



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 623/2009
No Precedential Significance

In the matter between:

ABRAM SELLO **Appellant**

and

INSPECTOR GROBLER **First Respondent**

INSPECTOR J CLAASEN **Second Respondent**

MINISTER OF SAFETY & SECURITY **Third Respondent**

**NATIONAL DIRECTOR OF HEALTH
MEDICINE REGULATORY AFFAIRS,
INSPECTORATE & LAW ENFORCEMENT** **Fourth Respondent**

Neutral citation: Sello v Grobler (623/09) [2010] ZASCA 134 (1 October 2010)

Coram: MPATI P, LEWIS, PONNAN, CACHALIA JJA and K PILLAY AJA

Heard: 20 August 2010

Delivered: 1 October 2010

Summary: Search and seizure — unlawfulness admitted — whether appellant entitled to return of all seized items.

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Jajbhay J sitting as court of first instance):

- 1 The appeal is upheld with costs.
- 2 The order of the court below is set aside and substituted with an order in the following terms:
 - ‘(a) The respondents’ searches of the applicant’s pharmacy and home on 8 July 2008 are declared unlawful.
 - (b) The respondents’ are directed forthwith to return to the applicant all items seized pursuant to those unlawful searches that the appellant may lawfully possess.
 - (c) The respondents’ are ordered to pay the costs jointly and severally, the one paying the other to be absolved.’

JUDGMENT

K PILLAY AJA (Mpati P, Lewis, Ponnann and Cachalia JJA concurring)

[1] The appellant, Abram Sello, is a pharmacist and owner of Lake Field Pharmacy, situated at shop 23, Lakefield, Benoni, Gauteng.

[2] Towards the end of June 2008 the Organised Crime Unit of the South African Police Services, of which the first and second respondents are members, received information from members of the Medicines Regulatory Affairs Inspectorate (‘MRAI’) that the appellant was

suspected of selling scheduled medicines and or substances without the necessary prescriptions.

[3] Acting on that information on 8 July 2008, the first and second respondents, together with members of the MRAI, decided to set a trap at the appellant's pharmacy in accordance with the provisions of s 252A of the Criminal Procedure Act 51 of 1977. In furtherance of the trap exercise a female inspector, Heather Conradie, was given two marked one hundred rand notes to purchase Stilpain and Stilnox tablets. She proceeded to the appellant's pharmacy where she was assisted by Thobeka Gladys Bambisa, an employee of the appellant. Ms Bambisa supplied her with those tablets against payment of the sum of R155 for the Stilnox and R14 for the Stilpain tablets. The tablets were schedule five drugs and despite the fact that they required a prescription were sold by Ms Bambisa without one. Moreover, Ms Bambisa, who was not a pharmacist, was not permitted to dispense medication.

[4] The appellant was not in the pharmacy when the transaction was concluded. Upon his arrival he was informed of the trap and in his presence his pharmacy was searched by the police and inspectors of the MRAI. The police seized various items including scheduled medicines with blister strips and expiry dates that had been removed. In a back room of the pharmacy a drum containing Myprodol capsules in a transparent plastic bag were found.

[5] Andrew Colin Brandon, a risk officer, employed by Adcock Ingram Healthcare (Pty) Ltd, arrived at the pharmacy. He identified his company as the source of the Myprodol. According to him the capsules are not sold in containers as found in the appellant's pharmacy but rather,

after being processed, are placed in blue containers similar to the one discovered in the backroom of the pharmacy. Pholconcor tablets with batch number 080331 and Ziak tablets with batch number 0714962 were also found. William Daniel Botha from Pharmaceutical Healthcare Distributors identified these tablets as part of a batch which had been stolen from their warehouse. Other items such as computers and the appellant's laptop were seized. The appellant and his employee, Ms Bambisa, were then arrested. Thereafter his motor vehicle which was parked outside the pharmacy was searched. His identity book, cheque books, personal documents, and his house, shop and car keys were taken. A trip to his home followed. A search there yielded more tablets in a box, similar to the ones found in the pharmacy. From his home R114 000 cash was taken.

[6] These common cause facts provided a backdrop for an application launched by the appellant, in the South Gauteng High Court, for an order declaring the searches carried out at the appellant's home and pharmacy on 8 July 2008 unlawful and the forthwith return of all items seized. The application was dismissed by Jajbhay J with costs. Leave to appeal was granted to this court.

[7] In his founding affidavit the appellant alleged that the search and seizure operation were conducted in violation of his 'right to privacy, his right to trade freely and without a lawful basis'. In addition he averred that he was at all times in 'peaceful and undisturbed possession' of all the items seized.

[8] It is not disputed that in respect of the aforesaid searches the police acted without a warrant. That is not in itself a ground for finding that the

searches and seizures were unlawful. But before us counsel for the respondents conceded that the searches were unlawful. That was for two reasons. First, although s 22 of the Criminal Procedure Act 51 of 1977 authorizes seizure without a warrant where a police official believes that the delay occasioned by obtaining a warrant would defeat the object of the search, the police advanced no grounds for such a belief. Second, the inspectors of the MRAI had not shown that they were authorized to conduct searches in terms of the Medicines and Related Substances Control Act 101 of 1965. That concession so, the appellant contended, entitled him to the return of all the items seized. As this issue was not fully ventilated on the papers, the matter was postponed to enable the legal representatives, after fuller consultation with the parties, to file a schedule of those items that they agreed could be returned to the appellant. We have since been advised that no consensus could be reached between the parties.

[9] It is common cause that criminal proceedings against the appellant are still pending at which some of the seized items may be required by the State as evidence. It was not disputed that amongst the items seized were allegedly stolen items and expired medication, some without proper identifying details. Since the seizure certain other drugs have also expired. All of those items obviously cannot be returned to the appellant.

[10] The appellant does not in his founding affidavit deal with his lawful entitlement to have possessed all the items seized nor does he allege what exactly he is lawfully entitled to have returned. Rather he contents himself with the allegation that he was in peaceful and undisturbed possession of the seized items. That would have sufficed had this been a spoliation application. But it is not. It follows that we can only

order the return of those items that the appellant is lawfully entitled to possess.

[11] In the circumstances the following order is made:

- 1 The appeal is upheld with costs.
- 2 The order of the court below is set aside and substituted with an order in the following terms:
 - ‘(a) The respondents’ searches of the applicant’s pharmacy and home on 8 July 2008 are declared unlawful.
 - (b) The respondents’ are directed forthwith to return to the applicant all items seized pursuant to those unlawful searches that the appellant may lawfully possess.
 - (b) The respondents’ are ordered to pay the costs jointly and severally, the one paying the other to be absolved.’

K Pillay
Acting Judge of Appeal

APPEARANCES

APPELLANT: Z Omar of Zehir Omar Attorneys, Springs
EG Cooper Majiedt Inc, Bloemfontein

RESPONDENTS: TF Mathibedi (with him TK Manyage)
Instructed by State Attorneys,
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