



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 20345/2014
Reportable

In the matter between:

DAVID NAIDOO	FIRST APPELLANT
M & M HIRING CC	SECOND APPELLANT
M & M HIRING MARQUEE CC	THIRD APPELLANT
MNM MARQUEE & HIRING (PTY) LTD	FOURTH APPELLANT

and

S J KALIANJEE NO	FIRST RESPONDENT
N ABRAM MATLALA NO	SECOND RESPONDENT
THE MAGISTRATE FOR THE DISTRICT OF JOHANNESBURG	THIRD RESPONDENT
DOWNINGS MARQUEE HIRING CC	FOURTH RESPONDENT
INGWE MARQUEE MANUFACTURING CC	FIFTH RESPONDENT

Neutral citation: *Naidoo v Kalianjee NO* (20345/2014) [2015] ZASCA 102 (29 June 2015)

Coram: Mpati P, Leach, Petse and Willis JJA and Mayat AJA

Heard: 12 May 2015

Delivered: 29 June 2015

Summary: Insolvency Act 24 of 1936 — validity of search and seizure warrant granted by magistrate in terms of s 69(3) of Insolvency Act 24 of 1936 — distinction between such a warrant and one issued under the Criminal Procedure Act 51 of 1977 — anomalies in warrant not rendering it invalid — warrant not too broad in scope.

ORDER

On appeal from North Gauteng High Court, Pretoria (Vorster AJ sitting as court of first instance): judgment reported *sub nom Naidoo & others v Kalianjee NO & others* 2013 (5) SA 591 (GNP).

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Leach JA and Mayat AJA (Mpati P, Petse and Willis JJA concurring)

[1] The appeal in this matter relates to the validity of a search and seizure warrant issued by a magistrate under s 69(3) of the Insolvency Act 24 of 1936 (the Act). The appellants unsuccessfully applied to the court a quo for the warrant to be set aside. They appeal to this court with leave of the court a quo.

[2] At all relevant times the first appellant, Mr David Naidoo, was the sole member of a close corporation named M&M Hiring SA CC (M&M). He was also the sole member of two similarly named close corporations, the second and third appellants, and the director of the fourth appellant, a

private company. Not only were all these corporate entities similarly named but they shared the same business address at 11-13 Sprinz Avenue, Village Main, Johannesburg.

[3] In 2010, the fourth and fifth respondents in this appeal (who we intend to refer to as ‘the petitioning creditors’ for purposes of convenience) brought an application for the winding-up of M&M. As a result, on 14 September 2010 a provisional winding-up order was granted which was made final on 26 October 2010. In due course, the first and second respondents were appointed as joint liquidators of M&M (for convenience we shall refer to them as ‘the liquidators’).

[4] The course of M&M’s winding-up was somewhat eventful, to say the least. However, the background history detailed in the papers is largely irrelevant to the issues to be decided in this appeal. Suffice it to say that on two occasions interdictory relief was granted against Mr Naidoo to restrain him from using, alienating or trading with assets of M&M and that, on 5 October 2010, pursuant to an order to that effect, the sheriff attached certain of M&M’s assets. Moreover, in November 2010 the Master of the High Court issued a directive to the sheriff to attach certain movable assets, including those listed on the asset register of the close corporation. The sheriff was, however, unable to trace most of the assets listed in the directive.

[5] On the strength of information forthcoming from Mr Naidoo's former business partner and at an insolvency inquiry, as well as reports from an employee of Naidoo and a private investigator appointed by the petitioning creditors, the liquidators suspected that the terms of the interdicts had been breached as assets of M&M were either being used by certain of Mr Naidoo's associated corporate entities or had been dissipated, alienated or subsumed into the asset registers of such other corporations. This was corroborated by goods reflected in invoices of purchases made by M&M not appearing in inventories of its post liquidation assets. Moreover, there was eye-witness evidence of Naidoo having changed the markings on an asset of M&M so as to reflect the name of another of his close corporations.

[6] It is unnecessary to record the background history in any further detail as it can be accepted that the liquidators had a reasonable suspicion that assets of M&M had been concealed. On the strength of that suspicion, they approached a magistrate for a warrant under s 69 of the Act (which also applies to winding-up procedures). The provisions of the section relevant to this appeal are the following:

‘(2) If the trustee has reason to believe that any such property, book or document is concealed or otherwise unlawfully withheld from him, he may apply to the magistrate having jurisdiction for a search warrant mentioned in sub section (3).

(3) 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.

(4) Such a warrant shall be executed in a like manner as a warrant to search for stolen property, and the person executing the warrant shall deliver any article seized thereunder to the trustee.'

[7] As there was clearly a reasonable suspicion as envisaged under s 69(3), the magistrate (the third respondent, who was cited as a party but has played no part in the proceedings either in the High Court or on appeal to this court) granted a warrant, the material terms of which are as follows:

'2. That in accordance with the liquidation of M & M HIRING SA CC (in liquidation) ("the insolvent entity") the members of the South African Police Services, the Sheriff of the above Honourable Court and the First and Second Applicants [the liquidators] are authorised and ordered in terms of Section 69(3) of the Insolvency Act (Act 24 of 1936) read together with Section 21 of the Criminal Procedure Act (Act 51 of 1977) to enter and search, at any time day or night, the properties situated at:

2.1 11-13 Sprinz Avenue, Village Main, Johannesburg, Gauteng.

2.2 At any other premises and/or address where assets of M & M HIRING SA CC (in liquidation) as set out in paragraph 3 hereunder may be found and/or utilized in the area of jurisdiction of the above Honourable Court.

3. That the members of the South African Police Services, the Sheriff of the above Honourable Court and First and Second [Applicants] are authorized and ordered in terms of Section 69(3) of the Insolvency Act (Act 24 of 1936) to

3.1 Take possession of all movable and/or other assets of whatever nature of the insolvent entity in the possession of any or all of the Respondents which are under judicial attachment.

3.2 Any and all documents, including financial, accounting and investment documents and records belonging to the insolvent entity.

3.3 The books and documents contained on the hard drive and similar device of the auditors, relating to the insolvent entity.

4. That the members of the South African Police Services and the Sheriff of the above honourable court be authorized and ordered in terms of Section 69(4) of the Insolvency Act (Act 24 of 1936) to deliver all the attached assets and documents referred to in paragraphs 3.1 to 3.3 above to the first and second applicants herein, in their capacities as the joint liquidators of the insolvent entity.

5. That the costs of this application be awarded to the applicants on a scale as between attorney and own client *alternatively* on such scale as the above honourable court deems fit, the one to pay the other to be absolved.

5(a) The return date is the 27 June 2013 at Court 1013 at 09h00. The respondents are entitled to anticipate the return date on 24 hour notice to the applicants in writing.

6. That this application be served simultaneously on the respondents at the time this Order is executed.

7. Further and alternative relief.’

[8] The appellants subjected the validity of this warrant to a multi-faceted challenge, although not all of the points they raised were pressed in this court. Their principal contention, both initially and in this court, was that the warrant could not stand as the respondents had applied for it without giving them notice of their intention to do so. In this regard the appellants relied on the majority judgment of Smalberger JA (F H Grosskopf JA and Melunsky AJA concurring) in *Cooper*¹ in which it was held that a warrant under s 69(3) should not be issued without notice to persons affected,² save where the items to which the warrant relates have allegedly been ‘concealed’ in the sense that they ‘had been hidden with a view to denying their existence or preventing their recovery’.³ In a minority judgment, Marais JA (Zulman JA concurring) concluded that s 69 impliedly excludes the giving of notice of intention to seek a warrant in all cases.⁴

[9] The correctness of these two views was not debated before this court, nor were we called upon to revisit the issue or decide whether the majority view should stand. Indeed, the entire issue became a storm in a teacup as counsel for the appellants was driven to concede that, on the

¹ *Cooper NO v First National Bank of SA Ltd* 2001 (3) SA 705 (SCA).

² Paras 23 to 25.

³ Para 26.

⁴ See in particular paras 8 to 16.

undisputed facts alleged by the respondents, namely, that Mr Naidoo dissipated M&M's assets or moved them into the asset registers of his other corporate entities (allegations which were not pertinently denied by Mr Naidoo and which must therefore be accepted for purposes of these proceedings), there was a reasonable suspicion that those assets had been concealed. That being so, the appellants correctly conceded that the matter falls to be decided on the basis that the respondents had been entitled to apply for the warrant without notice.

[10] A further major assertion raised at the outset was that the liquidators' application had constituted an abuse of the process of court. The argument in this regard appeared to be two-fold. First, that the warrant was unnecessary as clause 3.1 related to goods that were already under judicial attachment and, second, that the request for a warrant had been motivated by an improper purpose.

[11] Both these arguments can be disposed of shortly. In regard to the first, the evidence placed before the magistrate was to the effect that the judicial processes until then had proved to be ineffective. Of course, as counsel for the appellants argued, a lengthy period had passed after the final winding-up order and the sheriff having effected an attachment in November 2010. But even if the liquidators or the sheriff had been somewhat slow or remiss in securing M&M's assets, about which it is

unnecessary to decide or comment, the surreptitious concealment of assets long after the formality of their attachment does not preclude a magistrate from issuing a warrant to preserve them.

[12] The second point is equally without merit. It was premised upon an allegation that the idea of obtaining a search and seizure warrant was not that of the liquidators but of a former business partner of Mr Naidoo, Mr S M Mashita, who had been cited by the liquidators as a respondent when applying for the warrant. The appellants contended that the issue of the warrant was the product of a mala fide process driven by Mr Mashita as part of a personal vendetta against them, particularly as he deposed to an affidavit exposing Mr Naidoo's actions in concealing assets. There is nothing to substantiate this gratuitous allegation with which counsel for the appellants wisely did not persist, despite it being raised in the heads of argument.

[13] In reality, the simple answer to both legs of the appellants' allegation of an abuse of process is that there was a reasonable suspicion that assets of M&M had been concealed and, that being so, the liquidators were perfectly entitled to apply for a warrant. And when they did, the magistrate was fully entitled to issue it.

[14] For completeness, it should be recorded that the appellants abandoned a further argument that the warrant had been irregularly issued

due to the petitioning creditors having been parties to the application for its issue. Although the warrant indicated that possibly might be the case, a reading of the papers showed they were not. The appellants' concession in that regard was properly made and it is surprising that it was ever contended otherwise.

[15] The appellants' next challenge to the warrant was based on an allegation by Mr Naidoo that certain of the assets which form the subject matter of the warrant were acquired by 'the [appellants] independently and with money emanating from [their] own resources'. Mr Naidoo also asserted that the warrant improperly gave the liquidators carte blanche to reap from the appellants' premises 'everything they could have laid their hands upon'.

[16] There is no merit in this challenge. As is apparent from the terms of the warrant, it relates to assets of M&M and not to any assets that belong to any of the appellants. Moreover, as both Smalberger JA and Marais JA stated in their respective judgments in *Cooper*, the magistrate's decision to issue the warrant is not dispositive of any ownership rights. As Marais JA said:

'The decision to issue a warrant is in no sense an adjudication of any substantive issue, existing or potential, between the trustee and any third party or between the insolvent and the third party. Success in obtaining a warrant and success in its execution brings the trustee no more than provisional physical possession of the

relevant asset. The trustee's continued possession is open to challenge in the courts and the customary gamut of remedies (review proceedings, prohibitory interdicts, vindicatory actions, declarations of right, etc) is available to the third party. A successful challenge will bring an end to the trustee's possession.'⁵

[17] It is accordingly always open to any affected owner to take legal measures relating to ownership of assets falling outside the ambit of the proceedings to which a warrant relates. In these circumstances, if assets seized in execution of the warrant are shown by the appellants not to have been the property of M&M when it was placed into liquidation, they are liable to be returned. But that is no reason to invalidate a warrant which relates to assets of M&M. The challenge on this basis must therefore also fail.

[18] In the light of the above, the appellants were obliged to fall back on allegations in regard to what might be termed 'technical imperfections' in the warrant. The first of these is based upon the provisions of clauses 5 and 5(a) of the warrant, namely, to an order for costs of the application and the setting of a 'return date', albeit one that the appellants were entitled to anticipate on written notice.

[19] The appellants' initial argument in respect of these provisions was that the process by which a magistrate issues a warrant for search and

⁵ Para 4 of the minority judgment.

seizure under s 69 constitutes ‘administrative action’ which cannot be issued provisionally and in respect of which a costs order could not be granted. In argument in this court, counsel for the appellants varied his stance somewhat. Relying on certain comments in *Minister of Police v Auction Alliance*⁶ he stated that it was no longer the appellants’ contention that the issue of a warrant constitutes administrative action but, rather, that it involves the exercise of a judicial discretion. But, that discretion, so he submitted, was not akin to civil proceedings so that it was neither proper to grant a costs order nor to issue a warrant provisionally. In these circumstances, the appellants contended that the warrant had been issued beyond the provisions of s 69 of the Act.

[20] This cannot be accepted. One must accept that the terms of both clauses 5 and 5(a) of the warrant are anomalous. Awkwardly phrased the warrant may well be, but it was clearly not issued in the process of civil litigation. As is clear from the provisions of clauses 2, 3 and 4 where reference is made specifically to s 69 of the Act, it was no more than a warrant issued under that section.

[21] Moreover, the award of ‘costs of this application’ in clause 5 makes no mention of who should pay those costs. As there was no civil *lis* between the liquidators, who applied for the warrant, and any of the

⁶ *Minister of Police & another v Auction Alliance (Pty) Ltd & others* [2014] 2 ALL SA 432 (WCC) para 25.

persons affected thereby, namely, those cited in the application as so-called ‘respondents’, the latter could never be bound by the provisions of clause 5. That clause can therefore be regarded as irrelevant, unenforceable and *pro non scripto*.

[22] Similarly, clause 5(a) is also anomalous but, again, it is an anomaly that is, in truth, without effect. The appellants’ contention that this was a provisional warrant is without merit. It is clear from clause 6 that the warrant was to be executed on its issue. No person was called upon to show cause on the so-called return date why a provisional order should not be confirmed. Indeed the use of the phrase ‘return date’, while unfortunate, conveys no more than that any person affected thereby (the appellants in this appeal) could approach the court on that date to challenge the issue of the warrant if so advised.

[23] Relying upon the provisions of s 69(4) of the Act, the appellants then argued that as the section required the warrant to be ‘executed in a like manner as a warrant to search for stolen property’, the warrant was in fact one issued under the provisions of the Criminal Procedure Act 51 of 1977 — and that had been envisaged by the magistrate who, in issuing the warrant, referred to s 69 ‘read together with s 21 of the Criminal Procedure Act’ as authority for doing so. On the strength of this

contention, the appellants further argued that the warrant did not match up to the strict requirements of a criminal warrant and should be set aside.

[24] Whilst accepting that a warrant issued under s 69 has, at the very least, the potential to infringe the rights of others, there is nevertheless a fundamental distinction between it and a criminal warrant. There will be certain criminal matters in which the existence of a particular article connected with a suspected crime is known so that it can be described in specific terms in a warrant; while in others no particular article can be identified but it can be expected that, if the offence being investigated was committed, an article or articles should exist, and in those latter instances the purpose of the search will be to discover if they do.⁷ The overall purpose of a warrant issued in criminal proceedings is thus to find and seize evidence of a commission of a crime which may be preserved for use should a prosecution follow. This, as Mogoeng J stated in *Minister of Safety and Security v Van der Merwe*,⁸ is an important weapon ‘designed to help the police to carry out efficiently their constitutional mandate of, amongst others, preventing, combating and investigating crime’.⁹

⁷ See the remarks of Nugent JA in this court in *Minister of Safety & Security v Van der Merwe & others* 2011 (1) SACR 211 (SCA) para 11.

⁸ *Minister of Safety & Security v Van der Merwe & others* 2011 (2) SACR 301 (CC).

⁹ Para 35.

[25] The underlying purpose of a seizure under s 69 of the Act is fundamentally different. As stated by Marais JA in *Cooper*:

‘It is to disable the insolvent and anyone else who may be physically in possession of such assets from alienating or encumbering them to the prejudice of creditors. That purpose is achieved by, inter alia, providing for the trustee to have physical possession of them in the case of movables or, in the case of movables under attachment or immovables, by having the relevant functionaries place caveats against the assets.

Despite all that, but for s 69, there would remain a window of opportunity for a third party in possession of a movable asset, the ownership of which is vested in the trustee, to alienate it in such a way that it could not be vindicated by the trustee . . . The longer a third party can resist handing over the asset, the more extensive the opportunities of alienating the asset to another for value to the prejudice of creditors of the insolvent may be . . . Hence the need for a provision such as s 69.’¹⁰

[26] In the light of these fundamental differences, a warrant under s 69 can neither be construed as being akin to a warrant issued under s 21 of the Criminal Procedure Act nor necessarily subject to the same limitations and restrictions attendant upon criminal warrants. In any event, a distinction must be drawn between the issue of a warrant, on the one hand, and its execution, on the other. As 69(4) only requires a warrant to be executed and not issued ‘in a like manner as a warrant to

¹⁰ Paras 11-12.

search for stolen property,’ the provisions relating to the issue of warrants in criminal proceedings are of no relevance to a s 69 warrant.

[27] Section 21 of the Criminal Procedure Act requires a warrant issued under that section to ‘be executed by day, unless the person issuing the warrant in writing authorises the execution thereof by night’¹¹ and that the police official executing the warrant shall, upon the demand of an affected person, hand over a copy of the warrant.¹² Clearly, then, the reference to s 21 of the Criminal Procedure Act in the warrant issued by the magistrate meant no more than it was to be executed in such a manner, and not that it was a warrant issued under the provisions of the Criminal Procedure Act or fell to be regarded as such.

[28] In the light of that conclusion, the appellants’ argument that the warrant was to comply with the provisions of s 21 of the Criminal Procedure Act and that it was therefore necessary for a specific police officer to be identified in the warrant as the person who should effect the search and seizure, falls away. In any event, there can be no doubt that the order authorises the sheriff and the liquidators (the latter acting in their capacity as officials charged with the duty to protect assets upon which the hand of the law has been placed) to execute the warrant with the assistance of the police.

¹¹ Section 21(3)(a) of the Criminal Procedure Act 51 of 1977.

¹² Section 21(4).

[29] Finally, the appellants fell back on an argument that the use of language such as ‘any or all documents’ or ‘all movables and/or other assets under judicial attachment’ in clause 3 of the warrant was so wide that it was impossible for any person to ascertain what should be seized and attached. Relying upon various well-known decisions they argued that a wide, general description of the documents to be sought was not competent.

[30] This argument, too, cannot be upheld. The warrant clearly refers to assets of M&M, and no-one else. Indeed clause 3.1 of the warrant refers to those assets already attached, but which of course had not been secured but left at the business premises M&M shared with the other appellants. This alone militates against confusion. The terms of the warrant were therefore not so broad that it was impossible for a person executing it to ascertain what should be sought out and seized. This final challenge, too, cannot succeed.

[31] For these reasons, despite its imperfections, the warrant was not invalid and the court a quo was correct both in concluding that to be so and in dismissing the appellants’ application to have it set aside. The appeal must therefore fail.

[32] The appeal is dismissed with costs, including the costs of two counsel.

L E Leach
Judge of Appeal

H Mayat
Acting Judge of Appeal

Appearances

For the Appellants: M P van der Merwe SC (with him C de Villiers)

Instructed by:

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For the First, Second,

Fourth and Fifth

Respondents: G W Woodlend SC (with him L Zazaraj)

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