IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

DATE: 14/07/2021 LENYAI AJ

CASE NO: 10044/2020

In the matter between :

DANIEL JACOBUS PRINSLOO N.O (in his capacity as Trustee of the Anko Trust)	FIRST APPLICANT
LOUIS JOHANNES ROSSEL N.O (in his capacity as Trustee of the Anko Trust)	SECOND APPLICANT
VZF SERVICES (PTY) LDT REPRESENTED BY HENDRIK MARTHINUS VAN ZYL N.O (in its capacity as Trustee of the Anko Trust)	THIRD APPLICANT
VZF AUDITORS INCORPORATED	FOURTH APPLICANT

and

MAGISTRATE BIANCA BOTHA	FIRST RESPONDENT

WILLEM FRANCIOS BOUWER N.O SECOND RESPONDENT

(in his capacity as *curator bonis* of Mrs Anna Prinsloo)

WILLEM FRANCIOS BOUWER THIRD RESPONDENT

JUDGMENT

This matter has been heard in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020 and 11 May 2020. The judgement and order are accordingly published and distributed electronically. The date and time of hand-down is deemed to be 10h00 on 14 July 2021.

LENYAI AJ

[1] This is a review application brought against the decision taken by the first respondent and the warrant issued by the first respondent on the 22nd of January 2020.

[2] The relief sought in the application is as follows:

(a) That the decision of the first respondent to issue a search warrant be reviewed and set aside.

(b) That the search warrant issued by the first respondent in terms of section 26 of the Administration of Estates Act 66 of 1965, be rescinded and set aside.

(c) That the second and third respondents be ordered to return to the fourth applicant all documents attached and/or removed from the third and fourth applicants during the execution of the said search warrant.

(d) That the second and third respondents compile a list of photographs that were taken by both the Sheriff of the High Court as well as the representatives of the second and third respondents at the fourth respondent's premises during the execution of the said search and that such list be confirmed under oath.

(e) That the second and third respondents be ordered to delete or destroy all photographs taken by both the Sheriff of the High Court as well as the representatives of the second and third respondents on the 22nd of January 2020 at the fourth applicant's premises during the execution of the said search warrant and that the second and third respondents be ordered to confirm under oath that such photographs have been deleted and/or destroyed.

(f) A declaratory order that the second and third respondents erroneously sought the warrant of execution to be issued by the first respondent and the first respondent erroneously allowed/granted the issuing of same, in the absence of the applicants.

(g) A declaratory order that the conduct of the second and third respondents in erroneously seeking the warrant of execution to be issued by the first respondent and the conduct of the first respondent in erroneously allowing/granting the issuing of same, is unconstitutional and constitutes an infringement of the applicants' constitutional rights, in particular its

rights to privacy, property, just administrative action and access to courts as respectively contained in section 14, 25, 33 and 34 of the Constitution of South Africa, 1996.

[3] The first respondent served a notice to abide by the decision of the Court whereas the second and third respondents opposed the application.

[4] The applicants also brought an application for condonation for the late filing of the supplementary founding affidavit and replying affidavit. After reading the papers and having heard the parties I am satisfied that the applicants have shown good cause and I am granting the condonation.

[5] The first to third applicants are the trustees of Anko Trust. Mr Hendrik Marthinus van Zyl is an auditor by profession, representative of third applicant in its capacity as trustee of Anko Trust and director of fourth applicant who dealt with the auditing requirements of Anko Trust since the fourth applicant's appointment. The fourth applicant is an entity appointed as the auditor of the Anko Trust on or about 21 August 2018.

[6] The first respondent is the Magistrate who considered, heard and adjudicated on the *ex parte* application, whose decision of the 22nd January 2020 forms the subject of this review application together with the search warrant issued by her on the same date.

[7] The second respondent is Mr Bouwer in his *nomino officio* capacity as the *curator bonis* of Ms Anna Prinsloo and the third respondent is Mr Bouwer, a practising attorney in his personal capacity.

[8] On the 22nd of January 2020 the Sherriff executed a search warrant issued in terms of Section 26 of the Administration of Estates Act 66 of 1965. The Sheriff

provided the fourth applicant with his instructions namely, a search warrant issued in terms of Section 26 of the Administration of Estates Act, notice of motion in terms of Section 26, an affidavit by the applicant and a notice of attachment and execution. The search warrant was executed in conjunction with Mr Abdullah Hendriks from the offices of the Sheriff Pretoria South East and in the presence of Ms Tanya Kruger, Ms Renette Basson, Ms Rene Verster and Mr Willem Bouwer, all of whom are from the office of WF Bouwer Attorneys.

[9] During the execution of the warrant photographs were taken and the draft pro-forma 2018 annual financial statement was seized. All this was done in the presence of fourth applicant's other clients.

[10] The applicants aver that on the 23rd of January 2020, a day after the search and seizure warrant was executed they wrote a letter through their attorneys to the second respondent demanding the return of all documents taken, a list of all photographs taken and confirmation under oath to have deleted all photograph images as well as the name of the Magistrate who issued the warrant. It was further demanded that the second respondent should comply by close of business on the same day, failure of which the fourth applicant would approach the High Court for an order to rescind the warrant issued and for the immediate return of the documents attached and removed. In such application a punitive costs order will be sought against the second respondent and a costs *de bonis propriis* against the third respondent.

[11] The applicants aver that the second respondent failed to make a full and frank disclosure of all material facts to the Magistrate and further brought the

application on an *ex parte* basis in circumstances where there was a clear prohibition of such actions.

[12] The second respondent did not disclose to the Magistrate that there was a trail of material and extensive correspondence between the parties during 19 September 2019 to 23 October 2019 wherein the second respondent demanded information from the fourth applicant. The fourth applicant responded by advising the second respondent that Anko Trust was the owner of all the information and documents it had in its possession and they have not been authorised to provide or disclose such information and documentation to any third parties. The second respondent was referred to the correct person and/or entity who can lawfully deal with his request.

[13] The second respondent in an e-mail dated 21 October 2019 advised the fourth applicant that he was proceeding with an application to obtain an order in terms of section 26 read with section 85 of the Administration of Estates Act and would request that the police be appointed to assist the Sheriff in executing the proposed order.

[14] The attorneys of the fourth applicant addressed a letter to the second respondent wherein it was clearly stated that any application ought to be served on the fourth applicant by way of service on Geyser Attorneys and that such application would be opposed and it should not be brought *ex parte*. It was also stated that the legislation in terms whereof the second respondent wished to bring the application did not provide for an *ex parte* application and further that there was no risk of the fourth respondent dissipating any documents. It was further stated that the conduct of the fourth applicant is that of an ethical auditor

who was protecting the interests of his clients in accordance with his duty as an auditor.

[15] At all material times the fourth applicant and Mr Van Zyl complied with the SAICA Code of Professional Conduct that governs the ethics of the auditors' profession, in particular Rule 140 which deals with the ethical codes concerning confidentiality between auditor and client. In terms of the aforesaid rule, the fourth applicant and Mr Van Zyl were not legally permitted or authorised, to adhere to the second respondent's demands, as to do so would have meant they are in breach of the SAICA Code of conduct.

[16] There is no legal basis upon which the second respondent is entitled to any documents belonging to the Anko Trust, including the financial statements of the Trust. As such the respondent was not entitled to an order in terms of Section 26 of the Administration of Estates Act.

[17] Section 26 of the Administration of Estates Act cannot be used as a tool to seek discovery as a sort of Anton Pillar application, especially in circumstances where the second respondent is not in law entitled to the documents sought.

[18] The *audi alteram partem* rule could only be departed from in exceptional circumstances which were not present in this matter.

[19] The applicants aver that it is common cause that the second and third respondents failed to set out any factual and/or legal basis in regard to why the application was brought *ex parte* without a notice to the fourth applicant.

[20] The applicants aver that the application was brought on an urgent basis and the Magistrate in her reasons for granting the order stated that she considered

the urgency of the application and accordingly found that the application was urgent.

[21] The applicants further aver that the second and third respondents failed to set out any factual and/legal basis in regards to the urgency of the application.

[22] The second respondent made the following allegations in the founding affidavit in summary:

22.1 *That he is the duly appointed curator bonis of Ms Prinsloo;*

22.2 *That according to a first and final liquidation and distribution account in the estate of the late Mr Prinsloo it appears that the patient has a significant interest and claim in the form of a loan account against the Anko Trust as she is the sole heir to the late Mr Prinsloo's estate , and that she is also a beneficiary in the Anko Trust;*

22.3 *That the fourth applicant is the appointed auditors for Anko Trust and holds all information and records with regards to the patient's claim in the Anko Trust;*

22.4 *That the second respondent made enquiries with the fourth applicant to provide him with all information and financial statements of the Anko Trust, refused to provide same and as such is concealing documents and information from the second respondent;*

22.5 *That the second respondent has a duty to take proper control of the assets and is accountable to the Master for the proper protection and care of the assets of the patient;*

22.6 *That section 26 read with section 85 of the Administration of Estates Act applies and that a search warrant ought to be issued in terms thereof.*

[23] The applicants aver that the following facts were incorrectly recorded in the said founding affidavit:

23.1 *The patient is not a beneficiary of the Anko Trust as is clear from the latest amended Trust Deed dated 2019.*

23.2 *Mr Van Zyl, in his personal capacity, or in his capacity as an auditor of the fourth applicant, VZF Auditors Incorporated, is not a trustee of the Anko Trust.*

[24] The applicants aver that the second and third respondents failed to inform the first respondent of material facts, failed to make necessary allegations to sustain a cause of action based on the provisions of section 26 read with section 85 of the Administration of Estates Act and was not factually and legally entitled to an order in terms of the provisions of section 26 read with section 85 of the Administration of Estates Act.

[25] The applicants aver that despite the above, the first respondent granted the second respondent's application and took a decision to issue the search warrant in terms of section 26 read with section 85 of the Administration of Estates Act.

[26] The second respondent avers that subsequent to his appointment as *curator bonis of Mrs Prinsloo* (patient), he investigated the financial circumstances of the patient and found that the estate of the late Mr Prinsloo contained assets where the patient was the sole heir of the deceased's estate.

[27] The second respondent further avers that his investigation revealed that an amount of R 3 746 169.00 was payable to both Mr Prinsloo and the patient. He further established that Mr Hendrik Marthinus van Zyl is a director of VZF Auditors Inc, (fourth applicant), is also a director of VZF Services (Pty) Ltd (third applicant) and is a trustee of Anko Trust either in his personal capacity or as a representative of VZF Services (Pty) Ltd.

[28] The investigation further revealed that attempts were made to amend the trust deed where the patient and the children were both capital beneficiaries and the patient an income beneficiary. This resulted in the second respondent requesting from Mr Van Zyl recent financial statements of the Anko Trust, confirmation of who deals with the finances of the partnership in which the trust Anko Trust was involved of a day to day basis, the dividend that is paid to Anko trust and in particular who monitors the payments, financial policy of the trust regarding the partnership, the auditors of the partnership, to whom payments as income beneficiaries are being made and whether Mr Van Zyl had knowledge of the frequency of division of income of both the partnership and the trust.

[29] The second respondent avers that the responses received were not satisfactory and referred him to Dr JD Prinsloo as the beneficiary of the trust and also that there was no loan account for the patient.

[30] As a result of the unsatisfactory responses, the second respondent indicated to the fourth applicant that he would approach the Magistrate Court in terms of the provisions of section 26 read with section 85 of the Administration of Estates

Act. He proceeded to apply for search warrant which was granted and executed.

[31] The application was brought against the background that Dr DJ Prinsloo, the son of the patient, indicated to the second respondent that the loan account was allegedly fictitious and was removed. The second respondent questioned the explanation given to him as Dr Prinsloo was the executor of his late father's estate and had reflected the loan account as an asset and awarded it to the patient as part of her inheritance.

[32] The second respondent avers that sufficient circumstances existed in order for him to rely on section 26 of the Administration of Estates Act. These circumstances caused him to have grave concern pertaining to the changes to the financial position of the patient, in particular assets that were awarded to her in terms of a recorded and official process, that now were alleged not to be due.

[33] At the heart of this review application is the interpretation of the provisions of section 26 read with section 85 of the Administration of Estates Act \, section 69 of the Insolvency Act, the common law principle of *audi alteram partem* rule and the common law principles applicable to the *ex parte and locus* standi of the second respondent in the initial application to the Magistrate.

[34] Section 26 and 85 of the Administration of Estates Act, reads as follows:

> *"26 Executor charged with custody and control of property in estate*
>
> *(1) Immediately after letters of executorship have been granted to him an executor shall take into his custody or under his control all the property, books and documents*

in the estate and not in the possession of any person who claims to be entitled to retain it under any contract, right of retention or attachment.

(1A) The executor may before the account has lain for inspection in terms of section 35(4) with the consent of the Master release such amount of money and such property out of the estate as the executor's opinion are sufficient for the subsistence of the deceased's family or household.

(2) If the executor has reason to believe that any such property, book or document is concealed or otherwise unlawfully withheld from him, he may apply to the magistrate having jurisdiction for a search warrant mentioned in subsection (3).

(3) If it appears to a magistrate to whom such application is made, from a statement made upon oath, that there are reasonable grounds for suspecting that any property, book or document in any deceased estate is concealed upon any person or at any place or upon any or in any vehicle or vessel or receptacle of any nature, or is otherwise unlawfully withheld from the executor concerned, within the area of the magistrate's jurisdiction, he may issue a warrant to search for and take possession of that property, book or document.

(4) Such a warrant shall be executed in like manner as a warrant to search for stolen property, and the person executing the warrant shall deliver any article seized thereunder to the executor concerned."

[35] In terms of section 85 of the Administration Estates Act, section 26 applies *mutatis mutandis* with reference to curators.

[36] Section 26 read with section 85 of the Administration of Estates Act is akin to section 69 of the Insolvency Act 24 of 1936 (the "Insolvency Act").

[37] Section 69 of the Insolvency Act reads as follows:

"69. Trustee must take charge of property of estate

(1) A trustee shall, as soon as possible after his appointment, but not before the deputy-sheriff has made the inventory referred to in subsection (1) of section nineteen, take into his possession or under his control all movable property, books and documents belonging to the estate of which he is trustee and shall furnish the Master with a valuation of such movable property by an appraiser appointed under any law relating to the administration of the estates of deceased persons or by a person approved of by the Master for the purpose.

(2) If the trustee has reason to believe that any such property, book or document is concealed or otherwise unlawfully withheld from him, he may apply to the magistrate having

jurisdiction for a search warrant mentioned in subsection (3).

(3) If it appears to a magistrate to whom such application is made, from a statement made upon oath, that there are reasonable grounds for suspecting that any property, book or document belonging to an insolvent estate is concealed upon any person, or at any place or upon or in any vehicle or vessel or receptacle of whatever nature, or is otherwise unlawfully withheld from the trustee concerned, within the area of the magistrate's jurisdiction, he may issue a warrant to search for and take possession of that property, book or document.

(4) Such a warrant shall be executed in a like manner as a warrant to search for stolen property, and the person executing the warrant shall deliver any article seized thereunder to the trustee."

[38] In the matter of ***Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*** **2001 (1) SA 545 (CC)** it was held that:

"One of the core considerations when classifying the discretion is whether in making the decision it is possible that there could be a legitimate difference of opinion as to the proper outcome of the exercise of discretion. In this case, it seems clear that the discretion to issue the warrant is a matter upon which different judicial officers may reasonably and legitimately disagree. An appellate court, therefore, may not

interfere with the discretion simply because it would have reached a different conclusion to that reached by the judicial officer issuing the warrant. It may only set aside the warrant if it is persuaded that the discretion has not been exercised judicially, or flowed from a wrong appreciation of the facts or the law."

[39] In the matter of ***Cooper NO v First National Bank of SA Ltd* 2001 (3) 705 (SCA)** the court held that:

"The primary purpose of section 69(3) is to enable a trustee to collect and take control of assets reasonably believed to belong to an insolvent estate which are being concealed or unlawfully withheld. It does not purport to, nor was it intended to, provide a means for finality determining competing claims to property which is alleged to belong to an insolvent estate.

Section 69(3) was clearly intended to strengthen the hand of a trustee in carrying out the obligation to take charge of all the assets belonging to an insolvent estate."

[40] In the matter of ***Bruwil Konstruksie (Edms) Bpk v Whitson NO and Another* 1980 (4) SA 703 (T)** the court held as follows:

"It seems to me that the purpose of the section is clearly to enable the liquidator or trustee to obtain speedy possession of goods belonging to an estate which he suspects, or believes on reasonable grounds, to be assets of the estate. The safeguard to the ordinary public lies in the word 'reasonable' belief, or 'reasonable' grounds for suspecting. I put it to Mr Goldstein whether the words 'reasonable grounds' imply that it should

amount to a prima facie case in a court of law. Unfortunately, there is no guidance or precedent on this particular section but, in my view, it contemplates a lesser burden than a prima facie case in a court of law, otherwise there would be hardly any purpose in the section. The section is obviously designed to enable a liquidator or trustee to obtain possession of assets speedily and to place an onus on the person in possession to prove his ownership or right to possession, and to remove the burden from an estate of instituting action first and of discharging the onus of proving that the estate is the owner. If this is so, it seems to me that it would be wrong to equate the duty resting on a liquidator or trustee under this section with that of a litigant in proving a prima facie case. It seems clear that sometimes less would suffice. However, he can never be free of a burden before he applies to the magistrate and makes the statement that he had reasonable grounds for suspecting that these are assets belonging to the estate of the insolvent.

It seems to me that the words 'reasonable grounds' imply an investigation of some kind. The question is how far does he have to go in his investigation? It also seems clear that the reasonable suspicion which must exist must be an objective and not a subjective one, as far as the particular trustee or liquidator is concerned. This seems to be the error into which the first respondent has fallen, namely that he acted in some respect impulsively, and that he jumped to a conclusion which he should not have done. Had he investigated the matter more fully, had he communicated and consulted with Mr Pols and enquired from him where Pienaar was, he no doubt have been able to contact Pienaar and then it

seems clear that he would have been constrained to investigate the question of the offer of compromise which had been made during 1977 and 1978, as a result whereof Pienaar acquired his claims against the company which enabled him to effect the set-off and acquire the assets which he subsequently sold to the applicant."

[41] In the ***Bruwil*** matter the court found that the Magistrate ought to have called for facts on which the liquidator's opinion and conclusions were based and ought not to have merely accepted same without factual proof. The court held that the error of judgement was not only that of the Magistrate but of the liquidator too.

[42] In the ***Cooper*** matter ***supra***, the central issue that the court had to adjudicate on was whether the common law principle of *audi alteram partem* applied to applications for search warrants brought in terms of section 69 of the Insolvency Act. The court held that the principle applies to an application directed to a magistrate for a section 69 search warrant, unless the applicant can show the following:

42.1 The object and purpose of the search and seizure would be defeated by giving notice;

42.2 It could be inferred that the legislature intended to exclude the giving of notice and the concomitant right to be heard.

[43] It was further held in the ***Cooper*** matter that in circumstances where prior notice ought to have been given, and was not, any such warrant obtained stands to be set aside on that ground alone.

[44] It is trite that a party who brings an application on an *ex parte* basis must make full disclosure of all material facts and must observe the utmost good faith in the application.

[45] In the matter of ***De Jager v Heilbron and Others* 1947 (2) SA 415 (W)** at 415 to 420 the court held that :

> *"It has been laid down, however , in numerous decisions of our Courts that the utmost good faith must be observed by litigants making ex parte applications, and that all material facts must be placed before the Court ... If an order has been made upon an ex parte application, and it appears that material facts have been kept back which might have influenced the decision of the Court whether to make the order or not, the Court has a discretion to set aside the order on the ground of the non-disclosure ... It is not necessary that the suppression of the material fact shall have been wilful or mala fide."*

[46] Section 26(1) of the Administration of Estates Act is crystal clear that the executor *shall take into his custody or under his control all the property, books and documents in the estate and not in the possession of any person who claims to be entitled to retain it under any contract, right of retention or attachment.*

This in my view, means that the assets must belong to the estate of the deceased or patient and the executor or curator must have a reasonable suspicion that such assets are being withheld or concealed from him. The second respondent should not have jumped to the conclusion that the patient is a beneficiary in the trust, he should have rather made enquiries with the

Master of the High Court and obtained certified copies of the Trust Deed and any other relevant documents from the Master's file. Had he done so, he might not have acted so impulsively. Similarly with regard to the Liquidation and Distribution Account that he relied on, it was not yet approved by the Master and could not be considered an asset in the estate of the patient .

[47] The Applicants aver in their founding affidavit that the fourth applicant advised the second and third respondents that they are in possession of the documents and information they were requesting. Their only predicament was that as the auditors of Anko Trust, they were not at liberty to provide the second and third respondent the information without the approval of their client and directed them to the relevant person to request the documents from. This in my view does not mean that documents or information was being concealed from him.

[48] The second and third respondents were within their rights to apply to the magistrate in terms of section 26 however they should have given the fourth applicant notice, more so because when they advised the fourth applicant of their intention to invoke section 26, the fourth applicant advised them in writing to serve them at their attorneys' offices with the application. The fourth applicant advised the second and third respondents that there is no threat of them dissipating the documents as they are ethical auditors. It is my view that because the assets did not belong to the estate of the patient, the search warrant stands to be set aside.

[49] On careful scrutiny, both section 26 (2) and (3) of the Administration of Estates Act and section 69 (2) and (3) of the Insolvency Act provides that the executor

may apply to a magistrate as opposed to approaching the magistrate as the second responded avers.

[50] The second and third respondents rely on section 29(4) of the National Prosecuting Authority Act which reads as follows:

> *"Subject to subsection (10), the premises referred to in subsection (1) may only be entered, and the acts referred to in subsection (1) may only be performed, by virtue of a warrant issued in chambers by a magistrate, regional magistrate or judge of the area of jurisdiction within which the premises is situated: Provided that such a warrant may be issued by a judge in respect of premises situated in another area of jurisdiction, if he or she deems it justified."*

[51] It is my respectful view that it is irrelevant whether the matter was heard in court or in chambers, what is of importance is that the presiding officer must apply their mind properly to the facts placed before him/or her and be satisfied that a clear and substantial case has been made out.

[52] It is trite that *ex parte* applications in the Magistrate Court are brought in terms of Rule 55 which provides that the following requirements are satisfied:

(1) The giving of notice would defeat the purpose of the application; or

(2) The degree of urgency is so great that the dispensing of notice is justified.

[53] Turning to the matter before me, the second and third respondents admit in their answering affidavit that their founding affidavit is not beyond criticism, they submit that the affidavit has to be seen in the context on which it was deposed

to in order to obtain access to documents that would support the claim and indicate the liability of the trust to the deceased estate and/or the patient. They left out material facts, namely, correspondences between them and the fourth applicant, which might have caused the magistrate to decide otherwise had this information been placed before her. The authorities are crystal clear that the utmost good faith must be observed by litigants making *ex parte* applications, and *"that all material facts must be placed before the Court ... If an order has been made upon an ex parte application, and it appears that material facts have been kept back which might have influenced the decision of the Court whether to make the order or not, the Court has a discretion to set aside the order on the ground of non-disclosure ... It is not necessary that the suppression of the material fact shall have been wilful or mala fide."* ***De Jager v Heilbron supra.***

[54] By their own admission in their documents, they state that the matter was not urgent and what is even more glaring is the fact that no information was put before the magistrate to suggest that the matter had to be dealt with urgently.

[55] Section 26 is clear that the assets must belong to the estate the executor is administering. The second and third respondents did not place any information before the magistrate that proved that the assets belonged to the estate of the patient as required by section 85. What was placed before the magistrate was a liquidation and distribution account that had not been accepted by the Master, they also alluded that the patient was a beneficiary in the trust. Had the curator done a proper investigation with the Master of the High Court, he would have established for himself that the patient was not a beneficiary of the trust and also that the administration of the estate of the patient's husband was not finalised.

[56] The first respondent in her reasons for granting the order stated that application was brought before her on an urgent basis as set out in the papers and based on the information before her, believed that the assets belonging to the estate of the patient were being withheld or concealed from the *curator*. It is my respectful view that there was not enough information in the founding affidavit that could have made the first respondent to grant such a drastic order without calling for facts on which the *curator*'s *(second respondent)* opinion and conclusions were based and ought not to have merely accepted same without factual proof.

[57] The applicants aver that the second and third respondents should have afforded the fourth applicant the right to be heard by serving them with the papers when they made the application to the magistrate. By not serving them, they denied them their right to the common law principles of natural justice , the *audi alteram partem principle*, which is the right to a fair hearing. The authorities are clear on this matter, and in the ***Cooper*** matter it was held that where prior notice ought to have been given and was not, then any warrant granted or obtained stands to be set aside on that ground alone. My view is that the second respondent acted in an unacceptable manner in bringing the application before the magistrate in an *ex parte* application.

[58] The applicants are requesting costs *de bonis propriis* against the second and third respondents, reason being that their conduct in not disclosing extensive correspondence *"is most definitely unacceptable and also improper"*. The applicants further aver that the correspondence contained detailed reasons by the fourth applicant explaining why the respondent's demands were not lawful and further why the fourth applicant could not legally and lawfully adhere to

such demands. The correspondence went further to indicate that should any litigation be brought in terms of section 26 of the Administration of Estates Act, the applicants should be served by way of service on their attorneys as they intended to oppose such application.

[60] The second and third respondents on the other hand contend that they had a reasonable suspicion that the assets belonged to their client (patient) and they were trying to protect the assets and interests of their client.

[61] In the ***Cooper*** matter ***supra*** where the court dealt with issue of costs *de bonis propriis* against a trustee in relation to section 69(3) of the Insolvency Act it was held:

> *"There remains to be considered the appeal against the cost order. The general principle of the common law is that a trustee, who acts in a representative capacity, cannot be ordered to pay costs de bonis propriis unless he has been guilty of improper conduct. The Judge a quo found the appellant's conduct to be 'unacceptable'. Improper conduct is always unacceptable; but unacceptable conduct is not necessarily improper. While the appellant's conduct may have been ill-considered, and his application lacking in certain essential detail to the extent that it may be said that he did not make a full disclosure of all relevant facts, one cannot, in my view, go so far as to hold that his conduct was improper. It has not been shown that there was a conscious attempt on his part that to mislead the magistrate or to use section 69(3) unfairly to his advantage. In the circumstances the special costs order against the*

appellant was not justified and falls to be set aside. The appeal succeeds pro tanto."

[62] Turning to the matter before me, I am not convinced that the *curator* acted in an improper manner. In my view the *curator* was under the mistaken reasonable suspicion that the documents belonged to his client (patient) and acted impulsively. His reasonable suspicion was not objective but rather subjective and the assets did not belong to his client(patient). In my view his conduct was impulsive, ill-considered and unacceptable but not improper nor *mala fide*.

[63] I conclude that first responded erred in granting the search warrant, as I am persuaded that the court's decision flowed from a wrong appreciation of the facts and law. The facts placed before the court were scanty and the magistrate should have asked for further information to support the *curator*'s opinions and conclusions in the founding affidavit. Further, the application before the magistrate did not require her to make any findings on urgency and nevertheless in her reasons the first respondent based her finding on the grounds of urgency contained in the founding affidavit in support of the *ex parte* application.

[64] I further concluded that the second respondent did not establish that the assets belonged to the estate of the patient. Section 26 read with section 85 of the Administration of Estates Act is a draconian provision giving the *executor* and /or *curator* extra ordinary powers and should be interpreted strictly, although these powers can only be accessed after an application has been made to a magistrate and a search warrant has been issued. The *curator* should have made a further investigation with the master's office and perhaps on doing so

may have found information that may have caused him to exercise restraint and have instituted action against the legal owner of the information he was requesting. On the ground that the assets did not belong to the estate of the patient, the *curator* had no *locus standi* to bring the application.

[65] I further conclude that the second respondent did not comply with the requirements for an *ex parte* application and should have afforded the applicants a right to a fair hearing. The authorities are clear that the common law principle of *audi alteram partem* is sacrosanct to our jurisprudence and cannot be dispensed of without just and reasonable cause as has been done in the case before me.

[66] Based on the reasons above I decide that having reviewed the matter, the search warrant stands to be set aside.

[67] Having decided to set aside the search warrant on the basis indicated above, I consider it unnecessary to deal with the submissions made by the applicants regarding the constitutionality thereof.

[68] In the premises, the following order is made

1. The decision of the Magistrate to issue a search warrant on the 22 January 2020 is reviewed and set aside.
2. The second and third respondents are ordered to return to the fourth applicant all documents attached and/or removed from the third and fourth applicants during the execution of the said search warrant.
3. The second and third respondents are ordered to compile a list of photographs that were taken by both the Sheriff of the High Court as well as the representatives of the second and third respondents at the fourth

respondent's premises during the execution of the said search and that such list be confirmed under oath.

4. The second and third respondents are ordered to delete or destroy all photographs taken by both the Sheriff of the High Court as well as the representatives of the second and third respondents on the 22nd of January 2020 at the fourth applicant's premises during the execution of the said search warrant and that the second and third respondents are ordered to confirm under oath that such photographs have been deleted and/or destroyed.
5. The second and third respondents must pay the costs on an Attorney and client scale, including the costs of two counsel.

M.M.D. LENYAI

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

CASE NO: 10044/2020

HEARD ON: 28 April 2021

FOR THE APPLICANTS: ADV. T. STRYDOM SC

ADV. A. CRAUCAMP NÉE VAN NIEKERK

INSTRUCTED BY: Geyser Attorneys Incorporated, Lynnwood Pretoria

FOR THE FIRST RESPONDENT: State Attorney, Pretoria

FOR THE SECOND AND THIRD RESPONDENTS: ADV. G.J. SCHEEPERS SC

INSTRUCTED BY: JPA Venter Attorneys

DATE OF JUDGMENT: 14 July 2021