

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO : **5822/2022**

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|---------------------------------------|
| Reportable: Yes / No |
| Of interest to other judges: Yes / No |
| Revised: No |
| Date: 15 March 2024 |
| _____ |
| A B Bishop |

In the matter between:

M[...] H[...]

Applicant

and

MARYNE SYMES N.O.

First Respondent

GORDON NOKHANDA N.O.

Second Respondent

JOHANNA WILLEMIA N.O.

Third Respondent

THE MAGISTRATE: JOHANNESBURG CENTRAL

Fourth Respondent

JUDGMENT

BISHOP AJ :

- [1] On 10 December 2019, Affinity Mining (Pty) Ltd was placed under final liquidation by the court. ¹ It had only been established since 1 February 2017. ² The application for its liquidation had been brought by Mr Callin Harris, at the time, the only director of Affinity Mining. ³
- [2] The applicant, Mr M[...] H[...], had previously been a director of Affinity Mining and at the time of the liquidation application was the representative of the Einstein Trust, which, holding 34% of the shares in Affinity Mining, is its majority shareholder. ⁴
- [3] Consequent upon its liquidation, the first respondent, Ms Maryne Symes N.O., the second respondent, Mr Gordon Nokhanda N.O., and the third respondent, Ms Johanna Willemia N.O., ⁵ were appointed

¹ CaseLines 11-15, par 19.5 (FA); 11-92, par 6.8.1 (AA)

² CaseLines 11-14, par 19.1 (FA)

³ CaseLines 11-14, par 19.4 (FA)

⁴ CaseLines 11-14, par 19.2 (FA)

⁵ The third respondent has been cited and described in this application as Johanna Willemia N.O., but these appear to be her first names and her surname appears to be missing from her citation and description. From the order obtained from the fourth respondent, annexure **MHS4** to the founding affidavit (at CaseLines 11-39 to 11-40), it appears that the full names of the third respondent

as the final liquidators to Affinity Mining.⁶

[4] On 1 July 2022, on an *ex parte* basis, the liquidators obtained an order⁷ from the fourth respondent, the magistrate for the Johannesburg Central Court.⁸ It is this order that forms the central focus of this application. It provides:

In the *ex parte* application of:

| | |
|----------------------------|------------------|
| MARYNE ESTELLE SYMES N.O. | First Applicant |
| GORDON NOKHANDA N.O. | Second Applicant |
| JOHANNA WILLEMIA YZEL N.O. | Third Applicant |

In re:

AFFINITY MINING (PTY) LTD

and

| | |
|---------------|------------|
| H[...] M[...] | Respondent |
|---------------|------------|

Draft order

Having read the Papers and heard arguments on behalf of the Applicants it is ordered that:

a) ~~The~~ A Station Commander of the South African Police Services. **RANDBURG** and/or any member of the SAPS appointed by him

are in fact Johanna Willemia Yzel and that she should have been cited at Johanna Willemia Yzel N.O. in this application. See also in this regard CaseLines 11-106 (annexure **MS2** to annexure **A** to the answering affidavit). Nothing appears to turn on this and the parties appear to have the same person in mind when referring to her in the papers.

⁶ Although this is not expressly said and no proof from the master of their appointment has been provided, it appears to be the correct inference to draw from the papers and the basis upon which the parties approached the matter.

⁷ CaseLines 11-39 to 11-40 (**MHS4** to the FA)

⁸ CaseLines 11-10, par 6.2 (FA)

and/or Sheriff of the Magistrate Court for the district of Northcliff be authorised to search the property of the Respondent including but not limited to the [...] J[...] A[...], N[...], Johannesburg for the undermentioned moveable property of the Applicants and to take possession of the property and deliver any article seized thereunder to the applicants or such persons appointed by them.

- b) The property that is authorised to search for and to hand over to the Applicants are:
 - i. Any and all paper work dealing with the company AFFINITY MINING (PTY) LTD;
 - ii. Any and all crypto currency Ledgers;
 - iii. Any and all passwords and/or recovery phrases.
- c) The Applicants is authorised to appoint a locksmith to gain access to any locked doors on the premises [...] J[...] A[...], N[...], Johannesburg.

(The typed draft order had been amended in manuscript, as the “strikethrough”-portions indicate, prior to the granting of the order.)

[5] The essence of the applicant’s case is that he attacks both the granting of the order and its execution, and seeks the following relief: ⁹

[5.1] that the court order granted by the fourth respondent on 1 July 2022 to enter and search the premises at [...] J[...] A[...], N[...], Johannesburg be set aside;

[5.2] that the search conducted on 1 July 2022 under the auspices of the order be declared unlawful;

⁹ CaseLines 11-6, prayers 2 to 5 (NoM)

- [5.3] that the first, second and third respondents be ordered to return forthwith all articles seized under the order of 1 July 2022;
- [5.4] that the first, second and third respondents pay the costs of this application.
- [6] The legal basis for obtaining the order lies in s 69 of the Insolvency Act, ¹⁰ which provides:

Trustee must take charge of property of estate

(1) A trustee shall, as soon as possible after his appointment, but not before the deputy-sheriff has made the inventory referred to in subsection (1) of section nineteen, take into his possession or under his control *all movable property, books and documents belonging to the estate* of which he is trustee and shall furnish the Master with a valuation of such movable property by an appraiser appointed under any law relating to the administration of the estates of deceased persons or by a person approved of by the Master for the purpose.

(2) If the trustee has reason to believe that *any such property, book or document* is concealed or otherwise unlawfully withheld from him, he may apply to the magistrate having jurisdiction for a search warrant mentioned in subsection (3).

(3) If it appears to a magistrate to whom such application is made, from a statement made upon oath, that there are reasonable grounds for suspecting that *any property, book or document belonging to an insolvent estate is concealed* upon any person, or *at any place* or upon or *in any* vehicle or vessel or *receptacle* of whatever nature, or is otherwise unlawfully withheld from the trustee concerned, *within the area of the magistrate's jurisdiction*, he may issue a *warrant to search for and take possession of that property, book or document*.

(4) Such a warrant shall be executed in a like manner as a warrant to search for stolen property, and the person executing the warrant shall deliver any article seized thereunder to the trustee.

¹⁰ Act 24 of 1936

[7] (Emphasis added.) In his founding papers, the applicant has indicated his attack upon the validity ¹¹ of the magistrate's order is based upon (a) the absence of any reference to s 69 of the Insolvency Act in the order itself, ¹² (b) the failure by the magistrate to apply his mind when granting the order, ¹³ (c) the broadness with which the order describes the 'movable property, books and documents belonging to the estate', which might be searched for in terms of the order, which exceeds the permissible scope of the authority afforded by s 69 to the magistrate in granting such an order, ¹⁴ and (d) the magistrate only being permitted to issue the order if it appeared to him, from a statement under oath, that there were reasonable grounds for suspecting that any 'movable property, books and documents belonging to the estate' were being concealed at any place or in any receptacle, but because no such statement has been produced to the applicant, this attracts a negative inference that the statement never existed, alternatively, it gives rise to the granting of an order that it be produced. ¹⁵

[8] The applicant also attacked the manner in which the order was executed, raising that (i) Mr Louwrens Grundling of the firm Grundling

¹¹ CaseLines 11-20, par 37 (FA)

¹² CaseLines 11-20 to 11-21, par 39 to 45 (FA)

¹³ CaseLines 11-14, par 46 to 47 (FA)

¹⁴ CaseLines 01-21, par 48 to 49 (FA)

¹⁵ CaseLines 01-21 to 01-22, par 50 to 53 (FA)

and Associates, who act as the first to third respondents' attorneys, was not identified in the order and, by implication, was not entitled to play any role in its execution, but did so nonetheless, ¹⁶ and (ii) the locksmiths opened not only the doors to two rooms but also attempted to open two safes, which was in excess of their authority in terms of the order. ¹⁷

[9] Based upon his contentions (a) to (d) above as to the irregularity in the granting of the order and his contentions as to defects (i) and (ii) above in its execution, the applicant's position was that there has been an infringement of his constitutionally enshrined rights, which are embodied in ss 14 (his right to privacy) ¹⁸ and 25(1) (his right to

¹⁶ CaseLines 01-23, par 54 to 56, as read with 11-16, par 20 to 23 and 11-18, par 31 to 32 (FA)

¹⁷ CaseLines 11-23, par 57 to 58 (FA)

¹⁸ Section 14 of the Constitution provides:

Privacy

Everyone has the right to privacy, which includes the right not to have-

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed.

property)¹⁹ of the bill of rights.²⁰

[10] Mr Nico Jagga, counsel for the applicant, described this application as being in the nature of an indirect review,²¹ while Mr Chris Harms, counsel for the first to third respondents, contended that the applicant was endeavouring to appeal the granting of the magistrate's order, albeit under the guise of a reconsideration or indirect review.²² Sitting as a single judge, I do not have the authority to undertake an appeal hearing into the granting of the magistrates' order. I propose disposing of this application on general review principles, having inherent powers so to do.

[11] The proper way to approach this matter seems, to me, to commence

¹⁹ Section 27 of the Constitution embodies the right to health care, food, water and social security. The applicant's reference to s 27 is an obvious error when his founding papers are read in context; moreover his assertion that '[t]he search and seizure infringed upon [his] rights of privacy and *protection against arbitrary deprivation of property*' (emphasis added) (CaseLines 11-13, par 17.2 (FA)).

Section 25(1), however, provides that '[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

²⁰ The applicant has referred to ss 14 and 27 of the Constitution (CaseLines 11-24, par 63.3) in reference to his rights that he has said were infringed. But he has also said that his 'rights to privacy' and his right not to be subjected to 'arbitrary deprivation of property' (CaseLines 11-13, par 17.2) are implicated. The reference to s 27 seems to be in error.

²¹ CaseLines 04-11, par 6 (applicant's HoA); 14-22, par 92 to 95 (applicant's HoA).

²² CaseLines 13-5, par 4.2 (first to third respondents' PN). See also CaseLines 11-85 to 11-86, par 3.1 and 11-91, par 6.6 (AA).

The first to third respondents also contended that the proper approach was for the applicant to have sought the rescission of the magistrate's order in the magistrates court, and that it is the court with jurisdiction (CaseLines 11-91, par 6.7, as read with 11-85 to 11-86, par 3.1). This point was not pursued in argument on the first to third respondents' behalf.

by considering s 69 of the Insolvency Act closely. Section 69(1) obliges the liquidators to take into their possession or under their control all movable property, books and documents belonging to the estate of Affinity Mining, in order that the liquidators may discharge their obligation to the master to furnish him with a valuation of that property.

[12] Ordinarily the taking into their possession or control of the moveable property, books and documents of the estate of Affinity Mining should not present any difficulties, but the legislature foresaw that the situation might arise where the liquidators have 'reason to believe' that any such moveable property, books or documents 'is concealed or otherwise unlawfully withheld' from them. Section 69(2) provides that, where the liquidators have such 'reason to believe', then they may apply to the magistrate having jurisdiction for a search warrant.

[13] If the liquidators elect to apply for a search warrant, then s 69(3) obliges them to produce to the magistrate 'a statement made upon oath'. The purpose of that statement is that it should contain sufficient evidence upon which the magistrate may conclude that it 'appears' to him 'that there are reasonable grounds for suspecting that any property, book or document belonging to Affinity Mining's estate is concealed upon any person, or at any place or upon or in any vehicle or vessel or receptacle of whatever nature, or is otherwise

unlawfully withheld from the liquidators concerned, within the area of his jurisdiction. If it so appears to the magistrate, then he may issue a warrant to search for and take into the possession of the liquidators any property, book or document belonging to Affinity Mining's estate, which is within the magistrate's jurisdiction.

[14] The requirements for such a warrant are, firstly, that the liquidators must have 'reason to believe' that any such property, book or document is concealed or otherwise unlawfully withheld from them. That such 'reason to believe' exists should be capable of being objectively established, based upon facts that have come to the attention of the liquidators or inferences that might reasonably be drawn from facts known to the liquidators.

[15] What the source of those facts or inferences may be, in my view, is very broad. It may, for example, encompass evidence given at an enquiry, information given extracurially to the liquidators, or even evidence given anonymously. But, for there to be 'reason to believe', this requires the liquidators to consider this evidence or information and assess if it could possibly be true. This would entail a reasonable assessment of the evidence or information that has come to light, in the context of other information known to the liquidators. The more detailed and convincing the evidence or information that has come to hand and which is being assessed, the less essential the context of

the other information known to the liquidators at the time will be. And the reverse will apply to less detailed and less convincing evidence or information.

[16] By way of demonstration, if a liquidator were to find an anonymous note on her desk, which read 'search the house at [...] J[...] A[...], N[...], Johannesburg, because I know there are documents hidden there' and that address bore no connection to Affinity Mining or anyone known to be associated with Affinity Mining, it would be unlikely that a liquidator could on the strength of that note alone *reason* that there are possibly documents of Affinity Mining concealed at that address.

[17] If, however, it was also known to the liquidator that that address was the former matrimonial home of one of the directors of Affinity Mining and that he kept a locked study at that address, to which study only he had access, despite no longer living at that property, then the liquidator might *reason* that such a locked study could be being used to conceal from her documents of Affinity Mining. If the liquidator also knew from other evidence or information that there were documents of Affinity Mining, of which she had not yet obtained possession, she might *reason* that such missing documents could be being concealed at the address mentioned in the anonymous note. If the liquidator also possessed evidence that those documents had been taken to

that address and there was no reason to suspect that they had been taken away from that address, she might *reason* that those documents are being concealed at that address. Thus, she would have 'reason to believe' that the documents are being concealed there.

[18] The term 'reason to believe' implies, in my view, that the liquidators must, as a matter of fact, undertake the exercise of reasoning, having regard to whatever facts they have at their disposal and whatever inferences may reasonably be drawn from those facts. That process must give rise to their 'reason to believe' that documents are being concealed. In other words, with reference to the example above, the anonymous letter itself is not *a* or *the* 'reason to believe'. The letter contains information, along with whatever other evidence or information the liquidators might have at their disposal, upon which they may rely to *reason* that documents may be being concealed at the address and, therefore, have such 'reason to believe' that documents are concealed there. ²³

²³ The employment of the present tense, 'is concealed', in both ss 69(2) and (3) is significant. If the evidence or information is to the effect that the documents were previously concealed at a certain place, but are unlikely still to be concealed there, then that information is, on its own, unlikely to be sufficient to establish 'reason to believe' that the documents are concealed there presently, as required by these subsections.

Similarly, if the only evidence or information to hand is that the documents could or might or would in the future be concealed at a particular address, this would be insufficient to establish 'reason to believe' that the documents are concealed presently at the address.

- [19] Without such 'reason to believe' the liquidators are not permitted to approach the magistrate having jurisdiction. ²⁴ If, however, they have such reason to believe, then s 69(3) obliges them to place before the magistrate, from whom they seek the warrant, a 'statement made upon oath'. This is the second requirement.
- [20] The third requirement pertains to the magistrate, whereas the first two pertained to the liquidators. From the 'statement made upon oath', that is, evidence placed before the magistrate, it must 'appear' to him that 'there are reasonable grounds for suspecting' that, for example, any property, book or document belonging to an insolvent estate is concealed.
- [21] This does not mean that the magistrate must be persuaded that the liquidators have 'reason to believe' that, for example, documents are being concealed at a particular address. The magistrate must himself objectively assess the evidence under oath placed before him in the statement and assess if it 'appears' to him that 'there are reasonable grounds for suspecting' the documents are being concealed at the particular address.
- [22] I would describe the magistrate's function in issuing such a warrant as being *quasi-judicial*, as opposed to administrative, but certainly not

²⁴ The question of jurisdiction is dealt with below, as part of the discussion concerning s 69(3).

judicial, in the sense of ordinary civil or criminal proceedings.²⁵ Because of this, the test for the issuing of the warrant is not one usually employed in granting relief generally in civil or criminal proceedings. Instead, it is a lighter test, where no *onus* is imposed upon the liquidators. Instead, the function is that of the magistrate alone, to whom it must 'appear' that there are 'reasonable grounds for suspecting', for example, that documents are concealed at a particular address.

[23] The levity of the test, however, does not mean that the magistrate may issue a warrant on the mere production of a statement made upon oath. He must bring his mind to bear upon the statement, because, in my view, even if it appears to him that there are reasonable grounds for suspecting, for example, that documents are being concealed at a particular address, he must still exercise his discretion to issue the warrant. That discretion is reserved to him through the term 'may issue a warrant'. My view would have been different if s 69(3) had read 'must issue a warrant'.

[24] There is good reason for the retention of such discretion, which must be exercised upon all of the facts before the magistrate. The issuing of a warrant necessarily anticipates that its execution will likely result

²⁵ Compare *Naidoo and Others v Kalianjee NO and Others* 2016 (2) SA 451 (SCA), 19-22

in the infringement of, at least, constitutional rights to privacy.²⁶ The legislature's prescribed oversight in the issuing of such a warrant by a magistrate must be interpreted so as to afford the magistrate the opportunity to assess and determine if it is, on all of the evidence before him, appropriate to issue the warrant sought, knowing the likely implication of its execution. His office obliges him, after all, to uphold the provisions of the Constitution as the supreme law,²⁷ while at the same time giving effect, as best he may, to the intention behind ss 69(1) to (3) of the Insolvency Act.

[25] In order for the magistrate to exercise such discretion, the statement made upon oath should provide sufficient evidence both for it to 'appear' to the magistrate that 'there are reasonable ground for suspecting, for example, that documents are being concealed at a particular address, and for him to exercise his discretion to issue the warrant, once it so appears there are reasonable grounds.

[26] The fourth requirement arises from s 69(3) and it has been imported into s 69(2) by way of reference therein to s 69(3). It is the requirement that the place of concealment, whether it be the place where the person is who is concealing, for example, the documents

²⁶ The common law right to privacy at the time of the promulgation of the Insolvency Act 24 of 1936 was similar in concept, if not in application, to the now constitutionally enshrined right.

²⁷ Section 2 of the Constitution provides that:

The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

upon his person, or whether it be another place or upon or in a vehicle, vessel or receptacle of whatever nature where the documents are being concealed, must be 'within the area of the magistrate's jurisdiction'.

[27] So, for example, a magistrate sitting in Johannesburg would not, in my view, be entitled to issue a warrant in terms of s 69 of the Insolvency Act if it appeared to him that there are reasonable grounds for suspecting that the documents of Affinity Mining sought are being concealed at a place in Cape Town, not Johannesburg, since Cape Town clearly does not fall within his area of jurisdiction. The limit on the magistrate's jurisdiction is, therefore, geographical, being restricted to his 'area of jurisdiction'.

[28] Based upon these four requirements, it should be clear that in order for me to exercise my inherent powers of review, in assessing whether the order of the magistrate should be set aside, it is necessary for me to have regard to the 'statement made upon oath', which served before the magistrate, who issued the order. ²⁸

²⁸ While s 69 of the Insolvency Act employs the terminology of a 'warrant' being issued and while in this matter it was an 'order' that was issued and is sought to be set aside, in the context of this matter and how the parties addressed the disputes for determination, nothing turns on any strict difference in form between a 'warrant' and an 'order'.

This is not to say that, in other matters, because a magistrate issues an 'order' instead of a 'warrant' that this might not indicate that he has failed to apply his mind properly to what was required of him.

[29] As I have already indicated above, ground (d) of the grounds upon which the applicant has attacked the validity of the order was that the magistrate had not been provided with 'a statement sworn upon oath'. The applicant has contended that because of the absence of such 'a statement sworn upon oath', I should draw a negative inference and conclude that there was no such statement, alternatively, I should order that it be produced. The latter request is not sought in the notice of motion and I would have been disinclined to grant such substantive relief, where there has been no proper notice that such relief is sought. However, the applicant has sought to resolve this issue through the delivery of a supplementary affidavit, to which the 'statement made upon oath' has been attached.

[30] The applicant seeks the introduction of its supplementary affidavit and Mr Jagga produced detailed written argument, including relevant authority, for why it should be admitted. I did not understand the first to third respondents to put up any serious opposition in argument in this regard, although an affidavit in opposition had been filed. Had the respondents seriously opposed the introduction of this evidence, I would have been surprised. In my view, although they have contended that the contents of the 'statement made upon oath' should not be disclosed to the applicant,²⁹ since it contains information

²⁹ Section 417(7) of the Companies Act 61 of 1973 provides:

Any examination or enquiry under this section or section 418 and any application therefor shall be private and confidential, unless the Master or the Court, either generally or in respect of any particular person, directs otherwise.

obtained through an enquiry conducted in terms of ss 417 and 418 of the Companies Act,³⁰ they have conceded this objection and agreed that the matter be adjudicated with reference to the contents of the 'statement made upon oath'.³¹

[31] As I have also indicated above, I have approached this application as a review application. In assessing whether the order of the magistrate was lawfully granted, I must needs have regard to the evidence considered by the magistrate and from which it 'appeared' to him that there existed 'reasonable grounds for suspecting' that, for example, documents were being concealed at a particular address and in terms of which he purported to exercise his discretion in granting his order. In other words, the 'statement made upon oath', for all intents and purposes, was the evidence before the magistrate and constitutes a crucial missing part of the record pertaining to the granting of the order.

[32] Notwithstanding the persuasive argument for the introduction of the supplementary affidavit of the applicant into evidence, there seems to me a crisper approach. Section 173 of the Constitution vests in me the inherent power, *inter alia*, to regulate the process before me, taking into account the interests of justice. Those interests of justice

³⁰ Act 61 of 1973

³¹ CaseLines: 18-22 to 18-23, par 8.4 (first to third respondents' affidavit opposing SA)

include, in my view, that the record of the proceedings before the magistrate be placed before me, in order for me to properly assess whether the magistrate's order ought to be set aside or not. This is an obvious requirement in almost every reviewing procedure, which inevitably turn on an assessment of the record. In this case, there can be no genuine complaint of prejudice for the liquidators, since it is the very 'statement made under oath' that was presented to the magistrate on their behalf to obtain the order that is sought to be introduced. If they were satisfied with that sworn statement being placed before the magistrate in the first place, they can have no genuine objection to it being placed before me. Therefore, I admit both the applicant's supplementary affidavit ³² and the first to third respondents' supplementary opposing affidavit. ³³

[33] I turn now to examine what was placed before the magistrate. ³⁴ The papers were in the nature of an application, consisting of a notice of motion, a founding affidavit, various annexures and a draft order, which was ultimately made the order by the magistrate. Excluding the draft order, the papers ran to 66 pages. The draft order mimics the notice of motion, except it has no provision for the award of costs, which the notice of motion did incorporate.

³² CaseLines 15-4 to 15-84

³³ CaseLines 18-1 to 18-11

³⁴ The application appears at CaseLines 15-17 to 15-84.

[34] The notice of motion sought to authorise the station commander of the South African Police Services for 'RANDBURG', ³⁵ and/or any member of the SAPS appointed by him, and/or the sheriff for the magistrates court for the district of Northcliff to search the property of the applicant, including but not limited to, [...] J[...] A[...], 'N[...]', Johannesburg for certain moveable property of the liquidators, to take possession of any such property and to deliver any article seized thereunder to the liquidators or any person appointed by them. I have emphasised the location of the property in 'Northcliff', since it must fall within 'the area of the magistrate's jurisdiction', in order for him to have granted the order, that is, the fourth requirement identified above.

[35] The Department of Justice and Constitutional Development has issued a public document, accessible on the internet, wherein the proclaimed magisterial districts are set out with each correlating area, which falls within the particular court's area of jurisdiction. Although the applicant did not take issue that the named place, which is the subject of the order, falls within 'the area of the magistrate's jurisdiction', I have nonetheless satisfied myself with reference to the proclaimed magisterial districts that Northcliff indeed does fall within the area of jurisdiction of the Johannesburg magistrates court. The

³⁵ In the order itself (CaseLines 11-39, par a) (annexure **MHS4** to the FA), the reference to 'RANDBURG' was deleted, broadening the authority to search for property and to seize it to all SAPS station commanders.

fourth requirement is met.

[36] *Prima facie*, therefore, the magistrate was empowered to grant the order sought insofar as it related to that property being within his area of jurisdiction. However, to the extent that the broadness and the vagueness of the order might be read to include places outside of the area, the magistrate would have acted *ultra vires* his powers in authorising the search for and seizure of property falling within Affinity Mining's estate, which was concealed at a place outside of the 'area of the magistrate's jurisdiction'. Since the search and seizure was executed at the Northcliff property, this issue was not raised by the applicant and it shall detain me no further, save to say that the term 'included but not limited to' in paragraph a) of the magistrate's order must be regarded as being *pro non scripto*. It is too vague to meet the strictures of ss 69(2) and (3).

[37] In the notice of motion that served before the magistrate and in the order that the granted, the property identified as the subject of the proposed search and seizure was: ³⁶

- i. Any and all paper work dealing with the company AFFINITY MINING (PTY) LTD;
- ii. Any and all crypto currency Ledgers;
- iii. Any and all passwords and/or recovery phrases.

³⁶ CaseLines 15-20, par b) (annexure **M1** to the supplementary affidavit); 11-40, par b) (annexure **MHS4** to the FA)

[38] *Ex facie* the order, this less than ideally worded. Firstly, in my view, in paragraph 'i', Affinity Mining should have been described as being 'in liquidation'. To any third-party recipient of this order, there is no indication that the first to third respondents, who were identified on the order as the first to third applicants, are the liquidators of Affinity Mining (in liquidation). Secondly, in paragraphs 'ii' and 'iii', there should have been express reference to the crypto currency ledgers and the passwords and/or recovery phrases being those of Affinity Mining (in liquidation). Again, to any third-party recipient of this order, the crypto currency ledgers, and passwords and/or recovery phrases sought to be searched for and seized at the Northcliff property, could belong to anyone and they do not appear to be restricted to only those falling within the estate of Affinity Mining. Little wonder that the applicant criticized the order for not containing any reference to s 69 of the Insolvency Act and contending that it should have.³⁷ Had there been such a reference, it might have reduced my concerns over the broadness of the wording, which is what is attacked by the applicant under ground (c) of the applicant's grounds relied upon to set aside the warrant.³⁸

[39] I deal now with the first requirement identified above for the issuing of a warrant. I commence by asking: Could the liquidators have had

³⁷ See par 7 above.

³⁸ See par 7 above.

'reason to believe' that any such property, book or document is concealed or otherwise unlawfully withheld from them at the Northcliff property? From the contents of the 'statement made upon oath',³⁹ there was sufficient information upon which they could have reasoned that there was moveable property, books and/or documentation being concealed from them at the Northcliff property. Did they form this 'reason to believe'? From the facts that they had Mr Grundling prepare the application and move it before the magistrate, this is sufficient to infer that they had formed the necessary 'reason to believe'. While I appreciate that there may have been a need to prepare the application papers in haste and present them to the magistrate urgently, and while it is not fatal to their application that Mr Grundling, as the attorney for the liquidators, deposed to the 'statement made upon oath', it would have been preferable, in my view, for one the liquidators to have deposed to the necessary 'statement made upon oath', supported by statements under oath by the other liquidators. It is after all they who seek the warrant and it is they who must have 'reason to believe', so that they may approach the magistrate for the warrant. It would also have been preferable for Mr Grundling, as deponent, to have explained why he, not the liquidators, had deposed to the 'statement under oath'. I find that the first requirement has been met.

³⁹ An analysis of the statement itself appears below.

[40] I turn now to the second requirement, that is, the existence of 'a statement made upon oath'. It was deposed to by Mr Grundling. It is known, at least, from the applicant's supplementary affidavit that it exists. The second requirement has been met.

[41] The third requirement is to determine if the 'statement made upon oath' contains sufficient material upon which it could have appeared to the magistrate that there were reasonable grounds for suspecting that there was 'paper work dealing with the company AFFINITY MINING (PTY) LTD', that there were 'crypto currency Ledgers' or that there were 'passwords and/or recovery phrases' at the Northcliff property, and upon which evidence he could have exercised his discretion to grant the order.

[42] In the 'statement under oath', Mr Grundling deposed that Affinity Mining had been placed into final liquidation, producing the relevant order. He deposed that the first to third respondents are its appointed liquidators but attached the certificate appointing them as the provisional liquidators, not the certificate appointing them as the final liquidators. Nothing appears to turn on this, since it seems to me to be common cause that the first to third respondents are the final liquidators of Affinity Mining. He described the purpose of the application to be 'gaining access to the property situate at [...] J[...] A[...], N[...], Johannesburg and attaching assets belonging to the in

re Applicant'. The reference to the 'in re Applicant' is a reference to Affinity Mining. After addressing issues of jurisdiction and *locus standi*, which do not appear to be in dispute, Mr Grundling set out the basis for the application.

[43] He also set out that the applicant was a director of and is a shareholder representative of Affinity Mining, thereby linking the applicant to Affinity Mining. He said that Affinity Mining 'is the owner and developer of certain Crypto Currency Wallets with alleged Bitcoin currency and/or cash in it', thereby laying a rudimentary basis for searching for and attaching property of Affinity Mining which relates to crypto currency. For this statement of his, he relied upon an affidavit from Mr Greg van der Spuy, which Mr Grundling said contains allegations that the applicant is in possession of the necessary passcodes to access the crypto currency wallet and that there are further assets in Affinity Mining which are to be investigated.

[44] The sworn statement of Mr van der Spuy, which was an annexure to the statement of Mr Grundling, disclosed that Affinity Mining has a fund ledger wallet with three separate amounts standing to its credit. Converted to Rands, they are approximately R11,430,921.97, 'R245,092,42.00' and R755,547.50 respectively.⁴⁰ Whatever the precise amounts, these are large values and if, as alleged, they are

⁴⁰ The copy of Mr van der Spuy's affidavit (CaseLines 15-39 to 15-43) is not a particularly clear copy and the amounts are not clearly printed.

assets in the estate of Affinity Mining, then they represent significant assets. Mr van der Spuy said that he is not in possession of the passwords, 'seeds' and/or master key to access Affinity Mining's fund ledger wallet. But he described how access to the fund ledger wallet requires both the physical fund ledger nano 5 hardware wallet, which had been handed by Paul O'Sullivan & Associates to the first to third respondents, and 'private keys' and the PIN to access the device. ⁴¹

[45] Mr van der Spuy said that he handed the 'private keys' that were written on a piece of paper to the applicant at his Northcliff house. This placed the 'passwords and/or recovery phrases' in the possession of the applicant and mentions his Northcliff house as being where they were given at the time, although Mr van der Spuy did not say when he gave them to the applicant. Mr van der Spuy described how to access the funds in the fund ledger wallet and added that the PIN could be obtained from the applicant.

[46] However, in correspondence exchanged between Mr Grundling's offices and the offices of the applicant's attorneys, it was said on behalf of the applicant that he was not in possession of any passwords or 'seeds' or keys relevant to the fund ledger wallet and that Mr van der Spuy had always dealt with the cryptocurrency operations of Affinity Mining, not the applicant, so the applicant did not

⁴¹ CaseLines 15-39 to 15-43 (annexure **MS4**, to annexure **M2** to the applicant's SA)

know any of the identity numbers or wallet addresses relevant to Affinity Mining.⁴²

[47] More than a year later after the above communications, Mr Grundling said in his sworn statement that on 30 June 2022 he received a call from investigators operating for Mr van der Spuy, requesting his attendance at a meeting at the applicant's Northcliff home that day and that it was at that meeting that the applicant's estranged wife, Mrs S[...] S[...]H[...], who lives in the property, provided Mr Grundling with a 'Bitcoin Passcode', which she said she had retrieved from the applicant's home office. Her sworn statement was also attached to Mr Grundling's statement.⁴³

[48] In Mrs S[...]H[...]’s statement, she explained how she had broken a hole in the door to Mr H[...]’s study because she feared a fire was about to break out in the room, owing to the beeping noises coming from the back-up batteries in the room. She did this after calling Mr H[...]’s security company and asking for assistance, but none was forthcoming. Mrs S[...]H[...] knew enough about these batteries to know that they needed filling with distilled water, which is why she purchased such water from the chemist and filled the batteries, once she had broken into the room. While busy with this task, she

⁴² CaseLines 15-44, par 1 to 4 (annexure **MS5**, although it is marked '**MS3**', to annexure **M2** to the applicant's SA)

⁴³ CaseLines 15025, par 7.4 to 7.5 (annexure **M2** to the applicant's SA)

observed, what she termed, a 'ledger paper wallet', which in essence is a document consisting of 'a list of handwritten words'. She said that she had been told by Miss Sarah-Jane Trent of Paul O'Sullivan & Associates that she (Miss Trent) was looking for such a 'ledger paper wallet', as part of an investigation she was doing for the case of Mrs S[...]H[...] versus Mr H[...] in this court, under case number 2020/42563. ⁴⁴ Mrs S[...]H[...] took photographs of the 'ledger paper wallet' and sent them to Miss Trent. ⁴⁵

[49] It appears to me that Mrs S[...]H[...] knew full well from the order of this court, which she refers to in her affidavit, that she was not supposed to be entering the applicant's locked study and server room. The point of that order was to ensure that Mr H[...] could keep his private affairs in those rooms safely under lock and key. That, notwithstanding, on my interpretation of the order, if there was a genuine threat of harm to the rest of the house because of a potential fire in one of those rooms, the order forbidding Mrs S[...]H[...] from entering those rooms must be read down to allow her to enter those rooms, if necessary, by force to neutralise the threat. Her conduct in breaking a hole in the door in order to access the batteries so as to fill them with distilled water would not, on her version alone, *prima facie* constitute a breach of the order. But, that rider did not permit

⁴⁴ It is apparent from the order of Siwendu J attached to Mrs S[...]H[...]’s affidavit (CaseLines 15-51 to 15-55) that this case is the divorce action between Mrs S[...]H[...] and Mr H[...].

⁴⁵ CaseLines 15-47 to 15-49 (annexure **MS6**, to annexure **M2** to the applicant’s SA)

Mrs S[...]H[...] to look around the room, having entered it for purposes of preventing a fire, to see what she could find potentially for use in her case against Mr H[...]. It seems probable to me that Mrs S[...]H[...] knew that she was breaching the intent behind and purpose for this court's order in taking photographs of the 'ledger paper wallet'. I must then ask: Does this mean that those photographs and what was observed by her could not be taken into account in the application for a warrant in terms of s 69 of the Insolvency Act?

[50] In my view, they could be taken into account. The admissibility of such evidence will have to be determined by a court, if and when an attempt is made to make use of such evidence to obtain some relief. It would not have been for the magistrate, in considering the application for a warrant, to make a determination of the admissibility of such evidence. His role was purely to determine whether there appeared to be reasonable grounds for suspecting that any document 'belonging to an insolvent estate is concealed' at any place or in any receptacle.

[51] Mr Grundling went on in his 'statement made upon oath' to state that he tried unlocking the Bitcoin ledger in his possession with the passcodes provided by Mrs S[...]H[...], but that the passcodes were

not for that ledger.⁴⁶ This was unsurprising to me since Mrs S[...]-H[...] had said nothing in her affidavit to suggest that the photographs of the 'ledger paper wallet' pertained to Affinity Mining. If anything, her affidavit suggests that the reason she took the photographs is because they might be of assistance in her divorce case against Mr H[...].

[52] Mr Grundling, however, round out his sworn statement on this aspect by deposing that he received an email from Mr van der Spuy's representatives, which indicated that the passcodes do relate to Affinity Mining's property.⁴⁷ Mr van der Spuy's email to Ms Trent of Paul O'Sullivan & Associates, whom it would seem are also representing or assisting Mr van der Spuy, in addition to Mrs S[...]-H[...], is clear that the passcodes and 'ledger paper wallet' are the property of Affinity Mining.⁴⁸

[53] Faced with all of this information in the 'statement made upon oath' from Mr Grundling, was the magistrate justified in concluding that there were reasonable grounds for suspecting that there was any property, book or document belong to Affinity Mining concealed at the Northcliff house of the applicant in his study or server room? The answer must be yes. Were there reasonable grounds for suspecting

⁴⁶ CaseLines 15-25, par 7.6 (annexure **M2** to the applicant's SA)

⁴⁷ CaseLines 15-26, par 7.7 (annexure **M2** to the applicant's SA)

⁴⁸ CaseLines 15-81 to 15-84 (annexure **MS7**, to annexure **M2** to the applicant's SA)

that such items were being concealed in any vehicle or vessel or receptacle? None were mentioned and so the answer must be *no*.

[54] Could the magistrate have considered that there were reasonable grounds to search for, seize and hand over paper work dealing with Affinity Mining? The answer is *yes*. Could the magistrate have considered that there were reasonable grounds to search for, seize and hand over crypto currency ledgers and passwords and/or recovery phrases of Affinity Mining? The answer is *yes*. Could the magistrate have considered that there were reasonable grounds to authorise a locksmith to unlock locked doors at the Northcliff property, so as ensure that the search, seizure and handing-over could be effectively achieved? The answer is *yes*. The sworn statement of Mr Grundling and the annexures thereto were sufficient.

[55] The last enquiry related to the issuing of the order by the magistrate is: Was the magistrate merited in exercising his discretion to grant the order? Like all orders issued on the strength of a discretion, a reviewing court will not lightly set the order aside unless it can be shown that, in the particular case, the magistrate failed to exercise his discretion upon the facts before him, taking into account the constitutionally protected rights of Mr H[...] and the intention behind the provisions of s 69 of the Insolvency Act. There is no basis, in my view, in this matter to conclude that the magistrate failed to exercise

his discretion when granting the order. The third requirement has been met.

[56] Lest I give the wrong impression, I must point out that the process followed and the order granted were less than ideal. Section 69(2) permitted the first to third respondents to apply for a search warrant. In my view, they should have filed a notice of application for a search warrant to be issued in terms of s 69 of the Insolvency Act. This, notwithstanding, the 'notice of motion', albeit blandly identified as such in the tramlines, expressly states that the first to third respondents intended 'applying ... in terms of Section 69 of Act 24 of 1936 for an order' in certain terms, and those terms were expressly said to be 'a search warrant be issued in terms of Section 69(3) of the Insolvency Act, Act 24 of 1936' in certain terms.⁴⁹ The magistrate could not have been uncertain as to what was required of him. He was to consider whether he ought to issue a search warrant in terms of s 69 of the Insolvency Act. This also relates to ground (b) if the applicant's grounds upon which he attacked the validity of the order.⁵⁰ There can be no merit to ground (b) of the applicant's attack on the validity of the order.

[57] It would have, in my view, been preferable for Mr Grundling to have prepared a draft search warrant, attached it to the application papers

⁴⁹ CaseLines 15-19 (annexure **M2** to the applicant's SA)

⁵⁰ See paragraph 7 above.

and sought an order that the draft search warrant be issued as the search warrant. If a separate order was necessary, it could have provided that the search warrant attached to the order is issued. The granting of an order in the terms that the order herein was granted is strictly not what the legislature contemplated the magistrate should do, but I do not think that the order is so at odds with the intention behind s 69 that I am entitled to find that the order has not been issued in terms of the powers conferred on the magistrate by s 69. These considerations, as well as those above, relate to ground (b) of the grounds upon which the applicant has attacked the validity of the magistrate's order. Upon all of these considerations, I find that ground (b) cannot succeed.

[58] As regards ground (a) upon which the applicant attacked the validity of the magistrate's order, Mr Jagga argued with some vigour that the absence of a reference to s 69 was sufficient to find that the order was so defective as to be set aside. This approach was doubtlessly founded upon the principles relevant to criminal search and seizure warrants, as enunciated in decisions such as *van der Merwe*.⁵¹ In my view, applying an overly technical approach to warrants issued in terms of s 69 of the Insolvency Act might well defeat the purpose of the provisions. Unlike a warrant issued under the Criminal Procedure

⁵¹ *Minister of Safety and Security v van der Merwe and Others* 2011 (5) SA 61 (CC), par 55-56

Act,⁵² the intention of which is to obtain information for the prosecution of a criminal offence, the intention behind s 69 of the Insolvency Act is to assist a liquidator in securing the moveable property of the insolvent company, so that it might be realised for the benefit of its creditors.⁵³ To hamstring such a process with an overly technical approach when scrutinising a warrant issued in terms of s 69 would not serve the interests of justice.

[59] I have been referred to the decision of **de Beer NO**⁵⁴ by Mr Jagga. The approach of the court to a warrant issued under s 69 of the Insolvency Act in that matter⁵⁵ appears to me to have been to equate such a warrant to one issued under the Criminal Procedure Act and, resultantly, to have been to place great reliance upon decisions such as **Goqwana**,⁵⁶ which related to a warrant issue in criminal proceedings, in adjudicating that matter. That approach, in my view, appears to be at odds with the approach adopted in decisions such as **Naidoo**,⁵⁷ by which I am bound. In the result, it would be more appropriate, in my view, first to enquire whether there has been substantive compliance with the requirements of s 69 of the

⁵² Act 51 of 1977

⁵³ Compare **Naidoo**, par 24-26

⁵⁴ **de Beer NO and Others v Magistrate of Dundee NO and Others** (5148/2020P) [2020] ZAKZPHC 70 (19 November 2020)

⁵⁵ See for example, **de Beer NO**, par 28

⁵⁶ **Goqwana v Minister of Safety and Security NO and Others** 2016 (1) SA 394 (SCA)

⁵⁷ Compare **Naidoo**, par 26

Insolvency Act in issuing the warrant ⁵⁸ and then to determine if the warrant issued or order granted in terms of s 69 falls within the contemplated bounds of s 69, ⁵⁹ when reviewing the issuing of such a warrant in terms of the Insolvency Act. Both such an enquiry and such a determination, for the reasons aforesaid, must be answered in the affirmative in this matter.

[60] The absence of a reference to s 69 on the warrant itself is in this case not fatal. Ground (a) upon which the validity of the order has been attacked by the applicant must fail. Had the order had attached to it a copy of the 'statement made upon oath' at the time of its execution, this would have supplied the missing reference to s 69. It is preferable to have the sworn statement attached to the warrant so that both the executing party and the party against whom the warrant is being executed are able to see what the purpose of the warrant is. This will also serve to afford the party against whom the warrant is being executed an opportunity to see why the warrant was issued and to take steps to set aside the warrant, if they so wish.

[61] From the grounds upon which the validity of the order was attacked, one of them was not that the failure to attach the 'statement made upon oath' to the order rendered the order fatally defective. The

⁵⁸ The four specific enquiries set out above should provide the answer to this general enquiry.

⁵⁹ This would implicate the examination of the exercise of magistrate's discretion in issuing the warrant.

attack pertaining to the sworn statement is differently put in ground (d), namely, that it must be inferred that the magistrate had no such statement, alternatively, it must be produced. I do not, therefore, make any finding whether the failure to attach the sworn statement rendered the order defective in this matter. But this is not the last of the considerations in this regard. As pointed out on behalf of the applicant, the first to third respondents refused to produce that 'statement sworn upon oath' by Mr Grundling, contending that it contained confidential information obtained in the inquiry held in terms of s 417 and 418 of the Companies Act.⁶⁰ I have been unable to identify any confidential information in the sworn statement of Mr Grundling. On the contrary, that part of his sworn statement, where he sets out the information motivating the order,⁶¹ makes no mention whatsoever of ss 417 and 418, nor does it suggest that any of the information there contained is confidential. If anything, it reveals that the information has been obtained other than through an inquiry in terms of ss 417 and 418.

[62] The refusal by the first to third respondents to produce the 'statement sworn upon oath' was wrong. It has caused the applicant to go to the additional unnecessary expense of having to file his supplementary affidavit and he has had to consider and address the first to third

⁶⁰ CaseLines 18-22, par 8.1 to 8.3 (first to third respondents' affidavit opposing SA)

⁶¹ CaseLines 5-25 to 15-26, par 7 (annexure **M2** to the applicant's SA)

respondents' supplementary affidavit in which they oppose the introduction of the 'statement made upon oath' which was presented to the magistrate. I have indicated that this sworn statement was an obviously essential element to be considered in this inherent review application. I address this further in respect of the aspect of costs below.

[63] The final ground relied upon by the applicant to attack the validity of the order, which I must consider, is ground (c). This ground concerns whether the order is overly broad in describing that which might be searched for, seized and handed to the liquidators and it concerns whether the scope of the order exceeded the permissible authority of the magistrate in terms of s 69. Giving the order a sensible meaning, this ground cannot be sustained. When orders a), b) and c) are read in context with one another, ignoring for the moment the sworn statement of Mr Grundling, the warrant informs those to whom it is directed that it is the liquidators' property ⁶² that is to be searched for and seized and to be handed to them. That property consists of all paper work dealing with Affinity Mining, any and all crypto currency ledgers, and any and all passwords and/or recovery phrases. In my view, the description is fair. What the liquidators, through

⁶² Perhaps, more accurately, the order might have referred to the property as being that of Affinity Mining (in liquidation), but since it is the obligation of the liquidators in terms of s 69(1) to take into their possession the moveable property, books and documents of the insolvent estate of Affinity Mining of which they are its liquidators, loosely put, it is their property as custodians thereof on behalf of the estate.

Mr Grundling, had in mind, was to obtain documentary information which would allow them to access Affinity Mining's bitcoin accounts, so that, no doubt, the funds therein can be realised to pay creditors of the estate, which is being wound up.

[64] In summary, I am not inclined to set the order issued by the magistrate aside on any of the grounds (a) to (d) set out above. ⁶³ I turn now to the applicant's attack on the execution of the order, which is based upon grounds (i) and (ii) above. ⁶⁴ The first of these is that Mr Grundling played a role in the execution of the order, when the order did not permit him to do so. *Strictu sensu*, this is correct. The order was addressed to a station commander, who logically would have been the station commander of the police station in whose area the Northcliff house is situate; a person whose name and other details could easily be determined. In addition to the station commander, any member of the SAPS who was appointed by the station commander could execute the order. Who that person was or those persons were could also easily be determined. Finally, the sheriff for the magisterial district into whose area the Northcliff house fell was authorised. His details could also easily be determined.

[65] The contention by the applicant, however, is that at 14h15 on 1 July 2022, the day that the warrant was being executed, Mr Paul

⁶³ See paragraph 7 above.

⁶⁴ See paragraph 8 above.

O'Sullivan arrived at the Northcliff house. At 14h40, Mr Grundling arrived and the two of them, along with a locksmith, entered the premises, when Mrs S[...]H[...] permitted them to.⁶⁵ It is also said that 20 minutes later, two members of the SAPS arrived at the premises.⁶⁶

[66] The first respondent, in answer to this, says that 'the only parties present at the search was our appointed attorney and IT expert who was appointed agents of the joint liquidators, together with two SAPS members'. I infer that the 'IT expert' is Mr O'Sullivan, since no one else has been identified as an IT expert and it was Paul O'Sullivan & Associates who had handed the physical fund ledger nano 5 hardware wallet to the first to third respondents.⁶⁷ Nothing in the order permits an IT expert, whose role no doubt would have been to examine computers or IT equipment and perhaps make copies of the information therein, to be at the premises or to perform any role. It is not clear to me what Mr O'Sullivan's role was. There is no evidence of him having examined any computers or other IT equipment nor is there any evidence of him having made any copies of the information on any computers or other IT equipment. Had there been evidence of this, this would have been outside of the scope of the order and clearly impermissible. The inventory drawn up by the SAPS officers is

⁶⁵ CaseLines 11-30, par 8 (annexure **MHS1** to the FA)

⁶⁶ CaseLines 11-30, par 9 (annexure **MHS1** to the FA)

⁶⁷ See paragraph 44 above.

largely illegible and less than helpful in this regard. ⁶⁸

[67] As for the conduct of the search, the first respondent has deposed that no search of the premises was conducted prior to the SAPS members entering the premises. ⁶⁹ An explanation has also been provided about the papers seen in Mr Grundling's hands, when he stepped out of the premises. ⁷⁰ Mr Grundling has confirmed this. ⁷¹ Left with two conflicting versions, I cannot reject that of the first respondent as being palpably implausible. ⁷² I must accept it or refer this matter to oral evidence on this aspect. Neither party has asked me to make such referral and I am disinclined to refer it to oral evidence *mero motu*. In the result, I accept the version of the first to third respondents, where it is at odds with that of the applicant, on these aspects.

[68] It seems a fair inference to draw that Mr Grundling was in attendance at the execution of the order, as was Mr O'Sullivan. What their roles were has not been set out in any detail. Mr Grundling should have

⁶⁸ CaseLines 11-115, 20-115 (annexure **MS5** to the AA)

⁶⁹ CaseLines 11-90, pars 6.3.1 and 6.3.3; 11-92, par 6.9.1; 11-93, par 6.9.2 (AA)

⁷⁰ CaseLines 11-93, par 6.9.3 (AA)

⁷¹ CaseLines 11-117

⁷² See ***Plascon-Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd*** 1984 (3) SA 623 (A), 635C, which is authority for a court to reject a respondent's version, where it is "so far-fetched or clearly untenable". See also ***National Director of Public Prosecutions v Zuma*** 2009 (2) SA 277 (SCA), par 26 for, in addition to these grounds, the rejection of a respondent's version for being 'palpably implausible'.

done so himself, or through the first respondent. In my view, the presence of Mr Grundling, an officer of this court, at the execution of the order, acting as the agent of the first to third respondents, does not render the execution of the warrant unlawful *per se*. He could have performed a meaningful role and directed the SAPS members on what to look for. Bitcoin ledgers, passwords and the like are doubtlessly not the everyday work of SAPS members, although they are likely in a digital age to become more so with the passing of time. I do not find that Mr Grundling acted inappropriately during the execution of the order.

[69] The copying of information from computers or other IT equipment by an IT expert, in the guise of Mr O'Sullivan, was not authorised by the magistrate, and any role that Mr O'Sullivan might have played in this regard would have been improper and rendered the execution of the order, to that extent only, unlawful. This was not pertinently raised by the applicant as a ground upon which to contend that the execution of the order was unlawful. I am in the circumstances precluded from determining the matter on this basis. ⁷³

[70] The second ground pertaining to the unlawful execution aspect that was raised by the applicant was that the locksmiths had exceeded the authority of the order by trying to open and/or opening the safes.

⁷³ Compare *MEC for Education, Gauteng Province and Others v Governing Body, Rivonia Primary School and Others* 2013 (6) SA 582 CC, par 100

With this ground, I agree. There is not the slightest suggestion in the 'statement sworn under oath' by Mr Grundling that documents pertaining to Affinity Mining might be contained in safes, or that Bitcoin ledgers or passwords or the like might be in safes. Not even the statement of Mrs S[...]H[...] makes this suggestion. All that she says is that the study and server room were locked and she had to break into them to prevent a fire. The magistrate could not, therefore, have thought that he was permitting the locksmiths to do more than unlock the doors to these two rooms, so that the documents described in the order could be searched for and, if found, seized and handed over to the first to third respondents. To the extent that the locksmiths attempted to or did open the safes, this was an unlawful execution of the order.

[71] Alive to this difficulty, no doubt, the first to third respondents have contended that, on 1 July 2022, the applicant's attorneys provided an undertaking that the safes could be opened.⁷⁴ This is denied.⁷⁵ The stance of the applicant since learning of the magistrate's order, his attempts to have his attorneys present during the execution of the order, his urgent application to stay the execution of the order and his attacks both upon the validity of the order and the execution thereof are entirely at odds with the undertaking alleged by

⁷⁴ CaseLines 11-86, par 4.1; 11-90, par 6.3.2 (AA)

⁷⁵ CaseLines 11-136, par 14; 11-137, par 16 (RA)

the first to third respondents. This, in my view, renders the existence of such an undertaking palpably implausible.⁷⁶ I reject the version of the first to third respondents in this regard.

[72] In conclusion, I find that the order was not invalid for any of the grounds (a) to (d) raised by the applicant. *En passant*, the four requirements for the granting of the order were present. I would have found that the order was unlawfully executed to the extent that Mr O'Sullivan may have examined or copied any information on any computers or other IT equipment in either the study or server room of the applicant at the Northcliff property, if this had been pertinently raised by the applicant on the papers as a ground to declare the execution of the order unlawful and provided there was evidence to support this ground. I would have ordered any such information in the actual possession of the first to third respondents or through the agency of Mr O'Sullivan to be returned to the applicant. It was the first to third respondents who sent Mr O'Sullivan to the premises as their agent and they are liable for his conduct, if any, on their behalf. Since this was not the applicant's case, I cannot and do not make any order in relation thereto. I do, however, find that the order was unlawfully executed to the extent that any documents or other information was obtained from within the safes. Any such documents and information must be returned to the applicant.

⁷⁶ See footnote 72 above.

[73] Lastly, I deal with the issue of costs. I have already addressed the improper conduct on behalf of the first to third respondents of not providing to the applicant or his attorneys a copy of the application made to the magistrate on what appear to be spurious grounds. The first to third respondents must, as a result of such behaviour, pay all of the applicant's costs pertaining to the preparation and filing of his supplementary affidavit, as well as his costs in addressing the first to third respondents' supplementary opposing affidavit filed in response to his supplementary affidavit. These costs were entirely unnecessarily incurred by the applicant as a direct result of the first to third respondents' unreasonable attitude. Such costs shall be paid out of the estate of Affinity Mining.

[74] The applicant has been successful to a degree in obtaining an order declaring the execution of the order unlawful to a limited extent. In my view, the degree of contamination of the execution is insufficient to hold that the entire execution should be declared unlawful. Because of the applicant's limited success, he should be awarded one-third of his costs, in addition to all of his costs incurred pertaining to his supplementary affidavit and the first to third respondents' supplementary opposing affidavit, all of which the first to third respondents shall be liable and which must be paid out of the estate of Affinity Mining.

[75] In my view, all factors considered, it is in the interests of justice to make the following order:

1. the search of the premises situate at [...] J[...] A[...], N[...], Johannesburg, on 1 July 2022 is declared unlawful to the extent that a safe or safes at the premises were opened or attempted to be opened;
2. any and all documents or information obtained from that safe or those safes are to be returned to applicant forthwith and any copies of such documents or information in the possession or under the control of the first to third respondents is to be destroyed forthwith;
3. the first to third respondents are to pay out of the estate of Affinity Mining (Pty) Ltd (in liquidation):
 - 3.1 all of the applicant's taxed or agreed party and party costs associated with or related to his supplementary affidavit and the first to third respondents' supplementary opposing affidavit; and
 - 3.2 one-third of the applicant's taxed or agreed party and party costs in this application.

ANTHONY BISHOP
Acting Judge of the High Court
Johannesburg

| | |
|---|------------------------------|
| Heard: | 3 November 2022 |
| Judgment: | 15 March 2024 |
| Attorneys for the applicant: | Jagga and Associates |
| Counsel for the applicant: | Mr N Jagga |
| Attorneys for the first to third respondents: | Louwrens Grundling Attorneys |
| Counsel for the first to third respondents: | Mr C Harms |
| Fourth respondent: | No appearance |