REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2014/20483

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

....
DATE SIGNATURE

In the matter between:

KEITH HO T/A BETXCHANGE	First Applicant
PLAYBET (PTY) LTD	Second Applicant

And

THE MINISTER OF POLICE	First Respondent
THE MINISTER OF TRADE AND INDUSTRY	Second Respondent
JASPER NIGHTINGALE N.O.	Third Respondent
P C KUBEKA	Fourth Respondent

M V MAKHANYA	Fifth Respondent
M V N P MASUKU	Sixth Respondent
D S MAKHASI	Seventh Respondent
M V HLONGWANE	Eighth Respondent
D M KISCH INCORPORATED	Ninth Respondent
GERALD BOURNE	Tenth Respondent
FARREL DUANE FRANK	Eleventh Respondent

JUDGMENT

Headnote

Rights to privacy of a juristic person by appropriation of private information– violation of section 14 of the Constitution - private information of a juristic person distinguished from personal information of a natural person
Violation of privacy by police search and photographing of business activities and recording of private information – lawfulness of appropriation of private information dependent on validity of a warrant issued by a magistrate under the Counterfeit Goods act 37 of 1997
Applicant applying for access to the documents put before the magistrate to issue warrant – applicant intent on adducing the documents in review application to set aside the warrant - police refusing to disclose – averring that applicant obliged to apply ito rule 53
Resistance to disclosure misconceived – a person who seeks to challenge the validity of a warrant possessed of a substantive right to access to such documents – rule 53 channel for disclosure is optional
Where a decision maker has to compose a 'record' to justify a decision, rule 53 is the ideal channel, but where the document sought already is in existence and

complete and is physically available to hand over, a rule 6 application is appropriate at applicant's election- not obligatory for applicant to use rule 35 (14)
Resistance to disclosure on basis that if and when prosecuted the information could be accessed then– wholly misconceived notion- failure to appreciate that applicant has a substantive right to the information immediately
Interim interdict, pending the review to decide the validity or otherwise of the warrant, to prevent access to private information which had been appropriated by police – real threat of harm if trade rival used it to procure a breach of contract with a supplier of the applicant which breach could materially disturb the applicant's business activities – elements for interdict established – relief granted

Order sought to reveal who had been given access to the private information – relief justified in order to take steps to protect dissemination of private information to the prejudice of applicant

SUTHERLAND J:

Introduction

[1] The applicants, two related companies, were subjected to a search by the police (the first and third to eighth respondents) of its business operations pursuant to a warrant issued by a magistrate under the provisions of the *Counterfeit Goods Act 37 of 1997 (CGA).*

[2] The applicants are bookmakers and publicans. The police entered their premises and took photographs of their business activities and noted the serial numbers of four DSTV decoders used by the applicants to screen horse races to the public who frequent their pubs and place bets. No property of the applicants

was removed. However, the police conduct is, if not lawfully authorised, a violation of their right to privacy and a misappropriation of their private information.[1]

[3] The applicants seek to set aside the warrant, and procure ancillary relief thereto, calculated to protect the integrity and confidentiality of their private information. In addition to the self- evident violation of privacy by means of the search, as is addressed more fully hereafter, the applicants articulate a fear that by obtaining the serial numbers of their DSTV decoders, a trade rival, Tellytrack, whose complaint triggered the search, is able to approach Mnet and, because it can identify the decoders with the applicants as users, suborn a breach of the contractual relationship between the applicants and Mnet by cutting off their access to horse racing videos, and thereby prejudice their business operations.

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[1] Section 14 of the Constitution provides: Everyone has the right to privacy, which includes the right not to have-

(a) their person or home searched;
(b) their property searched;
(c) their possessions seized; or
(d) the privacy of their communications infringed.

Section 14 rights extend to juristic persons too, though not as extensively as in respect of a natural person. (See Investigating Directorate *SEO v Hyundai Motor Distributors 2001 (1) SA 545 at [17] – [18*] which dealt with the search and seizure provisions of the National Prosecuting Authority Act 32 of 1998.)

The search of the applicants' property was plainly encapsulated by Section 14(b). (*see too: Hyundai at [20].)* 'Private information' is not a term used in Section 14, but as Section 14 is not a closed list, it follows logically that it too is be encapsulated by the concept of privacy articulated in the section. The term 'personal information' has been employed in the Promotion of Access to Information Act (PAIA) to apply to 'individuals' ie natural persons, only, and is the subject of an extensive definition in section 1 of PAIA. Accordingly it seems sensible to employ the term 'private information' for information of a juristic person intended to be confidential to that juristic person. The gravamen of the protection of personal information in PAIA is to prevent or limit the identification of individuals through connections being made between otherwise disparate pieces of information and the opportunity that can arise thereby to prejudice those individuals. The facts of this case are an illustration of exactly that predicament in respect of a juristic person.

[4] It has chosen to approach the court using the double-barrelled form of relief in two parts, A and B. The explanation for that is historical; the relief in Part A began life as an urgent application, but upon a court failing to appreciate any urgency in the relief sought, the matter has crept back onto the ordinary opposed motion roll for adjudication.

[5] This application is for the part A relief. The prayers consist of four items of *de facto* final relief and one item of interim relief. The prayers sought in Part A are these:

> "2. Ordering the Respondents to deliver a copy of the complaint affidavits/statements, together with annexures ("the documents") used in support of the applications brought, on or about the 27th May 2014, for the following search and seizure warrants:-
>
> 2.1 a search warrant issued by the Third Respondent on or about the 27th May 2014 in respect of premises described as BetXchange, Cnr. Main & Geranium Streets, Rosettenville ("the BetXchange Premises"), a copy of which is annexed to the founding affidavit ("the BetXchange Warrant").
>
> 2.2 a search warrant issued by the Third Respondent on or about the 27th May 2014 in respect of premises described as Playbet, 546 Jues Street, Malvern, Johannesburg ("the Playbet Premises"), a copy of which is annexed to the founding affidavit ("the Playbet Warrant").(the aforementioned warrants are referred to as "the search warrants");
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> 3. Ordering the First, Second and Fourth Respondents forthwith and within 24 hours:-
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> 3.1. to furnish the Applicants with copies of all photographic images created by them in the course of the execution of the search warrants; and

3.2 to deliver up all records of the identification numbers of the DSTV decoders and/or smart cards in whatever form such records have been kept.

4. Granting the Applicants leave to supplement their papers upon receipt of the affidavits referred to in prayer 3 above, for the purposes of the relief sought in Part B of this notice of motion.

5. Pending the determination of the relief sought in Part B:-

5.1 Ordering that all items seized pursuant to the search warrants, including all information, documents, data and photographic images, be sealed in the possession of the Registrar of this Honourable Court, alternatively an independent and trustworthy stakeholder as agreed between the parties;

5.2 Interdicting the Respondents, including any officers, employees or agents of the Respondents from handling, dealing with, processing, examining, interpreting or in any other way having access to the seized items, including all information, documents, data and photographic images;

5.3 Ordering the Respondents to disclose the names of all parties who have been orally advised as to the contents of the inventory forms and/or are in possession of the inventory forms and/or any of the photographic images."

[6] The relief in part A is said by the applicant to be "process in aid' to enable it to prosecute a case for the relief prayed for in Part B of the proceedings. It is apparent that, save for the interim orders in prayer 5.1 and 5.2, the rest of the prayers in Part A are final in effect. Prayer 4, about supplementation of the papers is ancillary to other relief and is uncontroversial; indeed, it is probably superfluous, and warrants no further attention.

[7] The relief in Part B, which part A anticipates, is formulated as a review, thus:

> "…. an order will be sought in the following terms:-
>
> (a) setting aside, alternatively reviewing and setting aside the BetXchange Warrant and the Playbet Warrant as described in the founding affidavit; and
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> (b) setting aside, alternatively reviewing and setting aside the execution of the BetXchange Warrant and the Playbet Warrant as described in the founding affidavit; and
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> (c) directing the Respondents to forthwith return all original documents and copies thereof including information, data and photographic images, and documents created during the course thereof, arising from the search warrants and the execution thereof; and
>
> (d) ordering the Respondents to forthwith destroy all copies of original documents including information, data and photographic images, and documents created during the course thereof, arising from the search warrants and the execution thereof; and
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> (e) ordering the Respondents to pay the costs of this application, jointly and severally, the one paying the other to be absolved; and granting the Applicants such further and/or alternative relief.

[8] A brief account of the context is useful to understand how this affair came to pass. The applicants, as alluded to, are bookmakers and publicans. They use the DSTV channel 239 to screen horse races to their clientele. Tellytrack, [2]the 12th respondent films the horse races and streams the images to Mnet who in turn make the images available for public viewing on the DSTV network. Until

[2] Tellytrack brought itself into this case by way of an unopposed joinder application, despite no conceivable relief being claimable against itself, and to compound that anomaly, Mr Friedman, fairly and properly concedes that now that it is in the case, it is exposed to an adverse costs order.

recently this channel was available to home viewers and to businesses. Tellytrack changed its conditions of supply to Mnet to confine open viewing to the home market and to require businesses to pay for a licence to screen the races to their customers in the pubs and clubs.

[9] This move enraged the bookmaker publicans and litigation about the matter ensued. At present, the applicant is amongst a number of disgruntled businesses at odds with Tellytrack and litigation between the adversaries is work in progress.

[10] Tellytrack's point of view is that the applicant has no lawful right to facilitate a screening of its images to a business clientele, which images, it alleges, are subject to copyright protection, unless the applicant procures a licence from Tellytrack. Against this still unfolding saga, Tellytrack complained to the police about the applicant's screening of these images, and that complaint led to the warrant being authorised.

[11] The merits of the accusations by Tellytrack against the applicants are outside the compass of this case.

[12] Mr Friedman, on behalf of Tellytrack, argues that the final relief sought is in the form of a mandamus. I agree. It is uncontroversial that relief which is final in effect must be substantiated by a clear right. The interim relief must be assessed in accordance with the usual interdictory relief criteria; ie a prima facie right albeit open to some doubt, imminent harm to such right, no suitable alternative remedy, and a balance of convenience in the applicants' favour. [3]

[13] The case for the various prayers and the controversy which attaches to each requires distinctive treatment.

Prayer 2: The demand to disclose 'founding' documents for the procurement of the warrant.

The narrative

[14] The warrants were obtained from a magistrate, *ex parte*, a procedural step which was in accordance with the enabling statute, the CGA. [4] The act of authorisation of a warrant is a judicial act performed by a Judge or Magistrate.

[3] Setlogelo v Setlogelo 1914 AD 221

[4] Section 6(1) of the Counterfeit Goods Act (CGA) 37 of 1997 provides: The warrant contemplated in section 4 (2) read with section 5 (1) will be issued in chambers by any judge of the High Court or by a magistrate who has jurisdiction in the area where the relevant suspected act of dealing in counterfeit goods is alleged to have taken or to be taking place or is likely to take place, and will be issued only if it appears to the judge or magistrate from information on oath or affirmation that there are reasonable grounds for believing that an act of dealing in counterfeit goods has taken or is taking place or is likely to take place, and the inspector seeking the warrant may be asked to specify which of the powers contemplated in section 4 (1) is or are likely to be exercised.

[5]The applicant has articulated several substantive complaints about the validity and propriety of the warrants. Among them is the argument that on the face of the warrant, action was authorised beyond the ambit of the CGA. Section 2 of the CGA contemplates the protection of traders from the manufacture, production or duplication of goods that imitate authentic goods.[6]

[15] It is plain that the subject matter of the protections is 'goods' which the definition of 'counterfeiting' and of 'counterfeit goods' makes clear are 'things' capable of manufacture or replication [7]. Goods could conceivably be property of

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[5] See: Pretoria Portland Cement Co Ltd & Others v Competition Commission & Others 2003 (2) SA 385 (SCA) at [23] – [24]

[6] Section 2 of the CGA provides:

Dealing in counterfeit goods prohibited and an offence

(1) Goods that are counterfeit goods, may not-

(a) be in the possession or under the control of any person in the course of business for the purpose of dealing in those goods;

(b) be manufactured, produced or made except for the private and domestic use of the person by whom the goods were manufactured, produced or made;

(c) be sold, hired out, bartered or exchanged, or be offered or exposed for sale hiring out, barter or exchange;

(d) be exhibited in public for purposes of trade;

(e) be distributed-

(i) for purposes of trade; or

(ii) for any other purpose to such an extent that the owner of an intellectual property right in respect of any particular protected goods suffers prejudice;

(f) be imported into or through or exported from or through the Republic except if so imported or exported for the private and domestic use of the importer or exporter, respectively;

(g) in any other manner be disposed of in the course of trade.

(2) A person who performs or engages in any act or conduct prohibited by subsection (1), will be guilty of an offence if-

(a) at the time of the act or conduct, the person knew or had reason to suspect that the goods to which the act or conduct relates, were counterfeit goods; or

(b) the person failed to take all reasonable steps in order to avoid any act or conduct of the nature contemplated in subsection (1) from being performed or engaged in with reference to the counterfeit goods.

[7] Section 1 of the CGA provides:

'counterfeiting'-

(a) means, without the authority of the owner of any intellectual property right subsisting in the Republic in respect of protected goods, the manufacturing, producing or making, whether in the Republic or elsewhere, of any goods whereby those protected goods are imitated in such manner and to such a degree that those other goods are substantially identical copies of the protected goods;

an intellectual, rather than a tangible, nature. Theft of a person's 'goods' is however not a matter covered by the CGA. Section 5 provides for a warrant to enter, search, inspect and seize.[8]

(b) means, without the authority of the owner of any intellectual property right subsisting in the Republic in respect of protected goods, manufacturing, producing or making, or applying to goods, whether in the Republic or elsewhere, the subject matter of that intellectual property right, or a colourable imitation thereof so that the other goods are calculated to be confused with or to be taken as being the protected goods of the said owner or any goods manufactured, produced or made under his or her licence; or

(c) where, by a notice under section 15 of the Merchandise Marks Act, 1941 (Act 17 of 1941), the use of a particular mark in relation to goods, except such use by a person specified in the notice, has been prohibited, means, without the authority of the specified person, making or applying that mark to goods, whether in the Republic or elsewhere.

However, the relevant act of counterfeiting must also have infringed the intellectual property right in question;

'counterfeit goods' means goods that are the result of counterfeiting, and includes any means used for purposes of counterfeiting;

[8] Section 5(1) (a) – (e) of the CGA provides:

(1) An inspector acting on the authority of and in accordance with a warrant issued under section 6, may at any reasonable time-

(a) enter upon or enter, and inspect, any place, premises or vehicle at, on or in which goods that are reasonably suspected of being counterfeit goods, are to be found or on reasonable grounds are suspected to be or to be manufactured, produced or made, and search such place, premises or vehicle and any person thereat, thereon or therein, for such goods and for any other evidence of the alleged or suspected act of dealing in counterfeit goods. For the purposes of entering, inspecting and searching such a vehicle, an inspector who is a police official or who is assisted by a police official may stop the vehicle, if necessary by force, wherever found, including on any public road or at any other public place;

(b) take the steps that may be reasonably necessary to terminate the manufacturing, production or making of counterfeit goods, or any other act of dealing in counterfeit goods being performed, at, on or in such place, premises or vehicle, and to prevent the recurrence of any such act in future. Those steps may include any of the steps contemplated in paragraphs (c), (d) and (e) but do not include the destruction or alienation of the relevant goods unless authorised by the court in terms of this Act;

(c) seize and detain, and, where applicable, remove for detention, all the goods in question found at, on or in such place, premises or vehicle;

(d) seal or seal off any place, premises or vehicle at, on or in which-

(i) the goods in question are found, or are manufactured, produced or made, either wholly or in part;

(ii) any trade mark, or any exclusive mark contemplated in paragraph (c) of the definition of 'counterfeiting' in section 1 (1), or any work which is the subject matter of copyright, is applied to those goods;

(iii) the packaging for those goods is prepared; or

(iv) the packaging of those goods is undertaken;

(e) seize and detain, and, where applicable, remove for detention, any tools which may be used in the manufacturing, production, making or packaging of those goods or applying a trade mark or that exclusive mark or such a work to them;…

[16] The warrants that were authorised contain statements that '*information*' was placed before a magistrate that there were reasonable grounds to believe that the applicant was dealing in counterfeit goods and authorised the police to enter inspect and search for evidence of '*acts of copyright infringement'*. To this end the police were further authorised to take photographs '….*depicting the unauthorised screening and display to the public, ie customers and potential customers of* [the applicant] *of the Tellytrack telecast, as well as photographs of the dstv decoders and smartcard used to facilitate the screening and display of the Tellytrack telecast, including the recordal of the serial numbers of the aforementioned decoder and smartcard*.'

[17] The application and the supporting affidavits, if any, put before the magistrate to procure the warrants are wanted by the applicants to give flesh to their further affidavit which is to be placed before the court to justify the relief sought in part B by, self-evidently, demonstrating the alleged disconnection between the provisions of the CGA and the information placed before the magistrate to apply for the warrant. Despite request the respondents refused.

The respondents' First basis for refusal

[18] The refusal is qualified. The argument runs that the applicant is entitled to these documents, but not yet. The refusal is therefore merely dilatory. The

respondents, in effect, say that the applicant's approach to the court in regard to prayer 2 is the wrong way to compel disclosure and until they are compelled in the appropriate form the respondents refuse disclosure.

[19] What, according to the respondents, is the proper way? It is argued that the applicant will be entitled to the documents in terms of rule 53 of the uniform rules,[9] upon the bringing a review application invoking that rule to set aside the

[9] Rule 53 provides: (1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected-

(a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

(b) calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so.

(2) The notice of motion shall set out the decision or proceedings sought to be reviewed and shall be supported by affidavit setting out the grounds and the facts and circumstances upon which applicant relies to have the decision or proceedings set aside or corrected.

(3) The registrar shall make available to the applicant the record despatched to him as aforesaid upon such terms as the registrar thinks appropriate to ensure its safety, and the applicant shall thereupon cause copies of such portions of the record as may be necessary for the purposes of the review to be made and shall furnish the registrar with two copies and each of the other parties with one copy thereof, in each case certified by the applicant as true copies. The costs of transcription, if any, shall be borne by the applicant and shall be costs in the cause.

(4) The applicant may within ten days after the registrar has made the record available to him, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of his notice of motion and supplement the supporting affidavit.

(5) Should the presiding officer, chairman or officer, as the case may be, or any party affected desire to oppose the granting of the order prayed in the notice of motion, he shall-

(a) within fifteen days after receipt by him of the notice of motion or any amendment thereof deliver notice to the applicant that he intends so to oppose and shall in such notice appoint an address within eight kilometres of the office of the registrar at which he will accept notice and service of all process in such proceedings; and

(b) within thirty days after the expiry of the time referred to in subrule (4) hereof, deliver any affidavits he may desire in answer to the allegations made by the applicant.

(6) The applicant shall have the rights and obligations in regard to replying affidavits set out in rule 6.

(7) The provisions of rule 6 as to set down of applications shall mutatis mutandis apply to the set down of review proceedings."

magistrate's decision to issue the warrants. The application has not invoked rule 53.

[20] Moreover it is trite that a litigant aggrieved by an adverse decision made by an official exercising a public power is not obliged to use a rule 53 procedure to review any decision susceptible to review. [10] The aggrieved litigant may proceed, more simply, under rule 6.[11]

[21] Despite that consideration, the thrust of the respondents' argument is, therefore, that Rule 53 is a suitable alternative to the relief sought and for that reason the applicant has not cleared the threshold of an absence of an alternative remedy as contemplated by interdictory relief. Mr Vetten points to the absence of a substantive difference between the present application which will have the same outcome as a rule 53 application, and the more glaring absence of any policy reason why a litigant ought to be pressed into a rule 53 application to achieve the identical outcome. I agree. In my view, this is a classic case of a distinction without a difference.

[22] Moreover, if, as it seems to be conceded that the applicants have a right to the documents and the only real dispute is the *procedure* by which they must

[10] Jockey Club of South Africa v Forbes 1993(1) SA 649 (A) at esp 662F-G.
[11] Rule 6 of the uniform rules provides for a simple procedure requiring the applicant to serve and file a notice of motion with a supporting affidavit, and no more.

disgorged, it follows in my view that unless the procedure adopted by the applicant can be faulted as being inimical to orderly litigation no reason exists to proscribe it. In particular, it seems to me that a rule 53 approach is apt when the decision maker must go to the rouble to compose a 'record' but a rule 6 application is appropriate when the document sought is unequivocally described and is already in existence, on the shelf, so to speak, awaiting only the photocopier's caress, to be produced and handed over. This case is an example of exactly that.

[23] It is true that a litigant, having applied in terms of rule 6 to review a decision could avail itself of the provisions of rule 35 (12) read with Rule 35(13)[12] to call for discovery of documents from an adversary as being relevant to an issue. The documents sought here could have been procured in that fashion. However, that is a cumbersome procedure, requiring a court to consent to its use before demanding delivery of the documents in question and most unsuitable when a degree of expedition no less, urgency is present. [13]Moreover, Rule 53 and rules 35(12) and (13) are mere procedural devices, not the fount of any rights.

[12] Rule 35(12) Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording.
Rule 35(13) The provisions of this rule relating to discovery shall mutatis mutandis apply, in so far as the court may direct to applications.

[13] Afrisun Mpumalanga (Pty) Ltd v Kunene NO & Others 1999 (2) SA 599 (T); Investec Bank Ltd v Blumethal N.O. [2012] ZAGPJHC 21.

Respondents second basis for refusal

[24] The second argument advanced on behalf the respondents by Mr Dlamini, is that the applicants can procure the documents when a prosecution, if any, is instituted.

[25] This argument is correct but misses the point. The documents which an accused person must wait until charged to get from the docket are documents to which he has no right to see, until that moment. The comparison advanced is not apt if the applicant has a right to see them now, independently of a prosecution commencing.

The nature of this application

[26] In this case the applicant has brought an application to compel disclosure, *simpliciter* in the form of a *mandamus*. On behalf of the applicants Mr Vetten has argued that a person who is the subject of an ex parte order, taken as such without notice to the person and without adherence to the principle of *audi alterem partem* has been treated in an extraordinary and arbitrary fashion. It must follow that such person has a right to challenge such an order and do so expeditiously. That notion, is itself not controversial, but in addition, in pursuit of such right, a person must have an ancillary right to effectively interrogate the

basis for the order granted *ex parte* by a court. This is the central pillar of Mr Vetten's argument. A demand for disclosure of such documents is integral to the challenge and the disclosure is instrumental in the effective assertion of the right.

[27] By way of comparison, in Anton pillar orders, there is a public accessible court file to see what was put before the judge who authorised it. Where an aggrieved person seeks a reconsideration in terms of rule 6(12)(c)[14] of an *ex parte* order taken against such person, it not necessary to beg for the application relied on by the applicant for the *ex parte* order. Under the provisions of the *Interception and Monitoring Prohibition Act 127 of 1992* in terms whereof a tap on a person's telecommunications can be judicially authorised, the application to the judicial officer must be disclosed when its propriety is challenged.[15]

A clear substantive right to disclosure on demand

[28] The very purpose of requiring judicial oversight over the issue of a warrant to enter, search and seize is to protect a (natural or juristic) person's rights to privacy and to subordinate, to judicial scrutiny and oversight, a belief by the

[14] Rule 6(12)(c) provides: 'A person against whom an order has been granted in his absence in an urgent application may on notice set down the matter for reconsideration of the order.'
[15] See, eg: Mngomezulu v NDPP 2008 (1) SA 105 (SCA), an example where, subject to a judicially approved redaction, the documents were disclosed.

police, however bona fide, that they really have a need to invade a person's privacy and have shown a cogent basis for a lawful invasion to be authorised, because not every alleged crime justifies a search warrant to procure evidence.

[29] Accordingly, it seems to me that such considerations point towards any person indeed having a right of access to the founding papers in respect of a search warrant, as part and parcel of the broader right to privacy and freedom from arbitrary state action. These are values which permeate the Constitution. For the purposes of this case Section 14 of the Constitution is relevant in relation to the invasion of privac**y** and the misappropriation of private information, but other sections of the Constitution address the absence of arbitrariness too; in particular, sections 12, 20, 21, 25, 33, and 35.

[30] In my view, in any exercise to assert the right to privacy and freedom from arbitrary state power, where a procedure that is orderly and conducive to expeditious litigation is selected, it is improper to resist disclosure. The insistence on the use of a rule 53 procedure is inappropriate, and the idea of awaiting a prosecution misdirected.

[31] Accordingly, the relief in prayer 2 should be granted.

Prayer 3: The demand for copies of the photographs and notes of serial numbers

[32] The copies of the documents demanded are the fruits of the search and are ancillary to the founding documents. They are relevant to demonstrate the actions performed in the search and to illustrate the alleged disconnection between what the CGA can authorise and what indeed occurred. It is argued on behalf of the respondents that these items are not strictly necessary or essential to prosecute part B; I agree, but it is artificial to distinguish them from the documentation which authorised bringing them into existence, and once the 'founding documents' ought to be disclosed, these ancillary documents ought also to be provided.

[33] It follows that if prayer 2 is granted so should prayer 3.

Prayer 5.1 and 5.2: The demand for the preservation and sealing of the photographs and notes, and interdicting anyone from using the data for any purpose adverse to the applicant's interest pending the decision in Part B.

[34] The true gravamen of the interim relief sought in these prayers is the prevention of use or abuse of the applicants' private information. The part B proceedings envisage asserting a breach of privacy by an unlawful invasion and

an unlawful misappropriation of private information. There is a logical need for the interim preservation of the confidentiality of the applicant's information until that assertion has been tested in part B. If the applicant succeeds in setting aside the warrant then the fruits thereof may be illegitimately in the possession of strangers. It is common cause that the applicant and Tellytrack, a trade competitor, are at loggerheads and Tellytrack may obtain access to the applicants' information without lawful justification and, at least potentially, use it to identify the DSTV codes which it can divulge to MNET to cut off the applicant's access to services. The risk is sufficient to establish an imminent potential harm.

[35] Accordingly, in my view interim protection is appropriate because the applicants have a clear right to protect the confidentiality of their information, and because there is, axiomatically, no effective alternative remedy but an interdict.

[36] As to prospects of success, there are manifest difficulties with this warrant. Most obvious is the failure to describe a crime. Moreover, no goods are described as counterfeit. The throwaway allusion to a 'breach of copyright' cannot be construed, however generously, as an identification and description of a crime, a minimum standard for validity.[16] Moreover, the controversy about whether the CGA can properly be used as a Launchpad to protect theft of copyright, assuming copyright ownership is proven, is based on a rather tenuous premise and may turn out to be a contention that shall have to scale some

[16] Minister of Safety and Security v Van der Merwe 2011 (5) SA 61 (CC)

considerable height. It is enough for the purposes of part A to conclude that it is an open question, at best.

Prayer 5.3: The demand to know who has been given the information?

[37] The appropriation of private information without the consent of its owner is tolerable only when it occurs pursuant to lawful authorisation. Until the question of the lawfulness of the appropriation is settled, the dissemination of private information ought not to be allowed because the prospect of it being abused to the detriment of the applicants is plain. Accordingly, relief in the form of the identification of the persons who have had access to the private information is appropriate to facilitate steps by the applicants to effectively protect any further dissemination of their private information.

[38] An order to disclose the names of the persons, if any, who have or have had access to the private information is appropriate.

Costs

[39] The applicant has been successful and costs ought to follow that result.

Conclusion and order

[40] Accordingly, an order shall be made in terms of prayers 2, 3, and 5 as set out in the notice of motion. As to costs, an order in terms of prayer 6.1 is made against the respondents, save for the 9th -10th respondents who did not pose the application) the one paying the others to be absolved. The order is as follows:

(1) The Respondents are ordered to deliver a copy of the complaint affidavits/statements, together with annexures used in support of the applications brought, on or about the 27th May 2014, for the following search and seizure warrants:-

(a) a search warrant issued by the Third Respondent on or about the 27th May 2014 in respect of premises described as BetXchange, Cnr. Main & Geranium Streets, Rosettenville ("the BetXchange Premises"), a copy of which is annexed to the founding affidavit ("the BetXchange Warrant").

(b) a search warrant issued by the Third Respondent on or about the 27th May 2014 in respect of premises described as Playbet, 546 Jues Street, Malvern, Johannesburg ("the Playbet Premises"), a copy of which is annexed to the founding affidavit ("the Playbet Warrant").(the aforementioned warrants are referred to as "the search warrants");

(2) The First, Second and Fourth Respondents are ordered within 24 hours to furnish the Applicants with copies of all photographic images created by them in the course of the execution of the search warrants; and to deliver up all records of the identification numbers of the DSTV decoders and/or smart cards in whatever form such records have been kept.

(3) Pending the determination of the relief sought in Part B:-

(a) all items seized pursuant to the search warrants, including all information, documents, data and photographic images, shall be sealed in the possession of the Registrar of this Honourable Court, alternatively an independent and trustworthy stakeholder as agreed between the parties;

(b) the Respondents, including any officers, employees or agents of the Respondents are interdicted from handling, dealing with, processing, examining, interpreting or in any other way having access to the seized items, including all information, documents, data and photographic images;

(4) The Respondents are ordered forthwith to disclose to the applicants the names of all persons who have been orally advised as to the

contents of the inventory forms and/or are in possession of the inventory forms and/or any of the photographic images.

(5) The first, third to eighth, and twelfth respondents shall pay the costs of this application jointly and severally, the one paying the others to be absolved.

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ROLAND SUTHERLAND
Judge of the High Court of South Africa

Hearing: 27 October 2014
Judgment: 24 November 2014

For the Applicants:
Adv Dirk Vetten
Instructed by John Joseph Finlay Cameron

For 1st, and 4th - 8th Respondents
Adv M W Dlamini
Instructed by the State Attorney

For the 12th Respondent
Adv Adrian Friedman
Instructed by Roodt Inc