



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Case No: 193/10

In the matter between:

THE MINISTER OF TRADE AND INDUSTRY

First Appellant

DIRK ASPELING

Second Appellant

and

E L ENTERPRISES

First Respondent

ELGIN BROOKSTEIN

Second Respondent

Neutral citation: *The Minister of Trade and Industry v E L Enterprises* (193/10) [2010]
 ZASCA 149 (29 November 2010)

Coram: HARMS DP, HEHER, SNYDERS, TSHIQI JJA AND
 R PILLAY AJA

Heard: **3 November 2010**

Delivered: **29 November 2010**

Summary: Counterfeit Goods Act 37 of 1997 – procedure prescribed in s 5(4)(a)

ORDER

On appeal from: High Court (Pretoria) (Poswa J sitting as court of first instance).

(a) The appeal is upheld;

(b) The order of the court below is set aside;

(c) It is declared that an application in terms of s 5(4)(a) of the Counterfeit Goods Act 37 of 1997 is not an application on notice of motion addressed to the court which has to be served on the respondent.

JUDGMENT

SNYDERS JA (Harms DP, Heher and Tshiqi JJA and R Pillay AJAconcurring)

[1] After the second appellant, an inspector in terms of the Counterfeit Goods Act 37 of 1997 ('the Act') seized without a warrant suspected counterfeit goods under the control of the respondents, the appellants approached the court below for an order in terms of s 5(4)(a) of the Act, confirming the seizure. The appellants were unsuccessful in their application and their failure turned on the interpretation of the procedural requirements of s 5(4)(a). Leave to appeal was refused by the court below, but was subsequently granted by this court.

[2] Whilst the appeal was pending the parties settled all aspects of their dispute, including costs. Notwithstanding the settlement the appellants pursued the appeal without any further participation by the respondents. The appellants advanced two reasons why they should not fall foul of s 21A(1) of the Supreme Court Act 59 of 1959.¹ First, conflicting interpretations were given to s 5(4)(a) in two different judgments in the

¹ Section 21A(1) reads: 'When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone'.

Pretoria High Court and, second, it is in the interest of future action by the appellants in terms of the Act that clarity be obtained on the correct procedure to be followed.² Those two grounds indeed justify the exercise of a discretion in terms of s 21A(1) not to dismiss the appeal on the basis that it will have no practical effect or result.³

[3] The second appellant was at all material times in the employ of the first appellant as an inspector for the purposes of the Act. The second respondent was the proprietor of the first respondent. The powers of an inspector in relation to counterfeit goods are set out in ss 4 and 5. Broadly speaking, they state that an inspector, who entertains a reasonable suspicion that an offence in terms of the Act has been or is being committed, may obtain a warrant in terms of s 6 to enter and search premises, collect evidence, take reasonable steps to terminate the act of dealing in counterfeit goods, seize goods and evidence, and question witnesses.

[4] As a result of a complaint received, the second appellant formed a reasonable suspicion that the respondents were in violation of the Act. On the basis of that suspicion he approached a magistrate on 22 April 2005 and obtained a search and seizure warrant in terms of s 6. The warrant authorized him to enter and search the premises of the respondents and seize 'screen printing plates, boxes, empty or filled that imitates the registered [OMO] trademarks, . . . to such a degree that they are substantial identical copies of the registered trademarks, registered in the name of Unilever PLC. . . '

[5] Whilst searching the premises of the respondents in terms of the warrant the second appellant found images, positives and screen prints bearing SUNLIGHT and RAJAH

² The first is the judgment of Poswa J in *Minister of Trade and Industry v EL Enterprises* (15383/2005) [2008] ZAGPHC 130 (6 May 2008) and the second a judgment by Legodi J in *EGL Eagle Global Logistics (South African Proprietary) Ltd v Eagle Logistics CC* (37053/2007) [2008] ZAGPHC 160 (6 June 2008).

³ On the discretion of this court in terms of s 21A(1) see *Land en Landbouontwikkelingsbank van Suid-Afrika v Conradie* 2005 (4) SA 506 (SCA) paras 6 and 7.

trademarks which, according to information available to the second respondent, were registered trademarks of Unilever South Africa Home & Personal Care (Pty) Ltd and Unilever South Africa Foods (Pty) Ltd respectively. Upon finding these images the second appellant was informed by a representative of the latter two companies that the respondents were not authorized to produce images of the SUNLIGHT and RAJAH trademarks. On the strength of this information he concluded that 'I thus had a reasonable suspicion that an offence was being committed in terms of the Counterfeit Goods Act and that considering the nature of the operation by the Respondent, I should act without a warrant in terms of the Act to terminate the alleged acts of counterfeiting, and seize the goods'.

[6] The second appellant's decision not to first obtain a warrant was motivated by the following facts as stated in his own words:

'I could not leave the premises to approach a magistrate for a warrant because I was the only inspector available at the scene and there were no additional inspectors to secure the goods. It was Friday afternoon at about 16:30 and the chances were slim that a magistrate would still have been available at that hour. I am of the opinion that I had sufficient evidence to proceed without a warrant and that a warrant would have been granted by a magistrate in the circumstances. I am also of the opinion that the delay that would have ensued by me first obtaining the warrant would have defeated the object and purpose of the seizure, and removal and detention of the evidence.'

[7] The second appellant's decision to proceed without first obtaining a warrant fell within the ambit of s 5(2) which reads:

'Subject to subsection (3), an inspector may, during the day, without a warrant enter upon or enter any place, premises or vehicle after having identified himself or herself, and, in accordance with paragraphs (a) to (f) of subsection (1), exercise the powers of seizure, removal, detention, collecting evidence and search contemplated in section 4(1) (a), (b) and (c) (except

the power to search any person), as well as the power to take the steps contemplated in section 4(1)(d), if –

(a) the person who is competent to consent to the entry and to such search, seizure, removal and detention, gives that consent; or

(b) the inspector on reasonable ground[s] believe that -

(i) the required warrant will be issued to him or her in terms of section 6 if he or she were to apply for the warrant; and

(ii) the delay that would ensue by first obtaining the warrant would defeat the object or purpose of the entry, search, seizure, removal, detention, collection of evidence and other steps.’⁴

[8] The second appellant acted properly within the ambit of s 5(2)(b) and no issue arose concerning that, but having so acted, he was obliged to follow the procedure prescribed in s 5(4)(a):

‘(4) Notwithstanding the provisions of subsections (1) and (2)–

(a) any acts performed by an inspector by virtue of subsection (2) must be confirmed by a magistrate or a judge of the High Court having jurisdiction in the area where the acts were performed, on the application of the inspector brought within 10 court days of the day on which those acts were performed. . . ’

[9] It is the interpretation of this subsection that was in issue between the parties in the court below and that remains the issue before this court. The appellants launched an application on notice of motion within the required 10 day period but only served that application on the respondents after the expiry of the 10 day period. The argument by the respondents was that having served the application outside the prescribed 10 day

⁴ Subsection (3) excludes the operation of s 5(2) from application to a private dwelling.

period the appellants failed to have 'brought' it within 10 court days. The court below upheld this argument.

[10] When a warrant is obtained prior to acting in terms of s 5 of the Act, it is to be done in terms of s 6(1):

'The warrant contemplated in section 4(2) read with section 5(1) will be issued in chambers by any judge of the High Court or by a magistrate who has jurisdiction in the area where the relevant suspected act of dealing in counterfeit goods is alleged to have taken or to be taking place or is likely to take place, and will be issued only if it appears to the judge or magistrate from information on oath or affirmation that there are reasonable grounds for believing that an act of dealing in counterfeit goods has taken or is taking place or is likely to take place, and the inspector seeking the warrant may be asked to specify which of the powers contemplated in section 4(1) is or are likely to be exercised.'

[11] Both ss 6 and 5(4)(a) seek to achieve a control for the existence of reasonable grounds external to the authority that performs the acts of search and seizure. For that reason it is useful to look at the provisions of the two sections together. The interrelationship between the two sections is also evident from the provisions of s 5(2)(b) that authorizes an inspector to act without a warrant as long as he or she has the belief that a warrant will be issued in terms of s 6 if it was applied for. The only significant difference between the two sections is that whereas confirmation of the existence of reasonable grounds is sought in advance of acts of search and seizure in terms of s 6, s 5(4)(a) seeks to ensure that confirmation of the existence of reasonable grounds be obtained after the acts of search and seizure have been completed.

[12] In the context of the facts of this case it is significant to note that the purpose of the two sections does not include notice to any respondent. On the contrary, the nature and purpose of search and seizure in terms of the Act demands that no notice be given.

Notice is likely to defeat the purpose of the warrant when the procedure in terms of s 6 is followed and in many cases the identity and whereabouts of potential respondents are not likely to be known by the time a warrant is sought or acts of search and seizure are performed. More often than not, counterfeit goods are found in a container or warehouse in the absence of any potential respondents or knowledge of their whereabouts.

[13] The wording of s 6 is clearer in excluding the giving of notice to any potential respondent than s 5(4)(a). The warrant in terms of s 6 is issued by a judge or magistrate in chambers on the strength of information on oath or affirmation. Section 5(4)(a) does not refer to the warrant being issued 'in chambers', unlike s 6 requires an 'application' and does not require that the information be placed before the judge or magistrate on oath or affirmation. The essential question is whether these differences in the wording of the two sections justify an interpretation that s 5(4)(a) prescribes formal application procedure on notice of motion with notice to a respondent.

[14] Uniform rule 1 defines 'judge' as 'a judge sitting otherwise than in open court'. This is the first indication that there is no difference in procedure between ss 6 and 5(4)(a).

[15] In s 5(4)(a) the word 'application' is used as the manner in which the inspector is to approach the judge or magistrate. As s 5(4)(a) does not refer to a notice of motion, the procedure that is available in the high court, or a notice, the procedure that is available in the magistrate's court, it suggests that no formal application procedure in terms of the rules of court with notice to any respondent is envisaged.⁵ The legislature must have been alive to the distinction between a judge or magistrate on the one hand and a court on the other as well as an application on the one hand and application on notice of

⁵ Application procedure in the different courts is to be found in Uniform Rule 6 and Magistrates courts rule 55.

motion on the other, as is apparent from the provisions of s 7(4). In terms of s 7(4) a person prejudiced by a seizure of goods in terms of s 4(1) is entitled to apply to court for a determination that the goods seized are not counterfeit goods and are to be returned to that person. Section 7(4) expressly prescribes that the application be one to court on notice of motion, unlike s 5(4)(a). It is during these proceedings that the aggrieved party may attack the legality of the search and seizure proceedings.

[16] For the reasons stated the slight difference in wording between ss 6 and 5(4)(a) do not result in a substantial difference in procedure. The confirmation after the search and seizure is also to be sought from and given by a magistrate or a judge of the high court as opposed to a court. The confirmation is to be sought in chambers, on oath or affirmation.

[17] The submission on behalf of the respondent in the court below that the confirmation in terms of s 5(4)(a) is to be sought on notice of motion, issued and served before the expiry of 10 court days from the date of the seizure, for the reasons stated above, should not have been upheld. The appellants issued an application within the required 10 day period. Thereafter the obligation was on the registrar of the court below to place the application before a judge in chambers for confirmation. The Act does not require that the confirmation by the judge or magistrate is to be obtained within the 10 day period and for that reason the fact that it was issued and lodged with the registrar was sufficient in the circumstances. The appellants were not required to give notice to the respondents and that they have done so outside the prescribed 10 day period is not fatal to their compliance with s 5(4)(a).

[18] Although the matter has been settled between the parties an appropriate order must still issue. The following order is made:

(a) The appeal is upheld;

(b) The order of the court below is set aside;

(c) It is declared that an application in terms of s 5(4)(a) of the Counterfeit Goods Act 37 of 1997 is not an application on notice of motion addressed to the court which has to be served on the respondent.

S SNYDERS

JUDGE OF APPEAL

APPEARANCES:

For appellant: C E Puckrin SC (with him R Michau)

Instructed by Adams & Adams, Pretoria,
The State Attorney, Bloemfontein.

For respondent: No appearance