



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No. : 3069/2015

In the matter between:-

EDDIE SITHOLE

Applicant

and

MINISTER OF POLICE

1st Respondent

DIRECTOR OF PUBLIC PROSECUTIONS

2nd Respondent

HEARD ON: 21 APRIL 2016

JUDGMENT BY: KRUGER, J

DELIVERED ON: 28 APRIL 2016

- [1] This is an application declaring a search and seizure conducted at applicant's home at 3am on the morning of 23 November 2014 to be unlawful, setting aside the search and seizure, and ordering the first respondent to return seized items to the applicant.

- [2] The application was launched on the basis that no search warrant existed. In the answering affidavit the first respondent said the search and seizure were conducted on the strength of a search warrant, which is attached. The second respondent, the Director of Public Prosecutions, filed a notice to abide.
- [3] In the replying affidavit the applicant attacks the search warrant on a number of grounds. The first is that it is addressed to “The Station Commander” not to a named and identified police official as required by section 21 of the Criminal Procedure Act 51 of 1977 (the Act). The search warrant is addressed to “The Station Commander”. It is not stated of which police station. The applicant also complained that the warrant did not authorise the taking of all the items seized. In argument Mr Omar raised the point that the search and seizure were conducted in contravention of section 21(3)(a) of the Act which reads:

“(3)(a) A search warrant shall be executed by day, unless the person issuing the warrant in writing authorizes the execution thereof by night.”

Mr Omar said the magistrate who issued the warrant did not authorise the execution thereof by night.

- [4] A warrant addressed to “The Station Commander” was set aside in **Goqwana v Minister of Safety and Security NO and Others** (20668/14 [2015] ZASCA 186 (30 November 2015) per Wallis JA. The police officer who is to execute the warrant must be identified to ensure accountability (par [26]).

- [5] The warrant did not authorise the search by night. The roneod form on which the warrant was signed states:

“THESE ARE THEREFORE to authorize you to search during day time/night time * the identified person/to enter and search the identified premises and to search any person found on or at such premises and to direct you to seize the said**ARTICLES AS PER ANNEXURE A.....** if found, and to deal with it accordingly to law/bring it before me to be dealt with according to law.”

The asterisk (*) is not explained on the warrant attached to the papers.

- [6] Mr Williams, who appeared for the first respondent stressed that an applicant must make out its case on the founding affidavit, with reference to **Port Nolloth Municipality v Xhalisa and Others; Luwalala and Others v Port Nolloth Municipality** 1991 (3) SA 98 (C) at 111E; **National Council of SPCA v Openshaw** 2008 (5) SA 339 (SCA) at 349A-B.
- [7] Mr Williams pointed out, as to privacy, that it was pointed out in **Magajane v Chairperson, North-West Gambling Board and Others** 2006 (2) SACR 447 (CC) par [68] that a search warrant is a mechanism which balances the individual's right to privacy with the public interest in combatting crime (See also **Minister of Safety and Security and Others v Mohamed and Another** 2012 (1) SACR 321 (SCA) par [20]).
- [8] The rule that an applicant must make out his case in the founding affidavit is not absolute. A court can permit the filing of further

affidavits (see **Shephard v Tuckers Land and Development Corporation (Pty) Ltd (1)** 1978 (1) SA 173 (W) at 178A). A court may not decide a case on points not raised. The point to be decided must appear from the founding affidavit (**Director of Hospital Services v Mistry** 1979 (1) SA 626 (A) per Diemont JA at 635H).

- [9] It seems to me that where the cause of action in a damages claim is assault, in the form of a kick, that the respondent could admit that he hit the applicant with a fist. The court could then assess the situation on the basis of the blow with the fist, and find for the applicant. Similarly, in a sequestration application the applicant may rely on a particular debt. In the answering affidavit the respondent might refer to another debt. It is not wrong for the court to decide the matter on the basis of the debt raised in the answering affidavit, if that issue has been fully ventilated.
- [10] In the present matter the cause of action is an alleged wrongful search and seizure. The respondent relies on a warrant. The warrant stands on its own legs, and must be assessed on the contents thereof. The contents of the warrant were fully ventilated by counsel in argument. A reading of the warrant shows two things:
- (1) It is addressed to "The Station Commander". In the light of the findings of the Supreme Court of appeal in the **Gogwana**-case (*supra*) that is fatal. The warrant is of no force or effect on that basis alone.

- (2) The warrant does not authorise a search by night. The fact that there is no deletion or the addition of “and” as to the time of search, shows that the magistrate issuing the warrant did not apply his or her mind to the time of search. But it is not necessary to decide this case of that point.

The fact that the warrant is directed to “The Station Commander” is fatal. It might as well have been addressed “To whom it may concern”. That is not the intention of section 21. A person, who can be held accountable, must be named. More than one person can be named. The search must be set aside. As to the pistol and ammunition, the applicant has not been able to provide proof that he is entitled to validly possess the pistol and ammunition.

ORDER

1. The search and seizure conducted at applicant’s home at 1922 Europa Street, Riebeeckstad Welkom on 23 November 2014 is declared unlawful and set aside.
2. The first respondent is ordered to return to the applicant the items seized during the search. The respondent will only return the colt 45 pistol and ammunition if the applicant is able to provide proof that he is entitled to possess same lawfully.
3. The first respondent is ordered to pay the costs of the application.

A. KRUGER, J

On behalf of Plaintiff: Mr Z Omar
Instructed by:
E G Cooper Attorneys
BLOEMFONTEIN

On behalf of Defendant: Adv A Williams
Instructed by:
State Attorney
BLOEMFONTEIN

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