IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 1761/2014

In the matter between:

THE MINISTER OF POLICE	**FIRST APPLICANT**
COLONEL DEVANDRI PILLAY N.O.	**SECOND APPLICANT**

and

AUCTION ALLIANCE (PTY) LTD	**FIRST RESPONDENT**
RAEL LEVITT	**SECOND RESPONDENT**
SMIEDT & ASSOCIATES ATTORNEYS	**THIRD RESPONDENT**
ALAN SMIEDT	**FOURTH RESPONDENT**
DALE SMIEDT	**FIFTH RESPONDENT**
GRANT ENGEL N.O.	**SIXTH RESPONDENT**
ESTATE AGENCY AFFAIRS BOARD	**SEVENTH RESPONDENT**
KPMG SERVICES (PTY) LTD	**EIGHTH RESPONDENT**
ACCOUNTANTS @ LAW (PTY) LTD	**NINTH RESPONDENT**

Coram: ROGERS J

Heard: **26 FEBRUARY 2014**

Delivered: **28 FEBRUARY 2014**

JUDGMENT

ROGERS J:

Introduction

[1] This application concerns the procedure to be followed in relation to various documents, hard drives and the like which are currently being preserved pending the determination of an application for a search warrant. The applicants are the Minister of Police and Colonel D Pillay. Save where a distinction is required, I shall refer to them collectively as 'SAPS'. The 1st respondent is Auction Alliance (Pty) Ltd ('AA') and the 2nd respondent its former managing director Rael Levitt ('Levitt'). The 3rd respondent is the firm of attorneys that acts for them, Smiedt & Associates Attorneys ('SAA'), while the 4th and 5th respondents are Alan Smiedt and Dale Smiedt, respectively a partner and professional assistant in the firm (referred to hereafter as Smiedt Snr and Smit Jnr respectively). The 6th respondent is Mr G Engel, an acting magistrate serving at the Cape Town Magistrate's Court. The 7th respondent is the Estate Agency Affairs Board (' the EAAB'), a regulatory body created by the Estate Agency Affairs Act 112 of 1976. The EAAB is the complainant in respect of certain criminal charges laid against AA and Levitt. The 8th and 9th respondents respectively KPMG Services (Pty) Ltd ('KPMG') and Accountants@Law Pty Ltd.

The facts

[2] The background to the matter is briefly as follows. On 7 August 2012 SAPS conducted countrywide search and seizure operations in respect of the criminal investigation pursuant to warrants issued by various magistrates. On 8 August 2012 AA and Levitt, represented by SAA, brought an urgent application in this court to set aside the warrants executed at premises in Cape Town and for the return of the seized items. On 23 August 2012 the urgent application was resolved by a consent

order made by Stelzner AJ. In terms of that order the warrants were declared unlawful. The seized items were to be returned and retained by SAA until Friday 7 September 2012. If a fresh application for a search warrant was brought by that date (of which five court days' notice to AA and Levitt was required), the seized items were to be retained by SAA pending the determination of the fresh application.

[3] Pursuant to that order, the seized items were duly returned to SAA, whose offices are at 1 Thibault Square in Cape Town. Pillay and Smiedt Jnr oversaw this process and co-signed an agreed list. The handover list comprised 119 sealed evidence bags with unique serial numbers and a further item comprising 21 boxes.

[4] The period for the bringing of a fresh application was extended by agreement to 14 September 2012. On that date SAPS launched an application in the Cape Town Magistrate's Court for a fresh search warrant in respect of the seized items which were being preserved at the offices of SAA. Pursuant to receiving notice of the application (as required by the order of Stelzner AJ), AA and Levitt opposed the granting of a fresh search warrant. This was done by way of answering papers. SAPS filed a replying affidavit. In the replying affidavit SARS sought *inter alia* to meet some of the objections by amending the terms of the proposed warrant. SAA and Levitt then brought an application to strike out certain material from the replying affidavit.

[5] The application for the search warrant was argued before Mr Engel as an acting magistrate on 18 and 19 April 2013. On those days he heard argument on certain preliminary questions raised by AA and Levitt regarding the nature and form in which the application had been brought and the inclusion of supposedly new matter in reply. Upon conclusion of argument the magistrate reserved his decision and asked the parties to file supplementary submissions on the preliminary questions. Those submissions were duly filed. They are annexed to the founding affidavit in the present application. SAPS' counsel argued in their supplementary submissions that the procedure for seeking a search warrant was not an application in the usual sense and that SAPS was thus entitled, if objections were raised, to place additional information before the magistrate and to amend the terms of the proposed warrant. SAPS submitted that the material in question was in any event

not objectionable and that if it were regarded as new matter the appropriate course would be to afford AA and Levitt an opportunity to traverse it. The focus of the supplementary submissions filed on behalf of AA and Levitt was that the magistrate, sitting as a 'court', had no jurisdiction to grant the application. The argument was that in terms of s 21(1)(a) of the Criminal Procedure Act 51 of 1977 a magistrate considering an application for a warrant does not sit as a court; but that SAPS had avowedly approached the magistrate by way of an application to court in terms of rule 55 of the Magistrate's Courts Rules.[1] Their fall-back position was that, if the proceedings were properly before the magistrate sitting as a court, he was bound to apply the usual rules regarding new matter in reply and should thus strike out the supposedly new material (though that was not addressed in the supplementary submissions).

[6] By the time the present application was launched on 6 February 2014 the acting magistrate, Mr Engel, had not given judgment on the preliminary questions, and that remains the position. SAPS' attorney wrote several emails to Mr Engel over the period August to November 2013. The response was that the magistrate was endeavouring to finalise his judgment but was battling to get around to it because of his daily workload. In an email he wrote on 17 October 2013 he mentioned that a new problem had arisen, namely that the Deputy Minister of Justice was reluctant to extend the contracts of acting magistrates beyond three months whereas he (Mr Engel) had already been 'on contract' for eight years. He suspected that his contract would not be extended and for that reason wished to finalise the judgment before his contract was terminated. On 23 January 2014 he wrote to SAPS' attorneys saying that his contract had only been extended to the end of February 2014 'as per the instructions of the Deputy Minister of Justice'; that a number of magistrates had already left the Department due to their contracts not being extended; and that he would be following suit. He continued:

'Having said that, I am of the opinion that even if I give judgment on the matter, it is highly improbable that we will get all the parties together before end of February to conclude this matter. In the circumstances, it might be advisable to start with the matter *de novo* before

[1] Rule 55 of the Magistrates' Courts Rules is the general rule governing applications in that court. Sub-rule (1)(a) commences: 'Every application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief.'

another magistrate. A copy of this email is also sent to Senior Magistrate Maku, as well as Chief Magistrate Dimbaza.

I do apologise for the inconvenience, but unfortunately, there is nothing I can do under the circumstances.'

[7] That the delay in giving judgment is entirely unacceptable needs hardly be said. This delay, and the possibility that judgment will never be given, are the major contributing factor to the bringing of the present application in the high court. Since I do not know the circumstances under which magistrates operate in the Cape Town Magistrate's Court, it would not be fair to apportion blame in this judgment nor is it necessary to do so.

[8] SAPS decided, in the light of Mr Engel's letter of 23 January 2014, to prepare a fresh application for a warrant and to request the Chief Magistrate to have it placed before a new magistrate, again giving AA and Levitt five days' notice. In the meanwhile, however, and on the same day as Mr Engel wrote his letter, SAA notified SAPS' attorneys that over the last few weeks members of the firm had moved the preserved items around in the firm's storage facilities to make way for other material; that some of the evidence bags were torn; and that SAA was not sure whether these tears were new. They thus invited SAPS to conduct an inspection.

[9] The inspection was conducted by Pillay with two colleagues on 29 and 30 January 2014. It is unnecessary to go into the detail. Although some of the evidence bags which had previously been intact were now found to be torn, this seems to have been because their contents were very heavy. The contents were repacked into smaller exhibit bags and re-sealed. The real point of concern for SAPS was that six evidence bags which had been on the signed handover list could no longer be found. These bags contained computer hard drives. SAPS regards their loss as a serious blow to the criminal investigation.

[10] A combination of the magistrate's letter of 23 January 2014 and the results of the inspections on 29 and 30 January 2014 led SAPS on 6 February 2014 to launch the present application for urgent hearing on 7 February 2014. The relief sought in

the original notice of motion was in summary the following: that the items currently being preserved at the offices of SAA be removed to and retained by KPMG pending the final determination of an application for a search warrant (prayers 2 or 3); that SAPS be directed to bring a fresh application for a search warrant within 30 days, subject to the rights of AA and Levitt to be given notice of the application and to challenge any warrant issued in accordance with the earlier order of Stelzner AJ (para 4); and that a rule nisi be issued calling on the respondents to show cause why SAA and the two Smiedts should not be found in contempt of court (para 7).

[11] On the following day, 7 February 2014, Ndita J made an order on the application by consent. Paras 2 and 3 of the order made provision for the transfer of the preserved items from SAA to KPMG and for the retention of those items by KPMG until the final determination of an application for a search warrant in accordance with the provisions of para 4 of the order. Para 4 of the order, which was in the form of a rule nisi returnable on 26 February 2013, was an elaboration of para 4 of the notice of motion, in that it introduced three different ways, in the alternative, in which the application for a search warrant might be finalised: (i) The first option was in line with the original notice of motion, and contemplated an order that SAPS bring a fresh application for a search warrant within 30 days. (ii) The second option was that SAPS present the papers in the existing warrant application to the Chief Magistrate with a request that it be allocated to a new magistrate for determination as soon as practically possible. (iii) The third option was that Mr Engel be directed to deliver his ruling on the preliminary questions within 10 days and thereafter to ensure that the other issues in the application were dealt with and that a final decision on the application be made as soon as practically possible. Ndita J's order contained a separate rule nisi, returnable on 27 May 2014, in regard to the contempt relief.

[12] There is no remaining dispute regarding the transfer of the preserved items from SAA to KPMG. The dispute regarding contempt is not before me and will be determined later. I am only concerned with the relief sought in para 4 of the rule nisi. This involves, in effect, the choice of one of the three options previously summarised. SAPS argues for option (i), supported by the EAAB. AA and Levitt, by contrast, contend that option (iii) is to be preferred, alternatively that option (ii) is

more appropriate than option (i).) Mr A Breitenbach SC, leading Ms A Erasmus and Ms G Goosen, appeared for SAPS; Mr M Hellens SC appeared for the EAAB; and Mr Katz SC and Mr Rosenberg SC appeared for AA and Levitt respectively, in each case leading Mr D Simonsz.

Urgency

[13] AA and Levitt contended in their answering papers that the application was not urgent. This was not pressed in argument, save in relation to the costs of the appearance on 7 February 2014. I shall deal with costs at the end of this judgment.

The merits

[14] Counsel for AA and Levitt submitted that option (i) was not competent. Originally AA and Levitt's contention to this effect in their answering papers was based on the fact that there is an existing application in the Cape Town Magistrate's Court which has not been withdrawn and in regard to which judgment on preliminary issues is awaited, so that a new application would contravene the *lis pendens* principle. In its replying papers SAPS made explicit what I think was obvious in para 4.1 of the rule nisi, namely that the fresh application will be brought before a different magistrate, not Mr Engel; and has also said that upon the bringing of the fresh application SAPS will deliver a notice withdrawing the pending application. SAPS proposes that these matters be incorporated in the court's order. Counsel for AA and Levitt conceded in their written argument that this disposed of the *lis pendens* objection.

[15] They nevertheless submitted that option (i) would be subversive of the judicial process: the parties were entitled to a judgment on the existing application. They also submitted that option (i) would result in a wasting of all the time and effort which the parties had put into the pending warrant application. Apparently the papers in that matter run to more than 1 000 pages. SAPS, AA and Levitt, and the EAAB were each represented by senior and junior counsel at the hearing before Mr Engel.

[16] I do not consider that either of these considerations is a bar to the adoption of option (i). A respondent is not invariably entitled to a judgment. It is open to an applicant to withdrawn an application. In terms of option (i) as varied, the bringing of the new application will have to be accompanied by a withdrawal of the pending application. As to the costs of the withdrawn application, I do not think that a magistrate has jurisdiction to make a costs order in relation to proceedings governed by s 21(1)(a) of the Criminal Procedure Act. A magistrate only has such powers as are conferred on him or her by legislation. I have not been able to find any statutory provision which would empower a magistrate to grant an order in favour of or against SAPS in relation to an application for a warrant in terms of s 21(1)(a).[2] Be that as it may, if AA and Levitt consider that they are entitled to costs, that can be argued in due course, either before Mr Engel or before another magistrate. (Mr Breitenbach in open court tendered an alternative procedure to deal with costs, namely an arbitration on whether costs could be ordered in s 21(1)(a) proceedings and if so what the appropriate costs order in this case would be.) Whether the fact that the costs of the first application remain unresolved means that a defence of *lis pendens* could be raised to a new application is by no means clear; the relevant *lis* has to with the substantive relief claimed, not costs. In any event, *lis pendens* is not an absolute defence; the court may in its discretion allow a second application despite the fact that there is a pending first application *(Janse van Rensburg & Others NNO v Steenkamp & Another* 2010 (1) SA 649 (SCA) paras 31-35; Herbstein & Van Winsen *The Civil Practice of the High Court of South Africa* 5th ed at 313). The unusual circumstances of the present matter may well justify a discretion to allow a fresh application, even if the first application has not been fully resolved.

[17] The objection that the time, energy and costs relating to the first application will be wasted also does not impress me. The papers in the application currently pending before Mr Engel have mercifully not been placed before me. However, it is safe to assume that in large part they deal with the merits of the matter, namely

[2] Section 48 of the Magistrates' Courts Act 32 of 1944 empowers a magistrate's court to grant a just costs order as a result of the 'trial of an action'. Section 80(1) refers to the costs of 'any civil proceedings in magistrates' courts'. Rule 33(1) of the Magistrates' Courts Rules provides that '[t]he court in giving judgement or in making any order, including any adjournment or amendment, may award such costs as it deems fit'.

whether, as contemplated in s 21(1)(a) of the Criminal Procedure Act, there are reasonable grounds, appearing from information on oath, for believing that the items in question are at the premises from which SAPS wishes to take them and that the items are of a kind contemplated in s 20. The material in the current papers relating to these matters will remain relevant to the fresh application. I was told that, because of the disappearance of the six evidence bags containing the computer hard drives, material in the original application and in the proposed warrant relating to these particular items will fall away in a new application.

[18] The two days spent in argument before Mr Engel were devoted not to the merits but to matters which in all probability will not feature in a fresh application. SAPS will no doubt make clear in the fresh application that it is approaching the magistrate in the capacity contemplated in s 21(1)(a) of the Criminal Procedure Act, and SAPS will eschew forms and language which suggest that it is invoking the ordinary jurisdiction of the magistrate as a court pursuant to rule 55. SAPS will from the outset in the new application modify the terms of the proposed warrant (as it did in the replying papers in the earlier application) so as to meet the objections raised by AA and Levitt. SAPS will now include in its founding papers any new material which may impermissibly have been included in its replying papers in the old application. AA and Levitt will have a full opportunity to traverse these matters in their answering papers in the new application. The magistrate who hears the new application will thus in all probability not need to decide the preliminary matters which Mr Engel was called upon to decide. Those preliminary matters are in truth a distraction.

[19] Counsel for AA and Levitt submitted in their heads of argument, with reference to *Thint (Pty) Ltd v NDPP; Zuma v NDPP & Others* 2009 (1) SA 1 (CC), that the preservation of unlawfully seized items is an exceptional remedy, the usual position being that such items should be returned to the person from whom they were taken and whose privacy was unlawfully violated. I do not need to express a final view on counsel's characterisation of preservation as exceptional though it does not appear to accord with para 223 of the *Thint* judgment. In the present case the parties agreed, by way of the order made by Stelzner AJ, that preservation would apply in this case, and that the items would be preserved pending the

determination of an application for a warrant. Nothing has changed, and indeed AA and Levitt accept that there should be a final determination of a new application. The only difference between them and SAPS is that they want the pending application before Mr Engel to be finally determined by way of either option (iii) of (ii) whereas SAPS, because of the lengthy delay which has characterised the pending application and because of Mr Engel's imminent departure from judicial office, want a fresh application to a magistrate to be determined (ie option (i)).

[20] Not only is option (i) a permissible one but it is also to my mind the preferable course to follow. Option (iii) would entail a direction to Mr Engel that he give judgment on the reserved questions within 10 days and that he then expeditiously determine the remaining issues in the application. The fact that Mr Engel will apparently cease to be a magistrate at the end of February 2014 does not necessarily mean that he could not, after that date, give judgment on the preliminary questions and then (if he did not dismiss the application) hear the application on its merits. Section 9(6) of the Magistrates' Courts Act 32 of 1944 provides that an acting magistrate shall also deemed to have been appointed 'in respect of any period during which he or she is necessarily engaged in connection with the disposal of any proceedings – (a) in which he or she has participated as such a magistrate… ; and (b) which have not yet been disposed of at the expiry of the period for which he or she was appointed'. Whether he could still issue the warrant would depend on whether an application for a warrant in terms of s 21(1)(a) of the Criminal Procedure Act constitutes 'any proceedings' as contemplated in s 9(6) of the Magistrates' Courts Act or whether that phrase is confined to civil and criminal proceedings. There is at very least some uncertainty on that question. It is also uncertain whether a judge can, in the absence of review proceedings, direct a magistrate to deliver a judgment within a specified period of time.

[21] In any event, ten months have passed since Mr Engel reserved judgment. This is an unacceptable delay in itself. If he was unable to produce a judgment within ten months, there is no reason to believe that he will now be able to do so within ten days. Furthermore, the emails which Mr Engel has sent to SAPS' attorneys strongly suggest that he will not deliver a judgment, given that his appointment does not to extend beyond February 2014. The practical reality

appears to be that he will not deliver a judgment. I am aware, in this regard, that questions have sometimes arisen concerning the remuneration of acting judicial officers who are required to spend substantial time on part-heard matters after the termination of their acting appointments. If Mr Engel considers that he will be inadequately remunerated for the further time he will have to spend on the matter, this might be further cause for delay.

[22] Moreover, the judgment which is awaited from Mr Engel is a judgment on preliminary issues which, if a fresh application were made, would in all probability not arise. In those circumstances, to require Mr Engel now to decide them, after the termination of his acting appointment, strikes me as an exercise in futility. Judicial resources would be better served in getting on with the merits of the case. Insofar as the merits are concerned, the retention of Mr Engel in the case presents no advantages. He will still need to hear argument on the merits. That may as well be done by a new magistrate with a current appointment rather than by Mr Engel, who is likely to be completely demotivated. It may be said that Mr Engel is steeped in the matter. Given that he heard argument only on preliminary matters, I do not know whether Mr Engel read his way fully into the merits of the case. Even if he did, the details are likely to have gone from his mind after what will be a period of more than one year.

[23] Option (ii) is also unsatisfactory. Although, in terms of that option, the matter would be placed before a magistrate with a current appointment, the new magistrate would – on the pending application in its current form – need to re-hear argument on the same preliminary issues with which Mr Engel was entertained on 18 and 19 April 2013. Only after giving judgment on those issues could the new magistrate proceed to the merits of the matter. I have already indicated that the preliminary issues which have bedevilled the pending application are a sideshow and that it would be an inefficient use of judicial resources to compel a decision on them if a different and more efficient procedure is available.

[24] Although option (i) will mean that AA and Levitt will have spent money in vain on preliminary objections which will probably not remain relevant in a fresh

application, they will be entitled, if they so wish, to argue the wasted costs incurred before Mr Engel or another magistrate.

[25] Even if an application to a magistrate for a warrant in terms of s 21(1)(a) of the Criminal Procedure Act were regarded as an ordinary civil proceeding, I would, for the reasons stated above, conclude that option (i) is to be preferred. In my view, however, a s 21(1)(a) application does not constitute civil proceedings, and the Magistrates' Courts Rules governing civil actions and civil applications do not apply. Ordinarily the party to be searched is not given notice. A magistrate who authorises the issue of a warrant is not required to give a judgment or reasons. His decision to issue the warrant is not subject to appeal though, like other exercises of public power, it may be taken on review (at which point the magistrate may need to furnish reasons in defence of his decision). An application for a search warrant in terms of s 21(1)(a) may be made not only to a magistrate but also to a justice of the peace. The nature of the function is the same whether the functionary is a magistrate or a justice. One is not concerned with court proceedings but with the exercise of a discretion vested in a public functionary, albeit of a judicial character (see *Thint supra* paras 89-93).

[26] In the present case the parties agreed, by way of Stelzner AJ's order, that AA and Levitt would be given five court days' notice of the bringing of the application for a warrant. Stelzner AJ's order did not itself set out a procedure for answering and replying papers. The parties seem of their own accord to have followed the rule 55 procedure as a pragmatic way of placing their respective contentions before the magistrate. That cannot change the nature of the function performed by a magistrate in terms of s 21(1)(a) of the Criminal Procedure Act. Stelzner AJ's order contemplated the usual application to a magistrate or justice for a search warrant.

[27] The proper characterisation of s 21(1)(a) proceedings substantially undermines the basis of the opposition by AA and Levitt to option (i), since the opposition is largely based on treating the pending application before Mr Engel as a civil application governed by the ordinary rules relating to the filing of affidavits and on which AA and Levitt are entitled to a judgment (including a judgment on the interlocutory application for striking-out) and in which they would, if successful, be

entitled to costs. The true position, I conceive, is that a magistrate dealing with a s 21(1)(a) request does not sit as a court in civil proceedings. The magistrate is entitled to receive or call for additional information and to make modifications to the proposed warrant in order appropriately to balance the public interest in criminal investigations on the one hand and the privacy of the person to be searched on the other hand and to ensure that the warrant complies with the requirements laid down in leading cases (cf *Van der Merwe & Others v Additional Magistrate, Cape Town & Others* 2010 (1) SACR 470 (C) paras 45 and 48). The rules governing civil applications heard by a magistrate sitting as a court do not apply. The magistrate in s 21(1)(a) proceedings must follow whatever procedure he thinks appropriate to determine whether a search warrant should be issued. If the party to be searched has notice of the application (this will not be the norm) and if such party places evidence and submissions before the magistrate, the magistrate must no doubt in fairness take them into account. However, he is not required to give decisions on objections made in interlocutory form (such as a striking-out application). He must simply follow a fair procedure and, when he concludes that he has heard enough, decide either to issue the warrant or not issue it. Like a justice to whom a s 21(1)(a) request has been made, he is not required to deliver a judgment with reasons nor does he have the power to make a costs order. Submissions regarding the cogency and admissibility of evidence and the like will simply be taken into account in his final decision.

[28] Counsel for AA and Levitt placed considerable emphasis on the fact that the order of Stelzner AJ was the product of agreement between the parties. In the ordinary course, AA and Levitt would, if the original search warrants were invalid, have been entitled to the return of their documents and other items. They agreed instead to a preservation order (and also agreed, in the proceedings before Stelzner AJ, to bear their own costs) but such agreement was specifically on the basis that an application for a search warrant had to be brought by 7 September 2012 (later changed to 14 September 2012), failing which they would be entitled to the return of the preserved items (or more accurately, the duty to preserve would fall away). The application brought by SAPS on 14 September 2012 was the application contemplated by Stelzner AJ's order and was the application which thus kept the agreed duty to preserve alive. Counsel submitted that I should show as much fidelity

as possible to the terms of the agreed order made by Stelzner AJ. This would be best achieved by following option (iii), alternatively option (ii). To link continued preservation to a fresh application, ie option (i), would be an invasion of the privacy of AA and Levitt which was not what the parties had agreed.

[29] This argument was advanced in tandem with an argument that the application in the form in which SAPS brought it on 14 September 2012 was, in effect, a straitjacket; any material alteration in the form of the proposed warrant after that date, and any material information adduced in support of the warrant after that date, changed the substance of the application, so that it no longer qualified as the application contemplated in Stelzner AJ's order. This would mean that the seized items would no longer have to be preserved, even though SAPS might be entitled (outside the framework of Stelzner JA's order) to pursue its request for a warrant.

[30] Although Stelzner AJ made his order by agreement, the order is nonetheless an order of the court and must be construed as such. The order's reference to the final determination of an application for a search warrant plainly meant an ordinary s 21(1)(a) application with the character I have described earlier. The application brought by SAPS on 14 September 2012 was an application for a search warrant relating to the 120 items on the handover list. It retained that character, notwithstanding the adducing of further evidence in reply and the modification of the terms of the proposed warrant. I thus have no doubt that if a decision to issue a warrant were in due course made on the existing application (whether by Mr Engel or a new magistrate), it would be the final determination of the application contemplated in Stelzner AJ's order. And for the same reason I have no doubt that, pending such decision, the preservation for which Stelzner AJ's order provides would remain binding.

[31] The difficulty is that there is no realistic prospect that Mr Engel will give a decision on the s 21(1)(a) application and it is not even certain in law that he will be entitled to do so after the termination of his acting appointment. It is thus clear that some alteration to the order made by Stelzner AJ is required. The relevant provisions of his order are procedural in nature and are thus subject to revision by this court if circumstances demand, as indeed they do. This really leaves one with a

choice between options (i) and (ii). As a matter of form, it is correct – as counsel for AA and Levitt contended – that option (ii) seems more closely to adhere to the procedure contemplated in Stelzner AJ's order, because the application brought within the original time-limit laid down in his order would still be decided, albeit by a different magistrate. In substance, however, option (ii) is not closer to the regime contemplated in Stelzner AJ's order than option (i). Because of the true character of s 21(1)(a) proceedings, a magistrate hearing the existing application pursuant to option (ii) could not permissibly strike out supposedly new material as if the application were an ordinary civil proceeding before a court. The magistrate could even now receive further evidence regarding developments since April 2012. Option (ii) will require there to be placed before a new magistrate an unwieldy and out-of-date application which will have to be supplemented and modified to account for later developments. It would be far preferable to place before a new magistrate a fresh application which incorporates in logical order all the material which SAPS now wishes to rely upon (ie such material as was before the magistrate in April 2012 to the extent that it remains germane, together with any other relevant material which has become available to SAPS since April 2012) and which excises from the current application the material specifically relating to the six items of evidence which have disappeared and which will thus no longer feature in the proposed search warrant.

[32] It was repeatedly submitted to me by counsel for AA and Levitt that SAPS was only seeking the relief they now do because SAPS did not like the outcome of the 'trigger mechanism' for which the Stelzner AJ order made provision. It was suggested to me, in a colourful expression, that SAPS had 'pulled the trigger' (ie issued an application for a warrant by 14 September 2012) but had 'shot a blank'. I do not accept this criticism of SAPS. There was nothing wrong with the mechanism contained in the Stelzner AJ order or with the manner in which SAPS acted upon it. If the application brought by SAPS to the magistrate on 14 September 2012 had been dealt with properly, promptly and with due regard to the true character of the s 21(1)(a) function, SAPS should long since have had a decision on the issuing of the warrant one way or the other. The mechanism contemplated in Stelzner AJ's order failed because of a failure on the part of the magistrate, though to some extent the parties may themselves have led him astray by allowing the request for a warrant to become enmeshed in the inappropriate trappings of a court application.

[33] I appreciate that the views I have expressed regarding the character of s 21(1)(a) proceedings effectively answer certain of the questions argued before the magistrate. However, the correct characterisation of a s 21(1)(a) application is a relevant consideration in the proceedings before me and it is for that reason that I have expressed views thereon. Those views may also be of some assistance when a new magistrate comes to deal with the application for a warrant.

[34] One of the points argued before Mr Engel was the admissibility of a statement made by Levitt to the National Consumer Commission pursuant to s 102 of the Consumer Protection Act 68 of 2008. I was not addressed on the merits of that point and I express no opinion on it. I do not doubt that where an application for a search warrant is opposed, the opposing party may make submissions to the magistrate regarding the admissibility of SAPS' evidence. If Levitt's statement is included in the new application, AA and Levitt can make submissions regarding its admissibility to the magistrate pursuant to option (i). (Even if option (ii) were followed, the new magistrate would need to re-hear argument on that question.) Those submissions, together with others, will be taken into account by the magistrate when he or she makes a final decision on whether a case for the issuing of the warrant has been made out.

Conclusion

[35] For all these reasons I consider that an order should be granted in terms of para 4.1 of the rule nisi, amended in the manner indicated in the replying papers. I sincerely hope that the fresh application is dealt with expeditiously, having regard to the true character of s 21(1)(a) proceedings.

[36] SAPS does not seek costs at this stage. It asks that those costs stand over for later determination.

[37] Counsel for AA and Levitt submit that they should at this stage at least be awarded the costs of the proceedings on 7 February 2014. They contended that the order sought in para 4 of the original notice of motion, which was not in the form of a rule nisi, was not justifiably sought on such short notice. However, para 4 was part

of a broader application. SAPS' discovery that the items stored at SAA' offices had not been faithfully preserved justified urgent action. Pillay obtained final confirmation on 3 February 2014 from Smiedt Jnr that the missing items could not be found, and the present application was launched on 6 February 2014. Since the original undertaking to preserve the seized items had, for whatever reason, proved insufficient, I do not think that SAPS was obliged to rely on a further undertaking. SAPS was entitled to bring the matter to a head by an urgent application.

[38] It is true that, in relation to the further conduct of an application for a search warrant, SAPS in the original notice of motion sought an immediate order corresponding in essence with option (i). However, the parties were able on 7 February 2014 to refine the various possibilities for finalising the warrant application. This was not time wasted. Since SAPS was in any event entitled to come to court as a matter of urgency on 7 February 2014, I do not think it likely that the failure to formulate para 4 as a rule nisi in the original notice of motion materially increased the costs incurred by AA and Levitt.

[39] I am thus disinclined to make any costs order at this stage. All questions of costs should stand over. AA and Levitt will be entitled, when the costs of the application as a whole come to be considered, to submit that they should be awarded wasted costs in respect of 7 February 2014.

[40] I make the following order:

[a] In this order the expression 'the seized items' has the meaning stated in para 2 of this court's order (per Ndita J) dated 7 February 2014.

[b] Pursuant to the order referred to in [a] above, the applicants are directed to bring a fresh application, before a magistrate in the District of Cape Town other than the sixth respondent, for a search warrant pertaining to the seized items within 30 days: provided that such application shall be subject to paras 5 and 6 of the order of this court (per Stelzner AJ) dated 23 August 2012 in case 15482/2012; and provided further that, when bringing such application, the applicants shall deliver a notice

withdrawing the application for a search warrant pertaining to the seized items which up to now has served before the sixth respondent.

[c] The costs of this application to stand over for later determination.

ROGERS J

APPEARANCES

For Applicants:	Mr A Breitenbach SC & Ms A Erasmus & Mr G Goosen Instructed by: State Attorney Mr L Manuel Cape Town
For First Respondent:	Mr Katz A SC & Mr D Simonsz Instructed by: Smiedt & Associates Cape Town
For Second Respondent	Mr S Rosenberg SC & Mr D Simonsz Instructed by: Smiedt & Associates Cape Town

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