

SOUTH AFRICA / JUDGMENT

Neffex (Pty) Ltd and Another v Impala Platinum Holdings Ltd and Others (2024/095671) [2024] ZAGPPHC 1356 (31 December 2024)

[2024] ZAGPPHC 1356

COURT

North Gauteng High Court, Pretoria

BEFORE

K La M Manamela

CASE / FILE NUMBER

2024/095671

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Policy

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE NO: 2024-095671

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

31

December 2024

Date

K. La M Manamela

In

the matter between:

NEFFEX
(PTY) LTD
Registration
Number: 2020/800865/07
First
Applicant
BMG
MINERAL PROCESSING
TECHONOLOGIES
(PTY) LTD
Registration
Number: 2023/897542/07
Second
Applicant
and
IMPALA
PLATINUM HOLDINGS LTD
Registration
Number: 1957/001979/06
First
Respondent
IMPALA
PLATINUM LTD
Registration
Number: 1952/071942/06
Second
Respondent
THE
BIDVEST GROUP LTD
Registration
Number: 1946/021180/06
Third
Respondent
BIDVEST
PROTEA COIN (PTY) LTD
Registration
Number: 1991/003768/07
Fourth
Respondent
WARRANT
OFFICER ANNA CATHERINA
HENDERSON
Fifth
Respondent
STATION
COMMANDER, SAPS
TLHABANE
POLICE STATION
Sixth
Respondent
THE

MINISTER OF POLICE N.O.

Seventh

Respondent

MAGISTRATE

YVONNE GADIFELE MOTEANE

Eighth

Respondent

INDEPENDENT

POLICE INVESTIGATIVE

DIRECTORATE

Ninth

Respondent

PRIVATE

SECURITY INDUSTRY REGULATORY

AUTHORITY

Tenth

Respondent

DATE

OF JUDGMENT: This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives

by email. The judgment is further uploaded to

the electronic file of this matter on Caselines by the Judge's

secretary. The

date of the judgment is deemed to be 31 December 2024.

JUDGMENT

KHASHANE MANAMELA, AJ

Introduction

- [1] Neffex (Pty) Ltd ('Neffex') and BMG Mineral Processing Technologies (Pty) Ltd ('BMG'), the first and second applicants, respectively (jointly, 'the applicants'), caused to be issued this application comprising relief divided into Part A and Part B. The applicants, in terms of Part A of the application, primarily, sought urgent interdictory relief against the first to seventh respondents to vacate a farm or immovable property known as Farm Number 4[...], Portion 8[...], Farm H[...], Brits in the Northwest Province (the 'Property') and for restoration of possession and/or occupation of the Property to the applicants, as well as some articles seized from the applicants at the instance of the respondents or functionaries of the sixth and/or seventh respondents. Part B, to be dealt with at a later stage, relates to the setting aside of a search and seizure warrant issued by the eighth respondent in her capacity as the Magistrate. The matter is only opposed by the first to seventh respondents (jointly, 'the respondents').

- [2] For convenience, the respondents would be identified as follows. The first and second respondents, namely, Impala Platinum Holdings Ltd and Impala Platinum Ltd will be referred to jointly as ‘the Impala respondents’. The Bidvest Group Ltd, third respondent, and Bidvest Protea Coin (Pty) Ltd, fourth respondent, will be referred to jointly as ‘the Bidvest respondents’. And, the fifth, sixth and seventh respondents, namely, Warrant Officer Anna Catherina Henderson, the Station Commander: South African Police (‘SAPS’) Tlhabane and the Minister of Police, will be referred to jointly as ‘the State respondents’.

Obviously, in some instances distinct or exclusive identification may be required.

- [3] The application came before me on 4 September 2024 and was stood down to 6 September 2024 to allow delivery of further material, mainly, in the form of written submissions or heads of argument by counsel. On both dates, Mr L van der Merwe appeared for the applicants; Mr YF Saloojee for the Impala respondents; Mr C Richard for the Bidvest respondents, and Mr PA Mabilo for the State respondents. I reserved this judgment which, gratefully, benefited from the oral and written submissions by counsel. Although, this judgment, regrettably, is handed down later than initially intended, it would appear below that the urgent circumstances which precipitated the application had been reversed by subsequent events by the time the application was heard.

Supplementary affidavit, replying affidavit and variation of relief sought

- [4] The applicants have further filed an application for leave to supplement its founding affidavit, which was opposed by some of the respondents. The respondents, also, complained about the delivery of the applicants’ replying affidavit and the excessive length thereof. Further, they accuse the applicants of trying to impermissibly build their case in the replying affidavit.[1]
- [5] But, in the interests of justice, I would grant leave for the admittance of the supplementary affidavit with the applicants liable for costs thereof as the indulgence allowed was at their instance. I would for the same reason allow the admission of the replying affidavit. The filing of the supplementary and replying affidavits may have unsettled the respondents, especially given the timeframes allotted to them by the applicants to file their papers. I also consider the concerns about the length of the affidavits filed to be legitimate. But I did not detect nor was I made aware of any prejudice insurmountable to prevent the hearing of the application to proceed as it did.
- [6] The relief sought by the applicants in terms of Part A of the application is set out in the notice of motion.[2] The applicants say that the opposing respondents have rendered some of the relief in this matter unnecessary or moot by virtue of their conduct and/or capitulation. This conduct is detailed in the replying affidavit.[3]
- [7] The applicants say that they have been forced by the change in circumstances to abandon relief appearing under paragraphs numbered 2 and 3 of the notice of motion relating to the spoliation application.[4] Also, the applicants - in their replying affidavit – advised that they

are no longer seeking any relief against the first and third respondents, and proceeding only against the second, fourth and fifth to seventh respondents. Therefore, in some instances I will be compelled to refer only to the second respondent ('Impala') and fourth respondent ('Bidvest Protea').

Brief background

- [8] During or about November 2023 the Impala respondents laid a criminal complaint with the State respondents regarding the theft of their material containing the platinum group metals ('PGMs') from one of their operating sites. Impala Platinum Holdings is the holding or parent company of Impala. One or both of the Impala respondents informed the fifth respondent, Warrant Officer Anna Catherina Henderson ('the Warrant Officer') that the stolen material was kept at the Property, belonging to Neffex.
- [9] The Warrant Officer, based in the Organised Crime Unit of the South African Police Service ('the SAPS') in Rustenburg, North West Province, caused to be issued a search and seizure warrant at the Brits Magistrate Court on 2 August 2024 under CAS 10/11/2023 ('the Warrant'). The Warrant was issued by Ms Yvonne Gadifele Moteane, the eighth respondent, in her capacity as Senior Magistrate at the Brits Magistrates Court ('the Magistrate'). She presided over the application for the authorisation and issuing of the Warrant.
- [10] On 7 August 2024, the second and fourth to seventh respondents entered the property to execute the Warrant. The execution of the warrant included the incarceration of Mr Barend Michael du Plessis ('Mr du Plessis') a businessman residing in Brits, Northwest Province and his wife Mrs Denise Claudette du Plessis ('Mrs du Plessis'). They are both the directors of Neffex. But according to Mr du Plessis, Mrs du Plessis played a minor to almost no role in the running of Neffex. They were incarcerated from 7 August to 16 August 2024 when they were eventually granted bail. Mr Du Plessis is also a director of BMG together with one Ms Bhavna Baldeo. Mr du Plessis says that Ms Baldeo also played a minor to almost no role in the running of BMG.
- [11] Other than the incarceration of Mr du Plessis and Mrs du Plessis, the execution of the Warrant included the members of the SAPS descending on the Property, and seizing items belonging to the applicants and/or the Du Plessis including the 'contaminated coal'. Employees of Impala and Bidvest Protea also played a role towards the execution of the Warrant. The Bidvest Group Ltd is the holding or parent company of Bidvest Protea. Part of the applicants' case is that the employees or functionaries of Impala and Bidvest were not authorised – in terms of the Warrant and/or the law - to assist the SAPS to execute the Warrant. This, and other aspects to be dealt with below, rendered the execution of the Warrant unlawful, the applicants contend.

- [12] The Property or the Farm belongs to Neffex and it is the registered address of BMG. BMG is a holder of a refining licence issued by the South African Diamond and Precious Metals Regulator. The licence was issued on 15 July 2024 and is valid for ten years until 14 July 2034. BMG is, therefore, allowed to acquire, possess or dispose of unwrought precious metals, as envisaged by section 4(1) of the Precious Metals Act 37 of 2005.
- [13] The urgent application was issued on 23 August 2024. The respondents were to indicate their intention to oppose the application by 26 August 2024 and file their answering papers by 27 August 2024. Curiously, the application was set down for hearing on Wednesday, 4 September 2024 instead of the normal Tuesday, 3 September 2024.
- [14] On 2 September 2024 the applicants filed an application to remove the matter from the urgent roll. But this was opposed by the first to seventh respondents. On 4 September 2024 when counsel appeared it was agreed that the application would be heard on 6 September 2024.

Applicants' case (including submissions)

- [15] This matter concerns what the applicants refer to as 'contaminated coal' and the respondents refer to as material containing the platinum group metals or PGMs. The stockpiles of the impugned material was stored on Neffex's property and is said to belong to BGM. According to the Impala respondents the material was stolen, hence the Warrant to seize it and ferry it away to police custody. This is disputed by the applicants.
- [16] But the applicants say that the underlying causa of this application is the unlawful execution of the Warrant which resulted in the spoliation of the applicants' occupation of the Property. The applicants say that it is not necessary that this Court determines whether the so-called contaminated coal bought by BMG is or is not the alleged stolen property of the Impala respondents.
- [17] On 7 August 2024, the second and fourth to seventh respondents entered Neffex's property. According to the applicants this was done in an unlawful manner. This was on the strength of the Warrant. The applicants say that the manner in which the Warrant was issued and executed was unlawful. They say that the execution of the Warrant included persons not authorised by the Warrant in the form of private persons, including armed private security assisting in or forming part of the execution of the Warrant.
- [18] The incarceration of the Du Plessis was on the basis that they had stolen or were part of the theft of the PGMs belonging to Impala. It is pointed out by Mr Du Plessis that the alleged stolen material is contaminated coal which does not come from the Impala respondents nor was transported from their site. He explains that the contaminated coal, as will be borne by waybills, was collected from the Waterval smelter complex of the Anglo American (Rustenburg platinum mines).

- [19] It is stated that while Mr and Mrs Du Plessis where incarcerated, their family members and friends as well as the employees of BMG were prevented from accessing the Property by the SAPS.
- [20] The applicants dispute the right of the second and fourth to seventh respondents to have occupied Neffex's Property, restricted the applicants' access to the Property and removed BMG's movable property, including 8500 tons[5] of contaminated coal valued at R1,1 billion in terms of the Warrant.
- [21] The applicants complain that the SAPS' unlawfulness meted out to them was despite the SAPS entrusted with the authority to protect them. The transgression requires this Court's intervention, they plead. The applicants also contend that the Impala and Bidvest respondents, were not justified to be on the Property. They should be interdicted from doing so. The unlawful conduct of these parties was seriously prejudicial to the applicants, the contention continues.
- [22] The SAPS' conduct also exceeded the parameters of the Warrant. Further, the SAPS misrepresented facts to the Magistrate when applying for the Warrant. This justifies the relief sought by the applicants that it is necessary that should they again apply for a warrant they should be required to give notice to the applicants, to avoid a repeat in the abuse of process of the courts.
- [23] The attack on the Warrant in this application is two-fold in accordance with the relief sought under Part A (i.e. interim relief) and Part B (i.e. final relief). In terms of Part A, the attack is premised on the unlawful execution of the Warrant. This does not concern the application or other processes in the acquisition of the Warrant, as well as any irregularities associated with the process. What is of concern is the actual carrying out of the search and seizure operations in terms of the Warrant. The applicants say the execution of the Warrant was unlawful. On the other hand, Part B concerns the alleged unlawfulness, irregularities and/or misrepresentations linked to the application by the Warrant Officer for the Warrant and the issuing or authorisation of the Warrant by the Magistrate on the basis of the impugned misrepresentations. The hearing on 6 September 2024 dealt only with Part A of the application (i.e. the unlawful execution of the warrant).
- [24] First, the place where the warrant was executed. The premises or physical address stated or authorised in the Warrant was 31 Martjie Avenue, Brits, North West Province¹. [6] It is common cause that the search and seizure in terms of the Warrant was carried out at the Property (i.e. Farm Number 4[...]
- Portion 8[...], Farm H[...], Brits in the Northwest Province). The applicants contend, therefore, that the execution of the Warrant at the Property was not authorised in the Warrant.

- [25] Second, the persons involved in the execution of the Warrant. The applicants dispute that Impala and Bidvest, including anyone associated with them were authorised to assist in the execution of the Warrant. Impala ferried the seized contaminated coal away whilst Bidvest Protea guarded the Property or the execution exercise.
- [26] Third, the manner in which the warrant was executed. The applicants say that the second and fourth to seventh respondents entered the Property unlawfully on 7 August 2024 when executing the Warrant.
- [27] Other aspects relevant to the unlawful execution of the Warrant alleged by the applicants include the following: (a) the items seized, including the contaminated coal, were not listed on the Warrant and, thus, could not be seized; (b) the execution of the Warrant was done during the night notwithstanding that the Warrant was only authorised to be executed during the day; (c) there was failure to store goods (listed in SAP13), including the contaminated coal by the SAPS and opting to store same with Impala. This was without consent of the applicants or the Du Plessis.
- [28] The applicants say that this application is urgent for the reasons appearing above including the following: (a) they were unlawfully dispossessed or locked out of the Property; (b) the inability to access the Property led to BMG or its business suffering damages; (c) employees of BMG or at least two of them could not access their residences on the Property during the dispossession. In the replying affidavit it was stated that the 'extreme urgency' in existence when the application was issued no longer prevailed due to the return of the Property to the applicants. The urgency has reduced to what is labelled 'the normal urgency' justifying an order in terms of Part A of the application. The applicants, also, rely on the inherent urgent nature of spoliation proceedings.

Impala respondents' case (including submissions)

- [29] The first and second respondents (i.e. the Impala respondents) dispute that the application is urgent as provided for in terms of Rule 6(12)(b) of this Court and that the applicants are entitled to the relief sought in terms of Part A of the application. They point out that possession of the Property has been restored to the applicants and, thus, spoliation of the Property can no longer be an issue.
- [30] The application, it is further contended, lacks urgency as the seized material constitutes evidence in related criminal proceedings against the directors of the applicants. The applicants' grounds for urgency as set out in the founding and replying affidavits are without merit, the Impala respondents argue.
- [31] The Impala respondents deny that the applicants were locked out of the Property, unlawfully. They say that the deprivation of the use of the Property was in terms of the Warrant, validly issued and executed.

- [32] Further, the Impala respondents point out that the SAPS themselves conducted within the scope of the Warrant. The Property and other items or their possession were restored to the applicants after their seizure. The seizure was pursuant to criminal proceedings and the material not returned to the applicants is stored in a secure and constantly monitored facility.
- [33] With regard to the alleged damage to BMG's business, the Impala respondents say that the applicants have an alternative remedy. BMG may institute a damages claim in due course against those persons it deems liable for its damages. There is sufficient information in the material filed to put together and quantify the claim. But this ought to be in the ordinary course as the alleged damages claim is not urgent.
- [34] The Impala respondents say that the employees of BMG residing on the Property were only temporarily displaced to allow execution of the Warrant. Besides, this could not genuinely predicate the alleged urgency as BMG mitigated the effect of the temporary situation by providing its employees with alternative accommodation.
- [35] The seized articles were also removed from the Property in terms of the Warrant. Those items capable of restoration to the applicants and BMG's employees have been accordingly restored.
- [36] The Impala respondents dispute that the applicants could validly rely on the inherent nature of spoliation proceedings. They point out that the applicants' challenge is directed towards the execution of the Warrant and storage of the seized articles at the Impala's storage facility.
- [37] In effect, the applicants cannot successfully seek the return of the seized material or articles, constituting evidence in criminal proceedings, without providing an undertaking for the preservation of the evidentiary material until the conclusion of the criminal proceedings, it is contended by the Impala respondents.
- [38] As the Property has been returned to the applicants, the spoliation part of the application is no longer feasible. The spoliation was relied upon by the applicants for the purported urgency in the application hence the applicants' case has now shifted to the return of evidentiary material in the criminal proceedings allegedly valued at R1, 1 billion. For a successful reliance on the remedy of mandament van spolie, the applicants need to establish the requirements for the remedy, including existence of peaceful and undisturbed possession of the seized articles[7] and unlawful dispossession of the such articles.[8] The circumstances of this matter no longer require a determination of the applicants' possession of the seized articles, but the applicants ought to demonstrate that they were unlawfully dispossessed of the articles. The latter part of the requirement can only be met where the Warrant is proven to be invalid and unlawful.
- [39] The Impala respondents, further, point out that this Court may still order that the seized material be preserved – for purposes of the criminal proceedings – despite any adverse findings against the respondents.

[40] Also, the applicants have failed to meet the requirements for an interim interdict for the rule nisi to be granted. The Impala respondents argue that the applicants have not only failed to make out a case for urgency, but there is also no case for interim relief and, consequently, the application ought to be dismissed with costs.

Bidvest respondents' case (including submissions)

[41] The third and fourth respondents (i.e. the Bidvest respondents) point out that the respondents are aligned in their opposition of the relief sought by the applicants, including that the Warrant was lawfully executed.

[42] The Bidvest respondents criticise what they call the use of labels and monikers by the applicants without any factual basis. For example, they find the reference by the applicants to the seized material as 'contaminated coal' to be concerning and point out that the items removed are in fact PGMs.

[43] The Bidvest respondents criticise the applicants for saying that the relief against the third respondent is abandoned. They say the use of the word 'abandonment' is unclear and the applicants should have made it clear that they are withdrawing the application against the third respondent. The third respondent should not have been included in this litigation. Under the circumstances the third respondent does not have much to contribute as its version would remain uncontested given the 'abandonment' of the applicants' case against the third respondent. The approach taken by the applicants amounted to a fishing expedition for more information about the conduct of the SAPS when executing their duties in terms of the Warrant. There was nothing sufficient by way of necessary allegations to sustain the relief initially sought against the third respondent.

[44] There is equally no case against the fourth respondent, it is argued. An adequate and conclusive explanation has been placed before the Court by the fourth respondent in the opposing affidavit to the effect that the fourth respondent did not execute the Warrant. The fourth respondent only participated to the extent required by the SAPS and in compliance with the requirements of the SAPS.

[45] The applicants had actually failed to establish grounds for an interdict or a spoliation order against the Bidvest respondents. This includes that the applicants had to show that they were unlawfully dispossessed by the third and fourth respondents or deprived of their possession without due legal process.[9] The Bidvest respondents, clearly, only provided additional security services requested by the SAPS through the Impala respondents. They never dispossessed or deprived the applicants of any possession.

[46] Besides, the respondents acted within lawful authority of the Warrant and the SAPS executed the Warrant with the assistance of the second and fourth respondents. Without the Warrant or its execution being unlawful it was always impossible for an interdict to be granted. What remained for the applicants was to first attack the Warrant for it to be set aside and, thus, remove lawfulness of its execution. This, the Bidvest respondents contend,

would render the alleged dispossession a spoliation and the conduct of any of the involved respondents unlawful.

State respondents' case (including submissions)

- [47] The State respondents significantly associate with the cases put forward by the other respondents and the submissions made on their behalf. The State respondents deny the accusations by the applicants that the Warrant was obtained through misrepresentation of facts. Warrants it is argued, serve a critical purpose for the SAPS to combat crime with the support of the courts issuing such warrants, where the warrants are issued in compliance with the provisions of Criminal Procedure Act 51 of 1977 ('the CPA'). It ought to be borne in mind that all these have been precipitated by the applicants, themselves, storing mineral extracts without a valid licence, counsel for the State respondents submits.
- [48] On the other hand, the remedy of mandament van spolie is available even against the police where their seizure of the assets from affected persons is proven to have been unlawful. The remedy is focussed on weeding out self-help. But the requirements for spoliation order have not been met in this matter, counsel further submits. The applicants have failed to make out a proper, probable and plausible case, and the application ought to fail with costs.

Applicable legal principles

General

- [49] This application, or at least Part A thereof, was aimed towards attaining an interim interdict. This was due to the fact that the applicants had been deprived of possession of the Property and the 'contaminated coal' or PGMs, as well as other articles. Although, the deprivation was in terms of a search and seizure warrant (i.e. the Warrant), the applicants assert that the Warrant was not lawfully authorised and executed. The relief was sought on an urgent basis.
- [50] Gleaning from what appears in the preceding paragraph it means that the following legal principles are implicated: (a) requirements for obtaining an interim interdict; (b) requirements for a mandament van spolie; (c) issuing and execution of a search and seizure warrant, and (d) obtaining relief on an urgent basis.
- [51] Some of the above principles may have already been referred to above when discussing the respective cases of the parties. But, a reflection of the legal principles under this part is necessary to facilitate the discussion and determination of the relevant issues in the application to follow. The discussion will not be in the order the principles are tabulated above.

Spoliation / mandament van spolie

- [52] The relief sought under Part A of the application was significantly in the form of a spoliation order. This appears to be common cause between the parties.

[53] The remedy of mandament van spolie refers to similar relief as a spoliation order.[10] The remedy is available including under the following circumstances:

- (a) where, a person has been - wholly or partly - deprived of its, his or her possession of a movable or immovable property, unlawfully, or (b) where, a person has been deprived of its, his or her quasi-possession of other incorporeal rights, unlawfully.[11]

[54] 'Spoliation' constitutes 'any illicit deprivation of another of the right of possession which [it, she or he] has, whether in regard to movable or immovable property or even in regard to a legal right'.[12] The Supreme Court of Appeal ('the SCA') in *Eskom Holdings SOC Ltd v Masinda*[13] captured the nature and extent of the remedy accurately, as follows:

The mandament van spolie (spoliation) is a remedy of ancient origin, based upon the fundamental principle that persons should not be permitted to take the law into their own hands to seize property in the possession of others without their consent. Spoliation provides a remedy in such a situation by requiring the status quo preceding the dispossession to be restored by returning the property 'as a preliminary to any enquiry or investigation into the merits of the dispute' as to which of the parties is entitled to possession. Thus a court hearing a spoliation application does not require proof of a claimant's existing right to property, as opposed to their possession of it, in order to grant relief. But what needs to be stressed is that the mandament provides for interim relief pending a final determination of the parties' rights, and only to that extent is it final. The contrary comment of the full court in *Eskom v Nikelo* [[2018] ZAECHMHC 48] is clearly wrong. A spoliation order is thus no more than a precursor to an action over the merits of the dispute.[14]

[footnotes are omitted]

[55] Mandament van spolie, as a remedy, derives its principles from the maxim: 'spoliatus ante omnia restituendus est' (i.e. 'the person who has been deprived of his or her possession must first be restored to his or her former position before the merits of the case can be considered').[15] The quest is to preserve public order by restraining conduct amounting to taking the law into one's hands and, consequently,

inducing submission to the rule of law.[16] Essentially, the remedy discourages the act of resorting to self-help to regain possession of a thing which may have been lost so that peace and legal order in the community is maintained.[17]

[56] Mandament van spolie is concerned with protection of a physical manifestation of a right and not the right, itself.[18] The order granted focusses on redressing the effect of the breach of the peace which may arise from the unlawful interference with the factual control or the physical manifestation of a right.[19] This means that, an enquiry into the impugned right of access or right of use forming the subject of the breach is unwarranted as it would be delving into the merits of the matter, which is an antithesis of the spoliation law.[20]

- [57] The principles appearing immediately above suggest that to succeed in accessing the remedy of mandament van spolie, the applicants ought to show that:[21]
- (a) they had peaceful and undisturbed possession of the Property and other material things,[22] and
 - (b) they were unlawfully deprived of such possession.[23] Therefore, to succeed, the applicants ought to have been unlawfully deprived of their peaceful and undisturbed possession of the material thing. My understanding of all these is that there would have been no spoliation if the applicants were lawfully deprived of possession of the material things.[24] This outcome would prevail where the authorisation and execution of the Warrant are beyond reproach. I deal with the applicable legal principles relating to warrants below.
- [58] A respondent authorised, for example, in terms of a court order or by a statutory provision or consent obtained from the applicant to effect the dispossession or disturbance of possession would have a valid defence against an application for spoliation.[25] An example in this regard is an instance where the sheriff – acting upon the authority of a writ of execution – attached a judgment debtor’s assets. The attachment or seizure - in this example – would not be unlawful.[26] Other possible defences which may validly fend off a spoliation claim are as follows, that:
- (a) there was no peaceful and undisturbed possession of the material thing on the part of the applicant when it, he or she was dispossessed; (b) there was no unlawful dispossession and, consequently, no spoliation, and (c) restoration of possession is impossible.[27]
- [59] For current purposes the following may constitute obvious instances of spoliation: (a) obtaining possession of a thing by the sheriff of the court through an invalid warrant or writ of execution,[28] and (b) eviction of occupants from premises by functionaries of the State without strict adherence to the requisite statutory provisions
- or the authorising warrant.[29]
- [60] In its nature mandament van spolie offers only temporary relief, as the resultant situation may be reversed by a subsequent order of restoration of possession, such as a rei vindicatio successfully sought by the respondent in the matter.[30] The applicants in this matter sought restoration of the Property and other material things pending a determination of whether the Warrant is valid or not.
- [61] The Warrant which precipitated the current application is said to have been issued in relation to criminal proceedings against the directors of the applicant companies. The primary provisions in this regard are sections 20 and 21 of the Criminal Procedure Act 51 of 1977 (‘the CPA’). There are other provisions of the CPA which may be labelled ancillary to the aforesaid.
- [62] Section 20 of the CPA, subject to section 21 below, empowers the State to ‘seize certain articles’ linked to commission or suspected commission of an offence and reads as follows:

The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article)—

- (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; or
- (c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.

[63] Section 21 of the CPA provides for an '[a]rticle to be seized under search warrant' as follows in the material part:

- (1) Subject to the provisions of sections 22, 24 and 25, an article referred to in section 20 shall be seized only by virtue of a search warrant issued—
 - (a) by a magistrate or justice, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or upon any person or upon or at any premises within his area of jurisdiction; or
 - (b) by a judge or judicial officer presiding at criminal proceedings, if it appears to such judge or judicial officer that any such article in the possession or under the control of any person or upon or at any premises is required in evidence of such proceedings.
- (2) A search warrant issued under subsection
 - (1) shall require a police official to seize the article in question and shall to that end authorize such police official to search any person identified in the warrant, or to enter and search any premises identified in the warrant and to search any person found on or at such premises.
 - (3) (a) A search warrant shall be executed by day, unless the person issuing the warrant in writing authorizes the execution thereof by night.
 - (b) A search warrant may be issued on any day and shall be of force until it is executed or is cancelled by the person who issued it or, if such person is not available, by a person with like authority.
 - (4) A police official executing a warrant under this section or section 25 shall, after such execution, upon demand of any person whose rights in respect of any search or article seized under the warrant have been affected, hand to him a copy of the warrant.

[64] Section 22 of the CPA provides for the circumstances under which an article may be seized without a search warrant.[31]

[65] The applicants are dissatisfied with the execution of the Warrant, including the entry and search of the premises or the Property. Section 25 of the CPA sets out the powers of the police to entered premises for purposes of conducting a search and reads as follows in the material part:

- (1) If it appears to a magistrate or justice from information on oath that there are reasonable grounds for believing ...
- (b) that an offence has been or is being or is likely to be committed or that preparations or arrangements for the commission of any offence are being or are likely to be made in or upon any premises within his area of jurisdiction, he may issue a warrant authorizing a police official to enter the premises in question at any reasonable time for the purpose—
- (i) of carrying out such investigations and of taking such steps as such police official may consider necessary ... for the prevention of any offence;
- (ii) of searching the premises or any person in or upon the premises for any article referred to in section 20 which such police official on reasonable grounds suspects to be in or upon or at the premises or upon such person; and
- (iii) of seizing any such article ...

(2) A warrant under subsection

- (1) may be issued on any day and shall be of force until it is executed or is cancelled by the person who issued it or, if such person is not available, by a person with like authority.
- (3) A police official may without warrant act under subparagraphs (i), (ii) and (iii) of subsection
- (1) if he on reasonable grounds believes—
- (a) that a warrant will be issued to him under paragraph
- (a) or (b) of subsection
- (1) if he applies for such warrant; and
- (b) that the delay in obtaining such warrant would defeat the object thereof.

[66] The relief sought by the applicants under Part A of the application also takes the form of an interim interdict or a rule nisi pending the disposal of the relief under Part B of the application. The requirements for an interim interdict were set out in *Setlogelo v Setlogelo*[32] and have evolved to be as follows: (a) a prima facie right, although open to some doubt;[33]

- (b) a well-grounded apprehension of irreparable harm if the interim relief is not granted;[34] (c) balance of convenience favours the granting of interim relief,[35] and (d) the applicant has no adequate alternative remedy. The respondents argue that the applicants have failed to meet some or all of these requirements. This would receive attention below.

[67] As stated above, the above legal and statutory principles are those considered primary to the discussion of the issues in the determination of this application. No doubt, there will be other legal principles featuring in the discussion of the issues identified as those necessary for the determination of this matter, below.

Issues for

determination

[68] I have deduced from what appears above, in the papers and submissions on behalf of the parties, the following as issues to be determined by this Court for the disposal of this matter: (a) urgency; (b) requirements for an interim

interdict; (c) requirements for a spoliation order; (d) attempted 'unilateral removal' of the application from the urgent roll; (e) stay of the search and seizure warrant; (f) notice of any further warrant to be issued in the future; (g) interdict of the respondents from entering the property and coming near the boundary of the property in the future; (h) interdict of the respondents from intimidating the applicants and their functionaries; (i) the place of storage and the return of the seized goods;

(j) damage to the business of BMG; (k) abandonment of relief against some of the respondents, and (l) costs of the application.

[69] The issues identified above as those material for determination and disposal of this matter are discussed under self-explanatory subheadings, below. Some of the issues will be jointly discussed, due to substantial interlinkages between them. Overlaps and necessary repetition are unavoidable. Also, the issues will not necessarily be discussed in the order they are listed above.

Urgency

[70] The Warrant was issued on 2 August 2024. Its execution commenced on 7 August 2024 and included the incarceration of the Du Plessis until 16 August 2024 when they were released from jail on bail. A week later (i.e. from 16 August 2024) on 23 August 2024 this application was issued. This was after a cease and desist letter was dispatched on behalf of the applicants to the respondents on 21 August 2024, but to no avail. The so-called 'handover' of the Property by the SAPS to the applicants was in the afternoon of 30 August 2024. This was a week after the application was issued and a few days before the hearing of the application on 4 September 2024, although the application was eventually heard on 6 September 2024. These issues are common cause between the parties or are not effectively disputed.

[71] The application was issued for relief which included restoration of occupation of the Property by the applicants and those occupying the Property through their authority. It was also aimed at halting the removal of the so-called 'contaminated coal'. The applicants say these two considerations rendered the matter extremely urgent and that even if other aspects of the matter could be considered to be less urgent, no purpose would have been served by staggering the relief or approaching the Court in separate applications.

[72] The respondents disputed that the matter was ever urgent and sought that it be struck off the urgent roll with punitive costs.

[72.1] On behalf of the Impala respondents it is submitted, among others, that (a) the applicants – inconsistent with the claimed extreme urgency – elected to set down the matter for hearing on a date twelve days from date of issuing and service;

(b) the applicants filed an interlocutory application to supplement the founding affidavit; (c) the applicants filed a notice to remove the matter from the urgent roll whilst filing a replying affidavit, and (d) the applicants accept that they could obtain substantial redress in the ordinary course.

[72.2] On behalf of the Bidvest respondents it is argued, among others, that: (a) there is no explanation in the founding papers but only belatedly in the replying affidavit for deviating from the Practice Directives and enrolling the matter for hearing on a Wednesday; (b) undue time periods were imposed on the respondents in the notice of motion for delivery of papers; (c) the founding affidavit include argument on case law; (d) the replying affidavit was filed considerably out of time and long outside of normal working hours, when the applicants never included a timeline for filing a replying affidavit in the notice of motion; (e) the applicants irregularly attempted to remove the matter from the roll in the absence of an agreement and leave of the Court which amounts to a postponement of the matter sine die.[36]

[72.3] Submissions on urgency on behalf of the State respondents include the following:

(a) the Uniform Rules do not refer to 'extreme urgency', 'urgency' or 'general urgency' as purported by the applicants; (b) the applicants, despite stating in correspondences that a substantive application will be launched for the removal of the matter from the roll failed to do so on the basis of some 'general urgency', and (c) the Court ought to show its displeasure by censoring the applicants' conduct with a special costs order.

[73] The matter, in my view, was clearly urgent or even extremely urgent when it was launched. It does not matter that the occupation or possession of the Property was subsequently restored to the applicants. The respondents did not react favourably to the applicants' pre-litigation letter and, thus, the applicants had to approach this Court for relief. The truncation of the time periods for the exchange of papers may have not been done in an admirable manner, but it does not detract from the urgency in the matter.

Attempted 'unilateral removal' of the application from the urgent roll

- [74] After possession of the Property was restored to the applicants on 30 August 2024 the applicants attempted to remove the matter from the roll on 2 September 2024. The notice of removal did not include a tender of the costs occasioned thereby. But this does not appear to have been the reason or the only reason the respondents opposed the purported removal.
- [75] The applicants were effectively forced to abandon their attempted removal and enthusiastically pursued the application or at least Part A thereof, albeit in a modified form. I revert to the latter issue below.
- [76] From the above, it appears that the attempted removal ceased to have any bearing on this application when it was rejected by the respondents and, consequently, abandoned by the applicants. Nothing will turn on all these.

Abandonment of some of the relief against some of the respondents

- [77] The applicants, as indicated above, say that the ‘capitulation’ by the respondents or some of them in the restoration of possession or occupation of the Property rendered moot some of the relief sought under Part A of the application.[37] I think this is immaterial to the determination as the material issues will be considered as before and after the change in facts.
- [78] The applicants abandoned the relief sought against the first and third respondents in the replying affidavit.[38] I agree that the so-called ‘abandonment’ effectively amounts to withdrawal of the application or Part A thereof against

these respondents. But the affected respondents still participated at the hearing of this matter. In my opinion the timing of the withdrawal led to the withdrawal having no practical effect to the hearing of the matter. It will be dealt with in respect of costs and the order to be granted. The applicants say that they should not be held responsible for the costs of the first and third respondents as they have made it clear in the founding papers the mechanism of pursuing both set of respondents. Also, that the papers prepared for the first and third respondents continue to be utilised by the second and fourth respondents, and these respondents had ample opportunity to clarify their involvement in the matter.[39]

Requirements for a spoliation order

- [79] To access the spoliation remedy an applicant ought to show that there was part or whole deprivation of possession of a movable or immovable property in an unlawful manner.[40]
- [80] It is common cause between the parties that the applicants were deprived of possession of the Property, the ‘contaminated coal’ and other articles. Some of these have been restored to the applicants. But, I do not agree with the contention by the respondents that the restoration of some of the articles and the Property to the applicants renders the application unnecessary or even its urgency. I have already dealt with urgency, above.[41]

[81] The other part of the question is whether the deprivation was unlawful. The respondents contend that as the deprivation was executed in terms of the Warrant, there is no room to allege unlawfulness. It is specifically argued on behalf of the State

respondents that a balance needs to be struck when considering issues relating to warrants between effective combatting of crime, on the one hand, and the constitutional rights and freedoms of persons, on the other hand.[42] The applicants' retort is that there was unlawfulness in the manner in which the Warrant was executed. As already indicated, the applicants do not seek to challenge the validity of the Warrant under this part of the relief sought. They have reserved that for later consideration under Part B.

[82] The applicants say the execution of the Warrant was unlawful for many reasons. I discuss the pertinent reasons for the assertion and the determination, next

[83] The Impala respondents and Bidvest respondents should not have taken part in the execution of the Warrant.

[83.1] The applicants contend that Impala entered their Property when searching for, seizing, collecting and transporting the 'contaminated coal', and proceeding to store it at Impala's premises. Also, that Bidvest Protea entered the applicants' Property and provided security services to the SAPS and Impala, whilst preventing the applicants from accessing the Property.

[83.2] The applicants argue that the law does not allow private treaties to take part in the execution of a search and seizure warrant but only the SAPS or other law-enforcement agencies. Bidvest Protea and Impala say that there was nothing unlawful in them assisting the SAPS to execute the Warrant within the confines of its lawful authority. It is common cause that the trucks and drivers of Impala collected the 'contaminated coal'. Bidvest Protea denies being on the Property, a fact disputed by the applicants on the basis of what was relayed by the sheriff (under oath).[43]

[83.3] The applicants rely on the following dicta by the Constitutional Court in *Magajane v Chairperson, North West Gambling Board and Others*: [44]

"...The warrant guarantees that the State must justify and support intrusions upon individuals' privacy under oath before a neutral officer of the court prior to the intrusion. It furthermore governs the time, place and scope of the search, limiting the privacy intrusion, guiding the State in the conduct of the inspection and informing the subject of the legality and limits of the search."

[83.4] Recently in *S v Murphy and Others*

- 2024 (1) SACR 138 (WCC)[45] the following was restated:

"It is well established in our law that search warrants are to be carefully scrutinised, and that courts must adopt a strict approach

to the question of whether the police acted within the limits of the warrant. The Constitutional Court has held that a search warrant must identify the searcher. It follows that only those police officers specifically mentioned in a search warrant are authorised to search in terms thereof, and that it is unlawful for an officer whose name is not listed in the warrant to search and seize, unless his or her actions can be justified in terms of s 22(a) or (b) of the CPA.”

[83.5] Unnamed peace officers may assist in the execution of a warrant, but not persons who are not peace officers or are private persons.[46]

[83.6] I understand the law to be that private persons or persons who are not peace officers cannot execute warrants. But I do not understand this to outlaw participation of such persons in the execution of a warrant to assist the peace officers. The peace officers or the SAPS, as in this instance, may not have the technical or even capacity to carry out the execution of a warrant. In this instance the Impala respondents and the Bidvest respondents acted as the specialist workforce to assist the SAPS to carry out the terms of the Warrant using their own required machinery and vehicles, whilst guarding the Property. It does not really make any difference whether Bidvest Protea guarded the Property from within or from the perimeter of the boundary, as long as what is done is effective guarding of the material assets. I accept that they did so under the instructions of the SAPS, who may have been or have not been at the premises at all material times. It would be unreasonable or even expecting the impossible to expect the SAPS to have the wherewithal to execute warrants in all sorts of situations. A pragmatic approach is that the police or SAPS should not outsource their powers or allow anything to happen without being in charge of the process or to steer outside of the confines of the authorising warrant and the law.[47]

[84] Seizure of the ‘contaminated coal’ or PGMs.

[84.1] I understand the applicants’ complaint in this regard to be about the actual removal of the material and also that the material was not listed on the Warrant.

[84.2] The Warrant clearly makes reference to ‘unwrought precious metal’.[48] I think this disposes of the naming issue and would include anything related to the offence or suspected offence of possession, acquisition or disposal of unwrought precious metal.

[84.3] The respondents say that the seizure of the material (i.e. contaminated coal or PGMs) is pursuant to ongoing criminal proceedings and to preserve same as evidence. I have no evidence before me to deem this unlawful, although I will deal with the issue of the place of storage below.

[85] Prevention of family members and friends of the Du Plessis, as well as the employees of BMG from accessing the Property. The respondents argued that the lockdown was due to the existence of the Warrant. I think it is an issue of reasonableness. It ought to have been shown that it was not reasonably possible to execute the Warrant without the complete lockdown of the nature and extent that it was. This relates to issues such as whether the whole premises were required for execution of the Warrant and whether the length of time it took to execute the Warrant whilst lockdown was in existence was reasonable. I do not think it was reasonable to prevent access by the applicants to the Property and for the time that it took to

do so. There is no suggestion that those prevented would have interfered in any way with the execution of the Warrant amidst the SAPS and Bidvest Protea guarding the premises.

Therefore, the complete denial of access to the Property and for the long duration it took was unlawful.

[86] SAPS misrepresented the facts to the Magistrate when applying for the Warrant. This relates to the processes or validity of the Warrant which the applicants reserved for determination under Part B. No execution is implicated.

[87] The place where the Warrant was executed. The Warrant clearly refers to an address in Brits, which appears to be the residence of the Du Plessis, but distinct from the address of the Property.

[87.1] The applicants say that the execution of the Warrant at the Property was unlawful.

[87.2] Counsel for the State respondents argues that the reference in section 21(1)(a)[49] of the CPA authorises execution of an issued warrant 'at any premises within his area of jurisdiction'. I do not think that the provision, without more, would authorise the execution of a warrant anywhere within the area of jurisdiction of the authorising authority or the magistrate.

[87.3] The issue was not argued forcefully by the other respondents. But I have been referred to the Warrant at length and have noted that it comprises - on the first page - segments A, B and C. [50] Segment C deals with the articles to be seized (and appears to be a continuation of segment B). Segment C has items (i) and (ii) on this page. Item (i) refers to 'such articles' being 'upon or at the following premises within the area of jurisdiction' and allows for insertion of a geographical or physical address. Item (ii) refers to 'such articles' being 'otherwise ... under the control of or upon the following person(s) who currently reside(s) within my area of jurisdiction' and allows for the insertion of the affected persons and their 'identification number or passport number'. The two segments (i.e. (i) and (ii)) are joined by the words 'and/or'. Therefore, it appears to me that instead of the named address the person executing the warrant can execute it at the address or place under the control of the named person. Should I be correct in this regard the Warrant cannot be challenged on the basis of the geographical address only. But as this issue was not fully argued before me, I will defer final ruling on it to Part B of the application. In fact, it goes onto the validity of the Warrant as well, reserved for determination under Part B.

[88] The time of the day when the Warrant was executed. The execution of the Warrant was also done during the night notwithstanding that the Warrant was only authorised to be executed during the day. The applicants make an issue of the fact that the SAPS and their assisting parties were at the premises or the Property all the times from the moment they took possession until the handover or they relinquished possession of the Property. I do not think that it would have served the purpose of the Warrant for a start and go approach of entering the Property in the morning and vacating it in the afternoon before dusk.

[89] Place of storage of the seized articles. The applicants argue that the storage of the PGMs or 'contaminated coal' by the SAPS at the premises belonging to Impala is unlawful or not provided for by the law, at least without the consent of the applicants or the Du Plessis. The applicants rely on section 30[51] of the CPA in this regard, which clearly requires consent of the person from whom the articles were seized. It is common cause that neither the applicants nor the Du Plessis gave such consent. The applicants argue that the respondents cannot rely on section 30(c) of the CPA to circumvent section 30(b). Section 30(c) of the CPA provides for a seized article to be given 'a distinctive identification mark' and be retained in police custody or for the police to 'make such other arrangements with regard to the custody thereof as the circumstances may require'. I agree that the one provision cannot be used to circumvent the other. But this does not mean that section 30(c) of the CPA cannot be considered by the police and that they have to always proceed in terms of section 30(b). It does not matter that the place of custody of the seized articles belongs to the person who may have an interest in the matter. The test under section 30(c) is that what informed that choice of the custody of the seized articles are the requirements of the circumstances. The respondents say that the facility is a secure and constantly monitored facility and will be used for the preservation of the seized material for purposes of the criminal proceedings. This should satisfy all reasonable interest-bearers in the seized material. Beyond that would be to

elevate form over substance in interpretation of these provisions which does not accord with modern principles of interpretation.[52] It also does not matter that Impala may have conflict of interest as the complainant in the criminal proceedings. I do not have anything by way of evidence to suggest that Impala may do anything untoward to the seized material without falling foul of the law. The respondents also state that the entire process of transportation and storage is documented and Impala holds the proper licence and approval to store the seized articles. Also, should the applicants need to access the seized material in order to exercise their rights, including to test the quality and the content thereof, Impala and SAPS may be approached to allow that, failing which, the Court.

[90] Alleged damage to BMG's business. This issue was not pursued with any amount of force. I agree with the respondents that the applicants have the alternative remedy for a damages claim in this regard.

Requirements for an interim interdict

[91] The requirements for an interim interdict are set out above.[53] I think it is not necessary to delve into the discussion of these requirements in the light of what is stated above regarding the
remedy of mandament spolie.

[92] The applicants assert that they have met the requirements for an interim interdict and the remedy of mandament spolie. It is submitted that the applicants established (a) prima facie right (i.e. they own the Property and the seized articles); (b) actual harm and reasonable apprehension of that harm; (c) the balance of convenience favours the granting of the relief sought, and (d) there simply having been no alternative remedy than to pursue this application.

[93] The respondents dispute the satisfaction of the requirements of or test for an interim interdict by the applicants.[54] Further, that the Property has been returned to the applicants and the seized articles cannot be returned as they are preserved for the criminal matter. In my view the Warrant did not include the lockout of the applicants and, for the reasons stated above, any interim interdict to allow access would have been justified.

Stay of the search and seizure warrant

[94] The applicants seek as relief the stay of the Warrant pending the determination of the relief under Part B. I think it would be proper to grant a temporary stay of the Warrant until the matter is fully disposed of in terms of Part B. I would carve this in such a way that it does not unravel some of the activities already effected in terms of the Warrant.

Notice of any further warrant to be issued

[95] The applicants request that the fifth to seventh respondents be directed to notify them should there be a need to issue any further warrant in terms of section 20 of the CPA. The mischief desired to be guarded against is said to be preventing any misrepresentation of the facts to the Magistrate when applying for such warrant. I do not think this is necessary. Perhaps, when the applicants approach the Court under Part B of the application they would be able to convince the Court that this is necessary and provide evidence of the alleged misrepresentations.

Interdict of the respondents from entering the property and coming near the boundary of the property or intimidating the applicants and their functionaries

[96] The applicants, further, seek that the respondents be interdicted from entering the Property or coming within five metre radius of the boundary. They also seek that the respondents be interdicted from intimidating them or their employees. In my view, as stated above, the Warrant did not entitle the respondents or the SAPS to lockout the premises and refuse access from 7 to 30 August 2024. This was not proportional. The applicants were entitled to approach the Court to regain occupation of the Property. But, I do not think that it would be proper to grant an interdict of the nature sought under the circumstances. The applicants would always be entitled within the confines of the law to protect their rights and interests in case of need. As already mentioned, I would stay the Warrant to avoid it being used again.

Conclusion

[97] From the rulings made or conclusions reached above, it is clear that the applicants have had some mixed ‘fortunes’ in this application. They have succeeded in some respects and lacked success in other respects of Part A of the application. I have found the matter to be urgent (i.e. prayer 1 of the notice of motion) and the Property was restored voluntarily, but the application was necessary especially given the total lockout of the applicants (i.e. prayers 2 and 3). I will also order that the State respondents furnish the applicants with SAP 13 register of the articles seized (prayer 4). As stated above, I am satisfied that access to the Property would not have been restored without the applicants approaching the Court. But because I would stay the Warrant I will not grant an interdict against the respondents for any anticipated or future conduct (i.e. prayers 5, 6.3, 6.4 and 6.5). In as far as the remainder of the relief sought in terms of prayer 6 is concerned, I will allow the granted relief to operate as interim relief (or rule nisi) pending the determination of Part B of the application (i.e. prayer 7), but not require the State respondents to give notice to the applicants in case of a further warrant.

[98] The above signifies partial success. Therefore, the costs order to be granted would reflect this. There would also be issues deferred for determination under Part B of the application.

Costs

[99] Under the circumstances, I will hold the respondents, except for the first and third respondents, liable for costs of the application until 30 August 2024 when the Property was restored to the applicants. For the costs incurred after 30 August 2024 I will order that they form part of the costs to be awarded in respect of the determination of Part B of the application. I consider this fractioning of the costs to be appropriate under the circumstances. The ultimate successful party would be justified in being awarded costs in respect of the events post 30 August 2024.

Order

[100] In the premises, I make the order, that:

1. the forms and service in the Uniform Rules of Court are dispensed with, and that the applicants’ non-compliance with same be condoned, and that this application is enrolled, heard and determined as one of urgency as contemplated in Uniform Rule 6(12);
2. the fifth to seventh respondents are ordered to produce to the applicants, within thirty (30) days from date hereof, the SAP 13 register of articles seized in terms of the search and seizure warrant issued at Brits Magistrate’s Court on 2 August 2024 under CAS10/11/2023 (‘the Warrant’) by the eighth respondent;
3. a rule nisi be issued in the following terms, pendente lite Part B of this application:

3.1 the Warrant issued by the eighth respondent is stayed, save for the fact that the articles seized in terms of the Warrant shall not be affected by the staying of the Warrant unless as may be directed by the Court or agreed upon between the parties.

4. the order in 3 hereof shall operate as interim relief with immediate effect;
5. the second, fourth, fifth to seventh respondents, subject to 7 hereof, are liable to pay the costs relating to Part A of this application up to and including 30 August 2024 on party and party scale, jointly and severally, the one to pay, the other to be absolved;
6. the costs relating to Part A of this application from 31 August 2024 onwards shall form part of the costs order made in respect of Part B of this application;
7. the applicants are liable to pay the costs of the interlocutory application for condonation for the delivery of a supplementary affidavit to the founding affidavit, and
8. the applicants are granted leave to supplement their founding affidavit and make amendments to their notice of motion as necessary for the adjudication of Part B of this application, and they are ordered to do so within 45 days from the date hereof; and
9. the determination of the following issues is deferred for determination with the issues in Part B of the application:

9.1 the validity of the Warrant and/or lawfulness of its execution considering the geographical or physical address stated in the Warrant.

La M. Manamela

Acting Judge of the High Court

Dates of Hearing: 04, 06 September 2024 Date of Judgment: 31 December 2024

Appearances:

For the Applicants: Mr L van der Merwe (heads of argument Mr U Hammond-Smith) Instructed by: Hammond-Smith Attorneys, Pretoria For First and Second Respondents: Instructed by: Mr YF Saloojee Norton Rose Fulbright Attorneys, JHB For Third and Fourth Respondents: Instructed by: Mr C Richard Weavind & Weavind Attorneys, PTA For Fifth, Sixth and Seventh Respondents: Instructed by: Mr PA Mabilo State Attorney, PTA

[1] Mauerberger v Mauerberger 1948 (3) SA 731 (C) at 732; Titties Bar & Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd 1974 (4) SA 362 (T) at 368H-369B; Director of Hospital Services v Mistry 1979 (1) SA 626 (A) at 635-636.

[2] Notice of Motion, CaseLines 03-4 to 03-5.

[3] Replying Affidavit ('RA') pars 14-27, CaseLines 03-561 to 03-565.

[4] Notice of Motion, CaseLines 03-4.

- [5] First and Second Respondents' Answering Affidavit par 8, CaseLines 03-296.
- [6] The Warrant (i.e. annexure 'BD9' to the founding affidavit), CaseLines 03-102.
- [7] Impala Water Users Association v Lourens NO [2008 (2) SA 495 (SCA).
- [8] George Municipality v Vena 1989
(2) SA 263 (A).
- [9] Sillo v Naude 1929 AD 21; Ntai v Vereeniging Town Council
[1953] [4] All SA 358 (A); George Municipality v Vena
[1989] [2] All SA 125 (A).
- [10] CG Van der Merwe Things in The Law of South Africa ('LAWSA') (Volume 27, Second Edition LexisNexis 2014) ("Van der Merwe, Things in LAWSA (Vol 27)") 94.
- [11] Van der Merwe, Things in LAWSA (Vol
27) 94.
- [12] Nino Bonino v De Lange 1906 TS 120 at 122 where the observation is as follows: "... spoliation is any illicit deprivation of another of the right of possession which he has, whether in regard to movable or immovable property or even in regard to a legal right" [accessed through the link: <https://lawblogs.files.wordpress.com/2013/01/nino-bonino-v-de-lange.doc>]. See also Van Eck & Van Rensburg v Etna Stores 1947 2 SA 984 (A)1000, 1947 3 All SA 143 (A) 152. See further Van der Merwe, Things in LAWSA (Vol
27) 94.
- [13] Eskom Holdings SOC Ltd v Masinda 2019 (5) SA 386 (SCA).
- [14] Eskom v Masinda 2019 (5) SA 386 (SCA) [8].
- [15] Van der Merwe, Things in LAWSA (Vol 27) 93, 111 and the authorities cited there.
- [16] Van der Merwe, Things in LAWSA (Vol 27) 93.
- [17] Van der Merwe, Things in LAWSA (Vol 27) 93. See also Ngqukumba v Minister of Safety and Security and others 2014 (5) SA 112 (CC) [10]-[12].
- [18] Van der Merwe, Things in LAWSA (Vol 27) 103.
- [19] Van der Merwe, Things in LAWSA (Vol 27) 103.
- [20] Van der Merwe, Things in LAWSA (Vol 27) 103. See also Eskom v Masinda 2019 (5) SA 386 (SCA) [8], quoted in par [54] above.
- [21] Van der Merwe, Things in LAWSA (Vol 27) 108. See also Chopper Worx (Pty) Ltd v WRC Consultation Services (Pty) Ltd 2008 (6) SA 497 (C) [16]-[21].

- [22] When establishing that he or she was in peaceful and undisturbed possession of the thing, the applicant ought to show that she or he had factual control of the thing, which control was accompanied by an intention to derive some benefit from the material thing. See Van der Merwe, Things in LAWSA (Vol 27) 108
- [23] An act of spoliation ought to be established on the part of the respondents, being an illicit deprivation of the applicant's possession of the impugned thing or disturbance of such possession without the consent and against the will of the possessed applicant. See Van der Merwe, Things in LAWSA (Vol 27) 108; Wightman t/a JW Construction v Headfour (Pty) Ltd 2008 (3) SA 371 (SCA) [27].
- [24] Van der Merwe, Things in LAWSA (Vol 27) 108.
- [25] Van der Merwe, Things in LAWSA (Vol 27) 109.
- [26] White & Tucker v Rudolph 1879 K 115 [available through the link: <https://www.saflii.org/za/cases/ZATransvHCRpKotze/1879/17.pdf>] at 122-123; Surtee's Silk Store (Pty) Ltd and others v Community Development Board and another 1977 (4) SA 269 (W); Kleinsakeontwikkelingskorporasie Bpk v Santambank Bpk 1988
- (3) SA 266 (C) 275B-E. See also Van der Merwe, Things in LAWSA (Vol 27) 108.
- [27] Van der Merwe, Things in LAWSA (Vol 27) 109.
- [28] White & Tucker v Rudolph 1879 K 115 at 122-123. See also Van der Merwe, Things in LAWSA (Vol 27) 108.
- [29] George Municipality v Vena 1989 (2) SA 263 (A); Rikhotso v Northcliff Ceramics (Pty) Ltd and others 1997 (1) SA 526 (W) 531-532; Minister of Finance and others v Ramos 1998 (4) SA 1096 (C) 1101F-H. See further Van der Merwe, Things in LAWSA (Vol 27) 108.
- [30] Van der Merwe, Things in LAWSA (Vol 27) 111. Rei vindicatio refers to a remedy which entitles an owner "to reclaim possession of her or his property". See LTC Harms, Amler's Precedents of Pleadings (10th ed LexisNexis 2024) 383.
- [31] Section 22 of the CPA reads as follows: 'A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20— (a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or (b) if he on reasonable grounds believes— (i) that a search warrant will be issued to him under paragraph (a) of section 21 (1) if he applies for such warrant; and (ii) that the delay in obtaining such warrant would defeat the object of the search.'
- [32] Setlogelo v Setlogelo 1914 AD 221, endorsed by the Constitutional Court in National Treasury and others v Opposition to Urban Tolling Alliance and others 2012

- (6) SA 223 (CC) [41].
- [33] The prima facie right has to be established on a balance of probabilities. See *Steam Development Technologies 96 Degrees Proprietary Limited v Minister: Department of Public Works & Infrastructure - Reasons for the Interim Interdict* (4264/2023)
- [2024] ZAECMKHC 23 (16 February 2024) [8] which reads: “[e]ven if all these requirements are met, the court still enjoys an overriding discretion whether or not to grant the interim interdict ... Applicants for interim relief are required to establish at least a prima facie right to relief, even if open to some doubt.” [footnotes omitted]
- [34] Relief ought to be granted only if the discontinuance of the act complained of would involve irreparable injury to the respondent: *Steam Development Technologies 96 Degrees v Minister: Department of Public Works & Infrastructure* [2024] ZAECMKHC 23 (16 February 2024) [12].
- [35] The balance of convenience ought to be applied cognisant of the normative scheme and democratic principles which underpin the Constitution, equating to promotion of the object, spirit and purpose of the Constitution. See *National Treasury and others v Opposition to Urban Tolling Alliance and others* 2012
- (6) SA 223 (CC) [46]-[47].
- [36] *Petse v Minister of Deference and Military Veterans and Others* (2016/01339)
- [2024] ZAGPJHC 358 [19].
- [37] RA pars 14-27, Caselines 03-561 to 03-565.
- [38] RA par 6, CaseLines 03-556.
- [39] RA pars 7-10, CaseLines 03-556 to 03-557.
- [40] Pars [53]-[55] above. See further *Kwatsha v Minister of Police* 2023 JDR 4096 (ECM) [22]; *Ivanov v North West Gambling Board and Others* 2012
- (2) SACR 408 (SCA) []; *Impala Water Users Association v Lourens* NO [2008 (2) SA 495 (SCA)].
- [41] Pars [70]-[73] above.
- [42] *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others: In re Hyundai Motor Distributors (Pty) Ltd & others & others v Smit* NO & Others
- [2000] ZACC 12; 2001
- (1) SA 545 (CC); *Goqwana v Minister of Safety NO & Others* (20668/2014) [2015] ZASCA 186; [2016] 1 All SA 629 (SCA); 2016 (1) SACR 384 (SCA) (30 November 2015).
- [43] Confirmatory affidavit by the sheriff, Caselines 03-644 to 03-646.

- [44] Magajane v Chairperson, North West Gambling Board and Others [2006] ZACC 8; 2006 (2) SACR 447 (CC) [74].
- [45] S v Murphy and Others - 2024 (1) SACR 138 (WCC).
- [46] Strauss v Minister of SAPS N.O and Others (UM30/2019; UM34/2019) [2019] ZANWHC 23 (2 May 2019) [30.3]; Extra Dimension and Others v Kruger NO and Others 2004 (2) SACR 493 (T) at 369j-497h; Goqwana v Minister of Safety and Security and others 2016 (1) SACR 384 (SCA) [25]; Mineral Sands Resources (Pty) Ltd v Magistrate for the District of Vredendal & others [2017] 2 ALL SA 599 (WCC) [210].
- [47] Keating v Senior Magistrate & others 2019 (1) SACR 396 (GP) [37]-[38].
- [48] Warrant, CaseLines 03-102.
- [49] Par
- [63] above for a reading of the provision.
- [50] CaseLines 03-102.
- [51] Section 30 of the CPA deals with the disposal of articles after their seizure by the police and reads as follows in the material part: 'A police official who seizes any article referred to in section 20 ...— (a) ... (b) may, if the article is stolen property or property suspected to be stolen, with the consent of the person from whom it was seized, deliver the article to the person from whom, in the opinion of such police official, such article was stolen, and shall warn such person to hold such article available for production at any resultant criminal proceedings, if required to do so; or (c) shall, if the article is not disposed of or delivered under the provisions of paragraph (a) or (b), give it a distinctive identification mark and retain it in police custody or make such other arrangements with regard to the custody thereof as the circumstances may require.'
- [52] In Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) [18].
- [53] Par [66] above.
- [54] Webster v Mitchell 1948 (1) SA 1186 (W) at 1189-1190; National Treasury & others v Opposition to Urban Tolling Alliance & others 2012 (6) SA 223 (CC) [41], [50].

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