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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

Case No: 8633/2020

REPORTABLE

In the matter between:

SIMON PETER OOSTHUIZEN	Applicant
and	
THE MAGISTRATE FOR THE DISTRICT OF HERMANUS, MR L.P. LE ROUX	First Respondent
THE MINISTER OF SAFETY & SECURITY	Second Respondent
CAPTAIN CHRISTIAAN ROSSOUW	Third Respondent
CAPTAIN DANIE JOHAN RAUTENBACH	Fourth Respondent

Coram: Norton AJ
Heard: 9 September 2020
Delivered: 29 October 2020

JUDGMENT

Norton AJ

[1] On 21 May 2020 the Magistrate for the District of Hermanus (the Magistrate) issued a search warrant in terms of s 21 read with s 20 of the Criminal Procedure Act 51 of 1977 (the CPA) authorising the third respondent, Captain Rossouw of the South African Police Services (the SAPS), to enter and search identified premises in Gansbaai and to seize articles including cannabis and cannabis oil.

[2] In execution of the warrant the premises of the applicant were searched on the same day. A range of articles were seized and the applicant was arrested on charges of dealing in cannabis, alternatively possession of cannabis in contravention of ss 5(b) and 4(b) respectively of the Drugs and Drug Trafficking Act 140 of 1992 (the Drugs Act).

[3] The applicant on 10 July 2020 instituted this application in which he seeks the setting aside of the warrant on an urgent basis. He does so on a range of grounds pertaining to the issue of the warrant and its terms.

[4] The Magistrate, who is cited as the first respondent in the application, did not oppose the application or file an affidavit setting out his version, but delivered notice of his intention to abide the decision of the court. The application was opposed by the second to fourth respondents, referred to in what follows as 'the respondents'.

The law governing search warrants

[5] Section 20 of the CPA empowers the State to seize any article –

> '(a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere;

(b) which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or

(c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.'

[6] Subject to ss 22, 24, and 25 of the CPA (which are not applicable on the facts in this matter), an article referred to in s 20 may be seized only by virtue of a search warrant issued –

'(a) by a magistrate or justice, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or upon any person or upon or at any premises within his area of jurisdiction; or

(b) by a judge or judicial officer presiding at criminal proceedings, if it appears to such judge or judicial officer that any such article in the possession or under the control of any person or upon or at any premises is required in evidence at such proceedings.'

[7] Provisions for the issue and execution of search warrants implicate two conflicting sets of interests: the State's constitutionally mandated task of investigating and prosecuting crime, and individuals' constitutional rights of privacy and dignity (*Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) para 54).

[8] The individual rights which are at stake are protected by a range of safeguards from the time that a search warrant is sought up to the time that

articles seized in terms of a search warrant are relied upon as evidence in a criminal trial.

> 'First, a judicial officer will exercise his or her discretion to authorise the search in a way which provides protection for the individual's right to privacy. Second, once the decision to issue the search warrant has been made, the judicial officer will ensure that the warrant is not too general nor overbroad, and that its terms are reasonably clear. At the third stage, the right to privacy may still be vindicated by a reviewing court, which can strike down overly broad warrants and order the return of objects which were seized in terms thereof. Finally, the criminal trial must be fair, and an accused person is entitled to object to any evidence or conduct that may render the trial unfair' (*Thint (Pty) Ltd v National Director of Public Prosecutions and Others: Zuma v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC) para 78).

[9] In *Minister of Safety and Security v Van der Merwe and Others* 2011 (5) SA 61 (CC) Mogoeng J (as he then was), on behalf of a unanimous Constitutional Court, outlined the requirements for a valid warrant and the guidelines to be observed by a court considering the validity of a warrant as follows:

> '[55] [A] valid warrant is one that, in a reasonably intelligible manner:
>
> (a) states the statutory provision in terms of which it is issued;
>
> (b) identifies the searcher;
>
> (c) clearly mentions the authority it confers upon the searcher;
>
> (d) identifies the person, container or premises to be searched;
>
> (e) describes the article to be searched for and seized, with sufficient particularity; and

(f) specifies the offence which triggered the criminal investigation and names the suspected offender.

[56] In addition, the guidelines to be observed by a court considering the validity of the warrants include the following:

(a) the person issuing the warrant must have authority and jurisdiction;

(b) the person authorising the warrant must satisfy herself that the affidavit contains sufficient information on the existence of the jurisdictional facts;

(c) the terms of the warrant must be neither vague nor overbroad;

(d) a warrant must be reasonably intelligible to both the searcher and the searched person;

(e) the court must always consider the validity of the warrants with a jealous regard for the searched person's constitutional rights; and

(f) the terms of the warrant must be construed with reasonable strictness.'

[10] The test for 'reasonable intelligibility' is an objective one. A warrant must, on its face and at the time of its issue, be 'reasonably capable of being understood by the reasonably well-informed person who understands the relevant empowering legislation and the nature of the offences under investigation' (*Thint*, paras 153 and 162).

The pertinent provisions of the Drugs Act

[11] Sections 4 and 5 of the Drugs Act (which proscribe, respectively, the possession of and dealing in specified substances) distinguish between three different categories of substances:

(a) a 'dependence-producing substance' (defined as meaning 'any substance or any plant from which a substance can be manufactured included in Part 1 of Schedule 2');

(b) an 'undesirable dependence-producing substance' (defined as meaning 'any substance or any plant from which a substance can be manufactured included in Part III of Schedule 2'); and

(c) a 'dangerous dependence-producing substance' (defined as meaning 'any substance or plant from which a substance can be manufactured included in Part II of Schedule 2').

[12] Part III of Schedule 2 lists 'Cannabis (dagga), the whole plant or any product thereof' as an 'undesirable dependence-producing substance'.

[13] The possession of –

(a) any dependence-producing substance is prohibited by s 4(a) of the Drugs Act; and

(b) any dangerous dependence-producing substance or any undesirable dependence-producing substance is prohibited by s 4(b) of the Drugs Act.

[14] The possession of cannabis or any product of it is therefore prohibited by s 4(b) of the Drugs Act, subject to the exceptions set out in sub-paragraphs (i) to (vii), sub-section (vii) being the exception read in by the Constitutional Court in

Minister of Justice and Constitutional Development and Others v Prince; National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton and Others 2018 (6) SA 393 (CC) para 105 where cannabis is possessed or used by an adult in private for his or her personal consumption in private.

[15] Dealing in –

(a) any dependence-producing substance is prohibited by s 5(a) of the Drugs Act; and

(b) any dangerous dependence-producing substance or any undesirable dependence-producing substance is prohibited by s 5(b) of the Drugs Act.

[16] Dealing in cannabis, which includes cultivating cannabis or manufacturing a product of it (see definition of 'deal in' in s 1(1) of the Drugs Act, read with Part III of Schedule 2) is therefore prohibited by s 5(b) of the Drugs Act.

The warrant under review

[17] The warrant issued by the Magistrate on 21 May 2020 (on a *pro forma* search warrant form) identified Captain Rossouw of the SAPS as the member in charge of the search and seizure operation.

[18] The address of the premises at which the search was authorised was identified as '6[...] M[...] Drive, D[...] P[...], Kleinbaai, Gansbaai'.

[19] The 'suspected offence' was described in part III of the warrant as:

'Contravention of section 4(a) and 5(a) of the [Drugs Act]
Dealing in Cannabis and Cannabis Oil (Dronabinol)'.

[20] The articles to be seized were described as ‘Cannabis and Cannabis Oil and items as per Annexure 2’, with the items listed in Annexure 2 to the supporting affidavit of Captain Rossouw being:

- All dagga/cannabis plants and plant material.
- All dagga/cannabis oils.
- All equipment used in the extraction of dagga/cannabis oils.
- All equipment used to cultivate dagga/cannabis.
- All electronic equipment which include cell phones, desktop computers, laptops and Ipad’s.
- All documentation that provide evidence to the crime committed.’

[21] The warrant recorded that it appeared to the Magistrate from information on oath that there were reasonable grounds to believe that there was ‘Cannabis and Cannabis Oil’ which (a) was concerned in the suspected commission of the offence mentioned in part III; (b) was on reasonable grounds believed to be concerned in the suspected commission of the offence mentioned in part III; (c) may afford evidence of the suspected commission of the offence mentioned in part III; and (d) was on reasonable grounds believed to be intended to be used in the commission of the offence mentioned in part III.

[22] The information before the Magistrate when he issued the warrant was contained in two affidavits. The first was an affidavit by the third respondent, Captain Rossouw of the SAPS Directorate for Priority Crime Investigation, South African Narcotics Enforcement Bureau, in which he explained that his unit’s investigations entail the dismantling of drug and dagga or cannabis laboratories and investigations of drug and dagga or cannabis manufacturing and distribution.

[23] Captain Rossouw stated that on 12 May 2020 he received information from a reliable source that cannabis was being cultivated in an organised manner (by means of hydroponic processes under nets) and cannabis oils were being extracted from cannabis plants (by means of pressure cookers or kettles in a bunker) on a smallholding at 6[...] M[...] Drive, D[...] P[...], Kleinbaai, Gansbaai (the property).

[24] He had asked Captain Rautenbach, the Detective Commander at SAPS Gansbaai, to confirm that the address existed and to 'do observation' at the property to confirm whether there was a cannabis cultivation plantation and a bunker on the property.

[25] On 20 May 2020 Captain Rautenbach informed him that he had done observation at the property and confirmed that there was a cannabis plantation under nets as well as 'a kind of bunker' and a house on the property. Captain Rautenbach also advised him that he had obtained photographs and video footage from the observation.

[26] Captain Rossouw stated in his affidavit that 'the cultivation of dagga/cannabis and manufacturing of dagga/cannabis oils is a criminal offence in terms of the [Drugs Act] section 5(a)' and that the items to be seized could prove that 'an offence in terms of the [Drugs Act] section 5(a) Dealing in dependence producing substance and section 4(b) Possession of dependence producing substance was committed'.

[27] Captain Rossouw named eight police officers, including himself, who he said would 'take part in the search' at the property. In Annexure 1 to Captain Rossouw's affidavit, under the heading 'Particulars of members who will execute the search warrant', the names of the same eight police officers were listed, along with the words 'Any other SAPS members that can be of assistance during the search'. Annexure 2 to Captain Rossouw's affidavit listed the articles to be seized in the search.

[28] The second affidavit before the Magistrate was deposed to by the fourth respondent, Captain Rautenbach, on 21 May 2020. He stated that on 15 May 2020 he had received a request from Captain Rossouw to observe a property where cannabis was apparently being cultivated. On 20 May 2020 at around 17h30 he observed the property, a smallholding situated at 6[...] M[...] Drive, D[...] P[...], Kleinbaai, Gansbaai. He said:

> 'During the observation it was found that it appears that dagga is being cultivated in a hothouse situated on the northern side of the smallholding at the back. I took photos of the property. I also noticed that there is a structure at the back of the property which consists of an underground and a surface level. There are even stairs which provide access to the structure…I also took photos and video of the structure. In my opinion and experience in the police it did indeed appear that the property satisfies the information which exists and that dagga or drugs are indeed being cultivated.'

[29] He stated further that he had informed Captain Rossouw of what he had observed and handed over the photos he had taken on 21 May 2020.

[30] Captain Rossouw executed the warrant at 13h20 on 21 May 2020. In an affidavit deposed to on 25 May 2020 he stated that the following articles were seized during the search of the property: (a) one iPhone; (b) one Apple laptop; (c) one tablet device; (d) approximately 2 kg of loose cannabis; (e) five small cannabis trees; (f) four 5-litre plastic containers of Glycerine; (g) one 25-litre container of Glycerine; (h) fourteen 25-litre plastic cans containing Ethanol; and (i) three 25-litre and four 5-litre plastic containers containing liquid which is possible cannabis plant material and Ethanol.

[31] On the same day Captain Rossouw arrested the applicant on a charge of dealing in cannabis, alternatively possession of cannabis.

Grounds on which the warrant is challenged

[32] A range of grounds for the setting aside of the warrant were advanced in the applicant's founding affidavit. Those grounds were supplemented with new grounds raised in his replying affidavit, the heads of argument filed on his behalf, and in oral argument by his counsel.

[33] Having filed a founding affidavit of 28 pages and a further ten pages of annexures, the applicant filed a replying affidavit which ran to 83 pages, with a further 51 pages of annexures. For reasons which I set out below, there are compelling grounds on which the replying affidavit might be struck out in its entirety as an abuse of the process of this court. The respondents have brought an application for the striking out of only the new grounds of review introduced in the replying affidavit.

[34] In circumstances in which the respondents have provisionally provided a response to the new grounds raised in the replying affidavit, and in the interests of ventilating all the issues in a matter which concerns fundamental constitutional rights, I have decided to allow the replying affidavit and consider the grounds raised in it. My disapproval of the applicant's conduct will be reflected in the costs order which I make.

[35] I have also considered one of the grounds raised for the first time in the applicant's heads of argument and one of the grounds raised for the first time in oral argument on behalf of the applicant. I do so on the basis that in each case the ground requires the application of the relevant legal principles to the undisputed contents of the warrant and has been addressed in argument by the respondents, and its consideration does not therefore occasion prejudice to the respondents which cannot be addressed by an appropriate costs order (see *Minister van Wet en Order v Matshoba* 1990 (1) SA 280 (A) 285E-F).

[36] The principal grounds relied on by the applicant are, first, that the objective jurisdictional facts for the issue of the warrant were not present; and

second, that the warrant is vague, overbroad and not reasonably intelligible. An overarching ground relied on by the applicant is that the Magistrate failed to apply his mind properly to the issue of the warrant.

[37] As a threshold point, the applicant contends that the Magistrate's failure to depose to an affidavit means that the allegation that he failed to apply his mind stands unchallenged and must be accepted. There is no merit in this submission.

[38] It is regrettable that the Magistrate, as an accountable decisionmaker, did not furnish this court with an explanation of how he reached his decision to issue the warrant, but it does not follow that the applicant has therefore established that the Magistrate failed to apply his mind (see *Grammaticus (Pty) Ltd v Minister of Police NO and Others* [2017] ZAGPPHC 342 (22 March 2017) para 26). The determination whether the Magistrate applied his mind is not a subjective one, based on the Magistrate's own 'say so', but an objective one, based on the warrant and the information which was before the Magistrate when he issued the warrant.

The ground based on the absence of objective jurisdictional facts

[39] A court reviewing the issue of a warrant must be satisfied that the objective jurisdictional acts for the issue of the warrant were present. The jurisdictional facts required by ss 20 and 21 of the CPA are reasonable grounds for believing that an article which (a) is concerned in; (b) may afford evidence of; or (c) is intended to be used in the commission or suspected commission of an offence, is on the premises to be searched.

[40] The applicant contends that the affidavits of Captain Rossouw and Captain Rautenbach do not disclose information on the basis of which the warrant could validly be issued.

[41] It is evident from the affidavits, however, that Captain Rossouw had been furnished with information from what he regarded as a reliable source that

cannabis was being cultivated in an organised manner, and cannabis oils were being extracted on the property, and Captain Rautenbach was able to confirm (from his observations and with photographs) that there were structures on the property conforming to the structures which had been described to Captain Rossouw as the locus of (a) the cultivation of cannabis; and (b) the manufacture of cannabis products.

[42] I am satisfied that the affidavits contained sufficient information to satisfy the Magistrate that the objective jurisdictional facts for the issue of a warrant - the existence of reasonable grounds for believing that articles involved in the cultivation and possession of cannabis and the manufacture of cannabis products, as proscribed by ss 4(b) and 5(b) of the Drugs Act - were present.

Grounds based on vagueness, overbreadth and lack of reasonable intelligibility

[43] The applicant contends that the warrant fails to meet one or more of these standards on the grounds that it (a) does not specify a period of validity; (b) refers to the incorrect provisions of the Drugs Act and incorrectly refers to the substance 'Dronabinol'; (c) specifies the wrong address for the property; (d) authorises the execution of the warrant by named police officials as well as 'any other SAPS member that can be of assistance during search'; and (e) permits the seizure of 'all electronic equipment'.

Period of validity

[44] The warrant contains no date, next to the words 'warrant valid until', on which the warrant would 'expire'. On the face of it, this renders the warrant overbroad in its duration.

[45] Section 21(3)(b) of the CPA, however, provides that a search warrant

> ‘shall be of force until it is executed or is cancelled by the person who issued it or, if such person is not available, by a person with like authority.’

[46] Commenting on this provision in *Hiemstra’s Criminal Procedure* (May 2020, 2-7) Kruger suggests that an issuing authority should issue a warrant for a specified period only, or withdraw it of its own accord after a reasonable period, as otherwise a warrant constitutes ‘an excessively far-reaching encroachment upon the privacy of the individual’.

[47] The specification of an expiry date for a warrant would plainly be a salutary practice, but it is not one commanded by the CPA. Since in this case the warrant was executed on the same day on which it was issued, it is not possible to say that the Magistrate would not have cancelled the warrant – as contemplated in s 21(3)(b) of the CPA – if it was not executed within a reasonable period of time. This attack on the warrant must therefore fail.

Reference to incorrect provisions of the Drugs Act

[48] In Part III of the warrant, under the heading ‘Description of suspected offence’, the following is stated:

> ‘Contravention of section 4(a) and 5(a) of the [Drugs Act]
> Dealing in Cannabis and Cannabis Oil (Dronabinol)’

[49] This description of the suspected offences gives rise to at least three concerns. The first is that ss 4(a) and 5(a) of the Drugs Act do not proscribe any conduct in respect of cannabis. The second is that reference is made to dronabinol, which is an altogether different substance to cannabis. The third is that Part III of the warrant is in conflict with Captain Rossouw’s affidavit, which records his reliance on ss 4(b) and 5(a) of the Drugs Act, and makes no reference to dronabinol.

[50] The provisions of the Drugs Act which proscribe possession of, and dealing in, cannabis are ss 4(b) and 5(b) respectively. The warrant however identifies as the suspected offences contravention of ss 4(a) and 4(b) which, respectively, proscribe possession of and dealing in entirely different substances.

[51] Part III of the warrant does make reference to 'Cannabis and Cannabis Oil', but includes in parentheses after these words, a reference to 'Dronabinol'. Dronabinol is a substance which is (a) listed as a dangerous dependence-producing substance in Part II of Schedule 2 to the Drugs Act; and (b) expressly excluded from the reference to cannabis in Part III to Schedule 2:

> 'Cannabis (dagga), the whole plant or any portion or product thereof, except dronabinol [(-)-transdelta-9-tetrahydrocannabinol].'

[52] Captain Rossouw's affidavit also erroneously identifies s 5(a) of the Drugs Act as the provision which prohibits the cultivation of cannabis and the manufacture of cannabis oil, while correctly identifying s 4(b) as the provision which prohibits the possession of cannabis. The affidavit makes no reference to dronabinol.

[53] The reference to provisions of the Drugs Act which are not applicable to the substances identified, and the unexplained reference to dronabinol, create confusion and uncertainty in respect of a pivotal issue: the suspected offences which underpin the required jurisdictional facts.

[54] In *Goqwana v Minister of Safety NO and Others* 2016 (1) SACR 384 (SCA) the Supreme Court of Appeal (per Willis JA) observed that it is 'ordinarily desirable' that when dealing with a statutory offence, as opposed to a common law crime,

> 'the warrant should pertinently refer to *the specific statute and the section or subsection thereof* in order to enable the person in charge of the premises to be searched (assisted, if needs be, by his or her lawyer) and

also the police official authorised in terms of the search warrant *to know precisely that for which the search has been authorised*' (para 29). (Emphasis added).

[55] Willis JA went on to say:

'The need for particularity in a warrant, especially where one is dealing with statutory offences, is salutary. This should present no difficulty in practice because search warrants are issued by magistrates who are trained and experienced in law (para 29).

[56] In *Powell NO & Others v Van der Merwe NO & Others* 2005 (5) SA 62 (SCA) para 59 Cameron JA (as he then was) stated:

'It is no cure for an over-broad warrant to say that the subject of the search knew or ought to have known what was being looked for: the warrant must itself specify its object, and must do so intelligibly and narrowly within the bounds of the empowering statute'.

[57] In my view the requisite particularity is absent not only when the relevant provision governing a statutory offence is not identified, but also when the wrong provision is identified or when confusion is created by the description of the suspected offence.

[58] In this instance, a person reading the warrant would not know whether the suspected offence at the core of the search and seizure authorisation relates to the substances listed in Part I, II or III of Schedule 2 to the Drugs Act, or even to the substances in all three Parts.

[59] The errors in the description of the suspected offence not only render the warrant invalid on the grounds of vagueness and a lack of reasonable intelligibility, but also evidence the Magistrate's failure to apply his mind properly in issuing the warrant. As Willis JA noted in *Goqwana:*

> ‘A search warrant is not some kind of mere “interdepartmental correspondence” or “note”. It is, as its very name suggests, a substantive weapon in the armoury of the State. It embodies awesome powers as well as formidable consequences. It must be issued with care, after careful scrutiny by a magistrate or justice, and not reflexively upon a mere “checklist approach”’ (para 30).

The wrong address

[60] The ground advanced most forcefully in the applicant’s affidavits is that the address identified in the warrant – 6[...] M[...] Drive, D[...] P[...], Kleinbaai, Gansbaai – does not exist. In making this argument, the applicant highlights trivial differences between the various iterations of the address in the warrant and the affidavits of Captain Rossouw and Captain Rautenbach, and avers that the correct address of the property is 2[...] M[...] Drive, Birkenhead.

[61] On the respondents’ version (which must in terms of the *Plascon- Evans* rule prevail, but is in any event not disputed by the applicant) the property which was searched in execution of the warrant is in the town called Gansbaai, in a street called M[...] Drive, and at a location the physical entrance to which is clearly marked with the number ‘6[...]’. The address was identified in the warrant with sufficient precision for the police officials executing the search to have found their way to the applicant’s property.

[62] The Supreme Court of Appeal in *Polonyfis v Minister of Police and Others* 2012 (1) SACR 57 (SCA) para 16 accepted that the requirement in s 21(2) of the CPA that a warrant shall authorise a police official ‘to enter and search any premises identified in the warrant’,

> ‘means no more than that the warrant should intelligibly describe the premises to be searched so that the official who is authorised to conduct the search is able to identify it.’

[63] Noting that '[a]bsolute perfection in description is not required', Cachalia JA held that 'a technically wrong address does not invalidate a warrant if it otherwise describes the premises with sufficient particularity so that the police can ascertain and identify the place to be searched'.

[64] Thus, even if the address in the warrant had been technically wrong (which I find not to be the case), the fact that the police officials executing the warrant were able to ascertain the property which was intended to be searched, would mean that this attack on the warrant must fail.

The authorised police officials

[65] The applicant contends that the warrant is impermissibly broad in that Annexure 1 to Captain Rossouw's affidavit contains not only the names of eight police officers who would execute the search, but also the words 'Any other SAPS member that can be of assistance during the search'.

[66] This contention runs up against the decision of the Supreme Court of Appeal in *Goqwana,* where the Court considered the validity of a search warrant which was addressed simply to 'the Station Commander', without naming the Station Commander or the relevant police station. Observing that on a plain reading of ss 21(2) and 25(1) of the CPA, it is clear that 'an identified police officer should be named and should act throughout' (para 22), and that it would normally be the investigating officer who conducts a search in terms of s 25 of the CPA (para 25), Willis JA said:

> 'The interpretation that the police official should be named in the search warrant acts as a safeguard against abuse so that when the warrant is executed, a person at the premises to be searched can ask not only for the police official to produce his or her police identity card but also to demonstrate the reference to him or herself in the warrant itself. This interpretation also reinforces the principle of accountability, more

especially as it will ordinarily be the investigating officer who applies to the magistrate for a search warrant, leading to the search itself' (para 25).

[67] Pertinently, Willis JA went on to say:

> *'*Of course, *the circumstances will very often require that the investigating officer be assisted by other police officials*. It remains salutary, however, that *at least one police official responsible for the search should pertinently be identified* in the actual search warrant' (para 25). (Emphasis added)

[68] The warrant under review pertinently identified Captain Rossouw as the police official responsible for the search, and identified a further seven police officials who would execute the search. The reference to other SAPS members who might be of assistance during the search does not render the warrant vague or overbroad.

The articles to be seized

[69] Finally, there is the question of the articles which Captain Rossouw was authorised to seize. These included a category of articles described as: 'All electronic equipment which include cell phones, desktop computers, laptops and Ipad's'.

[70] This category of articles is strikingly broad. While the description 'all electronic equipment' is arguably narrowed by the reference to specific types of electronic devices, the warrant does not distinguish between the electronic devices themselves and any material or information stored on them, let alone identify the material to be seized as material which might have a bearing on the suspected offence.

[71] It is readily apparent that the respondents did not anticipate that the electronic devices themselves would furnish evidence (as, for example,

instruments or products) of the suspected offences. It was the information stored on the electronic devices which was the focus of this part of the warrant, and the respondents were accordingly required to identify that information as precisely as possible in order to limit the inroads upon the applicant's privacy which would follow from a 'general ransacking' of his electronic devices.

[72] The scope of the privacy risks posed by the search and seizure of electronic communication devices is significant. In *Riley v California* 573 U.S. 373 (2014) the United States Supreme Court considered the question whether the police may search the cell phone of an arrested person without a warrant. Chief Justice Roberts made the following observations regarding the volume and quality of personal information contained on cell phones, most of which are applicable also to personal computers:

> 'The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information – an address, a note, a prescription, a bank statement, a video – that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labelled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone' (p 18).
>
> 'Although the data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data are also qualitatively different. An Internet search and browsing history, for example, can be

found on an Internet-enabled phone and could reveal an individual's private interests or concerns – perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD. Data on a cell phone can also reveal where a person has been. Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building' (pp 19-20).

'Mobile application software on a cell phone, or "apps", offer a range of tools for managing detailed information about all aspects of a person's life… The average smart phone user has installed 33 apps, which together can form a revealing montage of the user's life' (p 20).

'Indeed, a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form – unless the phone is' (pp 20-21).

[73] In *Craig Smith and Associates v Minister of Home Affairs and Others* [2015] BCLR 81 (WCC) this court set aside as overbroad a warrant which permitted the seizure, among other things, of 'any computers including laptops and external hard drives'. Davis J, questioning whether it could possibly be that all the information on the applicants' computers constituted part of the search, found that the warrant failed to describe the articles to be searched with sufficient particularity, 'certainly insofar as the open-ended reference to "computers" is concerned' (para 94).

[74] In *R v Khan* 2005 CanLII 63749 (ON SC) the Ontario Superior Court of Justice held that a generic description of the items to be seized (including 'all computer related equipment and peripherals') left the executing officers 'entirely without guidance, either from the description of the offence or from any words

limiting the various categories, as to how they might ascertain the relevance to the specific offence being investigated of anything they might find' (para 53), and 'led to warrants that essentially purported to authorise a search and seizure without limit'(para 56).

[75] What was required, in my view, was for the warrant, first, to specify that the object of the search (under this category of articles) would be material stored on the electronic devices, and second, to identify the relevant material by its connection to the suspected offences, and with reference to the types of electronically stored material (such as accounting records, invoices, correspondence, photographs or videos) which might evidence activities related to the suspected offences. This is the only way in which the police officers conducting the search would be able to distinguish between the electronically stored material subject to seizure, and material not subject to seizure.

[76] The nexus between the articles to be seized and the suspected offence (which is pertinently required by s 20 of the CPA) is not established by a reference elsewhere in the warrant to the suspected offence (*Cine Films (Pty) Ltd and Others v Commissioner of Police and Others* 1972 (2) SA 254 (A) 267F).

[77] The conclusion reached in *Cine Films* is apposite in this matter. After considering a part of a warrant issued in terms of s 42(1) of the CPA (as it was then) which directed seizure of 'all stock books, stock sheets, invoices, invoice books, consignment notes, all correspondence, film catalogues', Muller JA said the following:

> 'A reading of the warrants issued in the present case leads me to the irresistible conclusion that the magistrate either intended that *all documents of the kind mentioned in the warrants should be seized*, irrespective of whether some of them might or might not afford evidence of a contravention of the Copyright Act, *in which case he would have exceeded the powers conferred on him* by sec. 42 (1) of the [now

repealed] Criminal Procedure Act [56 of 1955], or he did not so intend, *in which case he could not, in framing the terms of the warrants, have properly applied his mind to the matter*. In either case his act or omission would have the effect of permitting an unlawful seizure and, in the respects in which and to the extent to which such was permitted, the warrants in question must be held to be invalid (268C-D). (Emphasis added)

[78] On the same reasoning, the impermissible breadth of the category of 'all electronic equipment' in this case demonstrates that the Magistrate exceeded his powers under s 21(a) read with s 20 of the CPA or failed to apply his mind properly in issuing the warrant.

[79] Three articles falling into the category of 'all electronic equipment' were seized during the search of the applicant's property: an iPhone, a laptop and a tablet. I enquired during argument whether these articles had been returned to the applicant, and counsel for the respondents subsequently indicated that the respondents tendered the return of the laptop and the tablet, but required the iPhone for evidential purposes. Before the conclusion of argument, I was advised that a mirror image of the iPhone had been obtained, and the respondents tendered return of the iPhone. I return to these articles below when I deal with the issue of a preservation order.

[80] The question of when an electronic device may be removed from the searched premises in order to conduct an off-premises search for the electronically stored material which has been identified, is not an issue before me. I consider however that it would be appropriate, if it is anticipated that an off-premises search of electronic devices will be required, that the basis for such a search be laid in the affidavits supporting the application for a search warrant (see United States Department of Justice, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations,* 2009, pp 76-79).

Conclusion on validity

[81] I find that the warrant falls to be set aside on the grounds that (a) it does not indicate with reasonable intelligibility or the required specificity the nature of the suspected offences; and (b) it provides for the seizure of an impermissibly broad category of articles falling within the description 'all electronic equipment which include cell phones, desktop computers, laptops and Ipad's.'

The respondents' application for a preservation order

[82] The respondents have filed a counter-application in which they seek, in the event that this court determines that the warrant is invalid, an order (a) referring the application back to the Magistrate for reconsideration; and (b) directing that the seized articles be preserved by Captain Rossouw until the redetermination of the application for the warrant by the Magistrate.

[83] The remittal of a matter for reconsideration by a decisionmaker is relief which may be granted by a court in terms of s 8(1)(c)(i) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) when it sets aside administrative action as defined in PAJA. The issue of a warrant however does not amount to administrative action (see *Thint*, para 89 and *Ivanov v North West Gambling Board and Others* 2012 (6) SA 67 (SCA) para 13) and in my view the remittal of the search warrant for reconsideration by the Magistrate is not competent or appropriate relief. It is indeed open to the respondents to seek a fresh search warrant.

[84] A preservation order, on the other hand, is competent relief. It is now established law that when a court sets aside a search warrant, an order preserving the evidence obtained in the search authorised by the warrant may be granted in terms of s 172(1)(b) of the Constitution, which provides that a court deciding a constitutional matter within its power –

‘(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including-

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.’

[85] In *Thint* Langa CJ explained:

‘This section … expressly contemplates an ongoing violation of a right pending rectification by a competent authority. It should also be noted that section 172(1)(a) is not limited to declarations of invalidity in respect of laws but also includes declarations of invalidity in respect of conduct. From the start, this Court has recognised that at times there will be considerations of justice and equity which outweigh the need to give immediate relief for the breach of a constitutional right. A preservation order raises similar questions of balancing the need to protect the right to privacy on the one hand, with other important public considerations on the other’ (para 219).

[86] Observing that it is ‘highly desirable’ that the trial court be the court which determines the admissibility of evidence in terms of s 35(5) of the Constitution (which provides for the exclusion, in appropriate circumstances, of evidence obtained in a manner that violates fundamental rights), Langa CJ held as follows in respect of a warrant issued in terms of s 29 of the National Prosecuting Authority Act 32 of 1998 (the NPAA):

> ‘It follows accordingly that the ordinary rule should be that when a court finds a section 29 warrant to be unlawful, it will preserve the evidence so that the trial court can apply its section 35(5) discretion to the question of whether the evidence should be admitted or not. It seems to me that it is only if an applicant can identify specific items the seizure of which constitutes a serious breach of privacy that affects the inner core of the personal or intimate sphere, or where there has been particularly egregious conduct in the execution of the warrant, that a preservation order should not be granted’ (para 222).

[87] Although the Court in *Thint* was concerned with warrants issued in terms of s 29 of the NPAA, this Court (per Binns-Ward J) accepted in *Van den Berg & Another v Page and Others* [2016] ZAWCHC 82 (27 June 2016) para 11 that the principle applies equally to warrants issued in terms of s 21 of the CPA.

[88] In this case the applicant has not identified any articles the seizure of which constitutes a serious breach of privacy. Although he has made various complaints about the manner in which the warrant was executed, no particularly egregious conduct has been averred or established. I am accordingly of the view that a preservation order is appropriate.

[89] In respect of the electronic equipment which was seized, the respondents have tendered the return of the laptop, the tablet and the iPhone, subject to their retention of a mirror image of the iPhone. That mirror image must be sealed and furnished to the registrar of this court. The remainder of the articles seized must be preserved by Captain Rossouw as set out in my order below.

Costs

[90] The question of costs remains. The applicant has been successful in his bid to have the warrant set aside. However, as I have indicated, the volume and content of the applicant’s replying affidavit, and his failure to set out all the

grounds on which he relied in his founding affidavit, must be taken into consideration in determining the appropriate costs order.

[91] The Supreme Court of Appeal (per Schutz JA) has said the following about replying affidavits:

> 'In the great majority of cases the replying affidavit should be by far the shortest. But in practice it is very often by far the longest - and the most valueless. It was so in these reviews. The respondents, who were the applicants below, filed replying affidavits of inordinate length. Being forced to wade through their almost endless repetition when the pleading of the case is all but over brings about irritation, not persuasion. It is time that the courts declare war on unnecessarily prolix replying affidavits and upon those who inflate them' (*Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) para 80).

[92] The applicant filed an 83-page replying affidavit with a further 51 pages of annexures. Both the affidavit and the annexures contain new matter which could and should have been included in the applicant's founding papers (see *Brayton Carlswald (Pty) Ltd and Another v Gordon Donald Brews* 2017 (5) SA 498 (SCA) para 29).

[93] The replying affidavit addresses each and every allegation in the answering affidavit, and contains the applicant's (inadmissible) opinions on technical issues of aerial photography and alleged manipulation of photographic evidence; his painstaking analysis of maps relied on by the respondents to identify the property; and his detailed dissection of the language used in the affidavits before the Magistrate. It is replete with rhetorical questions and spurious, unfounded allegations aimed at impugning the credibility of Captain

Rossouw and Captain Rautenbach. The affidavit not only traverses new ground, but also rehashes and embellishes allegations made in the founding affidavit.

[94] The replying affidavit also canvasses a range of issues which are irrelevant to this application, including detailed accounts of the applicant's defences to the charges against him, the merits of which fall to be determined by the court which presides over the applicant's criminal trial.

[95] Replying papers in this form amount to an abuse of the process of this court, occasioning inconvenience to the court and prejudice to the opposing party. As Harms ADP stated in *Van Zyl and Others v Government of the Republic of South Africa and Others* 2008 (3) SA 294 (SCA) para 46, 'such affidavits should not only give rise to adverse costs orders but should be struck out as a whole'.

[96] In the interests of ventilating all the grounds raised in support of the application, I have decided not to strike out the replying affidavit or any portions of it. However, the applicant is not entitled to the costs of the replying affidavit, and I must consider the unnecessary costs sustained by the respondents in having to bring an application to strike out specific paragraphs of the replying affidavit; prepare a supplementary affidavit to answer those paragraphs in the event that they were not struck out; and deal in argument with the new material raised in the replying affidavit. I must also take into account that the respondents were compelled to deal with new grounds raised for the first time in the written and oral argument on behalf of the applicant.

[97] In the circumstances I consider that the applicant is entitled to only 50% of his costs.

Order

[98] The following order is made:

(a) The application by the second, third and fourth respondents to strike out portions of the applicant's replying affidavit is dismissed.

(b) The second, third and fourth respondents are granted leave to file their conditional supplementary answering affidavit.

(c) The search warrant issued by the first respondent on 21 May 2020 in respect of the property at 6[...] M[...] Drive, D[...] P[...], Kleinbaai, Gansbaai, is declared unlawful and set aside.

(d) In respect of the iPhone seized and removed from the property in terms of the search warrant, the third respondent shall within five court days of the date of this order hand over to the registrar all copies and images of the material on the iPhone which the second or third respondents or their agents may have made while the iPhone was in their possession.

(e) The registrar shall retain the copies and images referred to in paragraph (d) of this order, and keep them safe and intact under seal until:

    (i) the conclusion of any criminal proceedings instituted against the applicant arising from his arrest on 21 May 2020;

    (ii) the date upon which a decision is taken by the National Prosecuting Authority not to institute, or to abandon, any such criminal proceedings; or

    (iii) the registrar is notified by the third respondent or the National Prosecuting Authority that the retained items or any of them may be returned to the applicant,

whereupon the items so retained shall be returned to the applicant.

(f) The third respondent shall within five court days of the date of this order return to the applicant the laptop, the tablet and the iPhone seized and removed from the applicant's property in terms of the search warrant, along with all copies and images of the material on the laptop and the tablet which the second or third respondents or their agents may have made while the laptop and the tablet were in their possession.

(g) The third respondent shall retain the remainder of the articles seized in terms of the warrant, and keep them safe and intact until:

(i) the conclusion of any criminal proceedings instituted against the applicant arising from his arrest on 21 May 2020;

(ii) the date upon which a decision is taken by the National Prosecuting Authority not to institute, or to abandon, any such criminal proceedings; or

(iii) the third respondent is notified by the National Prosecuting Authority that the retained items or any of them may be returned to the applicant,

whereupon the items so retained shall be returned to the applicant.

(h) The provisions of paragraphs (e) and (g) of this order are subject to:

(i) an order of any competent court;

(ii) the lawful execution of any search warrant obtained in the future; and

(iii) the duty of any party in possession of the seized articles to comply with any lawful subpoena issued in the future.

(i) The second and third respondents jointly and severally shall pay 50% of the applicant's costs.

Michelle Norton
Acting Judge of the High Court
Western Cape Division

APPEARANCES:

For the applicant:	R Liddell Instructed by Liddell, Weeber & Van der Merwe, Wynberg c/o Holmes Attorneys Cape Town
For the second, third and fourth respondents:	A Erasmus Instructed by The State Attorney Cape Town