

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: REV168/2024

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE..... SIGNATURE:.....	

In the matter between:

CHIDIEBERE MODESTUS ANYANWU

APPLICANT

And

ACTING REGIONAL COURT MAGISTRATE

FIRST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS

LIMPOPO PROVINCE

SECOND RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] The applicant is appearing in Modimolle regional court charged with one count of the alleged offence of contravening the provisions of section 4(b) read with sections 1, 13, 17 to 25 and 64 of the Drugs and Drug Trafficking Act 140 of 1992 – Possession of drugs and read with section 250 of the Criminal Procedure Act 51 of 1977 as well as section 51(2)(a), Part II of Schedule 2 of the Criminal Law Amendment Act 105 Of 1997. The applicant is been legally represented and has pleaded not guilty to the count.
- [2] The first witness for the prosecution to testify was Mporoma Abel Phetla, who is a police officer and colonel by rank, and was also the station commander of Bela-Bela police station at the time of the applicant's arrest. He testified that he was phoned by captain Kwinana requesting him to prepare a search warrant following information about drugs. He prepared the warrant but they could not find any magistrate in Bela-Bela magistrate court to sign it. Phetla realised that the delay in obtaining the warrant would defeat the object of the search as Kwinana had informed him that he had reasonable grounds to suspect that the information that he had received were positive.
- [3] Phetla decided to sign the warrant that he had completed and gave it to Kwinana. Kwinana went on to conduct the search. Later Kwinana phoned Phetla to notify him that he did find the drugs, and they managed to arrest the suspect on the information that they have followed. Phetla conceded that he did not have the authority to sign the warrant, but had seen it fit to sign as the delay in obtaining such a warrant was going to defeat the object of the search.
- [4] Under cross-examination when asked why he was saying that he was not authorised to sign the search warrant, he stated that because only the

magistrate or Judge of the judicial office presiding on the matter can issue a search warrant. Further that he knew that he was not authorised to sign the warrant, hence after preparing it he tried to secure either a magistrate or Judge, but could not succeed. Counsel for the applicant corrected Phetla that he did have the authority to sign the warrant but did not follow the correct procedures, in that Kwinana did not give him the information under oath, and he also did not make a formal application. Phetla conceded to that, and further that the procedure that he had followed was flawed, and that the warrant cannot be valid as it was not properly applied for. However, Phetla disagreed that the evidence that was obtained as a result of an invalid warrant was inadmissible, in that as police officer he can still search without a warrant.

[5] After the witness has finished testifying, counsel for the applicant notified the court of his intention to oppose the admissibility of the evidence obtained as a result of the search warrant that was signed by Phetla. As per the transcribed record, after this notification, there was a short adjournment. When the trial resumed, counsel for the applicant did not proceed with his application, but instead the prosecution called its second witness Malesela David Kwinana. He testified that he is employed by the South African Police Services (SAPS), attached to the Waterberg flying squad. He received information from his informer about a man who was selling drugs in Bela-Bela. He feared that the drugs might be moved and he phoned the magistrate court Bela-Bela, and was told that the court was busy and there was no one to assist them with a search warrant.

[6] Kwinana went to colonel Phetla and explained to him the situation they found themselves in. Phetla prepared a search warrant and gave it to them. After

that Kwinana and sergeant Langa proceeded to the address they have been provided for by their informer and found the applicant. They asked the applicant permission to search the house and permission was granted. They searched inside the house, but did not find anything. The applicant pointed them a place outside the house where he had buried the drugs. After digging they found the drugs, and thereafter he phoned the members of the LCRC to come and take the photos of the scene. After photos were taken, they explained to the applicant his constitutional rights and thereafter he was placed under arrest.

[5] Kwinana further testified that on arrival at the applicant homestead, they did not show the applicant the search warrant. That usually when they arrive in such matters, the person will ask to see the search warrant, but if the person did not ask to see the search warrant, they will not show him. In this case they did not deem it necessary to show the applicant the search warrant as he had given them permission to search. Kwinana further stated that they did not force the applicant to search his house, but he had agreed on his own. That when they applied for the warrant, their intention was that if the applicant requested to see the warrant, they must be in a position to show him.

[6] The witness was cross-examined and he stated that when he applied for the search warrant before colonel Phetla, he had told Phetla that they were having information to make an urgent search. He conceded that the information that he gave to colonel Phetla was not made under oath. He stated that it was for the first time he made an application before colonel Phetla, and he had never made such an application before. He further stated that he had informed colonel Phetla that it was the first time he made such

kind of an application. The witness stated that when they arrived at the applicant's homestead they did not show him the warrant, as in most cases they show or give the person the search warrant when the person indicated that he wants to see it. In this case the applicant did not indicate that he wanted to see it. Counsel for the applicant applied that the search warrant be handed in as an exhibit, and it was duly accepted into evidence as an exhibit.

[7] The prosecution called Phillemon Tshabangu as its third witness. He testified about the exhibit that he had received from captain Kwinana which were in a sealed bag with a serial number. On receipt of the exhibit he had put it inside the safe of the strong room and locked it. Thereafter he detained the applicant. The said exhibit was taken by sergeant Nkwe the SAPS clerk the following day. The witness was cross-examined by the defence counsel.

[8] The prosecution called Bafedile John Nkwe as its fourth witness. He testified that he had received the exhibit from captain Tshabangu so that he can be able to keep it in the safe and be the only one to have control of it. After some days he handed the exhibit to sergeant Mabala, the investigating officer. The witness was cross-examined by the defence counsel.

[9] The prosecution has called Lesiba Lucas Mabala as its sixth witness. He testified that he is the investigating officer, and he is the one who had investigated the matter. He is the one who took the drugs that were found at the applicant's premises to Forensic Science Laboratory (FSL) in Pretoria to be verified. The said exhibit was booked out of the SAPS 13 by sergeant Sebola who handed them to him. The witness was cross-examined by the defence counsel.

[10] The prosecution has called Tlou Jeffrey Langa as its seventh witness. He testified that he was with captain Kwinana on 31st August 2022 when Kwinana arrested the applicant at a certain house in Bela-Bela. Whilst they were doing patrol around Bela-Bela Kwinana had received information about a Nigerian citizen who was dealing and selling drugs around Bela-Bela. Kwinana phoned colonel Phetla to assist in obtaining the search warrant. They went to the police station, and according to his observation when they arrived, the search warrant was already prepared, as Kwinana went in and came back with it. After obtaining the search warrant they proceeded to the identified house and found the applicant. They asked the applicant permission to search his house and he gave them permission, and also voluntarily took them out of the house and pointed to where the drugs were hidden. They dig on the spot pointed by the applicant and found the suspected drugs inside the buckets. After that Kwinana placed the applicant under arrest.

[11] The members of the LCRC were called to come and take photos of the scene. Later Kwinana detained the applicant and booked in the exhibit in the SAP13 book, and a case docket was opened. Before they started searching, the applicant did not ask them to show him the search warrant. They started searching the house because the applicant had voluntarily given them permission to search his house without asking them to see the search warrant. The witness stated that he did not know the procedure of how to apply for a search warrant, and that what he knows is that it is obtained from a magistrate. The witness was cross-examined by counsel for the applicant.

[12] The prosecution called Masilo George Sebola as its eight witness. He testified that he and Mr Mabala went to Bela-Bela and book out the drugs. After

collecting the drugs, they took them to their office in Polokwane where they stored them in a safe. On 7th September 2022 he took out the drugs from the safe and delivered them at FSL in Pretoria. The witness was cross-examined by counsel for the applicant.

[13] The prosecution called Patricia Mabela as its ninth witness. She testified that she is the crime scene management or attender, and also do crime scene photography. On 30th August 2022 he received a call from lieutenant-colonel Smith to attend to a crime scene in Bela-Bela. On arrival at the crime scene he found captain Kwinana who requested her to take photos of the exhibits that he had found at the crime scene. The exhibits that she was requested to take photos were alleged drugs that were found at that house in Bela-Bela. After taking the photos of the exhibits, she gave the forensic bags to the police officers at the scene and thereafter left. Later she compiled a photo album comprising of 10 photographs, and also deposed a section 212 affidavit. The spot where she took the photographs was pointed to her by the applicant. The witness was cross-examined by counsel for the applicant.

[14] The prosecution called Thobeka Queen Nhlapo as its tenth witness. She testified that she is a warrant officer attached to FSL, and is a forensic analyst. On 8th November 2022 she received a sealed evidence bag from the chemistry section. She opened the evidence bag and found that it contained (i) seventeen plastic bags each containing solid substance; (ii) one plastic bag containing an amount of crystalline substance; and (iii) one plastic bag containing an amount of crystalline substance. After examining the exhibit material mentioned in (i) he found that it contained methcathinone which is listed in Part 3 of Schedule 2 of the Drugs and Drug Trafficking Act 140 of

1992. The total mass of the exhibit material was 1 692.90 grams. The exhibit material mentioned in (ii) contained methamphetamine which is listed in Part 3 of Schedule 2 of the Drugs and Drug Trafficking Act 140 of 1992. The total mass of the exhibit material was 13.60 grams. The exhibit material mentioned in (iii) contained ephedrine hydrochloride which is listed in Part 1 of Schedule 1 of the Drugs and Drug Trafficking Act 140 of 1992. The total mass of the exhibit material was 498.32 grams. The witness stated that the street name of the drug mentioned in (i) was known as CAT, one mentioned in (ii) known as tik, and the one mentioned in (iii) known as ephedrine which is a precursor for preparing tik and CAT. The witness was cross examined by counsel for the applicant. That concluded the evidence of the prosecution and it closed its case.

- [15] After the prosecution had closed its case, counsel for the applicant brought an application seeking that the evidence obtained as a result of the search warrant be excluded because the search warrant was unlawful. Counsel for the applicant in the court *a quo* submitted that if applicant's application was upheld, there will be no evidence left and that will enable him to bring an application for the applicant to be discharged in terms of section 174 of the Criminal Procedure Act (CPA). The prosecution opposed the applicant's application and submitted that the search warrant was merely a back-up, and that captain Kwinana had asked for permission to search from the applicant which permission was granted. The search that was conducted at the applicant premises was a result of the permission granted by the applicant, and was not based on the search warrant. The court *a quo* dismissed the applicant's application and ruled that the evidence obtained in terms of the warrant was at that point admissible.

[16] Aggrieved by the ruling of the court *a quo*, the applicant has brought a review application seeking orders that the ruling handed down by the first respondent on 17th September 2024 admitting evidence which is inadmissible be reviewed and set aside; and further make an order directing the first respondent to refrain from admitting any evidence which was obtained as a result of an unlawful and/or invalid search warrant. The grounds upon which the review application is based are that the first respondent has failed to conduct a trial within trial, and has also made a ruling without giving the applicant an opportunity to give evidence under oath, and has based its decision on the evidence led by the prosecution only. That the evidence which was obtained as a result of an invalid search warrant will definitely render the trial unfair and detrimental to the administration of justice. Neither of the respondents have filed any opposing papers or attended court. The matter proceeded on default basis.

[17] The proceedings in the main matter have not yet been finalised. What this court is called upon to determine is whether the court *a quo* has committed a gross irregularity in admitting the evidence obtained in terms of the search warrant which would result in grave injustice threatening or whether intervention is necessary to attain justice. Generally, courts do not readily intervene in incomplete proceedings. The general principle is that a case should follow its normal course, through acquittal, or conviction and sentencing, before the matter is taken to a higher court. The practice of piecemeal reviews and appeals are discouraged.

[18] In *Magistrate, Stutterheim v Mashiya*¹ Cameron JA said:

"[13] That the higher Courts have supervisory power over the conduct of proceedings in magistrates' courts in both civil and criminal matters is beyond doubt. This includes the power to intervene in unconcluded proceedings. This Court confirmed more than four decades ago that the jurisdiction exists at common law. It subsists under the Constitution, which creates a hierarchical court structure that distinguishes between superior and inferior courts by giving the former but not the latter jurisdiction to rule on the constitutionality of legislation and presidential conduct as well as inherent power. The Constitutional Court has emphasised the role of the higher Courts in ensuring 'quality control' in the magistrates' courts, and the importance of the High Court's judicial supervision of the lower courts in reviewing and correcting mistakes. This entails as Chaskalson CJ has observed, that the higher Courts can 'supervise the manner in which' lower courts discharge their functions. His general formation echoes the provisions of the Criminal Procedure Act, which provides that in criminal proceedings subject to review in the ordinary course the High Court may, amongst many ample powers, 'remit the case to the magistrate's court with instructions to deal with any matter in such manner as' it may think fit.

[14] The higher Courts, however, have emphasised repeatedly that the power to intervene in unconcluded proceedings in the lower courts will be exercised only in cases of great rarity – where grave injustice threatens, and where intervention is necessary to attain justice. The same approach has been followed under the Constitution. At the same time, although the cases in which intervention has actually occurred are uncommon, this Court has refused to define or limit the circumstances in which intervention would be justified. The categories remain open".

[19] The basis of the applicant's review application is that Kwinana has conducted a search at the applicant's premises based on an invalid search warrant, and that the evidence obtained as a result of such a warrant be excluded. Counsel for the applicant has notified the court *a quo* of his intention to oppose the admissibility of such evidence as early after the testimony of the prosecution's

¹ 2004 (5) SA 209 (SCA) at paras 13 and 14

first witness who is the author of the warrant in question. However, the witnesses for the prosecution testified that even though they were in possession of the search warrant, they did not use it to conduct the search on the applicant's premises, but their search was based on the permission which the applicant has voluntarily given to them. The witnesses for the prosecution stated that it was not necessary to show the applicant the search warrant as he did not request to see it, but has just voluntarily given them permission to search, and therefore the evidence that they have obtained from the applicant's premises was not as a result of the search warrant.

[20] The prosecution did not hand in the search warrant into evidence as according to their version the search was not based on the warrant. It was counsel for the applicant who had requested that the search warrant be admitted into evidence and marked as an exhibit. Counsel for the applicant did not immediately brought an objection on the admissibility of the evidence allegedly obtained through the search warrant as the prosecution at no stage led evidence which shows that such evidence was obtained through the alleged invalid search warrant. The applicant's application was brought after the prosecution had closed its. The applicant's application is so wide and does not specify which evidence should be excluded. Even in the review application it has not been specified which evidence should be excluded. It is not the duty of this court to start speculating which evidence should be excluded. It is upon the applicant to be clear what needs to be excluded and not leave any room for guessing.

[21] The applicant in his founding affidavit of the review application stated that the first respondent ruled on the admissibility of the evidence without conducting a

trial within a trial and also without giving the applicant an opportunity to give evidence under oath. From the record of the proceedings, the applicant had not requested for a trial within a trial but opted to bring an oral application after the close of the case for the prosecution. The court *a quo* ruled on the application that was brought before it, and could not rule on application which was never brought before it. The applicant was at no stage prevented from presenting *viva voce* evidence, but opted to make oral submissions, and after his application was dismissed, instituted his review application. The applicant's submissions on this issue are misplaced.

[22] The prosecution's witnesses have testified that their search at the applicant's premises was not based on the search warrant, but on the consent that was given to them by the applicant, and felt that it was not necessary to show the applicant the search warrant. The applicant has not yet rebutted this version. Section 22(a) of the *Criminal Procedure Act*² (Act) authorises a police official to search any person, container or premises if the person concerned consent to such search. The uncontested version of the prosecution case is that the applicant had consented to such a search, and it was no longer necessary to show him the warrant. The evidence tendered by the prosecution regarding the search does not need a trial within a trial to determine its admissibility, but if the applicant wishes to challenge it he is at liberty to take witness stand and do so.

[23] From what appears from the applicant's application in the court *a quo*, and which was confirmed by counsel for the applicant on date when the review application was heard, they wanted the evidence of the search warrant to be

² 51 of 1977

rendered inadmissible in order to pave the way for them to bring an application for a discharge of the accused in terms of section 174 of the Act. The applicant has allowed the trial to run until the prosecution closed its case without challenging the alleged evidence that was obtained through the search warrant. The prosecution did not present evidence to the effect that the search and seizure on the applicant's premises was based on the search warrant hence the applicant did not have an opportunity to object to it. In fact, the search warrant itself was introduced by the applicant's counsel during cross-examination and requested that the search warrant be admitted into evidence and marked as an exhibit. The prosecution had at no stage relied on the warrant in justifying its search at the applicant's premises.

[24] The applicant wants to pave the way to enable him to apply for a discharge in terms of section 174 of the Act, and have realised that with the evidence as it stands, their chances of succeeding with the 174 application are non-existent. Counsel for the applicant here in court when he was engaged by the court on why he only made the application after the close of the prosecution case, submitted that they could see where the matter was going to end, hence the application. It is therefore not an issue about grave injustice threatening, but they wanted this court to assist them in paving the way to bring a section 174 application as they foresee that the applicant might be convicted.

[25] The manner in which the applicant brought his application in the court *a quo* is problematic. If indeed the evidence of the search was obtained through an invalid search warrant, it was proper for the applicant to have first challenged the validity of the search warrant. Once that is achieved, it will pave the way for the evidence obtained through the alleged invalid warrant to be rendered

inadmissible. The action of Phetla in signing the search warrant amounted to an administrative action. Until the search warrant is set aside by a court in proceedings for judicial review, it exists in fact and it has legal consequences that cannot be overlooked. An unlawful administrative act is capable of producing legally valid consequences for as long as the unlawful act is not set aside. (See *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*³). The applicant in my view, had followed the wrong approach in seeking to render the evidence inadmissible without first challenging the validity of the search warrant which remains legally effective.

[26] The motive of the applicant in bringing the review application, justify why higher courts have repeatedly emphasised that the power to intervene in unconcluded proceedings in lower courts will be exercised only in cases of great rarity. The current case is not one of those cases of great rarity. This court will not intervene merely to prevent the applicant from been convicted. If the applicant is convicted he still had other avenues in which he can exercise his rights. The applicant has failed to show that the intervention at this stage of the proceedings is necessary to attain justice, but is been based merely on the fear that he already knew what the outcome of the case is going to be. This court will not intervene based on assumptions or speculation, but a solid case must be made which shows that grave injustice threatens or intervention is necessary to attain justice. It follows that the applicant's review application stands to fail.

[27] In the result the following order is made:

27.1 The applicant's review application is dismissed.

³ [2004] ZASCA 48; [2004] 3 All SA 1 (SCA), 2004 (6) SA 222 (SCA) (28 May 2004) at para 26

27.2 There is no order as to costs

KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

LIMPOPO DIVISION, POLOKWANE

I AGREE

STROH AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH

AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the applicant : NC Malumbete

Instructed by : Malumbete & Makhubele Inc

Counsel for the respondents : In default

Date heard : 5th September 2025

Electronically circulated on : 3rd October 2025