

SOUTH AFRICA / JUDGMENT

Imperial Crown Trading 289 (Pty) Ltd v Birch NO and Others (1338/2011) [2012] ZANCHC 12 (11 May 2012) [2012] ZANCHC 12

COURT

Northern Cape High Court, Kimberley

BEFORE

Lacock

CASE / FILE NUMBER

1338/2011

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IN

THE HIGH COURT OF SOUTH AFRICA

(Northern

Cape High Court, Kimberley)

Saakno: / Case number:

1338 / 2011

Datum verhoor: / Date

heard: 15 & 16/03/2012

Datum gelewer: / Date

delivered: 11/05/2012

In

the matter between:

IMPERIAL

CROWN TRADING 289 (PTY) LTDApplicant

and

THE

ACTING SENIOR MAGISTRATE RICHARD

EDWARD

BIRCH, KIMBERLEY, N.O.First

Respondent

THE

MINISTER OF POLICE, N.O.Second

Respondent

THE

DIVISIONAL COMMISSIONER, DIREC-

TORATE

FOR PRIORITY CRIME INVESTIGA-

TION

OF THE SOUTH AFRICAN POLICE
SERVICE,
N.O.Third
Respondent
LIEUTENANT
COLONEL SANDRA
VAN
WYK N.O.Fourth
Respondent
SISHEN
IRON ORE COMPANY (PTY) LTDFifth
Respondent
KUMBA
IRON ORE LIMITEDSixth
Respondent
Coram: Lacock,
J

JUDGMENT

LACOCK, J

[1] This application concerns the setting aside of a search warrant authorized by the first respondent in favour of the SA Police Service, herein represented by the second, third and fourth respondents.

For purposes of appreciating the intricacies of this matter, it is necessary to briefly deal with the historical background that brought about the application. These factual circumstances are not in dispute.

Prior to the commencement of the Mineral and Petroleum Resources Development Act, No. 28 of 2002 (the MPRDA) on 1 May 2004, the fifth respondent (Sishen), a subsidiary of the sixth respondent, owned a 78.6 % undivided share in iron ore mined on what is generally known as the Sishen Properties situate in the district of Kuruman, Northern Cape Province. The remaining portion of 21.4 % undivided share in the ore was held by ArcelorMittal (Pty) Ltd (AMSA).

At the commencement of the MPRDA Sishen and AMSA continued their mining activities on the Sishen properties. In terms of the MPRDA the mining authorization in terms whereof these entities mined on the said properties were referred to as “old order mining rights”. These old order mining rights had, in terms of item 7(1) of Schedule II of the MPRDA, to be converted into mining rights under the MPRDA on or before 30 April 2009, failing which the right would lapse.

Sishen duly and timeously applied for and had its old order mining right converted to a mining right under the MPRDA. AMSA however failed to apply for the conversion of its old order mining right.

I pause here to note that at this juncture all parties laboured under the impression that Sishen and AMSA held two separate mining permits; one to mine 78.6 % of the Sishen properties, and the other for the mining of 21.4 % of the properties. Subsequently Zondo J found in Sishen Iron Ore Company (Pty) Ltd and Others v The Minister of Mineral Resources and Others, Case no. 28980, North Gauteng Division, that only one old order mining right existed and that, upon the conversion thereof, Sishen became the exclusive holder of the converted mining right. This judgment was delivered in December 2011.

When it became apparent on 30 April 2009 that AMSA had failed to convert its “old order mining right” both Sishen and the applicant (ICT) filed applications at the offices of the Department of Mineral Resources (DMR) for the granting of a mining right and a prospecting right respectively in respect of AMSA’s 21.4 % mining right.

The DMR refused Sishen’s application, and granted ICT’s application for a prospecting right. Sishen consequently applied in the North Gauteng High Court under the aforesaid case number 28980/10 for the review and setting aside of the aforesaid decisions of the DMR and the officials concerned. The judgment of Zondo J referred to above was the one delivered in this matter.

[2] Whilst the aforesaid matter was still pending in the North Gauteng High Court, Sishen filed a complaint in terms of section 34 of the Prevention and Combating of Corrupt Activities Act of 2004 with the Serious Economic Offences Unit of the Directorate for Priority Crime Investigation against ICT for the alleged committal of the crimes of fraud, forgery and the uttering of a forged document. The factual supporting averments on which these complaints were founded are contained in a written report dated 2 September

2010. The relevant portions of this report read as follows:-

“5.6 AMSA failed to lodge its old order mining right in respect of the 21.4 % undivided share for conversion in terms of item 7 of schedule II before the expiry of the five year period. Consequently, in terms of item 7(8) of Schedule II, AMSA’s old order mining right as to a 21.4 % undivided share ceased to exist as at the end of 30 April 2009.

5.7 Since AMSA failed to convert its old order mining right as to a 21.4 % undivided share, SIOC applied for a mining right for iron ore and aggregate in respect of the 21.4 % undivided share in respect of the Sishen Mine.

5.9 On 15 May 2009, the Regional Manager of the Department of Mineral Resources in Kimberley wrote a letter to SIOC informing it that its application for a mining right had been accepted, but that its application ‘was competing with another application which was lodged on the same day for the same minerals’.

5.10 It later transpired that the so-called competing application was an application which had been submitted by Imperial Crown Trading 289 (Pty) Ltd (“ICT”) for a prospecting right in respect of certain of the farms on which the Sishen Mine is situated as well as certain other farms (“the ICT application”).

5.12 The timing of the submission of certain applications in terms of the MPRDA is, therefore, of considerable importance as competing applications are, in terms of the MPRDA, to be dealt with in date order.

6. Fraud

6.3 Insofar as the purported signing of the check list is a representation that a full and complete application was submitted by ICT on 4 May 2009 in respect of the other documents itemized and “ticked” as having been submitted on 4 May 2009, this is patently false as the ICT application provided by the State Attorney as part of the record contains no less than six documents which bear signatures which are dated after 4 May 2009 and which accordingly could not have been included in the ICT application on 4 May 2009, which is the date on which the checklist indicates that they were received.

6.4 As appears from the attached documents, the ICT application itself was signed 5 May 2009 (page 6 of the record). The prospecting works programme was signed 5 May 2009 (page 45 of the record). A resolution relating to funding (by Adistra 11 CC) is also dated 5 May 2009 (page 58 of the record) and an acknowledgement signed by Mr Luhlabo that the minister may require additional information is also dated 5 May 2009 (page 77 of the record).

6.5 Furthermore, certain plans that were included in ICT’s application only appear to have been signed on 8 May 2009 and 9 May 2009 (pages 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of the record) judging by the date which appears on the maps themselves. These plans are also prescribed requirements for application for prospecting rights in terms of the MPRDA and its regulations. I have also been informed that the land surveyor who completed the requisite plans for submission as part of the ICT application, has indicated that he was provided with a copy of the title deeds, which had been certified by the Registrar of the High Court as a copy only on 4 May 2009, and that he used these for the purpose of commencing the work which he subsequently performed in relation to preparing the requisite plans. He confirmed that the date on which he signed the plans was the date on which he actually

prepared the plans, being 8 May 2009 and 9 May 2009.

6.7 It would appear that ICT has potentially committed a fraud either through representing that a complete application was submitted on 4 May 2009 or alternatively by ensuring that the application was “back dated” to 4 May 2009.

7. Forgery

7.1 I am advised that in terms of the relevant prescribed requirements, an application for a prospecting or mining right must contain a certified copy of the title deeds to which the land relates.

7.2 As such, SIOC’s application which was delivered to the DMR included a certified copy of the original relevant title deed T3280/2001 relating to the relevant farms on which the Sishen Mine is situated. These were certified by Bridget Engela (now van der Bijl) on 28 April 2010.

7.5 It is clear that the copies of the extracts of the title deed in the ICT application are photocopied manipulated copies of the certified copy of that deed which was in the SIOC application lodged in Kimberley (a copy of the partial copy of the title deeds in the ICT application is to be found in the ICT application). This is so by virtue of the following.

7.5.1 Title deed T3280/2001 is a title deed to land and as such is a document available to the public at the office of the Registrar of Deeds. ICT could therefore readily have obtained a certified copy of the deed from the Registrar. ICT would however have not been able to obtain a copy of the deed from the Registrar over the long weekend of 1 – 3 May 2009.

7.5.2 The copy of the title deed in SIOC's application was certified by Commissioner of Oaths, Bridget Engela, to be a true copy of the original.

7.5.3 A comparison of the title deeds lodged by SIOC on the one hand and 'lodged' by ICT on the other hand, simply upon the observation by an ordinary layman, reflect that the title deeds submitted by ICT are forgeries. This is so because it appears that:

7.5.4 ICT apparently obtained access to documents which form part of SIOC's application. This is evident from the fact that the copies of the title deeds submitted as part of the ICT application were obtained from SIOC's application.

7.5.5 ICT has manipulated the copies of the title deeds obtained from SIOC's application in an attempt to disguise the origin of the title deeds attached to SIOC's application and to give the false impression that the ICT application had been made in the prescribed manner and complied with the regulations as regards the requirement to submit certified copies of the original title deeds. ICT's application consequently involved the process of fraudulently manipulating the documents already filed by SIOC and representing that those documents, (the title deed documents), were obtained in the normal way by ICT and that a Commissioner of Oaths had in the normal way certified them as copies. In fact it was achieved by gaining unlawful access to SIOC's application and manipulating copies of the title deeds attached to SIOC's application in order to obtain title deeds which could be used as annexures by ICT.

7.5.6 It is quite apparent from an examination of record that the extracts of the title deed contained in the ICT application have been manipulated to obscure Engela's certification stamps by blanking them over with a piece of paper or card and then photocopying the pages. This appears from a comparison of the copy of the extracts from title deeds contained in the ICT application compared with the full copy of the title deeds contained in the SIOC mining right application. On each of pages of the copy of the title deed contained in the ICT application, it is apparent that Engela's certification stamp and manuscript certification on 28 April 2009 and signature have been obscured by placing a blank card over these portions of the document before the relevant pages were copied.

8. Uttering a forged document

8.1 The apparent use of the forged certified copies of SIOC's original title deeds in ICT's application for the purpose of obtaining a mineral rights grant from the DMR, would appear to meet the requirements of uttering a forged document."

(Sishen is referred to as "SIOC" in this report).

- [3] The fourth respondent (Van Wyk) is the investigating officer appointed as such to investigate the said complaints.
- [4] On 26 July 2011 (that is 20 days prior to the hearing of the aforesaid application before Zondo, J), Van Wyk applied to the first respondent for a search and seizure warrant pursuant to the provisions of section 21 read with section 20(a), (b) and (c) of the Criminal Procedure Act, no. 51 of 1977, for the search and seizure of certain documents and articles in possession or under the control of the persons (mostly officials or employees of ICT) mentioned in the application. The warrant was issued on the same date by the first respondent.
- [5] In her supporting affidavit (for purposes of the application for the warrant) Van Wyk relied on – and echoed to a large extent the contents of the complaint quoted in paragraph 2 above.

From the aforesaid it will be noted that all complaints leveled against ICT and its officials or employees centered around its application for the prospecting right referred to above.

- [6] The relevant portion of the warrant issued by the first respondent reads,

"4. You are hereby authorized to enter the aforesaid premises of Imperial Crown Trading 289 (Pty) Ltd during the day and you are instructed to search for the articles and documents reflected in annexure "A" hereto and to seize the said documentation, if found, and to deal with the said documentation according to the provisions and powers accorded to you under Section 20 of Act 51 of 1977."

The said Annexure 'A' reads as follows:-

"1. Correspondence with any party relating to the conducting of prospecting work of any type over the Sishen Iron Ore Company (Pty) Limited properties being the properties mentioned in the application purportedly by Imperial Crown Trading (Pty) Limited purportedly submitted on 4 May 2009.

- 2. Any record of the actual number or numbers of the landline and cellular telephones used by Sehunelo, Carter (Ferris), Luhlabo, Mtshali, Mbete and Tshethlo.
- 3. The physical cellular telephones of the parties mentioned in this annexure for the purpose of downloading the information contained thereon.
- 4. The physical laptop and/or desktop computers of Sehunelo, Carter (Ferris), Luhlabo, Mtshali, Mbete and Tshethlo including the right to take a digital mirror image of the hard-drives of the said computers by the computer data images experts designated for this task in the warrant.

5. All digital or other records of communication with or between Sehunelo, Luhlabo, Mtshali, Mbete, Tshethlo, Duduzile Kunene, or any employee of the Department of Mineral Resources e.g. e-mails for the period 29 April 2009 to 15 May 2009.
 6. All petrol / garage card slips or records of Sehunelo for the period 30 April 2009 to 11 May 2009.
 7. Correspondence with any party other than the attorneys, Mendelow Jacobs Attorneys, relating to an application for prospecting rights over the SIOC properties mentioned in 1 above at any time, but in particular in the period 29 April 2009 to 11 May 2009.
 8. The physical cellular telephone of Mr Sehunelo for the purpose of downloading the information contained thereon.
 9. A copy and/or original prospecting right application together with the annexures (details of area, title deeds of land est.) to the prospecting right application over the Sishen Ore Mine of Imperial Crown Trading (Pty) Limited which was purportedly lodged on 4 May 2009 at Department Mineral Resources Kimberley.”
- [7] It is common cause that the warrant was executed by members of the SA Police Service at the business premises of the applicant, and that a number of documents were seized and removed. It is further common cause that all electronically stored data on the applicant’s computer had been downloaded and removed, as well as electronically stored data on the cellphones of two of the applicant’s officials.

7.1 Despite verbal and written requests on behalf of the applicant for the second respondent to engage in a process whereby only relevant information is downloaded from the electronically stored data and irrelevant as well as privileged data to be returned to the applicant, such requests were refused. A further request on behalf of the applicant to safeguard the documents at the offices of the Registrar pending an application for the setting aside of the warrant, elicited a similar response.

7.2 The applicant then instituted these proceedings. In part A of the notice of motion urgent relief was sought for the interim safekeeping of the documents and data, and in Part B thereof relief was sought for the setting aside of the warrant.

7.3 On 19 August 2011 this Court granted the following order:

“1. A rule nisi hereby issued in terms whereof the respondents are to show cause on or before 23 September 2011 why (pending the final determination of Part B of this application), the following order should not be made final:

the Second, Third and Fourth Respondents are ordered to hand to the Registrar of this Court by not later than 12:00 on Monday 22 Augustus 2011 for safekeeping under seal, pending the final decision of this application, all documents seized on 27 July 2011 and copies made of electronic communication data, electronically stored data and electronic data messages from cell phones and computers used by the Applicant and/or its employees and/or its officers;

The Second, Third and Fourth Respondent are interdicted from disclosing, directly or indirectly, to Sishen Iron Ore Company (Pty) Ltd ("SIOC"), Kumba Iron Ore Co. Ltd ("Kumba") or any company or business related to SIOC or Kumba, or any of its employees, officers, shareholders or representatives, any information obtained as aforesaid.

Such respondents who may oppose this application should not be ordered to pay the costs of the application.

2. Paragraph 1.1 and 1.2 hereof will serve as an interim order and interdict with immediate effect."

This order was amended on 22 August 2011 to substitute the registrar of this Court for the registrar of the Free State High Court. The reason for the amendment is irrelevant for purposes hereof.

[8] Adv Wessels, appearing for the applicant, attacked the validity of the warrant on three grounds. Firstly it was submitted that, on the wording of the warrant, it was overbroad. Secondly it was contended that the warrant was obtained for an ulterior purpose and that relevant information was not disclosed to the first respondent, which information, had it been disclosed, might have persuaded the first respondent not to issue the warrant. Thirdly it was submitted that the warrant authorized the seizure of privileged documents and data unrelated to the complaints leveled against the applicant.

[9] I do not intend to spend much time on the alleged non-disclosure of material facts by Van Wyk to the first respondent and/or the allegation that the warrant was obtained for an ulterior purpose viz. to assist Sishen in its civil suit against ICT, and/or the allegations of collusion between representatives of Sishen and the office of the Director of Public Prosecutions.

9.1 In this regard it had been alleged ad nauseum in the papers that Van Wyk had been influenced and encouraged by the legal representatives of Sishen to obtain and execute the warrant; that these representatives had actively assisted Van Wyk in her application for the warrant; that the real purpose for the obtaining of the warrant was to allow Sishen access to documentation and data in possession of ICT for purposes of pursuing its claim against ICT and the Department of Mineral Resources for the setting aside of the prospecting permit granted to ICT; that Van Wyk knew that Sishen itself misrepresented to the Director General of the Department of Minerals or its deputy that its application was not antedated, but failed to disclose this fact to the first respondent; and that Van Wyk failed to disclose a number of other factual averments contained in the papers in the said matter heard by Zondo J to the first respondent.

9.2 Furthermore, what the applicant attempted to do in its papers was to convince the Court of its innocence in regard to the alleged charges.

[10] My reasons for not dealing with these allegations in any detail are the following:

10.1 All allegations of collusion between the police and/or the office of the Director of Public Prosecutions and Sishen or its representatives are denied. These are serious allegations of at least dishonest conduct of a senior police officer and a senior prosecutor. To my mind any attempt to resolve these issues on the papers will be tantamount to jungle justice.

10.2 On receipt of the written complaints, Van Wyk was duty bound to investigate these complaints. I fail to appreciate the submission that the assistance by the complainant or its legal representatives in an intricate commercial matter as this is either unwarranted or indicative of an ulterior motive as alleged.

10.3 What Van Wyk investigated were the complaints as described in the aforesaid written report. Even if it is accepted that the complainant itself made certain misrepresentations to the officials in the Department of Mineral Resources, and if it is further accepted that these misrepresentations in itself constitute criminal conduct, that, to my mind, has no bearing on the question whether the applicant allegedly committed the crimes complained of by Sishen. Van Wyk has not received a complaint against Sishen, and neither was she called upon to investigate such a complaint.

10.4 For these reasons it is improbable that the first respondent, had he been alerted to Sishen's alleged misrepresentation, might not have issued the warrant. A second crime committed by a third party under similar circumstances as the crime committed by another suspect, cannot serve as a pardon or defence in favour of the latter.

10.5 What the applicant attempted to illustrate in its papers was, inter alia, that it did not commit the alleged crimes. The factual allegations on which ICT's "defence" are founded, are strenuously denied, and are therefore subject to a real factual dispute which cannot and should not be resolved on the papers.

These allegations in any event beg the question: What the first respondent had to consider was not whether ICT was guilty or innocent, but whether there were reasonable grounds to believe that the alleged offences had been committed. It was not contended that this jurisdictional requirement was not met.

[11] That brings me to the "overbreadth" issue. For purposes hereof I intend to approach this question in line with the following dicta:

"The warrants in the present case cannot, to my mind, be said to have been drawn in such a manner as to identify the documents directed to be seized with the offence mentioned in the warrants, namely, a contravention of sec. 22

- (1) of the Copyright Act. In this respect I cannot agree with the finding of the learned Judge a quo that ‘the documents referred to in the warrant must ... be read to refer to such as will relate to the suspected offence’. Moreover, even if it were possible to say that the general description of the documents mentioned in the first part of the warrant was meant to be qualified by the preceding words “a contravention of sec. 22 (1) of Act 63 of 1965 – Copyright Act”, I find it difficult to visualize how the executing officer could exercise a discretion as to what documents to select where the said section of the Copyright Act makes provision for a number of different kinds of offences relative to copyright.”

(Cine Films (Pty) Ltd v Commissioner of Police 1972 (2) SA 254 (AD) at 267G to 268A).

“(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 authorizes.
- (e) If a warrant is too general, or if its terms go beyond those the authorizing statute permits, the Courts will refuse to recognize 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.”

(Powell N.O. and Others v Van der Merwe N.O. and Others, 2005 (5) SA 62 (SCA) at 85 D to F).

- [12] The offences Van Wyk were investigating all turned on alleged conduct of officials or employees of ICT committed in connection with the application and granting of a prospecting permit during or about the period April to May 2009 in respect of the Sishen properties.

12.1 Read in its context, paragraph 1 of Annexure ‘A’ to the warrant is clearly intelligible. It narrows the ambit of the search to such correspondence relevant for purposes of the application for a prospecting permit on the particular properties. To my mind it cannot be said that the contents of this paragraph is either vague or overbroad.

- [13] To my mind, the contents of paragraphs 2, 3, 4 and 5 of the said annexure do not meet the aforesaid judicial requirements because of its overbreadth.

13.1 Paragraph 8 is a duplication of paragraph 3 since the name of Mr Sehunelo already appears in paragraph 2 of “this annexure”.

13.2 The telephone or cellular telephones mentioned in paragraph 2 are not limited to any time period nor to the purpose for which it was used. On the wording of the paragraph, it literally includes all telephones or cellphones ever used by any of the persons mentioned in the annexure at any time during their lives, whether it be their personal or official phones or that of another. It even includes “any employee” of the DMR.

13.3 The same applies to the information to be downloaded as authorized in paragraphs 3 and 4 in that the information to be so downloaded is not limited to any time period or to data relevant for purposes of the police investigation. See for instance the limitations contained in paragraph 7. The contents of these paragraphs will in effect give unlimited access to the police of all data and correspondence

electronically captured on these devices, whether such data is of a personal nature, business related or whatever.

13.4 The “records of communication” referred to in paragraph 5 of Annexure ‘A’, although limited to a time period, are in no way limited to the offences investigated by the Police. Compare in this regard the wording of the search warrants in *Thint (Pty) Ltd v NDPP*, 2009

(1) SA 1 (CC).

[14] The documentation, correspondence and other goods referred to in paragraphs 1, 6 and 9 of Annexure ‘A’ to the warrant, are clearly relevant to the investigation of the offences mentioned in the warrant. The wording of these paragraphs are reasonably intelligible and not overbroad or vague. See *Minister of Safety & Security v Van der Merwe*, 2011 (2) SACR 301 (CC) at 313 (e):

“[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 warrant must be defined with adequate particularity to avoid vagueness or overbreadth. The search and seizure operation must thus be confined to those premises and articles which have a bearing on the offence under investigation.”

[15] Since the complete execution of the warrant had been avoided by the interim order issued, it is possible to strike down only those parts of Annexure ‘A’ to the warrant found to be defective, and thereby severing the good from the bad. (*Thint (supra)* paragraph 211.)

[16] It is common cause that, since the seizure of the cellphones and computers referred to in paragraphs 3 and 4 of Annexure ‘A’ to the warrant, the police had the information and/or data captured thereon downloaded, which copies, electronic data and/or mirror images, are presently held in safe custody by the registrar of the Bloemfontein High Court. Since some of this data may contain certain evidence for the purposes of the envisaged criminal prosecution, I agree with counsel for the respondents that the appropriate remedy would be to grant a preservation order in respect of the downloaded data. See in this regard *Thint (Pty) Ltd v NCPP* [2008] 1 All SA 229 (SCA) at 231 to 232; as well as *Thint (supra)* paragraphs 223 and 224.

16.1 A preservation order will efficiently protect the applicant’s claim it may have in respect of any legal professional privileged information contained in the downloaded data. No privilege was claimed by the applicant in respect of any specific document seized under paragraphs 1, 6, 7 or 9 of Annexure ‘A’ to the warrant.

16.2 No purpose will be served for this Court to determine or lay down the procedure to be followed should the prosecution or defence in the purported criminal proceedings wish to adduce any information captured on the copies or images preserved in terms of the order I intend to make herein. Such procedure should be determined by the Court in the criminal trial.

[17] What remains to be considered is the question of costs. I will deal first with the costs of the application for interim relief.

17.1 The warrant was issued on 26 July 2011. The very next day Attorney Mendelow and Adv Wessels telephonically requested Van Wyk (the fourth respondent) to agree to the following proposal:

“I would like to ask you to not or .. I don’t want you to download anything at this stage. What I want to ask you to do is the following. I am going to ask you to remove all of these laptops, computers and everything else that you want to, to take it to an independent attorney in Kimberley to retain it pending our arrival there to be present in to .. to be able to see item for item what you are downloading so that we’ve got a contemporaneous record of what you are actually taking off these computers and there seems to me that there is no reason you can’t safeguard your own interests by removing these computers to an independent attorney or you can keep them in situ on the premises, you can have somebody there to ensure that they remain off, that they are not in any way tampered with. That would be a very easy thing to safeguard. We will get onto the next plane to Kimberley and we will come and we will do this exercise with you because we want to be present given the completely inextricable nature of all the

confidentiality that there is here, and any items that may be in dispute as to whether they are or aren’t privileged, can at least be safeguarded, set aside and placed before a Judge to determine their privileged or otherwise. So they can be safeguarded...”

and,

“... my suggestion is carry on, complete your task of downloading, but do not remove anything, even the hard drives onto which you are downloading, until such time as we have had the opportunity of sitting with you and going through it with you, identifying that which is contentious, that which is not contentious as far as privilege is concerned, that which properly falls under the warrant, that which doesn’t.”

The proposals were abruptly turned down by Van Wyk.

17.2 These requests and proposals were repeated to the third and fourth respondents in writing on the 29th of July 2011, but were not accepted. On 3 August 2011 the said respondents were called upon

“... to give us your undertaking by immediate return of email, that all the information as well as the physical documents which were seized by the SAPS on 27 July 2011 shall be placed in the custody and control of the Registrar of the High Court, Northern Cape Division, still sealed, to be kept under lock and key, pending the outcome of the application which we intend to launch in the near future to set aside the warrant. Such undertaking would enable the said contemplated application to be heard in the ordinary course rather than by way of urgency and on short time limits.”

Once again the said respondents declined to agree to these proposals.

17.3 To my mind the aforesaid proposals were reasonable under the circumstances, and, had the said respondents agreed thereto, the ensuing litigation could have been avoided. Not surprisingly, when the urgent application was heard, the respondents consented and agreed to the terms of the said order.

17.4 The applicant was the successful party in the urgent application, and is partially successful in the main application.

17.5 For these reasons the second, third and fourth respondents should pay the applicant's costs of the urgent application.

[16] To my mind no costs order is justified in the main application.

16.1 Both the applicants on the one hand and the respondents on the other hand were partially successful and partially unsuccessful in the relief claimed.

16.2 It is correct, as contended on behalf of the respondents, that the applicant unnecessarily burdened the papers in the application with irrelevant and foreseeable factually disputed allegations, which in turn elicited lengthy responses, but not all these averments were necessarily uncalled for. For instance the allegations and affidavits in regard to the apparent tampering with the sealed bags in which the information et cetera were kept when removed from the High Court, Kimberley to the Bloemfontein High Court were not insignificant. Such evidence may cast a different light on the veracity of the Police employees if another court should adopt a different approach to the application than the one I adopted.

[17] The following order is therefore made:

A. SAVE AS PROVIDED FOR IN THIS ORDER, THE RULE NISI GRANTED ON 19 AUGUST 2011 AS AMENDED ON 22 AUGUST 2011, IS HEREBY DISCHARGED.

B. THE SECOND, THIRD AND FOURTH RESPONDENTS ARE DIRECTED TO PAY THE APPLICANT'S COSTS JOINTLY AND SEVERALLY, THE ONE PAYING THE OTHERS TO BE ABSOLVED, OF THE AFORESAID APPLICATION FOR INTERIM RELIEF.

C. PARAGRAPHS 2, 3, 4, 5 AND 8 OF ANNEXURE 'A' TO THE SEARCH AND SEIZURE WARRANT ISSUED BY THE FIRST RESPONDENT ON 26 JULY 2011 ARE HEREBY SET ASIDE AND DECLARED NULL AND VOID.

D. IN ALL OTHER RESPECTS THE AFORESAID WARRANT IS DECLARED LAWFUL AND VALIDLY EXECUTED.

E. THE REGISTRAR, FREE STATE HIGH COURT, BLOEMFONTEIN, IS DIRECTED TO RETURN TO THE THIRD RESPONDENT AND/OR FOURTH RESPONDENT ALL GOODS AND/OR DOCUMENTS SEIZED UNDER PARAGRAPHS 1, 6, 7 AND 9 OF ANNEXURE 'A' OF THE AFORESAID SEARCH AND SEIZURE WARRANT.

F. THE AFORESAID REGISTRAR OF THE HIGH COURT, BLOEMFONTEIN, IS DIRECTED TO RETAIN UNDER SEAL AND SAFEKEEPING COPIES AND/OR IMAGES AND/OR DATA DOWNLOADED FROM ANY COMPUTER, LAPTOP COMPUTER OR CELL PHONE SEIZED UNDER PARAGRAPHS 2, 3, 4, 5 AND 8 OF ANNEXURE 'A' TO THE AFORESAID SEARCH AND SEIZURE WARRANT, SUBJECT TO THE FOLLOWING:

F1. SUCH COPIES, IMAGES AND/OR DATA SHALL NOT BE DELIVERED AND/OR DISCLOSED TO ANY PERSON WITHOUT A COURT ORDER TO THAT EFFECT, AND THEN ONLY IN TERMS OF SUCH ORDER; OR

F2. ON THE WRITTEN INSTRUCTIONS OF THE FIRST AND/OR SECOND AND/OR THIRD RESPONDENT, THE SAID COPIES, IMAGES AND/OR DATA OR ANY THEREOF SHALL BE RETURNED TO THE APPLICANT; OR

F3. ON THE WRITTEN NOTIFICATION BY THE SECOND AND/OR THIRD AND/OR FOURTH RESPONDENT THAT NO CRIMINAL PROCEEDINGS ARE INSTITUTED AGAINST THE APPLICANT PURSUANT TO THE ALLEGED OFFENCES REFERRED TO IN THE AFORESAID WARRANT, THE SAID COPIES AND/OR IMAGES AND/OR DATA ARE TO BE RETURNED TO THE APPLICANT FORTHWITH.

G. THE AFORESAID REGISTRAR IS INSTRUCTED TO RETURN TO THE APPLICANT ALL OTHER DOCUMENTS AND/OR GOODS SEIZED UNDER PARAGRAPHS 2, 3, 4, 5 AND 8 OF ANNEXURE 'A' TO THE AFORESAID WARRANT.

H. NO ORDER AS TO COSTS IS MADE.

HJ LACOCK

JUDGE

For the Applicant: Adv. E. Wessels oio Van de Wall & Partners

For the 2nd to 4th Respondents: Adv. M. Khoza SC oio The State Attorney

For the 5th to 6th Respondents: Adv. Marcus SC oio Duncan & Rothman Inc.

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ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZANCHC/2012/12.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/imperial-crown-trading-289-pty-ltd-v-birch-no-and-others-unknown-topic-anchc-2012>

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