IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE COVERSHEET

Case No.: 3176/2008

In the matter between

MUSTAFA MAHOMED	First Applicant
OMAR HARTLEY	Second Applicant
and	
PAUL CHRISTIAAN LOUW	First Respondent
MAGISTRATE CORNELIUS N.O.	Second Respondent
SUPERINTENDENT NOEL GRAHAM ZEEMAN	Third Respondent
DIRECTOR OF PUBLIC PROSECUTIONS, CAPE TOWN	Fourth Respondent
MINISTER OF SAFETY AND SECURITY	Fifth Respondent

Coram	:	SAMELA, AJ
Judgment by	:	SAMELA, AJ
For the Applicants	:	Mr Zehir Omar (Attorney) - 011 8151720
Instructed by	:	as above
For the Respondent	:	Adv A Schippers SC - 021 4248408
Instructed by	:	State Attorney Mr G Köhler - 021 4419200
Date/s of hearing	:	25/03/2008 & 20/08/2008
Judgment delivered on	:	14 NOVEMBER 2008

Appeal Judgment by full bench on: 30 APRIL 2010 (Case No. A228/09)

Reportable

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

CASE NO.: 3176/2008

In the matter between

MUSTAFA MAHOMED	First Applicant
OMAR HARTLEY	Second Applicant
and	
PAUL CHRISTIAAN LOUW	First Respondent
MAGISTRATE CORNELIUS N.O.	Second Respondent
SUPERINTENDENT NOEL GRAHAM ZEEMAN	Third Respondent
DIRECTOR OF PUBLIC PROSECUTIONS – CAPE TOWN	Fourth Respondent
MINISTER OF SAFETY AND SECURITY	Fifth Respondent

JUDGMENT DELIVERED ON 14 NOVEMBER 2008

SAMELA, AJ

[1] The Appellants (Mustafa Mahomed and Omar Hartley) sought an order to set aside a search warrant issued by the Simon's Town Magistrate on the

24th January 2008 and also directing the return of the items seized by the Respondent pursuant to the warrant.

[2] On the 24th January 2008, the third Respondent, who is a Superintendent in the South Africa Police Service, in the company of other South African Police Service members, acting in their course and within the scope of their employment as employees of the fifth Respondent, entered the premises at 16 and 16A Axminster Street, Muizenberg, being premises of the first and second Appellants respectively. They searched the premises and removed items. In both searches, the Respondents had obtained the necessary permissions from the owners. The first Respondent did not oppose the application. Only the second, third, fourth and fifth Respondents opposed the application.

[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 justify 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 Appellants 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 purpoting to be an affidavid is not signed by

the deponent and attested by the commissioner of oaths as it in this matter, the document cannot be regarded as an affidavit.

[4] The application which was made to the first Respondent for the warrant was supported by an unsigned and unattested document, purporting to be an affidavit. In the warrant issued by the first Respondent to the third Respondent and other South African Police Service members, the following is recited:

> *"Whereas it appears to me from information on oath that there are, at the premises referred to in annexure "A" hereto, being within the District of Simon's Town, certain articles/documents as listed and identified in annexure "B" hereto, which are concerned in or are on reasonable grounds believed to be concerned in the commission or suspected commission of any one or more of the offences (offences mentioned and names of the persons) or which may afford evidence of the commission or suspected commission of the offences by (names of persons mentioned), within the Republic of South Africa."*

The first Respondent in his affidavit, paras 5 and 6, stated that:

Para 5 *"..... On 24 January 2008 Superintendent Noel G Zeeman applied to a Magistrate at Simon's Town, in terms of the provisions of ss 20 and 21 of the Criminal Procedure Act 51 of 1977, for a warrant for search and seizure (annexure MM1 to the founding affidavit). That application was accompanied by an affidavit deposed to by Superintendent Zeeman on 24 January 2008.*

Para 6 *At the time I was the Magistrate on duty in Simon's Town. I 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."

[5] The warrant purported to have been issued by the first Respondent in terms of ss 20 and 21 of the Criminal Procedure Act 51 of 1977 (as amended).

Section 20 of the Act provides that:

"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;

(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."

Section 21 (1) of the Act provides that:

"Subject to the provisions of ss 22, 24 and 25, an article referred to in s 20 shall be seized only by virtue of a search warrant issued –

(a) by a Magistrate or justice, if it appears to such Magistrate of 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." (Sections 22 and 24 of the Act are not relevant here).

Section 25 of the Act is for jurisdictional requirements which must be met for the issuance of a search warrant. The section provides that:

"(1) If it appears to a Magistrate or justice from information on oath that there are reasonable grounds for believing –

(a) ...

(b) That an offence has been or is being or is likely to be committed or that preparations or arrangements for the commission of any offence are being or are likely to be made in or upon any premises within his area of jurisdiction, he may issue a warrant authorising a police official to enter the premises in question at any reasonable time for the purpose –

(i) ...

(ii) of searching the premises or any person in or upon the premises for any article referred to in section 20 which such police official on reasonable grounds suspects to be in or upon or at the premises or upon such person; and

(iii) of seizing any such article."

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.

In **Goodwood Municipality v Rabie** 1954 (2) SA 404 (C) at 406 B-C the court defined an affidavit as:

> *"... a statement in writing sworn to before someone who has authority to administer an oath;... [it is] a solemn assurance of fact known to the person who states it, and sworn to as his or her statement before some person in authority such as a judge, or a magistrate, or a justice of the peace, or a commissioner of the court, or a commissioner of oaths."*

Regulations governing the administration of an oath or affirmation had been passed by the State President (see section 10 of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act 16 of 1963)).

Section 3(1) of the regulation provides that:

> *"The deponent shall sign the declaration in the presence of the commissioner of oaths; and*

Section 4 provides that:

> *"(1) Below the deponent's signature or mark, the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration;*
>
> *(2) The commissioner of oaths shall-*
>
> *(a) sign the declaration and print his full name and business address below his signature; and*
>
> *(b) state his designation and the area for which he holds his appointment or the office held by him if he holds his appointment ex officio."*

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 **Naidoo and Another v**

Minister of Law and Order and Another 1990 (2) SA 158(W) at 159 1, the court referring to s25 (1) of Act 51 of 1977 (as amended) said that:

> *"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."*

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. There is no doubt that he acted contrary to s.25(1) mentioned above Furthermore, the first Respondent acted contrary to section 21(1)(a) of the Criminal Procedure Act 51 of 1977 (as amended) in authorising the warrant. This section provides that:

> *"(1) 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."*

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; see **Toich v The Magistrate, Riversdale and Others** 2007 (2) SACR 235 (C) at 240 e-f.

[6] In **Powell NO and Others v Van Der Merwe NO and Others** 2005 (1) SACR 317 (SCA) at 340 d-g, para 59, after analysing all the relevant authorities, the court said the following:

" (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 overboard 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."

[7] The court said further in **Naidoo and Another v Minister of Law and Order and Another** (supra) at 159 E-Ithat:

"... 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 be issued.*
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.*

See also **Mahomed v National Director of Public Prosecutions and Others** 2006 (1) SACR 495(W) at 501 I – 502 a-g. Compare **Mistry v Interim Medical and Dental Council of South Africa** 1998 (4) SA 1127 (CC) at 1142E – 1143A.

[8] The third Respondent in his answering affidavit said the following:

"para 17 I was accompanied by two uniformed police officers. I banged on the door of the premises where the First Applicant stays, as indicated in the search warrant. The Applicant appeared at the window. I showed him my appointment certificate and instructed him to open the door. He looked at the appointment certificate as if he was studying it.

para 18 *Thereafter, the First Applicant opened the front door. I told him that I am a member of the police and that I had a search warrant to conduct a search of the premises. At that time his father was also present. They were told why the police were there. A copy of the search warrant was shown to both of them. They both indicated that they were not interested in having a copy of the search warrant and declined to accept a copy….*

para 22 *I was also involved in the search of the premises at 16A Axminster Street. These premises are occupied by the Second Applicant who is married to the First Applicant's sister. As is in the case of the First Applicant, the search warrant was shown to the Second Applicant, before we commenced with the search of that property. However, nothing was found at the Second Applicant's property."*

The above extracts indicate that the third Respondent did not advise the Applicants of their constitutional rights as was expressed in Mohamed case, mentioned above at 520 a and c, where the court said:

> *"… Everyone faced with this type of warrant, including attorneys, are not expected to know the law. … The search should have commenced only after the Applicant was advised of her rights. This way the protection afforded by the Act will be effective."*

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. As I have discussed above, the search warrant and seizure was invalid and therefore unlawful.

[9] Courts have held that even where oath was not properly administered, as opposed to where not administered at all, it has been held that there is no evidence see Sv Naidoo 1962 (2) SA 625 (A). Furthermore, it has been held that where children were not properly warned or admonished to speak the truth, there is also no evidence at all. S164 (1) of the Act provides that: "Any person who, from ignorance arising from youth, defective education or other cause, is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth, the whole truth and nothing but the truth." In Sv N 1996 (2) SACR 225 (C) at 230 (d) the court said that:

"The testimony of a witness who has not been placed under oath properly, has not made a proper affirmation or has not properly been admonished to speak the truth, as provided for in the Act, lacks the status and character of evidence." Consequently, the admission of evidence given other than after an oath was duly taken or an affirmation or admonition to speak the truth does not elevate it to a status of evidence. In my view, an irregularity occurs which constitutes a failure of justice. See Sv V 1998 (2) SACR 651 (C).

The Applicants are entitled to the costs of this application. They have requested that costs be awarded against the first, second, third, fourth and fifth Respondents. I am of the view that the Applicants have not established sufficient facts to justify such an order against the second and fourth Respondents. The first Respondent did not oppose this application and indicated that he would abide by the decision of this court. No costs will be awarded against the first Respondent.

[11] In the result, the following order is made:

(1) The decision of the first Respondent of 24 January 2008 to authorise the issue of a search warrant, annexure "MMI" to the Applicants founding affidavit, is set aside, as is the said search warrant;

(2) the third and fifth Respondents are directed forthwith to return to the Applicants all the articles/items seized by members of the South African Police Service at 16 Axminster Street, Muizenberg, on the 24th January 2008 and on or about 28 November 2008.

(3) The third Respondent is directed within fourteen (14) days of the making of this order to furnish the attorneys of record of the Applicants with an inventory of all the articles seized by members of the South African Police Service at 16 Axminster Street, Muizenberg, on the 24th January 2008 and on or about 28 November 2008.

(4) The third and fifth Respondents are ordered to pay the costs of this application and also costs incurred by the Applicants on 7th March 2008.

SAMELA, AJ