

/EVDM

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)

6/8/2010

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

DATE 6/8/2010

SIGNATURE

Case Number: 19440/2010

Case Number: 19758/2010

REGISTRAR OF THE NORTH GAUTENG
HIGH COURT, PRETORIA

PRIVATE BAG/PRIVAATSAK X67
JUDGE'S SECRETARY

2010 -08- 06

REGTERS KLERK
PRETORIA 0001

GRIFFIER VAN DIE NOORD GAUTENG
HOE HOF, PRETORIA

In the matter between:

GREENWOODS NO. 25CC

1ST APPLICANT

VS

THE LEARNED MAGISTRATE YVONNE NONG
INSPECTOR F. J. NEPGEN
DIRECTOR OF PUBLIC PROSECUTIONS – NORTH
GAUTENG HIGH COURT (PRETORIA)
MINISTER OF SAFETY & SECURITY
KOBUS HATTINGH
PROFERRO CC

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT
6TH RESPONDENT

JUDGMENT

Matter heard on: 18 June 2010

Delivered on: 6 August 2010

POTTERILL J,

1. The applicant is applying under both case numbers 19440/2010 and 19758/2010 for the setting aside of search warrants granted by the first respondent (Magistrate Nong) on respectively 5 (sic) November 2007 and 23 September 2008. The court is also requested to direct that all the objects/items seized from the Applicant's premises on 5 (sic) November 2007 and 23 September 2008 be restored forthwith to the Applicant. A declaratory order is also sought that the search and seizures carried out on 5 (sic) November 2007 and 23 September 2008 were unlawful. It is in fact common cause that the warrant in November 2007 was granted on the sixth and not the fifth.
2. The first respondent is the Magistrate who authorized the warrants. The second respondent is the Inspector who applied for and executed the warrants. The third and fourth respondents are respectively the Director of Public Prosecutions and the Minister of Safety and Security. The fifth respondent is Kobus Hattingh, the person averring that the applicant was counterfeiting goods to which copyright attached and the copyright vests in him and/ or Proferro. At the commencement of the application Proferro CC was joined, without opposition, by the applicant as sixth respondent. Ms Khatri represented the first to fourth respondents and Mr Michau appeared for fifth respondent. Mr Omar assisted by Ms Naidoo acted for the applicant.

On the 5th day of September 2007 Mr Jacobus Christiaan Hattingh, a member of Proferro CC deposed to a complaint affidavit. Paragraph 4.1 sets out the core of the complaint:

"The works which Proferro and I, contend are being counterfeited by Just Africa and/or Mr Cassim, are works that are the subject of copyright, which copyright vests in Proferro. More particularly, these are statutes which, I am advised, qualify as artistic works in terms of the provisions of the Copyright Act 98 of 1978("the Copyright Act")."

In paragraphs 10-13 of this affidavit he sets out how his sculptures are made. In paragraph 14 he sets out the history between Proferro and Just Africa/Greenwoods CC and Mr Cassim. In paragraphs 14.3 and 14.4 he states: "...several incidents occurred which led me to believe that Just Africa (aided and assisted by Mr Omar and Mr Cassim) were copying the animal sculptures that Proferro had sold then. I questioned them about it and they vehemently denied that they were doing so and assured me that they would not do so. My suspicions were however confirmed some time during 1994, when they brought to me three statutes of a tortoise for repair and in order for them to be "repainted". According to Mr Cassim and Mr Omar, someone had spilled something on these tortoise statutes which had damaged the paint; Mr Omar and Mr Cassim were however blissfully unaware that I had made the tortoises that Proferro had sold to them by pigmenting the material used in the sculpture in unique fashion and that I had not painted the tortoises. It was therefore clear to me that they had used the tortoise

statutes that I had sold them in order to make a mould of their own and thereby copying the statute."

In paragraphs 17 -21 he then sets out specific instances whereby Just Africa and Mr Cassim have infringed the copyrighted works of Proferro and have made counterfeit copies of those works. He then requested the necessary search warrant to be granted in terms of Section 6 of the Counterfeit Goods Act, Act No 37 of 1997 (herein after referred to as the CGA) and that the search warrant is executed. There was also an affidavit by Ms Marilyn Krige, from the firm Adams and Adams, the legal representative of the fifth respondent. Inspector Nepgen deposed to an affidavit in support of the application for the warrant on suspicion that an act of counterfeiting was being committed. He executed the warrant in the presence of Mr Cassim.

On 14 July 2008 a further complaint was laid by Marilyn Krige, an admitted attorney of Adams and Adams as attorney of record for Proferro CC. The complaint resulted in a warrant being issued in terms of Section 6 as read with Sections 4 and 5 of the CGA. In the complaint it is averred that Jacobus Christiaan Hattingh created original artistic works, being sculptures of various animals. The copyright works were created by Hattingh, the fifth respondent, in the course and scope of his employment with the sixth respondent, Proferro CC. In this complaint reference is made to the search and seizure operation that was carried out at the premises of Just Africa, being a trading style of the applicant, on 6 November 2007. In paragraph 8.2 of this complaint it

is averred that despite the operation taken in 2007 further investigation revealed that the applicant continued to manufacture and deal in the offending sculptures.

The complainant accordingly requested a fresh application for a search and seizure warrant.

Inspector Nepgen then deposed to an affidavit and applied to the Magistrate in Brits to have the warrant issued. The warrant was granted on 1 August 2008. This warrant was cancelled on the request of the attorney, Ms Krige, whom informed him that she intended making an affidavit supplementing the original affidavit. This was done on 20 August 2008. The two affidavits of Ms Krige and his own affidavit were placed before the magistrate. The magistrate then granted the warrant. The warrant was executed on 23 September 2008.

5. Mr Omar placed much emphasis on the new constitutional jurisprudence. It was argued that despite the CGA being promulgated three years after 1994, the right to privacy is invaded and I am to apply section 39(2) of the Constitution when interpreting this act; this speaks for itself.
6. Ms Naidoo argued that the warrants should not have been granted *ex parte* as there was no inherent risk that the goods would be destroyed or disposed off. The purpose of these search and seizures were to prevent any further dealings in counterfeit goods. There is no provision in the CGA that notice must be given to the affected party. There is

always the distinct danger that the object of the search and seizure would be defeated if notice is given. In **Zuma v National Director of Public Prosecutions** 2009(1) SA 1 CC at paragraph 98 it was found:

"...It may well be that the more serious the crime, the more likely it will be that suspects or their associates will remove or destroy incriminating evidence. In the absence of such inherent risk, a judicial officer may justifiably require notification of the party to be searched, for the Act does not preclude this. However, in the ordinary course, the provision of notice to affected parties has the potential to frustrate the purpose of the detection and investigation of serious, complex and organised crimes, evidence of which is often to be found in documentary form or stored on computers, which can be easily destroyed or altered."

I am satisfied that on the facts set out in both complaints there was no need to give the applicant notice of the applications.

7. Ms Naidoo also argued that the interrogation procedure in terms of s5(1)(f) of the CGA should have been utilized and not the search and seizure procedure. This was because the fifth respondent is a competitor of the applicant and they had a long standing dispute. Section 5(1)(f) is not a separate procedure to search and seizure. It is in fact one of the powers of an inspector only granted acting on the authority of and in accordance with a warrant issued for search and seizure. This submission is thus rejected.

8. The applicant argued that the applicant does not have the onus to persuade this court that the relief should not have been granted against the Applicant. He argued that the onus stays on the respondents that they were entitled to the warrants. This argument is flawed in so far as that the applicant has the onus to prove that he is entitled to the relief claimed in the notice of motion; this is so even if the onus rested on the respondents. The principle as set out in **Plascon Evans Paints v Van Riebeeck Paints (Pty) Ltd** 1984(3) SA 623 (A) has to be applied to the application before me.
9. Mr Omar on behalf of the applicant submitted that because the first respondent made no affidavit the affidavit of the applicant must be seen as unchallenged. In support of this contention I was referred to **Toich v Magistrate, Riversdale and Others** 2007 (2) SACR 235 (C) and **The Minister of Safety & Security and Two Others v Mustafa Mahomed and Another**- Western Cape High Court Case no A228/09 delivered on 30 April 2010. I can not find support in the above two matters for the contention that evidence by the Magistrate is peremptory. I agree with the finding of my brother McCall J in **Greenberg And Others v Minister of Safety and Security And Another** BIP 2004 313 at 323 G-H :*"Since the warrants have been executed and the applicants do not seek to review the decisions to issue the warrants, I am of the view that it was, and is, not necessary to cite the magistrate or magistrates and the said Minister, as they have no interest in the issue of a determination of whether the goods seized are in fact counterfeit goods*

and whether they should be returned to the applicants.” This position was confirmed in the matter of **Shoprite Checkers (Pty)Ltd v The Commissioner of the South African Revenue Services and Others** BIP 2008 369 on 373 B-C. There is accordingly no obligation on the Magistrate to file an opposing affidavit. The affidavit in support of the application is challenged by the affidavit of the second respondent.

10 On behalf of the applicant it was also argued that the second respondent had no authority to make the affidavit on behalf of the first, third and fourth respondents and the affidavit must be struck out as inadmissible hearsay evidence. In the replying affidavit [paragraph 7] the following is stated:

“The second respondent is placed to the proof of proving that he is authorized to depose on behalf of the first, third and fourth respondents. The reasons for my denial of this paragraph will appear hereunder.”

The only reason in the replying affidavit is to be found in paragraph 11.2:

“Noteworthy is deponent’s failure to state the source of the information or grounds of belief for his purportedly signing an affidavit on behalf of the 1st, 3rd and 4th respondents.”

Frederick Jacob Nepgen states under oath that he is warrant officer with the commercial crimes unit and employed by the second respondent. In paragraphs 1.3 and 1.4 of the opposing affidavit he states as follows:

"I am duly authorized to depose to this affidavit on behalf of the First, Third and Fourth Respondents in this matter."

Inspector Nepgen refers only to matters within his own knowledge and can swear positively to the facts. No specific authority is required, only the institution of proceedings must be authorized:-**Plettenberg Bay Country Club v Bitou Municipality** 2006(4) ALL SA 395(C). This principle is confirmed in **Gaines And Another v Telecom Namibia Ltd** 2004(3) SA 615 SCA at 624 G-H:

"In my view it is irrelevant whether Hanke had been authorized to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorized by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorized."

In *casu* it must be accepted that the institution of the proceedings was duly authorized because there is no challenge thereof in the application.

In any event the applicant is raising a bare denial of authority and accordingly minimum formal evidence from the respondent is required.

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I find it practical to now deal with the argument that Inspector Nepgen was never asked by the first respondent to produce his certificate of appointment contemplated by the provisions of Section 22(3) of the CGA and the applicant accordingly denies that he has such a certificate. In terms of section 22 the Minister has the power to appoint or designate inspectors. The Minister must issue to an

appointed or designated inspector a certificate. The definition of Inspector reads as follows:

"Inspector means any person who under or by virtue of section 22 has been appointed or designated to be an inspector for the purposes of this Act, as well as-

(a) any police official as defined in section 1(1) of the Criminal Procedure Act, 1977(Act 51 of 1977), holding the rank of sergeant or a higher rank;..."

Inspector Nepgen is a Warrant Officer employed by the Minister of Safety and Security (second respondent) at the commercial crimes unit. He is thus not an inspector by means of being appointed or designated but by virtue of being a police official holding the rank of sergeant or higher. This bare denial by the applicant that the inspector has no certificate is rejected.

12. It was argued that the magistrate did not apply her mind. In the affidavit this bold statement is made without setting out any grounds [paragraphs 30 and 39]. From the bar it was argued that the failure to apply her mind can be inferred from the ticking of the boxes on the roneo forms; on both warrants simply all the boxes are ticked. She should also when approached in 2008 have recalled that in 2007 she had granted a similar warrant and have enquired what happened to the first warrant.

Both these submissions are rejected. On the form whereby Inspector Nepgen was authorized to search and seize in 2008 the first 5 blocks

are ticked, on the form of 2007, the first 6 blocks are ticked. There is nothing untoward in the ticking of all the boxes and it gave effect to the comprehensive complaint affidavits of Mr Hattingh in 2007 and Ms Krige in 2008. The boxes reflect the wording of the CGA. It allows the inspector to enter the premises, inspect the premises, collect or obtain evidence, seize and detain goods and question or take a statement. The boxes ticked authorize a systematic flow of search and seizure provided for in the CGA.

In the affidavit of Ms Krige in 2008 she refers to the fact that despite the 2007- warrant the respondent *in casu* was persisting with the conduct; the magistrate thus knew about the 2007 warrant and why a further one was requested.

Ms Naidoo argued that as the ticks were typed the Magistrate did not choose them herself and accordingly did not apply her mind. In the respective matters the Magistrate had the benefit of the detailed affidavits Mr Hattingh and Ms Krige. The affidavits and photographs clearly apprised her of all the facts and I can not see on what plausible basis it can be argued that she did not apply her mind. The affidavits set out reasonable suspicion. The ticked boxes specify which of the powers contemplated in section 4(1) is to be exercised. In terms of s6 (1) the ticking of the boxes is the manner in which the inspector specifies to the Magistrate which powers are to be utilized, it is not the Magistrate's function. The Magistrate has the duty to ensure that the ticked boxes are not too general, overbroad and reasonably clear. I can

not find that in view of the detail in the complaints she did not fulfil her duty accordingly.

13. In terms of section 3 of the CGA a complaint may be laid by any person representative or the attorney of any such person. Both Mr Hattingh and Ms Krige thus had the right to lay the complaints to Inspector Nepgen and qualify as complainants in terms of the definition of "complainant."
14. A further submission was that if the magistrate had applied her mind she would have required safe-guards to be built in. This she would have done by asking questions relating to the sculptures for example where are the original sculpture etc. All the suggested questions relate to the sculptures and all suggested questions are answered in the comprehensive affidavit and photographs attached to the affidavit of Mr Hattingh. In fact 25 instances are photographed depicting 25 different sculptures made by Proferro and depicting 25 copies thereof sold by Just Africa. These comparisons were sufficient evidence to permit the magistrate on reasonable grounds to believe that an act of dealing in counterfeit goods had taken place and to issue the warrants. I can not find that the Magistrate as custodian of the Constitution did not fulfil her function to safeguard the intrusion subject to the limitations which are reasonable and justifiable in an open and democratic society.

15. Although the affidavit to this application before me avers that there were no material facts before the Magistrate when she granted the application this was not argued before me; simply because this averment is unfounded.

16. The fact that the complaints had photographs attached thereto was attacked. Any information, from which the essential physical and any other distinctive features, elements and characteristics of the alleged counterfeit goods may be ascertained, may be furnished. Photographs are par excellence such information and were confirmed under oath. In the application before me it is never denied that the photographs are what they depict to be.

17. It was argued on behalf of the applicant that the warrants are overbroad and is on the papers only substantiated with the following "*that there is no rational connection between the wide terms of the search warrant and the grounds for justification for such warrant.*" In paragraph 32 of the founding affidavit the only other bold statement is that the respondents did not justify the limitation placed on the applicant by virtue of the warrants. In the applicant's supplementary heads it was argued that the Magistrate should have only authorized a warrant for extraction of evidence or details from the Applicant, not for seizure.

The warrants authorize the following:

"1 Enter the above-mentioned place or premises inspect and search it for suspected counterfeit goods;

- 2 *After entering above-mentioned place or premises, inspect and search it for any other evidence of alleged/suspected acts of dealing in counterfeit goods;*
- 3 *Collect or obtain evidence, including relating documents, relating to the suspected counterfeit goods or the relevant act(s) of dealing in counterfeit goods;*
- 4 *Seize and detain, and where applicable, remove for detention suspected an/or identified counterfeit goods found at, on or in the said place or premises;*
- 5 *Question a person or take down a statement from any person found in possession or in control of the suspected counterfeit goods if it is reasonably suspected that such person can furnish information relating to the dealing in such counterfeit goods"*

On the 2007 warrant there is the added authorization to execute the warrant during the day.

This search and seizure is done in terms of Section 6(1) read with sections 4(2) and 5(1) of the CGA. The purpose of these sections are to confer on inspectors and certain members of the South African Police Service upon having obtained a warrant to enter premises and there to search for, and if found, to seize and remove suspected counterfeit goods for detention pending the finalisation of civil or criminal proceedings to be instituted.

This is exactly what happened in this matter. The civil trial was set down for 8 March 2010, but on 5 March 2010 the applicant in casu requested a postponement. The matter was postponed but leave was

granted to apply for a preferential date. The civil trials were then set down for 8 days to commence on 26 May 2010. On 8 May 2010 the applicant in casu issued the current applications as urgent applications. The applicant then unilaterally removed those applications without tendering the costs. At the commencement of the trials it was ordered that these applications first be heard. The applicant accordingly now, respectively 2 and 3 years after the warrants were executed is prior to trial now requesting that the warrants be set aside.

Against this background these search and seizures must be scrutinized to ascertain whether they constitute a reasonable and necessary limitation on Section 14 of the Constitution and the right to privacy. The test whether a warrant is too general or overbroad must be objectively assessed by ascertaining whether the warrant is reasonably intelligible, i.e. will the inspector and the inspected understand the ambit of the search.

The warrants did not go beyond what the CGA permits. On reading both warrants in the terms expressed Inspector Neppen must at Just Africa Stand 240 Damdoryn execute the warrant on reasonable suspicion of dealing in Counterfeit Goods. They enter the premises, they inspect and search for counterfeit, or suspected counterfeit goods and those goods are seized pending a civil or criminal trial. The ambit of the warrants terms is not too wide. Applying all the principles as set out in **Powell N O and Others v Van der Merwe N O and Others** 2005(5)SA 62 (SCA) I can not find the warrants were too general. It

was argued that three truck loads of goods were seized in 2007 and it was invasive to the applicant's business. On the facts the applicant, after the first warrant, without an application to set the warrant aside carries on with his business. A year later he went through the same search and seizure procedure; these search and seizures seemingly did not frustrate his business and was not so general as to close his business activities.

18. Another argument was that on the warrants issued the magistrate had no authority to empower on the 2007-warrant Mr Hattingh, Ms Krige, Ms Louw and Mr Moolla to assist the Inspector. The same argument on the 2008-warrant was raised against the presence of Ms Krige, Mr Moolla, Ms A Louw, Mr Hattingh and Ms M Oosthuizen.

In terms of s6(9) the inspector when undertaking any search for and inspection and seizure may be assisted by the complainant or any other knowledgeable person in identifying the goods. Ms Krige and Mr Hattingh was the respective complainants and were entitled to be there. The other persons are all from the office of Adams and Adams and as attorneys or article clerks have a workable knowledge of the CGA and counterfeit goods. I can not find that the warrants must be set aside on such argument.

19. The high water mark of the applicant's argument was that the peremptory statutory provisions of the CGA were not complied with. If this is found to be correct it would be good argument because in the

words of Cameron JA in the Powell-matter supra at paragraph [59] ...*"the courts examine their [warrants] validity with a jealous regard for the liberty of the subject and his or her rights to privacy and property;"* Rule 6 of the Supreme Court Act, 59 of 1959, requires that the affidavit attached to the notice of motion set out the facts upon which the applicant relies for relief. In the founding affidavits [paragraph 46] only the following is averred:

- "i) Section 5(4)(a) of Act 37 of 1997. I never received notice of the application contemplated in this Section. The records at the offices of the 1st Respondent do not reveal that the application contemplated therein was pursued;*
- ii) Section 7(1) of Act 37 of 1997;*
- iii) Section 7(2)(a) of Act 37 of 1997;*
- iv) Section 9(1) & (2) of Act 37 of 1997."*

The respondents correctly submitted that paragraph 46 does not set out the facts relied upon. The respondents were accordingly left in the dark as to how the provisions were not complied with when compiling their answering affidavits. In the applicant's replying affidavits there is then an attempt to set out some detail. Despite the applicant's procedural and substantive failure to set out facts, only attempting to do so in the replying affidavits, these points were argued. The matters needed to be finalized pending the civil trials.

20. Mr Omar did not address me on Section 5(4)(a) of the CGA; I think for the simple reason that Section 5 was in these matters not applicable and I accordingly need not address it.

21. The applicant further contended that section 7(1) and 7(2) of the CGA were not complied with. It was argued that respondents did not show compliance with Section 7(1) (d) of the CGA because the complainant was not within 72 hours after the seizure furnished with an inventory. I reject this contention because there is no such factual allegation under oath before this court to support such a submission. How does the applicant know that the complainants were not furnished with an inventory? No factual allegations were made in the founding affidavit to which the complainants/respondents could react. Mr Omar assumes this because Annexures AC8 do not contain the signature of the complainants. The heading on AC8 is "*Section 7(1)(d) Notice (Seizure Notice) to suspect*"; the complainants signature will not be on AC8 as it is the notice in terms of s7(1)(d) to the suspect, not the notice to the complainant. I thus accept the respondents version that they did comply with section 7(1)(d).

A court's jealous regard of the validity of the warrants relates to the subjects that were searched and his/her or its privacy and property, and not the complainant's rights. It would be unhealthy jealousy declaring warrants invalid because the "searched" is complaining, on no factual basis, that the complainant did not receive an inventory.

It is also submitted that the respondents did not reveal compliance with the provisions of Section 7(2)(a) of the CGA which reads as follows:

"(2) In any notice in terms of subsection (1)(d) that is issued-

- (a) to the complainant, the complainant must be notified of his or her right by virtue of section 9(1)(a) to lay a criminal charge, not later than three days after the date of the notice, against the person from whom those goods were seized (hereafter called the suspect)."*

Once again in the founding affidavits the fact that the complainant did not receive such notices is not averred and the respondents deny that they did not comply with section 7(2)(a). If the applicant argues that there was non-compliance with s7(2)(a) then to be successful in his applications he must prove that there was non-compliance; he can not shift the burden to the respondents. There is no averment that the applicant knew that there was no notice in terms of s7(2)(a) brought to the attention of the complainants.

In terms of s7(1)(d)(i) and 7(1)(d)(i) and 7(d)(ii)(aa) a notice is to be given to *"the person from whom those goods were seized: and also the complainant, where the inspector exercised his or her powers in terms of section 4(1) pursuant to a complaint laid in terms of section 3(1)"*

There are thus two notices required and Annexures AC8 is the notice to the person from whom the goods were seized and not the notice sent to the complainants. From this notice no inference can be made that no notice was given to the complainants.

The applicant also argues that the respondents did not comply with sections 9(1)(a) & 9(1)(b) of the CGA. The heading of section 9 reads:

"Seized goods to be released if criminal investigation or criminal or civil proceedings not contemplated against suspect."

"9(1)(a) Where suspected counterfeit goods have been seized by an inspector in terms of section 4(1), the complainant or prospective complainant (as the case may be) if he or she wishes to lay a criminal charge against the suspect with the South African Police Service for having committed an offence referred to in section 2(2) and request that a criminal investigation into the matter be undertaken, must do so not later than three days after the date of the notice referred to in section 7(2).

(b) If, upon the expiry of that three day period, a criminal charge has not so been laid, the relevant seized goods must be released to the suspect, subject to subsection (2)

Section 9(2) Subject to subsection (3), goods seized in terms of section 4(1) must be released to the suspect also-

(a)(i) if the State fails within 10 working days after the date of the notice given to the suspect in terms of paragraph (d) (i) of section 7(1) to inform the suspect, by further written notice, of its intention to institute a criminal prosecution against him or her for having committed an offence referred to in section 2(2) and

(ii) if any person to whom notice has been given in terms of paragraph (d)(ii) of section 7(1) fails within 10 working days after the date of that notice to inform the suspect, by further written notice, of the person's

intention to institute against the suspect civil proceedings founded on act of dealing in counterfeit goods on the part of the suspect; or"

In both the founding affidavits no facts as to why there was non-compliance with Section 9(1) & (2) are set out. In paragraph 38.5 of Mr Moolla's answering affidavit (2007 and 2008-application) he states the following:

"There is no indication as to why the provisions of Section 9(1) & (2) of the CGA were allegedly not complied with. I attach and mark Annexure "AA8" copies of the letters addressed to the Applicant indicating that the civil matter would proceed."

In paragraph 29.8 of the answering affidavit (2007 & 2008-applications) Inspector Nepgen denies that there was non-compliance with s9(1). In Paragraphs 29.8 and 29.9 he states:

" Section 9(2) has also been complied with. I attach hereto as Annexure "FJN5" a copy of the notice to the Applicant of the State's intention to institute criminal proceedings. Proferro also timeously instituted civil proceedings against inter alia the Applicant and Mr Cassim. In the premises, all of the allegations are denied.

In the replying affidavits to the 1-4th respondents opposing affidavits the applicant in paragraphs 36.11, 36.12, 36.13 & 36.14 affirmed to the following:

"The complainant (5th respondent) was required by the provisions of Section 9(1)(a) to request a criminal investigation against the Applicant not later than three days after the notice referred to in Section 7(2) of the "CGA." Respondents, more specifically the 5th Respondent has not

revealed compliance with the three day period provided for by Section 9(1)(a) of the "CGA."

"FJN5 to the 1st-4th Respondents answering affidavit is dated 8th October 2008. "FJNS" dated 8th October 2008 is approximately one year after the search/seizure operation at Applicant's business premises on the 6th November 2007. Section 9(2) prescribes that the notice contemplated by the provisions of Section 9(2)(a)(i) of the "CGA" must be given to the Applicant /I within ten working days of compliance with the provisions of Section 7(1)(d) of the "CGA." Respondents purported compliance with Section 7(1)(d) of the "CGA" is the 6th November 2007. The date 8th October 2008 on "FJN5" clearly emasculates compliance with the provisions of Section 9(2)(a)(i) of the "CGA."

I deny that the Applicant received "FJN5". The space for the date and the signature of Applicant/I on "FJN5" is conspicuously incomplete. "FJN5" in any event does not follow upon the search on 6th November 2007 but rather the search of the 23rd September 2008.

The fax transmission report on annexure "FJN5" reveals date of dispatch to be the 8th October 2008. Section 9(2)(a)(1) does not contemplate the notice referred to therein being faxed."

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In essence section 9 requires that the suspect be informed of criminal and civil proceedings within time-frames and if not complied with the goods seized in terms of section 4(1) must be released to the suspect.

Just as the Court will ensure that justice is served by scrutinizing the warrant to ensure the suspects rights, a Court will not tolerate shots in the dark by any party. The applicant does not know whether the complainant within three days after the date of the notice in terms of section 7(2) requested a criminal investigation. In both applications it is denied by the respondents' that they did not comply with rule 9(2). If the applicant makes these averments he must lay a factual foundation, none is laid and this submission is rejected. I accept there was compliance with rule 9(2).

As for giving notices of criminal prosecutions Annexures FJN4 (2007-warrant) and FJN5 (2008-warrant) show prima facie compliance with Section 9(2)(a)(i) of the CGA, i.e. written notices to the suspect within 10 working days of criminal prosecutions. The respondent for the first time in the replying affidavit denies that he received FJN5. These notices have provision for the suspect to acknowledge receipt of the written notice and whereas on FJN4 the suspect signed acknowledgment, on FJN5 he did not acknowledge receipt of the notice. It is also argued that notification by fax is not permitted. On FJN5 there is a fax transmission report indicating the time, date and number to which the notice was faxed and that the transmission went through. The applicant can not for the first time in the replying affidavit make the bold statement that he did not receive the fax. He is not prepared to say that it is not his fax number or employees did not hand it over to him or any other fact to substantiate this bold averment. I

accordingly accept the respondent's version that the applicant was "informed by written notice" as required by section 9.

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The applicant argues that there was non-compliance with section 9(2)(a) pertaining to the warrants.

Annexure AA8 is a complaint affidavit by Marilyn Krige, duly authorized, whereby the applicant is informed that Proferro CC intended to pursue the criminal matter. The affidavit is attested to on 26 September 2008. AA9 is written notice from M Krige, duly authorized, on a letterhead of Adams & Adams to the applicant informing the applicant that Proferro CC intended to institute civil proceedings. The letter is dated 8 September 2008. Attached thereto is a fax confirmation that the letter was sent on "10/8/2008 10:13:00AM." A further Annexure with the heading "Mail Envelope Properties" is attached to AA9. It sets out the date of creation as being "08 October 2008 10:02:10" and the date and time delivered as being "08 October 2008 10:02:10."

Mr Omar argued that AA9 is clearly a misrepresentation and that this document was falsified. On the other hand it was argued that it pertained to the 2007-warrant, thus rendering it out of time; instead of the applicant being informed 10 working days after the notice in s7(1), it was done approximately a year later.

The argument that AA9 refers to the 2007-warrant is rejected. Annexure AA8 pertaining to the 2007-warrant is an affidavit by Ms Krige, duly authorized, attested to on the 9th of November 2007 informing the applicant that the complainant intended to proceed with

criminal proceedings. Annexure AA8 on the 2007-warrant is a letter written on an Adams and Adams letterhead whereby the applicant was informed that the complainant intended to institute civil proceedings against him. The letter is dated 20 November 2007 and a fax confirmation sheet is attached reflecting the date of transmission as 20 November 2007 at 8:28. The letter was faxed to Mr du Plessis, the applicant's then attorney of record. AA9 attached to the 2008 warrant has no application to the 2007-warrant and any such version of the applicant is rejected and respondents' version is accepted.

26. The serious allegation that a firm of attorneys would falsify a document is also rejected. The argument of Mr Michau is accepted that the date of AA9 (2008-warrant) being reflected as 8 September 2008 is a typographical error and should be 8 October 2008 is accepted. This can be deduced from the correct date on the fax confirmation and Mail Envelope properties; 8 October 2008. If the firm had falsified the document, which I reject, then on probabilities they surely would have done a better job!

I accordingly find that all the provisions of section 9(1) and 9(2)(a) were complied with.

27. The applicant put no facts before the court as to why section 9(2) (b) and (c) were not complied with. With no facts before me the respondents' version is accepted that in both matters there were compliance with s9 (2)(b) & (c).

28. I was after the recess period presented with a letter emanating from the office of Mr Omar. Apparently further argument pertaining to the costs of 11 May 2010 was made. Judgment was already written during the recess and accordingly the content of the letter was not entertained. It would also have been unethical to entertain it because it was not sent to the respondents for their further attention.

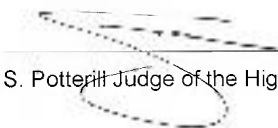
During the hearing I was addressed on the costs of 11 May 2010. The matters were placed on the urgent roll by the applicant and removed after opposing affidavits were filed. It was unilaterally removed by the applicant without tendering the costs. The applicant should have tendered the costs as is normal practice. Mr Omar could not convince me with any argument why the normal principle should not be applied.

29. I accordingly make the following order:

29.1 Both the applications under respective case numbers 19440/10 and 19758 /10 are dismissed.

29.2 The applicant is to carry the costs of both applications.

29.3 The applicant is to carry the wasted costs, if any, of 11 May 2010.


S. Potlatch Judge of the High Court

Matter heard on: 18 June 2010

Delivered on: 6 August 2010

Attorneys for the Applicant:

Mr. Omar & Mr. Naidoo

ZEHIR OMAR ATTORNEYS.

c/o FRIEDLAND HART SOLOMON & NICOLSON ATTORNEYS.

Monument Park.

Pretoria.

012 424 0200

(Ref: T VAN STRAATEN/CB)

Attorneys for the 1st, 2nd, 3rd & 4th Respondents:

Mr. Khatri

THE STATE ATTORNEYS.

Manaka Heights.

Pretoria.

012 309 1500

(Ref: 2040/2010/Z5 – JJ LE ROUX)

Attorneys for the 5th & 6th Respondents

Mr. Michan

ADAMS & ADAMS ATTORNEYS

Hatfield.

Pretoria.

012 481 1500

(Ref: M MOOLA/LO124811500)