IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA CASE NO.: 13673/09

Heard: 23 July 2010 **Reportable**

Delivered: 17 August 2010

In the matter between

KOGILAN MUDALY **APPLICANT**

and

M K N GWALA **1ST RESPONDENT**

THE CHIEF MAGISTRATE, DURBAN N O **2ND RESPONDENT**

S J MAYEZA N O **3RD RESPONDENT**

THE CHIEF MAGISTRATE, PINETOWN N O **4TH RESPONDENT**

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **5TH RESPONDENT**

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **6TH RESPONDENT**

THE DIRECTOR OF PUBLIC PROSECUTIONS, KWAZULU – NATAL **7TH RESPONDENT**

THE OFFICE COMMANDING

ORGANISED CRIME UNIT, DURBAN **8TH RESPONDENT**

THE MINISTER OF LAW AND ORDER **9TH RESPONDENT**

JUDGMENT

DHAYA PILLAY J

Introduction

1. The applicant, Kogilan Mudaly, challenged the validity of two search and seizure warrants, annexures "C" and "F" to his founding affidavit and the ensuing search and seizures effected on 15 December 2006, purely on the basis that he ran the risk of prosecution. The sixth to the ninth respondents resisted the application principally on the ground that the applicant lacked standing to challenge the warrants because he had not shown that he was in any way connected to the items seized or the premises searched.

Standing

2. The superior courts are divided as to whether a person has standing to challenge the validity of a search and seizure warrant merely because she risks prosecution. In *Zuma and Others v National Director of Public Prosecution* 2008 (1) SACR 298 at paragraph 15 -20 (*Zuma 1*) the Supreme Court of Appeal (SCA) answered this question in the negative. On appeal, the Constitutional Court (CC) doubted the correctness of the SCA's conclusion.[1] The CC elected to dispose of the dispute finally by determining the validity of a letter of request in terms of section 2 of the International Co-operation in Criminal Matters Act 75 of 1996 and so avoided a firm ruling on the procedural question of standing.

3. The *Zuma* judgments determine standing to challenge the validity of a letter of request to the Attorney-General of Mauritius to transmit to the South African prosecutors the original of a document relating to the prosecution of the appellant. Although this case is a challenge to search and seizure

[1] *Thint Holdings (South Africa) (Pty) Ltd and Another v National Director of Public Prosecution and Others; Zuma v National Director of Public Prosecution and Others* 2008 (2) SACR 557 *(ZUMA 2)* at paragraph 47

warrants by the applicant who has already been charged, the common theme is whether and in what circumstances a person has standing to challenge search and seizure instruments available to the police and prosecution to investigate crime.

4. An analysis of both *Zuma* judgments and the cases discussed in them may assist in determining whether and to what extent they apply to the facts in this case.

The SCA's *Zuma 1*

5. The SCA found that the rights of the appellants were not affected by the issuing of the letter of request.[2] Citing two pre-1994 cases,[3] the SCA concluded that the appellants did not have a "direct and substantial interest" in the litigation in respect of "a right which is the subject matter of the litigation." In coming to this conclusion the SCA reasoned that by issuing a letter of request, a Court does not pronounce upon or adjudicate on rights; it merely places its *imprimatur* upon the request.[4] Although it acknowledged that the right to a fair trial is engaged in criminal prosecutions, that right, it said, is unaffected by the issue of the letter of request and the admissibility of the evidence it obtains is justiciable before the trial court[5].

6. The SCA's conclusion is premised on its opinion that the rights of the accused to a fair trial is unaffected by the granting of the request because even though the evidence sought to be obtained by the letter might result or contribute to a conviction, it will do so only if the trial court admits it. The accused may object to its admission before the trial court.[6] In other words, the appellants did not have standing to challenge the letter of request by way of this application but they would have standing when the evidence it generates is sought to be admitted against them in their prosecution.

---

[2] *ZUMA 1* paragraph 50.
[3] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A); *Dalrymple and Others v Colonial Treasurer* 1910 TS 372.
[4] *ZUMA 1* paragraph 16.
[5] *ZUMA 1* paragraph 2g.
[6] *ZUMA 1* at paragraph 2g – i

7. Although the SCA was mindful of the CC's broad approach to constitutional matters,[7] it declined to adopt a broad approach in *Zuma 1* because, in its view, the context was not about the adjudication of rights.[8]

8. The SCA criticised the two-bench Cape decision in *Kolbatschenko v King NO and Another* 2001 (4) SA 336 (C) ([2001] 4 All SA 107). In that case Thring J and Van Heerden J held that the applicant was sufficiently affected in his rights and legal interests by the seizure to establish standing, not only because the items seized were closely connected to him but also because of their possible use in his criminal prosecution.[9] Consequently, even if the applicant's interest in the items seized was insufficient, the mere risk of prosecution elevated his interest to a direct interest in the subject matter of the litigation. In coming to this conclusion the learned judges compared *Kolbatschenko* to *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) (1996 (1) BCLR 1).[10]

9. The SCA distinguished the decision in *Reuters Group PLC and Others v Viljoen NO and Others* 2001 (2) SACR 519 (C*)* (2001 (12) BCLR 1265).[11] In *Reuters* another two-bench Cape Court found that the prosecution had given an undertaking to notify the applicant of its intention to apply in terms of section 2 (2) of the International Co-operation in Criminal Matters Act. Traverso DJP and Davis J held:

> "It is a basic proposition of law that the invocation of any procedure which potentially affects the rights, property or legitimate expectations of a person entails prior notice and an opportunity to be heard".[12]

---

[7] *ZUMA 1* pragraph 16, citing *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) (1996 (1) BCLR 1) in paragraph 165; *Minister of Home Affairs v Eisenberg & Associates: In re Eisenberg & Associates v Minister of Home Affairs and Others* 2003 (5) SA 281 (CC) (2003 (8) BCLR 838) in paragraph 28.
[8] *ZUMA 1* paragraph 16b –c
[9] *Kolbatschenko* 348G/H – 349E-F
[10] *Kolbatschenko* at 349

[11] *ZUMA 2* paragraph 18.
[12] Reuters at 529d

10. Just as in *Kolbatschenko*, rights were also engaged in *Reuters*. In fact, the learned judges went beyond rights to include legitimate expectations.

11. The SCA preferred to follow the unreported Transvaal Provincial Division judgment of Van der Merwe J in *Ex parte National Director of Public Prosecutions: In re an Application for the Issuing of a Letter of Request in terms of Section 2(2) of the International Co-operation in Criminal Matters Act 75 of 1996* (TPD case No 3771/07, H 14 September 2007*. (Zuma 3)*

12. *Zuma 3* was also a challenge to an application for a letter of request in terms of section 2 (2) of International Co-operation in Criminal Matters Act. Van der Merwe J disagreed with the holding in *Kolbatschenko*[13] that the risk of prosecution on its own clothed a person whose affairs are to be investigated with standing; he also found that it was distinguishable from *Zuma 3* on the facts.[14]

13. Van der Merwe J also distinguished *Zuma 3* from *Reuters* on the facts. The first distinction he relied on was that *Reuters* was brought in terms of section 31 whereas *Zuma 3* was a challenge in terms of section 2 (2) of the International Co-operation in Criminal Matters Act. This distinction is, with respect, doubtful.

14. Section 31 does not confer powers on the State.[15] The learned judges in *Reuters* found that if the prosecution were to apply for international assistance, they would invoke section 2 of The International Co-operation in Criminal Matters Act, because section 2 and not section 31 deals with the issuing of letters of request.

---

[13] *ZUMA 3* page 21
[14] *ZUMA 3* page 21
[15] Section 31 of the Act provides as follows: "Nothing in this Act contained shall be construed so as to prevent, abrogate or derogate from any arrangement or practice for the provision or obtaining of international co-operation in criminal matters otherwise than in the manner provided for by this Act."

15. It is not altogether clear whether the second distinction was in fact a distinction. In *Reuters* the prosecution had given an undertaking to notify the applicant of the section 31 application, which also seemed to have been given in *Zuma 3*.[16]

16. Van der Merwe J denied *locus standi*"[17] even though the applicant merely wanted an opportunity to be heard on whether he should be allowed to partake in the investigation.

The CC's *Zuma 2*

17. In contrast, the Constitutional Court premised its remarks on its precedents[18] and its interpretation and application of section 38 of the Constitution.[19]

18. Section 38 provides:

> *"*Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –
>
> a. anyone acting in their own interest; …"

19. Chaskalson J, who wrote the majority opinion on the issue of standing in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) (1996 (1) BCLR 1 observed:

> "The category of persons empowered to do so is broader than the category of persons who have hitherto been allowed standing in cases where it is alleged that a right has been infringed or threatened, and to that extent the section demonstrates a broad and not a narrow approach to standing."[20]

[16] *Zuma 3 p21*
[17] *ZUMA 3* 2007 JDR 0832T page 23
[18] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) (1996 (1) BCLR 1)
[19] *Zuma 2* paragraph 47
[20] *Ferreira* paragraph 167

20. In *Ferreira,* the appellants' non-compliance with the Companies Act had possible criminal consequences. The CC found that the appellants had sufficient standing.

21. Chaskalson J acknowledged that the objection to standing may be well founded in constitutional challenges brought by persons who have only a hypothetical or academic interest in the outcome of litigation. Decisions, he pointed out, are best made when there is a genuine dispute in which each party has an interest to protect. Furthermore, scarce resources constrained courts to hearing issues that are properly before it.[21] Drawing on a Canadian case,[22] he illustrated that a male doctor had standing to challenge the constitutionality of abortion legislation in which he may be liable to be prosecuted even though the rights upon which the constitutional challenge was based were the rights of pregnant women, which did not vest in him as a male doctor.[23]

Analysis

22. The conflict between *Zuma 1* and *Zuma 2* creates a dilemma for this Court as the SCA's judgment is a *ratio decidendi* and the remarks of the CC are *obiter*. However, the obiter enjoys the numerical superiority of a unanimous decision of the CC. Add to the opinion of the eleven CC judges the voices of the two judges from *Kolbatschenko* and another two from *Reuters* and the overwhelming weight of judicial opinion favours a broad approach.[24] That opinion is that rights are engaged when a risk of prosecution arises. The persuasive value of the obiter in *Zuma 2* is also enhanced because it is an appeal from *Zuma 1. Zuma 2* does not uphold *Zuma 1* on the issue of standing. At the same it does not overrule *Zuma 1.*

[21] *Ferreira* paragraph 164 165
[22] Morgentaler, Smoling and Scott v R (1988) 31 CRR 1 @ 26
[23] *Ferreira* paragraph 166
[24] See also Constitutional Law of South Africa by Woolman, et al 3-15; 3-16

23. This Court is therefore bound to apply the *ratio* in *Zuma 1.* Section 38 of the Constitution and *Ferreira* also binds this and all other courts to take a broad view of rights. How then should this Court resolve the conflict?

24. As a general proposition, the risk of prosecution may put at risk freedom, dignity, privacy and property. Other rights engaged may include access to courts, to just administrative action and to information. Rights may be at risk at the mere possibility of prosecution.[25] When the prosecution has already commenced, the risk becomes a reality.

25. However, rights come with limitations. Section 38 would suffer from over-breadth unless it is interpreted contextually taking into account the circumstances of each case. In the context of prosecutions, the controversy stems from the need to balance the breadth of section 38 and individual rights on the one hand with the power of the police and prosecutors to fight crime in the greater interest of the public good on the other hand. Although a broad approach minimises the risks of illegalities and injustices going unchecked,[26] it could also seriously hamper crime fighting if investigations and evidence gathering are routinely frustrated by interdicts and possible appeals against them. *Zuma 1* balances these competing interests in favour of the police, the prosecution and the public interest.

26. In this case, in addition to applying the principle of *stare decisis,* giving effect to the balance struck in *Zuma 1* suits the facts of this case. The applicant is awaiting trial on charges of racketeering, prostitution, employing illegal foreigners and various other offences. He claims standing to apply to set aside the search and seizure warrants and have the items seized returned to the premises from where and the persons from whom they were taken.

27. He has not established any link whatsoever to the items seized and the premises searched. He has also not admitted to any facts in the summary of substantial facts in the charge sheet. In reply, he claimed for the first time the

[25] *Ferreira* paragraph 166
[26] *Zuma 1* paragraph 15d-e

right to a fair trial and asserts that this court has "an intrinsic duty" to "expunge procedural irregularities" (*sic*). He seeks the relief in this application so that he would know exactly what charges are proffered against him otherwise there will be confusion and he would be hampered in his defence, he contends.

28. All the authorities cited above are agreed that courts are not concerned with academic, hypothetical matters but with genuine disputes affecting people who have "an adequate interest",[27] a "real and substantial interest",[28] or a "direct and substantial interest" in the "the right which is the subject-matter of the litigation".[29]

29. Whether this requirement is met in any particular case will depend on the facts.[30]

30. On the facts of this case, the warrants were executed at a preliminary, investigative and evidence gathering stage. At that stage and now that he is charged, they cannot be set aside because the applicant claims no link to them at all. He also asserts no right other than the risk of prosecution. His confusion about what he is charged with can be remedied by a request for further particulars and if necessary, further and better particulars. He has an opportunity to challenge the admissibility of the evidence seized if they are to be used against him at the trial.

31. The Court concludes that the applicant has no standing.

Order

32. The application is dismissed with costs.

[27] *Kolbatschenko* pg 346 paragraph G-H
[28] *Ferreira* paragraph 160
[29] *Zuma 1* paragraph 16
[30] *Kolbatschenko* pg 346 paragraph H-I

_____

JUDGE DHAYA PILLAY

COUNSEL

Counsel for the Applicant	:	P.D. Hemraj SC
		M.E Stewart
Instructing Attorneys	:	DMI Attorneys
Counsel for the Respondents:		J Nxusani
Instructing Attorneys	:	State Attorneys, KZN
Date of hearing	:	23 July 2010
Date of Judgment	:	17 August 2010