



IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape, Kimberley)

Case number: **1365 / 2007**
Date Heard: **18 / 09 / 2009**
Date delivered: **16 / 10 / 2009**

In the matter between:

ELEFTERIOS POLONYFIS

Applicant

and

**THE PROVINCIAL COMMISSIONER FOR
THE SAPS, NORTHERN CAPE, N.O.**

First Respondent

INSPECTOR P.I. VAN RENSBURG N.O.

Second Respondent

CONSTABLE J. STRYDOM N.O.

Third Respondent

INSPECTOR BOOYSEN N.O.

Fourth Respondent

CONSTABLE MOLELEKOA N.O.

Fifth Respondent

CONSTABLE MARKGRAAFF N.O.

Sixth Respondent

THE MAGISTRATE, COLESBERG, N.O.

Seventh Respondent

INSPECTOR MOUTON N.O.

Eighth Respondent

CONSTABLE PETERS N.O.

Ninth Respondent

CONSTABLE MPULANYE N.O.

Tenth Respondent

INSPECTOR MATSHEBE N.O.

Eleventh Respondent

CONSTABLE BARNES N.O.

Twelfth Respondent

THE MAGISTRATE, DE AAR, N.O.

Thirteenth Respondent

Coram: **Lacock J**

JUDGMENT

LACOCK J

- [1] This matter was originally heard by Kgomo, JP under case number 1573/06 on 13 March 2007, who dismissed the application with costs for the sole reason that the relevant warrants and accompanying affidavit annexed to the supporting affidavit, were illegible. The merits of the application were not considered. Subsequently the Applicant under case number 1365/07 applied for identical relief to that originally applied for, and inserted in his Notice of Motion a prayer for the incorporation of the papers filed in case number 1573/06. The Respondents did not oppose the relief thus applied for, and there are no reasons for refusing same.
- [2] The Applicant applies for the review and setting aside of two search warrants purportedly issued in terms of Section 21(a) of the Criminal Procedure Act, 51 of 1977 (the CPA) by the Magistrate, De Aar, and the Magistrate, Colesberg, authorising members of the South African Police to search and seize certain goods in or on the premises described in the warrants as "*Voortrekkerstraat 59, De Aar Entertainment Club*", and "*Kerkstraat Hall Entertainment Centre*", respectively; setting aside the execution of the warrants; and for the return of the goods seized by the police.

Mr. Coetzee, appearing on behalf of the Respondents, conceded that, should the warrants be set aside, the

ancillary relief applied for should be granted. The issue for determination is therefore the validity of the warrants issued.

[3] It will be convenient to first dispose of that portion of the application pertaining to the warrant issued by the Magistrate, De Aar. Mr. Coetzee indicated that, for what I regard as a rather technical reason, the application in respect of the De Aar warrant should succeed, and is no longer opposed by the Respondents. It is therefore not necessary to deal any further with this part of the application save to grant the relief applied for in respect of the De Aar warrant.

[4] The following facts are common cause between the parties, or are at least not in dispute:-

4.1 The Applicant is the owner of the "*Entertainment Centre*", a business situated at Shop 10, the Mall, 72 Church Street, Colesberg.

4.2 On 1 December 2006 the Magistrate, Colesberg, at the request of members of the South African Police Service, issued a search warrant in terms of Sections 20, 21 and 25 of the CPA. The warrant reads as follows:-

"VISENTERINGSLASBRIEF"

Aan: Kst Strydom
 Insp Booysen;
 Kst Markgraaff

Kst Janse van Rensburg
 Kst Molelekwa

en enige ander lid van die Suid-Afrikaanse Polisiediens wat behulpsaam kan wees met die visentering en beslaglegging.

Dit blyk aan my uit inligting onder eed, dat redelike gronde bestaan om te glo dat daar binne die Landdrosdistrik van **Colesberg** voorwerpe is, soos wat in Aanhangsel 'A' hierby aangeheg, beskryf is, en wat –

- *(a) op redelike gronde vermoed word betrokke te wees by vermeende pleging van;
- *(b) tot bewys kan strek van die vermelde pleging van; of
- *(c) op redelike gronde vermoed word bestem te wees om gebruik te word by die pleging van:

die misdryf(we), synde **onwettige dobbelary onder Artikel 81(1)(a) van die Noord-Kaap dobbel en wedren wet 1996 (nr5/1996)** en dat ek redelike gronde het om te vermoed dat hierdie voorwerpe

- in besit, of onder die beheer van (vermeld naam en/of persoon(e) is;
- of by 'n perseel, te wete **Kerkstraat, Hall Entertainment Centre** (beskryf perseel)

U word hierby gemagtig om gedurende die dag die geïdentifiseerde –

- persoon(e) te visenteer
- perseel te betree en te deursoek om enige persoon(e) op of by daardie perseel te visenteer,

en op die voorwerp(e) wat in Aanhangsel "A" beskryf is, beslag te lê, wat gedurende die deursoeking gevind word en om daaroor te beskik ooreenkomstig artikel 30 van die Strafproseswet.

Gegee onder my hand te Colesberg op hierdie 1ste dag van Desember 2006.

 LANDDROS: COLESBERG

 GESERTIFISEER DEUR
 Volle Name: Edward William Schön
 Ampstitel: Landdros/Magistraat

Landdrosdistrik: Colesberg"

The contents of the affidavit of Inspector Mouton, containing the information on which the warrant was issued and which was attached to the warrant as annexure "A", reads:-

1.

Ek is 'n volwasse man 34 jaar oud met ID 721015 5068 08 1 werksaam te MII DE AAR as 'n Inspekteur woonagtig te Venterstraat De Aar 7000, Tel 082 858 0590.

2.

Ek het gedurende 2006 op 'n navraag gewerk ten opsigte van onwettige dobbel persele. Inligting is ingesamel ten opsigte van die bedrywighede van die persele in die Bo-Karoo.

3.

Te De Aar Voortrekkerstraat 59 is 'n perseel met die naam van De Aar Entertainment Club. Die perseel beskik oor geen dobbel lisensie nie. Die modus operandi is dat geld by die toonbank gegee word vir speel munte. Indien u wen kom die dame na die masjien, skryf die lesing neer, kanseleer die lesing en die geld word by die toonbank uitbetaal. Daar is 40 masjiene.

4.

Te Colesberg is Entertainment Centre geleë in die winkel sentrum Hall wat in Kerkstraat is by die perseel is die modus operandi presies soos op De Aar. Die geld word by die toonbank betaal en weer word speel munte wat die masjiene werk aan jou gegee iniden u enige wenning maak word die lesing neer geskryf en uitbetaal by die toonbank. Beskik oor geen lisensie nie 38 masjiene.

5.

In altwee gevalle is aansoek gedoen vir 252A en sal van lokvinke gebruik gemaak word op 06/12/02 om dobbel te kan bewys op alle gelde en masjiene sal beslag gelê word.

6.

Dit is al wat ek kan verklaar."

4.3 On 2 December 2006 a member of the South African Police Service entered the aforesaid shop, exchanged a R10.00 and a R20.00 note at the counter for 60

tokens ("*speelmunte*"), played with these tokens on one of the machines (generally known as "one-arm bandits"), won 35 "*credits*" (the machine did not pay out winnings, but registered all winnings as credits), returned to the cashier where an amount of R17.50 in cash was paid to him, and thereafter left the shop.

- 4.4 The aforesaid police officer reported what had transpired in the shop to Inspector Booysen of the Crime Intelligence Unit of the South African Police Service, one of the police officers mentioned in the warrant, whereupon the latter entered the said shop. He presented the warrant to the person in charge, and proceeded to execute the warrant by seizing cash in the amount of R15,162.30, 26 "*gambling machines*", a coin counting machine, a scale used for weighing tokens, all tokens found in the premises, documents and receipt books, keys, ashtrays, chairs and some other smaller items. Booysen also took possession of a black book found in the room of the person in charge.
- 4.5 The affidavit of Mouton referred to above was not attached to the copy of the warrant presented to the person in charge of the premises nor his attorney who arrived at the shop during the seizure of the goods.

4.6 All goods seized were removed to the premises of the South African Police Service in Colesberg.

[5] Mr. Jagga, on behalf of the Applicant, attacked the validity of the warrant on a number of grounds. I will deal ***seriatim*** with each of these grounds.

[6] In the first instance it was submitted that the warrant handed to the person in charge by Booysen, was not accompanied by the affidavit (annexure "A") and therefore did not contain a description of the goods to be searched for and seized. The warrant, so it was submitted, therefore did not comply with the provisions of Section 21(1)(a) of the CPA, reading,

"Subject to the provisions of sections 22, 24 and 25, an article referred to in section 20 shall be seized only by virtue of a search warrant issued

(a) by a magistrate or justice, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or upon any person or upon or at any premises within his area of jurisdiction;"

The difficulty with this argument is that annexure "A" was in fact attached to the warrant issued by the Magistrate and formed part thereof. The police officers' failure to hand the complete warrant to the person in charge, can therefore not affect the validity of the warrant issued by the Magistrate. It is not in dispute that the officer in fact had the relevant affidavit in his possession at the time when the warrant was executed.

[7] In the alternative, Mr. Jagga argued that the goods to be seized in terms of the warrant were in any event not described with sufficient particularity in annexure "A" to render the warrant valid. In this regard reliance was placed on the case of **Powell N.O and Others vs Van der Merwe and Others**, 2005(1) SACR 317 (SCA) where Cameron, JA, after having referred to earlier case law, made the following general remarks at 340(d) to (g):

"These cases establish this:

- (a) Because of the great danger of misuse in the exercise of authority under search warrants, the courts examine their validity with a jealous regard for the liberty of the subject and his or her rights to privacy and property.*
- (b) This applies to both the authority under which a warrant is issued, and the ambit of its terms.*
- (c) The terms of a search warrant must be construed with reasonable strictness. Ordinarily there is no reason why it should be read otherwise than in the terms in which it is expressed.*
- (d) A warrant must convey intelligibly to both searcher and searched the ambit of the search it authorises.*
- (e) If a warrant is too general, or if its terms go beyond those the authorising statute permits, the Courts will refuse to recognise it as valid, and it will be set aside.*
- (f) It is no cure for an overbroad warrant to say that the subject of the search knew or ought to have known what was being looked for: The warrant must itself specify its object, and must do so intelligibly and narrowly within the bounds of the empowering statute."*

The cases referred to by the learned Judge of Appeal reveal that the goods in the relevant warrants were described in such vague and/or overbroad terms as to render the warrants invalid for either vagueness or overbreadth. In some instances the alleged crime for which the warrant was issued, was not specified; in another, the goods were

described as “*certain books and documents and other papers*”, and in yet another case as “*all other documents including statements of whatsoever nature concerning reports in connection with the conditions in gaol and experience of prisoners in gaols throughout the RSA.*”

At 341(b) to (d) Cameron JA commented as follows on the description of the goods as contained in the warrant in **Powell, supra**

- “*The first paragraph authorises the seizure of literally all documents passing between Powell, his family and Nell and Nell’s family. What if, as Powell deposed, he and Nell have been friends for many years? Christmas and birthday cards, emails between the families’ children, notes between their spouses, are included.*- *The third paragraph would license the seizure of even share certificates in publicly listed companies ‘in which BC Nell and/or O M Powell and/or their spouses and/or their family members and/or an employee of O M Powell has an interest’.*- *The seventh (‘any other document and/or object that has relevance to or may have relevance to the investigation’) is so unbounded as to resist coherent analysis. Some application of the phrase ‘the imagination boggles’, which this Court endorsed in the SAP v SAAN case, would seem appropriate. Together with the rest of the annexure this paragraph affords neither investigation nor investigated the slightest guidance as to what could, and what could not, lawfully be taken.*

[62] *Instead, those carrying out the search were given virtually untrammelled power to carry out what Mr Slomowitz in his argument justly called ‘a general ransacking’ of Powell’s premises.”*

7.1 Mr. Jagga submitted that the words “*alle gelde*” (all monies) contained in annexure “A” are so wide and uncertain that it can be read as to include money found on clients or patrons in the shop. The warrant, so he submits, is therefore void for vagueness.

[8] I do not agree with these submissions. What the Colesberg warrant authorises the police to search for and seize, are "*die voorwerpe wat (in) aanhangsel "A" beskryf is*" (the objects referred to in annexure "A"). The objects referred to in annexure "A" are: "*geld*" (monies), "*speelmunte*" (tokens) and "*masjiene*" (machines). To these goods are referred to in annexure "A" in the following terms:-

"Die modus operandi is dat geld by die toonbank gegee word vir speelmunte. Indien u wen, die dame na die masjiene skryf die lesing neer, kanselleer dan die lesing en die geld word by die toonbank uitbetaal."

"Die geld word by die toonbank betaal en weer word speelmunte wat by die masjiene werk aan jou gegee."

"38 masjiene."

"Op alle geld sowel as masjiene sal beslag gelê word."

(My emphasis).

To my mind, when reading annexure "A", there can be no doubt that the monies referred to are the monies used in the shop in exchange for tokens and that monies paid to patrons for credits won on the machines. The tokens referred to are clearly the tokens used for playing the machines, and the machines are the machines thus played.

The suspected crime is referred to in the warrant as illegal gambling. To my mind, there is no vagueness or overbreadth in regard to either the suspected crime or the

nature of the goods to be seized as described in the warrant.

[9] I do, however, agree with Mr. Jagga, that the warrant did not authorise the police to seize any other goods but money, tokens and gambling machines.

[10] That brings me to Mr. Jagga's second submission, viz that since the police seized goods such as chairs, ashtrays, books, a scale and a counting machine which was not covered and authorised by the warrant, this conduct by the police tainted the warrant with invalidity.

I do not agree.

10.1 This, to my mind, is a case where the good can easily and without any real prejudice be severed from the bad. In fact, counsel are agreed that the chairs and ashtrays had been returned to the Applicant. The remaining goods not covered by the warrant can immediately be returned to the Applicant, and Mr. Coetzee has conceded that that should be done immediately.

10.2 Although a search and seizure procedure constitutes an invasion on the privacy of a person and requires strict compliance with the applicable statutory provisions of the CPA, one should not lose sight of

the **ratio** behind this procedure which is to curb crime. It is in the public interest that crime should be appropriately dealt with by law enforcing officers.

"In a democratic State such as ours, search is a permissible, subject to reasonable limitation. It is an integral part in assisting the police in the investigation of crime. It serves as a vital means to procure evidence for the consideration of initiating a prosecution or for the institution of a prosecution. To ensure that searches and seizures are credible, safeguards are provided in the Criminal Procedure Act 51 of 1977 ("CPA") and in certain special laws. If the safeguards are not adhered to then the logical consequence is that it will not have the same validity and credibility, which a search and seizure will have if the safeguards are adhered to." (**Rajah vs Chairperson: NW Gambling Board** [2006] 3 All SA 172 (T) at 174e).

Therefore, to my mind, a balance should be struck between private interests on the one hand which demands the protection of a constitutional right to privacy and freedom, and public interest on the other hand which in turn demands a protection against crime.

Applying these principles to the facts of the present matter, I conclude that public interest outweighs the private constitutional rights of the Applicant, and that it would therefore not be in the interest of justice to set aside the entire warrant by reason of the said conduct of the police officials involved in the execution of the warrant.

[11] Thirdly, Mr. Jagga contended that the premises to be searched could not be properly identified in the warrant.

In the warrant itself the premises are described as "*Kerkstraat, Hall Entertainment Centre*". The proper address of the premises is however "*The Entertainment Centre, Shop 10, The Mall, 72 Church Street, Colesberg*".

Mr. Jagga was constrained to concede that, once annexure "A", and which formed part of the warrant, was read in conjunction with the warrant, the premises would be identifiable by a third person without any difficulty. In annexure "A" the premises are described as, "*te Colesberg is Entertainment Centre geleë in die winkelsentrum Hall wat in Kerkstraat is.*" The word "*Hall*" is clearly a misnomer for "*Mall*".

[12] Mr. Jagga's main argument, and which was the main thrust of the Applicant's case, is summarised as follows in his Heads of Argument:

"49.1 Annexure "A", which formed the basis for the issuing of the search warrant, clearly states that according to Mouton: "*Geld word by die toonbank betaal en weer word speelmunte wat by die masjiene werk aan jou gegee. Indien u enige wenninge maak word die bedrag neergeskryf en uitbetaal by die toonbank*".

49.2 This clearly states that in accordance with what Mouton observed illegal gambling is taking place at the premises in Colesberg. This is confirmed by the fact that he states: "*Dit beskik oor geen lisensie*".

49.3 He furthermore states that a section 252A authority will be obtained "*om dobbel te kan bewys*".

50. It is in accordance with this respectfully submitted that the affidavit on oath submitted to the seventh respondent clearly

therefore shows that according to Mouton the offence of illegal gambling is committed at the Colesberg business.

51. *There is no reference in the affidavit that it is suspected that there may be goods there which are used in the commission of an offence or may be used in the commission of an offence or is intended to be used for the commission of an offence. What is stated as a fact is that there is the offence of illegal gambling, which is committed by way of "speelmunte, masjiene" and if you win you are being paid out.*
52. *It is in fact conceded by the respondents on page 26 of the answering affidavit (para 38.4) where it is stated:*
- "Ongeag of the eedsverklaring aandui dat daar reeds 'n misdryf gepleeg is bestaan daar geen rede om nie die tweede tot sesde respondent toe te laat om op voorwerpe beslag te lê wat vermoed word betrokke te wees of ter bewys kan strek of bestemming wees vir die pleging van 'n misdryf nie".*
53. *It is therefore conceded by the respondents that the affidavit indicates that an offence has already been committed.*
54. *The seventh respondent himself filed an affidavit to enlighten this Honourable Court as to why he authorised the warrant. In paragraph 7.2 of this affidavit (p138 of the paginated papers) he states:*
- "Nadat ek die verklaring deurgelees het was ek oortuig dat daar redelike gronde bestaan om te glo dat daar 'n misdryf op die perseel gepleeg word."*
- And:*
- "10.1 Ek het inderdaad die aangeleentheid deeglik oorweeg. Ek het dit nie nodig gevind om die polisie se bevoegdhede te beperk deur te spesifiseer watter tipe masjiene op beslaggelê moet word en watter nie. So ook met die geld.*
- 10.2 My bedoeling was om die bevoegdhede van die Suid-Afrikaanse Polisie Diens nie onnodig te beperk en hulle derhalwe nie te belemmer in die uitvoering van hulle pligte nie."*
55. *It is respectfully submitted that it is therefore abundantly clear that what the seventh respondent intended was to under the guise of a search warrant not restrict and limit the members of the SAPS but indeed to give them a free hand*

insofar as what is to be searched for, as long as they know what they search for are money or machines.

58. *It is in accordance with the above respectfully submitted that however admirable the views of the seventh respondent may have been in that he did not wish to unnecessarily curb the powers of the members of the SAPS, no indication is given that he considered any other information than that what is contained in annexure "A". He had to therefore accordingly apply his mind in accordance with the information placed before him under oath as contained in annexure "A".*
59. *As stated hereinabove, annexure "A" clearly indicates that the offence of illegal gambling has been committed. There is therefore no indication in the annexure that any of the other grounds as provided for in section 21(b) and (c) of the Criminal Procedure Act are apposite.*
60. *Had the magistrate accordingly duly applied his mind he would have noted that the grounds as set out in subparagraph (a) on the warrant had been apposite. He accordingly would have deleted paragraphs (b) and (c). By allowing the warrant to also authorise search and seizure for purposes of subparagraphs (b) and (c) he has made the warrant too wide and general in accordance with the abovestated dicta and for this reason alone the warrant is to be regarded as being too wide and to be set aside."*

[13] In support of this argument, Mr. Jagga strenuously relied on the unreported judgments of Webster, J in **Fiona Henning v The Minister of Public Safety & Security and Others**, Case Number 22157/2003 (TPD) and that of Gura, J in **Sarel Blaauw v The Chairperson of the North West Gambling Board and Others**, Case Number 940/04 (BPD).

In **Fiona Henning, (supra)** the following was said in this regard:

"It will be observed that the magistrate marked all the reasons for the granting of the warrant as 'toepaslik'. The affidavits by captain

JC Taljaard attached to the application for the issue of the warrant sets out clearly that he carried out an entrapment operation at the premises in question. In the reasons for granting the issue of the warrant the magistrate repeats all the reasons set out in the roneod form as his reasons for granting the warrant. It is clear that the roneod form covers all the three subsections of section 20 of the CPA. The magistrate clearly did not attempt to distinguish which of the three instances of section 20 of the CPA were 'toepaslik'. The affidavits submitted to the magistrate clearly set out that the equipment on the premises had been used for gambling. Clearly an offence had been committed. Accordingly paragraphs b-d and f-h on the roneod form were not material and relevant for the granting of the warrant. This raises the question of whether the magistrate concerned applied his mind in determining what the relevant facts were that justified the issue of the warrant (SA Police v SA Associated Newspapers 1996 (2) SA 503 (SCA) at 502) and further whether the warrant was so wide that it is too general (Worldwide Film Distributors v Director-Commissioner SA Police, SA Police Cape Town 1971 (4) SA 312 (C))."

It is difficult to conceive how the magistrate could have marked all the squares on the warrant as 'toepaslik'. They clearly make provision for different circumstances. It is my considered view that the magistrate concerned did not read the roneod form to consider and decide why the warrant was being issued. In my considered view he clearly did not apply his mind. The consequence was that even though the officer to whom the warrant was issued knew what he was after the warrant authorised was too general and consequently irregular and unlawful."

And in **Sarel Blaauw (supra)** the learned Judge expressed himself as follows:-

"In my view there is only one reason why the warrant was requested. There was a suspicion that an offence was being or had been committed, that being a ground in section 21(a) of the Act. However, the fifth respondent decided to authorise a warrant covering the other grounds in section 21(b) and (c). With respect, the fifth respondent is not authorised to do so. As it is the warrant is too general (Worldwide Film Distributors (Pty) Ltd vs The Provincial Commission SA Police Cape Town and Others 1971 (4) SA 312 (C)) and cannot stand the test of validity. It is therefore invalid."

(as quoted in Mr. Jagga's Heads of Argument)

In both these judgments reliance was placed on the judgment in **Worldwide Film Distributors vs Director-Commissioner SA Police, Cape Town, and Others** 1971 (4) SA 312 (C).

Mr. Jagga further relied on the judgment in **Rajah and Others vs The Chairperson: North West Gambling Board and Others (supra)**.

[14] Section 20 of the CPA reads,

"The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article)-

- (a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence whether within the Republic or elsewhere;*
- (b) which may afford evidence of the commission or suspected commission of an offence whether within the Republic or elsewhere; or*
- (c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence."*

The relevant portion of Section 21 of the CPA reads,

"(1) Subject to the provisions of sections 22, 24 and 25, an article referred to in section 20 shall be seized only by virtue of a search warrant issued-

- (a) by a magistrate or judge, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or upon any person or upon or at any premises within his area of jurisdiction;"*

[15] In reply to the allegations that he failed to apply his mind to the matter at hand when the warrant was issued, Mr. Shön, the Magistrate, stated under oath,

"7.1 Ek ontken dat ek nie my aandag aan die aangeleentheid spandeer het alvorens ek die lasbrief onderteken en uitgereik het nie. Ek het juis nie enige van (a), (b) or (c) deurgehaal nie, aangesien ek dit nodig gevind het om die bevoegdhede soos in aldrie vervat, intact te hou en nie die Polisie se magte onnodig te beperk nie.

7.2 Nadat ek die verklaring deurgelees het, was ek oortuig dat daar redelike gronde bestaan om te glo dat daar 'n misdryf op die perseel gepleeg word.

7.3 Dit was vir my duidelik dat die geld, masjiene en speelmunte kwalifiseer in terme van (a), (b) en (c) en derhalwe het ek nie een van die drie deurgehaal nie."

[16] I cannot agree that the failure of the magistrate to indicate on the warrant which subsections of Section 20 of the CPA were applicable, justifies the inference that he failed to apply his mind when the warrant was issued.

16.1 A magistrate derives his or her authority to issue a search and seizure warrant from Section 21(1)(a) of the CPA. Clearly the information supplied to the magistrate under oath needs to be considered against the provisions of Section 20 of the CPA. The information and the provisions of Section 20 therefore require conjunctive consideration by a magistrate of the information as well as the provisions of Section 20. This section, however, makes no provision for a magistrate to indicate on a

warrant which subsection of Section 20 he or she deems applicable. On the contrary, this section is couched in general terms and the discretion of a magistrate is left unfettered therein.

The mere fact that the roneod form of the warrant makes provision for the deletion of one or more of the subsections of Section 21 as quoted therein, cannot alter the intention of the legislature as expressed in Section 21 of the CPA.

16.2 To the extent that Guda, J opined in **Sarel Blaauw (supra)** that a magistrate is not authorised to issue a warrant on all three subsections of Section 20 of the CPA, I respectfully disagree with that portion of the judgment. There is no indication in the wording of Section 20 to justify such an interpretation: in the wording of the section, one subsection is not an alternative to the other subsections.

To my mind, if it appears to a magistrate – on the information supplied to him under oath – that all three subsections of Section 20 of the CPA may be applicable, nothing prevents him or her from issuing a warrant on the strength of all three subsections. ***In casu*** the magistrate stated that he deliberately did not delete any of the quoted subsections since he was of the view that all three were applicable and he

did not wish to restrict the police when executing the warrant. To my mind, this constitutes a proper and judicial exercise of the magistrate's discretion.

16.3 Again, with respect, I find it difficult to follow the reasoning of Webster, J in **Fiona Henning (supra)** quoted hereinbefore. Even if the information submitted to a magistrate is indicative of an offence having been committed, the offender still needs to be charged and brought to justice, i.e. the alleged offender must still be prosecuted and the offence proved in a court of law. I have immense difficulty in appreciating why a magistrate – once it appears to him or her that an offence had been committed – would be precluded from considering whether the articles to be seized “*may afford evidence of the commission or suspected commission of an offence*”, and/or were “*intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence*” (Sections 20 (b) and (c) of the CPA).

The present matter appears to me to be almost a textbook example of a case where all three subsections of Section 20 are apposite. The offence referred to in the warrant, is the alleged contravention of Section 81(1)(a) of the Northern Cape Gambling and Racing Act reading as follows:-

"No person shall without a licence –

conduct or permit the playing of any gambling game or conduct or permit any betting or racing in or on any premises under his or her control or in his or her charge."

What constitutes a "gambling game" in terms of this Act, is defined as follows:-

"...means any game played with or by means of cards or dice or any mechanical, electro-mechanical or electronic device, component or machine or computer hardware or software for money, property, cheques, credit or anything of value and includes, without derogating from the generality of the foregoing, roulette, bingo, twenty-one, blackjack, chemin de fer, baccarat, poker, craps and punto banco;"

A "gambling machine" is defined as:-

"...any electronic, electro-mechanical or mechanical device, contrivance or machine which, upon insertion of a coin, token or similar object, or upon payment of any consideration, is available to be played or operated, the play or operation of which, whether by reason of the skill of the operator or application of the element of chance, or both, may deliver or entitle the person playing or operating the machine, or any other person, to receive cash or anything of value;"

- a) It appears from annexure "A" to the warrant that it was suspected that the offence of illegal gambling was committed on the relevant premises.
- b) It further appears that the police intended to make use of an undercover operation to prove the commission of the said offence. It goes without saying that the machines used by the Applicant would be an essential exhibit or object in the hands of the

State to prove that illegal gambling was committed, and the machines would therefore afford evidence of the commission of the offence.

- c) The practice employed by the Applicant as described in annexure "A" reveals that money is exchanged for tokens, the tokens are used for playing the machines, and, once credits are won, such credits are paid in cash to the person who played the machine. The monies and tokens in or on the premises therefore constitute articles intended to be used in the commission of the offence of illegal gambling.

16.4 Mr. Shön himself said that he concluded that all subsections of Section 20 of the CPA were apposite. I do not find the manner in which he exercised his discretion unreasonable or arbitrary, nor indicative of a failure to properly apply his mind to the issues when he issued the relevant warrant.

16.5 The issue for consideration raised in this matter, was not dealt with in **Worldwide Film Distributors (supra)** and I find it unnecessary to deal with that decision.

16.6 The facts in **Rajah (supra)** are distinguishable from the facts in the present matter. In that case a warrant containing the wording of all three

subsections of Section 20 of the CPA was issued in respect of an offence pertaining to *"a gambling machine or gambling device on the First Applicant's premises and the possession of which is unlawful and that there are reasonable grounds to believe that there is such a machine or device which is evidence of the commission of an offence."* (At paragraph 22).

Patel, J went on to state,

"If possession of a gambling machine in itself is an offence, and that is the only offence mentioned in the search warrant, the search and seizure could not have been authorised because the machine is concerned in the commission of an offence or is to be used in the commission of an offence, due to the nature of the offence which formed the basis of the search warrant. Mr Jagga rightly submitted that if one has regard to the contents of the search warrant, it is clear that the fifth respondent did not ascertain whether any specific activity or all of them specified in the subsection was or were applicable for purposes of the warrant. Had he done so then the warrant could not have been couched vaguely in the manner in which it had been done, that is:

'Wat betrokke is of waartoe daar redelike gronde is om te glo betrokke is by die oortreding van Artikel 9(1)(a) van die Nasionale Dobbeltwet, Wet 7 van 2004, en dat die voorwerpe gesoek soos vermeld in aanhangsel 'C' betrokke is by die pleging van 'n misdryf of tot bewys van die pleging van 'n misdryf te perseel Bafana Bafana, Alkmaar House, Erf no 3639, Civic Straat, Stilfontein, in die Republiek van Suid-Afrika, en wat as bewys kan dien by die pleging van 'n oortreding of vermoedelike pleging van 'n oortreding of wat redelike gronde vermoed word by die pleging van die gespesifiseerde oortreding...'

Had the fifth respondent in fact considered the nature of the offence under section 9(1)(a), then it would have been clear to him that not all activities specified in the subsection are applicable. The warrant must clearly indicate a link between the unlawful activity and the item that is authorised to be seized and for that very reason both warrants are too wide and vague." (My emphasis)

In casu, the alleged offence was not merely the possession of a gambling device, but “*illegal gambling*” an offence the elements of which are more complex than that of mere possession of a gambling device.

The magistrate in **Rajah (supra)** failed to file an affidavit challenging the allegations that he failed to apply his mind to the matter at hand when issuing the warrant. (See paragraph 14 of the judgment). ***In casu*** the magistrate fully explained his reasons for considering that all three subsections were applicable.

It would appear that Patel, J too did not regard the applicability of all three subsections of Section 20 of the CPA to be inappropriate in all matters concerning the issue of a warrant under Section 20(1)(a) of the CPA. In paragraph 21 of the judgment he states,

“Having regard to the contents of the search warrants authorised by the fifth respondent, he could not have applied his mind as to whether the gambling machines that were authorised to be seized resort under subsections (a), (b) or (c) of section 20 or whether anyone or all of them in fact applied.” (emphasis supplied)

(At paragraph 21)

As explained hereinbefore, the offence referred to in the Colesberg warrant entails an activity (gambling) suspected to be committed by the use of devices (gambling

machines) tokens and money, and all three subsections of Section 20 can therefore be apposite.

[17] I therefore conclude that the Colesberg warrant had been properly issued, and is not invalid for any of the reasons advanced except to the limited extent as indicated. The application in respect of the Colesberg warrant, can therefore not succeed.

[18] Since both parties were partially successful and partially unsuccessful, to my mind it would be fair and reasonable to both parties if no order as to costs is made.

[19] In the premises, the following order is made:

- 1. The papers filed in the matter of Elefterios Polonyfis and the Provincial Commissioner of the SAPS, Northern Cape, N.O. and Others under Case Number 1573/2006, are incorporated into this application.**
- 2. The search warrant issued by the Thirteenth Respondent dated 30 November 2006 in respect of the business, De Aar Entertainment Club, 59 Voortrekker Street, De Aar, as well as the execution of the aforesaid warrant by the Eighth to the Twelfth Respondents, is set aside.**

3. **The Eighth to Twelfth Respondents are ordered to forthwith restore to the Applicant the possession of the items seized on 2 December 2006 at the De Aar Entertainment Club, 59 Voortrekker Street.**
4. **The Second to Sixth Respondents are ordered to forthwith restore to the Applicant the possession of all items seized on 2 December 2006 at the Entertainment Centre, The Mall, Kerk Street, Colesberg, except the monies, tokens and gambling machines thus seized.**
5. **But for the aforesaid, the Application is dismissed.**
6. **No order as to costs is made.**

HJ Lacock
JUDGE

On behalf of the Respondents: Adv W.J. Coetzee (o.i.o State Attorney, Kimberley)