IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.

DATE 21-10-2011 SIGNATURE

CASE NO: 8927/10

21/10/2011

In the matter between

GERHARDUS JOHANNES ALBERTS	Applicant
and	
S HITCHCOCK N.O. **THE MAGISTRATE PRETORIA**	1st Respondent
THE MINISTER OF POLICE	2nd Respondent
THE DIRECTOR OF PUBLIC PROSECUTIONS: TRANSVAAL	3rd Respondent

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JUDGMENT

MATOJANE J

[1] On 23 December 2007, Detective Inspector Coetzee, together with other members of the South African Police Service, acting in the course and scope of their employment as servants of second

respondent, entered the premises of applicant at 918 14th Avenue, Wonderboom South, searched the premises and seized and removed articles consisting of computer equipment, videos and photographs containing images of child pornography. The police purported to act on the strength of the search and seizure warrant ("the second warrant") issued by magistrate S Hitchcock on 19 December 2007.

[2] Pursuant to the search and seizure of the articles by detective Inspector Coetzee, the applicant was arrested by her on 23 December 2007 for possession of child pornography (in contravention of Section 27(1) of the Films and Publications Act 65 of 1996).

[3] The applicant seeks, *inter alia,* an order directing that the search and seizure warrant issued by magistrate S Hitchcock on 28 November 2006 ("the first warrant) and 19 December 2007 respectively, be set aside. That the seizure of articles pursuant to the search and seizure warrants be set aside and articles seized in terms of the search and seizure warrants be declared inadmissible in the criminal prosecution against the applicant.

[4] In terms of his founding affidavit in support of the application (before its amendment), applicant avers that the first warrant was

the only search and seizure warrant issued in respect of the premises situated at 918 14th Avenue, Wonderboom South and the articles which formed the subject matter of the application were seized on 19 December 2006.

[5] In the answering affidavit, the second respondent denies that the charges against the applicant arise out of the search and seizure pursuant to the warrant issued by magistrate S Hitchcock on 28 November 2006 ("First warrant") and no articles were at any stage seized in terms of the first warrant. Second respondent avers that the search and seizure warrant issued on 28 November 2006 was cancelled on 19 December 2007. The articles seized in the possession of the applicant were seized in terms of the search and seizure warrant issued by magistrate S Hitchcock on 19 December 2007 ("second warrant") and it was executed on 23 December 2007.

[6] In his replying affidavit, applicant denies that the articles were seized in terms of the second warrant.

[7] The court is able to resolve this issue on the application of the rule in **Plascon-Evans Paints Limited v Van Riebeeck Paints** 1984(3) SA 623 AD 634-635. The general rule in Plascon-Evans case is that where disputes of facts have arisen in affidavits filed in motion proceedings, a final order may be granted if the facts

alleged in the applicant's affidavit which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.

[8] On the facts that are common cause articles consisting of videos and photographs containing child pornography were seized in the possession of the applicant at 918 14th Avenue, Wonderboom South. Pursuant to the search and seizure of there articles, the applicant was arrested on 23 December 2007 for possession of child pornography. It follows accordingly that the defendants version that the articles were seized in terms of the second warrant must prevail.

[9] Applicant subsequently gave notice of his intention to amend the notice of motion in order to set aside both warrants after it was alleged on behalf of the second respondent that the second warrant dated 19 December 2007 and not the first warrant which was issued on 28 November 2006 was executed.

[10] It was submitted by counsel for the respondents that applicant should not be permitted to make a case in reply when no case was made out in the original application. Counsel argued that applicant has failed to make any case for setting aside of the second warrant in the original application and now seeks to substitute the

existing claim in the original application with a different claim based on a different cause of action in the replying affidavit.

[11] Counsel for the applicant submitted that second respondent was granted an opportunity by the Deputy Judge President to file a duplicate affidavit in answer to the new issues raised by applicant in his replying affidavit and has failed to do so. Counsel submitted that second respondent has waived the opportunity to complain about the new evidence in the replying affidavit.

[12] It is trite that all the necessary allegations upon which an applicant relies must appear in the founding affidavit, as applicant will not generally be allowed to supplement the founding affidavit by adducing supporting facts in a replying affidavit. See **Erasmus, Superior Court Practice** (service 37, 2011 at B1-45 and cases cited in footnote 10).

[13] The submission on behalf of applicant that respondent has waived the right to complain about new evidence in the replying affidavit is untenable and unsustainable. For a waiver to be effectual the applicant had to show that the second respondent, with full knowledge of its right, decided to abandon it 'whether expressly or by conduct plainly inconsistent with an intention to enforce it'. See **Laws v Rutherford** 1924 AD at 263. The Deputy

Judge President in chambers did not make an order that respondent should duplicate, he merely granted the second respondent an opportunity to file a duplicate affidavit if it so wishes. In my view, respondent did not have any right to waive, as it is not permissible for applicant to make a case for the first time in the replying affidavit.

[14] In the founding affidavit in support of the relief sought in terms of the notice of motion, applicant alleged that the warrant issued on 28 November 2006 was "die enigste lasbrief is wat ten opsigte van perseel 14de Laan 918, wonderboom-Suid uitgereik is" and that the warrant was executed on 19 December 2006 when the articles were seized. In the replying affidavit applicant now seeks a different relief, namely the setting aside of the second warrant which is a different claim based on a different cause of action. The application falls to be dismissed on this ground alone.

[15] Counsel for the applicant submit that first respondent did not apply her mind properly to the matter when she authorized the first warrant because Detective Coetzee admitted in her affidavit in support of her application for the warrant that the suspicious bank transactions linking applicant to the purchase of images of child pornography on his internet were disputed by the applicant and that he was in fact refunded by the bank and that the name of Griet van

Zyl and the known address of 919 x55 Avenue Tshwane were false. Counsel argued that on the information placed before the first respondent there were no reasonable grounds for believing that articles, to which the warrant relates, are articles as referred to in section 20 of the Criminal Procedure Act.

[16] The same argument was advanced in respect of the second warrant. Counsel submitted that the information as contained in the affidavit of Detective Inspector Coetzee before magistrate Hitchcock does not say that there are reasonable grounds to believe that an offence has been committed. Counsel argues that at the time when Inspector Coetzee requested the warrant she did not have any information indicating that applicant was in possession of any articles referred to in Section 20 of the Criminal Procedure Act because she states:

> "... ondersoek in te stel en beslag te le op enige bewysstukke, soos uiteengesit per aanhangsel A tot hierdie verklaring om vas te stel of daar enige oortreding plaasgevind het".

[17] Section 20 of the Criminal Procedure Act 51 of 1977 provides as follows:

> "The state may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article)-

(a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence whether within the Republic or elsewhere;

(b) which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or

(c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence."

Section 21(1) reads:

"Subject to the provisions of ss 22, 24 and 25, an article referred to in s 20 shall be seized only by virtue of a search warrant issued -

(a) by a magistrate or justice, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or upon any person or upon or at any premises within his area of jurisdiction;..."

[18] The 'reasonable grounds for believing' in section 21(1)(a) are not grounds measuring up to an objective standard, but are grounds which in the subjective opinion of he magistrate are reasonable. See **Mandela and Others v Minister of Safety and**

Security and Another 1995(2) SACR 397 (W) at 404g-i. It follows that there is not onus on the magistrate to show that 'reasonable grounds for believing' in fact existed that an article referred to in section 20 was within her area of jurisdiction. The court will only interfere with the magistrate's exercise of her discretion in exceptional circumstances, if it can be shown that she had not properly applied her mind to the matter or in the case of bad faith of the magistrate in issuing the warrant.

[19] From the information on oath placed before the second respondent at the time of issuing the first warrant, it appeared that a certain Griet van Zyl ordered and paid for images of child pornography from a website during 2003. The bank account used for the child pornography transactions was a BOE bank, now Nedbank and the particulars of the account holder is that of the applicant. According to the bank statement, the transactions were in dispute and applicant was refunded. Detective Coetzee says in the affidavit "Therefore it seems necessary to conduct an investigation to determine if the accountholder could have bought child pornography on other websites".

[20] The information on oath before the second respondent at the time of her issuing the second warrant was that subsequent to the issue of the first search and seizure warrant on the 28 November

2006, new information had come to light via an investigation team of the American Embassy that an agent in America had reported that one Griet van Zyl had made contact with the agent and that the discussions had taken place in respect of the manufacturing of child pornography. This Griet van Zyl is the same person as the applicant in respect of whom the first warrant had been obtained.

[21] I disagree with the submission by counsel for the applicant that the information as contained in the affidavit of Detective Inspector Coetzee when she applied for the first warrant, does not state that an offence has been committed. It is clear from the affidavit that images of child pornography were bought which may afford evidence of the commission of an offence. Detective Inspector Coetzee clearly states that she wanted to conduct an investigation to determine if the applicant could have bought child pornography on other websites. The second affidavit states that applicant had contacted an agent regarding the manufacturing of pornography. The information before the magistrate showed that applicant was involved with child pornography which is an offence.

[22] In my view, the information on oath which was before the magistrate at the time she issued both warrants shows that she properly applied her mind to the matter and subjectively found that there were reasonable grounds to believe that articles referred to in

section 20 of the Criminal Procedure Act involving the offence of possession of child pornography were at the premises of the applicant. Her belief was vindicated when articles consisting of videos and photographs containing child pornography were seized in applicants possession pursuant to the second warrant.

[23] In the result the following order is made:

The application is dismissed with costs.

K E MATOJANE
JUDGE OF THE HIGH COURT