

SOUTH AFRICA / JUDGMENT

Buys and Another v Minister of Police and Another (2339/2016) [2017] ZANCHC 45 (21 April 2017) [2017] ZANCHC 45

COURT

Northern Cape High Court, Kimberley

BEFORE

Snyders

CASE / FILE NUMBER

2339/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(Northern

Cape Division, Kimberley)

Saakno / Case number: 2339/2016

Datum

aangehoor / Date heard: 23

/ 02 / 2017

Datum beskikbaar / Date available: 21

/ 04 / 2017

In

the matter between: CHARLES
BUYS
1ST
Applicant
ANDRIES
BUYS
2ND
Applicant
CONRAD
BUYS
3RD
Applicant
GORDON
BUYS
4TH
Applicant
LOUIS
MOSSEL
5TH
Applicant
and
THE
MINISTER OF POLICE
1ST
Respondent
HEAD
OF HAWKS, SA POLICE SERVICE
2ND
Respondent
Coram: Snyders
AJ

JUDGMENT

SNYDERS, AJ

1. This matter came before me as an opposed motion for the return of various articles to the applicants seized by members of the Respondents in terms of s 20 (read with ss 21 and 22) and s 31 (1) (a) of the Criminal Procedure Act, 51 of 1997 (“the CPA”).
2. The 1st applicant is Charles Buys (C Buys). The 2nd to 4th applicants are his sons, Andries Buys (A Buys), Conrad Buys and Gordon Buys (G Buys), respectively. The 5th applicant is Louis Mossel (L Mossel). C Buys and his sons resided at [...] H., Windsorton and L Mossel resided at [...] V. B. S., Warrenton.
3. The 1st and 2nd respondents are the Minister of Police (“the Minister) and the Head of the Hawks, SA Police Service (“the Head of the Hawks”).

4. Before going any further, the following preliminary issues must be dealt with:

4.1 The applicants abandoned any relief against the Head of the Hawks as no such entity exists;

4.2 The affidavit by the applicants' legal representative dated 16 February 2017 was disallowed at the hearing of the matter. It was irregularly filed by attaching same to the applicants' heads of argument. The Minister objected to the handing up of same as they were not ad idem with the contents thereof. The applicants then abandoned the relief to hand up said affidavit;

4.3 The Minister applied to hand up a search and seizure warrant for House [...], H. dated 26 July 2016. In his argument, the Minister intimated that he had neglected to attach same to their papers as the applicants had failed to refer thereto in the Founding Affidavit. The applicants objected to the handing in thereof. The applicants pointed out the references made in the Founding Affidavit to the search and seizure warrant of 26 July 2016 at House [...], H.. The Minister made reference thereto in three separate paragraphs of his opposing affidavit and at no stage indicated that there was a search and seizure warrant. The applicants further objected as the document was not the original and did not follow the best evidence rule. The Minister argued that the original document was in the police docket and was required for criminal proceedings. It is trite that a party in application proceedings stand and fall on their papers. The Minister was forewarned in the Founding Affidavit of the articles seized on 26 July 2016 at House [...], H.. He thus had the opportunity to adduce this evidence in their opposing affidavit and failed to do so. Consequently I find that the search and seizure warrant dated 26 July 2016 for House [...], H. was not properly placed before me by the Minister and I will have no regard thereto.

5. It was not disputed that the officials who executed the search and seizure warrants were police officials acting in the course and scope of their employment in executing their duties on behalf of the Minister. The Minister seized the following articles from:

5.1 C Buys at [...] H. on 29 July 2016:

Tata Bus, Quantum taxi, Chev Corsa Bakkie, Trailer; Ford Focus 1.8 motor vehicle, Nokia Cellphone;

5.2 A Buys at [...] H. on 29 July 2016:

Nokia Cellphone; Blackberry Cellphone, Laptop; BMW 325 CI motor vehicle;

5.3 Conrad Buys at [...] H. on 26 July 2016:

Nokia cellphones and Air Max sneakers;

5.4 G Buys at 2084 Holpan on 29 July 2016:

Lounge suite, Samsung curve television, television stand, 2 beds, microwave and Samsung dvd speakers;

5.5 L Mossels at [...] V. B. S., Warrenton Station on 09 September 2016:

Black Opel Corsa.

6. Consequently, the following provisions of the CPA are applicable: secs 20, 21, 22 and 31 (1)
(a). S 20 deals with the articles that are susceptible to seizure. S 21 deals with the power of the Minister to search and seize with a warrant and

s 22 deals with the power of the Minister to search and seize without a warrant. Section 31 sets out the disposal of articles where no criminal proceedings are instituted.

7. S 20 stipulates that items may be seized if on reasonable grounds it is believed that:

7.1 Such article was used in the commission or suspected commission of an offence;

7.2 Such article may afford evidence of the commission of an offence;

7.3 Such article is intended to be used in the commission of an offence.

8. S 21 stipulates that whenever possible, a warrant must be obtained from a Magistrate or a Justice of the Peace before a search is conducted. The search and seizure warrant under this section will be granted where it appears to such Magistrate or Justice of the Peace from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or upon any person or upon or at any premises within his area of jurisdiction; or such article in the possession or under the control of any person or upon or at any premises is required in evidence of such proceedings. A search and seizure warrant was presented by the Minister for the seizure of G Buys' articles. Prima facie, this search and seizure was lawful.

9. S 22 sets out the powers of the Minister to conduct searches without a warrant. There are two such instances under this section:

9.1 If the person concerned consents to the search and seizure; or

9.2 If the Minister on reasonable grounds believes that the search warrant will be issued under s 21 or s 25 (s 25 deals with the power of the Minister to enter premises in connection with State security or any offence). The second leg of this enquiry must be the reasonable belief that the delay in obtaining the search warrant will defeat the object of the search.

10. C Buys, A Buys, G Buys, Conrad Buys and L Mossel's articles were seized by the Minister without a warrant. The question is thus whether these seizures were lawful or not and if not, whether the items should be returned. The further question is whether s 31 of the CPA finds application herein and the articles subsequently returned in terms thereof.
11. S 31(1) (a) of the CPA governs the procedure for the disposal of articles if no criminal proceedings are instituted. Thus if it appears that such article is not required at the trial for purposes of evidence or for purposes of an order of court, the article shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess it.

12. The test under both secs 21 and 22 of the CPA is whether there was a reasonable belief that the seized articles were used in the

commission of an offence or will provide evidence of the commission of an offence. The onus rested on the Minister to prove that reasonable grounds existed. Reasonableness should be assessed objectively. The grounds

justifying the seizure must be based on reasonable grounds, which grounds must have existed at the time when the Minister acted and not only facts which appear at a later stage.[1]

13. The reasonable belief required by the Magistrate or Justice of the Peace in terms of s 22 of the CPA must similarly be based on objective facts provided by the Minister. If no such objective facts for the reasonable belief were disclosed, the Minister was not entitled to seize the articles in question and same must be returned to the applicants if they may be in lawful possession thereof. [2]
14. Thus I accept that if the reasonable belief by the Minister is rebutted by the applicants, then the seizure may be set aside and the property be returned to the applicants.
15. The reasonable belief offered by the Minister is that that some of the articles were instrumental to the commission of theft and money laundering and the rest may afford evidence to the commission of the alleged crime. The alleged crime relates to R37 million that was stolen on 06 May 2016. The Minister followed certain leads that led him to the applicants whose articles were seized and

the applicants arrested. The applicants were granted bail and the investigation proceeded. Investigations revealed that none of the applicants had sufficient available funds to purchase the articles and that:

15.1 C Buys paid R65 400.00 in cash for a Quantum taxi motor vehicle purchased after 06 May 2016, and paid an instalment of R11 500.00 in cash;

15.2 C Buys paid R365 000.00 in cash for a Quantum Taxi;

15.3 C Buys paid R122 816.41 in cash for a Corsa motor vehicle on the same day that he paid for the Quantum Taxi;

15.4 C Buys paid R10 499.00 in cash for a trailer;

15.5 C Buys has a Ford Focus financed with Nedbank with a monthly instalment of R3 263.40, believed to be an instrument in the commission of a crime.

15.6 A Buys paid 3 cash deposits for a BMW 325i (amount undisclosed);

15.7 L Mossel purchased an Opel Corsa for R75 000.00 after the commission of the offence.

16. The objective facts show that cash amounts of approximately R810 000.00 were paid by the applicants for vehicles after the commission of the offence. The applicants must then rebut the basis for this reasonable belief.
17. The applicants alleged that the Quantum taxi seized by the Minister is a 2011 model which was purchased under financing. C Buys attached the financial statement thereto. The Minister alleged that they attached a 2016 model but neglected to attach the SAP 13 to that effect. However, applying the test laid down in *Plascon-Evans*[3], I must take the Minister's version as well as those aspects of the applicant's version that are not in dispute. If on all probabilities the preponderance points to the version of the applicant being weak, the applicant should fail. On his own version in the replying affidavit, C Buys alleged that he merely attached the statement to show how he did purchases. The preponderance of probabilities point in favour of the Minister.
18. A Buys alleged that the BMW 325 CI was a 2006 model which he purchased with money he received from the sale of two other vehicles. The Minister could not find any evidence of the sale of these vehicles on E-Natis system.
19. I find there to be sufficient objective information to constitute a reasonable belief for the seizure of the articles. C Buys indicated that he has a contract with the Department of Transport from which he earned R30 000.00 per month. No other explanation is provided to successfully rebut the onus that was discharged by the Minister. No account is given for purchases of approximately R810 000.00.
20. I align myself with the finding in *Choonara v Minister of Law + Others*[4] that s 20 of the CPA should be read adjunct to s 31 as both sections are aimed at facilitating the investigation and proof of the link between the articles and the offence, but also that the State must act with reasonable expedition in instituting criminal proceedings. Thus the articles must be returned to the applicants where time taken to investigate becomes so extended that it constitutes an act oppressive of the applicants' rights. There must also not be any real prospect of further advance by the State in the investigation. Where the Minister has not shown that applicants cannot legally possess the articles, same must be returned to the applicants.
21. The applicants bear the onus to show that there are no criminal proceedings pending and that there are no prospects of criminal proceedings being instituted in the foreseeable future. Unfortunately, the applicant failed to discharge this onus on a factual basis on the papers. An assertion was made from the Bar by the parties that the matter was provisionally withdrawn in the Magistrate's Court. The applicant further only included a "last thought" paragraph in the founding affidavit indicating that the Minister is not entitled to keep the articles as they cannot afford evidence of the commission of the crime,
22. Distinguishing this matter from the *Choonara*[5], *Venter*[6] and *Dookie*[7] matters is that no criminal proceedings had been instituted in those matters; alternatively there were no proceedings to be instituted in the foreseeable future. It is clear that a long period to finalise

the investigation must be coupled with the fact that no proceedings had been instituted or there are no prospects of proceedings being instituted. Therefore, although the Minister cannot hold the articles seized for an indefinite period of time whilst awaiting the finalisation of the investigation, proceedings herein had in fact been instituted against the applicants.

23. Therefore, the applicants cannot find any shelter in s 31 of the CPA. Had the applicant brought the application under s 31 after the case was withdrawn, they may have had better success. As it is, their reliance on s 31 is stillborn and was not sustained in their papers.
24. Ordinarily the costs should follow the result. I, however, find that the Minister cannot be awarded costs due to their failure to fully address crucial allegations in their opposing affidavit and attempting to supplement their case by handing up documents during argument. Neither is the applicant entitled to costs based on the irregular filing of an affidavit attached to heads of argument, their poorly drafted papers and joinder of a non-existent respondent. This does not lend itself to a cost order in their favour. This is thus an appropriate matter in which neither party is entitled to costs.

Wherefore the following order is made:

1. The application is dismissed.
2. Each party is to pay their own costs.

JA SNYDERS

ACTING JUDGE

On behalf of Applicant: Adv Schreuder (On instructions of Rick Ishmael Attorneys)

On behalf of Respondent: Ms Phakama (State Attorney)

[1] See *Mnyungula v Minister of Law & Order & Another* 2004 (1) SACR 219 at para 12

[2] Compare *Marvanic Development (Pty) Ltd & Another v Minister of Safety & Security & Another* 2007 (3) SA 159 (SCA) at para 9

[3] *Plascon-Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd* 1984

(3) SA 623 (A)

[4] 1992

(1) SACR 239 (W) at 246 a - c

[5] At 245 E- F

[6] *Venter v Minister van Polisie* 2014 JDR 0373 (GNP) at p 2

[7] Dookie v Minister of Law & Order and Others 1991 (2) SACR 153 (d) at p 155 para 4.3

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