REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 302/06
Reportable

In the matter between:

THE MINISTER OF SAFETY AND SECURITY	FIRST APPELLANT
THE COMMANDING OFFICER SERIOUS ECONOMIC OFFENCES UNIT	SECOND APPELLANT
D H S SMITH	THIRD APPELLANT

and

S H BENNETT	FIRST RESPONDENT
G P PORRITT	SECOND RESPONDENT
SYNERGY MANAGEMENT (PTY) LTD	THIRD RESPONDENT
MAJORSHELF 117 (PTY) LTD	FOURTH RESPONDENT
A DATHOO N.O	FIFTH RESPONDENT
J U E BUYTENDAG N.O	SIXTH RESPONDENT
B M MTBELE N.O	SEVENTH RESPONDENT

CORAM: FARLAM, NUGENT, CLOETE, PONNAN et MLAMBO JJA

HEARD: 3 MAY 2007

DELIVERED: 8 NOVEMBER 2007

SUMMARY: Search and seizure – whether execution of warrants issued in terms of s 21 of Criminal Procedure Act 51 of 1977 invalid – whether seizure of documents covered by warrant invalidated by simultaneous seizure at the same time of privileged documents not covered thereby.

Neutral citation: This judgment may be referred to as *Minister of Safety and Security v*

Bennett **[2007] SCA 139 (RSA).**

JUDGMENT

FARLAM JA

[1] This is an appeal against a decision by Bertelsmann J, sitting in the Pretoria High Court, in which, amongst other things, he declared the execution of certain search warrants to have been performed in an unconstitutional and unlawful fashion and ordered the return of all documents removed in terms of the warrants.

[2] The respondents in this matter, Susan Hilary Bennett, a businesswoman of Johannesburg, Gary Patrick Porritt, a businessman of Johannesburg and two companies at whose premises searches authorized by the warrants took place, applied to the Pretoria High Court for, amongst other things, orders (1) setting aside search warrants issued by magistrates in Pietermaritzburg, Kokstad and Johannesburg, (2) directing the appellants, the Minister of Safety and Security, the commanding officer of the Serious Economic Offences Unit of the South African Police Services and a member of the unit, who is the investigating officer in a criminal case pending against the respondents, to return all documents, data and other property seized pursuant to the warrants and (3) interdicting the appellants from utilizing any of the documents, other property seized pursuant to the warrants or copies or reproductions thereof or information derived therefrom.

[3] Bertelsmann J refused to set aside the warrants holding that they were validly issued. He also refused to interdict the use at the trial of the respondents of the documents, data or other property or copies or reproductions or information therefrom, holding in this regard that the trial court would be in a better position to decide on the admissibility of evidence derived from the execution of the warrants. The respondents have not cross appealed against his refusal to set the warrants aside or to interdict evidence obtained pursuant to the execution thereof.

[4] The learned judge did, however, as I have said, grant an order declaring the

execution of the warrants to have been performed in an unconstitutional and unlawful fashion as well as directing the appellants to return to the respondents all documents removed in terms of the warrants. In addition to ordering the appellants to pay the costs he made a declaration that the appellants were entitled, at their own expense, to make copies of all documents they had removed in terms of the warrants, other than privileged documentation, and ordered that such copies prepared by the appellants had to be placed in sealed boxes and handed to the Registrar of the Johannesburg High Court for safekeeping, pending a decision by the trial court as to the admissibility of individual documents.

[5] The second respondent was arrested on various charges of fraud and contravening the Income Tax Act in December 2002. The first appellant was arrested on the same charges in March 2003.

[6] They are to stand trial in the Johannesburg High Court on an indictment containing over 3 000 counts of fraud and contraventions of various provisions of the Income Tax Act, the Companies Act, the Stock Exchanges Control Act, the Exchange Control Regulations and the Prevention of Organised Crime Act.

[7] On 24 March 2005 members of the South African Police Service, acting in terms of search warrants issued on 23 and 24 March 2005 under s 21 of the Criminal Procedure Act 51 of 1977, searched premises at 218 Boom Street, Pietermaritzburg, Hlani Farm, Swartberg, and 32 Delta Road, Elton Hill, Johannesburg and seized some 400 000 documents. The documents seized were marked with reference to the identification of the files in which they were bound and placed in boxes which were sealed.

[8] At the time of the search and seizure at Boom Street, Pietermaritzburg, an attorney, Mr TP Reed, who acted on behalf of the respondents, was present and participated in a discussion with the third appellant and Director Van Graan, another representative of the South African Police Service, relating to the procedure to be followed with regard to the documents seized. The marking of the documents and their being placed in sealed boxes took place in accordance with an agreement concluded then and there between Mr Reed and the third appellant and Director Van Graan. It was also agreed that Mr Reed could be present when the seals were

removed so that he could satisfy himself that the documents had not been tampered with.

[9] During the discussion between Mr Reed and Director Van Graan and the third appellant it was never suggested that privileged documents were involved.

[10] Subsequent to the seizure of the documents the first and second respondents brought an application in Pretoria High Court for an order interdicting the first appellant from opening the sealed boxes containing the seized documents, pending the outcome of an application for the setting aside of the warrants. In the founding affidavit in that application it was stated for the first time that privileged documents had been seized. This allegation was confined to the documents seized at Delta Road, Elton Hill, Johannesburg.

[11] The application for an interdict was dismissed by Van der Merwe J on 13 May 2005. In his judgment he found that the warrants had been lawfully issued and executed.

[12] Thereafter the State Attorney, acting on behalf of the appellants, invited the first and second respondents to engage in a process with an independent advocate appointed on behalf of the Police Service in order to identify privileged or possibly privileged documents. In terms of the process the advocate and the first and second respondents were to be present when the boxes were opened, privileged documents were to be identified and immediately handed over to the first and second respondents. No members of the Police Service were to participate in the process. This process was agreed to. It extended over the period from 23 May to 2 June 2005. In total 18 000 pages of privileged documents were identified and handed over to the first and second respondents. On all days except the last either the first or the second respondent was present with the independent advocate when the boxes were opened.

[13] On 3 June 2005, the day after the identification process ended, the first and second respondents (to whom I shall refer in what follows as ‘the respondents’) brought an application, *inter alia,* for an order authorising them to make copies of all

documents seized, alternatively to have access to the process of paginating and inventorising them. In this application they alleged for the first time that privileged documents had also been seized at Boom Street and Loop Street, Pietermaritzburg.

[14] On 11 August 2005 the respondents brought the application forming the subject of the present appeal. As I have said the respondents did not obtain the relief they had sought in relation to the alleged validity of the warrants or an exclusion of information obtained thereunder at their trial but they did obtain an order for the return of all the documents seized, whether or not they were privileged. (The appellants had tendered return of all privileged documentation, in so far as it had not already been returned.)

[15] The portion of the judgment dealing with the return of the documents, even though not covered by privilege, reads as follows:

'61. The removal of the privileged documentation was intentional in the sense that the police were informed, while they were executing the warrants, by applicants' attorney that privileged documents were among the vast mound of paper that was removed. None of the items identified as privileged were inspected by the police. They have remained sealed.

62. But the removal of privileged documentation remains a very serious matter. It infringes the right to legal representation and to attorney-client confidentiality, regardless of whether the documents were inspected and considered by the State and the police or not.

63. The removal of privileged documents was never authorized by the warrants. A warrant must be strictly interpreted – this is trite: See section 14 of the Constitution 108 of 1996; *Powell NO and Others v Van der Merwe NO and Others* 2005 (1) SACR 317 (SCA) and the comprehensive discussion of the authorities therein; *Cheadle, Thompson and Haysom and Others v Minister of Law and Order and Others* 1986 (2) SA 279 (W); *De Wet and Others v Willers NO and Another* 1953 (4) SA 124 (T).

64. The applicants demand the return of all items seized in the operation that was tainted by the removal of the privileged documents, as well as a blanket interdict against the use thereof in all future proceedings, in particular the criminal trial that is about to start next year. Grave as the infringement of the right to protection of privileged communications is, I am not convinced that the future proceedings have been irreparably tainted to the extent that the entire criminal trial with all its thousands of charges can at this stage already be said to be unfair under any circumstances. There is no evidence that the privileged papers were ever read by any police officer or State official. Although the warrants were carried out unlawfully, and although all documents removed in terms of the warrants must therefore be returned to the applicants, it is normally the prerogative of the trial court to decide whether any evidence that would

otherwise be admissible but was obtained unconstitutionally, should nonetheless be admitted in the interests of justice.'

[16] Counsel for the appellants contended that the Court *a quo* misdirected itself in a number of respects and that its decision that the warrants had been executed in an unconstitutional and unlawful fashion was incorrect. In particular they submitted that the court's finding that members of the Police Services intentionally removed privileged documents, which was clearly the basis of its decision on this part of the case, was not supported by the evidence before it. It will be recalled that the judge said that 'the removal of the privileged material was intentional *in the sense that the police were informed, while they were executing the warrants, by [the respondents'] attorney that privileged documents were among the vast mound of paper that was removed.'* (The emphasis is mine.)

[17] It is clear that this statement refers to what Mr Reed, the attorney who was then acting for the respondents, said to the third appellant and Director Van Graan when the search warrant relating to the premises in Boom Street, Pietermaritzburg, was being executed. The respondents' own version of what happened then is set out in a letter addressed by the attorneys presently acting for the respondents to the State Attorney on 17 May 2005, the material portions of which read as follows:

'4.1 Attorney Reed saw Superintendent Smith [the third appellant] at the Boom Street premises shortly after the SAPS had arrived to commence their search and seizure. He saw that members of the SAPS were putting quantities of files into boxes and told Superintendent Smith that he required a full index of every document taken. Superintendent Smith said he would do so and would place the items in boxes which would be sealed and the boxes would be opened at their office in Pretoria on Wednesday, 30 March 2005. He said that Mr Porritt or any person authorised by Mr Porritt may be present. . . .

4.2 Superintendent Smith and Director van Graan later came to see Attorney Reed at his offices (which are just up the street) and said that they did not have time to go through all the documents and that they were simply going to issue an index indicating the number of lever arch files removed. They stated, however, that our clients would not be prejudiced as they could be present or could have a representative present when the boxes were opened in Pretoria and a proper inventory drawn up. . . .

4.3 On the basis of their concession that they did not have time to go through all the documents and without prejudice to the rights of our clients, Attorney Reed accepted the offer that our clients or their representatives could be present when the boxes were opened; however, he insisted on an index

being issued by the SAPS indicating the subject matter of each file. Director van Graan and Superintendent Smith agreed to let him have this and again stated that, in any event, our clients and/or their representatives could be present at the opening of the boxes. . . .

4.4 It was Attorney Reed's clear understanding that this agreement applied to the opening of all the boxes sealed during the various search and seizure operations.

4.5 Attorney Reed then spoke to Mrs Bennett [the first respondent] . . .

4.6 Attorney Reed then informed Director van Graan and Superintendent Smith that Mrs Bennett would not be available on 30 March 2005 as she was involved in a court case. Attorney Reed was informed by them that if Mrs Bennett could not be present then she could arrange for someone else to represent her. Attorney Reed thereupon stated to Director van Graan and Superintendent Smith that this was impractical as only Mrs Bennett and Mr Porritt (and not someone who had no experience of the matter) could properly say what documents were covered by the warrants or not. . . .

4.7 The offer made by Superintendent Smith and Director van Graan was unconditional and was given on the basis that they accepted that the search and seizure operations were being carried out without the presence of our clients and that all the documents being removed had not been properly examined or inventoried and may not be covered by the warrants. It was understood that any prejudice suffered by our clients could be mitigated by their being present when the sealed boxes were opened.'

[18] It is clear that the existence of privileged documents was *not* mentioned by Mr Reed to the members of the Police Service who were executing the warrants.

[19] The matter is taken further in a letter written on 22 May 2005 by Mr Harry Pretorius, another attorney who acted at one stage on behalf of the respondents, in which the following appears:

'10. With regard to privilege, if our clients had been present at the search and seizure operations, they would have been able to claim privilege over any articles at the time, which could then have been placed in a sealed box pending an agreement as to how these articles would be handled.

11. However, this did not happen because your client deliberately chose to carry out their operations on the late morning before the Easter weekend, when any reasonable person would have known that it was likely that our clients would not be present at the premises and that their legal representatives would also not be available. In any case, it would have been

impossible for our clients to have been in seven different locations at the same time, and they were thus denied their right to claim privilege at the time of the search and seizure.

12. Attorney Tommy Reed, who was consulted at the Boom Street premises but did not attend during the entire operation as he too was leaving for the Easter weekend, was the only person who had any knowledge of the concept of privilege. However, he has stated that only our clients would know what documents were privileged or not.

13. The persons who were present at the four premises when documents were seized had no such knowledge of the concept of privilege or that it could be claimed, or indeed what documents could be claimed as being privileged. Such persons were the domestic worker employed by Sue Bennett (and not the businesses) at Delta Road, the farm manager at Hlani Farm, John Robinson (an estate agent) at Loop Street, and the receptionist and two bookkeeping staff at Boom Street.

14. In any event, we do not believe that anyone other than our clients can have had the requisite knowledge of the facts in order to claim privilege at the time of the seizures. In this respect, it should be noted that Mrs Bennett has not had sight of stacks of the documents seized in Pietermaritzburg – only Mr Porritt has – so she would also have to check with Mr Porritt on what can be claimed as privileged.'

[20] This statement makes it clear beyond any doubt that privilege was not claimed at the time of the search and seizure at any of the four places where the warrants were executed.

[21] In the circumstances I am satisfied that the basis for the court *a quo's* finding that the warrants were executed in an unconstitutional and unlawful manner was incorrect. The members of the police service adopted the procedure they did with the consent of the respondents' attorney, Mr Reed. This procedure was designed to ensure that the respondents would not be prejudiced in any way. The attorney and client privilege was not in fact breached because the privileged documents remained sealed in the boxes until identified, whereupon they were forthwith handed to the respondents. Not a single document was read by any member of the Police Service or any other State official.

[22] Counsel for the respondents contended, however, that what they called the *animus* of the police when executing the warrants was not relevant when the

lawfulness of the execution of the warrants was under consideration in a case such as the present when privileged documents were seized. They contended further that the fact that the documents once seized were put in sealed boxes and not read by the police was also irrelevant.

[23] Counsel stressed that the warrants did not authorise the seizure of privileged documents and that in seizing such documents (even though they were not read and were kept in sealed boxes until identified and handed over in terms of the process summarised above) the police had acted beyond the terms of the warrant. Counsel went so far as to submit that the seizure of one privileged document rendered the whole execution of the warrant in question invalid with the result that all documents seized thereunder had to be returned even if they were covered by the express terms of the warrant. It was contended that this result flowed from the fact that the attorney and client privilege, for obvious and cogent reasons, enjoys a high degree of protection under our law. It was conceded that no authority could be found either in our system or in other jurisdictions supporting the proposition contended for but it was argued that it was necessary from a policy point of view for such a ruling to be made. Counsel also contended that, although this was not the law before the Constitution came into force, the strong adherence to the principle of legality which characterises our law under the Constitution means that the law is now different. It was also argued that, if this were not so, the door would be opened to what were described as cavalier searches with no practical restrictions. Once they had a search warrant the police could enter premises, seize whatever took their fancy, sort it at their leisure and hand back what was not covered by the warrant: there would be no effective sanction to prevent such behaviour.

[24] In my view this argument is devoid of merit. I can think (without intending to cover the whole field) of various sanctions which could be invoked against conduct of the kind described, namely delictual actions for damages and disciplinary steps against the police officers concerned.

[25] In any event it is difficult to see how considerations of that kind can operate in a case such as the present where the police officers concerned acted in the way they did with the consent of the respondents' attorney and the authorities went out of

their way to devise and implement a process to prevent prejudice to the respondents.

[26] Nor is it clear why documents covered by a valid search warrant and seized in execution thereof should be regarded as having been unlawfully seized merely because privileged documents, which *ex hypothesi* were not covered by the warrant, were also seized. Regard being had to the judge's order to the effect that the State could copy the documents not covered by privilege and lodge them for safe keeping with the Registrar of the Johannesburg High Court (which order was not challenged on appeal before us) it is difficult to see how the resultant practical problems the State would encounter in trying to use the documents could be regarded as a sanction, effective or otherwise, against the police who seized the privileged documents in the circumstances described.

[27] In the circumstances I am satisfied that the appeal must succeed and that the judgment of the court *a quo* cannot be upheld.

[28] As regards costs no costs order was made in the court *a quo* and counsel for the appellants did not contend that if the appeal succeeded, the appellants should be given their costs in the court *a quo.*

[29] The following order is made:

1. The appeal is allowed with costs, including those occasioned by the employment of two counsel.

2. The order of the court *a quo* is set aside and replaced with the following:

'The application is dismissed.'

……..
IG FARLAM
JUDGE OF APPEAL

CONCURRING
NUGENT JA
CLOETE JA
PONNAN JA
MLAMBO JA