IN THE HIGH COURT OF SWAZILAND

In the matter:

THE DIRECTOR OF PUBLIC PROSECUTIONS

v

RON SMITH
MAGISTRATE MRS. NKAMBULE
SENIOR MAGISTRATE KENNETH NKAMBULE
CRI. REVIEW NO.31/99

CORAM	:	SAPIRE CJ
FOR THE APPLICANT	:	MR. NGARUA
FOR THE RESPONDENTS	:	MR. DU TOIT

Judgement
(25/05/99)

The Director of Public Prosecutions instituted the present application in order to set aside proceedings then pending in the subordinate Magistrate's Court at Manzini. The Respondents were Ron Smith and the two Magistrates before whom the proceedings had been held.

The circumstances which gave rise to the application were a police search of Ron Smith's home and business premises and the seizure of items in the course thereof. After Smith had been arrested in South Africa on drug related charges Inspector Ndlangamandla of the Royal Swaziland Police applied for search warrants from Magistrate Ms. Hlophe. Armed with such warrants, granted by the magistrate he together with other members of the royal Swaziland police conducted a search of Smith's business

and residential premises ostensibly to obtain evidence which could be used against Smith in a contemplated prosecution. It is not clear whether the evidence was needed for a prosecution in Swaziland or whether the information was to be used in the pending case in South Africa. The Royal Swaziland Police were accompanied by members of the South African police service and someone who is said to be a prosecutor, possibly in the Smith's case in South Africa. Ron Smith's bail conditions prohibits him from leaving South Africa and he may not return to his home in Swaziland pending the conclusion of proceedings against him.

While the search was in progress, Smith through his attorney applied to the Magistrates' Court in Manzini to have the warrants set aside. The application was made, citing The Director of Public Prosecutions and the Magistrate who issued the warrants as respondents. The Applicant of course, was Smith himself. It is not clear to me why the Director of Public Prosecutions was cited at all. The notice which Smith's attorney gave was short and the point is made that it was so short as to amount to no notice at all. There is much to be said for this objection but I do not have to make any finding thereon.

Smith in the absence of any opposition, obtained an order from the Magistrate's Court setting aside the warrants and requiring the police to return the material that they had seized on the basis of the said warrants

The police did not comply with the Order and did not return the items seized by them, as they were required to do in terms of the Order. Contempt proceedings were brought before the Senior Magistrate Mr. Nkambule. When the contempt application was about to be heard, the Director of Public Prosecutions, who was cited in the proceedings in the Magistrates' Court brought this application.

Ron Smith was cited as the Respondent in this application as he was the Applicant in the application in the Magistrates' Court. The matter came before the Court and was opposed by Smith. At his request, he was given an opportunity to file affidavits and pending the hearing of the matter interim relief was granted staying the proceedings in

parties to the application. The Director Public of Prosecutions did not apply for the warrants, he did not conduct the search, he did not seize and remove anything and has got nothing to do with the return of the items that have been seized.

The Commissioner of Police was informally joined without the leave of this Court and four applicants intervened in the proceedings without any leave at all. These Applicants were themselves not parties to the original application Why these parties if they sought relief did not make their own application citing the proper respondents in the prescribed manner is unexplained. The proceedings are fatally irregular. The procedure adopted by the counter applicants is not sanctioned by the rules of court, and quite contrary to established practice. For this reason alone, the relief sought in the counter application cannot be granted. The parties are not properly before court.

Mr. Du Toit urged that I ignore this irregularity, which he described as merely technical. This cannot be done.

The court regards the invasion of person's rights gravely. The investigation of crime is no less important. The law strikes a balance between the needs of the police to obtain evidence to combat crime and mount criminal prosecutions, and, the rights of persons to privacy and not to be invaded in their homes and business premises. For this reason a warrant to search for and seize property must be regularly issued.

Because the matters raised in the counter application were extensively argued before me I have given them consideration and I make the following observations for the guidance of the parties.

The formal setting aside of the warrants is largely academic at this stage. The procedure adopted in applying for the warrants was gravely defective.

The required oath verifying the information placed before the magistrate was taken before another police officer that possibly had an interest in the matter. This in

the Magistrate's Court.

In due course, replying affidavits were filed together with other information constituting what has been called a "counter application". The strange thing about the counter application is that the parties are different from those who feature in the original application and it is quite clear that the relief that is claimed in the counter application has nothing to do with the Director of Public Prosecutions. I will deal with the counter application shortly.

The original application is limited to seeking an Order setting aside the proceedings in the Magistrate's Court. Mr. Du Toit who appeared on behalf of the Respondent in the main application, that is Ron Smith, conceded that firstly, the granting of a warrant is not a judicial function, but is an administrative function. A judicial officer of the Magistrates' Court sitting a court has no jurisdiction to entertain an application to set aside a warrant granted by another Magistrate.

Mr. Du Toit argued that the action by the second Magistrate in withdrawing the warrant and ordering the return of the goods was, like the granting of the warrant itself a permissible administrative act. This argument cannot stand in the view of the form the proceedings took. The proceedings clearly took the form of an application to court and it was the Magistrate's Court which ordered the setting aside of the warrant and the return of the items seized.

Added to this is the fact that when there was non-compliance of the Order, the Director of Public Prosecutions was cited as a Respondent in the contempt proceedings. These proceedings are clearly, as I said on the admission of Mr. Du Toit, quite inappropriate and quite beyond the jurisdiction of the Magistrate Court. As far as the application is concerned the relief sought must be granted and the proceedings in the Magistrate Court are set aside.

As far as the counter application is concerned, the parties are not the same as the

itself could invalidate the granting of the warrants originally issued.

The evidence placed before the magistrate was insufficient for the magistrate to justify the issue of the warrant. She could not on the basis of that evidence have independently come to a conclusion that there was reason to suspect that there were items on the relevant premises which would afford evidence of the commission of a crime by Smith either in Swaziland or anywhere else.

The form of the warrant itself does not relate to the evidence at all and describes the goods that are to be searched for, as items which were stolen from Ron Smith. This is clearly not the purpose for which the issue of the warrants was sought. No attempt was made to connect items other than the specific drugs mentioned with the commission of any offence. None of these drugs were in fact found in the course of the search The warrants are clearly irregular and but for the fatal irregularity of the manner in which the counter application was brought I would have made an Order setting them aside.

See NAIDOO AND ANOTHER v MINISTER OF LAW AND ORDER AND ANOTHER[1]

In relation some of the items allegedly removed from the premises, there is clearly a dispute of fact on the papers. It would not have been possible even if the application had been regularly brought to make an Order for the return of all items allegedly removed during the search. This applies in particular to a considerable amount of money in local currency which is said to have been taken. This is denied by the police. There is also evidence suggesting that Smith's family had undisturbed and unmonitored access to the premises during the search. This aspect cannot be decided without hearing oral evidence.

The dollar notes are presently being examined to test their authenticity. There seems to be sufficient reason why the police attached and remained in possession of these notes. Prima facie the possession of foreign currency without the necessary permission is

[1] 1990(2) SA 158 (W)

in itself a contravention of the currency regulations, and may be relevant to the enquiries made by the police.

The police may be well advised to return all those items they admit having taken pursuant to the warrants, save where there is a legitimate reason for retaining possession thereof. It was suggested upon evidence, that the police went far beyond what was necessary in this case and exceeded even that authority which they would have had, had the warrants been regular. Indeed the warrants are such that they invite a search and invasion of the individual's privacy to a far greater extent than is necessary or sanctioned by law.

I do not think it is appropriate in these proceedings, therefore to make any Order on the counter application. The circumstances do not call for the making of any order as to costs.

In the result, the application succeeds and no Order is made on the counter application.

S.W. SAPIRE CJ

1990 (2) SA 158 (W)