

DIRK JACOBUS SWANEPOEL versus THE MINISTER OF HOME AFFAIRS & 3 OTHERS

CASE NO. A 120/2000

Silungwe, J.

2000.05.03

CIVIL PRACTICE

URGENT APPLICATION: Urgency - commercial interest qualify.

SEARCH WARRANT: Warrant authorizing, *inter alia*, seizure of money in a bank account as well as all relevant documents.

SEARCH WARRANT: Whether money in a bank account liable to seizure- whether proceeds of an alleged stolen cheque deposited into a bank account are identifiable - Once money is paid into a bank account, it becomes unidentifiable and so also are the proceeds of a deposited cheque - hence, such money (proceeds are) is not liable to seizure.

SEARCH WARRANT: To be construed with reasonable strictness in determining its validity of otherwise.

3. Declaring any instruction or order given to Third Respondent or any of its officials that the Applicant be prohibited from making deposits to or withdrawing monies standing to his credit in current account no. 041 365 194 or 041 365 191, held at the Auspannplatz Branch of Third Respondent to be null and void and of no force and effect.

4. Directing the First, Second and Fourth Respondents to pay the costs of this application jointly and severally the one paying the other to be absolved.

5. Directing Third Respondent to pay the costs of this application jointly and severally with First, Second and Fourth Respondents, but only in the event that Third

Respondent opposes this application.

6. Further and/or alternative relief.

The notice of motion is supported by the applicant's affidavit. The first, second and fourth respondents have filed a notice of their opposition to the notice of motion; but the third respondent does not resist the application.

The applicant runs business as a tracing agent under the name and style of Swanepoel & Kie, at 7 Daan Bekker Street, Windhoek; his business entails tracing stolen vehicles and/or vehicles sold subject to instalment sale agreements which the affected financial institutions wish to reposes.

The applicant holds a current business bank account No. 041 365 194 and a trust bank account (with which we are not here concerned) with the third respondent at Ausspannplatz Branch, Windhoek.

On April 7, 2000, the applicant deposited into his business account (the account) a cheque in the sum of N\$111 032-00 which, together with a balance of N\$11 124-76 already in the account, brought the total balance to N\$122 156-76. On April 10, the applicant withdrew from the account the sum of N\$89 000-00.

On April 14, Constable Sebastian K Kock approached the applicant and quizzed him about the N\$111 032-00 cheque which he alleged had been stolen from the Motor Vehicle Accident Fund. On April 15, the applicant could not be allowed to withdraw N\$500-00 from the account because of an intervention by the Namibian Police not to allow the cashing of any of the applicant's cheques drawn on that account. A Mr Van Rooyen, an official of the Ausspannplatz Branch of the third respondent, confirmed to the applicant that the account

had been frozen at the instance of the Namibian Police. A search warrant, dated April 12 but date-stamped April 11 (Annexure C), was issued by the Windhoek Magistrate's Court in terms of sections 43 and 21 of the Criminal Procedure Act No 51 of 1977.

Mr Miller represents the applicant and Mr Campher represents the first, second and fourth respondents.

Mr Campher takes up a point *in limine*, namely, that the matter is not urgent for the following two reasons: (1) the applicant is at liberty to open any number of new business accounts; and (2) the only reason the applicant wishes to operate this specific account is because he wishes to withdraw the rest of the money which represents the proceeds of crime, namely, the alleged theft of the cheque. But Mr Miller counters that the matter is clearly urgent as the applicant is not allowed to operate his account.

It is trite that urgency does not only relate to life or liberty, but also includes commercial interests which may justify the invocation of rule 6(12) of the Rules of court, no less than any other interests. See per Goldstone, J. (as he then was) in *Twentieth Century Fox Film Corporation v Anthony Black Films (Pty) Ltd 1982(3) SA 582(W)* at 586 F-G. A business account, as in the present case, evidently embraces commercial interests. The reasons canvassed by Mr Campher do not in any way detract from the fact that the matter is urgent. Thus, condonation of the applicant's non-compliance with the rules of Court relating to forms and service is justified in this matter.

With regard to the merits of the application, Mr Campher concedes in his heads of argument as well as in his *viva voce* submission before me that "the freezing of the entire account was probably not the right way to keep the money (*sic*) safe by means of the search warrant ...". What the first, second and fourth respondents sought to achieve through the search warrant was to confiscate the balance of N\$17 002-55 as a prospective court exhibit and thereby frustrate the applicant's possible withdrawal of the said sum.

At this juncture, it is fitting to examine the relevant portions of the search warrant which may be condensed to read as follows:

"TO ALL POLICEMEN

I Whereas it appears to me from information on oath that there are reasonable grounds to believe that, within the Magisterial District of Windhoek there is

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an article, to wit a cheque (sic) in the amount of N\$111 032.00 as well as all relevant documentation (a)-(c)...

(d) is on reasonable grounds believed to be concerned in the suspected commission of an offence and which is in the possession of (sic) or under the control of (sic) or upon or at the premises of Standard Bank, Ausspannplatz. THESE ARE THEREFORE to direct you to search during the daytime ...the identified premises ... and to seize the said cash of N\$110 000.00/cheque and all relevant documentation if found and to deal with it according to the powers granted by section 30 of the Criminal Procedure Act and bring it before me to be dealt with according to law."

The search warrant was dated April 12, 2000 but date-stamped April 11, 2000, by a Windhoek Magistrate. On April 18, Constable Kock, accompanied by other Namibian Police officers, served the search warrant upon Mr van Rooyen, an official of the third respondent, seized the (already cashed) cheque and instructed Mr van Rooyen to freeze the applicant's business account pending the finalisation of a criminal investigation into the alleged stolen cheque.

The present enquiry is essentially limited to two issues: (1) whether money in a bank account is liable to seizure as a potential court exhibit on the authority of a search warrant? and (2) whether the search warrant should be upheld? Mr Miller strongly argues that both (1) and (2) should be answered in the negative. Quite understandably, however, Mr Campher's approach to both questions is diametrically opposed to that of Mr Miller.

(1) above raises the question whether the proceeds of the alleged stolen cheque are identifiable. As Millin, J. said in *Stern Ruskin, N. O. vAppleson, 1951(3) SA 800 at 811 F-G*:

"It is quite true that money like any other species of property may be interdicted; but then it must be shown that the money to be interdicted is identifiable ..."

See also *Buckingham v Doyle and Others 1961(3) SA 384 at 391 A-B*.

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It has long been judicially recognized that the relationship between a bank and a customer is one of debtor and creditor. When a customer deposits money into his/her bank account, ownership thereof passes to the bank subject to the bank's obligation to honour cheques validly drawn by the customer. See *S v Kotze 1965(1) SA 118 at 125 A*; and *Dantex Investment Holdings v Mutual Explosives 1990(1) SA 736 at 740 B*. Once money is paid into a bank account, a mixing of funds occurs and such money, therefore, becomes unidentifiable. As De Vos, J., aptly observed in *Amalgamated Society of Woodworkers of S.A. and Another v Die 1963 Ambagsaal Vereniging 1976(1) SA 586(T) at 596 B-C*:

"In any event, once the money was paid over it became unidentifiable and rights of ownership, if any, were lost. The money can, therefore, not be vindicated."

It follows, on the foregoing authorities, that once the allegedly stolen cheque was deposited into the applicant's account, the resultant money became unidentifiable and could, as such, not be seized even under the authority of a search warrant. I would say, however, that the applicant's right to the balance in the account is attachable.

As to the question whether the search warrant should be upheld, its terms are decisive. It is indisputable that although the search warrant commands officers of the Namibian Police Force to seize "N\$110 000-00/cheque..." from the third respondent, and quite apart from the fact that the warrant could not confer power of seizure of money from the applicant's account, the balance in the account was not N\$110 000-00, but N\$17 002-55 only. To direct seizure of what was well in excess of the balance was thus *ultra vires* and improper. Further, the reference to "all relevant documentation" seems to me to be too general and vague. Since a search warrant encroaches upon the rights of individuals, it must be construed with reasonable strictness in determining its validity or otherwise. In this regard, what was said in a three-judge decision in *De Wet and Others v Willers, N. O. and Another* 1953(4) SA 124 (*per* Ramsbottom, J., as he then was) at 127 B, is instructive:

"To enter premises, to search those premises, and to remove goods there from is an important invasion of the rights of the individual. The law empowers police officers to infringe the rights of citizens in that way provided that they have a legal warrant to do so. They must act within the terms of that warrant. When a dispute arises as to what power is conferred by the warrant, the warrant must be construed with reasonable strictness, and ordinarily there is no reason why it should be read otherwise than in terms in which it is expressed."

And in *Divisional Commissioner of S. A. Police Witwatersrand Area, and Others v S. A. Associated Newspapers Ltd and Another* 1966(2) SA 503 (A. D.) 512 D, Beyers, A.C.J., remarked:

"It has long been established that the courts will refuse to recognise as valid a warrant the terms of which are too general."

See also *Cine Films (Pty) Ltd and Others v Commissioner of Police and Others* 1972(2) SA 254(A. D.), *per* Muller, A. J., at 268 B; and *S v Poggrund* 1974(1) SA 244 SA at 247E-F and 249 B.

In the instant case, and for the reasons given, I am satisfied that the search warrant is

too general, vague, improper and voidable. I make the following order:

1. the application succeeds;
2. the search warrant is set aside;
3. the applicant is entitled to operate his business account; and
4. the first, second and fourth respondents are to pay the costs of this application jointly and severally, the one paying the other to be absolved.

SILUNGWE, J

ON BEHALF OF THE APPLICANT

Instructed by:

Theunissen, Louw & Partners MR

ON BEHALF OF THE RESPONDENT

Instructed by:

ADV MILLER

CAMPHER

Office of the Prosecutor-General