IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 142/2000

In the matter between:

MARK WILLIAM SHELTON Appellant

and

THE COMMISSIONER FOR THE

SOUTH AFRICAN REVENUE SERVICE Respondent

Coram: Vivier, ADCJ, Howie, Streicher, JJA Conradie and Cloete, AJJA

Heard: 15 November 2001

Delivered: 27 November 2001

Validity of issuing and execution of a search and seizure warrant issued in terms of s 74D(9) of the Income Tax Act 58 of 1962.

J U D G M E N T

STREICHER JA:

[1] This appeal concerns the validity of the issuing and execution of a warrant authorizing officers employed in the South African Revenue Service to enter premises to search for certain documents and other items (hereinafter jointly referred to as ‘documents’) and to seize such documents.

[2] Erasmus J issued the warrant on 16 April 1999. On 15 July 1999 the warrant was executed and a number of documents were seized in terms thereof. In a joint judgment by a full bench of the Eastern Cape Division an urgent application by the appellant in terms of s 74D(9) of the Income Tax Act 58 of 1962 (‘the IT Act’) for an order directing the respondent to deliver all information, documents or things seized in terms of the warrant was dismissed. With the leave of that court the appellant now appeals to this court.

[3] The appellant is a businessman. It is common cause that he has an interest in numerous businesses and properties through partnerships,

companies and trusts. He is, *inter alia*, a trustee of the Shelton Trust which holds 50% of the shares in a company which owns the Heritage Spar in Port Alfred. He is also a trustee of the Seaspray Trust which has a 90% interest in the Peppergrove Spar in Grahamstown. Both Spars are managed by him and he and his wife have offices at the Peppergrove Spar. He was assessed to tax in the Transkei for the 1990 to 1993 tax years in respect of income earned in the Transkei but, although registered as a taxpayer at the Umtata office of the South African Revenue Service during the 1994 and 1995 tax years, he was not assessed to tax for those tax years in respect of income earned in the Transkei. From 1993 until 1997 he was also assessed to tax in respect of returns submitted to the East London office of the South African Revenue Service. For the 1993 to 1995 tax years his income so assessed did not include income earned in the Transkei. By virtue of the repeal of the Income Tax Act

58 of 1962 of the Transkei by the Income Tax Act 21 of 1995 the assessments for the 1996 and 1997 tax years included all of his income earned during those years.

[4] According to the warrant it had been issued in terms of s 74D of the IT Act s 57D of the Value Added Tax Act 89 of 1991 ('the Vat Act'). Section 74D of the IT Act provides as follows:

> '(1) For the purposes of the administration of this Act, a judge may, on application by the Commissioner or any officer contemplated in section 74 (4), issue a warrant, authorising the officer named therein to, without prior notice and at any time-
>
> (a) (i) enter and search any premises; and
>
> (ii) search any person present on the premises, provided that such search is conducted by an officer of the same gender as the person being searched,
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> for any information, documents or things, that may afford evidence as to the non-compliance by

any taxpayer with his obligations in terms of this Act;

(b) seize any such information, documents or things; and

(c) in carrying out any such search, open or cause to be opened or removed and opened, anything in which such officer suspects any information, documents or things to be contained.

(2) An application under subsection (1) shall be supported by information supplied under oath or solemn declaration, establishing the facts on which the application is based.

(3) A judge may issue the warrant referred to in subsection (1) if he is satisfied that there are reasonable grounds to believe that-

(a) (i) there has been non-compliance by any person with his obligations in terms of this Act; or

(ii) an offence in terms of this Act has been committed by any person;

(b) information, documents or things are likely to be found which may afford evidence of-

(i) such non-compliance; or

(ii) the committing of such offence; and

(c) the premises specified in the application are likely to contain such information, documents or things.

(4) A warrant issued under subsection (1) shall-

(a) refer to the alleged non-compliance or offence in relation to which it is issued;

(b) identify the premises to be searched;

(c) identify the person alleged to have failed to comply with the provisions of the Act or to have committed the offence; and

(d) be reasonably specific as to any information, documents or things to be searched for and seized.

(5) Where the officer named in the warrant has reasonable grounds to believe that-

(a) such information, documents or things are-

(i) at any premises not identified in such warrant; and

(ii) about to be removed or destroyed; and

(b) a warrant cannot be obtained timeously to prevent such removal or destruction,

such officer may search such premises and further exercise all the powers granted by this section, as if such premises had been identified in a warrant.

(6) Any officer who executes a warrant may seize, in addition to the information, documents or things referred to in the warrant, any other information, documents or things that such officer believes on reasonable grounds afford evidence of the non-compliance with the relevant obligations or the committing of an offence in terms of this Act.

(7) The officer exercising any power under this section shall on demand produce the relevant warrant (if any).

(8) The Commissioner, who shall take reasonable care to ensure that the information, documents or things are preserved, may retain them until the conclusion of any investigation into the non-compliance or offence in relation to which the information, documents or things were seized or until they are required to be used for the purposes of any legal proceedings under this Act, whichever event occurs last.

(9) (a) Any person may apply to the relevant division of the High Court for the return of any information, documents or things seized under this section.

(b) The court hearing such application may, on good cause shown, make such order as it deems fit.

(10) The person to whose affairs any information, documents or things seized under this section relate, may examine and make extracts therefrom and obtain one copy thereof at the expense of the State during normal business hours under such supervision as the Commissioner may determine.'

The wording of s 57D is identical save that ss (1) thereof contains a reference to s 57(1) and not to s 74(1).

No constitutional challenge to the validity of either section was mounted at any stage of the proceedings and facts relevant to such a challenge do not appear from the record. The respondent's counsel submitted in their heads of argument that the appeal should be decided on the basis that the section is

constitutionally valid and the appellant's counsel did not take issue with this approach. In the circumstances I see no reason not to follow it.

[5] By providing in s 74D(9) that a court may 'on good cause shown, make such order as it deems fit' without in any way specifying what would constitute 'good cause' the legislature clearly intended to confer a wide discretion on a court dealing with an application for an order directing the return of documents seized under s 74D. Counsel for the appellant submitted that good cause was established in that:

5.1 The application for a warrant did not comply with s 74D(2) of the IT Act and s 57D(2) of the VAT Act.

5.2 Material facts were not disclosed to Erasmus J.

5.3 The application for the warrant was fatally defective.

5.4 The warrant itself was fatally effective.

5.5 The execution of the warrant was irregular.

I shall deal with each of these grounds in turn.

[6] The first main ground on which the appellant relied was that the application did not comply with s 74D(2) of the IT Act and with s 57D(2) of the VAT Act in that it was not ‘supported by information supplied under oath or solemn declaration, establishing the facts on which the application [was] based’ as required by these sections.

[7] The application upon which Erasmus J issued the warrant consisted of a notice of motion and two affidavits annexed thereto in support of the application. The one affidavit, dated 5 November 1998, was deposed to by Mr Nortje, the Receiver of Revenue at Port Elizabeth, an officer to whom the Commissioner for the South African Revenue Service, in terms of s 74(4), delegated the powers vested in him by s 74D. The other affidavit, dated 11

November 1998, was deposed to by Mr Hewson, a Revenue Inspector at the East London office of the Special Investigation Division of the South African Revenue Service. The facts on which the application was based were set out in the latter affidavit. Nortje said in his affidavit:

> 'In support of this application I respectfully refer to the sworn affidavit of LINDEN JAMES HEWSON that contains the facts upon which this application is based, which facts I have perused and which satisfies me that reasonable grounds exist for this application.'

The appellant submitted that, in the light of the fact that Hewson's affidavit was dated after Nortje's affidavit, another affidavit than the one referred to by Nortje must have been annexed to the notice of motion and that the application for a warrant, for this reason, did not comply with s 74D(2) and s 57D(2).

[8] Hewson admitted that the affidavit ('the second affidavit') annexed to the notice of motion was not the same affidavit as the one perused by Nortje ('the first affidavit'). However, according to him the content of the second affidavit was exactly the same as that of the first affidavit except that the second affidavit was commissioned by another commissioner of oaths and that each page thereof was initialed by him and the commissioner. He explained that it was considered necessary to depose to a second affidavit because the first affidavit had not been initialed by him and the commissioner. Although Hewson did not explain how it came about that Nortje and the commissioner who commissioned Nortje's affidavit initialed Hewson's second affidavit there is in my view no reason to believe that, save as aforesaid, the content of the affidavit Nortje perused differed from the affidavit annexed to the notice of motion. In any event it is quite irrelevant whether or not Nortje had perused

the second affidavit and whether or not he was satisfied that reasonable grounds existed for the application. Erasmus J had before him an application supported by information supplied under oath establishing the facts on which the application was based as required by s 74D(2) and he, and not Nortje, had to be satisfied that reasonable grounds existed for the application.

[9] The second main ground on which the appellant relied was that the respondent failed to disclose to Erasmus J facts which, according to him, were 'highly relevant'. He submitted that these non-disclosures were material and that, in the absence of any plausible explanation for the non-disclosures, the interests of justice required that the documents seized should be returned. The facts which should according to the appellant have been disclosed are the following:

9.1 The discrepancy between the dates of the affidavits by Nortje and Hewson.

9.2 The fact that Hewson, a month prior to the application, deposed to an affidavit in respect of a similar application in the Transkei High Court in which almost all of the equivalent of paragraph 6(f) of his affidavit in the present matter was deleted.

9.3 The fact that at the time when the application for the warrant was brought the respondent knew that there would be a substantial delay in its execution.

[10] The discrepancy between the dates of the affidavits was not concealed by the respondent and was only relevant to an irrelevant statement by Nortje. In the circumstances I do not think that the failure by the respondent to direct the attention of Erasmus J thereto constituted a material non-disclosure.

[11] Para 6(f) of Hewson's affidavit contained a reference to an allegation that a business associate of Hewson paid a bribe to a staff member at the Umtata office of the South African Revenue Service to 'lose' his (the business associate's) income tax file. The corresponding reference in his affidavit in the application to the Transkei High Court ('the Transkei application') was deleted from that affidavit. Hewson explained that Mr Jacobs who represented the State Attorney in the Transkei application effected the deletion. Hewson deposed to the affidavit and initialed the deletion but that is not to say that he was persuaded that the portion deleted was incorrect or untruthful. He stated in his answering affidavit that he had not received any information which cast doubt on the veracity of the informants concerned. The fact that Jacobs did not consider it necessary or advisable that Hewson should refer to the allegation was once again irrelevant and need not have been disclosed to Erasmus J.

[12] The warrant was issued on 16 April 1999 and executed on 15 July 1999. Hewson explained that he was required to co-ordinate searches in East London, Umtata, Port St Johns, Grahamstown and Port Alfred as it was necessary for an effective search and seizure operation that the searches should take place simultaneously. This entailed that a time had to be found when the persons who had been authorized in terms of the warrants to conduct the search and seizure operation were available. According to Hewson the searches were conducted as soon as it became practical to conduct them simultaneously. There was in my view no reason for the respondent to think that circumstances might change during the time that it would take to co-ordinate the searches or that the appellant might be prejudiced if the warrant was executed on 15 July 1999 rather than 16 April 1999. Moreover, the appellant did not allege that circumstances could have changed or that he was

prejudiced by the delay. In these circumstances it cannot be said that the respondent's failure to disclose to Erasmus J that there would be a delay in the execution of the warrant constituted a material non-disclosure.

[13] The third main ground on which the appellant relied was that the application for the warrant was fatally defective. The appellant submitted that that was so for the following reasons:

13.1 Despite the fact that the application was made in terms of s 57 of the VAT Act there were no averments in the respondent's affidavits regarding any non-compliance by the appellant with his obligations in terms of the VAT Act.

13.2 There was an inordinate delay between the making of the affidavits used in support of the application and the moving of the application for a warrant.

13.3 No basis was laid in the respondent's affidavits for bringing the application without notice to the appellant.

13.4 Hewson's affidavit contained inaccuracies and hearsay allegations with the result that no adequate factual basis for the application was laid.

[14] It is correct that the respondent's affidavits did not contain an averment regarding any non-compliance with the VAT Act as is required by S 57D of the VAT Act. However, the warrant was also issued in terms of the IT Act and would have read no different, except for the references to the VAT Act, had it been issued in respect of the IT Act only. The failure to aver any non-compliance with the VAT Act was therefore of no consequence.

[15] The affidavits used in support of the application were deposed to in November 1998 and the application was moved in April 1999. Hewson

explained that it was decided to first obtain warrants in respect of the appellant and his former partners in the Transkei Division and that a delay was caused when the application papers lodged with the Transkei Division got lost with the result that new papers had to be prepared. He stated furthermore that there was no change in circumstances between November 1998 and April 1999. It was not alleged by the appellant that he was prejudiced by the delay. Again the delay was of no consequence.

[16] The appellant submitted that the respondent had to give notice to him of the application for a warrant unless a case could be made out that notice should be dispensed with; that the respondent failed to make out such a case; and that the respondent's application for a warrant should, therefore, have been refused. As authority for this proposition the appellant relied on *Cooper NO v First National Bank of SA Ltd* 2001 (3) SA 705 (SCA). In that case the

issue to be decided was whether notice should have been given of an application in terms of s 69(3) of the Insolvency Act 24 of 1936 for a warrant to search for and take possession of property. Smalberger JA said at 713F:

> '[A]s a general principle, a warrant should not be issued without affording the person or persons affected, or likely to be affected (to the extent that their identities are ascertainable or reasonably ascertainable), an opportunity to be heard, unless it can be said that s 69(3) (the authorising provision) excludes that right either expressly or by necessary implication. An opportunity to be heard would require the giving of appropriate notice to the person or persons concerned.'

And at 714E:

> 'When seeking to recover concealed items suspected of belonging to an insolvent estate, the giving of prior notice and affording a right to be heard would, or at least might, defeat the very object and purpose of the section. From this it must be inferred, by way of necessary inference, that the Legislature intended to exclude the giving of notice (and the concomitant right to be heard) in cases involving concealed items.'

In the present case the warrant was applied for and issued on the basis of allegations, among others, suggesting that the respondent failed to comply

with his obligations in terms of s 66 of the Income Tax Act of the former Transkei in that he did not submit income tax returns to the office of the Receiver of Revenue in Umtata in respect of the 1994 and 1995 tax years. Furthermore, that he committed an offence in terms of s 104(a) of the IT Act in that there were reasonable grounds for believing that he, with intent to evade the payment of income tax levied under the IT Act, made a false statement in relation to his personal assets and liabilities in a return rendered in terms of the IT Act. In these circumstances the giving of prior notice of the application for a warrant would have defeated the object and purpose of the section which is, among other, to enable the respondent to enter premises to search for information intentionally concealed from him. In the circumstances the section, by necessary implication, did not require the giving of notice.

[17] The submission that Hewson's affidavit used in support of the application for a warrant contained material inaccuracies and hearsay allegations is made in the appellant's heads and, although not abandoned, was not pressed in argument before us. I do not consider it necessary to deal with the alleged inaccuracies and hearsay allegations save insofar as they relate to a failure to submit income tax returns and to disclose assets.

[18] In regard to the submission of income tax returns to the office of the Receiver of Revenue in Umtata the appellant alleged in his founding affidavit that he did submit such returns for the 1994 and 1995 tax years and annexed incomplete unsigned copies thereof without copies of the schedules referred to in the returns. According to the appellant the copies were incomplete because they were made prior to signature and submission and because he did not keep copies of the schedules. He stated that an accountant, from whom a

confirming affidavit was annexed to his affidavit, prepared the returns. He did not say how and when the returns were submitted. It is not surprising that the submission that the appellant did submit these returns was not pressed in argument before us. In my view it is so improbable that an experienced businessman such as the appellant would have submitted his income tax returns without himself or his accountant keeping copies of the detailed schedules annexed thereto, that the allegation cannot be taken seriously.

[19] In his affidavit in support of the application for a warrant Hewson referred to a calculation he had done on the basis of information contained in the appellant's income tax returns submitted to the East London Office of the South African Revenue Service for the 1995, 1996 and 1997 tax years and an estimation of the appellant's annual living expenditure. According to this calculation a decrease of the appellant's capital during those three years in an

amount of R963 394 was unaccounted for. Hewson stated that the reason for a taxpayer to understate his net asset worth was normally to conceal the omission of taxable income. In his founding affidavit the appellant denied that he had not properly disclosed his net worth or that he omitted taxable income. However, although he should have been able to explain the discrepancy, he made no attempt to do so with the result that the discrepancy remains unaccounted for. In my view an adequate factual basis for the granting of a warrant in terms of s 74D(4) had been laid.

[20] The fourth main ground on which the appellant relied was that the warrant itself was fatally defective for the following reasons:

20.1 Contrary to s 57D(4)(a) of the VAT Act the warrant did not refer (other than in general terms) to any non-compliance by the appellant with the VAT Act.

20.2 The warrant authorized a search of the Peppergrove Spar and the Heritage Spar supermarkets but no allegation was made in the affidavits filed in support of the application for a warrant that the premises on which the two Spars were situated were likely to contain any documents which could afford evidence of non-compliance by the appellant with his obligations in terms of the IT Act.

[21] As in the case of the application for the warrant the fact that the warrant itself did not refer to any specific non-compliance with the provisions of the VAT Act and therefore did not comply with the provisions of the VAT Act was of no consequence.

[22] According to the affidavits the appellant was in control of the two Spars. That fact was in my view sufficient to justify the belief that the

premises on which those Spars were situated were likely to contain documents which could afford evidence of the commission of the suspected offence namely the failure by the appellant to disclose assets.

[23] Three other reasons for the warrant being fatally defective were advanced in the heads of argument filed by the appellant. They were not pressed in argument before us, are without merit and do not warrant detailed consideration.

[24] The fifth and last main ground on which the appellant relied was that the execution of the warrant was irregular for the following reasons:

24.1 The respondent unjustifiably delayed the execution of the warrant from 16 April 1999 when it was issued, to 15 July 1999. I have already dealt with this submission in another context.

24.2 Unauthorized persons were involved in the searches of appellant’s home in Port Alfred and the Heritage Spar. In the case of the search and seizure at the Heritage Spar Mr Champion, who was authorised in terms of the warrant to conduct the search, employed the services of a person not mentioned in the warrant to compile an inventory of the documents to be seized. His involvement did not extent to participation in the search and seizure itself and could for that reason not have invalidated it. In the event only one item was seized. In the case of the search of the appellant’s home the search was indeed conducted by persons not authorised to do so in terms of the warrant. However, no documents were seized. There are therefore no documents to be returned as a result of this unauthorised search.

[25] It follows that the appellant has not shown good cause in terms of s 74D(9) for the return of the documents seized in terms of the warrant.

The appeal is therefore dismissed with costs including the costs of two counsel.

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P E Streicher

Judge of Appeal

Vivier ADCJ)

Howie JA)

Conradie AJA)

Cloete AJA) concur