IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO. 38/2012

In the matter between

JACKPOT SUPERMARKET (PTY) LTD	**1ST APPELLANT**
JACKPOT WHOLESALE (PTY) LTD	**2ND APPELLANT**

AND

THE MAGISTRATE OF MASERU **HER WORSHIP MG MOKHORO** **MAGISTRATES COURT**	**1ST RESPONDENT**
THE COMMISSIONER OF POLICE	**2ND RESPONDENT**
LESOTHO REVENUE AUTHORITY	**3RD RESPONDENT**
THE DIRECTOR OF CUSTOMS & EXCISE	**4TH RESPONDENT**
THE ATTORNEY GENERAL	**5TH RESPONDENT**

CORAM: RAMODIBEDI, P
HOWIE JA
HURT JA

HEARD: 4 APRIL 2013
DELIVERED: 19 APRIL 2013

SUMMARY

Search Warrants — Validity of warrant for search and seizure – Requirements – Whether omission from the warrant of the statutory provision under which it was issued renders the warrant invalid – Whether warrant reasonably intelligibly identifies to be searched – Appeal dismissed with costs.

JUDGMENT

THE COURT

[1] The appellants in this appeal challenge the validity of a search warrant, annexure "SJ1" to the notice of motion, which was issued against them by the first respondent on 28 July 2011. The High Court (Majara J) dismissed with costs the appellants' application for the following relief:-

(1) that the search warrant in question be declared invalid, null and void and of no force and effect;

(2) that the respondents be ordered to return all documents, equipment, images of electronic data, processing equipment and communication devices and any other materials so seized in terms of the search warrant;

(3) that the respondents be interdicted from making or retaining copies of the material so seized in terms of the search warrant or to use any information, documentation or images from such material against the appellants; and

(4) that the respondents be ordered to pay the costs of the application on attorney and client scale.

[2] It is appropriate to cite the salient parts of the warrant. They read as follows:

> *"WHEREAS it appears to me on information taken on oath (annexure "A" hereto") that there are reasonable grounds for suspecting that the following documents records, files and registers of Jackpot Supermarket and Wholesalers (Pty) Ltd covering the period from 1st April 2009 to 31st March 2011 including electronic data storing and processing equipment and mobile communication devices belonging to the company or which are used for the company:*
>
> *are in custody or possession of Jackpot Supermarket and Wholesalers (Pty) Ltd, its Directors and its employees,*

Elizabeth Monku and Sadiq Patel at the following addresses:-

(i) Jackpot Wholesalers (Pty) Ltd Industrial Area, Lioli Road, Maseru;

(ii) Jackpot Wholesalers (Pty) Ltd 219 Moshoeshoe Road, Maseru: and

(iii) Directors residence (Plot N0. 12284-195, High Court, Europa Maseru,

and that there are reasonable grounds for believing that the aforesaid records, files, documents, registers and electronic data storing and processing equipment and mobile communication devices will afford evidence as to the commission of offence of fraud and contravention of sections 79 (1) and (2) read with sections 12 and 14, section 85 (1) and 84 (a) read with section 84 (c), of the Customs and Excise Act 1982.

This is therefore in His Majesty's name, to authorize and require you with the necessary and proper assistance... to enter the said premises ... and there diligently to search..."

The warrant concludes with the signature and official stamp of the first respondent.

[3] The appellants are aggrieved by the decision of the High Court. Hence, this appeal.

[4] Firstly, the appellants contend that the search warrant in question authorised the seizure of data, documents, registers and equipment of Jackpot Supermarket and Wholesalers (Pty) Ltd and yet no such entity existed. The warrant was therefore invalid, they say, because it failed to state an existing entity, more particularly one or other appellant, as the addressee.

[5] It is their case, secondly, that the search warrant in question was invalid because it made no reference to the statutory provision in terms of which it was issued.

[6] The appellants contend, correctly, that because the second appellant was only registered after the period stipulated in the search warrant the search warrant could not be lawfully issued or executed against the second appellant. This being so, the discussion can be confined to the case of the first appellant on the validity issue.

[7] It is not in dispute that on the date in question, namely, 28 July 2011, and armed with the warrant, police officers duly assisted by officers of the third respondent,

entered the appellants' premises fully described in the search warrant, namely, Industrial Area, Lioli Road, Maseru 219, Moshoeshoe Road, Maseru and plot N0. 12284-195 as well as High Court Road, Europa, Maseru respectively. At all these venues they conducted a search and seized documents, equipment and materials listed in the warrant. These comprised documents, equipment, images of electronic data, processing equipment and communications devices.

[8] It is convenient to address, first, the appellants' complaint that the search warrant was not addressed to the first appellant.

[9] It is true that a company by the name of Jackpot Supermarket and Wholesalers (Pty) Ltd did not exist but the question is whether, applying the test of reasonable intelligibility, the entity, seizure of whose property the warrant was intended to authorise, was properly identifiable in the warrant as the first appellant.

[10] The first appellant was registered on 11 April 2000 and at all relevant times operated the respective retail and wholesale sections of a trading enterprise in Maseru. Another company whose apparent existence is disclosed in the record is Jackpot (Pty) Ltd. The evidence shows,

however, that there has never been a registered company of that name. Nevertheless the records of the Lesotho Revenue Authority (LRA) show that on 1 July 2003 an entity with the name Jackpot (Pty) Ltd was registered with the LRA as being the legal entity of the enterprise bearing the trade name Jackpot Supermarket and Wholesalers (Machache) and trading at Moshoeshoe Road, Maseru. It is clear from the record that during the relevant period the first appellant traded at both Moshoeshoe Road and, in the Industrial area, at Lioli Road. At the former venue it traded as Jackpot Supermarket and at the other, from 19 October 2010, as Jackpot Wholesale. Despite that, as the record shows, trade and import invoices were frequently directed to Jackpot Wholesalers at Moshoeshoe Road without any suggestion from anyone that the invoices were mistaken or misdirected.

[11] When the first appellant's public officer addressed a letter to the LRA advising that "Wholesale" was trading at Lioli Road she caused it to bear a stamped imprint bearing the name Jackpot (Pty) Ltd.

[12] On 17 March 2011 the first appellant's public officer, on a letterhead bearing the name Jackpot (Pty) Ltd requested the LRA to add to the documentation reflecting

the import VAT credit facility of the VAT registered enterprise, the name Jackpot Wholesalers, adding that the legal entity of the enterprise was Jackpot Supermarket and Wholesalers.

[13] The last-mentioned name, with the added expression "(Pty) Ltd." (the exact name reflected in the warrant) appears on a tax invoice dated 2 March 2011 and, without "(Pty) Ltd" on an invoice dated 15 February 2010.

[14] Distilled from the record, the following is a list of all the names which the first appellant has used or by which it has variously been called, obviously to its knowledge, in the course of its trade. They are:

Jackpot;
Jackpot (Pty) Ltd;
Jackpot Wholesale;
Jackpot Wholesaler;
Jackpot Wholesalers;
Jackpot Supermarket;
Jackpot Supermarket and Wholesale;
Jackpot Supermarket Pty Ltd (the correct name);
Jackpot SM (Pty) Ltd;
Jackpot Supermarket and Wholesalers;
Jackpot Supermarket and Wholesalers (Pty) Ltd.

[15] The inference is inescapable that the first appellant contrived, or at least acquiesced in, the use of those names as referring to it and, further, that it had the Jackpot (Pty) Ltd letterhead and stamp respectively printed and made and that it used that name in communications with the LRA. In one such communication its relevant officer referred to it by the name in the warrant, omitting only the "(Pty) Ltd".

[16] Now, the principles applicable in search warrants in this jurisdiction have been authoritatively laid down by this Court in **Moosa and Others v Magistrate, His Worship Mr Ntlhakana and Others, 2007 – 2008 LAC 318.** The Court relied on the following principles as summarised in the South African case of **Powell NO v Van der Merwe NO 2005 (5) SA 62 (SCA)** at 85-C-F, namely:-

> *"(a) Because of the great danger of misuse in the exercise of authority under search warrants, the courts examine their validity with a jealous regard of the liberty of the subject and his or her rights to privacy and property.*
>
> *(b) This applies to both the authority under which a warrant is issued, and the ambit of its terms.*

(c) The terms of a search warrant must be construed with reasonable strictness. Ordinarily there is no reason why it should be read otherwise than in the terms in which it is expressed.

(d) A warrant must convey intelligibly to both searcher and searched the ambit of the search it authorises.

(e) If a warrant is too general, or if its terms go beyond those the authorising statute permits, the courts will refuse to recognise it as valid, and it will be set aside.

(f) It is no cure for an overbroad warrant to say that the subject of the search knew or ought to have known what was being looked for: The warrant must itself specify its object, and must do so intelligibly and narrowly within the bounds of the empowering statute."

[17] Viewed in this way, it seems to us that the appellants' contention that no such entity as Jackpot Supermarket and Wholesalers (Pty) Ltd existed and that, therefore, the search warrant in question was invalid is unmeritorious. The truth of the matter is that the search warrant authorised the searchers to seize certain property at specified premises and so it

happened. The first appellant was, one must infer, under no misapprehension as to the intended entities or premises required to be searched because neither in the founding nor replying affidavits is it alleged that the appellants' personnel were uncertain whose premises were to be searched or whose property was to be seized. Counsel for the appellants' protestations that inclusion of "(Pty) Ltd" in the warrant signified a different entity were in vain. The weight of the evidence is such that the recipients of the warrant could not have been in the slightest doubt that the warrant was directed at the search of the premises, and the seizure of the property, of the entity trading at the (correctly) specified premises, namely, the first appellant.

[18] Turning to the submission that the warrant was invalid because it made no reference to the statutory provision in terms of which it was issued, this is not one of the requirements which this Court laid down in the **Moosa** case. However, counsel for the appellants submitted that since the **Moosa** decision, the law in respect of the requirements of a valid search warrant has developed in South Africa. He referred to the cases of **Thint (Pty) Ltd v National Director of Public Prosecutions and Others 2008 (2) SACR 421 (CC)** and **Minister for Safety and Security v Van der Merwe 2011 (1) SACR 211 (SCA) and 2011 (2) 301 (CC).** He accordingly submitted that Lesotho law should develop along

the same lines. On that basis he argued that the court a quo should have held it to be a requirement that the statutory provision in terms of which a search warrant was issued must appear from the search warrant itself.

[19] It need hardly be stressed that South African decisions, indeed any decisions from foreign jurisdictions for that matter, are not binding upon this Court whatever strong persuasive force they might have in appropriate cases. Such cases would ordinarily involve matters governed by the common law, or foreign statutes and constitutional provisions substantially similar to those in Lesotho.

[20] In this jurisdiction the issue of search warrants is provided for in various statutory provisions. We were only referred to s 46 (1) of the Criminal Procedure and Evidence Act 1981. The section reads as follows:-

> *"46. (1) If it appears to a judicial officer on complaint made on oath that there are reasonable grounds for suspecting that there is upon any person or upon or at any premises or other place or upon or in any vehicle or receptacle within his jurisdiction —*
>
> *(a) stolen property or anything with respect to which any offence has been, or is suspected*

on reasonable grounds to have been, committed; or

(b) anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of any offence; or

(c) anything as to which [there] are reasonable grounds for believing that it is intended to be used for the purpose of any offence,

he may issue a warrant directing a policeman named therein or all policemen to search any such person, premises, other place, vehicle or receptacle, and to seize any such thing if found, and to take it before a magistrate to be dealt with according to law."

[21] The equivalent provisions in South Africa are sections 20 and 21 of the Criminal Procedure Act 51 of 1977 (CPA), s 20 corresponding in many respects to paragraphs (a), (b) and (c) of s 46 (1), and s 21 (1) (a) substantially corresponding to the first part of the Lesotho subsection.

[22] The South African cases of **Powell** and **Thint** concerned warrants issued not under that country's Criminal Procedure

Act but under s 29 of the National Prosecuting Authority Act, 32 of 1998 (NPA). Brief reference to the relevant provisions of the NPA are necessary.

[23] Section 28 (1) (a) empowers an official called an Investigating Director to hold an inquiry if he or she has reasons to suspect that a specified offence (specified in Proclamation R123 of 1998) has been or is being committed or that an attempt has been or is being made to commit such an offence. Apart from other instances in which an inquiry may be held, there is also provision in s 28 (13) for the holding of a preparatory investigation in order for the Investigating Director to decide if there are reasonable grounds for holding an inquiry.

[24] Then, s 29 (1) of the NPA empowers the Investigating Director for the purposes of an inquiry to enter any premises on which anything connected with that inquiry is suspected to be and, inter alia, in terms of para (d), to seize, against the issue of a receipt, anything on the premises which has a bearing or might have a bearing on the inquiry or if he or she wishes to retain it for further examination or safe custody. Entry must be by virtue of a warrant issued by a judicial officer and the warrant may only be issued, says s 29 (5), if the judicial officer to whom application for the warrant is made, considers there are reasonable grounds for believing that the

thing referred to in subsection (1) is or is suspected to be on the premises.

[25] The provisions of s s 28 and 29 of the NPA were held to be constitutional in **Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others** 2001 (1) SA 545 (CC) provided there is a reasonable suspicion that an offence, which might be a specified offence, has been or is being committed or attempted.

[26] There is a Lesotho statute with sections corresponding in substantial respects to s s 28 and 29 of the NPA. This is the Prevention of Corruption and Economic Offences Act 1999 (PCEO Act). It provides for the issue of warrants in two different situations. Its provisions corresponding to those of the NPA concern the situation where the Director of Prevention of Corruption and Economic Offences has reason to suspect that a serious economic offence has been or is being committed or attempted. The Director may, in terms of s 36 (1), hold an inquiry into the matter. Section 38 then empowers the Director to enter premises and effect seizure on the strength of a warrant, all pursuant to provisions which in present respects are identical to those of s 29 (1) of the NPA.

[27] The other situation for which the PCEO Act provides is covered by s 12. If it appears to the Director that there is reasonable cause to suspect that there is anything in, inter alia, any premises which is or contains evidence of the commission of an offence either specifically referred to in the Act or generally referred to as a serious economic offence, a search warrant may be applied for. If the magistrate to whom application is made is satisfied that there are reasonable grounds for the suspicion referred to, he or she may issue a warrant for search of the premises, and the seizure of the thing concerned.

[28] Reverting to the cases of **Moosa** and **Powell**, it is settled law that the validity challenge involves ascertaining, inter alia, if the terms of a warrant go beyond those which the authorising statute permits. The first question here is whether that inquiry, concerned as it is with the constitutional protection of the rights of the subject duly balanced against the rights of the state and its public, will be hampered to any relevant degree by the absence from the warrant of mention of the authorising statutory provision.

[29] The two cases in which it is said that such mention is a requirement for a valid warrant are those of **Thint** and **Van der Merwe**, both the subject of decisions of the South African Constitutional Court. **Thint** was concerned with the issue

whether, in a warrant issued under s 29 of the NPA, the offence which was reasonably suspected of having been, or being, committed or attempted, had to be stated in the warrant. **Van der Merwe** was concerned with the same question, this time applied to a warrant issued in terms of the CPA. The need to specify in the warrant the provision authorising the warrant was not in issue in either case. In neither case was it necessary for the decision of the matter to consider the need for such particulars.

[30] No reported case available to us or cited to us has given considered reasons why mention in the warrant of the authorising section is, apart from a matter of practice or efficiency, a requirement for its validity. Nor did counsel for the appellants seek to put forward submissions answering that question.

[31] Neither authority nor practical reality dictate that the subject must be able to determine all the facts and legal criteria relative to validity before a search commences or even by the time it ends. In practice it must be very rare for the subject to have either legal representation or the text of the authorising section available at any time material to the search. Apart from the obvious enquiry which could be made to the officer in charge of the search as to the statute in terms of which he purports to act, the same question could be

directed at the investigating authority preparatory to bringing a court challenge. In any event determination whether the terms of the warrant go beyond those permitted by the governing statute is a decision for the courts, not the subject. And it would be extraordinary if, by the time a validity challenge were launched in a court, it was not clear what the authorising statutory provision was. Plainly, the investigating or prosecuting authority could not leave the matter obscure. So non-mention of the statutory provision in the warrant could not, realistically, prevent or inhibit a court's comparative determination of the respective ambits of the statute and the warrant.

[32] If the subject wanted either before, during or after the search (and this would have to be with the aid of legal advice) to object to the investigating officer concerning the validity of the warrant by reason of its omission of the statutory provision, thus initiating the comparative analysis just mentioned, the following considerations must be borne in mind. In Lesotho a search warrant can be issued in terms of s 46 (1) of the CPEA or in terms of either s 12 or s 38 of the PCEO Act. As regards warrants in terms of the latter statute, there are obvious tell-tale features. A s 12 warrant will have to refer to the Director. It will have to refer to the oath of the Director or an officer of the Directorate, not the oath of a police officer. It will have to refer to an offence or offences named in

the PCEO Act or to a "serious economic offence". And the magistrate will have to state that there are reasonable grounds for suspecting that the thing concerned is or contains evidence of the offence, not merely, as in s 46 (1) of the CPEA, that there are reasonable grounds for believing that it will afford such evidence.

[33] A s 38 warrant will also have to refer to the Director or his authorised agent. It will have to refer to an inquiry in terms of the PCEO Act. And it will have to state that the thing to be seized has or may have a bearing on an inquiry. It will be obvious that the seizure is required for the purposes of an inquiry and not to acquire evidence (unlike s 12 and unlike s 46 (1) of the CPEA).

[34] Of course, if these features are missing, the warrants, as warrants in terms of the PCEO Act, would be bad on that account, not simply because the authorising section was not stated. However, none of these features is present in the warrant in this matter. Inescapably, the conclusion must be that it was issued in terms of s 46 (1) of the CPEA and the appellants' counsel did not suggest otherwise. The court below was fully able to examine the ambit of the warrant against the provisions of that subsection.

[35] The furthest that an argument can be taken in support of the contention that the particulars of the authorising statute had to appear in the warrant as a requirement for its validity is that, in accordance with the rule of law and the principle of legality, the addressee was entitled to be informed that the law permitted the Crown temporarily to interfere with the addressee's constitutional rights for purposes of the search, in other words that the warrant was authorised by law.

[36] With regard to this interference it is instructive to note the dicta of the South African Constitutional Court in the **Van der Merwe** case in paragraphs [36],]37] and [38] of its unanimous judgment. It was observed that safeguards are necessary to ameliorate the effect of the interference by ensuring, inter alia, that the power to issue and execute warrants is exercised within the confines of the authorising legislation and the Constitution. In that particular regard one of the safeguards, said the Court, was the significance of vesting the authority to issue warrants in judicial officers:

> "*The judicial exercise of this power by them enhances protection against unnecessary infringement. They possess qualities and skills essential for the proper exercise of this power, like independence and the ability to evaluate relevant information so as to make an informed decision.*"

[37] The acceptable evidence shows that when served, the warrant in this case was accompanied by the affidavit to which the police investigating officer deposed in his application to the magistrate for the warrant. The affidavit, so the recipient of the warrant would have seen, was made in support of an application for a search warrant and the deponent referred to the magistrate as *"The Honourable Court".* In addition the recipient would have seen in the warrant itself that it was issued by the magistrate of the Maseru Magistrate's Court in *"His Majesty's name."*

[38] We are unable to see how mention in the warrant of the authorising statutory subsection could have made it any clearer to the recipient of the warrant than did the features we have mentioned, that the warrant was authorised by law. Moreover, that the issuing magistrate knew what statutory provision was to be considered and, if a case was made out, duly applied, was a conclusion that not only the court below but more especially the recipient, could reach with sufficient assurance.

[39] The conclusion to which we come, therefore, is that the statements in the **Thint** and **Van der Merwe** cases, unsubstantiated as they were, that it is a requirement of a valid search warrant that the authorising statutory section be

mentioned in the warrant, are not persuasive in prompting us to receive them as part of the law of Lesotho.

[40] The appellants' attack on the validity of the warrant accordingly fails, as does the appeal, subject only to the next consideration.

[41] As regards the execution of the warrant, it was not in dispute that seized property of the second appellant had been returned. Some reference was made in argument to copies of its documents made by the Crown agents after seizure. Because the second appellant's property was not lawfully liable to seizure in terms of the warrant, if any such copies are in the possession of any of the second to fifth respondents they must be returned to the second appellant. Provision to this effect will be made in our order but as this aspect was no more than peripheral to the essential issues raised by the appeal, it can have no influence on the costs of appeal.

[42] This Court's order is as follows:-

1. Any copies of the second appellant's documents made after seizure of the second appellant's property pursuant to the warrant in issue which are in the possession of the second, third, fourth or fifth

respondents are forthwith to be delivered to the second appellant.

2. Save for the order in paragraph 1, the appeal is dismissed with costs.

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M.M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

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C.T. HOWIE
JUSTICE OF APPEAL

_____

N.V. HURT
JUSTICE OF APPEAL

For Appellants	**:**	Adv Ben Pretorius, with him Adv T.R. Mpaka
For Respondents	**:**	Adv H.P. Viljoen SC