THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 894/2024

In the matter between:

THE COMMISSIONER FOR THE

SOUTH AFRICAN REVENUE SERVICE **APPELLANT**

and

BULLION STAR (PTY) LTD **RESPONDENT**

Neutral citation: *CSARS v Bullion Star (Pty) Ltd* (894/2024) [2026] ZASCA 76 (22 May 2026)

Coram: HUGHES, MOLEFE and KOEN JJA and NUKU and OPPERMAN AJJA

Heard: 17 November 2025

Delivered: 22 May 2026

Summary: Income tax law – Tax Administration Act 28 of 2011 – overbroad warrant granted *ex parte* to the Commissioner for the South African Revenue Service (SARS) – reconsideration in the high court setting warrant aside as unlawful – whether discretion exercised at all and factors considered – whether interference with discretion of the high court required.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Janse van Niewenhuizen J sitting as the court of reconsideration):

The appeal is dismissed with costs, including the costs of two counsel where so employed.

JUDGMENT

Hughes JA (Molefe and Koen JJA concurring)

Introduction

[1] The genesis of this appeal lies in the issuance of a search and seizure warrant in terms of s 60 of the Tax Administration Act 28 of 2011 (the Tax Administration Act). Following an *ex parte* application, such a warrant (the warrant) was issued by the Gauteng Division of the High Court, Pretoria (the high court) on 28 March 2022, by Maumela J, in favour of the appellant, the Commissioner for the South African Revenue Service (SARS), against the respondent, Bullion Star (Pty) Ltd (Bullion Star).

[2] In terms of rule 6(12)*(c)* of the Uniform Rules of Court,[1] Bullion Star launched an urgent application for the reconsideration of the warrant granted (the reconsideration application). The reconsideration application came before Janse van Niewenhuizen J. On 2 February 2024, the warrant granted by Maumela J was set aside, and ancillary relief was granted. The appeal against this order is with the leave of this Court.

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[1] Rule 6(12)*(c)* states:
'A person against whom an order was granted in such person's absence in an urgent application may by notice, set down the matter for reconsideration of the order.'

Brief background

[3] Bullion Star is a limited liability company and a licensed gold refinery with beneficiation facilities. The beneficiation process involves transforming minerals, or a combination of minerals, into a higher-value product. The business of Bullion Star is the purchase of second-hand gold and the smelting and refining of the gold into either coins or bars. Additionally, since January 2022, Bullion Star has been registered as an exporter of such goods. The coins or bars are sold both locally and internationally. The sole director of Bullion Star is Ms Musarrat Khan Niyazi (Ms Niyazi).

[4] SARS conducted investigations into the suppliers of Bullion Star, as it believed that Bullion Star was involved in the purchase and sale of Krugerrand gold coins and was not, as Bullion Star had claimed, engaged in the business of buying and selling second-hand gold. The purchase of second-hand gold is taxable and subject to value-added tax (VAT). The investigation of Bullion Star focused on the VAT period from November 2020 to February 2022. As part of the investigation, and through an *ex parte* application, SARS was granted the warrant against Bullion Star. The warrant was executed at the premises of Bullion Star and at the residences of Ms Niyazi, and an employee, Ms Colleen Bhagoo (Ms Bhagoo).

[5] Bullion Star filed an urgent application on 4 April 2022 seeking an order to seal the seized documents and information to institute the reconsideration application. The application resulted in an agreement between SARS and Bullion Star, which was made an order of court by consent on 7 April 2022. The consent order, among other things, compelled Bullion Star to seek a reconsideration of the order resulting in the warrant. It further provided that all documentation and information, including that contained on electronic devices already seized by SARS, arising from the execution of the warrant, could be used by SARS in the VAT audit for the period November 2020 to February 2022.

The reconsideration application in the high court

[6] In the reconsideration application, Bullion Star sought an order that included: the reconsideration and setting aside of the warrant granted; ordering the return of the documents and items seized; and destroying all recordings, copies, mirror images,

computer files, notes, scans, emails, or recordings made. It also sought an order restraining and prohibiting the use of the information obtained.

[7] The basis of Bullion Star's request for reconsideration was that the terms of the warrant were too broad, rendering it unlawful. Further, the founding affidavit did not support the relief sought. Additionally, it argued that SARS had failed to disclose all relevant facts and had made misrepresentations concerning other material facts related to the issuance of the warrant. It contended that SARS was unable to establish reasonable grounds to believe that Bullion Star had committed a tax offence, and had not demonstrated that there were not less intrusive means of obtaining the documentation or information sought.

[8] During the reconsideration proceedings, SARS conceded that the warrant was overbroad, time-specific authorising execution only between 07h00 and 19h00 during the week at the premises listed and limited to a specific assessment period, namely, 'only for the period of assessment ending on or after 1 November 2020'. The overly broad warrant, so the concession went, was limited to that set out in paragraph 160 of the founding affidavit.[2] Accordingly, a suggested draft order varying the terms of the warrant was handed up to Janse van Nieuwenhuizen J. The high court however granted Bullion Star the order it sought.

Before this Court

[9] SARS sought leave to appeal against 'the order …and paragraphs 66 to 74' of Janse van Niewenhuizen J's reconsideration judgment particularly: the high court's finding that there was non-compliance with s 60(1) of the Tax Administration Act; the finding that the warrant was 'unduly or overly overbroad'; the failure of the high court to exercise its discretion to narrow the ambit of the warrant; the high court's finding that SARS had dismally failed to explain why the warrant was obtained despite Bullion Star not having been afforded an opportunity to be heard on this aspect; and, lastly, that

[2] Paragraph 160 reads thus: 'In order for SARS to ascertain the veracity of these photos and other electronic messages, SARS would require the original raw data relating to these messages, WhatsApps, emails and photos. It is for this limited purpose only that SARS is requesting this Honourable Court to issue the warrant for search and seizure.'

the terms of the consent order conflicted with the high court's order regarding SARS's utilisation of the information it had secured as a result of the warrant.

[10] During argument, the issues for determination have crystallised as follows: whether the overbreadth portions of the warrant should be severed; and the interpretation, effect, and scope of the parties' consent order.

Discussion

[11] Section 60(1) of the Tax Administration Act states:

'**Issuance of warrant**

(1) A judge or magistrate may issue the warrant referred to in section 59(1) if satisfied that there are reasonable grounds to believe that–

(a) a person failed to comply with an obligation imposed under a tax Act, or committed a tax offence; and

(b) relevant material likely to be found on the premises specified in the application may provide evidence of the failure to comply or commission of the offence.'

[12] SARS's case is that the high court, when reconsidering the issuance of the warrant, was incorrect in concluding that the warrant did not comply with the requirements of s 60(1) of the Tax Administration Act. SARS relies on the fact that the court's reasoning for non-compliance with s 60(1) of the Tax Administration Act is inconsistent with the section's requirements, that the requirements do not apply to the section governing an *ex parte* application under s 59(1) of the Tax Administration Act, but instead relate to the overbreadth of the warrant. SARS further asserts that, based on the facts of the case, Bullion Star failed to comply with the Tax Administration Act, and that the search and seizure were necessary to verify this failure.

[13] It is important to remember that SARS conducted its investigation into Bullion Star's customers and requested their electronic information, photographs, and WhatsApp messages relating to business transactions, indicating that Bullion Star was providing gold bars to its customers. SARS argued that issuing the warrant would enable it to seize electronic information from Bullion Star's phones and other devices, as the requested assistance had not been forthcoming.

[14] It alleged the purpose of the warrant sought to be as follows:

'In order for SARS *to ascertain the veracity of these photos and other electronic messages*, SARS would require the original raw data relating to these messages, WhatsApp[s], emails and photos. It is *for this limited purpose* only that SARS is requesting this Honourable Court to issue the warrant for search and seizure.' (Emphasis added.)

[15] On the other hand, Bullion Star contends that the overbroad warrant did not comply with s 60(1) of the Tax Administration Act. Its issuance, they argue, does not align with the purpose outlined by SARS in its affidavits and argument. The core of Bullion Star's application was that the warrant granted was not fit for the purpose outlined in SARS's founding papers. Therefore, when the overbroad warrant was authorised, Maumela J exercised his discretion incorrectly. In response to this contention, SARS argued that the warrant's breadth has no bearing on the requisites of s 60(1) of the Tax Administration Act and could not have rendered the warrant invalid; thus, Janse van Niewenhuizen J was wrong to conclude that the warrant did not comply.

[16] Reference was made above to Bullion Star having filed the urgent application to seal the seized documents and information which culminated in the parties' agreement, which was made an order of court and pursuant to which Bullion Star proceeded with the reconsideration application. During the reconsideration application, SARS conceded that the warrant was excessive and overbroad. The warrant did not authorise a search and seizure at the director's and employee's residences.

[17] What constitutes an overbroad warrant? Simply put, a search warrant is overbroad if its terms authorise acts beyond those permitted by the governing statute, or if, having regard to the facts, it fails to define the scope of the search with adequate particularity. An overbroad warrant occurs when clearly stated terms encompass activities or items that the law does not allow.[3]

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[3] *Powell N O and Others v Van der Merwe N O and Others* [2004] ZASCA 25; [2005] 1 All SA 149 (SCA); 2005 (5) SA 62 (SCA); 2005 (1) SACR 317 (SCA); 2005 (7) BCLR 675 (SCA) (*Powell*) paras 4, 18, 21, 28, 48 and 59.

[18] In *Minister of Safety and Security v Van der Merwe and Others (Van der Merwe)*,[4] Mogoeng J, delivering the unanimous judgment of the Constitutional Court, said:

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

(a) states the statutory provision in terms of which it is issued;

(b) identifies the searcher;

(c) clearly mentions the authority it confers upon the searcher;

(d) identifies the person, container or premises to be searched;

(e) describes the article to be searched for and seized, with sufficient particularity; and

(f) specifies the offence which triggered the criminal investigation and names the suspected offender.

In addition, the guidelines to be observed by a court considering the validity of the warrants include the following:

(a) the person issuing the warrant must have authority and jurisdiction;

(b) the person authorising the warrant must satisfy herself that the affidavit contains sufficient information on the existence of the jurisdictional facts;

(c) the terms of the warrant must be neither vague nor overbroad;

(d) a warrant must be reasonably intelligible to both the searcher and the searched person;

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

(f) the terms of the warrant must be construed with reasonable strictness.' (Footnotes omitted and emphasis added.)

[19] A balance must be struck between the State's need to obtain the issuance of a warrant and the rights and dignity of individuals subjected to a search pursuant to a warrant. It bears emphasis that the terms of the overbroad warrant were drafted by SARS. Not only do judicial requirements apply when issuing a warrant, given its invasive nature, but protecting the right to privacy of the persons subjected to its terms, is also a crucial consideration. Therefore, it is appropriate to restate s 14 of our Constitution, which guarantees that serious violations of personal privacy are not tolerated. It provides:

'Everyone has the right to privacy, which includes the right not to have –

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[4] *Minister of Safety and Security v Van der Merwe and Others* [2011] ZACC 19; 2011 (5) SA 61 (CC); 2011 (9) BCLR 961 (CC); 2011 (2) SACR 301 (CC) (*Van der Merwe*) paras 55 and 56.

(a) their person or their home searched;

(b) their property searched;

(c) their possessions seized; or

(d) the privacy of their communications infringed.'

The Constitutional Court in *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit N O and Others* (*Hyundai*) stated that the aforesaid rights were in fact 'right[s] to privacy in the social capacities in which we act'.[5]

[20] In *Thint (Pty) Ltd v National Director of Public Prosecutions and Others* (*Thint*),[6] the Constitutional Court emphasised the importance of an individual's personal rights concerning human dignity, which are zealously protected. It stated:

'The privacy of the individual is no less important. Section 14 of the Constitution entrenches everyone's right to privacy, including the right not to have one's person, home, or property searched, possessions seized or the privacy of his or her communications infringed. These rights flow from the value placed on human dignity by the Constitution.[7] The courts therefore jealously guard them by scrutinising search warrants "with rigour and exactitude".'

[21] The decision whether to grant a warrant falls within the judicial officer's discretion. It is a judicial function that considers the factors outlined in the founding papers and in the text of the warrant sought. As was highlighted in *Thint*:

'… a judicial officer [is] to be satisfied, first, that there is a reasonable suspicion that an offence, which might be a specified offence in terms of the Act, has been committed; and secondly, that there are reasonable grounds to believe that an item that has a bearing or might have a bearing on the investigation is on or is suspected to be on the premises to be searched. Finally, the judicial officer must consider whether it is appropriate to issue the search warrant. The decision to issue the search warrant clearly involves the exercise of a discretion, as the reasoning in *Hyundai* makes plain. Factors relevant to the exercise of that discretion will include the material set out in the affidavit seeking the search warrant and the text of the warrant itself.'[8]

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[5] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others and Others v Smit N O and Others* 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC); 2000 (2) SACR 349 (CC) (*Hyundai*) para 16.

[6] *Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others* [2008] ZACC 13; 2008 (2) SACR 421 (CC); 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) (*Thint*) para 76.

[7] *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 para 77; *Hyundai* fn 4 above para 18.

[8] *Thint* fn 6 above para 86; *Hyundai* fn 5 above paras 50-52 and 56.

Such a discretion ought to be exercised judicially; consequently, any exercise of that discretion predicated upon a material misapprehension of the facts or the law is invalid and liable to be set aside.

[22] The warrant was granted by Maumela J, and SARS has conceded it was overbroad. There would be no purpose served in further examining the discretion exercised by Maumela J when he granted the warrant. In any event, the warrant has already been executed.

[23] Although the warrant was overbroad, SARS argues that Janse van Nieuwenhuizen J ought to have amended its overbroad terms. It contends that she failed to do so and should, upon reconsideration, not have set the warrant aside but rather amended its terms to the limited extent sought by SARS.

[24] What remains for this Court's consideration is whether the existing overbroad warrant, already executed, should be varied. A further issue concerns the effect of the consent order on the status of the warrant. I address this below.

[25] I begin by stating that *Powell* holds that a warrant's terms should not exceed what the authorising statute permits; should they do so, the warrant may be declared invalid.[9] Furthermore, an overbroad warrant cannot be remedied simply by stating that 'the subject of the search knew or ought to have known what was being looked for…'.[10] Notably, the circumstances under which SARS sought the severance of the warrant to a limited extent are relevant.

[26] In the reconsideration, SARS's answering affidavit contended that the warrant complied with the jurisdictional requirements in terms of s 60(2) of the Tax Administration Act and was not overbroad. However, during the argument in the reconsideration, it conceded that the warrant was overbroad. SARS only sought a limited severance of the terms of the warrant when it submitted a draft order, after Bullion Star had presented its case. SARS failed to clearly outline a solid basis to justify why the high court should exercise its discretion to limit the reach of the warrant,

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[9] *Powell* fn 3 above.
[10] Ibid para 59.

especially since it did not challenge Maumela J's discretion at all. These failures by SARS weaken its case for the severance of the warrant sought before this Court.

[27] The concession by SARS was rightly made. Courts will not tolerate an overbroad warrant.[11] Given the circumstances, SARS's argument that the warrant complied with s 60(1), despite being overbroad, must fail. It does not align with the case presented by SARS or the purpose for which the warrant was sought. Further, the warrant clearly failed to balance the individual's right to privacy against the public interest.

[28] It is undisputed between the parties that the reconsideration application was brought in terms of rule 6(12)*(c)* of the Uniform Rules of Court. SARS argues that, in such a case, the judicial officer seized with the reconsideration has the authority to exercise his/her discretion to amend the warrant. Both Bullion Star and SARS agree that in such situations, the court's discretion is broad. It is well established that a warrant may be set aside or modified, in whole or in part. It was held in *Van der Merwe* that '*the terms of the warrant must be neither vague nor overbroad*'.[12] An overbroad warrant is considered unlawful.

[29] That said, SARS's reliance on s 66(4) of the Tax Administration Act[13] is misplaced. During the reconsideration, SARS's aim was to defend the warrant in its entirety. The order by Janse van Nieuwenhuizen J set aside the warrant in accordance with the discretion granted to her under rule 6(12)*(c)*, for all the reasons previously discussed. Importantly, the warrant had already been executed, and SARS already possessed the items sought through the overbroad warrant. In those circumstances, and absent a proper case, formal amendment, and appropriate notice, SARS could not seek to vary the overbroad warrant to the prejudice of Bullion Star.

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[11] *Van der Merwe* fn 4 above.
[12] Ibid para 56.
[13] Section 66(4) states:
'If the court sets aside the warrant issued in terms of section 60(1) or orders the return of the seized material, the court may nevertheless authorise SARS to retain the original or a copy of any relevant material in the interests of justice.'

[30] In my view, SARS relied too heavily on the terms of the consent order. For this reason, I include the relevant paragraphs of the consent order of 7 April 2022, granted pending the reconsideration application, to provide context. These formed part of the application before Janse van Nieuwenhuizen J. The relevant paragraphs of the consent order state as follows:

'1. That the applicant, ("Bullion Star"), is ordered to institute its application for reconsideration of the search and seizure warrant issued by this Honourable Court on 28 March 2022, in terms of section 60 of the Tax Administration Act, Act 28 of 2011("the warrant"), within ten days from date of this order;

…

3. That the parties are directed to approach the Honourable Deputy Judge President of this Court for enrolment of the reconsideration application, once all affidavits have been filed;

4. That pending the finalisation of the reconsideration application in this Court, and subject to paragraph 6 & 7 below, no documents or information derived from the search and seizure pursuant to the warrant be used by SARS in the execution of its duties and obligations in terms of the tax Acts as defined in section 1 of the Tax Administration Act;

…

6. Nothing in this order will prevent SARS from considering the documents or information (which includes the documents or information contained on any electronic storage device) obtained by SARS as a result of the search and seizure effected pursuant to the warrant, solely in order to establish whether such document or information, may be returned to the person or persons from whom the documents or information or electronic storage device containing such documents or information were taken during the execution of the warrant;

7. SARS is authorised to use the documents and information seized pursuant to the warrant in the course and scope of the VAT audit for the periods 11/2020 to 02/2022.'

[31] A court order, whether or not it is a consent order, generally remains in effect until it is rescinded or set aside.[14] SARS acknowledged that the order was interim, pending the determination of the reconsideration application. SARS contends that the order is subject to paragraphs 6 and 7 thereof, which they contend are not confined to

[14] In *Standard Bank of South Africa Limited v Pygon Trading Close Corporation* 2024 JDR 1232 (SCA); [2024] ZASCA 28 para 21, this Court stated that:
'An order once made may not generally be altered. The only bases of which I am aware to prevent the enforcement of a court order are if it is set aside or abandoned. A party in whose favour an order has been granted has the power to abandon it. The procedures available to set aside an order are stringent and few. The power to do so arises on appeal and by way of rescission or amendment… .'

the interim period pending the determination of the reconsideration application, but are self-standing. In my view, this argument is misconceived.

[32] The status of such orders was addressed in *Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others (Pretoria Portland)*,[15] namely, that an application for the issue of a warrant is an *ex parte* application that can lead, in the first instance, only to provisional orders that are subject to reconsideration after all the parties who have a direct and substantial interest in the order have been heard.[16]

[33] This is decisive in respect of SARS's argument. An examination of the intention behind the reconsideration application clarifies the position. The notice of motion confirms that the consent order was interim. The prohibition on using the obtained material was contingent on the outcome of the reconsideration application. Considering that the overbroad warrant had already been issued and executed, Bullion Star's intended application for reconsideration served as the only remaining safeguard against the use of unlawfully obtained data. If the warrant was found to be unlawful, then the documents could not be used, otherwise there would be no purpose to have the issuance of the warrant reconsidered.

Riposte

[34] I have read the dissenting judgment (the second judgment) of Opperman AJA and comment thereon as follows. Before this Court, the issues had crystallised, namely, whether the overbreadth portions of the warrant should be severed, and the interpretation, effect, and scope of the parties' consent order.

[35] The warrant's purpose was for SARS to verify the authenticity of the photos and other electronic messages. SARS would need the original raw data for these messages, including WhatsApp messages, emails, and photos. The request for the warrant was solely for this limited purpose. However, an overbroad warrant was granted, which was not in line with the case made out by SARS in its founding affidavit

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[15] *Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others* 2003 (2) SA 385 (SCA) para 44-45.
[16] *Thint* fn 6 above para 95; *Pretoria Portland* above paras 45 and 47.

and with the warrant's purpose. That being said, the overbroad warrant having been granted is now water under the bridge; in addition, there is even a concession by SARS that the warrant was overbroad. Added to these factors was the fact that the warrant had been executed. The result was that Janse van Nieuwenhuizen J set aside the warrant in its entirety during the reconsideration.

[36] Having set aside the warrant, the second judgment concluded that Janse van Nieuwenhuizen J did not exercise a discretion, as the enquiry did not end with the setting aside of the warrant. The second judgment states that the high court ought to have determined: '(a) whether it was empowered to limit the ambit of the warrant – this is a question of law – (the first issue); and (b) if so, how, and having regard to which factors, it ought to have exercised its discretion in doing so – this is a question of both fact and law – (the second issue).'

[37] The warrant, in its form, and the fact that it had already been executed by the time the reconsideration took place, did not permit Janse van Nieuwenhuizen J to proceed to the second enquiry, as suggested by the second judgment. Why so? First, the overbroad warrant, as it stood, was unlawful, and, as such, SARS has to stand or fall by the warrant it sought to defend. The case involved an overbroad, non-compliant warrant, and SARS sought a dismissal of the reconsideration application. Second, Janse van Nieuwenhuizen J concluded that the warrant presented by SARS to Maumela J for authorisation did not conform to the facts advanced by SARS in the *ex parte* application. SARS failed to explain why such a warrant was sought in the first place. Third, the severance of the warrant was sought after the argument presented by Bullion Star at the reconsideration, merely by handing up a draft order, for which no proper case was made out. Thus, the conclusion in the reconsideration application, that 'the issuing of the warrant does not in law and fact comply with the provisions of section 60(1) …'.

[38] The discretion exercised by Janse van Nieuwenhuizen J in the reconsideration in terms of rule 6(12)(*c)* is a wide discretion. As the order of issuance of the warrant stems from an *ex parte* application, the reconsideration thereof gives a party like Bullion Star an opportunity to rebut the case put forth for the grant of the warrant. It may seek an order that the order for issuance of the warrant was unjustified or seek

that the order be set aside. As has been observed, '[t]he scheme of the rule takes as its point of departure that the applicant has got its order and the reconsideration is about whether it can keep its order'.[17] In reconsidering the issuance, Janse van Nieuwenhuizen J considered it *de novo* and, in her discretion, could either uphold the order, sever or amend the warrant, or, as in this case, set the warrant aside as overbroad and thus unjustified. It has not been shown that she erred in exercising her discretion in the manner she did.

[39] Addressing the inversion of the parties upon which the second judgment relies, which it states resulted in a conceptual flaw, there is, with respect, no conceptual flaw. Neither party has addressed this Court regarding this inversion. The context where Bullion Star is the applicant, is where Bullion Star sought to amend its notice of motion, which was dismissed by the high court. This is evident from the heading of the introduction to paragraphs 3 to 8, namely '*Amendment*'. Further, on a reading of the judgment in its totality with the order granted in the reconsideration application, there is no inversion of the parties and no conceptual flaw.

[40] Finally, on the discretion question. Nowhere in SARS's papers does SARS make out a case or give any reason why the discretion ought to be exercised in its favour. If SARS requires a search and seizure to be carried out, then it may properly apply for a lawful warrant.

[41] Lastly, the consent order. The second judgment holds that paragraph 7 of the consent order reflects an agreement between SARS and Bullion Star to utilise, for the agreed purpose, the seized items. Regard must however be had to the context in which the consent order was concluded. The reconsideration application was pending, and to prevent it from being moot and academic, Bullion Star sought to prevent SARS from utilising the unlawfully seized items if the reconsideration application was to succeed. The documents could only be used in the interim for a limited purpose. This much is set out in Bullion Star's sealing application.

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[17] *Mazetti Management Services (Pty) Ltd and Another v AmaBhungane Centre for Investigative Journalism NPC* 2023 (6) SA 578 (GJ) para 14.

[42] Contrary to what is stated in the second judgment, the addition of paragraph 7 of the consent order was clearly intended to limit the effect of the unlawful warrant, as borne out by clause 4 of the order. Clause 7 cannot, as argued by SARS, be a stand-alone clause. Further, according to SARS's own version, clause 4 of the agreement treated the entire consent order as an interim agreement 'subject to paragraphs 6 & 7'; hence, these clauses could not stand alone.

[43] In conclusion, the fact that SARS was already in possession of, and had sight of, the seized documents is neither here nor there as SARS will not, in any event, be able to use these documents.

Order

[44] In the result, I would grant the following order:

The appeal is dismissed with costs, including the costs of two counsel where so employed.

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W HUGHES

JUDGE OF APPEAL

Opperman AJA (Nuku AJA dissenting)

Introduction

[45] I have read the judgment of my sister Hughes JA (first judgment). I am indebted to her for the overview of the facts of the matter and the summation of the litigation history. I am unable to agree on certain features of the matter and these are set out below under what I consider to be appropriate sub-headings.

How is a judicial officer required to approach the task of issuing a warrant in terms of the Tax Administration Act?

[46] Section 60(1)[18] of the Tax Administration Act requires the judicial officer to ascertain whether there are reasonable grounds to believe that the taxpayer failed to comply with an obligation imposed under a tax Act or committed a tax offence (the misconduct), and to consider whether there are reasonable grounds to believe that relevant material is likely to be found on the premises specified in the application, which material may provide evidence of the taxpayer's failure to comply with, or commission of, an offence under a tax Act (evidence of the misconduct). Finally, the judicial officer must consider whether it is appropriate to issue the warrant. This involves the exercise of discretion. *Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others* (*Thint*) provides guidance:

'Factors relevant to the exercise of that discretion will include the material set out in the affidavit seeking the search warrant and the text of the warrant itself.'[19]

[47] These were the three tasks Maumela J was seized with on 28 March 2022 when he authorised the warrant. It is to the averments in the founding affidavit in the *ex parte* application that one must look to answer the first two questions, whether there are reasonable grounds to believe that the misconduct has taken place and that evidence of the misconduct is likely to be found at the premises.

[48] The founding affidavit centres around the accusation that the main commodity in which Bullion Star trades is not gold bars or second-hand gold, but Krugerrand gold coins (Krugers). SARS contends that it investigated Bullion Star's suppliers. It says that if this is correct, Bullion Star would not be entitled to the input tax of R13 942 127.24 (R14 million), as Krugers are zero-rated in terms of the VAT Act. It concludes:

'The fact that the supply chain mainly consists of Krugers, which is a zero rated commodity, gives reason to SARS to believe that there may be serious non-compliance with the tax Acts and that it may be possible that Bullion Star is or has been committing tax offences.'

[49] The SARS deponent to the founding affidavit expressly states that there are reasonable grounds to believe that Bullion Star failed to accurately calculate the

[18] Quoted in paragraph 11 of the first judgment.
[19] *Thint* fn 6 above para 86.

amount of VAT payable, failed to pay the correct amount of VAT over to SARS and failed to accurately charge and declare the correct tax fraction on the supplies made by it. In brief, the deponent attempted to demonstrate that the test for believing that the misconduct had taken place was satisfied.

[50] In relation to the second leg of the s 60(1) of the Tax Administration Act requirements, the affidavit sets out in great detail why SARS contends that the invoices and photos pertaining to the delivery of second-hand gold are incorrect, and why it is necessary to inspect and analyse the digital information from the originals of such photos, WhatsApp messages, emails, and other electronic information. In brief, the deponent to the affidavit attempted to demonstrate that the test for believing that evidence of the misconduct would be found at the premises was satisfied.

[51] One must assume, because the warrant was authorised, that Maumela J was satisfied that the first two tests were indeed satisfied, as was the third, since he exercised his discretion in favour of SARS and thus, must have concluded that the requirements of the Tax Administration Act were satisfied.

What did the high court do in the reconsideration application?

The high court inverted the parties

[52] The high court in the reconsideration application erroneously dealt with the reconsideration as though Bullion Star was the applicant in the *ex parte* proceedings and SARS the respondent. In *Pretoria Portland*,[20] Schutz JA cautioned against this pothole:

'[The] case was *started* by the Commission [SARS], not by the appellants [Bullion Star]. Although they [Bullion Star] were ordered at the second stage by Bertelsmann J to file a notice of motion and founding affidavit, that affidavit when filed was largely in the nature of an answering affidavit, to which was added information as to the manner in which the search had been conducted. With the possible exception of the post-warrant events, if the matter is approached in the manner I have suggested it may be that the *onus* and the operation of the *Plascon Evans* rule is reversed. *The fact that the appellant's [Bullion Star's] first affidavit*

[20] *Pretoria Portland Cement Company Ltd. and Another v Competition Commission and Others* 2003 (2) SA 385 (SCA) fn 14 above para 48.

was called a founding and not an answering affidavit is a matter of form, not substance, and the law is concerned with substance.' (Emphasis provided.)

[53] The high court's incorrect approach to the assessment of the roles of the parties, and hence the evidence, is evident from the way it dealt with an objection raised by counsel for SARS regarding the non-disclosures raised by counsel for Bullion Star, which had not been mentioned in the founding affidavit in the reconsideration application. In paragraph 43 of its judgment, the high court found:

'It would be most unfair to deprive SARS of an opportunity to deal with the further alleged non-disclosures and will be in conflict with the trite principle that an applicant [here Bullion Star] must make out a case for the relief it claims in its founding affidavit.'

[54] Paragraph 43 is located far away from the amendment dealt with in paragraphs 3 to 8 of the high court's judgment and which paragraphs the first judgment resorts to in an attempt to explain away the inversion. It is correct that the inversion was not argued by the parties but it was raised with both counsel during argument and both counsel conceded the correctness of the principle distilled by Schutz JA. The context where Bullion Star is incorrectly treated as an applicant, is where Bullion Star seeks to rely on new non-disclosure grounds not raised in its 'founding affidavit'. That is precisely the pothole Schutz JA cautions against: Bullion Star ought to have, for purposes of that argument, been considered the respondent.

[55] It is thus clear that the high court dealt with Bullion Star as though it were the applicant and SARS the respondent in the reconsideration application. This is at odds with the jurisprudence of this Court as recorded in *Pretoria Portland*. The ruling to disallow the belated raising of new non-disclosures might have been correct, but not for the reason advanced by the high court being that an applicant must make out its case in its founding affidavit. Bullion Star was not strictly speaking an applicant. Bullion Star was the respondent and if anything, the *Plascon Evans* rule ought to have operated in its favour. The law is concerned with substance, not form.

[56] I raise this because it strikes me that this conceptual flaw in the high court's approach permeated the judgment. It appears that the high court dealt with the reconsideration as a self-standing opposed motion, and this might well explain its

failure to consider what I regard as important features of the matter, such as the consent order, which recorded an important agreement between the parties, a topic to which I return later in this judgment, amongst other oversights.

The failure to consider all the factual material

[57] More recently, in *Afgri Grain Marketing (Pty) Ltd v Trustees for the time being of Copenship Bulkers A/S (in liquidation) and Others (Afgri Grain Marketing),*[21] Wallis JA writing for the majority, summarised the correct approach in reconsideration applications as follows:

'Rule 6(12)(*c*) does not prescribe how an application for reconsideration is to be pursued. The absence of prescription was intentional and the procedure will vary depending upon the basis on which the party applying for reconsideration seeks relief against the order granted *ex parte* and in its absence. A party wishing to have the order set aside, on the ground that the papers did not make a case for that relief, may deliver a notice to this effect and set the matter down, for argument and reconsideration, on those papers. It may do the same if it merely wishes certain provisions in the order to be amended, or qualified, or supplemented. The matter is then argued on the original papers. It is not open to the original applicant, save possibly in the most exceptional circumstances, or where the need to do this has been foreshadowed in the original founding affidavit, to bolster its original application by filing a supplementary founding affidavit.

The party seeking reconsideration is not confined to this route. It may file an answering affidavit, either traversing the entire case against it, or restricted to certain issues relevant to the reconsideration. In many instances such an affidavit will be desirable. Even if an affidavit is filed, however, it does not preclude the party seeking reconsideration arguing at the outset, on the basis of the application papers alone, that the applicant has not made out a case for relief. That is a well-established entitlement in application proceedings and there is no reason why it should not be adopted in reconsideration applications.

If an affidavit is filed in support of the application for reconsideration then the party that obtained the order is entitled to deliver a reply thereto, subject to the usual limitations applicable to replying affidavits. When that is done, and the party seeking reconsideration does not argue a preliminary point at the outset that the founding affidavit did not make out a case for relief, *the case must be argued on all the factual material before the judge dealing with the reconsideration proceedings. That material may be significantly more extensive and the nature*

[21] *Afgri Grain Marketing (Pty) Ltd v Trustees for the time being of Copenship Bulkers A/S (in liquidation) and Others* [2019] ZASCA 67; [2019] 3 All SA 321 (SCA); 2024 (1) SA 373 (SCA) paras 12-14.

of the issues may have changed as a result of the execution of the original ex parte order.' (Emphasis provided.)

[58] The high court did not consider all the factual material placed before it. This was contrary to the decision in *Afgri Grain Marketing*. For example, the high court did not consider the evidence relating to the execution of the warrant. It concluded in paragraph 74 of its judgment that it was not necessary to do so, a conclusion it erroneously reached by virtue of its misstatement of the law.

The flawed premise and failure to exercise a discretion

[59] The high court approached the matter on the basis that the warrant could only be set aside on two grounds: (a) defects in the *ex parte* application and the warrant issued in terms thereof, and (b) the manner in which the warrant was executed. This flawed premise led the high court to conclude that it was not necessary to consider the facts relating to the execution of the warrant at all.

[60] The high court embarked on an analysis of what the warrant authorised and, because it was overbroad concluded that: 'In the result, the issuing of the warrant does not in law or fact comply with the provisions of section 60(1) of the Act and stands to be set aside'. However, the conclusion that the warrant was overbroad was not the end of the enquiry. The high court did not deal with whether it had a discretion, nor did it exercise that discretion. This approach constituted a fundamental misdirection. It was obliged to determine: (a) whether it was empowered to limit the ambit of the warrant – this is a question of law – (the first issue); and (b) if so, how, and having regard to which factors, it ought to have exercised its discretion in doing so – this is a question of both fact and law – (the second issue).

[61] The first issue required the high court to engage with the legal question whether severance is ever appropriate where the impugned part of the warrant is executed to any degree. This is a question that was left open in *Thint*[22] and SARS submits that there are no reported authorities on the question.

[22] *Thint* fn 6 above paras 210-211.

[62] The high court did not engage with this issue at all, nor did it consider the application of s 66 of the Tax Administration Act. Section 66 of the Tax Administration Act regulates an application for the return of seized relevant material. The lawmaker appears to have carved out a safety net for SARS. Section 66(3) vests the court with the power to make the order it deems fit, on good cause shown. Section 66(4) vests a court with a further discretion, one which the high court did not consider at all:

'If the court sets aside the warrant issued in terms of section 60(1) or orders the return of the seized material, the court may nevertheless authorise SARS to retain the original or a copy of any relevant material in the interest of justice.'

[63] During argument before the high court, SARS conceded that the warrant was overbroad.[23] It conceded that its ambit was wider than the limited purpose for its request, as recorded in paragraph 160 of the founding affidavit in the *ex parte* application and it did not record the conditions in respect of two of the premises identified in paragraph 161 of the founding affidavit in the *ex parte* application.

[64] SARS argued that the high court was empowered to amend or vary the order granted in the *ex parte* application, had furnished the high court with a draft order that caters for a variation of the order granted *ex parte* and had reminded the high court of paragraph 7 of the consent order. The high court was urged to consider this.

Paragraph 7 of the consent order

[65] The high court judgment did not deal with paragraph 7 of the consent order at all. Paragraph 1 of the high court order set aside the warrant in its entirety and paragraph 4 interdicted SARS 'from utilising any information secured as a result of the search and seizure carried out on the strength of the warrant'. All of this was done without interpreting paragraph 7 of the consent order or considering its potential impact upon any order to be granted. In my view paragraph 7 of the consent order reflected an agreement between the parties that relevant information secured as a result of the search and seizure carried out on the strength of the warrant could be utilised for the agreed purpose. I quote the full consent order below.

[23] This concession in the high court is denied by Bullion Star in the answering affidavit in the application for leave to appeal. Bullion Star asserts that the high court independently concluded that the warrant was overbroad. This denial can safely be rejected as it would seem that Bullion Star overlooked the draft order which was furnished to the high court and which caters for a limited warrant.

[66] In performing the interpretational exercise of the consent order, I will start with the contextual setting. As the first judgment correctly records, Bullion Star launched the urgent sealing application (the sealing application) on or about 4 April 2022[24] and this resulted in the consent order which was endorsed by Collis J on 7 April 2022. The urgent application sought the following relief:

'2. Directing [Bullion Star] to institute an application for the reconsideration of the search and seizure warrant issued by this Court on 28 March 2022, as envisaged in section 60 of the Tax Administration Act 2011 ("TAA"), within 10 days of the grant of this order ("the reconsideration application");

3. Pending final resolution of the reconsideration application directing that:

3.1 all the material, documents and information seized, at [Bullion Star's] premises under the search and seizure warrant executed on 29 March 2022, and any copies or mirror images made, be sealed and retained in the custody of [SARS];

3.2 no material, document or information derived from the search and seizure under the warrant, or any copies or mirror images be employed in any investigation, audit or process by [SARS] against [Bullion Star];

3.3 directing that [SARS] may not use any of the material, documents or information obtained by it or any copies or mirror images thereof, pursuant to the search and seizure operation, pending the outcome of the reconsideration application;'

[67] The founding affidavit of the sealing application correctly records that Bullion Star, as a party affected by an order granted *ex parte* (without notice), could, as of right, apply for the reconsideration thereof. Bullion Star nonetheless sought an order in terms of which it would be compelled to exercise such right within 10 days of the granting of an order in its favour in the sealing application.

[68] The purpose of the sealing application was succinctly summarized in the sealing application by Bullion Star in the following terms:

'This right will ring hollow if the relief sought is not granted. I say so because the imminent reconsideration application will be academic and pointless if the articles and any copies or mirror images thereof are not sealed, and SARS not prevented from utilising same as explained above.'

[24] The sealing application appears to have been served on SARS on 5 April 2022.

[69] In its founding affidavit in the sealing application, Bullion Star set out chapter and verse regarding SARS's failure to capture and assess the VAT return for the 11/2022 to 02/2022 VAT period. It claimed that a substantial refund was due to it. The SARS Form VAT 201 corroborates that demand for the sum of R13 942 127.24. In Bullion Star's attorney's letter of 22 March 2022, Ms Faber communicated that if the demand were refused or not attended to by SARS within 10 business days of receipt of the letter, Bullion Star would institute legal proceedings against SARS. The letter further communicated that SARS was intentionally frustrating Bullion Star and procrastinating in finalising the assessment, considering the substantial refund due to Bullion Star.

[70] SARS responded to this as follows:

'As detailed above, the prejudice, if SARS is not allowed to consider the seized documentation, is more that of [Bullion Star] than of SARS, as SARS will not be able to complete the pending audit.

I point out that SARS would in any event have been able to have had access to this information, as the taxpayer would have been obliged to provide SARS with the relevant information as a result of the audit and if SARS requested same in terms of section 46 of the Tax Administration Act.'

[71] It thus came as no surprise when the parties – Bullion Star, anxious to be refunded its R14 million, and SARS, being threatened with legal action should it not finalise the audit – recorded in their consent order an agreement that:

'SARS is authorised to use the documents and information seized pursuant to the warrant in the course and scope of the VAT audit for the periods 11/2020 to 02/2022.'

[72] The only question which remains is whether this authorisation was limited in time. Bullion Star contends it was intended to regulate the interim period only until the hearing of the reconsideration application, and hence that the high court's order was sound. SARS contends that it was entitled to use the relevant seized documentation for purposes of an audit in respect of the period concerned. It argues that it is not possible to use the relevant documents and information seized pursuant to the warrant in the course and scope of a VAT audit on an interim basis.

[73] Interpretation must start somewhere, and it falls to this Court to search for the meaning of the consent order, considering the text to be interpreted, the broader context in which it appears, and the purpose thereof,[25] which is, of course, a unitary exercise.

[74] I have above started with the context of the order and then worked through the express wording contained in paragraph 7 of the consent order. In my view, the only meaning that can be attributed to paragraph 7 is that it is a self-standing agreement between Bullion Star and SARS to utilise the documents necessary to perform and finalise the audit, in the context of Bullion Star wanting to be refunded R14 million, and SARS wanting to avoid further litigation in respect of such refund. This is its purpose.

[75] The first judgment finds that the dicta in *Pretoria Portland* is dispositive of the entire issue because it held that an application for the issuing of a warrant can only ever lead to a provisional order that is subject to reconsideration. I agree with the legal position as summarised in paragraphs 44 to 49 of *Pretoria Portland* by Schutz JA in the unanimous judgement. However, those general principles are, in my view, not conclusive to the interpretational exercise this Court is called upon to perform in this case. First, the judgment deals with *ex parte* orders granted for search and seizure warrants in terms of the Competition Act 89 of 1998. This matter involves the Tax Administration Act; second, the consent order was granted as part of the sealing application which distinguishes this matter from *Pretoria Portland*; third and perhaps most importantly, *Pretoria Portland* was not concerned with a consent order which dealt with the defined use of a certain category of documents seized.

[76] The first judgment in paragraph 33 deals with the purpose of the consent order in the following terms:

‘This is decisive of SARS's argument. An examination of the intention behind the reconsideration application clarifies the position. The notice of motion confirms that the consent order was interim. The prohibition on using the obtained material was contingent on the

[25] As encapsulated in this Court’s path-finding judgment in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18 and reaffirmed in many Constitutional Court judgments including *Independent Community Pharmacy Association v Clicks Group Ltd and Others* [2023] ZACC 10; 2023 (6) BCLR 617 (CC) paras 238 and 239.

outcome of the reconsideration application. Considering that the overbroad warrant had already been issued and executed, Bullion Star's intended application for reconsideration served as the only remaining safeguard against the unlawfully obtained data. If the warrant was found to be unlawful, then the documents could not be used, otherwise there would be no purpose to have the issuance of the warrant reconsidered'

[77] I assume that the notice of motion being referred to is the one in the sealing application. The notice of motion can only inform what was intended to be achieved by Bullion Star in the sealing application. It cannot 'confirm' that paragraph 7 of the consent order was intended to be interim. It is relevant to context, but that is as far as it can assist in the interpretation of paragraph 7 of the consent order.

[78] The first judgment does not employ 'the triad' being of text, context, and purpose in interpreting the consent order as a whole, or paragraph 7 in particular, in order to arrive at the conclusion it does. I am thus unable to engage with the reasoning underpinning the conclusion reached.

[79] The consent order provides:

'1. That the applicant, ("Bullion Star"), is ordered to institute its application for reconsideration of the search and seizure warrant issued by this Honourable Court on 28 March 2022, in terms of section 60 of the Tax Administration Act, Act 28 of 2011("the warrant"), within ten days from date of this order;

…

3. That the parties are directed to approach the Honourable Deputy Judge President of this Court for enrolment of the reconsideration application, once all affidavits have been filed;

4. That pending the finalisation of the reconsideration application in this Court, *and subject to paragraph 6 & 7 below*, no documents or information derived from the search and seizure pursuant to the warrant *be used by SARS* in the execution of its duties and obligations in terms of the tax Acts as defined in section 1 of the Tax Administration Act;

5. Nothing in paragraph 4 of this order shall be interpreted to mean that any document or information obtained by SARS from a source other than the search and seizure effected pursuant to the warrant may not *be used by SARS* in the execution of its duties and obligations in terms of the tax Acts as defined in section 1 of the Tax Administration Act.

6. Nothing in this order will prevent SARS from considering the documents or information (which includes the documents or information contained on any electronic storage device) obtained by SARS as a result of the search and seizure effected pursuant to the warrant, solely in order to establish whether such document or information, may be returned to the person or persons from whom the documents or information or electronic storage device containing such documents or information were taken during the execution of the warrant;

7. *SARS is authorised to use* the documents and information seized pursuant to the warrant in the course and scope of the VAT audit for the periods 11/2020 to 02/2022; 8. SARS is directed to immediately commence with the compilation of a detailed inventory of all documents and information seized pursuant to the warrant and to keep Bullion Star informed on a weekly basis of the progress of the aforesaid inventory… .' (Emphasis provided.)

[80] Paragraph 4 of the consent order records the parties' interim agreement pending the finalisation of the reconsideration application. It expressly records that its provisions are *subject to* paragraphs 6 and 7. (Emphasis added.) In my view, the answer to the question of why such paragraphs were excluded from the reach of paragraph 4 is clear: the provisions of paragraphs 6 and 7 are final in effect, and those contained in paragraph 4, are interim. The content of paragraph 6 bears this out: it permits SARS to look at a document to establish whether it should be returned to that individual. How such an act can be undone once executed is difficult to fathom. Once a SARS official has looked at a document and made a decision about it, it cannot be undone. Such an act is final. Similarly, the content of paragraph 7 supports this view: once a document or piece of information has been used for the relevant VAT-period audit, it cannot be 'unused'. It has been 'consumed' into the process of an audit, or, put differently, once it has been looked at and processed, that cannot be undone. It is for this reason, that paragraphs 6 and 7 were excised from the reach of paragraph 4.

[81] The first judgment proffers no explanation of how SARS is to 'unsee' the documents and information it had regard to in preforming the VAT audit for the periods 11/2020 to 02/2022 as contemplated in paragraph 7 of the consent order.

[82] This construction all ties up with the obligation in paragraph 8 of the consent order: SARS was obliged to compile a detailed inventory of all documents and information seized. This exercise would enable the parties and the court to determine:

(a) the documents and information that were relevant to the VAT audit for the periods 11/2020 to 02/2022 and which SARS could use (paragraph 7 of the consent order); (b) the documents and information SARS examined and returned to the person or persons from whom they were taken (paragraph 6 of the consent order); and, (c) that use of a document and any information in terms of paragraph 5 of the consent order could be verified and cross-checked if the source were disputed at any stage.

[83] I therefore conclude, having regard to the text, context and purpose of paragraph 7 of the consent order, that the objective and sensible meaning is that it is final.

[84] SARS argues that such a finding 'renders paragraph 4 of the order of [Judge] Janse van Nieuwenhuizen incompetent'. Paragraph 4 of the reconsideration order reads:

'The respondent [SARS], its employees and/or agents are interdicted from utilising any information secured as a result of the search and seizure carried out on the strength of the warrant.'

[85] What needed to be culled from paragraph 4 of the reconsideration order were those documents which were relevant to the VAT audit for the periods 11/2020 to 02/2022, as those documents the parties *agreed* could be used. (Emphasis added) SARS states that it seized almost 28 000 documents. The detailed inventory compiled by SARS in terms of paragraph 8 of the consent order should have been used to identify those documents used for the VAT audit and those documents not used. The documents not used ought to have been returned or destroyed (paragraphs 2 and 3 of the reconsideration order) and ought to have formed the subject matter of the interdict contemplated in paragraph 4 of the reconsideration order. I will refer to such identified documents and information, those not used in the VAT audit, as 'the tainted documents'.

[86] The submissions by Bullion Star that there would be no benefit or purpose to it in pursuing an expensive and time-consuming reconsideration application if, no matter the outcome of the reconsideration application, SARS would have the benefit of using

the seized documents, are without substance. The fate of the tainted documents would still need to be determined. Crucially, the court would have had to decide whether the warrant ought to have been authorised and issued and, if so, for what purpose, and it would then have decided whether it was empowered to limit the ambit of the warrant.

What to do?

[87] This Court has repeatedly said that it is desirable, where possible, for a lower court to decide all issues raised in a matter before it.[26] This impacts on the fairness of an appeal hearing. The reasons for this are that litigants are entitled to a decision on all issues raised, especially where they have an option of appealing a matter further; and that the court to which an appeal lies benefits from the reasoning on all issues.[27] In *Spilhaus Property Holdings (Pty) Ltd and Others v Mobile Telephone Networks (Pty) Ltd*,[28] the Constitutional Court found that the same applies equally to the Supreme Court of Appeal.

[88] If I had commanded the majority of this Court, I would have remitted the matter to the high court to decide the first and second issues defined previously. It was obliged to determine: the first issue – whether it was empowered to limit the ambit of the warrant; and the second issue – if it was so empowered, how, and having regard to which factors, it ought to have exercised its discretion in doing so. That would have entailed deciding to what extent its discretion was fettered by the agreement recorded in paragraph 7 of the consent order.

[89] The high court did not address these issues at all. It cannot be in the interests of justice for this Court to sit as a court of first instance on an important interpretational issue, nor as a court of first instance on the exercise of a discretion that would include fact-intensive questions. These issues also include novel issues of law.

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[26] *Levco Investments (Pty) Ltd v Standard Bank of SA Ltd* 1983 (4) SA 921 (A) at 928A; *Democratic Alliance v Acting National Director of Public Prosecutions* [2012] ZASCA 15; 2012 (3) SA 486 (SCA); 2012 (6) BCLR 613 (SCA) para 49; and *Theron N O v Loubser N O* [2013] ZASCA 195; [2014] 1 All SA 460 (SCA); 2014 (3) SA 323 (SCA) para 26. See also *Heyman v Yorkshire Insurance Co Ltd* 1964 (1) SA 487 (A) at 491.

[27] *Mphahlele v First National Bank of SA Ltd* 1999 (2) SA 667 (CC); 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC) para 12.

[28] *Spilhaus Property Holdings (Pty) Ltd and Others v Mobile Telephone Networks (Pty) Ltd* [2019] ZACC 16; 2019 (4) SA 406 (CC); 2019 (6) BCLR 772 (CC) para 44.

[90] The high court would be better placed to receive further evidence, without prejudice to either party. It could conceivably also have regard to the inventory compiled in terms of paragraph 8 of the consent order and, due to the passage of time, permit the filing of further affidavits relating to the stage of the VAT audit. This Court was told from the bar that the audit has been completed. This paragraph is not intended to be prescriptive, and the high court would not be bound to follow any of these suggestions.

[91] I would accordingly have upheld the appeal and remitted the matter to the high court (not necessarily the same judge, although there is no reason why it should not be) for the determination of the issues summarised in paragraph 88 hereof.

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I OPPERMAN

ACTING JUSTICE OF APPEAL

Appearances:

For Appellant:	B H Swart SC with S Maritz
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	Webbers Attorneys, Bloemfontein
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