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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

CASE NUMBER.: 1323/2023

In the matter between:

N.A. NONXUBA ATTORNEYS	First Applicant
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NOVELWANO ALICIA NONXUBA	Second Applicant
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And

THE MINISTER OF POLICE	First Respondent
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DIRECTORATE FOR PRIORITY CRIME INVESTIGATION: SERIOUS COMMERCIAL CRIME INVESTIGATION	Second Respondent
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CAPTAIN NEIL HOFFMAN	Third Respondent
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NAZIM JOEMATH: ADDITIONAL MAGISTRATE EAST LONDON	Fourth Respondent
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THE REGISTRAR OF THE EAST LONDON HIGH COURT	Fifth Respondent
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JUDGMENT

Beshe J

[1] This is Part A of a two-legged application which has been brought on an urgent basis wherein the following order is sought:

“1.1 The time periods and forms of service be dispensed, and that PART A of the matter be heard as one or urgent in terms of the Uniform Court Rules, Rule 6(12) as read with the practice manual of Honourable Court.

1.2 That the Second and Third Respondents be directed to hand in the articles listed in Annexure “NOM1” to the Registrar of the above Honourable Court for safe keeping, that the Registrar seal the articles pending of the finalisation of PART B, and the direction of the Court thereon.

1.3 Cost on a punitive scale against the Respondents jointly and severally the one to pay the other to be absolved.”

NOM1 is an inventory list containing a number of items that appear to be copies of documents seized (hard copies) from second applicant's place.

The Parties

[2] First applicant is a firm of attorneys. Second applicant is the sole director thereof. Second applicant's address is 2[...] O[...] W[...], Gonubie, East London. The first respondent is the Minister of Police, care of The State Attorney, 17 Fleet Street, East London. The second respondent is The Director of Priority Crime Investigation, care of Captain Hoffman at Old Allied Building, Buxton Street, East London. The third respondent is Neil Hoffman a Captain in the South African Police Services, attached to the office of the second respondent situated at Old Allied Building, Buxton Street, East London. The fourth respondent is Nazeem Joemath NO in his capacity as a Magistrate employed at the East London Magistrates Court at 4 Buffalo Street, East London. The fifth respondent is The Registrar of East London High Court, herein joined in its capacity of a functionary no costs are sought against this party.

[3] The application is opposed by the first to third respondents.

Applicants' Case

[4] Third respondent deposed to an affidavit in support of an application for a search and seizure warrant which was issued on the basis thereof by the fourth respondent. The warrant was issued in respect of premises of the second applicant's private residence. In his affidavit, third respondent stated that he wished to search for, and seize all digital media devices which would possibly have been used to create and store documents relevant to the investigation of the trusts as well as client files in respect of payments received from Eastern Cape Department of Health (ECDOH). In this regard, the court is referred to third respondent's seven-page affidavit annexed to applicants' papers as NAN1. Applicants highlight the salient parts of the affidavit in the founding affidavit being *inter alia* that third respondent is the investigation officer of a case pertaining to theft and money laundering against a firm of attorneys, Nonxuba Inc, in respect of which second applicant is former director. Between the years 2014 and 2021, payments were made to the said firm of attorneys by the Department of Health, Eastern Cape as damages for medical negligence in respect of thirty-seven claims. Contrary to court orders directing that trusts be registered in this regard, no trusts were registered on behalf of the claimants or where registered, this was delayed. The balance standing in the trust account of Nonxuba Inc falls short of the amounts paid out in respect of trusts that have yet to been registered. Third respondent wishes to search the premises in question and seize all digital media devices which could possibly have been used to create and store documents relevant to the investigation of the trusts as well as client files and payments received from Department of Health, Eastern Cape. The articles to be seized are specified in the affidavit.

[5] It appears to be common cause that a search warrant was issued by the fourth respondent on the 1 August 2023. The said warrant is entitled "Search Warrant in terms of Section 29 read with section 25 of Cyber Crimes Act 19 of 2020. The validity of the search warrant is impugned on the basis that the third respondent's affidavit (NIN1) does not contain the jurisdictional requirements for the issuing of a search warrant, namely: The existence of a reasonable suspicion that a crime has been committed and the existence of reasonable grounds to believe that objects connected

with the offence may be found in the premises. As will appear from the fourth respondent's affidavit referred to earlier, the purpose of the search was to seize digital media devices. It is common cause that the articles that were seized were hard copies of certain documents. It however turns out that unbeknown to those who drew papers to launch this application, there was a second warrant that was authorised in terms of the Criminal Procedure Act.

[6] Applicants' attack was initially directed at NOM2 the search warrant that was issued in terms of the Cyber Crimes Act. The validity of the search warrant was impugned on the basis as stated earlier that the jurisdictional requirement for the issuing of search warrants were not met. On the basis that the presence thereof has not been made out in the third respondent's affidavit in support of the issuing thereof – NAN1. It being asserted that regarding the first requirement, the evidence provided by third respondents fell short of indicating that fraud, theft or money laundering had been committed by any person. Further that the mere fact that trusts had not been registered is not sufficient to show that an offence(s) has been committed without regard to complete files, business accounts etc. As far as the second requirement is concerned, applicants assert that there is no averment in third respondent's affidavit why he believes that the data sought to be seized is on the said premises., the premises being the home of the second applicant.

[7] Applicants also complained that the articles removed from the premises were not provided for in the search warrant, that the search warrant was overbroad.

[8] Another ground for asserting that the search warrant was invalid is that the applicants' right to privacy was infringed. Applicants are fearful that should the matter await its turn on the normal roll, it can be months before the matter is heard and the respondents will continue to base their investigations on inadmissible evidence and in the long run that will amount to an injustice. Not only to the applicants in that this will result in an unfair trial, but that it will also result in the state incurring wasted costs by attempting to present tainted evidence.

First to third respondents' opposition

[9] First to third respondents will be collectively referred to as the respondents. Respondents raise the point that the matter lacks urgency or if urgent same was self-created given that the search was conducted on the 2 August 2023, yet the court was only approached on an urgent basis on the 22 August 2023.

[10] Respondents confirm the issuing of NOM1 on 1 August 2023 but also allude to a second search and seizure warrant marked Annexure A. this search warrant was issued in terms of the Criminal Procedure Act. Respondents suggest that by failing to mention or deal with search warrant the applicants are attempting to mislead the court. Further that articles comprising of documents relating to thirteen of thirty-seven claimants/beneficiaries in respect of investigations that are underway, were seized on the strength of Annexure A. These included taxed bills of costs in respect of the matter listed in Annexure NOM1 and NOM2. Furthermore, that the articles fell within the definition contained in Section 20 of the Criminal Procedure Act in respect of the investigation being conducted. Third respondent asserts that the information provided to fourth respondent satisfied the requirements for the issuance of a search warrant.

[11] Unlike the search warrant that was issued in terms of the Cyber Crimes Act NOM2, the one that was issued in respect of the Criminal Procedure Act is not accompanied by a separate affidavit. The information required for the issuance of a search warrant is incorporated in the search warrant. The basis for seeking to search the premises in question appear from Annexure A. Briefly stated that fraud and theft (General deficiency) offences to the tune of R52 385 185.79 are being investigated. Flowing from the following:

Nonxuba Inc, a law firm represented by Mr Nonxuba and second applicant, was the attorney of record in respect of various medical negligence claims against the Eastern Cape Department of Health during the period 2014 to 2021. Various amounts amounting to some R500 000 000.00 were paid into the trust account of the firm in question. In respect of each of the plaintiffs, the court had ordered that a trust be established by Nonxuba Inc to administer the damages awards concerned which were invariably on behalf of injured minor children. The

residual amount of the award after client expenses and legal fees had been deducted was to be paid into the trust accounts in favour of the beneficiaries. So far, only sixteen trusts have been registered. And that an amount of ± R365 047 424.00 remains uncounted for. After the crunching of more figures, it is asserted that there is a general deficiency of ± R52 000 000.00. The criminal investigation is meant to follow the money trail relating to the deficiency. Further that the persons responsible for the trust and business accounts of the Nonxuba Inc are Mr Nonxuba and second applicant who were directors of the firm. Further that the articles capable of seizure which may afford evidence in the suspected commission of the offences as listed in Annexure A are at the premises that were ultimately searched viz 2[...] O[...] W[...], Gonubie, East London or otherwise under the control of the two aforementioned persons who currently reside therein. Items to be searched for are in respect of thirty-seven beneficiaries are listed, including the names of the beneficiaries.

[12] It appears to be common cause that two crates of documents listed in the inventory marked NOM1 in respect of beneficiaries or some of them were seized.

[13] Respondents allege that if the order sought by the applicants is granted, not only will the investigations be prejudiced by the delay, it is also not in the interest of justice that an investigation as to what came of millions of tax payers money destined for injured beneficiaries be delayed.

Applicants' replying affidavit

[14] The replying affidavit was deposed to by Mr Enzo Meyer of the applicants' attorneys of record. His affidavit was mainly concerned with addressing the issue of urgency or lack thereof and to a large extent with explaining why only one search warrant was dealt with in the founding affidavit. The explanation being that he did not realise that third respondent had forwarded him photographs of copies of two different search warrants issued in respect of Cyber Crimes Act and Criminal Procedure Act, respectively. As well as the fact that the urgency only arose as a result of third respondent's refusal to give an undertaking not to use the documents concerned in

response to a letter by those representing the applicants delivered on the 15 August 2023. He also makes the point that the grounds for impugning the validity of NOM2 apply with equal force in respect to Annexure A to the answering affidavit.

Parties' submissions

[15] Applicants contend that the respondents have not shown that the requirement pertaining to the existence of the reasonable grounds to believe that objects connected with the offences sought to be investigated may be found on the premises intended to be searched. In response, respondents submit that both jurisdictional requirements for the issue of a search warrant were met by the third respondent when he applied for the search warrant. So, were the guidelines set out in *Minister of Safety and Security v Van der Merwe*¹. They point out that it is common cause that documents seized from the premises in question contain those pertaining to thirteen of thirty-seven claims that are the subject of their investigations.

Discussion

[16] It is court that will be dealing with Part B of the application that will be required to make a pronouncement on the validity or otherwise of the search warrant concerned. On whether the two jurisdictional requirements were met. Mine is to determine whether the applicants will suffer irreparable harm should the court dealing with Part B of the application find that the search warrant is invalid. According to the applicants, the harm that they will suffer is that the investigations will continue based on inadmissibly obtained evidence and thereby affect the fairness of the trial.

[17] Respondents, whilst maintaining that the search warrant was properly obtained, deprecate any delay in investigating what happened to millions of rands meant for children who were injured as a result of medical negligence, pending the determination of Part B of the application.

¹ 2011 (2) SACR 301 CC at 38-39.

[18] It is trite that “*law-abiding citizens of this country are deeply concerned about the scourge of crime ... Warrants issued in terms of Section 21 of the Criminal Procedure Act are important weapons designed to help the police to carry out efficiently their constitutional mandate of, amongst others, preventing, combatting and investigating crime*”.² The court in Van der Merwe’s (*supra*) acknowledged that in the course of issuing search warrants the police inevitably interfere with the equally important constitutional rights of individuals.

[19] It is trite that unconstitutionally obtained evidence is inadmissible during a trial. The exclusion of the evidence will only occur later should criminal charges be preferred. But the investigations would have been carried out based on documents that were obtained via an invalid search warrant. The fact that the investigations are in all probability ongoing, may require that applicants’ rights be protected pending the determination of Part B of the application. This in a bid to ensure that, should the applicants be successful in validating their rights, they will receive effective relief. If indeed, the applicants are able to show that any one of the two jurisdictional requirements were not met by the third respondent to justify the issuing of search warrant, they will be validated. In my view therefore, the balance of convenience favours the applicants for the granting of the interim relief sought. Especially that the order sought is of a temporal nature and the return of the seized documents to the applicants is not sought at this stage.

[20] Accordingly, the application should in my view succeed. To ameliorate the prejudice of the delay complained of by the respondents, I propose to set a time frame within which Part B should be launched.

[21] As far as costs are concerned, I am not aware of any reason or conduct on the part of the respondents that warrants a punitive costs order. In my view, it will be appropriate that costs be costs in the cause.

Order

² Minister of Safety and Security v Van der Merwe *supra* at 312.

it is ordered that:

1. The time periods and forms of service be dispensed with and that PART A of case 1323/23 be heard as one of urgency in terms of the Uniform Court Rules, Rule 6(12) as read with the practice manual of the Honourable Court.
2. That the Second and Third Respondents be and are hereby directed to hand in articles listed in Annexure "NOM1" to the Fifth Respondent - Registrar of the above Honourable Court for safekeeping, that the Registrar seals the articles pending the finalisation of PART B and the direction of the Court thereon.
3. In order to facilitate the expedited resolution of PART B of this application, the applicants are directed to launch proceedings in respect of PART B within 20 days of this order.
4. Applicants are granted leave to supplement their papers if so advised for the hearing of PART B of the application.
5. Costs to be cost in the cause.

N G BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicants:	Adv: E Kilian SC
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For the Respondents:

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Instructed by:

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EAST LONDON

Ref: 501/23-P6 (Mr Isaacs)

Tel.: 043 – 706 5100

Date Heard:

30 August 2023

Date Reserved:

30 August 2023

Date Delivered:

12 September 2023