of any gambling game or conduct or permit any gambling in or on any premises under his or her control or in his or her charge; or
(b) be directly or indirectly involved in the operation of any gambling business;
without an appropriate licence, and this will include transportation of gambling machines or devices or the handling of such without the written approval from the Board.'

comply with the provisions of section 35 of the General Law Amendment Act 62 of 1955,[4] as no notice had been given to them. He conceded that the warrant might have been defective however he stated that the respondents were justified in their actions and had met the requirements of sections 20, 21 and 25 of the Criminal Procedure Act; that the appellant had contravened the provisions of section 9(1) of the National Gambling Act and that he was conducting an illegal casino contrary to the provisions of section 50(1)[5] of the Act. He averred that by virtue of section 79 of the Act, the gambling machines and other articles that were used in the commission of the offence were liable to forfeiture upon the appellant's conviction. He therefore sought that the rule nisi be discharged and the appellant be ordered to return the machines to the Board.

[9] The application was postponed on various occasions. It was eventually heard by Leeuw JP. After considering the issues, the learned judge president discharged the rule nisi in part. She declared the warrant invalid for being too general and vague and accordingly set it aside. Relying on the decision of *Oudekraal Estates (Pty) Ltd v City of Cape Town,*[6] she held that the search and seizure were not unlawful as the search warrant, albeit invalid, had not yet been set aside when the police executed it and that it had empowered them to conduct the search and seizure.

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4 Section 35 provides:
'Notwithstanding anything to the contrary contained in any law, no court shall issue any rule *nisi* operating as an interim interdict against the Government of the Union including the South African Railways and Harbours Administration or the Administration of any Province, or any Minister, Premier or other officer of the said Government or Administration in his capacity as such, unless notice of intention to apply for such rule, accompanied by copies of the petition and of the affidavits which are intended to be used in support of the application, was served upon the said Government, Administration, Minister, Premier or officer at least seventy-two hours, or such lesser period as the court may in all the circumstances of the case consider reasonable, before the time mentioned in the notice for the hearing of the application.'
5 This section prohibits anyone from conducting a casino without a licence.
6 *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para 26.

[10] The judge president further held that the appellant was not entitled to a spoliation order and that he had adopted the wrong procedure and relied on a wrong cause of action. She ordered the appellant to return the machines to the respondents with the qualification that he was only entitled to the return of the items which he might lawfully possess. Having found that the appellant had not displayed the utmost good faith required of an applicant in an ex parte application, the judge president ordered the appellant to pay costs on a punitive scale. She later granted leave to appeal to this court.

[11] Against that background the appeal raises two issues. They are:
(a) whether the declaration of invalidity of the search warrant could transform a bona fide search that was executed under a warrant into a spoliation; and
(b) whether as a result of the declaration of invalidity of the search warrant, the appellant is entitled to unqualified restoration of the machines the possession of which without a licence is prohibited by the Act.

Findings

[12] It is common cause that the search warrant is invalid and that the appellant is not a holder of any licence issued under the Act. Counsel for the appellant conceded that most of the machines seized from the appellant are gambling machines. In my view the learned judge president rightly came to the conclusion that the search warrant was invalid and accordingly cancelled it. She however erred when she held that the order

declaring the search warrant invalid did not affect the lawfulness of the search and seizure.

(a) *Reliance on Oudekraal*

[13] As indicated earlier in my judgment, the judge president found support in *Oudekraal* when she held that an unlawful act was capable of producing legally valid consequences for as long as the unlawful act was not set aside. Counsel for the respondents correctly conceded that the court below's reliance on *Oudekraal* was misplaced as that case dealt with the validity of administrative acts. The issue of a warrant is not an administrative act. It was so held by Langa CJ in *Thint (Pty) Ltd v National Director of Public Prosecutions*; *Zuma v National Director of Public Prosecutions*,[7] where he stated:

'In supplementary written submissions filed after the close of the hearing, the State submitted that the decision to issue a search warrant is an administrative one which falls within the terms of the Promotion of Administrative Justice Act 3 of 2000. The applicants, on the other hand, submitted that it is a judicial discretion and does not fall within the scope of administrative action. This latter approach accords more with the jurisprudence of this court.'

(b) *Effect of the declaration of invalidity of the search warrant*

[14] Counsel for the respondents submitted that the search and seizure were lawful as the warrant had not been declared invalid when the police executed it and that it remained valid until set aside on review. In my view this submission cannot prevail. 'A warrant is no more than a written authority to perform an act that would otherwise be unlawful.'[8] It must comply with the statutory provisions. If it is subsequently declared

7 *Thint (Pty) Ltd v National Director of Public Prosecutions*; *Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) para 89.
8 *National Director of Public Prosecutions v Zuma* 2008 (1) SACR 258 (SCA) para 76.

invalid, the invasion of privacy and the search and seizure cannot retain the lawfulness thereof as the essence of what made the dispossession lawful, falls away. As Harms DP stated in *Cadac (Pty) Ltd v Weber-Stephen Products Co*:[9]

'The declaration of invalidity operates retrospectively and not prospectively. This means that once a warrant is set aside it is assumed that it never existed, and everything done pursuant thereto was consequently unlawful.'

[15] Put differently, the lawfulness of the search and seizure is dependent on the legality of the search warrant. This must necessarily be so as the warrant provides the justification for the search and seizure. If the warrant is declared null and void, it means that there was no basis in law for the search and seizure, which were therefore invalid *ex tunc*. In this case, the police had no authority to seize the appellant's goods, albeit that they acted in good faith and believed that they had the power to search in terms of the warrant. Once the order of invalidity was issued, the necessary consequence is that the police acted unlawfully.

[16] The matter was put beyond doubt by the decision of the Constitutional Court in *Betlane v Shelly Court CC*.[10] In that case, the registrar had issued a writ of execution in favour of the respondent, contrary to rule 49 (11) of the Uniform Rules of Court, which requires it to be issued by the court which granted the order. The applicant was evicted on the strength of the writ of execution which was later declared unlawful and set aside. The applicant applied for a spoliation order. Mogoeng J held in para 36:

'Ordinarily, an eviction that is carried out pursuant to an invalid writ of execution amounts to spoliation. The evictee would therefore be entitled to restitution.'

9 *Cadac (Pty) Ltd v Weber-Stephen Products Co* 2011 (3) SA 570 (SCA) para 18.
10 *Betlane v Shelly Court CC* 2011 (1) SA 388 (CC).

However, a restoration order was not granted as the premises were already occupied by a bona fide third party.

[17] It follows that it was competent for the appellant in this case to apply for a spoliation order. The court below accordingly erred when it concluded that the appellant had used a wrong procedure and relied on a wrong cause of action. I now turn to the issue of spoliation.

(c) *Spoliation application*

[18] Counsel for the appellant submitted that the court below applied the wrong principles when considering the application. He contended that in spoliation proceedings, the lawfulness of the possession of the applicant for the spoliation order is irrelevant. All that is required of the applicant is for him or her to prove that he or she was in peaceful and undisturbed possession of the disputed property and that he was deprived of his possession against his will. Counsel for the respondent, on the other hand, supported the finding of the court below. He submitted that the lawfulness of possession had to be considered as the appellant is prohibited by the Act as well as the National Gambling Act from possessing gambling machines or gambling devices without a licence. In support of this submission counsel called in aid the decision of the full court of the North West High Court in *Schoeman v Chairperson of the North West Gambling Board*.[11]

[19] In my view the submission on behalf of the respondents is devoid of merit. The historic background and the general principles underlying the *mandament van spolie* are well established. Spoliation is the wrongful deprivation of another's right of possession. The aim of spoliation is to

11 *Schoeman v Chairperson of the North West Gambling Board* [2005] ZANWHC 81.

prevent self-help. It seeks to prevent people from taking the law into their own hands. An applicant upon proof of two requirements is entitled to a *mandament van spolie* restoring the *status quo ante*. The first, is proof that the applicant was in possession of the spoliated thing. The cause for possession is irrelevant – that is why possession by a thief is protected. The second, is the wrongful deprivation of possession. The fact that possession is wrongful or illegal is irrelevant as that would go to the merits of the dispute.

[20] In *Nino Bonino v De Lange*,[12] Innes CJ enunciated the principle underlying the *mandament van spolie* as follows:

'It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the Court will summarily restore the *status quo ante,* and will do that as a preliminary to any inquiry or investigation into the merits of the dispute.'

[21] In *Kelly v Wright; Kelly v Kok*,[13] the lessor had leased to two joint lessees a flat without first obtaining the consent of the controller of manpower as required by War Measure 74 of 1945. Rent was paid monthly. *Wright* had been given notice to vacate the flat forthwith whilst *Kok* was given some six weeks notice. The lessor applied in the magistrate's court for the ejectment of the lessees. The application was dismissed on the basis that insufficient notice of ejectment was given. The effect of the court's decision was that the lessees who had committed an offence remained in possession. The lessor appealed against that decision and submitted that he would be committing an offence if the court allowed the lessees to remain in occupation. In this regard, he found

12 *Nino Bonino v De Lange* 1906 TS 120 at 122.
13 *Kelly v Wright; Kelly v Kok* 1948 (3) SA 522(A) at 528-530.

support in the decision of *Gopal v Cohen*.[14] In that matter Neser J (Maritz and De Villiers JJ concurring) said at 288:

'I am of the opinion, moreover, that there is a further ground for granting an order of ejectment. Every day appellant resides on or occupies the property she is committing a criminal act and if respondent permits appellant to remain on the property she commits a criminal act. It may well be that respondent cannot be held to be permitting the appellant to occupy the property if the Court rules that she is not entitled to an order of ejectment against the appellant, but if the Court does so rule the Court is in effect permitting appellant to remain on the property and by so doing to continue committing criminal acts. It would clearly be against public policy to countenance a breach of the law which is declared by statute to constitute criminal conduct.'

Tindall ACJ held that the approach of the court was in conflict with the decision in *Jajbhay v Cassim*[15] and overruled it. He went on to say at 529:

'I am unable to accept as correct the alternative ground given in *Gopal v Cohen,* for ejecting the lessee in that case. It does not seem to me that by refusing the decree of ejectment the Court would be permitting or countenancing the commission of an offence by the lessee or would be acting against the requirements of public policy. In my opinion the requirements of public policy in a case like *Gopal v Cohen* would be satisfied by enforcing the criminal law'

[22] Turning to the case before him, Tindall ACJ said at 530:

'The refusal to eject the lessees can hardly prejudice the lessor in respect of prosecution; she apparently was liable to prosecution in any event and if she should be prosecuted it is not likely, even if she be legally liable to further prosecution, that she would thereafter be prosecuted a second time, seeing that she has taken legal steps to attempt to eject the lessees. As for the lessees they also apparently are liable to prosecution. Assuming against them that as long as they remain in occupation they will be liable to punishment as for a continuous offence, it cannot rightly be said that the Court, by refusing to eject them, will be permitting or countenancing the commission of an offence by them. It does not seem to me that considerations of public policy demand intervention by a civil court; such considerations will be

14 *Gopal v Cohen* 1946 TPD 283.
15 *Jajbhay v Cassim* 1939 AD 537.

satisfied by proceedings in a criminal court.'[16]

[23] Van Blerk JA in *Yeko v Qana*[17] outlined the requisites for the remedy and stated:

'The very essence of the remedy against spoliation is that the possession enjoyed by the party who asks for the spoliation order must be established. As has so often been said by our Courts the possession which must be proved is not possession in the juridical sense; it may be enough if the holding by the applicant was with the intention of securing some benefit for himself. In order to obtain a spoliation order the *onus* is on the applicant to prove the required possession, and that he was unlawfully deprived of such possession. As the appellant admits that he locked the building it was only the possession that respondent was required to establish… For, as *Voet,* 41.2.16, says, the injustice of the possession of the person despoiled is irrelevant as he is entitled to a spoliation order even if he is a thief or a robber. The fundamental principle of the remedy is that no one is allowed to take the law into his own hands. All that the *spoliatus* has to prove, is possession of a kind which warrants the protection accorded by the remedy, and that he was unlawfully ousted.'

[24] In *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi*,[18] it was said that the *mandament van spolie* is a possessory remedy, the limited and exclusive function of which is to restore the *status quo ante* and it therefore matters not that the spoliator might have a stronger claim to possession than the person spoliated or that the latter has indeed no right to possession. The principle is simple: possession must first be restored to the person spoliated irrespective of the parties' actual rights to

16 See also *De Jager v Farah and Nestadt* 1947(4) SA 28(W) at 35 and *Sithonga v Minister of Safety and Security* 2008 (1) SACR 376 (TkHC) at 390G-391F.(The passage at 391A-B is wrong − see *Setlogelo v Setlogelo* 1914 AD 221 at 227.)

17 *Yeko v Qana* 1973 (4) SA 735 (A) at 739D-G.

18 *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1) SA 508 (A) at 512A-B: 'Die mandament van spolie is 'n besitsremedie waarvan die beperkte en uitsluitlike funksie is om die herstel van die *status quo ante* te bewerkstellig (*Oglodzinski v Oglodzinski* 1976 (4) SA 273 (D) op 274F-G) en daarom kom dit nie daarop aan dat die spoliator 'n sterker aanspraak op besit as die gespolieerde mag hê nie of dat laasgenoemde inderdaad geen reg op besit het nie. Die beginsel is eenvoudig: *spoliatus ante omnia restituendus est* ongeag die partye se daadwerklike regte op besit.'

possession.

[25] It is clear from all these authorities that questions of illegality or wrongfulness of the spoliator's possession are irrelevant. The former has to be determined by the criminal courts; and the latter concerns the merits of the case which are irrelevant – unless the applicant claims a substantive right to possession and thereby in effect forces an investigation of the issues relevant to the further relief claimed.[19] That situation did not arise in this case.

[26] Applying the principles outlined in these authorities, it is clear that the findings by the full court in *Schoeman*[20] are wrong. In that case, the police obtained a search warrant. They searched the business premises of the applicant and seized various items. There was no dispute that the machines were gambling machines; that they were in the applicant's possession and that he did not hold any licence or permit issued by the Board to possess the machines. In his application, the applicant sought an interim order declaring the search warrant unlawful and directing the respondents to restore possession to him of all the items seized. The court dismissed his application on the basis that section 9 of the National Gambling Act precluded him from possessing the machines without a licence. The full court in dismissing the appeal relied on the decision of Carlisle J in *Yuras v District Commandant of Police*, *Durban*[21] and held that the appellant was not entitled to an order for restoration of his machines until he produced an appropriate licence.

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19 See *Street Pole Ads Durban (Pty) Ltd v Ethekwini Municipality* 2008 (5) SA 290 (SCA) para 15.
20 See n 11 above.
21 *Yuras v District Commandant of Police, Durban* 1952 (2) SA 173 (N) at 178.

[27] This conclusion by the full court in *Schoeman* is wrong and is overruled. The appellant, who was in undisturbed and peaceful possession, was entitled to the restoration of his machines once the search warrant was declared unlawful and set aside. The question of lawfulness or illegality was irrelevant. Furthermore, the court's reliance on *Yuras* is misplaced as that case involved an issue relating to consequences flowing upon the conviction of a wrongdoer and where goods used in the commission of an offence had been seized.

[28] In *Yuras*, the police had set up a trap. The applicant unlawfully and without permission bought unwrought gold from a police officer. He was arrested and the gold was seized. The applicant was convicted of buying gold in contravention of the Exchange Control Regulations as he was not an authorised dealer. He subsequently instituted an application claiming a refund of the money paid for the gold during the transaction, alternatively that the gold be returned to him in the event of his being able lawfully to possess or lawfully deal therewith. The court held that the applicant was not authorised to have the gold and had not established ownership thereof. Carlisle J accordingly dismissed the application stating that he could not relieve the applicant of the consequences of his illegal conduct by restoring possession of the gold to him.

(d) *Public Policy considerations*

[29] Counsel for the respondents confirmed that no criminal proceedings were pending against the appellant. He however urged this court to have regard to public policy considerations as we are dealing with legislation that had been enacted in the public interest. He urged us not to restore the machines to the appellant but to grant a preservation

order in favour of the Board. In this regard, counsel referred us to the decisions of *Zuma v National Director of Public Prosecutions*; *Thint (Pty) Ltd v National Director of Public Prosecutions*[22] and *Sello v Grobler.*[23]

[30] These cases do not assist the respondents as the facts thereof are distinguishable from the facts of the instant case. In *Thint*, criminal proceedings were pending, hence the grant of a preservation order. Similarly the reliance on *Sello* is misplaced as that case did not involve a spoliation application.[24]

[31] In this matter there are remedies available to the Board. One would have expected it to have taken steps to obtain a new search warrant immediately after Leeuw JP had declared the warrant invalid. Nothing precluded it from doing so. It can do so now. A period of 15 months has elapsed since the order was made by Leeuw JP and yet no action has been taken against the appellant. I am aware of the order by Hendricks J on 3 June 2010 that pending the outcome of the application, the machines were to remain in the appellant's possession; but that order could not prevent the execution of a new and valid warrant − which would have rendered the application academic (except for the question of costs).

(e) *Abuse of Court Process*

[32] It remains for me to deal with the issue relating to the allegation that the appellant has abused the court process. Counsel for the respondents submitted that the appellant had, in ex parte proceedings,

22 See n 7 above, paras 220-223.
23 *Sello v Grobler* 2011 (1) SACR 310 (SCA).
24 Ibid para 10.

failed to disclose all the material facts. He contended that Moloto AJ would not have granted the order had this been done. There is no merit in this submission. In my view, the appellant had a duty to disclose only what might influence the outcome of the spoliation application, that is, he had to establish the existence of the two requirements mentioned above. These were alleged in his founding affidavit. He had no duty to prove the lawfulness of his possession. As already stated, the issues raised on behalf of the respondents related to the lawfulness of the possession and are irrelevant for the purposes of the application. There is no doubt that the appellant has succeeded in establishing that he was in peaceful and undisturbed possession of the machines and that he was unlawfully deprived of that possession.

[33] There is however a legitimate criticism with regard to the use of ex parte proceedings in this case. Even on ordinary principles, there was no reason why notice should not have been given to the respondents. But in addition, the provisions of section 35 of Act 62 of 1955 had to be complied with as the respondents are all organs of state. The appellant was bound in terms of that section to afford the respondents notice of the application. There was accordingly no justification for ex parte proceedings for this reason as well. The appellant however, cannot be non-suited because of this. In my view costs should follow the result.

[34] For all these reasons the appeal must succeed. In the result the following order is made:

1 The appeal is upheld with costs, including the costs of two counsel.
2 The order of the court below is set aside and replaced with the

following:

'(a) the rule nisi issued by Moloto AJ on 30 January 2010 is confirmed;

(b) the search warrant issued by the sixth respondent on 22 January 2010 is declared unlawful;

(c) the first, third and fourth respondents are ordered forthwith to restore the assets referred to in annexure 'WGP1' to the first respondent's answering affidavit, to the applicant;

(d) the first, second, third and fourth respondents are ordered to pay the applicant's costs jointly and severally, the one paying the other to be absolved, such costs to include the costs consequent upon the employment of two counsel'.

NZ MHLANTLA
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	J P de Bruin SC (with him N Jagga)
Instructed by:	Vardakos Attorneys,Vereeniging
Correspondents:	Honey Inc, Bloemfontein
Respondents:	M Donen SC (with him ZZ Matebese)

Instructed by:	Mketsu & Associates Inc, Pretoria
Correspondents:	Matsepes Inc, Bloemfontein