REPUBLIC OF SOUTH ARICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 19019/2014

In the matter between:

FADWAAN MURPHY Applicant

and

COMMISSIONER OF POLICE WESTERN CAPE 1st Respondent

ELIZABETH HERMANUS 2nd Respondent
(In her capacity as Station Commander of
Lentegeur Police Station)

SENIOR MAGISTRATE MITCHELLS PLAIN
MAGISTRATE'S COURT 3rd Respondent

JUDGMENT DELIVERED ON 13 MAY 2015

RILEY, AJ

[1] On 23 October 2013 the applicant brought an application in terms of which he sought the following relief on an urgent basis:

1. that the actions of second respondent, Elizabeth Hermanus, in her capacity as Station Commander of Lentegeur South African Police Station, in issuing various and repeated search warrants for the search of applicants property at [7 T……..] Street [L…….], [M……] [P……] be deemed an harassment of applicant;

2. that the actions of second respondent in issuing various and repeated search warrants for the search of applicant's second property at No 7 [T…….] Street, [M……] [P…..] be deemed a harassment of applicant's sister;

3. that the repeated and unsuccessful searches of applicants residences mentioned at 1 above be deemed an unjust violation of the right to privacy of applicant;

4. that the first and second respondents or any of their members be prevented and prohibited from issuing any search warrants for purposes of searching the residences of applicant.

[2] On 24 October 2014 first and second respondents gave notice of their intention to oppose the relief sought. On 29 October 2014 when the matter was first before this court, counsel for the first and second respondents undertook before Yekiso J that the members of first and second respondents would not search applicant's premises until 7 November 2014 when the court was expected to make a decision on the matter. On 6 November 2014 first and second respondents filed their answering and confirmatory affidavits. On 7 November 2014 Ndita J postponed the matter for hearing to 19 November 2014 and the applicant was ordered to file his replying affidavits to first and second respondents opposing affidavits by no later than 17 November 2014. On 19 November 2014 Binns-Ward J postponed the matter for hearing to 3 March 2015 on the semi-urgent roll. The applicant was also ordered to pay the wasted costs occasioned by the appearance on 19 November

2014.

[3] At the commencement of his argument, Mr Twala who appeared for the applicant immediately conceded that no case has been made out on the papers for the relief sought on behalf of the applicant's sister and accordingly he limited his submissions for the relief in respect of the applicant.

[4] Considering the nature of the relief sought by the applicant, it is clear that the relief sought is of a final nature.

The applicant's version

[5] According to the applicant, his home and that of his sisters, respectively situated at numbers 7 and 10 [T…….] Street, [L…….], [M……] [P…….] have been the subject of numerous searches by members of the South African Police Services acting on the instructions of the second respondent. It is not in dispute that the searches which were conducted at the above premises were conducted based on search warrants which were either issued by the third respondent or by senior ranking police officers stationed at, and working under the supervision of the second respondent.

[6] Applicant in particular avers that during the period 2013 and 2014 approximately twenty-five search warrants were issued which resulted in searches being conducted at the houses where he and his sister reside. It is common cause that both the houses are owned by applicant. The search warrants in question authorize the police to search the premises for drugs and illicit firearms and ammunition.

[7] It appears that the repeated searches at the applicant's premises are based on the allegation that the applicant is a '*drug king pin*' and that drugs are sold from his premises. Applicant denies these allegations. He avers that the fact that he has never been arrested or convicted on charges relating to drugs or the illicit possession of firearms, and the fact that notwithstanding all the searches none of the items listed were ever found on his premises, is proof that the allegations are unsubstantiated

and untrue.

[8] According to applicant he has never previously acted against these searches as he had hoped that the fact that no drugs or illicit firearms or ammunition were ever found on his premises, would exonerate him.

[9] Applicant avers further that he and his two minor children require protection from the harassment that first and second respondent's employees have subjected them to and that his two minor children particularly require to be protected against the intrusions on the part of the members of the first and second respondents.

[10] Applicant avers that the reason for approaching the court on an urgent basis is that there has been an increase in the number of searches conducted in the months of September 2014, and October 2014 and because it has now become clear, based on newspaper articles in which a senior ranking officer of the first respondent is quoted as saying "*we have 10 targets of which he is one and he must have been informed he was a target, but we are going to get him*", that he is being harassed and targeted by members of first and second respondents. Apart from contending that the application falls to be dismissed for lack of urgency, Mr O'Brien who appeared on behalf of the first and second respondents, argued strongly that the members of first and second respondent were mandated by the constitution to perform their functions as police officers and that there was no basis in fact or law for the relief sought by the applicant. He in particular contended that first and second respondents have submitted clear evidence of various searches conducted at the premises and in the vicinity of the premises concerned, where various amounts of illicit drugs were found.

[11] It is important to note that the applicant has not attacked the validity of the search warrants. The main thrust of the relief sought by the applicant when summarised, appears to be directed at *inter alia*:

11.1 prohibiting the first and second respondents from issuing any search warrants for the purposes of searching the residences of the applicant;

11.2 preventing the third respondent from issuing any search warrants at the behest of the first and second respondents without proper evidence to substantiate allegations of a crime being committed;

11.3 that the actions of second respondent in issuing various search warrants for the search of his residence be deemed harassment and a violation of his right to privacy.

The general principles in regard to search warrants

[12] Considering that the applicant has approached the court on the basis that his constitutional rights in terms of *inter alia* section 14 of the Constitution has been violated and since the execution of further warrants will no doubt have an impact on the self-same constitutional rights it is necessary to refer briefly to the principles applicable to search warrants in our law. Section 14 of the Constitution provides that:

'*Everyone has the right to privacy, which includes the right not to have-*

a) their person or property searched;
b) their property searched;
c) *their possessions seized, or*
d) *the privacy of their communications infringed*.'

In *Powell N.O. v Van der Merwe* 2003(5) SA 62 (SCA) the SCA established the following principles concerning the approach of courts to search warrants:

'(a) Because of the great danger of misuse in the exercise of authority under search warrants the courts examined 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 search.
(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.'

See *Pullen NO and Others v Waja* 1929 TPD 838 at 846 – 847.

The Constitutional Court has emphasised the importance and strict nature of search warrants as a safeguard of individual rights (See *Magajane v Chairperson, North West Gambling Board* 2006(5) SA 250 (CC) at para 74). In Powell N.O. v Van der Merwe (*supra*) the court emphasised that warrants must be intelligible, lawful and cannot serve as excuse for the general ransacking of a person's private life (para 62).

[13] In *Minister of Safety and Security v Van der Merwe 2011(5) SA 61(CC) at para 35*, Mogoeng J (as he then was) held at para [55] that a valid warrant is one that, in a reasonably intelligible manner:

'a) states the statutory provision in terms of which it is issued;

b) identifies the searcher;

c) clearly mentions the authority it confers upon the searcher;

d) identifies the person, container or premises to be searched;

e) describes the article to be searched for and seized, with sufficient particularity; and

f) specifies the offence which triggered the criminal investigation, and names the suspected offender.'

[14] At para 56 the learned Chief Justice held that the guidelines to be observed by a court considering the validity of warrants, include the following:

'(a) the person issuing the warrant must have authority and jurisdiction;

(b) the person authorising the warrant must satisfy herself that the affidavit contains sufficient information on the existence of the jurisdictional facts;

(c) the terms of the warrant must be neither vague nor overbroad;

(d) a warrant must be reasonably intelligible to both the searcher and the searched person;

(e) the Court must always consider the validity of the warrants with a jealous regard for the searched persons constitutional rights; and

(f) the terms of the warrant must be construed with reasonable strictness.'

[15] Our courts, and more so, the Constitutional Court, have however made it clear that all law-biding citizens of this country are deeply concerned about the scourge of crime. Accordingly every lawful means must be employed to enhance the capacity of the police to root out crime or significantly at least reduce it. Warrants issued in terms of section 21 of the Criminal Procedure Act are important weapons designed to help the police to carry out effectively their constitutional mandate of amongst other things preventing, combating and investigating crime. See Minister for Safety and Security v Van der Merwe *supra,* at para 35.

[16] The unfortunate consequence of the police using a warrant as a tool in combating crime, inevitably results in interference with equally important constitutional rights of individuals, such as the applicant, who are '*targeted*' by these warrants. I have already referred to the safeguards which are necessary to ameliorate the effect of this interference.

Dispute of facts

[17] It was correctly contended by Mr O'Brien that in the present matter there exist a material dispute of facts. It is a well-established principle in motion proceedings that where disputes of facts arise on the affidavits, a final order can only be granted if the facts as averred in the applicant's affidavits which have been admitted by the

respondent, together with the facts alleged by the latter, justify such an order. On a consideration of the version put up by the respondents, I cannot find that it is palpably implausible, farfetched or clearly so untenable that the court is justified in rejecting it merely on the papers.

The facts as portrayed by the first and second respondents

[18] First and second respondents admit that many searches have taken place at the premises of the applicant. They aver that the reason for the searches is simply due to the fact that drug activities have occurred at the applicant's premises at 7 and 10 [T……..] Street, [L…..], [M…….] [P…….]. The applicant's premises are both known in the area as drug houses and since about the year 2006 a number of drug cases originated from the premises where people were arrested for being in possession of illicit drugs. In the answering affidavit respondents list some of the arrests that have taken place at the premises. I deem it necessary to list the instances as is set out in the respondents answering affidavit:

18.1 On 31 July 2014 at 7 [T…….] Street, Christopher Andrews, Shawaan Damon and Zanodeen Stemmet were arrested for being in possession of a half a kilogram of tik, 90 mandrax tablets and 130 units of heroine which was found in a white Golf registration number [C…….];

18.2 On 21 February 2014 at 10 [T……] Street, Glenda Bird, the applicants sister was arrested for being in possession of 16 parcels of tik, 1 straw with tik and 11 units of heroine;

18.3 On 21 February 2014 at 10 [T……] Street, Hyron Louw was arrested for being in possession of 1 pack of tik and 1 dagga unit;

18.4 On 26 July 2014 at 10 [T……] Street, Glenda Bird was arrested for being in possession of 70 grams of tik, 1 black pencil bag and plastic packet and 29mm empty magazines;

18.5 On 4 August 2014 at 10 [T……] Street, Apollo Taliwe was arrested for being in possession of 10 packets containing tik;

18.6 On 12 August 2014 at 10 [T……..] Street, Mogammad Natheef Davids was arrested for being in possession of 1 unit of heroine;

18.7 On 13 September 2014 at 10 [T……] Street, Anthony Fredericks was arrested for being in possession of 1 small packet containing tik;

18.8 On 19 October 2014 at 10 [T……..] Street, Ashley Filander was arrested for being in possession of 1 packet of tik;

18.9 On 2 June 2014 at 10 [T…….] Street, Anthony Fredericks was arrested for being in possession of tik and 1 stop dagga;

18.10 On 1 September 2014 at 10 [T……] Street, Abduragmaan Abbas was arrested for being in possession of tik;

18.11 On 8 September 2013 at 10 [T……] Street, Ashley Filander was arrested for being in possession of a tik “lollie”.

18.12 On 28 July 2014 at 10 [T…..] Street, Amedi Swarts was arrested for being in possession of tik;

From the above it is clear that drugs were found and people were arrested for illegal drugs in [T……] Street on or in the immediate vicinity of the two premises owned by applicant. Applicant has accordingly not been altogether frank and forthright to this court in his affidavit in support of the relief that he seeks.

[19] According to the respondents the applicants was arrested in October 2009 on a charge of Pointing a Firearm. As a result of his bail conditions, the applicant was not allowed to go to his aforesaid premises. Respondent avers that whilst respondent was not allowed to go to his premises, no illegal activities were conducted at the premises. The charge was withdrawn due to the complainant, who was previously resident at Lentegeur, relocating to the Eastern Cape. When applicant returned to the premises, the illicit sale and possession of drugs from the premises resumed. As a result of this, the police in turn, were forced to apply for

warrants to search the premises.

[20] It is clear from the above that the applicant's averments that no drugs have been found at the premises cannot stand and therefore falls to be dismissed.

[21] Considering that the relief sought by the applicant is in the form of a final interdict, the applicant has to prove:

a) a clear right;

b) an injury committed or reasonably apprehended; and

c) the absence of a similar protection by any other remedy.

[22] On a consideration of the evidence, I am not persuaded that the applicant has shown that he has a clear right to privacy at his aforesaid premises and that that right trumps the right and or obligation of the police to conduct searches and seizures based on lawful warrants in their pursuit to root out and combat crime. As is clear from the authorities referred to hereinbefore, the police are under a constitutional duty to perform their duties to stop the scourge of crime that pervades society, which includes conducting search and seizures of premises and persons, on reasonable grounds suspected of selling or possessing illicit drugs. Accordingly, in circumstances as the present, the police have relied on warrants which were validly issued in terms of the Criminal Procedure Act. There is no evidence, nor was it contended that there has been non-compliance of the principles, as laid down in Minister of Safety and Security v Van der Merwe (*supra*). In the absence of *mala fides*, it is accepted law that our courts will not readily grant an interdict restraining the police from exercising their statutory powers. *Thint (Pty) Ltd v National Director of Public Prosecutions and Others*; *Zuma v National Director of Public Prosecutions and Others* 2009(1) SA(1)(CC), which was decided before Minister of Safety and Security v Van der Merwe (*supra*), emphasised that in matters of this nature there are important public interest considerations that have to be taken into account and the courts have a role to play in respect of crime control, particularly in a country where the scourge of crime threatens the very fabric of our society. I agree with Mr O'Brien that in the present matter the applicant's right to privacy must be limited and

that for the applicant to rely on the right to privacy, applicant must show that his right to privacy has been exercised in accordance with the law, and that the applicant has not by his conduct infringed upon the rights of others.

[23] There is no evidence before me that the conduct of the members of the first and second respondent was unlawful and or that their conduct was actuated by malice. In addition, I cannot find that the third respondent issued the search warrants, which he/she was requested to issue by the members of first and second respondents, without properly considering whether or not the evidence presented to third respondent at the time that the requests were made, substantiated allegations of a crime being committed.

[24] It follows that applicant has not made out a case that the warrants were baseless and or that they fall foul of the guidelines laid down in Minister of Safety and Security v Van der Merwe (*supra*). Accordingly I must conclude that the searches conducted by the members of first and second respondents were lawful and that there has been no unlawful infringement of the applicant's rights.

[25] On the applicants version the alleged harassment has been going on for several years. It is therefore strange that at no stage during the period leading up to this application, did applicant deem it necessary to do anything about it. At no stage, even up and until the hearing of the matter, did applicant deem it necessary to address correspondence to the respondents to complain about the alleged harassment of the applicant by the members of the respondents. Nor did applicant address correspondence to the respondents complaining of and about the fact that he was being unreasonably targeted by the members of respondents. Applicant's explanation that the fact that he himself was never arrested for possession and or dealing in illicit drugs and that no drugs were found on his premises, does not make sense. If it is so, that the harassment was indeed genuine, and if the applicant is indeed a victim who has been subjected to baseless and unconstitutional searches, then one would have expected applicant to have done something about it long ago. At the least one would have expected him to record his dissatisfaction by writing to the respondents and complaining about their conduct. His inaction in these circumstances speaks volumes and leads me to conclude that he had no basis in

fact or law to complain, and that he knew that the police were justified in applying for search warrants and giving effect thereto in their efforts to combat crime.

[26] Applicant has failed dismissally to give a reasonable explanation why he did nothing. In any event, applicant was and is not prevented from instituting action against the respondents should he be of the view that there is any merit in proceeding against first and second respondents and or it members for the alleged harassment. It follows that applicant has not shown that he had no alternative remedy. The evidence rather illustrate that applicant did not consider and or exhaust other remedies before approaching this court. Applicant has accordingly failed to prove any of the requirements for the final relief that he seeks and the application therefore falls to be dismissed.

[27] In conclusion I pause to mention that there is merit in the submissions made by Mr O'Brien that good grounds exist for a finding that the application ought to be dismissed for lack of urgency. Considering the period of months and even years that has passed, during which period applicant has allegedly been subjected to the harassment and searches, it is incomprehensible that the applicant would wait until the time that he did, to launch this application. The evidence points to the conclusion that the urgency was self-created. Considering the conclusion that I have come to the issue relating to urgency is academic.

[28] In the result I make the following order:

The application is dismissed with costs.

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RILEY, AJ