

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO:48454/08

DATE: 1 APRIL 2010

In the matter between:

MOGALE, DAISY DIBUSENG PAULINAH

First Applicant

YOUNG STARS TRADERS CC

Second Applicant

MPHUTLANE, ELIZABETH

Third Applicant

MPHUTLANE, SIMON

Fourth Applicant

and

MINISTER SAFETY AND SECURITY

First Respondent

THE COMMANDING OFFICER OF THE

COMMERCIAL BRANCH, HIGH PROFILE

INVESTIGATIONS (SPECIALISED COMMERCIAL

CRIME UNIT)

Second Respondent

JUDEEL, JAN

Third Respondent

THE HONOURABLE MAGISTRATE MADAU

Fourth Respondent

THE HONOURABLE MAGISTRATE NIEMAN

Fifth Respondent

JUDGMENT

Ismail AJ:

[1] The applicants brought an application to this court wherein they sought an order in the following terms:

(1) Setting aside the search and seizure warrant(s) alternatively reviewing and setting aside the decisions to authorize the search and seizure warrants in respect of the following premises:-

1.1 [...] B[...] Street, C[...];

1.2 2rd floor, L[...] I[...] G[...], [...] S[...] B[...], B[...], Johannesburg;

(2) Directing the First, Second and Third respondents to return all of the documents , data and other property seized pursuant to the search and seizure warrant set out above, to the Applicants including all copies and reproduction thereof in whatsoever form.

(3) Interdicting the First, Second and Third Respondents and any agent, employee, contractor or third parties on behalf of the aforesaid Respondents from utilizing any of the documents, data and the property seized pursuant to the search and seizure warrants, or any copy or reproduction thereof, or having reference to any information obtaining from the documents , data and other property of the Applicants seized pursuant to the search and seizure warrants, for any purpose whatsoever.

(4) Ordering the First, Second and Third Respondents, alternatively such Respondents as may oppose the application, to pay the costs on the scale as between attorney and client.

(5) Granting the Applicants further and/or alternative relief.

[2] This present application for review was launched by the applicants on or about the 16 October 2008.

Initially all the respondents opposed the application. The fourth and fifth respondents on the 22 January 2009 withdrew their opposition and they noted that they would abide by the Court's decision.

[3] The first applicant who is the sole member of the second applicant in her founding affidavit at paragraph 18 set out the grounds for the review. The grounds in summary form are: -

(1) that the warrants grossly exceeded the ambit of term thereof; (2) the authorisation granted for the search and seizure warrants were unlawful in that the fourth and fifth respondents did not apply their minds to the contents and request for the authorisation of the search warrants in that the warrants were authorised in the absence of evidence under oath, more particularly the Justice of Peace and Commissioner of Oaths Act 16 of 1963 and the regulations promulgated thereunder were not complied with; (3) The affidavit of the third respondent, Judeel, which was commissioned is dated 24

June , however the date of the stamp indicates the 25 June. In addition the affidavit suggest that the oath was taken at Johannesburg whereas the stamp on the document indicates Carltonville; (4) the warrants were authorised for offences in relation to which no grounds were set out in the ‘affidavit’ indicating that the applicants were guilty of the offence or that reasonable grounds existed for the issuance of the search and seizure warrants; (5) the search and seizure warrants authorised the participation of an unjustified number of members of the SAPS, namely 17 members and this resulted in a gross invasion of the applicants right to privacy; (6) the warrants permitted the search and seizure of the two premises during the night without any justification or motivation on the part of the third respondent; (7) it was submitted on behalf of the applicants that the warrants ought to be set aside by virtue of the material non-disclosure on the part of the third respondent who withheld such information from the fourth and fifth respondents. This conduct vitiated the order granted and therefore the warrants ought to be set aside.

[4] The warrants for the search and seizure in this matter were applied for in terms of the provisions of section 20 read with section 21 of the Criminal Procedure Act 51 of 1977 [CPA]. The relevant section read as follows:

Section 20:-

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: to be used

(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.

Section 21 is headed Article to be seized under search warrant’ It reads

21(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 the 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 that warrant, or to enter and search any premises identified in that 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 under 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 effected, hand to him a copy of the warrant.

The issue of third respondent's affidavit to the magistrate:

[5] The third respondent presented an affidavit to the fifth respondent for a search and seizure warrant. Pursuant to the warrant having been issued the applicants attorneys, Garlicke & Bousfield Inc addressed a letter dated 14 July 2008 to the Specialised Commercial Crime Unit, Johannesburg for the attention of the Third Respondent. I do not propose to quote the entire letter, but only extracts thereof. This letter is to be found at pages 133-135 of the papers.

Paragraph 4 on the first page reads as follows:

“ Be that as it may at the moment, we write to you to ask that you forthwith supply to us on behalf of our clients, a copy of the affidavit and annexures thereto and all documents placed before the Magistrate who was asked to issue the search warrant in question on the 26th June 2008.

Further on in the same letter at page 2 thereof the writer stated:

" We must therefore urgently ask for the aforesaid documents, namely the affidavit and all other documentation placed before the Magistrate, forming the basis upon which the Magistrate applied his mind to grant the search warrant in question. "

[6] In response to this letter the applicants attorneys were forwarded with an affidavit of the third respondent which appears at pages 111- 116 of the indexed pages (annexure FA11). Notably this 'affidavit' is signed by the commissioner of oaths but not by the deponent the third respondent. Adv Bedhesi SC appearing on behalf of the applicants submitted that the document did not qualify as an affidavit as it was not signed by the deponent.

[7] The record in respect of the issuance of the warrant application was filed and the affidavit of the third respondent is again to be found at pages 235-240 of the papers. Save that this affidavit which is identical to the one referred to in paragraph [6] above bears a signature of the deponent and is date stamped on pages 2, 3 and 5.

[8] Mr Bedhesi submitted that the signature of the deponent appearing at pages 235-240 was inserted after the document was sent to Garlike & Bousfield Inc. and that the document presented to the magistrate lacked the deponent's signature.

[9] Mr Bedesi in his heads of arguments referred to the regulations governing the administration of oaths or affirmation in Government Notice R1258 of 21 July 1972, as amended from time to time, which was promulgated under section 10 of the Commissioner of Oaths Act No16 of 1963 and more particularly section 3(1) which stipulates:

" The deponent shall sign the declaration in the presence of the Commissioner of oaths. "

Furthermore it was held in *S v Msibi* 1974 (4) SA 821 (T) that the provisions of regulation 2(1)(c) (that the deponent be asked whether he or she considers the prescribed oath binding on his or her conscience) are peremptory, and strict compliance thereof is required. See: *The Law of South Africa* [Lawsa] 2nd edition volume 20 at para 132.

[10] Mr Lebala SC appearing on behalf of the Respondents submitted that the Fifth Respondent in his affidavit at pages 140-146 at paragraph 9 thereof stated;

" I refer the Honourable Court to the copies of the application submitted to me on 26/6/08 which is attached hereto and which reflect that it has been signed by the deponent as well as the commissioner

of oaths”

This affidavit is obviously the document appearing at pages 235-240 and not annexure FA11 (page 111). The magistrate conceded that he did not notice the difference in the dates and place where the affidavit was signed at the time when he issued the warrant, however he submits that he considered the application and applied his mind. He concluded that a reasonable suspicion was formed that a invalid pyramid investment scheme was in operation which needed to be investigated.

[11] In *Pullen NO and Others v Waja* 1929 TS 1074 at Tindall J stated:

“ The courts ought to examine the validity of warrants with a jealous regard for the liberty of the subject and his rights to his property and to refuse to recognise as valid a warrant the terms of which are to general ”

[12] Had the warrant only been obtained as a result of the affidavit of third respondent which raised the question whether it was deposed to correctly or not. I would have questioned and in all probability have rejected the warrant as being valid. The reason being that the third respondent’s affidavit created doubt whether the affidavit was deposed to before a commissioner of oaths or not. It raised the question whether there was compliance with the Commissioner of Oaths and Justice of the Peace Act. Judeel’s affidavit which was presented to the magistrate in order to obtain a warrant was accompanied by the affidavit of Mpoti Susan Maweca (annexure FA13). Her affidavit stated how the alleged offence(s) were effected. The information she parted to the third respondent created a reasonable suspicion that documents relating to the offences could possibly be found at the addresses the warrants were sought for.

In *Van der Merwe v Minister van Justisie en ‘n Ander* 1995 (2) SACR 471 (O) at 486 f-h the court held that hearsay evidence may be adequate to obtain a warrant if it is reliable. Section 21 merely states that there must be evidence under oath and in this matter the evidence of Susan Mpoti was in the form of an affidavit. I therefore need not have to make any decision regarding the issue whether the document signed by the third respondent was a statement or an affidavit.

[13] In my view even if I were to find that the affidavit of third respondent is tainted I find that the affidavit of Mpoti Susan Maweca resuscitated the validity of the issuance of the warrant.

In *Powell N.O. & Others v Van der Merwe and Others* 2005(1) SACR 317 SCA at 326i- 327b at para [14] the court held that:

“ What is clear however, is that to launch a preparatory investigation the investigating director must have, at least a suspicion that some form of offence [or an attempt] is being or has been committed.

There may be uncertainty about the fact of the offence or about the categorisation or about the nature and strength of the evidence for it. But an offence there must be and one is that capable of constituting a specified offence.

The reason being that section 21 of the CPA does not prescribe that the affidavit must be from the investigating officer. It states that

“the magistrate or justice from information under oath” may issue a warrant. Such a warrant must be issued on reasonable grounds. The fourth and fifth respondents in the determination of issuing the warrants were entitled to take into account those factors which would lead them to reasonable believe that an offence is being committed and that documents may be at the premises for which a search and seizure warrant is being sought. See *Minister of Law and Order v Dempsey* 1988 (3) SA 19(A)

[14] The warrant was also attacked on the basis that the magistrates did not apply their minds properly in that they authorised that the warrants could be effected at night “*up to 22 h 00*” and that 17 policemen were permitted to conduct the search and seize documents from the premises.

Section 21 (3)(a) stipulates that a “*search warrant shall be executed by day, unless the person issuing the warrant in writing authorizes the execution thereof by night*” (my underlining). Generally speaking warrants are to be executed during daylight hours, however, the section permits a magistrate or justice to extend the period of the search- see *Young and Another v Minister of Safety and Security and Others* 2005 (2) SACR 437 (SEC) paragraph [30],

Where a warrant is to be executed after sunset the magistrate or justice must in writing authorise on the warrant the time up to which the search and seizure process may continue to.

This should always be done with a view that the privacy of people and their homes are not unduly invaded.

[15] The restriction regarding the search was placed up to 22h00, this in itself suggest that the magistrate was alive to the fact that he did not want the search to endure beyond that time or into the early hours of the morning prior to sunrise.

[16] The applicants also submitted that by allowing 17 people to conduct the search the magistrate did not exercise his mind when he authorised the search warrant, i was told that there were myriad pages of documents which were seized. Common sense suggest that if fewer people had done the search the process would in all probability have taken longer. As the saying goes many hands make light work. On the other hand the greater the number of people conducting the search there would be more activity at the premises. I believe that by permitting as many as 17 persons to conduct the search it per se did not render the granting of

the warrant nugatory. The CPA does not prescribe or place a limit on the number of persons who may assist in such an operation. The fundamental issue is that the search must be conducted with dignity and decorum and must not be an affront to the person and / or his property.

[17] The fact that 17 policeman were named in the warrant does not imply that all of them were utilised to conduct the search.

It merely implies that no more than 17 person may traverse the premises. This number signifies that some or all of those named persons were permitted to attend the premises. The third respondent could use some of the members listed to assist him; or he could have utilised all those members listed to assist and others to back them up for security reasons. All those named would not necessarily be involved with the search and seizure process in the strict sense thereof. On the other hand the third respondent could have utilised some of the named persons who were on duty at the time whilst other members may have been off work or busy with other duties.

[18] Mr Bedhesi also raised a point that the magistrate who issued the warrant failed to take into account that the third respondent did not even allude to an offence in his affidavit. He refers to a passage from the third respondent's affidavit wherein the following is stated:

“ The reason for the search warrant is to search the premises as mentioned in annexure 'A' to obtain all documents as mentioned in annexure B' to prove that the agent and/or Young Star Investments did went (sic) into a contract with the complainant and that complainants money was paid over to them as reflecting in their bank statements. ”

[19] The third respondent attached the affidavit of the complainants in order to obtain the search warrant. At page 238 of the papers at paragraphs 5 and 6 thereof stated “ *As the investigating officer in this matter and out of the affidavits of the complainants that was obtained they feel that the agent in this matter and/or the company called Young Star / Double Star Investments CC made a misrepresentation to them by putting them under the impression that if they invest money with the company they will receive a profit as mentioned in the agreement knowing that they will not receive the profit.*

Member (sic) of the public lost the following amount as a direct result of the actions of the agent and/or the company

called Young Star / Double Investment CC in total an amount ± R104 000 000.00”

Section 21 of the CPA stipulates that an affidavit in support of a warrant must state the offence committed or reasonably suspected to have been committed. The requirement is one of reasonableness and no higher such

as beyond doubt.

See *Powell's matter supra* at paragraph [13] above;

Shidiack v Union Government 1912 AD 642 at 651 and *Beukes v Director General, Department of Manpower & Others* 1993 (1) SA 19 (C) at 29A.

[20] The affidavit in support of a search warrant need not disclose all material facts. See *Thint (Pty) Ltd v National Director of Public Prosecutions* 2009 (1) SA 1 CC at 62 para [129],

[21] In conclusion it is not necessary for me to determine the issue of whether the third respondent's affidavit complied with the Commissioner of Oaths and Justice of the Peace Act.

Mr Bedhesi submitted that the affidavit which was sent to the applicants attorneys was not deposed to and that the discrepancies relating to the date and place where the document was signed in all probability was not a document which was made “*under oath*” and therefore did not comply with the provisions of section 21 of the CPA. Even if I were to accept that Mr Bedhesi is correct for the purposes of argument this does not assist the applicants as there were other statements under oath.

For the same reason I need not pronounce upon the argument alluded to by Mr Lebala that the affidavit of the third respondent complied in substance with the tenure of the CPA and not possibly with form.

[22] The applicants application is premised on the belief that the third respondent's statement was not made under oath and therefore the magistrate's did not apply their mind when they authorised the warrants.

[23] I accordingly am of the view for the reasons set out above that the application should be dismissed with cost. Such costs to include the costs of two counsel.

Appearances:

For the Applicants : Adv Bedhesi SC assisted by Adv M Zulu

Instructed by Garlicke and Bousfield c/o

DMR Attorneys Pretoria.

For the First and third Respondents: Adv Lebala SC assisted by Adv I P Ngobese

instructed by the State Attorneys, Pretoria.

Judgment delivered : 1 April 2010