Reportable:	**YES** / NO
Circulate to Judges:	**YES** / NO
Circulate to Magistrates:	**YES** / NO
Circulate to Regional Magistrates:	**YES** / NO

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO: 1314/2017

In the matter between:

MATTHYS MACHIEL BASSON VAN ROOYEN First Applicant

MARIANE ELIZABETH VAN ROOYEN Second Applicant

And

THE MINISTER OF POLICE First Respondent

LT. COL. W VERMEULEN Second Respondent

COL. N VAN HEERDEN Third Respondent

Judgment: **O'Brien AJ**
Heard on: 07 September 2018
Delivered on: 26 October 2018

JUDGMENT

O'BRIEN AJ

1. The applicants who are married resides at 6 Schoeman Street, Kuruman, Northern Cape ("the premises"). On 2 December 2016 the second respondent in possession of a search and seizure warrant ("the warrant") issued and authorised by the third respondent under s21 of the Criminal Procedure Act 51 of 1977 ("the CPA") executed the warrant at the premises. The second respondent assisted by eight police officials searched the premises in the presence of the applicants and their attorney.

2. During the search, the police seized documentation; cell phones; cheque books and computer equipment. Weapons and ammunition were also seized but returned to the applicants. All the items seized are described in Annexure "**A**" to the notice of motion.

3. After the seizure of the items, the applicants were arrested and appeared in court.

4. The applicants approach the court for an order setting aside the warrant which authorised the search and the execution thereof at their premises on 2 December 2016. They also seek a spoliation order in respect of the items seized on the same date.

5. As matters progressed, the respondents on 19 July 2017 filed a counter-application. If the court should rule that the items seized on 2nd December 2016 be returned to the applicants, the respondents should be allowed to approach a magistrate or justice in accordance with s21(1) of the CPA for a new warrant of search and seizure. Furthermore, pending the application for a new warrant the articles that were seized on 2 December 2016 be reserved by the first and second respondents. *En passant* the respondents applied for the admission of further affidavits with regard to the main application which was not opposed by the applicants.

Background

6. Col Perumal ("Perumal") is attached to the Directorate for Priority Crime Investigation ("the DPCI"), Northern Cape, specifically the Serious Commercial Crime Investigation Unit. He was the deponent in the application for the warrant under s21 of the CPA.

7. In his affidavit, he states that previous conventional law enforcement efforts by the Northern Cape Gambling Board proved to be unsuccessful. The focus was mainly on illegal gambling machines rather than illegal gambling activity. Due to their unsuccessful law enforcement efforts, the police decided to form an intelligence-led operation to address identified illegal gambling at premises.

8. He explains that major problems exist within the illegal gambling industry which impacts negatively on the legal gambling industry and as such has an impact on the economy of the Northern Cape. This is due to the organised nature of illegal online gambling which is taking place at several unlicensed premises where networks are established between alleged perpetrators and individuals in law enforcement. This creates corrupt practices. As a result, income is not declared, and the fiscus is robbed of revenue.

9. The police identified various premises spread over the Northern Cape where online illegal gambling activities took place.

10. Concerning the applicants, he was in possession of a sworn statement from a police agent who implicates the applicants and their son. The first applicant paid monies to the police agent when the latter gave information to the former of planned police actions against illegal gambling activities at the premises of the applicants. At the time when Perumal applied for the search warrant, the agent continued to participate with the first applicant by giving him information

about police operations. The first applicant believed that the agent was a corrupt police official.

11. During the operations by the police agent s252A of the CPA was used as a mechanism to infiltrate any illegal online gambling syndicate.

12. Perumal further explains that online gambling is done through the internet where clients pay to get a numerical number from a cashier who works at the entrance door of the illegal online gambling premises. After receiving payment, the cashier will provide a number to the client who will then choose a computer on which to gamble. To start the gambling activity, the client has to punch in the number provided into the system after which credit is paid and made available to the client. There are several gambling programmes, and after choosing the particular programme, the client punches in the amount that he wishes to bet, then chooses how many pay lines he wishes to activate, and then presses the spin button on the screen. If the symbols on the screen line up, the client wins an amount of money that will be added to the balance available on the screen. When the client finishes gambling, he calls a cashier at the counter who will write down the amount available on the screen which the cashier will pay out to the client at the counter. In some instances, if the client wins big, then the client will receive the money in cash the next day.

13. Having regard to the activity and the manner it is operated it is done in secrecy.

14. He sets out in his affidavit many places spread all over the Northern Cape where s252A traps were carried out.

15. About the applicants, Perumal states the following:

"*It is believed that Matthys Machiel Basson van Rooyen with identity number 571005 5122 088, Mariane Elizabeth van Rooyen with identity number 570728 0095 089 and Reno Maree van Rooyen with identity number 831025 5197 084 has access to online video surveillance of some of the illegal premises. These images can be accessed from electronic equipment such as computers and smartphones. Therefore it is imperative that all electronic devices in their possession be ceased as it may afford evidence of the commission of an offence as well as provide evidence of all the persons involved in the illegal facilitation of gambling.*"

16. Perumal further states:

"*Policing actions under s252(A) of Act 51 of 1977 were authorised to be held at the internet café located at Livingstone Street, Kuruman, Northern Cape. During October 2015 the said operation could not be executed due to the said premises being locked as Matthys Machiel Basson van Rooyen with identity number 571005 5122 088 received information about the operation. This was confirmed by him in a recorded conversation with the agent. On the 14th March 2016 a similar operation was planned and executed by two shallow cover agents who were fitted out with video and audio recording and they did two transactions each. An amount of R2 000.00 was paid and nothing was returned. When the two shallow cover agents arrived in Kuruman, and they proceeded to the premises in Voortrekker Street in Kuruman. They entered the premises marked Internet Café and conducted the operation. The said premises are not affixed with a street address. I am of the view that from the evidence collected by the two shallow cover agents, that indeed unlawful gambling is being conducted at the premises at Voortrekker Street in Kuruman*."

17. Both Perumal and the third respondent confirm that his together with the police agent's affidavits were placed before the latter after when the search warrant was authorised.

18. In his affidavit, the police agent sets out how he made contact with the applicants over a period from 29 June 2015 until 28 November 2016. He was in contact either with the applicants or their son. The affidavit contains information about several meetings between the police agent and the first applicant. At some stages, the second applicant was present during these meetings.

19. The first applicant explained to the agent how illegal online gambling was conducted. The first applicant bought a computer programme known as Global which is a Russian programme which allows them access to a server overseas. The programme allows them to continue with gambling activities without being dependent on other role players. The programme was loaded on touchscreen computers. Games are loaded, credits are bought on which the applicants pay royalties. The computers are then used to conduct illegal online gambling.

20. On most occasions, when the police agent and the first applicant met the former was given payments for his role in giving the first applicant information.

21. The information sought by the first applicant related to when the police were to conduct searches on premises where the applicants operate from. The first applicant also requested the agent to stop illegal gambling activities conducted by their opposition.

22. Having regard to the information contained in the affidavit of Perumal read together with the affidavit of the police agent, the third respondent then

authorised a search warrant to be conducted on the premises of the applicants.

The search warrant

23. The third respondent, a justice of the peace issued the search warrant on 1 December 2016 at Kimberley. The search warrant allows police officials named in an annexure to the warrant to enter the premises of the applicants; to seize any articles; to search for and draw any data and data messages on any information system and making mirror imaging of the data and data messages restored on the information system. The police officials – 369 in total - are described in Annexure "**B**" to the warrant.

24. At this point, I pause to mention notwithstanding the significant number of named police officials in the warrant only eight took part in the actual search of the premises.

25. The warrant further states that information on oath suggests reasonable grounds for believing that offences in respect of the Prevention and Combatting of Corrupt Activities Act No 12 of 2004; contraventions of the Northern Cape Gambling Act 3 of 2003 and contraventions of the Prevention of Organised Crime Act 21 of 1998 are being committed at the premises. The factual basis for such reasonable belief is that police actions were carried out at the premises where it was established that persons access illegal online gambling sites in lieu of payment to the person in charge of the premises.

26. The items capable of seizure which may afford evidence that is concerned with or intended to be used in the commission of a crime are contained in an Annexure "**A**" to the search warrant. In this annexure, is listed accounting

records whether in electronic and hardcopy; bank deposits, book slips, counterfoil, printouts; bank withdrawal slips / counterfoil / printouts. I do not intend to list each and every item in this judgment save to state that a big part of the items refers to computers and computer equipment.

27. It is settled law that courts will vigorously scrutinise the validity of search warrants. More so, because of an individual's right to privacy and dignity and not to have his home searched without any legal foundation. The courts seriously guard the right to privacy. When the validity of a search warrant is attacked, a court must have regard to the stringent requirements laid down by the Constitutional Court.

28. The warrant is attacked on many grounds to which I turn presently.

Conflict of interest

29. It was contended on behalf of the applicants that the basis on which the warrant was issued is conflicted because of Perumal and the commissioner of oaths who commissioned his affidavit, Lt Col Fernando Luis being attached to the same unit.

30. The Justice of the Peace and Commissioners of Oaths Act 16 of 1963 deals with the appointment of commissioners and *ex officio* commissioners of oaths. Members of the South African Police Services by their office are *ex officio* commissioners. Regulation 7 which was promulgated on 21 July 1972 and published in Government Notice No 649 as Regulation No. R1258 is relevant. According to Regulation 7(1), a commissioner of oaths is prohibited from administering an oath or affirmation in which he or she has an interest. Regulation 7(2) stipulates that the provisions of sub-regulation 1 shall not

apply to an affidavit or a declaration mentioned in the schedule. The schedule provides that Regulation 7(1) does not apply to any affidavit or declaration taken by an officer who is in the service of the State, provided: his only interests in the declaration arises out of the performance of his duties in such service; the primary interest in the declaration is that of the State. (cf **S v Sihlobo [2004] JOL 12831 (Tk)**.)

31. It was submitted that Col Luis has an interest in the matter because he was part of the investigation concerning the applicants with specific reference to the s252A of the CPA when operations were carried out by the police agent.

32. In support of this submission, reference was made to **National Director Public Prosecutions v Ndolose 2014 (2) SACR 633 (ECM)** where the court held that the provisions of Regulation 7 are peremptory and that non-compliance renders the act of attestation void and deprives the documents of its validity as an affidavit. The court was also referred to an unreported decision in the **North West High Court Mafikeng of Malan Case No: M279/2017** and **Dyani v Minister of Safety and Security & Others 2001(1) SACR 634 (TK) [paras 19 and 20]** in which the same conclusion was reached: if there is non-compliance with Regulation 7 the warrant is void and should be set aside.

33. Counsel for the applicants quite correctly referred to a decision of **Grammaticus v Minister of Police Case No: 50538/2017 dated 12 December 2017** in which it was held on the facts of that case that the applicants have not illustrated any factual basis on which the police officer had an interest in the matter other than in exercising his functions as police officer in the service of the state.

34. I respectfully agree with the learned judge in **Grammaticus** supra that to set aside a warrant on the basis that a police officer has an interest would constitute a purely technical basis especially where there is no evidence of

any abuse of power or gross violation (**Polonyfis v Minister of Police 2012 (1) SACR 57 (SCA)**) of the rights of a person to be searched. In this instance it was not shown nor was it alleged that the respondents disregarded the rights of the applicants.

35. In any event, it was explained although Perumal and Luis are attached to the DPCI, they function in two separate units. Perumal is attached to the Serious Commercial Crime Investigation Unit whereas Luis is attached to the Serious Corruptions Investigations Unit. Furthermore, Luis' only interest arises out of the performance of his duties in service of the state. Lastly, the applicants could not show any evidence of abuse or power or gross violation of their rights.

36. As was stated in **R v Rajah 1955 (3) SA 276 (A) at 282 F - G**:

> "…*that a person in the position of Van Rooyen was intended by the legislature in a case such as this to be competent to administer an oath. Van Rooyen in the exercise of his duties as a member of the criminal investigation department administered the oath in the course of his investigation into an alleged offence. In doing so, he was carrying out his duty and cannot be said to have had 'any interest' in the matter within the meaning of the words in Reg.1(i) I respectfully align myself with this view.*"

37. Consequently, the reliance on Regulation 7(1) fails.

38. In **Minister of Safety and Security v Van der Merwe & Others 2011 (5) SA 61 (CC) at paras 55 – 56** the court said the following:

> "*What emerges from this analysis is that a valid warrant is one that, in a reasonably intelligible manner:*

> *(a) States the statutory provision in terms of which it is issued;*
>
> *(b) Identifies the searcher;*
>
> *(c) Clearly mentions the authority it confers upon the searcher;*
>
> *(d) Identifies the person, container or premises to be searched;*
>
> *(e) Describes the article to be searched for and seized, with sufficient particularity; and*
>
> *(f) Specifies the offence which triggered the criminal investigation and names the suspected offender.*"

39. At para 56 the court said the following:

> "*In addition, the guidelines to be observed by a court considering the validity of the warrants include the following:*
>
> *(a) The person issuing the warrant must have authority and jurisdiction;*
>
> *(b) The person authorising the warrant must satisfy herself that the affidavit contains sufficient information on the existence of the jurisdictional facts;*
>
> *(c) The terms of the warrant must be neither vague nor overbroad;*

(d) *A warrant must be reasonably intelligible to both the searcher and the search person;*

(e) *The court must consider the validity of the warrants with a jealous regard for the search person's constitutional rights; and*

(f) *The terms of the warrant must be construed with reasonable strictness.*"

[footnotes omitted]

Jurisdictional facts

40. The applicants submit that the jurisdictional facts to obtain the search warrant were absent. They contend that the third respondent did not apply his mind to the information at his disposal when authorising the warrant. In this regard, they say that there was not a reasonable suspicion that a crime has indeed been committed or that reasonable grounds exist to believe that objects connected with an offence may be found on the premises or persons intended to be searched.

41. But the applicants are wrong in this regard. The affidavit of Perumal was made available to the third respondent. In that affidavit, he describes the various investigative methods they employed in the Northern Cape to investigate illegal gambling. Furthermore, the affidavit of the police agent was also available to the third respondent when he authorised the warrant. In that affidavit, the police agent describes how he infiltrated and obtained the trust of the applicants. To this end, he described how the applicants and specifically the first applicant required of him to provide information when the police were to conduct operations on illegal gambling. The first applicant also informed the police agent that if a warrant is to be issued concerning the premises where

the operations are conducted on behalf of the first applicant, the warrant must be filled in as to allow the applicants' legal representatives to attack the warrant on the basis of insufficient information. It was also expected of the police agent to exert pressure on competition of the applicants.

42. For all his endeavours, the police agent was paid by the first applicant and in some instances with the knowledge of the second applicant whereafter the monies paid were marked and booked. At all material times, the police agent was monitored by his superior officers.

43. The applicants have opted not to attack the merits of the allegations alleged against them by the police agent. In these circumstances, it can hardly be suggested that there was no reasonable suspicion or that no reasonable grounds existed for the issuing of the warrant.

44. On this basis, the applicants' argument fails.

Was the warrant intelligible?

45. The applicants complain that the warrant was not reasonably capable of being understood by an informed person who understand the empowering legislation and the nature of the offences in question. In this regard, they referred to the fact that the warrant is vague because it refers to 396 police officers. For the above proposition, the applicants call in aid the decision of **Smit and Maritz Attorneys & Another v Lourens N.O. & Others 2002 (1) SACR 152 (W)** and **Naidoo & Another v Minister of Law and Order & Another 1990 (2) SA 158 (W) at 161 C – D**. In both these cases the warrants in question refers to "*police official*" and to *"all police officers"*. However, in the case at hand the police officials, are named. It should not be forgotten that at the time of the issuing of the warrants, the DPCI in the Northern Cape and specifically the Serious Commercial Crimes Unit and Serious Corruption

Crime Units were busy with intensive investigations concerning illegal gambling in the Northern Cape. Furthermore, the warrant reflects only eight police officials who were present at the execution thereof.

46. In any event to use as authority the cases referred to is misplaced. As pointed out, those cases referred to ‘police official’ and to ‘all police officers’. Whereas in this matter, the police officers are clearly identified by the terms of the warrant. The applicants’ argument on this score must fail.

The offences

47. The applicants were highly critical of the offences described in the warrant. The argument is that the offences are referred to in an omnibus fashion where no dates, periods and the particular section is identified. As I understand the argument, the respondents cannot merely quote the sections but should indicate when, where and what happened.

48. In support of their argument, the applicants referred to the decision of **Ferucci & Others v Commissioner, South African Revenue Service & Another 2002 (6) SA 219 (C)**. However, that case dealt with the provisions of the Income Tax Act 58 of 1962 and specific s74(d). It is indeed so that by and large the Income Tax Act and the CPA have corresponding provisions. However, I am guided by what was stated in **Thint (Pty) Ltd v National Director of Public Prosecutions & Others**; **Zuma v National Director of Public Prosecutions & Others 2009 (1) SA 1 (CC) at para 152** the following is stated:

> “*… I do not think that Powell lays down a subjective test for a warrants intelligibility, which would mean that the lawfulness of a warrant will depend on the understanding of the person present at the premises when it is executed. This approach would effectively require every*

> *warrant to be perfectly tailored so that any person search would, in the light of his or her own subjective mental capabilities and education, have a complete understanding of the scope of the search. The principle in Powell does not establish this requirement either explicitly or by implication. Such a requirement would be practically unworkable and would scupper the fight against serious and organise crime, because it would be practically impossible to prepare every warrant relating to complex offences and circumstances in a way that would make it understandable, in all its detail, to every person who may search.*"

49. The warrant refers to contraventions of the Prevention and Combatting of Corrupt Activities Act, No 12 of 2004; the Northern Cape Gambling Act, Act 3 of 2003 read with the National Gambling Act, Act 7 of 2004 and Contraventions of the Prevention of Organised Crime Act, No 121 of 1998. In Annexure "**C**" to the warrant, all the sections concerning the Prevention and Combatting of Corrupt Activities Act, the Prevention of Organised Crime Act and the Northern Cape Gambling Act are described, and all the offences are set out.

50. In my view, it cannot be expected when police, at the initial stages of an investigation to include in a warrant when, where and what specific offences were committed. The answer is obvious, at the initial investigation the police must still thoroughly investigate to determine which offences were allegedly committed. It cannot be expected of police officials to state the offences with so much clarity when reference is made to when, where and how the crimes were allegedly committed. In my judgment that is not what is envisaged in this section. Thus, the applicants fail at this hurdle too.

Data messages

51. The applicants argue that the reference to the articles to be seized are vague which makes the warrant unintelligible and overbroad. I do not agree. In **Thint (supra) at para 156** the following was said:

> "*It would also be unrealistic, however adequately represented the search person might be at the time, to expect differences of opinion to be resolved while the search is taking place. The act empowers investigators to execute the operation unilaterally, thus investigators are entitled to decide whether to examine or seize any particular item without the consent of the search person. Difference of opinion may, in the end, have to be resolved by a court. They do not necessarily render the warrant unduly vague or overbroad.*"

52. Furthermore, at **para 160**:

> "*… My view is that it is permissible to travel outside the warrant for that purpose. Indeed it seems very likely that every small item of knowledge attained by an investigator would be relevant to deciding whether an item might have a bearing on the investigation. Whether, for example, a particular letter or financial record is relevant to an investigation may depend on a host of factors beyond the terms of a warrant, including what other relevant letters and financial records state. Therefore, it seems to me that it would in most cases where complex criminal offences are involved, not be possible to prepare a warrant in such a way that the relevance or irrelevance to the investigation of any particular item found in the search premises could be determined without doubt by the search party having regard to the terms of the warrant alone. I do not understand the judgment in Powell to have laid down such a restrictive rule.*"

53. What must be understood is the following. It is notoriously difficult for the police to detect illegal online gambling. For obvious reasons, these types of

offences are committed in the secrecy of people's homes or business premises. In this instance, the police had to make use of an undercover agent to infiltrate the applicants to establish whether they have allegedly committed the offences as previously stipulated. In such a situation, the police will have to seize computers, hard drives, discs, etc. Therefore, the attack that the warrant is vague and overbroad is unfounded. The applicants, if the evidence of the police agent is accepted would in all probability have committed offences under the Prevention of Corruption Act. In my judgment, the description of the articles to be seized are not vague and overbroad.

54. However, the applicants had another string to their bow. They contend that they were in undisturbed lawful possession of the articles seized and are therefore entitled to restoration. In this regard, they refer to the case of **Ngqukumba v Minister of Safety and Security & Others 2014 (5) SA 112 (CC)**.

55. **Ngqukumba** is distinguishable from this case. In that case, the court dealt with the provisions of ss68(6)(b) and 89(1) of the National Road Traffic Act 93 of 1996. The court held that on the facts of that case – a vehicle bearing falsified or mutilated engine or chassis number – it is possible to possess such a vehicle with lawful course: hence the saying that a thief may also possess.

56. However, in my judgment the principles laid down in **Ngqukumba** is not applicable in this case. The facts are distinguishable. In paragraph 13 of the judgment, the court said non-compliance with the provisions of the CPA in seizing goods is unlawful. Furthermore, the court also remarked in paragraph 15 that the court was not concerned with objects the possession of which by ordinary individuals would be unlawful under all circumstances. Had the court been concerned with objects of that nature, then the mandament van spolie might not be available.

57. In this instance the police are dealing with alleged illegal online gambling activities and alleged corrupt activities. It is in the public interest for the police to investigate it because of the real possibility of items that may not be lawfully possessed.

58. I am mindful of what is stated in **Van der Merwe and Another v Taylor NO and others 2008 (1) SA 1 (CC) at para 55**:

> "*In circumstances where a criminal trial is pending, an application for the return of the article may be premature as it may be required for purposes of trial.*"
> (footnotes omitted)

59. In the view that I take of the matter I need not decide the conditional counter application.

60. I make the following order:

61.1 The application is dismissed with costs.

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S C O'BRIEN
ACTING JUDGE

For the applicants: **Adv L J Lowies** instructed by
Van De Wall Incorporated,
Kimberley

For the respondents: **Adv B S Mene** instructed by
the State Attorney,
Kimberley