



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 494/06
REPORTABLE

In the matter between:

ALLAN LE ROUX	FIRST APPELLANT
GERHARDUS VERMAAK	SECOND APPELLANT
PIETER JAN BENNETT VAN DER GRIJP	THIRD APPELLANT
CASPIAN FINANCIAL SERVICES (PTY) LTD	FOURTH APPELLANT

and

THE HONOURABLE MAGISTRATE MR VIANA	FIRST RESPONDENT
JOHN LOUIS CARTER FOURIE NO	SECOND RESPONDENT
JOSHUA MUTHANYI NO	THIRD RESPONDENT
MARIA ELIZABETH APPEL NO	FOURTH RESPONDENT
ELIZABETH MARGARET EDWARDS NO	FIFTH RESPONDENT

Coram: Navsa, Nugent, Jafta, Mlambo JJA et Kgomo AJA

Heard: 22 November 2007

Delivered: 30 November 2007

Summary: Warrants – whether s 69(3) excludes ‘books and documents’ in electronic form in the possession of a third party.

Neutral citation: This judgment may be referred to as *Le Roux v Hon Magistrate Mr Viana* [2007] SCA 173 (RSA).

JUDGMENT

MLAMBO JA

[1] This is an appeal from a decision of Boruchowitz J in the Johannesburg High Court dismissing a review application in which the appellants sought to set aside a warrant issued by the first respondent, a magistrate, in terms of s 69(3) of the Insolvency Act 24 of 1936. The appeal is with the leave of the high court.

[2] Condonation was sought by the appellant for the late filing of their heads of argument and practice note. Condonation is granted.

[3] The first appellant is a director of the fourth appellant, Caspian Financial Services (Pty) Ltd (Caspian), and is a former director of Herlan Edmunds Engineering (Pty) Limited and Herlan Investment Holdings Limited (the companies in liquidation). The second and third appellants are also former directors of these companies. Caspian was at least partly responsible for the administration of the financial affairs of amongst others the companies in liquidation.

[4] The other respondents who are the joint liquidators of the companies in liquidation applied in terms of s 69(2) for the warrant authorising the sheriff to attach, remove and hand over to them all books, documents and movables belonging to the companies in liquidation contained in a computer hard drive belonging to Caspian.

[5] Section 69(3) provides:

‘(3) If it appears to a magistrate to whom such application is made, from a statement made upon oath, that there are reasonable grounds for suspecting that any property, book or document belonging to an insolvent estate is concealed upon any person, or at any place or upon or in any vehicle or vessel or receptacle of whatever nature, or is otherwise unlawfully withheld from the trustee concerned, within the area of the magistrate’s jurisdiction, he may issue a warrant to search for and take possession of that property, book or document.’

[6] One of the issues raised in the appeal is whether the books and documents

belonging to the companies in liquidation and recorded on the hard drive can be regarded as those contemplated in s 69 and therefore susceptible to seizure in terms of that section. The point made in this regard is that if it is correct that the books and documents recorded on the hard drive, even though they belong to the companies in liquidation, are not in the form contemplated in the section, they are therefore not susceptible to seizure in terms of that section and the warrant is invalid on that basis.

[7] Counsel for the appellants submitted that properly construed s 69 does not contemplate the seizure of property, the ownership of which rests in a party other than the insolvent estate and that the section cannot be invoked for the purpose of seizing information relating to the insolvent estate in circumstances in which that information is not recorded in paper or tangible form. Reduced to its essence this submission is that the hard drive and the books and documents of the companies in liquidation recorded therein are beyond the ambit of s 69. Counsel submitted further that because the books and documents were contained in the hard drive of Caspian an innocent third party, they were not susceptible to seizure in terms of s 69(3). It was submitted that s 69(3) should be restrictively interpreted.

[8] Clearly the primary object of s 69(3) is ‘to enable a trustee to collect and take control of assets reasonably believed to belong to an insolvent estate which are being concealed or withheld’. This section is obviously intended to ‘strengthen the hand of a trustee in carrying out the obligation to take charge of all the assets belonging to an insolvent estate’. *Cooper NO v First National Bank of SA Ltd* 2001 (3) SA 705 (SCA) at 713B-E.

[9] The objective of s 69(3) contemplates nothing less than the seizure of property, books and documents relating to the insolvent estate wherever they may be. In this case the target of the warrant was the books and documents of the companies in liquidation contained on Caspian’s hard drive. A reading of the warrant

lists all that was to be seized consisting of financial, accounting and investment documents and records relating to the companies in liquidation. It is incorrect, as submitted on behalf of the appellants, that the objective of the warrant was the seizure of the hard drive. The magistrate was clearly alive to the fact that the hard drive did not belong to the companies in liquidation and that it also contained information relating to innocent third parties. Hence the warrant is couched in terms respecting the confidentiality of the other information on the hard drive and does not countenance the deputy sheriff having access to it.

[10] Furthermore, properly construed the reference to books and documents in s 69(3) has nothing to do with the form in which those books and documents are. The Concise Oxford English Dictionary (10th edition revised) defines a book as ‘a set of records or accounts or the embodiment of a record of commercial transactions’ and a document as ‘a piece of written, printed or electronic matter that provides information or evidence or that serves as an official record’. That these definitions accord with what the section contemplates cannot be disputed. They also fit in with the context within which one must view the role and functions of a trustee in the scheme of the Insolvency Act. There is no dispute in this case that the books and documents stored on the hard drive and targeted by the warrant relate to the financial and business affairs of the companies in liquidation. That being the case those books and documents, irrespective of the form they are in, are clearly within the contemplation of s 69 and are susceptible to seizure under a warrant in terms of that section. It can hardly be suggested, as counsel for the appellants submitted, that we should not take judicial notice of the technological advancements regarding electronic data creation, recording and storage because this was unheard of in 1936 when the Insolvency Act was passed.¹ For these reasons the warrant is beyond

¹See also ss 12 and 17 of the Electronic Communications and Transactions Act 25 of 2002 which provide:

‘12. Writing

A requirement in law that a document or information must be in writing is met if the document or information is –

- (a) in the form of a data message; and
- (b) accessible in a manner usable for subsequent reference.

reproach.

[11] This being the view I take on this issue the appeal must fail. This renders it unnecessary to consider the other issue raised in the appeal save to comment that judicial officers, judges in particular, have for a long time been approached to authorise warrants. It will be more productive I suggest that, rather than seeking to determine in what capacity the judge was acting when he issued a warrant, the issue must be to determine whether the warrant was lawfully authorised. Courts have for many years set aside unlawfully issued warrants and it does not matter whether one brands the action of issuing such a warrant as judicial or administrative. The focal issue should always be the lawfulness of the warrant. See *Pullen NO v Waja* 1929 TPD 838 at 846; *Ex Parte Hull* (1891) 4 SAR 134; *Divisional Commissioner of SA Police, Witwatersrand Area v SA Associated Newspapers Ltd* 1966 (2) SA (A); *Powell NO v Van der Merwe NO* 2005 (5) SA 62 (SCA) at 80F to 85F and many others.

[12] In the circumstances the following order is granted:

The appeal is dismissed with costs including the costs consequent upon the employment of two counsel.

D MLAMBO
JUDGE OF APPEAL

17. Production of document or information

(1) Subject to section 28, where a law requires a person to produce a document or information, that requirement is met if the person produces, by means of a data message, an electronic form of that document or information, . . .'

CONCUR:

NAVSA JA

NUGENT JA

JAFTA JA

KGOMO AJA