

SOUTH AFRICA / JUDGMENT

Westmead Carriers CC v Pillay NO and Others (426/2018; 635/2018) [2020] ZAKZPHC 80 (7 February 2020) [2020] ZAKZPHC 80

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Mossop, Chetty

CASE / FILE NUMBER

426/2018; 635/2018

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IN THE HIGH COURT OF
SOUTH AFRICA
KWAZULU-NATAL
DIVISION, PIETERMARITZBURG
Appeal
Case Numbers: 426/2018
and 635/2018
In

the matter between:

WESTMEAD
CARRIERS
CC Appellant
and
AMERASAN
PILLAY
N.O. First
Respondent
MUKHTAR
AHMED ISMAIL SHAIK DAWOOD N.O. Second
Respondent
ZOLILE
ABEL DLAMINI
N.O. Third
Respondent
LOGAN
LOGANATHAN REDDY
N.O. Fourth
Respondent

JUDGMENT

Mossop AJ [Chetty J concurring]

- [1] On 23 August 2017, the learned magistrates for Verulam and Durban respectively authorised the issuing of search warrants in terms of s 69(3) of the Insolvency Act 24 of 1936 ('the Act') on the application of the first to fourth respondents.
- [2] The appellant is the entity alleged to have been involved in the concealment, or withholding, of assets belonging to Sumi Brokers CC, which was placed in liquidation by special resolution on 21 November
2014. The first to fourth respondents are the duly appointed joint final liquidators of Sumi Brokers CC and are collectively referred to hereafter as 'the liquidators'.
- [3] The facts underpinning the two orders appealed against are largely the same. Before us, counsel for the appellant, Mr Joubert SC, focused his argument primarily on the Verulam matter. Because of the similarity of the allegations in both matters, it follows that the outcome of the appeal pertaining to the Verulam matter will be determinative of the outcome of the Durban matter. I accordingly confine myself to dealing only with the Verulam application and all further references are to that appeal only, unless indicated otherwise.
- [4] Section 69(3) of the Act provides as follows:
- 'If it appears to a magistrate to whom such application is made, from a statement made upon oath, that there are reasonable grounds for suspecting that any property, book or document belonging to an insolvent estate is concealed upon any person, or at any place or upon or in any vehicle or vessel or receptacle of whatever nature, or is otherwise unlawfully withheld from the trustee concerned, within the area of the magistrate's jurisdiction, he may issue a warrant to search for and take possession of that property, book or document.'
- [5] As is required by the Act, a statement made upon oath was presented to the magistrate of Verulam. The statement was lengthy and had a substantial number of annexures, with the entire document comprising in excess of some 200 pages.
- [6] From the statement under oath, it is apparent that the liquidators' contention was that there were allegedly reasonable grounds upon which to suspect that Sumi's funds were being concealed, or otherwise unlawfully withheld, from the liquidators and were being held in the bank account of the appellant at the Verulam branch of Standard Bank.
- [7] The application was brought without notice and was dealt with in chambers. The order was granted by the magistrate. The order made no provision for a return date.

- [8] On 8 December 2017, the appellant delivered a document described by it as being an ‘answering affidavit’. Nearly seven months after the warrant was authorised, and on 19 March 2018, the appellant appeared before a different magistrate of Verulam and sought the reconsideration of the order authorising the issuing of the search warrant.
- [9] The reconsideration application was not successful. It was dismissed as the magistrate concluded, *inter alia*, that he lacked jurisdiction to set aside or vary the order authorising the search warrant because of the application of the principle of *res judicata*.
- [10] The basis for this finding hinged on the fact that prior to attempting to have the authorisation for the issuing of the warrant reconsidered, the appellant had approached the Pietermaritzburg High Court with a substantive application seeking to have the search warrants authorised in the Verulam application and the Durban application set aside or varied (henceforth ‘the High Court application’).
- [11] I point out that the fact that the High Court application had been made and adjudicated upon went entirely unmentioned in the ‘answering affidavit’ delivered by the appellant in its attempt to have the authorisation of the search warrant reconsidered.
- [12] The High Court application was opposed by the liquidators. The matter was eventually argued as an opposed urgent application before Seegobin J. On 1 September 2017, Seegobin J delivered judgment and dismissed the application with costs. In dismissing the application, Seegobin J found that the magistrate was not required to make findings of any kind: all that was required to consider was to decide on the information before him whether or not there were reasonable grounds for suspecting that assets were being concealed or withheld. The learned judge concluded that the warrant was validly applied for and was validly granted and found no reason to interfere with the decision of the magistrate.
- [13] It was on the basis of this High Court judgment that the magistrate concluded that he was unable to reconsider the search warrant, the matter having been conclusively dealt with by the High Court. This, too, was the conclusion arrived at by the magistrate of Durban when an identical application brought by the appellant came before her at a later date.
- [14] The appeals that serve before us are consequently appeals against the judgments of the respective magistrates in declining to reconsider the decisions to authorise the issuing of the search warrants.
- [15] In my view, the true issue to first be determined is whether there was any scope for the appellant to have brought its application before the magistrate in order to have the order authorising the issuing of the search warrant reconsidered and set aside. This requires considering whether the order authorising the search warrant was an interim order, as contended for by the appellant, or was a final order.

[16] It is to be remembered that the order granted by the magistrate provided for no return date. There was, ex facie the search warrant, accordingly no opportunity for the appellant to be further heard by the magistrate. In order to 'anticipate' the order granted, as the appellant purported to do, it was necessary for it to create the fiction of a return date.

[17] Counsel for the appellant justified this course of conduct as follows:

17.1 the appellant was entitled to seek the reconsideration of the issuing of the search warrant because the request for the issuing of a search warrant had been brought ex parte without notice and therefore rule 55(3) of the Magistrates' Court Rules applied;

17.3 that rule dictated that the order issued by the magistrate must, of necessity, be an interim order. It ought therefore, so the argument went, to have had a return date; and

17.4 if there had been provision for a return date, the appellant would have been entitled to anticipate that return date, and that is what the appellant purported to do.

[18] It will be appreciated that there is much conjecture and wishful thinking in these submissions. The only demonstrable fact contained therein is that the request for the authorising of a search warrant was brought without notice on an ex parte basis.

[19] Our attention was correctly drawn to the matter of *Cooper NO v First National Bank of SA Ltd.*[1] That matter is authority, inter alia, for the fact that where a liquidator alleges concealment of assets belonging to an insolvent,

the giving of notice is not required.

[20] In this matter, the liquidators made the allegation in the founding affidavit of their application for a search warrant that the request for the search warrant was made:

'... on the basis that there are reasonable grounds for suspecting that funds belonging to Sumi are being concealed ...'

[21] If the giving of notice might prejudice the relief sought then, as was stated in *Cooper*,[2] 'it must be inferred, by way of necessary inference, that the Legislature intended to exclude the giving of notice (and the

concomitant right to be heard) in cases involving concealed items'.

[22] In this matter, given the allegation made, the giving of notice was, in the circumstances, not required. It is difficult in such circumstances to comprehend how the provisions of Magistrates' courts rule 55(3) then become applicable.

[23] This is more so when the matter of *Naidoo & others v Kalianjee NO & others*[3] is considered, a decision to which our attention was not drawn.

[24] In *Naidoo*, a magistrate had authorised the issuing of a search warrant in terms of the provisions of s 69(3) of the Act. The basis for the issuing of the warrant was that assets of a close corporation in liquidation were being concealed. The appellants applied to the High

Court to have the order set aside but were unsuccessful. They then appealed to the Supreme Court of Appeal. The Supreme Court of Appeal was faced with allegations that are not dissimilar to the allegations made before us: applying for the search warrant was an abuse of process and the application for the search warrant was motivated by an improper purpose. In the matter before the Supreme Court of Appeal, a 'return date' had been provided for in the order granting the search warrant, and so too was a costs order. The Supreme Court of Appeal concluded that the search warrant had not been issued in the course of civil proceedings and the warrant was therefore no more than a warrant issued under s 69 of the Act. The fact that there was a return date and a costs order was anomalous but, so the Court reasoned, the mention of a return date did not make the warrant a provisional order: it was a final order and was intended to be executed on its issue.

[25] The appellant's argument becomes tenuous in the light of the Naidoo

judgment.

[26] The search warrant in the matter before us was clearly not issued in the process of civil litigation between the parties: the search warrant specifically references s 69(3) of the Act. It is apparent from the terms of the search warrant that it was a warrant issued in terms of the provisions of that section of the Act. The provisions of Magistrates' courts rule 55(3) accordingly simply do not apply.

[27] There is, moreover, no evidence that the order authorising the search warrant was an interim order. Ex facie the terms of the search warrant, it was to be executed on its issue. For that reason, no provision was made for any person to show cause on a notional 'return date' why such an order should not be granted. In any event, even if a return date had been provided for, Naidoo makes it clear that this does not convert the order authorising the search warrant into a provisional or interim order. The concept of a 'return date' was a fiction, created by the appellant for its own purposes. That the order authorising the search warrant was intended to be a final order is further demonstrated by the fact that a costs order was granted.

[28] At one stage, it was also the appellant's view that the order granted was a final order. In its founding affidavit in the High Court application, the appellant stated the following on oath:

'A copy of the Order of the Court from the Verulam Court is attached marked Annexure "JH6" and a copy of the Order of Court from the Durban Court is attached marked Annexure "JH7". These were Final Orders obtained without notice to the Applicant.' [underlining added]

[29] I agree. The order granted by the magistrate was clearly a final order.[4]

[30] If it is therefore accepted that the order was a final order, then the next question to be considered is whether either of the magistrates had the ability to reconsider the orders that were granted in the Magistrate's Court. In other words, before considering whether the matter was res judicata, were the magistrates functus officio?[5]

- [31] In general, the *functus officio* doctrine applies only to final decisions. Before a decision becomes final, it is revocable. Once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it as its jurisdiction in the case has been fully and finally exercised and its authority over the subject-matter ceases. There are, however, a few exceptions to that rule but none of these exceptions find application in the present matter.
- [32] D M Pretorius in his article entitled ‘The Origins of the *Functus Officio* Doctrine, with specific reference to its application in administrative law’[6] puts the position as follows:
- ‘The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter. . . The result is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.’
- [33] Having delivered a final order, the magistrate of Verulam was *functus officio*. He could not change his decision even if he wished to do so.
- [34] The appellant must have recognised this as, significantly, it did not immediately approach the Verulam Magistrate’s Court after learning of the granting of the search warrant and attempt to have the matter reconsidered. Instead, it turned to the court that had the power to grant the relief that it sought and desired, namely the High Court. That it adopted this route is entirely understandable: on its own version, it regarded the order as a final order. When it was unsuccessful in this regard, it again approached the Magistrate’s Court.
- [35] In my view, it was not open to the appellant, after having elected to proceed with the High Court application, to attempt to have the matter before the magistrate of Verulam reconsidered.
- [36] The question of whether the matter is subject to the principle of *res judicata* accordingly appears to me to not arise. The fact of the matter is that the magistrate had made a final decision on the matter that he was called upon to consider. The appellant’s remedy consequently did not lie in the Magistrate’s Court.
- [37] Whether the magistrate made the correct decision in authorising the search warrant is a different matter entirely. It may very well be that the magistrate did not make the correct decision.
- [38] It follows in my view that both the magistrates were justified, albeit for different reasons, in arriving at the decisions that they reached. There was no basis upon which they could have entertained the appellant’s further arguments concerning the validity of the orders permitting the issuing of the search warrants.

[39] By virtue of the conclusion that I have come to, there is no need to consider the further points raised by the appellant.

[40] I have some sympathy for the appellant and the predicament in which it finds itself. But in my view, it ought to have appealed against the judgment of Seegobin J and sought to lead further evidence on appeal, if so advised. Its remedy was not to proceed back to the Magistrate's Court.

[41] In my view, the appeal must fail with costs.

Mossop AJ

Chetty J

[1] Cooper v First National Bank of SA Ltd 2001

(3) SA 705 (A).

[2] Para 26 of Smalberger JA's judgment and restated in para 7 of Marais JA's

judgment.

[3] Naidoo & others v Kalianjee NO & others 2016

(2) SA 451 (SCA).

[4] Naidoo v Kalianjee NO & others 2016

(2) SA 451 (SCA) para 22.

[5] Functus officio means after, 'having fulfilled the function, discharged the office, or accomplished the purpose, and therefore

[is] of no further force or authority. [It is] applied to an officer whose term has expired, and who has consequently no further official authority; and also to an instrument, power, agency, etc. which has fulfilled the purpose of its creation, and is therefore of no further virtue or effect.' See: Black's Law Dictionary, Online Legal Dictionary, 2 ed.

[6] D M Pretorius 'The Origins of the Functus Officio Doctrine, with specific reference to its application in administrative law'

(2005) 12 SALJ 832 at 832.

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Prepared on 13 October 2026 · Esheria