IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: CC 27 / 2018
REPORTABLE

In the matter of:

THE STATE

versus

FADWAAN MURPHY	Accused 1
SHAFIEKA MURPHY	Accused 2
GLENDA BIRD	Accused 3
DOMINIC DAVIDSON	Accused 4
LEON PAULSEN	Accused 5
FADWAAN MURPHY AS THE REPRESENTATIVE OF ULTERIOR TRADING SOLUTIONS CC	Accused 6
DESMOND DONOVAN JACOBS	Accused 7

SEARCH AND SEIZURE JUDGMENT : DELIVERED ON 12 JULY 2023

DAVIS, AJ

TABLE OF CONTENTS

INTRODUCTION

1. This judgment deals with the legality of four search and seizure operations conducted by the South African Police in terms of s 22 of the Criminal Procedure Act 51 of 1977 (“the CPA”), and the admissibility of the evidence obtained as a result of the searches.

2. The accused are on trial for alleged racketeering activities, money laundering and drug dealing, in contravention of the Prevention of Organised Crime Act 121 of 1998 (“POCA”) and the Drugs and Drug Trafficking Act 140 of 1992 (“the Drugs Act”).

3. During the course of the trial the State sought to introduce evidence of:

3.1. drugs and money seized in a search conducted at 1[...] R[...] Close, Lotus River, on 18 September 2015 (“the first search”);

3.2. money seized in a search conducted at [...]1 T[...] Street, Lentegeur, on 23 December 2014 (“the second search”);

3.3. drugs and money seized in a search conducted at 1[...] T[...] Street on 17 October 2017 (“the third search”); and

3.4. drugs seized in a search conducted at 1[...] T[...] Street on 7 November 2017 (“the fourth search”).

4. The lawfulness of the four searches was challenged and the resultant evidence sought to be excluded. Four trials within a trial were held to establish whether or not the searches were lawful and, if not, whether the evidence thereby procured should be admitted or excluded.

5. The first search involved an urgent, warrantless search of the premises at 1[...] R[...] Close after the police received information regarding suspicious conduct which suggested that illicit activity pertaining to drug dealing might be happening at the premises. I ruled that the first search was lawful, with the result that there was no issue regarding the admissibility of the evidence thereby obtained.

6. The second search involved a warrantless search of [...]1 T[...] Street in response to information received from an informant that “drug money” belonging to the first accused was being kept at the residence of the 5th accused. The State relied on alleged consent to search. I ruled that the second search was unlawful inasmuch as the ostensible consent was not informed consent and did not meet the threshold for waiver of a constitutional right. I further ruled that all evidence seized during that search was inadmissible on the grounds that its admission would be detrimental to the administration of justice in circumstances where the requirement for a search warrant had been flagrantly ignored.

7. The issue which arose in the third search was whether it was lawful to seize drugs and money discovered incidentally during a search under a warrant authorizing a search for firearms, and if not, whether the evidence so seized should nevertheless be admitted. I ruled that the seizure of the drugs and money in the circumstances was lawful, and no issue as to admissibility arose.

8. The fourth search involved a search for drugs at 1[...] T[...] Street in terms of a valid search warrant which listed the names of 5 police officers who were authorized to search. However, the drugs were found and seized by a police officer whose name was not listed in the search warrant, and who was merely present at the scene as part of a support team. I ruled that the search and seizure was unlawful, since it was not performed within the confines of the search warrant.

9. I ruled, however, that the evidence so seized was nonetheless admissible, as I considered that it would be detrimental to the administration of justice to exclude the evidence in circumstances where the violation of the constitutional right was

technical in nature and not serious, and where the evidence would inevitably have been discovered by one of the officers who was entitled to search under the warrant.

THE LEGAL FRAMEWORK

10. The Constitution of the Republic of South Africa, 1996 ("the Constitution") guarantees the right to privacy. Section 14 of the Bill of Rights provides that:

> *"**14. Privacy** – Everyone has the right to privacy, which includes the right not to have –*
>
> *(a) their person or home searched;*
> *(b) their property searched;*
> *(c) their possessions seized; or*
> *(d) the privacy of their communications infringed."*

11. The right to privacy is not absolute. It may be limited by a law of general application which satisfies the requirements of s 36 of the Constitution.[1] Sections 20 to 22 of the CPA, which confer powers of search and seizure on the police, are laws of general application which constitute reasonable and justifiable limitations on the right to privacy taking into account the needs and objectives of law enforcement. Section 20 of the CPA permits the State to seize articles connected with the commission of offences.[2] Section 21 provides for the issue of search warrants

---

[1] Section 36 of the Constitution provides that:

> *"The rights in the Bill of Rights may be limited only in term of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –*
>
> *(a) the nature of the right;*
> *(b) the importance of the purpose of the limitation;*
> *(c) the nature and extent of the limitation;*
> *(d) the relation between the limitation and the its purpose; and*
> (e) *less restrictive means to achieve the purpose."*

[2] Section 20 of the Criminal Procedure Act reads as follows:

> *"The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article) –*

authorizing the search for and seizure of such articles, and s 22 of the CPA allows for warrantless searches in limited circumstances.

12. In terms of s 21 of the CPA, the default position is that the seizure of articles referred to in s 20 (which may conveniently be described as "incriminating articles") must be authorized in terms of a search warrant. The relevant provision for present purposes is s 21(1)(a) of the CPA, which provides that:

> *"21 (1) Subject to the provisions of sections 22, 24 and 25, an article referred to in section 20 shall 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;… "*

13. Warrantless searches are regulated by s 22 of the CPA, which reads as follows in relevant part:

> *"22 A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20 –*
>
> *(a) if the person concerned consents to the search for and the seizure of the article in question … ; or*
>
> *(b) if he on reasonable grounds believes –*

(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;

(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."

(i) that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such a warrant; and

(ii) that the delay in obtaining such a warrant would defeat the object of the search."

14. The requirement that search and seizure ordinarily be performed in terms of a valid search warrant is fundamental to protection of the right to privacy. As Madlanga J explained in *Gaertner and Others v Minister of Finance and Others ("Gaertner"):*

> *"Exceptions to the warrant requirement should not become the rule. A warrant is not a mere formality. It is a mechanism employed to balance an individual's right to privacy with the public interest in compliance with and enforcement of regulatory provisions. A warrant guarantees that the state must be able, prior to an intrusion, to justify and support intrusions on individuals' privacy under oath before a judicial officer. Further, it governs the time, place and scope of the search. This softens the intrusion on the right to privacy, guides the conduct of the inspection, and informs the individual of the legality and limits of the search. Our history provides evidence of the need to adhere strictly to the warrant requirement unless there are clear and justifiable reasons for deviation."* [3]

15. However, as Madlanga J also observed in *Gaertner*, the law recognizes that in certain circumstances the need for the state to protect the public interest through effective policing compels an exception to the warrant requirement.[4] The Constitutional Court has recognized that s 22(b) of the CPA legitimately caters for circumstances in which there is a need for police to act swiftly, for instance because the evidence sought will be lost or destroyed if the search is delayed in order to obtain a warrant.[5]

---

[3] *Gaertner and Others v Minister of Finance and Others* 2014 (1) SA 442 (CC) at para [69].

[4] *Id* at para [70].

[5] *Ngqukumba v Minister of Safety and Security and Others* 2014 (5) SA 112 (CC) at para [19; *Minister of Police and Others v Kunjana* 2016 (2) SACR 473 (CC) at paras [30] – [31].

16. Since the default position is that a warrant is required to search and seize, a warrantless search and seizure of incriminating articles will be unlawful for failure to comply with s 21 of the CPA unless it is justified under s 22, either by consent in terms of s 22(a) or compliance with the requirements of s 22(b).

17. In order to justify a warrantless search under s 22 (b) of the CPA, the State is required to prove that, at the time when the search was executed,[6] the police officer concerned had information which, viewed objectively,[7] was sufficient to ground a reasonable belief:

a) that an offence had been committed or would be committed, and that an article connected with the suspected offence was on a particular person or premises;[8]

b) that a search warrant would be issued in terms of s 21(1)(a) of the CPA if it were sought; and

c) that the delay in obtaining the warrant would defeat the object of the search.

18. Reasons must be advanced for the police official's belief in these regards,[9] and the court evaluating the legality of the search must be satisfied that the grounds

---

[6] *LSD Ltd and Others v Vachell and Others* 1918 WLD 127; *S v Mayekiso en Andere* 1996 (2) SACR 298 (C); *Mnyungula v Minister of Safety and Security and others* 2004 (1) SACR 219 (Tk) para [12]. See, too, Hiemstra's Criminal Procedure (Lexis Nexis) commentary on s 22 of the Criminal Procedure Act 51 of 1977.

[7] *Ndabeni v Minister of Law and Order & Another* 1984 (3) SA 500 (D) at 511 D – 513 F; *Mnyungula v Minister of Safety and Security (supra)* para [8].

[8] These are the two jurisdictional grounds fora valid warrant. See *Minister of Safety and Security v Van Der Merwe and Others* 2011 (5) SA 61 (CC) para [39].

[9] *Sello v Grobler and Others* 2011 (1) SACR 10 (SCA) at 312 i.

justifying the search are objectively reasonable, i.e., reasonable in the judgment of the reasonable person.[10]

19. A warrantless search and seizure which does not meet the requirements of s 22(a) or (b) of the CPA is unlawful. Where the terms of a search warrant are not strictly observed during the execution thereof, the search is unlawful. An unlawful search will often, but not always, amount to a breach of the right to privacy. Whether or not there has been a violation of s 14 of the Constitution will depend on the particular facts and circumstances.

20. In this case, the places searched were the homes of the 4th, 5th, and 3rd accused respectively, the home being an inner sanctum where an individual has a high expectation of privacy.[11] The searches therefore *prima facie* infringed the privacy rights of those accused, and the question is whether those infringements are justified under s 22 of the CPA.

21. Where a constitutional right is violated by an unlawful search, the admissibility of the evidence so obtained is regulated by s 35(5) of the Constitution which 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."*

22. Section 35(3) is a constitutional directive that evidence obtained in a manner which violates any right in the Bill of Rights must be excluded. However, this

[10] Hiemstra's Criminal Procedure (Lexis Nexis) commentary on s 22 of the Criminal Procedure Act 51 of 1977.

[11] See *Bernstein and Others v Bester and Others NNO* 1999 (2) SA 751 (CC) at para [67].

directive only operates where the court concludes that the admission of the unconstitutionally obtained evidence would a) render the trial unfair or b) otherwise be detrimental to the administration of justice.[12] In determining whether or not the admission of the evidence would have one of these two consequences, the court has a discretion in the sense of a value judgment which must be made in the light of the particular facts, fair trial principles and considerations of public policy.[13]

23. In *S v Thandwa* Cameron JA (as he then was), writing for the Court, stated that in determining whether the trial is rendered unfair, courts are to exercise their discretion by weighing the competing social interests in ensuring, on the one hand, that the guilty are held accountable and, on the other, that constitutionally entrenched rights are protected.[14] He went on to say, with reference to decided cases, that:

> *"Relevant factors include the severity of the rights violation and the degree of prejudice, weighed against the public policy interest in bringing criminals to book. Rights violations are severe when they stem from deliberate police conduct or are flagrant in nature. There is a high degree of prejudice when there is a close causal connection between the rights violation and the subsequent self-incriminating acts of the accused. Rights violations are not severe, and the resulting trial not unfair, if the police conduct was objectively reasonable and neither deliberate nor flagrant."* [15]

24. The second determination under s 35(5) concerns the administration of justice. The admission of evidence which renders the trial unfair is always damaging

---

[12] *S v Tandwa* 2008 (1) SACR 613 (SCA) para 116.

[13] See Steytler *Constitutional Criminal Procedure* p 36; P J Schwikkard and S E van der Merwe *Principles of Evidence* 3 ed. p 215. See, too, *S v Lottering* 1999 (12) BCLR 1478 (N) at 1483 B - C; *S v M* 2002 (2) SACR 411 (SCA) para 30; *S v Pillay* 2004 (2) SACR 419 (SCA) para 92; *Sv Tandwa (supra)* para 116; *S v Mthembu* 2008 (2) SACR 407 (SCA) para 26; *S v Magwaza* 2016 (1) SACR 53 (SCA) at 65 a - b.

[14] *S v Tandwa (supra)* para 117.

[15] *Ibid.*

to the administration of justice, but the administration of justice could be damaged for reasons which do not impact on trial fairness. This leg of the enquiry envisages the exclusion of evidence for broad public policy reasons beyond fairness to the individual accused.[16]

25. In this regard Cachalia JA (Cameron and Maya JJA concurring) observed in *S v Mthembu*[17] that:

> *"[P]ublic policy, in this context, is concerned not only to ensure that the guilty are held accountable; it is also concerned with the propriety of the conduct of investigating and prosecutorial agencies in securing evidence against criminal suspects. It involves considering the nature of the violation and the impact that evidence obtained as a result thereof will have, not only on a particular case, but also on the integrity of the administration of justice in the long term. Public policy therefore sets itself firmly against admitting evidence obtained in deliberate or flagrant violation of the Constitution. If on the other hand the conduct of the police is reasonable and justifiable, the evidence is less likely to be excluded - even if obtained through an infringement of the Constitution."* [18]

26. In *S v Pillay*[19] and in *S v Magwaza*[20] the Supreme Court of Appeal approved the following factors listed in the Canadian decision of *R v Collins*[21] to be considered in the determination whether or not the admission of evidence would bring the administration of justice into disrepute: the kind of evidence obtained; what constitutional right was infringed; whether the infringement was serious or merely of

---

[16] *S v Tandwa (supra)* para 116.
[17] 2008 (2) SACR 407 (SCA).
[18] *Id* para 26.
[19] 2004 (2) SACR 419 (SCA).
[20] 2016 (1) SACR 53 (SCA).
[21] *R v Collins* (1987) 28 CRR 122 (SCC)

a technical nature; whether or not the evidence would have been obtained in any event and the availability of other investigatory techniques.[22]

27. Our courts have in a number of cases acknowledged the educative and deterrent role of the court in curbing excessive zeal on the part of law enforcement in the process of combating crime. In *S v Mphala*[23] Cloete J, as he then was, referred to the *"disciplinary function of the Court"*[24] when he excluded evidence obtained as a result of an intentional violation of the accused's constitutional rights. In *S v Soci*[25] Erasmus J excluded evidence obtained in circumstances where the accused, through no fault of the individual officer, had not properly been informed of his right to consult counsel because of a systemic fault in police operating procedure, which needed to be corrected. The standard warning form employed by the police was inadequate, despite a prior judicial decision which dealt with the *lacuna* in the form. Erasmus J made it clear that the documents supplied for use by police operating in the field should set out the rights of arrested and detained persons in clear and simple language.[26] In *S v Pillay* the majority considered that to admit evidence derived from a serious breach of the accused's right to privacy might create an incentive for law enforcement agents to disregard accused persons' constitutional rights, which would do more harm to the administration of justice than good.[27]

28. Our courts have also acknowledged the need to protect judicial integrity from moral corruption. In *S v Naidoo,*[28] for instance, McCall J remarked that

---

[22] *S v Pillay (supra)* para 93*; S v Magwaza (supra)* para 15.
[23] 1998 (1) SACR 388 (W) at 400 b.
[24] *Id* at 399h - 400 b.
[25] 1998 (2) SACR 275 (E).
[26] *Id* at 296 b - d.
[27] *S v Pillay (supra)* para 94.
[28] 1998 (1) SACR 479 (N).

countenancing the violation of the right to privacy by admitting evidence procured through illegal monitoring of telephone conversations *"would leave the general public with the impression that the courts are prepared to condone serious failures by the police to observe the laid-down standards of investigation so long as a conviction results."*[29] And in *S v Mthembu,*[30] Cachalia JA articulated the need to protect the judicial process from moral defilement. Referring to decisions of the House of Lords regarding evidence obtained through torture, he stated that:

> *"To admit Ramseroop's testimony … would require us to shut our eyes to the manner in which the police obtained the information from him. More seriously, it is tantamount to involving the judicial process in 'moral defilement'. This 'would compromise the integrity of the judicial process (and) dishonour the administration of justice. In the long-term, the admission of torture-induced evidence can only have a corrosive effect on the criminal justice system. The public interest, in my view, demands its exclusion, irrespective of whether such evidence has an impact on the fairness of the trial."* [31]

29. As regards the question of standing to invoke the protection of s 35(5) of the Constitution, it was held in *S v Mthembu* that a plain reading of s 35(5) requires the exclusion of evidence improperly obtained from <u>any</u> person, not only the accused.[32] Section 35(5) refers to *"any right in the Bill of Rights"* and does not specify who the bearer of the right should be. Thus it is not required that the accused's constitutional rights must have been violated before he or she can invoke the exclusionary rule in s 35(5) of the Constitution, and reliance can be placed on the section where another person's constitutional rights have been violated.[33] However, the fact that the accused's constitutional rights were not violated may well be a relevant factor in the

---

[29] Id at 530 g.

[30] *Supra.*

[31] *S v Mthembu (supra)* para 36.

[32] *S v Mthembu (supra)* para 27.

[33] *Principles of Evidence (supra)* pp 221 – 222.

assessment of whether or not the admission of the evidence would be detrimental to the administration of justice. Each case will depend on its own facts.

THE FIRST SEARCH (1[...] R[...] CLOSE)

The evidence

30. Three witnesses testified for the State in the trial within a trial regarding the search at 1[...] R[...] Close, namely Mr Craig Jones ("Jones"), Constable Adam Adams ("Adams") and Captain Nadine Britz, the Investigating Officer, who held the rank of Warrant Officer at the time of the search ("Britz"). The accused did not present any evidence at the trial within the trial, and the matter must therefore be decided on the basis of the evidence presented by the prosecution,[34] which was largely undisputed. The following summary of the relevant facts is gleaned from the testimony of Jones, Adams and Britz.

31. Jones rented a portion of the premises from the 4th accused, the owner of the premises. The premises comprised three separate dwellings: the front section of the house, which was occupied by Jones and his girlfriend; the back section of the house, which was occupied by the 4th accused; and an outhouse section behind the garage which was occupied by another tenant. The front and back sections of the house had separate entrances and were sealed off from one another internally.

32. The 4th accused used to leave for work at approximately 07h00 every day and return home after 17h00. Jones was unemployed and spent his days at home on the premises, along with his girlfriend.

[34] *S v Katoo* 2005 (1) SACR 522 (SCA).

33. Approximately one year before the date of the search,[35] Jones met the 1st accused when he arrived at the premises, together with the 2nd accused (Shafieka Muprhy) and one Gavin, and stated that Gavin and Shafieka were looking for a place to stay at the property. Jones assumed that they would be living on the premises, but he later observed that they did not sleep there. Instead Jones observed that the 1st accused would drop Shafieka and Gavin off at the premises by 07h30 in the morning and that they would be fetched at various times between 14h00 and 17h00 in the afternoon.

34. Some two to two and a half months after Shafieka and Gavin came to the premises, Jones observed that they were accompanied by two women, one of whom was named Zuluyga. After another two months or so, Jones no longer saw Gavin at the premises. Jones observed that the three women were dropped off at the premises, either by the 1st accused or an unknown driver, at around 07h30 and fetched in the afternoon between 14h00 and 17h00. They would spend the day in the rear bedroom in the 4th accused's section of the premises, with the door and windows closed and the curtains drawn. He did not know what the women did there.

35. Jones from time to time conversed with the 1st accused in the driveway of the premises. He knew him as "Wanie". They used to talk about cars, and Jones understood from the 1st accused that he was involved in the construction business. He knew the 2nd accused as "Shafieka", but did not know her surname. He was under the impression that she was a nurse who worked shifts.

---

[35] This was merely an estimate. It was clear that Jones was not certain of the exact date. Record 15/10/2018 p 71, l 22; p 83, l 18 - 19.

36. On Thursday 17 September 2015, while visiting a friend, Jones was shown an article in a local newspaper called “The Voice” about a recent drug raid conducted by the police in Lentegeur. The article featured a photograph of the 1st accused, who was described as “Fats Murphy”, and referred to his alleged involvement in drug dealing and ongoing police efforts to bring him to justice. Jones recognized the person in the photograph as “Wanie” and was flabbergasted. He’d had no inkling that the person he had encountered at the premises was suspected of being a drug kingpin.

37. The next morning, Friday 18 September 2015, Jones told his ex-girlfriend about the article. Because of the 1st accused’s alleged links to the drug trade they were concerned that illicit activities involving drugs might be taking place on the premises. Between 10h30 and 11h00 Jones’ ex-girlfriend telephoned the Lentegeur Police Station in Jones’ presence and asked to speak to General Goss (“Goss”), being the police official named in the newspaper article.

38. Jones’ heard his girlfriend inform the person to whom she spoke, who he assumed was Goss, that she recognized the person identified in the newspaper photograph as “Fats” Murphy, that three women came to the premises in the mornings and left at a certain time, that there was no sign of activity while they were there, that the premises were always closed and locked, and that Murphy sometimes brought the women there and sometimes a driver brought them there.

39. At 11h00 on the morning of 18 September 2015 Britz was in her office at Lentegeur Police Station with Colonel Pamplin (“Pamplin”) and Lt. Colonel Reddy (“Reddy”). Goss came into her office and informed her that he had received a

telephone call with information that the 1st accused had brought three women to 1[...] R[...] Close. He instructed Britz to go there, together with Pamplin and Reddy, and to ascertain what was happening at the premises.

40. At that time Britz was the leader of a special police project which had been running for a number of years to investigate the suspected criminal activities of the 1st accused and the Dixie Boys gang, of which he was the alleged leader ("**the project"**). The offences under investigation included drug dealing and unlawful possession of firearms. In the course of her work on the project, Britz had compiled profiles on the 1st accused and various of his associates, such as the 2nd accused, who was his ex-wife, and the 3rd accused, who was his sister.

41. Britz knew that the 1st and 3rd accused lived in close proximity to one another at 1[…] and [...]2 T[...] Street, Lentegeur respectively, in an area known as "the Island" which was reputed to be territory of the Dixie Boys gang. She was aware of the results of a radial analysis from these two addresses which indicated that a high number of drug-related cases had emanated from that particular area of Lentegeur. She was also aware from her work that these two addresses were frequently mentioned in statements in drug-related cases.

42. As instructed by Goss, Britz, Pamplin, Reddy and Warrant Officer Lindt ("Lindt") drove to 1[...] R[...] Close in an unmarked vehicle, the journey taking twenty five to thirty minutes. They were all dressed in full police uniform, as it was customary to wear full police uniform on Fridays as part of the visible policing policy.

43. At 1[...] R[...] Close, Britz interviewed Jones and his girlfriend. Jones told Britz that the house was divided into two separate sections, that he rented the front section and that the owner resided in the back section. Jones showed Britz the article in The Voice and told her that he recognized the person in the photograph, i.e., the 1st accused, that he brought three women to the premises in the mornings, that he did not know what they did there, and that the women had been dropped there that morning and were present in the back section at that time.

44. Britz recalled that she had received information from crime intelligence that the 2nd accused was coming from Worcestor to Cape Town with another woman to pack drugs for the 1st accused. She showed Jones a photograph of the 2nd accused which she had on her cell phone, and Jones recognized the person in the photograph as the woman called “Shafieka”, who had been dropped at the premises that very morning.

45. Once Jones identified the 2nd accused, Britz walked around the exterior of the premises. She observed that the back section of the house had two external doors, both of which were barred with security gates locked with padlocks. She also saw that the windows were all closed and barred and that the curtains were drawn. She could not see through the curtains, but could hear female voices talking inside the back section of the house.

46. At that stage, given the information received from Jones that the 2nd accused was on the premises, coupled with the earlier information which she had received from crime intelligence that the 2nd accused was packing drugs for the 1st accused, Britz was convinced that drugs were being packed in the back section of 1[...] R[...]

Close, and she believed that drugs would be found there. She also suspected that firearms might be present, because in her experience drugs and firearms went hand in hand with gangsterism, and firearms had previously been recovered in searches involving the 1st accused and the Dixie Boys.

47. Britz believed that she had sufficient information to justify a search warrant and that a magistrate would grant a search warrant if she were to apply for one in terms of s 21 of the CPA. She also believed that the delay in obtaining a search warrant would defeat the object of the search because she feared, based on her experience, that there was a real risk that any drugs on the premises would be disposed of or destroyed if the women in the premises became aware of the police presence. She explained that drugs can easily be disposed of by flushing them down a toilet, placing them in a washing machine or burning them,

48. Although nothing had happened to make the women aware of the police presence, Britz could not be sure that they had not peeped through the curtain and seen her. Nor could she be sure that the police presence at 1[...] R[...] Close had not been observed by someone else who might alert the 1st accused and/or the women by cell phone. She was concerned that she was conspicuous as a tall, white woman dressed in full police uniform, and that she may have been seen on the premises.

49. Britz stated that she “did not have the luxury of time” to apply for a search warrant. She said that it would have taken several hours for her to compile an affidavit in support of an application for a warrant and to travel to and from Wynberg Magistrates’ Court to obtain a warrant from a magistrate. She therefore believed that she was entitled to execute a warrantless search in terms of s 22(b) of the CPA. In

addition, Britz believed that she was entitled to execute a warrantless search in terms of s 11 of the Drugs Act.[36]

50. For these reasons Britz decided to execute a search without a warrant. She telephoned Colonel Van Wyk, the Station Commander at Grassy Park Police Station ("Van Wyk"), and requested back-up and a bolt-cutter to gain entrance into the back section of the premises. Britz requested that the vehicles approach with their sirens off as she hoped to maintain the element of surprise.

51. Two marked police vehicles proceeded to the premises from Grassy Park Police Station, one of the vehicles bearing Van Wyk and Adams, who brought a bolt-cutter. On their arrival Britz briefed them on the situation and a decision was taken as to how to enter the premises.

52. The police officers announced themselves and demanded entry to the back section of the premises. When there no response, they cut off the padlock to gain access and proceeded to enter the premises. In a room in the back section they discovered three women and a substantial quantity of drugs. The drugs were seized and the three women, being the 2nd accused, Zuluyga Fortuin and Felicia Wenn, were arrested. Fortuin and Wenn subsequently became State witnesses against the accused in terms of s 204 of the CPA. The search therefore yielded real evidence in the form of drugs, and testimonial evidence from the two women who elected to become State witnesses.

---

[36] In *Minister of Police and Others v Kunjana* 2016 (2) SACR 473 (CC) sections 11(1)(a) and (g) of the Drugs and Drug Trafficking Act 140 of 1992 were declared unconstitutional. The judgement was however only handed down on 27 July 2016, after the search at 1[...] R[...] Close on 18 September 2015. Britz was therefore entitled to rely on the section at that time.

Discussion

53. In terms of s 22(b) of the CPA the State was required to prove that Britz believed on reasonable grounds firstly, that a search warrant would be issued to her in terms of s 21(1) if she applied for one, and secondly, that the delay in obtaining such warrant would defeat the object of the search.

54. It was contended on behalf of the accused that there were no reasonable grounds for Britz's belief in either of these regards. It is therefore necessary to scrutinize the information known to Britz at the time of the search in order to determine whether, viewed objectively, it afforded a reasonable basis for her belief.

The belief that a search warrant would be issued if sought

55. The question is whether the information known to Britz, as referred to in her testimony in court, satisfied the requirements for the issue of a search warrant. Was it sufficient to ground a reasonable belief that drugs involved in illegal drug dealing were to be found on the premises at that time?

56. Based on her work with the project, Britz knew that the 1st accused was the alleged leader of the Dixie Boys gang and that he was suspected of involvement in the illegal drug trade. She was aware that illegal drug dealing is one of the main activities of criminal gangs operating on the Cape Flats. She knew that a radial analysis of cases emanating from the area around numbers […]2 and 1[...] T[...] Street showed that a high number of drug-related criminal cases arose from where the 1st and 3rd accused resided. She also had what she described as "good

information" received through crime intelligence channels that the 2nd accused was working for the 1st accused, packing drugs at an unknown location.

57. Based on this information derived from the project, I considered that Britz had good reason to suspect that the 1st and 2nd accused were committing offences involving the unlawful possession of and/or dealing in drugs.

58. When Goss instructed Britz to go to 1[...] R[...] Close and find out what was happening there, all she was told was that the 1st accused had brought people to the premises. That fact alone would not have afforded reasonable grounds for a belief that evidence of an offence was on the premises.

59. However, when Britz interviewed Jones at 1[...] R[...] Close, she ascertained that the 2nd accused was one of the people who had been dropped at the premises that morning, and that she was still on the premises. She also became aware that the 1st accused had regularly dropped the three women at the premises, including the 2nd accused, and fetched them later, and that they remained there for most of the day, closeted behind closed doors and windows in a secretive fashion with no indication as to what they were doing there.

60. Based on the knowledge gleaned from her work as leader of the project, in particular the information from crime intelligence that the 2nd accused was packing drugs for the 1st accused at an unknown location, together with the particular information imparted to her by Jones regarding the presence of the 2nd accused on the premises and the suspicious conduct of the three women who regularly came there, I am of the view that Britz at that point had reasonable grounds to believe that

the three women were engaged in packing illicit drugs for the 1st accused on the premises. As Britz put it in her evidence, when Jones identified the 2nd accused as one of the women present in the back section of the house, the pieces of the puzzle came together and she realized that this was likely the unknown location where the 2nd accused was packing drugs for the 1st accused.

61. To my mind the information at Britz's disposal on the morning of 18 September 2015, once she had interviewed Jones at 1[...] R[...] Close, disclosed objectively reasonable grounds for believing that the offence of illegal drug dealing was being committed, and that evidence thereof in the form of drugs was to be found in the premises. I had little doubt that a search warrant would have been issued on the strength of this information if Britz had applied for one. In my judgment, therefore, the State had shown that Britz had reasonable grounds for believing that a search warrant would be issued to her in terms of s 21(1)(a) if she applied for one.

The belief that the delay in obtaining a warrant would defeat the object of the search

62. Turning to the second leg of the enquiry under s 22(b), Britz testified that she did not have the luxury of time to apply for a search warrant as she feared that the drugs would be destroyed if she delayed the search. She knew from past experience that drugs could easily be disposed of by putting them in a washing machine, flushing them down the toilet or burning them, and she therefore wished to preserve the element of surprise.

63. Britz's testimony was to the effect that she feared that there was a risk of imminent discovery by the three women of the police presence at the premises,

either by the women themselves or by other associates of the 1st accused who would alert them, which would trigger the destruction of the drugs by the three women.

64. Counsel for the accused advanced two main lines of attack on the reasonableness of Britz's belief that the delay in obtaining a search warrant would defeat the object of the search. It was contended first, that she could have taken steps to shorten the time required to obtain a warrant and, second, that there was no indication that the women inside the premises were aware of the police presence and hence no threat of imminent destruction of the drugs.

Could a warrant have been obtained expeditiously?

65. As regards the time which it would have taken to apply for a warrant, Britz's evidence was that it would have taken several hours to compile her affidavit in support of the warrant application, and to travel to Wynberg Magistrate's Court and obtain a warrant from a magistrate. She feared that she might not find a magistrate still present at court when she arrived there, as it was a Friday afternoon. That particular difficulty could of course have been overcome by the simple expedient of telephoning ahead and alerting a magistrate that she would be coming to seek a warrant. But the difficulty remained that it would have taken some time for Britz to compile her affidavit in support of the warrant and to travel to and from the court.

66. As regards the preparation of the affidavit, defence counsel suggested that affidavits in support of warrants are usually short, and that it would not have been necessary for Britz to set out the entire history of her work on the project in order to obtain a warrant. That may well be so. But, as any competent legal practitioner

knows, it takes every bit as long to produce a lean document as it does to produce a long one - if not longer. The sifting of relevant detail from irrelevant takes time. And one must not forget that Britz did not have the training and skill of a lawyer accustomed to drafting affidavits under pressure. Although Britz's estimate that it would have taken her two hours to prepare her affidavit is perhaps exaggerated, I think one can accept that she would probably have spent at least an hour preparing the warrant application. And even if she could have saved the 20 minutes or so which it would have taken her to return to her office in Lentegeur by preparing the warrant application at Grassy Park Police Station which was a few minutes away, she would nonetheless have had to travel to and from the Wynberg Magistrates' Court, where the Magistrate would have needed time to read the application. Realistically speaking, it seems to me that an application for a warrant would have delayed the search by at least 90 minutes, if not longer.

67. It was further suggested that Britz could have shortened the process of applying for the warrant by dispensing with an affidavit and instead giving oral evidence to the magistrate. It is so that s 21(1)(a) of the CPA merely requires information on oath and does not in terms require an affidavit. Thus it would have been permissible for Britz to seek a search warrant on the strength of sworn oral testimony. However, it goes without saying that a record would have had to be kept of such oral evidence.[37] While a resort to oral evidence on oath might have saved the time taken to prepare an affidavit, it would in all likelihood have taken longer for Britz to present oral evidence to the magistrate than if she had simply presented an affidavit for him or her to read. I say that, because the magistrate would doubtless have wished to take notes of the evidence, notwithstanding the fact that the

[37] See Albert Kruger *Hiemstra's Criminal Procedure* p 2-7 (commentary on s 21 of the CPA).

proceedings were being mechanically recorded. It is therefore doubtful that dispensing with an affidavit would have shortened the time required to obtain a warrant.

68. It was also suggested that Britz could have shortened the time needed to secure a warrant by going to Grassy Park Police Station, which was close by, and applying for a warrant by giving sworn oral evidence to a commissioned officer. Britz does not appear to have considered this option as she was operating in accordance with police practice that warrants are to be sought from a magistrate during normal court hours. Of course, police practice cannot trump the provisions of s 21(1), and her apparent ignorance in this regard may render her conduct objectively unreasonable. However Britz's apparent failure to consider this option is not decisive: the question is whether, objectively speaking, it would have been reasonable to expect Britz to apply for a search warrant at Grassy Park Police Station on oral evidence as a way of curtailing the amount of time required to procure a warrant.

69. In my judgment that is not the case. It was not a matter of Britz simply walking into a commissioned officer's office, telling her story, and securing a warrant. In the absence of an affidavit, Britz's presentation of oral evidence to a commissioned officer would have had to be recorded. It would have taken time to arrange for the necessary recording, and for her to present her testimony. Thus the procurement of a warrant from a commissioned officer at the Grassy Park Police Station on oral evidence would still have delayed the search for a significant amount of time, which is what Britz was anxious to avoid.

70. In short, I found no merit in any of the arguments advanced by defence counsel that Britz could and should have taken steps to procure a warrant expeditiously. I considered that her judgment that it would take a significant amount of time to secure a search warrant was reasonable.

The threat of imminent destruction

71. That brings me another aspect of the enquiry under s 22(b)(ii) of the CPA. The section requires a belief, on reasonable grounds, that the delay in obtaining a search warrant "*would"* (as opposed to "could") defeat the object of the search. The Afrikaans version uses the word "sal" which translates as "will", and not the word "sou", which translates as "would".

72. What does this mean? The clear purpose of the section is to empower police officers to act expeditiously when the need arises to prevent the loss or destruction of evidence. But what degree of threat is required to trigger the section? Must the evidence already be in the process of destruction before a warrantless search is justified? Or is it sufficient that the evidence is threatened with removal or destruction? And if so, how real or imminent must the threat be? What degree of certainty is required that a threat of loss or destruction will materialize? Must the facts indicate that it is more probable than not that the risk will materialize before a warrant can be obtained? Or is it sufficient that there is a real possibility, as opposed to a probability, that the threat of loss or destruction will materialize?

73. In the nature of things, it will not always be possible to predict with certainty the result of delaying a search, because an officer in the field will invariably be

confronted with unknowns and imponderables. At one end of the spectrum one can imagine cases where the evidence is already in the process of destruction and the likely result of delaying the search is obvious, such as where a building containing documentary evidence is on fire. At the other end of the spectrum there may be situations where it is equally quite clear that delaying the search in order to seek a warrant would have no effect. That would be so if, for instance, the police knew for a fact that the suspect was blissfully ignorant of police scrutiny and had no intention or reason to move the evidence. Cases falling in between these two extremes will vary infinitely in terms of the degree of certainty with which the likely outcome of delaying the search may be predicted. A risk assessment is required which inherently involves a degree of conjecture, depending on the extent of the information at the police officer's disposal.

74. In assessing the degree of risk that the threat of loss or destruction will materialize before a warrant can be obtained, an officer is required to make a *bona fide* judgment call based on expertise, experience and common sense, mindful always that a search warrant should be obtained unless there is good reason not to do so. In a nutshell, what the section requires, in my view, is that the judgment of the police official be reasonable in all the circumstances. Each case will depend on its own facts and the information known to the police officer a the time. But speaking generally, it seems to me that s 22(b)(ii) does not require a <u>probability</u> that the evidence will be lost or destroyed. In my view a <u>real threat</u> or <u>reasonable possibility</u> of loss or destruction, not being fanciful, remote or contrived, is sufficient for purposes of the section. I consider that the purpose of the section would be frustrated if one were to require a probability as opposed to a reasonable possibility

of loss or destruction, because of the inherent difficulty of making a reliable risk assessment based on incomplete information.

75. Mr Van der Berg, who appeared for the first and sixth accused, referred me to the decision of the United States Court of Appeals, Third Circuit, in *United States v Rubin,*[38] and invited me to adopt the approach enunciated by that court to the question of whether a warrantless search was justified:

> "*When Government agents … have probable cause to believe contraband is present and, in addition, based on the surrounding circumstances or the information at hand, they reasonably conclude that the evidence will be destroyed or removed before they can secure a search warrant, a warrantless search is justified. The emergency circumstances will vary from case to case, and the inherent necessities of the situation at the time must be scrutinised. Circumstances which have seemed relevant to courts include (1) the degree of urgency involved and the amount of time necessary to obtain a warrant …; (2) reasonable belief that the contraband is about to be removed …; (3) the possibility of danger to police officers guarding the site of the contraband while a search warrant is being sought … ; (4) information indicating the possessors of the contraband are aware that the police are on their trial …; and (5) the ready destructibility of the contraband and the knowledge 'that efforts to dispose of narcotics and to escape are characteristic behaviour of persons engage in the narcotics traffic'… ."* [39]

76. It seems to me that this approach accords with our law and may provide useful guidance for a court dealing with a warrantless search under s 22(2) of the CPA. I would, however, make two comments regarding the quoted passage. First, the reference to a reasonable conclusion that evidence <u>will</u> be destroyed or removed before a warrant can be obtained, must be seen in the context of the judgment as a whole. The court in *US v Rubin* expressly rejected the notion that the police officers

---

[38] *United States v Rubin* 474 F.2d 262 (3rd Cir. 1973).
[39] *United States v Rubin (supra)* at para 32.

must have knowledge that the evidence is actually being removed or destroyed before a warrantless search was justified,[40] and stated that the US Supreme Court had only required a reasonable belief that evidence was *"threatened with destruction"*.[41] In my view a reasonable belief that evidence is threatened with loss or destruction would suffice for purposes of s 22(b)(ii).

77. Secondly, the *Rubin* list should not be viewed as a *numerus clausus* of all relevant considerations. The relevant factors will vary from case to case and a court must in each case scrutinize "*the inherent necessities of the situation at the time",* which will include the ease with which the evidence may be disposed of and the awareness of the suspects that the police are on their trail.

78. One must accept that drugs can easily be disposed of in the manner mentioned by Britz. The problem which confronted Britz when she learned that the 2nd accused was on the premises was that the very presence of four uniformed police officials at 1[...] R[...] Close had created an inherent risk that the police presence had either already been detected, or would imminently be detected, thereby triggering an attempt to dispose of the drugs.

79. Mr Van der Berg suggested that this risk was self-created because Britz should have anticipated the need to search and should have applied for a search warrant before proceeding to the premises. While I endorse the principle that the police should not be permitted to engineer or manufacture urgent circumstances in

---

[40] *United States v Rubin (supra)* at paras 18 and 29.

[41] *United States v Rubin (supra)* at paras 26 to 28.

order to avoid having to obtain a search warrant,[42] in my view that did not happened in this case. Britz cannot be faulted for going to the premises to investigate, as instructed by Goss. The information imparted to her by Goss would not on its own have been sufficient to obtain a search warrant, as it did not sustain a reasonable belief that an offence was being committed on the premises. It was only after Britz had interviewed Jones and ascertained that the 2nd accused was there, that she had reasonable grounds for a search warrant. The presence of the 2nd accused at the premises was the missing piece in the puzzle which completed the picture and created a compelling case for a warrant.

80. It is so, as Mr Van der Berg contended, that there was no indication that the three women were aware of the police presence when Britz, Lindt, Pamplin and Reddy arrived on the scene, or when Britz walked around the premises to take stock of the situation. But Britz could not be sure that one of the women had not peeped out from behind the curtains and seen one of the uniformed officers. Britz also could not discount the possibility that someone outside the premises might have seen the police and alerted the 1st accused, who would be able to communicate with the women by cell phone or WhatsApp messaging.

81. There was an obvious risk of detection of the police presence at the premises. Britz had no way of knowing whether or not this risk had already materialized or would imminently materialize. What Britz was sure of, based on her experience, was that if the women were to become aware of the police presence, they would in all

[42] See Linda Herman Mullenbach, *Warrantless Residential Searches to Prevent the Destruction of Evidence: A Need for Strict Standards,* 70 Journal of Criminal Law and Criminology 255 (1979) at 262 - 267, where the argument is advanced that courts should be alive to the potential of police abuse by creating an emergency to enable them to forego the warrant requirement.

likelihood try to dispose of the drugs. Every minute she delayed the search heightened the possibility of detection of the police presence and increased the risk of an attempt to dispose of the drugs.

82. In my view the real risk that the police presence had or would be detected, coupled with the ease with which drugs can be disposed of, provided reasonable grounds for Britz's belief that the delay in obtaining a search warrant would defeat the object of the search.

83. To sum up: I concluded that the information known to Britz once she had interviewed Jones at 1[...] R[...] Close on the morning of 18 September 2015 was sufficient to secure a search warrant, and that Britz therefore had reasonable grounds to believe that a search warrant would be issued to her if she applied for one. I also concluded that the risk of imminent detection of the police presence at 1[...] R[...] Close, coupled with the inherent ease with which drugs may be disposed of, gave rise to a reasonable belief that the evidence was threatened with destruction and that the object of the search would be defeated if the search were to be delayed in order to secure a search warrant. It therefore follows that, in my view, the requirements of s 22(2) of the CPA were met and that the search was accordingly lawful.

Search and seizure separate concepts?

84. Mr Van der Berg argued that, in the event that I determined that the search of the premises without a warrant was justified on the basis of exigent circumstances, I should hold that the seizure of the drugs was unlawful as a warrant to seize could

and should have been obtained, the emergency having passed once the police were in control of the premises and able to secure the evidence while waiting for a warrant to seize.

85. His argument in this regard rests on the proposition that ss 20, 21 and 22 of the CPA differentiate between search and seizure, and that different constitutional rights are implicated by the search of persons and the seizure of possessions, viz privacy and property.

86. Having regard to the wording of ss 21 and 22 of the CPA, it seems to me that the concepts of search and seizure are inextricably linked. Section 21(2) states that "*a search warrant shall require a police official to seize the article in question and shall to that end authorize such police official to search* …". Similarly, s 22 states that a police official may without a warrant *"search any person or container or premises for the purpose of seizing any article referred to in section 20."*

87. To my mind there is a clear indication in s 22 that where the conditions laid down in s 22 (a) or (b) for a warrantless search are satisfied, it is competent also to seize any article referred to in s 20 which are discovered in the course of the search. Since the entire purposes of the search is to seize articles which afford evidence of the commission of an offence, it would make no sense to insist on a separate warrant to seize articles discovered during a valid warrantless search. In any event, the seizure in this instance could not have amounted to a violation of any right to property, since the drugs which were seized could not be possessed lawfully.

Conclusion

88. In my judgment the warrantless search was lawful, for the reasons set out above. But even if I am wrong in this regard, I would nonetheless have admitted the evidence seized during the first search. If it were to be said that Britz could and should have sought a warrant instead of proceeding with the search, her error would have been the product of a reasonable and *bona fide* judgment call which turned out to be wrong, not a deliberate flouting of the law. The fairness of the trial would in no way be impaired by the admission of the evidence, and I consider that it would do the administration of justice more harm than good, in all the circumstances, to exclude the cogent real evidence derived from the search. I would therefore have ruled the evidence admissible notwithstanding the unlawfulness of the search.

THE SECOND SEARCH ([...]1 T[...])

89. On behalf of the 5th accused, to whom I will refer as "Paulsen", Mr Twalo challenged the legality of the search of [...]1 T[...] on the ground that Paulsen had not been informed of his constitutional rights before ostensibly consenting to the search of his home. It was contended that the consent referred to in s 22(a) of the CPA must be informed consent, and that Paulsen should have been informed of his right to refuse entry to his home without a search warrant and to insist on a search warrant.

The evidence

90. In the trial-within-a trial which followed, Captain Beukes ("Beukes") testified for the State and Paulsen for the defence. The evidence of Beukes and Paulsen was similar in many respects. What follows is a summary of the common cause evidence, together with material respects in which their versions differ.

91. On the morning of 23 December 2014 Beukes, then a Warrant Officer and commander of the Tactical Response Team ("TRT") Unit in Mitchell's Plain, was present at the execution of a search warrant at the home of the 1st accused at [...]2 T[...], Lentegeur. General Goss was in charge of the search operation, and the TRT Unit was there to provide support and assistance. The search was for drugs, firearms, money and documents.

92. While he was standing outside [...]2 T[...], shortly before 12h00, Beukes received a telephone call from a confidential informant, who told him that the 1st accused's drug money was being kept at [...]1 T[...]. Beukes immediately relayed the information to Goss and sought permission to go and seize the alleged drug money at [...]1 T[...]. Goss assented.

93. Beukes proceeded to [...]1 T[...], accompanied by a number of TRT members under his command. He knocked on the front door at [...]1 T[...] and asked for the owner of the premises. Paulsen was called to the front door, whereupon Beukes identified himself to Paulsen as a police officer.

94. According to Beukes, while he was standing outside the front door at [...]1 T[...], he informed Paulsen that he had received information that the 1st accused's drug money (*"Vet's drug money"*) was being kept on the premises. According to Paulsen, Beukes only mentioned that he had information that drug money was being kept on the premises and did not refer to the 1st accused.

95. Paulsen stated that Beukes informed him at that point, i.e., while he was still standing outside the front door, that he was there to search the premises. This was

disputed by Beukes, who maintained that he had already entered the premises at Paulsen's invitation and was standing in Paulsen's front room when he informed Paulsen that he was there to search the premises.

96. It was common cause, however, that Paulsen did invite Beukes to enter the premises: in Paulsen's own words he said, *"Don't stand there, come inside."*

97. Beukes and Paulsen differ significantly on what transpired once Beukes entered the premises, more particularly on whether or not Beukes informed Paulsen of his rights and whether or not Paulsen gave permission for the search.

98. Beukes testified in chief that he said the following to Paulsen once he had entered the premises and was standing in Paulsen's front room:

> *"I informed him that I had information that Fat's drug money was at his house. I also informed him that he had the right not to allow us to search his house without a warrant. I also told him that we did not have a warrant to search his house but that I needed his permission to search his house. He then said to me that we can proceed to search it. And then with his permission then or on his permission I then requested the other members to come into the house and then we started to search."*

99. According to Beukes he next informed Paulsen that he wanted to go to his bedroom, and Paulsen walked ahead of him to show the way to his bedroom. Inside the bedroom Paulsen pointed out a bedside cabinet and indicated that the money was contained a safe inside a bedside cabinet. Paulsen entered the combination required to open the safe, and money was found in the safe. On Paulsen's own admission the money belonged to the 1st accused.

100. During cross-examination Beukes admitted that his intention, once he received the tip, was to go to [...]1 T[...] and to confiscate the money. When it was pointed out to him that this required a search of the premises, he stated that his intention was to search with the permission of the owner. But he freely admitted, without any apparent qualms, that if the owner had refused permission to search the premises, he would nonetheless have proceeded to search the premises and confiscate the money. The exchange between counsel and Beukes is enlightening:

"Beukes: *The information was that there was drug money being kept at that premises and [that] my intention was to go there and confiscate the money.*

Mr Twalo: *So your intention was to go there to conduct a search?*

Beukes: *With the permission of the owner yes.*

Mr Twalo: *Okay so is it then your evidence that had the owner withheld permission you would not have proceeded to search his house?*

Beukes: *I would still have proceeded and confiscated the money.*

Mr Twalo: *So your intention was to go there to search the house with or without permission?*

Beukes: *As I told the Court that with or without his permission I would have confiscated the money."*

101. When he was asked what empowered him to confiscate the money, Beukes responded vaguely that s 20 of the CPA entitled him to do so. When asked what law he relied on to conduct the search itself, Beukes replied, *"the Criminal Procedure Act as well as the Police Act",* without elaborating.

102. In response to a number of questions regarding whether he had informed Paulsen of his constitutional rights, Beukes testified that he told Paulsen that he had

the right to tell the police not to proceed with the search without a search warrant, and that he had the right to consult a lawyer before the police went ahead with the search. His statement that he informed Paulsen that he had the right to consult with a lawyer was tentative at first, but became more emphatic with repetition. What began as *"I think I told him or I said to him that he had the right to a legal representative, that he could phone a lawyer"*[43] became *"I also warned him that he had the right to appoint a lawyer of his choice and also consult with that lawyer before we would go ahead or proceed with anything".*[44]

103. Paulsen, who stated that he could not remember whether the police officer who spoke to him was Beukes or another officer, testified that he was at no stage informed that he had the right to refuse to permit the police to search his house without a warrant, and that he had the right to contact a lawyer and take advice before permitting the police to enter his house. He was simply told that the police had information that he was keeping drug money and that they were there to conduct a search. He then invited the officer in charge to come inside, whereupon he stepped inside and asked Paulsen to point out his bedroom. On the way to his bedroom he was told by the officer that the police were going to search his bedroom, whereupon he replied, *"well you can look maar in".*

104. The gist of Paulsen's evidence was that he did not think that he had any say in the matter. He was confronted with what appeared to be a *fait accompli,* and his statement that the police could *"look maar"* did not convey permission but rather resignation or acceptance of the inevitable.

---

[43] In response to a question from Mr Twalo, for Paulsen.

[44] In response to a question from Mr Janties, for the 3rd accused.

105. Paulsen testified that if he had been aware that he could refuse the police permission to enter without a warrant, he would have insisted on a warrant, and that if he had been given the chance to call a lawyer for advice before the search went ahead, he would have done so and would have waited for his lawyer.

106. After hearing evidence and argument, it occurred to me during the course of my deliberations that I could not be sure of Beukes' knowledge of the relevant legal provisions pertaining to search and seizure, and that his state of knowledge of the law was relevant to a determination in terms of s 35(5) of the Constitution. Because I considered it essential to obtain clarity on this aspect in order to reach a proper decision, I asked for Beukes to be recalled to the stand in order that I might examine him in terms of s 167 of the CPA.

107. It became abundantly clear, when I questioned Beukes about his understanding of the law relating to search and seizure, that Beukes was woefully ignorant of the relevant legal provisions. He knew that there were *"certain articles"* which authorized him to *"seize any unlawful articles"* but he appeared to be oblivious to the fact that the default position under the CPA is that seizures must be authorized by a search warrant, unless the circumstances are such as to permit a search and seizure without a warrant.

108. His response to the question of when police are permitted to search without a warrant revealed that he lacked even a basic working understanding of the provisions of s 22 of the CPA:

"Court: What is your understanding of when you could act without a warrant?

Beukes: The first understanding is that the article must be unlawful and secondly, it must be - I must be able to destroy it easily."

109. Beukes confirmed that on receiving the tip from his informant, he decided that he was going to ask for consent to search from the owner of the premises, but that his mind was made up that, with or without permission, he was going to go ahead and search and seize.

110. When I asked him how he would have justified his actions if Paulsen had refused permission to search, he replied, *"I would have made a plan if I did not get permission, I would have had to apply for a warrant."* His response made no sense, and was an out and out contradiction of his earlier statement that he was intent on seizing the money regardless of whether or not the owner gave consent.

111. During further cross-examination of Beukes by defence counsel, Beukes was asked whether he had considered applying for a warrant <u>before</u> proceeding to [...]1 T[...]. The gist of his evidence was that he had made up his mind to ask for consent, failing which he would go ahead and search anyway without a warrant. He maintained that he discounted the option of applying for a warrant at that stage because the matter was urgent because his informant had mentioned that the money might move next door to number [...]2 T[...]. (It bears emphasis that these details emerged for the very first time during Beukes' second round of cross-examination.) Beukes admitted that he and Goss did not discuss the issue of a search warrant when he told Goss about his plan to search and seize at [...]1 T[...] and received the nod from Goss.

112. During his first round of cross-examination Beukes was uncooperative when asked to repeat exactly what he had said to Paulsen. He came across as evasive when he repeatedly responded that he had already answered the question. His performance as a witness deteriorated markedly when he was re-called, examined by me and subsequently cross-examined once again by defence counsel. He contradicted himself and was clearly adapting his evidence to meet difficult questions. He seemed to be protecting Goss, as he was at pains to state that Goss did not authorize him to search at [...]1 T[...] but merely permitted him to leave the operation at [...]2 T[...], leaving the search to his discretion. This evidence was self-conscious and disingenuous. The point of the matter is that Goss was well aware that Beukes intended to go and search immediately, i.e., without a search warrant, but nevertheless did not prevent him from doing so.

113. Beukes' poor performance in the witness box during his second round of testimony cast serious doubt on the reliability of his earlier testimony that he informed Paulsen of his right to refuse entry to the police without a search warrant and to consult a lawyer before the search proceeded. It was difficult to credit that Beukes, ignorant of the law as he appeared to be, had known enough to inform Paulsen of his constitutional rights.

114. In addition, Beukes' first rendition of what he told Paulsen, quoted above, contained no mention of his having informed Paulsen of his right to consult a lawyer before the search went ahead. This struck me as an afterthought when he was asked whether he had informed Paulsen of his constitutional rights.

115. Moreover, the probabilities seemed to me to favour Paulsen's version that he was not told that he could refuse the search without a warrant and call a lawyer before the search went ahead. Common sense suggested that, had he known these things, he would surely have insisted on a warrant and called his lawyer - as he says he would have done.

116. A further difficulty with Beukes' evidence is that it differed from the contents of the affidavit of one Contstable Ndulula ("Ndulula"), an officer under Beukes' command who was present at the search of [...]1 T[...], and who stated that he was the person who spoke to Paulsen and gained permission to enter the premises. When confronted with Ndulula's statement during cross-examination, Beukes insisted that his version was correct, and that is was he who dealt with Paulsen.

117. It is puzzling that the State did not see fit to call Ndulula to shed light on the matter. Ms Heeramun, who appeared for the State, assured me that Ndulula would be called to testify during the main trial. That, however, did not resolve the issue at hand. Ndulula's evidence was necessary to resolve an issue in the trial within a trial, and there was no explanation for why he was not called to testify. The consequence of the State's failure to do so is that I was left with doubt as to the reliability of Beukes' evidence regarding what transpired during the search. And since the State had to satisfy me beyond a reasonable doubt of the validity of the search, this doubt had to redound to the benefit of Paulsen.

118. Turning to Paulsen, it has to be said that he was not a perfect witness, particularly when it came to his dealings with the 1st accused. He was clearly not telling the truth when he distanced himself from the 1st accused and tried to suggest

that he always referred to him by his surname and did not know that his nickname was *"Vet"*. It was also straining the bounds of credulity when he pretended to have been unaware of the many search and seizure operations which had been conducted at [...]2 T[...] during the preceding year.

119. However it seems to me that Paulsen's evidence on the essentials pertaining to the search had the ring of truth about it. He did not exaggerate the alleged failings of the police, readily admitting that the officer who spoke to him was polite and did not intimidate him. And, as mentioned, the probabilities favour his version first, that he would have insisted on a search warrant and called a lawyer if he had been informed of his rights, and second, that he was merely indicating resignation to a *fait accompli* when he told the police that they could *"search maar".*

120. I therefore reject Beukes' version that he informed Paulsen that he had the right to refuse the search without a warrant and to call his lawyer. I accept Paulsen's version that he was simply told that the police were going to search his house for drug money, without being informed that he had the right to refuse the search without a warrant and to call a lawyer first.

Discussion

121. In support of the contention that the consent referred to in s 22(a) of the CPA must be informed consent, Mr Twalo referred me to the decision of *Mohamed and Another v* President of the RSA and Others (*"Mohamed"*).[45] At issue in that case was the lawfulness of Mohamed's deportation to the United States of America where he would stand trial for his role in the 1998 bombing of the American embassy in Dar

[45] 2001 (3) SA 893 (CC).

es Salaam. Since Mohamed would face the death penalty if convicted, his removal to the US implicated his constitutional rights to dignity, life and freedom from cruel, inhuman or degrading punishment.

122. The State argued that its conduct was lawful because Mohamed had consented to his removal to the United States. The Constitutional Court left open the question of whether one could validly waive a constitutional right, and assumed that a proper consent would be enforceable against Mohamed.[46] It held, citing local and foreign authorities on waiver,[47] that:

> *"To be enforceable, however, it would have to be a fully informed consent and one clearly showing that [he] was aware of the exact nature and extent of the rights being waived in consequence of such consent."* [48]

123. The Constitutional Court held that an indispensable component of Mohamed's consent to removal to the United States would be awareness on his part that he could not lawfully be delivered by the South African authorities to the American authorities without obtaining an undertaking that if convicted the death penalty would not be imposed on him or, if imposed, would not be carried out. The Court further held that any consent given by Mohamed in ignorance of this duty was inchoate. To be effective the State was required to prove that, when Mohamed consented to being taken to New York to be tried, he knew and understood his right to demand

---

[46] *Ibid*, at para 63.

[47] The authorities referred to included *Laws v Rutherford* 1924 AD 261 at 263, *Hepner v Roodepoort-Maraisburg Town Council* 1962 (4) 772 (A) at 778 E - F and the Canadian Supreme Court decisions of *Korponey v Attorney-General of Canada* [1982] 65 CCC (2d) 65 at 74, in which it was stated that an effective waiver of the right to a jury trial *''is dependant upon it being clear and unequivocal''* and that it must be made *''with full knowledge of the rights the procedure was designed to protect and the effect the waiver will have on those rights in the process''.*

[48] *Mohamed (supra)* at para 63.

that the South African authorities perform their duty to uphold the Constitution by seeking the aforementioned undertaking.[49]

124. The Court found on the facts that there was no evidence to suggest that Mohamed was aware of his right to demand this protection against exposure to the death penalty, and that there was a material impairment of his ability validly to waive any of his rights as he was cut off from legal advice.[50] It concluded that the State, which bore the onus of proving a valid waiver,[51] had not established that any agreement which Mohamed might have expressed to his being delivered to the United States constituted a valid consent on which the State could rely. The handing over of Mohamed to the United States government agents for removal to the United States was accordingly held to be unlawful.[52]

125. Relying on *Mohamed*, Mr Twalo and Mr Van der Berg contended that that any consent given to search in terms of s 22(a) of the CPA amounts to a waiver of the relevant rights of privacy under s 14 of the Constitution, and that the State bore the onus to prove that any consent given by Paulsen was made with full awareness of his rights and the consequences of such consent.

126. Ms Heeramun sought to counter this argument with reference to the decision of the SCA in *S v Lachman* (*"Lachman"*),[53] which was followed by this court in *S v Umeh* (*"Umeh"*).[54]

---

[49] *Mohamed (supra)* at para 65.
[50] *Mohamed (supra)* at para 67.
[51] *Mohamed (supra)* at para 65.
[52] *Mohamed (supra)* at para 68.
[53] 2010 (2) SACR 52 (SCA).
[54] 2015 (2) SACR 395 (WCC).

127. In *Lachman* it was contended that the the consent to search ostensibly given by the appellant could not be relied upon because he was not advised, prior to the search, that he could object thereto. In rejecting the argument, Griesel AJA, with whom Mthiyane and Van Heerden JJA concurred, agreed with the reasoning of the High Court that there was no statutory provision requiring the police to advise a subject that it was open to him to refuse to allow a search to be undertaken.[55]

128. In *Umeh* this court (per Henney J, Baartman J concurring) followed *Lachman* and held that an earlier unreported decision of this court in *S v Enujukwu*,[56] in which it was held that consent for purposes of s 22(a) of the CPA must be informed consent, was clearly wrong.[57]

129. It seemed to me, however, that in *Lachman* and *Umeh* the court was not required to deal with the question of whether consent in terms of s 22(a) of the CPA operates as the waiver of a constitutional right. The Constitutional Court's decision in *Mohamed* does not appear to have been referred to in *Lachman* and *Umeh,* and the constitutional issue was evidently not raised and considered in either of these cases.

130. While it is so that the Constitutional Court in *Mohamed* was not dealing specifically with consent to search in terms of s 22 of the CPA, it seemed to me that it laid down a principle of general import that any consent amounting to the waiver of a constitutional right must be fully informed. I therefore agreed with the submission by Mr Van der Berg that I was bound to follow the clear principle laid down by the

---

[55] *Lachman (supra)* at para 34 - 37.

[56] A judgment of Franks AJ delivered on 9 December 2004 in Case No A 775/03.

[57] Umeh (supra) at paras 38 - 40 and 41.5.

Constitutional Court in *Mohamed,* and was therefore constrained respectfully to depart from *Lachman* and *Umeh*.

131. Absent consent in terms of s 22(a) of the CPA, the police are required to produce a search warrant or else to satisfy the requirements of s 22(b) of the CPA in order to perform the search. In my view, a person who consents to a search of his or her home or person relinquishes the right not to be searched absent compliance with these requirements. Consent to search therefore operates as a waiver of the constitutional right not to be searched, and an abandonment of the important procedural and substantive protections afforded respectively by the search warrant requirement and the strictures of s 22(b).

132. In the same way that Mohamed's consent to his removal to the USA would only be legally effective if the State could show that, at the time of consenting, he was aware of his right to demand that the South African authorities seek an assurance from the US authorities that Mohamed would not be executed, I consider that any consent to search which Paulsen might have given would not be binding and enforceable absent proof that, when he gave the consent, he was aware that he had the right to insist on a search warrant, and that if he did consent to the search, any incriminating article found would be seized and used in evidence against him.

133. My view is fortified by the approach adopted by the Ontario Court of Appeal, Canada, in *R v Wills,*[58] which I find pertinent and persuasive. In that case Doherty JA (with whom Houlden and Griffiths JJA concurred) held that the requirements established by the Supreme Court of Canada for a valid waiver of a constitutional

[58] *R v Wills* (1992), 52 O.C.A. 321 (CA).

right in the course of a police investigation also applied to the determination of whether an effective consent was given to a search and seizure. He reasoned as follows:

> *"When one consents to the police taking something that they may otherwise have no right to take, one relinquishes one's right to be left alone by the state and removes the reasonableness barrier imposed by s 8 of the Charter.* [Section 8 of the Charter provides protection against unreasonable search and seizure.] *The force of the consent given must be commensurate with the significant effect which it produces.*
>
> *The Supreme Court of Canada has applied a stringent waiver test where the Crown contends that an accused has yielded a constitutional right in the course of a police investigation. According to that doctrine the onus is on the Crown to demonstrate that the accused decided to relinquish his or her constitutional right with full knowledge of the existence of the right and an appreciation of the consequences of waiving that right* [.] *… None of these cases involved s. 8 of the Charter, although they did pertain to a number of different constitutional rights engaged during the criminal process, e.g. ss 7, 7(b), 11(b), 11 (f).*
>
> *The high waiver standard established in these cases is predicated on the need to ensure the fair treatment of individuals who come into contact with the police throughout the criminal process. That process includes the trial and the investigative stage. In fact, it is probably more important to insist on high waiver standards in the investigative stage where there is no neutral judicial arbiter or structured setting to control the process, and sometimes no counsel to advise the individual of his or her rights.*
>
> *The exercise of the right to choose presupposes a voluntary informed decision to pick one course of conduct over another. Knowledge of the various options and an appreciation of the potential consequences of the choice are essential to the making of a valid and effective choice.*
>
> *…*
>
> *In my opinion, the requirements established by the Supreme Court of Canada for a valid waiver of a constitutional right are applicable to the determination of whether an effective consent was given to an alleged seizure by the police. The fairness principle which has defined the requirements of a valid waiver as they relate to the right to a*

> *trial within a reasonable time, or the right to counsel, have equal application to the right protected by s.8. In each instance the authorities seek an individual's permission to do something which, without permission, they are not entitled to do. In such cases, fairness demands that the individual make a voluntary and informed decision to permit the intrusion of the investigative process upon his or her constitutionally protected rights.*
>
> *…*
>
> *In my opinion, the requirements established by the Supreme Court of Canada for a valid waiver of a constitutional right are applicable to the determination of whether an effective consent was given to an alleged seizure by the police. The fairness principle which has defined the requirements of a valid waiver as they relate to the right to a trial within a reasonable time, or the right to counsel, have equal application to the right protected by s 8* [constitutional protection against unreasonable search and seizure]*. In each instance the authorities seek an individual's permission to do something which, without that permission, they are not entitled to do. In such cases, fairness demands that the individual make a voluntary and informed decision to permit the intrusion of the investigative process upon his or her constitutionally protected rights."* [59] [Emphasis added.]

134. I agree fully with the reasoning of the learned Judge, and I consider that the principles set out in the underlined portions of the quoted passage ought to be applied in our law.

135. Doherty JA went on to observe that knowledge of the right to refuse is central to the concept of waiver, and that individual could not be said to have consented to police conduct and waived the right to object thereto unless the individual knew that he or she had a right to refuse to comply.[60] He pointed out that the Supreme Court of Canada had recognized that mere compliance with a police demand could not be

[59] *R v Wills (supra)* at paragraphs 49 to 54.
[60] *R v Wills (supra)* at paragraph 55.

regarded as voluntary in any meaningful sense because of the intimidating nature of police action and uncertainty as to the extent of police powers.[61]

136. In *R v Borden*[62] the Supreme Court of Canada approved Doherty JA's statement in *Wills* that the force of the consent given must be commensurate with the significant effect which it produces. Iacobucci J, with whom the majority of the court concurred, held that :

> *"In order for a waiver of the right to be secure against an unreasonable seizure to be effective, the person consenting to the search must be possessed of the requisite informational foundation for a true relinquishment of the right. A right to choose requires not only volition to prefer one option over another, but also sufficient available information to make the preference meaningful. This is equally true whether the individual is choosing to forego consultation with counsel or choosing to relinquish to the police something which they otherwise have no right to take."* [63]
> [Emphasis added]

137. I agree that consent, in order to be legally effective, must be voluntary and informed.[64] Applying these principles to the facts of this case it seems to me that Paulsen's purported consent was neither informed nor voluntary. He was not told that he had the right to refuse to permit the police to search without a warrant; he was simply told that the police were there to search for alleged drug money. There is no indication that Paulsen was aware that he had any choice in the matter. His acquiescence to the search in these circumstances was not truly volitional and did

---

61 *Ibid.*

62 *R v Borden* [1994] 3 S.C.R. 145 (SCC).

63 *R v Borden (supra)* at p 162.

64 There is support in *S v Magobodi* 2009 (1) SACR 355 (TkHC) at paragraphs 13 to 16 for the notion that a mere request for permission to search is insufficient, and that the person asked to consent to search must be informed of the purpose of the search, of the right not to be searched and the right to refuse consent for the search.

not meet the threshold required for effective consent in terms of s 22(a) of the CPA. The search was therefore unlawful in my judgment.

138. I do not wish to be understood as laying down an inflexible requirement that the police must in every case inform the subject of an intended search of his or her right to refuse the search without a warrant. That would be superfluous where the person concerned is well acquainted with his or her legal rights in this regard. But since the State bears the onus of proving that the consent was voluntary and informed, it would be advisable for the police to advise subjects of their rights as a matter of course when seeking consent to search.

139. It bears emphasis that the State at no stage sought to make out a case for a warrantless search in terms of s 22(b) of the CPA. It pinned its colours firmly to the mast of consent in terms of s 22(a) and must stand or fall by that ground. The State would no doubt have relied on s 22(b) in the alternative if it had had a viable case.

140. I should also state, for the sake of completeness, that had Paulsen been asked for consent to search and refused, the State could hardly have relied on exigent circumstances in terms of s 22(b) where the urgency resided therein that the request to search had alerted Paulsen to the intended search, and that he was therefore likely to move the evidence in the time which it would take to secure a warrant. One must guard against the abuse of employing a request for consent to search as a cynical ploy aimed at creating urgency under s 22(b) of the CPA if the consent is refused. Police officers must know that, if consent to search is refused, they will not be permitted to rely on self-created urgency for the purposes of s 22(b).

The enquiry in terms of s 35(5) of the Constitution

141. That brings me to the question of whether the admission of the evidence seized during the unlawful search would render the trial unfair or otherwise be detrimental to the administration of justice.

142. The money seized during the search was not conscriptive evidence. It would have been discovered in any event during a search under a warrant, which would no doubt have been issued if sought. Defence counsel correctly conceded that the admission of the evidence would not render the trial unfair. The decisive question, therefore, is whether or not the admission of the evidence would be detrimental to the administration of justice.

143. Paulsen's right to privacy was violated by an unlawful search of his home, the place where an individual has the highest expectation of privacy. The very intrusion into his home without authority was a serious rights violation, notwithstanding that the search itself was conducted in a civilized manner.

144. The violation of Paulsen's constitutional rights occurred as a result of two discrete errors on the part of Beukes. One was his failure to inform Paulsen of his right to refuse the search without a warrant. The other was his blatant disregard of the search warrant requirement. These two errors warrant different treatment.

145. The former error is arguably excusable on the basis that the legal position was not clear. The implications of *Mohamed* in this context had not yet been considered, and, based on *Lachman*, the position appeared to be that there is no

legal obligation on police officers to inform subjects of their right to refuse a search without a search warrant.

146. The latter error, however, is serious and, in my view, inexcusable. It was incumbent on Beukes, when he received information from his informant that the first accused's drug money was being kept at [...]1 T[...], to consider *ante omnia* whether or not he needed to apply for a search warrant, or whether the circumstances were such that he could justify a warrantless search in terms of s 22(b) of the CPA. There is no evidence to suggest that Beukes engaged in the required thought process. If he had done so, one would have expected him to say so during his evidence in chief.

147. Beukes' evidence was that he planned to ask the owner of the premises for consent to search. But of course, in the nature of things, he could not be sure that he would get the necessary consent. On his own admission he was intent on seizing the money, whether or not consent was given, yet he could not give a satisfactory account of how he would have justified his actions in law if consent had been refused.

148. It is telling that Beukes could not explain how he would have justified a warrantless search if Paulsen had refused consent to search. In response to my question in this regard, he contradicted his earlier statement that he would have gone ahead with the search, stating that he would have had to make a plan, and that he would have needed to apply for a warrant. But he changed his tune during subsequent cross-examination when he tried to justify his actions in terms of s 22(b), stating that the informant had told him that the money might soon be moved. This

evidence was never mentioned in chief, and was clearly aimed at relieving the pinch of the shoe. I am satisfied that no reliance can be placed on it.

149. Beukes' testimony as a whole makes it plain that he at no stage considered applying for a search warrant. He made up his mind that he was going to search there and then, with or without consent, and without a search warrant. His actions were intentional and deliberate, and without regard to the requirements of the law.

150. Beukes' failure to consider the need to apply for a search warrant is either due to ignorance of the law, or intentional disregard for the law. The former reason is compatible with good faith, while the latter is not. But neither are reasonable, and neither can be countenanced. For as Farlam J, as he then was, observed in *S v Motloutsi:*[65]

> *"The maxim* ignorantia legis neminem excusat *does not permit an intentional and deliberate act or omission to be shorn of its legal consequences. It is appropriate to point out that the opinion of* [the Irish Supreme Court] *on a similar subject was expressed as follows at the report of State (Quinn) v Ryan: A belief, or hope, on the part of the officers concerned that their acts would not bring them into conflicts with the Courts is no answer, nor is an inadequate appreciation of the reality of the right of personal liberty guaranteed by the Constitution.' To hold otherwise would be to hold to what to many people would be an absurd position, namely that the less a police officer knew about the Constitution, and indeed, of the law itself, the more likely he would be to have the evidence which he obtained in breach of the law (and/or the Constitution) admitted in Court."* [66]

151. In my view the public are entitled to expect, and the administration of justice demands, that police officers in charge of search and seizure operations have a

---

[65] *S v Motloutsi* 1996 (1) SACR 78 C.

[66] *S v Motloutsi (supra)* at 87 i - j.

reasonable working knowledge and understanding of the legal provisions governing their actions. Not only should they be aware of the limits of their powers, but they should also have an appreciation of the relevant constitutional rights implicated by their actions, and the steps they are required to take to protect those rights. Beukes fell woefully short of this standard. It is disquieting, to say the least, that an an officer of his rank in charge of a tactical response team, was unable to demonstrate an adequate understanding of the law relating to search and seizure. If Beukes is anything to go by, greater attention needs be paid to the education and training of police officers in these regards.

152. It is disturbing that the idea of applying for a search warrant does not seem to have entered Beukes' mind. Equally disturbing, if not more so, is the fact that the subject of a warrant did not come up for discussion when he went to ask permission from Goss to proceed with the planned search. Goss was clearly aware that Beukes planned to search without a warrant, yet he apparently turned a blind eye.

153. The circumstances, viewed objectively, suggest that there was no reason to think that the money would be moved soon. As Beukes himself testified, the police had been conducting regular searches at [...]2 T[...] during the months preceding the day in question, and Paulsen would have had no reason to suspect that his property would be searched. There appears to have been no reason therefore why Beukes could not have approached a magistrate for a search warrant for [...]1 T[...] while the search of [...]2 T[...] was still in progress, and while police officers were on the scene and would have been in a position to apprehend Paulsen if he had emerged from his house and tried to move the money to a different location.

154. I have found that Beukes deliberately engaged in a warrantless search without considering whether his actions could be justified in terms of s 22(b) if he did not manage to secure consent for the search. I have also found that he was less than frank with the court when called upon to account for his actions. To my mind it would be detrimental to the administration of justice to admit the evidence obtained as a result of flagrant and deliberate disregard for the law, compounded by an attempt to conceal the truth from the court. I agree with the sentiments expressed by Zondi JA (Bosielo, Swain and Mocumie JJA and Dlodlo AJA concurring) in *S v Gumede*[67] that:

> *"...where the police deliberately mislead the court in an attempt to justify a serious rights violation, the administration of justice is brought into disrepute."* [68]

155. I am mindful of the public interest in ensuring that the guilty are convicted for their crimes. What weighs heavily with me, however, is the fact that one is dealing here with a serious rights violation which resulted from a combination of ignorance of the law and arrogance on the part of the police officer in charge of the search, compounded by an apparent wink and a nod by a General. Just as important as the public interest in successful crime control is the public interest in ensuring that the war against crime is lawfully waged. For as Cameron JA put it so eloquently in *S v Tandwa*:[69]

> *"[In] this country's struggle to maintain law and order against the ferocious onslaught of violent crime and corruption, what differentiates those committed to the administration of justice from those who would subvert it is the commitment of the former to moral ends and moral means. We can win the struggle for a just order only*

[67] *S v Gumede* 2017 (1) SACR 253 (SCA)
[68] *S v Gumede (supra)* at 265 g.
[69] *Supra.*

through means that have moral authority. We forfeit that authority if we condone coercion and violence and other corrupt means in sustaining order."[70]

156. Admittedly the court in *S v Tandwa* was dealing with evidence obtained through torture, whereas the violation in this case is less egregious. And it might perhaps be argued that the rights violation was of a "technical" character because a search warrant would have been issued if it had been sought, and the evidence inevitably discovered. But to my mind it would be wrong to regard the search warrant requirement as a "mere technicality": it is a bulwark against unreasonable invasions of privacy, and courts should be astute to insist on scrupulous compliance therewith.

157. In my view to admit evidence obtained through an unlawful warrantless search on the basis that a warrant would have been issued and the evidence lawfully discovered, is to provide a license to police officers to perform warrantless searches for reasons of convenience rather than genuine urgency as contemplated in s 22(b) of the CPA. The police should not be encouraged to cut corners with regard to the search warrant requirement.

158. For these reasons I ruled that the evidence unlawfully seized from Paulsen's home without a search warrant had to be excluded as I considered that its admission would bring the administration of justice into disrepute in the particular circumstances of the case.

THE THIRD SEARCH (1[...] T[...])

[70] *S v Tandwa (supra)* at 649 f - g.

159. In the third search drugs were incidentally discovered and seized during a search under a valid search warrant which specified firearms. Defence counsel contended that the seizure of the drugs was unlawful and the evidence inadmissible.

The evidence

160. Two witnesses testified for the State in the trial within a trial regarding the search of 1[...] T[...] on 17 October 2017, namely Constable Johan Hansen ("Hansen") and Sergeant Merale Manual ("Manual"), both members of "Operation Combat", a specialized unit tasked with anti-gang activities. The third accused, whose home was searched, did not give evidence. The matter therefore falls to be determined on the basis of the evidence of Hansen, which was corroborated in all material respects by Manual.

161. At approximately 19h15 on Sunday 17 October 2017, while on duty patrolling in Manenberg, Hansen received a telephone call from a confidential informant who told him that if he moved quickly he might be able to locate seven police issue firearms (which had been stolen from the South African Police Service a week previously) at 1[...] T[...] and two other addresses nearby. According to Hansen, the informant indicated that the weapons were soon to be distributed to other unknown locations.

162. The informant told Hansen that if he did not find the weapons inside the house at 1[...] T[...], he should look inside the "channel", being a slang term for a secret hiding place. The "channel" to which he directed Hansen was a derelict washing machine in the back yard of 1[...] T[...]. The informant also told Hansen that the

woman who lived at 1[...] T[...] was involved in a relationship with a corrupt policeman stationed at Lentegeur Police Station.

163. Hansen immediately relayed the information to his commanding officer, Captain Martin, who called together the members of his group and deployed them to go and search for the weapons at the three addresses furnished by the informant.

164. When asked about a warrant, Hansen's response was that he considered that there was no time to obtain a warrant because the information he had received indicated that the weapons would soon be moved. There was an urgent need to recover the stolen firearms. Hansen referred to s 22(b) of the CPA, and his evidence was to the effect that he believed that he would have obtained a warrant to search for the firearms if he applied for one, and that the delay occasioned by applying for a warrant would defeat the object of the search because the weapons would likely be moved. He also mentioned in cross-examination that he was reluctant to approach a senior officer for a warrant because he did not know who could be trusted because of the reality of corruption within the South African Police Service.

165. Hansen's unit of approximately twenty members was split into three groups and sent to search for the weapons at the three addresses furnished by the informant. Hansen led the small group which searched 1[...] T[...]. They first surrounded the premises and assumed control of all exits from the premises. The police announced their presence and demanded entry to the premises. They announced themselves and demanded entry, and when they were not admitted at once, they breached the garage door to gain entry to the premises.

166. On entry Hansen asked who owned the premises. The 3rd accused informed him that she resided there, but that the property was owned by her brother, Fadwaan Murphy, who resided nearby.

167. None of the stolen firearms were found on the premises. However, when Hansen searched inside a derelict washing machine in the back yard of the premises, he found a plastic bag containing 80 mandrax tablets, 270 1g units of methamphetamine or tik, 100 g of tik, R 13 830.00 in denominations of R 10, R 20 and R 50 notes, and 65 live rounds of ammunition of different calibres, being the same calibre as used in standard issue police weapons. The drugs, money and ammunition were seized and the third accused was arrested.

168. When Hansen was asked why no attempt had been made to obtain a warrant once the premises at 1[...] T[...] had been surrounded and the threat of removal of the weapons neutralized, Hansen stated that he had no way of knowing how many people were present inside the house, and that there was a risk that they could use the stolen firearms to attack the police. He also stated that the officers surrounding the premises were at risk of being attacked by members of the community who were sympathetic towards drug dealers and often threw stones at police engaged in operations against them.

Discussion

169. The State's argument, in a nutshell, was that Hansen's presence in the premises of 1[...] T[...] to search for stolen police firearms was lawful in terms of s 22(b) of the CPA, and that his subsequent seizure of the drugs, money and

ammunition which he discovered while lawfully searching for the stolen firearms was also lawful in terms of s 22(b) of the CPA.

170. Mr Van der Berg, with whose submissions all defence counsel associated themselves, challenged the lawfulness of the warrantless search for firearms on two bases. He contended, first, that the police should have asked for consent to enter and search before resorting to breaching the door to gain entry to the premises, and second, that once the police had surrounded 1[...] T[...], the situation was no longer urgent as it was not possible for anyone to leave the premises with the firearms, and a search warrant could and should have been obtained before entering the premises and conducting the search.

171. I do not agree with the first submission. While I accept, as a general proposition, that police officials in an effort to respect constitutional rights should adopt the least invasive measures to achieve their objectives in terms of search and seizure, it does not follow that they are obliged in all cases to seek consent to search without a warrant as opposed to proceeding directly to search in urgent cases.

172. Sections 22(a) and (b) of the CPA cater for different situations and create discrete grounds for a warrantless search. Section 22(b) is meant to facilitate fast and effective police action in urgent situations where evidence might otherwise be lost. Section 22(a), on the other hand, permits a search without a warrant in circumstances which are not urgent, and a warrant could therefore be obtained, but a person entitled to consent makes a valid waiver of his or her rights and consents to the search without a warrant.

173. To my mind it would frustrate the purpose of s 22(b) if police officials were required to stop and ask for permission to search before proceeding with an operation which requires speed and the element of surprise to maximize chances of success. In my judgment, if a police officer entertains the necessary reasonable belief to justify a warrantless search in terms of s 22(b) of the CPA, he is entitled to proceed with the search without consent.

174. It is so that in this particular case, the police attempted unsuccessfully to breach the outside door to gain entry to 1[...] T[...] and were eventually allowed entry by one of the occupants of the premises who opened the door for them. The fact of the matter, however, is that the police announced themselves and asked a number of times for the door to be opened, to no avail. It was only after they had been struggling with the door for five minutes or so, and it would have been obvious to the occupants that they would continue to do so until they prevailed, that the door was opened from the inside to permit entry. There is therefore no basis to suggest that co-operation would have been forthcoming without forcible entry, and that it was unreasonable for the police to resort to force to gain entry.

175. Furthermore, Hansen testified that when he told the 3rd accused that the police were there to search the premises, she asked for a search warrant, whereupon he informed her that there was no warrant and that the search was being conducted in terms of s 22(b) of the CPA. This, too, negates any suggestion that consent to search would have been furnished if sought.

176. Turning to the second submission advanced by Mr Van der Berg, I do not agree that the urgency was removed once the police officers had surrounded 1[...]

T[...], and that it was therefore incumbent upon the police to obtain a search warrant before entering the premises. When questioned in this regard, Sergeant Hansen explained that he did not pursue that course of action because he did not know how many people were inside the premises and there was the risk that they could use the stolen firearms to attack the police. Furthermore, the police stationed outside the premises would have been exposed to attacks by members of the community sympathetic to the Dixie Boys gang.The gist of his evidence was that the police needed to retain the element of surprise in order to maximize the chances of a safe and effective operation.

177. Mr Van der Berg submitted somewhat tentatively that the only exigent circumstance contemplated in s 22(b) of the CPA is the risk that the evidence would be lost or destroyed if the search were to be delayed in order to obtain a warrant, and that the risk of harm to police officers is not expressly mentioned in s 22(b). It seems to me, however, that it is implicit in s 22(b) that part of the object of a search is to recover the evidence safely without harm to the subjects of the search or the police officers performing the search.

178. Put differently, the words *"defeat the object of the search"* in s 22(b) must be broadly construed so as to include safety considerations. Therefore where the circumstances are such that a delay of the search to obtain a warrant would expose police officers and/or civilians to undue risk of harm, that would, to my mind, defeat the object of the search and serve to justify a warrantless search under s 22(b). I note in this regard that the court in *US v Rubin* (referred to at paragraph 77 above)

considered that the possibility of danger to police officers justified a warrantless search on the basis of exigency.[71]

179. In this case the police were faced with a situation in which they had surrounded a suspected gang / drug dealing stronghold where weapons allegedly stolen from the South African Police were thought to be hidden. They had no way of knowing how many people were inside the premises, and there was a fear that the occupants of the premises could arm themselves with the stolen weapons and use them on the police if they were alerted to their presence and afforded time to prepare an attack.

180. It may be so, as Mr Van der Berg contended, that this risk was notional and without any concrete basis in fact. That, however, does not render the risk acceptable, or so remote as to be fanciful. To my mind the fact that a number of firearms were possibly to be found on the premises created an inherent risk for the police officers performing the search that the weapons could be used against them. Added to that, they had in mind that they were dealing with suspected drug dealers in the heart of gang territory. In those circumstances the possibility of a shoot-out posed an obvious risk to both police and the occupants of the premises. Police officers are called upon to make speedy tactical decisions in the field, based on their experience and common sense. Provided those decisions are reasonable, made in good faith and with adequate knowledge of the relevant law, a court should be slow to second guess them in the manner of a armchair critic. In particular, police should

[71] *United States v Rubin (supra)* at para 32.

not be faulted for choosing a course of action aimed at prioritizing safety and minimizing the risk of harm to officers or civilians.

181. Hansen relied on s 22(b) of the CPA to justify a warrantless search of 1[...] T[...] in order to recover stolen police firearms. It is clear from his evidence as a whole that he entertained a belief that a warrant to search for firearms would have been issued to him if he had applied for one, and that he believed that the firearms would likely disappear, and the opportunity to recover them lost, if he delayed the search to apply for a search warrant. In my view his belief in these regards was objectively reasonable in the circumstances, as was his decision to continue with the search once the officers had surrounded 1[...] T[...]. The police entry into 1[...] T[...] and the ensuing search for the stolen police firearms was accordingly lawful as it met the requirements of s 22(b) of the CPA.

182. The question which arises, then, is whether or not the seizure of the other incriminating articles incidentally discovered during the course of the search was lawful. I agree with the submission by Mr Van der Berg that Hansen's conduct fell to be measured against the notional search warrant which he would have obtained on the strength of the information available to him, i.e., a warrant to search for stolen police issue firearms.

183. To my mind Hansen was confronted with a situation akin to that when a police officer, during the course of executing a search warrant, stumbles upon incriminating articles which are not specified in the search warrant. In this regard Ms Heeramun referred me to the cases of *S v Sihlobo ("Sihlobo"),*[72] a decision of Pakade J in the

[72] [2004] JOL 12831 (Tk) (Case No 198/01).

Transkei High Court, and *National Director of Public Prosecutions v Starplex 47 CC and Others: In re ex parte National Director of Public Prosecutions v Mamadou and Another ("Starplex"),*[73] a decision of this court (per Bozalek J).

184. In *Sihlobo* members of the police were tasked with executing a warrant to search a Dr Sihlobo's surgery for documents and computer data. During the course of the search they discovered scheduled medicines which were illegally possessed by the doctor. These items, which were not specified in the search warrant, were then also seized. The court subsequently had to decide whether the seizure of the medicines without the authority of a warrant was lawful.

185. Pakade J concluded that the police were entitled in these circumstances to seize the medicines without a warrant in terms of s 22(b) of the CPA. He stated that:

> *"In the present matter the jurisdictional facts are that Mynhardt, who was armed with a search warrant for the search and seizure of documents and computer data, suddenly found himself faced with unscheduled medicines displayed in the accused's surgery. The accused was in illegal possession of those medicines. … In my view therefore when they found themselves confronted with the scheduled medicines in accused's surgery, which they did not expect to find, it became clear to them that the magistrate would issue them with another search warrant when they applied for it. The information which they would furnish to the magistrate about this illegal possession of medicines would justify the issue of a warrant. However, they knew that the magistrate had already left the office. Leaving some of them in the premises to keep guard of the articles would be a futile exercise because even if the accused were to come back to remove those items they would do nothing to prevent him as they had no search warrant. Therefore in my view it would defeat the administration of justice for the police to leave the scheduled medicines in the illegal possession of the accused and go look for the magistrate or apply for a search warrant the following*

[73] 2009 (1) SACR 68 (C).

day when the police would be in his office. I am of the view that the search and the seizure of the scheduled medicines was justified by the provisions of s 22(b)." [74]

186. A similar situation arose in *Starplex,* where police officials were assisting officials from the Department of Home Affairs to execute a search warrant issued in terms of s 33(5)(a) and (b) of the Immigration Act 13 of 2002. During the course of the operation large sums of cash comprising bundles of South African and foreign currency were found, and the police suspected that the unauthorized sale of foreign currency in contravention of the exchange control regulations was taking place on the premises. Relying on s 22(b) of the CPA, the police officers proceeded to seize the cash without a warrant. When the legality of the seizure was later challenged, Bozalek J held that the police had acted lawfully in accordance with s 22(b) of the CPA. He reasoned as follows:

"Had the police authorities, upon finding the currency in question, left the premises in order to apply to a magistrate for a search warrant, there is every chance that some or all of the currency would have disappeared by the time that they returned. In my view, further, it is impractical to suggest, as respondent's counsel did, that any such possibility would have been obviated by posting a guard at the premises. Money is inherently capable of quick flight and can be difficult to trace. I am satisfied therefore that the search and seizure operation was lawfully conducted and that the provisional preservation order granted cannot be discharged on the grounds of an illegal search or seizure."

187. The principle which emerges from these cases is that if the police, during the course of a lawful search for article X, incidentally discover incriminating article Y, article Y may be seized without a warrant in terms of s 22(b) of the CPA, provided the requirements of the subsection are met at the time when the discovery is made.

---

[74] *Sihlobo* (supra) at para 45.

It makes no difference whether the initial search is rendered lawful by means of a valid search warrant or by virtue of legitimate reliance on s 22(b) of the CPA: what matters is that the police are lawfully on the premises and are acting lawfully at the time when they make the incidental discovery which prompts the subsequent seizure. That means that, at the time when incidental discovery is made, the police must not have strayed outside the ambit of the relevant search warrant, if they are acting under a search warrant, or the notional warrant which they would have obtained, time permitting, where they are acting without a warrant in terms of s 22(b).

188. In this case, the warrantless search for the stolen firearms was lawful for the reasons which I have already mentioned. The police were lawfully present on the property at 1[...] T[...], and it was during the course of his search of the “channel”, as specifically directed by his informant, that Hansen discovered the other incriminating articles which he then proceeded to seize. The question, then, is whether the requirements of s 22(b) of the CPA were met when he did so.

189. When Hansen made the discovery it was after 20h00 on a Sunday night. He and his team were in the midst of an alleged gang stronghold / drug dealer’s den. The items which he discovered gave rise to a reasonable suspicion that the articles were connected to the offences of drug dealing and unlawful possession of ammunition. Hansen would therefore have been clearly justified in believing that a warrant to seize the articles would have been issued had he applied for one based on his first-hand information about what he had found.

190. Hansen was faced with the choice of seizing the articles at once, or leaving them in their hiding place in the washing machine and going off to try and obtain a

search warrant. It would have been obvious to him that if he did not secure the items, they would in all likelihood have been moved before he could return with a search warrant. That meant he either had to remove the articles or leave officers stationed at the scene to guard them until he could return with a warrant. To my mind that was not a reasonable option in the circumstances. Unless police officers were posted right next to the washing machine in which the articles had been found, there was no guarantee that they would not be moved. Leaving officers inside the back yard of 1[...] T[...], alternatively searching anyone leaving T[…], in the hours while the warrant was awaited, would have been unduly invasive of the rights of the occupants of 1[...] T[...] and potentially risky for the officers left at the scene.

191. In my view Hansen held the requisite belief in terms of s 22(b) in regard to the drugs and other items discovered in the washing machine, and his belief was objectively reasonable. Therefore the seizure of the articles incidentally discovered during the search for stolen firearms was lawful in terms of s 22(b) of the CPA.

192. I should, for the sake of completeness, deal with Mr Van der Berg's submissions pertaining to the American doctrine of plain view. The doctrine allows a police officer to seize objects which are not described in a search warrant when executing a lawful search, if he observes the object in plain view and has probable cause to believe that it is connected with criminal activities.[75]

---

[75] See Legal Information Institute definition at https://www.law.cornell.edu/wex/plain_view_doctrine.
See, too, *Goldberg v Director of Public Prosecutions, Western Cape* 2014 (2) SACR 57 (WCC) at paragraphs 38 to 40, where Rogers J referred to the doctrine of plain view, but held that it was not necessary to rely on this doctrine. See, too, *Du Toit and Others v Provincial Minister of Environmental Affairs and Development Plannning, Western Cape and Others* 2019 (1) SACR 311 (WCC) at paragraphs 48 - 58, where Le Grange J referred to American and Canadian decisions based on the doctrine and stated that the approach was consistent with our law.

193. Mr Van der Berg argued that, since Hansen's notional search warrant was limited to a search for stolen firearms, he could only lawfully seize other suspicious items if they were in plain view. Since the drugs and money were concealed in the washing machine, so the argument went, they were not in plain view and could not lawfully be seized.

194. Leaving aside the question of whether or not the plain view doctrine should be adopted as part of our law, it seems to me that this argument fails on the facts. Hansen was not searching aimlessly when he came across the drugs and cash. He was purposefully searching in the "channel" for the stolen firearms, as his informant had told him to do. His incursion into the channel was therefore lawful within the parameters of the notional warrant pertaining to the stolen firearms.

195. Once he drew the plastic bag out of the washing machine and, on opening it, discovered that it held drugs and cash, he then had reason to believe that the articles were associated with criminal activity and was accordingly entitled to seize them without a warrant on the basis of exigent circumstances in terms of s 22(b) of the CPA.

THE FOURTH SEARCH (1[...] T[...])

196. The challenge to the fourth search was based on the fact drugs were discovered and seized, during a search under a warrant, by a police officer whose name was not listed on the warrant as one of the officers authorized to search. Counsel for the defence challenged the validity of the search and argued that the evidence seized should be declared inadmissible.

The evidence

197. Three witnesses testified for the State in the trial within a trial regarding the search of 1[...] T[...] on 7 November 2017, namely Constable Buhle Mqushulu ("Mqushulu "), Sergeant Mogamat Faeez Bloem ("Bloem"), and Constable Linton Kalase ("Kalase"). Again the third accused, whose home was searched, did not testify.

198. During November 2017 Mqushulu was working with Crime Intelligence. As part of information gathering he handled confidential informants. On 2 November 2017 he was told by an informer linked to narcotics and firearms in the Mitchells Plain area, that the premises at 1[...] T[...] Street, Lentegeur were being used for drug dealing. The informer related that an individual known to him as "Chakka" waited outside the premises for prospective drug purchasers and received money from them. He then took the money inside the premises and returned with the drugs, which he handed over to the customer.

199. On the same day Mqushulu conducted personal observation of the premises and verified the information received from the informant. On 7 November 2017 he applied for, and obtained, a warrant to search the premises for illegal narcotics in connection with suspected unlawful dealing / possession of drugs in contravention of sections 4(a) or (b), or 5(a) or (b) of Act 140 of 1992. The persons authorised under the warrant to search were Bloem and four other police officers, and the illegal substances specified in the warrant were mandrax, tik, tik lollies, dagga and unga.

200. Bloem, a police officer of 17 years standing, is a member of the Crime Prevention Unit, stationed at Lentegeur Mitchells Plain. Part of his work involves curbing gangsterism and drug-dealing in Lentegeur. Number 1[...] T[...] Street was located in an area of Lentegeur known as “the Island”, which was known to be a “hotspot” of the Dixie Boys gang.

201. On 7 November 2017 he received a search warrant to search for drugs at 1[...] T[...] Street, and he requested assistance from the specialized anti-gang unit known as Operation Combat in order to execute the search warrant. He did so because he considered that the 5 officers listed in the search warrant would not be sufficient for the task. Firstly, the premises were very difficult to enter and required equipment to breach the door. Secondly, the premises were a gang stronghold, and it was not safe for a few officers to enter on their own. He therefore called on Operation Combat to assist in breaching the door to gain entry, and in securing the premises so the searchers could perform their task safely.

202. Bloem, who was in charge of the search, briefed the twenty five members of Operation Combat on their role and impressed upon them that their task was simply to facilitate access and secure the premises, and not to search. The searching was to be left to the members of Bloem’s team, whose names were listed on the warrant. Bloem also told the Operation Combat team that a firearm had previously been found on the premises and that there were vicious dogs there. Kalase was aware of this as he had been present during the search of 1[...] T[...] on 17 October 2017 (the third search). Bloem’s understanding was that it was permissible to have members of Operation Combat provide assistance in the execution of the search warrant in the manner aforesaid, as long as they did not participate in the search themselves.

203. On arrival at 1[...] T[...] Street members of Operation Combat proceeded to breach the door when the door was not opened in response to the loud police demand for entry. Once the door was breached, some 12 males were seen in the front yard of the premises. Members of Operation Combat, armed with rifles and shotguns, moved in to contain these individuals.

204. Constables Kalase and Abrahams, both members of Operation Combat, then proceeded to the front door of the house in order to secure the premises for the searchers. The front door was open, but entry was barred by a locked security gate. Kalase looked through the gate and saw the third accused with a small black bag resembling a toiletry bag in her hand. It occurred to Kalase that there might be a firearm in the bag.

205. Kalase called out to the third accused to open the security gate. She turned and looked at him over her shoulder and proceeded to ignore his request, moving instead to the back of the house and disappearing from view as she turned left into the back yard of the premises. She returned seconds later without the bag, and opened the security gate.

206. Kalase feared that the third accused might have handed the weapon which he believed was in the black bag to someone in the back yard, who could pose a danger to the police officers coming in to search. He therefore asked the third accused to take him to the back yard to search.

207. On stepping into the back yard Kalase looked left and right and saw that there was no person there other than the third accused. He satisfied himself that there was

no danger and placed his 9 mm pistol back in its holster. He then asked the third accused where the black bag was.

208. The third accused pointed to a narrow passage between the house and the perimeter wall of the property. Kalase could not enter the passge, but he stuck his hand into it and felt and discovered an aperture where the black bag was hidden. He pulled out the bag, opened it and discovered that it contained tik, mandrax, marijuana and a silver scale.

209. He thereupon arrested the third accused for possession of drugs. Bloem arrived and Kalase informed him of his discovery and the arrest. Bloem's team then searched the premises with the third accused observing and Kalase in tow as her guard. No other illegal substances were found at the premises.

210. Under cross-examination Kalase freely admitted that he had been told by Bloem that he was not supposed to search. He also admitted that once he had seen that there was no-one in the back yard, he was satisfied that there was no danger, and that there was therefore no need to go further and look for the black bag which he thought contained a firearm. He conceded that he ought to have waited for Bloem to search for the black bag, acknowledging that if he had relayed the information to Bloem, Bloem would undoubtedly have found the bag. He admitted that that was what he ought to have done, but he said that he made a mistake. He explained that the events unfolded rapidly and his police instinct to make an arrest kicked in. He admitted that he had been eager to arrest the third accused and could not resist acting.

211. Mr Jantjies contended that Kalase's evidence that he thought the third accused had a firearm in the black bag was improbable because he testified that she carried the bag with one hand, whereas a firearm would have been too heavy to carry with one hand without support from the other. He also suggested that Kalase's evidence that he thought that there might be a firearm in the black bag was a recent fabrication, because he made no mention of this belief in his written statement made on the day of the search.

212. It is so that Kalase did not say in his written statement that he initially thought that the black bag contained a firearm. One must, however, bear in mind the purpose for which the statement was written, namely to form part of the docket which he opened against the third accused on a charge of unlawful dealing or possession of drugs. His mistaken belief that the bag contained a firearm was not relevant to the charge, and it is therefore not surprising that it was not included in the statement.

213. In my view Kalase's belief that the black toiletry bag contained a firearm was not fanciful or unreasonable, given his awareness that a few weeks previously a firearm had been found on the premises. As for the contention that the third accused would not have been able to carry a firearm with one hand, Kalase pointed out that a small handgun can be light enough to carry with one hand.

214. In my view there is no merit in these attacks on Kalase's credibility. I was favourably impressed by Kalase as a witness, who struck me as open and honest, relaxed and not in the least defensive. He freely admitting his error in his eagerness to arrest the third accused. Indeed he was disarmingly frank about it. The third

accused has not put up any testimony to gainsay Kalase's version of events. I am satisfied that his evidence was truthful, and I can see no reason to reject it.

Discussion

215. It is well established in our law that search warrants are to be carefully scrutinized, and that courts must adopt a strict approach to the question of whether the police acted within the limits of the warrant.[76] The Constitutional Court has held that a search warrant must identify the searcher.[77] It follows that only those police officers specifically mentioned in a search warrant are authorized to search in terms thereof, and that it is unlawful for an officer whose name is not listed in the warrant to search and seize, unless his or her actions can be justified in terms of s 22(a) or (b) of the CPA.

216. It is clear, therefore, that Kalase acted unlawfully when he strayed beyond the role of securing the premises and ventured to search for the black bag in the back yard of 1[...] T[...] Street, and proceeded to seize the drugs which he discovered. In so doing he committed an unjustified violation of the third accused's right to privacy. The question, then, is whether the evidence so obtained should be excluded in accordance with s 35(5) of the Constitution.

The enquiry in terms of s 35(5) of the Constitution

---

[76] See *De Wet and Others v Willers NO and Another* 1953 (4) SA 124 (T) at 127 B - C; *Powell NO and Others v Van der Merwe NO and Others* 2005 (1) SACR 317 (SCA) at para [50]; *Naidoo v Minister of Law and Order* 1990 (2) SA 158 (W); *Smit & Maritz v Lourens NO* 2002 (1) SACR 152 (W); *Goqwana v Minister of Safety and Security* 2016 (1) SACR 384 (SCA).

[77] *Minister of Safety and Security v Van der Merwe and Others* 2011 (5) SA 61 (CC) at para [55]; see, too, *Goqwana v Minister of Safety and Security (supra)* at paragraph 25.

217. It was common cause that the admission of the evidence could not operate to render the trial of the accused unfair, and that the only relevant issue was whether its admission would be detrimental to the administration of justice.

218. Having regard to the factors mentioned in *S v Pillay,*[78] it seems to me that one is dealing here with a rights violation which is technical and not serious in nature. I say that because had Bloem, or any one of his team, performed the search, the search would have been lawful, and there could have been no complaint. The violation of the third accused's right to privacy occurred purely because Kalase was not specified in the warrant as an authorized searcher. The violation was therefore notional rather than real.

219. Another factor which I regard as significant in this case is that the drugs discovered seized by Kalase would inevitably have been found by Bloem, or one of his team, acting lawfully in terms of the search warrant.

220. It is so that Kalase's conduct was not reasonable. He could, and should, have waited for Bloem and his team to come and search for the black bag. He showed a lack of restraint when he could not resist going after the black bag with a view to arresting the third accused. But his conduct was not *mala fide*, and he did not set out to defy Bloem's instructions or to break the law. He reacted in the heat of the moment, driven by his eagerness to catch a suspect and make an arrest - his "police instinct". He explained that on previous searches members of Operation Combat had made arrests, and that is what he wanted to do.

---

[78] *S v Pillay (supra)* at para [93].

221. He acknowledged his mistake, and made no attempt to conceal his error, which was that he strayed from his assigned task because he was over-eager to make an arrest. On the scale of police misconduct it seems to me that this is a relatively minor infraction, and it was an *ad hoc* error committed by an individual rather than a systemic error.

222. I do not consider that the admission of the evidence seized by Kalase would create an incentive to police officers to commit similar infractions in future. Nor do I consider it necessary to exclude the evidence in order to perform a disciplinary function. To my mind Kalase will have have learned the error of his ways through having had to explain himself in this trial-within-a-trial.

223. When one weighs the public interest in bringing criminals to book against the equally compelling public interest in ensuring that State agents act lawfully in the prevention, investigation and prosecution of crime, it seems to me that in this case the balance comes down in favour of the former, given the technical nature of the rights violation and the minor nature of the police officer's infraction, which was not deliberate or flagrant. Moreover, I consider that the repute of the administration of justice would be better served by admitting the evidence than excluding it in this case. I believe that, viewed from the perspective of reasonable, well-informed members of the public, confidence in the justice system would be impaired if the evidence were to be excluded.

224. For all these reasons I concluded that the admission of the evidence unlawfully seized by Kalase would not bring the administration of justice into disrepute, and I therefore ruled it admissible.

D M DAVIS AJ

Appearances:

For the State: Ms A Heeramun, Office of the DPP, Western Cape

For 1st and 6th Accused: Adv J Van der Berg SC, instructed by Mr R Davies, Davies & Associates.

For 2nd Accused: Adv C Van Aswegen, instructed by Ms S C Van Aswegen.

For 3rd Accused: Adv V Jantjies, instructed by Mr R Davies, Davies & Associates.

For 4th and 5th Accused: Adv T Twalo, instructed by P A Mdanjelwa Attorneys.

For 7th Accused: Adv T Mafereka, instructed by P A Mdanjelwa Attorneys.