THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 1182/2018

In the matter between:

NEIL MALHERBE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Malherbe v S* (1182/2018) [2019] ZASCA 169 (29 November 2019)

Coram: Wallis, Mbha and Mbatha JJA and Koen and Hughes AJJA

Heard: 19 November 2019

Delivered: 29 November 2019

Summary: Search warrant in terms of s 21(1)*(a)* of the Criminal Procedure Act 51 of 1977 – must be issued on the basis of information on oath – statement on basis of which warrant issued not sworn – warrant invalid – items seized under warrant inadmissible – admissions made after warrant ruled to be valid – such compelled by the decision that the warrant was valid – breach of fair trial rights in terms of s 35 of the Constitution.

ORDER

On appeal from: Gauteng Divison of the High Court, Mpumulanga Circuit Court (Mudau J and Roelofse AJ, sitting as a court of appeal from the Regional Court, Nelspruit):

The appeal succeeds and the convictions and sentence are set aside, including the order in terms of s 120(4) of the Children's Act 38 of 2005.

JUDGMENT

Mbatha JA (Wallis and Mbha JJA and Koen and Hughes AJJA concurring):

[1] The appellant, Neil Malherbe, was arraigned in the Regional Court, Nelspruit, Mpumalanga, on seven counts of contravening s 24B(1)*(a)* and one count of contravening s 24B(1)*(c)* of the Films and Publication Act 65 of 1996 (the Act). Four of these counts related to the possession of four films and one to the importation of another film. The sixth count related to his possession of a book, the seventh to senteen images discovered on his laptop and the last to five images found on his notebook. Each of the films, the book and the images were said to constitute depictions of child pornography, an expression that is broadly defined in s 1 of the Act. All of these items had been seized pursuant to a search warrant inrespect of Mr Malherbe's home issued by a magistrate, Mr Oosthuizen. Mr Malherbe tendered a plea of not guilty to all counts.

[2] The trial commenced with a trial within a trial in which the appellant challenged the validity of the search warrant. The trial court ruled against the appellant by finding

that the search warrant was validly obtained. He thereafter made admissions in terms of s 220 of the Criminal Procedure Act (CPA) wherein he admitted being found in possession of three images of child pornography in counts 3, 7 and 8, of which one was from the movie 'Barnens Ö: Children's Island', purchased from an online company called Amazon. He was convicted of counts 3, 7 and 8 and was accordingly sentenced on 27 October 2017 to three months' imprisonment in respect of each count. The sentences were wholly suspended for a period of 3 years on condition that the appellant was not to be convicted of contravening s 24B(1)(*a*) of the Act, during the period of the 3 years suspension. The court, as it was obliged to do, made an order in terms of s 120(4) of the Children's Act 38 of 2005, that the appellant was found unsuitable to work with children and ordered his name to be entered into Part B of The National Child Protection Register. In accordance with s 34 of the CPA, the images were forfeited to the state to be destroyed. The appellant's application for leave to appeal was dismissed. On petition in terms of s 309 of the CPA, he was granted leave to appeal against both the conviction and sentence.

[3] The appeal to the Gauteng Division of the High Court, sitting as the Mpumalanga Circuit Court, against both the conviction and sentence failed. The high court set aside the sentence imposed by the regional court and remitted the matter to the regional court for reconsideration of the sentence in the light of the comments made in the judgment by the full bench. With special leave of this court, the appeal against both conviction and sentence serves before this court.

[4] There were significant problems with Mr Malherbe's conviction on both count 3 and count 8. The former related to the possession of a film. It was unclear from the charge sheet whether he was in fact, being charged with the possession of a film that

had not been rated by the Film and Publication Board, a matter which no evidence was presented. Furthermore, the conviction was not in relation to the film, but to a single image from the film. Count 8 was based on one of two images found on his laptop, whereas the charge sheet on that count related to other images found on his notebook. The evidence did not support a conviction on this count. The two images from the laptop could at best have supported the conviction on count 7, which was based on images found on his laptop. However, in view of the conclusion I have reached on the validity of the search warrant, it is unnecessary to consider these issues any further. Nor is it necessary to consider whether the definition of 'child pornography' in the Act can withstand constitutional scrutiny.

[5] The crisp issue was whether the trial court was correct in holding that the search warrant issued in terms of s 20 and 21[1] of the CPA were valid. The appellant

[1] Section 20: 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.
Section 21: (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.
(3) (*a*) A search warrant shall be executed by day, unless the person issuing the warrant in writing authorizes the execution thereof by night.
(*b*) A search warrant may be issued on any day and shall be of force until it is available, by a person with like authority.
(4) A police official executing a warrant under this section or section 25 shall, after such execution, upon demand of any person whose rights in respect of any search or article seized under the warrant have been affected, hand to him a copy of the warrant.

challenged the validity of the search and seizure warrant at the outset of the trial. After the trial within the trial, the learned magistrate found that there was substantial compliance with the provisions of s 20 and 21 of the CPA. The appellant then made certain admissions in terms of s 220 and the State closed its case without leading any further evidence. Upon that basis he was convicted and sentenced.

[6] The provisions of s 21(1)(*a*) authorises magistrates and justices of peace to issue search warrant. Furthermore, the application therefore must be made on the basis of information on oath. In *Thint (Pty) Ltd v National Director of Public Prosecutions & Others; Zuma & Another v National Director of Public Prosecutions & Others*[2] the Constitutional Court held that certain jurisdictional factors also need to be met 'first, that there is a reasonable suspicion that an offence, which might be a specified offence in terms of the CPA, has been committed; and secondly, that there are reasonable grounds to believe that an item that has a bearing or might have a bearing on the investigation is on or is suspected to be on the premises to be searched. Finally, the judicial officer must consider whether it is appropriate to issue a search warrant'.

[7] The fundamental problem in this case is that the trial court misdirected itself by accepting Captain Swart's statement as a sworn statement. In lieu of the oath, it merely recorded that 'I hereby certify that the deponent knows and understands the contents of this statement and that the deponent's signature was placed here in my presence on 2013.07.12 at 10:20 White River'. This breached the specific requirement of s 21(1)(*a*) of the CPA that the information must be on oath and that there must be reasonable grounds for believing that the item is in the possession or under the control of any person. Captain Swart testified that even when he appeared before Mr

[2] *Thint (Pty) Ltd v National Director of Public Prosecutions & Others; Zuma & Another v National Director of Public Prosecutions & Others* 2008 (2) SACR 421 (CC); 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) para 85.

Oosthuizen, no oath was administered to him. Mr Oosthuizen also confirmed that he did not administer the oath nor did he make any further enquiries from Captain Swart regarding the information relied upon by the police.

[8] The law requires strict adherence to the requirements of s 21(1)(*a*) of the CPA. This is clear from the authorities. A search warrant issued on the basis of an unattested statement is invalid.[3] If the search warrant is issued on the basis of both a sworn statement and an examination of the police docket containing unsworn documents it is likewise invalid.[4] In similar vein, where evidence is required to be given under oath in terms of s 162 of the CPA, the testimony of a witness who has not sworn to the truth of the evidence, or made a proper affirmation, or been properly admonished to speak the truth, as provided for in the CPA 'lacks the status and character of evidence and is inadmissible'.[5]

[9] The magistrate should have held that the search warrant was issued unlawfully and was invalid. On that basis none of the material seized under the warrant would have been admissible. It was the failure of the trial court to declare the warrant invalid, which induced the appellant to make admissions in terms of s 220 of the CPA. Furthermore, the admissions were insufficient to justify a conviction. They were an admission that there were three images, one taken from the movie, 'Barnens Ö: Children's Island', and the two others downloaded from the internet to the appellant's laptop. It was admitted without reference to the Act, or the definition of this expression, that these three images displayed scenes amounting to child pornography of persons under the age of 18 years. The latter was at best for the prosecution an

[3] *Tioch v The Magistrate, Riversdale and others* [2007] 4 All SA 1064 (C).
[4] *Naidoo and another v Minister of Law and Order and another* 1990 (2) SA 158 (W) at 160B-H.
[5] *S v Matshivha* [2013] ZASCA 124 (SCA) para 10; 2014 (1) SACR 29 (SCA); *S v Naidoo* 1962 (2) SA 625 (A).

admission of a matter of law. In addition, those admissions did not show that the appellant had the requisite *mens rea*, which entails knowledge of possession and of unlawfulness of his possession.

[10] 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.

[11] The appeal succeeds and the convictions and sentence are set aside, including the order in terms of s 120(4) of the Children's Act 38 of 2005.

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Y T Mbatha
Judge of Appeal

Appearances

For the Appellants:	M R Hellens SC (with him N Ferreira) Instructed by: Richard Spoor Inc. Attorneys, White River Webbers Attorneys, Bloemfontein
For the Respondent:	A I S Poodhun Instructed by: Director of Public Prosecutions, Mbombela