



Republic of South Africa

REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE No: A 228/09

the matter of

MINISTER OF SAFETY & SECURITY

First Appellant

SUPERINTENDENT NOEL GRAHAM ZEEMAN

Second Appellant

PAUL CHRISTIAAN LOUW N O

Third Appellant

and

MUSTAFA MOHAMED

First Respondent

OMAR HARTLEY

Second Respondent

JUDGMENT DELIVERED : 30 APRIL 2010

MATTER HEARD ON 29 JANUARY 2010 BEFORE LOUW, MOOSA et ALLIE, JJ

Judgment: Moosa, J (Allie, J: Concurs)

On behalf of 1st and 2nd Appellants : Adv Z F Joubert SC
Attorney(s) : State Attorney

On behalf of 3rd Appellant : Adv R Jaga
Attorney(s) : Brink & Thomas

On behalf of Respondents : Att Z Omar
Attorney(s) : Zehir Omar Attorneys (c/o Niland Attorneys)



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MOOSA, J:

Introduction

[1] I have had the benefit of perusing and considering the judgment of my brother, **Louw J**, in this matter. I agree substantially with his approach, reasoning and findings in

respect of the issues dealt with by him in his judgment. However, I disagree with the order proposed that the costs of the application to lead further evidence on appeal, should be borne by Respondents. The issue is dealt with later in this judgment. Furthermore, **Louw J** dealt with the issue of whether the Respondents should have been advised of their constitutional rights before the warrant was executed. I am in full agreement with the *ratio* on that issue, but I am of the view that a formal finding should be made as it is one of the issues that was not formally decided by the court *a quo*. The court *a quo* disposed of the case on another issue, namely that the Third Appellant did not have evidence under oath which was a prerequisite for the granting of a warrant of search and seizure in terms of section 21 read with section 20 of the Criminal Procedure Act, No 51 of 1977 ("the Act"). I will refer to this as the main ground of challenge. I also agree with the *ratio decidendi* of **Louw J** that the warrant was issued on the basis of facts placed before the magistrate on oath under the provisions of section 20(1) of Act 51 of 1977. In view of the fact that the court *a quo* disposed of the matter on the main ground, the other grounds for the challenging of the warrant have not been adjudicated upon and those grounds must, in my view, either be referred to the court *a quo* for consideration and adjudication or ought to be considered and adjudicated upon by this court.

The Scope of the Enquiry

[2] The First Respondent in his founding affidavit sets out a "summary of grounds on which the warrant/warrants and all seizures should be set aside or declared unlawful". Some of the grounds overlap with each other and I will not necessarily be dealing with the grounds in the sequence that they appear in the said paragraph. Besides the grounds already dealt with, the other grounds of challenge are firstly, that the Second Appellant had failed to disclose to the Third Appellant material facts, and was accordingly guilty of

material non-disclosure; secondly, that the First Respondent should have been given notice of the Second Appellant's application to the Third Appellant for a warrant or in the absence of a notice, the Third Appellant should have built safeguards "into the order in terms of which we were given a fair chance to establish and enforce our rights before they were invaded", in view of the fact that the application for the issue of the warrant was made *ex parte* and without notice to him; thirdly, that the issue of the warrant imposed limitations on his rights to dignity (section 10), privacy (section 14) and freedom to practice trade, occupation and profession (section 22) and such limitations were not reasonable and justifiable in terms of section 36 of the Constitution; fourthly, that the terms of the warrant were too general and over-broad and lastly, that the Third Appellant did not apply his mind properly to the matter when exercising his discretion to authorise the warrant.

[3] During argument before us, the parties essentially concentrated on whether the Third Appellant had information under oath to justify the issue of the warrant. The *ratio decidendi* of the court *a quo* in setting aside the warrant, as **Louw J** correctly points out, was that the Third Appellant did not have information under oath to justify the issue of the warrant. Because the court *a quo* had disposed of the matter on that ground, it was unnecessary for it to dwell on the other grounds raised by the Respondents in their papers. The court *a quo*, did, in passing, refer to certain authorities dealing with the impact of search and seizure on the rights to privacy and property, the limitation of such rights, the nature and ambit of the terms of a warrant of search and seizure and the right to be informed of one's constitutional rights. The court *a quo*, however, did not make any formal findings in respect of those issues.

[4] The powers of the appeal courts to consider grounds of appeal not covered by the leave granted are succinctly set out in **Douglas v Douglas** [1996] 2 All SA 1 (A) at 8i-9c as follows:

*“It is trite that, in both criminal and civil matters, leave to appeal may be limited so as to allow only particular grounds of appeal to be advanced (see **Nggumba en ’n Ander v Staatspresident en Andere; Damons N O en Andere v Staatspresident en Andere; Jooste v Staatspresident en Andere** 1988 (4) SA 224 (A) op 246C-247C; **S v Safatsa and Others** 1988 (1) SA 868 (A) at 877A-G). But it is also true that ‘...this Court will not necessarily consider itself bound by the grounds upon which leave has been granted. If this Court is of the view that in a ground of appeal not covered by the terms of the leave granted there is sufficient merit to warrant the consideration of it, it will allow such ground to be argued’ (**S v Safatsa**, *supra*, at 877B-D. See also **R v Mpompotshe and Another** 1958 (4) SA 471 (A) at 472H-473F).”*

[5] During the hearing of the matter in this court, counsel for the parties were asked what would happen to the other issues raised by the First Respondent in his papers, but which were not decided, should this court uphold the appeal on the main ground in question. They were specifically referred to the challenge that the warrant was over-broad. It appears that counsel were taken by surprise as they had not prepared for such eventuality. The court indicated to them that they could submit further heads of argument in respect of those issues, but they did not take up the offer. Adv **Joubert** SC, for the First and Second Appellants, submitted that there was no merit in the other issues and more particularly said that the warrant was not overbroad. Adv **Jaga**, for the Third Appellant,

supported Adv **Joubert** in those submissions. Mr **Omar**, for the Respondents, was somewhat ambivalent. He indicated that the matter ought to be referred back to the court *a quo*, but at the same time said that the Respondents would like to see that the matter is brought to finality as soon as possible.

The Forum which is to Adjudicate the Remaining Issues

[6] As far as the adjudication of the other issues is concerned, the question which must be decided is, whether the matter should be referred to the court *a quo* for consideration or whether this court should adjudicate upon those issues. I am of the view that this court is in as good a position as the court *a quo* to decide such issues for the following reasons: **Louw J**, in his judgment, has partially adjudicated on the question of whether the Respondents should have been informed of any of their constitutional rights before the warrant was executed; the parties themselves are keen to bring the matter to finality as soon as possible; should the matter be referred to the court *a quo*, a delay would ensue before the issues are decided and, if the parties are then unhappy with the result, the matter would have to come to a full bench again on appeal; such process would entail the incurring of unnecessary costs; the issues are crisp and the parties have elected not to submit further heads of argument in respect of the issues. In the circumstances, I conclude that it will be in the interest of the administration of justice that this court decides the outstanding issues instead of referring the matter back to the court *a quo* for consideration.

[7] It is perhaps appropriate to mention that the Second Respondent was not a suspect in this matter and nothing was seized from his premises at 16a Axminster Street,

Muizenberg. We are essentially seized with the challenge of the warrant in respect of 16a and 16 Axminster Street, Muizenberg (“the said premises”) by First Respondent.

Application for the Reconsideration of the Matter

[8] Because of the *ex parte* nature of the application for the issue of a search and seizure warrant in terms of section 21 read with section 20 of the Act, the Respondents were entitled to bring an urgent application for the reconsideration of the matter in terms of Rule 6(12)(c) of the Uniform Rules of Court (**Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others** 2003 (2) SA 385 (SCA) paras [44] – [48]. The rule reads as follows:

“(c) *A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order.*”

This rule is a procedural remedy which recognises the *audi* principle. (**National Director of Public Prosecutions v Braun and Another** 2007 (1) SA 189 (C) paras [16] and [18].)

[9] The reconsideration of the order based on the *audi* rule must, as a rule, be founded on the record which served before the judicial officer that granted the order. In this matter it is common cause that the affidavit of the Second Appellant on which the Third Appellant granted the order was not made available to the First Respondent or the court *quo* on the basis that it contained sensitive information relating to the investigation. In paragraph 4 of his affidavit, dated 30 November 2009, the Second Appellant states that if the complete affidavit is made public:

“I would add that apart from compromising or jeopardising the criminal investigation, the disclosure of the complete affidavit placed before the

Third Appellant when he authorised the search warrant in question, is likely to reveal the identity of the source of the information contained in the affidavit, which in turn, is likely to endanger that person's life."

[10] The Second Appellant, in paragraph 14 of his answering affidavit, dated 18 March 2008, went on to state:

"I shall, however, ensure that a copy of the affidavit placed before the respective Magistrates (with sensitive details which is (sic) likely to prejudice the investigation expunged from it) is made available to the presiding Judge at the hearing of the application with the request that its contents not be made public."

[11] The First Respondent in his replying affidavit, dated 24 March 2008, says:

"The information that Respondent (sic) wishes to have expunged from the affidavit it plans to give this honourable court, has already been disclosed to at least two other magistrates. The hollow nature of the reasons for Respondent's (sic) refusal to disclose these alleged affidavits to this honourable court is emasculated by reasons why Respondents (sic) trust the magistrates more than the learned Judge seized with this matter."

[12] It is not clear on what authority the Second Appellant decided to circumscribe the record which served before the Third Appellant. It smacks of executive interference with a matter which is the exclusive confines of the judiciary. In my view, the First Respondent is justified in expressing his concern as to why the affidavit which served before the Third Appellant was not available to the High Court Judge who reconsidered the matter. The

further question that arises is: Why initially the Appellants were only prepared to make the truncated affidavit available to the court *a quo* and not the complete affidavit? The First Respondent averred that he must be allowed access to the complete affidavit to enable him to give his version of the allegations on the basis of the *audi* rule. In this regard he relied on rule 53 of the Uniform Rules of court to obtain access to the record of the proceedings before the Third Appellant. He submitted that this will enable him, in the first place, to respond effectively to the allegations contained in the affidavit of the Second Appellant which was placed before the Third Appellant and, in the second place, to enable the court to adjudicate effectively upon the propriety of the warrants, having regard to the jurisdictional requisite of “reasonableness”.

[13] The disclosure of the affidavit in question has a chequered history. Although **Louw J** touched thereon in his judgment, I would like to mention some of the facts for the sake of completeness. Soon after the warrant was executed, the First Respondent, through his attorney, informed the Chief Magistrate of Simons Town that he intended bringing an urgent application to review and set aside the warrant and requested access to “the affidavits or information under oath” which justified the issue of the said warrant. This request was refused. In the papers the Second Appellant undertook to ensure that a copy of the affidavit that was placed before the Third Appellant, with sensitive details expunged, is made available to the presiding judge with the request that the contents not be made public.

[14] In anticipation of the hearing in the court *a quo*, a document was filed pursuant to a practice notice. The document was in the form of an affidavit, but it was unsigned. Parts of the document were blanked out and illegible. Counsel for the Appellants could not give any explanation why the copy, which was placed before the court, was not signed and

attested. It appears that the court *a quo* was informed that the completed affidavit would be made available to the court only, but the Respondents would not agree thereto. At the hearing before us, application was brought for evidence to be placed before us on appeal. The new evidence was a copy of the duly signed and attested affidavit that served before the Third Appellant but in its censored form.

[15] In reconsidering the order, it is quite clear that neither the First Respondent nor the court *a quo*, nor this court had access to the affidavit in the form that it served before the Third Appellant. In his affidavit, the Third Appellant states that, in addition to the facts stated in paragraphs 6-10 of Second Appellant's affidavit, there was additional information in the impugned affidavit that justified the issue of the warrant. Neither First Respondent nor the court *a quo*, nor this court is privy to such information. Third Appellant states further in the affidavit that:

"I am not at liberty to disclose this information because it is sensitive and is likely to compromise or jeopardise the investigation, as stated in the affidavit of Superintendent Zeeman. For the same reasons, I have been asked not to annex to this affidavit, a copy of Superintendent Zeeman's affidavit made on 24 January 2008."

We are not told who asked Third Appellant not to annex Second Appellant's affidavit to his. In my view, the First Respondent is likely to have been prejudiced by not having been able to effectively present his case at the reconsideration of the matter and this can constitute a violation of the *audi alterem partem* rule. The courts are likewise disadvantaged in reconsidering the correctness of the order granted. This forms the very basis of the challenge launched by the First Respondent.

[16] It is unfortunate that the parties and the courts are placed in this dilemma. In my view, the Second Appellant should have crafted his affidavit in such a way so as to avoid disclosing information that is sensitive and likely to compromise and jeopardise the investigation and the identity of the informant. He should have been mindful of the fact that should the parties challenge the order authorising the warrant in an *ex parte* application, the record of the proceedings, including the affidavit in its uncensored form, would, as a rule and as a matter of course, be available to such parties in order to meet the case of the State.

[17] In my view, it would be improper for an officer of a lower court to have access to certain information in a matter and the officer of a superior court reviewing the decision of that officer not having access thereto. The situation is untenable as it impacts on the integrity and independence of the judiciary. At the same time, I am mindful of the fact that it is in the public interest for the identity of informers to be protected as they play a valuable role in the fight against crime. For reasons that will become apparent later, it is not necessary for me to resolve this dilemma.

Evaluation of the Remaining Issues

[18] With that backdrop, I will deal with the issues in the order that they are set out under the heading: “The Scope of the Enquiry” above. Thereafter, I will deal with the question of costs including the costs occasioned by the Application to lead further evidence on appeal. The facts are set out in the judgment of **Louw J** and I will not repeat them save insofar as they may be relevant to my evaluation of the issues. I return to the issue that the constitutional rights of the Respondents were not explained to them before the search was conducted by the Second Appellant. I agree with the *ratio* of **Louw J** on this issue,

and for the sake of completeness, I make a formal finding that it was not necessary for the Second Appellant to explain their constitutional rights to the Respondents as they were not charged. With that issue out of the way, I now turn to deal with the other issues.

Material Non-Disclosure

[19] The first ground is the question of material non-disclosure. The First Respondent alleged in his papers that the Second Appellant is guilty of misstatement and material non-disclosure in that he did not disclose to the Third Appellant in chambers that the First Respondent had no previous convictions. The Appellants denied these allegations. There is no obligation in law, statutory or otherwise, for the Second Appellant to have disclosed to the Third Appellant that First Respondent had no previous convictions. The presence or absence of previous convictions is, in any case, not a prerequisite for the issue of a warrant in terms of section 21 read with section 20. If such information were disclosed and the party did indeed have previous convictions, the party involved could well have argued that he or she had been prejudiced by such disclosure. I do not think that there is any merit in this ground.

Notice and Safeguards

[20] I now turn to deal with the second ground. The First Respondent in his papers stated that the *ex parte* application for the warrant was not supported by any factual material on the strength of which it could have been concluded that the object of section 21 read with section 20 of the Act, would be defeated “if prior notice of the application had been given to us or if safeguards were built into the order in terms of which we were given a fair chance to establish and enforce our rights before they were invaded”. It is not clear what safeguards the First Respondent had in mind. The Appellants denied that the warrant was not supported by any factual material and refuted First Respondent’s right to

be heard before the search warrant was granted. They also denied that his “rights were invaded”. It is common cause that no prior notice was given to the Respondents of the Second Appellant’s application to secure a warrant from the Third Appellant.

[21] There is no provision in Chapter 2 of the Act that prior notice ought to be given to the affected party of the intention of the State to obtain a warrant or that safeguards be built into the order in terms of section 21 read with section 20. It appears that the section envisages an *ex parte* application. These procedures have the element of secrecy and surprise, in order to safeguard the evidence from destruction, removal or concealment to frustrate the detection of crime or to impede the investigation. In my view, such procedure is not unconscionable as alleged by the First Respondent. There is the distinct danger that the object of the search and seizure operation may be defeated if prior notice is given to the affected party and accordingly render the relief nugatory. There may be exceptional circumstances where that may not happen and, in that event, the judicial officer would have a discretion to determine whether or not prior notice ought to be given, depending on the particular circumstances of the case.

[22] I am satisfied that, on the facts and circumstances of this case, there was no need to give the First Respondent prior notice of the application for a warrant or to build in safeguards in order to give him a fair chance to establish and enforce his rights before they were invaded.

Whether the Limitation of Respondents’ Rights was Reasonable and Justifiable

[23] The third ground relates to the limitation of the rights. The First Respondent states that the Appellants have not justified, or even made any serious efforts to justify the limitations of their rights in terms of section 36 of the Constitution. The Appellants sought

to impose and succeeded in imposing the limitations on his constitutional rights to dignity (Section 10), privacy (Section 14) and freedom to practice his trade, occupation or profession (Section 22) under cover of the warrant and the powers conferred upon them by the Act. The Appellants averred that these constitute legal argument. However, they have denied that the Respondents' rights have been infringed.

Legal Principles Governing Search and Seizure

[24] In this matter the search and seizure were authorised in terms of section 21 read with section 20 of the Act. Section 20 authorises the State to seize certain articles pursuant to a warrant issued in terms of section 21. The object is to enable the State to obtain evidence to institute a prosecution in respect of certain alleged offences. The search and seizure operation impacts seriously on the right to privacy which is entrenched in the Constitution.

[25] Section 14 of the Constitution provides:

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

(a) their person or home searched;

(b) their property searched;

(c) their possessions seized; or

(d) the privacy of their communications infringed.”

These rights are underpinned in the Constitution by values of human dignity, freedom and equality. (**Zuma v National Director of Public Prosecutions and Others** 2009 (1) SA 1 (CC) para [76]; **Bernstein and Others v Bester and Others NNO** 1996 (2) SA 751 (CC) para [77] and **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 2001 (1) SA 545 (CC) para [18].)

[26] These constitutional rights may be limited under certain circumstance in terms of section 36 (1) of the Constitution, which provides:

“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including –

- (a) the nature of the right;*
- (b) the importance of the purpose of the limitation;*
- (c) the nature and extent of the limitation;*
- (d) the relation between the limitation and its purpose; and*
- (e) less restrictive means to achieve the purpose.”*

[27] These rights are not absolute. When they are mutually limiting, they need to be balanced against each other and to be reconciled either by limiting the exercise of the one right to the extent necessary to accommodate the exercise of the other right or rights, or by limiting the exercise of both or all the rights as required by the particular circumstances of the case and within the constraints imposed by section 36 of the Constitution (***Midi Television t/a E-TV v Director of Public Prosecutions (Western Cape)*** 2007 (5) SA 540 (SCA) para’s [9]-[11]).

[28] It is a trite principle of our law that search and seizure provisions of the Act, constitute a reasonable and necessary limitation on the right to privacy to combat crime in

the country. In balancing and reconciling, on the one hand, the right of the State to fight crime by detecting and prosecuting crime, including the use of informers in that regard , and, on the other hand, the rights of the First Respondent, i.e. the right to privacy underpinned by the right to dignity and the freedom to practice his trade, occupation or profession and the right to fair legal process, the limitation on the rights of the First Respondent, in my view, is reasonable and justifiable in terms of section 36 of the Constitution. (See: *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others (supra)* paras [54]-[55].)

The Over- Broadness of the Warrant

[29] I now consider the fourth ground namely, the over-broadness of the warrant. The Respondents launched the challenge on two legs: the first leg was “that the people identified on page 4 of ‘MM1’ under the heading ‘Persons to participate in the search’ is over- broad and unlawful “; the second leg was that the warrant as a whole is over-broad in that there is no rational connection between the wide terms of the search warrant sought and the grounds for justification for such warrant.

The First Leg of the Enquiry

[30] I will deal with the first leg, namely, that the police officers authorised to participate in the search were over-broad and unlawful. The Appellants denied the allegations “for reasons to be argued at the hearing of this application”. The warrant is addressed to the Second Appellant and to the police officials identified in annexure “A”. Annexure “A” identifies five police officers by their ranks and names and contains a general category, namely, “And other members of Organised Crime”. Annexure “A” also contains a list of four premises to be searched. Only one falls within the jurisdiction of the court from which

the impugned warrant was issued. Section 21(2) of the Act authorises a police official to carry out the search and seizure operation.

[31] It is important that the police official, who is authorised to execute the warrant, is identified in the warrant, so that the person whose right to privacy is being invaded, can demand that the police official concerned identifies himself or herself. Section 29 of the Act provides for the search to be conducted with strict regard to decency and order. The unidentified members of the Organised Crime Unit mentioned in the warrant were merely required to assist the identified police officials to execute the warrant.

[32] Taking into consideration that four different premises were to be searched, the number of identified and unidentified officers, in my opinion, cannot be regarded as unreasonable for the operations. In the circumstances I hold that the number of police officers authorised to participate in the searches does not make the warrant over-broad and unlawful as alleged by the Respondents.

The Second Leg of the Enquiry

[33] I now turn to deal with the second leg, namely, that the warrant as a whole is over-broad in that there is no rational connection between the wide terms of the search warrant and the grounds for the justification for such warrant. In their replying papers the Appellants state that the allegations constitute legal argument. I assume that the matter was argued before the court *a quo*. The court *a quo* did not make a formal finding in respect of the issue because it disposed of the case on another ground.

[34] A close scrutiny of the warrant does not reflect when the alleged offences were committed. The Protection of Constitutional Democracy Against Terrorist and Related

Activities, Act No 33 of 2004 ("Act No 33 of 2004") came into operation on 20 May 2005. Terrorism, as an offence, is covered in the warrant as a separate offence, but is also replicated as an offence under section 2 of Act No 33 of 2004. The Internal Security Act 74 of 1982, which was the previous legislation that regulated the offence of terrorism, was repealed with the coming into operation of Act No 33 of 2004. It is, therefore, presumed that the crime of terrorism was included in the event of the offence having been committed prior to 20 May 2005 and thus falling outside the scope of Act No 33 of 2004. The affidavit of the Second Appellant dated 24 January 2008, seeking a warrant from the Third Appellant, says in paragraph 13:

"I refer to annexure "B" which contains the time periods relevant to the documents required. The time periods therein were determined with reference to the periods during which the suspects committed the offence."

[35] Having scrutinised annexure "B" of the warrant, no reference to dates can be found. In my opinion, this constitutes a material and fatal omission from the warrant. It not only makes the warrant over-broad, but begs the question: Did the Third Appellant apply his mind to the terms of the warrant? I will return to that question later. It appears from paragraph 10 of the Second Appellant's affidavit that the warrant was prepared beforehand as he refers to it in that paragraph. The annexure "B" of the warrant appears to be an exact replica of annexure "B" to the Second Appellant's affidavit save for the numbering. The warrant appears to have been prepared by the Second Appellant and presented to the Third Appellant as a draft warrant. It is quite apparent that the Third Appellant did not see the need to limit the scope of the warrant or build in any safeguards into the warrant. It is trite that the parameters within which the search is to be conducted is the function of the judicial officer and not the person executing the warrant. The judicial officer is the

custodian of the Constitution and is in the best position to strike a balance between the interest of the State and the interest of the individual. (**Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd** (*supra*) para [54].)

[36] **Cameron JA** writing for the majority in **Powell N O and Others v Van der Merwe N O and Others** 2005 (5) SA 62 (SCA), after analysing the relevant authorities, sets out the principles at para [59] as follows:

“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 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 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 objects, and must do so intelligibly and narrowly within the bounds of the empowering statute.”

(See also: **Toich v The Magistrate, Riversdale and Others** 2007 (2) SACR 235 (C).)

[37] The *dictum* of **Langa CJ** (as he then was) in **Zuma v National Director of Public Prosecutions and others** (*supra*) at para [79] re-inforces the above principles:

“First, a judicial officer will exercise his or her discretion to authorise the search in a way which provides protection for the individual’s right to privacy. Second once the decision to issue the search warrant has been made, the judicial officer will ensure that the warrant is not too general nor overbroad, and that its terms are reasonably clear. At the third stage, the right to privacy may still be vindicated by a reviewing court, which can strike down overly broad warrants and order the return of objects which were seized in terms thereof. Finally the criminal trial must be fair, and an accused person is entitled to object to any evidence or conduct that may render the trial unfair.”

[38] The test whether the warrant is too general and over-broad is assessed objectively on the basis that a warrant must be reasonably intelligible in the sense that it must reasonably convey both to the searcher and the searched the ambit of the search it authorises in the light of the requirements of section 21 read with section 20 of the Act.

[39] On the basis of the above principles, I will examine whether the terms of the warrant are too general and over-broad. The warrant under examination authorises the police officials described in annexure “A” to enter the said premises and to search and

seize articles/documents referred to in annexure “B” and to search any person, vehicle or container on or at such premises for the said articles/documents and to seize them if found.

[40] The warrant further authorises the Technical Support Unit (“TSU”) of the SAPS to download from computers, electronic equipment and devices (the “electronic equipment”) information that may be stored with regard to the documents referred to in annexure “B” or authorises any police official identified in annexure “A” to seal the equipment and remove them to the offices of the TSU for purpose of downloading. The search and seizure of the electronic equipment serves a limited purpose, namely, to download articles/documents mentioned in the warrant.

[41] The articles/documents set out in annexure “B” to the warrant, on the face of it, appear to be too general, over-broad and its terms are not reasonably clear. The warrant is, in my view, not reasonably intelligible, in that it does not reasonably convey to the persons participating in the search as per annexure “A” and the suspects and occupants of the premises the ambit of the search it authorises. The scope of the warrant gives, in my view, untrammelled power to search the said premises and seize from such premises any articles/documents they see fit within the range of the various classes of items. I will examine each class of item to show the generality, over-broadness and vagueness.

(a) Item 1: The object of searching and seizing the electronic equipment is limited to downloading the stored information and documents referred to in annexure “B” of the warrant or removing such electronic equipment for the purpose of downloading such information and documents. Should the need for downloading such information and documents cease, then the seizure of the electronic equipment comes to an end.

Because of my findings which will become apparent later, the object of searching and seizing the electronic equipment has come to an end.

- (b) Items 2, 3, and 4: The financial statements, accounting records and bank documents are unlimited in scope, too general and over-broad. The warrant authorises the seizure of these items belonging to anyone. In the present instance, the police could have seized the financial statements, accounting records and bank documents of the Second Respondent and his spouse and of those of the parents and maternal grandmother of the First Respondent, who occupied the premises. The warrant gave no indication how far back in time the searches could extend. Financial statements, accounting records and bank statements going back many years and unrelated to the alleged offences, could be subject to seizure. The warrant, furthermore, does not distinguish between persons who could reasonably be suspected of being in possession of the articles and documents and others who happen to be fortuitously on the premises. The warrant can expose innocent persons with no connection to the alleged offences to the risk of being searched and their rights of privacy and dignity being infringed;
- (c) Items 6, 7, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25 are too general and over-broad, and ambiguous as to render them reasonably meaningless to the searcher and the searched. Some of the items can only make sense to the investigating officer seeking the warrant and not the searched. There is also no indication in the warrant of the time frames of the articles and documents to be searched for and seized. It appears from the wording of the warrant that those executing the warrant have untrammelled power to determine what may or may not be taken within the range of classes set out in the said items and, as such, it is not reasonable and justifiable in terms of section 36 of the Constitution.

(d) Items 5, 6, 8, 9 and 26 are about the closest one can get to possible incriminating evidence of the commission of a crime. I will deal with them hereunder:

- (i) Item 5, relates to documents pertaining to the manufacture and preparation of explosives. The Respondents state that these documents can be downloaded from the internet by anyone, even a 15 year old child;
- (ii) Item 6, relates to documents and/or files pertaining to the planned illegal activities of the suspects. There is no indication from the Second Appellant's Replying Affidavit that such documents and/or files have been found;
- (iii) Items 8 and 9, relate to chemicals, articles and material that could be used to manufacture explosive devices. It is common cause that no explosives or explosive residue were found in the raid. However, certain items were removed from under the bed of the First Respondent. The First Respondent described them as a bottle of liquid pool cleaner, a bottle of paint remover and a bottle of hair bleach. He gives an innocent explanation for the use thereof. The Second Appellant, on the other hand, states that these items are chemicals that are used in the manufacture of explosive devices.
- (iv) Item 26 relates to illegal firearms and ammunition. It does not appear that any of these items were found on the premises.

[42] As mentioned earlier, the terms of the warrant permit the persons authorised to search, untrammelled power to search the said premises and seize anything they saw fit within the range of the various classes of items. The State seized tog bags, passport, ID book, 17 bags of books and 28 tapes, personal letters and essays that the First Respondent wrote on theology and politics. The warrant did not authorise the seizure of

these items. It appears that these items formed the bulk of the items which were seized from the premises. The First Respondent states that the Second Appellant removed “all the books that filled approximately 5 shelves in my book shelf (*sic*)”. He states that these books consisted of mainly Islamic writings by various authors. He accumulated these books during his studies in Islamic Law in Saudi Arabia. As the police officers were not authorised by the warrant to search for and seize books, their conduct in confiscating the books of the First Respondent constituted a violation of his right to privacy, dignity and property.

[43] Save for the items set out in paragraph 41 (d) to which I will return later, all the other items in the warrant, in my view, are too general, over-broad and the terms are not reasonably clear. This then brings me to the next issue, namely, whether the Third Appellant applied his mind to the matter and exercised his discretion properly or at all.

Whether Third Appellant Applied his Mind to the Matter

[44] The Respondents’ final ground for the challenge of the warrant is that Third Appellant did not apply his mind to the matter when authorising the warrant. This allegation is denied by the Appellants. The Third Appellant states in his affidavit that:

“The applicants also contended that had I applied my mind to the matter, I ‘would have required safeguards to be built into any order that was granted....and that I do ‘not appear to have given any consideration to the serious impact the search and seizure would have’.

The applicants, however, are mistaken. The requirement laid down in the Criminal Procedure Act that an article be seized only by way of a search

warrant on application to a neutral officer of the court, ensures that intrusions upon an individual's right to privacy are safeguarded."

[45] The Third Appellant misconceives his powers, role and function in terms of Chapter 2 of the Act. He states that the individual's right to privacy are safeguarded by the mere fact that a warrant is authorised by a neutral officer of the court in terms of section 21 read with section 20 of the Act. The same argument was tendered before the court *a quo*. **Langa CJ** in **Zuma v National Director of Public Prosecutions and Others** (*supra*) says pertinently that the judicial officer will exercise his or her discretion to authorise the search in a way which provides protection for the individual's right to privacy and once the decision to issue the warrant has been made, the judicial officer will ensure that the warrant is not too general nor over-broad, and that its terms are reasonably clear. The Third Appellant acts in his capacity as a judicial officer carrying out a judicial function. He is the guardian of the Constitution and must ensure that the fundamental rights of the citizens, as enshrined in the Constitution, are protected, subject to the limitations as envisaged in section 36 of the Constitution. In that regard he, as a neutral officer in the sense of an impartial officer, acts pro-actively and safeguards, as far as reasonably possible, the interest of the affected party who is not present when the warrant is sought. The provisions of Chapter 2 of the Act, by themselves, do not ensure that intrusions are safeguarded as submitted by the Third Appellant. Chapter 2 of the Act merely provides that the search and seizure operation shall take place during the day in a decent and orderly manner. It is his function, as the custodian of the Constitution, to safeguard any intrusions subject to limitations which are reasonable and justifiable in an open and democratic society.

[46] In the light of my findings, the only reasonable inference I can draw is that the Third Appellant had failed to apply his mind properly or at all, firstly when it came to the jurisdictional requirements for the authorisation of the warrant in terms of section 21 read with section 20 of the Act and secondly, when it came to the settling of the terms of the warrant. I say so for the following reasons: in the first place, The Third Appellant, misconceived his powers, role and function and made no input in the crafting of the warrant for which he was responsible as a judicial officer; in the second place, the terms and ambit of the warrant that was presented to him by the Second Appellant, was accepted and authorised uncritically by him without him having made any input into the terms and ambit of it; in the third place, he failed to take cognisance of the omission of the dates from the warrant which, according to the Second Appellant, contains time periods relevant to the documents required, and which were determined with reference to the periods during which the suspects committed the offence and, in the fourth place, the terms of the warrant were substantially too general, over-broad and not reasonably clear.

The Severability of the Warrant

[47] The next question to be answered is: Can the offending sections of the warrant be severed from the rest of the warrant? In principle I cannot see why an impugned section of the warrant cannot be excised from the rest of the warrant. There may be circumstances where such an approach may be just and equitable. In such instance in the words of **Langa CJ** in **Zuma v National Director of Public Prosecutions and Others** (*supra*) para [211] at page 88C-D, “*severance is the proportionate response; declaring the entire warrant invalid would amount to using a sledgehammer to crack a nut*”. However, in the present case, the defects and shortcomings go to the heart of the matter. I have found that the Third Appellant had failed to apply his mind to the matter and had failed to exercise his discretion properly or at all. In the result, I conclude that the entire warrant is tainted and

the impugned section cannot be severed from the rest. In any case the impugned portion constitutes the major portion of the warrant. In my view the warrant cannot be saved and falls to be set aside. In the light of that finding, it is unnecessary to resolve the dilemma concerning the censorship of the affidavit which served before the Third Appellant.

The Fate of the Articles Seized

[48] The next question to be considered is what happens to the articles and documents seized in terms of an unlawful warrant. In my opinion the articles and documents can conveniently be divided into four categories. The first is the electronic equipment; the second are those articles and documents which may be of an incriminating nature and which may proffer evidence of the commission of an offence; the third are those articles and documents which have been seized by virtue of the over-breadth of the warrant and the fourth are those articles and documents that have been seized but which have not been authorised by the warrant.

[49] It appears from the Second Appellant's affidavit that a preliminary examination of the documents, electronic data and chemicals seized, reveals that there are documents on how to manufacture and set off improvised explosive devices; chemicals used in the manufacture of explosive devices; videos depicting gruesome and explicit scenes of the murder of persons and numerous encrypted messages. It appears further that the investigation, to a large extent, is based on the items seized and is confined to contravention of sections 2, 3, and 5 of Act No. 33 of 2004.

[50] In my view it is just and fair, in the light of all the circumstances, to return all the articles and documents seized, other than those items described in paragraph 41(d) above, to the person or persons from whom they were seized, subject to the provisions of section

31 of the Act. Insofar as those items in paragraph 41(d) are concerned, I am of the view that it is just and fair that they should be made subject to a preservation order pursuant to section 172(1)(b) of the Constitution. **Langa CJ** in **Zuma v Director of National Prosecution and Others** (*supra*) at para [220] was of the view that the Constitution does permit a court to make a preservation order in suitable circumstances. In my view the circumstances in this matter justify the granting of a preservation order in respect of articles and documents seized pursuant to items 5, 6, 8, 9 and 26 of the warrant.

[51] Should the Director of Public Prosecution decide not to institute prosecution in terms of section 16 of Act 33 of 2004, the articles and documents should be returned to the persons from whose possession those articles and documents have been seized, subject to the provisions of section 31 of the Act. On the other hand, should he or she decide to institute prosecution and decide to tender the articles and documents as evidence, the accused would, in terms of section 35(5) of the Constitution, be entitled to object to the admissibility of such evidence on the ground that it would make his trial unfair. The trial court would then be in the best position to give a ruling on the matter in the light of relevant circumstances.

The Costs

[52] I now finally come to the question of costs. I have mentioned earlier that I will return to the question of costs in connection with the admission of new evidence on appeal. The Appellants as well as the Respondents have been successful in respect of some of the grounds of challenge to the warrant. The Respondents, in my view, have been substantially successful in the appeal. I see no reason why costs, including the costs of the admission of new evidence on appeal, should not be awarded to the Respondents.

The Order

[53] In the result the appeal is upheld in part and dismissed in part. The order of the court *a quo* is set aside and in its place is substituted the following order:

- (a) The decision of the First Respondent of 24 January 2008 to authorise the issue of a search warrant and the search warrant dated 24 January 2008 are declared unlawful and are set aside;
- (b) The search and seizure conducted on 25 January 2008 at 16 and 16a Axminster Street, Muizenberg, are declared unlawful;
- (c) Other than articles and documents seized in pursuance to items numbered 5, 6, 8, 9 and 26 of the search warrant, the Third Respondent is ordered to return all articles and documents, including computers, electronic equipment and accessories, to the person or persons from whose possession they have been seized, subject to the provisions of section 31 of the Criminal Procedure Act, 51 of 1977;
- (d) The articles seized in pursuance to items 5, 6, 8, 9 and 26 of the search warrant are made subject to a preservation order in terms of section 172 (1)(b) of the Constitution and the Third Respondent is ordered to hand over those articles to the Registrar of this Court for safe-keeping, pending the decision of the Director of Public Prosecutions whether or not to institute prosecution under section 16 of the Protection of Constitutional Democracy Against Terrorism and Related Activities Act, No 33 of 2004;
- (e) Should the Director of Public Prosecutions decide not to institute prosecution, the said articles and documents shall be returned to those from

whose possession they have been seized subject to the provisions of section 31 of the Criminal Procedure Act, No 51 of 1977;

- (f) Should the Director of Public Prosecutions decide to prosecute and make use of the exhibits which form the subject matter of the preservation order, the accused is entitled to exercise his rights in terms of section 35⁽⁵⁾ of the Constitution;
- (g) The First, Third and Fifth Respondents are ordered to pay the costs of First and Second Applicants, jointly and severally, the one paying the others to be absolved.


E-MOOSA

ALLIE, J: I agree.


R ALLIE