THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 64/10

In the matter between:

ELEFTERIOS POLONYFIS	**Appellant**
v	
THE MINISTER OF POLICE	**First Respondent**
INSPECTOR P I VAN RENSBURG NO	**Second Respondent**
CONSTABLE J STRYDOM NO	**Third Respondent**
INSPECTOR BOOYSEN NO	**Fourth Respondent**
CONSTABLE MOLELEKOA NO	**Fifth Respondent**
CONSTABLE MARKGRAAFF NO	**Sixth Respondent**
THE MAGISTRATE, COLESBERG NO	**Seventh Respondent**
INSPECTOR MOUTON NO	**Eight Respondent**
CONSTABLE PETERS NO	**Ninth Respondent**
CONSTABLE MPHULANYAE NO	**Tenth Respondent**
INSPECTOR MATSHEBE NO	**Eleventh Respondent**
CONSTABLE BARNS NO	**Twelfth Respondent**
THE MAGISTRATE, DE AAR NO	**Thirteenth Respondent**

Neutral citation: *Polonyfis v The Minister of Police* (64/2010) [2011] ZASCA 26 (18 March 2011)

Coram: Brand, Maya, Cachalia, Shongwe JJA and Petse AJA

Heard: **24 February 2011**

Delivered: **18 March 2011**

Summary: Search and seizure under ss 20 and 21 of the Criminal Procedure Act 51 of 1977 discussed – The execution of a warrant will only be set aside if there is an abuse of power or a 'gross violation' of a person's rights.

ORDER

On appeal from: Northern Cape High Court, Kimberley (Lacock J sitting as court of first instance).

The following order is made:

The appeal is dismissed with costs.

JUDGMENT

CACHALIA JA (Brand, Maya, Shongwe JJA, Petse AJA concurring):

[1] This is an appeal against a judgment of Northern Cape High Court (Lacock J) dismissing an application by the appellant for an order to set aside a search warrant issued by a Colesberg magistrate.

[2] These are the facts. The appellant was the owner of a business that

operated under the name 'The Entertainment Centre' at premises in the sleepy little Karoo town of Colesberg. It was the only business of its kind in the town. On 1 December 2006, at the request of members of the SAPS, the magistrate, who is the seventh respondent, issued the search warrant – with which we are concerned in this appeal – under s 21 of the Criminal Procedure Act 51 of 1977 (the Act). The warrant reads as follows:

'SUID-AFRIKAANSE POLISIEDIENS

VISENTERINGSLASBRIEF

Artikel 20, 21 en 25 van Strafproseswet, 1977 (Wet No 51 van 1977)

Aan: Kst Strydom Kst Janse van Rensburg
Insp Booysen Kst Molelekoa
Kst Markgraaff

(Rang, naam en werksadres van lede wat deursoeking gaan uitvoer)

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

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

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

die misdryf(we), synde onwettige dobbelary onder Artikel 81(1)(a) van die Noord Kaap dobbel en Wedren Wet 1996 (nr 5/1996) en dat ek redelike gronde het om te vermoed

dat hierdie voorwerpe

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

U word hierby gemagtig om gedurende die dag/~~nag~~ die geïdentifiseerde –

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

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

Gegee onder my hand te Colesberg op hierdie dag van 1 Desember 2006 (jaar).

Volle name: EDWARD WILLIAM SCHON
Ampstitel: Magistrate/Landdros
Landdrosdistrik: COLESBERG’

[3] The application for the warrant was supported by an affidavit, referred to in the warrant as ‘Aanhangsel “A”’, which the investigating officer had deposed to. The relevant portions of the affidavit read:

‘2.

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

4.

Te Colesberg is Entertainment Centre geleë in die winkel sentrum Hall wat in Kerkstraat

is by die perseel is die modus operandi presies soos op De Aar. Die geld word by die toonbank betaal en weer word speel munte wat die masjiene werk aan jou gegee indien u enige wennings maak word die lesing neergeskryf en uitbetaal by die toonbank. Beskik oor geen lisensie nie 38 masjiene.

5.

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

[4] The following day, on 2 December, the SAPS mounted an undercover operation to gather evidence of suspected gambling. A SAPS member entered the premises described in the warrant and exchanged a R10 and a R20 note at the counter in return for which he was given 60 tokens. He used the tokens to play on a machine known as a 'one arm bandit'. The particular machine does not pay out cash amounts but registers winnings as 'credits' that are redeemable for cash. The member's endeavours yielded 35 credits for which he was paid an amount of R17.50 in cash. He then left the premises and reported to his superiors.

[5] Armed with this information and the warrant, Inspector Booysen, who is the fourth respondent and one of the officers mentioned in the warrant, entered the premises later that day. He was accompanied by four other police officers, the second, third, fifth and sixth respondents. He read the content of the warrant to the manager and handed a copy of it – without the affidavit – to him. He then proceeded to execute the warrant by seizing cash in an amount of R15 162.30, gambling machines, a coin counting machine, a scale used for weighing tokens, tokens each worth fifty cents, documents, receipt books, keys, ashtrays, chairs and some other smaller items.

[6] While conducting the search, Booysen asked the manager for his identification document. He answered that it was in his hotel room, which was some distance from the premises. Booysen then escorted him there to find the document. When they entered the room, Booysen noticed a black book. He

enquired from the manager what information it contained. The manager replied that it contained telephone numbers. Booysen asked him who his employer was. The manager was uncooperative and replied that he did not know. Booysen then took possession of the book in the hope that he may be able to obtain the employer's contact details there. They then returned to the business premises and found the appellant's attorney standing outside with the other police officers.

[7] They entered the premises and Booysen exhibited the warrant to the attorney – again without the affidavit. It bears mentioning that Booysen had the affidavit in his possession throughout the search and seizure operation. The police officers then left with the items that they had seized. The appellant initially sought the return of all these items. The high court, by consent, granted an order for the return of all the articles, except the money, tokens and gambling machines. The appellant complains that the high court ought also to have ordered that the remaining articles be returned.

[8] The appellant attacks the lawfulness of the search and seizure operation on four grounds: first, because the warrant did not indicate which sub-section of s 20 of the Act was applicable to the search; secondly, for the reason that the address of the premises to be searched was vaguely described in the warrant; thirdly, that Booysen's failure to exhibit the affidavit, when the warrant was executed rendered the search unlawful, and finally, that the execution of the warrant was unlawful because the SAPS seized some things that were not mentioned in the warrant.

[9] Before I deal with each of these contentions it is worth referring to some of the broad principles applicable to search and seizure warrants that Nugent JA recently restated in *Minister of Safety and Security v Van Der Merwe*:[1]

'From the earliest criminal codes – both in this country and abroad – statutory powers of search and seizure have existed for the detection and prosecution of crime. Such powers, to search and seize in relation to crime, are generally authorised in the following

1 [2010] ZASCA 101 (7 September 2010); 2011 (1) SACR 211 (SCA) paras 8-15.

way.

A court or judicial officer is empowered by the statute to authorise, first, a search of premises, and secondly, the seizure of articles found in the course of that search, by issuing a warrant to that effect. Most often, the power to issue such a warrant is dependent upon it being shown, by information on oath, that it is suspected on, reasonable grounds, that an article (or articles) connected with a suspected offence is to be found on premises.

For a warrant to be justified, in such circumstances, the information that is placed before the court or judicial officer will necessarily need to demonstrate, firstly, that there are reasonable grounds to believe that a crime has been committed; and secondly, that there are reasonable grounds to believe that an article connected with the suspected crime is to be found upon particular premises. In order to demonstrate the existence of those jurisdictional facts, the "information on oath" will necessarily need to disclose the nature of the offence that is suspected.

In some cases it will be known that a particular article exists that is connected with the suspected crime. In those cases the purpose of the search will be to discover the particular article, and the article will thus be capable of being described in specific terms. In other cases it will not be known whether any particular article exists, but it can be expected that an article or articles of a particular kind will exist if the offence was committed. In such cases the purpose of the search will be to discover whether such article or articles exist/s, and thus they or it will be capable of being described only by reference to their genus. It is in relation to warrants of that kind that problems of validity most often arise. It will be inherent in the nature of the authority to search that the searcher might, in appropriate circumstances, be entitled to examine property that is not itself connected with the crime – for example, the contents of a cupboard or a drawer, or a collection of documents – to ascertain whether it contains or is the article that is being sought.

The authority that is conferred by a warrant to conduct a search, and then to seize what is found, makes material inroads upon rights that have always been protected at common law – amongst which are rights to privacy and property and personal integrity. In those circumstances – as demonstrated by the review of decided cases by Cameron JA in *Powell NO & others v Van der Merwe NO & others* – the courts in this country have always construed statutes that authorise the issue of warrants strictly in favour of the minimum invasion of such rights – which is in accordance with a

general principle of our law to that effect. As the learned judge said in that case:

"Our law has a long history of scrutinising search warrants with rigour and exactitude – indeed, with sometimes technical rigour and exactitude. The common-law rights so protected are now enshrined, subject to reasonable limitation, in s 14 of the Constitution:

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

(a) their person or their home searched;

(b) their property searched;

(c) their possessions seized; or

(d) the privacy of their communications infringed.' "

A challenge to the validity of a warrant will thus call for scrutiny of the information that was before the issuing officer, to determine, firstly, whether it sufficiently disclosed a reasonable suspicion that an offence had been committed; and secondly, whether it authorises no more than is strictly permitted by the statute.

Questions that arise in relation to the second issue will generally fall into either of two different categories. The first is whether the warrant is sufficiently clear as to the acts that it permits. For, where the warrant is vague, it follows that it will not be possible to demonstrate that it goes no further than is permitted by the statute. If a warrant is clear in its terms, a second, and different, question might arise, which is whether the acts that it permits go beyond what is permitted by the statute. If it does, then the warrant is often said to be "overbroad" and will be invalid so far as it purports to authorise acts in excess of what the statute permits. A warrant that is overbroad might, depending upon the extent of its invalidity, be set aside in whole, or the bad might be severed from the good.

Needless to say, a warrant may be executed only in its terms. But it is important to bear in mind that it is not open to a person affected by a search to resort to self-help to prevent the execution of a warrant, even if he or she believes that its terms are being exceeded – which is in accordance with ordinary principles of law. As Langa CJ pointed out in *Thint*:

"While a searched person may in certain cases collaborate and aid the investigator . . . the legislation envisages a unilateral exercise of power that is not dependent on such collaboration."

Thus it is ultimately the searcher who must decide whether an article or articles fall within the terms of the warrant, though he or she does so at the risk that, if not, his or her conduct might be found to have been unlawful.' (Footnotes omitted.)

[10] Bearing these principles in mind I turn to consider the first of the appellant's complaints – that the warrant is invalid because the learned magistrate failed to specify which sub-section of s 20 is applicable to the articles that may be seized.[2] I did not understand the appellant to contend that a warrant would in and of itself be invalid if it purported to authorise the seizure of articles under all three sub-sections. This must be so because the jurisdictional facts necessary for the issue of a single warrant may be found in all three sub-sections.[3] In other words an article may be 'concerned in the commission of an offence', 'may afford evidence of the commission of an offence' and also may 'on reasonable grounds believed to be intended to be used in the commission of an offence'. Indeed this would frequently be the case – particularly because the sections are couched in general terms and are almost impossible to delineate.

[11] The appellant's real objection to the warrant is that the information that was placed before the magistrate did not justify his using all three sub-sections. Mr Jagga, who appeared for the appellant, contended that from the magistrate's reasons it is apparent that he only extended the warrant to cover all the sub-sections so as to couch the warrant in terms that are as wide as possible. The warrant was therefore over-broad, and for that reason invalid.

[12] The contention does not bear scrutiny. The magistrate stated his reasons for issuing the warrant in the terms he did as follows:

2Section 20: 'State may seize certain articles
The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article)-
(a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere;
(b) which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or
(c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.

3 To the extent that it may be suggested that two provincial divisions have held that it is not permissible for a search warrant to be issued to cover the circumstances in all three sub-sections, I respectfully disagree. See *Fiona Henning v The Minister of Public Safety and Security* Case No 22157/2003 paras 23 and 24; *Sarel Blaauw v The Chairperson of the North West Gambling Board & others* Case No 940/04 paras 13 and 14.

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

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

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

[13] It is clear that the authorisation was sought to search the premises and seize articles that bear some relationship to illegal gambling on the premises. A gambling machine, for example, which is one of the articles we are concerned with in this case, may be concerned in the commission of the offence of illegal gambling, afford evidence of the commission of that offence and reasonably be used in the commission of further such offences. In other words the three sub-sections would all apply. Similarly, as the magistrate said, money and tokens could notionally also fall into all three categories. The magistrate, therefore, correctly did not limit the warrant to only one of the sub-sections.

[14] I turn to the appellant’s second ground of attack; that the inaccurate description of the address in the warrant rendered it invalid. The warrant describes the premises as *‘Kerkstraat, Hall Entertainment Centre’*. The correct description of the premises and its address is, however, *‘The Entertainment Center, shop 10, The Mall, 72 Church Street, Colesberg’*. The affidavit prepared for the purpose of obtaining the warrant contains the following description: *‘Te Colesberg is Entertainment Centre geleë in die winkel sentrum Hall wat in Kerkstraat is’*. It appears that the word *‘Hall’* was erroneously used instead of *‘the Mall’*.

[15] Mr Jagga, submitted that the description of the property must be

ascertained only by reference to the warrant and not the affidavit, which, as I have mentioned, was not attached to the warrant when it was executed. On this basis it is contended that the description of the address on the face of the warrant does not meet the strict requirements of the test that was adopted by Gura AJ in *Sarel Blaauw v The Chairperson of the North West Gambling Board & others.*[4] There the court was persuaded, on the basis of Canadian authority,[5] that South African law requires a warrant:

'(To) identify a physical location for the search to take place . . . The description of the place to be searched should be precise enough to allow someone unfamiliar with the investigation to identify the location to be searched from the warrant alone . . . the address or described place must be particular and accurate. For example, if the warrant outlines the wrong address, the search and seizure are viewed as warrantless.' (Ellipses added.)

[16] For present purposes it is not necessary to consider this authority, except to the limited extent that it is relevant in this case. The starting point must always be to ask what the South African law is. For this we must look to s 21(2) of the Act, which says that a warrant shall authorise a police official 'to enter and search any premises identified in the warrant'. The section means no more than that the warrant should intelligibly describe the premises to be searched so that the official who is authorised to conduct the search is able to identify it. Absolute perfection in description is not required – not even in the United States where the Constitution's Fourth Amendment provides in terms that no warrant shall issue except those 'particularly describing the place to be searched'.[6] US courts have thus held that 'it is enough if the description is such that the officer with the search warrant can, with reasonable effort ascertain and identify the place intended'.[7] In a similar vein, Canadian courts have emphasised that the substance of the warrant must be looked at to give effect to it.[8] Thus a technically

4 Case no 949/04 (BPD) para 16.
5 Scott C Hutchison *et al Search and Seizure Law in Canada* vol 2 at 16-30 and 16-31.
6 Wayne R LaFave & Jerold H Israel *Criminal Procedure* 1985 p 135.
7 *Steele v United States No 1* 267 US 498, 45 SCt 414, 69 LEd 757 (1925).
8 *R v Silverstone* 66 CCC (3 rd) 125 paras 61-64.

wrong address does not invalidate a warrant if it otherwise describes the premises with sufficient particularity so that the police can ascertain and identify the place to be searched.[9]

[17] Viewed in this light the warrant with which we are concerned – even without the affidavit – met the requirements of s 21 of the Act. The 'Entertainment Centre' was the only one of its kind on 'Kerkstraat' and in Colesberg. The police officers executing the warrant knew the premises and were able to locate it without any difficulty. I should add that, *Sarel Blaauw*, the case on which the appellant relies, does not support him. There the learned judge correctly said that if the description of the premises is not accurate, he would nevertheless uphold a warrant if the search was conducted at the correct address.[10] There is therefore no substance in this contention.

[18] I turn to the appellant's third complaint; that the absence of the affidavit when the SAPS executed the warrant invalidated the search. As I understand the complaint it is that because Booysen did not hand over the affidavit to the manager when he gave him the warrant, the warrant was incomplete and for this reason its execution was unlawful.

[19] Section 21(4) of the Act requires a police officer executing a warrant to '*after such execution, upon demand of any person whose rights in respect of any search or article seized under the warrant have been affected, hand him a copy of the warrant'.* The reason that the officer must, on demand hand a copy of the warrant, only after execution is, as Nugent JA points out in the passage quoted above, because the search and seizure process is a unilateral exercise that is not dependent upon the cooperation of the person who is in charge of the property that is being searched. And it is for the officer conducting the search to decide whether or not an item to be seized falls within the terms of the warrant. After the search a copy of the warrant and any document referred to in it must –

9 *R c Charles* 2010 QCCQ 9178 (Can LII) para 37.
10 n 4 para 17.

on demand – be handed to the person in charge who may then decide whether or not to challenge the validity of the warrant, either because it was unlawfully issued or unlawfully executed.

[20] Inspector Booysen read the contents of the warrant to the manager and handed a copy of it to him, albeit without the affidavit. The manager did not 'demand' a copy of the affidavit, even though the warrant referred to it. Neither did the appellant's attorney. They could have done so at any stage after the execution of the search when they must have realised that they had not received a copy of the affidavit. They elected not to do so for reasons only they are aware of. Booysen says pertinently that it was an oversight on his part not to have handed a copy of the document to the manager and that he would have handed a copy to him if he had asked for it because he had the document in his possession at the time of the search. There is therefore no merit in this complaint either.

[21] I turn to the appellant's fourth and final contention – that the manner of execution of the warrant was unlawful because the executing officers seized not only money, tokens, and machines, but they also took chairs, ashtrays and documents of whatever nature, including documents from the manager's hotel room. The validity of the whole search was therefore tainted. For this rather novel proposition Mr Jagga relied on this court's judgment in *Pretoria Portland Cement Company Limited & another v The Competition Commission & others*[11] where the court held that where the executing authority abuses its power in a manner that involves a gross violation of a person's right to privacy the entire search and seizure process may be set aside.[12] The court qualified this by saying that an unlawful execution will not by itself inevitably taint a warrant that is itself regular.[13]

[22] The search warrant authorised only the seizure of machines, money and

11 2003 (2) SA 385 (SCA).
12 Ibid para 71 and 73.
13 Ibid para 73I-J.

tokens. The SAPS, however, seized articles that the warrant did not mention. And it was not able to justify the seizure of the other articles on any other ground. The high court, therefore, correctly ordered the return of all those items not mentioned in the warrant.

[23] But it does not mean that because the execution of the warrant went beyond its strict terms that the entire search was tainted. I do not think that the behaviour or conduct of the police amounted to, in *Pretoria Portland's* formulation, either an 'abuse of power' or 'gross violation' of the appellant's rights. The seizure simply went beyond the ambit of the warrant and the appropriate remedy for this was, as the high court ordered, the return of those articles that were seized but not authorised by the warrant.

[24] In my view, the court below correctly dismissed all the appellant's contentions. In the result the appeal is dismissed with costs.

A CACHALIA
JUDGE OF APPEAL

APPEARANCES

APPELLANTS:	N Jagga Instructed by Vardakos Attorneys, Vereeniging Honey & Partners, Bloemfontein

RESPONDENT:	W Coetzee (1st – 6th and 8th) Instructed by The State Attorney, Kimberley (7th) The Magistrate, Colesberg NO, Colesberg (13th) The Magistrate, De Aar NO, De Aar The State Attorney, Bloemfontein