

IN THE HIGH COURT OF SOUTH AFRICA
(FREE STATE PROVINCIAL DIVISION)

Case No. : 2512/08

In the matter between:-

FIKIZOLO NORMAN KHOSANA

First Applicant

F N KHOSANA TRANSPORT CC

Second Applicant

and

THE MINISTER OF SAFETY AND
SECURITY N.O.

First Respondent

THE DIRECTOR OF PUBLIC
PROSECUTIONS N.O. FREE STATE
PROVINCIAL DIVISION

Second Respondent

CORAM:

H.M. MUSI, JP

HEARD ON:

4 DECEMBER 2008

DELIVERED ON:

19 MARCH 2009

JUDGMENT

H.M. MUSI, JP

Introduction

[1] This is an application for the setting aside of the warrants that were issued by a magistrate at Welkom on 12 February 2007 authorising the police to search for and seize certain articles at various premises belonging to the applicants and

for the return of such articles. It is necessary to set out the factual background to the matter. I should, however, at this stage mention that the first respondent is opposing the application on behalf of both respondents.

Factual background

[2] The application for the warrants arose from a police investigation into the alleged criminal activities of the first applicant, his brother, Louis Khosana, and one Anthony Math. These three men were suspected of being members of a syndicate that was engaged in unlawful dealing in unwrought gold and related illicit transactions. As part of the investigations, the police arranged for a controlled sale of unwrought gold by undercover police operatives. The operation was conducted on 9 February 2007. A report of such operation and the sworn statements of the police operatives who took part in it are annexed to the papers. Following such trap, the first applicant, Louis Khosana and Anthony Math (the accused) were arrested and charged in the magistrate's court at Welkom. Their case is pending before such court. It is common cause that it was remanded further to enable the applicants to launch the instant

application. The warrants in question were issued prior to the arrest and arraignment of the accused.

- [3] It should be noted that the second applicant is a close corporation, which owns some of the articles that were seized during the execution of the warrants. The first applicant is its member. In annexure “B” to the warrants, the second applicant is referred to simply as F N Khosana Transport and Plant Hire. It appears that the police were not aware of its status as a close corporation and assumed that it was just a business through which the first applicant traded. It is, however, common cause that it, and not the first applicant, owns the articles that were seized on its premises. It is important also to note that the second applicant is not an accused in the pending criminal case.

The warrants

- [4] Altogether there were six warrants issued. Each warrant authorised the search for and seizure of articles at the premises specified therein. In the papers and oral argument the warrants were described with reference to the address to which each related. They are as follows:

- 4.1 13 Aalwyn Street, Jim Fouche Park, Welkom. This is the residential address of the first applicant.
- 4.2 Flat No. 1, Hagoth Flats, 152 Haarlem Street, Dagbreek, Welkom.
- 4.3 Flat No. 4, Hagoth Flats, 152 Haarlem Street, Dagbreek, Welkom. The Hagoth Flats are owned by the first applicant.
- 4.4 31 Keerom Street, Voorspoed, Welkom. These are the business premises of the second applicant.

The warrants referred to in the papers as Rosalind Street and Thabong warrants have been lost. No search and seizure operations were conducted at the premises to which they relate. The respondents have indicated that the police do not intend following on these warrants and for that reason there was no need to refer to them anymore. Indeed they are irrelevant for purposes of this judgment.

- [5] It is worth noting that the warrants are identical, differing only in respect of the premises to which each is related. The offences in which the articles sought to be seized, are alleged to have been involved, are the same for all the

warrants and the alleged perpetrator is the first applicant, save in respect of the warrant relating to Flat No. 1, Hagoth Flats, where one K.A. Tom is cited in the alternative. All the warrants incorporate annexure “B”, which lists and identifies the articles that are alleged to be under the control of persons or at the premises to be searched.

- [6] It is important to note, firstly, that annexure “B” does not contain a separate list of articles pertaining to a specific warrant or premises but is a composite list of all the articles that are to be searched for and seized. As it stands, it means that all these articles would be on each of the premises to be searched. The list contains eight items. Paragraphs 1.1 and 1.2 comprise a variety of books, records and other documents as well as computer related items like computer hardware, software, hard drive, network servers etc. The documents include financial statements, auditors’ reports, tax returns and the like. They clearly relate to the running of a business. The list also contains under paragraph 1.7 particulars of three motor vehicles. It is also noteworthy that one set of the same affidavits was used to support the application for each of the warrants.

- [7] In order to give a complete picture of what the warrants look like, I reproduce hereunder the Aalwyn Street warrant.

“WARRANT FOR SEARCH AND SEIZURE

**WARRANT FOR SEARCH AND SEIZURE IN TERMS OF THE
PROVISIONS OF SECTION 21 READ WITH SECTION 20 OF
THE CRIMINAL PROCEDURE ACT, ACT 51 OF 1977**

TO: Capt Flynn service number 04299337 and members of the South African Police Service identified in **ANNEXURE “A”** hereto.

WHEREAS it appears to me from information under oath that there are reasonable grounds for believing that there are within the Magisterial District of **Welkom**, certain articles as listed and identified in **ANNEXURE “B”** hereto under the control of persons or at premises within the Magisterial Court’s area of jurisdiction, which are concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of the offence(s) of:

1. **Dealing in unwrought Precious Metal;**
2. **Contraventions of sections 2, of the Prevention of Organised Crime Act, Act 121 of 1998, (POCA)**
3. **Theft**
4. **Kidnapping (“*Menseroof*”)**

(hereinafter referred to as the specified offences) by
**Norman Khosana of 13 Aalwyn street, Jim Fouche
Park, Welkom**, within the Republic of South Africa, and
which may afford evidence of the commission or
suspected commission of the specified offences by
Norman Khosana

AND WHEREAS it appears to me from the said information
under oath that there are reasonable grounds of believing that
the articles as per **ANNEXURE “B”** hereto are located, kept or
stores at the premises listed herein under, *Viz*:

1. 13 Aalwyn Street, Jim Fouche Park, Welkom.

Your are hereby authorised, at any time during the **day** or **night**,
to enter the above-mentioned premises and to search that
premises and/or person, and/or vehicle found on the said
premises for the articles mentioned in **Annexure “B”** hereto and
to seize such articles found and to deal with such articles in
accordance with the provisions of Section 30 of the Criminal
Procedure Act, Act 51 of 1977.

SIGNED at _____ on this the ____ day of February 2007

MAGISTRATE: WELKOM

Preliminary objections

[8] In his heads of argument Mr. Madlanga, the respondents' senior counsel, raised two points *in limine*. He persisted therewith in oral argument. I shall deal with each of these briefly.

[9] The first point is that the instant application is an impermissible preliminary litigation whose only purpose is to circumvent the application of section 35(5) of the Constitution. Counsel cited **THINT (PTY) LTD v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS; ZUMA AND ANOTHER v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS** 2008 (12) BCLR 1197 (CC), at 1223 where Langa CJ expressed himself as follows:

“[65] I nevertheless do agree with the prosecution that this Court should discourage preliminary litigation that appears to have no purpose other than to circumvent the application of section 35(5). Allowing such litigation will often place prosecutors between a rock and a hard place. They must, on the one hand, resist preliminary challenges to their investigations and to the institution of

proceedings against accused persons; on the other hand, they are simultaneously obliged to ensure the prompt commencement of trials. Generally disallowing such litigation would ensure that the trial court decides the pertinent issues, which it is best placed to do, and would ensure that trials start sooner rather than later.”

Further on the Chief Justice stated:

“But in the ordinary course of events, and where the purpose of the litigation appears merely to be the avoidance of the application of section 35(5) or the delay of criminal proceedings, all courts should not entertain it. The trial court would then step in and consider together the pertinent interests of all concerned.”

But Mr. Madlanga acknowledged that the Constitutional Court also made it clear that this is not a hard and fast rule.

Langa CJ put it as follows:

“The courts’ doors should never be completely closed to litigants. If, for instance, a warrant is clearly unlawful, the victim should be able to have it set aside promptly. If the trial is only likely to commence far in the future, the victim should be able to

engage in preliminary litigation to enforce his or her fundamental rights.”

[10] Mr. Madlanga argued that when the Constitutional Court says that in the course of ordinary events the courts should not entertain such applications, it meant to convey that exceptional circumstances must exist entitling a litigant to approach the court by way of preliminary litigation. He submitted that no such exceptional circumstances exist in this case and that I should, therefore, refuse to entertain the application.

[11] In response, Mr. Kemp, for the applicants, pointed out that in the first place, the parties had been agreed that it would be appropriate that the validity of the warrants be determined in a separate hearing and the criminal case had been remanded by consent precisely to allow for the launch of the instant application. Secondly, he contended that the instant case was on the facts distinguishable from **THINT; ZUMA**. He pointed out that the second applicant’s articles had been seized and yet it was no party to the criminal trial nor was there any basis for linking the articles seized from its

premises to the crimes forming the subject matter of the criminal case. He contended that in the premises the second applicant was perfectly within its right to bring this application. Mr. Kemp submitted that it would make no sense to separate the case of the second applicant from that of the first applicant.

In regard to the latter point, Mr. Madlanga seemed to concede as much when he said that there was a convergence of facts linking the two applicants, which made it impossible to separate their cases. Mr. Kemp also pointed out that some personal articles of the first applicant had been seized which had no relevance whatsoever to the charges he is facing.

[12] I agree that the second applicant, in particular, was entitled to launch the instant application. It is important to note that at the start of the hearing, the respondents tendered the return of virtually all the articles seized from its premises at 31 Keerom Street, Welkom. This was a clear admission by the respondents that there had been no basis for seizing such articles. It is also common cause that some items were

seized from the first applicant's residence which simply could have had no link with the criminal charges. And there is indeed a convergence of facts which justify the challenge to the lawfulness of the warrants being brought in one application. In my view, this is an appropriate case where the dictum in **THINT; ZUMA** to the effect that if a warrant is clearly unlawful the victim should be able to have it set aside promptly should apply.

- [13] The second point *in limine* relates to *locus standi*, where it was contended that in regard to the Hagoth Flats warrants, the applicants had no *locus standi*. The thrust of Mr. Madlanga's argument was that the only right whose violation could found a basis for the instant application is the right to privacy and this applies only in respect of the first applicant, since the second applicant enjoys no such right. Mr. Madlanga said that the only other possible basis on which the applicants could have approached the court with the instant application, would be the alleged violation of the right to a fair trial but that this would apply only to the first applicant since the second applicant faces no criminal trial. Counsel argued that the first applicant has not laid any basis

for a complaint based on the right to a fair trial. At any rate, that is the sort of complaint that can only be addressed by the trial court in terms of section 35(5) of the Constitution, so it was contended.

[14] In regard to the right to privacy, Mr. Madlanga argued that since the first applicant did not reside in those premises, his rights to privacy and dignity were not affected by the search and seizure operations and he, therefore, had no standing to bring the instant application. Mr. Madlanga contended that it was only the privacy of the people who resided in the Hagoth Flats (the first applicant's tenants) whose rights to privacy could have been affected. As for the second applicant, it was contended that it had nothing to do with the Hagoth Flats as it was neither a tenant there nor did it have any proprietary interests in those premises.

[15] On the *locus standi* issue, Mr. Kemp pointed out that the first applicant was the owner of the Hagoth Flats and that these were leased to various tenants, who paid rental to him. Counsel submitted that the first applicant was entitled to protect his property against unlawful invasion and to provide

his tenants with peaceful, undisturbed occupation. He said that this was a sufficient legal interest to give the first applicant *locus standi*. Counsel cited **JACOBS EN 'N ANDER v WAKS EN ANDERE** 1992 (1) SA 521 (A).

- [16] I am not persuaded that the first applicant had no *locus* in respect of the search and seizure at the Hagoth Flats. Even putting aside the fact that the first applicant has a right and indeed a duty to protect his property against unlawful invasions as well as a duty to provide his tenants with peaceful occupation, and focussing only on his rights to privacy and dignity, if his property is raided by the police alleging that the owner is involved in criminal activities and that the premises are being used for such activities, surely that would impinge on the owner's dignity notwithstanding that he does not reside thereon. That becomes even more so when the target of the search and seizure is the owner himself as is the case *in casu*. At any rate, an unlawful invasion of a person's private property is a violation of his privacy. Section 14 of the Constitution provides as follows:

“Everyone has the right to privacy, which includes the right not to have-

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed.”

[17] Both points *in limine* stand to be rejected. A further query was raised relating to the non-joinder of the magistrate who issued the warrants. The point was not seriously pressed in argument. At any rate, the application has been brought to the attention of the magistrate and she has filed an affidavit wherein she responds to the allegations that she did not apply her mind to the issues. Nothing turns on this point.

The applicable statutory provisions

[18] A brief outline of the statutory provisions regulating the issuing of search and seizure warrants will facilitate the consideration of the merits of this matter. For present purposes, the relevant provisions are sections 20 and 21 of the Criminal Procedure Act, 51 of 1977, (the Criminal Procedure Act). Section 20 stipulates which article may be seized under authority of a warrant. It is an article which is

“concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence” or an article “which may afford evidence of the commission or suspected commission of an offence” or “which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence”. Section 21 sets out the circumstances that must be present for a warrant to be authorised. Subsection (a) thereof stipulates that information under oath must be put before the issuing magistrate which must disclose reasonable grounds for believing that the article is in the possession or under the control of or upon any person or upon or at premises within his area of jurisdiction.

- [19] The provisions of section 20 and 21 of the Criminal Procedure Act create two jurisdictional facts that must exist before a search warrant can be issued. They are captured in **TOICH v THE MAGISTRATE, RIVERSDALE AND OTHERS** 2007 (2) SACR 235 (CPD) at 242e as follows:

“Before issuing a search warrant in terms of ss 20 and 21 of the Criminal Procedure Act, the magistrate or justice of the peace

concerned must be satisfied by information on oath, not only that there are reasonable grounds for believing that the article to be searched for and seized is in the possession or under the control of or upon any specified person or is upon or at any specified premises within his area of jurisdiction (s 21(1)), but also that the article to be searched for and seized is an article such as is referred to in s 20;"

It stands to reason that a warrant that has been issued where any or both of these jurisdictional facts were not present will be invalid. The matter was put as follows in **THINT (PTY) LTD v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS; ZUMA AND ANOTHER v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS**, *supra* at 1232 par. [92]:

"When considering whether a warrant should be set aside, therefore, a court will determine, first, whether on the record the objective jurisdictional facts were present. If they were not, then a court will set aside the search warrant."

The final point to be made with regard to section 21 is that both the person in possession of the article and the premises

upon which the article is supposed to be, must be identified in the warrant.

Grounds of attack

[20] The first ground upon which the lawfulness of the warrants was attacked, was that the information that was put before the issuing magistrate did not disclose reasonable grounds for believing that the articles were in the possession of the persons identified in the warrant or at the places identified in the warrants. The basis of this contention was the averment made by the applicants in their founding affidavit that only the primary affidavit of Detective Sergeant A.D.O. van Blerk was before the magistrate when she issued the warrants. This affidavit refers to and relies on the affidavits of police officers who were involved in the controlled sale of gold (trap) to the first applicant and his co-accused in the pending criminal case. It was alleged that these affidavits were not annexed to Van Blerk's affidavit and that in the absence thereof there was no evidence justifying the issuing of the warrants. In their answering affidavit, the respondents disputed the notion that the supporting affidavits were not annexed to Van Blerk's affidavit. The magistrate concerned

has also filed an affidavit to the effect that all the documents referred to were before her. And a full explanation was also given by the police and a member of the prosecuting authority why these annexures would not have been part of the papers that the applicants' attorneys perused at the Magistrate's Court in Welkom. Faced with the uncontested version of the respondents, the applicants relented and abandoned the first ground of attack.

[21] The other ground upon which the lawfulness of the warrants was challenged is that, in relation to most of the articles that were to be seized, no reasonable grounds existed for believing that they were concerned in the commission or suspected commission of the offences set out in the warrants. The challenge under this ground of attack implicates both the issue of unlawfulness and overbreadth. In my view, the attack is well founded and I deal with its merits right away.

[22] The articles that are implicated are, firstly, those that were seized from the trade premises of the second applicant and whose return has been tendered (items 1.1 and 1.2 of

annexure “B”). Quite clearly there was no basis for believing that these articles were concerned in the commission or suspected commission of the relevant crimes. Furthermore, there was no averment whatsoever that these articles may afford evidence of the commission or suspected commission of an offence or that they were intended to be used or were on reasonable grounds believed to be intended to be used in the commission of any offence.

- [23] The other articles that are implicated in the ground of attack under consideration are those listed in par. 1.7 of annexure “B” comprising motor vehicles. The question of whether these vehicles could be said to have been concerned in the commission or suspected commission of the relevant offences generated a vigorous debate in oral argument. The arguments centred on the interpretation of the phrase “concerned in” the commission or suspected commission of an offence. Mr. Kemp relied on the interpretation given to the phrase “instrumentality of an offence” appearing in section 38(2) of the Prevention of Organised Crime Act, 121 of 1998, (POCA) in various reported cases. Mr. Madlanga, on the other hand, contended that it is not safe to rely on

such an interpretation and said that the phrase as appears in section 20 of the Criminal Procedure Act has a much broader connotation.

[24] In NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v R O COOK PROPERTIES (PTY) LTD; NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v 37 GILLESPIE STREET DURBAN (PTY) LTD AND ANOTHER; NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v SEEVNARAYAN 2004 (2) SACR 208 (SCA) it was pointed out that section 1 of POCA defines “instrumentality of an offence” as any property “which is concerned in the commission or suspected commission of an offence”. The court expressed itself as follows at p. 237 par. [58]:

“As we showed earlier, the Act's definition of 'instrumentality' goes deliberately wider than the 'means' by which an offence is committed. It embraces property 'concerned in' the offence. The question is thus not whether the fraud was committed 'by means of' the investments, but whether the money invested was 'concerned in the commission' of the fraud on either Sanlam or the revenue services within the intendment of the statute.”

And further on at par. [59]:

“As we found earlier (para [32]), the property must play a part, in a reasonably direct sense, in the acts that constitute the actual commission of the offence.”

See also **S v BISSESSUE** 1980 (1) SA 228 (NPD) at 230A – D.

[25] The question is whether it can be said that the motor vehicles played a part in a reasonably direct sense in the commission of the relevant offences. In order to resolve this question, it is necessary to give a brief outline of the accounts of the police operatives who were involved in the trapping operation of 9 February 2007.

The evidence

[26] The information that was put before the magistrate in support of the application for the warrants is contained in the affidavits filed by the police operatives who were involved in the trapping exercise and is briefly set out hereunder. Two policemen and their informer were involved. The informer

had arranged to meet the accused Anthony at a filling station in Welkom. There Anthony arrived in the company of the accused Louis in a white Corsa bakkie. The group then drove to 31 Keerom Street, the premises of the second applicant. After a brief discussion the police agents produced the unwrought gold earmarked for the trap. Louis then suggested that the gold should be tested and the group then left for 152 Haarlem Street, where the testing was to be done in one of the garages at the Hagoth Flats. The group used the informer's motor vehicle to get there. The Corsa bakkie had apparently been left at 31 Keerom Street and it did not feature any further.

[27] The second vehicle that featured is the maroon Nissan Hardbody registration CZX 992 FS. After the testing of the gold, the group retired to Louis' house that the police referred to as Flat No. 1. This is in fact an outbuilding which is situated next to the garages on the ground floor of the Hagoth Flats. Whilst there, a maroon Nissan Hardbody vehicle arrived driven by the first applicant. He allegedly went straight to Flat No. 4, where the group subsequently joined him. It is here that the gold's weight was determined

and the purchase price fixed and paid to the agents. Thereafter the first applicant left with the gold. I may add that he is said to have arrived there with the cash that was used to buy the gold. That is the only occasion that the maroon Nissan Hardbody featured.

[28] The next vehicle to feature is the black SLK Mercedes Benz AMG. It is said that the agents had by mistake been paid more money for the gold than was agreed upon (R8 000,00 instead of R4 200,00). The overpayment was discovered after the agents had left and the first applicant and his brother, Louis, then drove around in this black Mercedes looking for the agents. The brothers came across the police informer and allegedly kidnapped him when he could not produce the overpayment. However, the informer was not transported in the black Mercedes Benz. Instead, Louis got into his vehicle and instructed him where to go. The policemen who had taken the money were ultimately contacted and they returned the amount by which they had been overpaid.

[29] In their answering affidavit the respondents referred to another trapping exercise that was conducted on 13 February 2007 in which the white Corsa bakkie again featured. But again its driver, Louis, simply parked it and joined the operatives in their vehicle.

[30] It has to be borne in mind that the matter stand to be decided upon the information that was placed before the magistrate and not information that was obtained subsequent to the issuing of the warrants. The question is, on the basis of the above version of the police agents, can it be said that the requirements of section 20(a) have been met? Can it be said that there were reasonable grounds for believing that these motor vehicles were concerned in the commission or suspected commission of an offence, bearing in mind the interpretation of the latter phrase in the reported judgments referred to above?

[31] I deal first with the case of the black Mercedes Benz. It is alleged to have been concerned in the offence of kidnapping. But all that the information discloses is that the first applicant used it to look for the agents in order to retrieve the money

mistakenly paid to them and no more. It was not used to convey the informer and not even to escort his vehicle after he was allegedly kidnapped. This is because the first applicant had left the informer and Louis and drove around in order to look for the policemen who had the cash. In my view, it will be stretching logic too far to say that the black Mercedes Benz was concerned in the offence of kidnapping.

[32] The white Corsa bakkie was used by Louis and Anthony to go to the filling station and from there to 31 Keerom Street where it was left. The actual dealing in unwrought gold was allegedly conducted at the Hagoth Flats and the Corsa was not even on that scene. Nor was it used to transport the group thereto. In my judgment, it played no role in the commission of that offence.

The maroon Nissan Hardbody bakkie stands on a different footing. The information shows that the first applicant was conveying with it the cash that was used to buy the unwrought gold and after the sale he used it to convey the unwrought gold away from the scene. In my view, this information discloses reasonable grounds for believing that it

was concerned in the commission of the offence of dealing in unwrought precious metals.

Other articles

[33] I deal briefly with the items listed under 1.6 of annexure “B”, to wit, cellphones. In their answering affidavit the respondents say that these articles were not seized in terms of the warrants but that they were seized during the arrests of the suspects in terms of section 23(1)(a) of the Criminal Procedure Act. In saying this, the respondents do not explain why these articles were included in the warrants in the first place. The only reasonable inference one can draw is that there was no basis for including them. The items listed under 1.3, 1.4 and 1.8 stand on a different footing and will be dealt with in due course.

The Aalwyn Street Warrant

[34] What I have said above in connection with the Keerom Street warrant equally applies to the Aalwyn Street warrant. The information placed before the issuing magistrate does not disclose reasonable grounds for believing that any of the items listed in annexure “B” were in the possession or under

the control of any person there or upon or at such premises. In addition, articles that had no connection whatsoever with any of the relevant offences were seized from these premises. This is an instance of improper execution and the warrant stands to be set aside on that basis as well.

Severability

[35] The issue of severability arises only in respect of the two warrant executed at 152 Haarlem Street at the Hagoth Flats. The question here is whether the good can be separated from the bad. If this is possible, then the execution of the warrant will be endorsed. In dealing with this aspect one has to keep in mind what Langa CJ said in the **THINT; ZUMA-** case. The learned judge expressed himself as follows at 1267A – B:

“It seems appropriate to sever an overbroad part of a warrant where it is possible to separate that bad part from the rest of the warrant, and where that part was not in fact executed and therefore no concrete harm resulted to the person searched. In such circumstances, severance is the proportionate response; declaring the entire warrant invalid would amount to using a sledgehammer to crack a nut.”

[36] The first point to be made in connection with these two warrants, is that there were indeed reasonable grounds for believing that some of the articles listed were concerned in the commission or suspected commission of the offence of dealing in unwrought gold, in particular. These are the articles listed under 1.3, 1.4 and 1.8 of annexure “B”, as well as the maroon Nissan Hardbody bakkie. And there certainly was information establishing reasonable grounds that these articles were on the relevant premises. In fact, these articles and persons linked to them (the first applicant and his co-accused) were the real targets of the warrants. That part of the warrants authorising the search and seizure in respect of the particular articles can therefore be regarded as the good part.

[37] The bad part is the one that authorises the search for and seizure of the articles in respect of which there was no information from which reasonable grounds could be deduced for a belief that such articles were, firstly, concerned in the commission of any of the relevant offences and, secondly, that they could be found on the relevant premises. In regard to such articles the two jurisdictional

facts for the issue of a search warrant referred to above were absent. These comprise the rest of the articles listed in annexure “B”. The question remains whether the bad part is separable from the good.

- [38] What complicates matters in the instant case is that the bulk of the articles fall under the bad part of the warrants. In cases where severability has been ordered, the bad part appears to have been the minor part. Compare **DIVISIONAL COMMISSIONER OF SA POLICE, WITWATERSRAND AREA, AND OTHERS v SA ASSOCIATED NEWSPAPERS LTD AND ANOTHER** 1966 (2) SA 503 (AD) at 513B – C; **CINE FILMS (PTY) LTD AND OTHERS v COMMISSIONER OF POLICE AND OTHERS** 1972 (2) SA 254 (AD) at 268D – F. The same was the case in the **THINT; ZUMA**-case, *supra*.

- [39] The matter is further compounded by the fact that the items comprising the bad part are not listed separately but are mixed up with other items throughout annexure “B”. For separation to be made one would have to nick pick articles comprising the good from the document. In these

circumstances, separation is neither possible nor desirable.

Compare **WORLD WIDE FILM DISTRIBUTORS (PTY) LTD**

v DIVISIONAL COMMISSIONER, SA POLICE, CAPE

TOWN AND OTHERS 1971 (4) SA 312 (CPD) at 316D – E.

I am also of the view that in dealing with a matter like this the court should not lose sight of the now settled rule that the validity of search warrants must be scrutinised strictly and with a jealous regard for the liberty of the subject and his or her rights to privacy and property. See **POWELL NO AND**

OTHERS v VAN DER MERWE NO AND OTHERS 2005 (1)

SACR 317 (SCA) at 340d. Another factor that militates against separation is that the bad part has been executed as well.

- [40] But the warrants suffer from some other defects as well. The places to be searched were identified as Flats No. 1 and 4. Yet the bulk of the search was carried out in the garages and a building adjoining them, which were clearly not identified in the warrants. In their answering affidavit, the respondents ascribe this to an innocent mistake on the part of the police. Mr. Kemp criticised this explanation and said that it is an inexcusable mistake given that the police operatives who

had been involved in the earlier trapping exercise knew the correct venue, to wit, the garages and the adjoining outbuilding. The criticism is not without merit. Surely the garages could not be confused with a flat, more so that the garages and the outbuilding are quite apart from the flats. Mr. Kemp submitted that a warrant must specify the premises to be searched and only such premises can be searched, otherwise the warrant becomes invalid. He cited **TOICH v THE MAGISTRATE, RIVERSDALE AND OTHERS**, *supra*, at 238e – g. I think the submission is well founded.

- [41] In my view, the issuing magistrate did not apply her mind to the terms of the warrants as well as the document filed in support of the application for same. All the warrants stand to be struck down as being unlawful and overbroad.

Preservation order

- [42] Mr. Madlanga submitted that if I should set aside the warrants I should nonetheless grant an order preserving the evidence gathered during the execution thereof. He relied for this submission on the minority judgment of Farlam JA in

the THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v ZUMA AND ANOTHER [2008] 1 ALL

SA 197 (SCA). I may mention that the relevant part of Farlam JA's minority judgment was endorsed by the Constitutional Court in the THINT; ZUMA-case. (See pages 1269 – 1270 par. [220].) Mr. Kemp did not disagree. I think that that would be the appropriate route to follow as such order would be just and equitable in the circumstances.

[43] I must first identify the articles to be preserved. The list of articles actually seized and which are presently in the custody of the police appear as annexure "I" to a copy of the notice of motion which stands separately in the court file. There can be no doubt that the equipment used in the smelting and testing of unwrought gold must be preserved. Then there is the maroon Nissan Hardbody bakkie as well as the amount of cash. The article that was allegedly seized in terms of section 22(1) of the Criminal Procedure Act, as well as those that were allegedly seized in terms of section 23(1) of the latter Act do not form part of the warrants and fall outside the ambit of this judgment. I am referring to the green Mercedes Benz, the cellphones and the piece of gold

allegedly found during the arrest of the first applicant and his brother.

I shall identify the articles to be preserved by reference to annexure "I" and entitled "LYS VAN EIENDOM IN S.A.P.S BEWARING" which shall be attached to the order of court.

Order

[44] The following order is made:

- (a) All the search and seizure warrants issued by magistrate M. Rutherberg to Captain Flynn of the South African Police Service on 12 February 2007 authorising the search and seizure operations at the applicants' premises at 31 Keerom Street, Voorspoed, Welkom, 13 Aalwyn Street, Jim Fouche Park, Welkom, Flat No. 1 and Flat No. 4, Hargoth Flats, 152 Haarlem Street, Dagbreek, Welkom as well as the search and seizure operations conducted by members of the South African Police Service pursuant to such warrants on 13 February 2007 and 14 February 2007 are declared to be invalid and of no force and effect.

- (b) Save for the articles that are subject to the preservation order set out hereunder, all the articles seized and removed from the above premises in pursuance of the said warrants, must be returned to the applicants.
- (c) The following articles are to be preserved and are to remain in the custody of the South African Police Service at Welkom under the control of Captain Hendrik Frans Flynn of the South African Police Service, Klerksdorp. The latter captain shall ensure that the articles are secure and in safe custody and are made available as evidence in the pending criminal case involving the first applicant and his co-accused and are to remain so available until the court hearing the criminal case shall have made a ruling on such articles or another court of competent jurisdiction has ruled otherwise in relation to them. The articles to be preserved are those appearing under the document entitled “LYS VAN EIENDOM IN S.A.P.S BEWARING” and marked “I” under the following numbers: 2 – 4, 5, 8 – 17, 22 – 27, and 29 – 32 as well as the Nissan Hardbody 3.3 V6S registration CZX 992 FS.
- (d) The first respondent to pay the costs of suit.

H.M. MUSI, JP

On behalf of applicants:

Adv. K.J. Jemp SC
Instructed by:
Podbielski Mhlambi Inc
WELKOM

On behalf of respondents:

Adv. M.R. Madlanga SC
With him:
Adv. L.H. Adams
Instructed by:
State Attorney
BLOEMFONTEIN

/sp