

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>

CASE NO: 7453/2024

In the matter between:

ALLIANCE FUEL (PTY) LTD

Applicant

and

COMMISSIONER FOR THE SOUTH AFRICAN

REVENUE SERVICE

First Respondent

ALFRED MTHIMUNYE

Second Respondent

JUDGEMENT

GAISA AJ

INTRODUCTION

[1] This urgent application brought by Alliance Fuel (Pty) Ltd ("the Applicant") against the Commissioner for the South African Revenue Service ("SARS") and Mr Alfred Mthimunye, a SARS official (collectively "the Respondent"), arises from search and seizure operations conducted by the Respondent at the Applicant's premises in Louis Trichardt on 10 July 2024. These operations were executed pursuant to warrants obtained ex parte from the Louis Trichardt Magistrates Court on 3 and 4 July 2024.

[2] The Applicant seeks an order compelling the Respondent to furnish it with copies of the ex parte applications used to obtain the search warrants, as well as interdictory relief preventing the Respondent from conducting further searches or using seized materials pending the provision of the ex parte applications and determination of an application to reconsider the warrants.

[3] This matter raises important questions about the proper procedure to be followed when a party like the Respondent obtains and executes search warrants and the rights of affected parties to challenge such warrants. It requires this Court to balance the Respondent's statutory powers of investigation against the constitutional rights of taxpayers to fair administrative action and access to courts.

BACKGROUND

[4] On 3 and 4 July 2024, the Respondent obtained search warrants from the Louis Trichardt Magistrates Court in terms of section 4(4)(d) of the Customs and Excise Act 91 of 1964 ("Customs Act") and sections 59 and 60 of the Tax Administration Act 28 of 2011 ("TAA"). The warrants authorised the Respondent to search the Applicant's premises in Louis Trichardt.

[5] The Respondent executed the warrants on 10 July 2024, conducting a search and seizure operation at the Applicant's premises. Various items, including an employee's personal cell phone, were seized and detained.

[6] From 11 July 2024, the Applicant's attorney, Mr Mayet, made numerous requests to the Respondent's officials for copies of the ex parte applications used to obtain the warrants. Despite these requests, the Respondent initially refused to provide the applications, stating that the relevant affidavits were considered by the court that issued the warrants.

[7] On 13 July 2024, the Respondent's attorneys informed the Applicant that the Respondent intended to conduct a further operation at the Applicant's premises on 15 July 2024, despite the warrants expressly confining execution to 10 July 2024.

[8] The Applicant then launched this urgent application on 15 July 2024, seeking the relief outlined above.

[9] Notably, the Respondent eventually furnished a copy of the ex parte application a day or two before the hearing of this matter. However, this late provision does not negate the Respondent's earlier refusal and delay in providing it, necessitating the urgent application.

ISSUES FOR DETERMINATION

[10] The critical issues for determination are:

- 10.1. Whether the Respondent is obliged to furnish the Applicant with copies of the ex parte applications used to obtain the search warrants;
- 10.2. Whether the Applicant has established grounds for urgent interim interdictory relief pending provision of the ex parte applications and determination of an application to reconsider the warrants; and
- 10.3. Whether the Respondent is entitled to conduct further searches beyond the date specified in the warrants.

LEGAL FRAMEWORK

[11] Section 4(4)(d) of the Customs Act empowers the Respondent to apply ex parte to a magistrate for a warrant to enter and search any premises. The section requires the Respondent to set out in its application:

- 11.1. That there are reasonable grounds for suspecting that an offence under the Act has been committed;
- 11.2. That a search of the premises is likely to yield information concerning such an offence and
- 11.3. The search is reasonably necessary for the purposes of the Act.

[12] Sections 59 and 60 of the TAA contain similar provisions empowering the Respondent to apply for and execute search warrants.

[13] Rule 55(3) of the Magistrates' Courts Rules governs ex parte applications. Of relevance is Rule 55(3)(e), which provides:

"A copy of any order made ex parte and of the affidavit, if any, on which it was made must be served on the respondent thereto."

[14] This rule gives effect to the *audi alteram partem* principle and the constitutional right of access to courts by ensuring that a party affected by an *ex parte* order can challenge it.

[15] Section 34 of the Constitution guarantees the right of access to courts. This includes the right to challenge orders granted in one's absence.

ANALYSIS

[16] Obligation to Furnish Ex Parte Applications

16.1. The Respondent initially contended that it was not obliged to provide the Applicant with the *ex parte* applications, as a competent court issued the warrants after considering the relevant affidavits and information. This contention cannot be sustained.

16.2. Rule 55(3)(e) of the Magistrates' Courts Rules imposes an explicit and peremptory obligation on the Respondent to serve on the Applicant copies of the *ex parte* applications and supporting affidavits used to obtain the warrants. This obligation exists independently of the magistrate's consideration of the applications.

- 16.3. This rule aims to enable a party affected by an *ex parte* order to exercise its right to challenge that order appropriately. Access to the application papers is necessary for the Applicant to assess the lawfulness of the warrants and to exercise its right to apply for reconsideration.
- 16.4. The Respondent's initial refusal to provide the applications frustrated the Applicant's constitutional right of access to courts under section 34 of the Constitution. It effectively denied the Applicant a fair opportunity to challenge the warrants.
- 16.5. Moreover, as an organ of the state, the Respondent has a higher duty to respect the law, fulfil procedural requirements and tread carefully when dealing with rights. Its initial stonewalling approach in this matter fell short of this standard.
- 16.6. I, therefore, find that the Respondent was legally obliged to furnish the Applicant with copies of the *ex parte* applications and supporting affidavits used to obtain the search warrants. While the late provision of these documents is commendable, it does not fully remedy the earlier non-compliance.

[17] Grounds for Urgent Interim Relief

17.1. The requirements for interim interdictory relief are well-established:

17.1.1. a prima facie right;

17.1.2. a well-grounded apprehension of irreparable harm;

17.1.3. balance of convenience favouring the grant of relief and

17.1.4. no other satisfactory remedy.

17.2. The Applicant has established a clear right to be furnished with the *ex parte* application papers in terms of Rule 55(3)(e). This right is bolstered by its constitutional right of access to courts.

17.3. There is a well-grounded apprehension of irreparable harm. The Respondent has already conducted one search operation and has indicated its intention to perform further operations. Without timely access to the *ex parte* applications, the Applicant could not assess and challenge the lawfulness of these actions appropriately. Each day that passes with the Respondent possessing seized materials potentially used for further investigations compounds the potential prejudice to the Applicant.

- 17.4. The balance of convenience favours granting relief. If interim relief is granted, the Respondent will merely be prevented from conducting further searches or using seized materials until it complies with its legal obligations and the Applicant can challenge the warrants. The potential prejudice to the Applicant outweighs this temporary limitation on the Respondent's powers if relief is refused.
- 17.5. The Applicant had no other satisfactory remedy available. It made numerous attempts to obtain the *ex parte* applications from the Respondent without success. Court-ordered relief was the only viable option to protect its rights.
- 17.6. I am satisfied that the Applicant has established grounds for urgent interim interdictory relief pending the provision of the *ex parte* applications and the determination of an application to reconsider the warrants.

[18] Further Searches Beyond Specified Date

18.1. The search warrants expressly confined execution to 10 July 2024.

Therefore, the Respondent's intention to conduct further operations on 15 July 2024 is *prima facie* unlawful.

18.2. While the Respondent undoubtedly has broad investigative powers, these must be exercised within the confines of the law and specific court orders. To allow the Respondent to unilaterally extend the operation of a warrant beyond its specified terms would undermine the rule of law and the court's supervisory role over search and seizure operations.

18.3. I, therefore, find that the Respondent is not entitled to conduct further searches beyond the date specified in the warrants without obtaining fresh authorisation from a court.

CONCLUSION

[19] The Applicant has established its entitlement to urgent interim relief. Such relief is necessary to protect its constitutional rights and to ensure that the Respondent acts within the bounds of the law.

[20] This judgment should not be construed as fettering the Respondent's ability to conduct legitimate investigations into tax compliance. Instead, it affirms that such investigations must be performed following prescribed legal procedures that give effect to constitutional rights.

[21] The Respondent's late provision of the *ex parte* applications, while not fully remedying the earlier non-compliance, is acknowledged. However, it does not negate the need for this Court to guide the proper procedure for future cases to prevent similar issues, even involving other organs of state or private parties.

[22] This judgment underscores the importance of transparency and procedural fairness in *ex parte* applications, especially those involving search and seizure powers. It serves as a reminder that even in the pursuit of legitimate investigative goals, organs of state or private parties must adhere strictly to legal procedures and respect constitutional rights.

[23] The Respondent's conduct in this matter, particularly its initial refusal to provide the *ex parte* applications, raises concerns about the potential for abuse of *ex parte* procedures. Such methods mustn't be used to gain tactical advantages or frustrate affected parties' rights.

[24] In the future, the Respondent and other state organs should be mindful of their higher duty to act fairly and transparently in litigation. Withholding *ex parte* applications from affected parties is inconsistent with this duty and the principles of open justice.

[25] This judgment also highlights the need for courts to exercise vigilant oversight over *ex parte* applications, particularly those involving intrusive measures like search and seizure operations. Magistrates granting such orders should ensure adequate safeguards to protect the rights of affected parties.

ORDER

[26] As the result, I make the following order:

26.1. The application is granted as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court.

26.2. It is noted that the First Respondent has now furnished the Applicant with copies of the *ex parte* applications, including all supporting affidavits, used to obtain the search warrants issued by the Louis Trichardt Magistrates Court on 3 and 4 July 2024.

26.3. Pending the final determination of an application to be brought by the Applicant in the Louis Trichardt Magistrates Court for reconsideration of the warrants mentioned above:

26.3.1. The Respondents are interdicted from conducting any further searches or seizures at the Applicant's premises situated at 0 Bronn Street, Louis Trichardt, under the warrants mentioned above;

26.3.2. The Respondents are interdicted from using, for any purpose whatsoever, any materials, information or data seized or obtained during the search conducted on 10 July 2024.

26.4. The Applicant is directed to launch the application for reconsideration referred to in paragraph 3 within ten court days of this order.

26.5. The Respondents are ordered to pay the costs of this application on the attorney-client scale, jointly and severally.



GAISA AJ

**ACTING JUDGE OF THE HIGH COURT, POLOKWANE,
LIMPOPO DIVISION**

APPEARANCES

FOR THE PLAINTIFF: ADV ABO OMAR

INSTRUCTED BY: MAYET ATT

FOR THE DEFENDANT: ADV G DIAMOND

INSTRUCTED BY: DU TOIT SWANEPOEL STEYN & SPRUYT ATT

DATE OF HEARING: 16 JULY 2024

DATE OF JUDGEMENT: 25 July 2024