

SOUTH AFRICA / JUDGMENT

Mogale and Others v Minister of Safety and Security and Others (48454/2008) [2015] ZAGPPHC 953; 2016 (2) SACR 682 (GP) (17 September 2015)

[2015] ZAGPPHC 953

COURT

North Gauteng High Court, Pretoria

BEFORE

E Bertelsmann, S Mothle, F.G. Preller

CASE / FILE NUMBER

48454/2008

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IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG NORTH DIVISION,

PRETORIA

Appeal Case No. 151/12

CASE NO: 48454/2008

DATE: 17 SEPTEMBER 2015

In the matter between: DAISY DIBUSENT PAULINAH
MOGALE.....First
Appellant
YOUNG STARS TRADERS
CC.....Second
Appellant
ELIZABETH
MPUTHLANE.....Third
Appellant
SIMON
MPHUTLANE.....Fourth
Appellant
And
MINISTER OF SAFETY AND
SECURITY.....First
Respondent
THE COMMANDING OFFICER OF THE
COMMERCIAL BRANCH, HIGH PROFILE INVESTIGATIONS
(SPECIALISED COMMERCIAL CRIME
UNIT).....Second
Respondent
JAN JUDEEL Third Respondent
THE HONOURABLE MAGISTRATE
MUDAUFourth
Respondent
THE HONOURABLE MAGISTRATE
NIEMAND.....Fifth
Respondent

JUDGMENT

1. The first appellant is Daisy Dibuseng Paulinah Mogale, an adult businesswoman residing at [1.....] [C.....] [C.....], [H.....], [D.....], [R.....], Gauteng.
2. The second appellant is Young Stars Traders CC, a close corporation represented by the first appellant, duly incorporated and registered according to the Close Corporations Act of South Africa, with registered office at 2nd Floor Liberty Life Gardens, 10 South Boulevard, Bruma, Johannesburg, Gauteng.
3. The third appellant is Elizabeth Mputhlane, and adult female residing at no [5.....] [B.....] [S.....], [C.....], North West
4. The fourth appellant is Simon Mputhlane, an adult male residing at no [5.....] [B.....] [S.....], [C.....], North West.
5. The first respondent is the Minister of Safety and Security, (now the Minister of police), cited in his official capacity c/o the State Attorney, SALU Building, Thabo Sehume Street, Pretoria.

6. The second respondent is the Officer Commanding, Commercial Branch, High Profile Investigation I(Specialised Commercial Crime Unit), Johannesburg of 64 Eloff Street, cnr Commissioner Street, Johannesburg.
7. The third respondent is Jan Judeel, at the time of the institution of this matter a captain of the Johannesburg Commercial branch high profile Investigations (Specialized Commercial Crime Unit) of 64 Eloff Street, cnr Commissioner Street, Johannesburg.
8. The fourth respondent is Magistrate Charles Munenzhe Mudau, a Senior Magistrate stationed at Oberholzer, Carletonville, cited in his official capacity.
9. The fifth respondent is Magistrate Abraham Johannes Pelser Nieman, an Additional Magistrate stationed at the Johannesburg Magistrates' Court, cited in his official capacity.
10. The appellants sought an order setting aside the warrants issued to authorize search and seizure operations in respect of the residence of the third and the fourth appellants and the second appellants registered office; directing the first, second and third respondents to return all the documents, data and other property seized pursuant to the search and seizure warrants, including all copies and reproduction thereof; interdicting the first three respondents and any person or agent acting on their behalf from using the data, property or documents seized, or any copy thereof for any purpose whatsoever. In addition the appellants sought

a costs order against the first three respondents.

11. The court a quo dismissed the application, but granted leave to appeal to this Court. The application and the appeal was beset by delays, the last of which occurred because this Court requested further heads of argument and thereafter encountered challenges in finalising the judgment because of the overcrowded state of the roll of this Division. The delay is regretted, while the Court is indebted to the parties' legal representatives for their assistance.
12. This matter had its genesis in June 2008, when the third respondent, at that stage a captain in the Johannesburg Commercial Branch, applied for two search warrants in terms of section 21 of the Criminal Procedure Act, 51 of 1977, ("the CPA") for searches for documents and electronic storage devices of premises known as [5.....], [B.....]

[S.....], [C.....] and 2nd Floor, Liberty Life Gardens, 10 South Boulevard, Bruma, Johannesburg. The search

warrants were alleged to be required to investigate the affairs of the appellants and to obtain proof of the omission of offences related to theft, fraud and the illegal conduct of a pyramid scheme.

13. As the premises were situated in two different magisterial districts, two warrants were required. They had to be issued by magistrates appointed for the respective districts. The issuing of search warrants is statutorily controlled. Section 21 of the CPA reads as follows:

21 Article to be seized under search warrant

- (1) Subject to the provisions of sections 22, 24 and 25, an article referred to in section 20 shall be seized only by virtue of a search warrant issued-
 - (a) by a magistrate or justice, if it appears to such magistrate or justice 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
 - (b) by a judge or judicial officer presiding at criminal proceedings, if it appears to such judge or judicial officer that any such article in the possession or under the control of any person or upon or at any premises is required in evidence at such proceedings.
 - (2) A search warrant issued under subsection (1) shall require a police official to seize the article in question and shall to that end authorize such police official to search any person identified in the warrant, or to enter and search any premises identified in the warrant and to search any person found on or at such premises.
 - (3)
 - (a) A search warrant shall be executed by day, unless the person issuing the warrant in writing authorizes the execution thereof by night.
 - (b) A search warrant may be issued on any day and shall be of force until it is executed or is cancelled by the person who issued it or, if such person is not available, by a person with like authority.
 - (4) A police official executing a warrant under this section or section 25 shall, after such execution, upon demand of any person whose rights in respect of any search or article seized under the warrant have been affected, hand to him a copy of the warrant.
14. The search of premises and persons constitutes a significant invasion of the privacy of the person involved and the occupants of the premises affected thereby. The conditions under which a warrant may be issued, and the terms thereof, must therefore be interpreted strictly to ensure that only the minimum invasion of rights required to combat the relevant crime under investigation is authorised: *Toich v The Magistrate, Riversdale and Others* 2007 (2) SACR 235 (C); *Zoeko System Managers CC v Minister of Safety and Security and Others* 2013 (2) SACR 545 (GNP); *Minister of Safety and Security and Others v Bennett* [2008] 2 All SA 26 (SCA); (2009 (2) SACR 17 (SCA); *Thint (Pty) Ltd v National Director of Public Prosecutions and Others*; *Zuma and Another V National Director of Public Prosecutions and Others* [2008 (12) BCLR 1197; *Minister of Safety and Security v Van der Merwe and others* 2011 (2) SACR 301 (CC).

15. In the last-mentioned decision the Constitutional Court underlined that the invasion of rights by the application, the issue and the execution of search warrants must be limited:

Safeguards are therefore necessary to ameliorate the effect of this interference. This they do by limiting the extent to which rights are impaired. That limitation may in turn be achieved by specifying a procedure for the issuing of warrants and by reducing the potential for abuse in their execution. Safeguards also ensure that the power to issue and execute warrants is exercised within the confines of the authorising legislation and the Constitution, (per Mogoeng Mogoeng J as he then was, writing for the unanimous Court.)

16. The procedure specified for the issuing of warrants contained in section 21 CPA includes the prescript that a warrant may only be issued if information justifying the resultant interference with the affected persons' and institutions' rights is presented to the justice or magistrate under oath. The imposition of the condition that evidence should be given under oath ensures that such evidence is reliable: *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (4) SA 222 (CC); 2009 (2) SACR 130 (CC); 2009 (7) BCLR 637 (CC), at par [165], An affidavit must be signed and sworn to before a Commissioner of Oaths, as set out in the Justices of Peace and Commissioners of Oaths Act 16 of 1993:
 2. (1) Before a commissioner of oaths administers to any person the oath or affirmation prescribed by regulation 1 he shall ask the deponent— whether he knows and understands the contents of the declaration;
 - (b) whether he has any objection to taking the prescribed oath; and (o) whether he considers the prescribed oath to be binding on his conscience.
 - (2) If the deponent acknowledges that he knows and understands the contents of the declaration and informs the commissioner of oaths that he does not have any objection to taking the oath and that he considers it to be binding on his conscience the commissioner of oaths shall administer the oath prescribed by regulation 1 (1).
 - (3) If the deponent acknowledges that he knows and understands the contents of the declaration but objects to taking the oath or informs the commissioner of oaths that he does not consider the oath to be binding on his conscience the commissioner of oaths shall administer the affirmation prescribed by regulation 1 (2).
3. (1) The deponent shall sign the declaration in the presence of the commissioner of oaths.
 - (2) If the deponent cannot write he shall in the presence of the commissioner of oaths affix his mark at the foot of the declaration: Provided that if the commissioner of oaths has any doubt as to the deponent's inability to write he shall require such inability to be certified at the foot of the declaration by some other trustworthy person,

4. (1) Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration.
- (2) The commissioner of oaths shall—
 - (a) sign the declaration and print his full name and business address below his signature; and
 - (b) state his designation and the area for which he holds his appointment or the office held by him if he holds his appointment ex officio.
- 5.
6. A commissioner of oaths shall not charge any fee for administering any oath or affirmation or attesting any declaration.
7. (1) A commissioner of oaths shall not administer an oath or affirmation relating to a matter in which he has an interest.
17. The third respondent applied for the issuing of the search warrants by presenting what purported to be an affidavit in which he set out the grounds upon which the granting of the warrants was justified in the interests of the investigation and the prevention of criminal activities. He alleged that the documents and articles to be sought and attached related to the investigation and prosecution of a pyramid scheme and of fraud and theft.
18. His information as related in the affidavit was based upon facts communicated to him by others. To confirm the correctness thereof he attached an affidavit by a potential witness for the prosecution, Ms Mpoti Susan Macewa, who was allegedly a victim of the pyramid scheme, said to be operated by or through the applicants. This affidavit had been signed and sworn to before the third respondent as commissioner of oaths. The third respondent was the investigating officer. The fourth and fifth respondents issued warrants on the strength of this affidavit, presented to both of them. The premises identified therein were searched and a large number of documents and electronic storage devices were confiscated.
19. The appellants launched an application to have the warrants set aside and for the further relief set out above. The warrants were attacked on a variety of grounds, of which the only one of substance appeared to be the attack upon the manner in which the warrants were obtained, in particular the question whether the third respondent's affidavit was complete and regular when it was presented to the two magistrates. Both the fourth and the fifth respondent admit that they did not realize that there were errors in the affidavit they relied upon to authorize the search warrants.
20. It is not in dispute that the affidavit does contain at least a significant error if it does not display a fatal irregularity. At least one copy of the affidavit that was made available to the applicants' attorneys at their request by the third respondent was not signed at all by the deponent. The third respondent explains in his answering affidavit that, when the appellants' attorneys requested all the documentation relating to the application for the

warrants he included the unsigned copy by mistake. He is adamant that the affidavit presented to the fourth and fifth respondents was indeed signed. What he does not explain, however, is how the commissioner of oaths' confirmation of the proper

deposition of the affidavit and the taking of the oath in her presence came to be attached to an unsigned affidavit.

21. This aspect is not the only issue that arises in respect of the preparation of the affidavit. The commissioner of oaths before whom the affidavit was allegedly signed and sworn to declares that the deponent confirmed the correctness of the contents of the statement ‘..in Johannesburg ... “ and then placed his signature upon the document in her presence. At the same time, however, the third respondent states under oath that the affidavit had already been prepared and signed before it was presented to the commissioner.
22. In addition, the affidavit is said to have been sworn to in Johannesburg on the 24th June 2008. At the same time, the affidavit carries a stamp, admittedly placed there by the third respondent, of the Child Protection Unit, Carletonville, reflecting the date 25th June 2008. This is the date upon which the fourth respondent issued and signed the warrant authorizing the search of the Carletonville premises. The Johannesburg warrant was issued the next day.
23. It is therefore clear that the commissioner of oaths whose signature appears at the end of the third respondent's affidavit, did not witness the signing of the declaration, contrary to the statement recorded in her pre-printed confirmation. The third respondent on behalf of the respondents suggests that this failure relates to form and not to substance and can therefore be condoned by the court. The same argument is advanced by the fourth and fifth respondents.

I disagree. The commissioner who declares that an affidavit, on the strength of which people's lives may be negatively affected, has been finalized in accordance with the statutory prescripts must satisfy herself or himself of the identity of the deponent and must be certain that it is the person who signed as the deponent actually does swear to the affidavit - and therefore the deponent must sign in the commissioner's presence. A failure to fulfill this condition may lead to affidavits being presented to commissioners that have not been prepared and signed by the purported deponent. The potential for abuse if this condition is not met is self-evident. It is significant, as is pointedly observed by the appellants' counsel in their heads of argument, that the commissioner who signed the certification clause of the third respondent's affidavit has not herself sworn to an affidavit to explain the situation.

24. The question then arises whether the court is entitled to condone any failure to observe the statutory requirements relating to the signing and commissioning of an affidavit, always assuming that there has been substantial compliance with the statute's requirements. In pre-constitutional times it was held that substantial compliance with the formalities could be in the court's discretion be held to be sufficient: *S v Munn* 1973

- (3) SA 734 (NC) at 737F - 738B. It may well be argued that this approach may have to be reconsidered in the light of the Van der Merwe - decision *supra*. There is, however, no room in the present matter for the argument that there has been substantial compliance with the formalities as the document purporting to be an affidavit has not been signed at all, or has been signed in the absence of the commissioner before the oath was taken. Had the fourth and fifth respondents noticed this defect they would not have issued the relevant warrants.
25. The learned judge *a quo* correctly entertained serious misgivings about the validity of the warrants given the serious doubt that was cast on the lawfulness of the affidavit upon which the third and fourth respondents relied. He held, however, that the affidavit of the potential witness, Ms Macewa, was properly completed and the information therein contained justified the issuing of the warrants. The appellants attack this finding on the basis that this affidavit identifies neither the persons or entities that are alleged to be involved in unlawful activities, nor the residences that were sought to be searched. They submit further that the witness's affidavit is in any event inadmissible because it is an attachment to an inadmissible affidavit. Macewa's affidavit does not supplement the inadmissible affidavit sufficiently to allow any warrant to be issued on the strength thereof. Its contents do not amount to sufficient evidence to justify the conclusion that

there are reasonable grounds for the attachment of any article or document in the possession of any person or at any residence. The application to set the warrants aside should therefore have been granted.

14. It follows that the appeal must succeed.

The following order is made:

'1. The order made by the court *a quo* is set aside and substituted with the following order:

A. An order in terms of prayers 1, 2 and 3 in terms of the notice of motion is granted;

B. The first, second and third respondents shall jointly and severally, the one to pay the other to be absolved, pay the appellants' costs of the application and the cost of the appeal, which cost shall include the cost of two counsel'

Signed at Pretoria on this 17 day of July 2015.

E BERTELSMANN Judge of the High Court

I agree.

S MOTHLE

Judge of the High Court

F.G. PRELLER

Judge of the High Court (Rtrd).

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