IN THE HIGH COURT OF SOUTH AFRICA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED. ✓

DATE 29/10/10 SIGNATURE

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE No. 59460/2009

In the matter between:-

BAFANA BAFANA	First Applicant
BAFANA BAFANA LUCKY LINES STILFONTEIN	Second Applicant
GI ENTERTAINMENT CC	Third Applicant
JOAO MIQUEL ROSHA CALDEIRA	Fourth Applicant

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES	First Respondent
B MPOFU NO	Second Respondent
T MHLANGU NO	Third Respondent
NORTH WEST GAMBLING BOARD	Fourth Respondent
CASINO ASSOCIATION OF SOUTH AFRICA	Fifth Respondent
SUN INTERNATIONAL (SOUTH AFRICA) LTD	Sixth Respondent
PEERMONT GLOBAL (NORTHWEST) PTY) LTD	Seventh Respondent

JUDGMENT

Van der Byl, AJ:-

.../...

Introduction

[1] In this matter the Applicants seek, in addition to the usual order of costs, an order -

(a) setting aside the detentions and/or seizures by the First, Second and Third Respondents, purportedly executed in terms of section 88 of the Customs and Excise Act, 1964 (" *the Act* "), carried out at the various premises of the Applicants on 12 August 1009 (**prayer 2**);

(b) ordering the First, Second and Third Respondents to forthwith restore the possession of the Applicants of the items so detained or seized (**prayer 3**).

[2] Despite the vague reference in the Notice of Motion and the Applicants' founding affidavit to "*items .. detained or seized*", it is, as is apparent from the Respondents' papers, clear that the Second and Third Respondents, being officers charged with duties relating to customs and excise as envisaged in the Act, on 12 August 2009, according to the Respondents, detained in terms of section 88(1)(a) of the Act, 702 gambling machines of which 432 were removed and taken to the State warehouse in Pretoria and the others were sealed and left under detention on the respective premises.

[3] Although the issues in this matter fall within a relative narrow compass, the matter has nevertheless a fairly long history which calls for an evaluation of the facts

relevant to such issues.

Relevant facts of the matter

[4] I find it convenient to refer, because of some disputes between the parties, beforehand to the facts set out in the answering affidavits filed by or on behalf of the Respondents.

[5] On 24 July 2009 the Second and Third Respondents in the course of their duties conducted in terms of section 4(4)(a) of the Act inspections at 10 gambling establishments in the North West Province belonging to the one, the other or all of the Applicants. Because gambling machines are not manufactured in South Africa, they requested the persons in charge of the establishments to produce import documentation relating to the gambling machines found on the premises, but they were unable to do so. They, however, promised and undertook to furnish such documentation within a few days.

I need to mention that at the time of their visit to the premises the Second and Third Respondents handed a letter dated 24 July 2009 to the persons in charge in which it is stated that there is "*a reasonable ground for believing that Customs related documentation or goods are kept or stored*" at their premises. Apart from citing the provisions of section 4(4)(a) of the Act reference is also made to a "*section 4(8)(8A)(a)*" and it is stated that detention under that section "*is distinct from detention under section 88(1)(a)*".

It is apparent that there is no such section in the Act, but in so far as it may have been intended to be a reference to section 4(8A), that section is inapplicable to the situation in hand.

[6] On 12 August 2009, when the documents requested were not forthcoming, they again visited the premises and proceeded to detain 702 gambling machines found on the premises of which, as I already indicated, 432 were removed to the State warehouse in Pretoria as there were not sufficient space on the trucks that had been commissioned to convey the machines and directed the detention of the remaining 270 machines on the premises.

On this occasion a similarly worded letter dated 12 August 2009 was handed to the persons in charge of the premises.

In a letter addressed to the Applicants the next day, it is indicated -

(a) that the inspection conducted the day before was effected in terms of section 4(4)(a) of the Act;

(b) that the detention of the machines has, as appears from the detention notices handed to them at the time, been effected in terms of section 88(1)(a), read with section 87(1) of the Act;

(c) that they are required to comply with the provisions of section 102(1), read with

section 4(4)(a), of the Act by providing proof as to the person from whom the goods were obtained, the place where and the date on which the duty had been paid and so on;

(d) that failure to provide such proof may result in the matter being dealt with in terms of the Act; and

(e) that the reference to section 4(8)(8A) of the Act in the respective letters had been quoted in error and was withdrawn.

[7] The Applicants, thereupon, together with two other persons, on 14 August 2009 launched an urgent application under Case No. 49802/2009 enrolled for 17 August 2009 seeking relief similar to the relief claimed in this application.

As in this application no distinction was drawn between the machines that were still detained and those that were released.

[8] The First Respondent had in the meantime conducted, with the assistance of the North West Gambling Board, an investigation in locating the relevant serial numbers on the machines and eventually established that the machines, except for 28 of the machines, were older than five years so that the Applicants were, if regard is had to section 102 of the Act, read with rule 101.01, not obliged to produce any documents in respect of those machines. A letter dated 14 August 2009 was, thereupon, addressed to the Applicants in which they were informed that 674 of the machines were for that

reason released from detention and will as from 17 August 2009 be returned to the Applicants.

[9] In view of these developments the Applicants decided to remove the matter from the roll.

[10] In order to return the machines which had been released the First Respondent, thereupon, encountered a problem to return the machines as both the Gauteng and the North West gambling legislation, read with section 9(1)(a) of the National Gambling Act, 2004 (Act 7 of 2004), required the authorisation of the respective gambling boards to transport the various gambling machines back from Pretoria to the North West Province.

[11] As the First Respondent was unable to obtain such authorization it was suggested to them through the State Attorney that the Applicants should themselves approach the respective boards for such authorisation.

[12] The Applicants, however, ignored the suggestion and instead on 21 August 2009 launched an urgent application under the same case number, set down for 25 August 2009, seeking an order to the effect -

(a) that the First Respondent's notification of the release of the machines dated 14 August 2009, on the basis or assumption that the First Respondent conceded unlawfulness of the detention of the machines and that such notification constituted a settlement agreement, be made an order of court; and

.../...

(b) that the First Respondent be directed to immediately restore possession of the machines that were no longer detained.

[13] Although the First Respondent had no objection to **Annexure B** being made an order of court, he filed an affidavit to clarify that the detention of the machines had not been unlawful and to explain why the machines that were released had not in the meantime been returned.

[14] On 25 August 2009, being the date on which the application was set down, the North West Gambling Board and the Casino Association of South Africa launched applications to join as the Fourth and Fifth Respondents which applications were granted by Phatudi J and directed them to file their answering affidavits before or on 15 September 2009.

[15] On 15 September 2009 the North West Gambling Board filed its answering affidavit in which it contended -

(a) that it had always been and was still common cause between the Board and the Applicants that the Applicants' possession of the machines in question was at all times illegal as they do not possess, as provided in the North West gambling legislation, the licences, registrations or authorizations authorizing such possession;

(b) that in litigation against the Board for a considerable period of time, the

Applicants challenged the validity of the legislation in terms of which their possession is unlawful, being a contention which appears to have been turned down by Bertelsman J in ***Ebrahim and Another v Premier of the North West Province abd Others*** under Case No. 18175/07 and in which an application for leave to appeal to the Constitutional Court was refused.

[16] As a consequence of these developments the application was, at the request of the Applicants, postponed *sine die* and had in the meantime been withdrawn by the Applicants.

[17] The Applicants then on 25 September 2009 launched this application as a matter of urgency under another case number against the First, Second and Third Respondents seeking on 6 October 2009 relief identical to the relief that they claimed in the application lodged under Case No. 49806/09. The Fourth, Fifth, Sixth and Seventh Respondents applied for leave to intervene and was granted such leave on 7 October 2009. The matter was postponed *sine die* and the Fourth to the Seventh Respondents were ordered to file their answering affidavits within 10 days of the order. Another application for leave to appeal against the order granting the Fifth to Seventh Respondents leave to intervene was refused and an application to the Supreme Court of Appeal for such leave was later abandoned. The Fifth to the Seventh Respondents eventually filed their answering affidavits. The Applicants filed no replying affidavits. The application then remained dormant.

[18] The Fourth Respondent, the North West Gambling Board, then enrolled the

application launched on 14 August 2009 as well as this application for hearing. The Applicants, however, at the commencement of the hearing of those applications withdrew the application launched on 14 August 2009 and tendered the costs incurred by the Respondents in respect of that application.

[19] The hearing, thereupon, proceeded before me in respect of the application launched on 25 September 2009.

The Applicants' submissions

[20] It is the Applicants' contention that this application is "*by its very nature a spoliation application*" as they were at all times in peaceful and undisturbed possession of the items detained on 12 August 2009 and wrongfully deprived of such possession.

[21] The Applicants, acknowledging the powers vested in the First Respondent in, particularly, sections 4(4)(a), 87, 88(1)(a) and 102 of the Act, contended that the First, Second and Third Respondents acted *ultra vires* those powers and submitted that this application is in effect an indirect review of the First Respondent's conduct.

[22] In developing that submission it was contended on behalf of the Applicants, relying on the decision in the case of ***Commissioner of SARS v Saleem 2008(3) SA 655 (SCA)*** that the Second and Third Respondents failed to exercise their powers fairly and reasonably because of the fact, *inter alia* -

(a) that the letters addressed 24 July 2009 and 12 August 2009 were not addressed to any of the Applicants or t heir managers and were merely in general addressed to as "*sir*" or "*madam*";

(b) that although it is stated in the letters that there were "*reasonable grounds for believing*" that custom related documentation or goods are kept or stored on the premises no attempt was made until the making of the founding affidavit to provide the Applicants with any grounds for such belief;

(c) that the First, Second and Third Respondents did not inform the Applicants what they wanted on the occasion of their visit on 24 July 2009 and also failed to provide any ground for their reasonable belief in their answering affidavit;

(d) that the letters contain a reference to detention in terms of section 4(8)(8A) of the Act and stated explicitly that such detention is distinct from detention under section 88(1)(a) of the Act, but nevertheless acted under that section and that the fact that those references were withdrawn in a letter dated 13 August 2009 is only done after the fact;

(e) that it was only in the letter dated 13 August 2009, being after the detentions had taken place, that the Applicants are called upon to comply with the provisions of section 102, read with section 4, of the Act by providing proof of the person from whom the goods were obtained, etc;

.../...

(f) that section 102 of the Act can only be invoked if a person have "*dealt in*" goods whilst the Applicants did not "*deal in*" the goods;

(g) that, relying on the decision in the case of ***Pretoria Portland Cement Co. v Competition Commission and others 2003(2) SA 385 (SCA)***, the Second and Third Respondents, were on 12 August 2009 accompanied by officers of the North West Gambling Board whilst in terms of section 4(4)(b) of the Act they could have be accompanied only by an assistant or a member of the police;

(h) that the Applicants are, relying on the decision in the case of ***Sithonga v Minister of Safety and Security 2008(1) SACR 376 (Tk)***, entitled to the return of their equipment notwithstanding allegations that their possession of the equipment will, if returned, be unlawful.

Relevant legal principles

[23] It is trite that in a spoliation application an applicant must comply with two requirements, namely, firstly, peaceful and undisturbed possession and, secondly, wrongful deprivation of such possession (***LAWSA, volume 11, para 342 at p. 304***).

[24] It has, however, been held that if an applicant goes further than only to claim spoliatory relief, he or she in effect forces an investigation of the issues relevant to the further relief he claims. Once he does this, the respondent's defence in regard thereto has to be considered and, if such a defence furnishes justification for the respondent's

possession, a court will not order restoration of the *status quo ante* (see: ***Minister of Agriculture & Agricultural Development v Segopolo 1992 (3) SA 967 (T) at 971B; Street Pole Ads Durban (Pty) Ltd and Another v Ethekwini Municipality 2008 (5) SA 290 (SCA) at 295C, para [15]***).

[25] In this matter the Applicants indeed went further by attempting to show, as contended, by way of a so-called "*indirect review*", that the First, Second and Third Respondents exceeded the powers conferred upon officers charged with customs related matters and have in my opinion, therefore, opened the door not only to the First, Second and Third Respondents to deal with the lawfulness of their actions, but also to the Fourth to the Seventh Respondents to deal with the lawfulness of the Applicants' possession of the machines in question.

[26] In considering the contentions raised by the Respondents, the principles enunciated in the decision in the case of ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E-635C*** may, of course, find application.

[27] This brings me lawfulness of the Respondents actions

Powers vested in the First Respondent and officers charged with customs related matters

[28] In terms of section 4(4)(a) of the Act an officer employed on any duty relating to customs and excise may for purposes of that Act, without previous notice, at any time

.../...

enter any premises whatsoever and to conduct at such premises any examination he or she deems necessary and require the production of documents that relate to matters dealt with in that Act.

[29] In terms of section 102 of the Act any person who, *inter alia*, deals in imported goods is required, upon demand by an officer, to produce documentation relating to the importation of such goods.

[30] In terms of section 88(1)(a) of the Act an officer may detain any goods at any place for the purpose of establishing whether such goods are liable to forfeiture under that Act.

[31] Section 87 of the Act deals with the circumstances under which goods will be liable to forfeiture. In terms of subsection (1) of that section any goods imported or otherwise dealt with contrary to the provisions of the Act or in respect of which any offence under the Act has been committed shall be liable to forfeiture wheresoever and in possession of whomsoever found.

[32] In terms of section 101, read with Rule 101.01 made under the Act, any person carrying on business is required to keep books, documents and accounts relating to, *inter alia*, the importation of any goods and to retain such books, documents and accounts for a period of five years.

[33] It is apparent from these provisions that any officer employed on any duty

relating to customs and excise is duly authorized -

(a) to enter at any time, with or without notice, any premises and to make such enquiry as he or she deems necessary (***section 4(4)(a)(i)***);

(b) to require, whilst on the premises, from any person the production then and there of any document which is in terms of the Act required to be kept (***section 4(4)(a)(ii), read with section 101 and Rule 101.01***);

(c) to detain any goods at any place for the purpose of establishing whether such goods are liable to forfeiture under, *inter alia*, section 87(!) (***section 88(1)(a)***).

[34] It is, as I have already indicated, the First, Second and Third Respondents' case that they indeed at all times acted by virtue of the powers vested in them by these provisions.

[35] The Applicants are, however, challenging by way of, as I have already indicated, an "*indirect review*" the validity of their actions.

[36] As was submitted by Mr. Donen SC who, together with Mr. Matebese, appeared on behalf of the Fourth Respondent, the question arises whether in the circumstances the Applicants' application is, in so far as it is contended that its application is a spoliation application, not a misconception of what a *mandament van spolie* is. The underlying philosophy of the *mandament* is "*that no one should resort to self-help in*

order to obtain or regain possession" (***LAWSA, Volume 11, p. 437, para 340***). Having regard to the fact that there indeed exist statutory powers to take actions such as those that the First, Second and Third Respondents have indeed taken, the question is whether it can be said that they have taken the law into their own hands or whether they resorted to self-help. In my view they have in the circumstances where they acted by virtue of statutory powers vested in them not resorted to self-help. I have in this regard been referred to the decision in the case of ***Sillo v Naude 1929 AD 21*** in which the Court was concerned with a matter where the respondent has summarily dismissed the appellant, a farm labourer, who had a right to graze his stock upon the respondent's farm. The appellant refused to leave, whereupon, the respondent impounded the appellant's stock under the Pounds Ordinance, 1912, A spoliation application by the appellant was unsuccessful. On appeal De Villiers ACJ held at ***26*** as follows:

> "*In Nino Bonino v de Lange (1906, T.S. 120) INNES C.J stated the law in the following terms: '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.' That is the principle in concise language as stated in all the books. The appellant accuses the respondent of a delict, and to succeed he must therefore satisfy the Court not only that he was in possession at the time of ejection (which has not been denied), but also that instead of invoking the proper machinery of the Court, the respondent took the law into his own hands and by force, or by other unlawful means, wrongfully and unlawfully deprived him (the appellant) of possession by sending the cattle to the pound. This the appellant has failed to establish, and is not in a position to establish. For by setting the machinery of the Pound Ordinance into motion the respondent cannot, in any aspect of the matter, be said to have taken the law into his own hands. In sending the cattle to the pound he merely invoked the aid of the law of the land in his dispute with the appellant. If he has unlawfully impounded the cattle, he is liable in damages to the owner ..... and he would be so liable if, when the issues in dispute between the parties come to be tried, it is found that the cattle were not trespassing, for according to sec. 18 (1) of the Ordinance only cattle found trespassing may be sent to the pound. The*

.../...

decision made by himself that the cattle were trespassing, and the fact of acting upon that decision by sending the cattle to the pound, does not constitute taking the law into his own hands. The Pound Ordinance does not provide any machinery to determine there and then whether or not cattle are trespassing, and the owner of the land must of necessity, therefore, make Lip his mind whether they are or not, taking the risk of being mulcted in damages if he comes to a wrong conclusion. But to hold that under such circumstances he is taking the law into his own hands would be to lay down the absurd proposition that in every case where the owner of cattle, at the time of trespass, chooses to deny that the cattle are trespassing he would be entitled to a mandament van spolie if his cattle are then impounded.".

(See also: ***Boompret Inv (Pty) Ltd v Paardekraal Concession Store (Pty) Ltd 1990 (1) SA 347 (A)at 353B-C***)

[37] By analogy this is what occurred in this matter. The First, Second and Third Respondents invoked the relevant provisions of the Act in detaining the machines in question and by having done that it cannot be said that what occurred since 24 July 2009 until the detention was lifted that they took the law into their own hands.

[38] In so far as it is contended that the Second and Third Respondents acted *ultra vires* the powers conferred upon them, the Applicants' remedy is to subject their actions to review whereupon, if they succeed, the question of the return of the machines can be considered. This in itself poses a practical problem for the Applicants. It would appear that 419 of the 702 machines detained were removed from the premises of six persons who were all applicants in the first application launched on 13 August 2009. The question is accordingly which machines are to be returned to which Applicant.

[39] It accordingly follows that the Applicants approached the Court on a wrong

remedy in an application which does not contain sufficient facts and which seeks, if regard is had to the fact that the First Respondent cannot transport the machines without the prescribed authorization, impossible relief.

[40] I am in any event satisfied, applying the ***Plascon-Evans*** principle, on the papers of the Respondents -

(a) that the Second and Third Respondents did duly and properly entered the respective premises as they were empowered to do in terms of section 4(4)(a)(i) so as to conduct an investigation as to whether customs duty is payable or had been paid on the gambling machines on the premises;

(b) that they then and there requested the production of importation documentation in respect of the machines on the premises;

(c) that the persons in charge were unable to produce any such documentation, but promised to provide the necessary documentation within a few days;

(d) that when no documents were forthcoming they returned to the respective premises and detained the machines, as authorized in terms of section 88(1), so as to establish whether the machines are liable to forfeiture under section 87(1).

[41] On these facts I am satisfied that the Applicants were not wrongfully or

.../...

unlawfully dispossessed of the machines in question.

[42] In view of the conclusion I have reached in this regard it is not necessary to deal with the other issues raised on behalf of the Applicants.

[43] In so far as I may be wrong in relation to those conclusions, I may point out that the contents of the letters dated 24 July 2009 and 12 August 2009 do not in my opinion detract from the lawfulness of the Respondents' actions.

The contention that the letters contain an indication that there was a reasonable ground for believing that customs related documents or goods are kept on the premises is not without any substance. It is clearly stated in the Applicants' papers that because gambling machines are not manufactured in South Africa and must accordingly be imported, hence the request that documentation be produced relating to such importation and any duties paid thereon. This is in my opinion clearly a reasonable ground for their belief. The First Respondent has indeed wide powers of inspection and I fail to see why he should have any reasonable ground for believing that documents or goods are kept on any premises before exercising any of those powers In so far as a reasonable belief is a prerequisite for the exercise of the powers vested in section 4(4)(a) I can see no reason why the person concerned should be informed of the grounds on which such belief is based. There is accordingly also no reason why the contents of the letters should detract from the validity of the Respondents actions. The incorrect references in the letters were in any event corrected the next day. I am in any event satisfied that the persons in charge of the respective premises were duly informed

of what was expected from them.

I am accordingly of the view that the *ultra vires* argument is without any foundation.

[44] There are also two other issues which were dealt with in argument, namely, whether an order can be granted for the return of the machines where the Applicant's possession of the machines is unlawful.

As far as the first of these issues is concerned there is the question of impossibility by the First Respondent to return the machines because of the fact that he is unable to obtain the necessary authorization to convey the machines currently detained in the State warehouse. Any order for the return of the machines will in the circumstances be a mere *brutum fulmen*.

As far as the second of these issues is concerned there is the fact that the Applicants are not in law entitled to possess the machines.

On behalf of the Applicants I have been referred to the decision in then case of ***Sithonga v Minister of Safety and Minister of Safety and Security 2008(1) SACR 376 (Tk)*** in which it was held that the lawfulness of the applicant's possession is irrelevant in spoliation proceedings which is a summary remedy aimed at restoring the applicant's possession and that it is not open to a respondent to raise as a defence that the applicant's possession is illegal.

In another unreported matter ***Schoeman v Chairperson of the North West Gambling Board*** in Case No. 6/2005 in the Bophuthatswana Provincial Division in which an interdict was claimed preventing the Gambling Board from seizing and removing gambling equipment in accordance with a warrant pending an application to review and set aside the warrant. The Court refused to grant the interdict, *inter alia*, because the applicant was not entitled to to posses the machines in question until he produces and appropriate licence.

I am in respectful agreement with this decision, but having held that the Applicants' remedy in this matter is not based on the *mandament van spolie* the decision in the ***Sithonga case*** is distinguishable from the circumstances in this matter.

[48] In summary I am of the view -

(a) that the Applicants failed to establish the requirements of the *mandament van spolie* because, bearing in mind that the Second and Third Respondents invoked the provisions of sections 4(4)(a) and 88(1)(a) of the Act, it cannot be held that the First, Second and Third Respondents took the law into their own hands;

(b) that I am in any event, applying the principles enunciated in ***the Plascon Evans case***, satisfied that on the papers set out in the Respondents' papers together with the undisputed facts set out in the Applicants' papers, the First, Second and Third Respondents were duly authorized in law to take the actions they did.

.../...

In the result the application is dismissed with costs, including the costs of two counsel.

.....
P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF THE APPLICANTS — ADV N JAGGA

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.../...

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DATE OF HEARING 25 October 2010

JUDGMENT DELIVERED ON 29 October 2010