

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 1460/2006

DATE: 30 MAY 2008

5 In the matter between:

SHOPRITE CHECKERS (PTY) LTD Applicant

And

COMMISSIONER OF SOUTH AFRICAN

REVENUE SERVICES 1st Respondent

10 RUBINA LORRAINE HOLMAN 2nd Respondent

COMMISSIONER FOR CUSTOMS

AND EXCISE 3rd Respondent

CROCS INC 4th Respondent

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J U D G M E N T

(Application for Leave to Appeal)

ZONDI, J:

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[1] This is an application for leave to appeal against my entire judgment and orders delivered on 5 February 2008. The grounds upon which leave is sought can be summarised as follows:

1. The alleged non-disclosure of material facts in an *ex parte* application;
2. The magistrate's failure to hear the applicant and not requiring the presentation of all available facts to him for consideration prior to the issue of the warrant;
3. The Court's failure to find that the grounds upon which the applicant sought to oppose the application for the warrant constituted essential facts upon which the magistrate ought to have considered before deciding that reasonable grounds existed for the issue of the warrant;
4. The magistrate had no reasonable grounds for believing that an act of dealing in counterfeit goods had taken place or was taking place or is likely to take place given the material placed before him;
5. Whether the applicant infringed any rights of the fourth respondent contemplated in the Copyright Act 98 of 1978.

[2] It is trite law that in an application for leave to appeal the applicant must show that there are reasonable prospects of success on appeal. (See in this regard Van Heerden v

Conwright & Others 1985(2) SA 342 (T) as well as
Westing House Brake & Equipment (Pty) Ltd v Builder
Engineering (Pty) Ltd 1986(2) SA 555 (A) at 561)

5 [3] The Commissioner did not fail to disclose the material
facts to the magistrate when he made an application for a
warrant in terms of section 6(1) of the Counterfeit Goods
Act 37 of 1997. There was a dispute of fact between the
applicant and the third respondent as to whether Pillay in
10 seeking a warrant from the magistrate had disclosed to
him that the applicant was disputing that the goods in
respect of which a warrant was sought were counterfeit
goods. (Plascon-Evans Paints Ltd v Van Riebeeck Paints
(Pty) Ltd 1984(3) SA623(A) at 634e – 635c) In
15 accordance with the Plascon-Evans principle, I decided
the factual dispute on the respondent's version.

[4] Section 6(1) of the Act does not impose a duty upon a
magistrate considering an application for a warrant to
20 afford the applicant the opportunity of being heard. The
warrant application is made *ex parte* and is issued in
chambers. That being so, the provision of section 6(1)
makes no provision for the hearing of the applicant. The
magistrate had sufficient information on oath before him,
25 demonstrating that there were reasonable grounds for

believing that an act of dealing in counterfeit goods had taken place, or was taking place or was likely to take place.

5 [5] The magistrate's belief was based on the information placed before him in the form of the affidavit of Erik Olsen. It was clear from the affidavits of Olsen and Battiston that the fourth respondent is the holder of the intellectual property rights, which had been violated by
10 the goods in respect of which the warrant was sought. There was no evidence that the person from whom the applicant obtained the goods had authority to use the fourth respondent's copyright which subsisted in the drawing of the shoe.


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[6] Mr Sholto-Douglas referred me to an unreported Transvaal Provincial Division decision of Morespon (Pty) Ltd v Commissioner for South African Revenue Services & Others under case number 36853/2006 dated 25 March
20 2005. In that case Seriti, J set aside the search and seizure warrant which was issued by the magistrate in the circumstances where a letter setting out the applicant's defence in terms of section 15(3)A of the Copyright Act had not been brought to the attention of
25 the magistrate when a section 6 application was brought.

This was held to be a material non-disclosure. Mr Sholto-Douglas sought to use this case as a basis for arguing that there is a reasonable prospect that another court might come to a different conclusion. However, that case is distinguishable from the facts of the present case. In the present case, the person who applied for a warrant had advised the magistrate that the applicant was disputing that the goods were counterfeit goods.

- 10 [7] In the circumstances I am not persuaded that the application for leave to appeal has reasonable prospects of success and I therefore dismiss the application, with costs.

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ZONDI, J