

Reportable: Yes / No
Circulate to Judges:
Yes / No

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IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division)

Case No: CA& R 70A/07
Date heard: 12/02/2007
Date delivered: 28/09/2007

HENRY JACOBS

APPELLANT

versus

THE STATE

RESPONDENT

Coram: MOLWANTWA AJ et MOKGOHLOA AJ

JUDGMENT ON APPEAL

MOKGOHLOA AJ

1. The appellant who was legally represented appeared in the Magistrate's Court Victoria West on a charge of contravention of **Section 67(1)(a)** of the **South African Police Act 68 of 1995** i.e. obstructing a police official in the execution of his duties. Notwithstanding his plea of not guilty, he was convicted. However,

the passing of his sentence was postponed. He now appeals against his conviction only, with the leave of the trial court.

2. The appellant's grounds of appeal as they appear on his notice of appeal dated 10 March 2006 are as follows:

- "1. Die Agbare Landdros gefouteer en misgetas het deur die getuienis van die enkel staatsgetuie as geloofwaardig te aanvaar en derhalwe tot 'n foutiewe feitebevinding gekom het.*
- 2. Dat die Agbare Landdros gefouteer en misgetas het deur geen waarde te heg aan die getuienis van die verdedigingsgetuies nie.*
- 3. Dat Agbare Hof gefouteer en misgetas het deur die korrektheid van die visenteringslasbrief, wat as bewysstuk toegelaat is, te aanvaar en derhalwe tot 'n verkeerde regsbevinding te kom.*
- 4. Dat die Agbare Hof gefouteer het en misgetas het deur nie behoorlik ag te slaan op die bepalings van Wet 32 van 2000 nie."*

3. It is common cause or at least not seriously disputed that:

3.1. the appellant was at the material time employed by the Victoria West Municipality as an administrative officer, whilst one Martin Fillis was the Municipal Manager at Victoria West;

3.2. on 26 November 2004 one Captain J. S. Olivier visited the offices of

Victoria West Municipality armed with a search and seizure warrant;

3.3. the said Captain Olivier explained the reasons for his visit to the appellant;

3.4. in turn the appellant phoned Mr Martin Fillis informing him of Captain Olivier's visit;

3.5. the appellant then refused to give any information to Captain Olivier;

3.6. Captain Olivier warned the appellant that he is going to arrest him for refusing to give information;

3.7. the appellant was indeed arrested;

3.8. subsequently Captain Olivier returned to the Municipality offices later and seized the necessary documents which were in a lever-arch file.

4. The appellant's version as testified by himself was that:

4.1. he informed Captain Olivier that he did not have the authority to make available any information without the instructions of Fillis, the Municipal Manager;

4.2. he did phone Fillis whereafter Fillis discussed this issue with Captain Olivier over the phone;

5. What was therefore essentially in dispute was whether:

5.1. the search and seizure warrant conformed to the prescribed law and was valid;

5.2. there was a telephonic conversation between Captain Olivier and Fillis on the day of the incident;

5.3. the appellant's action were lawful in terms of the Municipality Act 23 of 2000;

5.4. the appellant obstructed or hindered Captain Olivier in the lawful exercise of his duties by refusing to make the relevant information available;

5.5. the appellant had the intention to commit the offence in issue.

(S v Jaffer 1988(2) S.A. 84 (CPD) at 87 a - j.)

6. In the context of this matter, I find it necessary and expedient firstly to determine whether the search and seizure warrant conformed to the strict requirements of **Section 21** of the **Criminal Procedure Act 51 of 1977 (the CPA)** and whether Captain Olivier's conduct on that day was lawful.

7. For ease of reference, **Section 21** of the **CPA** provides as follows:

"(1) Subject to the provisions of ss 22, 24, 25, an article referred to in s20 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; or

(b) by a judge or judicial officer presiding at criminal proceedings, if it appears to such Judge or judicial

officer that any such article in the possession or under the control of any person or upon or at any premises is required in evidence at such proceedings.

(2) *A search warrant issued under ss (1) shall require a police official to seize the article in question and shall to that end authorize such police official to search any such 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) *A search warrant shall be executed by day, unless the person issuing the warrant in writing authorises the execution thereof by night.*

(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 s 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 affected, hand to him a copy of the warrant."*

8. It is trite that search and seizure warrants give the police wide powers to enter certain specified premises and conduct lawful

search and seizure. It cannot be gainsaid that, unless properly and carefully executed, search and seizure can constitute a serious invasion of the rights to privacy and dignity of other people. It is therefore critical that search and seizure warrants be carefully worded and executed with scrupulous care.

9. In *Community Repeater Services CC and Others v Minister of Justice and Others* 2000(2) SACR 592 (SE) at 594h ChettyJ said:

“The principles to be applied in determining whether or not seizure under a search warrant is justified are well established.

*In **De Wet and Others v Willer NO and Another** 1953(4) SA 124 (T) RamsbottomJ, delivering the judgment of the Full Court, said at 127B:*

‘To enter premises, to search those premises, and to remove good therefrom is an important invasion of the rights of the individual. The law empowers police officers to infringe the rights of citizens in that way provided that they have legal warrant to do so. They must act within the terms of that warrant.’

*It is apparent that the warrants are couched in general terms. In this regard Beyers ACJ in **Divisional Commissioner of SA Police, Witwatersrand Area and Another** 1966 (2) SA 503(A) said at 512D:*

‘It has long been established that the courts will refuse to recognise as valid a warrant the terms of which are too general.’“

10. Recently, the Supreme Court of Appeal had occasion to grapple

with the sensitive and controversial aspect of search and seizure warrants. In **Powell NO and Others v Van Der Merwe NO and Others 2005(1) SACR 317 (SCA)**, at 340 para [59], Cameron JA in a careful, erudite and well – articulated judgement enunciated the principles applicable to search and seizure warrants in a constitutional democracy as follows:

“These cases establish this:

- (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.”

- 11.** It is against these legal principles that I have to determine the crisp question as to whether the search and seizure warrant *in casu* was valid. The search and seizure warrant reads as follows:

“Warrant of search and seizure in terms of section 21, read with section 20 (a), (b) and (c) of the Criminal Procedure Act 51 of 1977. (as amended)

To: Members as per annexure B

*After perusing the information supplied to me under oath, I am of the opinion that there appears to be reasonable grounds to believe that there are, within the Magisterial district of **Victoria West** certain articles as per “Annexure A” hereto, which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence of **Fraud/Theft** within the Republic of South Africa or elsewhere, or which may afford evidence of the commission or suspected commission of an offence to wit **books and accounts** which is intended to be used or is in reasonable grounds believed to be intended to be used in the commission of an offence within the Republic of South Africa and which are or near the premises, to wit*

MUNICIPAL OFFICES, CHURCH STREET, VICTORIA WEST (UBUNTU MUNICIPALITY)

You are hereby authorised to enter the abovementioned premises during the day/night, and you are instructed to search for the mentioned objects, as per Annexure “A” and to seize such objects if it is found and to dispose of such objects to the powers you have

in terms of Section 30 of Act 51 of 1977

Seizure take place in terms of section 22 (b) (i) and (ii) read with section 20 of Act 51 of 1977.

Annexure "A"

PROPERTY/OBJECTS AS FOLLOWS:

1. *Bankstate*
2. *Inbetalings Bewyse*
3. *Kwitansieboeke*
4. *Notules"*

12. It should be abundantly clear that the items to be seized listed in this warrant are both vague and extremely wide. There is no clear indication anywhere in the warrant how far back in time the search is to extend. Are bank statements, payment receipts, receipt books and minutes which are many years old to be seized, or is there to be a 'cut off' point somewhere? It is clear from the said warrant, in particular "Annexure A", that the items to be seized are sufficiently identified to enable the appellant to know which items Captain Olivier was authorised to seize and remove. I find the warrant to have been impermissibly over – broad and seriously invasive. In my view, it is not enough to say that the appellant knew what was being looked for. See **Powell No and Others v Van der Merwe No and Others** *supra* at para [59].

13. Furthermore in **Zuma and Another v National Director of Public Prosecutions and Others 2006(1) SACR 468(D)** at **487 b Hurt J** held that the warrant must convey the ambit of the search 'intelligibly'. This includes the fact that the person to be searched must be given enough information inter alia regarding when the suspected offence was committed and who is suspected to have committed it. Regrettably this warrant falls short of this requirement too.

14. In his address the appellant's attorney pertinently raised and impugned the validity of the warrant in issue. Quite inexplicably the magistrate failed to address this issue in his reasons for judgment. This can possibly be ascribed to the fact that the magistrate found himself to decide on the validity of the very warrant which he issued. That the magistrate found himself in an invidious if not embarrassing position is understandable.

15. Having found that the warrant was invalid, can it be said that the appellant's conduct amounted to obstruction of Captain Olivier in the lawful exercise of his duties. **CR Snyman** in his book, **Criminal Law,**

4th Edition, Butterworths, page 350 states the following in respect of the offence in question:

"The offence is only committed if the act is committed in respect of a member of the police service who is exercising his powers or performing his duties or functions. This means that the offence cannot be committed in respect of police conduct which is unlawful. Thus if X obstructs a member of a police service who attempts to gain entry into premises in an unlawful way, he does not commit an offence."

16. For the reasons adverted to above, I am of the view that since the search and seizure warrant was invalid, Captain Olivier was not conducting a lawful search and that therefore, in failing to furnish him with the documents as set out in "Annexure A", the appellant did not commit any offence.

In the circumstances I make the following order:

- 1. The appeal against both conviction and sentence is upheld.**
- 2. The conviction and sentence are set aside.**

F.E MOKGOHLOA
ACTING JUDGE
NORTHERN CAPE DIVISION

I concur

B.C. MOLWANTWA
ACTING JUDGE
NORTHERN CAPE DIVISION

For the applicant: Adv I.J. Nel	Instructed by: Wagener Attorneys
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For the state: Adv T.T. Birch
Instructed by: Director of Public
Prosecutions