IN THE HIGH COURT OF SOUTH AFRICA
CAPE OF GOOD HOPE PROVINCIAL DIVISION

Reportable

Case No.: 5880/2008 (A)

In the matter between:

GARY WALTER VAN DER MERWE	**First Applicant**
MONIQUE VAN DER MERWE	**Second Applicant**
FERN CAMERON (formerly VAN DER MERWE	**Third Applicant**
ALAN RAYMOND FANAROFF	**Fourth Applicant**
TANTCO GLOBAL (PTY) LTD	**Fifth Applicant**
EXECUTIVE HELICOPTERS (PTY) LTD	**Sixth Applicant**
EXEL AVIATION (PTY) LTD	**Seventh Applicant**
AIRCRAFT SUPPORT (PTY) LTD	**Eight Applicant**
MADIBA AIR AND SEA (PTY) LTD	**Ninth Applicant**
ZONNEKUS MANSION (PTY) LTD	**Tenth Applicant**
SUMMER DAZE TRADING 712 (PTY) LTD	**Eleventh Applicant**
WESTSIDE TRADING (PTY) LTD	**Twelfth Applicant**
SA BARTER (PTY) LTD	**Thirteen Applicant**
TWO OCEANS AVIATION (PTY) LTD	**Fourteenth Applicant**
HELIBASE (PTY) LTD	**Fifteenth Applicant**

and

THE ADDITIONAL MAGISTRATE, CAPE TOWN	**First Respondent**
WILHELMINA ANNA KOTZE	**Second Respondent**
COLIN ANDERSON GILLESPIE	**Third Respondent**
THE MINISTER OF SAFETY AND SECURITY	**Fourth Respondent**
THE COMMISSIONER: SOUTH AFRICAN REVENUE SERVICE	**Fifth Respondent**
THE ADDITIONAL MAGISTRATE, BELLVILLE	**Sixth Respondent**
THE ADDITIONAL MAGISTRATE, RANDBURG	**Seventh Respondent**

JUDGMENT: 24 December 2008

Davis J and Saldanha J

Introduction

[1] This application concerns the validity of certain search warrants and search and seizure operations which were conducted pursuant to search warrants during 2008.

[2] Much of the background to these operations is not disputed and can perhaps best be gleaned from second and fourth respondents' answering affidavit deposed to by Superintendent Kotze, a member of the Commercial Branch of the South African Police Services. She avers that, on 4 December 2007, her unit received a request from the office of the Director of Public Prosecutions for assistance in a tax investigation. Subsequently, she was appointed as the investigating officer. The case concerned a criminal investigation relating to charges against first applicant, the general manager of sixth and tenth applicants and the director of the eight, ninth, thirteenth and fifteenth applicants with regard to violations of legislation of income tax and value added tax ('VAT') as well as in respect of exchange control and civil aviation violations.

[3] During the course of her investigations she obtained a comprehensive affidavit from the third respondent, Mr Colin Gillespie, criminal investigator in the employ of SARS. She also prepared her own affidavit with a view of obtaining search warrants for various premises connected to applicants.

[4] Three separate sets of search warrants were generated in respect of premises in the Western Cape; one for Zonnekus, being the home of first applicant, secondly one at Helibase, being business premises of various of the applicants, and thirdly, one for Royal Ascot, the premises of fourth applicant. In addition, as Ms Kotze states in her affidavit, it was decided to apply for a search warrant for the premises of applicants' accountants / auditors, Messrs Carrim, Maritz & Associates, situated in Midrand and therefore located within the jurisdiction of Randburg Magistrates Court. All four applications for warrants were prepared on essentially the same grounds.

[5] Superintendent Kotze states in her affidavit that she traveled to Randburg and met with seventh respondent, Magistrate Mkhari on 25 February 2008. She handed Mr Mkhari the application and explained the reasons for bringing the application in his jurisdiction. On 27 February 2008 Mr Mkhari indicated that he required more time to come to a final decision. On the 28 February 2008 he signed and authorised the Randburg search warrant.

[6] On the 6 March 2008 the Chief Magistrate Cape Town, Mr Maku informed Superintendent Kotze that Mr Lekuleni, an additional magistrate on his staff, had been appointed to deal with the matter.

[7] According to Superintendent Kotze, she met with Magistrate Lekuleni on 6 March 2008 and explained the nature and extent of the investigation. He indicated that he would like to take his time to study the application and that they should return the following day, 7 March 2008. Mr Lekuleni raised certain procedural difficulties and asked questions with the draft warrants but on the 7 March 2008 he finally issued them.

[8] On the 10 June 2008 a further search warrant was issued regarding the Bellville premises of Carrim & Maritz and Associates. In this case, the warrant was considered by the senior Magistrate, Bellville, being sixth respondent. According to Superintendent Kotze, she explained the nature of the warrants and the complicated matter upon which the need for warrants had been based. The magistrate, Mrs Du Toit, carefully went through the documentation and spent some time considering the application, prior to authorising the warrant.

Applicants Case

[9] In assailing the validity of these warrants, applicants base their challenge on two central arguments:

(1) in the case of four of the five impugned search warrants there was no mention of the suspected offences that were under investigation;

(2) the various magistrates failed to apply their mind to the

application for such warrants and accordingly the warrants were fatally defective in law.

In addition, applicants contend that other than reasons provided for by Magistrate Lekuleni, there were no reasons provided by any of the magistrates for their decision. None of these magistrates filed affidavits in this application. Thus, applicants contend that the court had not been informed by these magistrates what they had read in preparation for their various decisions nor what they considered prior to issuing the relevant warrants. Any evidence provided by Superintendent Kotze concerning the decision making process of the various magistrates stood to be rejected as hearsay evidence.

A description of the warrants

[10] In essence the three warrants for Zonnekus, Helibase and Royal Ascot, which were issued by first respondent, take a similar form.

[11] Each warrant consists of one page and then refers to three Annexures A, B, C. The heading of the one page search warrant states:

"*SEARCH WARRANT*

[Section 20, 21, and/or 25 Criminal Procedure Act, (Act 51 of 1977)]

To persons as listed in "Annexure A" hereto"

Below the heading is a box in which a preamble to the operative part of the search warrant is contained and it refers to articles, 'to wit, as per annexure "B" hereto. Below that are 7 boxes marked (a) – (h), which each have and "X" marked next to the box. Immediately below those is the continuation of the preamble which states:

> "**and which is in the possession of/under the control of/upon or at a premises at/upon the person of Gary Van der Merwe, Monique Van der Merwe, Fern Van der Merwe at Zonnekus Mansions, Chandlers Close, Woodbridge Island, Milnerton, Cape Town"**

The operative part of the search warrant then states:

> *"THESE ARE THEREFORE to authorise you to search during the day time * the identified person/to enter and search the identified premises and to search any person found on or at such premises and to direct you to seize the said articles as described in "Annexure B" hereto if found (including inspecting, searching and seizing computer-related objects in the manner authorised in "Annexure C" hereto), and to * deal with it according to law/bring it before me to be dealt with according to law".*

The first respondent did not delete any part of the pro-forma search

warrant. For example, at the end of the operative part of the search warrant, he had a choice whether to delete either "*deal with it according to law*" or "*bring it before me to be dealt with according to law*".

[12] The three Annexures A, B, and C were attached to the printed warrant. Annexure "A" consists of a list of named individuals who are authorised by the search warrant to conduct the search. Annexure "B" lists the articles which may be seized during the search. There are 18 separate items so set out.

As stated above, the suspected offences that were under investigation are not mentioned at all in the 18 items. Similarly, the nature of the investigation is not described at all.

Despite the absence of any detail as to the nature of the investigation reference is made to documentation "*relevant to the investigation*" ('ondersoek') in terms 13,15,16,17 and 18 of Annexure B.

For example, item 15, which does not limit the search to the undefined "*ondersoek*", states:

> "**Enige stawing van betalings gemaak tussen die volgende individue**
>
> **Gary van der Merwe**

Monique van der Merwe

Robert A van der Merwe

Karin G van der Merwe

Fern van der Merwe

Alan Fanaroff

Sean Pautz

Gary Fox

William Olmstead".

Item 17, like item 15, is extremely wide. It permits seizure of any information relating to the lifestyles of the named individuals insofar as it is relevant to the indeterminate, and indeed open-ended, investigation ("*ondersoek*").

Item 18 refers, in general, to any electronic computer data "*wat wel of moontlik betrekking het op die indersoek*".

Annexure C authorises the manner of inspecting, searching and seizing computer-related objects. Annexure "C" sets out 4 methods of searching and seizing. Item 4 of Annexure "C" also has references to:

> **"...all information which has a bearing, or might have a bearing, on the investigation in question".**

It also permits for searches "*at a location removed from the premises*".

[13] The Randburg warrant, which was issued in 28 February 2008, also consists of one page and makes reference to Annexure A and B. Annexure A refers to the three police officers who are authorised to conduct the search. Annexure B consists of thirteen items which set out 'dokumente en bewysse relevant tot die ondersoek'. Applicants point out there is no identification of the suspected offences under the investigation.

[14] The final search warrant, being the search warrant authorising the search of the Bellville premises of Carrim & Maritz Associates, again takes the form of a printed page. Annexure A specifies the officers from South African Police Services and the official from SARS who are authorised to attend to the search. Annexure B consists of 6 items which detail the articles which may be seized. Applicants contend, in particular, that item 5 of Annexure B is excessively wide in scope:

> "**Enige stawing van betalings gemaak tussen die volgende individue**
>
> **Gary van der Merwe**
>
> **Monique van der Merwe**
>
> **Robert A van der Merwe**
>
> **Karin G van der Merwe**
>
> **Fern van der Merwe**
>
> **Alan Fanaroff**
>
> **Sean Pautz**

Gary Fox

William Olmstead".

[15] The major difference, however, between this warrant and the other warrants is the inclusion of Annexure C. In this Annexure a detailed description is provided of the reasonable grounds which the investigating authorities consider exist to sustain charges of income tax and VAT fraud against various of the applicants. Not only are particular sections of both the VAT Act and the Income Tax Act specified in Annexure C, but the manner in which it is alleged the fraud was conducted is also described in some detail.

[16] With this description of the various search warrants it is possible to turn to the application. Before dealing with the first of the major challenges launched by applicant, namely its contention that the offences require specification in the warrant, an in *limine* point must be analysed.

Jurisdiction of this court in respect of the Randburg warrant

[17] The Randburg search warrant was executed on 10 March 2008 at Carrim & Maritz in Midrand, Gauteng.

[18] The challenge to the validity of the Ranburg Carrim & Maritz search warrant is contained in an application by the applicants, which included

challenges – on similar grounds – to three search warrants issued in Cape Town and one in Bellville, all four of which were executed within the jurisdiction of this Court.

[19] The investigation and investigating officer are based in the Western Cape. The criminal investigation underlying the Randburg and other search warrants was registered under a Cape Town Commercial Branch case number CAS 3/12/2007.

[20] The investigating officer traveled from Cape Town to Gauteng to meet the magistrate of Randburg so that she could hand him the application for the search warrant and explain the reasons for applying in that jurisdiction.

[21] It is accepted that the basis of the challenge to the Randburg search warrant is almost in identical terms to that of the challenge to the three Cape Town search warrants.

[22] It must also be accepted that at the hearing none of the respondents took issue with this Court deciding on the validity of the Randburg search warrant. In addition, the Randburg Magistrate, the seventh respondent did not object to this Court's jurisdiction. Mr Hodes, who appeared with Mr Katz on behalf of applicant, submitted that the inescapable inference is

that the Randburg Magistrate has, at the very least by implication, consented to the jurisdiction of this Court.

[23] In support of this contention, applicants rely upon a judgment in Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and Others 2001 (4) SA 1184 (SCA), at para [22] where Cameron JA stated:

> "*The objection in any event has no substance. First, this is no ordinary litigation. It is a class action. It is an innovation expressly mandated by the Constitution. We are enjoined by the Constitution to interpret the Bill of Rights, including its standing provisions, so as to 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom'. As pointed out earlier we are also enjoined to develop the common law – which includes the common law of jurisdiction – so as to 'promote the spirit, purport and objects of the Bill of Rights'.* ***This Court has in the past not been averse to developing the doctrines and principles of jurisdiction so as to ensure rational and equitable rules****. In Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd this Court held, applying the common–law doctrine of cohesion of a cause of action (continentia causae), that where one court has jurisdiction over a part of a cause,* ***considerations of convenience, justice and good sense justify its exercising***

jurisdiction over the whole cause. *The partial location of the object of a contractual performance (a bridge between two provinces) within the jurisdiction of one court therefore gave that court jurisdiction over the whole cause of action. The Court expressly left open the further development and application of the doctrine of cohesion of causes. The present seems to me a matter amply justifying its further evolution. The Eastern Cape Division has jurisdiction over the original applicants and over members of the class entitled to payment of their pensions within its domain. That, in my view, is sufficient to give it jurisdiction over the whole class, who, subject to satisfactory 'opt-out' procedures, will accordingly be bound by its judgment."*

[24] The problem with both this case and the earlier one relied upon to justify an extension of jurisdiction, being Roberts Construction LTD v Willcox Bros (Pty) Ltd 1962 (4) SA 326 (A), is that both cases are clearly distinguishable. A failure to exercise jurisdiction in Ngxuza worked injustice to the applicants. In Roberts, the cause of action was significantly located in the Orange Free State, which court therefore had jurisdiction. For this reason, an application of the *continentia causae* principle was justified in these cases see LAWSA Volume 11 para 553.

[25] In the present dispute, both the site of the power of the permission (the authorising magistrate) and the search (Midrand) fall outside this court's jurisdiction. Absent national jurisdiction, this court cannot decide a direct question concerning the invalidity of an act performed by a Randburg magistrate. While section 19 (1) (b) of the Supreme Court Act 59 of 1959 does extend a provincial division's jurisdiction, it does so only when the court has jurisdiction over the 'cause'. In the present dispute, the cause is a discrete one, the Randburg warrant, over which this court has no jurisdiction. Furthermore, a mere submission by the parties to jurisdiction cannot be sufficient to confer jurisdiction. S v Absolom 1989 (4) SA 154 (A).

The omission of the suspected offences that are under investigation

[26] Mr Hodes, relied heavily on the majority judgment in Thint (Pty) Ltd v National Director of Public Prosecutions and others : Zuma and another v National Director of Public Prosecutions and others 2008 (2) SACR 421 (CC). In this case the validity of various search warrants were placed in issue. The warrants had been issued in terms of section 29 (5) and (6) of the National Prosecuting Authority Act 32 of 1998 ('NPA').

[26] In dealing with the validity of these warrants, Langa CJ noted that the NPA provided considerable safeguards which insured that the infringement of a person's right to privacy extended no further than was reasonably

necessary in the circumstances. A judicial officer was required to exercise his/her discretion to authorise a search in a manner which provided protection for the individuals right to privacy. Further, once the decision to issue the warrant had been made, the relevant judicial officer was required to ensure that the warrant was not excessively general nor overbroad and that its terms were 'reasonably clear'. The Chief Justice went on to say that there were further elements of protection for a party being so searched. A right to privacy may be vindicated by a reviewing court which can strike down overly broad warrants and order the return of objects seized pursuant thereto. Finally, the criminal trial must be fair and an accused person was entitled to object to any evidence of conduct that may render that trial unfair. See para 79 of the judgment.

[27] Turning to the role of a judicial officer in the issuing of a search warrant, Langa CJ referred to the earlier *dictum* of the Constitutional Court in South African Association of Personal Injury Lawyers v Heath and others 2001 (1) SA 883 CC at para 34:

> "*The performance of such function ordinarily call for the qualities and skills required for the performance of judicial functions – independence, the weighing up of information, the forming of an opinion based on information, and the giving of a decision on the basis of a consideration of relevant information. The same can be said about the searching of search warrants, where the Judge is*

required to determine whether grounds exist for the invasion of privacy resulting from searches."

[28] In performing the role of considering a challenge to the issue of the search warrant, a court was required to consider two jurisdictional facts for the issue of a search warrant: the existence of a reasonable suspicion that a crime has been committed and the existence of reasonable grounds to believe that objects connected with the investigation into the suspected offence may be found on the premises. See para 91

[29] Flowing from these jurisdictional requirements, Langa CJ described the obligations imposed upon investigators seeking search warrants as follows:

"*This approach, in a nutshell, may be described as follows: Investigators should restrict their search, examination, and seizure to those classes of items that they have reason to believe might have a bearing on the investigation in question. That reason may flow from prior knowledge of the investigation, or it may occur to an investigator during the course of the search or emerge during a conversation with persons at the searched premises, but a reason they must have. That reason, moreover, should also be sufficiently plausible to outweigh the countervailing risk that the item might be irrelevant to the investigation and examining it would amount to an*

invasion of privacy. Section 29 should not be interpreted to authorise the examination or seizure of an item in circumstances where there is no reason to believe that it might have a bearing on the investigation." para 146

[30] This analysis led Langa CJ to conclude that the most relevant principle in determining whether a search warrant that is lawful was that of intelligibility. Briefly stated, this principle provides that '*a warrant must convey intelligibly to both searcher and searched the ambit of the search it authorises*'. para 151. Langa CJ then sets out the test to be satisfied before a warrant passes the intelligibility principle as follows:

"[*t*]*hese warrants must be 'reasonable intelligible', in the sense that they are reasonably capable of being understood by the reasonably will-informed person who understands the relevant empowering legislation and the nature of the offences under investigation."* para 154

[31] Based on this analysis, Langa CJ held that the following was required for a valid warrant in terms of section 29 NPA:

"*A s 29 warrant should state at least the following, in a manner that is reasonably intelligible without recourse to external sources of information: the statutory provision in terms whereof it is issued; to whom it is addressed; the powers it confers upon the addressee,*

the suspected offences that are under investigation; the premises to be searched; and the classes of items that are reasonably suspected to be on or in that premises. It may therefore be said that the warrant should itself define the scope of the investigation and authorised search in a reasonably intelligible manner. "para 159.

Mr Hodes conceded that the case in Thint, *supra* concerned the proper interpretation and application of section 29 of the NPA Act as opposed to its constitutional validity or the interpretation of section 20 of the Criminal Procedure Act of 51 of 1977 (' the Act'), being the applicable provision in the present dispute. However, he submitted that the approach adopted in Thint, *supra* provides guidance for the process of interpretation and application which is necessary in terms of section 39 (2) of the Republic of South Africa Constitution Act 108 of 1996 ('the Constitution') to parse the particular provisions of section 20 of the Act.

[32] In this connection, Langa CJ observed that the common law principle of intelligibility needed clarification. It therefore fell to the Constitutional Court to give it more concrete content and to determine what it requires specifically when apply to section 29 warrants. He went on to say:

"*As this constitutes a development of the common law, the content we give it must promote the spirit, purport and objects of the Bill of Rights.*"(para 151)

Respondents' case

[33] Mr Le Grange, who appeared together with Mr Masuku on behalf of second and fourth respondents, made much of the fact that the present impugned search warrants were issued in terms of section 20 of the Act and not under the NPA. Further, he referred to a footnote which appears in the majority judgment of Langa CJ in Thint supra:

> "*There is no reason to hold that this intelligibility principle should impose exactly the same requirement for all search and seizure warrants, no matter the statutory provision in terms whereof they are issued.*" footnote 112 at 487

[34] Mr Le Grange emphasised two mechanisms contained in section 29 NPA which were designed to inform the searched person about the scope of the authorised search. Section 29 (9) (a) provides that 'immediately before commencing with the execution', a copy of the warrant must be provided to the searched person. Section 29 (9) (b) requires the investigator 'to supply such a person at his or her request with particulars regarding his/her authority to execute such a warrant'.

[35] Mr Le Grange submitted that these provisions placed a duty on investigator to answer questions about the scope of the authorised search that a searched person may wish to ask in order to 'to enable the

searched person who cannot read or understand complexed legal language to gain some idea of the ambit of the search to which she had been subjected'. Furthermore, the person executing the warrant had to hand to the searched person a copy of the warrant before commencing with the execution.

[36] By contrast, section 21 (4) of the Act provided that the person undertaking the search was obliged to hand a copy of the warrant 'to any person whose rights in respect in any search or article issued under the warrant have been affected' but only after the execution of the search warrant.

[37] Mr Le Grange therefore submitted that this distinction revealed the reason why a section 29 NPA warrant would require a reference to the suspected offence as opposed to a search warrant authorised under the Act. Under the NPA, the searched person had a right to gain an idea of the ambit of the search prior to its commencement. That was not the case with a search undertaken in terms of sections 20 and 21 of the Act.

[38] Furthermore Mr Le Grange sought to buttress his argument by way of reliance on a judgment of Tindall J (as he then was) in Pullen NO and others v Waja 1929 TPD 838, in particular the following *dictum*:

> *"It seems to me highly desirable that a search-warrant ought to mention the alleged offence, and if I could find a satisfactory reason*

*for holding that this Court has the power to lay down that mention of the offence is essential to the validity of a search warrant I should willingly lay down such a rule. It is desirable that the person whose premises are being invaded should know the reason why; the arguments in favour of the desirability of such a practice are obvious. But in my opinion there is nothing in sec.n 49 which justifies the Court in laying down such a rule. The use of the words "any such thing" in the sentence in the section which speaks of the warrant as a "warrant directing a policeman to search such premises and seize any such thing" cannot be construed to indicate anything more than that the warrant must identify the things to be seized. The section does not indicate in any way that the articles must be identified by reference to the offence."*at 849

Thus, Mr Le Grange contended that, while it might be desirable that a search warrant under the Act ought to mention the alleged offence/s, the approach adopted by Tindall J continued to request the legal requirements pertaining to validity of a search warrant issued in terms of the Act. A further authority relied upon by second and fourth respondents was a judgment of Bertelsmann J in Bennett and Others v Minister of Safety and Security and Others 2006 (1) SACR 523 (T) where the court adopted an extremely generous approach to warrants which it had described as having a 'huge compass'. The point of reliance on this judgment was to

emphasize the importance of considerations which allow due process principles to be trumped by the imperative of crime control.

Evaluation

[39] In our view, the majority judgment in Pullen hardly represents as convincing an assertion of the common law position as contended for by respondents. Significantly, there was a minority judgment by De Waal JP which referred to an earlier decision Innes CJ in Hertzfelder **v** Attorney General 1907 TS 403 in which the court had held that a warrant was bad if it had not specified the crime alleged to have been committed by the applicant. Hertzfelder *supra* at 405. Whereas Tindall J had accepted that his approach contradicted that of Innes CJ (at 850), he justified this difference by stating:

> "*In that case, however counsel for the respondent admitted that the warrant was invalid and the question was not argued.*"

This conclusion cannot be sustained after a careful reading of the judgment in Hertzfelder, a point made clearly by De Waal JP in his minority judgment. As De Waal JP said at 864 about the relevant legislation:

> "*If the legislature had intended that upon the passing of the 1917 Act the rule as laid down in Hertzfelder's case that a search warrant was bad which had not specified a crime alleged to have been*

committed, was no longer to be observed, it would have manifested that intention expressly and in clear language."

[40] Viewed accordingly therefore, the precedent invoked by Mr Le Grange by way of the majority judgment of Tindall J in Pullen was predicated on a very weak jurisprudential foundation.

[41] The contrary conclusion, to which we have arrived, is supported by the case law which has developed the applicable common law to search warrants and which principles are set out eloquently by Cameron JA in Powell NO and others v Van Der Merwe NO and others 2005 (1) SACR 371 (SCA) at para 59:

"*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 right 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 why 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 the 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 object, and must do so intelligibly and narrowly within the bounds of the empowering statute."*

[42] If there was any doubt about the need to include a reference to of the alleged offence in order to convey intelligibly to both searcher and searched the ambit of the search it authorises, then the Constitution provides a more than satisfactory reason for so holding, the absence of which reason resulted in Tindall J not converting a principle which he considered to be highly desirable into a rule of law. Van der Westhuizen J clearly states the point in Magajane v Chairperson, North West Gambling Board 2006 (5) SA 250 (CC) at para 74:

"Exceptions to the warrant requirement should not become the rule. A warrant is not a mere formality. It is the method tried and tested in our criminal procedure to defend the individual against the power of the state, ensuring that police cannot invade private homes and

businesses upon a whim, or to terrorise. Open democratic societies elsewhere in the world have fashioned the warrant as a mechanism to balance the public interest in combating crime with the individual's right to privacy. The warrant guarantees that the State must justify and support intrusions upon individuals' privacy under oath before a neutral officer of the court prior to the intrusion. It furthermore governs the time, place and scope of the search, limiting the privacy intrusion, guiding the State in the conduct of the inspection and informing the subject of the legality and limits of the search. Our history provides much evidence for the need to adhere strictly to the warrant requirement."

[43] A further important aspect in this connection is the imperative to read our law within the context of the history of this country. Over a long period prior to the attainment of constitutional democracy, there was great abuse in the exercise of authority by the police, including with regard to search and seizure operations. While courts must be careful to ensure that mechanisms that they fashion to protect the rights of citizens should not constitute onerous impediments upon the police so that the latter are disempowered from the imperative of crime control, nonetheless our history indicates that there is always a danger of abuse in the exercise of powers granted to a police authority. The courts must be vigilant to be the custodians of accountability and balance the demands between due process and crime control. It is this demonstrable lack of balance that

characterises the approach in Bennett, *supra*, which should thus be followed.

[44] That the common law would impose independent obligations on the magistrate empowered to authorise the warrant is not surprising. It flows directly from the ancient principle of *nemo iudex in sua causa*. A search warrant impacts significantly on the rights of the individual. The idea that the authority to search cannot simply be asserted by the agency which has a direct interest in the outcome of the warrants validity necessitates the evaluation task given to the magistrate. This mechanism is not based upon a distrust of police but rather it is a clear assertion of a key component of fairness: no one should judge her own cause. The function of a magistrate in chambers in deciding whether to grant a search warrant is thus not an exercise of a rubber stamp. It is an exercise of a judicial discretion to regulate the nature and extent of the search and seizure permitted by any warrant which, after due consideration may be issued by him or her. Not only does this task require that the warrant should be finetuned to ensure that it is no more invasive than is absolutely necessary but it is critical that in exercising his/her discretion, the magistrate should consider the level of specificity required in order to render the warrant intelligible.

[45] Mr Le Grange sought to draw a distinction between the role of the prosecution who determine the change and the police who investigate. The point of this distinction was to argue that to insist that the warrant contains the offences for which the suspect may be charged was to conflate the role of police, who wish to conduct a search, with the prosecution who frame the charges at a later stage.

[46] This argument misses the implication of the wording of section 20 of the Act. Section 20(a) authorises the search and hence the seizure of anything concerned in or, on reasonable grounds is believed to be concerned in, the commission or suspected commission of an offence. Likewise section 20 (b) and (c) employ the word 'offence' as the operative word in the section. Thus, at this stage the offence / suspected offence is critical to the operation of the entire section, a provision which authorises activity before a precise charge are framed. As Hiemstra Criminal Procedure (looseleaf) at page 2 – 8 observes 'there must be clarity as to which offence is suspected.'

[47] The outcome of the task depends on the nature of the investigation. In some cases, it may be difficult to craft the warrant to do more than provide a general framework of the alleged offences. However in the present case, aided by the expertise of the SARS, it was more than possible for the magistrate to demand that necessary amendments be made to the

warrants. The magistrates had available a detailed affidavit by third respondent who specified the offences which allegedly had been committed by various of the applicants and which would have allowed for the necessary inclusion in the warrant of the specified offences. Annexure C to the warrant directed at the Bellville premises of Carrim, Maritz & Associates illustrates very powerfully how sufficient information could have been included so as to comply with the intelligibility principle.

[48] That conclusion raised the question of the attack on the warrant of 10 June 2008. While paragraph 5 of Annexure B to that warrant which authorises the search of 'enige stawing van betalings gemaak tussen die volgende individue' is wide, I do not consider that the warrant reading with Annexure C authorises a 'general ransacking'. The warrant and annexure B must be read together with Annexure C. The basis of the case against applicants now becomes clear. Accordingly, the target of the investigation launched by second and fourth respondent is apparent as is the purpose of the search.

[49] Mr Hodes submitted that no reasons were provided by the magistrate who so authorised this particular warrant and accordingly it stood to be declared invalid. In his view, there was no clarity as to the basis upon which the magistrate had applied her mind in the issuing of such a warrant.

[50] However in this case, the seventh respondent enjoyed the benefit of the detailed affidavit of third respondent which specified the case against applicants. Annexure C provided further details thereof. On the basis that Annexure C was part of the warrant which was issued by seventh respondent, it is difficult to see the plausible basis upon which it can be alleged that a magistrate, in considering whether to grant such a warrant, could be said to have decided, without applying her mind, having been clearly appraised of all of these facts and having included within the warrant the relevant Annexure C. If the function of the magistrate is to scrutinize the case made out and ensure, in particular, compliance with the intelligibility principle, we consider that no adequate case has been made out by applicants to attack successfully the validity of this warrant. Given the approach adopted, we do not need to deal with the arguments concerning the alleged hearsay of Superintendent Kotze's description of the decision making process of the magistrates.

Preservation Order

[51] Mr Hodes submitted that a conditional counter application had been launched by fourth and fifth respondent on 28 November 2008, that is four days prior to the hearing of the case for a counter application. Applicants required an opportunity to file answering papers in opposition to this application. Mr van Rooyen, who appeared on behalf of the fifth

respondent, submitted that the counter application was not strictly necessary because, even without such an application, the court could grant a preservation order, sufficiently tailored to protect the interest of all parties. The difficulty with this submission is that a specific counter application was launched by respondents. It is in the interests of fairness therefore, that applicants be given some time to answer the case so brought. For this reason, the court will not decide the matter of preservation order in this judgment but will deal with the application at a date to be arranged with counsel.

Costs

[52] Although the court has only upheld three of the five challenges, applicants have been substantially successful and therefore are entitled to a favourable costs order

The Order

[53] For these reasons the following order is made:

1. The decision of the Additional Magistrate, Cape Town, Mr James Lekuleni ("the first respondent"), on Friday, 7 March 2008 to issue search warrants in respect of Zonnekus, Chandos Close, Woodbridge Island, Milnerton, Cape Town ("Zonnekus"), Helibase, off Martin Hammerschlag Way, Culemborg, Cape Town ("Helibase") and 110

Starfish Crescent, Coral Grove, Royal Ascot, Cape Town ("Royal Ascot") ("the search warrants") and the issue of these search warrants are declared invalid and are set aside;

2. The applications in respect of the search warrant issued by sixth respondent of the Randburg premises of Carrim and Maritz and the search warrant issued by seventh respondent of the Bellville premises of Carrim and Maritz are dismissed
3. The counter application for a preservation order is postponed to a date to be arranged with the Registrar.
4. Fourth and fifth respondents are ordered to pay the applicants' costs of suit, including the wasted costs of the postponement of the matter on 11 April 2008, and those occasioned by the employment of two counsel.

JUDGE D M DAVIS

JUDGE V SALDANHA