IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE HIGH COURT, KIMBERLEY)

CASE NO.: 1084/2013
1085/2013
Case heard: 02-08-2013
Case delivered: 06-09-2013

In the matter between:

1084/2013

DANIEL VISAGIE t/a PRIESKA ENTERTAINMENT CENTRE	**Applicant**
And	
THE MINISTER OF SAFETY AND SECURITY N.O.	**1st Respondent**
THE PROVINCIAL COMMISSIONER OF THE SAPS, NORTHERN CAPE N.O.	**2nd Respondent**
THE CHAIRPERSON:NORTHERN CAPE GAMBLING AND RACING BOARD N.O.	**3rd Respondent**
WARRANT OFFICER DANIELS N.O.	**4th Respondent**
THE STATION COMMANDER, PRIESKA SAPS N.O.	**5th Respondent**

And

1085/2013

CLYDE SHADLEY STEYTLER t/a KURUMAN ENTERTAINMENT CENTRE	**Applicant**
And	
THE MINISTER OF SAFETY AND SECURITY N.O.	**1st Respondent**
THE PROVINCIAL COMMISSIONER OF THE SAPS, NORTHERN CAPE N.O.	**2nd Respondent**
THE CHAIRPERSON: NORTHERN CAPE CAMBLING AND RACING BOARD	**3rd Respondent**
CAPTAIN LM VOS N.O	**4th Respondent**
THE STATION COMMANDER, KURUMAN N.O.	**5th Respondent**
THE MAGISTRATE, KURUMAN N.O.	**6th Respondent**

CORAM: C.C. WILLIAMS J:

J U D G M E N T

WILLIAMS J:

1. During July 2013 inspectors attached to the Northern Cape Gambling Board (the Board) received information that suspected illegal gambling activities were being conducted at entertainment centres situated in Prieska and Kuruman in the Northern Cape.

2. Inspectors Shebe and Jacobs together with the acting Chief Executive Officer of the Board, Mr. Goeieman, visited these premises and after satisfying themselves that illegal gambling activities were being conducted at both these premises, caused search and seizure warrants in terms of sections 20, 21 and 25 of the Criminal Procedure Act 51 of 1977 to be issued and executed at the Prieska Entertainment Centre on 3 July 2013 and at the Kuruman Entertainment Centre on 7 July 2013. The gambling machines and other related items found at the Prieska Entertainment centre were removed by members of the SAPS, whereas at the Kuruman Entertainment Centre, the gambling machines and related items were not removed – the SAPS simply took control of the premises by locking it and

retaining the keys, thereby effectively denying the applicant access to the premises.

3. In both applications numbers 1084/13 and 1085/13 the applicants seek orders setting aside the search warrants for being invalid and directing the respondents to return and restore possession of the items removed from the respective premises. It was envisaged, at the time when the applications were launched, that the gambling machines and other items would already have been removed from the Kuruman Entertainment Centre by the time the applications were heard. I was however informed by Mr. Jagga, who appeared for the applicants, that the SAPS still retained control over the premises.

4. I need not concern myself with the issue of the invalidity of the search warrants. At the hearing of the applications Mr. Khoko, who appeared for the 1st, 2nd, 4th and 5th respondents in both matters and Mr. Petersen who appeared for the 3rd respondent, readily and quite correctly so, conceded the invalidity of the search warrants.

5. The issue in both applications relate solely to the restoration of possession of the gambling machines to the applicants who do not have the requisite licenses or authorisation to possess such gambling machines. The possession of the gambling machines in these circumstances is a contravention of section 9(1) of the

National Gambling Act, No 7 of 2004 and constitute an offence under section 82 of the Act.

6. The applicants rely on the *mandament van spolie* for the restoration of possession, having established undisturbed and peaceful possession of the gambling machines and the unlawful deprivation of such possession.

7. In *Ivanov v North West Gambling Board and Others* 2012(6) SA 67 (SCA), the Supreme Court of Appeal found, in circumstances on all fours with the present, that the appellant was entitled to a spoliation order, that the lawfulness of the appellant's possession of the gambling machines were irrelevant in such circumstances and ordered the unqualified restoration of the machines to the appellant.

8. In a judgment delivered on 31 May, 2013 a differently constituted bench of the SCA, in *Ngqukumba v Minister of Safety and Security and Others*, (660/12) ZASCA 89, held that the *Ivanov* matter was wrongly decided. The *Ngqukumba* matter concerned the restoration of possession of a motor vehicle where there had been tampering with its engine and chassis numbers, such possession being unlawful in terms of section 68(6)(b) of the National Road Traffic Act 93 of 1996. The Court held at paragraph 15 and 16 that:

> *"[15] The appellant's possession of the vehicle for now – until such time as a police clearance is issued and the vehicle is registered in accordance with the provisions of the Act – will thus be unlawful according to the criminal law. The police cannot lawfully release the vehicle to the appellant, whether he is the owner or erstwhile lawful possessor thereof. An order by a court that it be done will be no different than ordering a person to be restored in the possession of his or her heroin or machine gun which he or she may not lawfully possess. In fact, when counsel for the appellant was invited in argument to distinguish this case from a claim by the former possessor of heroin, he was unable to do so. To my mind, that finally illustrates why the* ***Ivanov*** *approach cannot be sustained.*
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> *[16] In my view, therefore, the principle enunciated in the cases in Pakule and Tafeni applies with equal force to a spoliation claim as it does to a claim under s31 of the CPA. If this court were to direct that possession of the vehicle be restored to the appellant, it would be 'lending its imprimatur to an illegality'. Consequently, were this court to grant the relief sought, it would be party to allowing a state of affairs prohibited by law in the public interest."*

9. The decision in *Ngqukumba,* being the latest in the SCA on this subject, would be binding on this Court in terms of the *stare decisis doctrine* – thus disentitling the applicants *in casu* to spoliatory relief where the items seized cannot be lawfully possessed. The appellant in *Ngqukumba* has however lodged an application for leave to appeal against the judgment of the SCA. The application for leave to appeal has been set down in the Constitutional Court for hearing on 14 November 2013.

10. The respondents base their opposition to the restoration of possession of the gambling machines on the *Ngqukumba* decision.

11. Mr. Jagga argues that it is trite in terms of the common law that the noting of an appeal suspends the operation and execution of an order or judgment pending appeal, therefor the argument goes, this Court is bound by the *Ivanov* judgment until the Constitutional Court has pronounced on the application for leave to appeal in the *Ngqukumba* matter.

12. I cannot agree with this argument. The mere lodging of an application for leave to appeal did not under the common law bring about the suspension of an order or judgment. – the noting of an appeal did. See S*irioupoulas v Tzerefos* 1979(3) SA 1197(0) at 1202G.

13. Uniform Rule of Court 49(11) however, which restates the common law position with regard to the noting of appeals, also makes provision for the suspension of the operation and execution of an order where an application for leave to appeal has been lodged - and reads as follows:

> *"49 (11) Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs."*

The provisions of this subrule however relate to civil appeals from the High Court. I can find no such similar provision

relating to applications for leave to appeal against an order or judgment of the SCA. In such a situation it seems to me that the common law position must prevail and that only when the Constitutional Court grants leave to appeal and the appeal is noted will the judgment be suspended.

14. Even if I am wrong in this regard and the lodging of an application for leave to appeal a judgment or order of the SCA does trigger the suspension of an order or judgment on similar terms such as provided for in Rule 49(11), one needs to have regard to what is meant by *"an order"* or *"judgment".*

15. Mr. Jagga contends that since it is not only the execution but also the operation of a judgment which is suspended, that upon the application for leave to appeal, the whole of the *Ngqukumba* judgment, in its general sense of the reasons for the decision reached by the Court, the decision itself and the order made pursuant thereto, should be treated as if it never existed until the Constitutional Court decides on the application for leave to appeal.

16. On Mr. Jagga's interpretation of the word *"judgment"* in these circumstances, it would mean that whether or not a judgment is binding pending appeal would have to depend on whether or not a party to the proceedings elects to and is successful in applying for the upliftment of the suspension of the operation or execution of a judgment. The idea that the binding nature of a

judgment could depend on the whim of a party is untenable and runs contrary to the considerations underlying the doctrine of *stare decisis* i.e. certainty, predictability, reliability, equality, uniformity and convenience. See *Camps Bay Ratepayers and Residents' Association and Another v Harrison and Another* 2011(2) BCLR 121(CC) at paragraph 9.

17. The words *"judgment or order"* when referred to in section 20 of the Supreme Court Act, which deals with appeals, is said to be used in the restrictive sense of the ***"pronouncement of the disposition"*** upon relief claimed. See *Zweni v Minister of Law and Order* 1993(1) SA 523(A) at 532 D.

18. This being the case, the *"suspension"* of the *"judgment or order"* pending appeal can only relate to the judgment or order in its restrictive sense and does not affect the *ratio decidendi* or reasons for the decision. High Courts are obliged to follow legal interpretations of the SCA and remain so obliged unless and until the SCA itself decides otherwise or the Constitutional Court does so in respect of a Constitutional issue. (Ex parte *Minister of Safety and Security and Others*: In re: *S v Walters and Another* 2002(7) BCLR 663 (CC) at 693 (F)

19. It follows then, by virtue of the *ratio decidendi* in *Ngqukumba,* that the applicants are not entitled to the restoration of possession of the gambling machines. Possession of the

remainder of the items seized, which the applicants may lawfully possess, must however be restored forthwith.

20. As far as the costs of the application are concerned, the respondents have persisted in their stance that the search warrants were validly issued and executed up until the hearing of the applications. Although it is granted that the 3rd respondent had in the alternative contended, should this Court find that the search warrants were invalid, that the applicants are not entitled to unqualified restoration of the seized items since the applicants possession of the gambling machines is unlawful, the invalidity of the warrants were only conceded at the hearing. This meant that the applicants were compelled to approach the Court to have the warrants set aside and to have possession of the seized items restored. In this regard the applicants were substantially successful and I can see no reason why the respondents should not be ordered to bear the costs of the applications.

The following orders are made.

<u>In application no 1084/2013</u>

a) **The search warrant issued by the fifth respondent on 3 July 2013 in respect of the applicant's business premises situated at Prieska Entertainment Centre, Ou Koöperasie Building, 39 Loots Boulevard, Prieska is set aside.**

b) The respondents are ordered to forthwith return and restore possession of the movable goods which the applicant may lawfully possess and money that were seized at the above-mentioned business premises during the execution of the search warrant referred to above.

c) The respondents are ordered to pay the costs of the application jointly and severally, the one paying the other to be absolved.

In application no 1085/2013

a) The search warrant issued by the fifth respondent on 7 July 2013 in respect of the applicant's business premises, the Kuruman Entertainment Centre, situated at 1 Acacia Road, Kuruman is set aside.

b) The respondents are ordered to return and restore possession of the premises, the movable goods which the applicant may lawfully possess and the money that was seized during the execution of the above-mentioned warrant.

c) The first to fifth respondents are ordered to pay the costs of the application, jointly and severally, the one paying the other to be absolved.

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C.C WILLIAMS

JUDGE

For Applicants:	Adv N Jagga Vardakos Attorneys C/o Van de Wall & Partners
For 1st , 2nd , 4th and 5th Respondents:	Adv N.D Khokho State Attorney
For 3rd Respondent:	Adv Petersen Matthews & Partners