

SOUTH AFRICA / JUDGMENT

Jin Sweet Supermarket CC v Miniters of SAPS N.O and Another (UM228/2019) [2020] ZANWHC 16 (9 January 2020) [2020] ZANWHC 16

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks

CASE / FILE NUMBER

UM228/2019

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IN

THE NORTH WEST HIGH COURT, MAFIKENG

CASE

NO: UM 228/2019

In

the matter between:

JIN
SWEET SUPERMARKET
CC Applicant
and
THE
MINITERS OF SAPS N.O
1st
Respondent
W/O
CHARLES FRITZ MOORCROFT N.O
2nd
Respondent
DATE
OF HEARING
:
06 JANUARY 2020
DATE
OF JUDGMENT
:
09 JANUARY 2020
FOR
THE APPLICANT
:

ADV. JAGGA
FOR
THE RESPONDENTS

:
ADV. SCHOLTZ
ORDER

(i)

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

(ii)

The warrantless
search and seizure conducted by the members of the South African
Police Service (SAPS) at the applicant's
premises Jin Sweet
Supermarket CC, situated at 168 Market Street, Vryburg on 04th
December 2019, is declared unlawful and invalid.

(iii)

The respondents
are ordered to forthwith return and restore the applicant's
possession of the seventeen (17) boxes of cigarettes
currently booked
in and held at Vryburg Police Station, under SAP 13/948/2019.

(iv)

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.

JUDGMENT

HENDRICKS DJP

[1] Jin Sweet Supermarket CC (the applicant) is a close corporation conducting business of selling sweets and other items to the public from its premises situated at 168 Market Street, Vryburg. On 04th December 2019 Warrant Officer Moorcroft accompanied by other police officers and two civilians, conducted a search at the applicant's

premises and confiscated seventeen (17) boxes of what is alleged to be counterfeit cigarettes to the value of R115 600.00. Mr. Qinrong Yu was taken to the Vryburg Police Station but was released without any explanation. The following day Warrant Officer Moorcroft returned to the applicant's premises and instructed Mr. Yu to accompany him to the police station. Mr. Yu's attorney also went to the police station. Mr. Yu was released at the police station on R3000.00 bail and warned to attend court on 09th December 2019. On 09th December 2019 the prosecutor did not place the matter on the court roll.

[2] Mr. Yu's attorney requested that the cigarettes be returned to Mr. Yu seeing that no criminal prosecution was instituted. The investigating officer promised to revert to him after seeking legal advice and consent for the return of the cigarettes. This did not happen. The applicant launched an urgent application on the 11th December 2019 which was set down for 20th December 2019 seeking an order declaring the search and seizure invalid and ordering the return and restore of possession of the

cigarettes to the applicant. On 20th December 2019 the matter was postponed until 06th January 2020 for the filing of an answering affidavit by the respondents. This was by consent between the parties and it was also

ordered that the first respondent should pay the wasted costs occasioned by the postponement. The matter appeared before this Court

on 06th January 2020. Arguments were presented by counsel on behalf of both parties and judgment was reserved.

[3] Most of the facts in this matter are either common cause or not seriously disputed. The respondents submitted that this matter lack urgency and that the applicant dragged its feet to bring this matter to court. There was a time lapse of sixteen (16) days from 04th to 20th December 2019. The applicant contended that there were bona fide negotiations between its attorney and the investigating officer and such negotiations does not in any way negate the urgency. Furthermore,

this is a spoliation application which is by its very nature urgent.

[4] There are different degrees of urgency. Rule 6 (12) of the Uniform Rules of Court (the Rules) provide for a court to deviate from the specified time limits provided for in the Rules, on good cause shown.

In *South African Airways SOC v BDFM Publishers (Pty) Ltd & 2 Others* 2016 (2) SA 561 (GJ) at paragraphs [24] and [26] the following is stated:

"[24] ... When a litigant contemplates any application in which it is thought necessary to truncate the times for service in the Rules of Court, care must be taken to use all reasonable steps to mitigate such truncation. In a matter in which less than a day's notice is thought to be justifiable, the would-be applicant's attorney must take all reasonable steps to ameliorate the effect thereof on the would-be respondents. The taking of all reasonable steps is not a collegial courtesy, it is a mandatory professional responsibility that is central to the condonation necessary to truncate the times for service. When there is the prospect of a hearing before a judge after business hours, and even more so, when there is the prospect of the hearing taking place elsewhere than in a courthouse, the duty to take reasonable steps is ever more important and imperative.

[26] In my view it is incumbent on the attorney of any person who contemplates an urgent application on less than 24 hours' notice, to undertake the following default actions in fulfilment of the duty to ensure effective service:

26.1. At once the respondents are properly identified, the names and contact details, i.e. phone, cell, email, fax, and physical addresses of persons who have the authority to address the application must be ascertained. Obviously, if the issue has already been the subject of debate between the parties and an attorney has already been retained by a respondent, such attorneys contact details will top the list.

26.2. At the earliest moment after deciding to bring an urgent application, contact must be made to demand compliance with the relief to be sought and to alert one or more of such persons of the intention to bring an application, stating where it is likely to be heard, when it likely to be served, and the identity of the judge on urgent duty. Agreement should be reached about who should receive service on behalf of the respondent by email or fax or other method.

26.3. Next, the urgent judge shall be alerted, and a report made whether or not the respondents have been alerted.

26.4. When the papers are ready for service, direct contact shall again be made with the persons dealing with the matter on behalf of the respondent. Where delays occur, the respondents must be kept informed by interim calls to report progress.

26.5. Sufficient time must be allowed for the respondents to read and digest the papers. It is appropriate to send a notice of motion in advance of the founding papers to give the respondents a chance to formulate a view about the relief being sought.

26.6. When the papers are about to be served electronically or otherwise, the urgent judge should be consulted about when and where the hearing will occur, if at all, and how much notice must be given, in the context of earlier alerts to the respondents.

26.7. Once served in any manner other than by personal physical delivery, the attorney must immediately call the respondent's representatives directly to confirm actual receipt of all the papers."

In *Nelia's Liquor Store CC v Vresthena (Pty) Ltd & another* (UM 39/2019) 2019 ZANWHC 21 (2 May 2019) the following is stated in paragraphs [32] and [33]:

"[32] The question of whether sufficient grounds exist for a matter qualifying to be considered as urgent and that condonation, as envisaged in terms of rule 6(12)(a), should be extended to an applicant must be considered with due and judicial regard to the following:

32.1 the relief requested by an applicant;

32.2 the facts of the matter, with specific reference to the chronology of events leading up to and culminating in the launching of the application on an urgent basis;

32.3 any other extraordinary factor(s) which may be present in the particular circumstances of the case which may render it necessary and in the interest of justice to extend the relief contemplated in Rule 6(12) to an applicant, notwithstanding the fact that considerations emanating from the above referred to two subparagraphs may militate against the granting of the relief set out in rule 6(12).

- [33] An applicant must not only set forth sufficient grounds as referred to in the preceding paragraph but must also explain any dilatory behavior on its part. The onus to do so, rests squarely on an applicant.”
- [5] That Mandament van Spolie applications are inherent urgent, is trite. This application can be regarded as semi-urgent due to the lapse of time between the seizure of the cigarettes and the launching of the application. What contributed to the delay was the fact that there were amicable and bona fide negotiations between the applicant’s attorney and the investigating officer in an attempt to have the cigarettes returned but to no avail. Bona fide negotiations does not detract from the urgency of a matter.

See: Transnet Ltd v Rubenstein 2006 (1) SA 591 (SCA)

I am of the view that this matter is sufficiently urgent to be dealt with on that basis and not to be heard in the ordinary course because the relief prayed for is in the form of a spoliation order and an invasion of the applicant’s (Mr. Yu’s) right to privacy and property.

- [6] The crux of this application is whether Warrant Officer Moorcroft and other police officers were entitled to conduct a warrantless search and to seize the cigarettes. This Court should look at the respondent’s version, as admitted by the applicant, to determine this issue based on the principle as enunciated in the case

of Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984

- (3) SA 623 (A). On the respondents version, it is common cause that a warrantless search and seize was conducted on the 04th December 2019 at the applicant’s premises. This was done in terms of section 22 of the Criminal Procedure Act 51 of 1977 (CPA), as amended. Various members of the South African Police Services (SAPS) as well as two gentlemen employed by Gold Leaf Tobacco

Corporation participated in this operation. [On the applicant’s version they were ten (10) in number.] The two employees of Gold Leaf Tobacco Corporation, Mr. De Villiers and Mr. Maselakgomo, entered the applicant’s shop and purchased a packet of the RG Blue cigarettes. According to them, these cigarettes are counterfeit. They proceeded to the police station to lay a complaint and Warrant Officer Moorcroft was tasked to assist them. They, in the company of various other police officers, proceeded to the applicant’s premises and confiscated seventeen (17) boxes of RG cigarettes. These cigarettes are booked in at Vryburg Police Station under SAP13/948/2019.

- [7] The respondents contend that Warrant Officer Moorcroft assisted by the other police officers were entitled to conduct the warrantless search and seizure of the cigarettes in terms of section 22 of the Criminal Procedure Act 51 of 1977 , as amended (CPA).

Section 22 of the Criminal Procedure Act provides that a police official may without a warrant lawfully search any person, container or premises for the purpose of seizing any articles which on reasonable grounds are suspected to have been used in the commission of an offence where-

- (a) the person concerned consented to the search and the seizure; or
- (b) the police official on reasonable grounds believes that a warrant would have been issued to him if he applied for such warrant in terms of section 21 (1) and that the delay in obtaining such warrant would defeat the object of the search.

- [8] There are therefore two possible scenarios under which a warrantless search and seizure may lawfully be executed, namely-

- (a) the person concerned consents thereto; or
- (b) if there is no such consent, under circumstances where there is a reasonable belief that a warrant would have been granted had it been applied for and the urgency of the matter dictates that the search and seizure be executed without wasting time in applying for a warrant.

The consent given must be voluntary, and further, it must be consent from a person who is in possession or control of the subject of the search.

- [9] The contentions by the respondents are firstly that consent was granted by Mr. Yu and his wife who were in control of the premises and secondly, that Warrant Officer Moorcroft reasonably believed that a warrant would have been granted had it been applied for and the urgency of the matter dictated that the search and seizure be executed without wasting time in applying for a warrant.
- [10] As far as consent is concerned, the respondent states per Moorcroft that Mr. Yu's wife was found at the premises and she consented to the search and seizure. Mr. Yu in the founding affidavit dispute this. According to him, his wife is not conversant with English and can hardly understand it. She could therefore not consented to the warrantless search and possible seizure. This is confirmed by Mrs. Yu in her confirmatory affidavit.
- [11] Mr. Yu states in his founding affidavit that when he arrived at the premises, the premises were barricaded by the police officers, who were not in possession of a search warrant. They intimidated him and he felt threatened by their behaviour and demeanour. He reluctantly caused the place where the cigarettes are stored to be opened and the seventeen
- (17) boxes of cigarettes were seized. He acquiesce in that he accepted that the police were searching the place but immediately

thereafter contacted his attorney in order to assist him legally. This, so it was contended, does not amount to consent because he (and his wife) did not voluntarily consented that a search and seizure could be executed. Reliance in this regard was placed on the matter of *Ndlovu v Minister of Police Transkei and Others* 1993 (2) SACR 33 (TK).

[12] Consent must be clear and unequivocal. Acquiescence in the conduct of the police was not consent but an acceptance of his faith. The consent must be of a particular quality or kind in order to do away with the possibility of a misunderstanding or misconception about the requisite consent.

See:

- *Magobodi v Minister of Safety and Security* 2009 (1) SACR 355 (TK)
- *Ngobeni v Minister of Safety and Security* 2014 JDR 1730 (GP)

[13] Mr. Yu did not consent but acquiesce in the conduct of the police having regard to the fact that they were ten (10) in number and were intimidating in their conduct. His behaviour or reaction shortly after the search and seizure to illicit the help of his attorney is indicative of the fact that he did not consent to the warrantless search and seize. I find that neither Mr. Yu nor his wife consented to the search and seizure.

See: *Ndlovu* case, *supra*.

[14] Insofar as not obtaining a warrant is concerned, it is alleged by the respondents that in terms of section 22 of the Criminal Procedure Act there was a belief that a warrant would have been granted and to apply for one would be a waste of time. Furthermore because the cigarettes could easily be removed, by the time the police would return with a warrant, the cigarettes would have disappeared. It is undisputed that the police by far outnumbered the occupants of the applicant's premises. Nothing precluded them from securing the premises and even guard it whilst a warrant could be obtained. Even worse, the two employees of Gold Leaf Tobacco Corporation, Messrs De

Villiers and Moselakgomo, bought a packet of cigarettes and went to the police station to lay a complaint that the applicant is trading in counterfeit cigarettes.

[15] With this evidence at its disposal, the police officers and in particular Warrant Officer Moorcroft could easily have approached a Magistrate to obtain a warrant for the search and seizure. This was not done. Instead the police in their numbers, together with Messrs De Villiers and Moselakgomo, stormed the applicant's premises and conducted a warrantless search and seized the cigarettes. I echo the same sentiments expressed by Legodi J (as he then was), in the case of *Ideal Trading 458 CC v Minister of Safety and Security N.O and Others* (41422/2016) [2016] ZAGPPHC 546 (24 June 2016) (GP), in which the following is stated:

“[13] This kind of an attitude by the police reminds one of how the police in the past and before the constitutional imperative used to disregard people's rights, in the particular, of privacy by abusing the provisions of section 22 and also disguising of consent thereto when in actual fact it did not exist. Our court needs to be vigilant when dealing with any tendency to resort to self-help by the police under the disguise of section 22 of the Criminal Procedure Act.> Otherwise, it will be business as usual for the police. That is, you do not have to obtain a search and seizure warrant as if is better and easier to resort to self-help. The facts of the present case in my view, display that tendency and it has to be discouraged. For this, I also decided to deal with the matter as urgent. I was not satisfied that consent to the search and seizure was given. On this ground alone, the search and seizure was destined to be set aside.”

(own emphasis)

“[20] It was one thing to state the law, but another, to give facts to support the applicability of the law in a particular case. Two things are easily discernable from the answering affidavit. The police did not seem to have been pressed for time to conduct the search. On their own version they were not at the premises for the first time and for the purpose of search. They had been there before, but could not gain entry because the employees of the applicant refused them access. What did they then do? Or put differently, did they then apply for a search warrant? They did not. The question is why the police did not apply for a search warrant. This information is conspicuously absent from Colonel Arikum's answering affidavit, perhaps understandably so. In the circumstance of this case, there can be no explanation. You cannot talk about defeating the object of the search when the police had information at their disposal before the search about what was happening inside or at the premises aforesaid. Failure to apply for a search and seizure warrant in the instant case was fatal to the lawfulness of the search.”

- [16] In my view, the warrantless search of the applicant's premises was unlawful and invalid. So too was the seizure of the seventeen
- (17) boxes of cigarettes invalid. The status quo ante should therefore be restored. The prosecutor refused to enrolled the matter on the court roll. This was perhaps due to insufficient evidence or because further investigations needed to be conducted. Be that as it may, the prosecutor's decision is not questionable. However, it underscores the fact that there was no need on the side of the police to act with such haste in order to search and seized the cigarettes and arrested Mr. Yu. Proper investigations could also have been done before such action was taken. Needless to say, a warrant could have been obtained and a proper search and seizure could have been done.

Conclusion

- [17] I am satisfied that a proper case had been made out for the relief sought. There is also no plausible reason why costs should not follow the result and be awarded in favour of the applicant.

Order

[18] Consequently, the following order is made:

R D HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

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