REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA 19/04/2016

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED √

19 April 2016

DATE SIGNATURE

APPEAL NO: A464/2015

In the matter between:

SAREL ALBERTUS HEANEY Appellant

and

THE STATE Respondent

JUDGMENT

PETERSEN AJ:

INTRODUCTION

[1] This is an appeal against conviction with leave of Molopa-Sethosa and Hughes JJ on petition in terms of section 309C of the Criminal Procedure Act, Act 51 of 1977. The appellant pleaded not guilty to and was convicted on 17 September 2013 of a contravention of section 4(1) read with sections 1 and 20(1)(a) of the Precious Metals Act, Act 37 of 2005: Possession of unwrought precious metals: Gold and Platinum valued at R37188.

BACKGROUND FACTS

[2] An explanation of plea, including the basis of defence and admissions was tendered in terms of section 115 of the Criminal Procedure Act in the following terms: On 12 September 2013 at approximately 16h30 members of the South African Police Services arrived at the business address of Eye-link Electrics CC(the entity) at 67 Wright Street, Nuffield Springs, an entity of which the appellant is a member, with a document proclaiming to be a search to search the said property. They were in possession of an additional search warrant for a property at 8 Duiker Street, President Dam, Springs. The requirements for the issue of the search warrant for 67 Wright Street was challenged on the basis that the search warrant was authorized by a magistrate on what purported to be a typed affidavit by one Lieutenant Colonel PN Ngcobo which was neither signed nor commissioned. The entity applied for a license to operate as a refinery in terms of the Precious Metals Act, which at the time of trial was pending before the Diamonds and Precious Metals Regulator(the Regulator) under reference number APO8747. Representatives of the Regulator conducted a thorough investigation into the manner in which the entity proposed to conduct its refining business; and the entity adhered to all the relevant requirements of the Precious Metals Act. The entity came to be in possession of 20 tons of ordinary soil with a high metal content procured from and on instruction from an entity called AMOREF (PTY) LTD(AMOREF), for the sole purpose to test and calibrate equipment belonging to the entity subsequent to a visit from the Regulator. A letter from AMOREF confirming same formed part of the plea explanation. The soil was delivered approximately two months before the incident. The appellant admitted that he was found in possession of soil with a high metal content. He disputed that the soil had been procured unlawfully or that he had contravened the provisions of the Precious Metals Act.

[3] It is common cause that the appellant was found in possession of soil with a high metal content on 12 September 2012 in the district of Springs. In my view, the main issue in this appeal is the validity of the search warrant issued by the additional magistrate at Springs on application by Lieutenant Colonel Ngcobo. This is noted as the 6th ground of appeal of 12 grounds. The additional issues raised on the merits in the remaining 11 grounds are ancillary to the main issue. A finding that the search warrant was invalid would vitiate the evidence on the merits and no further consideration thereof would be required.

THE TEST ON APPEAL

[4] In **S v Hadebe**[1], the court said: "...in the absence of demonstrable and material misdirections by the trial court, its findings of fact were presumed to be correct and would only be disregarded if the recorded evidence showed them to be clearly wrong."

[1] 1997 (2) SACR 641 (SCA) at 641d

THE VALIDITY OF THE SEARCH WARRANT

[5] The validity of the search warrant was placed in dispute as early as the plea explanation. The issue of admissibility of evidence and its admission or exclusion vests predominantly with the judicial officer. The admission or exclusion of evidence more often than not sets the course for the conduct of the trial. The learned magistrate accordingly had to be alive at this early stage, as she was at judgment, to the admissibility of any evidence which would follow as a result of the search warrant. What the appellant raised at trial is tantamount to an alleged violation of the right to privacy contained in the Bill of Rights - section 14 of the Constitution, which includes, *inter alia,* the right of persons not to have their property or home searched; and not to have their possessions seized. The correct course would have been to identify with particular clarity the issue which the appellant was challenging and then to embark upon a trial-within-trial to adjudicate the alleged section 35(5)[2] violation.

[6] The failure to engage in a trial within a trial demonstrates that the magistrate in her judgment relegated the issue of admissibility to an issue of credibility. I am embellished in this view by the judgment of the magistrate at page 247, lines 19-25 where she says: "The court also finds that it is immaterial whether the affidavit by the state witness is defective because of the fact that he did not state the place where his office is situated as required by the Act. The court finds that even if these witnesses had not applied for a warrant to search the premises of the accused the court would still be in a position to *render the evidence admissible*, seeing that the version of the accused is that he said that he allowed the police to conduct the search because he had nothing to hide." It bears mentioning that the appellant allowing the police to search his premises adds nothing to the fact that once a search warrant is produced he has no choice but to comply with the terms of the search warrant, subject only to his right to later challenge the validity thereof. Did the failure of the magistrate to deal with the admissibility challenge in terms of section 35(5) constitute a material misdirection to vitiate the proceedings? The appellant submits that the search warrant was invalid. The respondent conceded at the hearing of the appeal that the search warrant was invalid. In light of the concession by the respondent, I embark on an act of

[2] "Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."

supererogation to re-affirm the requirements for the issue of a search warrant to restate the law and approach to search warrants.

THE REQUIREMENTS FOR THE ISSUE OF A SEARCH WARRANT

[7] The search warrant was applied for and issued by the additional magistrate Springs on pro forma form (J51) in terms of section 20, 21 and 25 of the Criminal Procedure Act. The Constitutional Court and Supreme Court of Appeal have settled the law dealing with the issue of search warrants, setting out a number of principles. I accordingly quote in detail what the SCA said in **Goqwana v Minister of Safety and Security NO and Others**[3]:

"[13] This case raises questions of fundamental constitutional importance. Provided there is no abuse of process, the issuing of search warrants and the seizure of articles consequent thereupon are a vital, indeed necessary, element in the effective combating of crime. On the other hand, all people within the Republic of South Africa have constitutionally enshrined rights to dignity, privacy, freedom, security, trade and property. Earnest though the support of the courts for the SAPS in their endeavours to combat crime must be, these constitutional rights have especial significance. More particularly in view of our history, that significance is cardinal in magnitude.

[14] Iridescent 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 NO and Others*, *Thint* and *Van der Merwe*, is the requirement that the courts must strike a wholesome balance between, on the one hand, the dignity and privacy of every citizen and, on the other, support for the state in combating crime.

[15] A brief outline of the basic principles relevant to search warrants is accordingly apposite. *Minister of Justice and Others v Desai NO* makes it clear that it has long been recognised in our law that a search warrant 'constitutes a serious encroachment on the rights of the individual' and that careful scrutiny by the courts is required.

[16] In *Van der Merwe* Mogoeng J, delivering the unanimous judgment of the court, said in paras 55 – 56: '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.'* – (my emphasis)

[3] 2016 (1) SACR 384 (SCA)

[20] Insofar as the failure of the warrant to refer to a specific police officer is concerned, the provisions of s 25(1) of the CPA are relevant. This section provides that:

'**Power of police to enter premises in connection with ... any offence**

(1) If it appears to a magistrate or justice from information on oath that there are reasonable grounds for believing — ...*(b)* that an offence has been or is being or is likely to be committed or that preparations or arrangements for the commission of any offence are being or are likely to be made in or upon any premises within his area of jurisdiction, he may issue a warrant authorising a *police official* to enter the premises in question at any reasonable time for the purpose — ...(ii) of searching the premises or any person in or upon the premises for any article referred to in section 20 which such *police official* on reasonable grounds suspects to be in or upon or at the premises or upon such person; and (iii) of seizing any such article.' [Emphasis added.] The repeated correlation between 'a' and 'such', when reference is made to a 'police official' in these subsections, is indicative of a singular degree of specificity. The references to 'a police official' and 'such police official' in these subsections are not reasonably capable of being interpreted in any other manner.

[21] This approach was correctly followed in *Naidoo and Another v Minister of Law and Order and Another*; *Smit & Maritz Attorneys and Another v Lourens NO and Others*; and *S v Ntsoko*. In *Naidoo* it was said that, where s 25(1) of the Criminal Procedure Act 51 of 1977 (the CPA) refers to a 'police official', that indicated 'that the Legislature intended that an *identified police officer* should be *named* and should act throughout'. (Emphasis added.) In *Smit & Maritz v Lourens* Van Oosten J followed *Naidoo* and required that a *'known and named* police official' should be authorised in terms of a search warrant. (The emphasis appears in the original text.) In *Naidoo* Roux J relied on the provisions of s 29 of the CPA, which require a 'strict regard to decency and order' in the search of any person or premises in coming to this conclusion.

[23] In *Ntsoko* Mabuse J observed, among other criticisms of various search warrants, that: 'All the said warrants are addressed to "the Station Commander. They have not been addressed to a specifically named officer nor have they been addressed to a particular police station. This is contrary to the provisions of Section 21(2) of the [Criminal Procedure Act] . . . .' The judge found, for a number of reasons, that the terms of the search warrants were overbroad, did not satisfy the test in *Powell* and set them aside. The full court hearing the present matter disagreed with the criticism in *Ntsoko*, of the warrant being addressed simply to 'the Station Commander'.

[24] In *Silwana and Another v Magistrate, District of Piketberg and Another*, however, Foxcroft J, with whom Dlodlo AJ concurred, noted *en passant*, when referring to criticisms that a search warrant had not referred to a specifically named police officer or to the officer commanding of a particular police station, that '(i)t would be a matter of no difficulty for anyone to ascertain who the station commander was on the date when the warrant was signed' and that it 'makes more sense to specify a station commander than a named person who might not be available at the very moment when the search needed to be carried out'. This judgment arose within the context of the application for the recusal of a magistrate in a trial, where he had earlier issued the search warrant. In regard to the naming of the police official, the approach adopted in *Silwana* does not, however, accord with either a literal or purposive approach to the interpretation of s 25(1) of the CPA.

[25] In the context of a purposive interpretation of s 25(1) of the CPA, Mr *Mtsweni*, counsel for the first to fourth respondents, conceded that, in practice, it will be rare indeed that the station commander conducts a search in terms of s 25 of the CPA. Normally it will be the investigating officer. The interpretation that the police official should be named in the search

warrant acts as a safeguard against abuse so that, when the warrant is executed, a person at the premises to be searched can ask not only for the police official to produce his or her police identity card but also to demonstrate the reference to him- or herself in the warrant itself. This interpretation also reinforces the principle of accountability, more especially as it will ordinarily be the investigating officer who applies to the magistrate for a search warrant leading to the search itself. Of course, the circumstances will very often require that the investigating officer be assisted by other police officials. It remains salutary, however, that at least one police official responsible for the search should pertinently be identified in the actual search warrant.

[26] As for the requirements that a search warrant should specify the offence in connection with which the search is to be conducted, and should be 'reasonably intelligible', the provisions of the NGA and CGA should further be read together with the provisions of ss 20, 21 and 25 of the CPA.

...

[30] A search warrant is not some kind of mere 'interdepartmental correspondence' or 'note'. It is, as its very name suggests, a substantive weapon in the armoury of the state. It embodies awesome powers, as well as formidable consequences. It must be issued with care, after careful scrutiny by a magistrate or justice, and not reflexively upon a mere 'checklist approach'.

[31] What of the affidavit upon which the magistrate relies in terms of s 25 of the CPA? In the body of the search warrant it does indeed refer specifically that it appears to the magistrate 'from information on oath that there are reasonable grounds to believe that . . . '. It therefore refers directly to the affidavit or sworn statement of Mr Lekoto. Section 21(4) of the CPA requires that, after execution, the police official who has executed the warrant shall 'upon demand of any person whose rights in respect of any search or article seized under the warrant have been affected, hand to him a copy of the warrant'. In *Polonyfis v Minister of Police and Others NNO* Cachalia JA, delivering the unanimous judgment of this court, said: 'After the search a copy of the warrant and any document referred to in it must — on demand — be handed to the person in charge [of the premises] who may then decide whether or not to challenge the validity of the warrant, either because it was unlawfully issued or unlawfully executed.' It is accordingly imperative that the affidavit or sworn statement in support of the warrant should accompany the warrant and be handed over together with it. This would, additionally, expedite any court application in which a person may wish to contend that his or her rights were adversely affected by the search. This injunction accords with the constitutionally enshrined right of every person to have access to information 'that is held by another person and that is required for the exercise or protection of any rights'. This right is embodied in the Promotion of Access to Information Act 2 of 2000. It is regrettable that the appellant had to wait several weeks before he was able to receive a copy of Mr Lekoto's sworn statement from the police.

[32] I am mindful of the recent decision of the Constitutional Court in *Ngqukumba v Minister of Safety and Security and Others*, 33 in which a helpful analysis was given of the circumstances in which the mandament van spolie would be available. We are also mindful of the fact that in *Polonyfis*, after having referred to *Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others*, this court indicated that, in the absence of an 'abuse of power' or a 'gross violation' of the rights of a person to be searched, it would be slow to find that a search warrant is unlawful on purely technical grounds...

[33] The standard forms or 'template' used for the issue of search warrants will have to be revised in the light of this judgment. Nevertheless, as Mogoeng J said in *Van der Merwe*, the

retrospective invalidation in respect of all past warrants issued in a manner that is defective, as a consequence of this judgment, does not ensue. This, as he observed, might give rise to undesirable consequences. The courts must adjudicate each individual case on its own merits and all warrants, hitherto issued contrary to the guidelines herein contained, remain valid unless set aside on a case-by-case basis.

[8] The search warrant in the present appeal issued on the pro forma (J51) speaks to the concerns raised in **Goqwana** *supra*. An examination thereof reveals the following:

[8.1] It is addressed to the Station Commander without identifying the police station. The guidelines set out in **Goqwana** at paragraphs [23] to [25] in this regard are apposite.

[8.2] The offence and article is not identified with particular clarity, referring merely to illegal precious metals. It is incumbent on the magistrate to carefully scrutinize the application to satisfy himself that an offence exists or that the article could constitute an article which forms the subject matter of an offence. A mere checklist approach (Mark with an 'X' in the applicable block) does not suffice. Paragraph [30] of **Goqwana** is apposite.

[8.3] It is a requirement that a copy of the sworn affidavit which formed the basis of the application for the search warrant be handed to the person affected with a copy of the search warrant. The appellant's evidence was that the typed "statement under oath" of Lt Colonel Ngcobo which is unsigned and not commissioned was handed to him with a copy of the search warrant on the 12 September 2012(the date of the search). Despite the protestations of Lt Colonel Ngcobo in distancing herself from the document, which does not comply with the peremptory provisions of the Regulations Governing the Administering of an Oath or Affirmation, the ineluctable deduction from the late admission into evidence of a later handwritten "statement under oath" is that such statement which the state could have used when the defence raised the issue with Lt Colonel Ngcobo was not available and was a recent fabrication to cover the unsigned, non-commissioned statement handed to the appellant at the time of the search. Paragraph [31] of **Goqwana** is apposite.

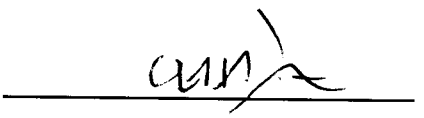
[9] Had the learned magistrate followed the course of a trial within a trial in terms of section 35(5) of the Constitution, the search warrant in all probability would have been ruled inadmissible signalling the end of the matter as the backbone of the state's case rested on the search warrant. It is opportune to conclude with the following salutary statement by Cameron JA in **S v Tandwa and Others**[4]: "In deciding whether evidence obtained in a manner that violates any right in the Bill of Rights should be excluded or not, judicial officers and practitioners will be well advised to heed to the following: "In this country's struggle to maintain law and order against the ferocious onslaught of violent crime and corruption, what differentiates those committed to the administration of justice from those who would subvert it is the commitment of the former to moral ends and moral means. We can win the struggle for a just order only through means that have moral authority. We forfeit that authority if we condone coercion and violence and other corrupt means in sustaining order. Section 35(5) is designed to protect individuals from police methods that offend basic principles of human rights."

[4] 2008 (1) SACR 613 (SCA) at [121]

CONCLUSION

[10] In the result:

The appeal against conviction is upheld.



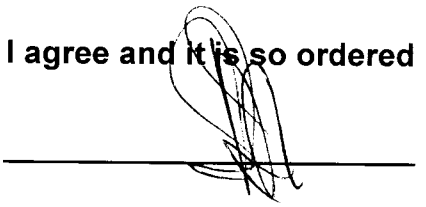
AH PETERSEN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

PRETORIA

I agree and it is so ordered



SS MPHAHLELE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

PRETORIA

Appearances:

On behalf of the Appellant : Mr Dickson

On behalf of the Respondent: Adv Williams

Director of Public Prosecutions PRETORIA

DATE HEARD: 18 April 2016

DATE OF JUDGMENT: 19 April 2016