

52/86

Case no 445/84.
MC

THE CONTROL MAGISTRATE, DURBAN

VS

AZANIAN PEOPLE'S ORGANISATION

(AZAPO)

JANSEN JA.

Case no. 445/84.

MC

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between

THE CONTROL MAGISTRATE, DURBAN

Appellant

- and -

AZANIAN PEOPLE'S ORGANISATION

Respondent

(also known as AZAPO)

Coram: JANSSEN, VILJOEN, VAN HEERDEN, BOSHOFF JJA
et GALGUT AJA.

Heard: 17 February 1985.

Delivered: 27 March 1986.

J U D G M E N T

JANSSEN /

JANSEN JA :-

During the early hours of 22 May 1984 members of the Special Branch of the South African Police visited certain 9 premises in and about Durban. These premises were occupied by persons having some association with the Azanian Peoples Organisation (AZAPO). The police conducted a search at each address and seized inter alia certain articles, mostly of a documentary nature, pertaining to AZAPO. The police purported to act in terms of warrants ex facie issued in terms of sec. 25 of the Criminal Procedure Act (Act 51 of 1977) by the control magistrate, Durban. AZAPO thereafter applied "as a matter of urgency" to the Durban and Coast Local Division for an order that the warrants be "set aside as having no force and effect whatsoever" and that the articles seized be returned. The control magistrate and the Minister of Law and Order were cited as first and second respondents respectively.

respectively. They opposed the application. The Local Division (per DIDCOTT J) held that the warrants were invalid and set them aside, awarding costs against the magistrate in his capacity as such. No order, however, was made against the Minister in view of an assurance that the articles seized would be returned. The magistrate appeals by leave of this Court.

The only issue now is whether the magistrate, in issuing the warrants, duly exercised his discretion in terms of sec 25(1) of the Act. The section reads as follows:-

"(1) If it appears to a magistrate or justice from information on oath that there are reasonable grounds for believing -

- (a)
- (b) that an offence has been or is being or is likely to be committed or that preparations or arrangements for the commission of any offence are being or are likely to be made in or upon any premises within his area of jurisdiction,

he

he may issue a warrant authorizing a police official to enter the premises in question at any reasonable time for the purpose -

- (i)
- (ii) of searching the premises or any person in or upon the premises for any article referred to in section 20 which such police official on reasonable grounds suspects to be in or upon or at the premises or upon such person; and
- (iii) of seizing any such article."

Each of the warrants states, above the signature of the magistrate, the following:-

"1.

2. Nademaal dit op grond van inligting onder eed gedoen, na my mening blyk dat daar redelike gronde bestaan om te dink dat daar op of by die perseel [in each case described]

(1)

(2)die misdryf van Artikel 13(1)(a)(v) van die Wet op Binnelandse Veiligheid (Wet 74/1982) voortsetting van die oogmerke van 'n verbode organisasie of soortgelyke oogmerke gepleeg is of gepleeg word of waarskynlik gepleeg sal word of dat voorbereidings of reëlins vir die pleging van 'n misdryf getref word of waarskynlik getref sal word in of op bogenoemde perseel.

3. U

3. U word hierby gemagtig om die bogenoemde perseel op 'n redelike tyd te betree ten einde -

- (1)
- (2) bogenoemde perseel of enige persoon in of op die perseel te 'deursoek vir 'n ARTIKEL 20 (WET 51 van 1977) bedoelde voorwerp wat, na 'n op redelike gronde vermoed in of op of by die perseel of aan bedoelde persone is, en
- (3) so 'n voorwerp in beslag te neem."

The case made out by AZAPO in its founding affidavit that the magistrate improperly exercised his discretion rests entirely on the following bald "allegation":-

"38. I respectfully submit that there was no basis whatsoever for believing that any offence had been committed or was about to be committed for the purpose for which the warrant was issued by the First Respondent and that, accordingly, he improperly exercised his discretion in ordering the same."

(It is true that some inference was also sought to be drawn from a reply by the magistrate to a telephonic inquiry by AZAPO's attorney, but the inference was so tenuous that

it

it was not mentioned in the judgment a quo nor does it merit further consideration).

In his answering affidavit the magistrate states that he issued the warrants pursuant to an application to him by Captain H S Miles of the South African Police on 21 May 1984. He continues:-

"

7.

Na deurlees van die eedverklaring ter ondersteuning van die aansoek, was dit my oorwoë mening dat, op grond van die inligting onder eed voor my geplaas, daar redelike gronde bestaan het om te dink dat daar op of by die persele genoem in die eedsverklaring ter ondersteuning van die aansoek, dit geblyk het voldoende grond bestaan vir die uitreiking van die gemelde lasbriewe waarna hierbo verwys word.

8.

Dit het verder geblyk dat 'n misdryf van oortreding van Artikel 13(1)(a)(v) van die Wet op Binnelandse Veiligheid, Wet 74 van 1982 gepleeg is, of gepleeg word of waarskynlik gepleeg sal word of dat voorbereidings of reëlins vir die pleging van so 'n misdryf getref word of waarskynlik getref word in of op die bovermelde persele.

9. Dit

9.

Dit het in besonder uit die bogemelde inligting onder eed aan my verskaf geblyk dat daar redelike gronde is om te dink dat die Applikant hom skuldig maak aan die verwesenliking van die oogmerke van 'n onwettige organisasie of organisasies soos gedefinieer in Artikel 1 van Wet 74 van 1982, te wete die South African Students Organisation (bekend as SASO) en die Black Peoples Convention (bekend as BPC) en voorts dat Applikant oogmerke had wat soortgelyk is aan die van SASO en BPC en sodanige oogmerk bepleit, aanraai, verdedig, aanmoedig en/of voortsit of handeling verrig wat bereken is om die verwesenliking van die oogmerke van SASO en die BPC te bevorder.

10.

Ek het gevolglik lasbriewe uitgereik ten opsigte van elk van die persele wat 'n polisiebeampte of beamptes magtig om elk van die betrokke persele op 'n redelike tyd te betree

The bona fides of the magistrate was never in doubt: the Court a quo remarked that "there is no suggestion, and rightly no suggestion, that he has acted anything but honestly in the matter". Moreover, it has been common cause

cause throughout that "reasonable grounds for believing" in sec 25(1) are not "grounds" measuring up to an objective standard, but grounds which in the subjective opinion of the magistrate are reasonable. Nevertheless, the Court, in effect, came to the conclusion that the magistrate had not applied his mind to the matter before him: the Court found it "inescapable, at the level of the probabilities, that the magistrate was either given no grounds at all for the belief, or, at most, that he was given grounds for the belief which this Court has clearly held to be equivalent to no grounds." The Court inferred that the only "information on oath" placed before the magistrate consisted of "bare opinions" or at most amounted to no more than an allegation that AZAPO shared with SASO a common belief in Black Consciousness. The latter allegation could not per se, as the Court had decided in an earlier case (Ndabeni v Minister of Law and Order and Another 1984(3)

SA 500(D)), give rise to a reasonable (in an objective sense) suspicion that AZAPO was advocating, advising, defending or encouraging some object of SASO.

For purposes of this appeal it is unnecessary to consider whether the "information" envisaged by sec 25(1) excludes opinion evidence or whether Ndabeni was correctly decided. It seems clear that the Court was not justified in arriving at the conclusion it did in respect of the nature of the information placed before the magistrate.

The essence of the Court's reasoning was that if more had been placed before the magistrate, he would have said so; in other words, that his failure to set out his grounds of suspicion in his affidavit raises the inference which the Court accepted. This reasoning, however, overlooks the fact that AZAPO in its founding affidavit had not made out a prima facie case of an improper exercise by the magistrate of his discretion and that it was not incumbent upon him to answer at all. Moreover

the

the Court a quo was erroneously under the impression that there was no suggestion that any of the information placed before the magistrate was of a confidential nature. In truth H S Miles says in his affidavit:-

3.

" Ek het die eedverklaring van beheerlanddros JOHANNES THEODORUS BOSCH hierin gelees en ek bevestig die inhoud daarvan insoverre as wat dit op my betrekking het. Ek wil verder meld dat die inhoud van die verklaring wat ek aan die gemelde Bosch voorgelê het, vertroulike inligting bevat."

The Court was also under the impression that "the magistrate has specifically referred to the evidence in this case as containing the information on which he acted." This led to an assessment by the Court of the affidavits by members of the police, made on behalf of the Minister and mainly relating to the seizure of the articles in question, as a basis of determining the nature of the information given to the magistrate. In fact, however, the magistrate had

made

made no reference to the police affidavits; the Court was mistaken in this regard (apparently as the result of what counsel said). In my view the magistrate's failure to give the reasons for his belief does not give rise, in the circumstances of this case, to an inference, as being the most probable, that the magistrate had no grounds for his belief, in the sense the Court a quo had in mind. In the absence of a prima facie case against him, the magistrate may at least equally well have been advised to say no more than he did, or have refrained from saying more because in his view the information given to him was confidential. Without the direct link between the information given to the magistrate and the affidavits by members of the police, erroneously accepted by the Court a quo to exist, an analysis of the affidavits cannot really carry the matter any further and will serve no useful purpose. It may, however, be remarked that they appear in many respects to go beyond mere opinion and beyond merely stating the existence of

a common faith in Black Consciousness between AZAPO and SASO.

The following order is made:

- 1) The appeal is allowed with costs, such costs to include those attendant upon the employment of two counsel;
- 2) The order of the Court a quo is altered to read:

"The application is dismissed with costs, such costs to include those attendant upon the employment of two counsel."

JANSEN, JA

VILJOEN, JA	)	
VAN HEERDEN, JA	)	Concur
BOSHOF, JA	)	
GALGUT, AJA	)	