

SOUTH AFRICA / JUDGMENT

Dong v National Commissioner of Police and Another (32212/2020)

[2020] ZAGPPHC 425 (27 August 2020)

[2020] ZAGPPHC 425**COURT**

North Gauteng High Court, Pretoria

BEFORE

C.J. Collis

CASE / FILE NUMBER

32212/2020

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Policy**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION,
PRETORIA**

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED
CASE NO: 32212/2020
27/8/2020

In the matter between:

MEIMEI
DONG
APPLICANT
and
NATIONAL COMMISSIONER OF
POLICE
FIRST RESPONDENT
THE STATION COMMANDER OF SILVERTON
POLICE
STATION
SECOND RESPONDENT

JUDGMENT**COLLIS J**

- [1] On 5 August 2020 I dealt with a spoliation application in the Urgent court using a virtual platform for the hearing. The application was opposed. On 12 August 2020 after having considered the matter, I issued my order. These are my reasons for my order.
- [2] In the present application, the applicant seeks urgent relief against the respondent for the immediate restoration of the possession of her property as listed in the Notice of Motion.
- [3] On the 15th July 2020, the said property was despoiled from her, in her absence, at her business premises situated at Highway Street, Equestria Pretoria, known as the Padstal Restaurant.

APPLICANTS CONTENTIONS

- [4] On the day in question members in the service of the first respondent arrested an employee of the applicant for the allegedly contravening Regulation 44(1) of the Disaster Management Regulations. It is alleged that one Mr Phillips sold and/or distributed alcohol in the form of two bottles of brandy to an unknown individual. The two bottles of brandy were seized and charges were proffered against Mr Phillips. These charges remain pending.
- [5] The matter however did not end there. Members of the first respondent then proceeded without a warrant to enter the restaurant of the applicant, searched the storeroom situated at the back of the restaurant and thereafter decided to seize the property of the applicant as listed in the Notice of Motion.
- [6] The applicant alleges, the property so seized never formed part of any alleged contravention of any Regulation and/or offence and/or was never utilised in the commissioning or furthering of any offence/s.
- [7] Furthermore, the property so seized was not under the control or in possession of the employee, Mr Phillips neither did members of the public have any access thereto. It was also not sold or distributed (neither offered to be sold) to the public. The two bottles allegedly distributed in contravention of the Regulations also did not form part of the property seized from the storeroom.
- [8] Upon the property being seized, members in the service of the first respondent refused to furnish a detailed list and/or confirmation itemizing the property which was seized and further on what legal grounds the seizure of the property was being effected.
- [9] Notwithstanding, subsequently requests directed by the applicants' attorney to the respondent to account for the whereabouts of the seized goods and the amount of alcohol so seized and for the applicant's property to be returned, the respondents neglected and has failed to answer to and/or adhere to such requests.

RESPONDENTS CONTENTIONS

- [10] On behalf of the respondents it was alleged that members in the service of the respondents elected without a warrant to seize the applicants' property by virtue of an alleged contravention, by an employee of the applicant, of Regulation 44(1) for the alleged sale of two bottles of brandy to a third party.
- [11] Member/s of the South African Police and in light of the provisions of Section 20 of the Criminal Procedure Act (Act 51 of 1977 as amended) is entitled to seize anything:
- (a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence whether within the Republic or elsewhere;
 - (b) which may afford evidence of the commission or suspected commission of an offence whether within the Republic or elsewhere;
- [12] The respondents deny that the acts by its members constituted acts of spoliation.
- [13] Furthermore, they contend that by the applicant's own admission that she acknowledges that the alcohol was seized in terms of section 20(b) of the Criminal Procedure Act, Act 51/1977 ("The Act") which provides as follows:

"The state may, in accordance with the Provisions of this Chapter, seized

anything (in this chapter referred to as an article) –

- (b) which may afford evidence of the commission or suspected commission of an offence whether within the Republic or elsewhere".

- [14] Furthermore, that the applicant did not plead the provisions of section 31(1)(a) of the Criminal Procedure Act, which provides that if no criminal proceedings are instituted in connection with any article seized, the article shall be returned to person from whom it was seized, if such person may lawfully possess it.
- [15] As such they further contend that it is premature for the applicant to allege that the provisions of section 31 mention above do not find applicability and in the absence of such an averment the applicant cannot succeed.

DEFENCES

- [16] Now, in order for a respondent to successfully raise a defence against a spoliation application, the respondent will have to prove the following:
- 16.1 That the applicant has consented to the respondents' actions; or
 - 16.2 that the respondents' actions were lawful by virtue of a court order or statutory provisions.

APPLICABLE LEGAL PRINCIPLES

[17] A spoliation application is inherently urgent. The main purpose of the mandament van spolie is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to submit the matter to the jurisdiction of the courts.

[18] In the decision *Nino Bonino v De Lange* 1906 TS 120 it was held 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 an inquiry or investigation into the merits

of dispute. It is not necessary to refer to any authority on a principle so clear.’

[19] The question as to who bears the onus of proving spoliation was settled in the case of *Yeko v Qana* 1973 (4) SA 735 (A)

“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.”

[20] In order for the applicant to succeed, two allegations must have been made and proved:

20.1 That the applicant was in possession of the property so seized; and

20.2 That the respondent deprived it of its possession forcibly or wrongfully against his consent.

[21] All that an applicant has to demonstrate is not that it was entitled to be in possession of the seized property but that it was in de facto possession of the property at the time of being despoiled.

[22] In the present instance it was common cause that Mr Phillips was found in contravention of Regulation 44(1) of the

Disaster Management Regulations by selling alcohol (two bottles of brandy) when he was not permitted to do so. It therefore follows that at best it is these two bottles of brandy which should have been seized by members in the employ of the respondents in terms of the provisions of section 20(b) of the Criminal Procedure Act.

REASONS FOR JUDGMENT

[23] If one further has regard to the opposing affidavit, the respondents failed to explain as to what alleged transgression the applicant committed to justify the unlawful seizure and retention of the remainder of her property which was kept in the storeroom. It is this property which forms the subject-matter of the present application.

[24] The property kept in the storeroom did not form part of a contravention of Regulation 44(1) of the Disaster Management Regulations, nor was it involved in any offence. Mr Phillips the arrested individual, was also not having this property under his control. This property was under the de facto possession of the applicant and this fact on the papers is uncontroverted.

[25] In addition to this, it is further common cause that to date, the applicant has not been charged with any offence which will justify the seizure of her property in terms of section 20 (b) of the Criminal Procedure Act.

[26] As mentioned, in order for the respondent to successfully defend a spoliation application, the property so despoiled should have either been taken with the permission of the applicant or seized in terms of a statutory provision or court order.

[27] In the present instance and having regard to the affidavits filed of record, the respondents have failed to persuade

this court of either such requirements being present, which justified such despoiled action.

[28] In the absence thereof, it as a result must follow that the application should succeed.

ORDER

[29] In the result the following order is made:

29.1 The forms and services provided for in terms of Rule 6 (12) is dispensed with and the matter is treated as one of urgency.

29.2 The warrantless search and seizure conducted by the members of the South African Police Service (SAPS) at the applicant's premises [....] Pretoria on the 15th of July 2020, is declared unlawful and invalid.

29.3 The respondents are ordered to forthwith, and within 48 hours of this order, return and restore the applicant's possession of the items currently booked in and held at Silverton Police Station under SAP213/07/2020.

29.4 The respondents are ordered to pay the costs of this application on a party and party basis on the High Court scale jointly and severally, the one paying the other to be absolved.

C.J. COLLIS

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant

: Adv. J.C. Gerber

Instructed by

: Loubser Van Wyk Inc

For the Respondents

: Adv. S.R. Sibara

Instructed by

: The State Attorney, Pretoria

Date of Hearing

: 05 August 2020

Date of Order

: 14 August 2020

Date of Reasons

: 27 August 2020

Judgment transmitted electronically.

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