

**SOLOMON ISLANDS NATIONAL PROVIDENT FUND BOARD -V-
ATTORNEY GENERAL**

High Court of Solomon Islands
(Palmer ACJ)

Civil Case Number 257 of 2001

Hearing: 9th November 2001

Judgment: 8th January 2002

Sol-Law for the Applicant

F. Waleanisia for the Respondent

Palmer ACJ: On 25th September 2001, I granted orders to stay the execution of a search warrant obtained by the Police from the Central Magistrate's Court, at the instruction of the Director of Public Prosecutions. The Police were investigating possible offences of conspiracy to defraud by the Solomon Islands National Provident Fund Board ("the NPF Board") alleged to have been committed in the set up of Solomons Mutual Insurance Limited ("SMI"). The Information relied on for the application of the Search Warrant from the Magistrate's Court is contained in the sworn statement of David Wate ("the Sworn Statement") of the Criminal Investigation Department dated 21st September 2001. It was alleged fraud was committed when premiums payable in respect of life term insurance cover taken by the Board on behalf of all members of the Solomon Islands National Provident Fund ("the Fund") were paid in respect of all members with credit balances instead of only active contributing members. The Police needed the documents to conduct an investigation into the alleged offence of conspiracy to defraud. The list of documents required in that search warrant are more fully set out in paragraph 13 of the Sworn Statement.

The Objections of the Plaintiff

The Plaintiff has raised a number of objections against the issue of the search warrant. The first two objections claim that the issue of the search warrant contravenes sections 39 and 40 of the Solomon Islands National Provident Fund Act (Cap. 109) (*hereinafter referred to as "the NPF Act"*). The third objection claims that the Information upon which the warrant was grounded is defective in that it failed to disclose in fact or according to reasonable suspicion based on reasonable grounds that an offence had been committed which would justify the issue of a search warrant.

The submissions of the Defendant

The Defendant relied on three grounds. (1) Defendant argues that section 101 of the Criminal Procedure Code ("the CPC") which authorizes a police officer to conduct searches is an exception to the protection afforded by section 39 of the NPF Act. (2) Defendant argues that the obtaining of the documents under section 101 of the CPC did not fall within section 39 or 40. (3) Defendant alleges the Plaintiff lacks locus standi.

The Issues

A number of issues arise from the submissions of the parties. First whether sections 39 and 40 of the NPF Act prohibit the divulgence of protected information even in the face of a validly issued search warrant. Secondly, whether there is defect in the issue of the warrant itself.

Sections 39 and 40 of the NPF Act

Section 39 of the NPF Act is a secrecy clause but with very specific application. It applies to the credit balance and related information of a member of the Fund or an employer. If information is required concerning details of a members credit balance save where it is required under criminal proceedings, it can only be done with the members consent. There is obviously good reason for this. The funds held by the NPF Board do not belong to them. They are mere trustees of it (section 7(2) of the NPF Act). Thus they cannot and should not disclose anything to anyone except with the consent of the member himself. The problem with this secrecy and confidence clause is whether it should also prevail over any allegations of impropriety, mis-management or the even more serious allegation of conspiracy to defraud or fraud against the NPF Board. In my respectful view, plain common sense tells us that where there are allegations of possible offences raised against the NPF Board, in relation to member's funds, the secrecy clause cannot be a shield to the Board. The shield extends only in so far as the members themselves. No member in his right mind would allow the NPF Board to mis-appropriate or mis-manage his funds or to be a party to any scheme to defraud his funds. Where such an allegation is made and the requirements stipulated to ground a search warrant under section 101 of the CPC are fulfilled, then I see no reason whatsoever for sections 39 and 40 of the NPF Act to be read as prohibiting or preventing the Police from obtaining the information that is required under the search warrant.

This is consistent with the principle that

"no private obligations can dispense with that universal one which lies on every member of the society to discover every design which may be formed, contrary to the laws of the society, to destroy the public welfare."

(See Annesley v. Earl of Anglesea (1743), 17 State Tr. 1139 at pp. 1223-1246 quoted by Lord Denning in Initial Services v. Puterill & Another [1967] 3 All E.R. 145 at 148).

At paragraph G of page 148 his Lordship Denning LJ states:

"The exception should extend to crimes, frauds and misdeeds, both those actually committed as well as those in contemplation, provided always- and this is essential – that the disclosure is justified in the public interest."

...The disclosure must, I should think, be to one who has a proper interest to receive the information. Thus it would be proper to disclose a crime to the police; or a breach of the Restrictive Trade Practices Act, 1956, to the registrar."

This exception is supported by the proviso in section 39 that

"Provided that nothing in this section shall prevent the Board or its officers from giving evidence relating to any such matter in any criminal proceedings."

In my respectful view, the meaning of "criminal proceedings" is capable of being extended to include applications made before a Magistrate for the issue of a search warrant. When a search warrant is being considered and issued by a Magistrate it is done so in pursuit of criminal proceedings that normally have been instituted under section 76 of the CPC. The issue and execution of a search warrant thus is done under the authority of the issuing court and any thing or item seized are brought within the jurisdiction of the same court. Where the issue of such warrant has been lawfully established, the proviso in section 39 is activated and permits the Board or any of its officers to provide such evidence as is required under the search warrant. It also protects any police officer acting under authority of that warrant from committing any offence under section 40 of the NPF Act.

Section 101 of the CPC

A Magistrate may issue search warrants if the requirements set out therein have been complied with. I quote:

"Where it is proved on oath to a Magistrate or a justice of the peace that in fact or according to reasonable suspicion anything upon, by or in respect of which an offence has been committed or anything which is necessary to the conduct of an investigation into any offence is in any building, ship, vehicle, box, or receptacle or place, the Magistrate or justice of the peace may by warrant (called a search warrant) authorize a police officer or other person therein named to search the building, ship, vehicle, box, receptacle or place (which shall be named or described in the warrant) for any such thing and, if anything searched for be found, or any other thing which there is reasonable cause to suspect to have been stolen or unlawfully obtained be found, to seize it and carry it before the court issuing the warrant or some other court to be dealt with according to law."

The Defendant submits that the above requirements had been fulfilled, as the Police Officer making the application for the search warrant believed that the documents listed in his Sworn Statement were necessary for him to conduct an investigation into an alleged offence of conspiracy to defraud. It is important however to note that an application for a search warrant cannot be made in isolation or separate to the requirement that an offence had been committed. This is the springboard from which an application for a search warrant normally is made. In other words, even if it had been proved on oath that the documents needed for the investigation of an offence are contained in any building etc., if there is no evidence of a belief based on reasonable grounds that an offence has been committed then no warrant can be grounded. His Lordship Kabui J, highlighted this vital link and requirement in Solomon Islands National Provident Fund Board v. The Attorney-General Civil Case 42 of 1999 judgment delivered on 23rd March 1999, at page 12:

"Subsection 2 (Section 76 of the CPC) is the relevant authority for laying a complaint against a person who from reasonable and probable cause is believed to have committed an offence. In my view, there is no evidence of the belief from a reasonable and probable cause that the Plaintiff had committed an offence and therefore a search warrant was necessary in the investigation of the offence committed. If no offence had in fact been committed by the Plaintiff, then the need for a search warrant would not have been necessary in the first place."

At page 15 his Lordship continues:

"In my view, section 101 of the Criminal Procedure Code can only be invoked where the Magistrate or a justice of the peace is satisfied that in fact a thing, by or in respect of which an offence has been committed is in any building etc. In other words, a Search Warrant may be issued where for example a murder weapon is known as a fact to be in a building etc or where it is reasonably suspected that a murder weapon is in a building etc. This procedure becomes necessary only where in this example, the murder has already been committed and the murder weapon is relevant evidence in the prosecution of the accused. In each case, a Search Warrant is a must to enter the relevant premises. The reason being that every householder must be protected against unauthorized entry by others."

And at page 16, his Lordship continues:

"In my view, section 101 of the Criminal Procedure Code Act can be invoked only after the commission of an offence has occurred. It cannot be used to fish for evidence."

The prerequisites for the issue of the search warrant in this case respectively have not been established. All that had been deposed to in the Sworn Statement of David Wate was that he had been assigned to investigate an alleged offence of conspiracy to defraud (paragraphs 1, 12 and 13). Unfortunately the nexus

between the alleged offence of conspiracy to defraud and the payment of premiums was not explained or established. A crucial element in any offence of conspiracy is the existence of an agreement. No agreement or material has been referred to which would support the existence of an alleged offence of conspiracy to defraud. Apart from what might appear to have been an irregularity in payment (if that was so) nothing has been adduced to show how that irregularity might have amounted to an offence of conspiracy to defraud, or was fraudulent. All that has been made is a bold assertion that the payments were fraudulent. How and why such an assertion was made was not disclosed. In my respectful view this should be established before a search warrant is issued. The material contained in the Sworn Statement respectively, is simply inadequate. It failed to disclose the existence of the offence of a conspiracy to defraud, which in turn would justify the grounding of a search warrant. In reality, the search warrant was sought to fish for evidence. That is wrong and cannot be permitted. On that basis the warrant is fatally defective and should not have been issued. I am satisfied an error of law on the face of the record had been committed which justifies the granting of the order of Certiorari sought in this case. The Search Warrant issued on 21st September 2001 in respect of this matter accordingly should be removed to this Court and quashed.

Locus Standi

The submissions of the Defendant on locus standi respectfully cannot hold water. The NPF Board has a statutory duty not to divulge information under section 39 save where proceedings are on foot. They have duty to ensure that any search warrants executed in respect of members' funds must be properly obtained. I am satisfied they have locus standi to make this application before this Court.

ORDERS OF THE COURT

- 1. Remove Search Warrant issued on 21st September 2001 to this Court and quashed.**
- 2. Grant order for costs against the Defendant.**

THE COURT.