THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 338/06
Reportable

In the matter between :

N Z MNGOMEZULU	FIRST APPELLANT
V G NGCOBONDWANE	SECOND APPELLANT

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	FIRST RESPONDENT
MINISTER OF SAFETY AND SECURITY	SECOND RESPONDENT

CORAM : CLOETE, VAN HEERDEN *et* COMBRINCK JJA

HEARD : 10 SEPTEMBER 2007

DELIVERED : 28 SEPTEMBER 2007

Summary: A direction granted ex parte in terms of the Interception and Monitoring Prohibition Act 127 of 1992 is provisional and subject to reconsideration, but there must be a legitimate purpose for its reconsideration. Where the purpose is to protect fair trial rights it is premature to seek, in advance of a pending trial, to have the direction reconsidered with a view to obtaining a declaratory order that information obtained pursuant to the direction, was unlawfully obtained.

Neutral citation: This judgment may be referred to as *Mngomezulu v NDPP* [2007] SCA 129 (RSA).

JUDGMENT

CLOETE JA/

CLOETE JA:

[1] The appellants were charged in the Wynberg Regional Court (Transvaal) with contravening s 5(b), alternatively s 4(b), of Act 140 of 1992 viz dealing in, or being in possession of, a dangerous or undesirable dependence-producing substance (methaqualone, commonly known as mandrax). They have not yet pleaded to the charges.

[2] The trial was due to commence on 20 June 2005.The appellants' attorney was furnished with a copy of the police docket, from which it appeared that a direction had been issued by a judge in chambers in terms of s 2(2) of the Interception and Monitoring Prohibition Act.[1] The direction authorised the interception and monitoring of any communication on specified telecommunication lines of, amongst others, the first appellant. The direction did not concern the second appellant.

[3] On 30 May 2005 a copy of the application for the direction was furnished to the attorney by the prosecutrix at the former's request, but certain information had been deleted as, according to the letter under cover of which the copy of the application was sent: 'This information concerns ongoing investigations and it cannot be disclosed at this stage.' Some of the deleted information was subsequently furnished because, according to the investigating officer, 'the reasons that initially necessitated the deletion thereof are no longer applicable'; the remainder was not. The nature of the information that was still withheld and the reasons for this appear from the affidavit of the investigating officer:

'[T]he aforesaid deleted portion contains names of seven persons or individuals who are *currently*[2] under investigation by the West Organized Crime Unit for offences in terms of Act 140 of 1992 as amended i.e dealing in dangerous dependence-producing substances and/or undesirable dependence-producing substances.

The reason for the non-disclosure of the identities of the aforesaid seven persons is that their disclosure would seriously compromise police investigations currently underway against them in that

[1]127 of 1992. The whole of this Act has been repealed by s 62(1) of the Regulation of Interception of Communications and Provision of Communications – related Information Act 70 of 2002. Section 62(1) will come into operation on a date to be fixed by the President by proclamation in the *Gazette* as will the transitional provisions in ss (2) to (5).

[2]Emphasis in the original.

these individuals would become aware that the police are investigating them and successfully cover their tracks or go into hiding. According to my informant, these persons are known to First and Second Respondent [*sic*; *sc* "Applicants"].'

[4] The appellants then brought motion proceedings in the Johannesburg High Court in terms of a notice of motion dated 19 August 2005. The relief sought was in two parts. The first part, part A, which both appellants sought, was for an order directing the NDPP (the first respondent in the court *a quo* and on appeal), alternatively the Minister of Safety and Security (the second respondent in the court *a quo* and on appeal), to furnish them with a full and unedited copy of all the documents placed before the judge in chambers in support of the application made in terms of the Act, and leave to supplement the founding affidavit on receipt of those documents. The second part, part B, which only the first appellant sought, was for an order setting aside the decision of the judge in chambers and an order directing that all telecommunications monitored, recorded and transcribed pursuant to the judge's decision had been unlawfully obtained.

[5] Section 2(2) of the Act provides that a judge may direct that postal articles and communications may be intercepted and that conversations may be monitored. Section 3 deals with the issue of the direction: subsections (1)(b)(i) and (ii) set out the requirements which must be satisfied for the direction to be issued; subsection (4) allows the duration of the direction to be extended; and subsection (5) provides:

'An application referred to in subsection (1)(b)(i) or (ii) or subsection 4 shall be heard and the direction issued without any notice to the person, body or organisation to which the application applies and without hearing such person, body or organisation.'

[6] Masipa J in the court *a quo* found that an order contemplated in s 3(5) is a final order, and that the section excludes any subsequent challenge thereto. This interpretation cannot be supported. An order granted *ex parte* is usually regarded as provisional, irrespective of its wording: *Pretoria Portland Cement Co Ltd v Competition Commission*.[3] Section 3(5) must be interpreted as excluding a hearing

[3]2003 (2) SA 385 (SCA) paras 45-47.

only at the time when the application is made and the direction issued and not as precluding a subsequent challenge to the validity of the direction by way of an answering affidavit to the original application. Initial secrecy would be necessary in order not to defeat the very purpose of the direction: a person who knows that his or her telephone line is going to be monitored would hardly make or receive incriminating telephone calls. But there is no reason for secrecy to be maintained once the order has been executed or the person concerned has become aware of its operation and wishes to challenge its validity. In terms of s 39(2) of the Constitution, it is the interpretation which promotes the spirit, purport and objects of the Bill of Rights which must be preferred: *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO*.[4] The interpretation placed on the section by the court *a quo* altogether excludes the fair hearing rights of persons affected by a direction whereas the other, legitimate interpretation which I have given merely limits them. The latter interpretation is accordingly to be preferred.[5]

[7] I turn to consider the allegations made in the founding affidavit and the arguments advanced in support thereof. The first appellant said in the founding affidavit:

'26.1 I am advised that I have a right, prior to my trial taking place, to have access to all the information in the possession of the State relating to the charges against me. . . .

26.2 . . .

26.3 I am advised that I am entitled to a full copy of the application in the form in which it was considered by the judge who granted the direction in terms of the Interception and Monitoring Prohibition Act.

26.4 I am entitled to this in order properly to prepare for my trial. It is not possible properly to prepare for my trial and to consider the contents of the application for a direction unless I have been supplied with the full contents of the application. . . .

26.5 The contents of the edited or deleted portions are pivotal to an understanding of the full content of the application. Any criticism that I may have, or indeed that I may not have, of the contents of the application may be changed completely by a perusal of the deleted portions. They may indicate

[4]2001 (1) SA 545 (CC) paras 21-26.
[5]See also *National Director of Public Prosecutions v Mohamed NO* 2003 (1) SACR 561 (CC) paras 33-52.

that the State had a good case for applying for the direction, or they may indicate, by virtue of their contents, that the State had no basis to bring such an application. I cannot decide which unless I am given access to the edited or deleted portions.

26.6 I am advised, and I believe, that an application under this Act for a direction is no less an *ex parte* application than any other application, be it one brought before the High Court in the normal course, or be it one brought for a search warrant such as under the NPA Act or under the Criminal Procedure Act. *I am advised, and accept, that in any circumstances where my rights to privacy are invaded, or any rights at all are invaded, by means of an application brought to a judge in chambers, I am entitled to bring the matter before a court once more for that court to decide whether the order should have been granted*.[6] In this instance it is the decision to grant a direction under Section 2(2) of the Interception and Monitoring Prohibition Act that would fall for reconsideration.

26.7 I am advised by my attorneys that the contents of the State's docket reveal that very many conversations were monitored, purportedly or allegedly under the auspices or power of the direction issued by the judge in chambers. In the event that that direction was lawfully issued, this may have the consequence that the monitored telephone conversations may be admissible in a court of law. For example, admissible in the trial which I am due to face.

26.8 On the other hand, if that order should never have been granted and was therefore unlawfully obtained, then it may well be that a court will refuse to admit the fruits of the unlawful action by the State, in this instance the unlawful interception and monitoring of telephone conversations. In order to consider whether the direction was lawfully obtained, I am entitled to consider, in full, all of the documents placed before the judge in chambers upon which the order was granted. This I cannot do where the State had exercised editing or deletion powers over the document.'

[8] The assertion in the founding affidavit that the information still being withheld by the prosecutrix is necessary to enable the first appellant to prepare for trial was not pressed in argument, and rightly so in view of the following passages which appear respectively in the first respondent's answering affidavit deposed to by the prosecutrix and the affidavit of the investigating officer deposed to on behalf of the second respondent:

The prosecutrix:

'7. My view that the information requested is not reasonably required in order to enable the defence to prepare for trial is premised on the fact that the deleted information comprises only names of individuals who are not witnesses in the pending criminal case. Further, these individuals are still being investigated by the police and have accordingly not made any statement to the police, either incriminatory or exculpatory to First and Second Applicant.

[6]Emphasis supplied.

8. I further do not intend to use the names of the aforesaid individuals in the prosecution of Applicants in the pending criminal case.'

The investigating officer:

'26. Further, I wish to clearly state that the aforesaid persons whose names have been deleted . . . are not witnesses for the state. As already indicated the aforesaid persons have not been interviewed by myself or any of my colleagues and I have thus no evidence from these individuals either implicating or favourable to First and Second Applicants.'

[9] Counsel placed much stress in argument on that portion of para 26.6 of the founding affidavit which I have italicized in para [7] above. The submission was that reconsideration of the direction given by the judge in chambers in terms of the Act might assist the first appellant in the pending criminal trial if the direction were to be set aside, and that the setting aside of the direction would be a necessary precursor to a civil claim for damages for unlawful invasion of privacy — but that the first appellant was, irrespective of these considerations, entitled as of right to have the order reconsidered. I cannot agree with this latter submission.

[10] It does not follow from the fact that a person's rights have been invaded in consequence of an order granted *ex parte*, that such person is without more entitled to have the order reconsidered. Reconsideration of the order is not an end in itself. Nor is it to be had simply for the asking. A court will not be detained by an academic exercise. Such reconsideration must be for a legitimate purpose, namely, to enforce a right by, for example, a claim for damages, return of documents seized or some other relief which would or might flow from the reconsideration. And if the relief is not competent, reconsideration of the order would serve no purpose.

[11] I am unable to identify in the founding affidavit any purpose for the reconsideration of the order save to protect the first appellant's right to a fair trial. The passage italicized was made in the context of the protection of that right. The relief sought cannot be granted on the basis that the first appellant might perhaps wish to bring (unspecified) civil proceedings to vindicate his rights to privacy or some other (unspecified) right should a reconsideration of the direction result in a finding

that his rights were invaded unlawfully: the first appellant himself has not said that he is contemplating civil proceedings. The argument advanced on his behalf that he might bring such proceedings is accordingly without factual foundation.

[12] It is clear from the notice of motion that the first appellant seeks the information that has been withheld with a view to obtaining an order setting the direction aside; and it is equally clear from the founding affidavit that his purpose in doing so is to protect his fair trial rights in the pending criminal trial. There are several decisions of this court which hold that, save in an exceptional case, a court will not issue a declaratory order affecting criminal proceedings: see eg *Attorney-General, Natal v Johnstone & Co Ltd*;[7] *Wahlhaus v Additional Magistrate, Johannesburg*;[8] *Ismail v Additional Magistrate, Wynberg*[9] and cf *S v Mhlungu*,[10] *S v Western Areas Ltd*[11] and *S v Friedman (2)*.[12] The decision of the majority of the Constitutional Court in *Ferreira v Levin NO*; *Vryenhoek v Powell NO*[13] is distinguishable. In that matter the appellant faced a choice between answering self-incriminating questions at an insolvency enquiry, with the risk that his answers could be used against him were he subsequently to be prosecuted, or refusing to answer the questions and risk being prosecuted for his refusal. Unlike the present case, the appellants' rights were under real and immediate threat.[14] The position which applies in a case such as the present appears from the following quotation from *Wahlhaus*:[15]

'The present case has no special features and cannot rightly be brought within the ambit of the *Johnstone & Co* decision *supra*. Apart from the fact that the petition neither referred to, nor sought any relief by way of, a declaration of rights, it is clear that the present would not be a suitable case for the granting of the very special relief entailed in the Court's exercising its discretion under s 102 of Act 46 of 1935[16] to make a declaratory order in relation to a criminal case. The appellants are alleged to have

[7]1946 AD 256.
[8]1959 (3) SA 113 (A).
[9]1963 (1) SA 1 (A).
[10]1995 (3) SA 867 (CC) para 59 at 895F, the minority judgment of Kentridge AJ.
[11]2005 (5) SA 214 (SCA).
[12]1996 (1) SACR 196 (W) which refers to decisions in Canada.
[13]1996 (1) SA 984 (CC).
[14]See the remarks by Chaskalson P in para 163, and contrast the views expressed in the minority judgments of Ackermann J, para 41; Kriegler J, paras 198-9 and 206; and Sachs J, para 248.
[15]At 118H-119B.
[16]Which corresponds to the present s 19(1)(a)(iii) of the Supreme Court Act 59 of 1959, viz 'A provincial or local division . . . shall . . . have power –
(iii) in its discretion, and at the instance of any interested person, to enquire into and determine any

committed a crime. The normal method of determining the correctness, or otherwise, of that allegation is by way of the full investigation of a criminal trial. There is a total absence of any of the types of consideration which induced this Court to make a declaratory order in the *Johnstone* case *supra*. Nor, indeed, does the case even contain any law point which, if resolved in appellants' favour, would dispose of the criminal charge, or a substantial portion of it.'

[13] The present is not an exceptional case. There is no reason to believe that an order declaring that any evidence obtained pursuant to the direction was unlawfully obtained, would curtail the trial ─ the first appellant has not even alleged that there is a likelihood that such evidence will be tendered. If it is, then that will be the time for its admissibility to be attacked. It will be for the magistrate to decide whether the evidence was unconstitutionally obtained. If he does come to that conclusion, that will also not necessarily be an end of the matter for it will then be for him to decide whether the evidence should be excluded in terms of s 35(5) of the Constitution:[17] *Ferreira v Levin NO*; *Vryenhoek v Powell NO*;[18] *Key v Attorney-General, Cape Provincial Division*;[19] *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat*.[20]

[14] Nor can it be argued that the appellants require an unedited copy of the application placed before the judge in chambers to enable them to prepare for trial in case the State should seek to rely on evidence obtained pursuant to the direction. That application can be made when and if it is established that the State will indeed seek to rely on such evidence and it should in any event be directed to the trial court.

existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'

[17]'Evidence obtained in any manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.'

[18]Above, n 13, para 153.

[19]1996 (4) SA 187 (CC) para 13.

[20]1999 (4) SA 623 (CC) para 98.

[15] In the circumstances the first appellant has not made out a case for the relief sought by him. The order made by the court *a quo*, albeit for reasons which cannot be supported on appeal, must therefore stand.

[16] The second appellant's application for disclosure of the names which have been deleted may be disposed of shortly. He said, in his replying affidavit:

'My interest in this application is to demonstrate, from my perspective, that the South African Police Services or any other law enforcement agency at no time had any suspicion that I was involved together with the First Applicant, or together with any other person in any criminal conduct whatsoever, and, in particular, in the alleged drug dealing offences with which I and the First Applicant are charged. . . . [T]he revelation of [the information withheld] will most certainly not refer in any way to me. Thus, in my trial, and in due course, I will be able to demonstrate, as corroboration for my defence of non-involvement in any drug dealing, that the South African Police Services at no time suspected me or linked me with any one allegedly involved in drug dealing and in particular with anything that is alleged against the First Applicant.'

The reasoning is fallacious. It does not follow that because the second respondent's name does not appear on the list of alleged drug dealers which the State seeks to withhold, that the SAPS did not suspect he was involved in drug dealing or that the absence of his name from that list would 'corroborate' his defence of non-involvement in drug dealing. The proposition advanced on behalf of the second appellant in argument ─ that 'he is entitled to all the information in the possession of the State for the purposes of preparing for his criminal trial' ─ is far too widely stated and is not the effect of *Shabalala v Attorney-General Transvaal*,[21] the case which was prayed in aid of the proposition. What Mahomed DP said in that case was:

'The basic test in the present matter must be whether the right to a fair trial in terms of s 25(3)[22] includes the right to have access to a police docket or the relevant part thereof. This is not a question which can be answered in the abstract. It is essentially a question to be answered having regard to the particular circumstances of each case.'[23]

[17] That brings me to the question of costs. The second appellant has been entirely unsuccessful on appeal and there is no reason why costs should not follow

[21]1996 (1) SA 725 (CC).
[22]Of the Interim Constitution, Act 200 of 1993; see now s 35(3) of the Constitution.
[23]Para 36.

the result. The first appellant on the other hand has succeeded on appeal to the extent that the ratio of the court *a quo* has been overruled on appeal, which could have future significance if the trial magistrate is called upon to consider whether evidence tendered by the State was obtained unlawfully. But had the first appellant not brought the application ─ and he ought not to have done so ─ he would not have been faced with an adverse judgment, so the costs of the appeal necessary to overrule that judgment can fairly be laid at his door. The respondents did not seek to support it. On the separate issue, whether the information withheld should be disclosed to him, he has failed. So far as the costs in the court *a quo* are concerned, first appellant's counsel submitted that the first appellant had been partially successful in that he had obtained some information which was withheld until the answering affidavit was filed. It was not suggested that that information was of any use save to attack the validity of the direction; and the first appellant's attempt to do so has failed. In the circumstances I see no reason to disturb the costs order made by the court *a quo*.

[18] The appeals are dismissed, with costs.

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T D CLOETE
JUDGE OF APPEAL

Concur: Combrinck JA

[19] I have had the privilege of reading the judgment of Cloete JA. I agree with his reasoning and conclusions, save for one reservation ─ the inclusion of para [10]. In my view, for the reasons appearing in paras [11] and [12] of his judgment, the first appellant's rather belated claim to the right of privacy, as distinct from its assertion in

relation to his fair trial right, was resorted to merely as a stratagem to overcome the legitimate refusal by the State to disclose privileged information. To my mind, that in effect is the end of the enquiry.

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B J VAN HEERDEN
JUDGE OF APPEAL