IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 18039/2010

DATE: 17 MARCH 2011

In the matter between:

HANS-JORG GOTTSCHALK Applicant

and

MINISTER OF HOME AFFAIRS 1st Respondent

DIRECTOR-GENERAL HOME AFFAIRS 2nd Respondent

DIRECTOR: IMS WESTERN CAPE 3rd Respondent

HEAD OF INSPECTORATE: WESTERN CAPE 4th Respondent

J U D G M E N T

BOZALEK, J:

In September 2010 the applicant brought an urgent application following a search and seizure raid on his home by members of the Inspectorate of the Department of Home Affairs on 2 February 2010. He sought a declaration that the failure by the respondents on that day to provide a copy of a warrant and a receipt to him and their failure to return his seized goods to

him, was unlawful, as well as mandatory relief, namely that he be furnished with:

1. the goods and documents seized by the respondents from him;

2. a receipt for those goods and documents seized from him in the prescribed form;

3. a copy of the warrant which was issued pursuant to the search and seizure in the prescribed form;

4. copies of all documents, reports, assessments, policies, records, minutes and any other information held by the respondents within their regional offices, relating to his status in the Republic of South Africa.

The matter came before court on 14 September 2010, before the respondents had filed their opposing affidavits. Gamble, J postponed the matter to 14 March 2011 and by agreement ordered that the respondents return certain listed goods to the applicant the following day. This was duly done. In addition the order imposed a punitive costs order on the respondents. Thereafter the respondents filed their opposing affidavits, from which it appears that the applicant's entire file has, as the

parties term it "mysteriously disappeared". The result is that the respondents cannot give effect to the mandatory relief claimed in paragraphs 3.3 and 3.4, namely furnishing the applicant with copies of the warrant and the contents of his file.

On 25 February 2011, some three weeks before the resumed hearing date, the applicant filed a notice entitled "notice of alternative relief to be sought by applicant at the hearing on 14 March 2011". In it he gave notice that, pursuant to his original prayer for "alternative relief", he proposed to seek an order:

1. recording what items and documentation the respondent did and did not furnish to him on 15 September 2010, in the latter case this was an official receipt, a copy of the warrant of arrest for search and seizure and his laptop which was seized but disappeared from the possession of the respondent's servants.

2. ordering the respondent to compensate him for the loss of his laptop and digital camera, which apparently, according to the applicant befell the same fate, on the presentation of invoices;

3. repeating the declaratory relief initially sought;

4. declaring that the arrest of the applicant in the search and seizure at his residence on 2 February 2010 were contrary to the Constitution and unlawful.

The supplementary relief so sought by the applicant was strenuously opposed by the respondent and with good reason. The recordals sought are not relief and are inappropriately sought. The relief sought relating to the loss of a laptop computer and camera is not only the inappropriate conversion of motion proceedings into a minor damages claim, but, together with a declarator sought in relation to the search and seizure operation and the arrest of the applicant as a whole, amounts to the formulation of an entirely new case under the rubric of alternative relief, and this after the respondents filed their opposing affidavits.

The courts do not countenance last minute wholesale changes to a claimant's case under the procedural veil of alternative relief. See ECA (SA) & Another v Bifsa (2) 1980 (2) SALR 516 (T), and I did not understand Mr Garland to persist in seeking any such supplementary relief. That leaves for determination such relief in the original notice of motion as has not yet been rendered moot or impossible by intervening events, namely a declaration that the failure by the respondents on February 2, 2010 to provide a copy of a

warrant and receipt to the applicant and their failure to return the applicant's seized goods thereafter, was unlawful.

The applicant persists in seeking this relief. Since the making of the court order by agreement, the applicant has received such of his goods as the respondent still had in their possession. In addition, the parties are in dispute over whether the applicant should have accepted an earlier tender by the respondents to take back his items and documentation. In the circumstances that aspect is not an appropriate subject for a declaratory order. The balance of the declaratory relief concerns the receipt and warrant authorising the search and seizure and/or arrest.

On the papers it is common cause that the respondents did not contemporaneously furnish the applicant with a receipt for the multitude of documents and items which they seized and removed from his residence. They state merely that this was as a result of the applicant's unruly behaviour. This is no excuse at all, even if he was unruly, a finding which I am unable to make on these papers. Nor is there any claim in the respondents' opposing affidavit that he was furnished with a copy of the warrants or warrant which, it is alleged by the respondents, they procured prior to the search and seizure operation. Thus a factual finding that the applicant was not

handed a copy of a warrants can be made against the respondents on these papers.

The question is, however, whether it is appropriate for this court to declare that the respondents' failure in these two respects was unlawful. Section 33(5) of the Immigration Act of 2002, provides in detail for the procedures to be followed by an immigration officer to obtain and the manner in which to execute a warrant to search premises or apprehend a person. It provides, *inter alia*, in subsection 33(8)(a) that:

> "A person executing a warrant in terms of this section shall immediately, before commencing with the execution, identify himself or herself to the person in control of the premises, if such person is present, and hand to such person a copy of the warrant, of if such person is not present, affix such copy to a prominent place on the premises;"

And in section 33(5)(c) provides that:

> "An immigration may obtain a warrant to: ... and after having issued a receipt in respect thereof, seize and remove documentation or any other thing...."

And there follows categories of documentations and items which may be seized and removed. This latter section must be read with Regulation 27 of the Immigration Regulations which makes provision for a specific form which must be completed listing and describing the items seized and which must be signed by the relevant immigration officer and the person in charge of the premises. I need hardly add that both of these procedures supplying, furnishing the receipt and a copy of the warrant are obvious safeguards which a person who is the subject of such a raid or operation is entitled to have observed by the authorities.

It is clear, therefore, that the respondents' failure to furnish a copy of any warrant to the applicant, or a receipt for the goods removed, was unlawful. Section 19(1)(a)(iii) of the Supreme Court Act provides that:

> "A provincial or local division shall have power in its discretion and at the instance of any interested person to inquire into and determine any existing future or contingent right or obligation notwithstanding that such person cannot claim any relief consequential upon the determination."

It was held in *ex parte* Nel 1963 [1] 1 SA 754 (A), which is the leading case, that an existing dispute is not a prerequisite to an exercise by the court of jurisdiction under the section and it is only necessary that there should be interested parties upon whom the declaratory order will be binding. Although it may be competent for a court to make a declaratory order in any particular case, its grant is the dependent upon the exercise by that court of its discretion to do so with due regard to the circumstances of the matter before.

In Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Limited 2005 (6) SA 205 (SCA) at 213e-g, the court held that section 19(1)(a)(iii) required a two stage approach, namely the court must in the first place be satisfied that the applicant has an interest in an existing future or contingent right or obligation and secondly, if so satisfied, the court must consider whether or not the order should be granted. In this regard the availability of another remedy does not render the grant of a declaratory incompetent. However, a court will not grant a declaratory order where the legal position has been clearly defined by statute. *Ex parte* Noriskin 1962 (1) SA 56 (D).

Pressed for reasons as to why a declaratory order should be granted, Mr Garland relied principally on the violations of the

applicant's fundamental human right to dignity, privacy, freedom and security of person, property and his right to challenge an unlawful detention. He laid emphasis moreover on the respondent's egregious breach of their duties in terms of the Immigration Act & Regulations and what he suggested was their poor record of breaches in this regard in similar matters. This latter consideration is, however, not made out on the papers. Although the applicant's founding affidavit makes reference to the applicant's intention to sue for damages arising out of the search and seizure operation and his subsequent arrest and detention, Mr Garland was not able to advise me, one way or the other, whether the applicant intends pressing such an action.

This raised the prospect of this court pronouncing formally on the lawfulness of aspects of the search and seizure operation, but giving no consequential relief in circumstances where the same issues may well come before another court seized in due course with a damages action. This strikes me as a potentially undesirable state of affairs, particularly where no real purpose for the declaratory relief is put up other than for the court to express the view that certain behaviour was unlawful. What is more, the sections I have quoted from the Immigration Act, make it quite clear that the failure to furnish a receipt and a copy of any warrant to the subject of the search and seizure

operations is unlawful.

There is no suggestion that the respondents take a different view of the law in relation to their obligations in the common cause or undisputed facts in the present matter, or that the applicant fears another such raid or arrest and that the declaration sought will arm him against such an eventuality. I do not consider that it is a proper use of the court's time or authority to give declaratory orders which in effect do little more, or no more, than restate clear provisions in a statute or regulation.

On the assumption that the applicant has indeed demonstrated that he has an interest in an existing right or obligation, and although I am most disquietened by the manner and circumstances in which the search and seizure operation was carried out by the respondents, I am nonetheless not persuaded that the declarator sought should be granted and I decline to grant such relief.

As far as costs are concerned, I take into account that the respondents' account of the search and seizure operation only came to light in affidavits a while after the first court hearing on 15 September 2010. They revealed that no receipt had been contemporaneously issued for the documentation and items seized in the raid and on the papers, that no copy of any

warrant of arrest or search and seizure had been furnished to the applicant. Those affidavits themselves are in an unsatisfactory state. The main deponent, a senior departmental official stationed in Pretoria and having no first hand knowledge of the raid, purports to give an account thereof relying on information from the officials actually involved. The latter purport to furnish brief confirmatory affidavits. These latter affidavits remain, six months later, unsigned with only a weak excuse from the Bar for this omission. The result is that there is in fact no version of the search and seizure operation properly before the court.

The applicant is, in my view, entitled to his costs up to the filing his replying affidavit on 1 November 2010 but not beyond. As a mark of the court's disapproval of the respondents' failure to follow lawful procedures in the search and seizure operation and the manner in which the respondents' opposing affidavits were presented, these costs will be awarded on the attorney/client scale. Thereafter the parties will bear their own costs. In the result the following order is made:

1. The alternative relief sought pursuant to applicant's notice dated 25 February 2011 is refused.

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2. The declaratory relief sought in terms of prayer 2 of the applicant's notice of motion is refused.

3. The respondents are to pay the applicant's costs in the application, jointly and severally, the one paying, the others to be absolved, on the attorney and client scale up to and including 1 November 2010, after which the parties will bear their own costs.

BOZALEK, J

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