

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 6890/2008

In matter between:

PODBIELSKI MHLAMBI INCORPORATED

Applicant

and

LANDDROS J FOURIE, SENIOR LANDDROS:
LANDDROSHOF WELKOM
MINISTER VAN VEILIGHEID EN SEKURITEIT
SPEUDER INSPEKTEUR C E RAUTENBACH
SPEUDER INSPEKTEUR E CROUS
PADONGELUKKEFONDS

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent

HEARD ON: 12 February 2009

JUDGMENT BY: C.J. MUSI, J

DELIVERED ON: 12 March 2009

Introduction

[1] On 14 November 2008 I granted a *rule nisi* in respect of an urgent interdict and ancillary relief sought by the applicant against the respondents. On 11 December 2008 my sister

Van Zyl J extended the return day to 12 February 2009 and ordered that the costs be reserved for later determination.

[2] The relevant parts of the aforementioned *rule nisi* read as follows:

- “1. Kondonasie aan die applikant verleen word vir die nie-nakoming van die voorgeskrewe reëls met betrekking tot vorm en prosedure van betoening en dat hierdie aansoek aangehoor word as ‘n dringende aansoek kragtens die bepalings van Reëls 6 (12) gelees met Reëls 53.
2. Tot die mate wat die nodig mag wees, kondonasie aan die applikant verleen word vir die nie-nakoming van die bepalings van Artikel 35 van die algemene Regs Wysigingswet no, 62 van 1955.
3. Bevel *nisi* uitgereik word wat die respondente oproep om redes aan te voer, indien enige, op Donderdag 11 Desember 2008 om 09:30 of so spoedig doenlik moontlik daarna as wat die applikant se regsvertegenwoordigers aangehoor kan word, waarom die volgende bevel nie deur die hof verleen behoort te word nie:
 - 3.1 Die besluit van die eerste respondent om lasbriewe te magtig en uit te reik onder Welkom MAS-nommer 427/09/2008 en Welkom MAS-

nommer 460/09/2008, op 2 November 2008 wat deursoeking van die applikant se perseel te Eerste en Tweede Vloer, Elizabethstraat Complex 5, Welkom, matig en beslaglegging van leers en hul inhoud soos uiteengesit in die aanhangsels "A" tot die onderskeie lasbriewe, hersien en tersyde gestel moet word nie;

3.2 Die tweede, derde en vierde respondente, alternatiewelik verantwoordelike beamptes in diens van die Suid-Afrikaanse Polisie diens onder wie se toesig en beheer die leers sorter en uiteengesit in aanhangsel "A" tot die funderende beëdigde verklaring en wat reeds deur die derde en vierde respondent verwyder is vanuit die applicant se perseel geleë te Essex Gebou, Elizabethstraat, Welkom, sonder versuim aan applicant oorhandig moet word by applikant se perseel geleë te Essex Gebou, Elizabethstraat, Welkom, Provinsie Vrystaat;

3.3 Die tweede tot en met vyfde respondent gelas word om die koste te wyte aan hierdie aansoek te betaal op 'n skaal soos tussen prokureur en kliënt, gesamentlik en afsonderlik, die een betaal die ander kwytskeld te word;

4. Die respondente opgeroep word om voor of op 16:00 op Vrydag, 21 November 2008 by die Griffier van hierdie Agbare Hof te liasser sodanige dokumente van die rekord van verrigtinge waar die onderwerp vorm van hierdie hersieningsaansoek, wat nie reeds by die applikant se funderende stukke aangeheg is nie, gevolglik met betrekking tot oorweging en verlening van die besluit op 10 November 2008 vir magtiging van die genoemde lasbriewe (soos uiteengesit in paragraaf 3.1 hierbo), tesame met sodanige redes vir die besluit wat die respondente regtens verplig is om te verskaf of wil verskaf en daarna sonder versuim die applikant in kennis te stel dat die rekord en sodanige redes by die Griffier geliasseer is...”

Facts

- [3] The facts of this matter are mostly common cause or not seriously in dispute. On 10 November 2008 the third respondent, a detective inspector in the South African Police Service (SAPS), obtained two search warrants, Welkom CAS no. 427/08/2008 and Welkom CAS no. 460/09/2008, from the first respondent, a senior magistrate at Welkom. The search warrants authorised the third and the fourth respondents to search, in the presence of a representative of

the fifth respondent (the Road Accident Fund), the premises of the applicant (a firm of attorneys) situated at 1st and 2nd floor Elizabeth Street, Welkom and seize two hundred and sixteen (216) client files and their contents. One hundred and nine (109) of those files related to supplier claims and the rest one hundred and seven (107) related to third party claims.

[4] In order to obtain the search and seizure warrant in relation to the supplier claims (CAS no 427/09/2008) an affidavit by a senior forensic investigator at the Road Accident Fund (RAF), Raubenheimer, as well as an affidavit by the third respondent was used.

[5] In his affidavit Raubenheimer stated that the applicant submitted numerous claims to the RAF on behalf of Bongani Hospital which claims were paid by the RAF. He attached a schedule to his affidavit setting out inter alia the date of the supplier service, the claim number and the amount claimed and paid in respect of each claim. He further stated that he obtained statements from Mr SD Ralile (Head of Administration at Bongani hospital) and Mrs Knoesen who

liaises with attorneys on behalf of Bongani hospital. He compared their statements with the items claimed in the bills of costs submitted to the RAF and found discrepancies. The discrepancies related to claims for follow up consultations that were never held and claims for instructions to issue summons against the RAF which instructions were never given. Ralile and Knoesen's statements were not attached to Raubenheimer's statement, although he mentions in his statement that their statements are attached to his.

- [6] The third respondent's affidavit is short. She stated that she received a complaint from Raubenheimer to the effect that he reasonably suspects that fraud is being committed at the applicant's premises; that she is reasonably satisfied that the information provided to her showed that the person who laid the complaint is *prima facie* qualified to do so and that the suspicion on which the complaint is based appears to be reasonable in the circumstances. This information was used by the first respondent to issue the warrant for the search and seizure of the 109 files and their contents.

- [7] In the case of the third party claims (CAS no 460/09/2008) Raubenheimer submitted an affidavit to the first respondent wherein he referred to a statement which he obtained from Juanita Victor, a third party, on whose behalf the applicant lodged a claim with the fifth respondent. In broad strokes, Juanita Victor stated that she did not consult with the applicant on seven occasions as the applicant claimed in the bill of costs submitted to and paid by the fifth respondent. She also denied instructing the applicant to issue summons - or to obtain a warrant of execution – against the property of the fifth respondent. The third respondent submitted an affidavit that is a mirror image of the one mentioned in paragraph 6 above. Based on this information the first respondent issued a search warrant for the search and seizure of 107 third party files and their contents.
- [8] On 11 November 2008 the third respondent, fourth respondent and Raubenheimer armed with the two search warrants, with annexures containing lists of the suspicious files, attended at the offices of the applicant. They enquired about the files mentioned in the annexures to the search warrants. They were informed that most of the files that they

were looking for are kept in an archive, which is situated in another building diagonally across the building mentioned in the search warrants. The applicant availed four of its personnel to the search party in order to assist them to seek for the files.

[9] Whilst the search was continuing, Mr Podbielski of the applicant obtained legal advice. Before the files could be removed he informed the third and the fourth respondents that the files contain privileged and confidential information. He claimed legal professional privilege on behalf of his clients and offered to give the files without the privileged documents. The offer was refused.

[10] The parties agreed that the third respondent will seal and remove the files without looking at its contents pending an application to be brought to this court on or before 14 November 2008. The applicant requested all the statements that were placed before the first respondent when he made the decision to issue the search warrants. This request was refused. The first respondent later availed copies of all the

information that was put at his disposal during the applications for the search warrants to the applicant.

Issues

[11] Mr Kemp SC on behalf of the applicant launched a multi-pronged attack on the validity of the search and seizure warrants and on the legality of the actual search and seizure. He argued that the search and seizure was not at the targeted premises; that there was insufficient information before the first respondent who issued the search warrants; that the search warrants do not provide or cater for privilege. Mr Sithole SC, on behalf of the respondents, was constrained to concede, after a gallant attempt to justify the respondents' action, that the respondents don't have viable counter arguments.

Law

[12] The third and fourth respondents purportedly acted in accordance with the provisions of section 20 and 21 of the **Criminal Procedure Act** 51 of 1977(the Act). The relevant parts of the sections read as follows:

“20 The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article) –

- (a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence whether within the Republic or elsewhere;
- (b) which may afford evidence of the commission or suspected commission of an offence whether within the Republic or elsewhere;
- (c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.

21 (1) Subject to the provisions of sections 22, 24 and 25, an article referred to in section 20 shall be seized only in 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; or ...

(2) A search warrant issued under subsection (1) shall require a police official to seize the article in question and shall to that end authorise such

police official to search any person identified in the warrant, or to enter and search any premises identified in the warrant and to search any person found on or at such premises.

(3)(a) ...

(b) A search warrant may be issued on any day and shall be of force until it is executed or is cancelled by the person who issued it or, if such person is not available, by a person with like authority.

(4) A police official executing a warrant under this section or section 25 shall, after such execution, upon demand of any person whose rights in respect of any search or article seized under the warrant have been effected, hand to him a copy of the warrant.

[13] When dealing with search and seizure warrants the point of departure is that the search of someone's house, business or person and /or the seizure of anything thereon is unlawful and unconstitutional, unless such search and / or seizure is legally authorised. Section 14 of the Constitution of the RSA 1996 provides that:

“Everyone has the right to privacy, which includes the right not to have

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed.”

[14] A search and seizure warrant therefore gives judicial authority to the State to search and seize property where such act would otherwise be unlawful. A search and seizure warrant not only gives authority to the state to invade the privacy of an individual or juristic person but also acts as a safeguard against the misuse or abuse of power by the State. Because the powers of the person armed with a search and seizure warrant are circumscribed in the warrant, the courts expect state officials to remain within the parameters set out in the warrant. In **Mistry v Interim Medical and Dental Council of South Africa and Others** 1998 (4) SA 1127 (CC) at paragraph [25] Sacks explained the importance of safeguards to regulate state official’s powers in the South African context thus:

“The existence of safeguards to regulate the way in which State officials may enter the private domains of ordinary citizens is one of the features that distinguish a constitutional democracy from a police State. South African experience has been notoriously mixed in this regard. On the one hand there has been an admirable history of strong statutory controls over the powers of the police to search and seize. On the other, when it came to racially discriminatory laws and security legislation, vast and often unrestricted discretionary powers were conferred on officials and police. Generations of systematised and egregious violations of personal privacy established norms of disrespect for citizens that seeped generally into the public administration and promoted amongst a great many officials habits and practices inconsistent with the standards of conduct now required by the Bill of Rights. Section 13 [of the interim Constitution; now s 14 of the Bill of Rights] accordingly requires us to repudiate past practices that were repugnant to the new constitutional values, while at the same time re-affirming and building on those that were consistent with these values.”

A very high level of protection is given to the right to privacy.

See **Berustein and Others v Bester and Others NNO** 1996

(2) SA 751 (CC) at paragraph [77].

[15] The right to privacy may be claimed by a juristic person.

Section (4) of our Constitution, 1996, reads as follows:

“A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.”

Although juristic persons, such as the applicant, are not “bearers of human dignity”, they do – to a limited extent enjoy the right to privacy. See **Investigating Directorate: SEO v Hyundai Motors Distributors** 2001 (1) SA 545 (CC) at paragraph [18]

[16] In **Powell NO and Others v Van Der Merwe NO and Others** 2005 (5) SA 62 (SCA) Cameron JA, as he then was, analysed the authorities in relation to search warrants and summarised the legal position as follows at paragraph [59]:

- “(a) Because of the great danger of misuse in the exercise of authority under search warrants, the courts examine their validity with a jealous regard for the liberty of the subject and his or her rights to privacy and property.
- (b) This applies to both the authority under which a warrant is issued, and the ambit of its terms.
- (c) The terms of a search warrant must be construed with reasonable strictness. Ordinarily there is no reason why it should be read otherwise than in the terms in which it is expressed.
- (d) A warrant must convey intelligibly to both searcher and searched the ambit of the search it authorises.
- (e) If a warrant is too general, or if its terms go beyond those the authorising statute permits, the Courts will refuse to recognise it as valid, and it will be set aside.
- (f) It is no cure for an overbroad warrant to say that the subject of the search knew or ought to have known what was being looked for: The warrant must itself specify its object, and must do so intelligibly and narrowly within the bounds of the empowering statute.

Search of Premises

[17] As stated above, it is common cause that the search and seizure warrants authorised the third and fourth respondents to search the premises of Podbielski Mhlambi Inc situated at 1st and 2nd floor Elizabeth Street Welkom. The respondents have admitted that the correct address is 1st and 2nd floor Elizabeth Street 5 Complex, Elizabeth Street. I will for the purpose of this judgment accept that it is the same premises.

[18] It is common cause that the files were stored and seized at Essex Building, Elizabeth Street which is not the same building as that mentioned in the warrants.

[19] The respondents contend that they were legally authorised to search the premises at Essex Building and to seize the files thereat because those offices/ storerooms were under Podbielski's, who has unlimited access thereto, control. He also told them where the files were kept. They further contend that there was no means of determining that the sought files were stored at an office other than that stated in the warrants. The applicant argued that the fact that the applicant was in control of a different building did not give the

third and fourth respondents authorization to search those premises.

- [20] The respondent's arguments don't fly. They requested and got prior authorization to search particular premises. They may not subsequently vary the terms of the warrants without again approaching the judicial officer who authorised the warrants. The fact that Podbielski was in control of the "archive offices" or storeroom at the other building does not assist the respondents. Podbielski cooperated under protest. He demanded to see the warrants and the supporting documents. When the third and fourth respondents refused to give him the supporting documents he threatened to sue the RAF. The fact that a warrant authorises the search of premises A and a person at those premises alleges that the items mentioned in the search and seizure warrant are kept at premises B does not give the police the right to search premises B without a valid warrant. Podbielski's conduct, consent or cooperation could in any event not render an unlawfully issued warrant valid or lawful. He would in all probability have acted differently if he was aware of all the information that formed the basis of the

application for the warrants. See **Beheermaatschappij Helling I NV v Magistrate Cape Town** 2007 (1) SACR 99 (C) at 120 i to 121 d.

[21] The terms of the warrant, although broad, are clear. The relevant parts thereof, albeit ineloquently drafted, read as follows:

“These are therefore to authorize you to search during the day 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 files and their content of the list attached as per Annexure A if found and to deal with it in accordance to law.” (my underlining).

[22] The police were therefore only authorised to search the identified premises. Likewise they were authorised to seize files on or at such (identified) premises. It therefore follows that the search at Essex Building was unauthorised and unlawful. The seizure of the files at Essex Building was also unauthorised and unlawful. The third respondent exceeded

the powers granted to her by the first respondent. See **Bogoshi v Van Vuuren NO and Others** 1996 (1) SA 785 AD at 796 F – G. See also **Toich v The Magistrate, Riversdale and Others** 2007 (2) SACR 235 at 238 f – g.

- [23] The fact that the police had no means of determining that the files were stored in another building is also of no assistance to the respondents. In her affidavit the third respondent alleged that she had received a complaint from Reubenheimer wherein he stated that he reasonably suspects that fraud is being committed at the applicant's premises. She then applied for a warrant authorizing her:

“ to enter upon or enter any place, premises in order to search and seize all the files and the documents in the files specified...”

The third respondent rushed to Court to apply for warrants without investigating whether there are less intrusive means to obtain the files or the relevant contents of the files from the applicant. The third respondent knew that the applicant was an attorney's firm. An enquiry at the attorney's firm as to

where their closed files are kept would have obviated the need to apply for a warrant couched in such wide terms. It follows that the inquiry would have shed light as to where the applicant's closed files are kept.

Requirements for valid warrant

[24] The requirements for a valid warrant under section 20 read with section 21 (1)(a) of the Act are:

1. The information must be under oath.
2. It must appear to the magistrate from such information that there are reasonable grounds for believing that the articles to which the warrant relates are articles referred to in section 20.
3. It must appear to the magistrate from such information that there are reasonable grounds for believing that the articles are in the possession or under the control of or upon any person or upon or at any premises within his area of jurisdiction. See **Mandela and Others v Minister of Safety and Security and Another** 1995 (2) SACR 397 (W) at 399 h – j. I deal seriatim with the requirements.

[25] Information under oath

There is no problem with this requirement. The magistrate had information under oath in the form of the affidavits of the third respondents and Raubenheimer.

[26] Reasonable grounds for believing that the files may afford evidence of the commission or suspected commission of an offence.

The first respondent filed reasons for issuing the two search and seizure warrants. The reasons are terse but telling. It reads as follows:

“Ingevolge Artikel 21 (1)(a) van die Strafproseswet 51 van 1977 het ek my regterlike diskressie uitgeoefen aangesien daar aan die gronde vir die uitreiking van so lasbriewe voldoen is. Uit die beëdigde verklarings aan my voorgelê blyk dit dat daar op dokumente beslag gelê kan word wat tot bewys van strek van die pleging of vermeende pleging van ‘n misdryf – vergelyk art 20 (b) van die gemelde strafproseswet.”

Hierdie handeling van my om die lasbriewe te magtig is slegs 'n vooraf proses tot die ondersoek. Die finale besluit berus by die verhoorhof of hierdie getuienis toegelaat sal word al dan nie. Al blyk dit dat hierdie getuienis op 'n ongrondwetlike wyse verkry is het die verhoorhof steeds die bevoegheid om die getuienis ingevolge Artikel 35 (5) van die Grondwet toe te laat.”

[27] I hasten to mention that the *bona fides* of the first respondent was never in doubt. I accept that the first respondent exercised his discretion in issuing the warrants. The question is whether he exercised such discretion judiciously after considering all the facts placed before him. In my view the information placed before the first respondent laid no basis for the believe or conclusion that all those files may afford evidence of the commission or suspected commission of an offence.

[28] In relation to the third party files, Raubenheimer only refers to one file or complainant. The only information before the first respondent was Reubenheimer's assertion that Juanita Victor attested to an affidavit in which she alleged that she

did not consult applicant on seven occasions; that she never gave the applicant instructions to issue summons against the RAF or to obtain a warrant of execution against the property of the RAF.

[29] There is no link between Juanita Victor's affidavit and the other files. There is also no link between her individual claim against the RAF and the other files. There is no indication whatsoever in Raubenheimer's affidavit that there is a link between Juanita Victor's case and the other files. There is no indication in Raubenheimer's affidavit that there was a practice at the applicant to submit fraudulent claims to the RAF. Raubenheimer does not even state why the contents of the other files will be relevant to any investigation conducted by the fifth respondent. At best, Raubenheimer's affidavit only shows that the information in the file of Juanita Victor v RAF may afford evidence of the commission or suspected commission of an offence. The same can't be said about the rest of the third party files.

[30] There was also in my view insufficient information before the first respondent to issue a warrant to seize all the files

mentioned in the supplier claims matter. The affidavit of Raubenheimer only relates to supplier claims on behalf of Bongani Hospital. The search and seizure warrant however relates to supplier claims on behalf of Goldfield West Hospital, Goldfields Regional Hospital, Free State Provincial Administration, Goldfields Health Services, Anglogold Health Service (Pty) Ltd and Ernest Oppenheimer.

[31] There is just no link shown, in the information before the first respondent, between Bongani Hospital and the other Hospitals mentioned in the preceding paragraph.

[32] It is clear that the first respondent did not give reasonable consideration to the facts before him. In any event he had hopelessly scant information to exercise his discretion in the manner in which he did.

[33] It must appear to the magistrate from the information under oath that an article or articles which may afford evidence of the commission or suspected commission of an offence is under the control of or upon any person or upon or at any premises...

[34] Mr Kemp argued that reasonable grounds for believing in section 21 (1) (a) of the Act, means the belief must be objectively rational. He referred me to **National Director of Public Prosecutions v Stander and Others** 2008 (1) SACR 116 (ECD) at paragraph [13] where Plasket J said the following:

“It is clear from the cases that reason to believe that a state of affairs exists involves an objectively justifiable belief – ‘a belief based on reason’ in which a ‘factual basis for the reason’ exists. There must, in other words, be ‘grounds, or facts, which give rise to, or form the basis of, the belief’ and they must be reasonable grounds. That the belief must be objectively rational (even I venture to suggest, when more subjective language is used in a statute) is now a constitutional imperative, flowing from the founding value of the rule of law.”

[35] I am of the view that the **National Director of Public Prosecution v Stander** *supra* case is not authority for the interpretation of “reasonable grounds for believing” as it appears in section 21 (1)(a) of the Act.

[36] In **Stander** *supra* the terms “reasonable grounds to believe” was interpreted with regard to the specific context in which it is used in section 38 (2) of the **Prevention of Organised Crime Act** 121 of 1998. The relevant part of section 38 (2) reads as follows:

“The High Court shall make an order referred to in subsection (1) if there are reasonable grounds to believe that the property concerned...”

Whereas section 21 (1)(a) of the Act reads that:

“...if it appears to such magistrate...there are reasonable grounds for believing...” (my underlining).

The two sections are clearly couched in different terms. Section 21(1)(a) refers to the subjective opinion of the magistrate.

[37] There are numerous cases in which it was stated that in section 21(1)(a) the grounds are those which in the

subjective opinion of the magistrate are reasonable. See **Mandela and Others v Minister of Safety and Security** *supra* at 404 at g – I where Streicher J, as he then was said the following:

“The ‘reasonable grounds for believing’ in s 21 (1)(a) are not grounds measuring up to an objective standard, but grounds which in the subjective opinion of the magistrate are reasonable. (See Divisional Commissioner of SA Police, Witwatersrand Area, and Others v SA Associated Newspapers Ltd and Another 1966 (2) SA 503 (A) at 511 G – H; Ndabeni v Minister of Law and Order and Another 1984 (3) SA 500 (D) at 513 C – D; and Control Magistrate, Durban v Azanian Peoples Organisation 1986 (3) SA 394 (A) at 400F.) The statement to the contrary in Highstead Entertainment (Pty) Ltd t/a ‘The Club’ v Minister of Law and Order and Others 1994 (1) SA 387 (C) at 392I – 393A is in my view not correct and not borne out by the authority relied upon, that is the Ndabeni case *supra*.” I agree with this interpretation.

The different interpretations have also been recognised by the Constitutional Court. See **Thint (PTY) LTD v NDPP**;

Zuma v NDPP 2008 (12) BCLR 1197 (CC) paragraph [92]
footnote 65.

[38] I may therefore not interfere with the first respondent's decision merely because I considered it to be wrong. I may however interfere therewith if I find that the first respondent did not apply his mind properly to the matter. See **Mandela** *supra* 404 i to 105 a.

[39] The first respondent was supposed to apply his mind to whether the files may afford evidence of the commission or suspected commission of a crime. He had to decide whether it appeared to him that there were reasonable grounds for believing that the files may afford evidence and whether it appeared to him that the files were kept upon the premises of the applicant.

[40] The first respondent seems to think that he does not have to apply his mind before issuing warrants because it is a preliminary step in the investigation. According to him, he may prejudice an accused or suspect at this stage because the admissibility of the unconstitutionally obtained evidence

will be determined later by the trial court. It might be so that the admissibility of the evidence will be dealt with later, but that does not mean that the first respondent should abdicate his responsibility.

[41] The first respondent's attitude / approach displays an unfortunate lack of appreciation of the important role that he should play in regulating and circumscribing police power in order to safeguard person's right to privacy. He unashamedly acted as a rubberstamp. The authorization of the warrants was, to him, a formality that had to be complied with at the request or rather behest of the police. He did not see the need to balance the right to privacy of the applicant and the right of the police to obtain evidence in order to bring criminals or suspected criminals to book.

[42] The information placed before him in the third party matters related to only one incident of an allegation of fraud or an incorrect bill of costs. There was no indication that the other files contained evidence that could substantiate the allegation of fraud. There was also no information before

him that the other files contained evidence of any offence being committed by the applicant.

[43] Likewise there was no information before him that the supplier claim files in relation to the hospitals other than Bongani Hospital contained or may contain evidence of the commission or suspected commission of an offence. In fact no mention is made of the other hospitals in Raubenheimer's affidavit. Raubenheimer did not even attach the statements of the personnel at Bongani Hospital which was in his possession or in the possession of members of the South African Police Service.

[44] The warrants are also too broad. The first respondent knew that the applicant is a firm of attorneys. He ought to have realised or foreseen that those files might contain privileged or confidential information. Having read Raubenheimer's statement he ought to have realised that the only reason why the files were sought was to verify whether consultations were held on the dates reflected on the bill of costs and whether there were instructions given to issue summons and to issue warrants of execution against the property of the fifth

respondent. The first respondent could then have tailored the warrants to such an extent that they do not include a seizure of the whole contents of the files but only the relevant information which might not even be privileged information. If the warrants were tailored to fit the particular circumstances the inference that the first respondent did not apply his mind to the matter would indeed be very difficult to draw.

[45] It is clear that the first respondent did not apply his mind properly before issuing the warrants. He also did not apply his mind to the terms of the warrants in order to tailor them in accordance with the information before him. The first respondent did not adhere to the admonition in **Mohammed v National Director of Public Prosecutions and Others** 2006 (1) SACR 495 (W) at 507 h that:

“A warrant should be tailored for the occasion, not simply taken from stock.”

In my view both warrants ought to be set aside.

Costs

[46] The applicants requested me to make a punitive cost order.

If one has regard to the manner in which the third respondent and Raubenheimer went about to obtain these warrants, it is clear that they had scant regard for the applicant's right to privacy. They deliberately put insufficient information before the first respondent. The third respondent requested a warrant to search any place or premises for the files being well aware that no proper case has been made out for such a warrant. Thankfully, it was not granted in those terms. The third respondent and Raubenheimer refused to give Podbielski the affidavits which were used in support of the application for the warrants. When Podbielski objected to the search and seizure operation his remonstrations were brushed aside and the third respondent proceeded to seize the files upon different premises. She knew full well that she was exceeding the authorization stipulated in the warrants. They ought to have foreseen that such a search and seizure at an attorney's firm, in a relatively small place such as Welkom, might do great damage to the applicant's reputation.

[47] This is indeed a case wherein I must show my disapproval of the strong-arm tactics employed by the third respondent and Raubenheimer. The most appropriate way to do so would be by way of a punitive costs order.

[48] The applicant employed two senior counsel and one junior. The applicant requested me to order that the costs should include the costs occasioned by the employ of two senior counsel and a junior. In my view this matter was not as complicated, intricate or involved as to employ two senior counsel. The respondents also employed senior counsel. There is therefore no reason why the costs should not include the costs of junior counsel and one senior counsel. No costs order was sought against the first respondent.

Costs of 11 December 2008

[49] I now deal with the costs of 11 December 2008. In the order mentioned in paragraph one above I ordered the respondents to file the record or documents that form the subject of this application on or before 16:00 on 21 November 2008.

[50] The record of the proceedings was not submitted by the respondents on 21 November 2008. On 9 December 2008 the applicant delivered a Rule 35 (12) notice. It is only in response to this notice that the statement of Juanita Victor, which according to the respondents was part of the information before the first respondent, was given to the applicants. The statements of Ralile and Knoesen was also requested and not given, because the respondents alleged that those statements were not before the first respondent. Likewise the statements of the other “complainants” referred to in Raubenheimer’s opposing affidavit were not disclosed because those statements were not before the first respondent.

[51] The postponement of this matter was necessitated by respondents’ non disclosure of information or by them disclosing relevant information at a late stage. The wasted costs occasioned by the postponement on 11 December 2008 should also be borne by the respondents.

Ruling

In my view the first respondent should not have issued the warrants. His decision ought to be set aside. All the files seized as a result of those warrants ought to be returned to the applicant.

Order

[52] I accordingly make the following order:

- 1. Paragraphs 1 to 3.2 of the rule nisi are confirmed.**
- 2. The second to the fifth respondents are ordered to pay the applicant's costs, jointly and severally the one paying the other to be absolved, including the costs occasioned by the postponement of this matter on 11 December 2008, on an attorney and client scale. Such costs to be limited to the costs occasioned by the employ of junior counsel and one senior counsel.**

C.J. MUSI, J

On behalf of the Applicant:

Adv. Kemp SC, Adv A.J. R.
Van Rhyn SC and Adv N.
Snellenberg

Instructed by:

Honey Attorneys
BLOEMFONTEIN

On behalf of the Respondents:

Adv. M.N.S. Sithole SC

Instructed by:

State Attorney
BLOEMFONTEIN

/ms