

SOUTH AFRICA / JUDGMENT

Page and Others v Additional Magistrate, Somerset West and Others (11275/2015) [2016] ZAWCHC 63; [2016] 3 All SA 619 (WCC) (20 April 2016)

[2016] ZAWCHC 63

COURT

Western Cape High Court, Cape Town

BEFORE

M J Dolamo, S Desai

CASE / FILE NUMBER

11275/2015

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IN

THE HIGH COURT OF SOUTH AFRICA
(WESTERN
CAPE HIGH COURT, CAPE TOWN)

Case

Number: 11275/2015

DATE:

20 APRIL 2016

In

the matter between:

DERRICK

PAGE.....First

Applicant

LEICA

GEOSYSTEMS

AG.....Second

Applicant

LEICA

GEOSYSTEMS (PTY)

LIMITED.....Third

Applicant

Vs

THE

ADDITIONAL MAGISTRATE, SOMERSET

WEST.....First

Respondent

PHINEAS

LETSHOLO
MOTEME.....Second
Respondent
JOHAN
FREDERICK VAN DEN
BERG.....Third
Respondent
GEOSYSTEMS
AFRICA (PTY)
LTD.....Fourth
Respondent
THE
MINISTER OF SAFETY &
SECURITY.....Fifth
Respondent
Date
of hearing: 11 + 12 November 2015
Date
of Judgment: 20 April 2016

JUDGMENT

DOLAMO, J

INTRODUCTION

[1] This assertion may appear to be banal. It is nevertheless worth restating: it is the duty of the South African Police Service

(“SAPS”) to prevent, combat and investigate crime; to maintain public order; to protect and secure the inhabitants of the Republic and their property; and to uphold and enforce the law[1]. To this end the police are empowered, in appropriate circumstances, to obtain from a magistrate or Justice of the Peace search warrants to search persons, or to enter premises, search and seize articles believed on reasonable grounds to be involved in or associated with the commission of crimes. Although search and seizure procedures are essential to the combatting of crime they are and remain matters which may infringe upon personal rights and privileges protected by the Constitution[2]. For this reason searches and seizure warrants are to be authorised and executed with circumspection.

[2] The central question in this matter is whether the search warrant which the second respondent obtained from the first respondent, based on information supplied by the third respondent, was legitimately obtained and for a lawful purpose: if not, whether it was obtained for a sinister motive as contended for by the applicants, in which case they stand to be set aside. A further question is if the warrant is unlawful what to do with the article seized pursuant such a warrant: first I outline the involvement of the various parties in this matter, thereafter the factual background and then the legal principles involved.

The Parties

- [3] The first applicant is Derrick Claude Page (“Page”) an adult male employed as a regional manager by the third applicant. The second applicant is Leica Geosystems AG (Leica AG) a company duly incorporated in terms of the company laws of Switzerland. The third applicant is Leica Geosystems (Pty) Ltd South Africa (“Leica SA”) a company with limited liability and registered as such according to the company laws of South Africa (“Leica SA”) but collectively be referred to as Leica Geosystems. These companies Leica AG and Leica SA conducted business associated with Geomatics and Metrology products which include surveying and measurement devices.
- [4] The first respondent is Mr Monde Mafeya, an Additional Magistrate Somerset West (“Additional Magistrate”), who is cited herein in his capacity as such and as a result of the fact that on 2 April 2015 he authorized the warrant for the search and seizure which took place at Page’s residence. This warrant was issued in terms of section 21 of the Criminal Procedure Act[3] (“CPA”). The second respondent is Lieutenant Colonel Phineas Letsholo Moteme (“Moteme”) a member of the SAPS stationed at the Commercial Branch in Johannesburg and who is cited herein in his capacity as the investigating officer of a criminal complaint filed at the Norwood Police Station in Johannesburg under CAS 304/4/2014. The warrant issued by the Additional Magistrate was issued relating to the investigation in the aforesaid CAS number. The third respondent is Johan Frederick Van Den Berg (“Van Den Berg”) the complainant in CAS 304/4/2014. I shall also refer to Van Den Berg as “the complainant”. The fourth respondent is Geosystems Africa (Pty) Ltd (“GSA”) a company duly registered and incorporated according to the company laws of South Africa. The fifth respondent is the Minister of Safety and Security (the “Minister”) who is cited herein in his official capacity and as the person responsible for the actions and conduct of the members of SAPS.
- [5] The applicants sought an order reviewing and setting aside the decision of the Additional Magistrate to authorise the search warrant against Page. The applicants also sought an order declaring the search warrant and the execution thereof unlawful, inconsistent with the constitution and invalid; a declaration that the applicants’ right to dignity, freedom and security of person, privacy and property were violated. Page also sought an order for the return of the computer seized pursuant the search warrant and the destruction of any mirror images made of the said computers’ contents. The application was initially opposed by all the respondents. The Additional Magistrate, Moteme, and the Minister of Police, however, had since withdrawn their opposition and filed notices to abide the decision of the Court.

Background

- [6] GSA was previously a distributor of Geometric products on behalf of Leica AG in South Africa. The relationship between GSA and Leica AG was governed by various distribution agreements concluded over the years. Leica AG, however, terminated this agreement by

giving written notice of termination to GSA which termination would have been with effect from 31 October 2013. This termination led to a dispute between Leica AG and GSA with the latter alleging that a Leica Geosystems which orchestrated the cancellation. There is a high degree of animosity between the parties associated with Leica AG, on the one hand, and those on the side of GSA, which bad blood has generated a host of legal actions. Amongst the legal action which was ongoing at the time was a matter in the Competition Tribunal where GSA was accusing the directors of Leica SA of unlawful competition.

- [7] It was through the discovery processes in the matter before the Competition Tribunal, that three emails came to light which,

according to Van Den Berg, were indicative of Page's unlawful conduct. The first email reads as follows: "Hi Ken, will do. Locksley is in China next week... I have also told them to make appointments with key clients we can visit together. It took us just as long to get up and running when we started as each department needs something from another to proceed. Locksley has used affirmative action people to bribe the process to go faster to no avail...". The second email reads as follows: "Hi Helgard this will be fine but please use 60% discount on both the TS30 and TM30... Try and not give it away cheaply make some profit GAS will be causing affairs because this is a premium product and I do not want the price eroded... be careful as this can cause trouble... be 5% less than GAS". The third email stated that: "Hi Ken Locksley and Helgard will start approaching GAS stuff from the 11 July 2011".

- [8] As a result of the discovery of these emails Van Den Berg laid criminal charges against Page at the Norwood Police Station during

April 2014 under CAS 304/4/2014. Moteme was the assigned investigating officer in that matter. In the affidavit supporting the

charges ("police statement") Van Den Berg alleged that he laid the charges as a result of the misrepresentations made by Page which seriously disadvantaged him and led to the loss of his consultancy business with GSA; and that since the laying of the charges he came into possession of certain documents which were discovered in terms of the Competition Tribunal case in which Leica Geosystems AG was the respondent. Copies of these documents were attached to the affidavit which included the three emails referred to supra.

- [9] In the police statement, Van Den Berg indicated that the allegations contained in the emails, referred to supra, may be further corroborated by information which may be located on Page's laptop computer ("laptop"). As a result of these allegations Moteme applied, in terms of sections 20, 21 and 25 of the CPA for a warrant to search the premises of Leica Geosystems (Pty) Ltd at 74 Mountain Road, Somerset West and to look for information which may corroborate Van Den Berg's allegations. The Additional Magistrate authorised a search warrant on 2 April 2015 in terms of which the police were authorised to search the premises of Leica Geosystems (Pty) Ltd and thereat to seize the computer(s) belonging to Mr Derrick Page, documents and files relating to Geosystem, documents relating to Lonmin Platinum Mine Gel Survey Solutions, documents relating to Cullinan Diamond Mine, Northan

Platinum Mine, and documents relating to PPL Mogalakwena Mine. The warrant further authorised as follows: “to make mirror images of all computers and hard drives and other computer peripherals capable of storing data or to seize the computer hardware and associated peripherals and to conduct an offside (sic) search of the hardware and associated peripherals for the articles as listed and identified in annexure A hereto, if upon arriving at the scene the technical support unit member of the South African Police Service assisting in executing the search warrant concludes that it will be impractical to search the computer hardware and associated peripherals on site for the articles as listed and identified in Annexure hereto”. The warrant was to be executed by Lieutenant Colonel JA Beukes (“Beukes”) of the DPC Commercial Branch of the SAPS Bellville and Warrant Officer AH Draai (“Draai”) of SAPS Cape Town Central.

- [10] Armed with the search warrant Beukes and Draai attended at Page’s home on the morning of 21 May 2015. The police officers duly introduced themselves, informed Page and his fiancé that they were looking for Page in connection with fraud and corruption

complaints, instigated against Leica Geosystems, and that they have a search warrant. When Page mentioned that it was not possible that Leica Geosystems could have instigated the investigation, as he was working for Leica Geosystem. Draai informed him that he did not know who had instigated the search warrant but he was there to search and seize the laptop and documents. Page further alleged that Draai and Beukes were hostile and unsympathetic towards him and his fiancé, treating them like criminals by insinuating, for example, that their home and material possessions were the proceeds of crime. They were particularly not interested in his explanation that Leica Geosystems was involved in mortal legal combat with GSA, which legal battles included the matter pending before the Competition Tribunal, as a possible motive for the search warrant. Draai and Beukes also did not let them out of sight throughout the duration of their presence on the premises. He was, however, allowed to make a telephone call to his attorney. Draai, who spoke on the telephone with Page’s attorney and intimated that he did not know how a search warrant works.

- [11] During the course of the search Draai accompanied Page to his office and instructed him to open a filing cabinet. He then searched the cabinet but did not seize anything. Page had two laptops in the office: one belonging to Leica AG and the other being his personal

property. When he explained this to Draai the latter chose the Leica AG laptop and left the one belonging to Page. This, according to Page, was contrary to the search warrant which only authorised the seizure of a computer or computers belonging to Page.

- [12] Later three additional police officers arrived on the premises. Captain Morris (“Morris”) who was one of the three police officers, identified himself to Page. The police then proceeded to take photographs in the house. Captain Morris thereafter seized the computer, placed it in a plastic bag, sealed it, and put Page’s personal particulars thereon. Page was requested to give all the passwords to this computer so that they could access the computer and all his emails, which he supplied under protest. While Captain Morris’s name did not appear on the search

warrant he was the one who removed the computer from Page's home. According to Page, the wrong laptop was seized and not the one authorised by the search warrant.

[13] Page alleged that the computer contained no evidence or suggestion of any criminal acts nor could any information contained therein serve as evidence of any alleged criminal wrong doing by Leica SA, and/or himself as alleged by Van Den Berg. The computer however contained sensitive and private information, inter alia, of his personal banking details, bank passwords, private communication with his fiancé and his interaction and dealings concerning his tax affairs with the South African Revenue Services. He objected to any stranger having access to this private information which had nothing to do with what was mentioned in the search warrant. The computer also contained, according to Page, extensive correspondence between the attorneys assisting Leica Geosystem and himself in the Competition Tribunal matter and documents concerning the preparation for and evidence gathering in both the High Court civil damages claims.

[14] Page alleged that, though the information on the laptop was privileged and may not be seized or copied the warrant authorised the copying thereof, that furthermore, that he had no doubt that the Additional Magistrate, fully apprised of all the disputes,

litigation and defences raised in the other related matters, would not have issued the warrant, alternatively, would have issued it with a lot more limitations as to what may be seized, accessed and/or by whom.

[15] After seizure of the laptop Beukes retained it at the Bellville SAPS. Later Page's attorneys intervened in the matter leading to an agreement being reached that the computer would be and was placed in the care and custody of an independent attorney, one McClusky Attorneys of Bellville. A week later, however, Van Den Berg's attorney also intervened and, on his insistence, the computer was removed from McClusky and eventually deposited with the Registrar of this Court where until the present is in such custody.

[16] Page averred that the computer was seized for an ulterior motive and not in pursuit of the investigation of criminal charges against him. He submitted that the timing of Van Den Berg's application for a search warrant was remarkably coincidental and contrived to be ancillary to the discovery application brought in the Competition Tribunal proceedings. Further there were inexplicable similarities to the affidavits of Van Den Berg in the warrant application and the averments relied upon in the damages claim, save that the warrant was far more vague and insubstantial. According to Page, Van Den Berg was using the SAPS machinery to obtain privileged and private information and this amounted to a clear abuse of the process and underlined the reasonable apprehension that the search warrant application was initiated with ulterior motive as its reason. Given the information contained on the seized computer Page submitted that it will, in the hands of Van Den Berg, GSA or its employees, undermine and allow the obtaining of confidential information relating to all of the matters referred to above.

[17] Van Den Berg and the GSA, while not opposing the review and setting aside of the decision of the Additional Magistrate to authorise the search warrant and the search itself and abiding the decision of the Court, nevertheless filed a conditional counter application for the preservation of the laptop which was seized from Page. Van Den Berg's contention was that the preservation of the laptop was effectively to ensure that serious and incriminating evidence, that in all likelihood would be contained on the laptop concerning the unlawful and criminal conduct of Page and Leica AG, was preserved pending the outcome of any criminal prosecution, of Page, be it a public or private one.

[18] Overall Van Den Berg conceded that the Court was bound to make a declaration under section 172 (1) (a) of the Constitution and, equally important, to exercise its discretion in granting an order which is just and equitable as contemplated by section 172 (1) (b) of the Constitution. He, however, maintained that it will be just and equitable to preserve evidence of criminal wrong doing in circumstances such as the present one. He submitted that any prejudice or unfairness to Page and Leica AG will be comparatively

negligible. For this reason he urged this Court to grant the relief sought in the counter application by ordering that the laptop be retained through a preservation order pending the outcome of the criminal proceedings against Page and Leica AG. Relying on the Constitutional Court judgment in *Thint (Pty) Ltd v NDPP and Others; Zuma v NDPP and Another*[4], Van Den Berg contended that the laptop seized in the search should be preserved even if the search warrant was found to have been unlawful.

[19] The Minister of Police's (formerly referred to as the Minister of Safety and Security) attitude towards the validity of the search warrant was clear: it was unlawful and should be set aside. It is its attitude towards the preservation of the laptop, as sought by Van Den Berg in the conditional counter-application, which is somewhat ambivalent. The Minister indicated that it will not be opposing the setting aside of the warrant and the return of the items attached pursuant thereto and the State Attorney, on his behalf, wrote a letter to the applicants attorneys stating that:

"1. We address you on behalf of the second and fifth respondents herein.

2. We have now conducted an investigation into the circumstances that led to the application for the search warrant that forms the subject matter of the above application and set out our instructions in this regard below.
3. Our instructions are to concede that the search warrant authorised by the first respondent on 2 April 2015 in Somerset West is invalid and fails to be set aside on the basis that it is overbroad, in that it fails to identify with sufficient particularity the alleged offences being investigated. Moreover insufficient grounds are adduced to justify the search for the seizure of the items listed in Annexure A to the warrant.
4. Consequently, the subsequent search of the premises situated at 74 Mountain Road, Somerset West and the seizure of a laptop computer

seized from the first applicant at the premises, but allegedly the property of the second applicant, is similarly unlawful and invalid and falls to be set aside.

5. However, our instructions are that the papers that served before the Magistrate do disclose reasonable grounds to believe that the first applicant unlawfully influenced the award of a tender by the Department of Water Affairs on or about 8 August 2012. The email exchange is annexed to the second affidavit of the complainant in the matter, Johan Frederick van den Berg, the third respondent herein.
6. In that affidavit reference is made (at paragraph 4) to emails dated 7 and 8 August 2012 between the first applicant and one Helgardt Van Heerden (Van Heerden) of Aciel in which the first applicant advises van Heerden to “be careful as this can cause trouble... be 5% less than GSA”.
7. According to van den Berg (paragraph 6) these emails “clearly demonstrate, Page was instrumental in ensuring that Aciel was awarded the tender by means of illegal collusion with Van Heerden of Aciel. Page was both aware of both the price that GSA and Aciel would tender at and illegally advised Aciel to tender at 5% less than the GSA tender”.
8. Prima facie, these emails suggest that the first applicant misused information acquired in the course of the exercise of his contractual

obligations to the fourth respondent in a manner that amounts to the violation of a legal duty to achieve an unjustified result, in contravention of section 3 of the Prevention and Combating of Corrupt Activities Act 12 of 2004. The circumstances surrounding how the information came to be used and the nature of the benefit the first applicant derived from his conduct are still subject to investigation.

9. The South African Police Service is under a constitutional duty to legal duty to unlawfully investigate the matter and to institute

criminal proceedings should same be warranted.

10. The first applicant concedes in these proceedings that the computer seized does indeed contain “highly sensitive and private

information” relevant to him such as his personal banking details, his bank passwords, private communications and his information relating to his tax affairs. He avers that the computer contains that most “comprehensive store” of information he possesses. (paragraph 37).

11. The computer also contains commercial information pertaining to the second and third applicant such as information about their

distributors, products, pricing and sales strategies. (paragraph 38).

12. The computer therefore may well afford evidence of the circumstances surrounding first applicant’s alleged misuse of information

relevant to the fourth respondent (i.e. the price at which it would make available Leica products to the Department of Water Affairs in its tender). It may also afford evidence of communication between the first applicant and Van Heerden and the first applicant and the third respondent, such as the emails adduced before the Magistrate who granted the search warrant.

13. If the computer is returned to the first applicant a real risk that incriminating evidence may be removed before a valid warrant to seize it is obtained.
14. In the circumstances, our instructions are to enquire whether your clients would consent to a preservation order along the lines dealt with in *Thint (Pty) Ltd v National Director of Public Prosecutions and Others*; *Zuma v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC) (Thint CC) paragraph 216 – 224, which (as appears from paragraph 219) must be read with the order proposed by the minority in *Thint (Pty) Ltd v National Director of Public Prosecutions and Others v Zuma and Another* [2008] 1 ALL SA 197 (SCA) and the order made by the majority in *National Director of Public Prosecutions and Another v Mahomed* [2008] 1 ALL SA 181 (SCA).
15. The purpose of the preservation order would be to permit the fifth respondent to make a mirror image of the computer and have the copy retained by the Registrar of the High Court for a period of one month. In that period SAPS members will be afforded the opportunity of obtaining a valid warrant to seize the laptop and to search its contents in a constitutionally permissible manner.
16. Should your client be amenable to this proposal the parties could approach the judge in chambers for an order along these lines.

Failing which we will be constrained to oppose the application and seek the preservation order to the above grounds. We will place this letter before court to motivate that, in the event that a preservation order is granted, the costs of preparing the application

in support of a preservation order and any opposition thereto, should be borne by the party opposing the preservation order.

17. For the sake of completeness we confirm that under no circumstances will the complainant in the matter be permitted access to the information seized other than in accordance with the law, i.e. if the information is adduced before a criminal court to sustain criminal charges. Whilst the second and fifth respondents have been provided with evidence from the complainant, no information has been provided to the complainant by SAPS.
18. We have not dealt herein with all the averments contained in the affidavits filed of record and our failure in this regard should not be construed as an admission of their contents. They will be dealt with at the appropriate time if the need arises.
19. Please also advise whether you intend supplementing the papers or amending the notice of motion so that we can determine the time-frame within which answering papers are to be filed.”

[20] It was in counsel for the Minister's submission that the ambivalence towards a preservation order came to the fore. The

puzzling attitude of the Minister was furthermore mirrored in the affidavit of Zidiya, filed in what he referred to as having been

necessitated by Van Den Berg's conditional counter-application for a preservation order. Zidiya, a Constable in the SAPS who replaced Moteme as the investigating officer of the complaints laid by Van Den Berg, acknowledged that from his perspective much of what was dealt with by the applicants and the third and fourth respondents in their affidavits, respectively, were strictly not germane to the criminal investigation and that this were not the relevant issues to be determined in this matter.

[21] On the history of the investigation into the charges laid by Van Den Berg Zidiya stated that in November 2014 the Public Prosecutor

assigned to the matter was of the view that the docket contained insufficient evidence to sustain a successful criminal prosecution

and declined to prosecute. On this basis the docket was archived and the investigation was deemed finalised; that the docket was reopened in February 2015 when further evidence came to light which required further investigation; that his predecessor, Moteme, applied for the search warrant in question, had it authorised and subsequently executed; that on the advice of the Minister's legal representatives it was conceded that the search warrant authorised by the Additional Magistrate on 2 April 2015 failed to comply with the requirements for a valid search warrant as articulated in the Constitutional Court judgment of Minister of Safety and Security v Van Der Merwe and Others[5]; that the warrant was therefore invalid and rendered the subsequent search in terms thereof unlawful. Zidiya also attacked the disclosure

by Van Den Berg of the letter of 16 July 2015, quoted supra, which the State Attorney directed to the applicant's attorneys on the grounds that it was privileged.

[22] Zidiya stated further that after reviewing the status of the investigation and the evidence available in the docket, with due

regard to the requirements of a preservation order and the advice of the fifth respondent's legal representatives, it was decided not to pursue an application for a preservation order in the matter but pursue alternative avenues of investigation. These alternative avenues of investigation, however, were not disclosed. According to Zidiya these were the reasons for attempting to settle the matter with the applicants by conceding the invalidity of the warrant and tendering the return of the computer. He argued that this approach would have had the advantage of remedying expeditiously and costs effectively the harm caused by the execution of the invalid warrant whilst at the same time permitting the investigation to run its course.

- [23] Zidiya stated categorically that it was his understanding at all times that should any further investigation uncover sufficient evidence to justify applying for a search warrant afresh, he will in due course be free to approach a magistrate for a search and seizure warrant. He denied, as was suggested by the applicant, that the criminal complaints were without merit. While he was not commenting on the merits of the conditional counter application for a preservation order he maintained that the investigation in the matter was ongoing and that the result would in due course be brought before a prosecutor to determine whether criminal charges would be proffered against any person; that under no circumstances can the Minister be obliged to seek a preservation order in every case where a defective warrant was obtained or a warrant was unlawfully executed.
- [24] The applicants contended that the warrant was invalid and falls to be set aside on the basis that it is overbroad, in that it fails to identify with sufficient particularity the alleged offences being investigated. The invalidity of the warrant as already stated, was conceded by the respondents.
- [25] The applicants also complained of egregious conduct in the execution of the warrant. In this respect the applicant contended that the seizure of the computer constituted a serious inroad into the private sphere of the applicants; that the laptop contained items the seizure of which constituted a serious breach of privacy which affected the inner core of the personal and intimate sphere; that it would be impossible to separate information in that private sphere from possible information which the complainant sought; that the complainant has no locus standi to prevent the computer being returned to its lawful owner by applying for a preservation order, a competency which falls squarely within the ambit of SAPS: that there was insufficient evidence to justify even asking for a warrant, the complainant having failed to place before the additional Magistrate an adequate and objective basis to justify the issue of the warrant; and that, absent such sufficient evidence or serious allegations against Page, no preservation order can or should be granted.
- [26] To oppose the provisional counter application Page relied heavily on Zidiya's submission that there was no need for a preservation order and that the laptop should be returned. The applicants further argued that the complainant has a strong motive to manipulate a search and seizure warrant in order to advance GSA's Competition Tribunal complainant and damages claim and that this was corroborated by Van Den Berg's request that the computer be kept until the end of the civil cases.
- [27] The applicants submitted that where a warrant and the accompanying search was ruled unlawful and was set aside, a preservation order and access to the items seized must be dependent on and subject to a new and valid search warrant being authorised. The new search warrant would be essential to direct and control access to the laptop which contained sensitive and private information of which the unlawful accessing of which would amount to criminal conduct, so argued the applicant.

- [28] Expounding on the lack of locus standi of the complainant, the applicants submitted that it was evident from the provisions of sections 20 and 21, coupled with a reading of sections 28, 29 and 30 of the CPA that these specifically allow only the State to seize articles in terms of a search warrant. The applicants argued that the Service Charter for Victims of Crime in South Africa does not extend the right of a complainant in a criminal case to have control over the police investigation, which the applicants alleged was what Van Den Berg sought in this matter.
- [30] The argument by the applicants that only the State has the right to apply for a search warrant misses the point. It was not Van Den Berg who applied for a warrant; it was Moteme, in the cause of his investigation of CAS304/4/2014 Norwood SAPS, who applied for a search warrant. All what Van Den Berg did was to lay criminal charges. It was in the course of investigating these criminal charges that Moteme applied for a search warrant. It is far-fetched to argue that Van Den Berg was seeking control over the police investigation when he applies for a preservation order of the laptop. Application for the search warrant, which correctly is the duty of the SAPS was at the instance of Moteme who was acting in the execution of his duties as a member of the SAPS. The conditional counter-application for a preservation order is a separate process. Here the Court would not be guided by who was on duty to apply for a preservation order but rather by whether there are reasonable grounds for the preservation of the laptop which may contain additional incriminating evidence to corroborate the emails referred to supra.
- [30] I deem it unnecessary to deal with any degree of particularity the argument relating to private prosecution, as in my view the emails in question, if corroborated by further evidence, would be sufficient to sustain a prosecution by the State and alleviate a need for a private prosecution. The prospects of a private prosecution would only arise, and open for determination, if the State decline to prosecute in the face of overwhelming additional evidence which may be obtained from the seized laptop.
- [31] The applicants' main submission was, given that the unlawfulness of the warrant was conceded, the laptop together with
- any mirror images which may have been made should be returned to Page. Van Den Berg on the other hand, argued that there are grounds
- for granting an order for the preservation of the laptop, alternatively its mirror image, must be kept which by the Registrar of this Court, where it is currently deposited. The crisp question is whether it would be in the interest of justice to grant a
- preservation order in the circumstances of this case?
- [32] The complainant contended that if the warrant is set aside, the laptop should be preserved as it is likely to contain evidence of the criminal conduct that gave rise to the criminal charges and the subsequent issue of the search warrant. According to the complainants to return the laptop to the applicants could cause the loss of incriminating evidence. Although

the invalidity of the search and seizure warrant was conceded by the respondents, I deem it necessary, in order to contextualise the conditional counter-application for a preservation order of the laptop, to briefly deal with the legal requirements for the issue of and the terms of a warrant obtained pursuant the provisions of section 21, read with section 20 of the CPA.

- [33] Search warrants are necessary tools in the gathering of evidence for purposes of criminal prosecutions. As stated in the opening paragraph it is however, necessary to put in place safeguards to prevent the abuse of this important tool for preventing, combatting and investigating crime so that the privacy of the person affected by the search warrant may only be impaired in the least intrusive manner and on justifiable grounds. For this reason, the authority to issue warrants is vested in judicial officers who, because of the qualities and skill they possess, are best suited for the proper exercise of this power[6].
- [34] Section 21 of the CPA furthermore requires that the decision to issue a warrant be made only if the evidence in support of the application

objectively establishes the existence of a reasonable suspicion that a crime has been committed, and 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.

- [35] As regards the terms of the warrant the Constitution requires the specification of the offence in the warrant. This was confirmed by the Constitutional Court in *Magajane v Chairperson North West Gambling Board and Others*[7] that failure to specify the offence in the warrant may lead to its invalidity[8]. See also *Thint (Pty) Ltd v National Director of Public Prosecutions and Others*; *Zuma and Another v National Director of Public Prosecutions and Others*[9]. The warrant therefore must set out with reasonable particularity the offence which underlines the search and the article the police are directed to search for and seize. *Mogoeng J* (as he then was) held in the *Van Der Merwe*[10] case that the specification of the offence in the warrant facilitates intelligibility while its absence hinders it. Particularity would avoid vagueness or overbroad[11].
- [36] The Courts have always paid close attention to the terms of the warrant to ensure that they are neither too general, nor vague or overbroad[12]. There are two jurisdictional facts for the issue of a search warrant: these are the existence of a reasonable suspicion that a crime has been committed and the existence of reasonable grounds to believe that objects are connected with that crime.
- [37] Another aspect on which a warrant, once obtained, may be contested is the lawfulness of the manner of its execution. Where there has been particularly egregious conduct in the execution of the warrant a Court may, in addition to setting aside the warrant, refuse to grant a preservation order of any items seized. In any other situation, the Court may grant a preservation order even where the warrant may be declared unlawful if it is just and equitable to do so.

[38] In *Thint* the Court held the search warrant to be lawful. Langa CJ, however, went on to discuss what the relief should be when a Court concludes

that a search warrant was unlawful, as is the case in this matter[13]. He held that a preservation order would frequently be a just and equitable remedy. In this respect he held that such an order, (i.e a preservation order) would be appropriate in this context, putting an end to the differing views held by the SCA Judges. On the question of the powers of a Court to grant just and equitable remedies derived from section 172 (1)(b) Langa CJ held that[14]:

“[220] The judges in the Supreme Court of Appeal differed as to whether a preservation order is a competent order at all. Farlam JA thought that it fell under the court's power to grant 'just and equitable' remedies in terms of s 172(1)(b) of the Constitution. Nugent JA disagreed. I am of the view that s 172(1)(b) of the Constitution does permit a preservation order to be made. That section explicitly states that a court deciding a constitutional matter may make any order that is just and equitable including an order 'suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect'. This section thus expressly contemplates an ongoing violation of a right pending rectification by a competent authority. It should also be noted that s 172(1)(a) is not limited to declarations of invalidity in respect of laws but also includes declarations of invalidity in respect of conduct. From the start, this court has recognised that at times there will be considerations of justice and equity which outweigh the need to give immediate relief for the breach of a constitutional right. A preservation order raises similar questions of balancing the need to protect the right to privacy on the one hand, with other important public considerations on the other.”

[39] Langa CJ considered a preservation order to be an appropriate remedy basically for two reasons. Firstly he found that preliminary

litigation on the validity of search warrants has the potential to delay the commencement of trials. Secondly, that it is the trial

Court which should primarily be concerned with ensuring trial fairness in general and can deal with the admissibility of evidence

in particular, by applying its discretion in terms of section 35 (5) of the Constitution. He concluded that this will open the way for a Court, when it finds a warrant to be unlawful, to preserve the evidence so that the trial Court can apply its section 35 (5) discretion to the question whether the evidence should be admitted or not. In my view only the second reason may find application in this matter.

[40] Langa CJ, however, did not grant the Courts a blanket jurisdiction to order preservation of evidence obtained through an unlawful search and seizure. Where the applicant can identify specifications the seizures of which constituted a serious breach of privacy that affects the inner core of the personal or intimate sphere, or whether there has been particularly egregious conduct in the execution of the warrant, a preservation order should not be granted. The use of the words “only if an applicant can identify” in my view seems to convey that a preservation order would ordinarily be granted unless there was a serious violation of the right to privacy which infringes the inner core of the personal or intimate sphere and

where the warrant was executed in an egregious manner that a court should refuse to grant a preservation order.

- [41] The applicants argued that the circumstances of this would justify the refusal to grant a preservation order. Page pointed out that the laptop contained highly personal details of his financial affairs as well as intimate correspondence with this fiancé which were private and affecting the inner core of his personal and intimate sphere. He also complained about the execution of the warrant claiming that the conduct of the police was egregious and about the manner in which the warrant was executed. His main complaint was that Beukes and Draai arrived at his home in the morning; that they appeared not to know exactly what they were authorized to search and seize; that they were hostile and unsympathetic towards them; and that they were treating them like criminals. This according to Page, was particularly egregious conduct which was unlawful and would justify a refusal to grant a preservation order.
- [42] It is indeed correct that Beukes and Draai arrived at Page's home at 8:20. Though relatively early it is not that early as to amount to a serious disturbance of Page and his fiancé's peace and privacy. The two police men duly introduced themselves and announced the purpose of their presence. They could have been uncertain about the exact documentation they were looking for because of the broadness of the search warrant but they knew that they have to search and if found seize a laptop and documents.
- [43] The authorities referred to do not define which conduct would qualify as egregious leading to a refusal to grant preservation order. The Oxford Dictionary defines "egregious" as outstandingly bad or shocking conduct. The conduct complained about must therefore be outstandingly or shockingly bad to be classified egregious. In my view such conduct must not only be an irritant or inconvenience to the person searched but must be outrageously bad so as to shock any right thinking individual. The conduct Page complained about does not reach this level. It cannot in the premises be classified as egregious.
- [44] No particulars of the alleged hostile and unsympathetic conduct of Beukes and Draai were furnished. How they were treated as criminals was also not particularised except that it was insinuated that their possession were the proceeds of crime. How this was insinuated was not explained. Beukes and Draai. They were armed with a warrant which they believed was valid and surely could not have been expected to call off the execution of the warrant merely on Page's explanation of the rift between Leica Geosystem and GSA. In my view more was expected from the applicant to satisfy the Court that the search was carried out in an egregious manner. On the evidence furnished by Page I am not convinced that the search was conducted in an egregious manner.
- [45] I now look at whether Page had identified items the seizure of which would constitute a serious breach of his privacy. There is no doubt that correspondence between Page and his finance, as well as matters relating to his personal financial affairs are of a personal and intimate nature. Access to these documents would constitute a serious breach of privacy

that affects the inner core of their personal or intimate sphere. Page has been able to identify and specify in broad strokes that the seizure of these documents would infringe upon his right to privacy.

[46] There was, however, no allegation that any unauthorised person has had access to these private documents, notwithstanding the

availability of his passwords. The laptop was in the possession of the police only for a brief moment. Therefore it was in the

possession of McClusky Attorneys, again for a brief moment. It has since been in the safe custody of the Registrar of this Court. I am in no doubt that with the necessary safeguards in place access to information of the private documents of a personal and intimate

nature which may lead to a breach of his right to privacy may be prevented. This will preserve any incriminating evidence which may later be used to advance any criminal prosecution which may be instituted.

[47] Such safeguards may include, providing for supervised access to the contents of the laptop, separating those documents which contain information of an intimate or personal nature from the rest, restricting access to the emails which only have a bearing on the dealings by Geosystems with any anti-competitive activities of a criminal nature.

[48] The emails referred to in paragraph 7 supra raise concern that Page or his associates may have been involved in corrupt activities relating to tenders in which Leica Geosystems had an interest. There is, in my view, a reasonable possibility that other emails on the laptop seized may offer more information which may conclusively prove the commission of an offence or offences. Search warrants have been authorised to search for items for items which are expected to exist. Nugent JA in *Minister of Safety and Security v Van Der Merwe*[15] put it as follows:

“[11] In some cases it will be known that a particular article exists that is connected with the suspected crime. In those cases the purpose of the search will be to discover the particular article, and the article will thus be capable of being described in specific terms. In other cases it will not be known whether any particular article exists, but it can be expected that an article or articles of a particular kind will exist if the offence was committed. In such cases the purpose of the search will be to discover whether such articles or article exist/s, and thus they or it will be capable of being described only by reference to their genus. It is in relation to warrants of this kind that problems of validity most often arise. It will be inherent in the nature of the authority to search that the searcher might, in appropriate circumstances, be entitled to examine property that is not itself connected with the crime- for example, the contents of a cupboard or a drawer, or a collection of documents – to ascertain whether it contains or is the article that is being sought.”

It was argued on behalf of the applicants that it is not sufficient to point to the three emails as proof of criminal activities on the part of the applicants without proof that Geosystems in fact did apply and used the devious means to obtain the tenders in question. Secondly that the word “bribe” was used in a different context and did not mean and was not intended to convey that in fact anyone was bribed to facilitate the achievement of the desired outcomes.

[49] There are no merits in both these arguments. The grammatical meaning of the word “bribe”, as a verb, means dishonestly persuading someone to act in one’s favour by payment or other inducement. Under the common law the crime of bribery could only be committed by or in respect of a State official. Under the Prevention and Combatting of Corrupt Activities Act[16] it has been extended to include private persons. It is now a crime for any person who directly or indirectly agree to accept any gratification from any other person or to give or agree or offer to give to any other person any gratification in order to act, personally or by influencing another person to act in a manner that amounts to the illegal, dishonest, unauthorised, incomplete or biased (or misuse or selling information) exercise, carrying out or performance of any power, duties or function arising out of a Constitutional, statutory, contractual or any other legal obligation. Such action must amount to an abuse of a position of authority, a breach of trust or a violation of a legal duty or set of rules and designed to achieve an unjustified result.

[50] These emails were said to have been used in relation to a tender in which company was interested. It does not matter whether Geosystems tendered or, if it had tendered, was awarded the contract; it is sufficient for purposes of the crime of corruption if Geosystems and its employees or agents attempted to influence the process or outcome by offering a gratification, as it was admitted in one of the emails.

[51] In my view there are reasonable grounds to believe that Page and his associates have been engaged in unlawful conduct which may lead to prosecution on a charge of corruption. Secondly the emails in question may be part of a series and may conclusively prove the involvement in criminal conduct on the part of Page and his associates. In the circumstances it would be just and equitable to preserve the mirror image of the laptop so seized with the necessary safeguard as to his privacy. A mirror image of the hard drive of the laptop must be made of only the emails and/or any other document, not of a private or intimate nature, which find to prove the commission of the offence of corruption or bribery.

[52] On the question of costs I am of the view that both sides have achieved significant success in the matter. The applicants were

successful in challenging the validity of the search warrant, on the one hand, and the complaints succeeded in achieving the main

objectives of the counter-application. In the circumstances I deem it fair and just that no costs order should be made.

[53] The order I make is therefore the following:

1. the decision of the first respondent of 2 April 2015 to authorise a search warrant in respect of Derrick Page at 74 Mountain Road Somerset West and the search warrant are hereby set aside.
2. the execution of the search warrant and the search and seizure operation on 20 May 2015 at 74 Mountain Road Somerset West are hereby declared inconsistent with the provisions of the Constitution of the Republic of South Africa and as such are declared invalid and set aside.
3. the Registrar of this Court is authorised and ordered to retain custody of the laptop computer (“the laptop”) seized on 21 May 2015 by fifth respondent at the home of the first applicant in pursuance of the execution of the warrant of search and seizure issued with respect to the first applicant by the first respondent on 2 April 2015 until;
 - 3.1 the finalisation of a my criminal proceedings against the first applicant or any other person flowing from the complaints of criminal conduct laid by the third respondent against the first applicant that gave rise to the issue of the warrant (“the complaints”); or
 - 3.2 in the event of the Office of the Director of Public Prosecutions issuing a certificate nolle prosequi with respect to the complaints, the final determination of a private prosecution of those complaints by the third respondent, which private prosecution is to be instituted within 60 days of the third respondent in this matter receiving such certificate, whichever may be later.
4. a mirror image of the harddrive of the laptop (“the mirror image”) be made by the Cyber Forensic Unit of the SAPS under the Registrar’s supervision;
5. the mirror image be given to the first applicant, and that, save for the making of the mirror image, no person shall be permitted to access the content of the laptop without the consent of the applicants, save by order of this Court or pursuant to a lawful search warrant.

M J DOLAMO

HIGH COURT JUDGE

I agree, it is so ordered

S DESAI

[1]see section 205 (3) of the Constitution of the Republic of South Africa.

[2] see *Key v Attorney-General Cape of Good Hope Provincial Division and Another* 1996 (6) BLCR 788 (CC)

[3] Act 51 of 1997

[4] 2009

(1) SA 1 CC

[5] 2011

(5) SA 616 (CC)

[6] See Minister of Safety and Security v Van Der Merwe 2011 (5) SA 61 at para 37

[7]

[2006] ZACC 8; 2006

(5) SA 250 (CC)

[8] See Van Der Merwe *supra*.

[9] 2009

(1) SA 1 (CC)

[10] Referred to *supra*

[11] See Powell NO and Others v Van Der Merwe NO and Others 2005

(5) SA 62 (SCA)

[12] Thint at para 88.

[13] Thint at para 129

[14] Thint at para 220.

[15] 2011

(1) SACR 211 at para 11.

[16] See section 3 of Act 12 of 2004.

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