REPORTABLE

Republic of South Africa

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

Case number: 67 / 2005

In the matter between:

THE STATE

versus

SELWYN WINSTON DE VRIES	Accused number 1
VIRGIL LENNITH DE VRIES	Accused number 2
JULIAN MICHAEL VAN HEERDEN	Accused number 3
VERNON NOEL VICTOR	Accused number 4
ALEX ANNA	Accused number 5
GARY WILLIAMS	Accused number 6
LLEWELLYN SMITH	Accused number 7
FRANCIS JAMES NGARINOMA	Accused number 8
EDWARD MOAGI	Accused number 9
DARRYL PITT	Accused number 10
ACHMAT MATHER	Accused number 11

REASONS DELIVERED ON 11 JUNE 2008
(ORDER GIVEN ON 30 JANUARY 2006)

BOZALEK, J:

[1] This is a ruling on the admissibility of certain evidence following a trial within trial. The eleven accused in this matter are standing trial on 25 charges including some under the Prevention of Organised Crime Act, 121 of 1998 which deals with racketeering. The charges revolve

principally around three armed robberies of delivery vehicles, two of which took place in the Western Cape in June and August 2003 and one outside Port Elizabeth in October 2003.

[2] In each instance a delivery vehicle belonging to BATSA (British American Tobacco Company) carrying a consignment of cigarettes was stopped outside an urban centre en route to its destination through being pulled off the road by one or more persons dressed as police or traffic officials. Such persons would be driving a white Volkswagen *Polo* of *Golf* equipped with a flashing blue light thus gulling the BATSA trucks' occupants into believing that the stopping was official. Once the vehicle had stopped firearms were produced by those manning the roadblock and the vehicle's driver and his assistant were placed in another vehicle and driven from the scene. In the meantime the cigarettes were unloaded onto another vehicle. Once this operation was complete the driver and his assistant were released. In each case a number of vehicles were used by the gang members who also used cell phones to communicate with each other during the robberies.

[3] The first robbery took place nearby Rawsonville on 24 June 2003 and the second nearby Darling on 12 August 2003. Little progress was made in the investigation until shortly after the second robbery when information was received by the police from an informant regarding the

identity of certain persons allegedly involved. This information led the police to seek and obtain subpoenas in terms of s 205 of the Criminal Procedure Act, 51 of 1977 ("the Act") requiring certain cell phone companies to furnish written records of calls made and received using specific cell phone numbers at the time of the robberies. Once obtained these records were analysed in relation to data from the satellite tracking system fitted to the BATSA vehicles involved in the robberies which records the precise whereabouts of the vehicles during their trips from BATSA's depot in Cape Town to outlying areas as well as other relevant information. The records furnished by the cell phone companies revealed the approximate geographical location of the cell phone being used at the time of each call made and received as well as the number to which or from which each call was made. In this manner a picture was built up of the whereabouts and use of the relevant cell phones on the day of the robberies and the days preceding and following them.

[4] On 7 October 2003 a successful application was made to the magistrate in Cape Town for warrants of arrest in respect of accused numbers 1, 2, 3, 6 and 7. All these accused appear to reside in Ennerdale, Gauteng and in the early hours of 9 October 2003 a large team of police officials executed a co-ordinated raid on eleven addresses in the area in order to execute the warrants. All five accused

were found and arrested and at the same time the premises in which they were found were searched. A variety of objects was seized, most notably cell phones, motor vehicles and in one case a bag of what appeared to be items of police clothing and rank insignia.

[5] Early in the trial notice was given on behalf of the aforesaid accused that they contested the admissibility of the cell phone data procured under the section 205 subpoenas, the validity of the warrants of arrest as well as the ensuing searches and thus the admissibility of the various items seized from the accused and/or their premises. In the result a trial-within-a-trial was held to determine the admissibility of such evidence. The State led a considerable number of witnesses but none of the accused elected to testify nor did they place the evidence of any witnesses before court.

GROUNDS OF THE OBJECTIONS

[6] In order to focus the trial-within-a-trial counsel were asked to set out the principal grounds of their objection to the admissibility of the disputed evidence. Counsel for accused 1, 2, 6 and 7 contended that the phone records had been illegally, wrongfully and unconstitutionally obtained in that there had been no reasonable grounds for the issue of the subpoenas. They contended that the warrants of arrest were unlawful and invalid in that the authorizing magistrate had lacked territorial jurisdiction to issue the warrants. Furthermore, it was

contended, information placed in front of the magistrate had been incomplete or misleading and, finally, that the warrants had not been executed in terms of the order. As regards the search and seizures effected pursuant to the arrests, it was contended that these had been unlawful and the evidence unconstitutionally obtained in that the police had not been armed with search warrants and had had no reasonable grounds to search and seize. Furthermore, the warrant of arrests being defective, all seizures flowing from the searches effected pursuant to the arrests were themselves unlawful and unconstitutional. Counsel for accused number three also relied on the above arguments relating to the warrant of arrest but contended further that there had been no evidence linking accused number three to the cell phone number, the use of which had been attributed to him.

ONUS

[7] In accordance with the general rule, the onus of proving both facts and conclusions relevant to an enquiry into the admissibility of evidence rests on the State and must be discharged beyond reasonable doubt. See *inter alia S v Zuma* and others 1995 (2) SA 642 (CC). Different considerations may apply where s 35(5) of the Constitution of the Republic of South Africa Act, 108 of 1996 ("the Constitution") comes into play. It provides that 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". To the extent that the defence avers the existence of a constitutional right and its infringement the burden of proving same is borne by the defence. See *S v Naidoo and Another* 1998 (1) SACR 479 at 523A – B. Different views have been expressed as to who bears the onus of proving that the admission of evidence would render a trial unfair or otherwise be detrimental to the administration of justice and the standard of such proof. See *S v Gumede* 1998 (5) BCLR 530 (D) and *S v Mfene and another* 1998 (9) BCLR 1157 (N). It would seem anomalous that the State is in effect required to prove a negative proposition, namely that the admission of the evidence would not render the trial unfair or in no other way be detrimental to the administration of justice, propositions furthermore which involve a value judgment to a lesser or greater degree. Nonetheless, for the purposes of this ruling I am prepared to accept that the State bears the onus of proving the two requirements in s 35(5) of the Constitution.

THE SECTION 205 SUBPOENAS

[8] I turn first to consider the admissibility of the evidence obtained from the cell phone companies by virtue of the s 205 subpoenas. This evidence comprises detailed billing records pertaining to a total of 17 cell phone numbers including calls made and received and the location

of the phone being used over the period of March to September 2003. Only five of these numbers related to the accused on whose behalf the objection was taken. The evidence reveal that their numbers were first furnished to the police by an informant, one Mentoor, who claimed that he had information implicating them in the first two robberies.

[9] On the strength of this information a subpoena was prepared which *inter alia* covered certain telephone numbers attributed to accused one (072 460 6755), two (072 221 2408) and three (072 565 6571). It was authorised by the magistrate, Cape Town on 22 August 2003. On 18 September 2003 a second subpoena was authorised by the selfsame magistrate and contained *inter alia* a telephone number relating to accused number six (072 373 1856). No trace can be found on either subpoena of the telephone number attributed to accused number seven (072 270 1704).

[10] The subpoenas call upon the cell phone companies to appear before a magistrate and give the information sought in respect of the cell phone numbers, alternatively, to furnish such information in the form of records to the investigating officer. The subpoenas conveyed further that information was sought in regard to an armed robbery but did not give the identity of those who allegedly used the cell phone numbers in question. The first of the relevant subpoenas related to the armed

robbery near Darling and the second to that committed near Rawsonville. The concluding paragraph of the subpoenas advised the witness that failure to meet the conditions of s 205 would subject such person to a fine not exceeding R1500,00 or imprisonment not exceeding a period of three months. The subpoenas were signed in the first instance by Adv. Niehaus, the deputy-director in the office of the Director of Public Prosecutions, Cape Town.

[11] The final witness called by the State in the trial within the trial was a senior magistrate of the district of the Cape, Mr. HJ Venter who had authorised the issuance of the subpoenas. Not unsurprisingly Venter had no independent recollection of considering the applications for the subpoenas. He stated that the general procedure which he follows in such instances is to consider the written statements in the docket placed before him by the investigating officer together with the application. He checks to see whether the application is made by the director of public prosecutions or a person authorised by him and, if satisfied with the application, grants authority for the issue of these subpoenas. It is doubtful, however, whether this was an accurate description of the magistrate's *modus operandi* in the present matter since when the contents of the relevant statements from the dockets were put to him in cross-examination, he had to concede that they made no mention at all of the cell phone numbers in question, let alone

any persons who may allegedly have used such numbers in connection with the commission of any crime. It also became apparent that the fact that the subpoenas had been sought under the signature of Adv. Niehaus weighed heavily with the magistrate and in truth this factor appeared to be the main determinant of the magistrate's attitude to the applications. Upon re-consideration, Venter stated that he would not have authorised the issue of the subpoena in one instance but would have granted the other since the statements, upon his reading of them in the witness box, made several references to persons involved in the Rawsonville robbery making use of cell phones.

[12] The State contended in the first place that the accused had no standing to challenge the admissibility of the evidence obtained pursuant to the subpoenas because their right to privacy was not infringed. As I understood this argument the contention was that because the records or data were not in the accuseds' possession, only the witness i.e. the cell phone company, could challenge the validity of the subpoena. Another leg to the State's argument in this regard was that no accused's right to privacy was involved since the content of telephone conversations or text messages was not involved. I disagree. The simple fact that the cell phone company's records relate to the use of cell phone numbers allegedly used by the accused gives them a sufficient interest in the subject matter to object to its admissibility. The

fact that the records do not reveal the content of telephone calls or text messages does not mean that the accuseds' right to privacy is unaffected. Information regarding to whom cell phone calls are made or from whom they are received, is, in the normal course, personal information which may be protected under one's right to privacy. Although a suspect or an accused person may, in practice, have no initial right to object to such information being disclosed by a third party under a s 205 subpoena to a court or the prosecuting authorities, there can be no reason in principle why, as and when such evidence is tendered at trial, such person cannot raise an objection to the admissibility thereof.

[13] The magistrate's approach to the applications for the subpoenas reveals, in my view, an unsatisfactory state of affairs. Section 205 contains far-reaching provisions for the procurement of information from potential witnesses. Failure to comply with the subpoena, directed at persons "likely to give material or relevant information as to any alleged offence", exposes the recipient to the fine or imprisonment previously mentioned - although s 205(4) does provide that no person shall be sentenced to imprisonment unless the presiding officer concerned is "also of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order".

[14] The reported cases dealing with s 205 are testimony to the conflicting interests and values which can be thrown up when its provisions are used, indiscriminately or not. Apart from the obvious conflict between media interests and the demands of the criminal justice system, a s 205 subpoena can raise not only the issue of the right to privacy of the witness, particularly in cases where documentation is concerned, but that of the suspect concerned. Recognizing these conflicting interests and the potential inroads upon basic rights, the courts have held that the function of the issuing magistrate (or judge) involves the exercise of a judgment as to whether the circumstances warrant the issue of a subpoena. The issuing magistrate's function is decidedly not that of a "rubber stamp". See *Haysom v Additional Magistrate, Cape Town and Another, S v Haysom* 1979 (3) SA 115 (C) at 158F – G and *Matisonn v Additional Magistrate, Cape Town and Another* 1980 (2) SA 619 (C) at 65. The provisions of s 205 passed constitutional scrutiny in *Nel v Le Roux N.O. and Others* 1996 (1) SACR 572 (CC) where it is was held that they were "as narrowly tailored as possible to meet the legitimate State interest of investigating and prosecuting crime" (at 583G – H). In concluding that there was no substance to the various constitutional challenges mounted, the court had regard to the context of the s 205 proceedings as a whole. It noted that the subpoena is obtained at the request of an attorney general (now the Director of Public

Prosecutions) or an authorised public prosecutor and can only be issued at the instance of an independent judicial officer. This observation underlines the importance of the issuing magistrate giving proper consideration to whether a case has been made out that the potential witness "is likely to give material or relevant information as to any alleged offence…".

[15] The approach seemingly adopted by the magistrate in the present matter to the application for subpoenas, namely, granting them largely on the strength of the reputation of the applicant and not considering the merits of the application, is impermissible. Whilst it would not be irregular, in my view, to consider such an application by having regard to no more than the contents of witness statements in the docket, a preferable procedure would be for the investigating officer to set out in an affidavit the grounds on which the subpoena is sought and, if appropriate, identify therein the particular witness statements upon which the application is based.

[16] Ms. Booysen, for the State, cited the evidence of the informant and the various police officers who interacted with him in an effort to persuade the court that the subpoena was necessary and justified upon the information then available to the investigating officer. In my view there is no point in considering this evidence since none of it was placed

before the issuing magistrate. His failure to exercise a judicial discretion as to whether the subpoenas were warranted in law was so complete that the proceedings cannot and should not be salvaged by this court considering, *ex post facto*, whether, if the available information had been placed before the magistrate, the issuance of the subpoenas would have been justified.

[17] In the circumstances I ruled that any information obtained from the cell phone companies pursuant to the two subpoenas and relating to the relevant cell phone numbers in question i.e. those attributed to accused numbers 1, 2, 3 and 6, were inadmissible.

THE WARRANTS OF ARREST

[18] The main ground of attack upon the warrants of arrest relating to accused 1, 2, 3, 6 and 7 was the authorising magistrate's lack of territorial jurisdiction to grant same. The warrants of arrest state that the accused were to be arrested in connection with an armed robbery which took place in Darling in August 2003 i.e. the second of the armed robberies. It is common cause that the location of this armed robbery fell within the territorial jurisdiction of the Malmesbury magistrates' court. Uncontested evidence was that by early October 2003 the investigating team were of the view that they had sufficient information implicating the accused to justify seeking warrants of arrest. They decided to approach the magistrate in Malmesbury to apply for the

warrants but, as a result of a telephone conversation with the control prosecutor there, they were referred to the Cape Town magistrate's court. As a result the application for the warrants was ultimately brought before chief magistrate Jooste in the Cape Town magistrate's court. This was the evidence of one of the investigating officers, Inspector Jonker. Notwithstanding that his first step had been to approach the Malmesbury magistrate for the warrants, the witness equivocated somewhat when taxed with the question of whether the magistrate in Cape Town had jurisdiction to issue the warrants.

[19] In this regard the provisions of s 43 of the Act are clear. A magistrate may issue an arrest warrant upon the written application of *inter alia* a police officer when three jurisdictional requirements have been met. One of these is that the written application must at least allege that the offence for which the warrant is sought was committed within the area of jurisdiction of such magistrate or, where the offence was not committed within such area, which alleges that the person sought to be arrested is known or is suspected be within the area in question. It is common cause that the statements which were placed in front of the Cape Town magistrate in support of the application did not rely on the second qualification. Mr Jooste, who authorised the warrants, had no independent recollection of the application. As chief magistrate of Cape Town he had administrative jurisdiction over a number of other

magisterial districts in the Western Cape but no documentation describing the limits of such authority was put before court.

[20] Jooste testified that the normal procedure which he follows is to consider the written application for an arrest warrant, which is completed on a J50 form by the police officer, together with supporting documentation such as sworn affidavits. He also sometimes relies on information supplied to him informally by the investigating officer. If satisfied that the requirement of s 43 are met he signs the warrant/s. He added that if the alleged offence was committed in a district other than the Cape, the warrants were normally issued by the magistrate of such district. If he himself was in doubt about whether he had jurisdiction he would not sign the warrant.

[21] Once again, unfortunately, the evidence reveals that the magistrate must have failed to apply his mind to a fundamental requirement for the authorisation of a warrant of arrest, namely, whether the offence was alleged to have been committed within his court's jurisdiction or not. Had he done so he would undoubtedly have reached the conclusion that the matter fell under the jurisdiction of the Malmesbury magistrate. The State initially sought to counter this defect in the warrants by arguing that the magistrate's extended jurisdiction, in terms of s 2(2) of the Magistrates' Courts Act, 32 of 1944, entitled him to issue warrants

in respect of offences committed in other magisterial districts falling under his administrative control and, secondly, upon the basis that theft, a conviction for which is a competent verdict on the charge of armed robbery, was a continuing offence. In this regard it was contended that the evidence revealed that the planning and execution of the armed robbery extended into the Cape Town magisterial district.

[22] I understood the State to ultimately abandon these arguments, correctly so in my view. Section 2(2) of Act 32 of 1944 makes provision for the creation of an administrative region “for administrative purposes”. There is no basis for interpreting this section as extending a magistrate’s judicial powers to include authorising arrest warrants in regard to offences committed in other magisterial districts. The other leg to the State’s argument is similarly without substance. Whilst theft is a competent verdict on a charge of armed robbery, no case was made out either in the evidence in the trial-within-a-trial or, more importantly, in the application for the warrants of arrest that the theft had commenced or continued into the Cape Town magisterial district. The robbery took place near Darling and what became of the cargo of cigarettes is quite unclear. Nor was there any suggestion that this approach was considered by chief magistrate Jooste when he considered the original applications.

[23] The conclusion is thus inescapable that the arrest warrants were technically defective by reason of having these sought from and authorised by a magistrate lacking jurisdiction to do so. It is worth noting that had the witnesses Jooste and Venter been called early in the lengthy trial-within-a-trial proceedings they could have been substantially shortened.

[24] Counsel for the accused also contended that the warrant was defective by reason of having not been executed in terms of the order. The wording of the warrants required the arresting official to keep the accused in custody and, in accordance with the provisions of s 50 of the Act, to bring them before the Cape Town magistrate's court. After their arrest in Gauteng on 9 October 2003 the accused appeared the following day in a local magistrate's court whereupon the matter was postponed and, in accordance with certain warrants, they were transferred to the district court in Malmesbury. From that court they were eventually remanded to the regional court in Cape Town. Having regard to the provisions of s 50 of the Act which deals with the procedure to be followed after arrest, it would appear that the accuseds' appearance in the Germiston magistrates' court was unnecessary. It was the State's obligation to transport them to the Cape Town court as soon as reasonably possible. Strictly speaking the accused should first have appeared in the Cape Town magistrate's

court, as the warrant decreed, and their appearance in the Malmesbury magistrate's court in the first instance seems to represent a belated recognition that the warrants of arrest should have been issued out of that court. Notwithstanding these further technical defects in the execution of the warrant, I can see no reason why they should have any bearing on the lawfulness of the warrants in the first place, or, more importantly, on the lawfulness of the search and seizure operations conducted immediately after the accuseds' arrest.

[25] The third ground upon which the validity of the warrants was challenged rests, as I understand it upon a dual basis. In the first place it was contended that the evidentiary material placed before chief magistrate Jooste in support of the application of the warrants was either misleading or incomplete to such an extent that the warrants should never have been issued. Allied to this argument was the contention that in any consideration of whether the warrants should have been authorised, all evidence emanating from the s 205 subpoenas served upon the cell phone companies in respect of the accused had to be disregarded.

[26] Section 43 provides that the written application for an arrest warrant must state that "*from information taken upon oath there is a reasonable suspicion that the person in respect of whom the warrant is applied for*

has committed the alleged offence". The correct approach to the discretion to be exercised by the magistrate considering the application for the warrants was set out more than 50 years ago in *May v Union Government* 1954 (3) SA 120 (N) at page 125B in relation to a similarly worded clause: "…*s 34 does not prescribe, as an essential prerequisite of the issue of a warrant, that all the material facts necessary to obtain a conviction should have been deposed to on oath. The section requires only reasonable grounds of suspicion but these reasonable grounds must appear from the sworn information.… I have no doubt that the sworn information must be looked at in its context of all the known facts of the situation, whether deposed to on oath or not. Nor have I any doubt that, in forming his suspicion the official concerned is not obliged to accept the sworn information as true. He may believe some of it and disbelieve some; he may even, perhaps, disbelieve it all. Information on oath he must have and from that information, looked at in its proper context, he must be able to form a reasonable suspicion*."

[27] It was common cause that the application before magistrate Jooste was founded upon three affidavits, namely, those of the investigating officer at that stage, Heydenrich, one of his assistants, Speed, and an investigator in the employ of BATSA, one Cottle. Furthermore, Cottle attended before the magistrate and made a presentation showing the

routes that the BATSA vehicles took immediately prior to the robberies in July and August and demonstrating simultaneous cell phone usage of the various cell phone numbers attributed to the accused. This presentation was based on the cell phone records obtained in terms of s 205 of the Act and the tracking devices fitted to the BATSA vehicles. The general effect thereof was to produce strong circumstantial evidence indicating the involvement of the cell phone numbers, and in turn their alleged users.

[28] In the light of the ruling that the information obtained pursuant to the subpoenas is inadmissible, the question which must first be answered is what weight it can be given in a determination of the validity of the warrants of arrest. In my view, to accord any weight to it would have the effect of indirectly rendering it admissible. Without purporting to subscribe unreservedly to a “fruits of the poisoned tree” approach, as was urged by defence counsel, I regard it as inappropriate to place such evidence in the scales when considering the validity of the warrants of arrest because of the egregious nature of the irregularity in the s 205 process. In any event the rigid exclusionary doctrine embodied in the aforementioned doctrine does not form part of our law. See *S v Melani and Others* 1996 (1) SACR 353e, *S v Malefo en Andere* 1981 (1) SACR 127 (W) and *S v Marx and Another* 1996 (2) SACR 140 (W).

[29] Senior Inspector Heydenrych's affidavit relied heavily upon the cell phone data in implicating the accused in the Darling robbery. If such information is excluded it is doubtful whether on the strength of this affidavit a judicial officer would have been justified in issuing warrants of arrest. The second affidavit placed before the magistrate, that of Inspector KD Speed, although concerned principally with how the cell phone numbers (of the accused) were obtained from the informant, revealed more substantial grounds for identifying accused numbers 1,2 6 and 7 as involved in the robbery. Speed had travelled to Gauteng and interviewed the informant, Mentoor, who had previously communicated with the police only telephonically. According to Speed's affidavit, Mentoor had furnished him with cell phone numbers for the aforementioned four accused, whom he identified as persons he believed, on undisclosed grounds, to be involved in the commission of the robberies. On this affidavit alone it is doubtful whether the issuing of arrest warrants would be justified since there is little if any substantiation of the informant's belief that the suspects were involved in the robberies.

[30] Apart from the above shortcoming various attacks were launched on the informant's claim to knowledge of the involvement of the accused in the robberies. To a large extent these attacks were based upon a

comparison of the evidence of Mentoor, who testified in the trial-within-a-trial, and Cottle regarding what Mentoor told him prior to the application for the warrants. This challenge was entirely misconceived. I can see no basis upon which a discretion exercised by a magistrate considering an application for an arrest warrant can be tested against evidence which emerges in a subsequent trial casting doubt on the contents of the affidavits on which the magistrate originally relied. The exercise of the magistrate's discretion can properly and logically only be tested against the contents of the affidavits placed before such official and on which he/she relied. The only (apparent) exception to this approach which comes to mind is where evidence is presented that the official applying for the arrest warrant *mala fide* put false or misleading information before the judicial officer. I can conceive that in such a case the fact that the judicial officer acted bona fide may not necessarily render the warrant immune to challenge. However, no case was made out that the investigating officer and/or Cottle had deliberately put false or misleading information before the magistrate.

[31] Finally, also put before the magistrate was the sworn affidavit of Cottle. He was the first person to interview Mentoor and had discussions with him on several occasions regarding to the identity of the persons allegedly involved in the BATSA robberies. Cottle's affidavit describes in some detail his dealings with the informant who had advised him that

the five accused in question were known by him to be directly involved in the robberies. Further, the informant is reported by Cottle as having himself heard two of the accused planning the second robbery. He furnished the names and telephone numbers of the five accused to Cottle. Using this information Cottle had independently established that three of these persons could well have been directly involved in the third BATSA robbery which had just taken place in Port Elizabeth. Accordingly, even excluding the evidence obtained pursuant to the s 205 subpoenas, there was material on oath before the magistrate which, on the face of it indicated "a reasonable suspicion" that the accused were involved in the robberies. I do not regard it as fatal to the application that the informant's information or allegations were themselves not on oath. In my view it was sufficient that his allegations of the accuseds' involvement appeared from the affidavit of two responsible officials who had interviewed him and who considered such information to be credible and, in Cottle's case, had followed up such information.

[32] In summary then, I find that, even entirely excluding any evidence obtained from the s 205 subpoenas, there was enough information on oath before the magistrate for him to have formed a reasonable suspicion that the accused were involved in the Darling robbery. The warrants were defective only in so far as the issuing magistrate did not

have the territorial jurisdiction to authorise them.

THE SEARCHES AND SEIZURES

[33] It is appropriate now to consider, in more detail, the challenge to the admissibility of evidence obtained pursuant to the search and seizures following upon the arrest of the accused. In broad terms it is contended on behalf of the accused that, no search warrants having been authorised, there were no reasonable grounds to search the premises of the arrested persons and seize material. In addition, in as much the search and seizures were made pursuant to the arrests, it is contended that since the warrants of arrest were defective all seizures flowing from the arrests were “unlawful, wrongful and unconstitutional”. It was also contended that the searches were “at variance with the Constitution and the guidelines as set down by case law”. This last contention appears to derive from criticism of the manner in which the police performed the individual searches.

FACTUAL BACKGROUND TO THE SEARCHES

[34] The arrest warrants were obtained from the Cape Town magistrate on 7 October 2003. On the following day several members of the Cape Town investigating team arrived in Johannesburg and renewed contact with the head of the East Rand Serious and Violent Crimes Unit, Superintendent Du Plessis, who had previously been involved in aspects of the investigation. Arrangements were made for an operation

in the early hours of 9 October to arrest the five suspects, co-ordinated by Supt. Du Plessis. To this end he assembled 40 to 45 police officers who met at the offices of the Brixton Murder and Robbery Unit on the night of 8 October and were briefed. The group was divided into 15 sub-groups. Du Plessis also met the leaders of the sub-groups to discuss the execution of the warrants. Present as well were three members of BATSA's security staff including Cottle. Although there were warrants of arrest for five persons, Du Plessis had a total of eleven addresses for the suspects. BATSA security staff had played a large role in compiling the eleven addresses and preparing maps and directions for each group. According to Du Plessis the BATSA employees were asked to avail themselves to help find the addresses and were also there to identify any cigarettes which might be found. Du Plessis tried to arrange a police photographer but was unsuccessful and therefore his deputy, Captain Botha, was asked to take along a camera. One of the BATSA officials also volunteered to use his camera. Each group had at least one vehicle and were assigned different tasks. Some were required to patrol the relevant areas in the event of a possible escape whilst eleven of the groups were each assigned an address.

[35] At the briefing the *modus operandi* involved in the armed robberies was explained and the leaders were instructed to be on the look-out for

certain types of vehicles reported as being involved in the robberies as well as cell phones, firearms and police uniforms or insignia since these too had been involved in the robberies. Each group was handed forensic bags to store any evidence they might find and were instructed to call Supt. Du Plessis to seal the forensic bags himself. Du Plessis held the originals of the warrants of arrest and handed out copies of the warrants to the various groups who were assigned to search a specific address with a view to arresting a particular suspect. After leaving Brixton the group assembled at a central point and from there left for the different addresses with instructions to reach each one at 02h30 a.m. In the result all the suspects were found and arrested and evidence seized from their residences. Du Plessis, at the request of his subordinates, attended at the scene of a number of the searches during the night, most notably that of accused number one's premises.

[36] Relying on *Park-Ross v Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C) at 172 it was contended on behalf of the accused that the search and seizures of the accused's premises should only have taken place in terms of a search warrant. In terms of the Act there are, however, various circumstances in which are the police entitled to search the persons and/or their premises without a warrant. S 22(a) of the Act authorises a police official to search "*any person or container or premises for the purposes of seizing any*

article… if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question…".

[37] Section 22(b) of the Act provides that a police official may search without a search warrant "*if he on reasonable grounds believes… that a search warrant will be issued to him… if he applies for such warrant; and… that the delay in obtaining such warrant would defeat the object of the search*". In addition, s 23(1) of the Act provides that an arresting officer may "*…search the person arrested and seize any article… which is found in the possession of or in the custody or under the control of the person arrested…*".

[38] In terms of s 20 the articles which may be seized fall into three classes. Two of them are relevant to the present matter, namely, 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…***
> ***b) which may afford evidence of the commission or suspected commission of an offence…".***

Finally, s 29 of the Act provides that a search of any person or premises shall be conducted "*with strict regard to decency and*

order…".

[39] Du Plessis testified that since they only received the eleven addresses that night they did not have time apply for search warrants because they had to get to the addresses as quickly as possible. As he understood the situation he would have to have made application to a magistrate in another district. There does not appear, however, to be any compelling reason why the arrests and searches had to be effected that very night. Du Plessis testified that he had not previously applied for search warrants and, in my view, the more likely reason why search warrants were not applied for was that such a procedure would take some time and was not usually followed whereas the police were eager to arrest the suspects and conduct any searches as soon as possible.

[40] *Park-Ross* is not authority for the proposition that every search conducted other than in terms of a warrant issued by a judicial officer is unlawful or is in breach of the subject's constitutional rights. Tebbut J's declaration that s 6, as it then read, of the Investigation of Serious Economic Offences Act, 107 of 1991, must be seen in its context, namely, the special provisions which allowed the director of the Office for serious economic offences to conduct search and seizures without any judicial warrant. I am unaware of any direct challenge to the

constitutionality of the search and seizure provisions in s 22 or 23 of the Criminal Procedure Act. In *Investigating Directorate: SEO v Hyundai Motor Distributors* 2001 (1) SA 545, the Constitutional Court held that the successor to the search and seizure section considered in *Park Ross*, s 29(5), was constitutional in that it provided sufficient safeguards against an unwarranted invasion of the right to privacy and that the limitation of the privacy right was reasonable and justifiable. Section 29(5) appears to have been enacted in response to *Park-Ross* and made provision for any search and seizure operations to require prior authorisation from a magistrate or a judge on application under oath. Langa DP, as he then was, referred in passing to ss 20 and 21 of the Criminal Procedure Act but nowhere suggested that any search and seizure effected without a warrant is *per se* unconstitutional.

[41] Although it clearly is desirable that, wherever practicable, searches should be conducted pursuant to a judicially authorised search warrant, search and seizures in the circumstances envisaged by ss 22 and 23 of the Act remain lawful and do not necessarily breach the constitutional rights of persons subjected there to. I do not propose to go into a full constitutional analysis of these sections since no direct argument or challenge was launched by the accuseds' counsel against their constitutionality. Suffice it to say that ss 22 and 23 contain partial safeguards against an abuse of the powers of a search and seizure for

which they provide, namely, consent on the part of the person being searched, urgency and, in the case of s 23, its limitation to the situation where a suspect is being arrested. The ultimate safeguard is, of course, the discretion of the trial court to receive such evidence or not having regard to the particular circumstances of the search and seizure. In my view taking into account these and other factors, the provisions of ss 22 and 23 of the Act represent justifiable limitations upon the right to privacy as envisaged in s 36 of the Constitution.

[42] It is thus necessary to consider in each case of the five separate searches whether the accused did in fact consent to their personal premises being searched and at the same time to consider various other objections raised concerning the manner in which the searches were conducted.

ACCUSED NUMBER ONE

[43] Snr. Insp. Lemmer led the group which arrested accused number one, who is wheelchair-bound, at his residence and searched it. Two cell phones were seized and a box in which one of the cell phones had apparently been bought. Lemmer testified that he identified himself as a police officer, showed a copy of the warrant of arrest to the accused and explained the purpose for his visit. Accused number one afforded him access to his residence and consented to it being searched. Accused number one did insist upon seeing the original of the warrant

of arrest and Lemmer therefore made contact with Supt. Du Plessis who eventually arrived with the original warrant. Only after the original warrant was shown to accused number one by Lemmer's colleague, Insp. De Lange, was he informed of his rights and arrested. According to Lemmer, apart from having to scale the locked gate to the premises no force was used in gaining entry to the house.

[44] Du Plessis testified that he had searched a red Jetta with a bullet hole on accused number one's premises but found the cubby-hole locked. Accused number one had given him permission to search the vehicle and gave him the keys to the vehicle. Upon enquiry, however, Du Plessis was told that there was no key to the cubby-hole. Finding this strange he proceeded to break open the cubby-hole looking for a fire-arm. This was the only damage done in the course of the search.

[45] Various propositions were put by accused number one's counsel both to this and other witnesses involved in the arrest and search taking issue *inter alia* with evidence that the accused had consented to the search or was shown the original of the warrant of arrest. Further allegations were made concerning the propriety of the search and alleging that it constituted an unjustifiable invasion of the accused's right to privacy. However, there was no evidence from the accused himself or any witness on his behalf to substantiate these allegations.

[46] Certain aspects of the search which were not in dispute were also criticised; one such area was the presence and role of two or three BATSA officials in the searches. I do not regard their presence as materially affecting the lawfulness and orderliness of the searches. These officials were under the control of the police at all times and, apart from the stand-in photographer who took some photographs, they appeared to have been largely passive observers.

[47] In several instances it was also contended that the police had acted outside their powers in seizing two cell phones when told by an accused that one belonged to his wife or companion. This does not seem to have been contentious or objected to at the time of seizure and there was no evidence or proof of ownership or exclusive use being raised by the other party at any point. Given that cell phones pass easily from hand to hand, the central role which they played in the offences and the data which might be forthcoming therefrom, I am persuaded that the police were within their rights to seize both phones in such circumstances.

[48] Since the evidence furnished by the arresting and searching officers relating to what happened at accused number one's premises was, on the face of it, acceptable, there is no basis for rejecting their version of

the arrest and search. I find then that accused number one did in fact consent to the search of his premises and his motor vehicle.

ACCUSED NUMBER TWO

[49] The team which attended at accused number two's residence to arrest him and conduct a search was led by Inspector D Khutoane. Another member of the party, Sergeant Smith, also testified regarding the circumstances of the arrest and search. Smith testified that they were given access to accused number two's residence by a woman who appeared to be the accused's wife and to whom they identified themselves to as police officials. The accused was on crutches as a result of a gunshot wound to his right leg. He was arrested and consented to his premises being searched. Upon enquiry the accused pointed out two cell phones, one apparently his and the other his wife's. Both phones were seized and eventually placed in forensic bags.

[50] An unlocked outside room was brought to the attention of Smith and Khutoane and they asked accused number two's wife to accompany them in a search thereof since accused number two was not mobile. She refused to do so. When the room was searched a black plastic bag was found containing a variety of items of police uniform and insignia.

When confronted therewith accused number two denied any knowledge of the bag or its contents. He also refused to sign documentation confirming the seizure thereof by the police. Both policemen testified that no force was used nor damage done during the search and that it was conducted in an orderly manner.

[51] In cross-examination various allegations were put to the police suggesting that the search was conducted in a disorderly fashion, without the accused's consent and that access to the premises had been gained by force including the tranquilising or killing of one or more dogs which patrolled the premises. All these allegations were denied by the policemen involved and no evidence was led by the accused or any witness on his behalf to substantiate them. In the circumstances and given that the evidence of the police was, at face value, quite acceptable, I find that the accused consented to the search of his premises and ensuing seizures and further that the police were entitled to seize the cell phones and police insignia given their potential relevance to the crimes involved in the investigation.

ACCUSED NUMBER THREE

[52] The group which arrested accused number three and searched his premises was led by Inspectors Berends and Serg. Ramolobeng. The accused's cell phone was seized as well as a white *Volkswagen Golf* which apparently belonged to him. Both policemen testified that they

were given access to the house by the accused's female companion. Upon their request and after identifying themselves to him and advising him of the arrest warrant, the accused handed them his cell phone. The accused however prevaricated about his identity and it was only when a cell phone number attributed to him was dialled causing his cell phone to ring that an end was put to any doubt concerning his true identity. After seizing the accused's cell phone, permission was sought from him and from his companion to search the house which permission was duly given. Nothing further was found apart from the vehicle outside the premises. That vehicle was seized on the basis of information given at the prior briefing that a white *Golf* had been involved in the armed robbery of the BATSA vehicles.

[53] In cross-examination it was put to the police witnesses that the door of the house had been broken down and that a large amount of cash had been stolen from the accused during the search as well as a watch and neck chain. Other allegations were also made relating to the details of the search but since neither the accused nor any witness gave any witness on his behalf and given the *prima facie* acceptability of the police evidence, these allegations can be given no weight.

[54] I find then that the accused and/or his companion consented to the search of the premises.

ACCUSED NUMBER SIX

[55] The accused was arrested by a team led by Insp. Ngobeni who seized the accused's cell phone after a search of his room. Ngobeni testified that the accused opened the door to the dwelling whereupon they identified themselves to him and confirmed his identity. The accused was shown the warrant for his arrest which was explained to him and whereupon he was arrested. The police asked the accused to point out his bedroom which he duly did giving permission to them to search it. The accused pointed out his cell phone when asked if he had one. This was seized and the accused, again upon request, furnished Ngobeni with his pin number for the phone.

[56] Ngobeni denied allegations put to him in cross-examination that the police had broken down the safety gate and the door, violently arrested the accused and had neither shown the warrant to the accused nor asked for permission to search his room. These allegations were not substantiated by evidence from either the accused or any witness called on his behalf. In the circumstances the police version of events must at this stage be preferred and I find that the accused consented to the search of his room where his cell phone was found.

ACCUSED NUMBER SEVEN

[57] Inspectors Van Vuuren and Strydom led the team which arrested

accused number seven and searched his premises. Both testified as to the circumstances of his arrest, the search of his premises and the seizure of a white *Volkswagen Polo* and a white *BMW* vehicle found on the premises as well as two cell phones and documentation relating to the vehicles.

[58] Van Vuuren testified that they had gained access to the premises when the door had been opened by another occupant of the house. The police identified themselves and, upon confirmation by the accused of his identity, showed him a copy of the warrant for his arrest and advised him of his rights whereupon he was arrested. The accused, together with a woman, was occupying a room. He identified one cell phone in the room as being his and the other as belonging to his woman companion. Both cell phones were seized. The accused identified the vehicles found on the premises as belonging to him and handed their keys to the police at their request. The vehicles were seized on the basis of information received at the briefing that similar vehicles were involved in the armed robberies. Both witnesses testified that no force or violence was used during the arrests or during the search.

[59] There was evidence that the police also arrested another occupant of the house after he, at their request, showed them a silver firearm

belonging to him. This was done despite there being no warrant of arrest for this person and no other indication, as far as can be ascertained, of any connection on his part to the robberies. This person was later released and had his firearm returned to him.

[60] In cross-examination it was put to the witnesses that the accused's dogs had been shot in order to effect the arrest, that no copy of the warrant had been shown to the accused and that he denied giving permission for the house to be searched. These allegations were denied and were not substantiated by evidence from the accused or any witness. In the circumstances I find that the search, insofar as it affected accused number seven, was conducted in an orderly fashion and that the accused gave consent.

ANALYSIS OF THE EVIDENCE

[61] There are, in my view, only two grounds of any substance challenging the lawfulness of the search and seizures which followed upon the arrest of the accused. The first is that the police, although able to do so, did not conduct their searches under the authority of a search warrant in terms of s 21 of the Act whilst the second ground flows from the invalidity of the arrest warrants.

[62] Although the lack of search warrants was undesirable, for the reasons I have given this did not, of itself, render the search and seizures illegal

or unconstitutional. The question then is whether the searches fell within the provisions of s 22(a) or (b) of the Act. In regard to the latter section, which provides for dispensing with the need for a warrant in cases of urgency, the evidence was that the police were conducting an arrest and search and seizure operation involving five accused and eleven addresses. Having just obtained warrants of arrest for suspects whom they believed to be implicated in a series of three armed robberies (although the warrant referred to only one), the last of which had taken place only a week before, they were understandably eager to make arrests and search for evidence. Whilst obtaining eleven search warrants would have been quite possible, it would in all probability have delayed the arrest and search and seizure operation and certainly rendered it more complicated. Nonetheless, the State failed to make out a case satisfying the requirements of s 22(b) and it must therefore fall back on the provisions of s 22(a) of the Act.

[63] I have found that on the evidence all the accused consented to the searches of their premises. There is no evidence that they explicitly consented to the various articles being seized but nor is there any evidence that any of them objected thereto. It appears, in the circumstances, that the accused tacitly consented to the seizures. I conclude, therefore, that the searches and seizures fell within the provisions of the exception created by s 22(a) of the Act to the general

rule that a search must be authorized by a search warrant.

[64] If I am incorrect in this conclusion, the only possible lawful basis for the searches is s 23 of the Act which provides for searches of persons arrested without the authority of a search warrant. However, the arrest warrants were invalid and unlawful by reason of the lack of jurisdiction on the part of issuing magistrate. To what extent, then, did this render the search and seizures unlawful or unconstitutional? In our constitutional democracy the ultimate test for the admissibility of evidence is governed by s 35(5) of the Constitution which provides as follows:

> ***"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."***

[65] At the very least an unlawful search would breach the subject's right to privacy in terms of s 14 which includes the right not to have one's person or home searched or one's possessions seized. More fundamentally, however, the accused rights would be infringed by virtue of the breach of the principle of legality inherent in acting upon warrants of arrest which were invalid in law. This principle is of foundational importance in our law. See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at para 58. It does not follow, however, that simply because the arrest warrants were defective the articles seized are inadmissible

as evidence. This result follows only if the admission of such evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

[66] Only limited argument was put before this Court, particularly concerning the first of these two qualifications. Simply because the accuseds' right to privacy may have been infringed does not necessarily mean that the admission of the disputed evidence would render their trial unfair. The question of the effect of admitting such evidence is fundamentally one of fairness but is not one which can be asked or answered in a vacuum. Guidance is to be found in several recent cases dealing with this issue.

[67] In *S v M* 2002 (2) SACR 411 (SCA) it was held that real evidence which obtained by illegal or improper means is generally more readily admitted than evidence so obtained which depends upon the say so of a witness, the reason being that it usually possesses an objective reliability. It does not "conscript the accused against himself" in the manner of a "confessional statement". In the case of all five accused all the evidence seized and objected to was real evidence in the form mainly of cell phones, police insignia and uniforms and motor vehicles.

[68] In *S v Pillay and Others* 2004 (2) SACR 419 (SCA) the court reviewed

authorities dealing with evidence unconstitutionally obtained being excluded where its admission would render the trial unfair or otherwise bring the administration of justice into disrepute. It concluded that the Canadian courts have moved in recent years towards an approach where evidence, whether real or derivative, which is derived from conscriptive evidence i.e. self-incriminating evidence obtained in violation of a constitutional right, will be excluded on the grounds of fairness if it is found that but for such conscriptive evidence the derivative evidence would not have been discovered. The court held that the question whether the admission of evidence will bring the administration of justice into disrepute requires a value judgment which inevitably involves considerations of the interests of the public. Some of the factors which should be considered in such an enquiry are the nature of the evidence obtained, what constitutional right was infringed, was such infringement serious or merely of a technical nature and would the evidence have been obtained in any event.

[69] In the present case, assuming in favour of the accused proof of an infringement of their rights to privacy or legality, the search of their premises and resultant seizures cannot be described as minor. However, the infringement occurred solely because the arrest warrants were invalid. This did not involve any *mala fide* action on the part of the police but was simply the result of a technical defect in the warrants.

The investigating officer was initially intent upon applying to the Malmesbury magistrate for the warrants but was incorrectly advised by an official of that court to approach the Cape Town magistrate. There is no suggestion that the investigating officer sought to gain any unfair advantage by doing so or that he was aware at the time that that magistrate had no jurisdiction. The evidence reveals furthermore that none of the other police officers involved in the matter, including those involved in the search and seizure operations in Gauteng, had any inkling that the warrants were not valid. There can be little doubt that had the investigating officer applied to the Malmesbury magistrate for the warrants of arrest the application would have been successful and searches pursuant thereto would also have brought to light the articles seized.

[70] A second important consideration is that the accused were not conscripted into furnishing evidence which would not otherwise have been available to the police. All the evidence seized was real evidence and was found without the active co-operation of the accused. Save for the bag of police uniforms and insignia, the articles seized were in plain view. There was no evidence that the search and seizures were conducted in an unreasonable, disorderly or unlawful manner (apart from the underlying invalidity of the warrant of arrest). Unlike *Pillay's* case, admitting the impugned evidence in this case is most unlikely to

create any incentive for law enforcement agents to disregard an accused person's constitutional rights and in that sense will do no harm to the administration of justice.

[71] Particularly in the light of the technical nature of the defect in the warrants, I can see no basis for finding that the admission of the evidence will render the accuseds' trial unfair. On the contrary, I am of the view that should the evidence seized be held inadmissible by virtue of this technical defect, the accused will gain an unjustified advantage in the trial and the administration of justice will be brought into disrepute in the eyes of reasonable members of the public in our society. Finally, I should add that, even if the search and seizures in terms of s 22(a) infringed the accuseds' constitutional rights, I would still hold the evidence to be admissible for the selfsame reasons.

[72] For these reasons I ruled that the evidence derived from the section 205 subpoenas relating to the four telephone numbers attributed to the accused was inadmissible but that all the evidence seized pursuant to the arrest and searches of the accused and their premises was admissible.

LJ BOZALEK, J