

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

“REPORTABLE”

Case number: CC 27/06

In the matter of:

THE STATE

versus

QUINTON MELVIN MARINUS	Accused 1
CALVIN MARINUS	Accused 2
DAVIDENE CHANTAL MARINUS	Accused 3
BRIAN DANIELS	Accused 4
FAREED MOHAMMED	Accused 5
FABIAN ABRAHAMS	Accused 6
GLESTIN RICARDO PETERSEN	Accused 7
DESIREE BLANKENBERG	Accused 8
JEFFREY JAMES BLANKENBERG	Accused 9
WINSTON ANTHONY BLAAUW	Accused 10
JOHAN CLASSEN	Accused 11
MARIO VOIGT	Accused 12
VINCENT KOEN	Accused 13
EMMALENE MARINUS	Accused 14
ANDREW VAN DER WALT	Accused 15

Coram	:	Veldhuizen, J
Assessor	:	Mr. W.J.P. Marais
Assessor	:	Mr. J.T.P. Swart
Judgment by	:	Veldhuizen, J

For the State	:	Adv. D.A. Greyling
	:	Adv. M. Julius
For Accused 1	:	Adv. J. Mihalik
For Accused 2	:	Adv. N. Ballem
For Accused 3	:	Adv. M. Pothier
For Accused 4	:	Adv. T. Vismer
For Accused 5	:	Adv. E. de Villiers
For Accused 6	:	Adv. E. de Villiers
For Accused 7	:	Adv. E. de Villiers
For Accused 8	:	Adv. T. Vismer
For Accused 9	:	Adv. T. Vismer
For Accused 10	:	Adv. E. de Villiers
For Accused 11	:	Adv. T. Vismer
For Accused 12	:	Adv. E. de Villiers
For Accused 13	:	Adv. T. Vismer
For Accused 14	:	Adv. M. Pothier
For Accused 15	:	Adv. J. Solomons
Instructed by	:	Legal Aid Board Cape Town
Date(s) of Hearing	:	14 April 2009 -
Judgment delivered on	:	26 October 2009

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

“REPORTABLE”

Case number: CC 27/06

In the matter of:

THE STATE

versus

QUINTON MARINUS EN OTHERS

**JUDGEMENT REGARDING THE ADMISSION OF DOCUMENTS
HANDED OVER TO THE DIRECTOR OF PUBLIC PROSECUTIONS
BY SARS**

[1] On 10 October 2003 the Deputy National Director of Public Prosecutions ('DPP') wrote a letter addressed to the Receiver of Revenue, Cape Town ('SARS'). The letter reads:

‘I have been authorised by the National Director of Public Prosecutions to request you to furnish me with information that is reasonably required for our investigations in terms of the Prevention of Organised Crime Act, Act 121 of 1998.

In terms of Section 71(1) of the Act, I therefore request you to furnish me with copies of the tax returns submitted (during the past seven years) by each of the following individuals, Close Corporations and Trust.’ Twenty persons and Close Corporations are then mentioned. During the year that followed six more letters were addressed to SARS. Although they were similarly worded they also required SARS to hand over ‘any other documents you may have gathered as a result of any investigations you may have conducted . . .’ and referred to different individuals and/or entities.

[2] The defence object to the admission of these documents mainly on the ground that SARS should, by reason of section 4 of the Income Tax Act, No 58 of 1962 (‘the Act’), have refused to hand over the documents. A second ground of objection is that the request relates in part to tax returns submitted and documents gathered by SARS during a period prior to the commencement of POCA.

[3] Section 4 of the Act reads:

4. Preservation of secrecy. – (1) Every person employed or engaged by the Commissioner in carrying out the provisions of this Act shall preserve and aid in preserving secrecy with regard to all matters that may come to his or her knowledge in the performance of his or her duties in connection with those provisions, and shall not communicate any such matter to any person whatsoever other than the taxpayer concerned or his or her lawful representative nor suffer or permit any such person to have access to any records in the possession or custody of the Commissioner except in the performance of his or her duties under this Act or by order of a competent court. . . .’

A number of provisos then follow.

In *Weltz and Another v Hall and Others* 1996(4) SA 1073(CPD)

Conradie J (as he then was) held:

‘The Legislature has thought it desirable to encourage full disclosure of their affairs by taxpayers, even by those who carry on illegal trades or have illegally come by amounts qualifying as gross income. This object might easily be defeated it was said in *Greenspan v R* 1944

SR 149 at 155 – 6, if orders were freely made for disclosure of those communications. These *dicta* were referred to by the Appellate Division in *R v Kassim* 1950(4) SA 522(A) at 526G, without dissent.

In *Ontvanger van Inkomste, Lebowa, en 'n Ander v De Meyer NO* 1993(4) SA 13(A) at 26A – C Smalberger JA, speaking for the Appellate Division, said that no departure from the secrecy principle would lightly and without sufficient cause be permitted. In *Estate Dempers v Secretary for Inland Revenue* 1977(3) SA 410(A) at 420A – C Corbett JA (as he then was) approved the *dicta* in *Silver v Silver* 1937 NPD 129 concerning the rationale of the secrecy provision.'

[4] In this regard it is also important to refer to section 4(1B) of the Act. It reads:

‘(1B) The Commissioner may apply *ex parte* to a judge in chambers for an order allowing him or her to disclose to the National Commissioner of the South African Police Service, contemplated in section 6(1) of the South African Police Service Act, 1995 (Act No. 68 of 1995), or the National Director of Public Prosecutions, contemplated in section 5(2)(a) of the National Prosecuting Authority

Act (Act No. 32 of 1998), such information, which may reveal evidence –

- (a) that an offence, other than an offence in terms of this Act or any other Act administered by the Commissioner or any other offence in respect of which the Commissioner is a complainant, has been or may be committed, or where such information may be relevant to the investigation or prosecution of such an offence, and such offence is a serious offence in respect of which a court may impose a sentence of imprisonment exceeding five years; or
- (b) of an imminent and serious public safety or environmental risk.

and where the public interest in the disclosure of the information outweighs any potential harm to the taxpayer concerned should such information be disclosed: Provided that any information, document or thing provided by a taxpayer in any return or document, or obtained from a taxpayer in terms of section 74A, 74B or 74C, which is disclosed in terms of this subsection, shall not, unless a competent court otherwise directs, be admissible in any criminal proceedings against such taxpayer, to the extent that such information, document

or thing constitutes an admission by such taxpayer of the commission of an offence contemplated in paragraph (a).'

Sections 74A, 74B and 74C of the Act refer to information, documents or things furnished to or obtained by the Commissioner or the presiding officer before whom an inquiry is held not only by the taxpayer but by any person. This provision, to my mind, underscores the importance of the secrecy provisions and especially those dealing with information supplied by the taxpayer, referred to in the decisions.

[5] Having said that, I now need to refer to section 71 of the Prevention of Organised Crime Act No. 121 of 1998 ('POCA'). Its commencement date is 21 January 1999 and it reads:

'71. Access to information. – (1) The National Director may request any person employed in or associated with a Government Department or statutory body to furnish him or her with all information that may reasonably be required for any investigation in terms of this Act and such person shall notwithstanding anything to the contrary contained in any law which prohibits or precludes him or her –

- (a) from disclosing any information relating to the activities, affairs or business of any other person; or

(b) from permitting any person to have access to any registers, records or other documents, or electronic data which have a bearing on the said activities, affairs or business, furnish the National Director with such information and permit the National Director to have access to any registers, records, documents and electronic data, which may contain such information.'

The National Director referred to is the National Director of Public Prosecutions ('NDPP') appointed in terms of section 179(1)(a) of the Constitution as well as certain other Directors referred to in section 1 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998).

[6] At this stage a few general comments regarding section 71 of POCA are apposite. The section clearly applies to SARS as an organ of state within the public administration although as an institution outside the public service (see section 2 of the South African Revenue Service Act, No 34 of 1997). The section may be employed while it is, so to speak, still early days, namely at the investigation stage. It need not appear to the Director that the information will assist to prove the commission of a crime. There may indeed not be any evidence that a crime has been committed. The section may in

fact be employed at a stage where information is gathered to assist the NDPP in coming to a decision whether a crime or crimes have been committed and, if so, by whom. The section may also be employed not only with the view of instituting a prosecution but also to put into operation the provisions relating to the proceeds of unlawful activities contained in chapter 5 of POCA. It is important to note that section 71 of POCA does not do away with the secrecy requirement of section 4 of the Act altogether. The records and documents delivered in terms of section 71 of POCA do not become freely available or accessible to other persons. Section 71(3)(a) of POCA rather extends the secrecy requirement. This section states that 'No person shall without the written permission of the National Director disclose to any other person any confidential information, registers, records, documents or electronic data which came to his or her knowledge in the performance of his or her functions in terms of this Act and relating to the activities, affairs or business of any other person, except –

- (i) for the purpose of performing his or her functions in terms of this Act;

- (ii) in the course of adducing evidence in any criminal proceedings or proceedings in terms of this Act; or
- (iii) when required to do so by an order of a court of law.’

It is also significant that the Legislator in section 73 provides for the sharing of information between the prosecuting authorities and SARS where an investigation as envisaged in the section is instituted. The section does not, however, authorise the Commissioner to simply divulge information regarding a taxpayer regardless whether it is relevant to the investigation conducted by the NDPP. If the information is not relevant to such an investigation then, in my view, the secrecy provisions of section 4 of the Act remain applicable to it and it may not be divulged.

[7] Lastly and of equal importance is the purpose and the reasons why the Legislator found it necessary to enact POCA. These are stated in POCA’s preamble.

[8] With these prefatory remarks I turn to the first question that must be answered. Is the NDPP the sole judge of what information may

‘reasonably be required for any investigation’ in terms of POCA? To put it differently: is the Commissioner for the South African Revenue Services (or persons employed in or associated with a Government Department or statutory body) obliged to hand over all documents requested by the NDPP simply because the NDPP states that they are reasonably required for an investigation in terms of POCA or does the possessor of the information retain the right or even the duty to exercise his own judgment whether the information requested should be made available.

[9] In my opinion the Legislature did not intend the person in control of information, to which secrecy provisions apply, to merely rubber stamp a request in terms of section 71 of POCA. If that had been the intention the section could very easily have been worded to make it clear that the judgment of what ‘may reasonably be required for any investigation’ is solely that of the NDPP. That, however, does not mean that the NDPP’s request should contain detailed information regarding the investigation that is being conducted or details of each and every bit of information that is required for such an investigation. It is in the nature of things impossible to be prescriptive with regard to

the information which such a request should contain. Each request will have to be considered on its merits at the time when it is made. When considering a request made in terms of section 71 of POCA the guardian of the information to which secrecy provisions apply will have to keep in mind that the request is made, not by some minor official, but by the NDPP, someone who is appointed in terms of the Constitution and therefore an important and responsible cog in the wheel of the criminal justice system. A detailed request may also be inimical to the investigation conducted by the NDPP. Having said that, it is, however, my view that the request should not be so vague or broad in its scope that the recipient thereof is unable to make any meaningful judgment regarding the validity of the request. In *SA Police v SA Associated Newspapers* 1966(2) SA 503(AD) Beyers ACJ stated at 512:

‘It has long been established that the Courts will refuse to recognise as valid a warrant the terms of which are too general.’

Although this decision dealt with the terms of a search warrant these remarks offer some guidance regarding the terms in which requests such as those under consideration should be couched.

[10] It could be argued that the NDPP may not at an early stage of the investigation know exactly what information is required and would, therefore, not be in a position to be specific. The answer is twofold: firstly the request need not set out the nature of the investigation and/or the information sought with the particularity required of pleadings or an indictment; and secondly, once the information is furnished, the NDPP may well be in a position to direct further and more meaningful requests.

[11] A request should, in my view, contain reasonably sufficient particulars of the investigation being conducted and/or of the information sought to place the recipient of the request in a position to decide whether he is justified in acceding thereto.

[12] The requests before me contain no information regarding the nature of the investigations being conducted. Having regard to the above observations I conclude that the words ‘. . . and any other documents you may have gathered . . .’ contained in some of the requests are vague and overbroad.

[13] None of the offences created in POCA have retrospective application, although proof of offences committed before the coming into operation of this act is admissible for a limited purpose. That being the case the information requested in the letters where it refers to '... the past seven years ...' is partly irrelevant.

[14] In the light of the foregoing I rule as follows: Copies of the accused' tax returns and documents forming part of such returns covering the tax years after POCA came into operation on 21 January 1999 may be admitted in evidence upon proper proof thereof.


VELDHUIZEN
26 October 2009