REPORTABLE

IN THE SUPREME COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 6583/06

In the matter between:

PRALINE TOICH Applicant

and

THE MAGISTRATE, RIVERSDALE First Respondent

THE MINISTER OF SAFETY AND SECURITY Second Respondent

DETECTIVE INSPECTOR (F) ASHLEY MICHAELS Third Respondent

JUDGMENT DELIVERED THIS 25th DAY OF MAY, 2007

THRING, J.:

On the 29th November, 2005 the third respondent, who is a detective inspector in the South African Police Service, together with other members of the police force, acting in the course and within the scope of their employment as servants of the second

respondent, entered the house of the applicant at 5 Church Street, Still Bay, searched it, and seized and removed seven items, including two personal computers, certain computer accessories, two folders, a number of compact discs and a camera. They did not have the applicant's permission to do so, but purported to act on the strength of a search warrant issued earlier on the same day by a Captain A.J. le Roux, who is presumably a Justice of the Peace by virtue of her rank in the South African Police Force.

This warrant, to which I shall refer as "the first warrant" authorises the third respondent and any other member of the South African Police Service who may be able to assist in conducting the search and seizure, to –

> "search the identified person" and to
>
> "enter and search the identified premises and any person found on or at such premises".

The only person identified in the warrant is one Allen Harmony. The only premises identified in the warrant are "Farm Ten Einde, Riethuiskraal, Still Bay". I shall refer to this address as "the farm", although it may, according to the applicant, in fact be two farms, but nothing turns on this. No mention is made anywhere in the warrant of the applicant or of her premises at 5 Church Street or 5 Kerkstraat, Still Bay.

The applicant seeks, inter alia, an order directing that her property so seized on the 29th November, 2005 be returned to her forthwith.

In her opposing affidavit the third respondent avers that the first warrant "erroneously" referred to "Allan (sic) Harmony, Farm Ten Einde, Riethuiskraal, Still Bay". How this could be true I do not know, as she says that this warrant was "first executed" at the farm. She does not say that what was done at the farm was done in error. Indeed, it would seem that it was done pursuant to and in terms of the first warrant. Neither does she or anyone else aver that the first warrant was intended to authorise searches and seizures at both the farm and at 5 Church Street. However, be that as it may: an error, if it exists, does not assist the respondents.

Now, the days of the general warrant ended in about 1763 with the arrest of John Wilkes and others in connection with the publication of the celebrated 45th issue of the North Briton. Since then, warrants have had to be specific: see Pullen, N.O. and Others v. Waja, 1929 TPD 838 at 846, Money v. Leach, 97 ER 1075 and Zuma and Another v. National Director of Public Prosecutions and Others, 2006(1) SACR 468 (DCLD) at 486 g-h. Consequently, a warrant authorising the arrest of an unspecified person, or the search of unspecified

premises, or for unspecified articles, will, as a rule, be invalid.

The first warrant is not a general warrant, but it is invalid for the same reason as regards its execution at the applicant's house: it authorises a search of the farm only; it does not authorise a search of the applicant's house. It follows that the search of her house, conducted under the purported authority of the first warrant, was, in fact, unauthorised and unlawful, and so was the seizure of her property on that occasion. Moreover, hardly any of the property seized under this warrant was specified in the warrant. The applicant is consequently entitled to its return.

On or about the 13th February, 2006 (the third respondent says that it was on the 14th February,2006) the third respondent, again accompanied by other members of the police force, repaired again to the applicant's house at 5 Church Street, Still Bay, entered it without her consent, searched it, and seized and removed approximately R16,000.00 in cash from a safe on the premises. The applicant alleges in her affidavit that they also removed a cash box and a plastic crate

containing files, but this is denied by the third respondent, and for the purposes of these proceedings her denial must be accepted.

The third respondent says that she was authorised to act as she did by another search warrant, to which I shall refer as "the second warrant", issued by the first respondent on the 13th February, 2006, but apparently not bearing his signature. Whether or not the absence of his signature renders it invalid, I need not decide in the light of other considerations which will presently become apparent. In terms of this warrant the third respondent and "any other member of the South African Police Service who may be able to assist in conducting the search and seizure" is purportedly authorised to enter and search "5 Kerk Street, Still Bay" (sic: presumably the applicant's house at that address) and to seize, inter alia, "kontant". The amount thereof is not stated. In the warrant the following is also recited:

> "It appears to me from information on oath that there are reasonable grounds for believing that, within the Magisterial District of Riversdale there are articles identified in Annexure "A" hereto, with – (sicwhich?)

a) are on reasonable grounds believed to be concerned in the suspected commission of;
b) may afford evidence of the suspected commission of; or
c) are on reasonable grounds believed to be intended to be used in the commission of;

the offence(s) off (sic)Art 27(1)(a) (sic) Producing and Possesion (sic) of Child Ponography (sic)

reasonable grounds for believing that such articles are -

in the possession or under the control of or upon (blank) ..... [state names(s) of person(s)]

upon or at 5 Kerk (sic) Street, Still Bay. [describe premises]"

The application which was made to the first respondent for the second warrant was supported by an undated document signed by the third respondent, purporting to be an affidavit. However, ex facie the photocopy of this document which was placed before this Court by the first respondent in terms of Rule 53, it is unattested, and it bears the signature of the third respondent only. In it she refers to the search of the applicant's house on the 29th November, 2005, and says that on that occasion:

> "In die kluis te Kerkstraat 5, het ek kontant twee honderd rand note ter waarde van ongeveer R100.000 gevind. Aangesien dit nie in die lasbrief vermeld was nie, het ek nie daarop beslag gelê nie. Dit is die opdrag van die Bate en Beslagleggings Eenheid, Kaapstad, dat daar op die kontant beslag gelê moet word. Die moontlikheid bestaan dat die kontant uit die pleging van die misdade gegenereer kon word.
>
> Tydens die borg verrigtinge het Praline Toich, die eienaar van Kerkstaat 5, onderneem om verslag aan die ondersoekbeampte te doen vir die oorsprong daarvan, maar het versuim tot op datum om verslag te doen."

From these allegations it would appear that the grounds advanced to the first respondent by the third respondent for the issue of the second warrant, as regards the search for and seizure of cash in the applicant's house, were:

a) that the Asset Forfeiture Unit, Cape Town, had instructed that it be seized;

b) that the possibility ("moontlikheid") existed that the cash concerned "uit die pleging van die misdade gegenereer kon word" (whatever that phrase may mean);

c) that, despite an undertaking to do so, the applicant had failed to account to the third

respondent for the source of the money.

The second warrant purports to have been issued in terms of secs. 20 and 21 of the Criminal Procedure Act, No. 51 of 1977. Sec. 20 provides as follows:

> "The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article) –
>
> a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence whether within the Republic or elsewhere;
>
> b) which may afford evidence of the commission or suspected commission of an offence whether within the Republic or elsewhere; or
>
> c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence."

Sec. 21(1) reads, in its material parts:

> "Subject to the provisions of sections 22, 24 and 25, an article referred to in section 20 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;"

(Secs. 22, 24 and 25 of the Act are not applicable here).

It is clear from the record of the proceedings before the first respondent which has been placed before this Court by him in terms of Rule 53 that the only document relied on by the third respondent in her application to him for the issue of the second warrant was her undated "affidavit" to which I have referred. No viva voce evidence was adduced.

In the first place, as I have said, it would seem that this "affidavit" was not attested. Consequently, there was no information of any kind placed before the first respondent on oath. For that reason alone the first respondent had no power under sec. 21(1)(a) of the Criminal Procedure Act to authorise the issue of the second warrant, and it is invalid: see Naidoo and Another v. Minister of Law and Order and Another, 1990(2) SA 158(W) at 159 I.

Secondly, there is no allegation anywhere in the third respondent's "affidavit" that the cash therein

referred to fell into any of the categories of article which are mentioned in sec. 20 of the Criminal Procedure Act. Thus it is not alleged by her:

a) that it is or was concerned in or that it is or was on reasonable grounds believed by anybody to be concerned in the commission of or suspected commission of an offence;

b) that it may afford evidence of the commission or suspected commission of an offence; or

c) that it is or was intended to be used or is on reasonable grounds believed by anybody to be intended to be used in the commission of an offence.

The high-water mark of the third respondent's allegations is that "die moontlikheid bestaan dat die kontant uit die pleging van die misdade gegenereer kon word" (my emphasis). For the reasons which follow, this allegation in my view falls short of the sort of allegation which would be necessary to bring it within the ambit of sec. 20(a) of the Criminal Procedure Act.

In Powell, N.O. and Others v. van der Merwe, N.O. and Others, 2005(5) SA 62 (SCA) the Court, after analysing the relevant authorities, said at 85 C-F

(paragraph [59]):

> "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."

In Divisional Commissioner of South African Police, Witwatersrand Area and Others v. South African Associated Newspapers Ltd. and Another, 1966(2) SA 503 (AD) the Court dealt with sec. 42 of the Criminal Procedure Act, No. 56 of 1955 which, concededly, is worded somewhat differently from secs. 20 and 21 of the present Criminal Procedure Act. However, mutatis mutandis, the following passage in the judgment of the Appellate Division in that case seems to me to be of equal application to the present matter. At 511 G-H Beyers, A.C.J. said:

> "The warrant has been issued to him by a responsible person to whom it has been made to appear on oath that reasonable grounds exist for believing certain things. In my opinion the opening words of sec. 42 –
>
> > 'If it appears to a judge of a superior court, a magistrate or a justice on complaint made on oath'
>
> were intended to govern all that follows, including not only the existence of reasonable

> grounds for suspecting that a certain article is to be found at a certain place, but also that there are, e.g., reasonable grounds for believing that the article in question will afford evidence as to the commission of an offence (cf. Minister of Justice and Others v. Desai, N.O., 1948(3) SA 395 (AD) at p. 402)."

In Naidoo's case, supra, where the Court was dealing with a warrant under sec. 25(1) of the present Criminal Procedure Act, Roux, J. said at 159 D-I:

> "For the applicants, reference was made to previous judgments where the approach to powers such as these were discussed, while on behalf of the respondent I was cautioned not to follow earlier judgments without appreciating that I am dealing with a new section designed to meet new circumstances.
>
> Be that as it may, I have a fundamental approach to a matter of this nature which I believe is founded on precedent. All persons enjoy an exclusive right to property which is their own. All persons enjoy the right to determine who may and may not enter premises which they lawfully control. If a statute authorises another to violate the rights I have mentioned, certain tests and requirements must be met before such inroads can be tolerated:

1. The meaning of the statute must be clear.

2. If the statute is unclear it must be interpreted in favour of the individual.

3. Certain facts, which are often described as jurisdictional facts, must exist before a warrant can issue.

4. The warrant must be unambiguous and confer no greater powers than those authorised by the statute.

5. Once issued by the competent judicial officer no person executing the warrant can widen its scope, even if the statute authorises wider powers than those in fact included in the warrant.

I believe what I have said is in concert with what Tindall, ACJ. said in Minister of Justice and Others v. Desai NO, 1948(3) SA 395 (A) at 403.

Referring to s. 25(1), it must appear to the magistrate from information 'on oath' that reasonable grounds exist on which he must base his belief before authorising a warrant. Either affidavits or viva voce evidence on oath would suffice."

From these authorities, and others such as Zuma's case, supra, loc. cit. it is clear that:

1) The validity of a search warrant must be examined with a jealous regard for, inter alia, the subject's rights to privacy and

property;

2) Before issuing a search warrant in terms of secs. 20 and 21 of the Criminal Procedure Act, the magistrate or justice of the peace concerned must be satisfied by information on oath, not only that there are reasonable grounds for believing that the article to be searched for and seized is in the possession or under the control of or upon any specified person or is upon or at any specified premises within his area of jurisdiction (sec. 21(1)), but also that the article to be searched for and seized is an article such as is referred to in sec. 20; and

3) The terms of a search warrant are to be construed with reasonable strictness, and it should ordinarily be read in the terms in which it is expressed.

Now, it is not contended by the respondents that the money seized from the applicant fell into either of the categories of article referred to in sec. 20(b) or (c) of the Criminal Procedure Act, viz. articles which may afford evidence of the commission or suspected commission of an offence, or articles which are intended to be used or which are on reasonable grounds believed to be intended to be used in the commission of an offence. Mr. Jacobs submitted, however,

on behalf of the second and third respondents that it fell within the first portion of the category of articles referred to in sec. 20(a), viz. that it was an article "which is concerned in .... the commission or suspected commission of an offence.. " But to my mind the mental leap which it would be necessary to make from the third respondent's averment in her "affidavit" that "(d)ie moontlikheid bestaan dat die kontant uit die pleging van die misdade gegenereer kon word" to a conclusion that the money in question was, as a matter of fact, actually concerned in the commission of an offence is too great to be justified. In fact, as a matter of logic it cannot be made. If this is what the first respondent did, it was, in my view, unwarranted.

It might possibly be contended that the third respondent's allegation was sufficient to establish to the satisfaction of the first respondent that the money fell into the category created by sec. 20(b): an article "which may afford evidence of the commission or suspected commission of an offence..." (my emphasis). However, in my opinion such an argument would also not be sound. The bald allegation by the applicant for the search warrant of the existence of a more possibility

that the money might afford such evidence would not, I think, have sufficed to justify the first respondent in issuing a warrant: in my view some rational basis for such an allegation would first have to be laid from which it could be deduced or otherwise concluded that there was at least a reasonable probability that this was the case: see Mandela and Others v. Minister of Safety and Security and Another, 1995(2) SACR 397 (W) at 401 b. Steytler, "Constitutional Criminal Procedure" (1998) says at 87 – 88, after drawing a comparison with some Canadian cases:

> "A similar standard is set in South African law. Prior to a search there must be reasonable grounds for belief relating to three issues: first, that an offence has been committed, second, that the articles sought may afford evidence of the commission of that offence, and third, that the articles are likely to be on the premises to be searched. With regard to the second issue, it has been held that it is an insufficient standard merely to ask whether the articles are only possibly concerned with the offence. On the other hand, the constitutional standard should not be as high as whether the articles will be used as evidence. The appropriate test is that set by section 20(b) CPA: articles may be seized 'which may afford evidence of the commission or suspected commission of an

offence'."

I emphasize and endorse the learned author's view that, regarding what he calls the "second issue", viz. that the articles sought may afford evidence of the commission of the offence concerned, there must be reasonable grounds for a belief that this is so. In the present case no such grounds were advanced to the first respondent by the third respondent in her "affidavit", and the first respondent could consequently not reasonably have harboured such a belief.

The latter part of the requirement in (2) above has therefore not, in my judgment, been complied with in the present instance, as regards the second warrant. Had the first respondent been aware of this, he should not and would not have issued the second warrant. It follows that he failed to apply his mind properly when issuing the warrant, and it is invalid: see World Wide Film Distributors (Pty.) Ltd. v. Divisional Commissioner, South African Police, Cape Town and Others, 1971(4) SA 312(C) at 315 H – 316 D. (As regards the supposed error in the first warrant, it is disposed of by the consideration in (3) above.)

The applicant seeks an order reviewing and setting aside the second warrant. For the reasons which I have mentioned she is entitled to such an order, in my judgment, and also to an order directing that the money seized by the third respondent at her house on or about the 13th or 14th February, 2006 on the strength of the warrant be returned to her forthwith.

The applicant also seeks an order directing the second and/or third respondents to reimburse her for damage allegedly caused by the police to her property. There is a material dispute of fact as to whether any damage was caused to such property, which is incapable of resolution on the papers. This claim will be appropriately resolved in an action for damages. I accordingly make no order on it in these proceedings.

The applicant also seeks an interdict against the third respondent and/or any "member of second respondent" restraining them from unlawfully harassing her or entering or searching her premises. In this regard, also, there are material disputes of fact on the papers, and the applicant must seek this relief by way

of appropriate action, if so advised. Moreover, the applicant makes no allegation of any threat of such conduct having been made by the third respondent or by anyone else with regard to the future, such as would be necessary to justify the granting of such an interdict. I accordingly make no order on prayer 4 of the applicant's notice of motion.

The applicant is entitled to the costs of this application. She has asked for the costs to be awarded against the second and third respondents on an attorney-and-client basis, but, subject to what follows, I do not consider that she has established sufficient to justify such an order.

However, the second and third respondents have burdened the record with unnecessary surplusage. They have annexed as annexure "AM1" to the third respondent's opposing affidavit the entire transcript of a certain application for bail, brought in December, 2005 by a daughter of the applicant. It runs to 359 pages. Save for six pages thereof which may possibly be of some peripheral relevance, the rest of it is entirely irrelevant to the present proceedings, as is evidenced

by the fact that it has not been referred to anywhere in the heads of argument of any of the parties nor, until the topic was raised by the Court with regard to costs, in counsel's oral submissions. Its inclusion in the record has led to a substantial waste of time and resources on the part of all concerned in this matter. As a mark of the Court's disapproval, I accordingly propose to make a punitive costs order against the second and third respondents in this connection. The first respondent has not opposed this application; he abides the decision of this Court, so that he is blameless in this regard and will not be mulcted in costs.

In the result, the following order is made:

1) The decision of the first respondent of the 13th February, 2006 to authorise the issue of the search warrant, annexure "PT2" to the applicant's founding affidavit, is set aside, as is the said search warrant;

2) The second and third respondents are directed forthwith to return to the applicant all items of property, including money, seized by

members of the South African Police Service at 5 Church Street, Still Bay, on the 29th November, 2005 and on or about the 13th or 14th February, 2006;

3) The second respondent is directed within ten days of the making of this order to furnish the attorneys of record of the applicant with an inventory of all the articles, including cash, seized by members of the South African Police Service at 5 Church Street, Still Bay on the 29th November, 2005 and on or about the 13th or 14th February, 2006;

4) Subject to what follows, the second and third respondents are ordered to bear the costs of this application; provided that the costs occasioned by the inclusion of annexure “AM1” to the third respondent’s opposing affidavit (pages 109 tot 467 inclusive of the record), save for pages 140, 144, 147 and 151 to 153 inclusive, shall be borne by the second and third respondents on an attorney-and-client basis.

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THRING, J.

I agree.

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ZONDI, J.