

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 90/10  
[2011] ZACC 19

In the matter between:

MINISTER FOR SAFETY AND SECURITY Applicant

and

GARY WALTER VAN DER MERWE First Respondent

MONIQUE VAN DER MERWE Second Respondent

FERN CAMERON (formerly VAN DER MERWE) Third Respondent

ALAN RAYMOND FANAROFF Fourth Respondent

TANTCO GLOBAL (PTY) LTD Fifth Respondent

EXECUTIVE HELICOPTERS (PTY) LTD Sixth Respondent

EXEL AVIATION (PTY) LTD (formerly  
AIRCRAFT SUPPORT (PTY) LTD) Seventh Respondent

MADIBA AIR AND SEA (PTY) LTD Eighth Respondent

HELICOPTER AND MARINE SERVICES (PTY) LTD Ninth Respondent

ZONNEKUS MANSIONS (PTY) LTD Tenth Respondent

SUMMER DAZE TRADING 712 (PTY) LTD Eleventh Respondent

WESTSIDE TRADING (PTY) LTD Twelfth Respondent

SA BARTER (PTY) LTD Thirteenth Respondent

TWO OCEANS AVIATION (PTY) LTD Fourteenth Respondent

HELIBASE (PTY) LTD Fifteenth Respondent

Heard on : 3 March 2011

Decided on : 7 June 2011

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## JUDGMENT

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MOGOENG J:

### *Introduction*

[1] The main question in this application for leave to appeal is whether search and seizure warrants are valid despite their failure to mention the offences to which the search relates. The answer depends on whether the common law intelligibility principle, properly understood, requires that the offence be specified in the search and seizure warrants issued in terms of section 21 of the Criminal Procedure Act<sup>1</sup> (CPA).

### *Parties*

[2] The applicant is the Minister for Police (Minister).<sup>2</sup> The first respondent is Mr Gary Walter van der Merwe. He is the general manager of the sixth and tenth respondents and a director of the eighth, ninth, thirteenth and fifteenth respondents. The second and third respondents are his wife and mother respectively. The fourth

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<sup>1</sup> 51 of 1977.

<sup>2</sup> The Minister for Police was formerly called the Minister for Safety and Security.

respondent is a director of some of the respondent companies and the fifth to fifteenth respondents are companies in which the first respondent has a financial interest.

*Factual background*

[3] The Criminal Investigations Unit of the South African Revenue Service (SARS) suspected some of the respondents of having committed financial irregularities and of involvement in criminal activities. In collaboration with the Director of Public Prosecutions for the Western Cape Province, SARS caused the Commercial Branch of the South African Police Service (SAPS) to investigate possible violations of the Income Tax Act,<sup>3</sup> fraudulent claims in contravention of the Value-Added Tax Act,<sup>4</sup> and money laundering in violation of the Prevention of Organised Crime Act.<sup>5</sup>

[4] Superintendent Kotze was assigned the case for investigation. When the need arose for search and seizure operations to be conducted at the premises linked to the respondents, Superintendent Kotze and employees of SARS deposed to affidavits in support of the issuing of the search and seizure warrants in terms of section 21 read with section 20 of the CPA.<sup>6</sup>

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<sup>3</sup> 58 of 1962.

<sup>4</sup> 89 of 1991.

<sup>5</sup> 121 of 1998.

<sup>6</sup> Section 20 of the CPA provides:

“The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article)—

[5] Armed with these affidavits, which set out the offences which the respondents were suspected of having committed, Superintendent Kotze successfully approached a magistrate at the Magistrates' Court, Cape Town for the issuing of three warrants. The first was for the Zonnekus home of the first respondent, which he shares with his wife and mother, the second for the business premises of various respondents at Helibase and the third for the residential premises of the fourth respondent at Royal Ascot. These warrants are at times collectively referred to as the Cape Town warrants.

[6] The fourth and fifth warrants were issued by magistrates who serve in courts which have jurisdiction over the Bellville and Randburg premises of Carrim, Maritz and

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- (a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence whether within the Republic or elsewhere;
  - (b) which may afford evidence of the commission or suspected commission of an offence whether within the Republic or elsewhere; or
  - (c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.”

Section 21 provides, in part:

- “(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; or
  - (b) by a judge or judicial officer presiding at criminal proceedings, if it appears to such judge or judicial officer that any such article in the possession or under the control of any person or upon or at any premises is required in evidence of such proceedings.
- (2) A search warrant issued under subsection (1) shall require a police official to seize the article in question and shall to that end authorize such police official to search any person identified in the warrant, or to enter and search any premises identified in the warrant and to search any person found on or at such premises.”

Associates, the accountants for a number of the respondents. Since the validity of these warrants does not fall for determination in this Court, nothing more need be said about them.

[7] The Cape Town warrants were, but for the naming of the person and the description of the property to be searched, phrased in identical terms. Each was titled “Search Warrant [Section 20, 21 and/or 25 of the Criminal Procedure Act, (Act 51 of 1977)]” and had three identical annexures. Annexure A consisted of the names of individuals who were authorised to conduct the search. Annexure B specified the articles that could be seized during the investigation. This annexure set out 18 items. Items numbered 13, 16, 17 and 18 allowed for the seizure of articles relevant to the investigation. Annexure C authorised the seizure and duplication of electronic devices which had a bearing on the investigation. The warrants and their annexures were made available to persons present at the Zonnekus, Helibase and Royal Ascot properties prior to the commencement of the search.

[8] Importantly, neither the warrants nor their annexures specified the offences under investigation. Nor did they describe the nature of the investigation.

[9] Members of SAPS and SARS conducted the search and seizure operations in terms of the warrants and removed several items from the targeted premises.

*Proceedings in the High Court*

[10] The respondents were displeased with these operations. Consequently, they approached the Western Cape High Court, Cape Town<sup>7</sup> (High Court) to challenge the validity of the warrants on the following grounds:

- (a) the suspected offences were not stipulated in the warrants; and
- (b) the magistrates failed to apply their minds to the applications for the warrants and this rendered them fatally defective in law.

[11] In relation to the first ground, the High Court observed that the Constitution requires the specification of the offence in a warrant. Relying on *Magajane*,<sup>8</sup> it further said that a person's privacy may be impaired by a warrant only in the least intrusive manner and on justifiable grounds. In that case this Court stated:

“Exceptions to the warrant requirement should not become the rule. A warrant is not a mere formality. It is the method tried and tested in our criminal procedure to defend the individual against the power of the state, ensuring that police cannot invade private homes and businesses upon a whim, or to terrorise. Open democratic societies elsewhere in the world have fashioned the warrant as the mechanism to balance the public interest in combating crime with the individual's right to privacy. The warrant guarantees that the State must justify and support intrusions upon individuals' privacy under oath before a neutral officer of the court prior to the intrusion. It furthermore governs the time, place and scope of the search, limiting the privacy intrusion, guiding the State in the conduct of the inspection and informing the subject of the legality and limits of the search. Our

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<sup>7</sup> *Van der Merwe and Others v Additional Magistrate, Cape Town and Others* 2010 (1) SACR 470 (C).

<sup>8</sup> *Magajane v Chairperson, North West Gambling Board and Others* [2006] ZACC 8; 2006 (5) SA 250 (CC); 2006 (10) BCLR 1133 (CC). (The correct spelling of this name is Mogajane.)

history provides much evidence for the need to adhere strictly to the warrant requirement.”<sup>9</sup> (Footnote omitted.)

[12] The High Court did not follow the majority decision in *Pullen*<sup>10</sup> which rejected the requirement that the offence has to be mentioned in a warrant for it to be valid. Instead it relied on *Hertzfelder*<sup>11</sup> and the minority in *Pullen* for the conclusion that the warrant would be invalid if the offence were not stipulated in it. *Powell*<sup>12</sup> was also relied on in support of this conclusion. Based on these cases, the Court declared the three Cape Town warrants invalid and set them aside on the ground that they did not stipulate the offence.<sup>13</sup>

[13] The challenge to the validity of the Randburg warrant was not entertained for want of jurisdiction, whereas the validity of the Bellville warrant was attacked on the basis that it was overbroad.<sup>14</sup> The Court found no merit in that challenge and dismissed it.

[14] The assertion that the magistrates failed to apply their minds to the application was also found to be without merit.

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<sup>9</sup> Id at para 74.

<sup>10</sup> *Pullen, N.O., Bartman, N.O. & Orr, N.O. v Waja*. 1929 TPD 838.

<sup>11</sup> *Hertzfelder v Attorney-General*. 1907 TS 403.

<sup>12</sup> *Powell NO and Others v Van der Merwe NO and Others* 2005 (5) SA 62 (SCA); 2005 (1) SACR 371 (SCA).

<sup>13</sup> It quoted this Court’s decision in *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma and Another v National Director of Public Prosecutions and Others* [2008] ZACC 13; 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) extensively, although it does not seem to have relied on it for the conclusion that the omission of the offence is fatal to the validity of the warrant.

<sup>14</sup> See [17] below for the meaning of vague and overbroad. It follows from that meaning that the terminology that the High Court ought to have used is vagueness instead of overbreadth.

[15] Since the respondents had attained substantial success, the High Court made a costs order in their favour. The Minister took the matter on appeal to the Supreme Court of Appeal and the respondents cross-appealed the decision relating to the Bellville warrant, with leave of the High Court.

*Proceedings in the Supreme Court of Appeal*

[16] The Supreme Court of Appeal upheld the decision of the High Court in respect of the Cape Town search warrants. Nevertheless, it rejected the High Court's reliance on *Hertzfelder* for the proposition that intelligibility requires the specification of the offence. The reason advanced for the rejection was that the warrant in *Hertzfelder* was set aside because of its vague description of the articles to be seized. The Court also held that *Powell* is not authority for the offence-specification requirement because the warrant in *Powell* was set aside for its overbreadth. Despite its observation that this issue was not before this Court in *Thint*<sup>15</sup> when it pronounced itself on this requirement, the Court did rely on *Thint*<sup>16</sup> as authority for its conclusion that a warrant should specify the offence.

[17] In dealing with the cross-appeal, a useful distinction was drawn between vagueness and overbreadth in the following terms:

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<sup>15</sup> *Minister of Safety and Security v Van der Merwe* [2011] 1 All SA 260 (SCA); 2011 (1) SACR 211 (SCA) (*Van der Merwe SCA*) at paras 28 and 33.

<sup>16</sup> *Thint* above n 13 at para 159 quoted below at [48].

“Questions that arise in relation to [whether a warrant authorises more than is permitted by statute] will generally fall into either of two different categories. The first is whether the warrant is sufficiently clear as to the acts that it permits. For where the warrant is vague it follows that it will not be possible to demonstrate that it goes no further than is permitted by the statute. If a warrant is clear in its terms a second, and different, question might arise, which is whether the acts that it permits go beyond what is permitted by the statute. If it does then the warrant is often said to be ‘overbroad’ and will be invalid so far as it purports to authorise acts in excess of what the statute permits. A warrant that is overbroad might, depending upon the extent of its invalidity, be set aside in whole, or the bad might be severed from the good.”<sup>17</sup>

The Court then concluded that the Bellville warrant was neither vague nor overbroad.<sup>18</sup>

[18] For these reasons, the appeal and cross-appeal were dismissed with costs. Dissatisfied with the decision of the Supreme Court of Appeal, the Minister approached this Court for leave to appeal on the grounds set out below.

### *Issues*

[19] The preliminary issue to be determined is the application for leave to appeal and the main issue is the alleged invalidity of the search warrants. Several subsidiary questions flow from the main issue and they are whether:

- (a) the common law intelligibility principle requires that the offence be specified in a warrant issued in terms of section 21 of the CPA;

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<sup>17</sup> *Van der Merwe SCA* above n 15 at para 14.

<sup>18</sup> The Court held that this was so as there was no difficulty in establishing the ambit of the search if the warrant and the annexures thereto were read together.

- (b) the search warrants are vague or overbroad;
- (c) the order of invalidity should apply retrospectively in the event of the warrants being declared invalid; and
- (d) any party should be held liable for costs?

I deal first with the application for leave to appeal.

*Application for leave to appeal*

[20] Two questions must be answered in the affirmative before an application for leave to appeal to this Court may be granted. They are whether the application raises a constitutional issue and whether it is in the interests of justice to grant leave to appeal. The interests of justice entail, in addition to other factors, the public interest in deciding the matter, the importance of the constitutional issue raised and the prospects of success.

[21] Search and seizure warrants by their very nature implicate at least two constitutional rights, namely the rights to dignity and privacy.<sup>19</sup> It follows therefore that constitutional issues of significance arise in this matter. Added to this is a long history of legal uncertainty about whether it is a requirement for the validity of a CPA search and seizure warrant that the offence, to which the search relates, be mentioned in the

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<sup>19</sup> The right to dignity (section 10) and the right to privacy (section 14).

warrant.<sup>20</sup> This uncertainty cries out for a definitive and authoritative pronouncement on the issue.<sup>21</sup>

[22] In addition, the Minister has an arguable case since neither *Powell* nor *Thint* turned on the stipulation of the offence in the warrant as a requirement for the validity of a warrant. Both were decided on the overbreadth of the warrant.

[23] There are further considerations weighing in favour of granting leave. First, important constitutional issues are raised. Second, more than eighty years of legal uncertainty about whether failure to stipulate the offence in a warrant issued in terms of the CPA<sup>22</sup> is fatal to its validity requires clarification. Third, there are reasonable prospects of success. Leave will thus be granted. Having crossed this hurdle, I will now deal briefly with the history of search and seizure warrants.

#### *The history of search and seizure warrants*

[24] Section 49<sup>23</sup> of the 1917 CPA<sup>24</sup> empowered a magistrate, justice of the peace or judge to issue a search warrant. This section, which foreshadowed sections 20 and 21 of

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<sup>20</sup> This has been the case since *Hertzfelder* was decided in 1907 and *Pullen* in 1928. See also the discussion of the legal history commencing at [24] below.

<sup>21</sup> Compare *Hertzfelder*, *Pullen* and *Powell*.

<sup>22</sup> This includes the Criminal Procedure and Evidence Act 31 of 1917 (1917 CPA) and the Criminal Procedure Act 56 of 1955 (1955 CPA).

<sup>23</sup> Section 49 of the 1917 CPA provides:

the CPA, was given conflicting interpretations in relation to whether the stipulation of an offence in a warrant is a requirement for the validity of a warrant. *Hertzfelder*<sup>25</sup> was generally regarded as the first reported case to set aside a warrant on the ground that it was unintelligible owing to, amongst others, its failure to specify the offence.

[25] The significance of the history of search and seizure warrants is that even as early as 1907<sup>26</sup> to 1919,<sup>27</sup> the courts and the authorities vested with the power to issue search warrants were alive to the need to specify the offence to which the search related.<sup>28</sup> The need to do so finds direct support from the decision of the minority and indirect support from that of the majority in *Pullen*.

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- “(1) If it appears to a judge of a superior court, a magistrate or a justice on complaint made on oath that there are reasonable grounds for suspecting that there is upon any premises within his jurisdiction—
- (a) stolen property or anything with respect to which any offence has been, or is suspected on reasonable grounds to have been, committed; or
  - (b) anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of any such offence; or
  - (c) anything as to which there are reasonable grounds for believing that it is intended to be used for the purpose of committing any such offence,
- he may issue his warrant directing a policeman or policemen named therein or all policemen to search such premises and to seize any such thing if found, and to take it before a magistrate to be dealt with according to law.
- (2) Any such warrant shall be executed by day, unless the judge, magistrate or justice, by the warrant, specially authorizes it to be executed by night in which case it may be so executed. Such warrant may be issued and executed on Sunday as on any other day.”

<sup>24</sup> The provisions of the 1955 CPA were not materially different from those of section 49 of the 1917 CPA.

<sup>25</sup> The warrant in *Hertzfelder* was issued in terms of section 45 of Ordinance 1 of 1903 which was similar to section 49 of the 1917 CPA.

<sup>26</sup> 1907 is when *Hertzfelder* was decided.

<sup>27</sup> See *Seccombe and Others v Attorney-General and Others*. 1919 TPD 270 at 276-7, where the offence was specified in the warrant.

<sup>28</sup> *Id.*

[26] *Pullen* sheds light on the specification of the offence in a warrant as a possible requirement for the common law intelligibility principle. In that case the validity of the warrant was challenged before a single judge. The Court held that a search warrant must set out with reasonable particularity the offence which underlies the search and the article the police officer is directed to search for and seize. That requirement was reversed on appeal on the basis that the 1917 CPA equivalent of sections 20 and 21 of the CPA did not require the specification of the offence in the warrant.

[27] Relevant to the determination of the main issue in this matter is the appreciation by the majority that: (i) it is desirable that a search warrant specifies the offence; (ii) if a satisfactory reason were to be found for holding that the Court has the power to lay down a rule which renders the mention of the offence essential to the validity of a search warrant, the Court would happily lay down that rule; (iii) for obvious reasons it is desirable that the owner of the searched premises should know the reason why her premises ought to be so invaded; (iv) officials issuing warrants would be well advised to use forms which mention the offence in every case; and (v) in a case where the article to be searched for is specified or clearly described in the warrant there would be no need to refer to the offence.<sup>29</sup>

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<sup>29</sup> *Pullen* above n 10 at 849-50 held:

“It seems to me highly desirable that a search-warrant ought to mention the alleged offence, and if I could find a satisfactory reason for holding that this Court has the power to lay down that mention of the offence is essential to the validity of a search warrant I should willingly lay down such a rule. It is desirable that the person whose premises are being invaded should know the reason why; the arguments in favour of the desirability of such a practice are obvious. But in my opinion there is nothing in section 49 which justifies the Court in laying down such a rule.

[28] In a minority judgment, it was held that a search warrant is invalid if it makes no reference to a specific crime or specific crimes.<sup>30</sup>

[29] *Powell* is the next enlightening case on this subject. Cameron JA discussed a number of very helpful authorities on warrants. Although the case was decided on overbreadth, when the learned Judge was addressing the validity of the warrant he did allude to the warrant's failure to specify the crime or irregularity.<sup>31</sup> He then distilled the following principles from the authorities:

- “(a) Because of the great danger of misuse in the exercise of authority under search warrants, the courts examine their validity with a jealous regard for the liberty of the subject and his or her rights to privacy and property.
- (b) This applies to both the authority under which a warrant is issued, and the ambit of its terms.

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I have come to the conclusion, therefore, that the absence of mention of the offence in the warrant is not fatal to its validity; I think a search-warrant is valid if it either describes the specific thing or things to be searched for or identifies them, as in the *Seccombe's* case, by reference to the offence. Further than that I do not think the Court would be justified in going. . . . At the same time I think that, in the absence of the forms prescribed by rules of Court, officers issuing warrants would be well advised to use forms mentioning the offence in every case rather than continue the undesirable practice of adapting to every case the old form used for the search of stolen goods by eliminating certain words in the form.

The conclusion I have arrived at makes no inroad on the doctrine that a warrant must not be in general terms, but it does conflict with the decision in *Hertzfelder's* case . . . . In that case, however, counsel for the respondent admitted that the warrant was invalid and the question was not argued.”

<sup>30</sup> *Pullen* above n 10 at 861-4. The minority relied on *Hertzfelder*.

<sup>31</sup> This appears from the repeated reference to the failure to mention the offence in the warrant in *Powell* above n 12 at paras 45 and 60. That is probably why the High Court relied on *Powell* as an authority for its answer to the core question before this Court.

- (c) The terms of a search warrant must be construed with reasonable strictness. Ordinarily there is no reason why it should be read otherwise than in the terms in which it is expressed.
- (d) A warrant must convey intelligibly to both searcher and searched the ambit of the search it authorises.
- (e) If a warrant is too general, or if its terms go beyond those the authorising statute permits, the Courts will refuse to recognise it as valid, and it will be set aside.
- (f) It is no cure for an overbroad warrant to say that the subject of the search knew or ought to have known what was being looked for: The warrant must itself specify its object, and must do so intelligibly and narrowly within the bounds of the empowering statute.”<sup>32</sup>

These principles were approved by this Court in *Thint*.<sup>33</sup>

[30] The relevance of the approach elucidated in *Powell* and approved in *Thint* is that the specification of the offence in the warrant facilitates intelligibility, while its absence hinders it.

#### *Parties' submissions*

[31] The Minister contends that the *Thint* decision, which made it a requirement that a warrant issued in terms of section 29 of the National Prosecuting Authority Act<sup>34</sup> (NPA Act) should stipulate the offence for it to be valid, does not apply since it was based on the specific wording of that section read contextually. He bases this on the words

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<sup>32</sup> *Powell* above n 12 at para 59.

<sup>33</sup> *Thint* above n 13 at paras 88 and 137.

<sup>34</sup> 32 of 1998.

“specified offence”<sup>35</sup> in this section coupled with the searched person’s entitlement to a copy of the warrant before the commencement of the search. He argues that the obligation to give a copy to the searched person before the commencement of the search is designed to enable the searched person to satisfy herself, prior to the search, that the warrant does relate to a “specified offence” and does not exceed the bounds of the limited investigative authority contemplated by section 29 of the NPA Act. He further submits that these considerations do not arise to justify the stipulation of the offence in the CPA warrant, contended for by the respondents, since there is no reference to a specified offence in section 21 of the CPA and the searched person is entitled to a copy of the warrant only after the search has been completed.<sup>36</sup>

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<sup>35</sup> Section 29 of the NPA Act does not make reference to the specification of the offence in the warrant. However, section 29(5) reads:

“A warrant contemplated in subsection (4) may only be issued if it appears to the magistrate, regional magistrate or judge from information on oath or affirmation, stating—

- (a) the nature of the *investigation* in terms of section 28;
- (b) that there exists a reasonable suspicion that an offence, which might be a *specified offence*, has been or is being committed, or that an attempt was or had been made to commit such an offence; and
- (c) the need, in regard to the *investigation*, for a search and seizure in terms of this section,

that there are reasonable grounds for believing that anything referred to in subsection (1) is on or in such premises or suspected to be on or in such premises.”

<sup>36</sup> Section 21(4) of the CPA reads as follows:

“A police official executing a warrant under this section or section 25 shall, after such execution, upon demand of any person whose rights in respect of any search or article seized under the warrant have been affected, hand to him a copy of the warrant.”

[32] To distinguish *Thint* from this case, the Minister also cites the complexity, seriousness and specialised nature of the crimes investigated in terms of the NPA Act, as opposed to those investigated in terms of the CPA.

[33] In response, the respondents contend that the Minister's submissions are ill-conceived and that the warrants are invalid as a result of their failure to mention the offence and their overbreadth.

[34] This Court has not considered a challenge to the validity of the warrants issued in terms of sections 20 and 21 before. It is therefore a necessary and fruitful exercise to give an overview of these warrants before the intelligibility principle is discussed in relation to these provisions.

*An overview of the search and seizure warrants*

[35] All law-abiding citizens of this country are deeply concerned about the scourge of crime. In order to address this problem effectively, every lawful means must be employed to enhance the capacity of the police to root out crime or at least reduce it significantly. Warrants issued in terms of section 21 of the CPA are important weapons designed to help the police to carry out efficiently their constitutional mandate of, amongst others, preventing, combating, and investigating crime.<sup>37</sup> In the course of

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<sup>37</sup> Section 205(3) of the Constitution.

employing this tool, they inevitably interfere with the equally important constitutional rights of individuals<sup>38</sup> who are targeted by these warrants.

[36] Safeguards are therefore necessary to ameliorate the effect of this interference. This they do by limiting the extent to which rights are impaired.<sup>39</sup> That limitation may in turn be achieved by specifying a procedure for the issuing of warrants and by reducing the potential for abuse in their execution. Safeguards also ensure that the power to issue and execute warrants is exercised within the confines of the authorising legislation and the Constitution.

[37] These safeguards are: first, the significance of vesting the authority to issue warrants in judicial officers; second, the jurisdictional requirements for issuing warrants; third, the ambit of the terms of the warrants; and fourth, the bases on which a court may set warrants aside.<sup>40</sup> It is fitting to discuss the significance of the issuing authority first.

[38] Sections 20 and 21 of the CPA give authority to judicial officers to issue search and seizure warrants.<sup>41</sup> The judicious exercise of this power by them enhances protection

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<sup>38</sup> The right to dignity (section 10) and the right to privacy (section 14).

<sup>39</sup> *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 54-5 and *Thint* above n 13 at paras 74-5.

<sup>40</sup> These four safeguards are found in *Thint* above n 13 at para 81.

<sup>41</sup> I say this aware that section 21 also empowers justices of the peace to issue warrants. Since all the warrants were issued by magistrates the discussion of this safeguard is confined to judicial officers.

against unnecessary infringement. They possess qualities and skills essential for the proper exercise of this power, like independence and the ability to evaluate relevant information so as to make an informed decision.<sup>42</sup>

[39] Secondly, the section requires that the decision to issue a warrant be made only if the affidavit in support of the application contains the following objective jurisdictional facts: (i) the existence of a reasonable suspicion that a crime has been committed and (ii) the existence of reasonable grounds to believe that objects connected with the offence may be found on the premises or persons intended to be searched.<sup>43</sup> Both jurisdictional facts play a critical role in ensuring that the rights of a searched person are not lightly interfered with. When even one of them is missing that should spell doom to the application for a warrant.

[40] The third safeguard relates to the terms of a warrant. They should not be too general. To achieve this, the scope of the search must be defined with adequate particularity to avoid vagueness or overbreadth.<sup>44</sup> The search and seizure operation must thus be confined to those premises and articles which have a bearing on the offence under investigation.

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<sup>42</sup> *Thint* above n 13 at para 83. See also *South African Association of Personal Injury Lawyers v Heath and Others* [2000] ZACC 22; 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC) at para 34.

<sup>43</sup> *Hyundai* above n 39 at para 52; *Thint* above n 13 at paras 85-6.

<sup>44</sup> *Powell* above n 12 at para 59; *Thint* above n 13 at para 88.

[41] The last safeguard comprises the grounds on which an aggrieved searched person may rely in a court challenge to the validity of a warrant. The challenge could be based<sup>45</sup> on vagueness, overbreadth or the absence of jurisdictional facts that are foundational to the issuing of a warrant.<sup>46</sup>

[42] A discussion of these safeguards highlights the centrality of the offence in the issuing of the warrant and sets the stage for the analysis of the intelligibility principle.

*The intelligibility principle*

[43] The intelligibility requirement is a common law principle introduced by the courts and is quite separate and distinct from the requirements of sections 20 and 21. As the name suggests, intelligibility is on the one hand about ensuring that the police officer understands fully the authority in the warrant to enable her to carry out the duty required of her, and on the other that the searched person also understands the reasons for the invasion of his privacy.

[44] The core issue is whether the warrant would be reasonably capable of that clear understanding even if the offence were not mentioned in it. Put differently, does the

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<sup>45</sup> This may be done either in motion proceedings or during a criminal trial when an attempt is made to rely on the articles seized on the authority of a warrant.

<sup>46</sup> In addition, the validity of a warrant may also be challenged on the bases set out in [55] below, with due regard to the guidelines in [56] below of this judgment.

intelligibility principle require the specification of the offence in the section 21 warrant for its validity?

[45] Innes CJ appears to have been the first to allude to the specification of the crime in the warrant as an integral part of the common law intelligibility requirement. He did so by declaring a warrant invalid and setting it aside as a result of, amongst others, its failure to state the offence.<sup>47</sup> As indicated above, this principle was subsequently reversed by the majority in *Pullen*.<sup>48</sup>

[46] In reasoning its way to that reversal, the majority articulated the ideal role of the offence-specification requirement in facilitating the intelligibility of a warrant.<sup>49</sup> The minority's endorsement of the principle that the specification of the offence in the warrant is a requirement for its validity is also significant.<sup>50</sup> This is relevant to the determination of the main issue and also sheds light on the soundness of the dictum in *Thint*.<sup>51</sup> What was merely desirable or advisable at the time has since been accepted as law in *Thint*.

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<sup>47</sup> *Hertzfelder* above n 11 at 405. I say this aware of the strongly held divergent views on the significance of the dictum in *Hertzfelder*.

<sup>48</sup> *Pullen* above n 10 at 849-50.

<sup>49</sup> The majority decision in *Pullen* expressed the view that (i) it was highly desirable that a search warrant mentions the alleged offence, (ii) the searched person should know the reason why her premises are being invaded, (iii) it was obvious why this should be so, and that (iv) officials issuing warrants would do well to ensure that the offence is stated in every case.

<sup>50</sup> *Pullen* above n 10 at 862-4.

<sup>51</sup> *Thint* above n 13 at para 159.

[47] As Langa CJ observed, the most relevant requirement in relation to the principle of intelligibility is that a warrant must convey intelligibly, to both the searcher and the searched person, the ambit of the search it authorises.<sup>52</sup> Intelligibility also requires that a warrant be reasonably intelligible in the sense that it is reasonably capable of being understood by a reasonably well-informed person who understands the relevant empowering legislation and the nature of the offences under investigation.<sup>53</sup>

[48] *Thint* laid down the offence-specification requirement for the intelligibility of the NPA Act warrant. It did so in the following terms:

“A section 29 warrant should state at least the following, in a manner that is reasonably intelligible without recourse to external sources of information: the statutory provision in terms whereof it is issued; to whom it is addressed; the powers it confers upon the addressee; *the suspected offences that are under investigation*; the premises to be searched; and the classes of items that are reasonably suspected to be on or in that premises. It may therefore be said that the warrant should itself define the scope of the investigation and authorised search in a reasonably intelligible manner.”<sup>54</sup> (Emphasis added.)

[49] In contending that *Thint* did not govern the CPA, the Minister referred to the observation by Langa CJ that the intelligibility principle lacks precision and that it had to

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<sup>52</sup> *Thint* above n 13 at paras 137 and 151. See also *Powell* above n 12 at para 59.

<sup>53</sup> *Thint* above n 13 at para 154.

<sup>54</sup> *Id* at para 159.

be given content to determine what it requires specifically in relation to warrants issued under section 29 of the NPA Act.<sup>55</sup>

[50] *Thint* imposed the offence-specification requirement as an integral part of the intelligibility principle in relation to the NPA Act. The question is whether that requirement applies also to the CPA. I find that it does.

[51] I can see no material difference between these pieces of legislation to explain why these aspects of the intelligibility principle cannot apply with equal force to warrants issued in terms of the CPA. Under either Act, a searched person ought to enjoy the same constitutional protection in relation to search and seizure warrants and both Acts are open to a construction that permits this to be done. As Nugent JA correctly pointed out:

“[T]he requirement that the offence must be specified was laid down unequivocally and without qualification in *Thint* in the context of the intelligibility of the warrant, and in that respect I see no material distinction between a warrant that is issued under that statute and a warrant that is issued under the Criminal Procedure Act.”<sup>56</sup>

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<sup>55</sup> Id at para 151. In support of this position, *Thint*, at fn 112, placed reliance on *Rudolph and Another v Commissioner for Inland Revenue and Others* 1997 (4) SA 391 (SCA) at 397 in holding that—

“[t]here is no reason to hold that this intelligibility principle should impose exactly the same requirements for all search and seizure warrants, no matter the statutory provision in terms whereof they are issued.”

<sup>56</sup> *Van der Merwe SCA* above n 15 at para 32.

[52] The intelligibility requirement has its roots in the rule of law which is a founding value of our Constitution.<sup>57</sup> Some of the essential attributes of the rule of law are comprehensibility, accountability and predictability in the exercise of all power, including the power to issue warrants. It is essential therefore that the warrant be crafted in a way that enables the person on the receiving end of the exercise of this authority to know why her rights have to be interfered with in the manner authorised by the warrant. A warrant can thus not be reasonably intelligible if the empowering legislation and the offence are not stated in it.<sup>58</sup>

[53] It is also consistent with both common sense and logic that the searched person's knowledge of the purpose or the reason for the search would enhance intelligibility and that its omission would reduce it. It follows that the baseline requirement for intelligibility in relation to a CPA warrant is that the offence must be mentioned.

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<sup>57</sup> Section 1 of the Constitution reads, in part:

“The Republic of South Africa is one, sovereign, democratic state founded on the following values:

....

(c) Supremacy of the Constitution and the rule of law.”

<sup>58</sup> Many foreign jurisdictions also require search warrants to specify the offence under investigation. In a query conducted through this Court's involvement in the European Commission for Democracy through Law (the Venice Commission) it emerged that, of the 13 countries that submitted replies, eight countries' laws directly required the specification of the offence in a search warrant and five countries held that it was not a requirement to specify the offence. Countries within the Venice Commission that require the offence be mentioned are the Czech Republic, Estonia, Finland, Germany, Latvia, Norway, Poland and Slovakia. Bosnia and Herzegovina, Bulgaria, Georgia, Lithuania and Mexico all reported that their legal system does not require the mentioning of the offence in a search warrant. Further, Australia (*Australian Broadcasting Corporation and Another v Cloran and Others* (1984) 4 FCR 151; 57 ALR 742 at para 7), Canada (section 487 of the Canadian Criminal Code), New Zealand (*Auckland Medical Aid Trust v Taylor and Others* [1975] 1 NZLR 728 (CA) at 736-7) and Nigeria (section 22(2) of the Criminal Procedure Act, Chapter 80 of the Laws of the Federation of Nigeria 1990) also require the specification of the alleged offence in search warrants.

[54] The principle of intelligibility requires that, even in the case of a CPA warrant, “the person whose premises are being invaded should know the reason why”.<sup>59</sup> As Tindall J correctly observed, “the arguments in favour of the desirability of such a practice are obvious.”<sup>60</sup> *Thint* is authority for the proposition that the common law intelligibility principle requires warrants issued in terms of section 21 of the CPA to specify the offence.

[55] What emerges from this analysis is that a valid warrant is one that, in a reasonably intelligible manner:

- (a) states the statutory provision in terms of which it is issued;
- (b) identifies the searcher;
- (c) clearly mentions the authority it confers upon the searcher;
- (d) identifies the person, container or premises to be searched;
- (e) describes the article to be searched for and seized, with sufficient particularity; and
- (f) specifies the offence<sup>61</sup> which triggered the criminal investigation and names the suspected offender.

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<sup>59</sup> *Pullen* above n 10 at 849.

<sup>60</sup> *Id.*

<sup>61</sup> Stated somewhat differently in *Thint* above n 13 at para 159.

[56] In addition, the guidelines to be observed by a court considering the validity of the warrants include the following:<sup>62</sup>

- (a) the person issuing the warrant must have authority and jurisdiction;
- (b) the person authorising the warrant must satisfy herself that the affidavit contains sufficient information on the existence of the jurisdictional facts;<sup>63</sup>
- (c) the terms of the warrant must be neither vague nor overbroad;<sup>64</sup>
- (d) a warrant must be reasonably intelligible to both the searcher and the searched person;
- (e) the court must always consider the validity of the warrants with a jealous regard for the searched person's constitutional rights; and
- (f) the terms of the warrant must be construed with reasonable strictness.

[57] Based on the elements of the intelligibility requirement<sup>65</sup> and the approach to adopt in considering the validity of the warrants<sup>66</sup> the Minister's contentions must fail, for none of the Cape Town warrants mentioned the offence. This conclusion obviates the need to address the question of vagueness or overbreadth.

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<sup>62</sup> Most of these guidelines were gleaned from both *Powell* above n 12 at para 59 and *Thint* above n 13 at paras 85-6 and 159.

<sup>63</sup> The jurisdictional facts are reasonably believing that (i) a specific offence has been committed or is suspected of being committed and (ii) the article to be searched for is in the possession of or under the control of a particular person or at specified premises.

<sup>64</sup> See the meaning of vagueness and overbreadth at [17] above.

<sup>65</sup> Set out at [55] above.

<sup>66</sup> Set out at [56] above.

*Retrospectivity*

[58] The question arises whether or not the order declaring the warrants invalid should operate retrospectively. In support of his contention that it should not, the Minister said there are many CPA warrants in the criminal justice system which fall foul of the offence-specification requirement. He added that a retrospective operation of the order would prejudice the criminal justice system. The respondents opposed this submission on the basis that the declaration of invalidity contended for would apply only to the impugned warrants since no legislation or conduct is required to be declared constitutionally invalid. They also contend that any other warrant which suffers from the same defect as the warrants in this matter would remain valid until otherwise declared invalid by a court of law. A resolution of these opposing positions depends on what a just and equitable order is in the circumstances.

[59] The constitutional validity of section 21 was not challenged. I am instead considering a remedy flowing from the declaration of invalidity of search and seizure warrants owing to their failure to comply with the offence-specification requirement. Since neither a section nor any conduct was declared invalid, the provisions of section 172(1)(a)<sup>67</sup> of the Constitution do not apply. This however is no impediment to crafting a remedy envisaged by section 172(1)(b).<sup>68</sup> As Moseneke DCJ pointed out:

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<sup>67</sup> Section 172(1) states:

“When deciding a constitutional matter within its power, a court—

“It is clear that section 172(1)(b) confers wide remedial powers on a competent court adjudicating a constitutional matter. The remedial power envisaged in section 172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under section 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct.”<sup>69</sup>

[60] What then is a just and equitable order to make? The order invalidating the impugned warrants applies only to those warrants. Any attempt to define preemptively situations to which the order applies or to extend its applicability to all defective warrants might give rise to undesirable consequences. The order we grant should thus be structured in a way that avoids unnecessary dislocation and uncertainty in the criminal justice process.<sup>70</sup> The least disruptive way of giving relief to persons affected by warrants that fall foul of the offence-specification requirement is through the established court structures.<sup>71</sup>

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

<sup>68</sup> Section 172(1) states:

“When deciding a constitutional matter within its power, a court—

...

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

- (i) an order limiting the retrospective effect of the declaration of invalidity; and
- (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

<sup>69</sup> *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) at para 97.

<sup>70</sup> *S v Bhulwana, S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 32.

<sup>71</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 97; *Centre for Child Law v Minister for Justice and*

[61] A just and equitable order to be made is therefore one that allows effective judicial control to be exercised<sup>72</sup> over all challenges to the validity of warrants other than those that were declared invalid in this matter. When courts have control they would then deal with matters on a case by case basis having regard to the interests of justice.<sup>73</sup>

### *Costs*

[62] The Minister is the unsuccessful party. He should therefore be ordered to pay the respondents' costs including costs occasioned by the employment of two counsel.

### *Order*

[63] In the result the following order is made:

- (a) Leave to appeal is granted.
- (b) The appeal is dismissed with costs including the costs of two counsel.

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*Constitutional Development and Others* [2009] ZACC 18; 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC) at para 75.

<sup>72</sup> Section 35(5) of the Constitution states:

“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.”

<sup>73</sup> *National Coalition* above n 71 at para 97 and *Centre for Child Law* above n 71 at para 75.

Ngcobo CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mthiyane AJ,  
Nkabinde J, Van der Westhuizen J and Yacoob J concur in the judgment of Mogoeng J.

For the Applicant:

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