Republic of South Africa

In the High Court of South Africa
Western Cape High Court, Cape Town

CASE NO: A228/2009

MINISTER OF SAFETY & SECURITY	**First Appellant**
SUPERINTENDENT NOEL GRAHAM ZEEMAN	**Second Appellant**
PAUL CHRISTIAAN LOUW N.O.	**Third Appellant**
vs	
MUSTAFA MOHAMED	**First Respondent**
OMAR HARTLEY	**Second Respondent**

JUDGMENT DELIVERED ON THE 30TH OF APRIL 2010

LOUW, J:

[1] This is an appeal, brought with leave granted by the court *a quo* (per **Samela, AJ**) on 19 December 2008, against the judgment and order of that court handed down on 14 November 2008:

1. setting aside a warrant issued by the third appellant in his capacity as the magistrate, Simonstown on 24 January 2008 (the warrant), authorising the search of certain premises situate at 16 and 16A Axminster Street, Muizenberg Cape;

2. ordering the first and second appellants to return to the first respondent all the items/articles seized at 16A Axminster Street, Muizenberg, Cape on 24 January 2008; and
3. Ordering the first and second appellants to pay the costs of the application.

[2] On 24 January 2008 the second appellant (Superintendant Zeeman) applied for the warrant in terms of the provisions of section 20 and 21 of the Criminal Procedure Act, 51 of 1977 and on the same day, the warrant was authorised by the third appellant, magistrate Louw. The warrant was executed by superintendant Zeeman and other members of the police during the early hours of 25 January 2008. Pursuant to a search of the premises occupied by the first respondent a number of articles were seized. These articles are currently being held by the police pending the outcome of this appeal.

[3] The warrant was set aside by the court *a quo* on the basis that the application for the issue of the warrant was not supported by "information on oath" as required by the provisions of section 21(1)(a) of the Criminal Procedure Act. The court *a quo* found that the application was supported by an unsigned and unattested document, purporting to be an affidavit.

[4] I mention that a similar application was brought by a Mr Achmat to set aside a search warrant issued by the magistrate in Vredenburg on 24 January 2008. This application was, however, withdrawn on 7 March 2008 by Mr Achmat, who did not tender to pay the respondents' costs to that date. No costs order was made by the court *a quo* against Mr Achmat and the appellants initially sought a costs order on appeal against Mr Achmat. This relief was correctly abandoned by the first and second appellants during the course of argument because, although the issue of a costs order against Mr Achmat was raised in the first and second appellants' notice of appeal, Mr Achmat is not a party to this appeal and no order can consequently be made against him on appeal.

[5] In the course of his judgment **Samela, AJ** commented that in executing the warrant, superintendant Zeeman did not advise the first respondent of his '*constitutional rights as was expressed in the Mohamed case*[1]. This finding did not, however, form a basis upon which the warrant was set aside by the court *a quo*. The sole basis upon which the warrant was set aside was that the application for the warrant was not supported by evidence set out on oath in the form of an affidavit. This is also the basis upon **Samela, AJ** granted the appellants leave to appeal.

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[1] This is a reference by the court *a quo* to the judgment in **Mahomed v NDPP and Others** 2006(1) SACR (W) at 520 a-c

[6] I turn first to consider whether the court *a quo* was correct in concluding that there was no evidence on oath before magistrate Louw, when he made the decision to authorise the issue of the warrant.

[7] The relevant part of the first respondent's launching affidavit reads as follows:

> The application for the search warrant against third applicant, second applicant and first was not accompanied by any material information under oath justifying the invasion of our rights, without first hearing our side of the story and without providing us with protection to enable us to establish what our rights were and how we were to enforce such rights.

[8] Magistrate Louw was the first respondent in the court *a quo*. He did not at the time oppose the relief sought in that court and he abided the decision of the court. He nevertheless filed an affidavit setting out the facts which gave rise to the issuing of the warrant. In response to the above allegation that the application for the warrant was not supported by information on oath, Louw stated that the application for the issue for the warrant that was placed before him on 24 January 2008

> was accompanied by an affidavit deposed to by superintendent Zeeman on 24 January 2008.

and that he (Louw)

> considered the application for the warrant and more particularly the affidavit filed in support of it. It appeared from the information contained in that affidavit that there were reasonable grounds to believe that there were articles and documents under the control of the persons or at the premises referred to in the warrant. I therefore issued the warrant for search and seizure which forms the subject of this application.

[9] Magistrate Louw referred also to a further answering affidavit, filed by superintendent Zeeman and stated that he had been requested not to annex a copy of the affidavit that had been placed before him because it contained sensitive information which was likely to compromise the investigation if made public.

[10] In paragraphs 7 to 11 of his answering affidavit superintendent Zeeman, who was the third respondent in the court *a quo*, and who with the first appellant (the Minister, who was the fifth respondent in the court *a quo)* opposed the application in that court, set out in broad outline the information obtained by the police which led to the application for the issue of the warrant. Zeeman's answering affidavit then continues as follows:

> 13 The affidavits placed before the magistrates to obtain the search warrants substantially contains the information referred to in paragraphs 7 to 11 above. I do not attach

these affidavits as they contain sensitive information relating to the investigation, which, if made public, is likely to compromise or jeopardise the investigation. . . .

14. I shall, however, ensure that a copy of the affidavit placed before the respective Magistrates (with sensitive details which is likely to prejudice the investigation expunged from it) is made available to the presiding Judge at the hearing of the application with the request that its contents not be made public.

[11] In reply the first respondent did not in terms deny the fact that an affidavit had been placed before the magistrate in support of the application for the issue of the warrant. He did no more than to refer to the "alleged affidavits" and to state that, to enable the respondents to give their version, they must be allowed access to the affidavits.

[12] The application was finally set down for hearing and was heard by **Samela, AJ** on 20 August 2008. In anticipation of the hearing, Mr Schippers, the first and second appellants' then counsel, filed a practice note dated 18 August 2008. Court Notices 8 and 13 require the filing of a note wherein is set out the nature of the proceedings, the estimated duration of the hearing and the details of the legal representatives of the parties. Counsel annexed a document to the practice note which he described therein as follows:

> A copy of the affidavit to obtain the relevant search warrant ... which was not attached to the answering papers for the reasons stated in the answering affidavit (p 62 paragraphs 13 – 14).

[13] The document annexed to the practice note is in the form of an affidavit by superintendent Zeeman. Parts of a number of paragraphs of this document are blanked out and are illegible. The document contains a certificate signifying that the affidavit was signed and sworn to before a commissioner of oaths on 24 January 2008 in Cape Town. The document is however not signed by the deponent Zeeman and the commissioner of oaths. The document annexed to the practice note is clearly not an affidavit in proper form.

[14] In his judgment, **Samela, AJ** comments as follows on what occurred during the proceedings before him.

> [3] Mr Omar, counsel for the Appellants, argued, amongst others, that the application for the issuing of a warrant was flawed because the affidavit by the third Respondent to the first Respondent was not signed and attested. Also, that the third Respondent did not justified the omission of explaining to both Appellants their rights. Mr Schippers, for the Respondents, argued, that the Magistrate considered the application and more specifically the affidavit and therefore the issuance of the search and seizure was justified. He argued further that provided that the search warrant complied with the safeguards contained

> in the Criminal Procedure Act, it was lawful and constituted limitation on the right to privacy.
>
> Counsel for the Applicants and the Respondents agreed that this matter was to be decided on papers before this Court. Mr Schippers, for the Respondents, told the Court that the affidavit that was placed before the Magistrate was signed and properly attested. He was unable to give any explanation why the copy which was placed before this Court was not signed and attested. Where a document purporting to be an affidavit is not signed by the deponent and attested by the commissioner of oaths as it (is) in this matter, the document cannot be regarded as an affidavit.

[15] It is clear from further passages in the judgment of the court *a quo* that the learned judge accepted that the copy which was placed before him by the appellant's counsel via the practice note, was in fact the "affidavit" which was placed before magistrate Louw when application was made for the issuing of the warrant. This appears from the following excerpts from the judgment:

> The *ex facie copy* of the "affidavit" which the third respondent relied on when he made the application before court, the document was not attested. There was also no *viva voce* evidence adduced before the magistrate.
>
> ....
>
> I am of the view that the document by the third Respondent to the first respondent, which was unsigned and unattested, did not

comply with the above requirements. It follows that there was no information placed before the first respondent on oath.

....

In this matter the Magistrate based his belief on an "affidavit" before authorising a warrant. There was no *viva voce* evidence on oath before him as well. As I have indicated above, the magistrate based his belief on a document which he mistakenly believed to be an affidavit.

....

Ex facie copy of the affidavit which was placed before court was a testimony to my view that the so called affidavit did not comply with the requirements laid down for the administration of an oath or affirmation which have been discussed above. Where there has been no proper administration of an oath or affirmation as it was the case in this matter, I am of the view that there was no evidence placed before the magistrate. It was not proper for the magistrate to issue a warrant, as it was in my view, invalid.

....

I am of the view that the document placed before the magistrate which purported to be an affidavit, was not an affidavit. Consequently, the magistrate mistakenly issued a warrant of search and seizure was invalid and therefore unlawful.

[16] Appellants' counsel on appeal, Mr Joubert (on behalf of the first and second appellant) and Mr Jaga (on behalf of the third appellant) submitted that on a proper analysis of the affidavits before the court *a quo* and, applying the **Plascon-Evans**[2] approach to the dispute, the

[2] **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984(3) SA 626(A) at 634G-635C

court should have found that evidence on affidavit had been placed before the magistrate and that the warrant was lawfully authorised.

[17] The learned judge *a quo* had before him direct evidence by magistrate Louw that he issued the warrant after he had considered the application which "was accompanied by an affidavit deposed to by superintendent Zeeman on 24 January 2008." It is true that superintendent Zeeman stated in his answering affidavit that he would ensure that a copy of the affidavit which was placed before the magistrate

> (with sensitive details which is likely to prejudice the investigation expunged from it) is made available to the presiding Judge at the hearing with the request that the contents not be made public

and that what was placed before the judge as a annexure to the practice note prepared by appellants' counsel, was an unsigned and unattested document in the form of an affidavit.

[18] There is considerable merit in the submissions made by counsel for the appellants. It is, however, not necessary to decide the matter on that basis because the third appellant has now, in addition, brought an application for evidence to be paced before this court on appeal. The third appellant seeks to place before this court a copy of the duly signed and attested affidavit (with sensitive parts blanked out) which

the appellants say were deposed to by superintendent Zeeman on 24 January 2008 and which was the affidavit which was placed before magistrate Louw in its uncensored form as basis for the issue of the warrant.

[19] The application to place the affidavit by Zeeman before this court as evidence, is supported by affidavits deposed to by magistrate Louw, superintendent Zeeman and the first and second appellants' attorney, Mr Kohler. Magistrate Louw confirms that the warrant was issued by him on the strength of the affidavit deposed to by superintendent Zeeman on 24 January 2008. It further appears from the supporting affidavits that the presiding judge was informed at the hearing that the complete affidavit would be made available to the judge only, so as to place it beyond doubt that magistrate Louw had before him evidence on oath justifying the issue of the warrant. When the respondents, however, would not agree to the complete affidavit being put before the presiding judge, the affidavit was not placed before the judge.

[20] The application to lead the further evidence on appeal is opposed by the respondents. The first respondent's attorney, Ms Yasmin Omar has filed an affidavit in opposition. Ms Omar challenges the third appellant's right to bring the application to lead further evidence on appeal. She does so on the basis that he has no *locus standi* to appeal

the decision of the court *a quo* in the light of the fact that he did not oppose the application in the court *a quo* and abided the decision in that court. The answer to this challenge is first that the third appellant has a clear and direct interest in the matter on appeal and secondly, he applied for and was given leave by the court *a quo* to appeal its decision. The third appellant is consequently properly before this court as an appellant and is entitled to bring the application to lead further evidence.

[21] To the extent that there is an discrepancy between the evidence of Louw and Zeeman and the document placed before the court *a quo*, it is in my view appropriate that the evidence relating to the affidavit be placed before this court on appeal. My reasons are briefly as follows.

[22] Section 22(a) of the Supreme Court Act 59 of 1959 gives this court the power on the hearing of an appeal, to receive further evidence. Generally the requirements for the exercise of this power are that the applicant must provide a reasonably sufficient explanation for the evidence not being led earlier, that the evidence must be materially relevant to the outcome of the case and that the evidence must be apparently credible. (See **Maketha v Limbada** 1998(4) SA 143 (W) at 146 F – H.)

[23] The explanation given by the appellants for the evidence not being placed before the court *a quo* is that it was tendered at the time of the hearing but was objected to by the respondents and therefore not admitted at the hearing. The evidence that this is what happened at the hearing is not disputed by Ms Omar in her answering affidavit filed in opposition to the application to admit the evidence. Secondly, the evidence sought to be placed before this court on appeal is apparently credible. Magistrate Louw said in his affidavit before the court a *quo* that a properly signed and attested affidavit did exist and was placed before him. The evidence also accords with what the first and second appellants' erstwhile counsel told the court *a quo* during the hearing. Thirdly, since the very issue is whether an affidavit was placed before magistrate Louw, the evidence is clearly of material relevance to the outcome of this case.

[24] Mr Omar, on behalf of the first respondent did not in argument before this court on appeal submit that if the evidence is placed before this court, the affidavit in its truncated form did not make out a proper case for the issue of the warrant. He also did not submit that the warrant was unlawful for any other reason. He limited his argument to three submissions.

[25] First Mr Omar referred to section 21A(1) of the Supreme Court Act 59 of 1959 which provides that a court may on appeal dismiss an

appeal if it is of the opinion that the issues raised in the appeal are of such a nature that even if judgment is given or an order is made on appeal which favours the appellant, that judgment or order "will have no practical effect or result." Mr Omar submitted that even if it be held on appeal that the warrant was validly issued, such an order will have no practical effect at any subsequent criminal trial against the first respondent. This is so, be submitted, because at the criminal trial it would be in the discretion of the magistrate or judge to admit evidence obtained pursuant to the search and seizure in terms of the warrant, irrespective of whether the warrant was lawfully issued or not. He relied on the provisions of section 35(5) of the Constitution, Act 108 of 1996 which provides that evidence obtained in a manner that violates any right in the Bill of Rights

> "must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice".

I do not agree with Mr Omar's submissions in this regard. An order upholding the lawfulness of the warrant will have a practical effect on the evidence obtained during the search. It will result in such evidence remaining in the custody of the police to be used at any future trial. The evidence will remain preserved and will not have to be returned to the first respondent. Secondly, the evidence will then have been

obtained pursuant to a warrant that had not been set aside. At any future trial the evidence will not already have been found to have been obtained in an unconstitutional manner. We were informed from the bar that the NDPP does intend proceeding with a prosecution based, *inter alia*, on the evidence obtained during the course of the execution of the warrant. It follows that the first point raised by Mr Omar is not good.

[26] Secondly, Mr Omar submitted that even if the document annexed to the application to admit the evidence is admitted the document did not constitute a proper affidavit. Although it is signed by superintendent Zeeman and is signed and attested by the commissioner of oaths on the last page thereof, it nevertheless lacks validity because, *ex facie* the copy annexed to the application, it was not initialled on each of the other pages by the commissioner of oaths. Mr Omar did not refer to any authority for this proposition. Although it certainly is the practice for both the deponent and the commissioner to initial all pages of an affidavit on which their signatures do not appear, this practice is not a requirement for the validity of the affidavit. It is not required by the rules governing the administering of oaths and affirmations that are set out in the regulations promulgated

under section 10 of the Justices of the Peace and Commissioners of Oaths Act, 16 of 1963[3].

[27] The third point raised by Mr Omar was that since it is common cause that no constitutional rights were explained to the first respondent at the time of the execution of the warrant, the warrant was not lawfully executed. All items seized pursuant to the unlawful execution of the warrant must, even if the warrant itself is valid, be returned to the first respondent, he submitted.

[28] Mr Omar relied in this regard on the judgment in **Mahomed v NDPP**, *supra*. That case concerned two warrants obtained in terms of section 29 of the National Prosecuting Authority Act 32 of 1998 (the NPA Act). The warrants authorised officials of the NPA to search the office and residence of a practising attorney. The warrants were executed at the office and residence of the attorney and a number of articles were seized and removed. The applicant applied for the setting aside of the warrants. One of the contentions raised by the applicant was that the warrants were executed without regard for the protections and safeguards afforded by the provisions of section 29 of the NPA Act and with no regard for attorney and client privilege.

[3] See the regulations promulgated in GN R1258 of 21 July 1972, as amended by GN R1648 of 18 August 1977, GN R1428 of 11 July 1980 and GN R774 of 23 April 1982.

[29] The court held against the NDPP on two bases. First, that the warrants were obtained in a manner which rendered them unlawful and secondly, that the warrants were unlawfully executed.

[30] The failure to disclose in an affidavit that the person occupying the premises to be searched is a practising attorney was held to constitute a material non disclosure that rendered the warrants themselves unlawful.

[31] Dealing with the execution of the warrants, the court held that the person who executes a warrant issued in terms of section 29 of the NPA Act, is under a duty to inform the persons at the premises to be searched of:

1. their rights in terms of section 29(11) of the NPA Act (that is, that if the documents to be seized are claimed to contain privileged information and the person claiming privilege refuses inspection and removal, such documents may be seized and removed by the registrar of the court for safe keeping pending a decision by the court on the question of privilege);
2. their right to assert privilege; and
3. their right to have an attorney present at the search.

[32] The court held that even though the applicant was herself an attorney, the search should have commenced only after she had been advised of the aforesaid rights. The court held that in "this way the protections afforded by the Act will be effective" (at 510c).

[33] The orders made by the court in **Mahomed** were confirmed on appeal by the SCA (subject to a variation in the order to the effect that the material seized will remain under seal in the custody of the registrar of the High Court pending the outcome of certain further steps set out in the order). [4]The court of appeal did not, however, expressly consider the merits of the appeal because the appeal was, in effect and subject to the making of the order preserving the material seized, conceded by the NDPP. The Constitutional Court in the judgment in the **Thint** and **Zuma** cases[5] distinguished the **Mahomed** on the facts. The Constitutional Court further disagreed with the judgment in **Mahomed** and held (at paragraph [206] 86 G – H) that it was not necessary to draw the attention of the attorney whose premises were being searched to the provisions of section 29(11) of the NPA Act.

[34] In my view the ratio of the **Mahomed** judgment, to the extent that it has survived the judgment of the Constitutional Court in the **Thint** and **Zuma** decisions, does not apply to this case. In this case we are

[4] NDPP and Anor v Mohammed 2008 (1) SACR 309 (SCA)
[5] **Thint (Pty) Ltd v NDPP and Others: Zuma and Another v NDPP** 2009 (1) SA 1 (CC)

concerned with the provisions of sections 20 and 21 of the Criminal Procedure Act, 51 of 1977. There are no provisions similar to section 29(11) of the NPA Act, in the Criminal Procedure Act. The **Mahomed** judgment does not, in my view, constitute authority for the proposition that any constitutional rights should first have been explained to the first respondent before the warrant was executed.

[35] Once the evidence regarding the existence of the affidavit is admitted, as in my view it should be, it is clear that the warrant was issued on the basis of facts placed before the magistrate on oath

[36] As indicated earlier, Mr Omar did not contend that the warrant was in other respects not lawfully obtained. In particular, Mr Omar did not contend that on the facts set out in the truncated version of the affidavit which should be placed before this court, magistrate Louw was wrong to conclude that there were reasonable grounds for believing that there were articles upon the premises which articles superintendent Zeeman on reasonable grounds believed to be concerned in the suspected commission of the offences mentioned in his affidavit or which articles may afford evidence of the suspected commission of those offences or which articles were intended to be used in the commission of the offences. In my view a proper case is made out on Zeeman's affidavit (even in the truncated version to be placed before this court) for the issue of the warrant.

[37] The warrant was consequently issued on the basis of facts placed before the magistrate on oath which justified the issue of the warrant under the provisions of section 20(1) of Act 51 of 1977.

[38] I mention that there are factual disputes on the papers in regard to the manner in which the warrant was executed. Mr Omar did not, however, contend that apart from the issue of the failure to explain any rights to the first respondent, which contention is dealt with above, the warrant was not lawfully executed.

[39] The warrant was issued lawfully and Mr Omar's contention regarding the lawfulness of the execution of the warrant is rejected. It follows that the appeal must succeed. That being the outcome, there is no reason why the cost of the original application, the application to lead further evidence and the appeal should not, in accordance with the normal rule, follow the event.

[40] In the result I would make the following order:

1. The application to place the further evidence before this court on appeal is granted and the first respondent is ordered to pay the cost of the application.

2. The appeal is upheld with costs.

3. The order made by the court *a quo* is set aside and is replaced with the following order:

"The application is dismissed with costs."

W J LOUW, J
Judge of the High Court