

SOUTH AFRICA / JUDGMENT

Oditrim (Pty) Ltd v Learned Additional Magistrate, Colesburg and Others (329/2018)

[2020] ZANCHC 2 (21 February 2020)

[2020] ZANCHC 2**COURT**

Northern Cape High Court, Kimberley

BEFORE

Mamosebo, Chwaro

CASE / FILE NUMBER

329/2018

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Reportable:	YES / NO
Circulate to Judges:	YES / NO Circulate to
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Regional Magistrates:	YES / NO IN THE HIGH COURT OF SOUTH AFRICA NORTHERN CAPE DIVISION, KIMBERLEY
CASE NO:	329/2018 In

the matter between: ODITRIM
 (PTY) LTD
 Applicant
 and
 THE
 LEARNED ADDITIONAL MAGISTRATE, COLESBURG
 First Respondent
 THE
 DIRECTOR OF PUBLIC PROSECUTIONS, NORTHERN
 CAPE
 HIGH COURT,
 KIMBERLEY
 Second Respondent
 THE
 MINISTER OF
 POLICE
 Third Respondent

CORAM: MAMOSEBO J et CHWARO AJ

JUDGMENT

CHWARO AJ:

INTRODUCTION

- [1] This is a review application brought in terms of rule 53 of the Uniform Rules read with the provisions of section 22 (1) (c) and (d) of the Superior Courts Act 10 of 2013 by Oditrim (Pty) Ltd (“the applicant”) who seeks to assail the decision of the Additional Magistrate, Colesberg, (“the first respondent”) in authorising and issuing a subpoena in terms of section 205 of the Criminal Procedure Act 51 of 1977, (“the CPA”) following an ex parte application brought by the second and third respondents.
- [2] The application is only opposed by the Minister of Police, (“the third respondent”) herein whilst the first respondent and the Director of Public Prosecutions, Northern Cape High Court, Kimberley, (“the second respondent”) have filed their respective notices to abide the decision of this court.

FACTUAL

BACKGROUND

- [3] During the early hours of 29 November 2017 and at Colesberg, police officers stopped a motor vehicle which was travelling along the N1 road. The driver of the said motor vehicle was Mr Vladislav Ryvkine, who is the managing director of the applicant, (“Mr Ryvkine”).

- [4] Upon being granted permission to search the motor vehicle, police discovered cash in the amount of R4 000 000-00, (four million rand) and gold weighing 2 kilograms inside the said vehicle. The cash and gold were then seized by the police and Mr Ryvkine was arrested and detained.
- [5] It is common cause that Mr Ryvkine is one of the directors of the applicant. He was subsequently released and the seized goods were returned to the applicant following a successful application which was launched out of this Division under case number 3022/2017.[1]
- [6] Notwithstanding the return of the seized goods as alluded to above, police continued with their investigations on the matter under Colesberg CAS 122/11/2017 and to that effect, a number of engagements were held between the police, Mr Ryvkine and an entity known as Cape Precious Metals (Pty) Ltd, ("CPM").
- [7] The police investigations culminated in the police being placed in possession of the second hand goods register kept by the applicant. Preliminary police investigations of the applicant's register, kept in term of section 21 of the Second Hand Good Act 6 of 2009, revealed a possible criminal conduct in the form of fraud, money laundering or corruption hence a need to conduct further investigations which include gaining access to documentation held by CPM relating to its dealings with the applicant.
- [8] Since CPM could not readily disclose its own and its clients' information kept by it without a subpoena, it was then necessary for the police to approach the second respondent to launch an ex parte application in support of a subpoena contemplated in section 205 of the CPA.
- [9] During or about 23 January 2018, an ex parte application was brought before the first respondent by Mr Braam Pretorius, who acted within the course and scope of his employment with the second respondent and thus duly authorised. The application was supported by an affidavit deposed to by Lieutenant Colonel Rudolph Daniel Bruwer ("Lt Col Bruwer") of the Directorate for Priority Crime Investigations, ("the DPCI"). I find it expedient to reproduce the relevant portions of the affidavit of Lt Col Bruwer herein:

“

6

Preliminary investigations into Colesberg Cas 122/11/2017

As the investigation progressed, it became apparent that corrupt practices were occurred after the prescript Jewellery Register of Oditrim (PTY) Ltd was inspected. According to the registers the amount of money seized was far more than money paid for Second Hand Goods, Jewellery.

7.

It is my respectful submission that, following from the abovementioned stated circumstances and/or facts there are sufficient grounds to show that it is necessary and in the interest of justice that I be authorized by law to obtain the necessary documentation and evidence as set forth in Annexure “A” to this subpoena from the institution mentioned therein.

11.

It is the policy of the institution in question not to disclose information relating to their own or their clients’ affairs,

unless the institution is so required by a subpoena. This aforesaid documentation and evidence is in the possession and/or under the control of the official as mentioned on “page 1” employed in the division of the institution mentioned in the attached Annexure “A” to this subpoena.”

- [10] The catalyst to the review application is the decision of the first respondent to authorise and issue a subpoena in terms of section 205 of the CPA on 23 January 2018, in terms of which one Yolandi Binneman, an employee of CPM, an entity described as an interested party in the applicant’s founding affidavit, was called upon to appear before the first respondent or any other Magistrate to be examined by the second respondent and to furnish material or relevant information.
- [11] The information sought from CPM, through Yolandi Binneman, was for a period between 1 January 2013 and 29 November 2017 and detailed in Annexure “A” to the subpoena as (a) clear and legible copies of all the opening documentation and of signatory authorisations of the applicant, (b) clear and legible copies of the transactions conducted between the applicant and the interested party and (c) copies of deposit slips, cheques and/or information of cash transactions.
- [12] In line with the provisions of rule 53, the first respondent filed the reasons for his decision to authorise and issue a section 205 subpoena as detailed above. A conspectus of the first respondent’s reasons is to the effect that he was satisfied that the jurisdictional facts for an ex parte application were present and that the objective facts placed before him warranted an authorisation and issuance of a subpoena contemplated in section 205 of the CPA.
- [13] In this regard, the first respondent’s reasons indicate that he was satisfied that the Senior Public Prosecutor was duly authorised to launch an ex parte application that served before him and that the information sought could only be obtained through such a subpoena from CPM.
- [14] On the exercise of his judicial discretion, the first respondent’s reasons reveal that he considered the material information placed before him sufficient enough to warrant the authorisation and issuance of a section 205 subpoena and he had no reason to doubt that that the person who was mentioned in the subpoena would be in a position to furnish the required information.

APPLICABLE LEGISLATIVE PRESCRIPTS

[15] The sale of second hand goods by dealers is a regulated business in South Africa. The legislative prescript governing such businesses is the Sale of Second Hand Goods Act 6 of 2009, which was primarily enacted to, amongst others, regulate the business of dealers in second-hand goods and pawnbrokers, to combat trade in stolen goods and to promote ethical standards in the second-hand goods trade.

[16] To this end, section 21(1) and (2) of Act 6 of 2009 provides as follows:

“21. (1) Unless otherwise provided in this Act, a dealer must keep a register in the prescribed form and record in the register the prescribed

particulars regarding every acquisition or disposal of second-hand goods.

(2) The particulars must at least include—

(a) particulars in respect of the identity of the person from whom the second-hand goods are acquired,

including—

(i) the person’s full names, contact address and contact telephone number;

(ii) the manner in which the person’s identity was verified; and

(iii) the person’s identity number.

(b) a description of the second-hand goods and serial number or distinguishing mark or feature of the second-hand goods;

(c) the purchase price paid by the dealer;

(d) the number assigned to the second-hand goods by the dealer;

(e) the name and signature of the person who conducted the transaction on behalf of the dealer; and

(f) the date and time of the transaction, the date on which the second-hand goods were sold or an account of how and when the second-hand goods were otherwise disposed of.”

[17] Sections 28 and 29 of Act 6 of 2009 further provide for the powers of police officers to conduct routine inspections at premises where the dealerships conduct business for purposes of ensuring compliance.

[18] It is against the said legislative provisions that the police sought and scrutinized the business register of the applicant as stated above and came to a conclusion that there was a need for further investigation which called for documentation held by CPM.

[19] Section 205(1) of the CPA provides as follows:

“(1) A judge of a High Court, a regional court magistrate or a magistrate may, subject to the provisions of subsection (4) and section 15 of the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002, upon the request of a Director of Public Prosecutions or a public prosecutor authorised thereto in writing by the Director of Public Prosecutions, require the attendance before him or her or any other judge, regional court magistrate or magistrate, for examination by the Director of Public Prosecutions or the public prosecutor authorised thereto in writing by the Director of Public Prosecutions, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed: Provided that if such person furnishes that information to the satisfaction of the Director of Public Prosecutions or public prosecutor concerned prior to the date on which he or she is required to appear before a judge, regional court magistrate or magistrate, he or she shall be under no further obligation to appear before a judge, regional court magistrate or magistrate.”

[20] The above section has been a subject of debate with regard to its potential to invade certain rights of individuals as provided for in the Constitution. This debate was put to rest by the decision of the Constitutional Court in *Nel v Le Roux NO and others*[2] where it was held that, if it is not misused or abused, it is an important evidence gathering mechanism in the preparation of criminal

prosecutions.

[21] The above legal stance was confirmed in the case of *De Lange v Smuts NO and Others*[3] where the Constitutional Court held that section 205 of the CPA is part of the criminal justice system which seeks to ensure that persons who may be in possession of material or relevant information concerning alleged criminal offences can be compelled to make the evidence available.

[22] It is also a trite principle of our law that the decision of a magistrate to authorise and issue a subpoena contemplated in section 205 of the CPA is a judicial discretion which does not fall under the purview of administrative law.[4] The exercise of this judicial discretion has, as its hallmark, elements of independence, weighing up of information placed before a magistrate and the formulation of an opinion based on a consideration of relevant facts derived from the information.[5]

[23] The exercise of a judicial discretion by a magistrate entails ascertaining whether there was compliance with the law in relation to the authority of the person seeking a subpoena, the nature of the offence which the police seek to investigate, with minimum details than those required in formulating a charge, and whether the person so identified in the subpoena will, in all probability, provide the required information and/or documentation[6].

ISSUES FOR

DETERMINATION

- [24] The applicant seeks an order to review and set aside the decision of the first respondent to authorise and issue the section 205 subpoena. In this regard, the applicant relies on rule 53 of the Uniform Rules read with the provisions of section 22 (1) (c) and (d) of the Superior Courts Act 10 of 2013 to the effect that the first respondent committed a gross irregularity and admitted inadmissible or incompetent evidence in his decision making process.
- [25] The applicant further contends that since the second and third respondents proceeded through an ex parte application, there was a duty on them to have disclosed all relevant and material information in that application, including the fact that there was a pending application for the return of the seized goods. To this end, the applicant contends that the second and third respondents failed to disclose the pending application in the affidavit filed in support of the issuance of the subpoena.
- [26] In developing its argument, the applicant contends that the facts and/or information contained in the affidavit of Lt Col Bruwer, especially those contained in paragraph 6 reproduced above, are very scant, unconvincing and inadequate to apply for a subpoena in terms of section 205 of the CPA and resultantly, the first respondent acted as a “rubber stamp” to the say-so of the second respondent and failed to reach a proper judgment.
- [27] The applicant further argues that the third respondents withheld information from this court by failing to disclose the successful application which it launched for the return of the seized goods, especially the fact that Yolandi Binneman, who was subpoenaed to appear for examination and produce certain documents, deposed to an affidavit in support of the applicant in the said application.
- [28] In the opposing affidavit filed on behalf of the third respondent, it is contended, as a preliminary point, that the application is defective as a result of the non-joinder of CPM or Yolandi Binneman as parties to the application. The third respondent contends that since the section 205 subpoena was issued calling upon Yolandi Binneman, who is an employee of CPM, to appear and produce certain documents, it was incumbent that either of them be joined in the application.
- [29] On the merits, the third respondent contends that the preliminary investigations conducted by the police revealed that the applicant’s registers and receipt books were not being maintained in accordance with the Second Hand Goods Act 6 of 2009 and therefore a reasonable suspicion existed that the applicant was conducting its transactions in a suspicious manner. This called for further investigations of the applicant’s business affairs and thus a need for a section 205 subpoena.
- [30] Having outlined the brief background facts pertinent to this matter and the applicable legal and legislative prescripts, it is the duty of this court to determine whether the applicant has made out a case for the relief sought in the notice of motion, being whether the first respondent’s decision to authorise and issue a subpoena in terms of section 205 of the CPA is

susceptible to be reviewed and set aside. Prior to dealing with the merits of the application, it is apposite to dispense with the preliminary point of non-joinder as raised on behalf of the third respondent.

NON-JOINDER

- [31] In *Amalgamated Engineering Union v Minister of Labour*[7] it was held that whether joinder is required depends, “on the manner in which, and the extent to which, the Court's order may affect the interests of third parties”. [8] Put differently, a person is a necessary party and must be joined if, and only if, such person has a direct and substantial interest in any order the court might make or that the order cannot be sustained or brought into effect without prejudicing that person. [9] A perceived interest in the reasoning underpinning an order is not sufficient to warrant the joinder of a party. [10]
- [32] Our courts have employed two tests to determining whether a party ought to be joined in the proceedings. These are, firstly, whether such a third party will have locus standi to claim relief in respect of the same subject matter and secondly, whether due to the non-joinder of a third party, an order that may be made by a court would be regarded as *res judicata* against that third party entitling him to approach court again on the same subject-matter and possibly obtain an order irreconcilable with the initial order. [11]
- [33] It is trite that joinder is a matter of substance and not form. It is without doubt that CPM and its employee who was called upon to appear before the first respondent through a section 205 subpoena have a direct interest in the order sought herein, being the review and setting aside of the subpoena authorized and issued by the first respondent.
- [34] The fact that the applicant did not formally cite either of them as a party to the proceedings has, in my view, been cured by the service upon CPM, through their attorney, of the application. The Executive Director of CPM indicated, through a letter dated 10 October 2018, that they will abide the decision of this court on the matter.
- [35] To suggest that the application must fail as a result of non-joinder of either of the parties mentioned above would be to place form over substance. It cannot be gainsaid that CPM is aware of the application and the relief sought by the applicant and have decided not to participate in these proceedings. Resultantly, I am of the view that the preliminary point raised by the third respondent cannot be sustained.

NON-DISCLOSURE OF MATERIAL FACTS

- [36] The applicant seeks to assail the subpoena issued in terms of section 205 on the basis of, amongst others, the alleged non-disclosure of material facts by the second and third respondents relating to the application which was brought out of this Court for the return of the seized goods.
- [37] It is now settled law that in an *ex parte* application, an applicant is expected to display good faith and disclose all relevant and material facts which a court considering

such an application must consider in its decision making process[12]. However, this general proposition is subject to a rider to the effect that only facts that are material and which are within the knowledge of the applicant should be disclosed[13].

[38] In the present matter, a determination that ought to be made is whether the information relating to the application that was brought for the return of the seized goods was material for consideration by the first respondent in his decision to authorise and issue a section 205 subpoena.

[39] I am inclined to disagree with the applicant's contention that the second and third respondents withheld material information from the first respondent. The details and merits of an application for the return of the seized goods had no bearing on the issues relating to an application for the issuance of a section 205 subpoena.

[40] On consideration of the objective jurisdictional facts that must be present before issuing such a subpoena, it is clear that the police must be in the process of investigating a possible commission of a crime and to that effect, the only manner of obtaining information for further investigation would be through obtaining a subpoena. These facts were laid bare in the affidavit filed in support of the subpoena.

[41] On the other hand, the fact that there was compliance with the legislative prescripts relating to search and seizure of the items, necessitating an application for the return of such items, is a distinct and separate matter for consideration and which has no bearing on the judicial discretion which a judicial officer faced with an application contemplated in section 205 must exercise.

[42] In the premises, I find that the second and third respondents did not act in any wilful or mala fide conduct to withhold any material information which would have had a bearing on the determination of an ex parte application that served before the first respondent.

JUDICIAL DISCRETION TO ISSUE A SECTION 205 SUBPOENA

[43] On a proper consideration of the case of the applicant, it is apparent that there is no issue being taken about the authority of the second respondent's representative to have brought an ex parte application which served before the first respondent. Stripped of all legal niceties, the applicant challenges the first respondent's decision on the basis that there was not enough, elaborate and detailed information before him pertaining to the alleged crime which would have convinced him to authorise and issue the subpoena.

[44] The facts that were placed before the first respondent are as contained in the affidavit filed by Lt Col Bruwer and reproduced elsewhere in this judgment. These facts are to the effect that:

44.1. The police conducted preliminary investigations on the register kept by the applicant in terms of Act 6 of 2009;

44.2. The preliminary investigations revealed some discrepancies in the register relating to money received and goods sold;

44.3. The discrepancies might lead to a possible offence of theft, fraud or money laundering being preferred against the applicant;

44.4. There was a need to obtain further information and documentation from CPM as a party in possession of certain registers pertaining to the applicant's business operations;

44.5. CPM was not in a position to provide such information without a subpoena; and

44.6. Ms Yolandi Binneman, as an employee of CPM, would be in a position to provide the requested information and documentation.

[45] On application of the legal principles enunciated above, I am of the view that the applicant has failed to make out a case for the relief sought. The applicant has not demonstrated any marked prejudice relating to the affidavit lacking in details as regards the possible suspect in the investigation undertaken by the police, the possible charge/s being investigated and the facts calling for the issuance of a subpoena against an employee of CPM.

[46] It is trite that a court considering whether a judicial discretion was properly exercised can only interfere if it can be demonstrated that the discretion was not exercised judicially or the decision was made from a wrong and/or incorrect application of the facts or the law.[14] The applicant has not shown that the first respondent applied the law incorrectly in considering the facts placed before him nor has it been shown that the facts, a summation of which is elucidated elsewhere in this judgment, were wrongly applied.

[47] In my view, the applicant's complaint about lack of details and pointed facts is generalised and lacks merit. The contention that the material facts that served before the first respondent were insufficient for decision making in a manner envisaged in section 205 of the CPA cannot be sustained. The applicant cannot avoid an investigation by the police in relation to the register which it has to keep in line with the provisions of section 21 of Act 6 of 2009.

CONCLUSION

[48] In the premises, I am of the view the applicant has failed to make out a case for the review of the first respondent's decision and thus the application falls to fail. In line with the general principles governing the award of costs, I find that there are no exceptional circumstances that dictate otherwise. Consequently, costs must follow the result.

ORDER

[49] In the result, the following order is made:

1. The application is dismissed with costs.

O.K.CHWARO

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

M.C.MAMOSEBO

JUDGE OF THE HIGH COURT

DATE OF HEARING:

17 February 2020

DATE OF

JUDGMENT:

21 February 2020

APPEARANCES:

Counsel for the Applicant: Adv. J.L.C. van Vuuren SC

Instructed by:

Towell & Groenewald Attorneys

Kimberley

Counsel for the Third Respondent: Adv. T. Tyuthuza

The State Attorney

[1] Judgment was handed down on 9 November 2018 by Coetzee AJ

[2] 1996 (3) SA 562 (CC)

[3]

[1998] ZACC 6; 1998 (3) SA 785 (CC) at para 149

[4] See Thint (Pty) Ltd National Director of Public Prosecutions and Others, Zuma v National Director of Public Prosecutions and Others 2009 (1) SA 1 (CC) at para 89

[5] See South African Association of Personal Injury Lawyers v Heath and Others [2000] ZACC 22; 2001 (1) SA 883 (CC) at para 34

[6] Matisonn v Additional Magistrate, Cape Town 1980 (2) SA 619 (C)

[7] 1949 (3) SA 637 (A) at 657

[8] Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 657.

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- [9] Judicial Services Commission and Another v Cape Bar Council and Another 2013 (1) SA 170 (SCA) at paras 16-17
- [10] National Director of Public Prosecutions v Zuma 2009 (2) SA 309 (SCA) at paras 84-85
- [11] Amalgamated Engineering, at 661-662 and Transvaal Agricultural Union v Minister of Agriculture and Land Affairs and Others 2005 (4) SA 212 (SCA) at paras 64-66.
- [12] National Director of Public Prosecutions v Basson 2002 (1) SA 419 (SCA) AT 489H-J
- [13] See Powell NO and Others v Van Der Merwe NO and Others 2005 (5) SA 62 (SCA) at para 42
- [14] See Thint decision, footnote 4 above, at paras 91-93
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