IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

DATE: 20/06/05

UNREPORTABLE

Case Number: 18878/2005

In the matter between:

ROT ARY SEAliNG SERVICES CC	**1 ST APPLICANT**
ROTARY FLUID CONTROL CC	**2ND APPLICANT**
IAN WILLIAM LONGMORE	**3RD APPLICANT**
DEBORAH ANNE LONGMORE	**4TH APPLICANT**
JOHANNES JOACOBUS KRUGER	**5TH APPLICANT**
AHUMBEGANY SLOAN	**6 TH APPLICANT**
WILMA HUISAMEN	**7 TH APPLICANT**
JANET STRYDOM	**8 TH APPLICANT**
ANDRE HAASBROEK	**9 TH APPLICANT**
PIETER WILLEM BRUMMER	**10TH APPLICANT**
WIKUS JOHANNES ERWEE	**11 TH APPLICANT**

and

THE NATIONAL PROSECUTING AUTHORITY AS REPRESENTED BY THE DIRECTORATE OF SPECIAL OPERATIONS	**1ST RESPONDENT**
SASOL SYNFUELS (PTY) L TD	**2ND RESPONDENT**

JUDGEMENT

JORDAAN J:

The Applicants launched an urgent application wherein they seek the substantive relief set out in prayers 2 to 5 of the notice of motion which reads as follows:

1.

2. That the decision of the First Respondent to hold an investigation in terms of section 28 (1) (a) of the National Prosecuting Authority Act, Act No. 32 of 1998 (as amended) be set aside.

3. That the search and seizure warrants issued in terms of section 29 (5) of the of the National Prosecuting Authority Act, Act No. 32 of 1998 (as amended) by Mr Justice Botha on 15 April 2005 in respect of the First to Eleventh applicants be declared null and void and set aside.

4. That all documents, records, data and other property of the Applicants seized by the First Respondent under the aforesaid warrants, as well as photographic or electronic copies of them, be returned to the applicants.

5. Costs of suit against the First Respondent.

6. ...

This application stems from the issue by Botha J on 15 April 2005 of various search and seizure warrants in terms of section 29(5) of the National Prosecuting Authority Act, No. 32 of 1998 (as amended - *"the NPA* Act') and the execution thereof by officials of the First Respondent on 26 April 2005.

The Seventh Applicant withdrew her mandate to the Applicants' attorney of record on 13 June 2005.

The Applicants joined the Second Respondent but do not seek any substantive relief or a costs order against it. The Second Respondent however filed a short answering affidavit.

I am satisfied that sufficient urgency was illustrated to deal with the matter in terms of Rule 6(12).

The investigating director, being the Deputy Head: Directorate of Special Operations (Mr. Ledwaba) authorised an investigation in terms of section 28(1)(a) of the NPA Act on 25 February 2005.

It is said, in annexure "VHM1", that Mr LEDWABA had reasons to suspect that specified offences of fraud and/or contravention of section 1 (a) and

(b) of the Corruption Act, 1992 and/or a contravention of the Prevention and Combating of Corruption Act, No. 12 of 2004 have been and/or are being and/or attempts have and/or are being made to commit such offences. Consequent upon the investigation being authorised, the officials of the Second Respondent applied for and were granted the search warrants which form the subject matter of this application. The warrants were granted in terms of section 29(4) and (5) of the NPA Act.

Section 28(1)(a) of the NPA Act required of Mr Ledwaba to have had *"reason to suspect"* that a specified offence has been or is being committed or that an attempt has been or is being made to commit such an offence. A mere suspicion will not suffice.

> **Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors {Pty} Ltd 2000 (10) BCLR 1079 CC par [44] at 1095C-D** (also reported at **2001 (1) SA 545 (CC)).**

If the investigating director does not have reasonable grounds to suspect that a specified offence has been committed he has the choice to hold a preparatory investigation in terms of section 28(13) of the NPA Act. That provision was enacted to assist the investigating director to *"cross the threshold from* a *mere suspicion that* a *specified offence has been committed to* a *reasonable suspicion, which is* a *pre-requisite for the holding* of *an inquiry".*

Investigating Director: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd (supra) (BCLR) par [44] at 10950.

It is contended on behalf of the Applicants that on 25 February 2005 i.e. the date upon which Mr LEDWABA issued his directive in terms of section 28(1)(a) of the NPA Act, the information at his disposal could not have led him to believe that there were reasonable grounds to suspect that a specified offence has been committed. They submit that at the best for the First Respondent (without conceding it) the investigating director might have had a *"mere suspicion"* that an offence has been committed. Under those circumstances the investigating director should have held a preparatory investigation in terms of section 28(13) of the Act. Under those circumstances the provisions of section 28(14) of the NPA Act would have been at his disposal. They submit that the provisions of subsections (2) to (10) should, under those circumstances have been applied by the investigating director.

Investigating Director: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd (supra) (BCLR) par [33] and [34] at 1 092A-F.

The Applicants submit (correctly in my view) that authorisation of search and seizure warrants under section 29(5) of the NPA Act places a formidable weapon in the hands of the investigating director. Various

essential safeguards have been prescribed by the Constitutional Court before such warrants should be authorised.

See: Investigating Director: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd (supra) (BCLR) par [36] to [40] at 1092H-1093F;
Powell N.O. & Others v Van Der Merwe & Others 2005 [1] All SA 149 (SCA) paras [68] to [71] at pp171-172.

Those essential safeguards were succinctly as set out in the **Powell** judgment *supra* as follows:

> *"(69) First,* a *search warrant is to be granted for purposes of* a *preparatory investigation only if there is* a *reasonable suspicion that an offence, which might be* a *specified offence, has been or is being committed, or that an attempt was or had been made to commit such an offence (par 56).*
>
> *(70) Second, the investigating director is required to place before* a *judicial officer an adequate and objective basis to justify the infringement of the right to privacy. The legislation sets up an objective standard that must be met prior to the violation of the right, thus ensuring that search and seizure powers will only be exercised where there are sufficient*

reasons for doing so *(para 55).*

(71) Third, there must be authorisation by a *judicial officer before* a *search and seizure* of *property takes place: an investigating director may not search and seize property, in the context* of a *preparatory investigation, without prior judicial authorisation (para* 35). *It must appear to the judicial officer, from information on oath* or *affirmation, that there* are *reasonable grounds for believing that anything connected with the preparatory investigation is,* or *is suspected to be, on such premises. The judicial officer is required, among other things, to be satisfied that there* are *Grounds for* a *preparatory investigation and in order to be satisfied the judicial officer must evaluate the suspicion that gave rise to the preparatory investigation* as *well* as *the need for* a *search for purposes* of a *preparatory investigation (para* 36). *It is implicit in section* 29(5) *that the judicial officer will apply his* or *her mind to the Question whether the suspicion which led to the preparatory investigation, and the need for the search and seizure to be sanctioned,* are *sufficient to justify the invasion* of *privacy that is to take place. On the basis* of *the information, the judicial officer makes an independent evaluation and determines whether* or *not there* are *reasonable Grounds to suspect that an object that might*

have a bearing on a preparatory investigation is on the targeted premises (para 38). It is also implicit in the legislation that the judicial officer should have regard to the provisions of the constitution in making the decision(par 38)."

[my underlining]

The investigating director decided that he had sufficient information at his disposal to direct that an investigation *should* be held in terms of section 28(1)(a) of the NP A Act. Both the **Hyundai** and **Powell** judgments *supra* deal with search warrants which were issued consequent upon a decision taken by the investigating director to hold a preparatory investigation. The Respondents submit that it follows that the test to be applied by a Judge in chambers to authorise the issue of warrants *under* section 29(4) and (5) read with section 28 (1)(a) of the Act is more stringent than those under **section 28(13). In my *view* this stands to reason. The essential** safeguards which were *enunciated* in the **Hyundai** judgment should therefore be viewed against the aforesaid submission. This test still is that the judicial officer should apply his or her mind to the question whether the suspicion which led to the investigation and the need for the search and seizure to be sanctioned is sufficient to justify the invasion of privacy that is to take place. The *Judge* in chambers has to make an independent evaluation and determine whether or not there are reasonable grounds to suspect that an object that might have a bearing on an investigation is on

the targeted premises.

It was incumbent upon the investigating director or his designates to place before Botha J a proper *"adequate and objective basis"* for the Judge to have authorised the warrants. Material facts should not have been misstated or withheld when the application was made for the search warrants. It follows that if that had occurred, Botha J would not have been able to properly consider whether the warrants should be authorised or not. These factors also underscore the necessity for the rules relating to proper disclosure of material facts in *ex parte* applications to be strictly and vigorously applied.

See: Powell N.O. & Others (supra) par [72] at p172.

It is common cause that the investigating director obtained the authorisation of the warrants on an *ex parte* basis. It is trite that in *ex parte* applications all material facts must be disclosed which might influence a court (or, for that matter, a Judge in chambers) in coming to a decision. These principles equally apply to the authorisation for search warrants under sections 29(4) and (5) of the NPA Act.

National Director of Public Prosecutions v Basson 2002 (1) SA 419 (SCA) par [21] where the SCA expressly approved of those rules as they are set out in **Schlesinger v Schlesinger 1979 (4) SA 342 (W) at 348E-349B;**

Powell N.O. (supra) par [73] to [74] at p172.

1.

In **Powell N.O. (Supra) at par [75]** Southwood AJA said the following:

"In my *view, this approach (i.e. the approach applicable to* ex *parte applications) should apply equally to relief obtained on facts which* are *incorrect because they have been misstated* or *inaccuratelv set out in the application* for *the* order *(compare. Hall and Another v Hevns and Others* 1991 (1) SA 381 (C) *at 397B-C)* or. as *in this case because they have not been sufficientlv investiGated and it should be viGorouslv applied where* a *riGht in the bill* of *riGhts has been violated. That is the only way that the courts can ensure that the right to privacy is vindicated after the event."*

[own insertion and own underlining]

In the same judgment Southwood AJA proceeded to say (in paragraph [76]):

"The purpose of *vigorously applying the rule and setting aside the decision to authorise the warrant is not to punish the director* as *was stated by the court below. It is to maintain the legality* of *the process. Infringement* of *the right to privacy by* a *search and seizure warrant is justifiable only if the correct facts have been placed before the judicial officer in an objective manner* so *that he*

can properly apply his mind. The process will be fatallv flawed if incorrect facts are placed before him".

[my underlining]

And further at paragraph [83]:

"Bv not investiGatinG the investiGatinG directorate did not discover the true facts and accordinGlv the correct facts were not placed before the two iudicial officers. I have no doubt that the way in which these bald allegations were made in the affidavit influenced the two judicial officers in authorising the warrants".

[my underlining]

The Applicants submit that Mr MOODLEY not only misstated the facts to Botha J but also failed to disclose material facts at his disposal and, even more importantly, failed to sufficiently investigate fundamental processes which were in place at the Second Respondent.

The sequence of events leading up to the decision which was taken on 25 February 2005:

An electronic mail was sent by one PAUL VICTOR to Mr ROB ASH on 18 January 2005.

Annexure "PGM1" does not disclose the identity of any of the Applicants.

Furthermore, it denotes the result of an investigation which revealed theft of new and reconditioned items to the value of approximately R7 million.

On 1 February 2005 Mr RR SCHULZ made a statement wherein he disclosed what a source apparently told him.

On 25 January 2005 Mr MOODLEY was seconded to SASOL L TO Forensic Audit Department to conduct an investigation into a complaint received from the Second Respondent.

On 26 January 2005 Mr MOODLEY met with Mr VAN DEN HEEVER.

On 9 February 2005 Mr VAN DEN HEEVER apparently deposed to an affidavit.

On 18 February 2005 Mr MOODLEY received a telephone call from Mr VAN DEN HEEVER informing him that his *"cover has been blown"* and that he has *"grave concerns over his safety",*

On 24 February 2005 Mr VAN DEN HEEVER deposed to a supplementary affidavit in which he, **inter alia**, stated that he believes that the First and/or Second Applicants may be in the process of destroying and/or removing incriminating documentation from their offices.

It was held in **Powell N.O. (supra) at para [5] p153** that for a plenary investigation to be held there must be a reasonable suspicion that a specified offence has been committed. The applicants submit that the circumstances could not have raised in the mind of Mr LEDWABA a reasonable suspicion that the offences specified in his authorisation of 25 February 2005 have been or are being committed. They do so for the following reasons: (I quote from their heads of argument)

" The offences specified in the annexure "VHM1" are:

Fraud;

A contravention of the Corruption Act, 1992;

A contravention of the Prevention and Combatting of Corruption Act, 2004.

Annexure "PGM 1" discloses, at best for the First Respondent, theft of new and reconditioned items to the value of approximately R7 million. That is not an offence specified in annexure "VHM1". It does not name any of the Applicants. It does note even attempt to particularise the so-called *"strong evidence"* to which reference is made in the annexure.

Annexure "PGM2" relies on what VAN DEN HEEVER would have said to SCHULZ. The unreliability and incongruity of the statements by VAN DEN HEEVER have been fully canvassed in the founding affidavit of the Third Applicant. ... It is significant that the number of so-called perpetrators in paragraph 4 of the statement by SCHULZ differs substantially from the list referred to in the affidavit by MOODLEY ...

The affidavit by Mr ASH ("PGM3" application p521) vacillates between an exoneration of the Second Applicant to theft of R9 million. From the affidavit by Mr STEWART ("PGM4" p528) it appears that Mr ASH's affidavit was not annexed to his i.e. Mr STEWART's affidavit. We therefore submit that it is probable that the affidavit by Mr ASH did not serve before Mr LEDWABA when he took his decision to institute the investigation. The significance thereof will be fully addressed during oral argument.

The two affidavits by VAN DEN HEEVER, as submitted above, does not pass scrutiny. We refer in this regard to the affidavit by the Third Applicant wherein he, in detail, demonstrates the inconsistencies, fallaciousness and incongruities in the two statements as narrated by MOODLEY ...

The telephone call of 18 February 2005 by VAN DEN HEEVER to

MOODLEY demonstrates the untrustworthiness of VAN DEN HEEVER and the lack of investigation by MOODLEY. It cannot substantiatea reasonable belief to institute an investigation.

The affidavit by STEWART ("PGM4") summarises the foregoing factual matter. The affidavit by STEWART does not take those allegations any further. The figures mentioned in paragraphs 16 and 17 of STEWART's affidavit must have created a false impression in the mind of Mr LEDWABA. This has been comprehensively explained by the Third Applicant in his founding affidavit.

It is significant that paragraph 21 of the affidavit by MOODLEY does not appear in the affidavit of STEWART.

Mr LEDWABA therefore did not know that the accuracy and veracity of the figures contained in paragraphs 16 and 17 of his affidavit have not been verified since no audit was done on the computer system from whence those figures were drawn.

The contents of paragraph 19 of the affidavit by STEWART must have weighed heavily with Mr LEDWABA in his decision to authorise the investigation. Unfortunately annexure "B", "D", "E",

"F", "G", "H", "I" and "J" to which reference are made in paragraph 19 have not been disclosed by the First Respondent in this application. The fact that VAN DEN HEEVER's identity has been compromised has been dealt with comprehensively by the Third Applicant."

The appllicants therefore submit that whilst Mr LEDWABA might have had a mere suspicion that an offence (which is not necessarily a specified offence i.e. specified in annexure "VHM 1 ") has been or is being committed, it does not pass muster when regard is had to the more stringent test to be applied in regard to section 28(1)(a) of the NPA Act. After due consideration of the evidence placed before me I share the views of the applicants. The facts might have warranted a preparatory investigation, but not more than that.

It must now be considered what the First Respondent placed before Botha J. Did they make full disclosure of all material facts? All material facts which might have influenced Botha J in coming to a decision should have been disclosed by the officials of the First Respondent. The nondisclosure or suppression of facts (according to the second proposition enunciated in **Schlesinger**) need not be wilful or **mala fide** to incur the penalty of rescission.

It is common cause that: Annexure "PGM1," the statement by SCHULZ

(annexure "PGM2") and the affidavit by ASH (annexure "PGM3") did not serve before Botha J. The two affidavits by Mr VAN DEN HEEVER dated 9 and 24 February 2005 respectively, also did not, serve before Botha J.

The affidavit by STEWART (PGM4") and the *"documentary evidence and exhibits"* discovered during the investigation process to which reference is made in paragraph 13 of the affidavit by Mr Mugwambane also did not serve before Botha J.

The *"other relevant evidence that will be admissible during the criminal prosecution"* to which reference is made in paragraph 13 of the affidavit by Mr MUGWAMBANE, did not serve before Botha J. Neither Mr MOODLEY nor Mr MUGWAMBANE even attempted to convey to Botha J the main thrust of those documents. The mere mention of those documents is not sufficient.

The importance of Ash's affidavit not serving before Botha J is apparent. In paragraph 5 he states that Mr HOLT reported to him that *"Procurement and Supply had done their own 'investigation' and that they were* of *the opinion that there was probably nothing really wrong with the transactions in question."*

[my underlining]

Botha J would undoubtedly have been influenced by the figures which may be gleaned from paragraphs 19 and 20 of the affidavit by Mr MOODLEY. The cumulative effect of those figures (being some R86 million) was introduced in the affidavit by Mr MOODLEY to create the impression that the alleged corruption and fraud were of an extensive nature. Had annexure "PGM1" served before Botha J he would have been able to glean from that document that the investigation has revealed that approximately R7 million worth of both new and reconditioned items had either not been delivered or have otherwise been misappropriated.

He would have been able to glean from the same document that the name of the supplier was not disclosed. The Applicants submit that Botha J would in all probability have attached some weight to the large discrepancy between the figure contained in annexure "PGM1" and those which are referred to in paragraphs 19 and 20 of Mr MOODLEY 's affidavit.

Had the statement by SCHULZ served before Botha J, he would have been able to glean that ten persons were referred to in paragraph 4 as opposed to the names of seventeen persons referred to in paragraph 8 of the affidavit by Mr MOODLEY. The second portion of paragraph 4 is significant - the introductory part clearly states that VAN DEN HEEVER limited the persons involved in the alleged corruption to ten persons. He furthermore specifies the instrument with which the alleged corruption was committed. This is in clear contradistinction to what is said in paragraph 8

of the affidavit by Mr MOODLEY. Botha J would have been able to glean from paragraph 6 of the statement by Mr SCHULZ that there was an ongoing investigation for *"onderde!e (wat) beste! (is) vanaf hierdie maatskappy wat vermis geraak het".* The applicants submit that Botha J would probably have surmised that parts were ordered from either the First or Second Applicants, delivered to the Second Respondent but that it was stolen at the premises of the Second Respondent. Had this information served before Botha J, he would have been able to determine that on this proposition that the offence to which reference is made in paragraph 6 of Mr SCHULZ's statement does not fall within the purview of the direction issued by Mr LEDWABA in terms of section 28(1)(a) of the NPA Act.

Had the affidavit by Mr STEWART served before Botha J he would have been able to determine that an important feature which appears in the affidavit by Mr MOODLEY does not appear in the affidavit of Mr STEWART i.e. the fact that the figures referred to in paragraphs 19 and 20 of the affidavit by MOODLEY were provisional figures in that no audit was done on the SYNFUELS SAP system. He would have been able to raise the question why that important piece of information was not put before Mr LEDWABA when the latter took the decision to institute an investigation in terms of section 28(1)(a) of the NPA Act. A Judge in chambers is enjoined to be satisfied that there were grounds for an investigation and in order to be so satisfied the Judge in chambers must evaluate the suspicion that gave rise to the investigation as well as the

need for a search for purposes of such investigation.

The Applicants submit that had the affidavits by Mr VAN DEN HEEVER served before Botha J he would have been able to determine whether Mr MOODLEY's interpretation of what Mr VAN DEN HEEVER said in his affidavits was correct. Botha J would have been able to discern, objectively, whether the clear discrepancies to which the Third Applicant referred in his founding affidavit are also to be found in the affidavits as such. He would have been able to discern, objectively, whether the fallacies to which the Third Applicant referred in his founding affidavit are reflected in the two affidavits.

This Court has discretion to set aside the order by Botha J being apprised of the true facts which should have served before the Judge in chambers. The First Respondent failed to advance cogent practical reasons why the order issued by Botha J should not be rescinded. Even if the First Respondent will be able, in future, to obtain search and seizure warrants on the facts not disclosed to Mr Botha J, it should not stand in this court's way to rescind those orders.

In my viev the Applicants have made a proper case for the relief sought in prayers 2 and 3 of the notice of motion.

It is not necessary to deal with the further submissions made before me.

An order is made in terms of prayers 2 - 4 of the notice of motion. The First Respondent is ordered to pay the costs, including costs consequent on the employment of two counsel. The costs in respect of the duplicated affidavit of the witness Kruger is however disallowed.