THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 598/10

In the matter between:

Minister of Safety and Security	First Appellant
Superintendent Noel Graham Zeeman	Second Appellant
Paul Christiaan Louw NO	Third Appellant

and

Mustafa Mohamed	First Respondent
Omar Hartley	Second Respondent

Neutral citation:	*Minister of Safety & Security v Mustafa Mohamed* (598/10) [2011] ZASCA 134 (21 September 2011)
Coram:	NAVSA, HEHER, CACHALIA, SNYDERS JJA AND PLASKET AJA
Heard:	**26 August 2011**
Delivered:	**21 September 2011**
Summary:	**Validity of warrant – ss 20 and 21 of Criminal Procedure Act 51 of 1977 – grounds of appeal not extended.**

ORDER

On appeal from: Western Cape High Court (Cape Town) (Louw, Moosa and Allie JJ sitting as court of appeal):

1 The appeal is upheld with costs, including, in respect of the first and second appellants, the costs of two counsel;

2 The order of the court below is set aside and replaced by the following:

'(a) The application by the third appellant to lead further evidence is allowed with costs;

(b) The appeal is upheld with costs;

(c) The order of the court below is set aside and replaced by the following:

"The application is dismissed with costs."'

JUDGMENT

SNYDERS JA (Navsa, Heher, Cachalia JJA and Plasket AJA concurring)

[1] This matter commenced in the Western Cape High Court, Cape Town (Samela AJ sitting as court of first instance) and proceeded on appeal to the full court of that division (Louw, Moosa and Allie JJ) with the leave of the former court. The full court was split in their decision on appeal, Louw J being the minority. This court gave special leave to appeal to it.

[2] The first appellant is the Minister of Safety and Security (the Minister). The second appellant, Superintendent Zeeman (Zeeman), was at all relevant times in the employ of the Minister and acted in that capacity. The third appellant is Magistrate Louw (the

Magistrate) in his official capacity. The first and second respondents, Messrs Mohamed and Hartley, occupied premises where Zeeman conducted a search and made seizures in terms of a warrant granted by the Magistrate. The respondents applied to the court of first instance for an order setting aside the warrant and for the return of all the items seized. They were granted such an order. On appeal the majority decision in the court a quo, by and large, confirmed that order, but for very different reasons.

[3] On 24 January 2008 Zeeman applied for a search warrant in terms of ss 20 and 21(1) of the Criminal Procedure Act 51 of 1977 (the Act). The Magistrate granted a warrant on the strength of information that was placed before him. On 25 January 2008 Zeeman and several of his colleagues went to the premises identified in the warrant and executed the warrant. The first respondent lived at 16 Axminster Street, Muizenberg, and was at home when the warrant was executed. The second respondent and his family lived at adjacent premises, 16A Axminster Street, Muizenberg, and were also at home when the warrant was executed. It is common cause that a large number of items were found and seized at 16 Axminster Street. Nothing was found or seized at 16A Axminster Street. The basis for the second respondent's participation in the proceedings has never received attention and it remains dubious. Be that as it may, it was this experience that motivated them to approach the court of first instance for an order that the 'searches and seizures . . . were unlawful' and for the 'setting aside [of] the search warrants and directing that all objects/items seized from [their] homes during the raids carried out on the 25th January 2008 be restored forthwith to [them]'.[1]

[4] The respondents raised several grounds for their attack on the validity of the warrant. Those grounds can be summarised as follows:

[1] A third applicant joined in the proceedings before the court of first instance in respect of another warrant and other premises, but withdrew his application before the delivery of the answering affidavits.

(a) There was no ‘credible information that would give rise to the reasonable suspicion’ required by the Act;
(b) Their rights to silence and rights to an attorney were not explained to them, nor were they informed that anything they said might be held against them;
(c) The appellants are guilty of ‘oppressive conduct’ as the application for the warrant was withheld from them;
(d) No allegations were made in the proceedings before the Magistrate justifying the ex parte nature of the proceedings before him;
(e) The Minister and Zeeman failed to disclose material information to the Magistrate namely that the respondents had no previous convictions;
(f) The Magistrate did not apply his mind when he granted the warrant;
(g) The warrant was issued in overly broad terms and there is no rational connection between the wide terms of the warrant and the grounds for the warrant;
(h) No safeguards were built into the warrant as is usually the case in Anton Piller orders.

[5] The vague nature and superficiality of most of these grounds probably contributed to the reason why they were not pursued before the court of first instance. A completely different point, not adumbrated in any of the affidavits, arose before Samela AJ.

[6] By the time the matter came before Samela AJ nobody had included a record of the proceedings before the Magistrate in the papers. The Minister and Zeeman placed before the court, under cover of a practice note, a copy of the affidavit by the latter that served before the Magistrate. Although the essence of the allegations made in that affidavit was repeated by Zeeman in the answering affidavit, it was not attached to the papers because Zeeman alleged that it contained sensitive information that would adversely affect his investigation if made public. The copy sought to be introduced was unsigned and unattested. Thus the point arose that there was no compliance with s 21(1) of the Act because what served before the Magistrate was not ‘information on oath’. The Minister and Zeeman then tendered what was foreshadowed in the

answering affidavit, namely, to make the original affidavit available to Samela AJ. This step was objected to by the respondents and refused by the learned judge.

[7] The Magistrate stated on oath, in an affidavit filed as part of the Minister's and Zeeman's case, that he granted the warrant in terms of the provisions of ss 20 and 21(1) after having had regard to an affidavit placed before him, deposed to by Zeeman on 24 January 2008. Similarly Zeeman stated on oath that he placed an affidavit before the Magistrate in order to obtain the relevant warrant. None of these factual allegations was contested by the respondents. By ignoring these allegations and not having regard to the best evidence available the court of first instance reached the extraordinary factual conclusion that the Magistrate 'based his belief on a document which he mistakenly believed to be an affidavit', that it was not proper for him to have granted the warrant and that he acted contrary to the provisions of the enabling statute.[2]

[8] The findings by the court of first instance placed the Magistrate, who up to that stage had not opposed the relief claimed, in an invidious position. Findings of fact had been made in relation to his professional conduct which had negative implications for him and were contrary to the truth. This necessitated that the Magistrate join the fray and, together with the Minister and Zeeman, seek leave from the court of first instance to appeal its decision.

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[2] This conclusion ignored some fundamental approaches in the conduct of litigation, recently restated in *Minister of Land Affairs and Agriculture & others v D & F Wevell Trust & others* 2008 (2) SA 184 (SCA) at 200C:'It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest – the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. The position is worse where the arguments are advanced for the first time on appeal. In motion proceedings, the affidavits constitute both the pleadings and the evidence: *Transnet Ltd v Rubenstein*, and the issues and averments in support of the parties' case should appear clearly therefrom. A party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted.' The reference is to *Transnet Ltd v Rubinstein* 2006 (1) SA 591 (SCA); [2005] 3 All SA 425 (SCA).

[9] The leave that was granted to appeal to the court a quo was expressed in the following terms:

'However, I wish to make this very clear that in as far as the so-called affidavit is concerned I still believe that it was not an affidavit but a document. However another Court might come to a different conclusion, and on that basis alone, therefore, I will GRANT THE LEAVE TO APPEAL TO THE FULL BENCH OF THIS DIVISION and the costs will be costs in the appeal.'

[10] When the matter served before the court a quo, the Magistrate brought an application to lead further evidence being 'a copy of the affidavit deposed to by Noel Zeeman, the second appellant, . . . (with sensitive details likely to compromise or jeopardize the relevant investigation being expunged from it)' which had supported the application to him for the warrant. The full court rightly accepted the document as one properly deposed to and attested. The issue that was on appeal ought rightly to have been considered to be at an end. The respondents pursued some arguments in opposition to the appeal, but none of them was upheld. There was no cross-appeal by them.

[11] Curiously, Louw J, who concluded that the appeal had to be upheld with costs, was in the minority. Moosa J, with Allie J concurring, dismissed the appeal after adopting a course that is explained in the judgment as follows:

'During the hearing of the matter in this court, counsel for the parties were asked what would happen to the other issues raised by the First Respondent in his papers, but which were not decided, should this court uphold the appeal on the main ground in question. They were specifically referred to the challenge that the warrant was over-broad. It appears that counsel were taken by surprise as they had not prepared for such eventuality. The court indicated to them that they could submit further heads of argument in respect of those issues, but they did not take up the offer. Adv Joubert SC, for the First and Second Appellant, submitted that there was no merit in the other issues and more particularly said that the warrant was not overbroad. Adv Jaga, for the Third Appellant, supported Adv Joubert in those submissions. Mr Omar, for

the Respondents, was somewhat ambivalent. He indicated that the matter ought to be referred back to the court *a quo*, but at the same time said that the Respondents would like to see that the matter is brought to finality as soon as possible.'

[12] I need to interrupt myself at this stage to refer to an argument on behalf of the respondents in this court that the order of the court a quo does not reflect that the majority meant to refuse the application to lead further evidence with costs against all the appellants. Although the order by the court a quo does not reflect an order allowing the application to lead further evidence and contains some other obvious errors and deficiencies, to which I refer later, it is very clear from the body of the judgment that not only did Moosa and Allie JJ agree with the receipt of the further evidence, but they proceeded on the basis that such further evidence put the main issue in the appeal beyond dispute and went on to decide the appeal on a completely different basis. In addition, there was no attempt by the respondents to cross-appeal or obtain a corrected order from the court a quo. The belated, opportunistic suggestion by the respondents' counsel during the hearing in this court that the appeal should be postponed to enable the order of the court a quo to be corrected, has no merit whatsoever.

[13] Without hearing argument by any of the parties the majority in the court a quo decided as follows:

'The articles/documents set out in annexure "B" to the warrant, on the face of it, appear to be too general, over-broad and its terms are not reasonably clear. The warrant is, in my view, not reasonably intelligible, in that it does not reasonably convey to the persons participating in the search as per annexure "A" and the suspects and occupants of the premises the ambit of the search it authorises. The scope of the warrant gives, in my view, untrammelled power to search the said premises and seize from such premises any articles/documents they see fit within the range of the various classes of items.'

[14] In the light of the conclusion that the warrant was overbroad in its terms, the court a quo also found that the Magistrate had not exercised his mind in granting the warrant. That conclusion was expressed as follows:

'In the light of my findings, the only reasonable inference I can draw is that the Third Appellant had failed to apply his mind properly or at all, firstly when it came to the jurisdictional requirements for the authorisation of the warrant in terms of section 21 read with section 20 of the Act and secondly, when it came to the settling of the terms of the warrant. I say so for the following reasons: in the first place, the Third Appellant misconceived his powers, role and function and made no input in the crafting of the warrant for which he was responsible as a judicial officer; in the second place, the terms and ambit of the warrant that was presented to him by the Second Appellant, was accepted and authorised uncritically by him without him having made any input into the terms and ambit of it; in the third place, he failed to take cognisance of the omission of the dates from the warrant which, according to the Second Appellant, contains time periods relevant to the documents required, and which were determined with reference to the periods during which the suspects committed the offence and, in the fourth place, the terms of the warrant were substantially too general, over-broad and not reasonably clear.'

[15] The approach of the majority of the court a quo contains at least two fundamental errors, one relating to the procedure and the other to the principles applicable to search warrants. I proceed to deal with these in turn.

[16] The court a quo relied on *Douglas v Douglas* [1996] 2 All SA 1 (A), *Ngqumba & 'n ander v Staatspresident & andere; Damons NO & andere v Staatspresident & andere; Jooste v Staatspresident & andere* 1988 (4) SA 224 (A), *S v Safatsa & others* 1988 (1) SA 868 (A) and *R v Mpompotshe & another* 1958 (4) SA 471 (A) to come to the following conclusion:

'As far as the adjudication of the other issues is concerned, the question which must be decided is, whether the matter should be referred to the court *a quo* for consideration or whether this court should adjudicate upon those issues. I am of the view that this court is in as good a

position as the court *a quo* to decide such issues for the following reasons: Louw J, in his judgment, has partially adjudicated on the question of whether the Respondents should have been informed of any of their constitutional rights before the warrant was executed; the parties themselves are keen to bring the matter to finality as soon as possible; should the matter be referred to the court *a quo*, a delay would ensue before the issues are decided and, if the parties are then unhappy with the result, the matter would have to come to a full bench again on appeal; such process would entail the incurring of unnecessary costs; the issues are crisp and the parties have elected not to submit further heads of argument in respect of the issues. In the circumstances, I conclude that it will be in the interest of the administration of justice that this court decides the outstanding issues instead of referring the matter back to the court *a quo* for consideration.'

[17] Only a few crisp points need to be made about this conclusion. There were no further issues before the court a quo that needed to be decided – not by it nor by the court of first instance. Leave was granted on one issue and one issue alone. None of the parties at any stage sought to extend the issues in the appeal. None of the parties was heard on the issues raised *mero motu* by the majority in the court a quo. The authority relied upon by the majority in the court a quo, correctly read and applied, could not have led to the conclusion arrived at. The legal position is succintly summarized in *Safatsa* at 877A-D:

'It is generally accepted that leave to appeal can validly be restricted to certain specified grounds of appeal . . . In practice this is frequently a convenient and commendable course to adopt, especially in long cases, in order to separate the wheat from the chaff. On the other hand, this Court will not necessarily consider itself bound by the grounds upon which leave has been granted. If this Court is of the view that in a ground of appeal not covered by the terms of the leave granted there is sufficient merit to warrant the consideration of it, it will allow such a ground to be argued. . . . In my view, however, it requires to be emphasised that an appellant has no right to argue matters not covered by the terms of the leave granted. His only "right" is to ask this Court to allow him to do so.' (My emphasis)

[18] The principle above was stated in relation to this court as it had jurisdiction to extend the grounds on which leave to appeal was granted. The court a quo had no such jurisdiction. If the appellants, for example, were not satisfied with the fact that Samela AJ granted leave to appeal on one ground alone, they had to direct a petition to this court, not the full court, to extend the grounds. Thus, even if any of the parties asked the court a quo to extend the grounds of appeal – other than when a point of law arose – it had no jurisdiction to do so. *Harlech-Jones Treasure Architects CC & others v University of Fort Hare* 2002 (5) SA 32 (ECD) at 51I-52B and *Queenstown Girls High School v MEC, Department of Education, EC* 2009 (5) SA 183 (Ck) at 186G-187A.

[19] While it is strictly unnecessary to decide any further issue, the judgment of the majority on the search warrant reveals so clear a departure from established principles as to require this court to ensure that it will not in future serve as authority for the reasoning contained therein.[3]

[20] The court a quo referred to several cases in which warrants of this nature were discussed but somehow the principles that emerge from those cases were incorrectly applied.[4] Hence I proceed to refer to the relevant principles again. Search warrants are statutory creations designed to assist the state in its fight against crime. It has been held that the impact it has on an individual's right to privacy is necessary in order to strike a balance between the interests of the state and that of the individual. In *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others: In re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others* 2001

[3] See in this regard *National Director of Public Prosecutions v Moodley & others* 2009 (2) SA 588 (SCA) para 10 where even after a point was abandoned that court was concerned that a judgment on that point did not serve as a precedent.

[4] The authorities referred to are: *Thint (Pty) Ltd v National Director of Public Prosecutions & others; Zuma v National Director of Public Prosecution & others* 2009 (1) SA 1 (CC); *Bernstein & others v Bester & others NNO* 1996 (2) SA 751 (CC); *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others: In re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others* 2001 (1) SA 545 (CC); *Powell NO & others v Van der Merwe NO & others* 2005 (5) SA 62 (SCA); *Toich v The Magistrate, Riversdale & others* 2007 (2) SACR 235 (C).

(1) SA 545 (CC) the constitutionality of a search warrant in terms of s 29 of the National Prosecuting Authority Act 32 of 1998 (the NPA Act) was considered and decided. That section requires reasonable grounds to exist for a suspicion that a crime has been committed, a lesser requirement than that contained in ss 20 and 21 of the Act. Langa J wrote at paras 54 and 55:

'I now turn to weigh the extent of the limitation of the right against the purpose for which the legislation was enacted. There is no doubt that search and seizure provisions, in the context of a preparatory investigation, serve an important purpose in the fight against crime. That the State has a pressing interest which involves the security and freedom of the community as a whole is beyond question. It is an objective which is sufficiently important to justify the limitation of the right to privacy of an individual in certain circumstances. The right is not meant to shield criminal activity or to conceal evidence of crime from the criminal justice process. On the other hand, State officials are not entitled without good cause to invade the premises of persons for purposes of searching and seizing property; there would otherwise be little content left to the right to privacy. A balance must therefore be struck between the interests of the individual and that of the State, a task that lies at the heart of the inquiry into the limitation of rights.

On the proper interpretation of the sections concerned, the investigating directorate is required to place before a judicial officer an adequate and objective basis to justify the infringement of the important right to privacy. The legislation sets up an objective standard that must be met prior to the violation of the right, thus ensuring that search and seizure powers will only be exercised where there are sufficient reasons for doing so. These provisions thus strike a balance between the need for search and seizure powers and the right to privacy of individuals. Thus construed, s 29(5) provides sufficient safeguards against an unwarranted invasion of the right to privacy. It follows, in my view, that the limitation of the privacy right in these circumstances is reasonable and justifiable.'

[21] That conclusion was supported in the judgment by reasoning to the effect that the relevant statute already embodies the constitutional safeguards to justify the infringement on the right to privacy. The reasoning is apparent from paras 35, 37, 38, 40 and 42, which I quote:

‘The section is an important mechanism designed to protect those whose privacy might be in danger of being assailed through searches and seizures of property by officials of the State. The provisions mean that an investigating director may not search and seize property, in the context of a preparatory investigation, without prior judicial authorisation. . . .

It is implicit in the section that the judicial officer will apply his or her mind to the question whether the suspicion which led to the preparatory investigation, and the need for the search and seizure to be sanctioned, are sufficient to justify the invasion of privacy that is to take place. On the basis of that information, the judicial officer has to make an independent evaluation and determine whether or not there are reasonable grounds to suspect that an object that might have a bearing on a preparatory investigation is on the targeted premises. . . .

It is also implicit in the legislation that the judicial officer should have regard to the provisions of the Constitution in making the decision. The Act quite clearly exhibits a concern for the constitutional rights of persons subjected to the search and seizure provisions. That is the apparent reason for the requirement in s 29(4) and (5) that a search and seizure may only be carried out if sanctioned by a warrant issued by a judicial officer. . . .

The concern for the constitutional rights of those affected by the invasion of privacy as a result of the execution of a search warrant is also apparent, as stated earlier, from the provisions of s 29(2) which require the execution of a search warrant to be conducted with strict regard to decency and order, including respect for a person’s right to dignity, to personal freedom and security and to personal privacy. . . .

Sections 20 and 21 of the Criminal Procedure Act require that searches be undertaken in connection with criminal investigations only if there is reasonable suspicion that an offence has been committed, and that the search is designed to secure evidence of such an offence.’

[22] There is nothing in the differences between s 29 of the NPA Act and ss 20 and 21 of the Act to justify a different conclusion to the one arrived at in *Hyundai*. The relevant sections provide:

’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.

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.'

[23] In addition, s 29 of the Act adds a further safeguard, similar to the one referred to in para 38 of *Hyundai*:

'A search of any person or premises shall be conducted with 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.'

[24] The constitutionality of ss 20 and 21 and therefore its impact on the respondents' rights to privacy has correctly not been attacked in these proceedings. Therefore, the starting point in a consideration of the validity of the warrant is to establish whether the warrant complies with the relevant sections. To this Nugent JA added, in his majority

judgment in *National Director of Public Prosecutions & others v Zuma & another* [2008] 1 All SA 197 (SCA) [5]at para 76:

'But there are two criteria for validity that will indeed apply to all warrants for search and seizure on account of their nature alone. A warrant is no more than a written authority to perform an act that would otherwise be unlawful. Like any other written authority it must obviously be intelligible ("capable of being understood") for it must be possible to determine with certainty the scope of its authority. A warrant must also authorise no more than is permitted by its authorising statute. . . .'

[25] The information placed before the Magistrate by Zeeman that motivated the granting of the warrant reveals that Zeeman had been investigating allegations against the individuals mentioned in the warrant since August 2007. He alleged that he was in possession of affidavits from informants that the first respondent was the leader of an organization that was formed to work towards the detonation of explosive devices at targets in South Africa in an attempt to persuade the South African Government to stop following democratic and capitalist principles. In order to pursue this ideal the individuals involved had obtained from the internet a formula for the manufacture of explosive devices and had already bought some of the elements needed to do so. The information also revealed that several members of this organization had been recruited to execute the detonation of these devices. Zeeman also alleged that the information obtained as a result of his investigation showed the commission, suspected commission and planned commission of several possible crimes, including high treason, terrorism, conspiracy to commit murder and the contravention of several sections of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004. Four individuals were identified as being involved in the organization and five premises were identified at which items relating to the activities of the organization had been kept under the control of the occupants of the premises.

[5] Hereafter referred to as *Zuma*.

[26] The items seized from 16 Axminster Street included a computer hard drive that contained directions to manufacture improvised explosive devices, video films of explicit scenes of murders, hydrochloric acid, acetone and peroxide. Zeeman's allegations of what was found on the searched premises are not disputed, nor are the allegations by Captain P J Bester, an explosives expert in the employ of the Minister, that hydrochloric acid, acetone and peroxide are chemicals used in the manufacture of improvised explosive devices.

[27] The material placed before the Magistrate disclosed a reasonable suspicion of the commission of the crimes mentioned, by the persons mentioned and that the articles identified were at the premises identified. Some of the articles identified were found at the premises of the first respondent and confirmed the reasonable suspicion held by Zeeman, disclosed by him and accepted by the Magistrate. The objective standard set in the Act, together with the judicial oversight, were important requirements that were duly satisfied.

[28] According to the wording of s 20 of the Act Zeeman was entitled to apply for a warrant that authorised him to search for and seize 'anything' that fell into the categories of ss (a), (b) and (c). The warrant authorizes a search of specified premises for items listed in groups which are concerned in or are on reasonable grounds believed to be concerned in the commission of specified offences by named suspects and does not, as was concluded by the court a quo, '[give] untrammeled power to search the said premises and seize from such premises any articles/documents [the police] see fit'. It is not overly broad in its terms, in fact it follows the wording of the empowering provision as was the case in *Zuma*.[6] The majority in the court a quo was wrong in their conclusion that the warrant was overly broad and that the Magistrate did not apply his mind.

[6] *Zuma* paras 88,89,98 and 101.

[29] The reference by the majority in the court a quo to necessary safeguards similar to those applied in Anton Piller orders was misplaced. Nugent JA in *Zuma* succinctly illustrated the inappropriateness of such a comparison at para 73:

'The example that the learned Judge used of an Anton Piller order highlights the defect of that approach. The Anton Piller order is a remedy that the courts have created in the exercise of their inherent powers. It is to be expected in those circumstances that the courts have fashioned a "body of rules" determining when and in what form such an order may be issued. But that is not what we are concerned with in this case. We are concerned with warrants that are issued under statutory powers. It is the statute that must dictate what is required for a warrant to be valid and not that warrant that must dictate to the statute.'

[30] In addition to the above conclusion on the substance of the warrant, I need to mention that the respondents failed to set out in their founding papers in which way they contend the warrant was overly broad. They confined their case to the bare statement alone. The majority ought not to have constructed a case for the appellants.

[31] When it came to costs the majority in the court a quo reasoned as follows:

'I now finally come to the question of costs. I have mentioned earlier that I will return to the question of costs in connection with the admission of new evidence on appeal. The Appellants as well as the Respondents have been successful in respect of some of the grounds of challenge to the warrant. The Respondents, in my view, have been substantially successful in the appeal. I see no reason why costs, including the costs of the admission of new evidence on appeal, should not be awarded to the Respondents.'

No order was, however, made in respect of the application to lead further evidence. An order in relation to the costs of the appeal before the court a quo was also not made, but in relation to the costs of the proceedings before the court of first instance the majority ordered the three appellants to pay the costs of the respondents, jointly and severally.

[32] The Magistrate did not oppose the proceedings in the court of first instance and there is no conceivable basis on which the costs of those proceedings could have been granted against him. The Minister and Zeeman did not bring the application to lead further evidence, but only the Magistrate, who was successful in that application. There is no conceivable basis why the Minister and Zeeman should have been mulcted in those costs nor why the costs of that application should not have followed the result.

[33] To the extent that the Magistrate participated in the appeal proceedings, he was successful. The decision by the court of first instance that he granted a warrant without having evidence on oath before him, was unanimously reversed by the court a quo. In addition, costs are not granted against judicial officers in relation to the performance of their official function on the mere ground that they acted incorrectly, see *Regional Magistrate Du Preez v Walker* 1976 (4) SA 849 (A) at 852H-853E:

‘It is necessary to consider first the circumstances under which it would be open to a Court, in its discretion, to grant an order *de bonis propriis* against a judicial officer whose actions in the performance of his duties as such have been corrected or set aside on review. It is a well-recognised general rule that the Courts do not grant costs against a judicial officer in relation to the performance by him of such functions solely on the ground that he has acted incorrectly. To do otherwise could unduly hamper him in the proper exercise of his judicial functions. . . . There are, however, exceptions to this rule. Thus if the judicial officer chooses to make himself a party to the merits of the proceedings instituted in order to correct his action and should his opposition to such proceedings fail, the Court may, in its discretion, grant an order for costs against him. . . It is also a recognised exception to the general rule that if it is established that the judicial officer’s decision has been actuated by malice the Court setting aside or correcting such decision may grant costs against him even although he has not made himself a party to the merits of the proceedings.’

[34] The following order is made:

1 The appeal is upheld with costs, including, in respect of the first and second appellants, the costs of two counsel;

2 The order of the court below is set aside and replaced by the following:

‘(a) The application by the third appellant to lead further evidence is allowed with costs;

(b) The appeal is upheld with costs;

(c) The order of the court below is set aside and replaced by the following:

“The application is dismissed with costs.”’

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S SNYDERS

Judge of Appeal

APPEARANCES:

For the First and Second Appellant:	F Joubert SC (with him D Kusevitsky)
	Instructed by:
	The State Attorney, Cape Town
	The State Attorney, Bloemfontein
For the Third Appellant:	R Jaga
	Instructed by:
	Brink & Thomas Inc, Cape Town
	Mabalane Seobe Inc, Bloemfontein
For the Respondent:	Z Omar
	Instructed by:
	Zehir Omar Attorneys, Springs
	Nilands Attorneys, Cape Town
	EG Cooper & Majiedt Attorneys, Bloemfontein