29/9/2010

NOT REPORTABLE

/bh

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

CASE NO: 34277/2009

IN THE MATTER BETWEEN:

JOHNSON & JOHNSON	**APPLICANT**
AND	
MAGISTRATE N SETSHOGOE NO	**FIRST RESPONDENT**
SURIKA LOURENS NO	**SECOND RESPONDENT**
ROWAN TREE 1123CC	**THIRD RESPONDENT**
ELIZABETH MARGARET VENTER	**FOURTH RESPONDENT**
COENRAAD HENDRIK SWART	**FIFTH RESPONDENT**
THE MINISTER OF SAFETY AND SECURITY	**SIXTH RESPONDENT**
MISTER MOVER CC	**SEVENTH RESPONDENT**

JUDGMENT

EBERSOHN, AJ

1. The applicant is a New York, USA, company.

2. On the 4th of April 2008 the applicant obtained a search and seizure warrant against the second, third and fourth respondents in terms of section 6, read with sections 4 and 5 of the Counterfeit Goods Act, no.

3 of 1997, pursuant to an affidavit of complaint lodged with the South African Police Services (SAPS). The affidavit itself was neither attached to the founding papers nor put before this court.

3. The warrant was executed by members of the SAPS at the premises of the third, fourth and fifth respondents and reflected what they seized in an inventory and the seized goods were stored in an approved depot of the sixth respondent.

4. The applicant then caused letters to be addressed to the third, fourth and fifth respondents regarding the applicant's intention to institute civil proceedings against them and the summons was eventually issued and served on them.

5. The criminal proceedings instituted on the strength of the applicant's complaint, was, however, withdrawn against the third, fourth and

fifth respondents and the magistrate ordered the return of the seized goods to them. This was done.

6. The applicant then brought an urgent application in this court on the 23rd of June 2009 but it was postponed *sine die* with costs reserved.

7. The matter eventually came before me, was argued and I reserved judgment.

8. The applicant on the 24th of June 2009 served a notice of its intention to amend the notice of motion by inserting therein a further prayer marked 1A wherein the return was claimed from the third, fourth and fifth respondents of all the items that was returned to it by the officials pending the final determination of the review proceedings or such further order as this court may make concerning the disposal of the evidence.

9. The amendment was opposed and it was contended on behalf of the respondents that whatever was returned has been removed from the bags and that the respondents were not able to verify what was originally seized and what was in the bags when the bags were returned in terms of the magistrate's order.

10. Mr. Morley, who appeared for the applicant contended that it was most improper of the third, fourth and fifth respondents to take control of the goods that was seized and released without advising the applicant that it was released and asked that the relief be granted against the respondent in terms of the amended prayers.

11. Mr. Vetten, who appeared for the third respondent, objected to the amendment of the prayers and argued that no case was made out in the papers for such relief and that this court could not grant the relief sought in terms of the proposed amendment as the only basis on which the possessor's possession could be disturbed would be by

way of a fresh search and seizure warrant. He also argued that the search and seizure was a wholesale fishing expedition, the inventory that was prepared was of no use in identifying what was taken and that there was no correlation between what was taken and what was authorised to be taken. In this regard I must agree with Mr Vetten. The inventory is in telegram style and in some places nonsensical and I quote some of the items appearing on the inventory:

"Plastic bag with files;" (9 items)

"Steel cabinet;" (3 items)

"Plastic bag with hard drive;"

"Plastic bag with PC."

"6 x One Touch Stepsure boxes"

"One Touch Sure Stepsure boxes"

"Sure step Plus (empty box)";

"Sure step Hospital (empty box)";

"Steel cabinet (locked)";

"Blue white suitcase"

"ATE"

"ABSA"

"CHASA FLOW"

"JJ PAYMENTS"

"DHL"

"VAT UTC"

"ZEE LêER"

"ZZ"

"COLO PLAAS"

"ROWAN TREE"

"TARGET"

12. It is clear that it would be impossible to put together again whatever is referred to in the inventory.

13. A proper case must be made out before a review and the setting aside of the magistrate's decision to have the seized articles returned can be granted. Mr. Veten argued that no case has been made out.

14. Mr Vetten also argued that the appellant is already exhausting a remedy it has namely by proceeding against the third, fourth and fifth respondents by way of action and the applicant can acquire the information and proof they require by calling upon his clients to make a discovery in terms of the court rules.

15. It is clear that the matter is not urgent and that the applicant did not make out a case for the relief asked for. Costs must follow the event.

16. The matter was postponed on the 23rd of June 2009 to enable the applicant to prepare the amendment and the reserved costs must accordingly also be awarded against the applicant.

17. I accordingly make the following order:

1. The application is dismissed with costs, such costs to include the reserved costs of 23rd July 2009.

P.Z. EBERSOHN
ACTING JUDGE OF THE HIGH COURT

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