

SOUTH AFRICA / JUDGMENT

B.K and Another v Minister of Police and Others (22575/2018) [2019] ZAWCHC 91; 2020 (1) SACR 56 (WCC) (21 June 2019)

[2019] ZAWCHC 91

COURT

Western Cape High Court, Cape Town

BEFORE

Bozalek

CASE / FILE NUMBER

22575/2018

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Policy

SOUTH

AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

CASE

NO: 22575/2018

DATE:

2019.06.21

In

the matter between

B

K 1st

Applicant

S

K 2nd

Applicant

and

THE

MINISTER OF

POLICE 1st

Respondent

THE

DIRECTORATE FOR PRIORITY
CRIME
INVESTIGATION 2nd
Respondent
MZIYANDA
MTI 3rd
Respondent

JUDGMENT

BOZALEK, J:

The applicants seek an order against The Minister of Police as the first respondent, The Directorate for Priority Crime Investigation, the second respondent and Mr Mziyanda Mti, as the third respondent, setting aside a search warrant issued by a member of the second

respondent and ordering them to return to them all items seized from the applicants pursuant to the warrant. The application is opposed by all the respondents.

The applicants are a married couple who live in Kenilworth. The first applicant is a general medical practitioner, practising from home, and his wife is a chef. The background to this matter is that on 17 October 2018 members of the second respondent, also known as the Hawks, and to whom I shall refer as such, arrested the first applicant outside the Kenilworth Post Office where he appears to have shortly before despatched a parcel containing two Venteze inhalers to an address in the United States of America.

The Hawks then drove the first applicant in his vehicle to his nearby residence to which they gained entry using his remote control.

The contingent of Hawks spent the next eight or so hours at the dwelling which they searched and from which they removed a host of items. According to a receipt which the Hawks issued these items comprised bags of medicine, envelopes, files, a doctor's case and a variety of electronic devices, including a cell phone, a laptop, computer towers, flash-drives and a CCTV unit. All these electronic devices, save for one, have been returned to the first applicant. But the Hawks first made a mirror image of the data contents and have retained this. The applicants seek the return of the mirror image or images as well.

The one electronic device not returned was the CCTV unit which apparently records all persons entering the property. The first applicant will not furnish the Hawks with the password to access that device and they are holding it whilst they seek to gain access to it by other means. A further items seized was an Audi A4 vehicle in which the first applicant drove to Kenilworth Post Office.

It is common cause that the first applicant did not consent to the entry into and the search of his property nor, obviously, to the removal of the various items which were seized. According to him the search commenced over his objections and later those of his attorney, who insisted that the Hawks first obtain a search warrant. Shortly after 6 p.m. the Hawks did obtain a search warrant.

According to them they held their search and seizure operation in abeyance while waiting on this warrant in the face of the insistence by the first applicant's attorneys that such a warrant was necessary.

Not only was the first applicant arrested but also the second applicant. They appeared in court the following morning to face charges of contravening certain provisions of The Medicines and Related Substances Act 101 of 1965 and were released on bail. These charges are still pending and according to the respondents will comprise charges under the aforesaid Act and the Drugs and Drug Trafficking Act 140 of 1992. Although no charge sheet form part of the papers before me, at various points in the opposing affidavits the respondents make reference to the first applicant's alleged failure to produce a permit entitling him to export specified medicines in terms of Section 22(11)(a) of Act 101 of 1965.

At other points, the first applicant's contention that he has a current valid permit to merely dispense such medicines is also disputed.

In this regard, the respondents' opposing affidavits also reveal that the first applicant's arrest was the culmination of an investigation

following complaints or information that a person, said to be the first applicant, was dispatching large numbers of parcels containing

scheduled medicines to overseas addresses from various post offices in Cape Town. The only return address these parcels had, were P O Box numbers in Johannesburg or Durban which, on investigation, proved to be non-existent with the result that the parcels were not traceable back to their sender.

In a nutshell, the applicants' case is that the search and seizure of their home was illegal in that they did not consent thereto and nor was it authorised by any statutory provisions. Furthermore, they aver, the search warrant which was belatedly relied on, was also unlawful, both for procedural reasons and by reason of flaws in the warrant itself. The applicant's case is furthermore that over and above these considerations the search and seizure was accompanied by egregious conduct on the part of the Hawks. As a result, the applicants aver, all the articles and material seized should be returned to them irrespective of whether it may otherwise constitute evidence in the forthcoming criminal trial.

The respondents' case is, firstly, that having arrested the first applicant in the circumstances which they did, they were entitled in terms of Section 20 and principally Section 23(1)(a) of the Criminal Procedure Act 51 of 1977 to conduct a search and seizure operation at the applicants' residence. Section 23 sets out the circumstances in which articles may be seized upon the arrest of a person. In any event, the respondents' case proceeds, the search and seizure operation was at the insistence of the applicants and their attorneys only conducted after a search warrant was obtained earlier on the evening of the applicants' arrest.

The respondents concede that there were flaws in the warrant, most notably that the charge or charges being investigated were not

specified therein but only the Acts or statutes which I have already referred to and, secondly, the warrant did not specify what articles or documents could be searched for and seized with the result that the Hawks had license to search for and seize anything they considered relevant.

As a backstop, so to speak, the respondents brought a counter-application seeking a so called preservation order in terms of which the Court was asked in terms of Section 172(1)(b) of the Constitution to direct that all those articles not returned to the applicants be preserved in the custody of the Registrar. That provisional order, it was envisaged, would remain in force until the

judgment

in the criminal trial or any appeal arising therefrom. The counter-application was opposed by the applicants.

The affidavits in this matter run to some 300 pages. There are many disputes of fact, particularly in regard to the detail of the search and seizure operation and in particular the alleged egregious conduct on the part of the Hawks. The question of the appropriateness of this court determining the lawfulness of the search and seizure operation rather than in the magistrate's court where the criminal proceedings are pending, was initially not addressed either in the affidavits or in the heads of arguments which were filed. Counsel were accordingly requested to furnish a note concerning whether it was appropriate for this court to determine the applications and if so, why this court should exercise its discretion by granting declaratory relief.

Counsel for both parties, at short notice, produced helpful notes on these aspects referring to and providing leading cases on the subject. The leading case is, I would venture, Thint (Pty) Limited v National Director of Public Prosecutions and Others 2009 (1) SA 1 (CC). That case ultimately concerned the validity of six warrants of search and seizure in terms of Section 29(5) and

(6) of the National Prosecuting Authority Act 32 of 1998, which had been executed. The warrants were challenged in two divisions of the High Court with varying results and were ultimately the subject of a consolidated appeal to the SCA which upheld the warrants.

The applicants then approached the Constitutional Court to have the orders of the SCA set aside. Shortly after execution of the warrants, two of the subjects thereof were indicted to stand trial in the High Court on charges of corruption. The appeal to the Concourt threw up many issues, the first of which was whether it was in the interest of justice to grant leave to appeal. The court ultimately granted leave to appeal. Langa, CJ's reasoning, on behalf of the full Court in this regard, at paragraph 62 and 63, is instructive and I will quote it in full:

"62. The prosecution argues that regardless of whether the applicants arguments bear reasonable prospects of success, it is not in the interest of justice to grant leave to appeal. It bases this submission on several grounds. First, this case concerns "justice in theory" not "justice in fact", because the applicants have made no attempt to establish that they have suffered any actual

prejudice, despite having had ample opportunity to do so. Second, the applicants launched these proceedings for one purpose only, namely to prevent the state from using the seized items as evidence against Mr Zuma and the Thint companies in a subsequent criminal trial. They thereby are trying to circumvent the application of Section 35(5) of the Constitution, which is the way the Constitution chooses to admit unlawfully obtained evidence. This is particularly invidious, they argue, given that the evidence is incriminating of Mr Zuma and the Thint companies, and for that reason it is of great public importance that the truth emerges. Third, this form of preliminary litigation unduly delays the commencement of criminal trials and, therefore, should be strongly discouraged. The trial court, rather than preliminary courts, is best placed to balance the varying public and private interests at stake, namely the public and private interests in the emergence of truth, the applicants' interests in their privacy and property and the accused's persons fair trial rights. Leave to appeal

should, therefore, be refused to allow the trial court to do so in this case.

63. There is certainly a great deal of merit in these arguments but I do not agree that it would be in the interest of justice for leave to appeal to be refused in these applications. There are several reasons for my conclusion. The first reason is that were this court to refuse leave to appeal, the Supreme Court of Appeal decision that the warrants and searches and seizures were lawful, would stand and would in all probability bind any subsequent trial court. It would follow that the seized evidence would have been lawfully obtained and Section 35(5) would have no application. The relevant competing interests would not fall to be balanced at all."

The Chief Justice when on to state in paragraph 65:

"65. I nevertheless do agree with the prosecution, that this court should discourage preliminary litigation that appears to have no purpose, other than to circumvent the application of Section 35(5). Allowing such litigation, will often place prosecutors between a rock and a hard place. They must, on the one hand, resist preliminary challenges to their investigations and to the institution of proceedings against accused persons. On the other hand they are simultaneously obliged to ensure the prompt commencement of trials. Generally, disallowing such litigation would ensure that the trial court decides the pertinent issues, which it is best placed to do, and would ensure that trials starts sooner rather than later. There can be no absolute rule in this regard, however. The court's doors should never be completely closed to litigants. If, for instance, a warrant is clearly unlawful, the victim should be able to have it set aside promptly. If the trial is only likely to commence far in the future the victim should be able to engage in preliminary litigation to enforce his or her fundamental rights.

But in the ordinary course of events and where the purpose of the litigation appears merely to be the avoidance of the application of Section 35(5) or the delay of criminal proceedings, all courts should not entertain that. The trial court should then step in and consider together the pertinent interests of all concerned. If that approach is generally followed, the state would be sufficiently constrained from acting unlawfully by the application of Section 35(5) and by the possibility of

civil and criminal liability. The nature and degree of unlawfulness of the search warrant, are important factors to be borne in mind for the purposes of a decision under Section 35(5). It is for this reason that the same court should consider the unlawfulness of the warrant and its impact."

Applying these principles to the present matter, one notes firstly, that the effect, if not the purpose of the relief sought by the applicants, would be to remove from the court hearing the criminal trial any opportunity to weigh up the competing private and public interests in admitting any of the evidence found and seized in the search and seizure operation, if indeed it was illegally obtained. Secondly, no court has yet made a determination on the legality of the search and seizure operation and thus the trial magistrate will not be constrained by the finding of any other court in his or her judgment on this issue and the admissibility of any evidence so procured.

There are further considerations why the issues raised in this application are best left to the trial magistrate. Certainly as regards the detail of the search and seizure operation and the alleged egregious conduct on the part of the Hawks, there are numerous disputes of fact; to mention but a few, whether the first applicant was subjected an assault when the Hawks gained entry to the premises; whether the search commenced before the warrant was obtained and whether the applicants' 14 year old daughter was treated by the Hawks in a manner that traumatised her.

Resolving these disputes of fact through the hearing of evidence in any trial-within-a-trial relating to the admissibility of evidence, is preferable to determining them on affidavit, as the applicants would have this court do. Any findings by this court could, quite conceivably, be the subject of an appeal or even a series of appeals, the effect of which will be to further delay the criminal trial. It is also not clear at this stage whether the state will, indeed, seek to use any of the material it obtained in the search and seizure operation against the applicants. It is conceivable that it might not, in which event there would have been limited point in this court pronouncing on the legality of the search and seizure operation at this stage.

What must also be taken into account is the desirability of the trial magistrate presiding over the criminal trial without constraints in the form of pronouncements from this court, which touch on the question of what evidence is admissible before him or her.

The judgment in *Thint*, although landmark in the sense that it was a post-constitutional examination of the principles to be followed when higher courts are presented with challenges to search warrants before the admissibility of evidence so obtained is weighed in lower court proceedings, by no means adopted a novel approach. Sixty years ago in *Wahlhaus and Others v Additional Magistrate Johannesburg and Another* 1959 (3) SA 113 (AD), the Appellate Division confirmed the general approach later followed in *Thint* by the Constitutional Court. In *Wahlhaus* it was held:

"While a superior court having jurisdiction in review or appeal will be slow to exercised any power, whether by mandamus or otherwise, upon the uninterminated of course of criminal proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result, or where justice might not by other means be

attained. In general, however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal, will ordinarily be available."

In that matter, the appellant sought an order reversing the trial magistrate's decision in criminal proceedings not to grant an exception to the charge and to declare the indictment invalid.

Various other post-constitutional matters were raised in argument and warrant some consideration. Mr King, who appeared on behalf of the applicants, placed some reliance on *Mineral Sands Resources v Magistrate for the District of Vredendal* [2017] 2 ALL SA 599 (WCC). Rogers, J was faced with a review of a search warrant issued in terms of Section 21 of the Criminal Procedure Act and where he ultimately pronounced on its validity, but issued a preservation order in respect of the items seized pursuant to the warrant. Rogers, J found that the warrant was invalid for various reasons and declared its execution unlawful. Discussing

the request by the respondents for a preservation order, which ultimately he granted, the learned judge stated as follows regarding

inappropriate preliminary litigation at paragraph 215:

"I did not understand Mr Paschke to press for the dismissal of the application as constituting inappropriate preliminary litigation.

As Langa, CJ observed in *Thint*, para 65, there is no absolute rule. He said that if a warrant is clearly unlawful, the victim should be able to have it set aside promptly. If the trial is only likely to commence far in the future, the victim should be able to engage in preliminary litigation to enforce its fundamental rights. The litigation which the courts should not entertain, is litigation having as its purpose to avoid the application of Section 35(5) of the Constitution or to delay criminal proceedings. This is not the case here. MSR has not yet been charged. No criminal trial is imminent. MSR has raised points of substance. The issue regarding the inspector's mandates requires resolution in any event."

The factors in the present matter are somewhat different. The applicants have been criminally charged and the criminal trial is in the offing. Significantly furthermore, the applicants resisted the notion of a preservation order being made which will leave over the question of the admissibility of evidence seized for later determination. On their behalf it was contended that all material seized must be returned to the applicants, even if this placed them in a position where they could destroy it and render questions of its admissibility moot. There are, moreover, further indications that the purpose of the present application may well be to avoid the application of Section 35(5) of the Constitution. I will refrain from enumerating those and rather leave the trial magistrate to draw his or her own conclusions in this regard.

As far as the search warrant is concerned, there are indeed clear flaws in it, not least the failure to set out the charges being

investigated and to specify the documents or articles which the Hawks could search for and seize. Ms Williams, on behalf of the respondents conceded these flaws, although she stopped short of an outright concession that the warrant was invalid. However, even if this court were to make such a finding, there are other grounds which might render the search seizure operation lawful. Most notably, the provisions of Section 23(1)(a) which permits a peace officer, on the arrest of any person, to search such person and seize any article which is found "in the possession of or in the custody or under the control of the person arrested".

Whether the provisions of Section 23(1)(a) could be used to justify a search of the first applicant's residence, when he was arrested elsewhere, depends on how liberally one interprets the section's reference to items "in the custody or control of the arrested person", i.e. does this extend to sites removed from where the person is arrested. I venture no opinion on this issue, but note that a narrow interpretation, i.e. the search being confined solely to the person or immediate surroundings of where that person is arrested, is not self-evident.

In *Goldberg v DPP* 2014 (2) SACR 557 (WCC) at para 36, Rogers, J, dealing with a situation not entirely dissimilar to the present matter, stated as follows:

"In the related civil proceedings, a submission was made on behalf of the appellant that Section 23(1) of the CPA only permits a peace officer to seize items found on the person of the arrested individual. I see no reason to give Section 23(1)(a) such a narrow meaning. The Section refers to an item found "in the possession of or in the custody or under the control of" the arrested person. Clearly an item can be in a persons' possession or in his custody or under his control without being on his person."

The point is, however, that any setting aside of the search warrant by this Court will still not bring it directly to the point where it must consider whether a preservation order should be granted. Other legal bases for a lawful search and seizure operation may well arise and there is, in my view, no compelling reason why these issues should not be addressed by the trial magistrate in the event that the state should seek to introduce as evidence any material seized in the search and seizure operation conducted on 18 October 2018.

One final consideration to be weighed in considering whether this Court should determine, in these proceedings, the lawfulness of the search and seizure operation or the warrant, is the principle that a preservation order should not be granted where an applicant

identifies specific items, the seizure of which constitutes a serious breach of privacy that affects the inner core of the personal or intimate sphere, or where there has been some particular egregious conduct in the execution of the warrant.

It is so that this Court is not at the stage of considering whether to grant a preservation order, since I am inclined to leave that issue to the determination by the trial court, should it arise in the trial. However, if I follow this approach, in effect the evidence found and seized is preserved pending the trial. Thus it is, in my view, not inappropriate to consider the factors just mentioned. As I have indicated, the issue of egregious conduct is best determined through the mechanism of a trial-within-a-trial, given the many disputes of facts in this area.

As regards the seriousness of the breach of privacy. It is so that the applicants' residence was searched, but the indications are that this was limited to the first applicant's medical practice and that what was seized was primarily medicines, data and records which presumably relate thereto or to medicines being dispensed. The applicants' furnished relatively little information regarding the material seized, although the first applicant did refer to "hardcopy patient files, plus 30 yellow files containing personal documents". The first applicant describes the material seized as "all the records and supplies that I depend upon to conduct not just my practice, but my wife's business".

It is common cause that to the extent that this material was stored on any electronic device these have been returned to the applicants.

Given the relatively paucity of these descriptions, I consider that no particular convincing case has been made out for the Court to determine at this stage the lawfulness of the warrant or the search and seizure operation generally, rather than leaving this to the trial court should these issues indeed arise in the trial.

One final argument requires addressing, namely, Mr King's assertion that the Court must intervene, since the trial magistrate lacked the powers to restore the status quo ante prior to the search and seizure operation should he or she determine that to be the course to be followed. I do not consider that this argument has merit. Sections 31, 31, 33 and in particular 34 of the Criminal Procedure Act make extensive provisions for the disposal of articles which have been seized, either where criminal proceedings have or have not been instituted. Specifically, Section 34(1) authorises the judicial officer, at the conclusion of criminal proceedings, to order that seized articles be returned to the personal persons from whom they were seized if such person or persons may lawfully possess such articles. With the benefit of their legal representation, I see no reason why the applicants should not be able to have the material seized from their residence and not thus

far returned, restored to them immediately upon conclusion of the trial should they be entitled to this in law.

For all these reasons, I consider that the applicants have failed to satisfy me that this Court should intervene at this stage and, even before the criminal proceedings proper have commenced, set aside the search warrant and order the return of all those items seized and not yet restored to the applicants. It follows that the issue of a preservation order does not arise and that as a whole, the application falls to be dismissed.

This leaves the question of costs. On behalf of the respondents, Ms Williams contended that the respondents should be awarded their costs in the event that the main application were to be dismissed. I should mention I see no need to deal with the counter-application, since although not expressly described as such, it is conditional upon the main application succeeding.

Mr King, on the other hand, disagreed, citing the fact that the applicants came to court to vindicate their constitutional rights

and, on the Biowatch principle, should not be mulcted in costs, even though unsuccessful. He also relied on the fact that the application had achieved some

success in that the respondents have now undertaken to return to the first applicant the Audi A4 vehicle which he had driven to the Kenilworth Post Office shortly prior to his arrest and which had been seized by the Hawks and held by them since 18 October 2018.

I should add that the basis upon which this seizure was justified by the respondents initially, was that it could in due course be forfeited to the state in terms of Section 35 of the Criminal Procedure Act as being a vehicle "used for the purpose of or in connection with the commission of the offence in question". After I expressed some scepticism during argument of the basis for any such forfeiture, given the purely incidental use of the vehicle

in the commission of any offence which may be proved, Ms Williams received instructions to tender the return of the vehicle to the first applicant. This, I consider, was a most sensible instruction, one which should never have been necessary in the first place.

It is indeed so that the applicants have sought to assert important constitutional rights to privacy and the right not to be subjected to unlawful search and seizures. There are clear indications of flaws in the search warrant at least partly relied upon by the Hawks. No finding has yet been made that the search and seizure operation was lawful or that evidence derived therefrom may be used against the applicants. The applicants have succeeded, indirectly at least, in having their motor vehicle restored to them by virtue of this application.

Taking these and other relevant factors into account, I consider that the most appropriate outcome should be that each party bear their own legal costs.

In the result the following order is made:

1. The application is dismissed.
2. There will be no order as to costs.

BOZALEK, J

JUDGE OF THE HIGH COURT

DATE: 21 JUNE 2019

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