22/97

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 503/94
IH

In the matter between :

GLYNN RUDOLPH	First Appellant
GLYNN RUDOLPH & CO (PTY) LIMITED	Second Appellant

v

THE COMMISSIONER FOR INLAND REVENUE	First Respondent
J F C HEYDENRYCH N O	Second Respondent
R J BEUKES N O	Third Respondent
J J HOLTZHAUSEN N O	Fourth Respondent
K STEYN N O	Fifth Respondent
P DU PLESSIS N O	Sixth Respondent
T J FRATES N O	Seventh Respondent
M M J VAN WYK N O	Eighth Respondent

CORAM : HEFER, SMALBERGER, VIVIER, NIENABER et PLEWMAN JJA

HEARD : 17 MARCH 1997

DELIVERED : 25 MARCH 1997

J U D G M E N T

HEFER JA :

This judgment will hopefully conclude the saga which commenced with an application brought by the appellants in the then Witwatersrand Local Division for an interim interdict and ancillary relief in connection with certain authorisations to search and seize in terms of s 74(3) of the Income Tax Act 58 of 1962 ("the Act"). Apart from other grounds for their contention that the authorisations were invalid and had been improperly executed the appellants alleged that s 74(3) was unconstitutional. Goldblatt J dismissed the application in a judgment reported as *Rudolph and Another v Commissioner for Inland Revenue and Others NNO* 1994(3) SA 771 (W). The matter then came on appeal to this Court but, for the reasons which emerge from *Rudolph and Another v Commissioner for Inland Revenue and Others* 1996(2) SA 886 (A), it was referred to the Constitutional Court. Eventually that Court found the question of the constitutionality of s 74(3) to be irrelevant for the determination of the case and ruled that this Court is competent to adjudicate upon the other

(so-called "common-law") grounds of invalidity. (See *Rudolph and Another v Commissioner for Inland Revenue and Others* 1996(4) SA 552 (CC) at 559G-H). It is with these grounds that we are presently concerned.

In order to clear the way for a consideration of their validity it is necessary to refer at the outset to a passage at 560E-F in the judgment of the Constitutional Court to the effect that respondents' counsel conceded that, should it be held that that Court had jurisdiction to consider the common-law grounds of invalidity, "one or more of the common-law challenges should succeed." In this Court respondents' counsel (who did not appear in the Constitutional Court) submitted that the concession was wrongly made and does not bind the respondents. The parties are not agreed on the question whether counsel in the Constitutional Court were authorised to make the concession but that is neither here nor there for the concession, albeit imprecise in its terms, is obviously a legal one which can be withdrawn and does in any event not preclude us from

considering the validity of the appellants' complaints. (*Bank of Lisbon and South Africa Ltd v The Master and Others* 1987(1) SA 276 (A) at 288D-F and cases cited there; *Telkom Suid-Afrika Bpk v Richardson* 1995(4) SA 183 (A) at 195B-D.) Respondents' counsel have now withdrawn it and are at liberty to argue the merits of the "common-law" grounds of invalidity.

S 74(3) of the Act reads as follows:

> "(3) Any officer engaged in carrying out the provisions of this Act who has in relation to the affairs of a particular person been authorised thereto by the Commissioner in writing or by telegram, may, for the purposes of the administration of this Act -
>
> (a) without previous notice, at any time during the day enter any premises whatsoever and on such premises search for any moneys, books, records, accounts or documents;
>
> (b) in carrying out any such search, open or cause to be opened or removed and opened, any article in which he suspects any moneys, books, records, accounts or documents to be contained;
>
> (c) seize any such books, records, accounts or documents as in his opinion may afford evidence which may be material in assessing the liability of any

person for any tax;

(d) retain any such books, records, accounts or documents for as long as they may be required for any assessment or for any criminal or other proceedings under this Act."

How these powers were exercised in the present case and what prompted the respondents to do so appear from this Court's previous judgment at 889D - 890B and the Constitutional Court's judgment at 555I -556C. Although a restatement of the facts is accordingly not necessary I will elaborate on what has already been recounted in the judgments wherever the need to do so arises in the course of the discussion which follows.

The appellants rely on three alleged grounds of invalidity. They are (1) that the authorisations were not issued by the Commissioner personally but by a subordinate official to whom the power granted to the Commissioner in s 74(3) could not lawfully be delegated; (2) that the authorisations lack the required degree of clarity and precision; and (3) that, having once been

executed during October 1993, they could not validly be executed again during April 1994.

There is no substance in the first contention. As Botha JA observed in *Attorney-General, O F S v Cyril Anderson Investments (Pty) Ltd* 1965(4) SA 628 (A) at 639C-D the maxim *delegatus delegare non potest* is based upon the assumed intention of the legislature and does not apply in cases where a delegation is authorised by the relevant legislation itself. S 3(1) of the Act expressly authorises the exercise or performance of the powers conferred and the duties imposed upon the Commissioner by any officer engaged in carrying out the provisions of the Act under the former's control, direction or supervision. Plainly included is the power to authorise searches and seizures in terms of s 74(3). The authorisations with which we are concerned were given in writing and signed by Mr CT Prinsloo, a Chief Director in the Department of Finance at the relevant time. His evidence that the Commissioner had delegated the

powers and duties under s 74(3) to him in terms of s 3(1) is confirmed by the written delegation annexed to his affidavit and is not contested. Mr Marcus for the appellants submitted that the respondents have failed to discharge the onus of establishing that Mr Prinsloo acted under the Commissioner's control, direction and supervision. But I do not agree. I accept that, where a delegation is legitimate in terms of the relevant legislation, an allegation that the powers and duties in question had been properly delegated and were performed in accordance with the provisions of the statute has to be proved. (Cf *Chairman of the Board on Tariffs and Trade and Others v Teltron (Pty) Ltd* [1997] 1 All SA 387 A at 391f-g.) Mr Prinsloo says in his affidavit that

> "ek [word] voortdurend van instruksies en riglyne voorsien deur die Kommissaris van Binnelandse Inkomste oor die uitoefening van my pligte en bevoegdhede, en doen ek aan hom verslag. Daar vind voortdurend samesprekings plaas waartydens ek en die Kommissaris van Binnelandse Inkomste gesprek voer oor die uitoefening van bevoegdhede soos hierdie."

In the absence of any rebutting evidence I regard this as proof of the

Commissioner's directions and of his control and supervision over Mr Prinsloo.

The contention that the authorisations lack the required degree of clarity and precision must also be rejected. All the authorisations are in identical form save for the name and address of the person whose affairs were, according to the evidence, being investigated. The one issued in respect of the first appellant reads as follows:

> "MNRE. J F C HEYDENRYCH, R J BEUKES, J J HOLTZHAUSEN, K STEYN, P DU PLESSIS, T J FRATES en MEV M M J VAN WYK, Inspekteurs van Binnelandse Inkomste, word hiermee gemagtig om die magte voorgeskryf in artikel 74(3) van die Inkomstebelastingwet, 1962 (Wet Nr 58 van 1962, soos gewysig), uit te oefen wat betref die sake van MNR GLYNN RUDOLPH te KONINGIN WILHELMINALAAN 58, BAILEYS MUCLKENEUK, PRETORIA, of te enige ander perseel hoegenaamd."

The pith of Mr Marcus's argument is that the authorisations do not indicate what documents are to be searched for or seized and retained. Calling in aid judgments of this Court and provincial courts on the validity of warrants to

search and seize in criminal cases, he submitted that this omission rendered the authorisations invalid.

Again I do not agree. Judgments on the validity of warrants issued under the provisions of statutes regulating criminal procedure are useful in order to discover the general approach which the courts have adopted. For this purpose reference may be made to *Pullen NO, Bartman NO & Orr NO v Waja* 1929 TPD 838 at 846-847 and *Minister of Justice & Others v Desai NO* 1948(3) SA 395 (A) at 403 where Tindall ACJ observed that

> "[t]he process of search under warrant ... constitutes a serious encroachment on the rights of the individual and consequently it is the duty of courts of law to scrutinise most carefully anything done under that section." (ie s 49 of Act 31 of 1917.)

For the same reason there is an obvious need to scrutinise the issue and execution of authorisations under s 74(3) of the Act equally closely. But, apart from their use as an indication of a general approach, the cases on which Mr Marcus relied, provide no further assistance. The simple reason is that the

courts were concerned in those cases with the application of legislation differing materially from the provision with which we are dealing. It serves no useful purpose to know that a warrant calling upon police officers to search for and seize "documents which may afford evidence ..." was held (in *Desai's* case) to be invalid under a provision in Act 31 of 1917 which authorised the granting of a warrant to search for and seize "documents as to which there are reasonable grounds for believing that they will afford evidence ..." The decisions in *Divisional Commissioner of SA Police, Witwatersrand Area, and Others v SA Associated Newspapers Ltd and Another* 1966(2) SA 503 (A) and *Cine Films (Pty) Ltd and Others v Commissioner of Police and Others* 1972(2) SA 254 (A) are basically to the same effect and equally unenlightening. Nor is it useful to know that "[i]t has long been established that the Courts will refuse to recognise as valid a warrant the terms of which are too general" (per Beyers ACJ in the *SA Police* case at 512D-E). The validity of authorisations under s 74(3) can

only be determined by reference to the terms of the section itself. And when these are examined it becomes quite plain that the legislature envisaged that the executing officer should search for *any* documents or other articles and then seize such documents or articles as, in *his* opinion, may afford evidence material to the assessment of the tax liability of the person concerned, and retain them for purposes of the assessment or for any criminal or other proceedings under the Act. The section deals, not only with the Commissioner's power to authorise a search and seizure, but also, and more particularly, with the executing officer's powers and functions. In short, the latter's powers and functions are defined in the Act itself - not in the Commissioner's authorisation; and so are the documents and other articles he is entitled and enjoined to search for and thereafter to seize and retain. There is accordingly no need for a reference in an authorisation to any specific documents or kinds of documents or to specific articles or kinds of articles.

The third and final contention is equally without substance. How it came about that two different sets of documents were discovered and seized at two different addresses during October 1993 and April 1994 respectively is described at 889G-J of this Court's previous judgment. The argument on appellants' behalf is that the authorisations were executed when the documents were seized on the first occasion and could not thereafter be "re-activated" to validate the search and seizure on the second occasion.

There is nothing in the Act which suggests that the mandate conferred by an authorisation under s 74(3) expires once documents or other articles discovered in the course of an authorised search have been seized and retained. This comes as no surprise bearing in mind that, in the broad terms of s 74(3), searches may be conducted and documents and other articles seized and retained "for the purposes of the administration of the Act ". It is obvious that documents discovered as a result of a search may, in many cases, reveal the

existence of other documents or articles for which further searches have to be made; and it is not easily conceivable that the legislature would in such cases require a fresh authorisation for each further search. Be that as it may, the question whether several consecutive searches are authorised by any particular authorisation must be answered by reference to the terms of the authorisation itself. An authorisation under s 74(3), after all, confers a mandate and the duration of the mandate depends, in the absence of any statutory direction, upon the terms of the authorisation itself.

In the present case every authorisation authorises the tax inspectors mentioned therein to exercise the powers under s 74(3) at a given address "of te enige ander perseel hoegenaamd". It is accordingly quite clear that consecutive searches were expressly authorised and there can be no doubt that, had it followed directly upon the first one, the validity of the second search and seizure would have been beyond dispute. The only question is whether it must

be excluded merely because it occurred six months after the initial one. Taking into account (1) the respondents' vain attempts before the authorisations were signed to obtain information about the appellants' affairs and their dissatisfaction with the outcome of the first search; (2) what I have already said about the discovery of certain documents necessitating further searches for others, and (3) that documents discovered in an initial search had to be unravelled before a decision about the need for further searches could be taken, the interval between the two searches does not, in my view, justify the exclusion of the one conducted during April 1994. Mr Marcus tried to make some point about the fact that it occurred as a result of information received from an undisclosed source but that does not make the slightest difference.

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

J J F HEFER JA

CONCURRED } SMALBERGER JA, VIVIER JA, NIENABER JA and PLEWMAN JA