IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 14/2007

In the matter between:

OSMAN SALLY MAHOMED MOOSA	**First Appellant**
BUILDING WORLD (PTY) LTD	**Second Appellant**
SELKOL 1983 (PTY) LTD	**Third Appellant**
MOOSA HOLDINGS (PTY) LTD	**Fourth Appellant**
O.S.M. MOOSA t/a MOOSA'S BARGAIN	**Fifth Appellant**
CITY MOOSA CASH & CARRY (PTY) LTD	**Sixth Appellant**

and

THE MAGISTRATE - HIS WORSHIP MR NTLHAKANA	**First Respondent**
SENIOR INSPECTOR MAKOTE	**Second Respondent**
OFFICER M.G. PHEPHETHO	**Third Respondent**
MOTLATSI SEKOTLO	**Fourth Respondent**
LEBOHANG MOKHESI	**Fifth Respondent**
MAQHALI LEPHOLISA	**Sixth Respondent**
DAVE OSWALD	**Seventh Respondent**
KELLY BEAMENT	**Eighth Respondent**
THE COMMISSIONER-GENERAL: LESOTHO REVENUE AUTHORITY	**Ninth Respondent**
THE COMMISSIONER OF POLICE	**Tenth Respondent**
THE MINISTER OF FINANCE	**Eleventh Respondent**

JUDGMENT

2, 11 April 2008

s. 46(1) of the Criminal Procedure Act, 9 of 1981 - validity of warrants for search and seizure - requirements - supporting affidavit before issuing magistrate also shown to subject of warrants - ability of court to construe warrants with reference to affidavit in such circumstances - consent thereafter by subject (advised by counsel) to execution of warrant proceeding — whether a waiver of right to challenge warrants

Coram:

Ramodibedi, JA
Smalberger, JA
Gauntlett, JA

Gauntlett, JA

[1] This appeal concerns the question whether the High Court (Majara, J) erred in dismissing an application by the appellants (as applicants) to set aside three search and seizure warrants issued against them in terms of s. 46(1) of the Criminal Procedure Act, 9 of 1981.

[2] It appears that the first appellant controls (whether as managing director or controlling shareholder or both) a group of four companies, comprising the second to fifth appellants. The warrants were obtained also in relation to a further company, Moosa Cash and Carry (Pty) Ltd. This, too, was an applicant in the court below, and had also appealed the High Court ruling as the sixth appellant. Counsel for the respondents however drew attention at the outset of argument before us to the fact that (as the judgment by Majara J expressly records) the respondents acknowledged before the High Court that the inclusion of the sixth appellant had been erroneous. Before that court they had withdrawn their opposition to the application, and tendered the return of material seized from the sixth appellant pursuant to the search and seizure, with the costs of the application (but not of the High Court hearing). Counsel for the appellants did not further pursue the appeal noted by the sixth appellant in the circumstances, and correctly so.

We were assisted in this matter by comprehensive heads of argument on both sides of the case, including wide-ranging comparative law authorities. Ultimately on oral argument however the issues narrowed. It was not contended that the manner of execution of the warrants provided any basis to set them aside (in contrast, for instance, with the events in Pretoria Portland Cement Co Ltd v Competition Commission 2003 (2) SA 385 (SCA), which were held to comprise a gross

violation of rights and an abuse of power such as "tainted the whole process" from the outset). Instead counsel for the appellants trained his guns on two aspects concerning the warrants: as he shortly put it, "their unintelligibility and their overbreadth".

Two factual matters arise in considering these attacks. The first is the terms of the warrants themselves, and the second is the contents of the supporting affidavit which was put before the issuing magistrate and thereafter the first appellant and his counsel in the execution of the warrants. This latter aspect raises the legal inquiry as to the role, if any, which the affidavit may permissibly play in the adjudication of the warrants' validity.

[5] The three warrants differ somewhat, but by agreement between counsel we have been invited to determine this appeal on the basis of the first of them. It is in this form (I quote it verbatim):

Search Warrant

To all Police Officers AND DALE OSWALD, KELLY BEAMENT, MOTLATSI SEKOTLO, LEBOHANG MOKHESI AND MAKALI LEPHOLISA.

WHEREAS it appears to me information taken on oath that the following goods,viz:-FINANCIAL STATEMENTS, MANAGEMENT ACCOUNTS, ANY COMPUTER RECORDING MATERIAL INCLUDING BUT NOT LIMITED TO PERSONAL COMPUTERS, LAPTOPS, CD's, DVD's, FLASH DISC, ANY RECORDS THAT MAY ESTABLISH THE CORRECT FINANCIAL POSITION OF THE COMPANIES AND BUSINESSES

the property of
OSMAN MOHAMED MOOSA AND HIS GROUP OF COMPANIES

have been stolen and are concealed in the house or premises situated at
SELKOL 1983 (PTY) LTD AT INDUSTRIAL AREA
In the occupation of BUILDING WORLD (PTY) LTD, SELKOL 1983 (PTY) LTD, MOOSA HOLDINGS (PTY) LTD, OSMOOSA T/A BARGAIN CITY AND SELKOL SHOWROOM.

THESE are therefore in His Majesty's name, to authorize and require you with necessary and proper assistance to enter the said house or premises in the day time, and there diligently to search for the said goods; and if the same, or any part thereof, shall be found upon such search, that you bring the ~~goods~~ hard copies so found and image computer hard drives & other equipment before

To be disposed of or dealt with according to law

Given under my hand at this
Day of
19

[signed]
Magistrate".

[6] Counsel for the appellants argued that the warrants were "fatally unintelligible" by virtue firstly, of the reference to the materials in question having been "stolen". It is common cause that that was never the case.

[7] The approach to be adopted by a court in assessing the validity of warrants has been the subject of many reported decisions, in Southern Africa and elsewhere in the world. In my view, a useful overall summary is provided by the recent South African Supreme Court of Appeal decision in Powell NO v Van der Merwe NO 2005(5) SA 62 (SCA)at85 C-F:

"(a) Because of the great danger of misuse in the exercise of authority under search warrants, the courts examine their validity with a jealous regard for the liberty of the subject and his or her rights to privacy and property.

b) This applies to both the authority under which a warrant is issued, and the ambit of its terms.

c) The terms of a search warrant must be construed with reasonable strictness. Ordinarily there is no reason why it should be read otherwise than in the terms in which it is expressed.

d) A warrant must convey intelligibly to both searcher and searched the ambit of the search it authorises.

e) If a warrant is too general, or if its terms go beyond those the authorising statute permits, the Courts will refuse to recognise it as valid, and it will be set aside.

f) It is no cure for an overbroad warrant to say that the subject of the search knew or ought to have known what was being looked for: The warrant must itself specify its object, and must do so intelligibly and narrowly within the bounds of the empowering statute".

[8] It was a major part of the appellants' case that the warrants here must be

construed by reference only to their own terms, and not considered together with the supporting affidavit. This is the appropriate stage to consider this legal contention, given (as I shall show) its significant effect on the facts of this particular matter.

[9] Much was made in argument of the reference in the passage quoted from Powell's case supra to the requirement that "the warrant must itself specify ". But the passage I have quoted is immediately followed by the observation that the supporting affidavit in that matter remedied certain factual deficiencies on the face of the warrant "but that [the affidavit] was not made available to Powell "(at 85 G). (The court went on to hold that, even if in considering the legality of the warrant, reference be had to a further document instituting the inquiry in that matter which was read to Powell, the warrant's deficiencies were not remedied). Thus Powell's case supra on closer scrutiny affords no basis for the suggestion that in no circumstances whatsoever may a court look beyond the ipsissima verba of a warrant.

[10] In the present case, the warrant itself refers to the reliance by the magistrate on "information taken on oath" - clearly, as counsel accepted, a reference to the affidavit. Furthermore the affidavits establish that the supporting affidavit was made available to the first appellant and his counsel (who was also present when the warrants were presented for execution), together with the warrants, and they in fact retired for some time to consider these before themselves expressly authorizing the execution of the warrants to proceed.

[11] Counsel for the appellants was obliged to concede that his objection to reference being had to the affidavit in conjunction with the warrants would have fallen away if the affidavit had been stapled to the warrant, or expressly incorporated in the latter by reference. Once that concession is made, it seems to me that the intelligibility attack must fall away. It would elevate form above substance for the outcome of the matter to depend on a staple, or a more explicit incorporation by reference than the actual phrasing of the warrants in this case. What the warrants convey may in my view on the facts of this particular matter be permissibly determined by reference to the affidavit too. It is this factual situation which distinguishes the present case from, for instance, De Wet v Willers NO 1953 (4) SA 124 (T), where the warrant had to stand or fall on its own.

Once this is so, then - as counsel for the appellants also correctly acknowledged - the attack on intelligibility must fail. This is because the affidavit is a detailed and lucid document which makes it clear to the reader that the purpose of the search and seizure operation related to allegations of specified tax violations, committed by the appellants. Clearly the joint team of police and tax investigators (to whom the warrants were addressed by name) sought financial records concealed at the appellants' premises, not - as the pro forma wording of the warrants itself suggests - stolen goods. The latter standard printed words should of course have been struck out, but were not. That they had been retained by error, were inapplicable and to be disregarded by the reader is perhaps most compellingly corroborated by the fact that, despite retiring as I have described to study the warrants, neither the first appellant nor his counsel directed a single query regarding what might have been "stolen", or expressed any reservation about the search proceeding.

For similar reasons the second attack related to intelligibility must fail. This was directed at the initially bald reference on the warrant to "the companies and business" of the first appellant. But immediately below appear the names of four listed companies being the further appellants. The matter is put beyond doubt when regard is again had to the affidavit: this lists "[t]he concerned companies and businesses" fully and accurately.

I turn now to the alternative leg of the argument: overbreadth, in the currently fashionable description for impermissible width of a warrant. Here counsel for the appellants himself had reference to the supporting affidavit, for the different purpose of showing that the warrants were too wide. That this inquiry may be undertaken on the basis of material not before the issuing officer, but before the court adjudicating the matter, seems sound in principle (and supported by authority elsewhere: Shelton v Commissioner, SARS 2002 (2) SA 9 (SCA); Ferucci v Commissioner, SARS 2002 (6) SA 219 (C)).

[15] The affidavit details information received from an informer. The deponent states that he believes this to be true, because that which had been "thoroughly tested" in the course of the investigation had been verified. Referring to the alleged tax violations, the affidavit states that "[t]hese improprieties are alleged to have taken place since 2003 ....."(emphasis supplied).

[16] Referring to the latter statement, counsel for the appellants contended that the warrants are too wide because they reflect no such limitation; pursuant to them, material dating back to the inception of the companies had been

searched and seized.

Again, however, it seems to me that the inquiry must be made with due regard for the facts of each case. Here it is common cause that the inception of the group of companies antedated the reported commencement of the irregularities by only seven years. The silence of the warrants as regards dates of documentation clearly in my view conveys that no limit as to time is imposed. The inclusion of the period of six years prior to 2003 is explicitly justified on the affidavits filed for the respondent in the proceedings: "[f]orensic audits have to be done and the previous performance of the business be considered". In another factual setting, the failure to specify a period properly related to the alleged criminal activity, and a wording which includes all_specified documentation since an individual's birth or a company's registration, might well be too wide. But in this case the de facto confined period, and the justification advanced before court for it, in my view put the matter on a very different footing. The second attack, too must fail.

A last matter argued before us is whether the appellants (represented by the first appellant) in any event waived whatever rights they may have had to challenge the irregularities they now allege. This issue arises from what transpired during the execution of the warrants. As already noted, the first appellant procured the attendance of counsel at the premises in question from the outset. The warrants and supporting affidavit were, as I have described, shown to both, and they took time together to consider and consult. They thereupon emerged, and volunteered an explicit assent to the execution of the warrants proceeding.

[19] If regard be had to the plethora of case law to which we were referred, these are most unusual circumstances. There are innumerable reported instances

of either immediate legal challenges to warrants being made, or such searches being carried out under protest and reservation of rights, or of subjects of warrants, unassisted by counsel, standing silently by as they are executed.

[20] The issue of waiver was not addressed by counsel for the appellants in his heads of argument. In oral argument he rightly emphasized that courts are careful in drawing conclusions of the waiver of constitutional rights, and that waiver itself - entailing an unequivocal abandonment of rights with full knowledge of them - is not lightly inferred. His chief contention was in essence that the appellants had had poor legal advice.

[21] In my view, the unusual facts - there was no sustainable dispute of facts - point very strongly to a considered decision, on legal advice following scrutiny of the warrants and the supporting affidavit for the search and seizure operation to proceed. Informed consent was given. The case before us is not that the irregularities complained of could not possibly be encompassed by the legal advice and consequent consent because they were not known at the time - to take an hypothetical example, if the issuing magistrate had been bribed, or some other gross irregularity unbeknown to the first appellant and his counsel had vitiated the process.

[22] In these particular circumstances, in my view the stringent requirements for waiver are probably met. Given the answers to be given to the first two attacks, however, it is not necessary to decide the matter on that basis.

[23] The appeal is dismissed, with costs.

Gauntlett, JA

I agree:

Ramodibedi, JA

I agree:

Smalberger, JA

For the appellants: K.J. Kemp SC

For the respondents: H.P. Viljoen SC