

SOUTH AFRICA / JUDGMENT

Auction Alliance (Pty) Ltd and Another v Minister of Police and Others (8324/2014) [2014] ZAWCHC 180 (3 December 2014) [2014] ZAWCHC 180

COURT

Western Cape High Court, Cape Town

BEFORE

RILEY AJ

CASE / FILE NUMBER

8324/2014

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IN THE HIGH COURT
OF SOUTH AFRICA
(WESTERN CAPE
DIVISION, CAPE TOWN)
Case
No 8324/2014

DATE:

03 DECEMBER 2014

In the matter

between:

AUCTION ALLIANCE
(PTY) LTD.....First
Applicant
RAEL
LEVITT.....Second
Applicant
And
THE MINISTER OF
POLICE.....First
Respondent
COLONEL DEVANDRI
PILLAY N.O.....Second
Respondent
KPMG SERVICES
(PTY) LTD.....Third
Respondent
ACCOUNTANTS @ LAW
(PTY) LTD.....Fourth
Respondent

Court: RILEY AJ
Heard: 4 November
2014
Delivered: 3
December 2014

JUDGMENT

RILEY AJ:

- [1] The first applicant (Auction Alliance) and the second applicant (Levitt), ('the applicants') and others, are being investigated by the South African Police Services ("SAPS") for a wide range of suspected serious offences including, but not limited to, fraud and/or contraventions of the Prevention and Combating of Corrupt Activities Act 12 of 2004 as well as other related offences allegedly perpetrated by employees of Auction Alliance and related parties.
- [2] The present matter concerns the correct interpretation of the Order of this court by Stelzner AJ dated 23 August 2012 ('the Stelzner AJ order').
- [3] The Stelzner AJ order was made an order of court by agreement between the parties. The order reads as follows:

'Pursuant to an agreement of settlement reached between the Applicants and the First Respondent (the Second Respondent abiding the decision of the Court), the following order is made:

1. The search warrants issued by the Second Respondent in respect of the following premises in Cape Town, namely:
 - 1.1 the First Applicant's business premises at 2nd floor, The Block, 51 Wale Street;
 - 1.2 the Second Applicant's residence at 101 Mouille Sands, Bay Road, Mouille Point;
 - 1.3 the business premises of Accountants@Law (Pty)Ltd at 4th floor, Hout Street Studios, 37 Hout Street; and
 - 1.4 the business premises of KPMG at MSC House, 1 Mediterranean Street, Foreshore, are declared unlawful and invalid.
2. Subject to what follows, by 16h00 on Friday 24 August 2012 at the latest the First Respondent will return all of the items seized on Tuesday 7 August 2012 during the searches of the premises mentioned in paragraphs 1.2 to 1.4 above (it being recorded that nothing was seized at the premises mentioned in paragraph 1.1 above) and from the following further premises:
 - 2.1 the First Applicant's offices at:
 - 2.1.1 21 Kellner Park, 63-67 Kellner Street, Westdene Bloemfontein

2.1.2 294 Main Street, Paarl;

2.1.3 135 Cape Road, Mill Park, Port Elizabeth;

2.1.4 17 Scott Street, Waverley, Johannesburg;

2.2 The residence of Shaie Zindel at 25 11th Avenue, Lower Houghton, Johannesburg;

2.3 the business premises of Gruzd Zets & Company (auditors of Merobex (Pty) Ltd) at 43 Chester Road, Parkwood, Johannesburg; and

2.4 the offices of Accountants@Law (Pty) Ltd at Unit 22, Villa Toscana, 25 Mellville Road, Hyde Park Extension 2, Sandton.

3. In amplification of paragraph 2 above:

3.1 The items seized from the premises described in paragraphs 1.2, 1.3, 2.1, 2.2 and 2.4 above, together with the mirror images made by the South African Police Service ("SAPS") of the three laptops seized from the premises described in paragraph 2.4 above, will be delivered to the office of the Applicants' attorneys of record, namely Smiedt & Associates, 19th Floor, Thibault Square, Long Street Cape Town. These items will be accompanied by a copy of the affidavit given by the SAPS to the Second Respondent in support of the application for the search warrants referred to in paragraph 1 above. For the avoidance of doubt, the laptops and external hard drives themselves seized from the premises described in paragraph 2.4 above are excluded from the ambit of this order, as these have already been returned to the offices of Accountants@Law (Pty) Ltd.

3.2 The items seized from the business premises of KPMG described in paragraph 1.4 above, will be returned to them at those premises.

3.3 The items seized from the business premises of Gruzd Zets & Company described in paragraph 2.3 above, will be returned to them at those premises.

4. Smiedt and Associates will retain the returned items referred to in paragraph 3.1 above in their sealed exhibit bags until Friday 7 September 2012 or until the final determination of any application(s) brought before that date for a subpoena(s) or a search warrant(s) pertaining to the returned items.
5. If any such application(s) is brought, the Applicants (and Accountants@Law (Pty) Ltd and Mr Zindel, if the application(s) encompasses materials seized from their premises) will be given at least five court days' prior notice of the date and time when the application(s) will be moved and will be entitled to oppose the granting of the application(s).
6. If any such application(s) is granted by a judicial officer other than a Judge of the High Court, the Applicants (and Accountants@Law (Pty) Ltd and Mr Zindel) will be given at least five court days to challenge it in the High Court, i.e. the warrant will not be executed or the subpoena will not be enforced until five days have elapsed after it has been granted.

7. Paragraphs 5 and 6 above will also apply to any application(s) brought for a subpoena(s) or a search warrant(s) pertaining to the items referred to in paragraphs 3.2 or 3.3 above, save that the other persons to whom notice will be given and who will be entitled to oppose will be KPMG and Gruzds Zets & Company. In the case of the items at KPMG, notice will also be given to the attorneys of record for the respondents in Western Cape High Court case number 4850/2012, namely the Estate Agency Affairs Board (“EAAB”), the Minister of Trade and Industry and the Minister of Finance, as well as to the administrator of the EAAB Mr Taswell Papier.
8. In order to obviate the need for such applications for subpoenas and search warrants, on or as soon as possible after Monday 27 August 2012 the First Respondent will make a “without prejudice” written proposal to the Applicants about the terms on which it proposes it be given access to the seized materials or some of them, including mechanisms for identifying materials stored on computers or the like which are not relevant to the investigation and for resolving any disputes about privilege. The parties will use their best endeavours to reach agreement, provided that no such agreement in respect of the data contained on the mirror images of the laptops and external hard drives seized from the premises described in paragraph 2.4 will be valid and enforceable unless Accountants@Law (Pty) Ltd also consents thereto, it being recorded that such data includes confidential material relating to other clients of Accountants@Law (Pty) Ltd.
9. All parties will carry their own costs.’

[4]In effect, the applicants apply for orders declaring, that paragraphs 4 and 6 of the Stelzner AJ order prevent the first and second respondents (‘SAPS’) from executing the search warrant, issued on 2 May 2014 by Mr Human, District Court Magistrate at Cape Town, pending the final determination of the applicants’ intended appeals against an unsuccessful application they brought in this court for judicial review of the issuing of the warrant.

THE FACTS

- [5] The facts and background to the present application have been ventilated in several applications which have been brought by the applicants in this court. Since there is no evidence on the papers that the background facts as set out by Colonel Pillay of SAPS, in the SAPS answering affidavit, is demonstrably and clearly unworthy of credence, I shall for the purposes of the determination of this application accept the factual account of Colonel Pillay as correct. For the sake of convenience, I will accordingly incorporate herein the chronology of the events succinctly summarised in the first and second respondents’ heads of argument.
- [6] On 7 August 2012 SAPS conducted country-wide searches pursuant to search warrants issued by various magistrates in terms of ss 20 and 21 of the Criminal Procedure Act 51 of 1977 (‘the CPA’). On 8 August 2012 the Applicant brought an urgent application in this court, under case number 15482/12, for a range of relief including orders setting aside the issuing of four of those search warrants issued by a magistrate in Cape Town and requiring the SAPS to return

the seized items to the Applicants' attorneys Smiedt & Associates ('Smiedts'). Following discussions and correspondence between the parties' representatives on 23 August 2012, the matter was settled and the terms of the settlement were embodied in the Stelzner AJ order (supra) which provided for, amongst other things, the setting aside of the four search warrants, the return by the SAPS to the Smiedts of both the items seized under the warrants, and certain further items seized elsewhere as well as the return to the third respondent ('KPMG') of certain

further items seized from its premises in Cape Town. Then followed paragraphs 4, 5 and 6 of the Stelzner Order, which are relevant to the determination of the present application.

[7] On 6 September 2012 Smiedts extended to 14 September 2012 the date of 7 September 2012 mentioned in paragraph 4 of the Stelzner Order. On 14 September 2012 the SAPS applied in the Magistrates' Court, Cape Town for search warrants pertaining to the items returned to Smiedts and to KPMG ('the first warrant application'). The first warrant application was never determined because the acting magistrate to whom it had been allocated, Mr Engel, left the magistracy without doing so.

[8] On 28 February 2014 this court (per Rogers J), following an application by the SAPS which was opposed by Auction Alliance and Levitt, made an order directing the SAPS:

'... to bring a fresh application, before a magistrate in the District of Cape Town other than [Magistrate Engel], for a search warrant pertaining to the seized items within 30 days: provided that such application shall be subject to paras 5 and 6 of the order of this court (per Stelzner AJ) dated 23 August 2012 in case 15482/2012 [the Stelzner Order]; and provided further that, when bringing such application, SAPS shall deliver a notice withdrawing the application for a search warrant pertaining to the seized items which up to now has served before [Magistrate Engel] ('the second warrant authorisation order').'

I pause to mention at this stage that the applicants unsuccessfully applied, in this Court, the Supreme Court of Appeal ('SCA') and the Constitutional Court ('CC'), for condonation for the late bringing of an application for leave to appeal against the second warrant authorisation order.

[9] Following a report by Smiedts to the SAPS that certain of the returned items in their custody had gone missing, this court (per Ndita J) made an order by agreement between the parties on 7 February 2014, authorising the transfer of the returned items to KPMG for safekeeping until the final determination of the application for a fresh search warrant.

[10] On 2 April 2014 the SAPS delivered to Smiedts the fresh application for a search warrant ('the second warrant application') and indicated that it would be made on 9 April 2014 to a newly-allocated magistrate, namely Magistrate Human, in chambers, along with a notice withdrawing the previous application.

[11] On 9 April 2014, at the request of the parties, Magistrate Human adjourned his consideration of the second warrant application to 29 April 2014.

[12] On 17 April 2014, following discussions between counsel, SAPS's senior counsel wrote to the Applicants' counsel setting out two undertakings that SAPS required from the Applicants, and setting out the SAPS's response to a request by the Applicants for reciprocal undertakings. The second undertaking which the SAPS required from the Applicants and the SAPS's response to the Applicants' request for reciprocal undertakings, read as follows:

'(2) An undertaking concerning the items currently held by KPMG pursuant to paragraph 2 of Ndita J's order of 7 February 2014, namely: if Magistrate Human refuses to issue a search and seizure warrant in relation to those items, AA and Levitt shall not remove or seek to remove any of such items from the custody of KPMG until the expiry of a period of 5 court days after such refusal and, if SAPS brings an application for judicial review of such refusal within that period, until the final determination of such application for judicial review including any appeal(s) against any refusal of such application for judicial review.

As to Sean's request for a reciprocal undertaking that if Magistrate Human issues the search warrant in relation to any of the items referred to in (1) and (2) above, i.e. that SAPS will not search and seize any of those items under such warrant for a period of 5 court days after the issuing of the search warrant and, if AA or Levitt brings an application for judicial review of such issuing within that period, until the final determination of such application for judicial review including any appeal(s) against any refusal of such application for judicial review, my instruction are that SAPS will not give such an undertaking because:

- (a) AA and Levitt are adequately protected by the undertaking in annexure 'E' to the search warrant; and
- (b) if AA and Levitt bring and are ultimately successful in any such application for judicial review, they will be entitled to the return of the seized items and any copies thereof unless SAPS succeeds in obtaining a further preservation order and/or further search warrant or subpoena in relation to such items and copies, any application for which will be brought on at least 5 days' notice to AA and Levitt'.

[13] On 29 April 2014, notwithstanding the SAPS's refusal to give any reciprocal undertakings, Smiedts gave the undertakings required by the SAPS, including the following:

'We confirm that our client provides an undertaking concerning the items currently held by KPMG pursuant to paragraph 2 of Ndita J's order of 7 February 2014, namely: if Magistrate Human refuses to issue a search and seizure warrant in relation to those items, AA and Levitt shall not remove or seek to remove any of such items from the custody of KPMG until the expiry of a period of 5 court days after such refusal and, if SAPS brings an application for judicial review of such refusal within that period, until the final determination of such application for judicial review including any appeal(s) against any refusal of such application for judicial review'.

[14] On 2 May 2014, after receiving written submissions from the parties on and shortly after 29 April 2014, Magistrate Human issued the warrant and the SAPS's attorney delivered a copy to Smiedts. The warrant provides that, if they want to, representatives of Smiedts may be

present when the search is undertaken, they may examine the items which the SAPS intends to seize and they may object to the seizure of items on the grounds that the items are private and irrelevant to the investigation, or subject to legal professional privilege. The warrant further contains an undertaking from the SAPS with a detailed mechanism for resolving any such objections before the SAPS may inspect the disputed items.

[15] On 12 May 2014 the Applicants applied to this Court, under case 8325/14, for judicial review of Magistrate Human's decision to issue the warrant ('the review application').

[16] On the same date the Applicants brought the present application in this Court ('the declaratory application'), in which they sought an order in the following terms:

'Declaring that on a proper interpretation of paragraph 6 of the Order of this Honourable Court dated 23 August 2012 (coram Stelzner AJ), the first and/or second respondents may not execute the search and seizure warrant issued on 2 May 2014 by the district magistrate, Cape Town, pending the determination of the review application launched by the applicants in this Court on Monday 12 May 2014'.

[17] On 14 May 2014 the SAPS wrote to Smiedts and gave the following undertaking:

'4.1 It undertakes not to execute the search warrant issued by Magistrate Human until after 27 June 2014; and

4.2 It further undertakes that, after that date, it will give your clients (through your offices) two clear days' written notice of its intention to execute the search warrant (the search warrant in any event entitling the representatives [of] your offices to be in attendance when the exhibit bags are opened).'

[18] On 28 May 2014 the Deputy Judge President made an order enrolling the review application for 25 June 2014. The declarator application was not enrolled for hearing as the Applicants did not persist with it. On the same day SAPS gave the Applicants the following further undertakings in writing:

'1. SAPS undertakes not to execute the search warrant issued by Magistrate Human until after the Court hearing the review application on 25 June 2014 (case 8325/14) delivers its judgment in that application.

2. SAPS further undertakes that, after the date on which the judgment is delivered, it will give your clients (through your offices) two clear days' written notice of its intention to execute the search warrant (the search warrant in any event entitling your offices to be in attendance when the exhibit bags are opened).'

[19] On 25 and 26 June 2014 the review application was argued before Allie J, who reserved judgment. On 7 October 2014 she handed down her judgment dismissing the review application. On 10 October 2014 Smiedts requested the SAPS to confirm that it would

‘... not execute the warrant until Auction Alliance and Mr Levitt had exercised their appeal remedies within the time periods prescribed by the High Court and all Appeal Courts’.

[20] On 15 October 2014 Auction Alliance and Levitt delivered an application for leave to appeal against Allie J’s judgment and order. On 16 October 2014 the SAPS’s attorney wrote to Smiedts saying the SAPS believed it was now entitled to execute the search warrant subject to giving the Applicants the two clear days’ notice mentioned in the SAPS’s undertaking of 28 May 2014, and further notifying the Applicants that it would be executing the search warrant on 3 November.

[21] On 20 October 2014 the Applicants delivered a revised notice of motion in the declaratory application, in which they seek the following substantive relief:

‘2. Declaring that on a proper interpretation of paragraph 4 of the Order of this Honourable Court dated 23 August 2012 (coram Stelzner AJ), the words “final determination of any application” include the outcome of any review of such application, including the final determination of any appeal processes which any of the parties may pursue in respect of any decision given on review, provided such review or appeal processes are brought in terms of the rules of any applicable court;

3. Declaring that on a proper interpretation of paragraph 6 of the Order of this Honourable Court dated 23 August 2012 (coram Stelzner AJ), the first and/or second respondents may not execute the search and seizure warrant issued on 2 May 2014 by the district magistrate, Cape Town, pending the final determination of the review application launched by the applicants in this Court on Monday 12 May 2014, including the final determination of any appeal processes which any of the parties may pursue in respect of any decision given on review, provided such review or appeal processes are brought in terms of the rules of any applicable court.’

[22] On 21 October 2014 the SAPS’s attorney sent Smiedts a letter informing them that, to accommodate the hearing of the declarator application, the SAPS will no longer execute the search warrant on 3 November 2014, but instead it will do so on 19 November 2014.

[23] On 24 October 2014 the Judge President made an order, by agreement between the parties, enrolling the current matter for hearing in the ‘fast lane’ for 4 November 2014. On 4 November 2014 I heard argument from the parties and reserved judgment.

[24] On 19 November 2014, and whilst I was considering my judgment herein I received correspondence from applicants’ attorney Smiedt advising me that the applicants’ application for leave to appeal under case no 8325/2014 (the review application) had been dismissed by Allie J and that an application to petition the SCA for leave to appeal the Allie J judgment would be filed with the registrar of the SCA on 20 November 2014. Application for leave to appeal against the judgment and the order of Allie J was served on SAPS’ attorneys on 19 November 2014. SAPS also agreed that they would not execute the search warrant until I have handed down my judgment in this matter.

- [25] The crucial issue for determination in this matter is whether SAPS can, in terms of the Stelzner AJ order, still execute the search warrant, given that the lawfulness of the search warrant has not yet been finally determined. Mr Epstein SC, who was assisted by Mr Simonsz, contended on behalf of the applicants that the material paragraphs of the Stelzner AJ order, i.e. paragraphs “4” and “6” (supra) can only be read to mean that the seized items are to be preserved until the “final determination” of any challenge to the lawfulness of the SAPS search warrant, which includes review and thereafter appeal. He contended further that the Stelzner AJ order must be interpreted in the light of all relevant and admissible content, including the circumstances in which the document (i.e. the order) came into being. He argued strongly that I must in particular take into account that the Stelzner AJ order came about as a result of a warrant. Furthermore, that each and every search warrant impinges upon inter alia, the right to privacy in terms of section 14 of the Constitution of the Republic of South Africa and that the purpose of the search warrant is to obtain evidence for use in possible criminal proceedings against the applicants. He emphasized the importance and strict nature of search warrants as a safeguard of individual rights.
- [26] Mr Breitenbach, who was assisted by Ms Erasmus and Mr Goosen, contended on behalf of the SAPS that the declarators in relation to both paragraphs 4 and 6 of the Stelzner AJ order as sought in the revised notice of motion amount to the following i.e. if within five days after the granting of the search warrant by a judicial official other than a judge of the High Court, the applicants bring a High Court challenge against the granting of the warrant, then the execution of the search warrant is suspended until
- (a) The determination of that challenge in the High Court and
 - (b) The final determination of any appeal process initiated by the applicants against any refusal by the high Court of that challenge.
- [27] The main reasons advanced by Mr Breitenbach why the declarator sought by the applicants should not be granted can be summarised as follows:
1. The Stelzner AJ order does not deal in any way with the further preservation of the seized items beyond the five day period provided for in paragraph 6 of the order, nor does it cater for the “permutations” covered by the declarators now sought by the applicants. According to Mr Breitenbach all it provides for (i.e. para 6) is a stay of five days after the granting of the warrant or subpoena to allow the applicants to challenge such granting in the High Court. He pointed out that the Stelzner AJ order did not extend further than providing a five day period for the applicants to institute a challenge in the High Court, if they so decided and that what is conspicuous by its absence is a further paragraph after paragraph 6, saying ‘If a challenge is brought in the High Court then ...’.
 2. That read in this context, the ‘final determination’ referred to in paragraph 4 of the Stelzner AJ order, is the final determination by a magistrate or other judicial officer of the application(s) for the search warrant(s) or subpoena(s) pertaining to the returned items. According to Mr Breitenbach paragraph 4 refers expressly and plainly to the ‘final

determination of any application(s) brought before 7 September 2012 for a subpoena(s) or a search warrant(s) pertaining to the returned items. He relied on this interpretation by referring to the opening words of paragraphs 5 and 6, namely 'If any such application(s) is brought' and 'If any such application(s) is granted'. According to him the challenge in the High Court referred to in paragraph 6 of the Stelzner AJ order, which had to be brought within five days of the granting of any such application(s) by a judicial officer other than a judge of the High Court, is clearly a new set of proceedings separate from the application(s) for the search warrant or subpoena, more specifically the granting of such application(s) to which it is directed. Therefore he submitted, 'the final determination' referred to in paragraph 4 of the Stelzner AJ order is not the final

determination

by a High Court of an application for judicial review of the granting by a magistrate of a search warrant or subpoena, let alone the final determination of any applications for leave to appeal or any appeals against an unsuccessful application for judicial review.

3. That the manner in which the parties have conducted themselves since the granting of the Stelzner AJ order is consistent with the SAPS interpretation of the Stelzner AJ order and inimical to the interpretation underlying the declarators now sought by the applicants. In this regard Mr Breitenbach relied on the undertakings sought by SAPS and given by applicant hereinbefore referred to, before Magistrate Human determined the application for the search warrant. Together with his argument about the manner in which the parties have conducted themselves, Mr Breitenbach questioned why the applicants had taken as long as they did to rely on paragraph 4 of the Stelzner AJ order in support of their claim that the Stelzner AJ order precludes the SAPS from executing the search warrant until the appeal process against their failed high court challenge to the issuing of the warrant has run its course.
4. That the agreement encapsulated in the Stelzner AJ order has been superseded by subsequent events i.e.
 - (i) The SAPS undertaking that if the review application failed, the applicants would be given at least two clear days' notice of its intention to execute the search warrant; and
 - (ii) The correspondence by means of which, applicants agreed to the request of the SAPS for an undertaking, and further that SAPS could execute the search warrant should their application in this court for judicial review of Magistrate Human's decision fail.

He was adamant that nothing endures beyond the period of notice which the SAPS has now given, i.e. beyond 19 November 2014.

5. In regard to this court's discretion whether or not to grant the declaratory relief sought, he submitted that the applicants are sufficiently protected by the warrant itself including Annexure "E" to the search warrant, and consequently it is not necessary for this court to determine the 'merits' of the application for declaratory relief. In his view the warrant contains a detailed procedure and undertaking from the SAPS aimed at preventing the SAPS from gaining access to any materials which Auction Alliance or Levitt legitimately claim are private and irrelevant to the investigation, or in respect of which they legitimately claim legal professional privilege.

[28] Mr Epstein SC in response contended that:

1. The reliance placed on the absence of any explicit mention in paragraph 6 of the Stelzner AJ order of preservation beyond five days is untenable because: (i) Paragraph 6 must be read with paragraph 4 and that the phrase 'final determination' in paragraph 4 can only mean preservation until the challenge is finally determined; and
(ii) That having a preservation order for only five days leads to practical absurdity for all the parties.
2. In regard to the second ground that 'finally determined' means only until application to the magistrate is finally determined, not until any challenge in the High Court is finally determined, he was of the view that –
 - (i) This artificially distinguishes paragraph 4 from paragraph 6. According to him it is clear from paragraph 6 that the parties were expecting and indeed planning for the eventuality that any search warrant would be tested in the High Court. Paragraph 4 accordingly cannot be reasonably read as referring only to applications in the magistrate's court.
 - (ii) Such an approach is impermissible as it ignores the word 'final'. He submitted that 'final' can only refer to finality that comes when a legal challenge is exhausted on review or appeal.
3. In regard to the alleged failure by the applicants to rely on paragraph 4 of the Stelzner AJ order in their founding papers, and that their failure to do so results in inferences against their bona fides, he contended that applicants have not raised new argument by relying on paragraph 4, as the applicants clearly regard paragraphs 4 and 6 as inextricably linked, and that in any event all the applicants contentions were made in their founding papers.
4. In regard to the contention that the Stelzner AJ order has been superseded by an undertaking by SAPS, he submitted that the short and complete answer to this is, that the Stelzner AJ order was an agreement between the parties enshrined in an order of this court, and it is not open to the SAPS to withdraw from the agreement and replace it with such undertakings as it deems convenient.
5. Finally in regard to the contention that the applicants were sufficiently protected by the undertakings in annexure E to the search warrant, and that no prejudice will be suffered by applicants if the SAPS breach the Stelzner AJ order, he submitted that the annexure post-

dates, and is irrelevant to the issue of the interpretation of the Stelzner AJ order and that none of the parties, including the SAPS can excuse their failure to abide by their agreements on the basis that they are of the view that other parties will not be prejudiced. The annexure in any event does not protect the applicants and indeed would effectively grant the persons in the employ of the SAPS access to the privileged documents of the applicants.

THE PRINCIPLES OF INTERPRETATION

[29] It is necessary to examine the principles of interpretation as they apply in our law to assist in arriving at the correct decision. According to Herbststein and Van Winsen *The Civil Practice of the High Courts of South Africa*, 5th ed at p936 the basic rules for interpreting the judgment or order of a court are no different from those applicable to the construction of documents. Where the court order records an agreement of settlement, the basic principles of the interpretation of contracts need also to be applied to ascertain the meaning of the agreement. See *Engelbrecht and Another NNO v SENWES Ltd* 2007 (3) SA 29 at 32 para [6].

[30] In *Engelbrecht and Another NNO v SENWES Ltd* supra, Malan AJA stated at para [7] that ‘The intention of the parties is ascertained from the language used read in its contextual setting and in the light of admissible evidence.’

Malan AJA distinguished three classes of admissible evidence namely,

‘Evidence of background fact is always admissible. These facts, matters probably present in the minds of the parties when they contracted, are part of the context and explain the “genesis of the transaction” or its “factual matrix”. Its aim is to put the Court in “the armchair of the author(s)” of the document. Evidence of “surrounding circumstances” is admissible only if a contextual interpretation fails to clear up an ambiguity or uncertainty. Evidence of what passed between the parties during the negotiations that preceded the conclusion of the agreement is admissible only in the case where evidence of the surrounding circumstances does not provide “sufficient certainty”.’

[31] In *Jaga v Dönges* 1950 (4) SA 653 (A) at 662H, Schreiner JA in interpreting a statute said:

‘The first is that “the context” ... is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background ...’

The above dictum of Schreiner JA was accepted as being equally applicable to the interpretation of contracts and not only of statutes as appears from the judgment of Wessels JA in *Van Rensburg v Taute* 1975 (1) SA 279 (A) where at 303C he states that:

'n Geskrewe stuk word natuurlik na gelang van sy aard en opset vertolk, bv. in die onderhawige geval gaan dit oor 'n ooreenkoms wat die daarstelling van 'n serwituut beoog. Ook moet die woord of woorde wat vertolk moet word nie in isolasie nie, maar in samehang van die stuk as geheel, gelees word. Die hof kan blykbaar ook ingelig word oor die agtergrondsomstandighede waaronder kontraksluiting plaasgevind het, maar slegs om die breë konteks, waarin die woorde vertolk staan te word, gebesig word, beter te kan begryp.'

[32] It is important to bear in mind as stated by Christie The law of contract in South Africa, 6th ed p228,

'that even if a contract has been drafted by a skilled legal draftsman, it has become the act of the parties and should therefore be interpreted not in a subtle way that might appeal to a lawyer, but in the straightforward way that can be presumed to represent the common intention of two business people ...'

[33] The correct approach to interpretation in our law is now emphatically set out in Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 where Wallis JA stated the following:

'In Natal Joint Municipal Pension Fund v Endumeni Municipality the current state of our law in regard to the interpretation of documents was summarised as follows:

'Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School. The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

That statement reflected developments in regard to contractual interpretation in *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd and Another*; *KPMG Chartered Accountants (SA) v Securefin Ltd and Another*; and *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund*. I return to it and to those cases only because we had cited to us the well-known and much-cited summary of the earlier approach to the interpretation of contracts by Joubert JA in *Coopers & Lybrand and Others v Bryant*, that:

'The correct approach to the application of the golden rule of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

- (1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract
- (2) to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted. . . .
- (3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions.'

That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding

circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'. Accordingly it is no longer helpful to refer to the earlier approach' (my emphasis).

[34] The approach adopted by Wallis JA in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk supra* is in line with the approach adopted by Lord Clarke SCJ in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 [2012] Lloyd's Rep 34 (SC) para 21 where he said that 'the exercise of construction is essentially one unitary exercise'.

[35] I turn now to deal with the interpretation of the words ‘final determination’. It seems obvious that the starting point must be, to give the words their ordinary grammatical meaning. Our courts have through the years recognised that any legal determination which has been taken on appeal cannot be considered to be final until the appeal is concluded. It seems logical that the very nature of an appeal would be to reconsider the determination and to decide whether it should stand or fall.

[36] In *Els v Weideman & Others* 2011(2) SA 126 (SCA) Heher JA stated at paragraph 34 that:

‘I do not agree that, because contempt proceedings are a continuation of an already instituted proceeding or “no more than a step in the execution of a judgment” (*James v Lunden*), the judgment must be enforced in the court which granted the original order. When a party leaves a High Court with an order in his favour (not obtained *ex parte*) those proceedings have been effectually completed (subject to appeal or, in the case of an interim order, its confirmation).’

[37] In *F O Kollberg (Pty) Ltd v Atkinson Motors Ltd* 1970 (1) SA 660 (C), this court, per Grosskopf AJ, considered the meaning of the phrase ‘final judgment’ in the context of Uniform Rule 8(11) and provisional sentence, and held at 662F-H that

‘Judgments which might appropriately be called final in a particular context may nevertheless be subject to appeal, review or rescission under the common law or under the Rules of Court. In my view the exact effect of the adjective “final” when applied to a judgment must in all cases be determined in its context in accordance with ordinary principles of construction before any conclusion could be reached as to the applicability of a provision such as Rule of Court 27.’

[38] In *Van der Merwe and Another v Astrapak Ltd and Another* (unreported) case no 11108/2013 (Western Cape Division, Cape Town) (‘Astrapak’) a full bench of this court per Cloete J (Ndita J and Le Grange JJ concurring) approved the approach adopted by Grosskopf AJ in *F O Kollberg (Pty) Ltd v Atkinson Motors Ltd* (*supra*) and concluded at paragraph 25 that:

‘proceedings are not necessarily concluded upon the handing down of a judgment by a court of first instance’.

[39] *Astrapak* (*supra*) concerned an automatic appeal, in terms of section 18(4)(ii) of the Superior Courts Act 10 of 2013 (‘the SC Act’), against an interim execution order. The interim execution order was itself sought after the respondents applied for leave to appeal, thereby automatically suspending the judgment of the court. In the course of its reasoning the court was called upon to decide what ‘pending proceedings’ meant under section 52 of the SC Act. The respondents in *Astrapak* contended that the application for leave to appeal and the counter-application constituted new proceedings which were thus not ‘pending’ in terms of the SC Act. The court disagreed, finding in effect that the application for leave to appeal and the interim execution order ‘formed a continuation of proceedings’ from the original application.

[40] Based on the authorities and the legal principles referred to hereinbefore there can be no doubt that the Stelzner AJ order must be interpreted in the light of all relevant and admissible content including the circumstances in which the document came into being.

THE WARRANT

[41] It is common cause that the applicants approached the court on the basis that their constitutional rights in terms of section 14 of the Constitution had been violated. Since the execution of further warrants will no doubt have an impact on the self-same constitutional rights it is necessary to refer briefly to the principles applicable to search warrants in our law. Section 14 of the Constitution provides:

‘Everyone has the right to privacy which includes the right not to have –

Their person or home searched;

- a) their property searched;
- b) their possessions seized;
- c) the privacy of their communications infringed.’

See *Minister of Safety and Security v Van der Merwe and Others* 2011(5) SA 61 (CC) at para 35.

[42] Section 35(5) of the Constitution provides that:

‘Evidence obtained in a 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.’

[43] In *Powell N.O. v Van Der Merwe* 2003(5) SA 62 (SCA) the SCA established the following principles concerning the approach of court to search warrants:

‘(a) Because of the great danger of misuse in the exercise of authority under search warrants the courts examined 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 search.
- (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.’

See *Pullen NO and Others v Waja* 1929 TPD 838 at 846-847.

[44] The Constitutional Court has emphasised the importance and strict nature of search warrants as a safeguard of individual rights (See *Magajane v Chairperson, North West Gambling Board* 2006(5) SA 250 (CC) at para 74). In *Minister of Safety and Security v Van der Merwe and Others* (supra) the court held that search warrants must conform to strict

requirements. In *Powel N.O. v Van der Merwe* (supra) the court emphasised that warrants must be intelligible, lawful and cannot serve as excuse for the general ransacking of a person's private life (para 62).

[45] In terms of the Stelzner AJ order the warrants utilised by the SAPS are unlawful and invalid. I am accordingly mindful when interpreting the word 'final determination' in paragraph 4 of the Stelzner AJ order, that the lawfulness of the warrant is now the subject of a legal challenge and that due deference must be paid to the constitutional rights applicants are seeking to protect.

[46] What was the intention of the parties when they entered into the agreement which resulted in the Stelzner AJ order?

[47] In my view the intention behind the agreement between SAPS and the applicants which culminated in the Stelzner AJ order must have been to achieve what has been aptly described by Levitt as:

'A quid pro quo and balancing of the parties respective rights and interest; and

A protection of the applicants' rights particularly having regard to the fact that the applicants' property had already been unlawfully seized pursuant to the unlawful and invalid original search warrants.'

[48] During argument Mr Epstein SC urged me to approach the interpretation of the Stelzner AJ order at two levels, namely purposively and textually and for me to have regard to the connection between paragraphs 4 and 6 of the order, bearing in mind the holistic approach to interpretation now adopted by the courts. See in regard to purposive and textual interpretation *Phillips v SA Reserve Bank and Others* 2013(6) SA 450 (SCA) at para 30; *S v Zuma and Others* 1995(4) BCLR 401 (CC) and *Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others* 1990(1) SA 925(A).

[49] If one considers the content of paragraph 4 of Stelzner AJ's order then it is clear that it deals with the period for which the seized items must be retained. Paragraph 6 in turn deals with when the seized items must be released to SAPS by the execution of the search warrant. There can be no doubt that paragraphs 4 and 6 must be read together to have the same meaning. The logical interpretation of paragraphs 4 and 6 must be that the duty to preserve the seized items must cease at the same time as when the search warrant is executed. There can be no other interpretation.

[50] I agree with Mr Epstein's submissions that the Stelzner order envisages that:

1. The items seized in terms of the unlawful and invalid warrants would be preserved;
2. The respondents would bring a further application by 7 September 2012 for a search warrant pertaining to the seized items;

3. The applicants would be given at least 5 court days' notice if the SAPS brought another application for a search warrant pertaining to the seized items;
 4. This was clearly so, so that the applicants could oppose the granting of the application; and
 5. If any such application for a warrant was granted by a magistrate, the applicants would be given at least five court days 'to challenge' the authorisation by the magistrate in the high court. In the meantime, the seized items would have been preserved.
- [51] The contention by the respondents that the Stelzner AJ order prevents the execution of the search warrant for five court days after the grant of the search warrant cannot be correct for the following reasons:
1. The applicants would never agree to such a burdensome and/or prejudicial situation, considering that they had in fact approached this court to have the original warrants declared unlawful and invalid.
 2. The fact that the agreement declares the original warrants unlawful and invalid.
 3. That considering the nature and complexity of the facts of this particular matter, the period of five days, is unrealistically too short a period, not only to challenge the search warrant, but more so to allow applicants the opportunity to launch and bring to finality a reasonably well-prepared and argued application for an urgent interim interdict.
 4. It could never have been the intention of the parties that SAPS would be allowed to execute the search warrant even before the applicants' challenge to the search warrant was completed.
 5. It is logical that if the search warrant could be executed only to be set aside on appeal, that the applicants would already have suffered severe prejudice and their rights would have been irreparably damaged.
 6. No rational party, particularly the applicant, would agree to an order that would allow the SAPS to execute a warrant, the lawfulness of which was in the process of being challenged and determined by the courts.
 7. Finally, there is the real likelihood that if SAPS did execute the warrant and obtain the preserved property that they would in all likelihood have had the benefit of information which would have been improperly obtained, which would be in conflict with the constitutional principles relating to warrants hereinbefore set out.
- [52] It must follow that the parties, in accordance with their quid pro quo and balancing of their respective rights and interest and to allow for the applicants to protect their rights (i.e. having already had their property unlawfully seized in terms of the original search warrants), must have envisaged that the authorisation of a warrant by a magistrate would not be the end of the matter as far as the applicants were concerned. The effect of the Stelzner AJ order must therefore be interpreted to mean that applicant could challenge the

authorisation by the magistrate in the high court. This is clearly illustrated by the fact that applicants brought the review application against the warrant issued by Magistrate Human.

- [53] I am mindful about the averment that the applicants have over a period of time impeded the investigation by the SAPS by preventing the SAPS from executing the search warrant. The applicants are however entitled to enforce whatever rights they have in terms of the law and the constitution. If I weigh up the prejudice which may be suffered, by either of the parties, I am satisfied that should the SAPS be allowed to execute the warrant and access the information in circumstances where the warrant may ultimately be set aside, the SAPS would be given an unfair and unreasonable advantage over the applicants. This could never have been intended by the parties.

Apart from having to wait for the final outcome of the appeal process, the respondents will not be disadvantaged. The items will remain preserved until the final determination of the matter on appeal. I do not agree, as was contended by Mr Breitenbach SC, that the solution or protection for the applicants, pending the outcome of the petition to the SCA on the review application for leave to appeal, is to make an application for relief by way of a separate interdict pending the determination of an appeal.

CONCLUSION

- [54] On a proper consideration of the Stelzner AJ order ‘final determination’ of an application must therefore be read to mean something, distinct from the mere ‘determination’ of the application. In my view the word ‘final’ in the Stelzner AJ order, can and must on its ordinary meaning only mean to include determination on review or appeal.
- [55] Accordingly I am satisfied that the applicants are entitled to the relief sought in the notice of motion.
- [56] In my view the matter is sufficiently complex to necessitate the use of senior and junior counsel. In accordance with the usual rule the costs, will follow the result.
- [57] In the result the following order is issued:
1. Declaring that on a proper interpretation of paragraph 4 of the Order of this court dated 23 August 2012 (coram Stelzner AJ), the words “final determination of any application” include the outcome of any review of such application, including the final determination of any appeal processes which any of the parties may pursue in respect of any decision given on review, provided such review or appeal processes are brought in terms of the rules of any applicable court;
 2. Declaring that on a proper interpretation of paragraph 6 of the Order of this court dated 23 August 2012 (coram Stelzner, AJ), the first and/or second respondent may not execute the search and seizure warrant issued on 2 May 2014 by the district magistrate, Cape Town, pending the final determination of the review application launched by the applicants in this court on Monday 12 May 2014, including the final determination of any appeal processes

which any of the parties may pursue in respect of any decision given on review, provided such review or appeal processes are brought in terms of the rule of any applicable court; and

3. Directing the first and second respondents to pay the Applicants' costs jointly and severally, the one paying the other to be absolved, including the costs consequent upon the employment of senior and junior counsel.

J F RILEY

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