

## **Introduction**

My name is Graeme Eatwell. I hold a BCom (Informatics) degree and was previously employed as operations manager and IT specialist.

I am the innocent victim of an ill-founded and in my view, malicious prosecution for a cybercrime that I am alleged to have committed. As a result of representations made by my legal representatives the State will no longer be proceeding with the charges levelled against me. This, however, is cold comfort when viewed against the financial and emotional cost that has been caused to me and my family as a result of the false accusations levelled against me. I believe that my case illustrates how the lack of understanding of the fundamentals of alleged cybercrimes and the handling of electronic evidence within the South African Police Services ("SAPS") and the National Prosecution Authority ("NPA") can lead to extreme prejudice.

While in this instance I was an accused, it is clear that the lack of expertise and capacity within SAPS and the NPA evidenced in my case will also mean that the true victims of cybercrime will be frustrated in their efforts to bring cyber-criminals to book.

While I fully understand the need for law and regulation aimed at combatting cybercrime, after discussing the Cybercrimes and Cybersecurity Bill with my legal advisors I can attest to the fact that the overbroad wording, the heavy bias in favour of law enforcement allied to the lack of expertise and capacity within the SAPS and NPA is a clear and present danger to the civil liberties that our Constitution promises to guarantee us.

## **Summary of Facts**

1. After initiating grievance procedures with my former employer, on the day that the grievance procedures were to be heard, 21<sup>st</sup> August 2015, I was accused by my former employer of committing offences, which included alleged crimes in terms of the ECT Act. I believe that this was done to deflect attention from the issues raised by myself and other employees. The result was that I was escorted from the premises, without being allowed to take my possessions. I was also told that I was suspended.
2. I did have in my possession my mobile phone and while waiting for my car keys to be provided to me I made some phone calls to family and friends to advise them of my predicament.
3. On the 2<sup>nd</sup> September 2015, based on wild and speculative findings made by a so-called "expert", an application was initiated in the High Court of South Africa (South Gauteng Division) by my former employer. These included the rather ludicrous allegation that using my mobile phone I had accessed and "annihilated" computers and a computer network. The application was made *ex parte* and I was not afforded an opportunity to address the court prior to the Court Order being granted.
4. The Order required that I hand over to the Sheriff computer equipment and information that my former employer alleged was in my possession. I draw the attention of the Committee to the fact that I was still employed at the time that the Order was sought and I readily admitted that there was information belonging to my former employer that was in my possession. My former employer, however, had full knowledge of the fact that I was in possession of the information

and that I often worked from my home. eMails were often addressed to me at my private eMail address which I used at home by senior representatives of my former employer. As the person responsible for IT I also made backups of my former employer's information and kept them offsite at my home, as is acceptable information security practice. This too was known to my former employer.

5. The Order included an interdict against me from using information belonging to my former employer, from hacking my former employer's information systems or enlisting the assistance of a third party to do so.
6. It is not unusual for applications of this nature to be brought for the purpose of seizing evidence which may be used in the course of civil proceedings. These applications are usually brought for what is termed "Anton Piller Orders". These orders are characterised by careful restrictions to ensure that the rights of the respondent are not violated, particularly in view of the fact that the respondent is not before the court when the application is made. It is drawn to the attention of the Committee that when the application was made the judge was never apprised (it would appear quite deliberately) of the fact that my former employer would use the same affidavits and indeed the order granted by him, to obtain a search warrant in terms of criminal proceedings that would be initiated. This is highly irregular as the protections that a court would usually require relating to orders of this nature would be absent in the search warrant and defeat the very purpose of protecting the respondent who has not been before the court.
7. The Order of the Civil Court, which in the view of my legal advisors was nothing more than a disguised Anton Piller Order and should have been subject to the restrictions typically placed on Anton Piller Orders, was then presented to the magistrate and a request for a warrant for search and seizure was made. I am advised by my legal advisors not only was this improper and irregular, but it resulted in a warrant being granted to the SAPS that was overbroad and highly prejudicial to my constitutional rights. It also, with great respect, shows a lack of appreciation on the part of the Magistrate issuing the warrant of the nature and treatment of electronic evidence.
8. On the 4<sup>th</sup> September 2015 the Order was served at my home. Present in the search and seizure was the Sheriff of the High Court, officers of the SAPS and a representative of the employer, the so-called "expert". The presence of the Sheriff who typically deals with civil issues and the SAPS who obviously deal with criminal issues, evidences the conflation of the civil proceedings and criminal proceedings. It also appeared that the State was acting at the direction of the so-called "expert" engaged by my former employer. This is highly irregular and, as events have proved, was intended to unlawfully harass me and aimed at securing my unlawful arrest and incarceration.

#### **Unqualified Expert and False Evidence**

9. The allegations of my alleged wrongdoing and cybercrime were based on statements made in the affidavits of the so-called "expert". As it turns out the expert is not an expert at all, has no qualifications in digital forensic investigation and his actions betrayed a complete lack of regard for the basic principles of gathering and retaining forensic evidence of electronic data. He never followed digital forensic procedures, his investigation only started 3 days after the crimes which he alleges I committed and he makes wildly speculative statements that have no foundation in digital forensic science or law.

10. The qualifications of the so-called expert are disputed in an affidavit deposed to by Mr Adrie Stander, whose is indisputably an expert in this area. Mr Stander's affidavit which sets out the basis for disqualifying the so-called expert and rebutting the evidence provided by him is provided as an annexure to this submission marked "GE1".
11. What is clear is that as a result of the SAPS not having a person sufficiently skilled to question the qualifications of the so-called expert or the veracity of his statements, they took their lead in the prosecution from an unqualified person who was no more than a very biased "hired gun" acting on the whim of a malicious complainant.
12. In substantiation of this contention I draw to the attention of the Committee the fact that despite not being a respondent in the application or subject to the search warrant granted to the SAPS, a friend who shares my home arrived at the home at the time that the search was being conducted, the Sheriff having employed a locksmith to enter the premises. My friend, when he arrived at the premises, was then ordered to also hand over his cell phone and laptop. My friend was not a respondent in the civil matter nor was he an accused in the criminal matter.
13. Naturally my friend refused to hand over his belongings and equipment and asked on what basis the SAPS could take such action. The so-called "expert" then referred to an agreement that my friend had signed while in the employ of my former employer. My friend had left the employ of my former employer more than a year prior to the date on which the search for a seizure was conducted.
14. When my friend still refused to hand over his equipment he was threatened that unless he did so he would be arrested for defeating the ends of justice. My friend phoned a legal advisor who told him that what the SAPS and the so-called "expert" were doing was unlawful, but as it was a Friday afternoon if they continued to act unlawfully and did arrest him he would be incarcerated and possibly not able to seek bail until Monday morning. The end result was that on the 4<sup>th</sup> September 2015 all of the computer equipment that was at the premises including the equipment belonging to my friend was seized pursuant to a warrant that was at least irregularly, if not unlawfully, obtained.

### **Flight Risk and Bail**

15. After the seizure of my equipment I consulted legal advisors and was advised to immediately provide a letter to the Station Commander at the SAPS Randburg. The letter prepared by my attorney was delivered by me to the Station Commander of Randburg on the 9<sup>th</sup> September 2015. It provided the contact details of my attorney and counsel, as well as my mobile phone number and undertook that I would co-operate with the SAPS investigations. A copy of the letter is attached to this submission marked "GE2".
16. I was also advised by my attorneys to at all times keep the letter with me because it had become clear that the complainant was seeking to have me unlawfully arrested and incarcerated based on the false allegations that I will deal with later in this submission. In the absence of a proper understanding of the allegations made by the complainant that were being relied on by the SAPS I was at clear risk of unlawful arrest and incarceration. I will deal with some of these false allegations later in this submission.

17. In the meantime I was summoned to a disciplinary meeting by my former employer. On the advice of my legal advisors and in view of what had transpired I resigned. My legal advisors believed that there were clear attempts to have me arrested and advised me against attending the disciplinary hearing on the basis that it was nothing more than deception to have me present myself to my former employer's offices, where I would be arrested. Their fears were substantiated by subsequent events.
18. Towards the end of October 2015, despite the letter addressed to the Station Commander on the 9<sup>th</sup> September 2015 and my legal advisors having filed a responding affidavit in the civil matter that set out my defence but was never provided by the complainant to the SAPS, quite by chance, one of my legal advisors became aware that a warrant for my arrest had been issued. In addition the rather unusual step was taken, treating me rather like an international terrorist, that all borders were closed to me and ports of entry and exit alerted to prevent my exit from the Republic. It transpires that the complainants had provided false evidence to the SAPS that I was a flight risk. Despite taking all reasonable precautions to ensure that the SAPS understood that I would cooperate with its investigation, no contact had been made by the investigating officer to my legal representatives before taking this drastic action.
19. As a result of acquiring this knowledge my legal advisors arranged for me to report to the investigator officer, accompanied by them. A Warning Statement was completed by me, subsequent to which I was advised to report to the investigating officer for the purpose of arranging bail at a date that was to be arranged with my legal advisors.
20. A meeting was later arranged for this purpose, but when I arrived the investigating officer immediately sought to take me into custody. He said that he would then have to investigate where I lived and he would only be able to do that later in the day. This would have resulted in my being incarcerated overnight. My legal advisors vehemently objected to the course of action and the lack of good faith that was shown by the investigating officer.
21. They advised him that should he attempt to take me into custody they would immediately proceed to the High Court and bring an application for my immediate release based on the bad faith that had been shown by the investigator officer. Further that the allegations that I was a flight risk, was in possession of "multiple passports" and that the crime that was alleged may have resulted in a loss of R500,000,000.00 (five hundred million rand) to my former employer were false. It also became evident that the letter that had been provided to the Station Commander SAPS Randburg had never been given to the investigating officer. Ultimately the investigator officer backed down and I was not arrested.
22. Arrangements were then made for me to appear in court on the 9<sup>th</sup> December 2015 for the purposes of postponing the matter for further investigation and setting bail. My legal advisors insisted that all of the preliminary investigations that were necessary to avoid my being incarcerated overnight were made prior to the 9<sup>th</sup> December 2015.
23. On the 9<sup>th</sup> December 2015 I presented myself, was arrested, and detained in custody awaiting the hearing of my bail application. I was handcuffed, my feet manacled and detained in a holding cell. I was advised that this is "normal procedure". Particularly when you know you are innocent of accusations made against you and that the State has not properly investigated the matter, this violation of the constitutional right that my dignity be respected and protected, remains difficult



for me to understand. It is an experience that simply is extremely degrading and should never be taken lightly and without proper investigation.

### **Bail Application**

24. When my matter was heard one of the conditions that the State sought in agreeing to bail was that I surrendered my passport. My legal advisors argued against this as I had arranged to visit my parents who live in Canada over Christmas. I had not seen my parents for 3 years. Ultimately the application to set aside the condition of the surrender of my passport was denied and bail was set at R10,000.00.
25. Aside from the financial loss and cancelled air tickets, the true loss to me was being unable to visit my elderly parents. Based largely on the fallacious allegations made by my former employer, the failure of the SAPS to understand the nature of the alleged cybercrime or that the so-called "expert" used by the complainant was in fact not an expert were the direct cause of a violation of my constitutional right of freedom of movement and to leave the Republic. I point out that the SAPS had been furnished with the affidavit of Mr Adrie Stander and had more than sufficient time to investigate the contradiction of the so called "expert's" evidence. This affidavit disputes the claims made by the so-called "expert",
26. At the bail application the affidavit deposed to by the investigator officer for some mysterious reason was not put before the court. This was later discovered by the state as it obliged to do when charges were drafted and put to me.
27. The investigating officer's affidavit was based on information that he had received from representatives of my former employer and the so-called "expert". The false information provided to him was aimed at establishing that I was a flight risk. It appears that to ensure that the matter was being investigated by the Hawks and being prosecuted in the Serious Commercial Crimes Court, the former employer made allegations that the loss that could be suffered as a result of the alleged cybercrime was R500,000,000.00 (Five Hundred Million Rand). This is utter nonsense, evidenced by the fact that in the civil action brought against me in the High Court the total claims of my former employer, which are also disputed total R1,678,554.53 (One Million Six Hundred and Seventy-Eight Thousand Five Hundred and Fifty-Four Rand and Fifty-Three Cents). The exaggeration of the claim by 30 times the amount actually claimed evidences the bad faith and dishonesty of the complainant. It appears that this was never questioned by the investigating officer. It is also important to note that although bail was eventually set at R10,000.00 (Ten Thousand Rand), in the affidavit of the Information Officer he recommended to the Prosecutor that an amount of R200,000.00 (Two Hundred Thousand Rand) be set for bail. Again, clearly this was intended to ensure my unlawful incarceration as I would not have been able to raise that sum to prevent my incarceration.
28. The allegations aimed at painting me as a super cyber-criminal were substantiated by the so-called "expert" deposing to an affidavit confirming that when my premises were searched (as already indicated it would appear quite irregularly under his direction), he saw 7 passports belonging to me. It was also stated by my former employers in affidavits that I had no family in the country. That was absolutely untrue. To the knowledge of my former employers my sister resides in South Africa and I, on the advice of my legal advisors, was living with her to avoid an



unlawful arrest. This was interpreted and stated on affidavit by representatives of my former employers that I was a fugitive from justice.

### **Conflict between SAPS and NPA**

29. I also draw to the attention of the Committee the events that took place on the 8<sup>th</sup> December 2015, the day before I attended court for the bail application. The advocate acting for me had heard that it was the intention of the NPA not to prosecute. In trying to establish whether it was necessary to even attend court if this was the case, while I was sitting with my legal advisors there were numerous calls made between my legal advisors, representatives of the NPA and the SAPS.
30. The representatives of the NPA confirmed to my legal advisors that they did not intend prosecuting the matter. They said that my legal advisors should talk to the SAPS about this and advise them of their intention. Bizarrely senior representatives of the NPA and the SAPS refused to talk to one another and insisted that my legal advisors act as the intermediary. The absurd situation arose that the senior representative of NPA (who I understand from my legal advisors should have the ultimate say in whether a crime is to be prosecuted or not) said he believed that there was no credible evidence to allow them to proceed with my prosecution at that time. The SAPS, however, insisted that the prosecution be proceeded with and that I present myself to the investigating officer on the 9<sup>th</sup> December 2015, for my arrest and for the matter to be postponed for further investigation.
31. The very evident political overtones between the NPA and the SAPS came as a shock to me and the inescapable conclusion that I had to come to was that the SAPS was being pressured by my former employers to proceed with the matter at all costs. Again, this substantiates the belief that my legal advisors share with me that the intent was to have me arrested and incarcerated.

### **Delay in Investigation of Computers**

32. Despite the insistence of the SAPS to proceed with the prosecution on the 9<sup>th</sup> December 2015, at the hearing of the bail application it became clear that the computers that had been seized from me on the 4<sup>th</sup> September 2015 were only sent to the SAPS laboratories for digital examination on the day of the hearing of the bail application, the 9<sup>th</sup> December 2015, some three months after the seizure of the equipment.
33. This further substantiated the suspicion of my legal advisors that the criminal proceedings had been brought in bad faith with the intention of having me arrested without the proper investigation of the allegations against me by my former employer was simply a side issue. Further, at no stage even up to now, have the computers of my former employers that it is alleged by the so-called "expert" were "annihilated" been tendered for forensic investigation to substantiate these claims.
34. Aside from the profound malice this evidences a complete and utter lack of understanding of the SAPS' rights in terms of the seizure of equipment, the investigation of cybercrime, the nature of electronic evidence and appropriate procedures for examination of electronic evidence.

### Backlogs in SAPS Laboratories

35. Subsequent to the 9<sup>th</sup> December 2015 my matter was repeatedly postponed to allow the investigation of the computer equipment to take place. The reason that was given for the postponements was that there was a backlog at the SAPS laboratories. This ongoing prejudice to me, particularly on my emotional state, cannot be quantified in money.
36. The SAPS eventually, after the investigation of my equipment, returned my equipment into the custody of my attorney, displaying an astonishing lack of understanding of a digital forensic investigation where digital forensic investigators image the information on the device that would be used in evidence, freeing the equipment to then be used. My attorney was required to sign an undertaking and indemnity that he would retain the equipment in his custody pending the hearing of the criminal matter against me. My attorney advised the investigating officer that this was highly irregular but as I would rather have had my equipment in his possession than the SAPS' possession this was agreed to.

### Bungling by SAPS Laboratories

37. Subsequently reports from the SAPS laboratories were provided to my attorney, together with flash drives containing the information that was investigated. On examining the reports of the SAPS laboratories, there was no relevant evidence and the only evidence that was ultimately found that related remotely to the charges that I had been advised would be made were documents that I had in civil proceedings admitted to having many months beforehand. The possession of this information could be explained and in no way indicated let alone provided any compelling evidence of the commission of any cybercrime on my part.
38. What also occurred was that one of the flash drives that was returned had information on it that had no relevance at all to my matter. It became evident that the information related to another investigation entirely. In the circumstances, this flash drive was immediately returned to the Prosecutor as it should never have been provided to my attorney, related to another crime and was most definitely the personal information of a third party.
39. Forensic investigations are subject to very stringent rules as the integrity of the evidence that will be used in court must be maintained at all times. That so fundamental a breach of procedure could occur on the part of persons who are ostensibly trained in the discipline of digital forensics, as the SAPS digital forensic investigators should be, is simply mindboggling.

### Summons and Representations

40. After the forensic reports had been reviewed by the Prosecutor a summons was drafted, a copy of which is provided with this submission marked "GE3". What is interesting about the summons is that the many allegations that have been made by my former employer and deposed to by its representatives, including the so-called "expert", no charge was laid against me alleging hacking into my former employer's information system, or the destruction of any of the information on computers that was initially alleged and formed the foundation of the investigation against me. The only charges that were made against me were possession of information, which, as I had previously advised, was used by me in the course of my employment and the possession of

which I was able to prove by documentary evidence and written communications, was well known to my former employer.

41. After receipt of the summons, almost 18 months after the initial seizure of my equipment, my legal advisors prepared representations to the Prosecutor. These are provided with this submission marked "GE4". In essence, the representations point to the many irregularities which had occurred in the State's investigation of the allegations made against me.
42. As a result of the lack of expertise and understanding of computers, electronic evidence and cybercrime generally the SAPS:
  - 42.1 Placed undue reliance on the so-called "expert" despite having in its possession an affidavit deposed to by a well-respected and undisputed digital forensic investigator, disputing the competence of the expert and the veracity of the allegations in the affidavits that they relied on to prosecute me;
  - 42.2 Decided to prosecute and arrest me prior to investigation of evidence alleged to have been on computers seized by it three months prior to my arrest and only examined months after my arrest.
  - 42.3 Found no evidence on the computers to substantiate the crimes that I was alleged to have committed;
  - 42.4 At no time investigated or obtained evidence relating to the computers that I was alleged to have "annihilated" by the so-called "expert" and that formed the basis of allegations of cybercrimes allegedly committed by me;
  - 42.5 Failed to follow due and proper process in the seizure of computer equipment from me and my friend and to maintain a proper "chain of custody" of the computer equipment while in its possession;
  - 42.6 laboratories failed to observe the stringent digital forensic procedures critical to the integrity of electronic evidence.
43. These representations were considered by the NPA and the charges withdrawn against me on the 18<sup>th</sup> April 2017.

### **Prejudice Suffered**

44. Among the instances of prejudice suffered by me I point out the following:
  - 44.1 As a result of the clear intention to have me arrested on the basis of the fallacious allegations that I am a cybercriminal and was responsible for the potential loss of R500,000,000.00 (Five Hundred Million Rand), I have lived in fear of unlawful arrest in contravention by the SAPS of my constitutional right of freedom of security of my person.
  - 44.2 The financial cost to me for legal representation (despite my legal advisors having accommodated me by providing significant discounts to their normal fees and undertaking some of the work pro bono) in defending myself against these baseless allegations could not be borne by me personally. It is only through the assistance of my elderly parents who have



had to use funds from their retirement savings to assist me in ensuring that the malice of the complainant and the incompetence of the SAPS, did not lead to my unlawful arrest and incarceration.

- 44.3 My arrest and the imposition of bail conditions before the SAPS had properly investigating the complaints against me led to my constitutional right of freedom of movement to leave the Republic being violated.
- 44.4 The failure of the SAPS to understand the basic principles relating to electronic evidence has led to me being deprived of my possessions, some of which are important to my earning of income, and prejudiced me in contravention of my constitutional right not to be deprived of my property arbitrarily.
- 44.5 The damage to my emotional and physical wellbeing has been significant and it will take some time for me to fully recover.
- 44.6 My trust in that the State (particularly the SAPS and NPA) is equipped to protect my constitutional rights and act lawfully and properly has been forever shattered.

### **Cybercrimes and Cybersecurity Bill**

45. I have a degree in Informatics and without professing specific expertise in cybercrime or cybersecurity can say that I am computer literate, understand how computer networks work and information is processed. In working through the harrowing experience with my legal advisors, both well versed in cybersecurity, has assisted me in understanding evidentiary issues relating to electronic information and "data messages" (as they are termed in the Electronic Communications and Transactions Act). Against this background I make the following submissions.

- 45.1 My experience has brought into stark profile the lack of competence within the SAPS and the NPA to deal with cybercrimes. The overbroad wording in the Cybercrimes and Cybersecurity Bill coupled with this lack of expertise and capacity, invites selective prosecution based on malicious motivation.
- 45.2 Section 4(1) provides that possession of a hardware or software tool in creating an offence without the State having to prove the purpose for which the hardware or software was possessed is extremely dangerous. While the words "*who is unable to give a satisfactory exculpatory account of such possession*" have been removed from this section, it should still be reworded to expressly require the State to prove that the possession of hardware and software was intended for unlawful purposes. Further, that it is clear that the wording "*who is unable to give a satisfactory exculpatory account of such possession and that reverses the onus of proof*" that appears elsewhere must not taint the interpretation of this provision. Unless this is done the circumstances that I found myself in, where the allegations of a so-called "expert" was relied upon to impute that my possession of software indicated an unlawful intent, will be repeated against innocent persons. I was placed in the position that it was up to me to prove my innocence rather than the state assuming evidence despite evidence to the contrary.

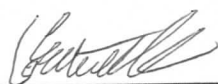
- 45.3 The provisions contained in Chapter 5 dealing with the "Powers to Investigate, Search and Access or Seize" refer to Standard Operating Procedures. The question is what will these Standard Operating Procedures provide? If they are aligned with international practice this would require at the very least that in exercising the powers contained in Chapter 5 that a person properly qualified in digital forensic investigation should accompany the SAPS. What has been done to ensure that this is the case? In my experience nothing!
- 45.4 The provisions of this Chapter allow for an "investigator" to assist the police. Against the background of my experience at the lack of expertise and capacity within the SAPS and NPA the appointment of investigators to assist without there being a minimum qualification creates a very real danger. I am told that this lack of expertise and capacity has been highlighted over many years by Professor von Solms of the University of Johannesburg and essentially ignored by the Department of State Security and JCPS Cluster in formulating the National Cybersecurity Policy Framework. I can attest to the fact that an "expert" who is not an expert, but rather a "hired gun" can influence an investigation, whether maliciously or unwittingly, and can cause grave injustice. The blind reliance on a so called "expert" who is nothing but an imposter has caused me enormous distress.
- 45.5 Whatever the merits of the Bill it fails to address the important issue of context. In the context of law enforcement agencies and prosecutorial authority not having sufficient expertise and being educated in information and communications technologies and the security thereof, the Bill, if enacted, provides no protection against infractions of civil liberties by those authorities. Without that protection, the Bill becomes very dangerous weapon in the hands of law enforcement agencies, particularly where they, in good or bad faith, do the bidding of overzealous or unscrupulous complainants.

### Thank you

46. I thank the Joint Parliamentary Portfolio Committee for Justice for receiving my representations. I trust that my experience will serve as a warning against overbroad legislation and the unconstitutional shifting of the onus of proof from the law enforcement agencies to alleged perpetrators of crimes. If this is done it will result in bad law and leave the vast majority of citizens in South Africa subject to the extreme prejudice that I have suffered.

### Oral Representation

47. I request that I be given an opportunity to address the Portfolio Committee on Justice and Correctional Services when oral comment is heard.



**GRAEME DOUGLAS EATWELL**

Date: 2017/08/08