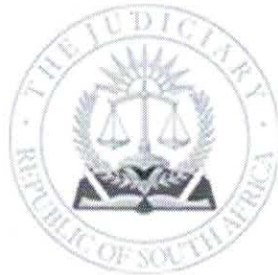


REPUBLIC OF SOUTH AFRICA



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	
27/10/23	
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

JUDGEMENT

FRANCIS-SUBBIAH J:

[1] This urgent application is based on a search and seizure warrant that was authorised and issued by Millar J on 16 October 2023.

[2] The respondents applied for a search warrant in terms of section 29(1)(a) of the Cyber Crimes Act 19 of 2020. The respondents sought a warrant for the seizure of certain articles which they contended were connected to a commission or suspected commission of corruption and money laundering. The search warrant was executed on 17 October 2023.

[3] On 19 October 2023, the applicants' attorneys, directed a letter to the fifth respondent requesting that the respondents do not open the sealed exhibit bags of items seized, copy and/or analyse the items. The request was made as the applicants intended to approach the Court to challenge the validity of the search warrant. The fifth respondent was requested to provide the written undertaking by close of business on 19 October 2023, that the items would not be unsealed, failing which, the applicants advised that they would approach the Court on an urgent basis for an interim relief. The respondents refused to give the undertaking based on their submission that the warrant is legal and was legally obtained.

[4] The applicants on the basis that the undertaking was not given approached the court on an urgent basis to have the seized items to remain sealed and if unsealed to seal the items in the presence of the applicant's attorneys. A further relief is claimed that the photographs taken at the searched premises be deleted, pending a reconsideration of the granting of the warrant.

[5] The urgency is premised on the basis that the warrant was obtained on an *ex-parte* basis. It is trite that the purpose of search and seizure warrants is to secure evidence. The giving of notice will defeat that purpose. It will forewarn suspects who will take all measures to hid, destroy, or prevent the items from being secured for the purposes of the investigation.

[6] The application was supported by an affidavit by Captain Magetse seeking a warrant to be issued in terms of section 20 and other relevant sections of Chapter 2 of

the Criminal Procedure Act, 51 of 1977 ("CPA") This affidavit refers to section 20 and "other relevant section in Chapter 2" of the CPA. The applicants assume that the respondents relied on this statutory provision in making the application for the search and seizure warrant. Section 21 (1) (a) of the CPA provides that:

"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 or at any premises within his area of jurisdiction"

[7] The applicant complains that the search and seizure warrant used was not issued by a magistrate or justice as contemplated in the empowering section. The CPA defines "justice" as a person who is a justice of the peace under the provisions of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act 16 of 1963). A Judge of the High Court is not included in the definition of justice in the said Act. For these reasons the applicants submit that they are entitled to the relief sought on an urgent and interim basis.

[8] However, the application for a search warrant is made in terms of section 29(1)(a) of the Cyber Crimes Act 19 of 2020. The section provides that an article can only be searched for, accessed or seized by virtue of a search warrant issued by Magistrate or a Judge of the High Court, on written application by a police official, if it appears to the

Magistrate or Judge, from information on oath or by way of affirmation, as set out in the application, that there are reasonable grounds for believing that an article is within the area of jurisdiction of the Court and is being used or is involved or has been used or was involved in the commission of an offence.

[9] Additionally section 27 of the Cybercrimes Act, 2020 provides that the Criminal Procedure Act, 1977 applies in addition to the provision of this Chapter in so far that it is not inconsistent with the provisions of this Chapter.

[10] The purpose of a warrant is to protect the rights of individuals and entities against the power of the state. In ***Magajane v Chairperson, North-West Gambling Board*** 2006 (2) SACR 447 (CC); 2006 (5) SA 250 (CC) at para 74 it was held that a warrant guarantees that the state must justify and support intrusions upon individuals' privacy under oath before a neutral officer of the court prior to intrusion.

[11] The judicial discretion of a judicial officer when authorising a warrant was considered by Langa DP, 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 as follows at para 52:

"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.”

[12] The limitation of a right to privacy is justifiable in the context of investigation and for the purpose to fight crime in the interest of security and freedom of community. The court went on to expand on this limitation further at paragraph 54 as follows:

“... There is no doubt that search and seizure provisions, in the context of a preparatory investigation, serve an important purpose in the fight against crime. That the state has a pressing interest which involves the security and freedom of the community as a whole is beyond question. It is an objective which is sufficiently important to justify the limitation of the right to privacy of an individual in certain circumstances. The right is not meant to shield criminal activity or to conceal evidence of crime from the criminal justice process.”

[13] The respondent explained that the purpose of the warrant is 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. The application to a Judge in chambers for the search and seizure warrant was supported by the 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. 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.

[14] In brief the complaint was received from Willem Venter from the Financial Intelligence Centre who indicates that his analysis revealed that Mr Nsele is a signatory for the POPCRU Absa account. His investigation revealed payments made to Moribo Wa Africa 32 (Pty) Ltd with Mr Sithole as its sole director. Evidence of movement of monies through Absa Bank to Moribo Wa Africa account at Nedbank is indicated. It notes that payments for an immovable property and motorcycle on behalf of Mr Nsele was made through EFT credit payments from the Moribo Wa Africa account, using the money from POPCRU. The amounts in question runs into millions of rands. The affidavit further set out the reasonable grounds for the search. A reasonable suspicion that an offence has been committed is made out in the application.

[15] I am therefore, satisfied that Miller, J was authorised to grant the search and seizure warrant. For these reasons any of the interim relief sought in this urgent application is refused.

[16] As a result the following order is made:

The application before the urgent court is therefore dismissed with costs.



R FRANCIS-SUBBIAH

JUDGE OF THE HIGH COURT, PRETORIA

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:
DATE OF JUDGEMENT:

23 October 2023
27 October 2023