THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 417/2024

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS (GAUTENG DIVISION)	**APPELLANT**

and

THATO MOLEFE	**FIRST RESPONDENT**
ZENZILE NDABA	**SECOND RESPONDENT**

Neutral citation:	*Director of Public Prosecutions, Gauteng Division v Thato Molefe and Another (*417/2024) [2025] ZASCA 67 (26 May 2025)
Coram:	NICHOLLS, HUGHES, KEIGHTLEY and BAARTMAN JJA and WINDELL AJA
Heard:	28 March 2025
Delivered:	26 May 2025
Summary:	Section 35(5) of the Constitution – defective search warrant – admissibility of evidence – unfair trial – administration of justice – public policy.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Phahlamohlaka AJ and Phahlane J sitting as court of appeal):

1 The appeal is upheld.

2 The order of the full bench is set aside and substituted with the following:

'1 The appeal is upheld.

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

(a) The material seized under the search warrant is found to be admissible.

(b) The acquittals on counts 1, 2, 3, 4 and 5 are set aside.'

3 The matter is remitted back to the regional court to continue with the trial.

JUDGMENT

Nicholls JA (Hughes, Keightley and Baartman JJA and Windell AJA concurring):

[1] Under what circumstances is evidence which has been obtained as a result of a defective search warrant admissible? That is the question to be determined in this appeal. The Regional Court, Vereeniging (the regional court), found that it was bound by this Court's decision in *S v Malherbe* (*Malherbe*),[1] that once the search warrant was defective, it had no option but to rule the evidence inadmissible. This was confirmed by a full bench of the Gauteng Division of the High Court, Pretoria (the high court), per Phahlamohlaka AJ and Phahlane J. The appeal is before this Court in terms of s 311 of the Criminal Procedure Act 51 of 1977 (the CPA), which affords the Director of Public Prosecutions (the DPP) an automatic right of appeal on a question of law.[2]

[1] *S v Malherbe* [2019] ZASCA 169; 2020 (1) SACR 227 (SCA) (*Malherbe*) paras 8 and 9.
[2] *Director of Public Prosecutions, Gauteng Division, Pretoria v Moabi* [2017] ZASCA 85; 2017 (2) SACR 384 (SCA) para 7; *Director of Public Prosecutions, Gauteng Division, Pretoria v Buthelezi* [2019] ZASCA 170; 2020 (2) SACR 113 (SCA) para 7.

[2] The respondents, Mr Thato Molefe (Mr Molefe) and Mr Zenzile Ndaba (Mr Ndaba) were charged in the regional court under the Drugs and Drug Trafficking Act 140 of 1992 (the Drugs Act) with the manufacture of drugs, dealing in drugs, as well as individual counts for possession of an illegal firearm and ammunition in terms of the Firearms Control Act 60 of 2000 (the Firearms Control Act).[3] There was a third accused , Mr Peter Mhlanga (Mr Mhlanga), who died during the course of the trial. The main charge against the three was that they operated a drug laboratory, manufacturing and supplying certain substances used in the manufacture of methaqualone, commonly known as mandrax.

[3] During the trial in the regional court, the only evidence led by the State was the discovery of drugs and drug manufacturing equipment, with a street value of R26 million. Mr Andre Van Schalkwyk, a Warrant Officer (Warrant Officer Van Schalkwyk) attached to the Vaal Organised Crime Unit, said that these were found by the police on the premises owned by Mr Ndaba, pursuant to a search warrant. Shortly after Warrant Officer Van Schalkwyk's evidence commenced, a trial within a trial was held to determine the admissibility of the evidence obtained under the search warrant.

[4] Warrant Officer Van Schalkwyk testified that he received information from a reliable informant, that Mr Mhlanga was involved in the manufacture of methaqualone. Mr Mhlanga would customarily get picked up from his residence and taken to the location where the drugs were being manufactured. On receiving this information, on 5 June 2016, Warrant Officer Van Schalkwyk followed Mr Mhlanga to a location in De Deur, Vereeniging, where the drugs were allegedly being manufactured. The property was surrounded by high walls, an impenetrable gate and there was no street name or house number. Warrant Officer Van Schalkwyk ascertained through his Global Positioning System (GPS) that the address was 12 Marble Road, De Deur.

[5] The following day, on 6 June 2016, Warrant Officer Van Schalkwyk completed a pro forma search warrant for the premises. He presented it to the Acting District Magistrate at Vereeniging Magistrates' Court, who duly signed it. On 7 June 2016,

[3] Sections 3 and 5*(b)* of the Drugs Act and s 3 and 90 of the Firearms Control Act, respectively.

Warrant Officer Van Schalkwyk and another police officer went to the said address where they saw two men coming out of the premises. Warrant Officer Van Schalkwyk identified himself as a police officer and explained that he was there to investigate a drugs related matter, and that he had a warrant entitling him to search the property. The two persons were Mr Mhlanga and Mr Molefe. A little while later, a third person emerged, Mr Ndaba, the owner of the property. Warrant Officer Van Schalkwyk then conducted a search of the house in their presence, and with the consent of Mr Ndaba. No drugs, drug-making equipment or chemicals were found inside the house. He discovered that the drug manufacturing operations were being conducted in an out-building. After receiving confirmation from the police officer who accompanied him that the machine running inside the building was a pill press machine, Warrant Officer Van Schalkwyk arrested the three suspects and warned them of their rights. He did not enter the out-building at any stage but called the forensic department who properly processed the scene.

[6] It is common cause that the search warrant was defective, in that it was directed to 'all police officials' as opposed to naming the individual police officers who would conduct the search. It described the address of the premises as that reflected on the GPS, namely, 12, Marble Road, De Deur, Vereeniging (this was an incorrect address, it should have been Plot 24, Road 3). The items identified in the warrant were 'equipment, chemicals, drugs'. Both Warrant Officer Van Schalkwyk and the Acting District Court Magistrate said that they were unaware that specific police officers had to be identified by name on the warrant and that they had the *bona fide* belief that the search warrant was correct in all respects. Warrant Officer Van Schalkwyk conceded that the address was wrong, although the location of the premises was correct as per his GPS.

[7] The regional court found that because of a 'formal defect', the search warrant was invalid. Accordingly, in light of *Malherbe* and the majority in *S v Pillay and Others* (*Pillay*),[4] the evidence obtained under the warrant was inadmissible. Once the magistrate held the evidence procured under the warrant to be inadmissible, the state

[4] *S v Pillay and Others* [2004] 1 All SA 61 (SCA); 2004 (2) BCLR 158 (SCA); 2004 (2) SACR 419 (SCA) (*Pillay*) para 84.

closed its case without leading further evidence.[5] The respondents were discharged and acquitted in terms of s 174 of the CPA.[6]

[8] An appeal to the Gauteng Division of the High Court, Pretoria (the high court) was unsuccessful. The high court confirmed the regional court's interpretation of *Malherbe*, that if a search warrant is invalid, then material seized under the warrant is inadmissible. The high court further found that there had been a flagrant and deliberate disregard of the respondents' constitutional rights in that they were not told of the existence of the search warrant nor informed of their rights as suspects during the arrest. It held that the issues raised by the DPP were moot as it had, 'without provocation', closed its case after the evidence was ruled inadmissible. This, said the high court, was a 'classical case' where the DPP should have immediately reviewed the decision of the magistrate.

[9] In the first place, several of the high court's findings are factually incorrect. Warrant Officer Van Schalkwyk's assertion that he informed the respondents that he had a warrant to search the premises, and that he informed them of their rights, was not challenged. No serious accusations of disregarding the constitutional rights of the respondents were levelled against him.

[10] Second, the reference to mootness is difficult to comprehend. The mootness argument was also advanced in this Court by Mr Zwane, counsel for the respondents. It appears to be based on the misconception that once the State closed its case without leading further evidence, the issues became moot and only of academic significance. Therefore, there was no point in a remittal to the magistrates' court for the continuation of the trial as the State would have to re-open its case. This appeal, it was argued, was nothing more than a backdoor application to re-open the case which would, if allowed, undermine the rule of law and the respondents' constitutional rights (presumably to an acquittal). This reasoning does not properly take into account what the effect would be, of a finding on appeal that the evidence procured pursuant to the

[5] Ibid para 72.
[6] Section 174 of the CPA provides that 'If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty'.

search warrant, was admissible. In such an event, the acquittals would be set aside and the trial would have to proceed.

[11] Finally, it is not open to an accused person or the prosecution to appeal the outcome of a case before it has been finalised. A judgment is a prerequisite to launching an appeal. Despite the high court's reference to an immediate review being permissible, there is no suggestion that the magistrate's decision to refuse to admit the evidence amounted to a reviewable irregularity. But even if this were the case, the review of an alleged irregularity is brought at the end of the proceedings.[7]

[12] The fundamental question in this appeal is whether the regional court and the high court were correct in disallowing the evidence, on the basis that the search warrant suffered a formal defect. This has been a subject of debate over the years. Much has been said about the United States's law of rigid exclusion of any evidence improperly obtained, as opposed to the position in English law of general inclusion of any evidence that is relevant.[8] South Africa has tended towards a Canadian approach, where the decision to admit improperly obtained evidence was left largely to the discretion of the judge, taking into account the individual facts of the case. The interim Constitution contained no express provisions on how to deal with such evidence. However, the Constitution has now codified our approach to unconstitutionally obtained evidence. Section 35(5) of the Constitution provides:

'Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.'

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[7] See *S v Malindi and Others* [1990] 4 All SA 433 (AD), the longest running trial in South African legal history, at the time, where the special entries were brought after judgment.

[8] Section 78 of the Police and Criminal Evidence Act 1984 provides that:

'**Exclusion of unfair evidence.**

(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.

(3) …'

This section gives judges a discretion to admit unlawfully obtained evidence. See also *Elias v Pasmore* [1934] 2 K.B. 164; [1934] 1 WLUK 57; *Price v Messenger* [1800] 5 WLUK 45; 126 E.R. 1213 (1800); *Dillon v O'Brien and Davis* [1887] 1 WLUK 5; (1887) 16 Cox C.C. 245.

[13] Section 35(5) has been described as a qualified 'exclusionary rule of evidence',[9] which contains a constitutional directive to exclude evidence obtained in violation of the Bill of Rights, but only where the trial will be unfair if the evidence were to be admitted or would otherwise be detrimental to the administration of justice. As such, the discretion of the court is removed. Instead, a decision has to be made to ascertain whether either of the two consequences will result. If the admission would render the trial unfair, then the evidence is to be excluded. If admitted, this significantly undermines the administration of justice. But as the provision states, there may be other factors which provide a basis for the exclusion.

[14] The two legs are interrelated but separate inquiries. It is notionally possible that admitting the impugned evidence could damage the administration of justice but leave the trial fair. However, the opposite is not true and where the admission of evidence renders the trial unfair, this will always be detrimental to the administration of justice. Central to the latter inquiry is the public interest.[10]

[15] Section 35(5) is indicative of the tension between respect for the Bill of Rights and respect for the judicial process. There are competing social interests in determining whether the impugned evidence should be admissible. The one is the social imperative to bring criminals to book, especially in South Africa, with its burgeoning and uncontrollable crime rate. But public policy not only demands that the guilty are held accountable but also that the police and prosecutorial officers uphold and respect the Bill of Rights. A trial which is not fair to an accused, will bring the administration of justice into disrepute. But an overemphasis on a technicality which leads to an acquittal of an accused who has committed a serious crime, will attach public opprobrium and engender a distrust in the legal system. This too, will be detrimental to the administration of justice.

[16] Several broad principles have emerged. Initially courts distinguished where real evidence had been obtained by improper means as opposed to derivative evidence

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[9] *Andrew Barney August v The State* (962/2022) [2023] ZASCA 170 (4 December 2023) para 12. Quoting S v Kotzè [2009] ZASCA 93; 2010 (1) SACR 100 (SCA); [2010] 1 All SA 220 (SCA) para 21.
[10] *S v Tandwa and Others* [2007] ZASCA 34; [2007] SCA 34 (RSA); 2008 (1) SACR 613 (SCA) paras 116-118; *S v Mthembu* 2008] ZASCA 51; [2008] 3 All SA 159 (SCA); [2008] 4 All SA 517 (SCA); 2008 (2) SACR 407 (SCA) (*Mthembu*) para 25.

obtained from the accused themselves. Derivative evidence is generally that which is extracted through confessions and pointing outs and entails self-incrimination by the accused person. Courts more readily received improperly obtained evidence, which was real evidence, in the form of tangible objects. As this Court stated in *S v Mthembu:* 'The reason was that such evidence usually bore the hallmark of objective reality compared with narrative testimony that depends on the say-so of a witness. Real evidence is an object which, upon proper identification, becomes, of itself, evidence . . .'[11]

[17] It has been accepted that this distinction can be misleading, as highly probative real evidence is often procured as a result of a confession or admission. The more significant consideration is whether the accused was coerced into providing the evidence. Any evidence which is procured through assaults or torture will always render the trial unfair. Even where the evidence was reliable and necessary to secure the conviction, the admission of such evidence will be detrimental to the administration of justice.

[18] Of greater importance is the seriousness of the infringement of the Bill of Rights in the procurement of the evidence. Police conduct which constitutes a flagrant and deliberate disregard of the rights of the accused, will be viewed in a different light to minor or technical infringements. A rights violation is not severe where the police acted in good faith, or where their conduct was objectively reasonable. Thus, if the conduct of the police is justifiable, the impugned evidence is less likely to be excluded, even if it was obtained unconstitutionally. 'The closer the connection is between the violation of the right and the procurement of the evidence, the more likely it will be that the reception of the evidence will fall foul of one of the two conditions set out in section 35(5).'[12]

[19] In *S v Dos Santos and Another,*[13] the regional magistrate who issued the warrant was not a magistrate as defined in s 21 of the CPA, thus rendering the warrant

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[11] *Mthembu* para 22.
[12] D T Zeffertt and A P Paizes *The South African Law of Evidence* 3 ed (2017) (Zeffertt and Paizes) at 803.
[13] *S v Dos Santos and Another* [2010] ZASCA 73; 2010 (2) SACR 382 (SCA); [2010] 4 All SA 132 (SCA).

defective.[14] A search under the warrant uncovered 153 unpolished diamonds and related paraphernalia.[15] This Court, in finding that the evidence obtained under the warrant was admissible, said:

'Here the investigating team did not act in flagrant disregard of the first appellant's constitutional rights. On the contrary, they sought judicial authority for their conduct. The judicial *imprimatur* was an attempt to uphold the law in spirit and letter. None of those executing the warrant knew that it suffered a defect. Eschewing the local Magistrates' Court in favour of one located in Cape Town was designed to protect the investigation and preserve the element of surprise . . .

In those circumstances it is plain that the task team was not attempting to garner any unfair advantage for themselves. Rather it plainly was an endeavour to protect the interests of the first appellant. For that they should be commended, not penalised by having the evidence that has been secured pursuant to that warrant excluded.'[16]

[20] Similarly, in *S v Tiry and Others* (*Tiry*),[17] it was common cause that the search warrant was issued irregularly in that no specific crimes or names of possible suspects were mentioned in the warrant.[18] Notwithstanding these defects, this Court was of the view that taking the evidence as a whole, the accused had a fair trial, and the evidence of petroleum storage tanks obtained under the warrant was correctly accepted by the trial court.[19] This Court held that s 35(5) was 'not an absolute exclusionary provision for evidence obtained in violation of an accused's constitutional rights'.[20]

[21] In *S v Van Deventer and Another*,[21] the search warrant was issued in terms of the wrong statute. The court held that the violation of the appellant's rights was of a technical rather than a flagrant nature and that the police officers acted *bona fide*.[22] Moreover, if the evidence could be obtained by lawful means, the inclusion thereof would generally not render the trial unfair or be detrimental to the administration of

[14] Ibid para 21.
[15] Ibid para 3.
[16] Ibid paras 23-24.
[17] *S v Tiry and Others* [2020] ZASCA 137; 2021 (1) SACR 349 (SCA); [2021] 1All SA 80 (SCA) (*Tiry*).
[18] Ibid para 45.
[19] Ibid para 48.
[20] Ibid para 45.
[21] *S v Van Deventer and Another* 2012 (2) SACR 263 (WCC) para 50.
[22] Ibid paras 57-58.

justice. The search, in *Tiry*, yielded valuable and real evidence of a vast network of theft of petroleum products, as well as actual products stolen from Sasol.[23]

[22] It is significant that this Court's majority judgment in *Pillay,* on which the regional court relied, pre-dated the cases referred to above. The majority in *Pillay* found that because false information was put up to obtain permission to monitor certain phone calls, derivative evidence obtained pursuant to the calls was inadmissible.[24] This included real evidence in the form of bank notes concealed in the roof. The minority would have admitted the evidence, *inter alia*, on the basis that the concealed money was real evidence which would have existed independently of the rights violation.[25] The exclusion of the evidence, resulting in an acquittal, would result in a loss of respect, not only for the judicial process, but also for the Bill of Rights, stated the minority.[26]

[23] In this matter, both the regional court and the high court placed great reliance on this Court's decision in *Malherbe*. There, pornographic material was discovered on Mr Malherbe's laptop, pursuant to a defective search warrant. Once the material was found to be admissible, Mr Malherbe made formal admissions in which he admitted to being in possession of pornographic images. He was found guilty on those counts. As observed by the Court:

'Section 35(5) of the Constitution provides that evidence obtained in a manner that violates the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice. In this case there can be no doubt that the decision that the search warrant was valid and that the items seized from Mr Malherbe's home were lawfully seized, compelled the making of the admissions. Therefore, the evidence obtained through the invalid search warrant rendered the trial unfair and should have been excluded. Anything done pursuant thereto was unlawful.'[27]

[24] That Mr Malherbe felt compelled to admit to the offences once the evidence obtained under an unlawful warrant was admitted, had a manifest impact on the

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[23] *Tiry* para 48.
[24] *Pillay* para 98.
[25] Ibid para 16.
[26] Ibid para 17.
[27] *Malherbe* para 10.

fairness of his trial. When this Court stated that the evidence seized in terms of an invalid search warrant should have been excluded, this was with specific reference to the facts in that case, rather than a general statement of the law.

[25] Zeffertt and Paizes remarked that s 35(5), at first blush, seems to be a departure from the discretionary approach of pre-1996 but once the connection between fairness and interests of justice are fully understood, one could be inclined to think the distinction could be one of form rather than substance.[28] In my view s 35(5), best understood, is not so much a balancing test or a discretionary approach, but a rule which provides for the exclusion if one of the two conditions is met. Whether the admission of evidence would render the trial unfair is responsive to a range of issues, often specific to a particular trial. These include the nature of the evidence, its probative value and how it was obtained, particularly the conduct of the police in its procurement. Careful consideration should be given to these factors. The extent of the procedural failure on the part of the police should be viewed in the light of possible detriment that would be caused to the administration of justice by incentives not to follow due process. Holistic consideration of all these would then permit a conclusion of whether the trial is to be rendered unfair, or otherwise detrimental to the administration of justice.

[26] The complaint here is that the search warrant was formally defective in two aspects, namely the incorrect address and because it was addressed to all police officers, without specifically naming Warrant Officer Van Schalkwyk. As far as the address is concerned, it was not unreasonable to provide the address which was reflected on the GPS. In any event, the correct premises were identified. Regarding the reference to 'all police officers', this was the pro forma search warrant provided to the police and available at all police stations at the time. Both the Acting Magistrate and Warrant Officer Van Schalkwyk were unaware of the findings of the Constitutional Court that a search warrant must be directed at a specific police officer,[29] and genuinely believed that the pro forma warrant was correct. This was not unreasonable

[28] Zeffertt and Paizes at 799.
[29] *Minister for Safety and Security v Van Der Merwe and Others* [2011] ZACC 19; 2011 (5) SA 61 (CC); 2011 (9) BCLR 961; 2011 (2) SACR 301 (CC) para 55.

in the circumstances and certainly cannot be attributed to any *male fides* on the part of the police.

[27] Moreover, as conceded by Mr Zwane, Warrant Officer Van Schalkwyk would have been well within his rights to enter without a search warrant in terms of s 22 of the CPA. This section provides that a police officer who, on reasonable grounds, believes that a search warrant would have been issued to him if he had applied, and that the delay in obtaining the warrant would defeat the object of such a search, may enter and seize items on a premises. Warrant Officer Van Schalkwyk agreed that it was not necessary for the police to obtain a search warrant before entering the premises. Nonetheless, he acted with greater circumspection than necessary and applied for a warrant.

[28] There are other factors which weigh in favour of admitting the evidence, despite the formal defect. The search warrant unearthed real evidence in the form of tangible objects – the drugs and the drug manufacturing equipment, the probative value of which was unassailable. The impact of the rights violation was not severe. It did not stem from deliberate conduct on the part of the police and there was no suggestion of coercion. Viewed in its totality, the conduct of the police was reasonable.

[29] Warrant Officer Van Schalkwyk was at pains to point out that there had been no complaints to date about the manner in which the search was conducted. He informed the respondents of their right to an attorney. He told them that he had received information that drugs were being manufactured on the premises and that the police had come to execute a search warrant based on information received. It is common cause that the evidence could have been procured by lawful means, namely conducting a search and seizure without a warrant. Nonetheless, Warrant Officer Van Schalkwyk sought judicial sanction for the search. He should not be penalised for this.

[30] On the facts of this particular case, the admission of the impugned evidence would not render the trial unfair or otherwise bring the administration of justice into disrepute. The appeal should be upheld.

[31] Finally, it is necessary to deal with the conduct of the respondents' attorneys in this matter. When no heads of argument were filed, in early January 2025, the Registrar of this Court contacted VM Mashele Attorneys, who represented the respondents in the high court. She was informed by Mr Victor Mashele that he had withdrawn and that the new attorney on record was Mr Phaladi Kanyane. Despite a request for a notice of withdrawal and a notice of appointment of the new attorneys, none was forthcoming. (Copies, without proof of service, were provided after the hearing at the request of the Court on 25 April 2025).

[32] On 16 January 2025, the Registrar directed that VM Mashele Attorneys file their heads of argument within 10 days. She was informed by Phatshoane Henny Attorneys, the Bloemfontein correspondents, that they had received an email from VM Mashele Attorneys to file heads of argument, but Mr Mashele refused to formally appoint them or pay a deposit. Despite being non-compliant, on 28 February 2025 the Registrar accepted the heads of argument signed by Mr Zwane, apparently instructed by Mr Kanyane.

[33] On 7 March, the date of the appeal, neither Counsel nor the attorneys for the respondents were present. Counsel for the appellant, Ms Maphalala, indicated that she had fortuitously discovered a few days prior that Mr Siphelele Zwane (Mr Zwane) was counsel for the respondents. She called him during a brief recess, and he informed her that his father was sick, and he had to turn back. The matter was postponed to 28 March 2025. The State undertook to ensure that the respondents would be personally notified of the date. Notices of set down were sent by the Registrar to all the legal representatives.

[34] On 28 March 2025, Mr Zwane and his attorney, Mr Phaladi Kanyane were present. In response to the bench's query as to their non-appearance, we were informed that Mr Zwane had been on his way to court when he was notified that his child was ill. He immediately returned to Johannesburg. The attorney, Mr Kanyane, we were informed, arrived at Court at about 12h00 due to problems with traffic, although he did not notify anyone at Court of his presence.

[35] Such conduct is unbecoming of legal practitioners. It shows disregard for this Court and the legal profession. The legal practitioners were informed that this Court is considering reporting them to their professional bodies and were invited to make affidavits explaining their conduct. Either inadequate explanations, or no affidavit at all, have been provided. A copy of this judgment will be made available to the relevant professional bodies, together with the affidavits, with a request that the conduct of Mr Mashele, Mr Kanyane and Mr Zwane be investigated.

[36] Had it not been in the interests of justice to proceed with the hearing, the matter would have been struck from the roll.

[37] The following order is made:

1 The appeal is upheld.

2 The order of the full bench is set aside and substituted with the following:

‘1 The appeal is upheld.

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

(a) The material seized under the search warrant is found to be admissible.

(b) The acquittals on counts 1, 2, 3, 4 and 5 are set aside.’

3 The matter is remitted back to the regional court to continue with the trial.

C E HEATON NICHOLLS

JUDGE OF APPEAL

Appearances

For the appellant:	N G Maphalala (with D Molokomme)
Instructed by:	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions, Bloemfontein
For the respondents:	S G Zwane
	Phaladi Kanyane Attorneys, Soweto.