THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20668/2014

In the matter between:

POMPO JOSEPH GOQWANA	**APPELLANT**
and	
THE MINISTER OF SAFETY AND SECURITY NO	**FIRST RESPONDENT**
THE PROVINCIAL COMMISSIONER OF THE SAPS, LIMPOPO PROVINCE	**SECOND RESPONDENT**
THE CHAIRPERSON: THE LIMPOPO GAMBLING BOARD	**THIRD RESPONDENT**
LIEUTENANT SEBOLA	**FOURTH RESPONDENT**
THE MAGISTRATE PHALABORWA NO	**FIFTH RESPONDENT**

Neutral citation: *Goqwana v Minister of Safety NO & others* (20668/14) [2015] ZASCA 186 (30 November 2015)

Coram: Mpati P, Petse, Willis, Swain and Zondi JJA

Heard: **13 November 2015**

Delivered: **30 November 2015**

Summary: Search warrant – should be addressed to a specifically named police official – where search relates to a statutory offence, as opposed to a common law crime, the warrant should pertinently refer to the specific statute and the section or subsection thereof – affidavit upon which search warrant based must accompany warrant when executed – appeal upheld – warrant set aside and goods seized ordered to be returned.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Kubushi, Bam and Molopa JJ sitting as a court of appeal):

1. The appeal is upheld with costs.
2. The order of the court a quo is set aside and replaced with the following:

   ‘(a) The warrant issued by the fifth respondent on 3 May 2012, in respect of the applicant’s business premises at the Skylounge Internet Lounge, Eden Square Mall, corner of Palm and President Nelson Mandela Streets, Phalaborwa, is set aside.

   (b) The fourth respondent and any other respondent who is in possession or control of the applicant’s goods and monies listed in annexure ‘A’ to the applicant’s notice of motion is to be restored to the applicant’s possession forthwith.

   (c) The first to fourth respondents are jointly and severally liable to pay the costs of the application, the one paying the other to be absolved.’

JUDGMENT

Willis JA (Mpati P and Petse, Swain and Zondi JJA concurring):

[1] The appellant conducted a business known as the Skylounge Internet Lounge at the Eden Square Mall in Phalaborwa. We were informed from the bar that the correct spelling of the appellant's surname is 'Qongwana' but, as the record has been prepared on the basis that it is 'Goqwana', I have retained the latter in the citation. His business premises were searched on 4 May 2012, consequent upon a search warrant issued by the fifth respondent (the magistrate of Phalaborwa), the previous day. As a result of the search, furniture, computer equipment and cash to the value of R13 200 were seized.

[2] The appellant brought an urgent application on 15 May 2012 before the Gauteng Division of the High Court, Pretoria (Van der Byl AJ) for an order restoring possession to him of the items seized. The root of the application was that the search warrant itself was not in conformity with the requirements of the law. It was opposed on the basis that the appellant had been lawfully deprived of the goods in question, in accordance with the search warrant. The high court dismissed the application with costs. It also dismissed the application for leave to appeal. The petition to this court was successful. This court directed that the appeal be heard by the full court in the Gauteng Division. The full court (Kubushi, Bam and Molopa JJ) dismissed the appeal with costs. Special leave was granted by this court to appeal to it against the decision of the full court.

[3] The third respondent (the Limpopo Gambling Board) had complained to the police that the appellant appeared to have contravened the provisions of both the National Gambling Act 7 of 2004 (the NGA) and the Northern Province Casino and Gaming Act 4 of 1996[1] (CGA) inasmuch as he had, without a license, allowed his business premises to be used for gambling activity as provided for in those statutes.

[4] The first respondent is the Minister of Safety and Security, the second respondent the Provincial Commissioner for the South African Police Service in the Limpopo Province. The search and seizure at the appellant's business premises was conducted by the third respondent, Lieutenant Sebola, a police official, on 4 May 2012.

[5] Mr Robert Lesibana Lekoto, a Law Enforcement Officer for the Limpopo Gambling Board, deposed to the affidavit (also referred to in the papers as a 'sworn statement') in support of the application for the search warrant. In that affidavit, Mr Lekoto said that he had investigated the premises of the appellant under the guise of being a customer and discovered that the premises had indeed been used for the conduct of illegal gambling activities. In that sworn statement Mr Lekoto refers to ss 28, 3 and, 82 of the NGA and ss 51, 56 and 77*(b)* and *(e)* of the CGA. In the respondents' answering affidavit, however, there was also a particular complaint that the appellant, without authorisation, had made his premises available to be used by persons engaging in 'interactive games', in contravention of the provisions of s 11 of

[1] This Act has since been replaced by the Limpopo Gambling Act 3 of 2013, promulgated in the *Provincial Gazette* on 22 August 2014, and came into effect on 1 September 2014.

the NGA. No reference was, however, made thereto in Mr Lekoto's sworn statement upon which the magistrate relied when he issued the search warrant.

[6] In the body of the search warrant, it reads as follows:

'To the Station Commander

Whereas it appears to me [ie the magistrate who signed it] from information on oath that there are reasonable grounds to believe that, within the magisterial district of Phalaborwa, there is an article to wit Illegal Interactive Gambling (Online Gambling) which:

(a) is concerned in the commission of an offence;

(b) is concerned in the suspected commission of an offence;

(c) is on reasonable grounds believed to be concerned in the commission of an offence;

(d) is on reasonable grounds believed to be concerned in the commission of an offence;

(e) may afford evidence of the commission of an offence;

(f) may afford evidence of the suspected commission of an offence;

(g) is intended to be used in the commission of an offence;

(h) is on reasonable grounds believed to be intended to be used in the commission of an offence

and which is in the possession of/under the control of/upon or at the premises at/upon the person of Syknet Internet Lounge at Eden Park Square Mall cnr Palm and President Nelson Mandela Streets.

THESE ARE THEREFORE to authorize you to search during the daytime the identified person/ to enter and search the identified premises and to search any person found on or at such premises and to direct you to seize the said computers, electronic devices, CD's, money, cash register, research and books relating to gambling activities if found and to deal with it according to law/bring it before me to be dealt with according to law.

Given under my hand at Phalaborwa this 3rd day of May 2012.'

After the words 'To the Station Commander' in the standard form document that was used for the issue of the search warrant, is a sign thus '†'. This sign is repeated at the bottom of the page with the following words alongside it: 'Name of Police Station'. The name of the police station was not filled in. In addition, the allegations in paragraphs (a) to (h) of the search warrant were the result of choices having been made on a checklist, in accordance with the instruction 'Mark with an X in the applicable block'.

[7] After the search warrant had been handed to the appellant at the premises, his attorney, Mr Vasilios Vardakos, was contacted and arrived at the scene. He enquired whether an affidavit had been presented to the magistrate in support of the issuing of the warrant and, if so, requested to have sight thereof. It was only after repeated requests by Mr Vardakos, including a formal letter of demand, that a copy of the affidavit was indeed given to him, several weeks later.

[8] As has been pointed out, the appellant relied on the law relating to a *mandament van spolie* for his application for the return of the seized items on the basis that the police had unlawfully obtained possession of his goods. The appellant contended that the search warrant was fatally defective because it did not name a specific police official who was authorised to conduct the search in terms of the warrant, alternatively that it was fatally defective inasmuch as it did not mention the particular police station to which 'the station commander' in question related or was intended to apply. The appellant also contended that there was no offence known as

'Illegal Interactive Gambling (online gambling)', this having been the offence which had been specified in the warrant. He contended further that the warrant had not been lawfully issued because the sworn statement upon which the magistrate had relied when issuing the warrant had made no mention of 'interactive games'. More particularly, the appellant contended that the warrant did not specify the offence and, in particular, did not refer to s 11 of the NGA, which relates to unauthorized interactive gambling. The appellant complained that the magistrate had invoked, in effect, the provisions of s 11 of the NGA without Mr Lekoto having done so in his sworn statement.

[9] In summary, the appellant based his case on two main contentions: (i) that the search warrant contained insufficient particularity as to whom it was addressed and (ii) that *ex facie* the document, it did not specify the offence in connection with which the search was to be conducted and therefore could not be 'reasonably intelligible' either to the searcher or person searched. Accordingly, so the argument went, the search warrant had been unlawfully issued and the seizure of the appellant's goods consequent thereupon was, correspondingly, also unlawful.

[10] The first to fourth respondents, on the other hand, contended that the issuing of the warrant addressed simply to 'the Station Commander' was sufficient, particularly in the context of there being only one police station in the relatively small town of Phalaborwa. They also contended that the warrant was reasonably intelligible, had satisfied the requirements of the law and, accordingly, that the dispossession of the goods had been lawful.

[11] Sitting as the court of first instance, Van der Byl AJ heard the urgent application. He observed that the search warrant was 'not a model of accuracy' but found that:

'The Station Commander, although not addressed by name, is a specific police official and one responsible for the performance of public functions by police officials under his or her command and I can see no reason why the fact that he was not referred to by name or that any other person designated by name to execute the warrant or that any such failure can detract from the aims and objectives of section 21 of the Criminal Procedure Act, 1977.'

He also found:

'In my view the affidavit contains more than sufficient particularity to establish a reasonable suspicion that offences of the contravention of the National Gambling Act 7 of 2004 and the Limpopo Gambling Act 4 of 1996 were being committed by the person or persons conducting business on the premises that was at that stage known as Skynet Internet Lounge which call for the search and seizure of all articles relevant to any such offences.'

Having considered the requirements set out by the Constitutional Court in *Mistry v Interim Medical and Dental Council of South Africa & others*[2] and *Magajane v Chairperson, North West Gambling Board*,[3] relating to the justification for intrusions into a person's privacy that a search warrant necessarily entails, the judge concluded:

'In these circumstances I find it difficult to see that the actions of the Respondents effected any injustice to the Applicant and that the aims and objectives of the relevant provisions [ie s 20 of the Criminal Procedure Act, read against the background of these decisions by the Constitutional Court] were not achieved.'

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[2] *Mistry v Interim Medical and Dental Council of South Africa & others* 1998 (4) SA 1127 (CC), especially paras 21, 23 and 27 to 30.

[3] *Magajane v Chairperson, North West Gambling Board* 2006 (2) SACR 447 (CC), especially paras 33 to 96.

[12] The full court placed large reliance on the Constitutional Court's decision in *Minister of Safety and Security v Van der Merwe & others*,[4] which, in turn, drew heavily upon *Thint Holdings (Southern Africa) (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions*[5] – also a decision of the Constitutional Court. The full court found that it could be inferred, quite obviously, that the search warrant was intended to be addressed to the station commander at the Phalaborwa police station and that this was a sufficiently adequate description of the police official to whom it was addressed. It also found that the search warrant contained a reasonably accurate description of the suspected offence and that it was, objectively, 'reasonably capable of being understood by a reasonably well-informed person, who appreciated the legislation and the nature of the offences involved.' The full court then, immediately before dismissing the appeal with costs, unanimously concluded:

'[C]onsidered at the time of its issue, the terms of the warrant were sufficient to satisfy the objective test of reasonable intelligibility.'

[13] This case raises questions of fundamental constitutional importance. Provided there is no abuse of process, the issuing of search warrants and the seizure of articles consequent thereupon is a vital, indeed necessary, element in the effective combatting of crime. On the other hand, all people within the Republic of South Africa have constitutionally enshrined rights to dignity, privacy, freedom, security, trade and property.[6] Earnest though the support of the courts for the SAPS

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[4] *Minister of Safety and Security v Van der Merwe & others* 2011 (5) 61 (CC).

[5] *Thint Holdings (Southern Africa) (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 141 (CC).

[6] See ss 1, 12, 14, 22 and 24 of the Constitution of the Republic of South Africa, 1996. See also, in general terms, *Mistry v Interim Medical and Dental Council of South Africa & others* 1998 (4) SA 1127 (CC); *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors*

in their endeavours to combat crime must be, these constitutional rights have especial significance. More particularly in view of our history, that significance is cardinal in magnitude.

[14] Iridescent in *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others: In re Hyundai Motor Distributors (Pty) Ltd & others & others v Smit NO & others*,[7] *Thint* and *Van der Merwe* is the requirement that the courts must strike a wholesome balance between, on the one hand, the dignity and privacy of every citizen and, on the other, support for the State in combatting crime.[8]

[15] A brief outline of the basic principles relevant to search warrants is accordingly apposite. *Minister of Justice & others v Desai NO*[9] makes it clear that it has long been recognised in our law that a search warrant 'constitutes a serious encroachment on the rights of the individual' and that careful scrutiny by the courts is required.[10]

[16] In *Minister of Safety and Security v Van der Merwe & others*[11] Mogoeng J, delivering the unanimous judgment of the court, said in paras 55 and 56:

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

(Pty) Ltd & others: In re Hyundai Motor Distributors (Pty) Ltd & others & others v Smit NO & others 2001 (1) SA 545 (CC); *Thint* (fn 5 above) and *Van der Merwe* (fn 4 above).

[7] *Hyundai* (fn 6 above).

[8] *Hyundai* (fn 6 above) para 54, *Thint* (fn 5 above) paras 74 to 79; *Van der Merwe* (fn 4 above) paras 21, 35 and 36.

[9] *Minister of Justice & others v Desai NO* 1948 (3) SA 395 (A).

[10] *Desai* (fn 9 above) at 403. See also *Ex parte Hull* (1891-1892) 4 SAR TS 134 and *Hertzfelder v Attorney-General* 1907 TS 403.

[11] *Van der Merwe* (fn 4 above).

(a) states the statutory provision in terms of which it is issued;

(b) identifies the searcher;

(c) clearly mentions the authority it confers upon the searcher;

(d) identifies the person, container or premises to be searched;

(e) describes the article to be searched for and seized, with sufficient particularity; and

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

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

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

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

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

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

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

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

[17] In the appeal before us, both the appellant and the first to fourth respondents relied on *Van der Merwe*. The appellant contended that the search warrant was not 'reasonably intelligible to the searched person' and that it was 'overbroad'.[12] The respondents protested that, on the contrary, the search warrant was reasonably intelligible to a person in the position of the appellant (ie a person operating an internet café) and that it was not overbroad.

[12] This was a term adopted by Cameron JA in *Powell NO & others v Van der Merwe & others* 2005 (5) SA 62 (SCA) paras 4, 18, 21, 28, 48 and 59.

[18] In *Pullen NO, Bartman NO and Orr NO v Waja*,[13] which the Constitutional Court affirmed in *Van der Merwe,* it was said:

'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.'[14]

[19] In *Powell NO & others v Van der Merwe No & others*[15] this court said that search warrants would be scrutinised with 'sometimes technical rigour and exactitude'.[16] As Cameron JA observed in *Powell*, 'a general ransacking' by the police carrying out a search has, ever since at least 1891, not been allowed. In *Ex parte Hull*,[17] the protection of confidential documents from the intrusions of privacy inherent in a search was an especial consideration. In *Ex parte Hull*, Kotze CJ said:

'The secrets of private friendship, relationship, trade and politics, communicated under the seal of privacy and confidence would become public, and the greatest trouble, unpleasantness and injury caused to private persons, without furthering the true purposes of criminal justice in the slightest degree.'[18]

[20] Insofar as the failure of the warrant to refer to a specific police officer is concerned, the provisions of s 25(1) of the CPA are relevant. This section provides that:

'**25 Power of police to enter premises in connection with State security or any offence**

(1) If it appears to a magistrate or justice from information on oath that there are reasonable grounds for believing-

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[13] *Pullen NO, Bartman NO & Orr NO v Waja* 1929 TPD 838.
[14] At 849. See also *Van der Merwe* (fn 4 above) para 54.
[15] *Powell NO & others v Van der Merwe NO & others* 2005 (5) SA 62 (SCA).
[16] Paragraph 50.
[17] *Ex parte Hull* (fn 10 above).
[18] At 141.

(a) that the internal security of the Republic or the maintenance of law and order is likely to be endangered by or in consequence of any meeting which is being held or is to be held in or upon any premises within his area of jurisdiction; or

(b) that an offence has been or is being or is likely to be committed or that preparations or arrangements for the commission of any offence are being or are likely to be made in or upon any premises within his area of jurisdiction, he may issue a warrant authorizing *a police official* to enter the premises in question at any reasonable time for the purpose-

(i) of carrying out such investigations and of taking such steps as such police official may consider necessary for the preservation of the internal security of the Republic or for the maintenance of law and order or for the prevention of any offence;

(ii) of searching the premises or any person in or upon the premises for any article referred to in section 20 which *such police official* on reasonable grounds suspects to be in or upon or at the premises or upon such person; and

(iii) of seizing any such article.' (Emphasis added.)

The repeated correlation between 'a' and 'such', when reference is made to a 'police official' in these subsections, is indicative of a singular degree of specificity. The references to 'a police official' and 'such police official' in these subsections are not reasonably capable of being interpreted in any other manner.

[21] This approach was correctly followed in *Naidoo & another v Minister of Law and Order & another,*[19] *Smit & Maritz Attorneys & another v Lourens NO & others*,[20] and *S v Ntsoko*.[21] In *Naidoo* it was said that where s 25(1) of the Criminal Procedure Act 51 of 1977 (the CPA) refers to a 'police official' that indicated 'that the Legislature intended that an *identified police officer* should be *named* and should act

[19] *Naidoo & another v Minister of Law and Order & another* 1990 (2) SA 158 (W).
[20] *Smit & Maritz Attorneys v Lourens NO & others* 2002 (1) SACR 152 (W).
[21] *S v Ntsoko* 2011 JDR 0655 (GNP).

throughout'.[22] (Emphasis added.) In *Smit & Maritz v Lourens*, Van Oosten J followed *Naidoo* and required that a *'known and named* police official' should be authorized in terms of a search warrant.[23] (The emphasis appears in the original text.) In *Naidoo*, Roux J relied on the provisions of s 29 of the CPA, which require a 'strict regard to decency and order' in the search of any person or premises in coming to this conclusion.[24]

[22] Section 29 of the CPA, upon which Roux J relied in *Naidoo*, provides as follows:

'A search of any person or premises shall be conducted with a strict regard to decency and order, and a woman shall be searched by a woman only, and if no female police official is available, the search shall be made by any woman designated for the purpose by a police official'.

In my respectful opinion, Roux J was incorrect to rely on the provisions of this section in drawing his conclusion. A plain reading of ss 21(2) and 25(1) of the CPA makes it clear, however, that he was correct in determining that an identified police officer should be named and should act throughout.

[23] In *Ntsoko*, Mabuse J observed, among other criticisms of various search warrants, that:

'All the said warrants are addressed to "the Station Commander". They have not been addressed to a specifically named officer nor have they been addressed to a particular

[22] At 161D.
[23] At 157d.
[24] At 161D.

police station. This is contrary to the provisions of Section 21(2) of the [Criminal Procedure Act] . . .'[25]

The judge found, for a number of reasons, that the terms of the search warrants were overbroad, did not satisfy the test in *Powell* and set them aside.[26] The full court hearing the present matter disagreed with the criticism in *Ntsoko* of the warrant being addressed simply to 'the Station Commander'.

[24] In *Silwana & another v Magistrate, District of Piketberg & another*[27] however, Foxcroft J, with whom Dlodlo AJ concurred, noted *en passant*, when referring to criticisms that a search warrant had not referred to a specifically named police officer or to the officer commanding of a particular police station, that '[i]t would be a matter of no difficulty for anyone to ascertain who the station commander was on the date when the warrant was signed' and that it 'makes more sense to specify a station commander than a named person who might not be available at the very moment when a search warrant needed to be carried out'.[28] This judgment arose within the context of the application for the recusal of a magistrate in a trial, where he had earlier issued the search warrant. In regard to the naming of the police official, the approach adopted in *Silwana* does not, however, accord with either a literal or purposive approach to the interpretation of s 25(1) of the CPA.

[25] In the context of a purposive interpretation of s 25(1) of the CPA, Mr Mtsweni, counsel for the first to fourth respondents, conceded that, in practice, it will be rare indeed that the station commander conducts a search in terms of s 25 of the CPA.

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[25] Paragraph 21.
[26] Paragraph 29.
[27] *Silwana & another v Magistrate, District of Piketberg & another* 2003 (5) SA 597 (C).
[28] At 601C-E.

Normally, it will be the investigating officer. The interpretation that the police official should be named in the search warrant acts as a safeguard against abuse so that when the warrant is executed', a person at the premises to be searched can ask not only for the police official to produce his or her police identity card but also to demonstrate the reference to him or herself in the warrant itself. This interpretation also reinforces the principle of accountability, more especially as it will ordinarily be the investigating officer who applies to the magistrate for a search warrant, leading to the search itself. Of course, the circumstances will very often require that the investigating officer be assisted by other police officials. It remains salutary, however, that at least one police official responsible for the search should pertinently be identified in the actual search warrant.

[26] As for the requirements that a search warrant should specify the offence in connection with which the search is to be conducted and should be 'reasonably intelligible', the provisions of the NGA and CGA should further be read together with the provisions of ss 20, 21 and 25, of the CPA.

[27] Section 20 provides as follows:

'**20 State may seize certain articles**

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

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

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

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

[28] Section 21 of the CPA provides:

'**21 Article to be seized under search warrant**

(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 at 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.' (Emphasis added.)

The repeated correlation, once again, between 'a' (or 'an') and 'such', when reference is made in these subsections either to the 'article' to be seized or a 'police official' who is to do the seizing, is indicative that a high degree of specificity is required.

[29] It is clear that any unlicensed interactive games that might have taken place at the premises would have been in contravention of s 11 of the NGA, which provides as follows:

'**11 Unauthorised interactive gaming unlawful**

A person must not engage in or make available an interactive game except as authorized in terms of this Act or any other national law…'

Nevertheless, in his sworn statement in support of the search warrant, Mr Lekoto did not refer to this section at all. Furthermore, there is no statutory offence known as 'illegal interactive gambling (online gambling)' – this being the 'offence' described in the search warrant. This underscores the importance of it ordinarily being desirable that when dealing with a statutory offence, as opposed to a common law crime, the warrant should pertinently refer to the specific statute and the section or subsection thereof in order to enable the person in charge of the premises to be searched (assisted, if needs be, by his or her lawyer) and also the police official authorised in terms of the search warrant to know precisely that for which the search has been authorised. The need for particularity in a warrant, especially where one is dealing with statutory offences, is salutary. This should present no difficulty in practice because search warrants are issued by magistrates who are trained and experienced in law. It hardly needs be said that gambling, whether 'online' or 'interactive' (whatever that may mean precisely), is not a common law crime.

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

[31] What of the affidavit upon which the magistrate relies in terms of s 25 of the CPA? In the body of the search warrant, it does indeed refer specifically that it

appears to the magistrate 'from information on oath that there are reasonable grounds to believe that …'. It therefore refers directly to the affidavit or sworn statement of Mr Lekoto. Section 21(4) of the CPA requires that, after execution, the police official who has executed the warrant shall '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.' In *Polonyfis v Minister of Police*[29] Cachalia JA, delivering the unanimous judgment of this court, said:

'After the search a copy of the warrant and any document referred to in it must – on demand – be handed to the person in charge [of the premises] who may then decide whether or not to challenge the validity of the warrant, either because it was unlawfully issued or unlawfully executed.'[30]

It is accordingly imperative that the affidavit or sworn statement in support of the warrant should accompany the warrant and be handed over together with it. This would, additionally, facilitate the expedition of any court application in which a person may wish to contend that his or her rights were adversely affected by the search. This injunction accords with the constitutionally enshrined right of every person to have access to information 'that is held by another person and that is required for the exercise or protection of any rights'.[31] This right is embodied in the Promotion of Access to Information Act 2 of 2000.[32] It is regrettable that the appellant had to wait several weeks before he was able to receive a copy of Mr Lekoto's sworn statement from the police.

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[29] *Polonyfis v Minister of Police* 2012 (1) SACR 57 (SCA).
[30] Para 19.
[31] See s 32(1) of the Constitution of the Republic of South Africa, 1996.
[32] See s 9 thereof as well as s 32(2) of the Constitution, which requires that national legislation be enacted to give effect to this right.

[32] I am mindful of the recent decision of the Constitutional Court in *Ngqukumba v Minister of Safety and Security & others*[33] in which a helpful analysis was given of the circumstances in which the *mandament van spolie* would be available.[34] We are also mindful of the fact that in *Polonyfis*, after having referred to *Pretoria Portland Cement Co Ltd & another v Competition Commission & others*,[35] this court indicated that, in the absence of an 'abuse of power' or a 'gross violation' of the rights of a person to be searched, it would be slow to find that a search warrant is unlawful on purely technical grounds.[36] In all the circumstances of the matter, however, the appellant has rightly claimed the setting aside of the search warrant and the return of the articles seized.

[33] The standard forms or 'template' used for the issue of search warrants will have to be revised in the light of this judgment. Nevertheless, as Mogoeng J said in *Van Der Merwe*, the retrospective invalidation in respect of all past warrants issued in a manner that is defective as a consequence of this judgment does not ensue.[37] This, as he observed, might give rise to undesirable consequences.[38] The courts must adjudicate each individual case on its own merits and all warrants hitherto issued contrary to the guidelines herein contained, remain valid unless set aside on a case by case basis.[39]

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[33] *Ngqukumba v Minister of Safety and Security & others* 2014 (5) SA 112 (CC).
[34] Paragraphs 10 to 21. See also *Judelman v Colonial Government* (1909) 3 BAC 446 at 453; *Sillo v Naude* 1929 AD 21 at 26; *Mans v Marais* 1932 CPD 352 at 353-354; *Moleta v Fourie* 1975 (3) SA 999 (O) at 1001–2; *Surtee's Silk Store (Pty) Ltd v Community Development Board* 1977 (4) SA 269 (W) at 270A–H; *Potgieter v Du Plessis* 1978 (1) SA 751 (NC) at 754H.
[35] *Pretoria Portland Cement Co Ltd & another v Competition Commission & others* 2003 (2) SA 385 (SCA) paras 71 and 73.
[36] Paragraph 23.
[37] Paragraphs 58 to 60.
[38] Paragraph 60.
[39] See also *Van der Merwe* (fn 4 above) paras 60 and 61.

[39] The following order is made:

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside and replaced with the following:

'(a) The warrant issued by the fifth respondent on 3 May 2012, in respect of the applicant's business premises at the Skylounge Internet Lounge, Eden Square Mall, corner of Palm and President Nelson Mandela Streets, Phalaborwa, is set aside.

(b) The fourth respondent and any other respondent who is in possession or control of the applicant's goods and moneys listed in annexure 'A' to the applicant's notice of motion is to be restored to the applicant's possession forthwith.

(c) The first to fourth respondents are jointly and severally liable to pay the costs of the application, the one paying the other to be absolved.'

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N P Willis

Judge of Appeal

APPEARANCES:

For the Appellant:	N Jagga
	Instructed by:
	Vardakos Attorneys, Vereeniging
	Honey Attorneys, Bloemfontein
For the First to Fourth Respondents:	D Mtsweni
	Instructed by:
	State Attorney, Pretoria
	State Attorney, Bloemfontein