Republic of South Africa

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

Case number: 10636/16

Before: The Hon. Mr Justice Binns-Ward

Hearing: 23 June 2016

Judgment delivered: 27 June 2016

In the matter between:

JOHAN FREDERICK VAN DEN BERG	First Applicant
GEOSYSTEMS (PTY) LTD	Second Applicant
and	
DERRICK CLAUDE PAGE	First Respondent
LEICA GEOSYSTEMS (PTY) LTD	Second Respondent
THE MINISTER OF POLICE	Third Respondent

JUDGMENT

BINNS-WARD J:

[1] The applicants, who appear to be the complainants in a criminal matter currently under investigation by the South African Police Service ('SAPS'), applied, as matter of urgency, for an order declaring an agreement entered into between the State Attorney, representing the Minister of Police, who is the third respondent, of the one part, and the attorneys representing the first and second respondents, of the other part, to be unlawful. The agreement, which is

recorded in a letter by the State Attorney to the first and second respondents' attorneys, dated 26 May 2016, provides that the first and second respondents will be afforded a copy of a search warrant to be procured by SAPS to search a computer hard drive currently kept in the possession of the registrar of this court five days before the execution of the warrant. The hard drive had been seized from the said respondents during a search executed in terms of an earlier warrant that had subsequently been set aside for being overbroad. The object of the agreement is to give the first and second respondents time to consider their position and decide before the warrant is executed, to apply to court, if so advised, for the review and setting aside of the warrant, or any other remedy they might consider appropriate.

[2] It is trite that the subject of a search warrant is not ordinarily[1] entitled to prior notice, either of the application for the warrant or of its intended execution. Prior notice would, for obvious reasons, ordinarily defeat the object of a search warrant. The subject's rights are provided for in the ordinary course in terms of s 21(4) of the Criminal Procedure Act, which requires that:

> A police official executing a warrant under this section or section 25 shall, after such execution, upon demand of any person whose rights in respect of any search or article seized under the warrant have been affected, hand to him a copy of the warrant. (Underlining for emphasis.)[2]

The applicants contend that s 21(4) is a 'statutory provision enacted for the police's benefit', which operates 'for the public's benefit'.[3]

[3] The facts of the current case show that this is not an ordinary case. As mentioned, a search and seizure operation has already been carried out. The article in issue has been seized and is effectively being retained under judicial seal.

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[1] Compare the attachment of the qualification '*ordinarily*' to the equivalent observations made in the context of a discussion of applications for search warrants in terms of s 29 of the National Prosecuting Authority Act 32 of 1998 in *Thint (Pty) Ltd v National Director of Public Prosecutions and Others*; *Zuma and Another v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC) at paras. 95-100. That the exigencies of a particular case might require a flexible application of the provisions of s 21(4) to afford appropriate recognition of the rights of the subject of the search that may be adversely implicated was acknowledged even in pre-constitutional jurisprudence; see, for example, *Cheadle, Thompson & Haysom and Others v Minister of Law and Order and Others* 1986 (2) SA 279 (W), at 283G, where Coetzee J held that in a case in which arguably privileged material was found in a search and sought to be made subject to seizure, the police should not remove it without first affording the subject an opportunity to apply to court to set the warrant aside.

[2] It has been held that a copy of the affidavit made in support of the application for the warrant should also be handed over together with a copy of the warrant; see *Goqwana v Minister of Safety and Security NO and Others* 2016 (1) SACR 384 (SCA), at para 31. That also manifests a departure, in the furtherance of constitutional compatibility, from the strictly literal tenor of the subsection.

[3] Para. 49 of the applicants' written submissions, dated 23 June 2016.

[4] On 20 April 2016, in case no. 11275/2015, this court (per Dolamo J, Desai J concurring) set aside the warrant in terms of which the search and seizure had been executed. But, because the court was satisfied by the evidence that due cause for some form of search had existed, it made what the parties' counsel referred to in argument as a 'preservation order'. The preservation order (set out in paragraphs 3-5 of the order made in case no. 11275/2015) directed that the laptop computer seized at the first respondent's home on 21 May 2015 be retained by the registrar of the court pending the final determination of criminal proceedings against the first respondent '*or any other person flowing from complaints of criminal conduct laid by the* [first applicant] *against the* [first respondent] *that gave rise to the issue of the warrant*'.

[5] The order directed the cyber forensic unit of SAPS to make a mirror image of the hard drive of the computer under the supervision of the registrar. The mirror image has to be given to the first respondent. The order also provided that '*save for the making of the mirror image, no person shall be permitted to access the content of the laptop without the consent of* [the first and second respondents and Leica Geosytems AG], *save by order of this Court or pursuant to a lawful search warrant*'.

[6] The relevant terms of the order appear to have been premised substantially on the formulation of a similar order proposed in terms of the minority judgment in *National Director of Public Prosecutions and Others v Zuma and Another* 2008 (1) SACR 258 (SCA), at para 70, and that which Farlam and Cloete JJA would have preferred to make in *National Director of Public Prosecutions and Another v Mohamed* 2008 (1) SACR 309 (SCA), at para 14. Even in the different order proposed by Nugent JA, which was endorsed by four of the appeal court judges in *Mohamed* (including Farlam and Cloete JJA), provision was made for the preservation of real evidence that had been attached in the course of an unlawful search and for its possible subsequent production, if so ordered by a court seized of the relevant principal proceedings.[4] Implicit in that provision was that the party whose material had been seized in the search would have the opportunity in the contemplated subsequent proceedings to argue against the making of any order for the production of the material.

[7] The applicants' standing to bring the current application was not contested. But the propriety of their having proceeded with it as an urgent application was disputed. The uncontroverted evidence is that a fresh search warrant is being prepared. That is the basis for

[4] See *Mohamed* supra, at para. 34.

the alleged urgency in the application. The essential test for urgency is whether proceedings brought in the ordinary course would not be heard and determined quickly enough to afford the applicant effective relief. As the agreement that the applicants seek to impugn could be given effect to at any moment, I was persuaded that a sufficient case for urgency had been made out. There was some suggestion that if the applicants had sought an undertaking from the third respondent to hold off until the intended challenge had been determined, it would have been given; and that their failure to have sought it had given rise to unnecessary or self-created urgency. Any strength that contention might have had was effectively defused, however, by the respondent's failure to have given the undertaking. He elected instead to deliver opposing papers on the merits of the case.

[8] It appears from the judgment in case no. 11275/2015 that the court accepted that the first respondent had private and personal information stored on the hard drive that would be of no relevance in the criminal investigation. It did so, apparently, without the documents concerned having been precisely or individually identified or considered. It accepted that the respondent had a right of privacy in respect of that information that was deserving of protection against the intrusion of a police search. In this regard Dolamo J remarked as follows at paras. 46-47 of the judgment:

> 46. … I am in no doubt that with the necessary safeguards in place access to information of the private documents of a personal and intimate nature which may lead to a breach of his right to privacy may be prevented. This will preserve any incriminating evidence which may later be used to advance any criminal prosecution which may be instituted.
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> 47. Such safeguards may include providing for supervised access to the contents of the laptop, separating those documents which contain information of an intimate or personal nature from the rest, restricting access to the emails which only have a bearing on the dealings by Geosystems with any anti-competitive activities of a criminal nature.

[9] It is plain that Dolamo J contemplated a situation in which regulated access to the data on the hard drive might be afforded to the investigating authority. The terms of the order he made expressly provide that the process of obtaining such access might be a fresh search warrant. Having regard to the observations by Dolamo J at para 46-47, quoted above, careful attention would probably have to be given to the wording of the warrant to achieve the sort of discriminative access to the content of the hard drive that was contemplated by the learned judge. It is readily conceivable in the given circumstances that a situation might arise in which any questions as to what falls to be withheld in terms of the respondents' right to privacy, and what does not, might in the last resort have to be determined on the basis of an independent

third party inspection – something perhaps along the lines of what is done in some contested discovery disputes where the call is made on the basis of the so-called 'judicial peek' procedure.[5]

[10] The Criminal Procedure Act does not make provision for preservation orders of the nature made in the current case. That they may be made in appropriate circumstances is, however, established by high authority. In *Thint (Pty) Ltd v National Director of Public Prosecutions and Others*; *Zuma and Another v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC) at para 219, Langa CJ held '*that a preservation order, such as that proposed by the minority in the Supreme Court of Appeal in the present matter*[6] *and that handed down on the same day by the majority of the Supreme Court of Appeal in* Mahomed,[7] *will frequently be a just and equitable remedy*'.

[11] The applicants' counsel pointed out that *Thint*, *Zuma* and *Mohamed* supra were all cases in which the search warrants in contention had been issued in terms of s 29 of the National Prosecuting Authority Act 32 of 1998, not in terms of s 21 of the Criminal Procedure Act. They sought on that basis to distinguish what happened in those cases from a matter in which the search warrant fell to be obtained and executed in terms of s 21 of the Criminal Procedure Act. I am not persuaded that the point of distinction is well taken. It is clear that the Constitutional Court treated the crafting of the preservation order relief in those cases not as a remedy attaching peculiarly to s 29 of the National Prosecuting Authority Act, but as an appropriate order made within the court's powers in terms of s 172(1)(b) of the Constitution following upon the determination of a constitutional matter; see *Thint* supra, at para 220. Paragraphs 3-5 of the order made by the court in case no. 11275/2015 are just such an order. The order afforded a customised basis by which a balance was sought to be struck between an affirmation of the respondents' basic right to privacy that had been infringed by the overbroad nature of the executed warrant and the public interest in the effective investigation of criminal offences, including by means of search warrants. Section 21 therefore does not afford the circumscribed basis for the determination of the current application that the applicants' counsel's arguments sought to suggest.

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[5] Cf. e.g. *President of the Republic of South Africa v M&G Media Ltd* 2011 (2) SA 1 (SCA), 2011 (4) BCLR 36 and *President of the Republic of South Africa v M&G Media Ltd* 2012 (2) SA 50 (CC).
[6] *National Director of Public Prosecutions and Others v Zuma and Another* 2008 (1) SACR 258 (SCA) at para. 70.
[7] *National Director of Public Prosecutions and Another v Mohamed* 2008 (1) SACR 309 (SCA).

[12] One of the contentions advanced on behalf of the applicants is that the impugned agreement impermissibly amended the court order '*without consulting the other parties or approaching the Court*'.[8] That is not so, in my view.

[13] The court order expressly contemplated that the hard drive would be accessed in terms of a further search warrant. In that sense all the parties were given notice that such a warrant would probably follow; especially in view of the court's statement that it had been satisfied that there were sound grounds for the investigation. That, by itself, connoted a departure from the ordinary situation in terms of s 21 of the Criminal Procedure Act, in which a search warrant is visited on the subject as a surprise.

[14] The order was, moreover, made in a judgment that in relevant part was intended to expressly address the tension between the public interest in access to the hard drive by SAPS being permitted on the one hand and the first respondent's right to dignity and privacy on the other. The judgment referred to the intensely litigious history of the matter. The court must have been conscious in that context of the possibility, if not the likelihood, of future disputes between the parties as to what material on the hard drive SAPS might be permitted to access. The order described a basis for discriminative access, but provided no procedural framework for achieving it.[9] The provision that the first respondent be given a mirror image of the hard drive implies that the court must have appreciated that the respondent would be in a position to finitely identify the material on it in respect of which he would wish to assert his right to privacy. There is no indication in the judgment that SAPS was understood to have been in a position to identify precisely the material that might be on the hard drive that would be relevant in its investigations.[10] The judgment did not indicate how SAPS might address the overbroad nature of the original search warrant; nor, as a matter of interest, do the applicants. In my view the impugned agreement does not amend the court order, it is directed instead at providing the basis upon which the further conduct of the investigation in relation to the material on the hard drive that was expressly contemplated in the terms of the order should proceed.

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[8] Para. 35 of the applicants' written submissions, dated 23 June 2016.

[9] Contrast, for example, the comparable order made in *Craig Smith and Associates v Minister of Home Affairs and Others* 2015 (1) BCLR 81 (WCC); [2014] ZAWCHC 127 (4 August 2014); 2014 JDR 1703, in which, at paras. 17-20 of the order, a procedure was expressly provided for any disputes to be resolved concerning access to material on a hard drive seized during a search authorised in terms of s 33 of the Immigration Act 13 of 2002.

[10] It is not incumbent on SAPS to individually or specifically identify the files on the hard drive that may be relevant in its investigation – reference to a genus would be sufficient for the purpose of obtaining a warrant; cf. *Minister of Safety and Security v Van der Merwe* 2011 (1) SACR 211 (SCA); [2011] 1 All SA 260; [2010] ZASCA 101 (7 September 2010), at para 11 and *Naidoo and Others v Kalianjee N.O. and Others* 2016 (2) SA 451 (SCA); [2015] 3 All SA 679; [2015] ZASCA 102 (29 June 2015), at para 24.

[15] That the first respondent be put in a position in which he has to identify the material on the hard drive that he maintains should not reasonably be exposed to SAPS in the course of a legitimate search would, in my judgement, contribute to the efficient advancement of the investigation. The impugned agreement appears to me to be directed precisely at the achievement of that object. It, in effect, calls upon the first respondent to identify the material he contends must be excluded from the search. If he does not, the search will proceed and it will fall within the discretion of the officer(s) conducting it to determine what should be taken and what should be left.[11] In the context of the first respondent being possessed of a mirror image of the hard drive, it would be expected of him, should he seek to review any fresh search warrant issued pursuant to the procedure ordained by the preservation order, to do so with precise reference to the material he would contend should be excluded from access, not with the broad brushstrokes of categorisation he apparently used in the previous application. It is implicit in the order made by Dolamo J and in the impugned agreement that the first respondent will do so appreciating that should his identification give rise to a dispute, the material in issue will be subjected to independent scrutiny for the purpose of the determination of such dispute. That, no doubt, is the sort of process Dolamo J had in mind when he referred in para 47 of his judgment[12] to '*supervised access*'.

[16] I am not able in the circumstances to uphold the applicants' contention that the agreement amounts to the waiver of a statutory protection, or is in any way contrary to the public interest.

[17] In the result, the application is dismissed with costs, including the costs of two counsel where such were engaged.

A.G. BINNS-WARD

Judge of the High Court

[11] Cf. *Polonyfis v Minister of Police and Others NNO* 2012 (1) SACR 57 (SCA), at para. 19.
[12] Quoted in paragraph [8], above.

APPEARANCES

Applicants' counsel:	P.B. Hodes SC Luke Kelly
Applicants' attorneys:	Ian Levitt Attorneys Sandton Maurice Phillips Wisenberg Cape Town
First and Second Respondents' counsel:	W.A. King SC P. Eia
First and Second Respondents' attorneys:	Werksmans Attorneys Sandton and Cape Town
Third Respondent's counsel:	H. Cronje
Third Respondent's attorneys:	State Attorney Cape Town