

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: B4176/23

(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	
(3) REVISED: YES/NO	
22/11/2024	
DATE	SIGNATURE

POLICE AND PRISONS CIVIL RIGHTS UNION

First Applicant

**ZISAMELE CEBEKHULU N.O: THE PRESIDENT POLICE
AND PRISONS CIVIL RIGHTS UNION**

Second Applicant

**JEFF DLADLA N.O: THE SECRETARY GENERAL
POLICE AND PRISONS CIVIL RIGHTS UNION**

Third Applicant

**THULANI NTSELE N.O: THE TREASURE
POLICE AND PRISONS CIVIL RIGHTS UNION**

Fourth Applicant

and

THE MINISTER OF POLICE

First Respondent

THE ACTING COMPONENT HEAD:
SERIOUS CORRUPTION INVESTIGATION
DIRECTORATE FOR PRIORITY CRIMES
INVESTIGATION – MAJOR GENERAL ZA BASI

Second Respondent

CAPTAIN MPHOFA PATRICIA MAGETSE

Third Respondent

LT COL ESTHER MAKGAMATHA

Fourth Respondent

LT COL LUDI SCHENELLE

Fifth Respondent

JUDGMENT - LEAVE TO APPEAL

FRANCIS-SUBBIAH J:

- [1] This is an application for leave to appeal. The application for the setting aside of a search and seizure warrant granted by a judge in chambers was considered and dismissed in the urgent court.
- [2] It is trite that an application for leave to appeal in terms of Section 17 of the Superior Courts Act, 10 of 2013 must satisfy the Court that there is a reasonable prospect of success that a Court will find differently or that there are some other compelling reasons to grant leave. The prospects of success must be strong, it is not a mere possibility that a higher court would issue a different order. The

Supreme Court of Appeal enunciated the correct approach for a leave to appeal consideration in **S v Smith** [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7 where this Court held as follows:

“What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

- [3] The present matter is based on the same facts and cause of action in the matter under case B4177/23 when both applications for the search and seizure warrant was considered by Miller, J on 16 October 2023. In B4177/23 it was conceded that the application was brought in terms of section 29(1)(a) of the Cyber Crimes Act, 19 of 2020. In the current matter the facts reveal that the payments made for the immovable property and motorcycle on behalf of Mr Nsele was made through Electronic Financial Transactions (EFT) from the Moribo Wa Africa account, using the money from POPCRU. These facts suggest a suspicion of cybercrime, which is defined as ‘using a computer to further illegal ends such as

fraud' however the applicant submits that the application for the search warrant was not in terms of this statutory provision and therefore leave to appeal should be granted on this ground alone.

- [4] The central part of the reasoning in the main judgment was based on the exercise of a judicial discretion of a judicial officer. Langa DP, considered the judicial discretion of a judicial officer when authorising a warrant in *The Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and others* (CCT1/00) [2000] ZACC 12; 2000 (10) BCLR 1079; 2001 (1) SA 545 (CC) (25 August 2000) and held at para 52 as follows:

“... The warrant may only be issued where the judicial officer has concluded that there is a reasonable suspicion that such an offence has been committed, that there are reasonable grounds to believe that objects connected with an investigation into that suspected offence may be found on the relevant premises, and in the exercise of his or her discretion, the judicial officer considers it appropriate to issue a search warrant. These are considerable safeguards protecting the right to privacy of individuals in my view the scope of the limitation of the right to privacy is therefore narrow.”

- [5] The application to a Judge in chambers for the search and seizure warrant was supported by an affidavit of Captain Magetse, who is a police official stationed at the Directorate for Priority Crime Investigation and attached to the Serious Corruption Investigation component. The affidavit explained that the purpose of

the warrant was to search and seize the items needed for the purpose of the investigation and not to determine the veracity of the allegations concerning the commission of the offence. In paragraphs 5 and 6 of her affidavit, it details the involvement and activities which point to the alleged commission of the offences of corruption and money laundering.

- [6] It follows therefore, that a reasonable suspicion that an offence has been committed is made out in the application and was sufficient and appropriate for the granting of a search and seizure warrant.
- [7] It is evident that in having a search and seizure warrant set aside the court must consider whether the issuing officer had considered the appropriate issues. In ***Van der Merwe v Minister van Justisie en 'n Ander*** 1995 (2) SACR 471 (O) the court correctly observes that the onus rests on the applicant to show that the issuing officer had not directed his mind to the matter. There are, however, no submissions in the applicant's papers that demonstrate Miller, J had not directed his mind to the matter at hand.
- [8] Therefore the applicant's complaint that the search and seizure warrant used was not issued by a magistrate or "justice of the peace" as contemplated in the empowering section, that a Judge of the High Court is not included in the definition of "justice" in section 21 of the Criminal Procedure Act, 51 of 1977 is unconvincing. It is trite that the application was made to a sitting judge, who is

moreover, a competent authority to exercise a judicial discretion to grant a warrant for the seizure of articles. The necessary implication to exclude the judicial discretion of a sitting judge in chambers implies that the judicial discretion of a judge is inferior to a magistrate and justice of the peace. The applicant's submission misses the objective view that the warrant was authorised by a competent authority – a sitting Judge exercising a judicial discretion as the main *ratio decidendi* of the judgment.

- [9] In addition, Section 21 of the Superior Courts Act 10 of 2013 empowers the High Court with wide powers to determine all causes of action within its area of jurisdiction. Section 21 (1) of this Act provides that:

“A Division has jurisdiction over all persons residing or being in, and in relation to all causes of action and all offences triable within, its area of jurisdiction and all matters of which it may according to law take cognizance, and has the power-
.....”

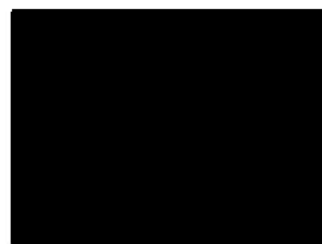
- [10] Where the Magistrate Court is given statutory jurisdiction does it oust the jurisdiction of the High Court. In the case of ***Robinson v BRE Engineering CC*** 1987 (3) SA 140 (C), it bears some resemblance to the present one. In this case, the question was whether section 7 of the Close Corporations Act, 69 of 1984 which gave jurisdiction to a Magistrate's Court over matters concerning a close corporation, including liquidations, ousted the jurisdiction of the High Court. Seligson AJ held as follows:

"It is furthermore a well-established rule of statutory construction that there is a strong presumption against legislative ouster or interference with the jurisdiction of courts of law and that a clear legislative provision is required to displace this presumption. See **Lenz Township Co (Pty) Ltd v Lorentz NO en Andere** 1961 (2) SA 450 (A) at 455 B; **Steyn Die Uitleg van Wette** 5th Ed at 78-9"

- [11] In addition to the High Court having wide powers of jurisdiction, the substantive issues in this matter had been considered by the Judge in chambers and on these facts I found in the main judgment that it serves the interest of justice.
- [12] Subsequent to the dismissal of the present matter in the urgent court, it was re-enrolled for re-consideration by the second urgent court where it was subsequently dismissed. Both sides agree that as the matter was re-considered, it may have become moot before this court. For all the aforesaid reasons I find that a court of appeal could not reasonably arrive at a different conclusion on the same facts as heard in this matter. The prospects of success on appeal are remote and do not have a realistic chance of succeeding. There are no dispassionate and rational basis for prospects of success on appeal. The applicant has failed to satisfy that it will be reasonably successful in another court. Further, there is no compelling reason why costs should not follow the result.

[13] The following order is made:

The application for leave to appeal is dismissed with costs.



R FRANCIS-SUBBIAH

JUDGE OF THE HIGH COURT, PRETORIA

This judgment has been delivered by uploading it to the court online digital data base of the Gauteng Division, Pretoria and by e-mail to the attorneys of record of the parties. The deemed date for delivery is 22 January 2024.

APPEARANCES:

FOR THE APPLICANT:
INSTRUCTED BY: Adv. N Manaka
Maluks Attorneys

FOR THE RESPONDENTS:
INSTRUCTED BY: Adv. M Rantho
The State Attorney, Pretoria.

DATE OF HEARING: 29 November 2023
DATE OF JUDGEMENT: 22 January 2024